FEATURES OF COURT PRACTICE IN THE LEGAL SYSTEM OF THE REPUBLIC OF AZERBAIJAN

Abstract. The purpose of the research is to analyze the importance of judicial practice in the Azerbaijani legal system on the basis of the existing research base.

Research Methods. During the study, methods of analysis, synthesis, induction, deduction as well as other general scientific methods (systematic, etc.) have been used in the research methodology.

The empirical basis of the research is consisted of the legislation of the Republic of Azerbaijan, the practice of law enforcement of higher courts.

The scientific novelty of the research is the investigation of the importance the decision of the Constitutional Court and the decisions of the Supreme Court as a de facto source of law in the legal system of the Republic of Azerbaijan.

Conclusion. The results of the research: In the independent Azerbaijan state, the court is not content with classical law enforcement activities, as in the Soviet era. Thus, the judicial practice of Azerbaijan is formed in connection with the solution of specific cases, the application of legal acts, the elimination of gaps, contradictions and unconstitutionality of legal acts in force. The basis of the formation of judicial practice is the process of concretization of the applied norm, including various methods of interpretation. In the legal system of Azerbaijan, the decisions of the Constitutional Court are precedents, the content of the decisions of the Plenums of the Supreme Court consists of specific legal provisions. Judicial practice is a factual auxiliary source of law. Decisions of the higher courts of the Republic of Azerbaijan refer to the precedents of the European Court of Human Rights.

Keywords: court, practice, Supreme Court of the Republic of Azerbaijan, Constitutional Court of the Republic of Azerbaijan, precedents of the European Court of Human Rights.
ОСОБЛИВОСТІ СУДОВОЇ ПРАКТИКИ У ПРАВОВІЙ СИСТЕМІ АЗЕРБАЙДЖАНСЬКОЇ РЕСПУБЛІКИ

Анотація. Зазначено, що метою дослідження є аналіз значущості судової практики у правовій системі Азербайджану на основі існуючої дослідницької бази.

У результаті дослідження використовувалися аналіз, синтез, індукція, дедукція, та інші загальнонаукові методи (систематичні та інші).

Наукова новизна дослідження - полягає у вивченні значення рішень (постанов) Конституційного та Верховного суду як фактичного джерела права у правовій системі Азербайджанської Республіки.

Зазначено, що судову практику в юридичній літературі розуміють у широкому та вузькому значеннях. Отже, у широкому розумінні під судовою практикою розуміється сукупність судових актів, які набрали законної сили внаслідок застосування правових норм під час здійснення судочинства. Під судовою практикою у вузькому розумінні розуміються положення, що склалися в результаті застосування норм до неповно або нечітко врегульованого відповідним законом ставлення.

Відмічено, що у незалежній Азербайджанській державі судова влада не задовольняється класичною правоохоронною діяльністю, як за радянських часів. Таким чином, судова практика Азербайджану формується у зв'язку з вирішенням конкретних справ, застосуванням правових актів, усуненням прогалин, протиріч та не конституційності чинних правових актів. У основі формування судової практики лежить процес конкретизації застосовуваної норми, що включає різні способи тлумачення. У правовій системі Азербайджану рішення Конституційного суду є прецедентними, зміст рішень Пленумів Верховного Суду складається із своєрідних конкретних правових положень. Судова практика є, власне, джерелом допоміжного права. Рішення вищих судів Азербайджанської Республіки посилаються на прецеденти Європейського Суду з прав людини.

Ключові слова: суд, практика, Верховний Суд Азербайджанської Республіки, Конституційний Суд Азербайджанської Республіки, прецеденти Європейського Суду з прав людини.

Problem statement. In modern jurisprudence, the disputes about judicial practice in mechanism of separation of powers in area of law-making are not over.
The activity of judicial practice to create general rules of conduct is discussed as an important scientific-theoretical and practical problem in jurisprudence. The activity of judicial practice to create general rules of conduct is discussed as an important scientific-theoretical and practical problem in jurisprudence.

The Republic of Azerbaijan that was the first democratic Republic in the East in 1918-1920, was part of the Soviet state for nearly 70 years, regained the independence in 1991, now has chosen the path of democratic, legal and secular state establishment.

The Constitution of the Republic of Azerbaijan, that was adopted in 1995 proclaimed human and civil rights and freedoms as the highest value and defined their protection as the duty of the legislative, executive and judicial authorities [1]. The accession of the Republic of Azerbaijan to the Council of Europe (January 25, 2001) and the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (December 25, 2001) demonstrate that rights and freedoms are guaranteed.

