**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On Interpretation of Article 49 of the Constitution of the Republic Azerbaijan*

**21 October, 2005 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of judges F.Abdullayev (presiding judge), F.Babayev, B.Garibov, R.Gvaladze (Reporter judge), E.Mammadov, I.Najafov, S.Salmanova and A.Sultanov

joined in the proceedings by the Court Clerk I. Ismayilov;

legal representatives of the interested parties in special constitutional proceedings M. Agazade, the Judge of the Supreme Court of the Republic of Azerbaijan; K.Shafiyev, Deputy Head of the Department on Legislation on Statehood and Head of the Section on Human Rights Legislation of the Secretariat of Milli Majlis (Parliament) of the Republic of Azerbaijan,

with participation of M.Ismaylov, docent of Constitutional Law Department of the Law Faculty of Baku State University

in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open court session via the procedure of constitutional proceedings the constitutional case on petition of 25 May 2005 N 8/2005 submitted by the Supreme Court of the Republic of Azerbaijan concerning interpretation of Article 49 of the Constitution of the Republic of Azerbaijan.

Having heard the report of Judge R. Gvaladze, the reports of the legal representatives of interested parties in special constitutional proceedings and comments of the experts and studied the case materials the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Article 49 of the Constitution of the Republic of Azerbaijan provides:

“I. Everyone has a right to freedom of assembly with others.

II. Everyone has a right together with others and upon prior notification of relevant state bodies to peaceful, unarmed assembles, meetings, demonstrations, street processions, pickets”.

The Supreme Court of the Republic of Azerbaijan with the purpose of ensuring a uniform judicial practice concerning the right to freedom of assembly has requested in its petition the Constitutional Court to interpret Article 49 of the Constitution of the Republic of Azerbaijan taken in conjunction with other relevant Articles of the Constitution and norms of international legal acts and clarify whether it is possible to place any restrictions on the exercise of a right to freedom of assembly.

In connection with the submitted application the Plenum of Constitutional Court notes as follows:

The purpose of a freedom of assembly, demonstrations, street processions and strikes is to discuss the problems of general significance and to try to present own position to publicity. The right to freedom of assembly is one of the widest political rights linked to main aspects of everyone’s political life.

Freedom of assembly that represents a significant element of every person’s legal status is a subjective right having interrelations with other rights, freedoms and responsibilities. Its primary objective is to ensure agreement and formation of everyone’s opinion, its subsequent expression on various issues of public life as well as exertion of impact on state organs and public unions via everyone’s participation in governance of social life.

The Constitutions of most of countries provides for freedom to assembly, demonstrations, strikes, and etc. as forms of everyone’s political activity. Such freedoms are considered as free and mass expressions of collective and individual views on any issue of public or state life. People use the mentioned political freedoms for the sake of development of both of their personality, self-expression and self-determination as well as to take active part in public and political life. Despite the fact that the gathering of people together to express freely their views is not always related to political interests, the freedom of assembly is usually viewed as an integral part of political rights and freedoms.

The right to freedom of peaceful assembly of every person is embodied in Article 20 of the Universal Declaration of Human Rights, Article 21 of the International Covenant on Civil and Political Rights, Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

It must also be mentioned that as is the case with most of the rights, the right to freedom of assembly also could not be considered as absolute and as the freedom, which could not be subjected to restrictions. Generally speaking, the inviolability of basic human rights is by itself carried out through conflict of individual and public interests and compromise of rights and interests of various persons (individuals). The only way out of this dilemma is to draw careful differentiation between areas of protection of basic (fundamental) rights and their restrictions thereof.

Human rights could not be considered as a behavior with unlimited permissions and voluntarism. On the contrary, every right and freedom has its clearly regulated framework and every freedom bears relevant obligation. The observance of common interests, non-interference with rights of others, respect for customs, inadmissibility of any arbitrary and in particular forceful action against rights of other citizens regardless of its form and substance can be shown as examples of the forms of expression of such duties.

The obligation of non-interference by a state and a human person with rights and freedoms of citizens and other persons is accepted as imposition of restrictions on rights. Lawful restrictions placed by a state on human rights aims at prevention of arbitrary interference with rights of other subjects. The law by imposing of restrictions on every person’s freedom within certain framework ensures free and peaceful exercise of that person’s rights, which means that it ensures the freedom within the said limits. The freedom of every person ends at the border of where the freedom of another person starts. By attempting to determine such boundaries the law helps to set up order based on freedom in a daily life of human persons.

