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INTERRELATIONS BETWEEN CONSTITUTIONAL COURT AND ORDINARY COURTS

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REPORT

Interrelations between Constitutional Court and ordinary courts: theoretical and practical approaches

By

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Dear Chairman, ladies and gentlemen!

The setting up of Constitutional Court (CC) created wide opportunities for protection of human rights and freedoms through constitutional review. And this is not by chance, because the ensuring of supremacy of Constitution and protection of every individual's rights and freedoms were defined as the basic mission of CC.

Within short historical period in Azerbaijan the constitutional review body has not only overstepped the period of formation and development but also there enlarged the list of entities entitled to address to CC and started the application of institution of individual complaint.

Despite that this changed the activity of CC as to its quality we had already accumulated enough experience in this field. The peculiarities of legislation require that before revealing the topic of my presentation it is necessary to clarify the legal aspects of interrelations between CC and ordinary courts including the model of constitutional review applied.

In our country the courts are united into three-level court system. Traditionally they examine the civil, criminal and administrative cases. In case if the decisions, which are adopted on these cases are re-examined by higher courts these decisions can be modified or canceled. First and appeal instance courts study the factual aspects of a case, apply the provisions of material and procedural legislation and decide on merits when adopting their resolutions. And the Supreme Court being the cassation body verifies the correct application of legal norms. Its boards examine the cassation complaints and the Plenum examines the complaints which are submitted through additional cassation procedure. However, the Plenum's decisions can be also re-examined and for this purpose the special types of legal proceedings exist.

And the CC is the supreme body of constitutional justice in our country. Its competences are broad and they are envisaged directly in Constitution. Of course, the ordinary courts do not enjoy such broad competences and cannot do this because of their nature. Within constitutional proceedings there is carried out the constitutional review over the acts adopted by executive, legislative, judicial and municipal authorities. And within special constitutional proceedings there are given the interpretation to Constitution and legislation, decided the disputes between branches of power as to separation of competences, verified and approved the results of elections to Milli Mejlis as well as officially declared the results of presidential elections. Within this type of proceedings there is also provided for deciding the issues of dismissal of President from power, verification of ability of the President to perform his/her duties for the state of health, giving the opinion on proposal of introduction of modifications into Constitution and other.

In principle, CC cannot initiate the constitutional proceedings without inquiry, request or complaint. CC initiates its proceedings on complaints submitted against judicial acts. And within it there are not examined the cases on civil, criminal or administrative delinquencies but the conformity of challenged judicial act to Constitution and laws. There are not checked the factual aspects studied in ordinary courts but there is examined the correct application or interpretation of normative legal act by court of law. Where there are revealed the inconformity of challenged acts to Constitution and laws these acts or some of their provisions shall lose their force. CC's decisions are final and cannot be canceled, modified or officially interpreted by any person or institution. The judicial acts recognized as null and void shall not be executed and certain cases shall be re-examined by courts through the procedure specified in civil procedural legislation.

In principle alongside with ensuring of supremacy of Constitution and human right and freedoms the CC decides on whether the rights were restricted and on the issues of the extents of admissibility of such restrictions. This is connected with examination of admissible limits of restrictions.

For instance, as regards the complaints submitted against normative acts of legislative authority one should take into account that Constitution entitles the legislator to regulate the human and citizen's rights and freedoms through adoption of laws and corresponding thereto the normative acts which determine the forms of responsibility and guarantees as well as the preconditions and procedures of implementation of human and citizen's rights and freedoms. The problem is that in most cases the regulation of human rights and freedoms is implemented by means of confrontation of individual and public interests, as well as different rights and interests.

On this issue the famous German jurist Klaus Schtern noted: "The existence of all fundamental rights, even those proceeding from natural human rights, upon participation of the state protecting and ensuring these rights − on one hand is conditioned by counter standing of the same state. There is only one way out from this dilemma – there should be carried out very gentle differentiation between protection of human rights and their restriction".[1]

If the legislator or the entities applying the law for some reasons have not done this before the basic mission of CC that studies the complaints is to carry out such differentiation, to protect the human rights and freedoms, to put an end to their violation and to prevent the restrictions, which are not based on Constitution.

As gets evident, it is inadmissible, because of its being held on legal issues, to equate the constitutional proceedings with cassation or additional cassation proceedings. According to well known in our country German Prof. Rolf Knipper "As a response to suspicions and accusations for being close to turning into super institution that reviews the decisions of ordinary courts, the German Federal CC admitted of being competent only for below mentioned issues: 1) whether the alleged act, that has a broad coverage, and the essence of fundamental rights constitute the basis of a judicial decision 2) whether the court acted arbitrarily 3) whether the court's legal creative work transgressed the boundaries of constitutional law or legal analogy". If anybody today studies closely the CC's decisions delivered on individual complaints they he/she will confirm that we take the same legal position as our German colleagues do.

