ISSN 2223-0874 (print)
ISSN 2522-1825 (online)
DOI: 10.61638/ilip23

INTERNATIONAL LAW AND INTEGRATION PROBLEMS
(Scientific-Analytical Journal)
№ 1 (70) 2025

CONTENTS

Alizade Mammadov, Khanimana Gafarova. The features of implementing universal international inheritance treaties into the legal system of the Republic of Azerbaijan. International Law and Integration Problems, 2025, №1 (70), pp. 4-15. DOI: 10.61638/ZQVA4449

THE FEATURES OF IMPLEMENTING UNIVERSAL INTERNATIONAL INHERITANCE TREATIES INTO THE LEGAL SYSTEM OF THE REPUBLIC OF AZERBAIJAN

Alizade Mammadov*, Khanimana Gafarova**

Abstract

The article provides a comprehensive analysis of issues concerning the international legal regulation of inheritance relations, particularly the unification of legal norms related to testamentary form. The author thoroughly examines the content and application mechanisms of international instruments such as the 1961 Hague Convention and the 1973 Washington Convention, while investigating the possibility of their implementation within the legal system of the Republic of Azerbaijan. It is emphasized that testamentary form holds significant importance in inheritance relations, and that adopting internationally unified norms has become necessary to eliminate legal uncertainty in this sphere. In conclusion, the author emphasizes that the application of international conventions holds significant importance from the perspective of legal stability, protection of rights, and reduction of inheritance-related litigation. The accession of the Republic of Azerbaijan to these conventions is both necessary and advisable, serving to align the national legal system with current international legislation in this field and to ensure more effective protection of citizens' rights.

Keywords: *international treaty, form of will, Washington Convention, indirect unification, implementation, international will, Civil Code, real estate.*

I. Introduction

As noted in legal literature, one of the significant issues in the international legal regulation of inheritance relations is the form of wills [14, p. 45–50]. To address this problem, appropriate measures have been taken by states and international organizations. Specifically, on October 5, 1961, the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions (hereinafter referred to as the 1961 Hague Convention) was signed. The convention has over 42 participating states, including our close neighbor Turkey [8, p. 17]. However, Azerbaijan, like none of the CIS member states, has not acceded to this convention.

The 1961 Hague Convention provides unified conflict-of-law rules concerning the form of will. The convention also applies to joint wills made by one or more persons.

The 1961 Hague Convention uses the term "testamentary disposition" instead of the traditional term "will". This concept encompasses all forms of expression of the testator's will. As Batiffol noted, a person's will can be expressed not only in the form of a will but also, for example, in the form of a letter [13, p. 17–23].

According to Article 8 of the 1961 Hague Convention, it applies only to inheritance relations arising after the Convention's entry into force. The Convention allows contracting states to make reservations regarding certain cases (articles 10, 11, 12). The Convention has a universal character, under article 6, the established conflict-of-law rules apply without any requirement of reciprocity.

* Head of the Department of Private International Law and European Law at the Faculty of Law, Baku State University, PhD in Law, Associate Professor

** Lecturer at the Department of Private International Law and European Law, Faculty of Law, Baku State University, PhD in Law

As also noted in legal literature, the presence of a foreign element in legal relations necessitates determining the applicable law to recognize the validity of a will in terms of its form [5, p. 53–84]. The purpose of states joining the Hague Convention was to eliminate grounds for invalidating a will due to formal defects [15].

Under the conflict-of-law rule set out in Article 1 of the Convention, a will is considered valid in terms of form if it complies with one of the following legal systems: 1)the law of the state where the will was executed; 2) the law of the state of which the testator was a citizen at the time of making the will or at the time of death; 3)the law of the state where the testator was domiciled at the time of making the will or at the time of death; 4) the law of the state where immovable property is located, if specified in the will; 5) the law of the state of the testator's habitual residence.

Interestingly, in addition to these conflict-of-law rules, the Convention allows member states to adopt other conflict-of-law rules in their national legislation regarding the form of wills.

The purpose of the 1961 Hague Convention is to ensure, to the greatest extent possible, the formal validity of testamentary dispositions. As previously noted, Article 1 of the Convention provides a list of legal systems applicable to the form of a will. Here, the reference is to the substantive domestic law of the relevant state. This specification is important to emphasize that, generally, the mechanism of "renvoi" (remission) does not apply in this legal instrument [12, p. 107–136]. The application of the Convention's provisions can only be challenged if they contradict general principles.

Thus, article 11 of the Convention includes the following reservation, adopted in the interests of certain states: a will shall be deemed valid in form if it complies with the requirements of the law of the state where the disposition was made; the testator died in a state other than the one where the will was executed; the will conforms to the law of the state where it was made; the testator had a habitual residence and was permanently residing in the relevant state; the testator was a citizen of the state that made the reservation.

Each contracting state has the right to make a reservation not to recognize oral testamentary dispositions, except in the case of its own citizens with dual nationality (art. 11). If a testator resides in one state and owns property there but travels to another state solely to make an oral will, such a will shall be deemed invalid.

Article 5 of the Convention also sets out requirements for witnesses involved in the will-making process alongside the testator. In addition to age and nationality, the term "other personal qualities" is used. In our view, this should be understood as referring to the legal capacity of the individual.

Article 8 of the 1961 Hague Convention explicitly states that it applies in all cases where the testator dies after the Convention enters into force. From this, it can be concluded that a testamentary disposition may be executed before the Convention's entry into force, provided that the testator dies after that moment. At the same time, article 13 allows each contracting state to make a reservation limiting the application of its provisions only to testamentary dispositions made after the Convention's entry into force in that state. However, this reservation has not gained widespread acceptance.

From all of the above, the following conclusions can be drawn: difficulties in creating unified norms in this area are historically due to the existence of national, cultural and religious traditions in the field of inheritance law in each country; in unified conflict-of-laws rules concerning the form of a will, the main conflict-of-laws links are: the law of the country in which the will was made; the law of the country of citizenship of the testator; the law of the testator's state of permanent residence; the law of the country in which the immovable property specified in the will is located. After the entry into force of the Convention, the number of legal disputes in the international arena regarding the validity of the form of a will has significantly decreased. This indicates the effectiveness of its mechanism. Considering all these and other circumstances, we believe that the accession of the Republic of Azerbaijan to the Hague Convention of 1961 is necessary.

II. 1973 on the Uniform Law on the Form of International Wills

Another international act in this area is the Washington Convention of October 26, 1973 on the Uniform Law on the Form of International Wills (Washington Convention) [4]. The Convention contains rules governing inheritance relations from the point of view of substantive law. The United States is the depositary of the convention. The Convention has legal force in the territories of the following States: Niger, Portugal, Canada, Libya, Yugoslavia, Belgium, Bosnia and Herzegovina, Cyprus, Ecuador, France, Italy, Slovenia.

The form of this convention differs significantly from other existing conventions. The main purpose of the Washington Convention is to unify the substantive law of the Contracting Parties. The treaty has the classical form of an international convention, but the annex to it contains a Uniform Law. The signatories undertake to incorporate the form of this Uniform Law into their national legislation. 16 articles of the Convention are devoted to the issues of application, and 15 articles are devoted to the issues of making a will.

The Washington Convention of 1973, consolidating the norms of substantive law, obliges the Contracting parties to include its principles precisely in their substantive legal systems. Along with this, the Convention also contains conflict-of-laws rules regarding the form of a will. Thus, in order to determine the applicable law, a will drawn up in accordance with the laws of the following states is recognized as valid: the state of the testator's habitual or permanent residence at the time of making the will or at the time of death; the state of nationality of the testator at the time of making the will or at the time of death; the state in whose territory the immovable property that is the subject of inheritance is located.

The articles of the Uniform Law are indicated by Arabic numerals. The form of the Uniform Law corresponds to the form of domestic legislation. States may include this form in their civil codes or use it as a separate piece of legislation. This form does not provide for either the renvoi mechanism or any bilateral obligations between the Contracting States. The main goal of States when signing the Convention is to incorporate the norms of a Uniform Law into the national legislation of the Contracting States in order to create unified norms of substantive law and facilitate the regulation of international relations. On the one hand, we are talking about simplifying the

procedure for making a will, and on the other hand, about recognizing its validity in the international arena.

