

THE ROLE OF CIVIL SOCIETY INSTITUTIONS IN THE FORMATION OF A LEGAL STATE

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Realization of human and civil rights and freedoms is among the main objectives of civil society building. In general, although the idea of human rights has stemmed from ancient times and developed in the Middle Ages, only in the Age of Enlightenment was it shaped as an excellent philosophical theory against despotism of monarchs. After the World War II, it was developed as a political concept, legal regulation and a discipline of contemporary knowledge. It is a very important principle which was established in general terms in the UN Charter (Articles 1, 55 and 56) for the first time and later after being recognized by a number of important documents, including the Universal Declaration of Human Rights (December 10, 1948) the catalog of civil, political, economic, social and cultural rights started to expand (2 international Covenants concerning this subject were adopted on December 16, 1966) (14), and in 1975 after adoption of the Final Act in the Helsinki Conference on Security and Cooperation in Europe, human rights became a universally recognized international norm and standard of behavior.

The States that have signed this act, can monitor realization of human rights in other countries and demand eliminations of the cases of violation of these rights. Protection of human rights and freedoms is the main duty of the UN. Charter of Paris for a New Europe adopted on November 21, 1990, the Action Program adopted on June 25, 1993 in World Conference, and the Vienna Declaration once again approved the obligations in relation to human rights and respect to human rights was determined as the main duty of states, observing these rights were viewed as the basis for freedom, justice and peace.

A legal state is a multidimensional and growing phenomenon. In the course of social progress, it gains new features in accordance with the specific terms of existence of a society and its level of development. Permanent general foundation for any legal state is its commitment to the law. The law plays a dominant role only if it acts as a measure of freedom to all and everybody and current laws actually serve to the interests of the people and the state and their implementation is the embodiment of justice. Mere development of legislation does not imply the existence of a legal state in the society. Recent experience has shown that totalitarian states regularly adopt legal acts, which are strictly enforced, but it is the opposite of a legal state.

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a) Economic basis of a legal state is shaped by production relations built upon various forms of ownership (state, collective, rentals, private, joint-stock cooperative and b.) provided with equal rights and equal legal protection. In a legal state ownership belongs directly to the producers and consumers of the material wealth. Individual producers act as the owner of the product of their own labor. Legal basis of statehood is realized only upon existence of free and independent ownership ensuring equality for the participants of productive relations, development of society and constant rise of its welfare from economic point of view. Social basis of the legal state is the self-governing civil society embodying free citizens - the representatives of public prosperity. The focus in such states is on humans and their various interests. Social institutions and system of social relations created the conditions necessary for all citizens to realize their creativity and labor capacity. Pluralism of opinions, personal rights and freedoms were secured. Transition from totalitarian methods of governance to the legal state is due to the fundamental change in social activity of the state and refusal from the dominance of the "unowned" production over the social, economic, political and moral interests of citizens. Strong social foundation of the state determines the stability of its legal basis. A legal state is at the same time a social welfare state.

b) A legal state confirms the highest moral values of humans, defines their decisive role in social life and excludes oppression and violence against individuals. It is specifically used in democratic methods of governance, fairness of judgment, predominance of individual's rights and freedoms in their relations with the state, protection of rights and freedoms and admissibility of various religious views. Spiritual integrity in the life of a state determines to a large extent the spiritual maturity of the society as a whole, its cultural level and humanism in socio-economic and political relations.

c) A legal state is the sovereign state embracing sovereignty of the people and nations settled within the country. Implementing supremacy, generality, integrity and exclusiveness of power, the state ensures freedom of public relations an equitable basis for all citizens. In a legal state enforcement is carried out in accordance with the law. As an important indicator of the state's sovereignty, coercion is restricted by law, arbitrariness and illegality are excluded, and state interference is allowed only in case of prejudice to state sovereignty and interests of citizens. If any person's behavior endangers the freedom of other people, then the state restricts the freedom of that person. Political nature of the state is more clearly manifested by its sovereignty. All the laws of interests related to demands by various links of the political system of a society are combined in sovereignty. Thanks to the sovereignty, interests of states and non-governmental organizations are linked and their fair legal equilibrium and independent development is ensured.

d) Sovereignty of nation means that the source of state power is the people only. Author of this very daring for old times idea is the famous scholar of the Middle Ages Marsilius of Padua. Author of 'The Defender of Peace' believed that the sovereign legislator within a state is the people. It was a completely new understanding of human as the creator and founder of his own destiny.

