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AZERBAIJAN CONSTITUTION COURT'S ROLE IN PROTECTING DEMOCRACY: LESSONS FROM THE EU

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We argued in this paper that Azerbaijan's constitution should focus on principles – like democracy (like the Treaty of Lisbon) or the common good (like Poland's constitution). These principles would give the constitutional court a specific principles-based measure to assess laws and executive action. With its focus on these principles, the Court can shed many of the competencies it currently has than executive agencies in the EU normally possess. Executive agencies or lower courts can intermediate disputes between government bodies and hear human rights cases. The Constitutional Court can focus on applying broad, abstract principles in concrete settings.

Keywords: Constitutional Court of Azerbaijan Republic, constitution, constitutional control, constitutional justice, the Court of Justice of the European Union, constitutionalism.

Scientific and practical problem. In autumn, 2016, Azerbaijan's politicians look poised to propose several reforms to the country's young constitution. That constitution should look familiar to any European – as German advisors helped draft early versions of the document and subsequent amendments to the constitutional framework [1]. Recent reforms include the extension of the president's term in office to seven years, pres-

idential power to call early presidential elections, and the creation/ appointment of a vice-president who serves at the pleasure of the president [2]. What do deep constitutional principles tell us about these proposed reforms? What should the role of the Constitutional Court be in ensuring that any constitutional amendments (and the implementation of constitutional principles in practice) conform to the country's commitment to «provide

a democratic system within the frames of the Constitution» while «protect [ing] the independence, sovereignty and territorial integrity of the Republic of Azerbaijan» [3].

Overview of the relevant researches. The author bases the research on the works of F. Langdal, G. von Sydow, G.-U. Charles, A. Coan, N. Bullard and others.

Article's thesis. The thesis of the article is to examine the Azerbaijan Constitutional Court's role in protection democracy using the EU experience.

The main part. Like other constitutions, the Azeri constitution seeks to manage the trade-offs between social and legal values. To take the simple example above, what happens when protecting the independence and sovereignty of Azerbaijan conflicts with democratic development – such as giving Nagorno-Karabakh limited home rule? Or similarly, the need to extend the president's powers (to protect Azerbaijan's independence and sovereignty) while ensuring a democratic system where a freely elected parliament decides laws big and small?

The question strikes at the heart of any constitutional regime – including the European Union's. Coan and Bullard provide a recent summary of the relevant literature, looking at the «doctrinal puzzle» of the need for a constitution (and thus a constitutional court) to defer to the executive's best judgment, while still overseeing (controlling) that the executive only uses the powers the constitution delegates to it [4, p. 765]. In theory – they note – the court monitors the powers of each part of government as delineated in the constitution [4, p. 776-782]. Yet, in principle, they find that these powers come from the constitutional capacity to do its job [4, p. 786-800]. Constitutional courts with more resources and with better cooperation from other parts of government (like the executive or the parliament) tend to manage this trade-off better.

Similar problems arise in deciding on the parliament's powers. Prof. Charles in particular looks at the constitutional courts role in deciding on the parliament's power to set its own rules – particularly those rules related to voting [5, p. 615]. Justices develop their own legal tests and doctrines as to whether the Court's interference in the rules governing the election of parliamentarians conform to the letter of the Constitution [5, p. 638-645]. Yet, too often no specific rules exist for constitutional justices to take decisions. Thus, the author argues that the justice must – and has in the EU's large experience both at the Union level and at the Member State level – rely on general constitutional principles to decide the relevant case [5, p.649-659]. Many authors – like Langdal and von Sydow – might argue that such «constitutionalism» (or the blind following of broad principles enshrined in a constitutional document like the proposed EU Treaty) helped lead to the failure of Member States to ratify the Treaty [6]. The government's acceptance of such constitutionalism at all costs undermines its legitimacy and undermines the very democracy that those constitutional principles seek to protect. The «democratic deficit» resulting from the rigorous implementation of constitutionalism thus weakens the government's and

court's attempts to judge and pass democratically decided laws.

These theories help us to think about the recent constitutional reforms in Azerbaijan. Coan and Bullard might argue that recent attempts to consolidate presidential power result practical attempts to empower the president to practically develop democracy in the country. The president and executive have the most resources – and thus are the most capable to gauge the extent to which government programmes and policies conform to the electorate's preferences. Charles might argue – in this context – that the constitution needs not necessarily place particular restraints on the president. Both the president and the constitutional, understanding the principle of democratic development, should use that principle – and not very specific rules – as a guide. Langdal and von Sydow might argue that focus on the constitution – and criticisms of the President's plan to amend the constitution – miss the point. Instead, the court should uphold the broader principle of promoting democracy. Other branches must concern themselves with how that happens in practice.

