INTERNATIONAL LAW AND INTEGRATION PROBLEMS
(Scientific-Analytical Journal)
№ 2 (65) 2022

CONTENTS

"LEGAL" STATUS OF THE CASPIAN SEA AND NATIONAL SECURITY ISSUES

Afsar Sadigov *

Abstract

The article analyzes the provisions of the Convention on the Legal Status of the Caspian Sea dated August 12, 2018 in the context of political, economic, and military priorities of the Republic of Azerbaijan. Although the Convention aims to regulate the interaction of coastal states in the watershed, in fact it has a broader geopolitical significance. In particular, the location of the Caspian Sea on the East-West corridor increases political and economic competition between both coastal and regional interests. Two years after the signing of the convention, in September 2020, the Russian-backed Armenian attack on the Tovuz region of the Republic of Azerbaijan, through which the Caspian oil and gas is transported to the West, shows that the economic value of the international energy transport corridor will increase. It seems that Russia is planning to pursue a more active policy of economic intervention in the region. Yet, the regional history of the last 200 years as well as the Georgian practice demonstrate that the guarantee of the strategic interests and political independence of the Republic of Azerbaijan is not with Russia, but with the West and away from Russia. The Convention on the Legal Status of the Caspian Sea was formed against the background of the political interests of two groups of coastal states – on one hand the Republic of Azerbaijan, Kazakhstan, Turkmenistan against Russia-Iran block on the other hand. Military security is directly in the interests of Russia, and the implementation of trans-Caspian projects is in the interests of Russia and Iran by using "eco monitoring mechanism". The transit fate of the economic and resource sovereignty of the developing coastal states is not in the interest of the "traditional powerful owners" of the Caspian Sea. The article provides proposals on international law to ensure the national security of the Republic of Azerbaijan in the Caspian Sea.

Keywords: *Caspian Sea, international legal status, military security, convention, international regime, constitutional procedure*

1. Geographical features and hydrocarbon resources of the Caspian Sea

In terms of determining its legal status and importance for the national security of the Republic of Azerbaijan (AR), it is necessary to firstly note the geographical features and hydrocarbon resources of the Caspian Sea. The Caspian Sea is a closed body of water with a width of about 1,200 km from north to south and a width of 200 to 435 km from west to east, with a depth of 1,025 meters. Volga, Kura, Araz, Ural, Terek and other more than 100 rivers flow into the Caspian Sea. The Caspian Sea, rich in natural resources, is located on the border of different parts of the Eurasian continent. The Caspian Sea is 28 meters below the world ocean level. It is a lake geographically because it has no direct connection with the world's oceans. However, due to its large area (about 390,000 km2) and salty water, it is conventionally called the sea. The Caspian Sea has a very rich flora and fauna. More than 120 species of fish in the Caspian Sea, including the main part of the world's sturgeon, live here. From the sturgeon gene pool – white sturgeon, rock fish, trout, Caspian salmon, white salmon, etc. 90% [23; 10, p.40-50] of the hunt is provided here. The economic and food value of these fish species is very high. For example, 1 kg of black sturgeon caviar is sold on the world market for an average of 1,200 USD, and red sturgeon albino caviar for 44,000 USD [3, p.51-62]. At present, it makes a very significant difference compared to the average price of a barrel of oil.

One of the features that increases the strategic importance of the Caspian Basin is that it has very rich hydrocarbon resources. In terms of reserves, the Caspian Sea is compared to the Persian Gulf [20, p.15-18]. The forecast for the Caspian Sea is around 80-100 billion tons of oil and 25 trillion m3 of natural gas. By 2019, annual production in the Caspian Basin is estimated at 4 million tons. barrels. The resources of the Caspian Sea as a

* Doctor of Laws, Professor of the Department of Public International Law of Baku State University

whole keep the Caspian Basin in the interest of consumer countries. Although the richest oil and gas resources of the Caspian coastal states belong to the Russian Federation and Iran due to their large land territories, their reserves are mainly located outside the Caspian Sea. In terms of oil and gas reserves in the Caspian Basin, Kazakhstan is in the first line, followed by Turkmenistan. The Republic of Azerbaijan, along with significant hydrocarbon reserves, is also among the most important transit countries of the "Historical Silk Road". The transit status of the Republic of Azerbaijan, the establishment of an alternative to the West over Russia, is also highly valued by political luminaries [8, p.54-55; 17, p.743; 7, p.135].

Along with its natural resources, the Caspian Sea also serves as an East-West and North-South transport corridor. The Caspian Sea is also marked by tourism, health and recreation centers. In the context of all these issues, the determination of the legal status of the Caspian Sea has been on the agenda as a strategic, national security problem for each of the coastal states. To understand the essence of the modern legal status of the Caspian Sea, it is necessary to refer to the historical stages of its establishment.

2. Early Russian-Persian agreements and Russia's military security concept

The legal problem in the Caspian Sea first arose with the Russia-Persia agreement. The treaty signed in St. Petersburg in 1723 sought to resolve legal issues in the Caspian Sea. With this agreement, Persia lost part of the Persian territories and accepted the right of the Russian state to have military sail in the Caspian Sea [19, p.3-17]. As a result of Russia's growing influence in the south, the Treaty of St. Petersburg was replaced in 1729 by the Treaty of Rasht. The Rasht Treaty, which included trade cooperation, gave only Russian warships the right to sail in the Caspian Sea in both war and peace periods. Persia kept its right to hold merchant ships only. Nearly 100 years later, Russia started next pillar of expanding its existing rights over the Caspian Sea. Thus, first the Gulustan Treaty of 1813 (hereinafter - the Gulustan Treaty), then the Turkmenchay Treaty of 1828 (hereinafter - the Turkmenchay Treaty) divided the historical territory of Azerbaijan into two. Ghajar-ruled Persia had to cede Northern Azerbaijan to Russia. According to the Treaty of Gulustan, only Russia could have a military flag in the Caspian Sea. The Turkmenchay Treaty regulated the relevance of the Caspian Basin in the legal status of the Caspian Sea and shipping issues. This agreement, as well as the Rasht agreement, confirmed Russia's military superiority in the Caspian Sea (Article 8). Under these agreements, Persia could only keep merchant ships in the Caspian waters [13, p.39].

Although the Bolshevik coup in Russia in 1917 resulted in the creation of Soviet Russia, the existing military doctrine of the Caspian legal regime was preserved. In 1921, the Treaty of Friendship and Cooperation was signed between Soviet Russia and Persia. In the agreement, the parties agreed on the concept of "common use" for the Caspian Sea. The Persian side (Article 11) restored the right to free shipping, got back the island of Ashuradagh in the Caspian Sea (Article 3) and the port of Anzali (Article 10). But even more important for Soviet Russia was the exclusion of other states from the Caspian waters. In this sense, the 1921 Treaty maintained the previous exceptional military regime. Article 6 of the treaty contained degrading terms for Persia. It was indicated that if the territory of Persia became the basis for military intervention by other states, then Russia would be free to intervene militarily in the territory of Persia. It was on the basis of this agreement that during World War II, the Union of Soviet Socialist Republics (USSR) sent troops to Persia against Germany.

The 1931 and 1935 agreements on settlement, trade, and shipping also closed the Caspian Sea to non-Caspian states. According to the 1935 agreement, the Russian Federation started to be called the USSR, and Persia as the Iranian state. In 1940, an agreement on shipping and trade in the Caspian Sea was signed. The two countries were once again committed to a common cause. The agreement stated that only USSR and Iranian ships had the right to sail in the Caspian Sea. The current legal regime lasted until the collapse of the USSR. With the emergence of new states (rebus sic stantibus), there was an emerging need for a new legal status for the Caspian Sea.

3. Contradictions of the Convention with the sovereignty of the Republic of Azerbaijan

The Convention on the Legal Status of the Caspian Sea (hereinafter - the Convention) was signed on August 12, 2018 in Aktau, Kazakhstan by 5 coastal states - the Republic of Azerbaijan, the Russian Federation, Kazakhstan, Turkmenistan and the Islamic Republic of Iran [25]. The Convention contains lot of indefinite provisions, but it annulled the previous Russia-Persia agreements of 1921 and the Soviet-Iranian agreements of 1940. With the exception of Iran, other countries have completed the ratification procedure. Since the Islamic Republic of Iran has not completed the necessary ratification procedure, the Convention should not be formally entered into force. This Convention is not just a codification act, but should establish a regional rule that requires the consent of all coastal states. The Convention is a framework and operates in conjunction with special agreements reached during diplomatic negotiations. Although it consists of a preamble and 24 articles, the strategy of the Convention is to protect the military and economic security of the Russian Federation (RF) only. The main subject of regulation is the division of waters, airspace, seabed and subsoil in the Caspian Sea, which must protect the doctrine of military and economic security of the Russian Federation, but not any other coastal states.

Unlike previous agreements, the Convention defines territorial waters of all coastal states. Nevertheless, further water territory is intended for free navigation. During the discussion of the draft convention, the main contentious issue was the division of the aquifer into "sectoral" or "territorial waters", including the "middle line" principle. Article 5 of the Convention states that the waters of the Caspian Sea consist of inland, territorial waters, fishing zones and common water areas. According to the same article, the sovereignty of the Caspian coastal states extends to the inland waters of the coastal states, consisting of a normal and direct outlet line, 15 nautical miles from the outlet line. The methodology for determining the exit line is based on the 1982 UN Convention on the Law of the Sea (art. 7). The Convention states that the sovereignty of the parties extends beyond its land and inland waters - the so-called territorial waters, as well as its seabed, subsoil and airspace above it (art. 6). All coastal states have agreed that the territorial waters should be 15 nautical miles wide (Article 7) [25].

The area after the territorial waters is classified as neutral. Yet, such a sectoral division is contradictory to the national constitutional provisions of Azerbaijan as it was defined in the Declaration of Independence of the Republic of Azerbaijan and in the1995 Constitution (Article 11.II of the Constitution of the Republic of Azerbaijan. The mentioned national law provisions of Azerbaijan are dedicated to inland waters, including the Caspian Sea (lake) section belonging to the Republic of Azerbaijan as well as air space over these territories are parts of Azerbaijani territory) [24]. The definition of "sector" established in Article 11.II of the Constitution of the Republic of Azerbaijan refers to the existing international treaty practice (for example, between the Russian Federation and

the Republic of Kazakhstan in the use of subsoil), which includes the sectoral division of the Caspian Sea Agreement of July 6, 1998 on delimitation of the northern part of the Caspian Sea for the exercise of rights; Agreement between the Republic of Azerbaijan and the Republic of Kazakhstan on delimitation of the seabed between the Republic of Azerbaijan and the Republic of Kazakhstan of November 29, 2001, etc.). Even the Convention itself contains the practice of sectoral division. Article 8.1 of the Convention refers to the division of the bottom and seabed of the Caspian Sea into sectors.

In this case, a very fundamental confusion rises between the Article 11.II and the Article 151 of the Azerbaijani Constitution. Article 151 of the Constitution states that except the Constitution and acts established by nation-wide referendum, international treaties, to which Azerbaijan is a party, prevails over national law norms. Yet, the mentioned Convention as an example of interstate treaty does not have any right to get prevailing power over the fundamental norms of the Article 11.II of the Azerbaijani Convention. The noted confusion lead us to conclude that the drafting process of the Convention was not so eager to take into account the national legal interests of the coastal states, except Iran and Russia, of course. This issue also calls into question the legal significance of the Convention. Because, according to this article 11.II of the Azerbaijani Constitution, the constitutional norm (Article 11) has priority over the Convention. That is, the waters up to the "middle line" or "modified middle line" of the Caspian Sea are considered the territory of the Republic of Azerbaijan, and all law enforcement agencies must act accordingly. As the constitutional norm (Article 11) prevails over the Convention, the Republic of Azerbaijan is not legally bound by the Convention or at least by its certain provisions. If an attempt is made to change the constitutional norm (Article 11), it requires a nationwide referendum. It is also unlikely that the people will vote to bring the constitutional norm in line with the Convention, which is a manifestation of Russia's pure military interests. Thus, it also contradicts the general rule of the Republic of Azerbaijan (ordre public).

Neutral waters and airspace based on the military doctrine of the Russian Federation have been used by Russia and Iran against the Republic of Azerbaijan for a very short time since the adoption of the Convention. The Russian Iranian pair ensured the illegal transportation of weapons to Armenia during the aggression against the Republic of Azerbaijan through the neutral waters established in the Caspian Sea. Despite the fact that the occupation of the territories of the Republic of Azerbaijan was confirmed by Resolutions No. 822 [30], 853 [31], 874 [32], 884 [33] of the UN Security Council and General Assembly Resolutions No. 62/243 of 2008 [29], these states are governed by international law (UN Charter m.1.1; 2.3; 2.4; 2.5) [9] ; They sided with the aggressor in violation of UN Security Council Resolution 56/589 of 12 December 2001 (Appendix 16) [18, p.157]. Thus, during the armed conflict between Azerbaijan and Armenia, which began on September 27, 2020, planes departing from the Russian city of Rostov crossed the neutral waters of the Caspian Sea and transported weapons to Armenia from the Iranian border checkpoint Norduz [16].

For many years since 1991, when the Republic of Azerbaijan declared its independence, it has consistently defended the concept of a lake-based sector (section) in the doctrine of international law, in the course of foreign policy, where "neutral" waters are not recognized. Scientific research on the lake regime of the Caspian Sea was conducted during the Soviet period, based on the agreements of 1921 and 1940, and the Soviet government accepted these studies. However, in the updated geopolitical and economic

situation after the collapse of the Soviet Union, Russia abandoned the concept of the lake without taking into account the legal succession. As a result of Russian pressure, the foreign policy course of the Republic of Azerbaijan has not been able to maintain its previous position what was based on customary international law.

There are other provisions of the Convention that contradict the national interests of the Republic of Azerbaijan. Article 3.1 of the Convention, which guarantees Russia's "historical" strategic interests, deals with the principles of international law in the UN Charter. Of course, this must be welcomed in terms of formal international law. In particular, Article 3.4 of the Convention (ensuring a stable balance of arms of the Parties in the Caspian Sea, the implementation of military construction within reasonable limits, taking into account the interests of all parties, without compromising each other's security); 3.5 (adherence to the agreed confidence-building measures in the field of military activities in the spirit of foresight and transparency in accordance with joint efforts to strengthen regional security and stability, including international agreements concluded between all Parties); Article 3.6 (absence of non-Partisan armed forces in the Caspian Sea) and Article 3.7 (non-transfer of territory by any Party to other States for aggression and other military activities) are normal acceptance for regional security and peace. It can be done and welcomed by international community. It should also be appreciated in terms of international law as well. However, this situation is a de jure acceptance of Russia's position as the de facto side of the issue. That is a real life sample of how can formal equalization of virtually unequal ones be possible.

It was by no means convincing that the Convention, to which Russia is a party, would ensure a "stable balance of armaments in the Caspian Sea, taking into account the interests of all parties in military construction ..." (Article 3.4). This is due to Russia's withdrawal from the Convention on Conventional Armed Forces in Europe in 2007 and so on. Ensuring a stable balance of armaments with the participation of Russia, taking into account the interests of all parties in military construction raise serious questions. In particular, the regular armament of Armenia has become a usual issue. In 2010-2018 alone, Russia provided 50,000 tons of weapons to Armenia. Armenia has become a weapon depot for Russia [15].

The amount of Armenian ammunition destroyed during the repression of the aggression of the Republic of Azerbaijan also showed that, following Russia, Armenia is not fulfilling its obligations under the Convention on Conventional Armed Forces in Europe. This proves that Article 3 of the Convention only protects the "national interests" of Russia. Rather, it aims to disarm the emerging coastal states against Russia. All these facts prova that it is not right to evaluate the Caspian Sea only in terms of energy resources. Its importance for the world market is also measured by the transport of political resources. The export of the natural resources of the emerging coastal states in the Caspian Sea to the world market bypassing Russia is their absolute national (alternative) security guarantee. In particular, the steady increase in the strategic importance of the transit status of the Republic of Azerbaijan in the region is not desirable for Russia. On July 12, 2020, Armenia, which occupied 20% of the territory of the Republic of Azerbaijan, attacked the Tovuz region, where the transport corridor passes, once again confirms what I am describing here. Russia's aggressive stance on neighboring countries is also a major threat to the West's energy security. Attempts by Armenia to occupy 20% of the territory of the Republic of Azerbaijan with the support of Russia for almost 30 years [1], including "preventing the export of Azerbaijani oil to the world market" [35, p.33] are also aimed at

ensuring Russia's monopoly economic interests in Western energy supply. The location of the Russian military base in Armenia on the opposite side of the transport corridor (15 km away) is also due to the desire to control the transport corridor.

The protection of Russia's priorities is enshrined in other parts of Article 3 of the Convention. The norm of "absence of non-Partisan armed forces in the Caspian Sea ..." expressed in Article 3, paragraph 6 of the Convention serves to maintain Russia's military superiority over other coastal states, including Azerbaijan. Article 20 of the Convention states that "this Convention does not affect the rights and obligations of the Parties arising from other international agreements to which they are parties." However, possible contradictions between other international agreements on military security of the Parties and the Convention remain unresolved. Special note here should be made on Article 16 of the Convention. The article states that in the Caspian Sea, the Parties shall cooperate with individuals and legal entities of states not party to this Convention, as well as with international organizations in accordance with the provisions of this Convention. It is true that the Republic of Azerbaijan has been working in the field of political and military security since the 90s of the XX century. In this sense, the cooperation with Western countries and international organizations, including the North Atlantic Treaty Organization [21, p.34-46], is of utmost importance for Azerbaijan.

However, the limitation of Article 16 of the Convention poses a serious threat to our national security, including "... cooperation with international organizations ...", including cooperation with the North Atlantic Treaty Organization. In order to meet Russia's military-political threat, the newly formed coastal states are obliged to apply the principle of "deterrence and balance" of international security law. However, Articles 3 and 16 of the Convention pose a serious threat to our military-political and economic security in the Caspian Sea by not allowing the Republic of Azerbaijan to apply the principle of "deterrence and balance".

One of the main uncertainties related to Article 3 of the Convention is the lack of a monitoring-supervisory mechanism. As the Convention is a framework, a new rule could be provided for the establishment of a Article 3 monitoring mechanism. Alternatively, Article 3 of the Convention could be provided in conjunction with the Treaty on the Cooperation of the Coastal States in the Sphere of Security in the Caspian Sea of 18 November 2010. However, the agreement does not provide for cooperation in the field of military security [6, p.138-139]. In a sense, cooperation in the field of military security monitoring is not brought to the level of international law.

