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The Role of the Constitutional Court and Ordinary Courts in the Protection of Human Rights

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Nowadays, it is already possible to state that almost in all countries of new democracy there took place the radical changes and particularly in arrangement of State power on the basis of principle of the separation of powers. Almost each constitution of those countries proclaimed the construction of state governed by law as its objective where the independent judiciary would hold its special place like in other European countries. The basic objective of judicial reforms in those consisted in turning of a court into independent referee in interrelationships between individual and State, resolution of disputes on the basis of law only and implementation of protection of human rights and freedoms. At the same time despite the incontestable successes there are still the problems, which have an effect on authority of justice. Among them I would like to note the pendency of a number of legal and procedural issues, which are mostly connected with correct definition of functions of prosecution and defense, role of the Ministry of Justice and the weakness of judiciary itself. It is also important that on the one hand the political and economic reforms held in those countries are possible owing to stability preserved and on the other hand not everyone is realizing that the true stability is based on the functioning of democratic institutions, protection of human rights and freedoms that all actions of authorities, who are thinking of preservation of stability by means of penetration of the "governed democracy", as it was designated by some analysts, will bring to reinforcement and predominance of authoritarian tendencies probably first of all through weakening of judiciary. It was correctly noted that a court is "the last boundary" of democracy. I am not in a position to dwell now on all the complex of unresolved problems but to analyze in the framework of this presentation the general tendencies and some issues of protection of human rights by courts.

First of all I would like to draw your attention on one important context. Almost all European countries are the member-States of Council of Europe and have ratified the European Convention of Human Rights. Most of countries incorporated the provisions of Convention into domestic legislation. But in countries, which have not done this, the courts should interpret the domestic law in conformity with Convention. The legal standards set up by European Court influence on domestic law in different fields: should it be the substantive or procedural law. European Court has been always recognizing the subsidiary nature of Convention considering that the values enshrined therein should be first of all ensured by domestic courts. Thus, the protection of rights and freedoms envisaged in European Convention is the mission of courts irrespective of the model of constitutional justice.

In most of European countries the created model of constitutional review is the result of theoretical researches by H. Kelsen who was seeking to substantiate the legal guarantees of Constitution in accordance with the idea of hierarchy of legal norms. He proposed the concept of integral legal order the whole hierarchy of the norms of which one and their juridical value is consequently derived from the single source constituting the top of pyramid that is the Constitution. The value of all this system and the mechanism of its functioning is conditioned by setting up of the only instance of constitutional review of normative acts - that is the Constitutional Court.

For many reasons the concept of protection of Constitution by Constitutional Court that was established for this purpose did not firstly settle down. There prevailed the decisions neglecting the mechanism of such protection and among its supporters there was spread the persuasion that the control for constitutionality should be built on American model. And in the beginning exactly such resolution of a problem was advocated in jurisprudence of Scandinavian countries, Germany, Portugal Greece and with some peculiarities in Switzerland.

However, the progressing development of authoritarian systems excluded the possibility of creation of remedial mechanisms protecting the Constitution and fundamental human rights. Starting from 1945 there has been appearing the tendency towards enlargement of constitutional review - not by means of enlargement of competencies of ordinary courts but through setting up of special judicial bodies. Thus, in most of European countries there appeared the body of special jurisdiction that is organizationally marked out from judiciary. In this definitely concentrated system of protection of Constitution the ordinary courts were deprived of the right to resolve the constitutional problems on their own. Undoubtedly, the protection of constitutional rights and freedoms is the objective of all courts: but the competence of Constitutional Court has got its peculiarities. The legal nature of constitutional review bodies can be characterized as political and legal one what is connected with the fact that the task of this body is the protection of Constitution that is not only juridical but also the political and legal document with the procedure of formation of these bodies.

One of the important means for protection of human rights is the individual complaint owing to which one the Constitutional Court gets the opportunity to penetrate into the spectrum of problems of implementation of these rights. This is absolutely new institution for Constitutional Court of Azerbaijan Republic after modifying Article 130 as a result of nation-wide voting held on 24 August 2002. Meanwhile, in most of countries this institution has become an effective remedy for restoration of violated rights. Since the Constitution is the basic law of a State it should be respected by all courts. Constitutional Court serves as the last instance for prevention of violation of rights. Taking this into account the legislation of a number of courtiers e.g. Germany, Latvia etc provides for the requirement of exhaustion of all judicial remedies as the most important one. On one hand this reduces the influx of complaints and on the other hand it ensures the checking of the questions of fact and that the applied law would be subject to consideration by ordinary courts. The individual tries to attract the attention of courts on violation of his/her rights and claims for their restoration because his/her interests have been directly affected by the challenged act. On another hand our Constitution is of self-executing nature and any court can refuse to apply the unconstitutional acts and apply in a certain case the Constitution and even the normative act of higher legal force. However, ordinary court cannot abolish this unconstitutional provision. From this point of view the possibility to refer directly to Constitution and to apply its provisions admits the courts to implement completely their direct social function that is to protect the human rights and freedoms from any arbitrariness. At the same time, the model of centralized review of the legal provisions under which one the ordinary courts address in this case to Constitutional Court as to verification of the applied or to-be-applied provision ensures the uniformity of practice of application of law and contributes to implementation of the principle of legal distinctness.