In 1917-1991, the Soviet judicial system existed in Azerbaijan. At present, the judiciary in Azerbaijan is realised by the Constitutional Court of the Republic of Azerbaijan, the Supreme Court, and the Court of Appeal courts, general and other specialized courts.

It is important to study the content and forms of judicial practice in the modern Azerbaijani legal system, its characteristics, its importance in the uniform and correct application of legal norms.

Analysis of the scientific research and publications. Judicial practice in the Azerbaijani legal system has been studied recently, especially in the context of judicial reform. Thus, the precedents of the European Court of Human Rights and the experience of the Constitutional Court of the Republic of Azerbaijan [2, p.303] the development of the legal system of Azerbaijan in modern times and the role of the Constitutional Court of the Republic of Azerbaijan in this process [3, p.608]. Gaps in the legislation of the Republic of Azerbaijan and their elimination [4, p.22] etc. Such problems have been the subject of scientific research. In the Republic of Azerbaijan, the activity related to the reference of the decision made by another court as a precedent-norm when making a decision on the case under its jurisdiction, application of case law [5, p.26] were studied.

It is shown that there is a practice not only of separate norms, but also by analogy of legal regimes [6, p.53-57] and jurisprudence creates legal norms that later lead to the formation of new relations [7, p.52]. The importance of the statements made by the Constitutional Court to eliminate the gap in the law by setting a precedent [8, p.15], the uniform understanding of the legislation and the establishment of stable judicial practice have been examined [9, p.38-46].

In the area of modern judicial law, the relationship between theory and reality...
is studied [10, p.164] judicial practice is studied as a source of law [11, p.3], the legal system is quite extensive by analogy of law it is concluded that the jurisprudence is formed [12, p.88-91]. Some authors define jurisprudence and case law as categories that are close but not identical [13, p.293-310], while others define jurisprudence as the embodiment of the doctrinal and legal values of the legal system, the factual nature of human and civil rights and responsibilities. Investigates as a reflection of security, reveals its legal and social sources [14, p. 892). At the same time, theoretical issues of the unity of judicial practice are studied [15, p.25-35) judicial law enforcement activity is studied as a specific type of law enforcement [16, p.199).

**Purpose of the article.** Scientific research studies the close connection of judicial practice with traditions and culture [17, p.258-260) substantiates judicial jurisprudence [18, p. 221) However, recent research have shown that the temporary rejection of the judicial precedent from the continental-European legal order is due to the specific historical features of its development [19, p.88).

Professor of Law of the Polish Academy of Sciences A. Mlinarskaya-Sobachevska examines the form of expression of the results put forward by the law enforcement officer in the law enforcement act and believes that the definition of methods of expression of the results of the interpretation indicates its level of quality [20, p.52-66). At the same time, various methods of interpretation have been studied [21, p.251) and a generalized theoretical-legal concept has been developed [22, p.49).

**Presentation of the main material. Definition, forms and functions of judicial practice:** court practice is an important component of the legal system. It was created in connection with the settlement of conflicts in society, the regulation of society through legal norms. There are different approaches to judicial practice in the legal literature. Therefore, the case law is equated with the precedent on the one hand, the decisions of the supreme court ‘s plenums on the other hand, and the mass of court decisions on the third. On the other hand, judicial practice and judicial activity are equated, or court practice is viewed as the results of this activity.

Judicial practice is a set of court decisions (first of all, the highest instance) on this or that issue in Romano-Germanic countries. The jurisprudence of the court on any issue is evaluated as the result of its activities or a set of its decisions, reflecting the experience of applying the current legislation [23, p.75-78]. In other words, case law refers to the legal positions defined in the acts of higher courts as a result of the theoretical generalization of individual court decisions based on the identification of typical and recurring similarities that have evolved over disputes and affect the legal relationship that will arise [24, p.89-92]. There is no unified concept of court practice in jurisprudence. Thus, the concept of judicial practice is interpreted as a court precedent in one case, the decisions of the plenums of higher courts in the second case, and any court decision in the third case. However, it should be noted that the
narrow meaning of case law is more reasonable. Thus, in this case, the case law is determined by the higher courts and the application of legal provisions is understood as binding. The importance of judicial practice lies in the validity and authority of the provisions it has developed.