One of the framework issues in the Convention is the division of the seabed and subsoil of the Caspian Sea. The division of the subsoil and the seabed is set out in Article 8 of the Convention. Part 1 of the article states that the division of the Caspian Sea seabed and subsoil into sectors, taking into account the well-known principles and norms of international law, the use of the seabed by agreements between neighboring and neighboring states, and for the exercise of sovereign rights over other lawful economic activities related to the appropriation of natural resources. Article 8.1 of the Convention can be considered one of the most successful norms for emerging coastal states. In particular, the division of the bottom and seabed of the Caspian Sea into sectors should be considered acceptable in terms of the realization of sovereign resource rights on the "continental shelves" of the newly formed coastal states. However, Russian authors mainly comment on the incompleteness of this division. Since the principle of a "modified midline" is not directly established in the Convention, some authors state that the distribution of the

seabed is uncertain [14, p.20]. In this area, bilateral agreements have been adopted among the coastal states on the delimitation of the bottom and bottom.

Although there have been attempts to "justify" [6, p.132] the invalidation of bilateral agreements on the division of the Caspian Sea, they have no scientific basis. Such positions are due to the desire of the newly formed coastal states not to recognize their sovereign rights on the "continental shelf". There is no provision in the Convention or any other document regarding the loss of legal force of these agreements. Section 4 (b) of Article 30 of the 1969 Vienna Convention on the Law of Treaties sets out the procedure for the application of treaties depending on the level of participation of the parties [34, p.31]. During the drafting of the 1969 Vienna Convention on the Law of Treaties, it was stated that if a new treaty on the same subject is not terminated at the time of the conclusion of the new treaty, the treaty will be applied in a more favorable manner [22, p.77]. It is important to note that the previously concluded bilateral agreements on the distribution of the bottom and the subsoil are dedicated to a specific issue. İn this regard, the 2018 Convention is a framework. As a result, bilateral agreements on the division of the bottom and the subsoil remain legal.

Bilateral agreements establish either the "modified midline" principle or the "midline" principle [11, p.115, 120]. Article 8.1 of the Convention also refers to the agreements of the coastal states on the delimitation of the bottom and bottom. The Russian Federation and the Republic of Kazakhstan adopted the Agreement of July 6, 1998 and the Protocol of May 13, 2002 on the delimitation of the northern part of the Caspian Sea for the exercise of sovereign rights in the use of subsoil. Subsequently, the Agreement between the Republic of Azerbaijan and the Republic of Kazakhstan on the demarcation of the Caspian Seabed between the Republic of Azerbaijan and the Republic of Kazakhstan was adopted on 29 November 2001 and the Protocol of 27 February 2003. Following these acts, agreements on subsoil use were signed between the Russian Federation and the Republic of Azerbaijan on May 14, 2003, and between Kazakhstan and Turkmenistan on December 2, 2014. The Islamic Republic of Iran has not signed such agreements with Turkmenistan and the Republic of Azerbaijan. There is no relevant agreement between Turkmenistan and the Republic of Azerbaijan. However, the practice of bilateral agreements is sufficient for the realization of the sovereign rights of the respective partners. In Article 1 of the Convention, the term "sector" (for purposes related to the development of bottom and subsoil resources) is derived from the practice of bilateral agreements.

Article 14 of the Convention is one of the norms of special importance for Kazakhstan, Turkmenistan, Azerbaijan, as well as Uzbekistan, which is not a party to the Convention in terms of transit of resources. According to Article 14.1 of the Convention, the Parties may lay submarine cables and pipelines on the bottom of the Caspian Sea. This norm is not in the interests of either Russia or Iran [5, p.16]. It is no coincidence that the right in Article 14.1 of the Convention is almost blocked by another norm. The realization of this norm is almost impossible. Therefore, Article 14 of the Convention is nothing more than a declaration. Russia is also trying to control the transit of hydrocarbon resources in the region through the Convention. If trans-Caspian pipeline projects are secured, Europe's dependence on Russia could be completely eliminated. The export of hydrocarbon resources of these countries to the West through Azerbaijan has a serious impact on the geopolitical situation in the region. The "Trans-Caspian Pipelines" defined in the Convention (Article 14) and their continuation as Baku-Tbilisi-Ceyhan, Baku-Tbilisi-Kars railway, Baku-Tbilisi-Erzurum and as a continuation of TANAP (Trans-Anatolian

Natural Gas Pipeline) and TAP (Trans-Adriatic Pipeline) means undesirable economic losses for both Russia and Iran. According to forecasts, the transportation of Central Asian gas to Europe via Azerbaijan will increase the annual capacity of TANAP and TAP by an additional $ 60 billion cubic meters. According to 2019 data, Azerbaijani gas has already covered 79% of the Turkish market. With the recent commissioning of the Shah Deniz field in Azerbaijan, the reduction of Turkish gas imports from Russia by 50% to 17% at the expense of Azerbaijani gas is on the agenda. It is inevitable that Turkey will prefer to buy Azerbaijani gas against the expensive pricing policy of both Iran and the Russian state company Gazprom [28]. Europe is also interested in cooperating with the Republic of Azerbaijan, a party to the Energy Charter Agreement (1994), rather than gas trade at higher prices, based on non-market principles. Undoubtedly, this cooperation has a significant negative impact on the position of Russia and Iran in the market. Russia's non-compliance with the principles of liberal regulation of the European market (for example, the separation of services from production) and its withdrawal from the Energy Charter Treaty (especially its Article 7, Transit) show that this state is based only on its aggressive military doctrine.

Article 14.3 of the Convention states that the determination of the area for laying submarine cables and pipelines shall be ensured in agreement with the Party to which the subsea cable or pipeline sector passes. That is, in this case, reference is made to the authority of the owner of the "continental shelf". However, as noted earlier, this right is subject to "eco-standards" of uncertain content and an "all-participant" permission system. Pursuant to Part 2 of Article 14 of the Convention, the Parties shall determine the design of submarine pipelines under the Caspian Sea under international agreements to which they are parties, including the 2003 (Tehran) Framework Convention for the Protection of the Marine Environment of the Caspian Sea and its relevant protocols. ensure compliance with environmental requirements and standards [26]. Monitoring of the Caspian Sea's environmental protection commitment seems to be problematic, not to neutral international organizations, but to the Tehran Convention's 2018 Protocol on Environmental Impact Assessment in the Transboundary Context. According to this Protocol (Art. 10, 11), decisions on environmental impact assessment are complex and overly "publicized" and must be made by consensus [27]. Any Party shall have the right to suspend the construction of the pipeline if there is a suspicion that the pipeline will adversely affect the marine environment. Of course, it is important to wait for the study of international environmental law as a "universally accepted" obligation. However, for obvious reasons, it is possible that Russia and Iran will not turn the conditions of environmental security in the Protocol into a military-political and, ultimately, economic advantage.

In addition to eco-conditions, the literature also focuses on other barriers. It is noted that Russia's veto in the construction of trans-Caspian pipeline projects is possible not only due to the norms of the ecosystem, but also due to its military-political influence. It seems that Russia retains the right to veto the construction of submarine pipelines. Russia's position as a "Trojan horse" opens the door to the country's unlimited military control over the region [2, p.273-292]. The Convention on the Legal Status of the Caspian Sea can only encourage the formal re-declaration of political sovereignty for the recently formed coastal states. The Russian-Persian and Soviet-Iranian treaty regimes were put to an end by accepting the possibility of changing the practice that had begun to take shape

in the early 18th century. As another positive point, the protection of the environment of the Caspian Sea has become the responsibility of all coastal states [4, p.500-519].

Specific regimes have been established in accordance with the legal status of the Convention. The Convention also contains numerous agreements in various fields. The Convention, along with its annexes (for example, the Agreement on Trade and Economic Cooperation between the Governments of the Caspian States; the Agreement on Cooperation between the Governments of the Caspian States in Transport; the Agreement on the Prevention of Incidents in the Caspian Sea, etc.), and together with the international treaties which are not included to its system, such as Protocols to the Agreement on Security Cooperation in the Caspian Sea: Protocol on Cooperation in Combating Terrorism in the Caspian Sea; Protocol on Cooperation in Combating Organized Crime in the Caspian Sea; Protocol on Interaction and Cooperation of Border Agencies, etc. [12], defines the foundation for the formation of special "Caspian sea law" field. As part of the "Law of the Caspian Sea", the Convention establishes regional trade, transport cooperation of the coastal states, the exclusive rights of the coastal states in the development of subsoil and subsoil, their sovereign rights in regulating activities in the fishing zone. However, it is necessary to conclude that the legal significance of the Convention for the newly formed states with these small and secondary positive points. In the context of the problems I have mentioned, the Convention has serious shortcomings. E.g., in the application and interpretation of the norms of the Convention, preference was given to the stages of political solution, rather than to mandatory legal mechanisms. As I have stated, the traditional international legal concept of the Russian position has had a significant impact on the modern legal status. The military security aspect of the recently formed coastal states, as well as the political and economic sovereignty of the Republic of Azerbaijan, has been subordinated to Russia's interests.

The Convention characteristically is a framework. Mainly defines the general principles. Many issues are not regulated yet. Among the problems that need to be addressed are environmental services in the Caspian Sea, illegal use of biological resources, protection of submarine cables and pipelines, etc. Gaps in the convention, require the continuation of the legislative process particularly to control the means of ensuring military security.

Conclusion and recommendations:

In general, the Convention on the Legal Status of the Caspian Sea of August 12, 2018 as an act ensuring the "recognition" of the existing political geography of the Caspian Basin, mutual cooperation in regional economic relations:

1) distinguishes between two groups of coastal states, the recently formed - Azerbaijan, Kazakhstan, Turkmenistan and, conversely, the Russian-Iranian tandem, in accordance with political and economic interests

2) recognizes the concept of equal military security in the legal sense on the paper, but in fact recognizes Russia as a guarantor of military security;

3) Accepts the economic sovereignty of the Republic of Azerbaijan, Kazakhstan and Turkmenistan in the distribution of the seabed and subsoil, as well as the formal recognition of the law on trans-Caspian projects, but subjects their implementation to the mechanism of environmental "joint monitoring" and consensus in decision-making;

4) Therefore, in the sense of the above-mentioned and for de facto parity in the Caspian Sea, either Article 3.6 of the Convention should be repealed, or full demi-

litarization of the Caspian Sea should be ensured, with the exception of forces to combat smuggling and terrorism.

References:

1. "Armenia is not a party to the conflict, and we cannot fight with Russia": Azerbaijan in a week. Translation of the extracts from the interview of the President of the Republic of Azerbaijan. [in Russian] www.regnum.ru/news/775196.html

2. Bahgat G. Splitting water: the geopolitics of water resources in the Caspian Sea. SAIS Review, 22(2) 2002, p.273-292

3. Batyr V.A. Balanced modern special international legal status of the Caspian Sea. Journal "Mejdunarodnoye pravo, № 9 (154), 2019, pp.51-62

4. Bayramov A. The reality of environmental cooperation and the Convention on the Legal Status of the Caspian Sea/ Central Asian Survey.Vol.39, 2020-Issue 4, p.500-519

5. Bayramov A. Unpacking the Environmental Requirements of the Caspian Legal Convention/Prospects for the Trans-Caspian Pipeline .Caucasus analytical Digest No.112, November 2019, p.16

6. Bekyashev K.A., Bekyashev D.K.The new international legal regime of the Caspian Sea // Economy, international cooperation and regulatory legal framework of fisheries. Trudi VNIRO, 2018. Volume 174, pp.129-142. [in Russian]

7. Brzezinski Z. Choice. World domination or global leadership. Translation from English. Russia, Moscow: Mejdurnarodniy otnosheniya. 2005, 288 p. [in Russian]

8. Brzezinski Z. The Great Chessboard. American dominance and its geostrategic imperatives. Russia, Moscow: Mejdunarodniye otnosheniya. 2000, 256 p. [in Russian]

9. Charter of The UN and Statute of The International Court of Justice www.un.org

10. Chingiz Ismayilov. The ecology of the Caspian Sea and its coastal territories. Azerbaijan, Baku: Ayna Publishing House, 2005.127 p.

11. Dinlap B.N. Divide and Conquer? The Russian plan for Ownership of the Caspian Sea // Boston College International & Comparative Law Review. Vol. 27:115, 12-1-2004, p.115-130

12. Documents signed following the meeting of the heads of state participating in the Fifth Caspian Summit [in Russian] http://www.kremlin.ru/supplement/5329

13. Geranmayeh A. The Caspian Sea in Iranian History and Politics // Central Asian Quarterly Labyrinth, Vol.2, No.3, 1995, p.39

14. Glandin S. V. Modern international legal regime of the continental shelf of the Russian Federation. Russia, Moscow. 2007, 24 p. [in Russian]

15. İ.Aliyev is coming to Ankara. Video of the speech from YouTube https://youtu.be/BJK.iz1YNILc.

16. Iran carries weapons: rush to aid Yerevan [in Turkish] https://www.yenisafak.com/dunya/iran-silah-tasiyor-erivanin-yardimina-kostu-3569272

17. Kissinger G. Diplomacy. Translated from English by Lvyova V. V. Russia, Moscow: Ladomir.M. 1997, 850 p. [in Russian]

18. Lukashuk I. Law of International Responsibility. Wolters Kluwer. Moscow, 2004, p.157

19. Mamedov R. About the international legal status of the Caspian Sea // Journal of International Law and Integration Problems No.1, 2019, pp.3-17

20. Primerova O.A. Caspian energy resources and security problems. Journal "Mir-Politika", № 6 (21). 2008, pp.15-18 [in Russian]

21. Sadigov E. I. North Atlantic Treaty and regional security. Cooperation between the North Atlantic Treaty Organization and partner countries after the NATO Wales Summit - Collection of reports and theses of the international conference. Azerbaijan, Baku: Elm ve tehsil. 2015, pp 34-46 [in Azerbaijani]

22. Talalayev A. N., Zakharova N. V. Vienna Convention on the law of Treaties. Commentary. Russia, Moscow: Yuridicheskaya literature. 1997, 336 p. [in Russian]

23. The bioresoucres of the Caspian Sea.[in Azerbaijani] https://az.wikipedia.org/wiki/X%C9%99z%C9%99rin_bioresurslar%C4%B1

24. The Constitution of the Republic of Azerbaijan https://en.president.az/azerbaijan/constitution

25. The Convention on the legal Status of the Caspian Sea www.nortonrosefulbright.com

26. The Framework Convention of 2003 on the environmental protection of the Caspian Sea. [in Azerbaijani] www.e.qanun.az

27. The Protocol on Environmental Impact Assessment in a Transboundary Context to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (the Tehran Convention) http://www.tehranconvention.org/spip.php?article41

28. Tokyay M. What meaning does the leadership of Azerbaijan in gas deliveries to carry? Experts comment. 02/06/2020 [in Turkish] https://tr.euronews.com/2020/06/02/azerbaycan-n-turkiye-ye-dogal-gaz-sevk-yat-nda-liderligi-ne-anlam-tas-yor-uzmanlar-yorumlu

29. UN GA Resolution 62/243 (2008).un.org

30. UN SC Resolution 822(1993).unscr.com

31. UN SC Resolution 853(1993).unscr.com

32. UN SC Resolution 874(1993).unscr.com

33. UN SC Resolution 884(1993).unric. org

34. Vienna Convention on the law of Treaties 1969. UN, Treaty Series, vol.1155, p.31 https://legal.un.org

35. Walde W. T. International Energy Law: Concepts, Context and Players. University of Dundee. Scotland. UK. 2001. 108p.

Date of receipt of the article in the Editorial Office
(15.07.2022)

INTERNATIONAL COOPERATION OF AZERBAIJAN REPUBLIC IN THE SPHERE OF PROTECTION OF ENVIRONMENT DURING ARMED CONFLICTS

Parviz Hasanov *

Abstract

In the framework of international cooperation on environmental protection issues in the economic regions of Karabakh and Eastern Zangezur, the Azerbaijan Republic's engagement is defined by the following characteristics: 1) The lack of diplomatic ties and direct bilateral communication between the disputing parties; 2) The predominance of vertical cooperation models; and 3) a low level of development of non-governmental/civil initiatives on the background of limited official relations between the conflicting parties. The aforementioned characteristics, in contrast to conventional forms, determine a more active use of potential based on institutional forms of international cooperation. While having no bilateral nature, these forms or formats do not only offer collaboration in the area of environmental protection on the post-conflict zone. Additionally, the efforts involved might be more successful if: 1) The active application of program methodology in the formulation of necessary environmental measures; 2) The extensive use of the potential for technical cooperation with the involvement of international partners; and 3) The inclusion of environmental dimension into international projects in the related fields that are planned or even in the implementation stage.

Keywords: *The Republic of Azerbaijan, international cooperation, environmental protection, armed conflicts, Karabakh, Eastern Zangezur.*

In the context of environmental protection for the Republic of Azerbaijan, the Nagorno-Karabakh conflict was one of the most complicated problems until 2020. Although the military operations ended 2 years ago, environmental problems are still on the agenda.

Before the liberation of the occupied territories of the Republic of Azerbaijan in 2020, the situation was evaluated as follows: In spite of the fact that "from the perspective of international law, Azerbaijan retains its sovereignty over conflict zone and the occupied regions adjacent to it", taken into account the fact of occupation, there are problems related to the fulfilment of pertinent sovereign rights in the framework of environmental protection that essentially preclude the appropriate possibilities [1, p.42].

However, from the perspective of international humanitarian law, "Armenia acted as a "occupying power" and was required to abide by the norms of international humanitarian law in connection to the lands it occupies, especially the Hague Conventions of 1907 and the Geneva Conventions of 1949" [1, p.42-43]. Articles 53 and 147 of the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War of August 12, 1949 deserve special attention. This is because damaging or destroying natural resources is a violation of the obligations outlined in these articles since they are regarded as non-military property that collectively belongs to private individuals [2, p.17].

Although the conflict is over, it is necessary to identify practical and effective means of protecting the environment in the occupied territories using maximal the potential of international cooperation, to the extent that this is acceptable to the Republic of Azerbaijan.

There are currently a number of distinguishable characteristics of the Republic of Azerbaijan's involvement in international legal cooperation on environmental protection issues in the Karabakh economic zone:

1. The lack of diplomatic ties between Armenia and Azerbaijan means that there is no direct bilateral interaction between the two countries regarding environmental pro-

* Ph.D., Baku State University

tection, which severely restricts the use of the potentials of institutional and conventional international legal cooperation.