When examining the issue of individual complaint to Constitutional Court the problem of correlation between constitutional and common rights draws an attention. It is obvious that Constitutional Court is neither appeal nor cassation instance. But it is also obvious that the court decision that is based on arbitrariness also violates the Constitution. Besides, according to the new text of Article 130 of the Constitution of Azerbaijan Republic the individuals were granted the right to challenge the court acts. What is to be done if an individual challenges the provisions of procedural legislation that is not respected or is interpreted wrongly by courts? One can suppose that in this case the formula elaborated by Federal Constitutional Court of Germany can serve as a guideline. According to this formula the decisions on the procedure, ascertainment of facts and application of provisions of

"simple law" are entrusted to ordinary courts and not subject to constitutional control. Constitutional Court can intervene only where the decision adopted by a court is directly related to the effect of the fundamental right.

In Germany, Italy, Spain, the right to address to Constitutional Court has been given to each judge, in other countries (e.g. Austria) this right is enjoyed by Supreme Courts and courts of second instance only. The Constitution of Azerbaijan Republic invested the Supreme Court along with other institutions with the power to address to the Constitutional Court for verification of constitutionality of normative acts. It can ask for determination of constitutionality of normative acts enumerated in Article 130 of Constitution and request to give interpretation of laws and Constitution. In its Article 4 the Law "On Constitutional Court" provided for extremely complicated procedure where the citizens can address to Constitutional Court via ordinary courts and the Supreme Court. However, despite the tenacious efforts of Constitutional Court this provision has been applied in practice exclusively rarely. Based on the new edition of Article 130 of Constitution the ordinary courts have been enabled to address to the Constitutional Court as to interpretation of laws and Constitution.

The practice of Constitutional Court displayed that the basic entity that is enabled to address to the Constitutional Court is the Supreme Court of Republic. I think that this is natural because it is exactly the Supreme Court as the highest judicial body that occupies the special place in the judicial system and by virtue of competencies invested to it appears as the bearer of functions on putting into good order the judicial practice and formation within it the characteristics of predictability and uniformity. It is supposed that interaction between Constitutional Court and ordinary courts especially the Supreme Court is very important from the point of view of respect to fundamental rights and freedoms. Before establishment of constitutional justice in our country the ordinary courts when applying the norms of law clarified its sense, objective and the will of legislator. All this contributed to the objective of ensuring the implementation of the legal norm that is not possible without activity connected with application of law. The latter is the forced mode of elimination of defects of the norms applied that is proceeding from constitutional principle of self-dependence of judiciary. Judge always makes a choice between the norms of law and takes the special position with respect to contradicting norms. He/she draws the conclusion from constitutional norms and principles, from basic principles of the State governed by the law. However, when there is no the case-law that is based on the respect to individual decision of one of higher courts and recognition of *ratio decidenti* that is to be followed by inferior courts, the decision delivered by court is binding only with respect to a concrete case. The Constitutional Court implements the constitutional interpretation of a norm that is subject to verification as to its conformity with Constitution. However, this should be differed from the special competence of a number of constitutional courts on interpretation of Constitution. The Constitutional Court of Azerbaijan Republic has been invested with the competence to give interpretation of laws and Constitution and in such cases its decisions become the sources of law. We consider this competence as a law creative one because there are formed the new decisions of normative character, which by their force are equal to interpreted norm of Constitution and law respectively. One can assert that in the described situation the Constitutional Court takes the role of positive legislator. Without changing the Constitution or law the Constitutional Court enlarges its content. The application of a norm that was interpreted by Constitutional Court is impossible in isolation from interpretation given by it. Practice of Constitutional Court took the way of enlargement of its own competencies what causes an ambiguous reaction of some jurists. For instance, when examining the case concerning the constitutionality of normative

acts the Constitutional Court did not confine itself to its interpretation only, having kept the norm as non-contradicting to Constitution but to be applied in future bearing in mind the interpretations given Constitutional Court. In other cases examining the request for interpretation of a norm the Constitutional Court came to conclusion that it was unconstitutional. For instance, examining the petition of the Supreme Court as to interpretation of Article 132 of the Labor Code providing that the term of serving the sentence by the persons condemned to correctional works shall not be included into seniority that enables to get the leave, the Constitutional Court recognized it as null and void because of its non-conformity to Article 37 of Constitution providing for the right to rest. In another case the Constitutional Court determining the constitutionality of Articles 67 and 423 of the Civil Procedure Code according to which ones the complaint can be lodged by a person who takes part in proceedings with advocate has recognized the given norms as corresponding to the Constitution of Azerbaijan Republic. However, the Constitutional Court clarified that when applying the mentioned norms there should be ensured the right to equality and the right to enjoy the legal aid. The essence of Constitutional Court's legal position on this case was that when respecting the requirements of the interests of justice the right to get free-of-charge legal aid by the people possessing the moderate means to protect their interests is the right that cannot be altered. When resolving the concrete case and where there emerge the legal problems requiring certain professional skills the State should not only ensure the constitutional right to enjoy the effective legal aid by the families of moderate means but also must also ensure their possibility to implement this right.

I would like also to note that the constitutional justice in the European countries have a lot of institutional differences and different jurisdictions. However, despite this all of them serve for protection of fundamental freedoms. The activity of Constitutional Council of France that is implementing the preventive control is estimated this way. It *prima facie* does not take part in protection of fundamental rights violated by Executive: this is the competence of State Council and ordinary courts under the control of Court of Cassation. However, as the French constitutionalists note the control of laws a priori corresponds to constitutional tradition of France. Among advantages of such control they mark out two aspects: first of all it is the clarity, because the discussion of the issue of conformity of law to Constitution is held before the law enters into force; and what is more important is that by their opinion there is achieved the legal security because the promulgated law cannot be prejudiced.

In conclusion I would like to express the confidence that the role of constitutional courts in protection of human rights and freedoms will steadily increase. But this function of Constitutional Court has the subsidiary character and this in its turn requires that ordinary courts and in particular the Supreme Court would definitely ensure the human rights.