Democracy in Azerbaijan's Constitution Framework. Azerbaijan's constitution clearly places democracy as a core – if not its key – value. As mentioned previously, democracy holds a prominent place in the Constitution's preamble. Article 1 vests power with Azerbaijan's citizens and dependents. Article 2 guarantees that the «sovereign right of the Azerbaijani people is the right of free and independent determination of their destiny and *establishment of their own form of governance*» (italics ours). Article 6 represents the strongest form of commitment to democracy – noting that,

I. No part of people of Azerbaijan, no social group or organization, no individual may usurp the right for execution of power, and

II. Usurpation of power is the gravest crime against the people.

Against this background, any power – whether the Constitutional Court or the Executive – may not overstep its bounds. Yet, the article does not define any test for deciding if an individual or group as «usurped the right for executive of power.» As such, both proponents and detractors of the current constitutional amendments may use Article 6 to argue their case. Does the Constitutional Court usurp power by deciding on the unconstitutionality of constitutional amendments which extend the democratically-elected president's powers? Or does the president usurp these powers, but claims powers above and beyond those envisioned by the people when they set up the social contract of their constitution?

If democracy represents a core value in Azerbaijan's constitution, the obligation to guarantee control and unity of the Azeri nation represents perhaps just as important and counter-balancing constitutional value. The constitutional preamble also requires the use of the people's sovereignty «to protect the independence, sovereignty and territorial integrity of the Republic of Azerbaijan» [3]. Such sovereignty must also guarantee «law-based, secular state to provide the rule of law as an expression of the will of the nation» – irregardless of

the effect on democracy. The «people of Azerbaijan are united» – and thus the government's will must – by definition – represent the will of the people [3].

Azerbaijan's constitutional order thus differs from the EU's in its *Unity of State Principle*. The unity-of-state principle thus claims that the «unity of the Azerbaijani people constitutes the basis of the Azerbaijani state» [3]. Contrast this claim with the first article of the Treaty of Lisbon, which states that.

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, *including the rights of persons belonging to minorities... in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality* [7].

The constitutions of EU Member States reflect this emphasis on democracy exercised by many different kinds of citizens. The preamble of the French constitution, for example, highlights the role the «self-determination of peoples» and «institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development». Clearly, in the French conception, the legal order establishing the state exists in order to push democratic development. In other words, a state based on constitutionalism. In contrast, the Azeri Unity-of-State principle argues that the unity of the people's will – as vested in the state – should determine how much, and at what speed, democracy should proceed.

The Spanish constitution provides an example perhaps closer to Azerbaijan's case. The Spanish constitution seems to a «balance social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism». While the constitution envisions the establishment of a democratic state, nothing in the constitution points to promoting or protecting democracy as a core value. Yet, the state clearly also does not have such a responsibility.

Nothing in Azerbaijan's constitution may be interpreted as install constitutionalist principle (following constitutionalism as a legal and constitutional principle).

The Role of the Constitutional Court. Azerbaijan's constitutional system envisions the Constitutional Court as proof-reader of various laws and rules. Specifically, Article 130.3.I has the Court monitoring the «correspondence of laws... to Constitution of the Azerbaijan Republic». Following sub-articles describe every other legal act and decision under its review. Other provisions require the Court to «gives interpretation of the Constitution and laws of the Azerbaijan Republic based on inquiries» [3]. The Court also engages in the «settlement of disputes connected with division of authority between legislative, executive and judicial powers» [3]. Most importantly, the Court itself decides on its own competence (sphere of action), as the «Constitutional Court of the Azerbaijan Republic takes decisions as regards the questions of its competence» [3]. The Court thus has extensive powers envisioned in the Azeri constitution – following the Unity-of-State principle.

In some ways, the EU Lisbon Treaty looks similar and different to the Azeri constitution. Like Azerbaijan, the EU does not follow a strict interpretation of the constitutionalist paradigm. «The Court of Justice shall have jurisdiction to decide on the legality of an act... solely at the request of the Member State concerned by a determination of the European Council or of the Council» [7]. Such limits on its competence thus ensure the vesting of greater powers in the executive – like in Azerbaijan. Unlike the Azeri constitution, the Lisbon Treaty gives the court competence to propose legal acts as, «Draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank shall be forwarded to national Parliaments by the Council» (see Annex 1 of [7]).

Unlike the Azeri constitution, the Lisbon Treaty instructs the Court to uphold certain constitutional principles. Specifically, art 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality requires the Court to «have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 230 of the Treaty on the Functioning of the European Union by Member States.» The European Court of Justice only represents one of many organisations responsible for reviewing legislation and other legal acts – including the Council, Parliament, Commission, the European Central Bank and European Investment Bank. Such a framework clearly violates the Unity-of-State constitutional framework existing in Azerbaijan.