The limitations imposed on universal human rights and freedoms can be estimated as the criteria admitting to establish the extent of protection and individual freedoms. And CC decides on whether such limitations adopted through different acts correspond to Constitution and laws. In such case the supremacy of Constitution, primacy of human rights and freedoms as well as other principles known in International Law shall play the role of criteria. They should constitute the unity with each other in the CC's practice. In order to achieve this CC tries to ensure the unity of case-law and law-making of state bodies and municipalities, which adopt different acts.

Nowadays, the interrelations between CC and ordinary courts provisionally can be divided into two stages. On the first stage covering the period before introduction of constitutional complaint institution it was only Supreme Court among ordinary courts that could submit an inquiry to CC concerning the verification of conformity of normative legal act or the municipal act to Constitution or other normative legal acts standing on higher level within legal hierarchy, the settlement of disputes as to separation of powers between authorities, as well as the interpretation

[1] Hereinafter, the references to German jurists and experience is explained by the fact that the constitutional review in our country is similar to German experience

of Constitution and laws. During that period there was a possibility of citizens to address to CC through Supreme Court, however this procedure was not used because of its being very complicated.

As to first stage the Supreme Court used its competence of submission of inquiry very actively. However, during the stage after introduction of constitutional complaint its activity extremely reduced. For instance, among the inquiries submitted by Supreme Court for the years of 1999-2003 relatively constituted from 38,4 to 73,3 % of cases admitted to examination in CC in 2004 this index reduced to 6,7% and in 2005 – to 5,6%. At the same time among the total number of decisions adopted by CC up to now 33,6% (44 of 131 decisions) were adopted upon the inquiry of Supreme Court.

As a result of referendum held on 24 August 2002 the Constitution was modified and all ordinary courts obtained the competence to address to CC for interpretation of Constitution and laws concerning implementation of human rights and freedoms. There have been already adopted four decisions of CC on such requests.

In connection with examination of individual complaints the new relations, as to their quality, between CC and ordinary courts have started to get set up. Similar situation was observed in other countries where it is admissible to submit the constitutional complaint against judicial acts. According to some authors[2] it is impossible to avoid the problems between CC and ordinary courts, which even are doomed to have such tensions because to some extent they are occupied with the same issue as regards the application of law. These authors consider that since the implementation by CC of its function of normative control does not cross the competence of ordinary courts and there are no any problems. The tensions emerge when the judicial acts are challenged through individual complaints. The matter is that in the countries where there exist the constitutional complaint the majority of cases examined by CC are the ones initiated by individual complaints. In Azerbaijan as well among adopted decisions 44 or 33,6% of total number were delivered on constitutional complaints.

At the same time, one should take into account that the implementation of constitutional review over judicial acts is an undeniable truth proceeding from the peculiarities of CC's nature. Once the judicial act examined by CC is declared as null and void there begins the new stage of its interrelations with ordinary courts. This stage is of high importance from the point of view of two aspects which are linked to each other. First of all the issue of adoption of decisions and taking of procedural actions required for elimination of the fact of violation of human rights established by CC is very significant. Then the execution of CC's decisions is required.

According to legislation, the judicial acts cancelled by CC's decisions shall not be executed and the relevant cases shall be re-examined. For these purposes the new legal proceedings are provided for procedural legislation. Within these proceedings the Plenum of Supreme Court shall cancel the judicial acts based on CC's decision and shall send the case to relevant court instance for re-examination.

[2] For instance Dr. Sieqfried Bross

In this connection, there emerged several questions in practice. For instance, should the legal proceedings within the Plenum of Supreme Court and further judicial examination have any limitations? CC revealed its position on this point as follows:

"The examination of case on legal points, within proceedings on new circumstances on violation of human rights and freedoms, by the Plenum of Supreme Court should not bring to appropriation of Constitutional Court's competences or distortion (revision, enlargement, limitation or interpretation in any other form), damage the efficiency of constitutional justice and should be implemented in accordance with constitutional status of the court of cassation instance. Thus, Supreme Court and other courts should adopt decisions only within framework installed by Constitutional Court on a certain case. The legal issues specified in the decision of Plenum of Constitutional Court and allegedly violated rights and freedoms should constitute this framework"[3].

Another important issue is that when canceling the judicial acts within new legal proceedings what kind of possible decisions should be adopted by the Plenum of Supreme Court in connection with sending a case to various court instances?

In practice, based on CC's decisions out of 44 cases 38 were sent for new appellate examination. The CC's position is that "With respect to the referring of a case to new judicial examination it is necessary to note that when deciding the issue as to new examination of a case it should be referred namely to that stage on which, according to the Constitutional Court's conclusion, the rights and freedoms were violated. The referring of a case to more previous judicial stage and new examination of a case within proceedings, in which a court did not commit any mistake, do not comply with the concept of proceedings on new matters connected with violation of human rights and freedoms and do not serve for complete restoration of violated rights"[4].