Legal state and democratic state: similarities and differences

The concept of legal state includes the features covered by the concept of the state of a constitutional democracy. However, dwelling on specific features of a legal state, we can create a larger and clearer picture of such states. These features are mainly the following:

- rule of law principle;
- principle of separation of powers;
- equality of all before the law;
- principle of superiority of rights and freedoms;
- principle of real guarantee for human and civil rights and freedoms;
- mutual responsibility, i.e. the responsibility of the state before individual and vice-versa;
- independence of judicial power.

The most important principles of the legal state are the principle of the rule of law and supremacy of Constitution. This principle finds its manifestation in the rule of law. In other words, the basic social relations in all aspects of the social life must be governed only by law, rather than by-laws. The following principles have practical importance for the implementation of the rule of law principle:

- principle of the central legislative system;
- principle of social justice;
- state bodies serving the whole community, rather than its individual sections;
- necessity of publishing all laws. In the system of legal values, the supreme form of expression of the establishment and protection of human freedom is law. In the laws the state sets mandatory rules of conduct that should take into account objective needs of social development on the basis of equality and justice. That is why the law has the supreme legal force. All other legal acts must comply with the law. Laws regulate more important, key aspects of public life. The by-laws, especially the industry-specific ones, may, if necessary, only specify certain provisions of the laws, but in no case "improve", "correct", or "modify" the law.

At the same time, the legal law does not enable legislators' arbitrariness. The laws should express objectively established social relations, and trends of their development and self-renewal. Various kinds of legislative restrictions and prohibitions of subjective nature undermine the basis of a legal state. In general, the legal state envisages formation of the society where human rights are fully protected. Respect to human rights is an indicator of a civilized society. A legal state is built upon civil society and fulfills all the terms for its development. Fundamental principle of the democratic decrees of the government is that the government does not give any rights to the people. Its duty is to protect the freedoms and rights granted from birth. The effective protection of these rights and freedoms is the direct evidence of the civil society. In this regard, it can be noted that one of the key components of legal state is namely the civil society.

Civil society in the legal state

Summarizing all aspects characteristic to civil society, it is possible to determine its universal features. These features are as follows:

- possession of property (individual and collective) by people, in other words, property rights;

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- existence of a multiform structure reflecting the interests of various groups and classes of a developed and diversified democracy;
- high level of intellectual, psychological development of members of the society, their ability to self-activity when included in an institution of civil society.
- realization of the rule of law among population, i.e. functioning of the legal state.

In other words, civil society can function only under a well-developed legal state.

In addition to the above stated, the main features of civil society are:

- fuller realization of the rights and freedoms of humans and citizens;
- self-government;
- competition of its constituent structures and various groups of people;
- freely formed public opinion and pluralism;
- general awareness and, above all, the real exercise of the right to information;
- life in civil society is based on the principle of coordination. Unlike the state apparatus, which is built on the principle of subordination, i.e. on the system of strict subordination of «juniors to seniors».