**Judicial practice acts as a legal tool in identifying and eliminating gaps in law.**

The following forms of judicial practice of the Republic of Azerbaijan can be specified: Decisions of the Constitutional Court of the Republic of Azerbaijan; decisions of Plenum of the Supreme Court of the Republic of Azerbaijan; judicial acts on specific cases; generalization.

The legal literature states that there is an inseparable link between theory and jurisprudence, and shows that jurisprudence without theory is culturally poor (Perfecto Andres Ivanes)[25]. There are also speculations about the use of Judicial practice as an innovative teaching tool in the training of judges (Margit)[26].

**Forms of influence of judicial practice on the law-making activity of the state.**

Unlike the creation of parliamentary law, the creation of judicial law requires the emergence of new appropriate forms. One of such forms is the forms created by the Constitutional Court, as well as by the Supreme Court. The legal positions of the Constitutional Court have both theoretical and practical significance. In practical terms, the position of the Constitutional Court leads to the improvement and development of the judicial system as part of its decisions, as well as the strengthening of the rule of law.

In general, the law-making of the court differs from the law-making activity of the legislature and the executive. This difference is as follows: the law-making of the court is not independent, because it depends on the realization of justice, which is the main function of the judiciary; is carried out on the basis of legislative power; mainly interprets the right and eliminates gaps in law; the legal position of courts is not by subjective expression of will, is prepared on the basis of existing principles and norms; judicial norms cannot freely change or repeal the law; the legal position of the courts should not contradict the laws, first of all the constitutional laws [28, p. 374].

According to the principle of separation of powers the courts do not have the power to create norms. However, in the absence of a specific normative regulation of public relations, the courts may make a decision. In this case, the courts should look for a more correct decision based on the analogy of the law and restore the gap in legislation. In this case, the decision of the court has a norm-creating character in itself. Gaps in the law are usually filled by the Constitutional Court and the Supreme Court of the Republic of Azerbaijan.

"From a universal point of view, judicial jurisprudence must be in harmony with general jurisprudence" [29, p.376]. The impact of the decisions of the European Court on the rule-making activities of the courts is more common in the decisions of the Constitutional Court of the Republic of Azerbaijan.
**Judicial practice as a source of law:**

Although the attitude to judicial practice in the Republic of Azerbaijan has changed dramatically, it is not officially recognized as the source of law as before. The change is in the field of judicial practice expanded and the tendency to recognize it as a source of law increased. Such an increase in the tendency to recognize can undoubtedly lead to an enrichment of the sources of law. Thus, all cases of a specific situation are handled by the legislature cannot be resolved objectively.

The Supreme Court of the Azerbaijan Republic performs the norm-setting function as well as the interpretation of legal norms. According to P.A. Guk, judicial regulation is carried out in the form of precedent form and judicial practice of the highest court [30, p. 49]. It appears that P.A. Guk distinguishes precedent and case law. Thus, according to some authors, although the precedent is the result of Judicial law, these concepts cannot be equated.

**Gaps in the law and judicial practice:**

The content of the judicial practice can be revealed by analyzing the gaps in the Azerbaijani legal system and the problem of their restoration.

The gap in the law is understood in a broad and narrow sense. Thus, in a broad sense, there is a gap in the law as a whole. For example, the lack of the necessary law, etc. In the narrow sense, any gap in the law means any legislation, it is understood that the act (law, etc.) does not regulate this or that situation. In general, law enforcement agencies need to create a rule of law to close the gap. However, because the process of creating a new rule of law takes a long time, analogy is used as an exceptional tool to fill the gap. Thus, the gap in the law is filled by adopting a new norm, it can be completed by applying an analogy. Analogy is a flexible method.

There are two types of analogy in law: the law analogy; analogy of right.

An analogy of a law is a solution of a specific legal case on the basis of a legal norm provided for similar cases. The analogy of the law is used when there is no norm regulating similar relations and cases.

An analogy of right means making a decision on a specific case on the basis of the general meaning and principles of law. This analogy applies when there is a gap in the law, when there is no similar law. In this case, the principle of "ratio legis" (to act in the general sense of the law) is used. For example, analogies of law and legal are allowed in civil law [Civil Code of the Republic of Azerbaijan, article 11.1.], Family law [Family Code of the Republic of Azerbaijan, article 5] and other areas of law.

