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in co-operation with
THE CONSTITUTIONAL COURT OF AZERBAIJAN

INTERNATIONAL
LEGAL TRAINING WORKSHOP

Improving Eexamination Methods of
Individual Complaints
Effective Case Management
Effective Decision Drafting

Baku, 26-27 February 2004

REPORT ON

"**Consequences within the Constitutional Court of Latvia of the introduction of individual complaints**"

Dzintra Pededze, Latvia

Consequences within the Constitutional Court of Latvia of the introduction of individual complaints

Honourable ladies and gentlemen!

First of all I would like to express gratitude to the organizers of this event for inviting me to this interesting and important seminar. The experience of our colleagues from other courts facing constitutional complaints always is very usefully for our Constitutional Court, because we are dealing with this matter only for approximately two and a half years, namely from the July 1th 2001.

Making myself familiar with the new law on the Constitutional Court of Azerbaijan, on the one hand I can see many similarities with the situation in Latvia two and a half years ago. In this short report I would like to concentrate most on these similarities and tell you about our experience in this field. I can imagine that you have similar problems too. So our good and also bad experience could be helpful.

On the other hand there are some differences in the model of the constitutional claim of the Constitutional Court in Latvia. I won't spend much time telling you about advantages and disadvantages of our so-called "false" or "pseudo" constitutional claim. Azerbaijan has chosen its own model and now this choice must be put into practice.

I would like very shortly to acquaint you with the headlines of our model because without this introduction it will be hard to understand our practice correctly. But I won't go into all particularities of our model, which can't be useful for putting your model into practice.

At the Constitutional Court of Latvia the term "case" can be used in the wider meaning and in the narrower one. In the narrower meaning we could speak about "the case" only when the decision to initiate the case is taken. In the wider meaning we could speak about "the case" from the moment when the application, namely constitutional claim is submitted to the Constitutional Court. In this report I shall speak about the case in the last meaning and inform how we are dealing with the "case" in this wider meaning, because the stage of initiating of the case is very important, when one is dealing with constitutional claims.

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In the Latvia the amendments to the Republic of Latvia Satversme (Constitution) about the Constitutional Court and the Constitutional Court Law were passed in June, 1996. The Constitutional Court started its activities in December 1996. But at that time there was nothing about constitutional complaint either in the Constitution or in the Constitutional Court Law .

Only in November, 2000 the individual complaint was envisaged in the amendments to the Constitutional Court Law. These Amendments essentially changed the performance of the Court. As a matter of fact, one may speak even about two stages of development of the Constitutional Court, marked by the amendments taking effect on July 1, 2001.

So there is big similarity in the situation in Latvia and in Azerbaijan. Namely, both courts started their performance without constitutional claims and worked without constitutional claims for a long time. In Latvia at that time a lot of big and small things were worked out as concerns the performance of the Constitutional Court. Everything: procedure, work of justices, work of the

staff, relations with mass media were worked out in the situation, when there was no institute of the constitutional claim. We envisaged, that the constitutional claim will take changes, but in the fact the changes were wider than we suspected.

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As I have mentioned before, a specific model of the constitutional claim functions in Latvia, namely, the so-called ”pseudo or false constitutional claim”. An application, submitted by a person, has been named the constitutional claim. In compliance with Article 19^2 of the Constitutional Court Law ”any person, who holds that his/her fundamental rights, established by the Constitution, have been violated by applying a legal norm, which is unconformable with the legal norm of higher force” may submit a claim. As a matter of fact, the constitutional claim in Latvia is one of the types of applications on the control of norms. There is no possibility to make the constitutional claim about the act of the court. Thus, our model is narrower than the constitutional claim, say, in Germany, Slovenia or in Azerbaijan.

As concerns the constitutional claim, the Constitutional Court of Latvia may review only the compliance of a legal norm with a legal norm of higher legal force. Our model doesn't provide the possibility to review at the Constitutional Court the cases mentioned in Article 130.3.4 of the Constitution of Azerbaijan Republic. So there is no constitutional matter in Latvia in cases provided for by Article 34.2 of the Law on the Constitutional Court of Azerbaijan. Namely:

– no constitutional case is initiated in Latvia if the normative legal act which should have been applied was not applied by a court;
– no constitutional case is initiated in Latvia if the normative legal act which should not have been applied was applied by a court;
– and no constitutional case is initiated in Latvia if the normative legal act was not properly interpreted by a court.

My opinion is that this is the biggest difference between the constitutional claim in Latvia and in Azerbaijan. And I can guess that this means many more constitutional claims and more problems in reviewing of cases in Azerbaijan than they are in Latvia.