It should be noted that the civil society in Western Europe, is celebrated as a natural social environment. Civil society in Eastern Europe is emerging as an ideological structure and in the formation of civil society very little space is left for economic problems. But in any case this society could not be "das burgerliche Gesell schaft" (word-for-word translation from German - "bourgeois society"). Thus, it is possible to confirm with confidence that the paradigm of civil society established within Western European political thought is broken in Eastern Europe: here citizen is not "bourgeois", but a citizen. A number of known factors stipulate the increase of the distance between the classical Western tradition and the ideas of civil society formed in Eastern Europe. [12] Thus, the idea of civil society in Eastern Europe and the countries of the region, which in turn limits the reasons for the civil society in recent years, the ideas of the last obstacles to a deep crisis committed and conditioned to spend. The reasons are as follows:

- 1) separation of civil society from political and economic society both in theory and in practice;
- 2) failure to fully understand the nature of the relationship between the state and civil society;
- 3) the lack of development in the economic outlook, including the requirement to implement full control over economy and the lack of an appropriate concept;
- 4) extreme uncertainty of the perceptions about a more equitable society, obsession with the idea of moral unity of citizens etc. [15]

Thus, in the real socialist countries (Eastern Europe), the ideas of liberalism and civil society have emerged as opposite to communism. Certain characteristics inherent to liberalism were envisaged for appropriation of socialism: civil liberties on the one hand, and market relations on the other hand. In this case, the point in issue was "open society" and the characteristics of non-liberal democracy were used.

One fact should be noted that, in general, real civil structures exist in an open society regardless of their contradiction with the state, i.e. whether they are opponents or proponents of the state. It is the usual environment where people's daily life passes. Of course, such civil societies (structures) restrict state requirements with respect to the citizens and at the same time they enable stability of democratic governments by establishing appropriate infrastructure for securing freedom. Many countries were in a more favorable

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position, having this type of infrastructure in place for centuries already. While other countries had to create such infrastructures to replace Nazism and communism.

The models of realization of the right of association in the Republic of Azerbaijan

As shown by our analysis in previous sections, establishment of a union is a means of achieving common goals. In this case, the basic principle is voluntariness. In other words, it means that no one can be forced to join a union. People comprehend their common interests and make a decision on joint action in order to protect them. At this point, they establish trade unions to function more efficiently. Both in the countries around the World and in the Republic of Azerbaijan the most common type of such associations are trade unions. As we have seen above, Article 11 of the European Convention on Human Rights specifies possibilities for establishing public associations. It also establishes the right to be a member of the public associations. But one point that attracted our attention should be emphasized here. Establishment of relationships between public associations and government is not reflected. Of course, this also often leads to formation of certain controversies. Thus, necessity of working towards further improvement of the right to associate remains relevant. According to the European Convention on Human Rights, activity aimed at establishing a union and protecting common interests is allowed, unless the terms of Article 11 are violated. Also, it should be noted that the strike of employees intending to protect their joint interests is deemed to be a right of the same category.

Constitution of the Republic of Azerbaijan specifies both the right to associate and the right to strike. It is guided by provisions of effective international conventions, i.e. Article 58 of the Constitution indicates that everyone has the right to establish and join a union (1, p.19). The Article provides for political parties, trade unions and other public associations. Their common feature is that they all are established to protect common interests and to achieve common objectives. Constitution of the Republic of Azerbaijan also contains a provision guaranteeing free activity of all unions. The third paragraph of Article 58 of the Constitution states: "No one can be forced to join a union or remain a member thereof." This point is also consistent with the standards of the European Convention on Human Rights.

It should be noted that in spite of joining international conventions and undertaking of specific obligations, certain limitations exist in relation to the realization of the right to associate. Of course, in accordance with international instruments the right of association can be restricted in a reasonable manner and in special cases. As mentioned in the previous sections, international conventions envisage preventing establishment of associations posing threat to public order and capable of violating the rights of others. In other words, the possibility of restriction of the right to associate is set forth. This point is expressed in the fourth paragraph of Article 58 of the Constitution of the Republic of Azerbaijan as follows: "Activity of unions intended for forcible overthrow of legal state power on the whole territory of the Azerbaijan Republic or on a part thereof is prohibited. Activity of unions which violates the Constitution and laws can be terminated by courts only (1, p.19).