The Karabakh issue is crucial to the process of normalizing relations between neighboring states; as a result, any delays in finding a solution make it impossible to forge strong ties between the parties in a range of potential areas of collaboration, especially on environmental issues. Additionally, the absence of direct and continuing relations between the parties has detrimental effects on the ability to follow trends and the environmental changes in the occupied region. For instance, from October 7th to October 12th, 2010, the co-chairs of the OSCE Minsk Group carried out a Field Assessment Mission in the occupied territories of the Republic of Azerbaijan that are adjacent to former Nagorno-Karabakh Autonomous Oblast in order to evaluate the general situation, including aspects pertaining to humanitarian aid and other issues. It is noteworthy that this was the first mission by the international community in the occupied territories since 2005 with this kind of a mandate and the first time UN representatives had been there in 18 years. [3] In other words, the Republic of Azerbaijan and the international community were deprived of the chance to directly verify information about the state of the environment in the occupied territories, at least for the time that has elapsed since the start of the conflict and until the dates indicated.

2. The implementation of environmental protection measures in the occupied territories in the context of the unsatisfactory state of relations between Azerbaijan and Armenia involves the use of the so-called model of vertical cooperation.

As previously mentioned, the weak and limited relationships between the Republic of Azerbaijan and the Republic of Armenia severely restrict, but do not entirely rule out, opportunities for cross-border collaboration on environmental issues in the Armenian-Azerbaijani border occupied regions. According to A.Maas, A.Karius, and A.Wittich, shuttle diplomacy between the two states is still effective considering the current situation. Through the extensive involvement of international partners in specific cross-border initiatives, where they carry out the agreed-upon measures separately and in parallel while avoiding direct contact with representatives of the other side, it offers an opportunity to integrate the parties. There is no such a horizontal relationship between Azerbaijan and Armenia, in contrast to the model outlined. [4, p.110]

The fact that the termination of such participation also results in the curtailment of relevant and important projects confirms that, in such circumstances, the active participation of international partners is a connecting and necessary link in the context of relations between the parties in the field of environmental protection. It should be added that "the first general conferences on the protection of water resources, soils, and migratory species as well as the first cooperative research on the conservation of transboundary ecosystems were established with international support of an organizational, expert, and financial nature". S.Vaisova asserts that the second half of the 1990s have seen the emergence of pertinent examples of joint work of representatives of the Republics of Azerbaijan and Armenia cooperating on projects related to the certain fields on environmental protection [5, p.140].

3. The Republics of Azerbaijan and Armenia have a limited official relationship in the area of environmental protection, which has a negative effect on non-governmental civil initiatives, aimed at resolving transboundary environmental problems. This results in the conservation of the current situation, exacerbating its negative effects.

According to S.Freizer, there are very few opportunities for information exchange and working relationships between official bodies and non-governmental organizations undertaking various cross-border initiatives, regardless of their scale, in both Azerbaijan and Armenia: "While the officials in charge of facilitating the process are mostly to blame, non-governmental organizations are also at fault since they lack detailed strategy for how to participate in negotiations and push for inclusion in agendas…" and these are very actual questions. [6, p.114] She uses the Caucasus Business and Development Network as an example, citing it as one of the largest and most comprehensive non-governmental peace initiatives, while also noting that there is a sense that issues relevant to the OSCE Minsk Group can't be properly discussed at the level of the aforementioned non-governmental organization.

As stated, in the framework of relations between two republics, S.Freizer's findings were particularly applicable to the sphere of environmental protection in the occupied territories before 2020 war: "Non-governmental organizations as actors supporting environmental cooperation are outside the political mainstream…" [5, p.46]. It is vivid that the implementation of some transboundary environmental projects was episodic and limited, which is still like this, as a result of the absence of an permanent and systematic discussion at both the official and civil initiative levels.

The Republic of Azerbaijan's participation in international legal cooperation on environmental issues in the Karabakh and Eastern Zangezur economic zones is characterized by the aforementioned facts, which are essentially a result of the actions of Armenia during occupation.

The problem about Sarsang reservoir, constructed in the Terter region of Azerbaijan in the 1970s and currently located in the peacekeeping occupied zone controlled by Russian military forces, is one of the most concerning in terms of potential dangerous consequences (height - 125 meters, and volume - 560 million m3). First and foremost, it was built to meet the needs of the population and industry for water resources to support the growth of agriculture and for energy (approximately 40–60% of supply of electricity in the border districts). For information, six irrigation canals of totally 240 km in length were constructed in Azerbaijan's Terter, Aghdam, Goranboy, Barda, Yevlakh, and Aghjabadi regions. [7, p.12; 8, p.64] However, during occupation, the reservoir's condition deteriorates catastrophically, which causes the more than 400,000 residents of the downstream area to have legitimate and reasonable concerns. In addition, "during spring floods, the water from Sarsang flows, which results increase of level of water and flooding of nearby fields, while on the other hand, during hot period of summer, the shutters are lowered, blocking the flow of water to villages of Azerbaijan" [9]. These factors prompted the Parliamentary Assembly of the Council of Europe to take the Sarsang reservoir situation into consideration. As a result, resolution 2085 was adopted on January 26, 2016, and it defined the relevant activities of the occupying power during its active control period as "environmental aggression" [10].

The situation regarding the protection of flora and fauna in the occupied territories is no less complex and it needs proper attention.

Currently, Azerbaijan has 890,000 hectares of specially protected natural areas, of which 42,997 hectares were occupied by Armenia. These areas include 152 natural monuments, 5 geological objects, 2 nature reserves, 4 sanctuaries, and 7 lakes with a diverse range of flora and fauna. Additionally, 247,352 hectares of forests are under occupation, including 13,197 hectares of forest land with hundreds of rare and valuable

tree species, such as plane tree, hazel, oak, evergreen boxwood, persimmon, Eldar pine and others. More than 460 species of trees and shrubs, including 70 indigenous species that cannot be found anywhere else in the world in their natural condition, are found growing in the post-occupation occupied territory, according to Ch.Gubadly (Mamedov).

In the lack of reliable information provided by Armenia on the status of the relevant objects, it can still be argued with some degree of certainty that their level of protection is far from optimal one. The fact that several cities, villages, agricultural lands, cultural and historical monuments, and specimens of flora and fauna were destroyed or burned down as a result of extensive fires that occurred in the eastern part of the occupied territories of the Republic of Azerbaijan in 2006, confirms it and prompted a response from the international community, in particular the Organization of Islamic Cooperation (OIC). The OIC "demanded that Armenia must take immediate action as the occupying power to avert an ecological catastrophe. The fires destroyed the ecosystems of these occupied territories and other adjacent regions of Azerbaijan to them, rendering them unsuitable for human habitation and agricultural purposes".

Despite the urgent importance of these concerns for the Republic of Azerbaijan, progress in finding solutions has, like with other environmental difficulties, been very slow up to this point. This is because the potential for international legal cooperation has not been fully implemented. S.Vaisova, for instance, points out that despite the support of the international community, there is no formal bilateral agreement between two republics regarding the general management of water resources, particularly the Kura and Aras river basins, and environmental protection, including the territories of the Azerbaijan Respublic under peacekeeping control . It should be mentioned that the Republic of Azerbaijan's institutional forms of international legal cooperation on environmental problems are more advanced than the formats of cooperation that are based on contractual model (however, none of them are bilateral and none specifically provide for activities in the area of environmental protection in former Nagorno-Karabakh territory and adjacent regions to it).

An example is the Regional Environmental Center for the Caucasus (hereinafter - RECC), which was founded in 2000 at the initiative of the governments of Azerbaijan, Armenia, Georgia, and the EU with the following triple objectives:

1) Assistance in the resolution of environmental issues in the Caucasus by promoting strong partnership between non-governmental organizations, governmental bodies, corporate groups, the local population and as well as all other parties interested in solving environmental problems at the national and regional levels in accordance with the principles of the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention), dated 25.06.1998;

2) Assistance all non-governmental organizations (NGOs) working in the environmental sector as well as other structures and groups with an interest;

3) Improvement the level of participatory democracy in decision-making, which will help the Caucasian states further their transition to a democratic civil society.

The RECC's board, which serves as both its governing and representative body, is one of its distinguishing characteristics. The board whose has totally 9 representative is consisting of representatives from the governments of Azerbaijan, Armenia, and Georgia (one rep.), NGOs (one rep. from relevant organizations of that states), as well as international donors, the European Commission, the private or scientific sector. In other

words, an effort was made to create a continuous dialogue between representatives of governmental and non-governmental organizations in the South Caucasus states about environmental issues, including those pertaining to the territory of Nagorno-Karabakh, within the framework of the RECC.

The researchers give the RECC work's outcomes a very high rating. T.Herman specifically points out that despite the fact that at first collaboration was primarily planned at the level of NGOs, all three states finally perceived the potential of interstate cooperation and actively used it. In particular, "the work of the RECC, which determined that this was not usual case, reduced tensions between Azerbaijan and Armenia regarding heavy metal pollution from the rivers running through the region of Karabakh. Despite the relative narrowness of the problem, these actions promote mutual understanding, peace, and increased cooperation in the future, but on different issues. In order to benefit from the contractual regulation of the integrated management of the transboundary basin of the Kura and Aras rivers, further collaboration between the three South Caucasus governments is conducted within the framework of a project… Contacts between the three South Caucasus governments are facilitated by initiatives like RECC, which results in effective cross-border cooperation to combat common dangers".

The Environmental and Security Initiative (hereinafter ENVSEC), established by the OSCE, United Nations Development Programme (UNDP), and United Nations Environment Programme (UNEP) in 2003, is another initiative on environmental issues in which all the South Caucasus nations take part. Since 2006, the Regional Environmental Center for Central and Eastern Europe (REC) and the United Nations Economic Commission for Europe (UNECE) have also joined. As said, "ENVSEC partners are aware that prevention, international conversation, and good neighborly ties are the best ways to respond to problems in the sphere of environment and security. For this reason, they support governments and non-governmental organizations in identifying problems and putting forward cooperative initiatives to resolve them". The major forms of ENVSEC activities include the organizing roundtables and seminars as well as the execution of various initiatives with a focus on environmental protection, resource exploitation in conflict zones, and resource protection in general.

The following questions are among the priority areas of cooperation between ENVSEC and the South Caucasus states for the years 2015 to 2020: 1) management of shared water resources; 2) toxic and industrial waste; 3) climate change and natural disasters; 4) Environmental good governance.

The fact that "despite ongoing ... clashes in the zones of frozen conflicts in the South Caucasus, ENVSEC has significantly succeeded in assessing environmental and security problems in areas affected by such kind of conflicts, is confirmation of the significant role ENVSEC has played in ensuring international legal cooperation on environmental issues in the occupied territories of the Republic of Azerbaijan. In the Nagorno-Karabakh and border regions damaged by the fires during October 2006, ENVSEC gave the OSCE-led Environmental Assessment Mission significant support. The relevant Mission conducted an environmental assessment of the massive fires, which took place in the area throughout the summer period, with the assistance of both international and local specialists from both sides of the line of contact. The Mission provided its recommendations on further prospects for regional cooperation and confidence building in the Nagorno-Karabakh region by making recommendations on how

to rebuild the areas damaged by the flames and prevent their recurrence". It is noteworthy that the outcomes of the aforementioned Mission, among other things, had their logical continuation within the three-staged projects "Enhancing national capacity on fire management and wildlife disaster risk reduction in the South Caucasus", which were carried out successively from 2008 to 2016 with the involvement of Azerbaijan, Armenia, and Georgia. This strategy further demonstrates the desire to guarantee consistency and consistency in ENVSEC's operations.

"One of the most interesting and significant aspects of ENVSEC is, perhaps, not so much its connection with environmental issues with security, but so much its preventive measures to avoid any conflict at not always conventional levels of activity expected from international institutions", F.Borthwick believes. "Although it is a small association with limited political and financial clout, it plays a special role at the regional and community levels as a mediator (third party) between contending governments". In other words, ENVSEC "promotes peace via human security, multilateralism, institutional capacity, as well as civil society, by focusing on its operations as a third party in mediation process on environmental issues".

The Republics of Azerbaijan and Armenia are parties to numerous multilateral institutional collaborations on environmental challenges, so, abovementioned examples are not the only ones: "Initiatives and support are provided by European (OSCE, EU and NATO) and international institutions (UNEP, UNDP), neighboring states (Georgia), expert groups (International Union for Conservation of Nature, WWF, Friends of Earth International), environmental and development agencies (The Federal Ministry for Economic Cooperation and Development of Germany - BMZ, USAID, Austrian Development Agency - ADA), as well as non-governmental organizations and foundations (i.e. Caucasus Network of Environmental Non-Governmental Organizations)" . In particular, the Ecoregional Conservation Plan for Caucasus (ECP) is being undertaken with financial assistance from the BMZ and consists of four parts: 1) Support Program for Protected Areas; 2) Caucasus Nature Fund; 3) Transboundary joint Secretariat; 4) The program for the creation of an eco-corridor in the South Caucasus (Eco-Corridors Fund for Caucasus. Although the aforementioned institutions' operations are generally geared toward environmental protection, they are not geographically limited to the occupied areas, which make it difficult to consistently respond to specific environmental preservation-related concerns in an effective manner.

In our view, the existing situation might be made better by taking into consideration the following suggestions in the framework of Republic of Azerbaijan's international legal cooperation on environmental issues in the occupied territories of Azerbaijan:

1. In order to ensure a systematic and consistent approach when taking part in various international projects, the Republic of Azerbaijan's development of international-legal cooperation on environmental protection issues in the occupied territories implies the viability of creating a single programme document at the national level that will determine the main directions of the environmental policy related to the post-conflict territories.

The programme method is currently employed extensively in the Republic of Azerbaijan to formulate environmental policy; nevertheless, its potential has not been fully used in the case of the occupied regions. In addition, the involvement of a sizable number of foreign actors in a variety of formats in collaboration on environmental

issues in the Karabakh and Eastern Zangezur economic zones necessitates giving environmental policy the equivalent direction in terms of systemicity, complexity, and consistency. In the lack of a cohesive and all-encompassing strategy, there is a risk of fragmentation and a decrease in the effectiveness of current international projects due, in particular, to duplication of activities or the imposition of authorities.

2. Formation of favorable conditions for expert-level multilateral international discussions on environmental issues in the occupied territories, in order to find solutions that are advantageous to both parties while avoiding the complicated political tensions between Azerbaijan and Armenia.

According to S.Freizer, the prospect of include, in particular, experts from the non-governmental sector in the format of working groups to look for solutions to technical problems is not given enough consideration in the work of the OSCE Minsk Group. It should be emphasized that the researcher attributed environmental issues with post-conflict region's development to a variety of technical issues that should be resolved in the relevant working groups. As an example of these issues, she provides the example of cooperative administration of common resources (and water, at first). She states that "the interaction between civil society and government circles can promote synergy by giving an opportunity to non-governmental organizations to share their experience, understanding, and joint solutions that they have developed over so many years of dialogue in order to overcome obstacles in the discussions of the OSCE Minsk Group" . We believe that such a strategy is completely justified, but in this example in the case, it is not advised to restrict it to the OSCE Minsk Group because such a strategy could be applied to a larger range of international organizations carrying out ecological projects, including those in the occupied territory. It should be mentioned that successful examples of cooperation at the expert level have taken place in the practice of the Republic of Azerbaijan. The South Caucasus River Monitoring Project is one of them. It was carried out between 2002 and 2009 with NATO support with the intention of developing a social and technical infrastructure for international monitoring of water quality in Transboundary Rivers and the exchange of data on monitoring its quantity, as well as support for basin management among the South Caucasian republics. According to the project's summary, "not only were valuable data acquired, but also professional contacts were made between the participants. The latter aspect is more likely to demonstrate its significance in the long term…"

3. Making better use of the post-conflict territories potential for environmental cooperation underscores the necessity of include an environmental component in any upcoming or ongoing international projects in related fields.

The governments of the South Caucasus states frequently view environmental issues as a barrier to economic development today, according to A.Maas, A.Karius, and A.Wittich: "The idea of the potentials of economic use of the prospects of protected areas, for example, such as the case of eco-tourism, is only gradually emerging". "The parties may advance on two grounds by engaging in dialog and collaborating together on economic and environmental issues, according to this statement: 1) improving the economic and environmental situation of a substantial part of the population; 2) supporting peacekeeping actions and changing perceptions of each other via regular cooperation and communication. Mutually beneficial activity in these regions may even serve as a symbol that peaceful coexistence is possible, reflecting the opposite example of the atmosphere of hostility". In this context, we believe that adding an environmental di-

mension to plan or ongoing international projects, particularly those targeted at promoting economic development, could be the most successful.

The Caucasus Business and Development Network's struggle against an agricultural pest like the American white butterfly (Hyphantria cunea) is a practical demonstration of the possibility of such a combination of environmental and economic concerns. Aside from reducing agricultural productivity, the expansion of the aforementioned insect was "the most serious environmental problem in recent years in the areas next to the Enguri River and beyond".

Thus, international legal cooperation in the field of environmental protection in occupied territories underscores the Republic of Azerbaijan's desire to ameliorate the environmental situation in that economic zones using any and all measures possible. Simultaneously, relevant efforts could be more effective if the programme method is actively used in developing the necessary measures, making extensive use of technical cooperation opportunities with international partners' participation, and incorporating an environmental dimension into planned or already implemented international projects in related fields.

References:

1. Gubadly (Mamedov) Ch. Ekologicheskoe sostoyanie v okkupirovayyyh Azerbajdzhanskih territorijah [Ecological condition on the occupied territories of Azerbaijan] / Centr Informacionno-kommukacionnyh tehnologij "Virtualnyj Karabah". URL: http://www.virtualkarabakh.az/read.php?lang=3&menu=76&id=194#.W21ndiQzYjJ (Accessed 19.02.2019)(in Russian)

2. Merezhko A.A. Problema Nagornogo Karabaha i mezhdunarodnoe pravo [Problem of Nagorno-Karabakh and International Law]. 2013. Kiev: Izdatelskij dom Dmitrijya Burago. 208 s. (in Russian)

3. Borthwick F. International Organizations' Co-operation Around Environment and Security. P. 159–184; In Stec S., Baraj B. (eds.) Energy and Environmental Challenges to Security. 2009 Dordrecht: Springer. 455 p.

4. Campana M., Vener B.-B., Lee B.-S. Hydrostrategy, Hydropolitics, and Security in the Kura Araks Basin of the South Caucasus. 2012. Journal of Contemporary Water Research & Education. Vol. 149. Issue 1. Pp. 22-32.