Unfortunately, one should note that the provisions of legislation in force cause some misunderstanding. For instance, according of legislation based on CC's decision the judicial acts shall be canceled by the Plenum of Supreme Court within new legal proceedings. This point caused several questions. If this is admissible, then why other type of acts recognized as null and void by CC through its constitutional review should not be canceled by authorities, who adopted these acts, or even higher authorities? On the other hand to what extent it is correct that the institution that plays the role of cassation court turns into the "mediator" that has no any competence within the procedure of re-examination of judicial acts canceled by CC? Does not this "mediation" undermine the authority and reputation of Supreme Court? Who and for what purposes needs the setting up of new legal proceedings that does not play any role but sending the case to the court instance identified by CC and thus admitting the losing of the "legalized" 3 months period that, in anyway prolonged legal procedures, will bring to transgression of "reasonable period of time"?

Another issue that causes the tensions in interrelations between CC and ordinary courts is that within their practice the ordinary courts do not take into account the CC's legal positions. It is obvious that ordinary courts, which re-examine the case, should be guided with CC's decision. The high legal force of CC's decision fully covers all its parts including the legal positions, which constitute the core of decision. However, one should also take into account that in most cases these legal positions "separating" from relevant decisions obtain specific significance. Since their force is equal to the legal one of decisions and since they bear general character they should be also applicable not only to subject of constitutional review but also to other analogous matters which are met in the practice of application of law. CC itself underlines that its decisions that the legal

[3] CC's decision of 25 January 2005
[4] See CC's decision of 25 January 2005

positions shall have broader coverage and that they should be taken into account not only with the practice of application of law but also future law making.[5]

Sometimes CC receives the repeat complaints after CC cancelled the judicial acts and the relevant cases were re-examined by ordinary courts. In these complaints it is noted that offences revealed by CC repeat again in courts. Citizens estimate this as biased protraction and arbitrariness in ordinary courts. According to our case-law CC repeatedly examined and cancelled two decisions of the Plenum of Supreme Court since these decisions had been adopted contrary to CC's decisions. Of course, CC considers such matters as inadmissible from the point of view of ensuring the supremacy of human rights and freedoms. However, in order not to admit such matters, perhaps, one should be guided with the points of legislation. Some issues should be settled within judicial system. Anyway, it is our common mission to rapidly settle all challenges.

Another point to be emphasized is the interpretation of Constitution and laws. In Azerbaijan it is the CC that is entitled to officially interpret those acts.

In total CC adopted 44 decisions on the inquiries submitted by Supreme Court. Out of those decisions 23 were devoted to interpretation of legislation and 1 was directed to the relevant provision of Constitution (Article 49)[6]. And as regards the requests submitted by ordinary courts (these were Sabail district court, Kyapaz district court, Economic Court N 1 and Court of Appeal) the CC adopted 4 decisions.

However, the application of law and equally the settlement of a number of issues within the practice of ordinary courts are impossible without interpretation. In such case there emerges the issue of fixing the general boundaries of interpretation. To be more clear from which moment and on which objective criteria the CC should interpret the legislation. Based on our practice I can say that CC does not regard its competence on interpretation as unlimited. Even without admitting for examination the requests of ordinary courts for interpretation of legislation the CC indicated that the issues mentioned in those requests can be settled within the competence for interpretation that is enjoyed by ordinary courts[7]. At the same time it should be noted that when examining the cases the ordinary courts sometimes do not take into account the interpretation given by CC and sometimes those courts adopt the decisions contradicting thereto. CC adopted also the decisions as to inadmissibility of such matters[8].

In general it should be emphasized that there is an obligation of each entity to interpret and conceive the constitutional law, which is to be applied, taking into account the relevant CC's decisions. It should be also noted that the legal stability, the predictability of state decisions and the ensuring of authority of Constitution and uniform application of constitutional law demand that the constitutional law would turn into standards, which are applied to everybody and are recognized by everyone.

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[5] See CC's decision of 23 July 2004

[6] 18 constitutional cases were devoted to verification of correspondence to Constitution, 1 constitutional case –to separation of powers between authorities and 1 constitutional case – to verification of conformity of Cabinet of Minister's resolution to legislation.

[7] See the CC's ruling of 6 January 2004 on the request of Absheron district court, the Panel of CC's ruling of 11 September 2006 on the request of Binagadi district court and other

[8] See the CC Plenum's decision of 17 June 2004 .

Dear Chairman, ladies and gentlemen!

Because of time shortage I have touched upon basic aspects. I hope that other participants will express their opinions on this issue and by eliminating jointly the existing problems we will achieve the strengthening of the role of justice in the process of democratization of society.

Thank you for attention.