However, the main place in the legal system of Azerbaijan is not the court, but law enforcement activities of government agencies. However, in order to close the gap, the courts, especially the Supreme Court of the Republic of Azerbaijan, The Constitutional Court of the Republic of Azerbaijan has a special role. According to Article 15.2 of the Constitutional Law of the Republic of Azerbaijan on normative legal acts (2010), the decision of the Constitutional Court of the Republic of
Azerbaijan on the application of the analogy shall enter into force on the day of its publication.

**Specification of legal norms:**

The content of judicial practice is also related to the specification of legal norms. Clarification in the field of law enforcement is carried out as a result of application and interpretation of the norm.

The concretization of law in the legal literature is as follows approach: application of the legal norm to the concrete situation; normative interpretation of the norm by higher courts.

However, specification is only the removal of specific provisions from general norms.

So, the norm is always abstract, applies to different cases and subjects, and is interpreted by the law enforcer when making court decisions. The law-enforcement court logically develops a previously established norm by adding new definitions.

On the other hand, lawmaking cannot be equated with judicial practice. Also, the fact that judicial practice in any way affects the development of law does not mean that the judiciary has become a legislature.

**Decisions of the Supreme Court of the Republic of Azerbaijan:**

Decisions of the Supreme Court of the Republic of Azerbaijan serve as the basis for the generalization of judicial practice. These decisions, on the one hand, reveal the content of the rule of law, interpret the norms and laws, and, on the other hand, determine the direction of judicial practice ("guide instructions") in certain categories of cases. Interpretation of legal norms means explaining and clarifying the meaning of legal norms.

The purpose of the interpretation of the law is the correct, uniform and precise understanding of the norm, which is abstract and general in nature, and the perception of the intention determined by the legislature and intended to be expressed by the symbol of the sign.

Analysis of the decisions of the Plenum of the Supreme Court of the Republic of Azerbaijan shows that their content consists of various forms of interpretation, clarification and interpretation of the content of existing legal norms. For example, "According to the decision of the Plenum of the Supreme Court of the Republic of Azerbaijan dated February 20, 2020 "On invalidation of some decisions of the Plenum of the Supreme Court of the Republic of Azerbaijan and amendments to some decisions" In paragraph 12 of the Plenum Resolution No. 7 of November 3, 2008, these words “because the claim for compensation for non-pecuniary damage in civil cases is of a property nature” were replaced with the words “compensation for non-pecuniary damage” [31]. This shows that the decisions of the Supreme Court of the Republic of Azerbaijan specify the norms of abstract substantive law.

Thus, the decisions are based on an analysis of the generalization of the Azerbaijani judicial practice. Such generalizations allow higher courts to determine
On March 28, 2016, the Plenum of the Supreme Court of the Republic of Azerbaijan issued Resolution No. 8 on the practice of applying the law by the courts in cases of divorce, the custody of minors after divorce, and the maintenance of child support. The first part of the seventh paragraph of the decision recommends that the courts take into account the fact that in the event of a divorce, the juvenile's mental status, it is in their best interest to be legally protected by the same parent, except in exceptional circumstances, in order to ensure their physical and psychologically healthy development and cohabitation with other siblings [32]. This decision also has a law-determining character.

This decision is also related to the idea in the legal literature that the content of the law enforcement activities of the courts is the clarification and application of the law [33, p.18].

The decisions of the Constitutional Court:

The Constitutional Court, with its official interpretation of Parts 1 and 2 of Article 239 of the Labor Code, by its decision of 15 July 2011[34], provided the basis for ensuring the principle of legal certainty and uniform and correct application of these norms by courts and similar executive authorities.

At present, there is a need to strengthen the unity of judicial practice.

Recently, the legal literature on the unity of judicial practice emphasizes the need to establish the concept of uniformity and unity of judicial practice, as well as to determine the responsibility of judges for violating the principle of unity and uniformity of judicial practice [35, p.32].

So the unity of judicial practice is ensured not only by the norms of the law, but also by the decisions of the Constitutional Court of the Republic of Azerbaijan.

The Plenum of the Constitutional Court showed that the provisions reflecting the principle of social and legal protection of public servants, ensuring a decent standard of living for themselves and their families are in accordance with Articles 19, 21-24, 33 and others of the law "About Public Service" provided in the articles.

Based on the Decision of its Plenum “On Interpretation of Articles 78.3, 85.4, 90.3 and 93.1.1 of the Tax Code of the Republic of Azerbaijan” dated January 12, 2011[37], the Constitutional Court also stated that public legal relations imply subordination of the parties. The obligations of individuals arise from the law, not from the contract.