The Convention does not directly address either the authenticity of the will or the issues of its general recognition. These issues are reflected in the Hague Convention of 1961. Article 1 of the Convention states that no later than six months after the entry into force of the Convention, each Contracting Party must incorporate into its legislation the rules on international probate contained in the annex to this Convention. Each Contracting Party, within the specified period (no later than six months), implements the provisions of the law by appointing persons authorized to act in matters related to international probate on its territory. In the absence of a ban from local legislation, they may also include citizens working in diplomatic or consular institutions abroad. Article 4 of the Hague Convention of 1961 sets out the basics of the supplementary part of the Convention and issues related to the certificate. The validity of the certificate provided for in article 10 of the Annex is recognized in the territory of all Contracting Parties. The certificate contains the exact information about the authorized person, as well as information about signing the will in his presence. In addition, if the testator has a special requirement to keep the will, this should also be reflected in the certificate.

The Convention also addresses the matter concerning witnesses in the process of will execution, which is formulated as follows: the conditions required to act as a witness to the expression of will contained in an international will shall be governed by the law of the state that appointed the authorized person; these provisions shall equally apply to an interpreter invited to perform translation. Article 6 of the Convention stipulates that the signatures of persons participating in the execution of an international will the testator, the authorized person, and the witnesses – shall not be subject to any legalization or other formal certification [12, p. 146–159]. However, if necessary, a competent authority of a contracting party may verify the authenticity of the authorized person's signature. The custody of an international will shall be governed by the law of the state that appointed the authorized person. Article 8 of the Convention confirms its mandatory nature by providing that no reservations may be made to the Convention or its Annex.

As previously mentioned, the "Annex" section of the Convention consists of 15 articles. The first article, concerning the execution of wills, states that if this international form applies to a person, regardless of whether they are registered at their place of residence, stay, permanent or temporary domicile, then articles 2 and 5 of the respective Convention shall apply. The Convention explicitly prohibits joint wills. Although the Republic of Azerbaijan is not a party to this Convention, a corresponding provision has been reflected in article 1169 of the Civil Code of the Republic of Azerbaijan. It stipulates that only a joint will between spouses regarding mutual inheritance is permitted. In all other cases, the execution of joint wills is inadmissible. The invalidity of a will as an international testamentary disposition shall not affect its validity as another form of testamentary disposition. It is also stated that the disposition of a single property by two persons is inadmissible, as confirmed by the following: according to this law, the form of instruction given by one or two persons regarding a single property shall be deemed invalid. If, for any reason, a person is unable to sign, the authorized person may sign on their behalf at their request in the presence of two witnesses. However, this circumstance must be indicated in the will. These

requirements of the Convention are also provided for in articles 1182 and 1188 of the Civil Code of the Republic of Azerbaijan. A will may be written in any language, handwritten, or produced by other means. Signatures must be placed at the end of each page, and each page of the will must be numbered. This directly prevents the possibility of falsifying the will. Thus, signing each page makes it impossible to misappropriate the inheritance reflected in the will. If the will consists of multiple pages, each page must be signed at the end. A review of the relevant documents reveals that our national legislation does not require the signing of each page of a will. The date of the will's execution is considered the day on which the authorized person signs it.

As noted earlier, the provisions of the 1973 Washington Convention have, in one form or another, been reflected in the Civil Code of the Republic of Azerbaijan. Although the Republic of Azerbaijan is not a party to the Convention, it has adapted its legislation to the Convention's provisions through indirect unification [6, p. 77–83]. Here, indirect unification serves as one of the forms of unification [11, p. 114]. Indirect unification refers to the adoption of national legislative acts based on the general provisions of a convention without acceding to the international treaty itself [1, p. 304].

As evident, the foundational principles of inheritance reflected in the Civil Code of the Republic of Azerbaijan incorporate many of the provisions outlined in this Convention, one of which is the requirement for testamentary expressions to be in written form. The stipulation of written testamentary expressions serves to safeguard against potential future disputes. Furthermore, the Convention addresses the matter of drafting a will in any language at the testator's discretion, a provision not fully aligned with our national legislation. Article 4 of the Convention also clarifies the role and identification of witnesses, articulated as follows: the testator declares their will in the presence of two witnesses, who, after confirming it as a genuine expression of intent, sign the relevant section of the will. Additionally, it is specified that the testator is not obligated to disclose the content of their will to the witnesses or the authorized person. Article 7 stipulates that the date on the will is to be recorded by the authorized person at its conclusion. The absence of a date does not invalidate the will. A will is rendered invalid only if concerns arise regarding the testator's mental or psychological capacity at the time of execution. Article 8 addresses the custody and form of the will's storage, stating: in the absence of mandatory storage rules, the authorized person must clarify information about its safekeeping. The location of the will's storage must be indicated in the certificate referenced in article 9. Article 10 of the Convention enumerates the essential details to be included in the will. Article 11 specifies that after execution, the authorized person must provide one copy to the testator and retain another.

Article 14 of the Convention addresses the annulment of wills under general procedures. Finally, Article 15 states that when interpreting these provisions, their application is permissible provided there is no deviation from the Convention's requirements. As evident from the analysis of its articles, the essence of the Convention lies in eliminating problems related to will execution one of the primary challenges in inheritance law.

A comparison between the Convention's provisions and modern legislation reveals that the Convention can only serve as a foundation for future laws or norms to be developed in this field. When examining our national legislation, numerous discrepancies with the 1973 Washington Convention become apparent. These

differences manifest in the following aspects: 1) the number of witnesses required; 2) the classification of testators into specific categories; 3) the existence of provisions allowing wills to be executed at home. As previously noted, the 1973 Washington Convention explicitly requires two witnesses. However, under the legislation of the Republic of Azerbaijan, the number of witnesses may range from two to four, depending on the testator's degree of disability.

The Convention contains no provisions regarding that will be written and signed at home. According to the Convention, a will must be signed by the testator, witnesses, and the authorized person. In contrast, national legislation separately regulates wills made by individuals with certain physical disabilities. In the Convention, testators are treated uniformly, without categorization an approach we consider somewhat flawed. Physical disabilities or limitations should not deprive a person of testamentary capacity. However, the conditions stipulated for the drafting of the will of such person should be different, yet the convention does not contain any provision in this regard.

Article 10 of the 1973 Convention provides a model form to precisely specify the procedure and formal requirements for executing a will. This form is directly aimed at preventing deviations from the established grounds and saving time when drafting a will in the states that have ratified the Convention, as well as facilitating the recognition of the unified document in other countries. It should be noted that the determination of these grounds was intended not only to avoid the loss of additional time for the person making the will, but also to ensure more effective use of their right to bequeath. As stated in legal literature, for the persons mentioned in the will to be considered heirs, the will must be valid both in terms of its form and the testator's capacity to make a will [2]. Therefore, the existence and recognition of this document serves both the undisputed realization of the testator's last will and the right of the heirs to receive a share of the estate, which is of particular importance in the context of the overarching goal of all legal norms to serve humanity.

During the comparative analysis carried out above, it is clearly observed that there are many common and different features between our national legislation and the provisions of the Convention. One of the issues that constitutes a contradiction between national legislation and the international treaty is the matter of each page of the will being signed by the person who draws it up.