Such a feature of a freedom was already referred to in Article 4 of the French Declaration of Human and Citizens’ rights of 26 August, 1789. The Declaration states: “… Freedom is a possibility to do everything without causing injury to others: in this sense, implementation of every person’s natural rights may be limited with the aim to ensure the use of those rights by other members of society”.

After World War II the right to impose restrictions on rights was declared in the Universal Declaration of Human Rights (Article 29), however, for the first time it was made real by adoption on 4 November, 1950 in Rome of the Convention for the Protection of Human Rights and Fundamental Freedoms. The right to place restrictions was reflected also in a number of universal human rights documents, among which are the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

According to Article 4 of the International Covenant on Economic, Social and Cultural Rights “the States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such restrictions as are determined by law…”

Provisions on imposition of restrictions on rights are reflected in the Constitution of the Republic of Azerbaijan in conformity with general nature of human rights and relevant provisions of international legal instruments.

 Article 49 of the Constitution of the Republic of Azerbaijan is entirely devoted to the right to freedom of assembly. The possibility of any restrictions on assemblies, demonstrations, strikes, street processions, pickets envisaged by the right to freedom of assembly is not clearly stipulated in the text of the said Article.

However, the issue of nature of the freedom envisaged in the mentioned Article and the issue of restrictions on the exercise of right must be examined with due consideration to basic (fundamental) human rights, essence of responsibilities, as well as in the context of other constitutional norms addressing the issue of freedoms and responsibilities.

Thus, Article 24.2 of the Constitution of the Republic of Azerbaijan, which embodies basic principle of human and citizen’s rights and freedoms, provides that the rights and freedoms also cover the responsibilities and duties before society and other persons. This principle in theory is expressed by following thesis: the freedom of every person ends at the border of where the freedom of another person starts”. The core principle reflected in this Article is analogical to the substance of provisions expressed in Article 72.3 of the Chapter 4 titled “Main duties of a citizen” of the Constitution. In accordance with the said norm, every person must comply with the Constitution and laws of the Republic of Azerbaijan, respect rights and freedoms of others, and fulfill other duties determined by law.

Article 71.2 of the Constitution is also of significance for the purposes of clarification of the substance of the right to freedom of assembly enshrined in Article 49 of the Constitution. The said norm states: “No one shall impose restrictions on the exercise of human and citizen’s rights and freedoms”.

It is evident from the black letter of this provision that the duty to avoid imposition of restrictions on human rights and freedoms rests not only with state organs or their representatives but with all institutions and persons within the territory of the Republic of Azerbaijan. This provision implies that any person while performing any action or engaged in any form of activity, including exercise of rights and freedoms enshrined in the Constitution, must refrain from restricting the rights of others or annihilating those rights as is envisaged in Article 71.5 of the Constitution. Such interpretation of the norm is also explained by the fact that on the basis of obligation to “ensure human and citizen’s rights” as a “supreme (main) goal of the State” reflected in Article 12.1 of the Constitution and on the basis of principle of effective protection of human rights that a State must ensure to everyone within its jurisdiction protection from any unlawful or arbitrary interference with human rights and freedoms not only by its organs or representatives but also by non-governmental institutions and physical persons. To put in other words, a State must not only refrain from interfering with the exercise of human rights but it must also take all necessary measures to ensure that no person is able to place restrictions on those rights and freedoms and that basic rights and freedoms become real and effective.

Thus, interpretation of Article 71.2 of the Constitution, taken together with part V of the same Article gives sufficient grounds to conclude that persons willing to exercise the right to freedom of assembly do not possess an unlimited freedom.

Understanding of Article 71.2 in the sense interpreted hereabove, taking together Article 24.2 and Article 155 of the Constitution, as well as the nature of a right to freedom of assembly excludes the interpretation that no restrictions can be placed by any person on this freedom. With respect to state organs or their representatives the term “no one shall place restrictions” must be interpreted jointly with Article 155 of the Constitution which means that state organs or officials (incumbents) may not place broader restrictions on the right to freedom of assembly than those envisaged by international agreements to which Azerbaijan is a party.

Pursuant to Article 12.2 of the Constitution human and citizen’s rights listed in the Constitution shall be applied in accordance with international agreements to which Azerbaijan Republic is a party. This norm reflects an important principle, which allows for application of human rights in accordance with international standards. The said principle makes it impossible to place within our country broader restrictions on human rights and freedoms than those envisaged by universal norms of international law and agreements in the area of human rights protection.