5. Freizer S. Twenty years after the Nagorny Karabakh Ceasefire: an Opportunity to Move Towards More Inclusive Conflict Resolution. 2014. Caucasus Survey. Vol. 1. No. 2. P. 109–122.

6. German T. Regional Cooperation in the South Caucasus: Good Neighbors or Distant Relarives? 2016. N.-Y.: Routledge. 201 p.

7. Maas A., Carius A., Wittich A. From Conflict to Cooperation? Environmental Cooperation as a Tool for Peace-building. P. 102–120; In Floyd R., Matthew R. (eds.) Environmental Security: Approaches and Issues. 2013. N.-Y.: Routledge. 302 p.

8. Sevdimaliyev R. International Political and Legal Aspects of the Threats Related to the occupied Sarsang Water Reservoir for Azerbaijan. P. 62–69; In Gurbanov A., Imanov F., Garibov A., Novruzova L. (eds.) Global and regional hydropolitical problems in the context of international cooperation and security (International Conference, Baku, November 25, 2014). Collection of speeches and articles. 2015. Baku: Aston-Print. 168 p.

9. Suleimenova Z. Water Security in Central Asia and the Caucasus – A Key to Peace and Sustainable Development, MPFD Working Papers WP/18/01, May 2018. 28 p.

10. Waisová S. Environmental Cooperation as a Tool for Conflict Transformation and Resolution. 2017. Lanham: Lexington Books. 197 p.

11. Wittich A., Maas A. Regional Cooperation in the South Caucasus: Lessons for Peacebuilding, from Economy and Environment. Initiative for Peacebuilding, 2009. 34 p. URL: https://www.adelphi.de/de/system/files/ mediathek/bilder/us_038_-_regional_cooperation_in_the_south_caucasus_1.pdf (Accessed 19.02.2019).

Date of receipt of the article in the Editorial Office
(19.08.2022)

REGIONAL HUMAN RIGHTS PROTECTION MECHANISMS

Lamiya Zeynalova*

Abstract

After the World War II, with the establishment of the United Nations, important steps were taken in protecting human rights and ensuring gender equality across the world. In particular, in the last 50 years, the deepening of the globalization process and international economic integration, as well as the expansion of cultural and political relations, made it possible for women to be more closely involved in social and political processes. In all states, to one degree or another, the legal framework for the protection of women's rights and the provision of gender equality was formed, and mechanisms were created for the implementation of these laws. As a result of global, regional, and national policies pursued for the protection of human rights, including women's rights, and ensure gender equality, women in most countries of the world are now closely involved in economic, political, and social life on an equal footing with men.

Keywords: *human rights, women's rights, European Court, Commission for Gender Equality, regional mechanism, OSCE agreement with Azerbaijan.*

One of the most important values achieved by modern civilization is related to the protection of human rights. As a result, the problems in this field in the world today are global problems rather than internal problems of individual countries. The expansion of international cooperation, in particular, the establishment of the UN, allowed the creation of the necessary mechanisms for the protection of human rights. Every country is internationally responsible for people whose rights are violated. Modern human rights mechanisms allow complaints to be filed through local, regional, and international mechanisms for violations of rights. The UN mechanisms for the protection of human rights, including women's rights, are extensive and effective. In addition to these mechanisms, there are also regional and national ones. Regional and national mechanisms are formed on the basis of principles determined by international mechanisms and cannot reduce their requirements. On the contrary, the practice of implementing more effective measures through regional and national mechanisms for the protection of human rights is possible and exists.

Regional mechanisms for the protection of human rights are important from the point of view of making more flexible appeals in cases of rights violations and taking regional specificity into account. Regional mechanisms are resorted to when national mechanisms do not justify themselves. At present, there are regional mechanisms covering European countries, African countries, Caribbean countries, and American countries and providing for the protection of human rights. As we mentioned, regional mechanisms are more flexible than UN mechanisms and take into account the specificities of the region. On the other hand, such mechanisms take into account not only the protection of human rights but also the attitude of a specific citizen toward society. Among the regional mechanisms currently protecting human rights, including women's rights, we can point to the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE), the Commonwealth of Independent States (CIS), the African Union, the Organization of American States, and the Organization of Islamic States. Since the research is conducted on the example of Azerbaijan, we will get acquainted with the mechanisms of protection of human rights, including women's rights,

* Ph.D. Candidate, Baku State University

within the framework of the Council of Europe, the OSCE, the CIS, and the Organization of Islamic States.

The human rights protection mechanism within the framework of the EU provides for the implementation of the European Convention on Human Rights. This international treaty, which was adopted by the newly created Council of Europe in 1950, but entered into force on September 3, 1953, regulates the protection of human rights and political freedoms in Europe. It is on the basis of this Convention that the European Court of Human Rights (ECHR) was established. The scholars, Andreadakis, S. [1], Helfer [2], for example, note that the ECHR has influenced the legal systems of member states in a short period of time as an effective mechanism in the field of human rights protection.

It should be noted that the Convention was essentially formed in response to the threat to the protection of human rights as a result of the spread of communist ideology in Eastern European countries during World War II and the subsequent period.

The CoE structure is primarily composed of six bodies: 1) the Committee of Ministers; 2) the Parliamentary Assembly; 3) the European Congress of Local and Regional Authorities; 4) the ECHR; 5) the Human Rights Commissionerate; and 6) the Conference of INGOs. In addition to these bodies, 1) the General Secretary of the Council and 2) the Deputy Secretary General are included in the organizational structure of the Council. It should be noted that the main office of the JSC is located in Strasbourg, France. The Committee of Ministers is the main decision-making body of the CoE. Foreign ministers of member states or their permanent representatives gather here. The second most important body in the Council of Europe is the Parliamentary Assembly. Representatives determined by the parliaments of each member state are represented in this body. Another important body is the Congress of Local and Regional Authorities. 636 members representing more than 200,000 local and regional authorities gather here to discuss democratic changes and the development of self-government institutions at the local and regional level. This body operates mainly based on the principles of the European Charter on Local Self-Government. The ECHR, which is the subject of our research, is a body that operates permanently and serves to protect the rights of the citizens of the member states stipulated by the European Convention on Human Rights. Another body that is directly related to human rights is the Human Rights Commissioner of the Republic of Azerbaijan. As stated by Dunya Mijatovic, Commissioner for Human Rights of the Council of Europe "Today, the system of human rights protection in Europe is one of the most advanced in the world. The European Convention on Human Rights, the Court, the different monitoring mechanisms and institutions, as well as my Office, work to ensure that States uphold their obligations to protect, respect and fulfil human rights. However, structural shortcomings and a lack of political will still hinder the full realization of human rights". [3]

The EU Commissioner for Human Rights is different from the ECHR and is a non-judicial institution. This body was established in 1999 and works to raise awareness of human rights and instill respect for human rights in member states. The powers of the Commissioner for Human Rights are defined in CoE Resolution No.50(99) on the Commissioner for Human Rights [4]:

promote education in and awareness of human rights in the member States and contribute to the promotion of the effective observance and full enjoyment of human rights in the member States;

- promote education in and awareness of human rights in the member States;

• identify possible shortcomings in the law and practice;

• facilitate the activities of national ombudsmen or similar institutions in the field of human rights;

• provide advice and information on the protection of human rights in the region.

Within the premises of the Council of Ministers, the Gender Equality Commission (CGE) also operates. The CGE was created to ensure that gender equality is mainstreamed in all Council of Europe policies and to bridge the gap between commitments made at the international level and the reality of women in Europe. The members of this commission are appointed by the member states. The Commission advises other bodies of the Council of Europe and member states on ensuring gender equality. The CGE supports the implementation of the six objectives of the Council of Europe Gender Equality Strategy for 2018-2023. The CGE has wide powers. For example:

• To ensure the follow-up of the relevant decisions taken at the 131st Session of the Committee of Ministers (Hamburg, May 21, 2021) and to contribute to the implementation of the main strategic priorities related to its special area of expertise;

• Monitor and support the implementation of the Council of Europe Gender Equality Strategy (2018-2023), prepare the Gender Equality Strategy (2024-2029), and monitor and support its implementation;

• Conducting legal and political analyses in member states, including on the basis of the findings of monitoring mechanisms, as well as conducting exchanges on trends, development, and good practices;

• To conduct needs assessments and make proposals for general policy development, including the determination of key issues and standards for member states within their jurisdiction; and etc.

After Azerbaijan gained independence in 1991, the process of integration into the global world, including Europe, intensified. Since 1993, when National Leader H.Aliyev took over the leadership of the country again, the integration of Azerbaijan into the European family has accelerated. The decrees signed by H. Aliyev on July 8, 1996, "On measures to implement the cooperation program between the Council of Europe and the Republic of Azerbaijan" on January 20, 1998, "On measures to deepen cooperation between the Council of Europe and the Republic of Azerbaijan" and the decree of May 14, 1999 on measures to deepen cooperation between the Republic of Azerbaijan and the Council of Europe and protect the interests of the Republic of Azerbaijan in Europe" played an important role in the integration of our country into the Council of Europe. Since January 2001, Azerbaijan became a full member of the Council. Along with political and economic dividends, Azerbaijan's CoE membership was of great importance in aligning Azerbaijani laws on human rights protection and gender equality with European standards. As a full-fledged member of the CoE, the ratification of the Conventions adopted by the Council by Azerbaijan created wide opportunities for the protection of women's rights and ensuring gender equality in our country.

The International Conference of Non-Governmental Organizations is an institution that includes more than 400 organizations. This Conference conveys the voice of the civil societies of the member states to the Council of Europe. All bodies of the CoE are not only independent, but also interconnected. For example, the issue related to complaints referred to the ECHR is referred to the Committee of Ministers in the implementation phase. Or the CoE works in close cooperation with the Committee of Ministers of the Parliamentary Assembly.

As a regional mechanism, the European Convention on Human Rights enables the protection of the rights of more than 840 million people in 47 countries of the Council of Europe. The articles of the Convention are in full compliance with the UN Universal Declaration of Human Rights. However, despite the rapid consideration of regional peculiarities and changes related to human rights and speeding up the solution of the problem made the adoption of such a document necessary. The experience of protecting human rights in the last 70 years shows that "regional cooperation in the field of human rights complements the forms of universal cooperation and, in some aspects, ensures the protection of basic rights more effectively. [5] On the other hand, "regional legal systems are closest to the structure of society; they clearly reflect the ethnic, confessional, and socio-cultural characteristics of the united community." [6] The executive, legislative and judicial authorities of the countries acceding to the Convention are oblidged to protect the rights defined in the Convention. The citizens of these countries can apply to the ECHR, provided that they use all the mechanisms related to the protection and restoration of their rights in their country.

Another important difference between the regional mechanisms for the protection of human rights, especially the ECHR, and the UDHR is the existence of legal mechanisms for the application of the former in specific cases. Thus, in cases of violation of any article of the ECHR, there is an opportunity to apply to the European Court of Human Rights (ECHR). All citizens of Member States can take advantage of this opportunity. The implementation of the ECHR is monitored by three bodies of the Council of Europe, namely the Committee of Ministers, the Commissioner for Human Rights, and the ECHR. This convention is dynamic and is constantly being improved by additions to it.

As it was earlier noted, the European Union citizens can apply to the ECHR in case of the violation of their rights. However, the application procedure is not that simple. First of all, it should be distinguished as to which violation of law should be referred to the ECHR. That is, the ECtHR can only hear cases related to violations of the ECHR and its Protocols. On the other hand, the Court has the authority to hear cases about alleging violations against a state party. The ECHR can be applied when one of the rights guaranteed by the ECHR and its Protocols, such as "right to life", "right to a fair trial (civil and criminal limb)", "right to respect for private and family life", "freedom of expression", "freedom of opinion, conscience and religion", “right to an effective remedy", "right to peaceful enjoyment of property" and "right to free elections" are violated. The Convention and its Additional Protocols prohibit

1) torture and inhuman or degrading treatment or punishment;

2) arbitrary and unlawful detentions;

3) discrimination in the exercise of the rights and freedoms defined in the Convention;

4) collective expulsion of aliens;

5) death penalty;

6) the expulsion of a citizen from the country or denial of entry to the country due to his attitude towards his country.

Some scholars point out that there are some problems with the activity of the ECHR. For instance, according to Maša Marochini [7], "despite the fact that the Convention system is the most effective system in terms of ensuring, there are some problems in the individual protection of civil and political rights." One of the biggest problems is

the overloading of the court. In 2012, the number of applications increased by 1% compared to 2011 and reached 65,150. This growth continues. Protocol No. 14 to the Convention allowed the sitting a single judge. The expansion of the powers of the three judges' committee was also an important change".

The 2018 Report on the activities of the European Court of Human Rights also mentions the large number of applications and their continued growth. However, the number of applications in 2018 was 56,000, a significant decrease from 2011 and 2012. An interesting fact is that among the applications, there are more from Russia, Romania, Ukraine, Turkey, and Italy, and there is also the name of Azerbaijan. Simplifying procedures, expanding language skills, and increasing the number of lawyers familiar with ECHR procedures have a certain effect on the number of such applications. [8]

The protection of women's rights and gender equality are of particular importance in the activities of the CoE regarding human rights. The Council of Europe and its relevant bodies have also developed certain standards related to women's rights and gender equality. According to Article 1 of the European Convention on Human Rights, which is called "Obligation to Respect Human Rights", "High Contracting Parties ensure the rights and freedoms defined in Section 2 of this Convention for everyone under their jurisdiction" [9]. This article establishes that people have equal rights regardless of gender, race, and other differences.

The Convention against Trafficking in Human Beings, adopted by the Council of Europe in Warsaw in 2005, aims to prevent and combat trafficking in women, men, and children. This Convention is also important in the development, implementation, and evaluation of measures to promote gender equality under this binding document. In Article 1 of the Convention, "combating and preventing human trafficking by ensuring gender equality" is listed among other goals. There is also an independent monitoring mechanism to assess how the provisions of the Convention are being implemented by member states.

Taking into account the recommendations of the CoE Committee of Ministers addressed to the Member States, as well as the recommendations of the PACE, Article 6 of the Convention stipulates that in order to eliminate the demand that creates conditions for all types of exploitation that lead to human trafficking, and especially the exploitation of women and children, each party must implement and strengthen legal, administrative, educational, social, cultural, and other measures.

The Convention considers measures to protect and promote the rights of victims of human trafficking by ensuring gender equality. Paragraph 1 of Article 10 of the Convention, which is called "Identification of the victims" states that "Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organizations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention".

Article 6 of the Convention envisages "preventive measures, including educational programs for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being".

Another important document adopted by the Council of Europe in the field of protecting women's rights and ensuring gender equality is the "CoE Convention on preventing and combating violence against women and domestic violence" (the Istanbul Convention). A two-pillar monitoring mechanism is envisaged for the evaluation of the implementation of the Istanbul Convention.

As a regional mechanism, the CoE Council of Ministers has prepared various recommendations for the Member States to protect women's rights and ensure gender equality. For example, Recommendation No.(79)10 requires Member States to adapt their national legislation and regulations to international standards regarding women migrants. The document recommends to take measures to provide the necessary information to migrant women, to prevent discrimination against them at work, provide for their socio-cultural advancement, to provide access to vocational training, and other various trainings.

According to recommendation No.R(85)2 of the Committee of Ministers, Member States are advised to create a system of legal remedies against sex discrimination. This system should implement and strengthen measures to promote equality between women and men. These and many other Committee of Ministers Recommendations are important for the protecting women's rights, increasing the role of women in the life of society, especially in political and economic life, and ensuring gender equality in society.

One of the important regional mechanisms for ensuring the protection of women's rights and gender equality is the OSCE. As a regional organization, the OSCE brings together 57 countries. The issues related to the security and cooperation of member states, including military-political, economic, and environmental issues, as well as human rights issues, are discussed within the framework of this organization. OSCE decisions are made on the basis of consensus among member states with the same rights.

In the management structure of the OSCE, decision-making bodies and executive bodies are distinguished. Regional offices and some OSCE-related bodies also play an important role in the activities of the OSCE. The function of ensuring human rights and gender equality in the structure of this organization is carried out by the "Democratic Institutions and Human Rights" Office of the OSCE, located in Warsaw. This Office supports democratic elections, protection of human rights, the rule of law, tolerance, non-discrimination, and Roman law in Member States.

In the first years of cooperation between Azerbaijan and the OSCE (Security and Cooperation Treaty in Europe until 1995 - OSCE), the main focus was on the fact of occupation of large areas of Azerbaijan as a result of Armenia’s military aggression and that hundreds of thousands of people lived as refugees and displaced people. Within the frame of this cooperation, the provision of gender equality and protection of women’s rights were also issues of priority along with this problem. The Government of Azerbaijan and the OSCE ODIHR have signed a Memorandum of Understanding in 1999. However, unfortunately, the agencies of the OSCE, especially the Minsk Group have not taken any specific measures for the restoration of the rights of hundreds of thousands of Azerbaijani women and children, violated in this armed conflict. In 2020, under the leadership of victorious Supreme Commander-in-Chief I. Aliyev, the Azerbaijani Army returned the occupied lands of Azerbaijan, putting an end to the injustice that had prevailed for nearly 30 years.

References:

1. Andreadakis, S. (2013). "The European Convention on Human Rights, the EU and the UK: Confronting a Heresy: A Reply to Andrew Williams". European Journal of International Law. 24 (4): 1187–1193. doi:10.1093/ejil/cht063

2. Helfer, Lawrence R. (1993) "Consensus, Coherence and the European Convention on Human Rights," Cornell International Law Journal: Vol. 26: Iss. 1, Article 4. Available at: http://scholarship.law.cornell.edu/cilj/vol26/iss1/4

3. Council of Europe. Commissioner for Human Rights. [Электрон ресурс]: https://www.coe.int/ru/web/commissioner/the-commissioner

4. Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (adopted by the committee of ministers on 7 may 1999 at its 104th session). [Электрон ресурс]: https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016805e305a

5. Nebratenko O. Mexanizmi zashiti orav cheloveka v Rossiyskoy Federasii: monoqraf. Rostov na Donu, 2015, p.152 (in Russian)

6. Anisimov P.V., Papichev N.V. Pravovoe requlirovanie zashiti prav cheloveka / pod. red. F.M.Rudinskoqo. Volqoqrad, 2003. p.15 (in Russian)

7. Maša Marochini, (2014) The interpretation of the European Convention Human Rights Zbornik radova Pravnog fakulteta u Splitu, qod. 51, 1/2014., str. 63.- 84.