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However, even our model of the constitutional claim took a drastic increase of work-load of the Constitutional Court. The work-load noticeably differs in the two periods of the Latvian Constitutional Court performance. From the time the Constitutional Court commenced its activities, namely, from December 1996 to July 1, 2001 only 33 applications were registered at the Court and on 30 of them cases were initiated. The greatest number of applications was received from the deputies of the Saeima.

In its turn from July 1, 2001 to January 1, 2004, 469 applications have been taken decisions on in the Panels of the Constitutional Court and 58 cases have been initiated. More than 90% of the applications have been received from the individuals.

Theoretically we were ready to face a big amount of claims. Practically many unforeseen problems arose. From the figures mentioned one could see, that in the last two and a half years there have been initiated twice as many cases as in the previous four and a half years. And one can see that in the two and a half years more than 10 times increased the number of applications to be decided as compared with the previous four and a half years.

Thus one can see that there were changes in the activities of the Constitutional Court. The justices and the staff is spending much more time for studying applications before taking the decision to initiate a case or not.

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And the work of the Chancellery and of the Chairman of the Court and his staff has changed as well because of the big amount of the so-called documents, which evidently don't meet the requirements determined by law concerning applications. Since July 1, 2001 until January 1, 2004 1470 documents were submitted with different names but with one purpose, namely, to initiate some activities of the Constitutional Court in current case or question. As I have said, only 469 from them, it means less then 1/3 were forwarded to the Panels of the Constitutional Court. All the others evidently didn't meet the requirements determined by law concerning applications. The submitters of these applications receive the explanation letter signed by the Chairman of the Constitutional Court. In such letters there are explanations about the competence of the Constitutional Court and requirements determined by law concerning applications. And there are explanations why the current document evidently doesn't meet these requirements.

I guess that there should be a very similar situation in Azerbaijan even if the model of the constitutional claim differs, because there is some similar kind of thinking we have inherited from the previous system. Namely, the individual isn't ready to defend his rights himself at that level where these rights should be defended and how they should be defended. There are many peoples who think that there should be some-body somewhere in the state power who should decide what to do, and who should do everything instead of the individual himself. In previous times such persons wrote claims to the Party Committee, today they write claims to the Constitutional Court. They write about everything they worry about. And they call such claims the constitutional claim.

Sometimes it is physically very hardly to deal with such letters, where particularities of current case are presented. Because the only one suggestion we as lawyers could give is the suggestion to ask for legal assistance. And we know the answer: I don't have money, could you help me…

But as the matter of fact Constitutional Court can't act as a legal assistance office. Especially in cases, when the application to the Constitutional Court should be written. So our position is, that we consult persons only about the procedural questions, but we don't give precise suggestions about the legal justification of the application. It is very important to discuss this solution at the very beginning, because the members of the staff sometimes would like to be good human beings and help the applicant to draw up the application. But the result could be very harmful to everybody, because suspicions could arise, that the court can't impartially review such cases.

Actually we have one good solution for this situation. Namely, when we see, that there could be the violation of the fundamental rights of a person, but the case is not within the jurisdiction of the Constitutional Court or the application does not comply with the requirements of the Law, we ourselves send the application to the State Human Rights Bureau or suggest the applicant to go to this institution.

The Constitutional Court can't be a magic remedy for all problems of our society. Everybody should do his own task.

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However every court, which starts to deal with constitutional claims should be first of all mentally ready to face big changes and to revise every custom of his work and every interpretation of procedural norms made by abstract control as well.

For example, there are big similarities in the Article 34.6 of the Law on Constitutional Court of Azerbaijan and the Article 18 of the Constitutional Court Law of Latvia. Only our Law is a little bit more laconic. Article 18 determines that to initiate a case an application to the Constitutional Court shall be made in writing. The application must indicate: 1) the applicant's name; 2) the institution or official who issued the disputable act; 3) an account of the true circumstances of the case; 4) the legal justification of the application; 5) the claim presented to the Constitutional Court.

The previous practice was that in his/her claim presented to the Constitutional Court the applicant should precisely indicate the name and the date of issue of the challenged act.

But with the first two constitutional claims received in the Constitutional Court even some days before the July 1, 2001 there arose the question about how to interpret these norms in the current situation. Both applicants were detained persons, to whom the security measure of arrest was applied. They wrote that there was one normative act adopted in the May 2001, which determines their rights and violates these rights. But this act wasn't published and they in the prison could not get information about the name, date of issue, author and precise content of this act. The essence of the claim was that this act prohibited receiving food parcels.