The State, for the purposes of effective provision of the right to freedom of assembly could guarantee more safeguards than those envisaged in international agreements or refuse to incorporate one or more restrictions determined by international agreements into its national legislation, or judicial bodies of a country may interpret such restrictions in a rather narrow sense.

However, to exclude restrictions on the right to freedom of assembly in general would be in conflict with human rights of others and main principles of constitutional organization.

International instruments to which Azerbaijan Republic is a party, including International Covenant on Civil and Political Rights (Article 21), Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11) specifically reflect legitimate aims upon pursuance of which the restrictions could be placed.

The right envisaged in those legal instruments may be subjected to restrictions, which are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

In addition to what has already been said it must be noted that in order to ensure compliance of implementation of human rights and freedoms in Azerbaijan Republic with the Convention for the Protection of Human Rights and Fundamental Freedoms, pursuant to Article 156.5 of the Constitution the Constitutional Law “On regulation of implementation of human rights and freedoms in Azerbaijan Republic” was adopted on 24 December 2002 as an integral part of the Constitution.

The Constitutional Law alongside with number of other rights also envisages placement of restrictions in the interests of state security, for the protection of health and morals or for the protection of the rights and freedoms of others, for the prevention of crime or riots as well as for the protection of public safety.

However, at the same time, the Constitutional act determines that restrictions on the exercise of human rights and freedoms contained in the Constitution of the Republic of Azerbaijan and international agreements to which Azerbaijan Republic is a party shall be placed only in cases prescribed by law without altering their substance, shall pursue legitimate aims envisaged in the Constitution and the Constitutional Law and be proportionate to the pursued legitimate aim.

The Constitutional Court also notes that one of the characteristic features of international legal instruments in the field of human rights protection is that they envisage placement of lawful restrictions on various rights when such restrictions are necessary in a democratic society.

Generally, effective realization of human rights can be made possible only when restrictions necessary in a democratic society are fully and clearly determined. This also ensures protection of democratic achievements.

Jurisprudence of the European Court of Human Rights on the matter at hand is also of great significance.

In its judgment in the case of “Platform Arzte fur das Leben” the European Court held the following: «A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.»

Thus, the European Court determines allows in this area for states a certain margin of appreciation.

At the same time, while it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.

Thus, the European Court by recognizing existence of difficulties related to holding of social assemblies has given states in this area certain discretion of choice. This includes obtaining of a permission to hold demonstrations, police protection of demonstrators with opposing views and etc.

It appears from the jurisprudence of the European Court that the Court when interpreting text of the Convention was of the view that the right to freedom of assembly was not an absolute right and lawful restrictions could be placed on its exercise. However, in this case the restrictions placed on the exercise of this right must not serve simply as a reason for its prevention but rather to ensure public and national interests, as well as interests of those wiling to realize this right. Any restriction placed by organs of state power must pursue legitimate aims envisaged in paragraph 2 of Article 11 of the Convention.

Taking into account the aforementioned, the Plenum of the Constitutional Court of the Republic of Azerbaijan comes to the conclusion that from the viewpoint of Article 12.2, Article 24.2, Article 71.2, Article 72.2, Article 155 of the Constitution of the Republic of Azerbaijan, Article 3 of the Constitutional Law “On regulation of implementation of human rights and freedoms in Azerbaijan Republic” and paragraph II of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that the right to freedom of assembly envisaged in Article 49 of the Constitution of the Republic of Azerbaijan can be subjected to restrictions prescribed by law and necessary in a democratic society.

Being guided by Article 130.4 of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65-67 and 69 of the “Law on Constitutional Court” the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. From the viewpoint of Article 12.2, Article 24.2, Article 71.2, Article 72.2, Article 155 of the Constitution of the Republic of Azerbaijan, Article 3 of the Constitutional Law “On regulation of implementation of human rights and freedoms in Azerbaijan Republic” and paragraph II of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that the right to freedom of assembly envisaged in Article 49 of the Constitution of the Republic of Azerbaijan can be subjected to restrictions prescribed by law and necessary in a democratic society.

2. The decision of the Constitutional Court of the Republic of Azerbaijan comes into force from the date of its publication.

3. The decision is subject to publication in the "Azerbaijan", “Respublika”, “Xalg gazeti”, “Bakinsky rabochiy” newspapers and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final and cannot be cancelled, changed or officially interpreted by any body or official.