Regardless of the recognition of judicial practice as a legal concept, it creates legal norms in reality by reacting to the emergence of new public relations, which later become legal norms [38, p.46-52]. The role of the judiciary in the mechanism of a particular state is determined by many different facts, including historical, socio-economic and political factors.

Courts at various levels use the institution of analogy to close gaps in decision-
making, while the highest courts, in fact, fill gaps in legislation without direct authority to do so. Also, judicial interpretation of the law by analogy application is also used [39, p. 88-91].

The Constitutional Court of the Republic of Azerbaijan can fill the gaps in several ways: to directly apply the norms of the Constitution in each specific case; to take advantage of the analogy of law and analogy of right; revealing the meaning of the legal norm through interpretation; establishment of a regulation on a certain legal relationship by the legislature before the adoption of the relevant law.

The Constitutional Court closes the gap in the law by setting a precedent used by the courts before the law is adopted. Although Article 130 of the Constitution of the Republic of Azerbaijan ("Constitutional Court of the Republic of Azerbaijan") does not provide for an appeal to the Constitutional Court regarding a gap in the law, such cases are revealed in the course of judicial activity in a particular case.

Taking into account the importance of the official interpretation of a normative legal act in terms of the formation of specific legal practice in the legislation, the Constitutional Court determines the correct application of any norm in practice. As a result of the official statement of the Constitutional Court existing gaps in the field of legal regulation are eliminated.

According to Part X of Article 130 of the Constitution of the Azerbaijan Republic, laws and other acts, or their separate provisions, intergovernmental agreements of the Republic of Azerbaijan are repealed within the period specified in the decision of the Constitutional Court. In this case, the Constitutional Court does not act as a legislator and does not replace it. In other words, the decisions of the Constitutional Court serve as a source of law for a certain period of time.

The main purpose of the Constitutional Court is to identify legal contradictions and gaps. Until the legislature takes into account the decision of the Constitutional Court, the decision of the Court shall be in the normative context. However, the relevant decision by making changes and additions to the legislation will cease to be a source of law.

Legal positions as an explanation of the constitutional meaning of the provisions of laws and other normative acts, such as the generalized opinions of the Constitutional Court of the Republic of Azerbaijan, allow to eliminate the existing uncertainty in specific situations.

In the process of formation and development of the rule of law in modern Azerbaijan, new forms of the legal system are emerging. One of them is the judiciary, a branch of government. The judiciary currently performs not only the function of justice, but also the law-making function with the form of court precedent and judicial practice [40, p. 6-15].

Conclusion. The judicial practice may pre-determine the provisions of the new legislation. Thus, the courts later as the law of the legislature develop new and
unregulated legal issues. On the basis of the Azerbaijani legal system, there are legal grounds for the recognition of the binding nature of the normative provisions of judicial practice by the higher courts. Thus, the case law eliminates contradictions and gaps in the current legislation. The basis for the formation of jurisprudence is the process of concretization of the applied norm, including various methods of interpretation. Decisions of the Constitutional Court are precedent in the legal system of Azerbaijan, the content of the decisions of the Plenums of the Supreme Court consists of specific legal provisions. The identity of the judiciary is a prerequisite for the successful administration of justice, which increases public confidence in the judiciary and enhances their prestige.

Stability and legal certainty of judicial practice is a fixed law system, is one of the foundations of the formation and development of the rule of law. In the independent state of Azerbaijan, the judiciary is not content with classical law enforcement activities, as in the Soviet era. Thus, the Azerbaijani judicial practice, along with the solution of specific cases, the application of legal acts is formed in order to eliminate gaps, contradictions and unconstitutionality of legal acts in the current legislation.

Judicial practice by the courts of the Republic of Azerbaijan it consists of the leading explanations of the Plenum of the Supreme Court, which ensure the correct and uniform application of laws, as well as acts of judicial bodies on the specific application of legal norms in civil, administrative and criminal cases. Judicial practice acts as a de facto auxiliary source of law, reversing gaps in existing legislation and providing a unified approach by courts to the interpretation and application of legal norms.

Decisions of the higher courts of the Republic of Azerbaijan specifically refer to the precedents of the European Court of Human Rights. From this point of view, attention should be paid to the characteristics of the acts of the Constitutional Court of the Republic of Azerbaijan as a special norm.

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