On the one hand these claims didn't meet the requirements of law as to the form of application. On the other hand the aim of the norms of the Constitutional Court Law isn't to restrict the right of a person to address the constitutional claim in the case, when the state authority violates their rights with the act, which isn't even published.

The Constitutional Court didn't reject these claims. Of course, the Court couldn't initiate the case about abstract act without name, date etc. The Court requested the Ministry of Justice to give information if there was such act, who had issued them, if it was published etc. And, indeed, there was an unpublished normative legal act – the Ministry of Justice Instruction "Transitional Provisions on the Procedure of Keeping the Suspected, Accused, Detained and Sentenced Persons in Investigation Prisons". At that time the above act determined the rights of the persons in investigation prisons.

The case was immediately initiated. Later in the judgment in this casei the Constitutional Court established, that the challenged act was an internal normative act. Regulation of the relations between the state and the imprisoned persons by internal normative acts is permissible only if the consequences of the above regulation are not unfavorable for the imprisoned persons. As concerns the imprisoned persons, whose relatives cannot send money to them, the consequences of the prohibition to receive food parcels, are unfavorable. The norm of the Internal Order, determining the prohibition on receiving food parcels, has been passed ultra vires (by violating the limit of authority). The Court established that the challenged act restricts the fundamental rights of imprisoned persons. In this judgment for the first time in Latvian law history was made the conclusion that the limitation of the fundamental rights of the imprisoned persons is permissible only by law or on the basis of the law.

This example shows that the norms of Constitutional Court procedure should be interpreted in accordance with the aim of constitutional claim. There one could see a slight difference between abstract control initiated by so-called political actors and constitutional claims initiated by individuals.

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The above example, of course, was a little bit extreme. But it was one of the features of the transitional stage from the socialist to the Western legal system. In the Constitutional Court of Latvia many cases were initiated on constitutional claims and connected with the problems when the Cabinet of Ministers or institutions, subordinated to it, or even the Presidium of the Saeima (Parliament) had reached a decision on issues, which in fact had to be settled by the legislator. Sometimes the challenged acts are very specific and it is hard to establish the kind of the act. Especially at the stage of initiation of the case such cases are hard to deal with, because one of the arguments always is that the case isn't within the competence of the Constitutional Court. In one scandalous caseii, where the application was submitted in the first months after the constitutional claims were reviewed, the Constitutional Court paid much attention to the procedural questions of the constitutional claim. First of all, the court stresses that one of the fundamental principles of a democratic state is the principle of separation of power. It follows that there exists control of the judicial power over the legislative and executive power. No legal norm or activity of the executive power shall remain out of control of the judicial power, if it endangers interests of an individual. On the one hand the Court holds that the judicial power as a whole and the Constitutional Court as its constituent part shall insure control over both other state powers. As concerns the judicial power, the competence of the Constitutional Court "steps back" behind the competence of the court of general jurisdiction and is interpreted as narrowly as possible. First of all it concerns the cases of constitutional claims. The law envisages that all the general means of protection shall be exhausted.

But on the other hand the Court pointed out that in its turn examination of the Presidium normative acts is not within the competence of any court of general jurisdiction, therefore such an interpretation of Article 16 of the Constitutional Court Law, which denies control of the above acts in case of violation of rights, would be at variance with Article 1 of the Constitution. Thus from the point of view of Article 16 of the Constitutional Court Law, a case on conformity of a challenged act with the legal norms of higher legal force is within the competence of the Constitutional Court.

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Article 20 of the Latvian Constitutional Court Law determines the cases, when the Constitutional Court may refuse to initiate a case. The conditions are different with regard to the constitutional claim and other applications.

When reviewing the applications the Court experiences the right of refusing to initiate a case, if: 1) the case is not within the jurisdiction of the Constitutional Court; 2) the applicant is not entitled to submit the application; 3) the application does not comply with the requirements of Articles 18 or 19-192 of the Constitutional Court Law; 4) an application on an already reviewed claim has been submitted.

When reviewing a constitutional claim, the Court may refuse to initiate a case also if the legal justification of the claim is evidently insufficient to satisfy the appeal.

The last provision is most of all used when refusing to initiate a case after receiving a constitutional claim.

There to my mind lies the biggest problem of the constitutional claim. Namely, how deep should the Panel of the Constitutional Court go into the case to reach the decision about initiating the case or to refuse initiating it.