It should be mentioned that the Constitution of the Republic of Azerbaijan contains a provision on the right to strike as well. The right to strike is enshrined in the Article 36

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of the Constitution of the Republic of Azerbaijan, i.e. the first paragraph of the Article 36 of the Constitution states: "Everyone has the right to strike alone or together with others." Also, relevant article of the Constitution also clarifies the issue of restriction of the right to strike. The second paragraph of the Article 36 of the Constitution reads as follows: "The right to strike for those working based on labour agreements might be restricted only in cases stipulated by law. Soldiers and civilians employed in the Army and other military formations of the Republic of Azerbaijan have no right to go on strike. At this point it should be noted that currently the issue of the removal of restrictions in relation to the rights of association of certain categories of employees is being widely discussed (1, p.13).

Establishment of the rights to associate and strike in the Constitution of the Republic of Azerbaijan is not all. In other words, numerous documents governing realization of the related rights are drafted and adopted in Azerbaijan. Following documents directly related to the realization of the right to associate can be mentioned:

- Law on Political Parties which was adopted on June 3, 1996; (10)
- Law on Trade Unions which was adopted on February 24, 1994; (5)
- Law on Non-Governmental Organizations which was adopted on June 13, 2000 (9).

Analysis of the Law of the Republic of Azerbaijan on Political Parties shows that this law is kind of intended for realization of the right to associate, which pertains to the category of fundamental human rights, i.e. Article 1 of the law clarifies the concept of a political party: "A political party is a non-commercial legal entity established by the citizens of the Republic of Azerbaijan for the purpose of participating in the political life of the country, forming and expressing the political will of the citizens" (7). As seen, political parties are also public associations established to realize citizens' rights to associate. Here, the basic principle is again the principle of voluntariness. This point was expressed more clearly in Article 3 of the Law, i.e. this Article reads as follows: "Political parties shall be established and function on the basis of the principles of freedom of association, voluntariness, equality of rights of their members, self-government, legality and publicity. Within their activities political parties may not restrict the fundamental rights and freedoms of human and citizens, enshrined in the Constitution of the Republic of Azerbaijan, in international agreements which the Republic of Azerbaijan is a party to and in other legislative acts of the Republic of Azerbaijan". (10) As noted, the right to (freedom of association) associate to establish political parties is underlined. Inadmissibility of restricting participation in political parties is enshrined in the law. Thus, restriction of citizens' membership in political parties on any ground is not allowed. It can be viewed as a guarantee of the right of association. Reviewing the Law of the Republic of Azerbaijan on Political Parties we can identify the possibilities of restricting the right to associate. Of course, it provided for possibility of restriction of the activity of political parties in certain cases taking into account the objective such as ensuring stable development of society, as well as the national security and interests. In other words, to some extent we can review it as a restriction of the right of association. As we know, international regulatory acts also justify restriction of the right to associate under certain conditions. Possibility of restriction in this area is expressed in Article 4 of the Law of the Republic of Azerbaijan on Political Parties, i.e. Article 4 of the Law states: "Establishment and functioning of political parties aiming or seeking to change the constitutional order

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and secular nature of the Republic of Azerbaijan, to violate territorial integrity, to promote war, violence and brutality, to instigate racial, national and religious hatred, shall be prohibited. Establishment and functioning of political parties of foreign States, as well as their branches and subsidiaries in the territory of the Republic of Azerbaijan shall not be allowed" (10).

The Law of the Republic of Azerbaijan on Non-Governmental Organizations regulates the issues related to establishment and functioning of public associations and foundations. A number of important provisions related to the right to associate are also reflected in the Law of the Republic of Azerbaijan on Non-Governmental Organizations. The law also clarifies the essence of the concept of non-governmental organizations. Paragraph 1.3 of Article 1 of the Law of the Republic of Azerbaijan on Non-Governmental Organizations reads as follows: "This Law establishes the rules for establishment, functioning, reorganization and liquidation of non-governmental organizations as legal entities, as well as the activities of non-governmental organizations, their management and relations with public authorities" (9). As seen, the Law of the Republic of Azerbaijan on Non-Governmental Organizations can be reviewed as a form of state guarantee for the right to associate. As stated above, existence of public associations, i.e. non-governmental organizations are assessed as the embodiment of the right to associate within society. Non-governmental organizations are a key component of civil society. Also, the issues such as establishment, functioning and termination of non-governmental organizations in the process of civil society building in the Republic of Azerbaijan are also governed by related legislation.