According to the civil legislation of the Republic of Azerbaijan, only the last page of the will must be signed by the person who draws up the will. In our opinion, it would be better if certain amendments were made to Chapter 65 of Section 10 of the Civil Code of the Republic of Azerbaijan, and a provision regarding the requirement for each page of the will to be signed by the person who draws it up were added. This, in turn, serves to protect both the will as a whole and the inherited property specified in the will from possible future problems and disputes. Another convention signed with the aim of universal unification of inheritance relations is the Hague Convention of October 2, 1973, concerning the international administration of the Estates of Deceased Persons (hereinafter referred to as the 1973 Hague Convention). The Convention reflects conflict-of-law regulation in inheritance legal relations. The administration of a deceased person's estate, i.e., inheritance at the international level, constitutes the subject matter of the Convention. As stated in chapter I, article 1 of the 1973 Hague Convention, the Convention does not contain provisions regulating the circle of heirs,

division of shares, compulsory portions, etc. Its main subject is the issuance of a certificate to authorized persons for the administration of the estate. Chapter I is titled "the international certificate". As indicated in article 1, its regulatory scope concerns the issuance of an international certificate to the person or persons who are granted authority to administer the movable property of the deceased abroad. The international certificate must be drawn up in accordance with the form attached at the end of the 1973 Convention and is valid in the territory of all member states. Consequently, the certificate grants certain persons the authority to take measures to preserve the estate until its transfers to the heirs. Among such measures, one can note the payment of debts related to the estate by the administering person. The main purpose of the 1973 Hague Convention is the international recognition of these powers. According to article 2 of the 1973 Hague Convention, the certificate is issued by the competent authority of the last habitual residence of the deceased. The issue of registration of this certificate by a court or administrative body is included in the Convention in substantive form. The issuance of the certificate by the competent authority of the last habitual residence limits its scope of application. If the last habitual residence of the deceased is not located in a member state of the Convention, the issuance of this certificate becomes irrelevant. However, under the 1973 Hague Convention, the certificate grants authority only for the administration of the movable property of the deceased (art. 1).

There are several cases in the Convention that exclude the application of the last habitual residence, which are reflected in article 3 of the 1973 Hague Convention. According to article 3 of the Convention, the competent authorities of the last habitual residence may apply the legislation of the country of nationality of the person in two cases when preparing the International Certificate: 1) if both countries to which the deceased had close ties (i.e., both the country of nationality and the country of last habitual residence) submit a request as provided for in article 31 of the Convention regarding the application of their national laws to the preparation of the international certificate; 2) if only the country of nationality of the deceased submits a request as indicated in article 31 of the Convention, and the person has lived in the country of the authority issuing the certificate for at least 5 years.

As seen from the provisions, the Convention determines the application of the legislation of the country of nationality and thus eliminates the conflict-of-laws issue.

Article 30 of the Hague Convention of 1973 states that a certificate may be issued to authorized persons for the management of the real estate of the deceased. However, this is the case only in cases where the law under which the certificate was drawn up grants such powers. If such cases exist, they should be indicated in the certificate [12, p. 56-81]. Article 39 of the Hague Convention of 1973 states that the convention has priority over other existing bilateral agreements. According to the provisions of the Convention, the Hague Convention of 1973 is considered a priority over the provisions of bilateral agreements for States that are parties to this convention or plan to accede to it in the future.

When examining the provisions of the Convention, the scope of its application to inheritance relations becomes clear. Thus, as we have previously mentioned, the Convention does not address issues such as determining the circle of heirs, the distribution of inheritance shares, mandatory portions, etc. Its scope grants certain individuals or entities the authority for the international administration of estates. This

authorized person performs the function of collectively gathering the estate of the deceased, settling their debts, and fulfilling the deceased's obligations to creditors.

At this point, the following question arises: Is the application of an international certificate necessary in common law countries? As we know, while in civil law jurisdictions, inheritance passes directly from the deceased to the heirs, in common law systems, the process differs. Common law applies to an administrator appointed by the court following a person's death. In such a case, the authorized person collects all the assets and liabilities of the deceased, clears the estate of debts, and transfers it to the heirs. These same functions are carried out by persons authorized by the international certificate provided for by the 1973 Hague Convention. Then what is the innovation of this Convention for countries of the anglo-saxon legal system? If in the Anglo-Saxon system, the court-appointed authorized person handles issues related only to the estate located within the borders of that specific state, the international certificate grants authority to manage the deceased person's estate at the international level. The regulation of inheritance relations, both at the national and international levels, is a rather complex area of law. We believe that the reason for these difficulties lies in the large number of formalities. In accordance with modern integration processes, the certificate proposed by the Convention, which practically reduces the documentation process for heirs to zero at both international and national levels, should be assessed positively.

As the next universal convention in this field, we can refer to the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons (hereinafter – the 1989 Hague Convention) [3]. The basis of the Convention is the determination of the applicable law. As already mentioned, this is an important issue in the regulation of such relations [7, p. 42–48]. Characteristics such as the recognition and protection of the estate are not within the scope of the Convention. The scope of the document is reflected in article 1. Thus, Article 1 of the Convention states that the Convention determines the law applicable to the estate of a deceased person. At the same time, the same article sets out the matters not covered by the Convention. Article 1.2 of the Convention states: with regard to the matrimonial property regime, the capacity to dispose and the form of disposition do not extend to property relations arising in a form other than inheritance. Another interesting feature of the Convention is reflected in article 2 of the document. It is noted that even the law of a state that is not a party to the Convention may be chosen as the applicable law (art. 2). Without turning to the other articles of the Convention, it becomes clear that this article provides for collective regulation within the Convention itself. The core essence of the Convention is outlined in its second chapter. Thus, the second chapter is titled "Applicable Law" [12, p. 89–105]. The law determined on the basis of conflict-of-law rules may be either the law of the state of which the deceased was a citizen or the law of their habitual residence. Specifically, article 3 of the Convention states that inheritance relations are governed by the law of the deceased's habitual residence, provided that this state is also the state of their nationality. Alternatively, as noted in another provision, inheritance relations are regulated by the law of the person's habitual residence if they had resided in that state for at least five years.

Finally, paragraph 3.3 of the article highlights the possibility of applying the law of the state of which the deceased was a citizen as the governing law for inheritance

relations. However, the application of this law is permissible only if the deceased was not closely connected with another state.

The Convention also incorporates the principle of freedom of disposition. However, this freedom is defined within certain limits [10]. Article 5 of the Convention stipulates that the testator may themselves designate the law applicable to their estate. However, this law must be either the law of the state of which they are a national or the law of the state of their habitual residence.

Paragraph 2 of the same article further specifies that the testator must formalize such a designation in the prescribed form of a declaration. If this document is deemed invalid for any reason, the law applicable to the inheritance shall be determined in accordance with Article 3 of this Convention. The principle of freedom of disposition under the Convention is granted to a certain extent and within defined boundaries for several reasons. Assoc. Prof. Dr. Feriha Bilge Tanrıbilir, in her article titled "*The Hague Convention on the Law Applicable to Succession,*" notes that the primary purpose of subjecting inheritance to a unified law and imposing certain restrictions on the testator's freedom of disposition is to prevent the possibility of disinheriting family members and to ensure that the estate remains within the family circle.

An examination of Article 5 of the document makes it clear that the applicable law is to govern all inheritance relations as a whole. However, the final paragraph of this article casts doubt on the unity of the applicable law. Specifically, the last paragraph of article 5 states that, in the absence of a specific designation by the testator, the chosen law applies to both intestate and testamentary succession, as well as to the entire estate.

Upon reading this provision, one might conclude that the testator could select a different law to govern a specific part of their property. This, in turn, would imply a breach of the unity of the legal regime. However, the next article of the Convention dispels this uncertainty.

Article 6 clarifies that, based on an express designation by the testator, the law of one or more states may be applied to a particular portion of their estate. Nevertheless, this must not conflict with the provisions of articles 3 and 5(1) of the Convention.

The issue of estate administration and whether the law applicable to the transfer of inheritance falls within the scope of regulation has also prompted consideration of certain provisions of the Convention.

Thus, in common law countries, estate administration is considered a matter of procedural law, and in such cases, the lex fori applies. In contrast, in continental European countries, the transfer of inheritance and its administration are viewed as closely related concepts and are governed by the same law.

To resolve these discrepancies, as mentioned in article 7.2 of the Convention, matters such as the determination of heirs, the concept of compulsory shares, and the distribution of inheritance shares also fall within the scope of the law applicable to the transfer of inheritance. Article 7 of the Convention establishes a unified legal regime.