8. Annual Report of Council of Europe – European Court of Human Rights, 2019. [Электрон ресурс]: www.echr.coe.int/Documents/Annual_report_2018_Eng.pdf

9. https://www.coe.int/az/web/compass/the-european-convention-on-human-rights-and-its-protocols

Date of receipt of the article in the Editorial Office
(11.07.2022)

BALANCING COMPETING INTERESTS: TRADEMARK PROTECTION AND FREEDOM OF EXPRESSION

Ali Alakbarli*

Abstract: *As trademark protection affords its holder monopoly over a certain symbol, i.e. the right to suppress others' commercial speech, it clashes with free speech considerations. The tensions between interests of trademark owners in protecting their marks's public image and originators of artistic expression in free speech have been particularly pronounced in the context of parodies. In view of the signifance of resolution of such interplay, this Article attempts to analyse the prevailing approach of US courts in this matter and explores how to reconcile those interests.*

Keywords*: trademark protection, parody, freedom of expression, First Amendment, artistic expression, expressive works*

A form of creative expression protected under the First Amendment to the United States Constitution (First Amendment), parodies appropriate original elements of an object while altering its other features in order to achieve a humorous or critical effect. [3, para.493-494; 15, p.1177] Given their symbolic richness, famous trademarks have proven susceptible to parodies. [13, p.177] The mocking aspect of parodies often clashes with the trademark owner's interest in preserving the mark's positive public image, prompting them to sue parodists. Since trademark law grants one private entity the right to suppress others' commercial speech, it inherently competes with freedom of expression considerations supported by the First Amendment. [1, p.382]

Traditionally, US courts addressing the issue of trademark parody either dismissed or evaded reference to free speech considerations, deeming false or misleading commercial speech outside the ambit of the First Amendment. [8, p.878; 12, p.737-738] Even when courts started invoking free speech concerns from the late 1980s onwards, absence of tools particularly designed for parody led to courts' treatment of it in an ad hoc way based on their own subjective evaluation of the value of parody and the morality of free rides. [8, p.878; 15, p.1192] A somewhat solid test for balancing consumer confusion concerns with free speech concerns in the context of parodies was articulated by United States Court of Appeals for the Second Circuit (the Second Circuit) in *Rogers v. Grimaldi*, which was adopted by United States Court of Appeals for the Ninth Circuit (the Ninth Circuit) in balancing competing Lanham Act and First Amendment interests in *VIP Products LLC v. Jack Daniel's Properties, Inc.*

VIP Products LLC ("VIP") designs, markets, and sells dog toys mimicking trade dress of popular beverage brands in a light-hearted way. [18, para.1172] Making comic and dog-themed alterations to the square bottle and labeling of Jack Daniel's Properties, Inc's ("JDPI") Tennessee whiskey, VIP launched a new dog toy called "Bad Spaniels" in 2013. The "Bad Spaniels" toy is in the shape of a liquor bottle and features a wide-eyed spaniel over the words "Bad Spaniels", "the Old No.2, on your Tennessee Carpet. VIP's intent behind designing the "Bad Spaniels" toy was to match the bottle design for Jack Daniel's "Old No.7 Brand". These design elements include the size and shape of the product, the use of white lettering over a black background, and font styles. When finished, the "Bad Spaniels" product featured all the elements of the Jack Daniel's Trade Dress,

* Ph.D. Candidate, Department of Intellectual Property Law, Baku State University

including the bottle shape, color scheme, and trademark stylization, as well as the word "Tennessee," and the font and other graphic elements. [18, para.1173]

In 2014, JDPI demanded that VIP cease all further sales of the Bad Spaniels toy. VIP responded by filing this action, seeking a declaration that the Bad Spaniels toy does not infringe or dilute any claimed trademark rights of JDPI and that Jack Daniel's trade dress and bottle design are not entitled to trademark protection. VIP also sought cancellation of the Patent and Trademark Office registration for Jack Daniel's bottle design. JDPI counterclaimed, alleging state and federal claims for infringement of JDPI's trademarks and trade dress, and dilution by tarnishment of the trademarks and trade dress. [18, para. 1173]

The district court found that VIP's use of JDPI's trademarks to sell pun-laden dog toys was likely to confuse consumers, infringed JDPI's trademarks, and tarnished JDPI's reputation. Deeming Bad Spaniels an expressive work entitled to the First Amendment, the Ninth Circuit, however, held that VIP's free speech interests insulated its use of JDPI's trademarks as its own marks on humorous dog toys from infringement claims and rendered VIP's commercial dog toys "noncommercial", hence constituting an exemption from dilution-by-tarnishment claims. [18, para.1172] Still, JDPI could convince the Supreme Court to grant *certiorari* to address the alleged circuit split, which does not exist actually. [6]

There are two questions to be addressed before the Supreme Court: whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, or instead receives heightened First Amendment protection from trademark-infringement claims; and whether humorous use of another's mark as one's own on a commercial product is "noncommercial", thus barring as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act ("TDRA"). [6]

Traditionally, courts apply the likelihood-of-confusion test to claims of trademark infringement under the Lanham Act. Where the infringing use involves expressive elements, however, "the traditional test fails to account for the full weight of the public's interest in free expression." [10, para.900] Instead, courts have adopted a two-prong *Rogers* test in the context of artistic expressions, such as parodies, in order to determine if such expression merits First Amendment protection. [3, para.495] Under *Rogers*, no Lanham Act infringement claim arises unless the defendant's use of the trademark is "either not artistically relevant to the underlying work" or "explicitly misleads consumers as to the source or content of the work." [14, para.999] Contrary to JDPI's contention, virtually every circuit to consider expressive works in the context of competing interests has sanctioned *Rogers* and thus no circuit split exists on the issue.

The multipronged likelihood-of-confusion test was originated for and performs well in the context of commercial trademarks assuming exclusively commercial functions, implying it was not tailored to treat works of expressive nature that entails reference. Expressive works including parodies do not admit of application of the multipronged test since they are necessarily and adequately referential. [10, para.792] The vagueness, costliness, time-intensiveness and unpredictability of their results constitute the major drawbacks of one-size-fits-all multifactor tests. Owing to such indeterminacy, parties litigating the multipronged test must develop and present evidence on all of the factors, unaware as to which of them will be deemed more or less significant in the eyes of the court. If the facts relevant to the applicable factors are contested, factual findings

must be made with respect to each of these factors, and these findings are subject to review only for clear error.

Yet another complication with such multifactor tests is that, as regards the parody, the significant role of factors potentially benefitting the senior user in commercial contexts are reversed when considered in respect of expressive works. To illustrate, the strength of an allegedly infringed mark is usually to the advantage of the senior user, but the converse should apply to parodies, considering "it is precisely because of the mark's fame and popularity that confusion is avoided, and it is this lack of confusion that a parodist depends upon to achieve the parody." [16, para.492] A multifactor test with factors reverse in significance from time to time could barely regard a good one in terms of rule of law, predictability or consistent application. In contrast, *Rogers* can be applied consistently within its scope, and attenuates the risk of litigating a lengthy list of indeterminate factors that might often be misleading in the context of artistic expressions.

The *Rogers* test is very much a likelihood-of-confusion test, but it is distinct from the multipronged test. In the context of artistic expressions, *Rogers* is a threshold way of assessing the likelihood of confusion that can be resolved more readily by summary judgment or even a motion to dismiss, without the need to build cases on each component of the multifactor test. In this regard, it can serve as a filter to distinguish expressive speech from the close calls.

The First Amendment requires clear rules concerning boundaries on protected speech, rather than *ad hoc* discretionary decisions founded on the balancing of disparate evidentiary factors of uncertain application in a given case. Categorical speech-based rules like *Rogers* that factor in the public interest in free speech makes possible early disposition of cases at the motion to dismiss and summary judgment phases, which is what they were designed to do. The *Rogers* test can resolve cases at the motion to dismiss stage.

The Bad Spaniels parody is an expressive work, as it conveys VIP's comical viewpoints on JDPI's trade dress, meaning *Rogers* applies. [7, para.29] That the humor is embodied in the form of dog toys does not detract from its free speech significance. [2, para.790] As Bad Spaniels comically comments on JDPI's trade dress, it possesses at least minimum artistic relevance under the first prong of *Rogers*.

In the case of Bad Spaniels, the consumer is purchasing the parodic message manifested in the dog toy, and their use and display of it can likewise serve as their free expression. The comical content of Bad Spaniels does not serve to convey what the product is - Bad Spaniels is clearly not a genuine bottle of whiskey. If one purchases a parody t-shirt or parody coffee mug, one may similarly take it for granted that the driver of the purchase is the parody, because people buy plain shirts or mugs if all they want is the function. Rogers, therefore, applies at the very least to mediums that can serve as vehicles for expression

Even if a parody or other artistic expression taps into the fame of the object of the parody or expression, the added value of the expression is what differentiates it and adds speech-based value to the public. However, the test does not hang on whether consumers necessarily get the import of the artistic impression. "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed." [9, para.801] Whether or not successful, parodies necessarily rely on the fame of those parodied, be they government officials, actors, or other celebrities.

Also, VIP has added its "expressive content the work beyond the mark itself" and attached to dog toys a disclaimer about no association with JDPI, thereby not becoming explicitly misleading under the second prong. [5, para.271] Since *Rogers* is applicable and both prongs are satisfied, VIP's Bad Spaniels is protected by First Amendment and the Ninth Court was correct in finding no infringement under the Lanham Act.

As for the dilution, TDRA sets out its definition as follows: "Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury." Notably, the phrase "likely to cause dilution" employed by the TDRA substantively changes the meaning of the law from "causes actual harm" under the preexisting law to "likely" or "likelihood" which means "probably". [17, para.900] The TDRA further defines dilution by tarnishment, as follows: "For purposes of 15 U.S.C. § 1125(c)(1), "dilution by tarnishment" is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark." [10, para.903]

To prove dilution by tarnishment under the TDRA, JDPI must prove that at least one of its asserted trademark and trade dress rights was not only valid but also famous before the accused use began, and that the accused use is likely to cause negative associations that harm the reputation of the famous mark. In view of the fame factors, JDPI's trademark satisfies the fame criterion, as it has expended hundreds of millions on promotion of its whiskey, which is the best-selling in the USA and it has been uninterruptedly utilized in commerce for more than a century.

There is no dilution by tarnishment under TDRA either, because Bad Spaniels, as protected expression under First Amendment, falls within TDRA's "noncommercial use" exemption. As the Supreme Court has held, "parody is a form of noncommercial expression if it does more than propose a commercial transaction." Bad Spaniels is noncommercial use as it "does more than propose a commercial transaction" through parodying JDPI, which is not rendered commercial because of VIP's economic motivation. [1, para.65, 67]

Contrary to JDPI's assertion, TDRA's noncommercial-use exception is an independent statutory basis for protecting expression. The Ninth Circuit explained in its detailed examination in MCA Records of the TDRA's legislative history that the statute contains "three statutory exemptions for uses that, though potentially dilutive, are nevertheless permitted: comparative advertising; news reporting and commentary; and noncommercial use." As the statute's plain language and the cases interpreting it make clear, these defenses may be asserted in the alternative, and the failure to satisfy the requirements of one defense does not rule out application of another.

In conclusion, the Ninth Circuit was correct in finding neither trademark infringement nor dilution by tarnishment. JDPI's circuit conflict allegation arises from its misguided interpretation of the Lanham Act and case law, and is motivated by its discontent with having its trade dress mocked. Trademark protections, however, do not exist for mark owners to stymie criticism or control public discourse. (4, para. 462) Now, the Supreme Court should rule in line with its precedents, uphold *Rogers* as the applicable

test for balancing competing interests and find VIP's brand parody as noncommercial use.

References:

1. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)
2. Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011)
3. Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc., 886 F.2d 490 (2d Cir. 1989)
4. CPC Intern., Inc. v. Skippy Inc., 214 F.3d 456 (4th Cir. 2000)
5. Gordon v. Drape Creative, Inc., 909 F.3d 257 (9th Cir. 2018)
6. Jack Daniel's Props., Inc. v. VIP Prods. LLC, No. 22-148. (U.S. Nov. 21, 2022)
7. LL Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987)
8. Mark V. B. Partridge, Trademark Parody and the First Amendment: Humor in the Eye of the Beholder, 29 J. Marshall L. REV. 877 (1996)
9. Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003)
10. Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002)
11. Rebecca Tushnet, The First Amendment Walks into a Bar: Trademark Registration and Free Speech, 92 NOTRE DAME L. REV. 381 (2016)
12. Rebecca Tushnet, Trademark Law as Commercial Speech Regulation, 58 S. C. L. REV. 737 (2007)
13. Robert J. Shaughnessy, Trademark Parody: A Fair Use and First Amendment Analysis, 77 TRADEMARK REP. 177 (1987)
14. Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989)
15. Stacey L. Dogan & Mark A. Lemley, Parody as Brand, 105 TRADEMARK REP. 1177 (2015)
16. Tommy Hilfiger Licensing v. Nature Labs, LLC, 221 F. Supp. 2d 410 (S.D.N.Y. 2002)
17. VIP PRODUCTS, LLC v. Jack Daniel's Properties, Inc., 291 F. Supp. 3d 891 (D. Ariz. 2018)
18. VIP PRODUCTS LLC v. Jack Daniel's Properties, Inc., 953 F.3d 1170 (9th Cir. 2020)

Date of receipt of the article in the Editorial Office
(14.08.2022)

INTERNATIONAL LEGAL BASIS FOR THE RIGHT TO GOOD GOVERNANCE

Laman Abbasli*

Abstract

In the article, the international legal basis of the right of good governance is deeply analyzed on the basis of the diversity of opinions and international practice existing in the legal literature. At the same time, the relevant provisions of such important international documents as the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Inter-American Convention on Human Rights of 1969, the 1981 African Charter on Human's and Peoples' Rights. The article notes that among the documents providing for the right to good governance, international documents adopted within the European region have an important place. Among these documents, the Treaty establishing the Constitution for Europe, the resolutions of the Committee of Ministers of the Council of Europe, the case law of the Court of Justice of the European Union and the Court of First Instance of the European Union, the Charter of Fundamental Rights of the European Union should be emphasized.

Keywords: *right to good governance, international legal basis, Court of European Union, European Ombudsman, human rights, protection of rights and freedoms.*

Under the international legal framework of the right of good governance are understood the international documents in which this right is enshrined. The right to good governance, especially its constituent elements, is reflected in the fundamental international legal instruments (adopted both on a universal and regional basis) for the protection of human rights. In this regard, the following should be emphasized:

- Universal Declaration of Human Rights of 1948 (the right to an effective remedy by the competent national tribunals – Article 8; full equality to a fair and public hearing by an independent and impartial tribunal – Article 10; duty to substantiate all decisions taken in relation to him – Article 11.2);

- International Covenant on Civil and Political Rights of 1966 (the right to an impartial and fair hearing of one's cases within a reasonable time – Article 14.1; right to be informed about the trial and the right to defense – Article 14.3; the obligation to justify all decisions taken in relation to person – Article 15; the right to demand compensation for the damage caused to person – Article 9.5, Article 14.6.);

- European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (the right to an independent and impartial judicial review of a trial – Article 6.1; the right to a fair and open investigation of one's trial within a reasonable time – Article 6.1; the right of access to materials relating to it, and the right to organize their protection – Article 6.3; the obligation to substantiate all decisions – Article 7.1; the right of access to documents – Article 10.1);

- Inter-American Convention on Human Rights of 1969 (the right to an impartial and fair hearing of one's trial – Article 8.1; the right to have a case heard within a reasonable time – Article 8.1; the right to express one's opinion – Article 13; the right to demand compensation for the damage caused to person – Article 10);

- African Charter on Human and Peoples' Rights of 1981 (the right to an impartial and fair hearing of one's trial – Article 7.1; the right to have a trial heard within a reasonable time – Article 7.1.d; the right to express one's opinion – Article 9.2; the

* Ph.D., Baku State University

obligation to justify all decisions – Article 7.2; the right of access to documents – Article 9.1).

In addition to the above-mentioned documents, among the documents in which the right to good governance is enshrined, documents adopted within the European Region have an important place. Among these documents, particular mention should be made of the Treaty establishing a Constitution for Europe, resolutions of the Committee of Ministers of the Council of Europe, the case law of the Court of Justice of the European Union (EU) and the European Court of First Instance, and the EU Charter of Fundamental Rights.

First of all, it should be noted the Treaty establishing the Constitution for Europe. This document was signed in Rome on October 29, 2004, being an international agreement that was supposed to serve as the EU Constitution and aimed at changing all previous founding acts of the EU. According to the signed Lisbon Treaty, at present this document is not expected to enter into force. The original intention of the representative of the Swedish Government in the Convention on the Future of Europe was that the right to good government should have a specific legal basis in Title III of the Treaty.

The European Ombudsman called on the Convent, which elaborated the EU Charter of Fundamental Rights, to also include the text of this Charter in the Constitution and create a clear legal framework for ensuring an open, accountable and efficient administration. When drafting the text of the Constitution, the term "good governance" was not included and replaced by the term "open, effective and independent governance".

Article III-398 of the Treaty states that: 1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration; 2. In compliance with the Staff Regulations and the Conditions of employment adopted on the basis of Article III-427, European laws shall establish provisions to that end [1].

It should be noted that the terms "pen", "effective" and "independent" mentioned above should not be considered as final criteria, and other criteria can be defined. Thus, this Article can also be used to adopt a law on the conscientious management of enterprises and institutions.

During the discussion of the Annual Report of the European Ombudsman in the European Parliament in September 2003, the responsible Commissioner, Loyola de Palacio, stated that Article III-398 of the Treaty establishing a Constitution for Europe provides the legal basis for European administrative law, which can be applied to all enterprises and institutions in a single form. [2]

Further, the resolutions of the Committee of Ministers of the Council of Europe should be noted. The Council of Europe, in its Resolution No. 77 (31) of 1977 on the Protection of Individual in Relation to Acts of Administrative Authorities, argued that if the development of the modern State has led to an increase in the importance of the administrative activity of the State, then administrative procedures are more concerned with individuals. [3]

The main objective of the Council of Europe is the protection of human rights and fundamental freedoms, and therefore the Council of Europe intends to initiate the adoption of rules, efforts to improve the procedural position of people in relations with the administration, which will ensure fairness in relations between the citizen and the administrative authorities. Here, the following principles were formulated:

I – right to be heard;
II – access to information;
III – legal assistance and representation;
IV - justification of the reasons;
IV - justification of remedies.

