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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

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The Constitutional Court of the Republic of Azerbaijan*

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

- 1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

According to article 95.1.10 and article 130.2 of the Constitution of the Republic of Azerbaijan appointment of judges of the Constitutional Court is carried out by Milli Mejlis (Parliament) of the Republic of Azerbaijan on the basis of recommendation of the President of the Republic of Azerbaijan. On the basis of article 95.2 of the Constitution the decision on appointment of judges of the Constitutional Court are passing with majority of votes of 63 members of the Milli Mejlis.

The general guarantees of independence of judges of the Constitutional Court are fixed in parts I-III of article 128 of the Constitution of the Republic of Azerbaijan, and also in article 16 of the Law «On Constitutional Court». It should be noted that in parts IV and V of article 128 of the Constitution are defined the bases and an order of deprivation of powers of judges of the Constitutional Court. So, whenever judges commit crime, the President of the Republic of Azerbaijan, based on conclusions of Supreme Court of the Republic of Azerbaijan, may make statement in Milli Mejlis of the Republic of Azerbaijan with the initiative to dismiss judges from their posts. Respective conclusions of Supreme Court of the Republic of Azerbaijan must be presented to the President of the Republic of Azerbaijan within 30 days after his request.

Decision on dismissal of judges of Constitutional Court of the Republic of Azerbaijan is taken by Milli Mejlis of the Republic of Azerbaijan with majority of 83 votes.

- 2. To what extent is the Constitutional Court financially autonomous - in the setting up and administration of its own expenditure budget?**

Activities of Constitutional Court are financed from the State budget of the Republic of Azerbaijan. The means allocated annually for the activities of Constitutional Court should not be reduced as compared to those ones allocated for the previous fiscal year. The annual means allocated for the activities of Constitutional Court cover the expenses directed at ensuring of the normal activities of Constitutional Court (article 70 of Law «On Constitutional Court»). According article 70.3 of Law «On Constitutional Court» also it is established that proposals of Constitutional Court regarding the volume of expenses for maintenance of Constitutional Court for the next year should be submitted to the relevant Executive body with the view to be included into the draft of the State budget.

3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?

Before entering of respective alteration and additions into the Law «On Constitutional Court» Milli Mejlis preliminary consults to the Constitutional Court.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

Legal basis of activity of Milli Mejlis (Parliament) is fixed in chapter V of the Constitution of the Republic of Azerbaijan. Procedure of activity of Milli Mejlis (Parliament) is defined by Internal Charter of Milli Mejlis of the Republic of Azerbaijan, confirmed by the Law of the Republic of Azerbaijan N 74-IQ of May 17, 1996. Proceeding from it, the Constitutional Court according to article 130.3 of the Constitution has the right to consider a question on constitutionality of "Internal Charter of Milli Mejlis of the Republic of Azerbaijan".

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

According to points 1-8 of part III of article 130 of the Constitution of the Republic of Azerbaijan the Constitutional Court is authorized to examine constitutionality of laws and decisions of Milli Mejlis of the Republic of Azerbaijan, decrees and orders of the President of the Republic of Azerbaijan, decisions and orders of the Cabinet of Ministers of the Republic of Azerbaijan, normative legal acts of the central executive authority bodies of the Republic of Azerbaijan, decisions of the Supreme Court of the Republic of Azerbaijan, municipal acts, interstate agreements of the Republic of Azerbaijan that are not in force, intergovernmental agreements of the Republic of Azerbaijan.

Besides, the Constitutional Court has the right to consider cases on a resolution of disputes regarding the separation of powers between legislative, executive and judiciary powers, and also a question of compliance of the Constitution of Nakhichevan Autonomous Republic, laws, decisions of the Supreme Mejlis and Cabinet of Ministers of Nakhichevan Autonomous Republic with the Constitution of the Republic of Azerbaijan; compliance of laws of Nakhichevan Autonomous Republic, decision of the Cabinet of Ministers of Nakhichevan Autonomous Republic with the laws of the Republic of Azerbaijan; compliance of decision of the Cabinet of Ministers of Nakhichevan Autonomous Republic with decrees of the President of the Republic of Azerbaijan and with decisions of the Cabinet of Ministers of the Republic of Azerbaijan.

6. a) **Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

According to article 120 of the Constitution establishing general procedures Cabinet of Ministers of the Republic of Azerbaijan issues decrees, as per all other questions – it issues orders.