Therefore, article 7 reflects the inheritance statute. The applicable law governs not only the determination of heirs, unworthy heirs, the estate composition, and compulsory shares under both intestate and testamentary succession but also regulates matters concerning the substantive and formal validity of testamentary dispositions.

Articles 8 and 12 of the Convention are devoted to inheritance contracts and mutual wills. Article 8 of the Convention states that an inheritance contract means a

document establishing the rights of one or more persons to the property of two or more persons. The inheritance contract must be in writing. An oral agreement is not subject to regulation under the Convention. The law applicable to the contract is determined in accordance with articles 9 and 11 of the Convention. While the inheritance contract is considered valid under the relevant provisions mentioned, its invalidity under articles 3 and 5.1 of the Convention is not considered a ground for annulment (art. 12.1). However, alongside this provision, article 12(2) states that the law determined in accordance with articles 9 and 11 cannot be considered valid if it negatively affects the interests of heirs identified under articles 3 and 5 by limiting the right to a compulsory share.

Article 16 of the Convention addresses the right of the state to inheritance. According to the law determined under the Convention's provisions, if the deceased has no heirs, the estate passes to the state. Article 17 of the Convention employs the term "law" or "legislation". Here, it is specifically emphasized that this term refers not to conflict-of-laws rules but to the substantive law of the state [12, p. 89–105]. The issue of public policy (ordre public) has also been addressed within the Convention. Article 18 stipulates that the Convention's provisions may only be disregarded if they contravene fundamental public policy norms. In other words, the establishment of a unified legal regime under the aforementioned relevant articles may only be deemed invalid if it violates public policy.

The Convention has not been signed by our country. From the provision mentioned in article 2 of the Convention, it can be concluded that even if the Republic of Azerbaijan is not a member of the Convention, the application of its law remains possible. Thus, the applicable law, as stipulated in article 2, may still be invoked even by a non-member state under certain conditions.

Another issue addressed in the document concerns the ability of states to make specific reservations when signing or acceding to the treaty. Article 24 explicitly regulates the permissibility of reservations. Article 24.2 states that reservations are inadmissible regarding matters beyond the scope of the specified provisions.

From the above, it can be inferred that national law under the Convention may only be deemed authoritative in the following cases: 1)if the law of the habitual residence and the law of the state of nationality are the same; 2) even if the deceased had resided for five years in another state, they maintained a close connection with their state of nationality; 3) if the testator, exercising freedom of choice, designates the law of their state of nationality.

The fact that the person transferring the inheritance has the opportunity to choose the law that will be applied to the inheritance based on the principle of free will in the Convention, in a sense, reminds us of our national legislation. Article 29.1 of the Law of the Republic of Azerbaijan on Private International Law states "that the case when a person who inherits an inheritance relationship chooses the law of the State of which he is a national in his will ..." A similar definition is given in article 5 of the Convention. Thus, this article also mentions the right to citizenship as a right that the person transferring the inheritance can choose based on free will. Another similar problem reappears in article 29.1 of the Law of the Republic of Azerbaijan on Private International Law. Thus, in the continuation of this article, it is noted that the right of the last permanent place of residence of a person applies to inheritance relations [9]. That is, it provides for the application of a single legal regime in general to relations, as stipulated by the convention.

III. Conclusion

Thus, the entry into force of the Inheritance Convention presupposes the application by the courts of a single law, regardless of whether the property is movable or immovable, in the territory of which state it is located. And this means eliminating contradictions in the regulation of inheritance relations, both between legal systems and the legislation of states. The establishment of a unified legal regime meant resolving this issue, at least on the territory of the participating states. As we have already mentioned, the Convention allows that, along with the states parties, the law to be applied to relations is the law of a non-party state.

As the analysis shows, Azerbaijan does not support universal international inheritance agreements. We believe that the participation of Azerbaijan in these agreements is important in terms of the purpose and importance of these agreements. But even if the Republic of Azerbaijan does not participate in the mentioned agreements, it has indirectly unified its legislation with the provisions of the mentioned conventions.

References:

1. Anufrieva, L.P. Private International Law. In 3 volumes. Volume 1. General Part. Textbook / Moscow: BEK Publishing, 2002, 288 p. Volume 2. Special Part. Textbook. Moscow: BEK Publishing, 2000, 656 p (in Russian / *Ануфриева, Л.П. Международное частное право. В 3-х т. Том 1. Общая часть. Учебник / М: Издательство БЕК, - 2002, 288 с. Том 2. Особенная часть; Учебник. М: Издательство БЕК, - 2000, - 656 с.).*

2. Cansu, Y.K. The Law Applicable to the Form of Wills Involving a Foreign Element / 2022, Vol. 3, No. 3, pp. 1079–1113 (in Turkish / *Cansu, Y.K. Yabancılık ünsüru içeren vasiyetnamelerin şekline uygulanacak hukuk: [Elektron resurs] // - 2022, Cilt 3, - № 3, -1079-1113 s.*) URL: https://dergipark.org.tr/tr/download/article-file/2183560) (last access: 14.12.2024).

3. Convention on the law applicable to succession to the estates of deceased persons /*Concluded on August 1, 1989. URL:* https://www.hcch.net/en/instruments/conventions/full-text/?cid=62 (last access: 13.12.2024).

4. Convention providing a uniform law on the form of an international will / Concluded 1973. URL: https://www.unidroit.org/instruments/international-will/ (last access: 14.12.2024).

5. Furkan, O. The Law Applicable to Official Wills Involving a Foreign Element / 2022, No. 44, pp. 53–84 (in Turkish / *Furkan, O. Yabancılık unsuru içeren resmî vasiyetnamelere uygulanacak hukuk: [Elektron resurs] // - 2022. № 44, - 53-84 s.)* URL: https://dergipark.org.tr/tr/download/article-file/2183560 (last access: 13.12.2024).

6. Gafarova, Kh.R. The Washington Convention on the Uniform Law on the Form of an International Will and the Legislation of the Republic of Azerbaijan // Scientific Bulletin of the Police Academy, 2018, No. 3–4, pp. 77–83 (in Azerbaijani / *Qafarova, X.R. Vəsiyyətnamənin forması barədə Vahid qanun haqqında Vaşinqton konvensiyası və Azərbaycan Respublikası qanunvericiliyi // Polis Akademiyasının Elmi Xəbərləri, - 2018, №3-4, - 77-83 s.).*

7. Inshakova, A.O. Inheritance Legal Relations in Private International Law // Inheritance Law, 2012, No. 1, pp. 42–48 (in Russian / *Иншакова А.О. Наследственные правоотношения в междунароном частном праве // Наследственное право, - 2012. № 1, -с. 42–48.).*

8. Lavranos, N. Hague Yearbook of International Law / N.Lavranos, A.K.Ruth // Annuaire de La Haye de Droit International. Volume 26 - Leiden: Koninklijke Brill, 2014, 528 p.

9. Law of the Republic of Azerbaijan on Private International Law / Adopted on June 6, 2000. – Unified Electronic Database of Legal Acts of the Ministry of Justice of the Republic of Azerbaijan (in Azerbaijani / *Azərbaycan Respublikası Beynəlxalq Xüsusi Hüquq haqqında Qanunu: [Elektron resurs] // 06 iyun 2000-ci ildə qəbul edilmişdir. – Azərbaycan Respublikasının Ədliyyə Nazirliyinin hüquqi aktların vahid elektron bazası).* URL:/ https://e-qanun.az/framework/509 (last access: 11.12.2024).

10. Lisa, N.F. Ratification of the Hague conference on the law applicable to the estates of deceased persons: toward uniformity ard uniformity in United States planning / NYLS Journal of İnternational and comparative law, 1991, Volume 12, No.1, 177-201p. URL: https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1326&context=journal_of_international_and_comparative_law (last access: 13.12.2024).