The provisions allowing restriction of the right to associate of the Law of the Republic of Azerbaijan on Non-Governmental Organizations can also be specified, i.e. paragraph 2.3 of Article 1 of the Law reads as follows: "Non-governmental organizations can be established and function with the purposes not forbidden by the Constitution and laws of the Republic of Azerbaijan. Establishment and functioning of non-governmental organizations, as well as the branches or representative offices of non-governmental organizations of foreign countries in the Republic of Azerbaijan, the purpose or activity of which is aimed at changing violently the constitutional order and secular nature of the Republic of Azerbaijan, violation of its territorial integrity, propaganda of war, violence and cruelty, provoking racial, national and religious hostility is prohibited. Looking closer we can see that those provisions of the Law that deal with the restriction of the right to associate are similar to the provisions specified in the Conventions of International Labour Organization and other international regulatory acts. In other words, it is also noted in these documents that restriction of the right of associate is possible under special conditions. This point in itself once again proves that corresponding provisions of international regulatory acts are referred to upon development of the legal framework in the relevant fields in the Republic of Azerbaijan.

In 1999, National NGO Forum was established in Azerbaijan. In any case, development of NGO sector has stipulated serious changes in the area of realization of the right to associate. Thus, various laws and programs are adopted for the efficient organization of the protection of human rights and freedoms in general. Legal framework for realization of all almost all rights and freedoms of the people from all layers of the society is in place and improved continuously. For example, in addition to the documents we have already considered the Law on Child Rights is adopted. Alongside with other child

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rights, the law also establishes children's rights to associate, i.e. Article 19 of the Law of the Republic of Azerbaijan on Child Rights adopted on May 19, 1998, states: "Children have the right in the order established by the legislation of the Republic of Azerbaijan, to create in their place of study or residence public associations or public bodies of independent action and associate within them. It is not allowed to involve children in political acts of public associations and public bodies of independent action (11). As you can see, children's right to associate is clearly expressed in the given Article of the law.

Law of the Republic of Azerbaijan on Trade Unions serves as an important regulatory framework for realization of the right to associate, i.e. the mechanisms, principles for employees to establish on voluntary basis their own unions to protect their common interests and achieve common objectives and to involve in the activity of these unions are expressed in the law. It should be noted that, Preamble of the Law of the Republic of Azerbaijan on Trade Unions establishes the guarantee for activity seeking to protect employee interests and benefits in accordance with Universal Declaration of Human Rights, Conventions of International Labour Organizations and European Social Charter. The first paragraph of the first chapter titled General Provisions of the Law of the Republic of Azerbaijan on Trade Unions clarifies the nature of trade union organization. The first article of this chapter shows that trade unions constitute the appropriate platform in the area of realization of the right to associate, i.e. Article 1 of the Law of the Republic of Azerbaijan on Trade Union reads: "Trade unions are independent, public and non-political organizations operating on the basis of their charters and this Law, where employees employed in productive and non-productive spheres, as well as pensioners and studying persons voluntarily unites in workplaces, branch and national levels and according to their professions on the principle of individual membership to protect their labour, social, economic rights and legitimate interests".(8) Apparently, establishment of trade unions is directly linked to the right to associate. In circumstances of failure to realize the right to associate the possibility of establishing a trade union cannot be discussed at all. As mentioned above, the principles of establishment and functioning of trade unions in the Republic of Azerbaijan are directly harmonized with Conventions of International Labour Organization and refer to the relevant international laws of this field.