According to article 130.3.1 of the Constitution the Constitutional Court based upon the request of the President of the Republic of Azerbaijan, the Milli Mejlis of the Republic of Azerbaijan, the Supreme Court of the Republic of Azerbaijan, the Prosecutor's Office of the Republic of Azerbaijan, Supreme Mejlis of Nakhichevan Autonomous Republic, Ombudsman and the constitutional complaints has the right to consider constitutionality of normative legal acts of the Cabinet of Ministers.

6. b) **Parliament can invalidate the constitutional court's decision: specify conditions.**

There is no the legal mechanism in the Constitution and legislation of the Republic of Azerbaijan allowing Milli Mejlis to nullify the decision of the Constitutional Court.

7. **Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?**

The full-fledged mechanism of cooperation of the Constitutional Court with other state structures at present unfortunately is absent. However, now the Constitutional Court in sphere of protection of the rights and freedoms comes into close contacts with the Ombudsman of the Republic of Azerbaijan. Besides, in the Constitutional Court created the Working Group consisting of employees of the Staff of the Constitutional Court which main task is the analytical survey of corresponding branches of the current legislation of the Republic of Azerbaijanis. At sessions of Working Group possibility of participation of scientists, employees of corresponding state structures is provided.

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

- 1. What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?**
- 2. Specify whether the Constitutional Court is competent to resolve such litigation.**

Article 130.3.8 of the Constitution of the Republic of Azerbaijan provides for competence of Constitutional Court on resolution of disputes regarding separation of powers between legislative, executive and judiciary. According to article 130.3 of the Constitution, the President of the Republic of Azerbaijan, Milli Mejlis of the Republic of Azerbaijan, the Cabinet of Ministers of the Republic of Azerbaijan, the Supreme Court of the Republic of Azerbaijan, Office of Public Prosecutor of the Republic of Azerbaijan, Supreme Mejlis of Nakhichevan Autonomous Republic have the right to submit to Constitutional Court the inquiries on the disputes regarding separation of powers between legislative, executive and judiciary.

- 4. Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether your constitutional court has adjudicated upon such disputes; please give examples.**
- 5. Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?**
- 6. What procedure is applicable for the adjudication of such dispute?**

Proceedings on cases related to the petitions on disputes regarding the separation of powers between legislative, executive and judiciary powers are carried out as the constitutional legal proceeding (article 40.1 and 40.2.2. of the Law «On Constitutional Court»).

The examination procedure of the given category of cases is defined by article 53 of the Law «On Constitutional Court». So, according to given article the matter concerning the inquiry on the disputes regarding the separation of powers between legislative, executive and judiciary powers, as a rule, brought to sessions of the Panels of Constitutional Court within 15 days and ruling on admissibility or inadmissibility for examination should be adopted. The ruling of Panel of Constitutional Court on admissibility or inadmissibility for examination of an inquiry should be send on the day of its adoption to the body or official person who submitted an inquiry.

The examination of a inquiry on the merits by Constitutional Court should be commenced within 30 days after its admission for proceedings.

7. What choices are there open for the Constitutional Court in making its decision (judgment). Examples.

8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards. Examples.

Constitutional Court by inquiries of the Supreme Court and Office of Public Prosecutor of the Republic of Azerbaijan has been taken out two decisions, connected with disputes on separation of powers between power branches.

Subject of the first inquiry initiated by the Supreme Court was a question on the contradiction of the order of the chief executive of a city of Baku N 876 of July 14, 1995 «On cancellation of the decision of executive committee of the Baku City council of People's Deputies« 3/81 of April 20, 1990» to a principle of separation of powers between legislative, executive and judiciary powers, fixed in article 7 of the Constitution of the Republic of Azerbaijan. So, points 2, 2.1 and 3, the chief executive of a city of Baku specified above the order it has been established that the citizens having passport registration till 1990 can get houses (apartment) by purchase and sale.

In connection with inquiry the Constitutional Court in the decision from February, 16th, 1999 concerning the dispute on distribution of powers between authorities in connection with the Order of the Head of Executive of Baku city N 876 of July 14, 1995 "On Cancellation of the Order of the Executive Committee of Baku City Council of the People's Deputies N3/81 of April 20, 1990" recognized points 2, 2.1 and 3 of the Order of the Head of Executive of Baku city N 876 of July 14, 1995 "On Cancellation of the Order of the Executive Committee of Baku City Council of the People's Deputies N3/81 of 20 April 1990" as contradicting to Article 7.3, Article 81.12, 81.13 Article 94.1 of the Constitution of the Republic of Azerbaijan and as null and void from the date of coming into force the given decision.