11. Mammadov, A.G. The Private International Law Legislation of the Republic of Azerbaijan and International Law / Dissertation submitted for the degree of Candidate of Legal Sciences. – Baku, 2005. – 180 p (in Azerbaijani / *Məmmədov, Ə.Q. Azərbaycan Respublikasının beynəlxalq xüsusi hüquq qanunvericiliyi və beynəlxalq hüquq / Hüquq elmləri namizədi alimlik dərəcəsi almaq üçün təqdim edilmiş dissertasiya. - Bakı, -2005, -180 s.).*

12. Medvedev, I.G. Commentary on Conventions Regarding Property Relations of Spouses and Inheritance / I.G. Medvedev. – Moscow: Wolters Kluwer, 2007. – 248 p (in Russian / *Медведев, И. Г. Комментарий к конвенциям в области имущественных отношений супругов и наследования / И.Г. Медведев. - М.: Волтерс Клувер, 2007. - 248 с.).*

13. Mironova, I.V. Unification of International Norms Regarding the Form of a Will // Bulletin of the Baltic Federal University named after I. Kant. Humanities and Social Sciences, 2015, No. 9, pp. 17–23 (in Russian / *Миронова, И.В. Унификация международных норм в области формы завещания // Вестник Балтийского федер. ун-та им. И. Канта. Гуманитарные и общественные науки, -2015. № 9, - с.17-23).*

14. Samailov, G.A. Contemporary Legislative and Doctrinal Issues of Conflict Regulation of Inheritance Succession Complicated by a Foreign Element / Dissertation for the Degree of Candidate of Legal Sciences, Moscow, 2012. – 181 p (in Russian / *Самаилов, Г.А. Современные законодательные и доктринальные проблемы коллизионного регулирования наследственного правопреемства, осложненного иностранным элементом / Дисс. на соиск. уч. степ. кан. юр. наук., М., 2012. -181с.).*

15. Sema, Ç. K. The Law Applicable to Inheritance in Private International Law / Private Law Master's Thesis Program – Ankara, 2019 (in Turkish / *Sema, Ç. K. Milletlerarası özel hukukta mirasa uygulanacak hukuk: [Elektron resurs] / Özel hukuk tezli yüksek lisan programı - Ankara, - 2019).* URL: https://www.academia.edu/39004304/Milletleraras%C4%B1_Miras_Hukuku (last access: 15.12.2024).

Date of receipt of the article in the Editorial Office
(26.12.2024)

CONSTITUTIONAL DUTY TO PAY TAXES: ANALYSIS FROM THE HISTORICAL DEVELOPMENT ASPECT OF LEGAL NORMS

Asmar Aliyeva*

Abstract

Tax is an important factor in the formation of budgets, which are among the most essential conditions for the existence of a state in the modern era. The state forms a budget to fulfil its duties and functions, and it primarily "fills" these budgets through taxes collected from legal entities and individuals. Therefore, according to the social contract theory, for us to see the state fulfilling its functions, it is necessary for us to pay taxes to it. All the above explains how significant the importance of paying taxes is. It is not surprising that when the duties of a person and citizen are listed in our Constitution, the duty to pay taxes and other charges is mentioned as a constitutional obligation among the foremost responsibilities. However, the legislative imposition of the duty to pay taxes on everyone living in the state cannot be considered as granting the state unlimited or unregulated powers in this area. As stated in the Constitution, individuals and citizens are only obliged to pay taxes and other state charges determined by law. Furthermore, the second part of Article 73 notes that no one can be forced to pay taxes and other state charges beyond those established by law or in amounts exceeding those specified in the law. These provisions of the Constitution define the scope of the state's authority to impose taxes on the population and establish the basic legal principles of taxation. The fundamental principles of taxation are the same in all democratic societies. However, humanity did not reach this understanding overnight. Since taxation first emerged until today, just as the purpose and philosophy of taxes have completely changed and taken a new form, the foundations of taxation have undergone a long and difficult development. Through a series of uprisings, revolutions, crises, and reforms, the precise legal framework of taxation was defined. It was determined that taxation must be established by law. It is no coincidence that the existence of the law, and not any other normative act, is required for taxation. The fact that the legal basis of taxes is determined only with the consent of representatives elected from among the population is known in tax law as the principle of "no taxation without representation." This article attempts to provide information about the development path of this and other principles formed in the field of tax law up to today.

Keywords: *constitutional duties, tax, taxation, tax code, budget, budget system, budget revenues, Tanzimat, Senedi-Ittifak, Magna Charta.*

I. Introduction: paying taxes is constitutional duty of everybody

Article 73 of the Constitution of the Republic of Azerbaijan imposes the duty of paying taxes and other charges on every citizen as a constitutional responsibility [6, art. 73]. In this article, we will discuss why this specific duty is one of the seven duties enshrined in the Constitution, the purpose and importance of placing the responsibility to pay taxes on everyone, and its significance.

The importance of taxes and the obligation to pay taxes for the state can be explained more effectively in the context of budgetary interests. We can boldly state that, in the modern era, budgets are the first and most essential condition for a state's functioning and its ability to perform the functions it is assigned. State budgets are also referred to as the "economic constitutions" of the state [1, p. 109]. The fact that the principles of the preparation, discussion, and approval of budget documents are reflected in the Constitution is not accidental. Thus, ensuring the preparation and

* Head of Department of Civil procedure and commercial law, PhD in Law, Associate Professor

execution of the state budget is entrusted to the Cabinet of Ministers based on Article 119, presenting the draft to the Parliament for approval under Article 109, and approving the budget and overseeing its implementation are entrusted to the Parliament based on Article 95. These powers are exclusively assigned to these bodies, and any change in the division of powers is not permitted [6, art. 95, 109,119].

The involvement of so many state authorities in the budget process and the clear division of powers between the branches of government as a constitutional norm reflects the importance of budgets as financial documents.

What are the reasons that make budget documents so important and, despite not fitting the classical definition of law, are accepted as "laws"?

The Law on the Budget System of the Republic of Azerbaijan, dated June 2, 2002, provides the following definition for the budget: "The budget is the primary financial document for the collection and use of funds necessary to perform the duties and functions of the state and municipalities through the relevant state authority and self-government bodies of the Republic of Azerbaijan" [9, art. 1]. While this definition is incomplete, it outlines the main purposes and characteristics of the budget. The main purpose of budgets—ensuring the execution of duties and functions assigned by law to the state and self-government bodies—can be considered the full explanation of the budget's essence. But has this always been the case, and why are the preparation and approval of these documents regulated by such complex and precise procedures?

To understand this, it is necessary to look at the historical development of budgets.

II. Evolution of budgeting: historical approach

Over time, the term “budget” began to refer to a type of folio containing important paperwork.

Connected to the meaning of “news,” the slang phrase “open my budget” emerged. When someone said they were going to “open their budget,” it meant they were going “speak their mind” and share some hot gossip or a scandalous opinion.

“Budget” was first used in a financial sense in 1733. It was deployed as a satirical term in a pamphlet entitled “The Budget Opened,” which attacked a government minister responsible for financial affairs and taxes in Britain.

"open your budget" meaning "show what you've got" or sometimes "own up" or "stop trying to fool us".

But despite its root in satire, people quickly adopted “budget” as a noun to describe a spending plan. By the 1880s it was used as a verb – “to budget” as an activity.

The adoption of financial documents, which contain information about the state’s main income and expenditures, by parliaments dates back to the Middle Ages. Of course, it is too early to talk about the discussion and approval of budget documents in today's sense, but we can already trace the initial stages of financial accountability to the population by rulers. In this context, it would be unjust not to mention the role of the 1215 Magna Carta of England. The idea that "no taxation without representation" is particularly associated with British and American society [4, p. 206]. The Magna Carta limited the king's taxation rights in three of its articles. It is noteworthy that this limitation was implemented for the first time in human history through the Charter [2, p. 140].

Article 12 of the Charter states: "No one shall be required to pay any new taxes or levies without the consent of the general council of the realm." This is the first legal document demanding the mandatory and uncompensated expropriation of people's

resources (whether in cash or kind) by the state and, at the same time, an example of the state's financial accountability to its citizens. Articles 14 and 15 of the Charter include similar regulations [13, p. 100-152].

