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LEGAL POSITION

OF THE PLENUM OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN ON LOCAL SELF-GOVERNMENT

LA ACTITUD JURÍDICA DEL PLENO DEL TRIBUNAL CONSTITUCIONAL DE LA REPÚBLICA DE AZERBAIYÁN SOBRE LA AUTONOMÍA LOCAL

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ABSTRACT

Local self-government in the Republic of Azerbaijan is based on democratic principles, organized in order to ensure the independent resolution of issues of local importance, taking into account economic and territorial factors. Based on the provisions of the European Charter "On Local Self-Government", issues related to local self-government are reflected in the legislative acts of the Republic of Azerbaijan, including the Constitution and more than 19 laws. Thus, the Plenum of the Constitutional Court of the Republic of Azerbaijan has adopted different decisions in order to fairly resolve the problems that arose during the application of the laws adopted in connection with local self-government. Then, the purpose of constitutional review is to verify the constitutionality of adopted normative legal acts. Taking this into account, the subject of the research is the analysis of normative legal acts adopted by the Constitutional Court in charge of local self-government, verification of compliance of these laws with the Constitution and international treaties to which the Republic of Azerbaijan take part.

Keywords: Constitution, law, local self-government.

RESUMEN

El gobierno autónomo local en la República de Azerbaiyán se basa en principios democráticos, organizados para garantizar la resolución independiente de cuestiones de importancia local, teniendo en cuenta los factores económicos y territoriales. Sobre la base de las disposiciones de la Carta Europea "Sobre la autonomía local", las cuestiones relacionadas con la autonomía local se reflejan en los actos legislativos de la República de Azerbaiyán, incluida la Constitución y más de 19 leyes. Por lo tanto, el Pleno del Tribunal Constitucional de la República de Azerbaiyán ha adoptado diferentes decisiones para resolver de manera justa los problemas que surgieron durante la aplicación de las leyes aprobadas en relación con el gobierno autónomo local. Entonces, el objeto del control de constitucionalidad es verificar la constitucionalidad de los actos jurídicos normativos adoptados. Teniendo esto en cuenta, el tema de la investigación es el análisis de los actos jurídicos normativos adoptados por el Tribunal Constitucional a cargo del autogobierno local, la verificación del cumplimiento de estas leyes con la Constitución y los tratados internacionales en los que participa la República de Azerbaiyán.

Palabras clave: Constitución, ley, autogobierno local.

INTRODUCTION

Autonomy, in Western ethics and political philosophy, is understood as the state or condition of self-governance, or leading one's life according to reasons, values, or desires that are authentically one's own. Although autonomy is an ancient notion (the term is derived from the ancient Greek words *autos*, meaning "self," and *nomos*, meaning "rule"), the most-influential conceptions of autonomy are modern, having arisen in the 18th and 19th centuries in the philosophies of, respectively, Immanuel Kant and John Stuart Mill (Taylor, 2017).

Thus, the ideal that justified the founding of modern representative institutions was "self-government of the people." The problem to be solved, as posed by Rousseau (1964), was to "*find a form of association which defends and protects with all the shared force the person and the goods of each associate, and through which each, uniting with all, still obeys but himself, remaining as free as before*" (p. 182). Self-government of the people was the solution to this problem. Self-government, in turn, was desirable because it was the best system to advance liberty, understood in a particular way as 'autonomy' (Przeworski, 2010).

However, as stated by Bartole (2020), the principles and standards regarding the judiciary's organization are part of national constitutional law. The history of constitutionalism has taught us that these principles concern a fundamental power of the state. Thus, within the nation-state to which it applies, the constitution will usually be regarded as both the ultimate source of legitimacy and authority for the practice of government and as a framework for the application of that society's political beliefs concerning how the process of government should be conducted and by whom. It follows that the authority and status of a constitution may usually be understood as having cultural as well as legal foundations. Hence, in addition to the legal duty of allegiance which it may impose, the constitution will be something which also attracts considerable respect and loyalty in a more personal sense (Carroll, 2021).

Among the most important institutions for adequate self-government are the courts. In the words of Brewer-Carias (2011, pp. 68–69): "*In democracies courts have always been the main institutional guarantee of freedom and of the rule of law. As such guardian, and as it in any rule-of-law system, the submission of the constitutional court to a constitution is absolute, not subject to discussion, because it would be inconceivable that the constitutional judge can violate the Constitution that he or she is called on to apply.*" As a matter of principle, it is possible to imagine that other bodies of the State could violate the Constitution (e.g., Parliament), but not its guardian. *For such purpose*

and to ensure that this does not occur, a constitutional court must have absolute independence and autonomy."