In the given decision the Constitutional Court has specified that «... The principle of separation of powers means activity of the executive, legislative and judicial authorities within the framework. According to Article 94.1.12 of the Constitution of the Republic of Azerbaijan, general rules concerning transactions, civil-legal agreements, representation and inheritance, and to point the 13-property right, including a legal regime of the state, private and municipal property are established by Milli Mejlis of the Republic of Azerbaijan. Thus, having adopted items 2, 2.1 and 3 of the specified Order the Head of Executive of Baku city in infringement of Article 7.3, Article 81.12, 81.13 and Article 94 of the Constitution of the Republic of Azerbaijan, has taken up competence of legislative power.

In the second case the Constitutional Court, by inquiry of Office of Public Prosecutor of the Republic of Azerbaijan, has carried out the constitutional examination of Order of the Head of Executive of Baku city N 961 of October 5, 1999 concerning the regulation of tariffs for the public utilities.

The Constitutional Court in the decision of March 2, 2000 on the Order of the Head of Executive of Baku city N 961 of October 5, 1999 concerning the regulation of tariffs for the public utilities has noticed that« ... According to Article 7.3 of the Constitution the state power in the Republic of Azerbaijan is organized on the basis of principle of separation of powers.

The principle of separation of powers assumes realization of various by content imperious functions by independent branches of power. Sense of such separation is the preservation of guarantees of freedom with a view not to admit replacement of democracy by autocracy. The aim of the principle of separation of powers is the inadmissibility of assignment by one of branches the powers of another ... ».

Hereupon, the Constitutional Court has considered that accepting the order N 961 of October 05, 1999 the Head of the Executive of Baku has infringed the requirements of Article 7.3, Article 29.3, Article 81, Article 94.1.13 and Article 149.7 of the Constitution of the Republic of Azerbaijan, Articles 13 and 14 of the Law “On Privatization of Dwelling Fund in the Republic of Azerbaijan”, Article 55 of the Housing Code of Azerbaijan Republic.

The given decision of the Constitutional Court recognized as null and void the Order of the Head of the Executive of Baku N961 of October 05, 1999 concerning the regulation of tariffs for the communal services as contradicting to Article 7.3 of the Constitution of Azerbaijan Republic providing for principle of separation of powers and recommended to the Cabinet of Ministers of the Republic of Azerbaijan to establish urgently the order of payment for usage of the dwelling area (rent).

It should be noted that the Cabinet of Ministers of the Republic of Azerbaijan, to execute the recommendation of the Constitutional Court accepted the Decision N40 of March 9, 2000, establishing order of payment for using a floor space (rent).

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. The Constitutional Court's decisions are:
 - a) final;
 - b) subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;
 - c) binding *erga omnes*;
 - d) binding *inter partes litigantes*.

According to article 130.9 of the Constitution of the Republic of Azerbaijan, the decision of the Constitutional Court has mandatory force within the territory of the Republic of Azerbaijan.

Decision of the Plenum of Constitutional Court is final and cannot be cancelled, changed or officially interpreted by any organ or official person (article 63.4 of the Law «On Constitutional Court»).

2. As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:
 - a) repealed;
 - b) suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;
 - c) suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;
 - d) other instances.

According to article 130.10 of the Constitution of the Republic of Azerbaijan, laws and other acts, or their separate provisions, intergovernmental agreements of the Republic of Azerbaijan lose their force within the timeframe established in the decision of the Constitutional Court of the Republic of Azerbaijan. But interstate agreements of the Republic of Azerbaijan do not come into force.

As a rule, laws and other normative acts, or their separate provisions lose their force from the moment of coming into force of the corresponding decision of the Constitutional Court. Terms of coming into force of the decision of the Constitutional Court are established in article 67 of the Law «On Constitutional Court». Thus, the decision adopted on the matters specified by paragraphs 1-7, part III of Article 130, parts V and V of Article 130 of the Constitution of the Republic of Azerbaijan enter into force from the date specified in the decision itself; decision on separation of authorities between the Legislature, Executive and Judiciary as well as on interpretation of the Constitution and laws of the Republic of Azerbaijan enter into force from the date of its publication; decision on other matters within the jurisdiction of Constitutional Court enter into force from the date of its announcement.

3. Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?

According to article 66.4 of the Law «On Constitutional Court» the judicial acts recognized as not conforming to the Constitution and laws of the Republic of Azerbaijan should not be executed and those cases shall be re-examined in accordance with procedure specified by procedural legislation of the Republic of Azerbaijan.