Article 3 of the first chapter of the Law on Trade Unions deals with the right of association, i.e. Article 3 is titled as ' the right to organize in trade unions'. Article 5 of the Law reads: "Employees, pensioners, studying persons, without any distinction, have the right to voluntarily establish trade unions at their choice without preliminary permission, to join trade unions to protect their legitimate interests, labour, socio-economic rights and engage in trade union activity" (5). Analysis of this Article shows that the provisions contained in the Charter of International Labour Organization are reflected here. It also testifies to the fact that in accordance with the preamble of the law, the mechanisms and principles for establishing, functioning and engaging in the activity of trade unions are based on international conventions. It should be noted that in the Conventions of International Labour Organization the right to associate is presented as employee's possibility to voluntarily associate with others to protect common interests. In accordance with this point, Article 3 of the Law on Trade Unions of the Republic of Azerbaijan states: "Trade unions may on voluntary basis establish sectoral, regional and other associations (councils, federations, confederations) to fulfil the tasks specified in their charter (5).

In general, as we have mentioned above, establishment and activity of trade unions in the Republic of Azerbaijan are governed by the Article 58 of the Constitution of the Republic of Azerbaijan. The second part of this Article establishes the right owned by everyone to organize and engage in activity of any association including trade unions (1, p.19). In addition to the Constitution of the Republic of Azerbaijan, the right to organize in a trade union is clearly stated in the Labour Code of the Republic of Azerbaijan. Article 19 of the Labour Code of the Republic of Azerbaijan is titled as Trade Union. The first paragraph of Article 19 of the Labour Code of the Republic clearly expresses the right to associate, i.e. the first paragraph of Article 19 states "A trade union may be established on a voluntary basis without discrimination among employees or without prior permission from employers. Employees may join the appropriate trade union and engage in trade union activity in order to protect their labour and socioeconomic rights and legal interests" (3). Nevertheless, we believe that a broader definition of the right to associate in the Labour Code of the Republic of Azerbaijan would be more appropriate. As already mentioned, only one Article in the Labour Code deals with trade unions. Accordingly, the right to associate is only reflected in this Article 19. In this respect, a separate chapter in the Labour Code about trade unions also stipulates expression of the right to associate in more detail. The Law on Trade Unions of the Republic of Azerbaijan can be deemed to be a quite important document in this regard. The document expressly specifies the possibility for employees to associate for their common interests and objectives. In this regard, in particular the Labour Code should be noted. As seen in the previous segment, Articles 19 and 20 of the Labour Code of the Republic of Azerbaijan deals with the relevant unions of employees and employers. It should be noted that, alongside with points related to establishment of corresponding associations and their activity, also possibilities for restricting their activity are set forth in these documents. Similar principles are noticeable in almost all laws containing points related to realization of the right of association and in general establishment of public associations. For example, as in all relevant international documents, receipt of additional authorization and the principle of voluntariness is highlighted in corresponding domestic legislation of the Republic of Azerbaijan in relation to realization of the right to associate or establishment of public associations. Thus, at the moment in the Republic of Azerbaijan, the right to associate is based on the principles set forth in international instruments. In general, joining almost all effective international agreements and conventions, the Republic of Azerbaijan has undertaken obligations in the area of protection of human rights and freedoms and specifically, realization of the right to associate. With the establishment of the legal framework for realization of the right to associate, development of an effective mechanism to this effect is also in the centre of attention and contributions of international cooperation is used in this field as well.

In general, as we know, like in all other fields, a new era has begun in the Republic of Azerbaijan in the field of implementation of reforms in legal system. It can even be noted that, the recent years in Azerbaijan can be characterized as a period of large-scale reforms in whole legal system.

Examining the current status and prospects of the right to associate in the Republic of Azerbaijan, we undoubtedly have to re-analyse the state of civil society, i.e. the progress in realization of the right to associate is directly linked with the civil society building. Currently, an active civil society building is in progress in the Republic of Azerbaijan. The

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