In the above case in the judgment was drawn up the opinion of the Court about this stage of the procedure. "In compliance with the first part of Article 192 of the Constitutional Court Law a person who "holds…" may submit a constitutional claim. The Law puts a stress on the viewpoint of the person on violation of the particular right and not on that of the court. The Law demands the person to hold that the fundamental rights fixed in the Satversme have been violated. However this demand has to be read together with the sixth part of Article 192 of the Constitutional Court Law, which determines that the viewpoint has to be substantiated. Thus, to initiate a case on a constitutional claim, it is necessary to establish that the claim includes a sufficient legal substantiation about it. However, the Constitutional Court Panel has no obligation of evaluating the viewpoint of the applicant "to the end". The Constitutional Court Panel has the right of refusing to initiate the case only in case if the legal justification of the claim is evidently insufficient to satisfy the appeal. In its turn it has the obligation to do it only if there is no legal justification.

An opposite assumption, namely, that the Constitutional Court Panel, already when examining the constitutional claim and reaching the decision of initiating a case or refusing to initiate it, has to establish that the fundamental rights of a person have been violated, would contradict the logical advancement of the Constitutional Court proceedings, which has been determined by law. The issue on the fact whether the fundamental rights of the applicant of the constitutional claim have been violated has to be adjudicated by the Constitutional Court in its judgment."[iii]

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The increase of work-load causes many problems in the all-day work of the Constitutional Court. First of all these problems were in the organization of the work of justices and the so-called legal staff. Our Constitutional Court has small number of justices – only seven. And the staff isn't big either. Until review of constitutional claims started, everybody examined every application in detail. Every small problem in the interpretation of the norms of procedure formally or informally was discussed by the full body of justices and everybody without special announcements knew the latest procedural solutions.

After review of the constitutional claims started, the work-load doesn't allow such a style of work, especially in the stage of initiating of a case.

The Constitutional Court Law determines that the Panel consisting of three justices examines the application and takes the decision to initiate a case or refuse to initiate it. The panel is elected for a year by an absolute majority vote of the entire total of the justices. Just now there are four Panels at the Constitutional Court, thus the Chairman of the Court and his Deputy preside over the body of the panel, but all the other 5 justices are each in two Panels.

As concerns the procedure of appointing the Panels to review the case, the Rules of Procedure of the Constitutional Court determine it. Panels are appointed in the succession of the applications entered in the received Correspondence Register. Panels are appointed in the succession of their formation.

Thus the chairman can't freely choose which panel will take the decision about the application. The good side of such a solution is that the work-load of different panels is similar and that nobody could reproach that the chairman is personally interested in forwarding of the particular application to the current panel. The bad side is that for different panels to take decisions about similar questions. On the one hand it takes more time and, on the other hand, even the bodies of the panels were changed. There are some differences in the practice of different panels and I dare to say that sometimes the similar question in the different panels has different results.

One small solution to this problem is provided in the Paragraph 70 of the Rules of Procedure of the Constitutional Court. Namely, to advance objective and quick reviewing of applications, the Chairman of the Court with a motivated direction may assign the task of reviewing the application to another panel. In practice it takes place in two cases, namely, 1) when one and the same person submits several mutually connected claims and 2) when several persons submit similar claims. There have been cases when more than ten copies of the same claim are submitted, changing only the data of the applicant. We have had many cases when ten and more similar applications were submitted.

However this is only partial solution of the above question. It is very important to create an internal information system to sum up the latest experience, which could be helpful for other cases.

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Of course, it isn't possible to mention all the interesting questions we faced in these two and a half years. So I would like to answer your questions about every particular matter you are interested in.

Thank you for attention!

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[i] Judgment in the case No. 2001-05-03 "On the Compliance of the Ministry of Justice May 9, 2001 Instruction No.1-1/187 "Transitional Provisions on the Procedure of Keeping the Suspected, Accused, Detained and Sentenced Persons in Investigation Prisons" with Articles 95 and 111 of the Satversme (Constitution)"" December 19, 2001

[ii] The judgment in the case No. 2001-06-03 "On Compliance of Items 4, 5, 6, 7, 8 and the First Sentence of Item 9 of the Saeima Presidium February 28, 2000 Regulations "On the Procedure of Compensating Expenses Occurred to the Deputies while Exercising their Authority" with Article 91 of the Republic of Latvia Satversme", February 22, 2002

[iii] The judgment in the case No. 2001-06-03 "On Compliance of Items 4, 5, 6, 7, 8 and the First Sentence of Item 9 of the Saeima Presidium February 28, 2000 Regulations "On the Procedure of Compensating Expenses Occurred to the Deputies while Exercising their Authority" with Article 91 of the Republic of Latvia Satversme", February 22, 2002