

МІЖНАРОДНЕ ПРАВО

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orcid.org/0000-0002-5222-9224*AXIOLOGICAL FUNCTION OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF AZERBAIJAN

The author argues, that the Constitutional Court of the Republic of Azerbaijan has the most important role amongst the other bodies of the public power in the interpretation of the principles of the Basic Law 1995, – solving conflicts between the principles, performs all of the activities, that are typically associated with the judicial application of constitutional principles, – and proposes to underline, that one of the Court's functions is the axiological function.

Firstly, the author demonstrates, that text of the Constitution of the Republic of Azerbaijan 1995 doesn't directly include a lot of principles.

Secondly, the author shows, that the Constitutional Court of the Republic of Azerbaijan through the official interpretation of the provisions of the Constitution and laws makes a significant contribution to determining the importance of a certain principle in particular and to the creation of a hierarchy of constitutional principles in general. Constitutional Court of the Republic of Azerbaijan, as the body of constitutional jurisdiction, officially interpretes the provisions of the Constitution of the Republic of Azerbaijan, and can conclude, that its text *de facto* contains constitutional principles, that are not included in it *de jure*. In general, the Constitutional Court of the Republic of Azerbaijan now performs all of the activities, that are typically associated with the judicial application of constitutional principles: the identification of principles as such, that is, the ascription of the status (or "value") of principle to a certain constitutional provision; the interpretation of a constitutional provision (previously or contextually) identified as expressing a principle; the balancing of such a principle with other conflicting principles in view of selecting the principle to be applied; the specification or concretization of such a principle in view of construing a rule to solve the case. All of these activities are performed by the Constitutional Court of the Republic of Azerbaijan within its axiological function.

Key words: constitutional principles, constitutional justice, Constitution, Basic Law, Constitutional Court of the Republic of Azerbaijan, axiology.

Гараджаєв Д. Я. АКСІОЛОГІЧНА ФУНКЦІЯ КОНСТИТУЦІЙНОГО СУДУ АЗЕРБАЙДЖАНСЬКОЇ РЕСПУБЛІКИ

Автор пропонує уважати, що однією з функцій Конституційного Суду Азербайджанської Республіки є аксіологічна функція. Висновок сформульовано виходячи з того, що Суд відіграє найважливішу роль серед інших органів публічної влади у тлумаченні принципів Основного Закону 1995 року, а також у вирішенні конфліктів між принципами, виконує всі види діяльності, які зазвичай пов'язані із судовим застосуванням конституційних принципів.

У статті автор демонструє, що у тексті Конституції Азербайджанської Республіки 1995 року прямо закріплено небагато принципів. Крім того, автор підкреслює, що Конституційний Суд Азербайджанської Республіки шляхом офіційного тлумачення положень Конституції та законів робить значний внесок у визначення важливості певного принципу зокрема та у створення ієрархії конституційних законів, принципи в цілому. Конституційний Суд Азербайджанської Республіки як орган конституційної юрисдикції офіційно тлумачить положення Конституції Азербайджанської Республіки і може зробити висновок, що її текст *de facto* містить конституційні принципи, які не включені до нього *de jure*. У цілому, Конституційний Суд Азербайджанської Республіки у межах аксіологічної функції зараз виконує всі види діяльності, які зазвичай пов'язані із судовим застосуванням конституційних принципів: визначення принципів як таких, тобто присвоєння статусу (або «цінності») певному конституційному положенню; тлумачення конституційного положення (раніше або в контексті), визначеного як принцип; уточнення або конкретизація змісту принципу для вирішення конкретної справи.

Ключові слова: конституційні принципи, конституційне правосуддя, Конституція, Основний Закон, Конституційний Суд Азербайджанської Республіки, аксіологія.

The introduction. Constitutional Court of the Republic of Azerbaijan is the only one court of the constitutional jurisdiction in the country. It deals with the principles of the Basic Law of Azerbaijan 1995 very frequently. The issues of the principles of the Constitution of the Republic of Azer-

baijan refer to the well-known Latin aphorism about the essence of law – *ius est ars boni et aequi*¹. The mention of goodness (*boni*) and justice (*aequi*) characterizes the essence of the 1995 Constitution's principles, while the mention of the art (*ars*) characterizes the complexity and necessity of observing the appropriateness, the "golden mean" in matters of securing and applying these principles.

The predominance of normativism in Soviet legal science made impossible the practical implementation of the aphorism that 'law is the art'. The formalist approach requires clarity, accuracy in the application of the rule of law principle, even if it is unfair, and thereby kills creativity in law enforcement, in the study of legal problems (the extreme degree of formalism in law is normativism). However, legal science, based on a natural approach to law, has demonstrated and continues to demonstrate a creative approach to the legal problems' researches.