In the case of the Republic of Azerbaijan the Constitutional Court is a relatively new legal institution in the field of justice proceedings, however since its creation it has played a key role in ensuring strengthening of democracy and the rule of law, as well as in protection of human rights and freedoms (Ali, 2017). Taking the above into account, the subject of the research is the analysis of normative legal acts adopted by the Constitutional Court in charge of local self-government, verification of compliance of these laws with the Constitution and international treaties in which the Republic of Azerbaijan take part. The methods of the research are systematic analysis, generalization of normative and practical materials, historical approach, as well as comparative jurisprudence.

DEVELOPMENT

Local self-government is the basis of any democratic system. When organizing local self-government, economic and territorial factors are taken into account. Fadeyev (1994), gives the following definition of local self-government: "*Local self-government means the management of municipal property, taking into account the interests of all residents in a particular area, the activities of citizens who ensure the independent resolution of issues of local importance*" (p. 33). The first part of the Article 3 of the European Charter of Local Self-Government, adopted in Strasbourg, France on October 15, 1985 (The Republic of Azerbaijan ratified the European Charter with the relevant statements by the Law of December 25, 2001) (Milli Majlis of the Republic of Azerbaijan, 2001) defines that local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.

According to the Article 2 of the European Charter of "Local Self-Government", the principle of local self-government shall be recognized in domestic legislation, and where practicable in the constitution. In this sense, the principle of local self-government is reflected in the Constitution of the Republic of Azerbaijan dated November 12, 1995, as well as in other legislative acts. Thus, Articles 142-146 of the Constitution are devoted to issues of local self-government (Republic of Azerbaijan, 2017, pp. 57–58). Article 142 of the Constitution, entitled "Organization of local self-government" states: "Local self-government is exercised by municipalities. Municipalities are created on the basis of elections. The bases of the status of municipalities are determined by this Constitution, and the rules of elections to municipalities are determined by law".

According to the first part of Article 146 of the Constitution of the Republic of Azerbaijan, municipalities are independent in the exercise of their powers, which does not exclude their responsibility to citizens living in the territory of the municipality. The cases and procedure for the election of members of municipalities, the suspension or termination of their powers, and the early dismissal of municipalities shall be determined by law.

Thus, local self-government is a specific form of people's government. Local self-government is the right of citizens to resolve local issues. According to the current legislation, all citizens of the Republic of Azerbaijan have the right to elect and be elected to local self-government bodies. Furthermore, local self-government bodies do not have legislative power. Local self-government bodies, within the scope of their powers, adopt municipal acts on the basis of legislative acts.

Also, in accordance with the legislation, the state monitors the activities of municipalities. According to the first part of Article 150 of the Constitution of the Republic of Azerbaijan, acts adopted by municipalities must be based on law and justice (equal treatment of equal interests), should not contradict the Constitution, laws of the Azerbaijan Republic, decrees of the President of the Azerbaijan Republic, decisions of the Cabinet of Ministers of the Azerbaijan Republic (and in the Nakhchivan Autonomous Republic the Constitution, laws of the Nakhchivan Autonomous Republic, decisions of the Cabinet of Ministers of the Nakhchivan Autonomous Republic).

In this regard, the following laws have been adopted in the Republic of Azerbaijan regarding municipalities:

1. The Law of the Republic of Azerbaijan dated July 2nd, 1999 "On the status of municipalities", consisting of 56 articles.
2. The Law of the Republic of Azerbaijan dated July 2nd, 1999 "On the Rules of Elections to Municipalities", consisting of 50 articles.
3. The Law of the Republic of Azerbaijan dated October 15th, 1999 "On approval of the Model Charter of the Municipality", consisting of 12 sections.
4. The Law of the Republic of Azerbaijan dated November 30th, 1999 "On Municipal Service", consisting of 14 articles.
5. The Law of the Republic of Azerbaijan dated December 7th, 1999 "On transfer of property to municipal property" consisting of 6 articles.
6. The Law of the Republic of Azerbaijan dated December 7th, 1999 "On territories and lands of municipalities", consisting of 3 articles and Annex.
7. The Law of the Republic of Azerbaijan dated December 7th, 1999 "On the Fundamentals of Municipal Finance", consisting of 15 articles.
8. The Law of the Republic of Azerbaijan dated April 14, 2000 "On joint activity, merger, separation and liquidation of municipalities" consisting of 9 articles.
9. The Law of the Republic of Azerbaijan dated April 14th, 2000, on the approval of the Regulation "On permanent and other Commissions of municipalities", consisting of 22 articles.
10. The Law of the Republic of Azerbaijan dated April 18th, 2000 "On the status of a member of the municipality", consisting of 16 articles.
11. The Law of the Republic of Azerbaijan dated May 8th, 2001 "On approval of the Model Regulations on neighborhood committees of municipalities", consisting of 10 articles.
12. The Law of the Republic of Azerbaijan dated June 29th, 2001 "On water economy of municipalities" consisting of 22 articles.
13. The law of the Azerbaijan Republic from June 29th, 2001 "About management of municipal lands" consisting of 28 articles.
14. Law of the Republic of Azerbaijan dated December 27th, 2001 "On local (municipal) taxes and fees" consisting of 14 articles.
15. The Law of the Republic of Azerbaijan dated March 15th, 2002 "On approval of the Regulations on the rules of preparation and approval of documents on the allocation of municipal lands", consisting of 27 articles.
16. Law of the Republic of Azerbaijan dated May 13th, 2003 "On administrative control over the activities of municipalities", consisting of 13 articles.
17. The Law of the Republic of Azerbaijan dated June 17th, 2003 "On approval of the Regulations on the tax service body of municipalities", consisting of 7 articles.
18. The Law of the Republic of Azerbaijan dated May 3rd, 2005 "On approval of the Model Regulations of regional associations of municipalities", consisting of 21 articles.
19. The Law of the Republic of Azerbaijan dated May 31st, 2017 "On the rules of ethical conduct of members of the municipality", consisting of 17 articles.

According to the legislation, the municipality has its own property and local budget. All types of movable and immovable property belonging to the municipality are considered municipal property. The municipality has the right of ownership over its property, i.e. it freely owns, uses and disposes of its property. Also, municipalities are legal entities, they have their own seal, stamp and bank account.

Municipal lands are lands within the relevant administrative territory, excluding lands kept in state ownership and transferred to private ownership in accordance with the legislation. According to the features of use, municipal lands are divided into public lands, lands in legal use and lease of legal entities and individuals, as well as reserve fund lands established by the legislation of the Azerbaijan Republic.

According to Article 9.8 of the Law on "Municipal Land Management", a person who has acquired a plot of land for the construction of a private house may not alienate the land plot within five years. Such restriction should be provided for in the decision of the municipality and in the contract to be concluded between the parties.

The following lands of the reserve fund of municipalities may be transferred to private ownership by the legislation of the Republic of Azerbaijan:

- Lands involved for perspective development of settlements.
- Lands less suitable and unsuitable for agriculture.

However, lands under public streets, squares, municipal roads and farm roads, parks, forest parks, boulevards, beaches, seabeaches, passages, water reservoirs, stadiums, sports grounds and cemeteries, protective forest strips, water facilities of local importance, hydraulic structures, lands with locally important objects and facilities of public use, lands of pastures used for livestock, as well as agricultural lands of municipalities used and leased by legal entities and individuals, as well as forest and water fund lands may not be transferred to private ownership.

Municipal lands transferred to private ownership are transferred to the following with payment, regardless of whether the land is owned or not:

- Citizens of the Republic of Azerbaijan for the construction of individual houses and cottages.
- Citizens of the Republic of Azerbaijan and their cooperatives for the construction of individual and cooperative garages.
- Legal entities and individuals of the Republic of Azerbaijan to carry out entrepreneurial activity.

We consider it necessary to state that sometimes in practice there are certain problems in the implementation of laws adopted in connection with local self-government. There are several decisions of the Plenum of the Constitutional Court of the Republic of Azerbaijan dedicated to the solution of these problems.

We would like to note that the Constitutional Court of the Republic of Azerbaijan was established based on the Law of the Republic of Azerbaijan "On the Constitutional Court" of October 21st, 1997. The Constitutional Court establishes its activity in the field of protection of the rights and freedoms of man, which occupy an important place in the general system of values. The protection of natural and positive rights and freedoms of a person, a citizen, as enshrined in the Constitution, is one of the most important tasks for this structure. Then, the Constitutional Court has an independent structure. It functions wholeheartedly within the framework of its authority, independent of any other organ.