With regard to limiting the application scope of the principles, the Council stated that the proposed principles apply to the protection of individuals and legal entities in administrative proceedings in relation to any individual measurement or decision. The term "administrative procedures" excludes judicial proceedings from its scope, while the term "individual measures or decisions" excludes administrative acts of a more general nature and, finally, this term does not cover persons indirectly affected by an administrative act.

It should be noted that this Resolution is considered the first significant step towards the establishment of good governance as an operational legal concept, since this Resolution identifies a number of important issues that are now usually considered as decisive elements for good governance. However, the term "good governance" is used in the ruling not as a subjective right, but as a limiting requirement for the actual implementation of the principles. The Resolution notes that the principles should be implemented in a manner consistent with the requirements of "good and effective governance". [4]

The Council of Europe continues to adopt principles relating to good governance, even in the modern age. In fact, the Committee of Ministers has instructed the drafting group on administrative law to explore the possibility of developing an exemplary code of good governance based on all the principles enshrined in its recommendations and resolutions. In the working paper, 26 principles are taken from various recommendations and listed as principles of good governance. Another working document declares the principles of good governance of the Member States of the Council of Europe. [5]

Further, the case law of the European Court of Justice and the European Court of First Instance has an important place. These European courts in their decisions have repeatedly emphasized the importance of procedural guarantees. An analysis of the precedents of the EU court gives grounds to note the following set of general administrative principles:

- General principle of legal management;
- The principle of non-discrimination;
- The principle of compatibility;
- The principle of legal certainty;
- The principle of protecting legitimate expectations;
- The right to be heard before an unfavorable decision made by the public authority.

According to Article 253 of the Treaty establishing the European Unions (Consolidated Nice Treaty), the grounds for decision-making must be presented. Rules, directives and decisions declare the bases to which they refer and refer to any proposals or ideas received in accordance with this Agreement. [6]

The Court of Justice of the European Union and the European Court of First Instance, through their decisions, created an unwritten administrative law on the basis of case law, turning the right to good governance into a fundamental right of individuals.

This developmental trend towards good governance has made good governance in general a fundamental human right, excluding it from the administrative procedure. [7]

In addition, the EU Charter of Fundamental Rights should be emphasized. The right to good governance as well as the right of access to documents are included in the text of the Charter. This document was signed and announced in Nice on December 7, 2000. Article 41 of the Charter enshrines the right to good governance. This Article notes that,

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- The right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- The obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42 of the Charter enshrines the right of access to documents. This Article notes that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 41 of the Charter is based on case law, which enshrined various principles of good governance. It should be noted that the right to good governance is usually considered as a category of rights, and not as a subjective right. The fact is that the right to good governance includes a group of rights listed in paragraphs 2-4 of Article 41 of the Charter. This list should not be considered exhaustive, so the right to good governance may include rights other than those listed in this Article. [8]

In addition to all of the above, European Code of Good Administrative Behavior has a special place. In accordance with the Maastricht Treaty, in order to combat administrative violations in the activities of enterprises and institutions of the Union, the Institute of the European Ombudsman was established. Prior to the Ombudsman, there was only a Petitions Committee that received complaints from the public. The Committee is still functioning, but plays a minor role in good governance efforts. For a long time, the Ombudsman has been constantly working on a general law on good governance as a means of preventing abuse. The Ombudsman has developed a draft Code of Good Administrative Behavior, which consists of 27 Articles. This document aims to serve as rules of good governance in a variety of ways.

The introduction to the Code states that by promoting good governance, the Ombudsman should contribute to strengthening relations between the EU and its citizens. According to the definition of the Ombudsman in his Annual Report of 1997, "bad governance" occurs when a public body does not act in accordance with a rule or principle that is binding on it. The European Parliament approved this definition. [9]

The original intention of the Code was to provide a more detailed practical explanation of the right to good governance enshrined in the Charter. Former Ombudsman

Sederman emphasized in a press statement that "officials who must respect this right can be sure that they will avoid bad governance" [10].

On September 6, 2001, the European Parliament, in its Resolution, adopted the Code presented by the Ombudsman. The Code is aimed at EU enterprises and institutions and their administrations and officials are also expected to adopt their own specific Code or to follow this Ombudsman Code in their dealings with the public.

In addition, the resolution also calls for the European Commission to submit proposals for rules based on the Code of Good Administrative Behavior. It was proposed that such regulation be based on Article 308 of the Treaty Establishing the European Union (as amended by Nice Treaty). The Commission has not yet issued this statement because Article 308 requires unanimity within the Council. There is general dissatisfaction in some Member States with the use of Article 308 as it is seen as a way to expand the powers of the Union.

The basic principles set out below are part of the European Code of Good Administrative Behavior. The following basic principles are considered minimum essential requirements for good governance:

- Rule of law (Article 4);
- Non-discrimination (Article 5);
- Proportionality (Article 6).

The following obligations are additional components of the European Code of Good Administrative Behavior:

- The obligation to be heard (Article 12);
- The obligation to indicate the remedies available to all interested parties (Article 19);
- The obligation to inform all interested parties about the decision (Article 20);
- Obligation to maintain registers (Article 24);
- Obligation to document and justify administrative processes (art. 24).

Prior to the adoption of the new Constitutional Treaty, the concept of good governance was codified in two documents with different status. First, in the EU Charter of Fundamental Rights, which has the dual status of a "solemn declaration" by the three most important institutions of the Union. Secondly, the essence of this concept has been specified in the European Code of Good Administrative Behavior of the EU Ombudsman. But the Code is not legally binding. Thus, the right to good governance will be significantly reinforced if a new Constitutional Treaty is approved (along with Article III-398).

It should be noted that there is currently a growing trend in most EU Member States aimed at protecting the procedural rights of persons related to administrative decisions. Over the past 15-20 years, a number of laws regulating administrative procedures have been adopted, or appropriate supplements and amendments have been made to existing laws. [11]

This is especially noticeable among new Member States that have recently reformed their administrations. Finland even included in its Constitution a separate chapter on procedural principles. The specified Chapter 21, entitled Protection by law, establishes the following rights: openness of the trial, the right to be heard, the right to a reasoned decision, the right to appeal, and other statutory guarantees of a fair trial and good governance.

In addition, all Member States of the Union are Members of the Council of Europe. Therefore, they should include recommendations and resolutions adopted by the Council of Europe. The Council of Europe, in turn, encourages its Members to follow the principles set out in the recommendations and resolutions. Here the term "principles" has a greater meaning than the term "rule", the purpose of which is not to achieve harmonization of national administrative law, but to promote the general acceptance of certain principles in Member States.

The idea is to give States as much freedom as possible in choosing their means, ensuring that administrative procedures are inherently consistent with the proposed principles.

Based on the analysis of the EU Charter of Fundamental Rights and the European Code of Good Administrative Behavior, a number of rights and obligations are identified. Such rights and obligations are of particular importance for good governance. These rights and obligations are mainly reflected in Articles 41 and 42 of the Charter. The rights and obligations enshrined in these articles are seen as central to the concept of good governance.

Thus, the rights and obligations that reveal the essence of the right to good governance are:

- Impartial and fair trial within a reasonable time (Article 41.2);
- The right to express one's opinion up to the personal application of measures that may entail adverse consequences for him (Article 41.2);
- The right of access to materials relating to him/her (Article 41.2);
- The obligation of substantiating all decisions (Article 41.2);
- The right to access documents (Article 42).

References:

1. Foster G.Nigel. Blackstone's EC Legislation 2006-2007. 17th edition, Oxford: Oxford University Press, 2006, p.702.

2. Harden Lan. Head of the European Ombudsman's Legal Department during the Stockholm expert meeting 6-7 December. p. 92.

3. Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities. Adopted by the Committee of Ministers on 28 September 1977 At The 275th Meeting of The Ministers' Deputies

4. https://www.refworld.org/docid/5a4caf0a4.html

5. List of principles of good administration in Council of Europe member states. CJ-DA-GT (2004) Misc. 2.

6. Raitio J. The Principle of Legal Certainty in EC Law. Dordrecht: Springer Science & Business Media, 2003, p. 332.

7. Harlow Carol. Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot // European Law Journal, Vol. 2. No 1. March 1996, p. 3.

8. Kańska Klara. Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights // European Law Journal, Vol. 10, No. 3, May 2004, p. 325.

9. Hertogh Marc, Richard Kirkham. Research Handbook on the Ombudsman. Cheltenham: Edward Elgar Publishing, 2018, p. 138.

10. Ternovaya, L.O. Protection of human rights, freedoms and interests in international law: history, directions, forms / Ternovaya L.O., Goldin G.G. Moscow: Publisher: Ethnosocium and Interethnic Culture, 2015, p. 156. (in Russian)

11. OECD (2000) Trust in Government: Ethics Measures in OECD Countries. OECD, Paris, p. 32.

Date of receipt of the article in the Editorial Office
(07.09.2022)

SMART CONTRACT APPLICATION IN BANKING SERVICES

Farahim Huseynzade*

Abstract

Smart contracts are self-executing contracts that are built on top of blockchain technology. They enable the automation of complex processes and the elimination of intermediaries, making them an attractive technology for the banking industry. In this paper, we explore the application of smart contracts in banking services, including payments, loans and trade finance. We discuss the benefits of using smart contracts in these areas and examine some of the challenges and limitations of the technology. We also present some real-world examples of smart contract applications in banking and provide some recommendations for future research and development.

Keywords: *smart contracts, blockchain, banking services, regulatory compliance, credit scoring, trade finance.*

In the rapidly evolving world of finance, the integration of technology has become an indispensable element for the growth and efficiency of the banking industry. One such revolutionary technology that has captured the attention of both financial institutions and consumers alike is the advent of smart contracts. In this article, we will explore the applications and potential benefits of smart contracts in banking services. Smart contracts, essentially self-executing agreements encoded on a blockchain, have the potential to transform the banking landscape by offering a new level of transparency, security, and automation. [1] Built on the principles of trustless and decentralized systems, they offer an innovative approach to traditional banking processes, which often rely on manual intervention and time-consuming procedures. Even, blockchain technology has the potential to disrupt and transform various industries, including finance, healthcare, and education. [2] From facilitating seamless cross-border transactions and simplifying lending processes to enhancing regulatory compliance and streamlining asset management, smart contracts can significantly improve the efficiency and accuracy of various banking services. As we delve deeper into the topic, we will discuss the current state of smart contracts in banking, their practical applications, and the challenges and opportunities that lie ahead for financial institutions as they embrace this transformative technology.

The concept of smart contracts was first introduced by computer scientist and cryptographer Nick Szabo in 1994, who envisioned self-executing contracts that could automatically enforce their terms without the need for intermediaries. [3] However, it wasn't until the launch of Ethereum in 2015 that smart contracts gained significant traction, as the platform provided a robust environment for developers to create and deploy these agreements on a decentralized network. Ethereum's native programming language, Solidity, enabled the creation of versatile and sophisticated smart contracts that could interact with other contracts and external data sources.

Smart contracts are digital contracts, often written using programming languages and executed on a blockchain. While lawyers may be involved in the process, they typically work alongside software developers or blockchain experts who have the technical knowledge to create and deploy smart contracts. [4] Below we give an overview of how a smart contract can be created:

* Ph.D. Candidate, Baku State University

a) Identify the use case: Determine the purpose of the smart contract and how it should function. This may involve consultation with lawyers, business professionals, or other stakeholders to understand the legal and business requirements.

b) Choose the appropriate blockchain platform: Select a blockchain platform that supports smart contracts and meets your specific needs. Some popular platforms include Ethereum, Binance Smart Chain, and Cardano.

c) Design the smart contract: Outline the smart contract's functions, variables, and events, taking into account the desired functionality and legal implications.

d) Develop the smart contract: Write the code for the smart contract using a programming language supported by the chosen blockchain platform [5]. For example, Solidity is the most commonly used language for Ethereum-based smart contracts.

e) Test and audit: Thoroughly test the smart contract to ensure that it behaves as expected and is free of bugs or vulnerabilities. This may involve engaging third-party auditors to perform a security audit.

f) Deploy the smart contract: After testing and auditing, deploy the smart contract to the chosen blockchain network.

g) Monitor and maintain: Continuously monitor the smart contract's performance and address any issues that may arise. In some cases, upgrading or modifying the smart contract may be necessary.

Thus, creating a smart contract is a collaborative process that often involves legal professionals, software developers, and business stakeholders working together. While lawyers can provide valuable input on legal and compliance aspects, technical expertise is essential for developing and deploying the actual smart contract code.

In the years that followed, numerous blockchain platforms and projects emerged, each offering their own unique smart contract capabilities. [6] Financial institutions, initially cautious of the technology, began to recognize the potential for smart contracts to streamline banking processes and reduce operational costs. Early adopters experimented with proof-of-concept projects and collaborated with technology partners to explore the practical applications of smart contracts in areas such as trade finance, syndicated loans, and regulatory reporting.

Smart contract standards and best practices evolved as the technology matured, fostering greater confidence in their reliability and security. This has led to an increasing number of banks and financial institutions adopting smart contract-based solutions, propelling the technology from a novel concept to an integral component of modern banking services.

Smart contracts have the potential to revolutionize numerous aspects of the banking industry by automating processes, reducing costs, and enhancing security. Here, we outline six key services that can be transformed through the application of smart contracts:

- Cross-border payments: Smart contracts can facilitate faster and more cost-effective cross-border transactions by automating the payment process and eliminating the need for intermediaries. They enable real-time clearing and settlement, thereby reducing the time and fees associated with traditional correspondent banking.

- Trade finance: By digitizing and automating trade finance processes, smart contracts can improve efficiency, reduce fraud, and minimize human errors. They

enable the automatic execution of contractual terms, such as the release of funds upon receipt of goods, thereby streamlining the entire trade finance workflow [4].

- Syndicated loans: Smart contracts can automate the administration and management of syndicated loans, simplifying the process for all parties involved. From loan origination and agreement execution to interest rate adjustments and repayments, smart contracts ensure that each step is executed in accordance with predefined terms and conditions.

- Regulatory compliance and reporting: Smart contracts can be programmed to enforce compliance with regulatory requirements, automatically generating reports and flagging any discrepancies. This not only simplifies the compliance process but also reduces the risk of penalties associated with non-compliance.

- Asset management and tokenization: By tokenizing assets such as stocks, bonds, and real estate on a blockchain, smart contracts can facilitate the issuance, trading, and management of these digital assets [5]. This process allows for greater liquidity, fractional ownership, and more efficient asset management.

- Digital identity verification: Smart contracts can be employed to store and verify customer identity data in a secure and tamper-proof manner. This streamlines the Know Your Customer (KYC) and Anti-Money Laundering (AML) processes, reducing the time and cost associated with manual identity verification [7].

- Insurance: Smart contracts can automate insurance claim processing by verifying the occurrence of an insured event and triggering the appropriate payouts. This can expedite the claims process and reduce administrative costs for insurers, while also minimizing fraudulent claims.

- Derivatives and risk management: By digitizing and automating the creation, valuation, and settlement of derivative contracts, smart contracts can enhance transparency and reduce counterparty risk. They can also streamline risk management processes, enabling real-time monitoring and automatic adjustment of risk exposures.

- Escrow services: Smart contracts can act as decentralized escrow agents, ensuring that funds are securely held and released only when predetermined conditions are met. This can minimize the risk of disputes and fraud while reducing the need for third-party escrow providers.

- Savings and deposit accounts: Smart contracts can facilitate the creation of automated savings plans and term deposit accounts. Interest payments and maturity dates can be automatically managed, simplifying the process for both the bank and the customer.

- Automated credit scoring and underwriting: Smart contracts can be employed to access and analyze customer data, automatically generating credit scores and underwriting decisions. This can speed up the loan approval process, reduce the potential for human bias, and improve overall risk assessment.

These are just a few examples of how smart contracts can be utilized in banking services. As the technology continues to evolve and mature, it is likely that we will witness the emergence of even more innovative applications that further transform the banking industry.

As smart contracts gain traction worldwide, several countries have emerged as pioneers in the adoption and integration of this technology [8]. The abovementioned

states have established best practices that can serve as a guide for others seeking to harness the potential of smart contracts in their financial ecosystems:

- Switzerland: Known for its progressive approach to blockchain technology, Switzerland has become a hub for blockchain and smart contract development. The Swiss government has implemented clear and supportive regulations for blockchain businesses, fostering a conducive environment for innovation. The Swiss city of Zug, often referred to as "Crypto Valley," hosts numerous blockchain startups and established companies focused on developing and implementing smart contract solutions.

- Singapore: Singapore's government and central bank, the Monetary Authority of Singapore (MAS), have been actively supporting blockchain and smart contract adoption through initiatives like Project Ubin. This project aims to explore the potential of blockchain technology for the clearing and settlement of payments and securities. The MAS has also established a regulatory sandbox that allows fintech companies to experiment with innovative technologies like smart contracts, helping to develop a robust ecosystem for the growth of blockchain-based solutions.

- Estonia: Estonia has been at the forefront of digital innovation, and its government has embraced blockchain technology and smart contracts as a means to enhance public services. The country has implemented blockchain-based solutions for various government services, such as e-voting, land registry, and healthcare records. These initiatives demonstrate the potential for smart contracts to improve efficiency and transparency in the public sector.

- United States: While the regulatory environment for blockchain and smart contracts in the US is complex and fragmented, several states have taken the initiative to create a supportive environment for the technology. For instance, states like Wyoming and Delaware have passed legislation that clarifies the legal status of blockchain-based assets and smart contracts, encouraging their development and adoption within their jurisdictions.

- By examining the best practices of these countries, it is evident that fostering a clear and supportive regulatory environment, encouraging innovation through government-backed initiatives, and promoting collaboration between the public and private sectors are crucial factors in driving the successful adoption of smart contracts. As more nations recognize the potential benefits of this technology, they can look to these trailblazers as models for implementing smart contracts in their financial ecosystems.

In this article, we want to show simple sample of smart contract that can be used in banking services. Thus, below is a simple example of a smart contract for a banking service using the Ethereum blockchain and Solidity programming language. This smart contract represents a basic savings account that allows users to deposit and withdraw Ether, as well as check their account balance:

This contract allows users to deposit Ether into their savings account, withdraw Ether from their account, and check their balance. Additionally, the contract owner can check the total balance of Ether stored in the contract [9]. Events are emitted for deposit and withdrawal transactions to facilitate tracking and auditing.