For example, exploring the structure of modern society, M. Nerfin, like most scientists, identifies three sectors in it, but calls them "systems of power in society" and gives them quite literary names: for the system of public authorities – "Prince", for the system business structures and private entrepreneurs – "Merchant", for members and institutions of civil society – "Citizen". He explains: together with the state power, the Prince, and the economic power, the Merchant, there is another power, sometimes obvious, always completely unmanifested: the power of people, their associations. People who understand the true power of such power associate with others and thus become Citizens. Citizens and their associations, when they do not aim to achieve state or economic power, create a third system [1, p. 47].

This approach is especially useful, because the relevant experience in this area of Azerbaijani legal science is only being formed, especially when it comes to the principles of the Constitution of the Republic of Azerbaijan.

The literature review. The constitutional principles are one of the most popular vectors in the constitutional researches, so there are various types of publications on this topic – starting from the leaflets for the schoolchildren's debates, up to the monographic researches. In this article the author refers to the works of D. Lyons "Constitutional Principles", R. Guastini "Applying constitutional principles" and M. Nerfin "Neither Prince nor Merchant: Citizen – An Introduction to the Third System". It should be underlined, that so far there are practically no publication on the constitutional principles, when it comes about the Constitution of the Republic of Azerbaijan, 1995.

As for the Constitutional Court of the Republic of Azerbaijan's functions, the researchers usually

don't pay a lot of attention to their nomenclature, citing the typical lists of the bodies of the constitutional jurisdiction's functions. So far there were no proposals to distinguish the axiological function as one of the Court's functions. This can be considered as a drawback, as it affects the legislation and the legal practice (when it comes about the legal practice, it might seem that the Court uses the doctrine of the judicial activism far more often, than the doctrine of judicial self-restraint).

The aim of the article is to argue that the Constitutional Court of the Republic of Azerbaijan has the most important role amongst the other bodies of the public power in the interpretation of the principles of the Basic Law 1995, solving conflicts between the principles and much more, and that one of the Court's functions is the axiological function.

The main text. The concept of "principle" (from the Latin *principium*) means the basis, the beginning, the guiding idea, the starting position. Consequently, legal principles are the main guidelines of law, reflecting objective patterns that express the essence and value of the entire system of law. Principles in law are of a generally binding nature, since they are formally defined and affect a wide range of legal relations. Constitutional principles cover a particularly wide range of social relations.

The principles of the Constitution are the fundamental ideas enshrined in the Basic Law, that express the essence of law and arise from the current state of the society and the state.

"Principles that are not given by the constitutional text, are sometimes attributed to the Constitution" [2, p. 1237]. The Constitutional Court of the Republic of Azerbaijan through the official interpretation of the provisions of the Constitution and laws makes a significant contribution, proclaiming that the constitutional text indirectly includes the certain principle, determining the importance of a certain principle in particular and creating a hierarchy of constitutional principles in general.

Most of the researches claim, that:

- the values in the constitution and other legal acts are enshrined in the constituent norms, that are a type of system-forming specialized legal norms;
- the principles are enshrined in the provisions of legal norms-principles, that also belong to the system-forming specialized legal norms.

Legal norms-principles could be distinguished from the constituent norms based on the form of their expression and on their functional purpose. Most of the times the constituent norms 'contain' the ideological foundations – and these foundations are developed by the norms-principles.

The principles in the Constitution of the Republic of Azerbaijan are enshrined by direct reference to them in the following provisions:

¹ *Ius est ars boni et aequi* (from the Latin) – law is the art of goodness and justice.

- Article 7, that proclaims: the state power in the Republic of Azerbaijan on the basis of the principle of separation of powers consists of legislative, executive and judicial;

- Preamble, that has a reference to the principles reflected in the Constitutional act "On the State Independence of the Republic of Azerbaijan", guided by which the people of Azerbaijan adopted the Constitution;

- Article 10, according to which "the Republic of Azerbaijan builds its relations with other states on the basis of the principles provided for in generally recognized international legal norms" (reference to the principles of international relations);

- Article 18, that introduced the prohibition of the dissemination and propaganda of religions (religious movements) that degrade the dignity of the individual and contradict the principles of humanity;

- Article 24 and the basic principle of the rights and freedoms of man and citizen (in accordance with the provisions of this article, "Everyone from the moment of birth has inviolable, inviolable and inalienable rights and freedoms. Rights and freedoms also cover the responsibility and duties of everyone to society and others persons");

- Article 127 part 7, that proclaims such a principle of legal proceedings, as the principle of competition.