By restricting taxation and prohibiting the king from imposing new taxes at his whim, the Magna Carta introduced a new mechanism of tax policy to human history. Moreover, the "common council" mentioned in the document transferred the power of consent from the king to the assembly, which later became the Parliament, referred to as *Magna Concilium*.

The provisions of the Magna Carta limiting taxation played a key role in forming the concept of "no taxation without representation" that emerged in the 17th and 19th centuries in English law. Stubbus notes that these provisions are the most significant articles in terms of constitutional law, as they first recognized that the power to tax belongs to the people and outlined the procedure for it [7, p. 102].

As public-political formations and theories about the origin of the state developed, so did ideas about the concentration of financial resources in the hands of the state. The bourgeois revolutions and the emergence of capitalist relations created a demand for the state to provide not only information on the taxes it collects but also on how those taxes are spent. Thus, as a logical consequence of historical developments, the collection of financial resources (mostly forcibly gathered from the population) by the state and the accountability of those expenditures through financial documents became a legal requirement, subject to discussion by representative bodies—parliaments [14].

For this reason, the primary purpose of the rise of parliamentary systems, particularly European parliamentary systems, is tied to the approval of these financial documents. The best example of this is still Great Britain. The term "budget" itself is related to England, and the word "bulga," which means "purse" in Latin, has an interesting history regarding its association with state financial documents.

It is believed that, in the Middle Ages people used this word for the bag, which a Prime Minister carried, put financial reports into and regularly spoke with these reports to the House of Lords. As early as 1760, the Chancellor of the Exchequer presented the national budget to Parliament at the beginning of each fiscal year. The purpose was to check the king's power to levy burdensome taxes and control spending of money by public officials. Later this word began to be used as a "report of Minister of Treasury to the Parliament.

When we talk about historical events that led to the limitation of the taxing powers of states, we cannot fail to mention popular uprisings. In fact, in the history of statehood, the heavy tax burden comes in second place among the three reasons for the occurrence of uprisings.

III. The role of popular uprisings and movements in the formation of the legal foundations of taxation: european examples

When we examine the history of Europe and America, we see that the Watt Tyler rebellion in England in 1381, the Hampden movement in 1629, and the Poujade movement in France in 1950 were purely tax-related. In addition, the events that occurred after the introduction of the Poll Tax in England in 1990 should also be examined in this context. The Stamp Duty Rebellion in America in 1765, the Boston Tea Party Rebellion in 1773, Shays' Rebellion in 1786-87, the Whiskey Rebellion in 1794, the Fries Rebellion in 1799, the Tariff Rebellion in 1828-29, and the tax revolts during the Great Depression of 1929 are also important events in the history of world tax law.

Approximately a century after the adoption of the Magna Carta, the first document in human history aimed at limiting the king's taxation powers, the Wat Tyler Rebellion is recognized in English history as the first tax revolt and is known as an uprising against unjust taxation. As a result, the poll tax was completely abolished in 1382. All the tax revolts we mention, exemplified by the Wat Tyler Rebellion, laid the groundwork in the history of civilization for the legal foundations of taxation powers and tax obligations, which is where societies stand today. As a logical consequence of all these protests, uprisings, and the reforms they brought about, modern legal systems in countries have clearly defined the precise limits of taxation powers. Although taxes are accepted as the main source of income for state budgets and generally one of the most essential conditions for the existence of the state, the rules and conditions for their collection must also be clearly specified in legislation

The most fundamental reason underlying individual or collective rebellions against taxation is that taxes are collected through the use of coercive power. This situation inherently involves "resistance." Throughout history, people have continuously questioned what taxes are and why they are obligated to pay them. They have tried to find answers to these questions. When examining the historical development of taxation, it is seen that it initially involved intentions such as voluntariness, donations, or gifts, but over time it transformed into a process of forced collection by the state. As is well known, the authority to tax emerged alongside the concept of the state. It is known that various tax practices existed in Ancient Egypt, Ancient Palestine, Babylon, and the Hittites [2].

The collection of taxes has, by its nature, carried a form of social resistance throughout history. The reason for this is that taxes reduce individuals' economic welfare, making voluntary compliance with taxation historically quite difficult. As a result of this historical process, the concept of "tax resistance" has emerged. Throughout history, many forms of active and passive resistance against taxes have been demonstrated.

When examining passive resistance, it typically involves the abandonment of voluntary tax compliance, negative attitudes toward taxes, and situations where taxpayers with reduced income increase their leisure time and withdraw from productive activities. Active resistance, even if it is individually based, is a form of resistance with a strong social dimension. In active resistance, taxpayers show disobedience to authority.

When examined within the conditions of the period—particularly in the context of France—the tax-society conflict can be clearly understood through the tax analyses of two important thinkers: Rousseau and Montesquieu. In 16th-century France, under the social stratification known as the *Ancien Régime*, the nobility was composed of the nobility of the sword (military elites), judicial nobility, and members of the royal lineage. Additionally, there was a classification called *États Généraux*, which included the nobles, clergy, and the so-called "Third Estate" [2].

During this period, the nobility did not pay taxes. The most important source of revenue for the state was the "salt tax," which was under the king's control. Another significant source of income was customs duties. The exemption of the nobility from taxation gave rise to a climate of conflict [2, p. 7–8].

Montesquieu noted that France's tax collection system operated in a way similar to the *tax farming* method. He referred to tax collectors as "financiers" who became unjustly wealthy. He advocated for government intervention because these individuals collected

taxes with a profit motive. According to Montesquieu, the more freedom citizens have, the more taxes may be imposed—within reason. He argued that taxes on alcohol, which were paid by both producers and consumers, violated the principle of freedom. Montesquieu also pointed out that state monopolies on salt would lead to corruption and that salt taxes were set far above the actual value. He believed that the object of taxation and the tax itself should be "proportional." If taxes are imposed without regard for social sensitivities, it is certain that they will trigger a social reaction [2, p. 12–13].

Rousseau, during times when commercialization increased and the fiscal structure deteriorated—leading to rising public reactions to taxation—also expressed his views on tax and economic policy. According to Rousseau, in order to reduce social backlash against taxation, it is essential to balance wealth inequality, levy taxes based on financial ability, exempt basic needs and sales taxes, and use taxation to penalize luxury [3, p. 17–19].

Indeed, when considering the relationship between taxation and society as seen by these two renowned thinkers, it becomes clear that the unfair collection of taxes, the emergence of a class that becomes unjustly enriched through taxation, and the oppression of individuals under heavy tax burdens inevitably lead to mass, active resistance to taxes. The observations made by these famous philosophers about France are also applicable to other centralized states of the time, and these minimum conditions must still be present today for taxes to leave a positive impression in the eyes of the masses.

The Hampden Movement (1624–1629) was a reaction to the monarch's dissatisfaction with the limitation of royal taxation powers, which had been in place since the Magna Carta. During the reign of King Charles, I, a rebellion broke out because the king attempted to impose taxes without obtaining the approval of Parliament. When a taxpayer named Hampden objected and was arrested for his resistance, this sparked a broader public reaction. Due to the unlawful imposition of taxes, revenue collection declined, and the power of the government weakened [12, p. 70-75].

The Poll Tax Rebellion (1990), which ended the political career of Margaret Thatcher—known as the "Iron Lady"—became a significant event in recent British political and fiscal history. The Poll Tax was introduced to replace the Domestic Rates, a major local government revenue source. Widespread objections emerged from various segments of society, including members of Thatcher's own party. The belief that the tax would help finance the Gulf War also contributed to rising opposition, ultimately forcing Thatcher to resign.

The backlash against the Poll Tax was driven by the fact that its burden exceeded that of the former property-based Domestic Rates. Although tax rates were later reduced in response to protests, the growing public dissent brought Thatcher's political career to an end. The tax was officially abolished starting with the 1993 fiscal year.

The prominent 14th-century Islamic thinker Ibn Khaldun also had noteworthy views on taxation… *(the sentence is incomplete).*

Active resistance, as a social reaction in the history of taxation, is thought to have produced significant social consequences.