To sum up, we would highlight that, the integration of smart contracts in banking services has the potential to reshape the financial landscape by revolutionizing various aspects of the industry. As we have explored throughout this article, smart contracts can streamline processes, increase efficiency, reduce costs, and enhance security across a

wide range of banking services, including cross-border payments, trade finance, syndicated loans, regulatory compliance, asset management, and more.

As financial institutions continue to adopt and experiment with this transformative technology, we can expect to see the emergence of new use cases and innovative applications that further disrupt traditional banking models. However, it is crucial for banks, regulators, and technology providers to work collaboratively to address the challenges associated with implementing smart contracts, such as regulatory concerns, privacy, and interoperability. By overcoming these obstacles and harnessing the full potential of smart contracts, the banking industry can unlock a new era of efficiency, transparency, and customer satisfaction.

References:

1. Nikolic, I., Kolluri, A., Sergey, I., Gudgeon, L., & Ford, D. "Smart contracts and their application in the banking industry. In Proceedings of the IEEE international conference on internet of things", 2018, p. 837-844

2. Tapscott, D., & Tapscott, A. "Blockchain Revolution: How the Technology Behind Bitcoin Is Changing Money, Business, and the World. Penguin, 2016, p 1

3. Szabo, N. "Formalizing and Securing Relationships on Public Networks", First Monday, 1997, p.5

4. Christidis, K., & Devetsikiotis, M. Blockchains and Smart Contracts for the Internet of Things. IEEE Access, 4, 2292-2303., https://doi.org/10.1109/ACCESS.2016.2566339

5. A. Zetzsche, Ross P. Buckley and Douglas W. Arner, "Smart Contracts: Legal and Regulatory Aspects", Dirk, 2018, p. 11

6. Swan, M. Blockchain: Blueprint for a New Economy. O'Reilly Media, 2015, p. 43

7. Mougayar, W. The Business Blockchain: Promise, Practice, and Application of the Next Internet Technology. Wiley, 2016, p. 59

8. "Smart Contracts: 12 Use Cases for Business and Beyond", Deloitte, 2016, p. 2

9. Buterin, V. (2014). A Next-Generation Smart Contract and Decentralized Application Platform. Ethereum Whitepaper. https://ethereum.org/en/whitepaper/

Date of receipt of the article in the Editorial Office
(08.09.2022)

INTELLECTUAL PROPERTY RIGHTS AS INVESTMENT ASSETS

Kanan Adilkhanov*

Abstract

This legal article discusses the nature of intellectual property rights as an investment and its value. The recent development of intellectual property rights has included it in the scope of investment treaties, making it an attractive investment for states. Firstly, the article discusses the economic value of intellectual property and the difference between intellectual property as an asset and other physical assets. The article then addresses how intellectual property rights issues are reflected in investment agreements. The article provides an overview of Lilly vs. Canada, an investment dispute related to intellectual property. Also, the relationship between international law and domestic legislation in the background of this issue was analyzed. This legal article provides an easy understanding of the issue with examples referring to various bilateral investment treaties.

Key words: intellectual property rights, international investment, investment agreement, BIT (bilateral investment agreement), domestic law.

In today's world, the value of the intellectual property is increasing day by day, and unlike in the past, investors pay more attention to this concept. In most of the currently existing international investment agreements, we find clauses characterizing intellectual property rights as investment, and this trend stems from the economic value of intellectual property, as well as the requirements of international conventions that have emerged in this field in recent years.

First and foremost, it is important to note that companies and investors who protect intellectual property rights and have a strong intellectual property strategy are considered more reliable partners in the market. In other words, a company that does not protect its intellectual property rights has a poor image and is taken lightly. On the other hand, one of the main factors that make intellectual property an attractive investment comes from its own nature. IP has no boundaries. Unlike physical assets, which have a fixed value, intangible assets have an unlimited potential for growth. If you invest in a startup whose IP has already been protected, you can be sure that as the business expands, the value of its IP (including its brands, designs, innovations, etc.) will increase as well. In fact, the IP may even help the business expand by fending off rivals and securing its position in the market. Even though it is expensive, legal protection can actually increase your business's profitability. For example, according to Forbes, the brand value of APPLE is nearly 150 billion euros and has been increasing significantly in the last 10 years [8]. It is not excluded that the value of the above-mentioned trademark is increasing day by day, and with time, the intellectual property strategy correctly created by the administration of APPLE company has developed and returned without any loss.

Companies in technologically advanced countries are increasingly focusing their asset structures on intellectual property rights. Trade secrets, trade names, technical processes, and other intellectual property rights may be included in the capital structure of a subsidiary when companies from technologically advanced nations distribute their production and Research and Development (R&D) facilities abroad. For these reasons, investment agreements define investment assets as including, but not limited to, intangibles, intellectual property rights, licenses, claims, and returns. The inclusion of IP

* Student in Master of Laws, Baku State University

rights in the definition of investments establishes a connection between investment agreements, which are typically bilateral, and IP instruments, which are typically multilateral.

During the MAI negotiations, there was a lot of discussion about whether IP rights should be included in the definition of investment. Some states proposed excluding intellectual property (IP) from the definition of investment [6].

Further negotiations did not result in a resolution to the problem. However, just because IP rights aren't specifically mentioned in the definition of investment doesn't mean it doesn't still count as investment. This is so because the intellectual property rights that protect the foreign company's technologies can be included in investment assets as claims, interests, and other intangibles. Determining the scope of rights and obligations resulting from investment agreements necessitates a thorough investigation as well as legal and economic analysis of the interface between IP and investment agreements. One point deserves special attention when considering the relationship between intellectual property and investment treaties. So, for intellectual property to be considered as an investment, it must be reflected in the contract. This can be reflected in several forms. Intellectual property can be characterized as an investment both directly and indirectly. Developed and industrialized nations frequently directly classify intellectual property as an investment. Based on experience, the 2012 United States Bilateral Investment Treaty recognized intellectual property as an investment-"'every kind of asset that an investor owns or controls … Forms than an investment may take include: … (f)intellectual property rights"[7]. The Agreement between the Republic of Turkey and Australia on the Reciprocal Promotion and Protection of Investments uses a similar but slightly different formulation and omits "geographical indications" and layout designs of integrated circuits but includes know-how and goodwill.

However, it is possible to imply that intellectual property is an investment. For instance, "real estate or other property, tangible or intangible...," is included under the definition of investment in the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership. Here, intellectual property can automatically be characterized as an investment by being included in the category of "intangible assets".

It is important to note that the protection of intellectual property rights as an investment usually occurs by the agreement of the parties creating that investment agreement. In order to ensure the effective and efficient operation of the international investment agreement, the domestic legislation of the countries must be taken into account. Otherwise, the contract cannot achieve its purpose, the necessary legal protection cannot be provided to the investment specified in the scope of the contract, and all of these can lead to legal disputes. If we look at the practice, the most famous case related to this issue is "Lilly" vs. Canada [3]. Lilly is an American pharmaceutical company that applied to the relevant authority to obtain patent protection for two products in Canada under the North American Free Trade Agreement and received a refusal. Because the "utility" requirement under Canadian law was not met by "Lilly"'s pharmaceutical products. However, "Lilly" filed a lawsuit in the Federal Court of Canada, stating that this decision was a violation of Article 17 of the NAFTA Agreement. In justifying its claim, this company referred to the TRIPS agreement, the text of the NAFTA agreement and the legislation of the United States and Mexico. From the text of the case given above, it is also clear that when concluding an international investment

agreement, domestic legislation must be taken as a basis, and in this regard, domestic legislation should be evaluated as an important reference point, not as an auxiliary source. When acquired in accordance with domestic law, intellectual property rights acquire investment characteristics and financial value. A tribunal concluded in this regard that the reference to the host country's laws and regulations refers to the validity of the investment rather than its definition-, " it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal."

The Chile-Australia BIT (1996), on the other hand, qualifies the determination of the scope of rights over investment assets in accordance with domestic law: "The term "investment" shall mean every kind of asset, including property and rights of any kind acquired or effected in accordance with the laws of the receiving state … The meaning and scope of the assets above mentioned shall be determined by the laws and regulations of the Party in whose territory the investment was made."[2]

Similar to this, the 1990 Belgium-Luxembourg-Argentina Bilateral Investment Treaty (BIT) defines investment as: "The Content and scope of the rights corresponding to the various categories of assets will be determined by the law and regulations of the Contracting Party in whose territory the investment is located."[1]

Since intellectual property rights are inherently territorial in nature, it is especially important that the appropriate feature of investment and its relationship with domestic law be taken into consideration. The acquisition and recognition of their right to protection in one territory does not equate to the same acquisition and recognition in any other territory. In addition, as recognized by multilateral agreements, the states that grant IP rights make different decisions regarding the extent and scope of the rights, as well as the limitations and exceptions that are applicable to the rights. The specific categories and technologies, in addition to the applications of the criteria for the grant of the intellectual property, are subject to variation from nation to nation. In this regard, certain investment agreements, such as several of the Indian Bilateral Investment Treaties (BITs), clearly limit the intellectual property that can be used to form an investment to the extent that is acceptable in accordance with the applicable laws of the respective countries. Some other investment agreements take things a step further by mandating that intellectual property rights be subjected to a formal process of capital registration in order for those rights to be considered an investment asset:

"Member Countries, …., may consider as capital contributions, such intangible technological contributions like trademarks, industrial models, technical assistance and patented or non-patented know-how, that take the form of physical goods and technical documents and instructions."[4]

Almost all of the various objects that are part of intellectual property rights are included in the protection of investment treaties. In particular, the protection of patent rights is of great importance in investment contracts. If we review the text of modern investment agreements, we can find provisions related to the conditions of granting a patent, patent invalidation, cancellation and compulsory licensing. The parties to the investment agreement can define a system of legal protection that is compatible with the provision of applying the minimum standards established by TRIPS in this area. However, there are also areas of intellectual property that, even if they are included in the scope of the investment agreement, it is very difficult to ensure their effective protection as an investment. Copyrights and well-known trademarks are among such in-

tellectual property objects. The term "investment" and the function of domestic law in determining the legality, extent, and nature of the rights to investment assets are not always explicitly defined in investment agreements. Even if domestic law is included as a requirement for investment assets to be valid, the expansive definition of investment may offer greater asset protection than what is permitted by domestic law. Investment arbitration tribunals place a strong emphasis on how public international law interprets treaties, which means that legal terms in investment agreements that are thought to have their own independent meanings that are appropriate to the contents of a given treaty may not always have the same meanings as equivalent terms in the domestic law of the contracting parties. In cases where such protection is unavailable or less advantageous under the domestic laws of the host country, investors may argue that the protection of their intellectual property rights is available to the extent specified in investment agreements. As a result, there is a gray area where domestic law does not recognize the intellectual property rights that are acknowledged under investment agreements.

The majority of investment agreements include a list of intellectual property rights, which may include assets that are in the public domain under domestic law. Some investment agreements, for example, have become more explicit in their definition of investment by specifying geographic indications, plant varieties, data, and encrypted programs. Some investment treaties clearly deviate from domestic intellectual property laws. The Ethiopia-Israel Bilateral Investment Treaty (BIT) of 2003, for example, defines geographic indications and plant-breeders rights as investment assets [9], despite the fact that Ethiopia, which is not a member of the WTO or the International Union for the Protection of New Varieties of Plants (UPOV), did not protect geographic indications and plant-breeders' rights in its domestic law at the time the investment agreement was signed. The protection of the above-mentioned intellectual property rights as an investment in recent times is one of the successes of the TRIPS agreement adopted by the World Trade Organization. Thus, the adoption of mandatory provisions of TRIPS in this field and the implementation of these provisions by WTO member states had a great impact on international investment relations and intellectual property rights became an important component of investment agreements.

In conclusion, IP rights that have been legally acquired in accordance with host country law may be considered an investment asset. Their scope, content, and form will be determined by domestic law of the host nation. However, the host country will still be required to protect such rights as investment assets where investment agreements specifically list a given right as an investment asset even nations, though it is not covered by domestic law [8]. Since adding new sources of IP rights for foreign investors does not specifically benefit developing it is crucial to always be clear about the extent of investors' property rights and the function of domestic law. Additionally, it is essential to refrain from listing any rights that are not safeguarded by national legislation or agreements to which the state is a signatory. It is important to note that the value and importance of intellectual property are increasing due to the rapid development of technology and industry, and this positive alterations will also be reflected in investment agreements.

References:

1. Argentina - BLEU BIT (1990), Article 1.2

2. Australia - Chile BIT (1996), Article 1.1

3. Is ıntellectual property "ınvestment" , Elı lılly v. Canada and the ınternatıonal ıntellectual property system, ruth l. Okedıjı

4. Indian BIT with Ghana (2000), Indonesia (1999), Thailand (2001), Oman (1997) and Sri Lanka (1997)

5. IP rıghts under ınvestment agreements: the trıps-plus ımplıcatıons for enforcement and protectıon of publıc ınterest Ermias Tekeste Biadgleng, page 7

6. OECD (1997), p. 4

7. 2012 United States Model BIT, art 1: < www.state.gov/e/eb/ifd/bit/index.htm>. For further examples, see Rachel A. Lavery, 'Coverage of Intellectual Property Rights in International Investment Agreements: An Empirical Analysis of Definitions in a Sample of Bilateral Investment Agreements and Free Trade Agreements'(2009) 6(2) Transnational Dispute Management 1, 4.

8. https://www.eu-startups.com/2018/01/5

9. https://investmentpolicy.unctad.org/international-investment agreements/treaties/bit/1480/Ethiopia --- Israel-bit-2003.

Date of receipt of the article in the Editorial Office
(19.09.2022)

THE RIGHT TO PROFESSIONAL LEGAL ASSISTANCE AND ISSUES OF HUMAN RIGHTS PROTECTION

Polad Mehdiyev*

Abstract

In the article, the right to professional legal assistance and the protection of human rights are widely analyzed based on the existing diversity of opinions in the legal literature and international practice. It is noted that professional legal assistance is recognized as an independent basic human right, which widely demonstrates its importance and necessity in the protection and promotion of human rights. Professional legal aid serves as a crucial mechanism to ensure the effective exercise of various human rights and to contribute to the overall realization of justice, equality, and the rule of law. The right to receive professional assistance has an irreplaceable role in the provision of legal equality and human rights. It is the violation of these rights that indirectly leads to the restriction of other human rights and freedoms, which is clear proof of the important place of the mentioned right in human rights.

Keywords: *legal aid, protection of human rights, right to equality, rule of law, rights and freedoms, norms of international law, legal services, justice.*

The right to receive professional legal assistance is distinguished by its special importance in ensuring human rights and freedoms. First of all, professional legal aid acts as one of the main guarantee mechanisms of the right to a fair trial as stipulated in international human rights documents. Also, defining and ensuring the right to receive professional legal assistance is considered one of the main steps that legal, democratic, and civilized states should take. Because professional legal assistance directly or indirectly affects the provision of basic human rights and freedoms. Therefore, ensuring the right to receive professional legal assistance is very necessary from the point of view of human rights and freedoms.

In one of the scientific studies conducted in the sphere of human rights, the right to receive professional legal assistance is presented as one of the basic human rights accepted at the international level regarding the impartiality of a person's justice [1]. It is possible to fully agree with this position. We also consider it necessary to mention that professional legal assistance should be considered as a basic human right in international human rights documents. Analysis of modern requirements and processes shows that the right to professional assistance is one of the main human rights of modern times. The provision of the right to professional assistance, as well as the provision of professional legal services to those in need, and the existence of state guarantees for this, show the urgency and importance of professional legal assistance in ensuring human rights. It should also be noted that the provision of professional legal assistance is closely related to a number of recognized human rights. That is, it is impossible to think about ensuring a number of human rights without providing professional legal assistance. Professionalism is considered essential for the effective exercise of these rights. The provision of professional legal assistance is considered the main component of these human rights and has a central position in this direction.

One of the main reasons why the right to professional legal assistance is recognized as one of the basic human rights in modern times is that it is related to the rule of law and the requirements of a civilized society. It is impossible to think that the right to professional legal assistance is not recognized and not guaranteed in any civilized, democratic state. This is due to the fact that the right to receive professional legal

* Ph.D. Candidate, Baku State University

assistance is one of the main essential elements of ensuring the right to a fair trial, effective protection of rights and freedoms, and justice, as well as the right to equality before the law.

The right to a fair trial, which will be considered one of the constituent elements of the right to professional legal assistance, should be considered one of the most basic human rights. The right to a fair trial is rightly presented in the literature as a key element in the application of the rule of law, effective public administration, and impartial and correct administration of justice [2]. As can be seen, every state that is guided by the principles of democracy and the rule of law forms professional legal assistance mechanisms in the measures it takes, being interested in the impartiality and transparency of justice in this direction. In this way, it is possible to ensure the right to a fair trial. Professional legal assistance should be recognized as a key component of the right to a fair trial, enshrined in many international instruments. Professional legal assistance from various directions has various positive effects in the process of ensuring a fair trial. First of all, Article 10 of the Universal Declaration of Human Rights of 1948 and Article 6 of the European Convention on Human Rights of 1950 establish the right to a fair trial and determine that every person shall have both rights and duties there is also the right to have the claims and accusations brought in criminal cases heard by fair, impartial and open courts. The European Convention on Human Rights, approaching this right from a wide range, also defines the right to receive legal assistance free of charge based on the person's choice, as well as in cases where it is necessary to ensure justice if he does not have sufficient financial means to provide legal services [3]. Based on the norms established in international legal documents, we can note that if one of the main elements of the right to a fair trial is the presumption of innocence, another equally important component is the right to professional legal assistance. It is rightly noted in the literature that professional legal assistance is one of the main requirements for a fair and impartial trial [4[. Looking at the experience, it is possible to note that in the context of ensuring the right to a fair trial, the right to professional legal assistance basically means that the person accused of a crime has the opportunity to receive legal advice and assistance throughout the criminal trial process, the rights and duties of the person, the nature of the charges, potential defenses and various legal provides guidance on the consequences of options. It allows individuals to make informed decisions and understand the consequences of their choices.

It is noted in the legal literature that the creation of equal opportunities for the use of legal services is the basis for the fairness of the judicial system and the formation of public opinion in the direction of ensuring the rule of law in the state [5]. Indeed, professional legal assistance is extremely necessary in order for the parties to have equal opportunities, as well as to ensure that the person remains defenseless before the investigative authorities of the state in the criminal process. Legal consultation in the context of professional legal aid promotes the principle of equality of the parties, which aims to ensure a balanced and fair litigation process, and manifests itself as one of the mechanisms for ensuring human rights. By providing legal representation to the accused, they help to bridge the gap in opportunities between the prosecution and the defense and to equalize the situation between the prosecution and the defense. This enables accused persons to effectively challenge the case against them, cross-examine witnesses, and ensure their fundamental human rights.