Human Rights in Azerbaijan and the EU. What about human rights? The Azeri constitution allows that «everyone claiming to be the victim of a violation of his/her rights and freedoms... may appeal... to the Constitutional Court of the Republic of Azerbaijan with the view of the *restoration* of violated human rights and freedoms» [3]. Except for a brief mention in the preamble, the Azeri constitution makes no more mention of human rights. In contrast, the Lisbon Treaty places human rights at the centre of the document – mentioning human rights as one of the founding principles of the Union. Continuing with its value based constitution, the Treaty requires the Union «relations with the wider world» to *pro-actively* advance human rights, peace, sustainable development and so forth [7]. The Treaty just not just admonish the Union to observe human rights – but to actually work to promote them outside of its borders. A protocol specifically defines the Union's implementation of the European Convention on the Protection of Human Rights and Fundamental Freedoms [7]. The EU's commitment to human rights appears not just in legislation – but as a protocol to its constituting document.

Yet, constitutions of Member States do not look very different than Azerbaijan's. The French constitution – clearly a role-model for the Azeri constitution – only mentions human rights in a commitment to «enter into agreements with European States [with] identical... protection of human rights and fundamental freedoms.» The Spanish constitution seeks to «protect all Spaniards and peoples of Spain in the exercise of human rights». The

Spanish constitution does explicitly give constitutional force to the Universal Declaration of Human Rights... again, elevating those values above legislative and to constitutional.

The conclusion and the perspectives for the further researches. Azerbaijan's constitutional court does not yet function like many of the constitutional courts in Europe. How can Azerbaijan change its constitution to give a more pro-active and central role to the Constitutional Court? How can Azerbaijan's constitution order keep with tradition – and incorporate progressive aspects of EU constitutional law?

Azerbaijan's constitution order does not lag behind EU countries. Instead, Azerbaijan has probably grown out of its French-style constitutional order. The French never saw its Constitutional Council as a central government body. A model more similar to EU law or the law of many

more recent and progressive EU Member States would give the Constitutional Court a greater role in Azeri life.

We argued in this paper that Azerbaijan's constitution should focus on principles – like democracy (like the Treaty of Lisbon) or the common good (like Poland's constitution). These principles would give the constitutional court a specific principles-based measure to assess laws and executive action. With its focus on these principles, the Court can shed many of the competencies with executive agencies normally possess in the EU. Executive agencies or lower courts can intermediate disputes between government bodies and hear human rights cases. The Constitutional Court can focus on applying broad, abstract principles in concrete settings. The future researches in the field can be concentrated around the problems of the separation of powers and Court's role (see [8; 9]).

References:

1. Knieper R. Learning the Rules of the Game. Germany Assists Economic Legal Reform in Azerbaijan / R. Knieper, W. von Heynitz [Electronic resource]. – Available at: http://www.azer.com/aiweb/categories/magazine/84_folder/84_articles/84_germany.html
2. Azerbaijan opposition is against constitutional reform package [Electronic resource]. – Available at: <https://news.am/eng/news/338118.html>
3. Constitution of Azerbaijan [Electronic resource]. – Available at: http://azerbaijan.az/portal/General/Constitution/doc/constitution_e.pdf
4. Coan A. Judicial Capacity and Executive Power / A. Coan, N. Bullard [Electronic resource]. – Available at: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2558177
5. Charles G.-U. Democracy and Distortion / G.-U. Charles [Electronic resource]. – Available at: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3061&context=clr>
6. Langdal F. Democracy, Legitimacy and Constitutionalism / F.Langdal, G.von Sydow [Electronic resource]. – Available at: <http://www.scandinavianlaw.se/pdf/52-17.pdf>
7. Treaty of Lisbon [Electronic resource]. – Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12007L/TXT&from=en>
8. Мішина Н. Проблеми доктринального супроводження розвитку конституційної юстиції в Україні / Н. Мішина // Вісник Конституційного Суду України. – 2015. – № 4. – С. 122-126.
9. Mishyna N. V. Local Government and the Doctrine of Separation of Powers / N. V. Mishyna // Юридический вестник. – references 2004. – № 4. – С. 100-103.

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РОЛЬ КОНСТИТУЦИОННОГО СУДА АЗЕРБАЙДЖАНА В ЗАЩИТЕ ДЕМОКРАТИИ: УРОКИ ЕС

Аннотация

В статье автор обосновывает, что в процессе применения Конституции Азербайджанской Республики целесообразно сосредоточить внимание на закрепленных в ней принципах – таких, как принцип демократизма (как в Лиссабонском договоре) или принцип общественного благосостояния (как в Конституции Польши). Эти принципы последовательно реализуются Конституционным Судом в процессе осуществления официального толкования законов и выполнения иных полномочий. Сосредоточив внимание на этих принципах, Конституционный Суд Азербайджанской Республики может передать часть своих полномочий органам исполнительной власти с тем, чтобы сосредоточить внимание на применении широких, абстрактных конституционных принципов в конкретных случаях.

Ключевые слова: Конституционный Суд Азербайджанской Республики, конституция, конституционный контроль, конституционное правосудие, Суд справедливости Европейского Союза, конституционализм.