After the Magna Carta, the Bill of Rights of 1689 required that approval for raising funds and levying taxes come from Parliament, but the concept of the annual budget and budgetary oversight had not yet developed.

A turning point in the history of the budget was the separation of the monarch's finances from the state treasury. For example, in Great Britain, until 1689, the personal finances of the royal family were not separate from the state budget. Beginning in this

period, the king's treasury gradually became separate from the state budget. Similar processes took place in other European states during the same period. After the revolution in England, Parliament decided to grant the king and his family a permanent allowance for personal expenses, and in return, the king relinquished a significant portion of his control over state revenues. Initially, these expenses were directed toward the king and his family's needs, and gradually, administrative expenses began to be removed from the king's expenditures. This process continued until 1830 when it was officially declared that the king's personal expenses were separate from state expenditures.

During this period, the House of Commons also passed decisions limiting Parliament's budgetary powers. In 1703, the Commons declared that no expenses related to public service would be accepted by Parliament without the king's proposal. In 1713, the right of the king to initiate financial proposals was formalized. These limitations on Parliament's budgetary powers remain a constitutional principle to this day. Therefore, Parliament, as a body demanding budgetary powers, is recognized as the first parliamentary body that voluntarily limited its powers in presenting and changing financial legislation.

Even after this decision in the 18th century, full parliamentary control over the budget was not realized. This required two centuries of revolution and changes. By the early 20th century, budgetary policy in both England and continental Europe had shifted to being entirely concentrated in the hands of lower houses of Parliament [5, p. 108].

IV. The development path of the formation of the legal basis of taxes in Eastern countries

In the East, this limitation can be observed by studying the history of the Ottoman Empire. Researchers claim that these processes developed in a somewhat different form. In the East, declarations were not made as a result of revolutions and popular movements but were instead enacted in alignment with developments in other countries. Furthermore, particularly during periods of decline and collapse, these reforms were aimed more at preserving the state than granting rights and freedoms to the people.

Ottoman declarations, which differ from other declarations of rights and freedoms, also reflect some common features related to limiting the power of the state. These limitations were often justified by religious or military considerations. Examples of Ottoman documents that limited the state's taxation powers include the *Senedi-Ittifak* (1808), the *Tanzimat* Edict (1839), the *Reform Edict* (1856), and the *Kanuni Esas* (1876) [8, p. 20].

For example, in the 7th article of the *Senedi-Ittifak*, three conditions are mentioned to limit the king's taxation powers: taxes cannot be used as a tool of oppression or abuse, they must be collected fairly and without discrimination, and the king must impose taxes following mutual consultations. The second and most important condition is that the king must impose taxes through mutual agreement, and the third condition involves the punishment of rulers who impose heavy taxes [7, p. 170].

When studying the history of taxation in Eastern states, we see that, similar to the West, tax revolts have occurred from time to time. The phrase, concluded by researchers analyzing the history of Western states — "heavy tax burdens are the main causes of the most famous popular uprisings" — is also confirmed in the East. However, sometimes these uprisings did not yield lasting results and did not have a strong impact on the formation of the legal bases of taxation or the limitation of the Sultan's taxation powers. Examples of tax revolts in the Ottoman state include the Celali

uprisings, the Patrona Halil rebellion, the Atçalı Kel Mehmet rebellion, the Niš uprising, and the Vidin uprising.

The prominent 14th-century Islamic thinker Ibn Khaldun also had a similar perspective on taxation. According to Ibn Khaldun, increasing tax rates does not lead to an increase in state revenues; rather, it intensifies the resistance mechanism among individuals, resulting in a decline in revenues. He states that when the tax burden increases, individuals' desire and motivation to work decrease. Ibn Khaldun says: "When taxes increase, the market stagnates. This is because the enthusiasm for work is broken, and the spirit of initiative is lost. This situation signals the disintegration and collapse of civilization" [5, p. 102].

When taxation is analyzed from historical, economic, and intellectual perspectives, the important warnings of many thinkers become apparent. In Ibn Khaldun's view, instead of an active resistance to taxation, a more passive resistance mechanism stands out. However, when his quote is examined in detail, it becomes clear that he associates the disintegration of civilization (*'umran'*) with the societal consequences of unjust or improper taxation.

In the statement by Ibn Khaldun mentioned above, it is expressed that an unjust or improper tax can lead to the disintegration of *'umran'*—in other words, a societal collapse or catastrophe. According to Ibn Khaldun, unjust and high tax rates not only harm social peace but also lead to a long-term decline in state tax revenues.

When reactions to taxation throughout history are examined, it is observed that, in addition to collective reactions, there have also been individual responses, including examples of civil disobedience. Civil disobedience refers to peaceful actions that violate the laws of the legal state without harming the values of others A notable example of civil disobedience and tax-related individual protest is that of Henry Thoreau.

V. Role of Civil disobediences in a formation of legal basics of taxation

Researchers examining the historical aspects of taxation have concluded that alongside popular uprisings, civil disobedience is also seen as a form of protest in the struggle against taxation.

Civil disobedience, as a term, first entered scholarly literature in the early 19th century through Henry David Thoreau's work *Resistance to Civil Government*. This work was written during the period when Thoreau was imprisoned in 1846 for refusing to pay taxes related to an event at that time. Civil disobedience is a peaceful and passive resistance against oppression [7, p. 206].

The Boston Tea Party Rebellion (1773) occurred when, despite the growing opposition to increased taxation, the United Kingdom refused to repeal the Tea Tax. This tax was maintained to preserve Britain's fiscal dominance over the colonies. In response, groups led by Samuel Adams threw the tea from British ships into the sea. In retaliation, the British closed Boston Harbour to commercial ships. As a result, the colonies convened a congress, and following a series of difficult wars, officially declared their independence on July 4, 1776 [11, p. 50-70].

The Whiskey Rebellion (1794) followed the American Revolution, when the newly formed government-imposed taxes that drew significant resistance. Toward the end of the 1700s, as national debt increased, the government used taxation—specifically on whiskey—as a tool to raise revenue. Farmers in the western regions suffered under the heavy financial burden. Whiskey producers staged a mass protest, which escalated into

a major social uprising marked by violence. One rebel, Tom Tinker, reportedly killed tax-paying individuals. In response to this widespread unrest, the government ultimately backed down.

The Fries Rebellion (1799) occurred when, in 1798, the U.S. Congress perceived a threat from France and began searching for new revenue sources. As part of this, a new wealth tax was proposed. This proposal sparked widespread discomfort and led to the Fries Rebellion. In the 1800 presidential election, Thomas Jefferson was elected, replacing John Adams, and upon taking office, Jefferson repealed many of the taxes imposed by the previous administration

VI. Conclusion

Taxes have been vital economic and financial elements for people since ancient times. Throughout history, taxes have been collected for many different reasons. In every era, there has been societal resistance based on individual discontent toward taxation. The main reason for resistance against taxes lies in the fact that taxes are collected by force, through the coercive power of the state. When individuals experience a decline in their well-being, they tend to become noncompliant with taxation.

Following the Magna Carta (1215), financial practices that can be considered the foundation of modern taxation and democratic maturity began to emerge. In the lead-up to the Magna Carta, the public had become deeply troubled by the heavy tax burden and the arbitrary taxation imposed by the king. As a result of this discontent, the people forced the king to accept limitations on his power to tax. One of the most significant outcomes of this constitutional document was the principle that no tax could be levied without the approval of the people's assembly.

Throughout the historical development of taxation, many uprisings and struggles have also been observed specifically in the United Kingdom. In France, the public, overwhelmed by taxes, responded with mass resistance, which ultimately culminated in the French Revolution, a historically significant event for the entire world. Similarly, in the United States of America, heavy taxation triggered the process of American independence. In the Ottoman Empire, numerous social uprisings were observed throughout its tax-based historical period. As a result of these uprisings, many prominent statesmen were dismissed, and tax reforms were implemented.

Taxation is a highly important element for societies. While fair taxation can lead a society to prosperity, unjust tax burdens have historically been seen to damage the foundations of societies [15].