The existence of requirements for the persons providing professional legal assistance in the defense of human rights and freedoms in justice to have special higher education, as well as to be qualified, confirms the importance of professional legal assistance as the main guarantee mechanism. Thus, the subject who provides professional legal assistance plays an important role in protecting the rights of the person to whom legal assistance is provided during the trial. When the persons provided with legal assistance are participants in the criminal proceedings, they can be informed about the accusations, evaluate the evidence, object to the accusation, and get extensive and detailed information about the material and procedural rights and duties established by the legislation in both criminal and other types of proceedings, and it is possible to obtain the evidence on their own. in cases where they are not, they get the opportunity to use the help of state authorities and get information about the results and prospects of the work. Professional legal aid entities also help protect the accused from potential violations of their rights during the trial. As mentioned in the literature, in this process, lawyers who provide professional legal assistance services appear as the main individuals who stand guard over the rule of law, and the main task and direction of activity of these subjects is the provision of human rights and freedoms, as well as the rule of law [6].

Lawyers who provide professional legal assistance services have an important role in ensuring human rights and freedoms. As a result of their activities in the context of the professional legal aid mechanism, the access of individuals to effective means of protection against violations of human rights and freedoms increases, and the process of rights protection and elimination of violations is accelerated. So, if we approach it as mentioned in one of the scientific studies, as a result of the activity of the subject providing professional legal assistance in justice, individuals are not deprived of their legal guarantees and the correct formation of legal results is achieved [7]. Based on their highly qualified education and experience, professional lawyers defend their rights and prevent violations by developing a legal strategy adapted to their case. They collect evidence, examine witnesses, object to the admission of evidence, and present legal arguments on behalf of defendants in criminal cases. Representation by a professional lawyer plays an important role in the persuasive presentation of the case of an accused or suspect in criminal proceedings. In other words, professional legal aid is essential to ensuring the fairness of the trial process by providing legal representation, advice, and support to individuals to effectively resolve their cases and challenge evidence.

In a word, by means of professional legal assistance, individuals have the opportunity to ensure the protection of their rights and freedoms, to actively participate in various processes, and to act in accordance with their legal interests in each process. Professional legal assistance facilitates the work of judges, who preside over cases in justice. Thus, the qualification of the persons providing professional legal assistance services allows them to convey the opinions and positions of the persons whose rights they defend more easily on the subject of justice. This is the basis for establishing effective communication, impartial and objective administration of justice. In short, a lawyer providing professional legal services contributes to the protection of human rights and freedoms, legal expectations, and the protection of the legal interests of individuals by providing effective legal representation.

As a result, one of the scientific studies has rightly stated that the right to professional legal assistance is a component of the right to a fair trial, and in many cases, the

latter right includes the content of the right to professional legal assistance [8]. We can say that most cases of violations of human rights and freedoms by states worldwide occur in places of detention and in the investigation process. Being subjected to the mentioned inhumane treatment occupies a unique place on the world agenda as one of the most important issues. From this direction, the right to professional legal assistance can be considered as a very important mechanism. The provision of professional legal assistance services can be considered as a safeguard against coercion, inhumane or harsh treatment, and abuse of power and privileges by representatives of public authorities during criminal proceedings.

For this reason, in the Principles adopted by the UN General Assembly, the right to legal aid is also established in the list of rights of a person arrested or deprived of liberty [9]. This is a clear indication of defining professional legal assistance as the main mechanism for ensuring the right not to be subjected to torture and inhumane treatment at the international level. Because the persons who provide professional legal assistance help the suspect, accused, or convicted person to be treated fairly and respectfully by law enforcement agencies, prosecutors, and the court by explaining their rights and duties, as well as by using complaint mechanisms in case of a violation of this guidance. In case of violation of the accused's rights or violations of the law, the subject providing professional legal assistance intervenes in the matter. Thus, professional legal assistance acts as a key decisive mechanism in the provision and protection of another human right.

The right to effective legal remedies is defined as one of the basic human rights in the main international documents defining human rights and freedoms. The right to effective remedies against human rights violations is recognized in international human rights law. Thus, the right to effective legal remedies is enshrined in Article 8 of the Universal Declaration of Human Rights dated 1948, Article 2 of the International Covenant on Civil and Political Rights dated 1966, and Article 13 of the European Convention on Human Rights dated 1950. , established in Article 47 of the Charter of Fundamental Rights of 2000, adopted within the framework of the European Union. The right to effective legal remedies determines the creation and operation of effective legal remedies in cases where human rights and freedoms are violated, regardless of who committed the violation (including violations by state authorities). Professional legal aid plays an important role in enabling individuals to seek appropriate remedies, such as compensation, restitution, or other forms of redress, for the human rights violations they have experienced. It helps individuals assert their rights, assert remedies, and seek legal remedies for harm.

Although access to justice is not explicitly defined as an independent human right, it is widely recognized as an important element of the rule of law and the effective protection of human rights. Thus, in the statement of the high-level meeting of the UN, equal access to justice was identified as a decisive element in ensuring the rule of law. Also, from this direction, legal aid was assigned to state services regarding the rule of law in ensuring effective management, providing legal aid under the condition of creating high-quality and equal opportunities from this direction was imposed as an obligation on the states [10]. In addition, in the international document adopted by the UN General Assembly, ensuring equal access to justice for victims of violations of international human rights and international humanitarian law is an obligation of the states [11]. Professional legal aid plays an important role in facilitating access to justice

by providing individuals, particularly those who are economically disadvantaged or marginalized, with the necessary assistance to navigate the legal system and defend their rights. This is an irreplaceable mechanism for individuals to defend their rights and freedoms.

Professional legal assistance has a very important role in ensuring the right to equality. So, it should be noted that equality manifests itself both as a human right and as a basic principle in various legal fields. The right to equality as one of the basic human rights and freedoms is established in the main international normative documents on human rights. This right includes equality before the law and the court. In this regard, it should be noted that according to the approach of the UN, professional legal assistance is also the main component of the right to equality. That is why legal aid is at the center of the agenda of goals that the UN aims to achieve by 2030. It is in one of the official sources of the UN that providing equal access to legal aid is considered an important issue for compliance with international human rights standards, as well as the protection of rights and freedoms at all times [12]. In one of the studies carried out in this direction, it was rightly noted that the international norm established in Article 14 of the International Covenant on Civil and Political Rights of 1966 imposes on the state the obligation to provide legal assistance to persons who have no financial means and who are involved in criminal proceedings. acts as the legal basis for guaranteeing the right to legal assistance [13]. The document adopted by the UN Human Rights Committee confirms this idea and defines Article 14 of the 1966 International Covenant as the legal basis for the right to professional legal assistance [14]. From the point of view of the right to equality, failure to provide professional legal assistance results in the violation of this right.

In the literature, the equality of every person before the law is determined by normative documents. However, not everyone has the same financial and social level. Thus, it is rightly stated that professional legal assistance can be efficient and effective only when approached in the context of equality law [15]. Because, when a legal dispute arises between people with different financial means, in many cases, those who have the means can use professional legal services, but those who do not have the financial means cannot use such services, and there is inequality between the parties in justice. On the other hand, when the rights of a person as an applicant are violated during administrative proceedings, in court proceedings where the administrative body is represented by professional lawyers, the person's lack of legal assistance can exclude equality before the court. This results in a violation of the right to a fair trial, access to justice, and the right to law and equality. This makes it necessary to provide free legal assistance not only in criminal cases but also in civil and administrative court proceedings.

The prohibition of all forms of discrimination leads to the guarantee of the right to equality. Cases of discrimination result in the violation of human rights and freedoms. Professional legal assistance is also very important in cases of violation of human rights through the application of discrimination. This manifests itself more in providing advice on the violated rights of these persons or defending them in court. Professional legal aid ensures equal access to justice for all people, regardless of their socioeconomic status and other characteristics. This helps mitigate the barriers that marginalized or economically disadvantaged individuals may face in seeking legal aid. Providing legal aid services to those in need helps to eliminate inequalities in access to justice and promotes equal treatment before the law.

In one of the rightly conducted analyses, it was noted that, in addition to the individual effect of protecting human rights and preventing violations, the provision of free legal aid to persons who have no opportunity to defend their rights in cases of discrimination also affects the change of the legal thinking of the society. However, some strata of the population living in poverty cannot afford such legal services, which reduces trust in the protection of human rights and freedoms and a fair trial in society. Professional legal assistance is necessary, especially in cases of discrimination [16]. Professional legal aid provides equal access to justice for all individuals, regardless of socioeconomic status or other characteristics, and helps overcome the legal and procedural barriers that marginalized or economically disadvantaged individuals may face and benefit from legal services in situations of discrimination. Providing legal aid services to those in need, it helps to eliminate inequalities in access to justice and promotes equal treatment before the law. In addition, professional legal assistance provided without any discrimination contributes to the reduction of discrimination in society and the promotion of human rights protection.

In other words, professional legal aid includes the opportunity for individuals to challenge discrimination and seek legal aid for human rights violations based on discriminatory grounds. Legal aid professionals help individuals understand their rights, identify discrimination and take appropriate legal action. This includes the effective use of procedural means to protect individuals' rights, challenge discriminatory practices, and seek redress.

Professional legal aid plays an important role in protecting the rights of vulnerable groups who are often discriminated against. Even denying professional legal assistance to a group of people due to discrimination based on the groups they belong to violates the right to a fair trial and the right to equality and non-discrimination. According to the legal position formed by the European Court of Human Rights, the denial of legal assistance to a migrant, because he is a migrant, is considered a violation of the rights of access to court and discrimination [17]. Legal aid services should include special support provisions for people from marginalized communities, such as victims of discrimination based on race, gender, disability, or any other characteristics. This helps to protect their rights and ensure their access to justice on an equal basis.

In the context of professional legal assistance, the discriminated persons should be given legal advice and, if necessary, legal representation should be carried out in relevant authorities or institutions, as well as in court. It gives individuals the chance to understand their rights, navigate legal processes and seek remedies for discrimination. Legal aid specialists can provide legal services to victims of discrimination in the direction of application of existing substantive and procedural legal norms, use of procedural legal means, collection of evidence, and effective presentation of claims in cases of discrimination.

We consider it necessary to note that in the context of professional legal aid activities, public relations, legal literacy programs, and educational campaigns should be organized frequently to raise awareness of discrimination and promote understanding of rights. As we mentioned, professional legal memory also includes the enhancement of legal knowledge. Awareness about signs of discrimination, legal and legislative norms in this area, and sanctions can have a positive effect on the promotion of human rights. It is also possible to change the legal thinking of society in a positive direction, to

reduce the number of violations of the law on discrimination, and to build an inclusive society through the implementation of the mentioned.

In general, professional legal aid contributes to the realization of the right to non-discrimination by ensuring equal access to justice, preventing discriminatory practices, and empowering individuals to defend their rights. It helps level the playing field, address systemic inequalities, and promote a more inclusive, just society.

Professional legal assistance, which takes its place as the main legal mechanism in the protection and provision of basic human rights, plays a very special role in ensuring the basic rights and freedoms of vulnerable groups. This group of people includes victims of domestic violence, refugees, internally displaced persons, children, disabled people, etc. can be attributed. Due to their circumstances and situation, these persons need more professional legal assistance. It is noted that one of the main components of a just society is the creation of equal opportunities for professional legal assistance and the provision of legal education to special vulnerable groups [18].

Professional legal assistance is especially important for protecting the rights of vulnerable groups such as victims of domestic violence, refugees, children, or the disabled. In order to ensure the protection of their rights and the fulfillment of their special needs, it is necessary to implement specialized support and representation activities. It contributes to the fulfillment of the human rights principles of dignity, equality, and non-discrimination.

It should be noted that among the principles established by the UN Human Rights Commission, it is determined that states should ensure that persons deprived of the capacity to act receive legal assistance to restore their rights and defend their claims. In addition, it was noted in the same publication that states should provide children with disabilities in all matters, and all persons with disabilities who have been subjected to violence, especially women and girls with disabilities, in all legal proceedings free of charge or in relation to violations of human rights or fundamental freedoms they must ensure the provision of efficient professional legal services [19].

As it can be seen, professional legal assistance is seen as one of the main mechanisms of securing or protecting basic human rights in various aspects. This increases the importance of professional legal assistance activities in modern times when the importance and necessity of human rights are increasing day by day. The role and importance of professional legal assistance in ensuring human rights and freedoms become more clear in these cases.

Here, another approach is to clarify the issue of including the right to professional legal assistance as one of the main human rights. So, is the right to professional assistance a mechanism for ensuring and protecting basic human rights? Or is professional legal assistance one of the basic human rights? Although there is no consensus on this in the literature, it should be noted that the right to legal aid is established in Article 61 of the Constitution of the Republic of Azerbaijan, which is included in the chapter called Basic human rights and freedoms. This suggests that in the Constitution of the Republic of Azerbaijan, the right to receive legal assistance is included in the category of basic human and civil rights. Thus, according to the content of that article, the provision of high-quality legal assistance is defined as the right of everyone. Also, from the content of this norm, it appears that a person has the right to use a defender from the moment when the right to freedom is restricted by state authorities.

In one of the scientific studies in which the right to professional legal assistance is treated as an independent human right in the literature, it was defined as the duty of civilized and democratic states to provide professional legal assistance as one of the basic human rights and not to require payment for these services if necessary (20). This should be taken as an opinion that indicates the importance of securing and protecting the right to professional legal assistance in countries where the rule of law and democratic principles are applied.

Also, in another analysis that emphasizes the importance of the right to professional legal assistance, it is noted that professional legal assistance is distinguished by its specificity and fundamentality. This right is so important that in some cases, failure to provide or protect it can reduce the importance of ensuring other human rights. This is mainly found in the process of ensuring human rights in the criminal process. In that literature, the position is that the right to receive professional legal assistance in international legal documents has been taken into account only as a component of the right to a fair trial [21]. It is also possible to agree with this idea. Only as mentioned in that scientific study, the importance of the right to receive professional legal assistance has increased in modern times. Thus, it acts as an independent right with its own characteristics. The fact that it is closely related to other human rights, and sometimes has the nature of a provision or protection mechanism, as well as the fact that it is defined in the content of the right to a fair trial in international normative legal documents does not exclude treating the right to professional legal assistance as a separate human right.

In another scientific study carried out in this direction, the right to professional legal assistance is presented as a means of guaranteeing independent human rights and freedoms, regardless of whether it is guaranteed together with other human rights [22]. It is also possible to accept the approach from this direction. Because, indeed, the professional assistance mechanism is considered as a legal mechanism with a particularly important role in the provision and protection of the above-mentioned basic human rights.

Thus, professional legal aid is recognized as an independent basic human right, which widely demonstrates its importance and necessity in the protection and promotion of human rights. Professional legal aid serves as a crucial mechanism to ensure the effective exercise of various human rights and to contribute to the overall realization of justice, equality, and the rule of law. The right to receive professional assistance has an irreplaceable role in the provision of legal equality and human rights. It is the violation of these rights that indirectly leads to the restriction of other human rights and freedoms, which is clear proof of the important place of the mentioned right in human rights.

References:

1. Sangroula Y. Legal aid is a human right to access to justice: it is "neither a facility given by government nor a charity of person or organization, 2010, p. 1. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=235995

2. https://www.oas.org/es/temas/justicia.asp

3. European Convention Human Rights 1950

4. Tarik N,. Jallad A. Civil Right to Counsel: International and National Trends, UNC Center on Poverty, Working Research Paper, August 2009 https://www.researchgate.net/scientific-contributions/Tarik-N-Jallad-27993192

5. Amy Gangl, Procedural Justice Theory and Evaluations of the Lawmaking Process, 25 POL. BEHAV. 119,121-127 (2003)

6. Sossin L. The Public Interest, Professionalism, and Pro Bono Publico, 46 OSGOODE HALL L.J., 2008, p. 131- 132

7. In the Public Interest: the Report and Research Papers of the LSUC Task Force on the Rule of Law and the Independence of the Bar (Toronto: Law Society of Upper Canada, 2007.

8. Flynn A., Hodgson J., Mcculloch J., Naylor B. Legal aid and access to legal representation: redefining the right to a fair trial. Melbourne University law review Vol-40 (1), (2016), p. 8.

9. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by General Assembly of UN resolution 43/173 of 9 December 1988

10. Resolution adopted by the General Assembly of the UN on 24 September 2012, № 67/1. Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels

11. Resolution adopted by the General Assembly of UN on 16 December 2005 № 60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

12. https://www.unodc.org/unodc/en/justice-and-prison-reform/legal-aid.html

13. The Right to Equality and Non-Discrimination in the Administration of Justice, Chapter 13 of Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, p.638.

14. Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

15. Cole, R. The Right to Legal Representation and Equality before the Law in Criminal Proceedings in Botswana. Stellenbosch Law Review. (2011), p.112.

16. Access to legal aid for discrimination cases, Equality and Human Rights Commission, June 2019. 49 p., p. 5, 12. https://www.equalityhumanrights.com/en

17. Affaire Anakomba Yula C. Belgique, European Court of Human Rights (№45413/07), dated 10/06/2009.

18. Teremetskyi V., Duliba Y., Drozdova O., Zhukovska L., Sivash O., Dziuba İ. Access to Justice and Legal Aid for Vulnerable Groups: New Challenges Caused by the Covid-19 Pandemic, Journal of Legal, Ethical and Regulatory Issues, 2021 Vol: 24 Issue: 1S, p.12.

19. İnternational Principles and Guidelines on Access to Justice for Persons with Disabilities, United Nations High Commissioner, Geneva, August 2020, p. 13.

20. Kivalov S. Legal clinics as an important element of human rights for free legal aid Revista de Derecho. Vol. 8 (2019), p.171.

21. Marasinghe C. The right to legal assistance in international law, with special reference to the ICCPR, the ECHR, and the ache, Asian Yearbook of International Law, Volume 5 (Ko Swan Sik et al., eds.; 90-411-0375-9 © 1997 Kluwer Law International; printed in the Netherlands), p. 15-16.

22. Kashkovsky V.S. Legal assistance as a legal category and social and legal phenomenon: issues of theory and practice: Tambov, 2009, 25 p.8 (in Russian).

Date of receipt of the article in the Editorial Office
(27.08.2022)