Revision of judicial acts is carried out by ordinary courts as proceedings on new circumstances, in connection with infringements of the rights and freedom. An order and the bases of revision of such judicial acts are regulated accordingly by chapter 44-1 of the Civil Procedure Code and chapter LIV - the Criminal Procedure Code of the Republic of Azerbaijan.

Besides, in the decision of Plenum of the Constitutional Court of January 25, 2005 On verification of conformity of para III, item 9 and para IV, item 7 of the Law of the Republic of Azerbaijan N 688-II QD of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of the Republic of Azerbaijan” to Article 130, para IX of the Constitution of the Republic of Azerbaijan» it has been specified, «... 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.

... When carrying out the proceedings on new circumstances in connection with violation of rights and freedoms the Plenum of Supreme Court and then other courts, which revise relevant cases should adopt a decision that would contradict to the decision of Constitutional Court aimed at restoration of violated rights and freedoms.

Plenum of Constitutional Court particularly notes that according to constitutional norm (Article 130, para IX) concerning high legal force of the decisions of Constitutional Court the adoption of new judicial acts similar to the judicial act recognized by Constitutional Court as contradicting to Constitution cannot on one hand derogate the effect of the decision of supreme body constitutional justice and on another hand gives a reason for submission of complaint to Constitutional Court via the procedure specified in Article 34 of the Law of Azerbaijan Republic “On Constitutional Court”...».

4. Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found- as a result of *a posteriori* and/or *a priori* review?

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.

There is no legal norm defining an order and terms of elimination from authorized bodies, any legislative contradictions revealed by the Constitutional Court in the legislation of the Republic of Azerbaijan.

At the same time, the Constitutional Court of the Republic of Azerbaijan develops practice according to which, recognizing in the decisions of appealed legal norm of any normative legal act of the contradicting to Constitution and to laws, the corresponding recommendation also is given to the legislative and executive authorities on reduction of positions of normative legal act according to legal positions of the Constitutional Court or to an establishment of a corresponding legal regulation on the legal question considered by the Constitutional Court. So, in decisions of Constitutional Court to Milli Mejlis (Parliament) and the Cabinet of Ministers it has been addressed about 30 corresponding recommendations.

Though, as it has been specified above, in the Constitution and in the Law «On Constitutional Court» the order and terms according to which corresponding recommendations of the Constitutional Court should be executed are not defined, by the authorized bodies the majority of recommendations specified in decisions have been executed.

Also we will notice that the Constitutional Court, taking into account practice of execution of decisions of Court, prepares a package of proposals on change and addition to the Law «On Constitutional Court», directed on the further perfection of execution of decisions of the Constitutional Court.

6. Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.

In the legislation of the Republic of Azerbaijan there is no legal regulation concerning possibility of acceptance of other normative legal act or its separate positions, instead of previous which has been recognized earlier by Constitutional Court as unconstitutional. However, practice of execution of decisions of the Constitutional Court shows that the recognition by Constitutional Court as unconstitutional of any normative legal act or its separate position did not involve further acceptance of other normative legal act.

Besides, in the mentioned above decision of Plenum of the Constitutional Court of January 25, 2005 the following legal position has been formulated: «... In general, it is necessary to take into account that the approval by Constitutional Court of the fact

that it corresponds or does not correspond to Constitution can be accepted as a special fact of pre-judicial importance not only for a body, which adopted that act but also for other law-making or judicial bodies.

With respect to law-making bodies the prejudicial importance of the decisions of Constitutional Court consists of inadmissibility of adoption of an act similar to the normative legal act recognized by Constitutional Court as contradicting to Constitution. The prejudicial importance of the fact of recognition by Constitutional Court of any provision of normative legal act as contradicting to Constitution makes impossible the application by courts of similar provisions envisaged in other acts».

Along with it, the Constitutional Court prepares the offer on a legislative regulation of this point in question by introduction of the corresponding legal norm in the Law «On Constitutional Court».

7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?

In article 130 of the Constitution of the Republic of Azerbaijan and in the Law «On Constitutional Court» there is no rule of law according to which the Constitutional Court has the right to allocate other state structures with power on maintenance to execution of the decisions.

Alongside with it, it is necessary to consider that decisions of the Constitutional Court according to a part of article 130 of the Constitution of the Republic of Azerbaijan possess a binding force on territory of the Republic of Azerbaijan. Besides, the Constitutional Court of the Republic of Azerbaijan develops practice according to which its legal positions formulated in decisions, should be obligatory for all state structures, local governments, officials in all similar legal situations. It means that legal force of legal positions possesses the general character and is equated to legal force of decisions of Constitutional Court and thereof is subject to application not only on concrete case, but also on all similar cases.