According to the constitutional practice, the preference should be given to the approach when the principles are included in the provisions (text) of the Constitution of the Republic of Azerbaijan. The advantages of this approach are as follows:

- principles will be taken into account in the of rule-making process – that will positively affect the quality of regulatory legal acts;

- principles will be taken into account in the process of law enforcement – that will increase the level of effectiveness of the regulatory legal acts' impact on public relations;

- this will contribute to a deeper implementation of constitutional principles in legal consciousness, in legal culture;

- principles will be taken into account by researchers in developments of the constitutional law doctrine.

Constitution of the Republic of Azerbaijan of 1995 is a "rigid" Basic Law, that is amended using a complex procedure. One more important argument to consider is the need to comply this feature with such a characteristic of the Constitution, as the stability of its provisions, – so in some situations it is necessary to apply for an official interpretation of the provision of the Basic Law to the Constitutional Court of the Republic of Azerbaijan.

Constitutional Court of the Republic of Azerbaijan, as the body of constitutional jurisdiction, officially interpretes the provisions of the Constitu-

tion of the Republic of Azerbaijan, and can conclude that its text *de facto* contains constitutional principles that are not included in it *de jure*. In general, the Constitutional Court of the Republic of Azerbaijan acts to provide:

"(1) the identification of principles as such, that is, the ascription of the status (or "value") of principle to a definite constitutional provision;

(2) the interpretation of – that is, the ascription of meaning to – a constitutional provision (previously or contextually) identified as expressing a principle;

(3) the balancing of such a principle with other conflicting principles in view of selecting the principle to be applied;

(4) the specification or concretisation of such a principle in view of construing a rule apt to solve the case at hand" [3].

Two cases are the most notable in that context.

Plenum of the Constitutional Court of the Republic of Azerbaijan in its Resolution "On the interpretation of the provision "having a higher legal education" provided for in Article 126 of the Constitution of the Republic of Azerbaijan and a number of normative legal acts" dated June 30, 2014, noted that "any legal issue, in particular the issue of exercising the rights, enshrined in the Constitution, should be regulated in the legislation in such a way, that no damage is done to constitutionally significant values, a balance is maintained between public and private interests. Explaining its position on maintaining a balance in the system of state regulation in the field of education, the Constitutional Court of the Republic of Azerbaijan indicated that state authorities, within their powers, are free to exercise state regulation of the field of education. However, such regulation is possible only if and in the form that the determination of the relevant areas of higher education was based on objective circumstances, justified itself, served constitutionally significant goals and was proportionate to the legal means used to achieve these goals" [4].

Plenum of the Constitutional Court of the Republic of Azerbaijan in the Resolution of the "On the interpretation of certain provisions of Art. 320.1 of the Criminal Code of the Republic of Azerbaijan" of November 15, 2019, the body of constitutional control, considering the appeal of the Kapaz District Court of Ganja on the interpretation of the disposition of Article 320.1 of the Criminal Code of the Republic of Azerbaijan, which provides for liability for falsification of an official document in relation to the actions of a person who tried to enter to take an exam instead of another person (applicant), noted, that the cards, issued by the State Examination Center for participants in entrance examinations to higher or secondary specialized educational institutions, are an official documents, that give the right to fill out a form, which is

coded in the name of each applicant. The completion of an answer card by someone other, than the relevant applicant, should be characterized as a forgery of an official document. As a result, if another person filling out the answer card, the answer card reflects the results of the knowledge level of the person, who actually passed the exam, and not the applicant. This means that the answer card is, in fact, were falsified.

Thus, substantiating its position, the Constitutional Court of the Republic of Azerbaijan pointed out that “such actions hinder the process of training specialists useful for the developing modern society, and cast doubt on the state’s commitment to the principle of social justice and scientific values” [5] (the author of the article, as one of the justices, though, remained with a dissenting opinion).

In *summary*, the importance of constitutional principles in the legal system should be emphasized once more. They are the basis for the legal regulation not only of the constitutional, but of all other social relationships. Such universality is a feature of constitutional principles because of the role of the branch of constitutional law in the legal system. Based on such a characteristic of the 1995 Constitution, as the stability, it is logical, that it is the Constitutional Court of the Republic of Azerbaijan that fills the constitutional principles with essence and content, adequate to modern social realities, and solves the conflicts between these principles in case they occur. Constitutional Court of the Republic of Azerbaijan now performs all of the activities, that are typically associated with the judicial application of constitutional principles: the identification of principles as such, that is, the ascription of the status (or “value”) of principle to a certain constitutional provision; the interpretation of a constitutional provision (previously or contextually) identified as expressing a principle;

the balancing of such a principle with other conflicting principles in view of selecting the principle to be applied; the specification or concretization of such a principle in view of construing a rule to solve the case. All of these activities are performed by the Constitutional Court of the Republic of Azerbaijan within its axiological function (see [6 – 8]).

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