On December 23rd, 2003, a new Law of the Republic of Azerbaijan "On the Constitutional Court" was adopted. From the date of entry into force of this law, the Law of the Republic of Azerbaijan "On the Constitutional Court" of October 21st, 1997, lost its validity. Compared to the Law of 1997, in the Law of December 23rd, 2003, the legal basis for the activities of the Constitutional Court was somewhat broadened and more specific. Article 4 of the new Law on the Constitutional Court, entitled "Basic Principles of the Constitutional Court", states: "The activity of the Constitutional Court is based on the principles of supremacy, independence, collegiality and openness of the Constitution of the Republic of Azerbaijan" (Milli Majlis of the Republic of Azerbaijan, 2019).

The subject of the case in constitutional proceedings is a normative legal act, an agreement or part of it, the contested powers of state authorities presented for the interpretation of the norms of the Constitution or the law. During the proceedings in the Constitutional Court, judges shall consider cases independently, impartially, and fairly. Constitutional justice is administered on the basis of equality before the law and the Constitutional Court. Thus, for approximately 23 years of its activity, the Plenum of the Constitutional Court of the Republic of Azerbaijan has taken more than 450 decisions.

The Constitutional Court is not a norm-setting body, ie a body that adopts a normative legal act regulating any legal relations, including initiating amendments and additions to any normative legal act. The Constitutional Court is the supreme body of constitutional justice, which exercises constitutional control over acts adopted by the legislative, executive and judicial authorities and local self-government bodies on the basis of inquiries and appeals of authorized subjects and individual complaints (Constitutional Court of the Republic of Azerbaijan, 2017).

The Constitutional Court, with great emphasis on the international practice of interpretation of law, in its decisions

constantly refers to the provisions of international law, in particular the case law of the European Court. Such references serve to enrich and justify the position of the Constitutional Court.

Let's look at some decisions of the Plenum of the Constitutional Court of the Republic of Azerbaijan on local self-government. The Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated May 11th, 2004 "On checking the compliance of judicial acts on the complaints of E. Alizadeh and others with the Constitution and laws of the Republic of Azerbaijan" stated with reference to legislative acts that *"public associations may be established by citizens (or other persons) without the prior permission (consent) of state or local self-government bodies. Their state registration is carried out after their establishment"*. (Constitutional Court of the Republic of Azerbaijan, 2004)

The Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated June 29th, 2007 "On Article 1179.2 of the Civil Code of the Republic of Azerbaijan, Articles 15 and 18-1 of the Law of the Republic of Azerbaijan "On Notaries" states that though Articles 15 and 18-1 of the Law of the Republic of Azerbaijan "On Notaries" do not provide for the procedure for approval of wills by municipalities, in itself do not exclude the authority of local self-government bodies to certify wills in the absence of notary established by Article 1179.2 of the Civil Code (Constitutional Court of the Republic of Azerbaijan, 2007). In making its decision of June 29th, 2007, the Constitutional Court referred to paragraphs 1 and 2 of Article 4 of the European Charter on Local Self-Government of October 15th, 1985. Paragraph 1 of the Article 4 of the European Charter states that the basic powers of local self-government are determined by the constitution and law. However, this provision does not preclude the granting of specific powers to local self-government bodies in accordance with the law. In accordance with paragraph 2 of this article, "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority".

In accordance with paragraph 3 of the Article 4 of this Charter "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy".

The Plenum of the Constitutional Court of the Republic of Azerbaijan stated in its Decision of 15 January 2010 "On

verifying the compliance of the decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan dated 02 June 2009, in connection with the compliant of V.G. Teryokhin, with the Constitution and laws of the Republic of Azerbaijan"(Constitutional Court of the Republic of Azerbaijan, 2010): *"According to the case law of the European Court of Human Rights, local self-government bodies are undoubtedly state bodies, in the sense that they are governed by common law and perform the state functions assigned to them by the Constitution and laws. According to international law, the concept of "state body" is not limited to the central executive authorities. In cases where some functions of state power are delegated to local authorities (decentralization), this concept applies to any national authority that performs state functions"*.

Then, according to the legal position formed by the Decision of Plenum of the Constitutional Court of April 4, 2012, "On the interpretation of Article 872 of the Law of the Republic of Azerbaijan "On Enforcement" and Article 2.1 of the Code of Administrative Procedure of the Republic of Azerbaijan, "administrative legal relations (general (public) legal relations in the field of governance) arise in the field of public administration or local self-government and are directly related to the performance of duties and powers of administrative bodies in the process of public administration activities". (Constitutional Court of the Republic of Azerbaijan, 2012)

As another examples the decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated July 15th, 2014 "On the interpretation of some provisions of Article 467 of the Civil Code of the Republic of Azerbaijan" states that "budget revenues means funds received by state authorities and local self-government bodies free of charge and on a non-refundable basis in accordance with the legislation of the Republic of Azerbaijan". Revenues of the state budget form the financial base of the state. These revenues represent the economic relations between the state and legal entities and individuals, regardless of their organizational and legal form, in the process of forming the state's monetary fund (Constitutional Court of the Republic of Azerbaijan, 2014).

The Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated August 27th, 2020, "On interpretation of the provisions of Article 152 of the Civil Code of the Azerbaijan Republic, Articles 13 and 29 of the Constitution of the Republic of Azerbaijan, Article 9.8 of the Law of the Republic of Azerbaijan "On Management of Municipal Lands" states that "the provision of Article 9.8 of the Law of the Republic of Azerbaijan "On Management of Municipal Lands" restricting the alienation of land does

not violate the rights of the owner (Constitutional Court of the Republic of Azerbaijan, 2020).

Then, according to the examples presented it can be seen that the legal position of the Plenum of the Constitutional Court of the Republic of Azerbaijan on local self-government meets justice, i.e. equal interests.

CONCLUSIONS

During the 23 years of the Constitutional Court's activity, the adoption of decisions on local self-government have been a very positive thing to protect the human rights and fundamental freedoms of people in Azerbaijan. In this regard, Constitutional Court decisions have always referred to the provisions of international law, in particular the case law of the European Court of Human Rights which have served to justify the court's position, leading to fair decisions.

REFERENCES

- Ali, G. H. (2017). Legal nature of Constitutional Court's decisions and its role in improvement of criminal procedure of legislation. *European Journal of Law and Political Sciences*, 2, 26–30.
- Bartole, S. (2020). *The Internationalisation of Constitutional Law: A View from the Venice Commission*. Hart Publishing.
- Brewer-Carias, A. R. (2011). *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Paperback). Cambridge University Press.
- Carroll, A. (2021). *Constitutional and Administrative Law* (10th ed.). Pearson.
- Constitutional Court of the Republic of Azerbaijan. (2004). *On checking the compliance of judicial acts on the complaints of E. Alizadeh and others with the Constitution and laws of the Republic of Azerbaijan*.
- Constitutional Court of the Republic of Azerbaijan. (2007). *On Article 1179.2 of the Civil Code of the Republic of Azerbaijan, and Articles 15 and 18-1 of the Law "On Notaries" of the Republic of Azerbaijan*.
- Constitutional Court of the Republic of Azerbaijan. (2010). *On the verification of the compliance of the decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan dated 02 June 2009, in connection with the complaint of V. G. Teryokhin, with the Constitution and laws of the Republic of Azerbaijan*.
- Constitutional Court of the Republic of Azerbaijan. (2012). *On interpretation of Article 87.2 of the Law of the Republic of Azerbaijan "On execution" and Article 2.1 of the Administrative Procedure of the Republic of Azerbaijan*.
- Constitutional Court of the Republic of Azerbaijan. (2014). *On the interpretation of some provisions of Article 467 of the Civil Code of the Republic of Azerbaijan*.
- Constitutional Court of the Republic of Azerbaijan. (2017). *On interpretation of Article 28 of the Code of Administrative Procedure of the Republic of Azerbaijan*.
- Constitutional Court of the Republic of Azerbaijan. (2020). *On interpretation of the provisions of Article 152 of the Civil Code of the Azerbaijan Republic, Articles 13 and 29 of the Constitution of the Republic of Azerbaijan, and Article 9.8 of the Law of the Republic of Azerbaijan "On Management of Municipal Lands*.
- Fadeev, V. I. (1994). *Municipal law of Russia*. Jurist.
- Milli Majlis of the Republic of Azerbaijan. (2001). *On approval of the European Charter "On Local Self-Government"*. <http://www.e-qanun.az/framework/1026>
- Milli Majlis of the Republic of Azerbaijan. (2019). *Law of the Republic of Azerbaijan dated December 23, 2003 "On the Constitutional Court"*. Qanun.
- Przeworski, A. (2010). *Democracy and the Limits of Self-Government* (1st ed.). Cambridge University Press.
- Republic of Azerbaijan. (2017). *Constitution of the Republic of Azerbaijan dated November 12th 1995*. Huquq Publishing House.
- Rousseau, J.-J. (1964) [1762]. *Du contrat social* (R. Derathe, Ed.). Gallimard.
- Taylor, J. S. (2017). Autonomy. In *Encyclopedia Britannica*. <https://www.britannica.com/topic/autonomy>