In this study, which attempts to examine some uprisings in Western states and the Ottoman Empire, a comparative historical perspective reveals that tax-related uprisings in the Ottoman Empire were not due to demands for regime change or broader social needs. Rather, they were the result of the oppressive tax burdens, poor conduct of rulers, and the exploitative behaviour of tax-collecting elites toward the agricultural classes.

In contrast, the uprisings in Western states were often directed against the state or political regime itself. As a result, major social transformations occurred in the West, leading to the birth of new states and democratic institutions. These democratic institutions have become indispensable components of modern states. While tax revolts in Western nations triggered regime changes and societal transformation, no such outcome was observed in the Ottoman Empire.

Whether in Western or Eastern societies, for many centuries, taxes were seen as a primary condition for the realization of the divine rights of kings, rulers, and monarchs. However, through revolutions, revolts, and painful struggles, people eventually succeeded in introducing the principle of "no taxation without representation." Over time, the purpose of taxes evolved from funding the absolute monarch's expenses to becoming the main source of revenue for filling the state's budget, which is crucial for fulfilling its obligations to citizens. This transformation is part of the "social contract" theory of the state's origin: citizens voluntarily relinquish part of their rights to the state, which, in turn, assumes an obligation to fulfill other rights. The state also legalizes the expropriation of a portion of citizens' wealth to fund its financial needs. This expropriation, enforced in a compulsory manner, has become established as a constitutional duty due to the state's essential role.

Thus, it is the logical conclusion of the above that one of the eight duties outlined in Article 73 of the Constitution of the Republic of Azerbaijan, and the first in the list, is the duty to pay taxes and other charges. This is because, without taxes and other mandatory payments, the budget cannot be formed, and a state without a budget cannot fulfill its obligations, which would result in the cessation of its existence.

References:

1. Aliyeva A., Mirzayeva A., Cabbarli F. Tax law. Baku, 2023. 650 p.
2. Alper, Doğan; Muhammet Emin Coşkun. Prominent Tax Revolts in the Historical Development of Taxation // Nazilli Journal of Economics and Administrative Sciences, 2022, Vol. 3, No. 1, pp. 28–41 (in Turkish / *Alper Doğan, Muhammet Emin Coşkun. Vergilendirmenin tarihsel gelişim sürecinde öne çıkan vergi isyanları// Nazilli İktisadi ve İdari Bilimler Fakültesi Dergisi, 2022, Cilt 3, Sayı 1, 28-41.)* URL: https://dergipark.org.tr/en/download/article-file/2264122 (last access: 27.12.2024).
3. Aghdemir, Z. (2018). Taxes in Montesquieu and Rousseau: A Brief Introduction. Kırşehir Ahi Evran University Journal of Faculty of Economics and Administrative Sciences, 2(1), pp. 06–23 (in Turkish / *Ağdemir, Z. (2018). Montesqiue ve Rousseau'da vergiler: Kısa bir giriş. Kırşehir Ahi Evran Üniversitesi İİBF Dergisi, 2(1), 06-23.).*
4. Alan Melville. Taxation. Financial act 2013. Edinburgh, 2014. 610p.
5. Adams, R. (1981). Tax rates and tax collections: the basic analytics of Khaldun-Laffer curves. Public Finance Quarterly, 9(4), 415-430.
6. Constitution of Azerbaijan Republic. URL: https://e-qanun.az/framework/897 (last access: 25.12.2024).
7. Can Aktan. Vergi. Cilt-2. Istanbul, 2020,500s.
8. Chetin, H. (2018). Rebellions in the Ottoman Empire. Journal of Law and Economics Research, 10(1), pp. 18–34 (in Turkish / *Çetin, H. (2018). Osmanlı Devleti'nde Meydana Gelen Ayaklanmalar. Hukuk ve İktisat Araştırmaları Dergisi, 10(1), 18-34.).*
9. Law on Budget system of Azerbaijan Republic. URL: https://e-qanun.az/framework/1126 (last access: 28.12.2024).
10. Tax Code of Azerbaijan Republic. URL: https://e-qanun.az/framework/46948 (last access: 26.12.2024).
11. Joachim Wehner. Effective Financial Scrutiny: The Role of Parliament in Public Finance. World Bank Parliamentary Staff Training Program. 112p.
12. Passant J. (2016). Tax and the forgotten classes: From the Magna Carta to the English revolution. Australasian Accounting, Business and Finance, 10(3), 67-88.

13. Victor Thuroni. Tax law design and drafting. IMF, 1998. 528 p.

14. Vinnitsky, D. V. Tax Law: Textbook for Academic Bachelor's Degree / D. V. Vinnitsky. — 2nd ed., revised and supplemented. — Moscow: Yurayt Publishing House, 2019. — 305 p. (in Russian / *Винницкий, Д. В. Налоговое право : учебник для академического бакалавриата / Д. В. Винницкий. — 2-е изд., перераб. и доп. — Москва : Издательство Юрайт, 2019. 305 с.).*

15. Krohina, Y. A. Tax Law: Textbook for Universities / Y. A. Krohina. — 10th ed., revised and supplemented. — Moscow: Yurayt Publishing House, 2025. — 503 p. (in Russian / *Крохина, Ю. А. Налоговое право : учебник для вузов / Ю. А. Крохина. — 10-е изд., перераб. и доп. — Москва : Издательство Юрайт, 2025. — 503 с.).*

Date of receipt of the article in the Editorial Office
(09.01.2025)

Qahraman Behbudov, *Parviz Garibov*, *Yusif Mirzazade*. Legal grounds for including the training period of military servicemen at civil higher and secondary specialized educational institutions in the calculation of long-term service for pension purposes. International Law and Integration Problems, 2025, №1 (70), pp. 26-31. DOI: 10.61638/GSAG1627

LEGAL GROUNDS FOR INCLUDING THE TRAINING PERIOD OF MILITARY SERVICEMEN AT CIVIL HIGHER AND SECONDARY SPECIALIZED EDUCATIONAL INSTITUTIONS IN THE CALCULATION OF LONG-TERM SERVICE FOR PENSION PURPOSES

Qahraman Behbudov*, Parviz Garibov, Yusif Mirzazade*****

Abstract

The purpose of this article is to investigate the legal foundations and practical significance of including half of the training period undertaken by military servicemen at civilian higher and secondary specialized educational institutions in the calculation of long-term service for the purpose of pension entitlement in the Republic of Azerbaijan. The article employs methods such as the analysis of normative legal acts, a comparative legal approach, and the study of practical application experience. The scientific novelty of the article lies in the fact that, for the first time, the legal grounds for the inclusion of half of the training period spent by military servicemen in civilian higher and secondary specialized educational institutions into their long-term service for pension purposes are systematically analyzed within the context of the Republic of Azerbaijan. Furthermore, new approaches and proposals are put forward regarding the improvement of existing legislation in this field. The approach is substantiated through various legislative acts and assessed from a legal perspective.

Keywords: *law, education, legislation, work experience, military serviceman, pension, pension provision, duration of education.*

I. Introduction

Pension provision is one of the key directions of a state's social protection policy and serves to ensure a decent standard of living for its citizens. In modern legal systems, the right to a pension is regulated based on the principle of social justice and varies according to different types of professional activity. In particular, the pension provision for military servicemen is regulated within a distinct legal framework, taking into account the specific nature of their service, as well as the demanding and stressful working conditions.

In the Republic of Azerbaijan, the length of service stands out as one of the main criteria in determining the pension rights of military personnel. In this context, the inclusion of the period of training undertaken at civilian higher and secondary specialized educational institutions into the calculation of long-term service is both a theoretically and practically significant issue.

II. Main body

Pension legal relations, as one of the complex structures of social security law, require the existence of various legal facts for the establishment of such relations. These relations are mainly based on legal events (for example, the death of a person, the occurrence of disability, reaching a certain age, etc.) and legal actions (related to the expression of will by a citizen, such as applying for a pension or waiving the right to a pension) [10].

* PhD in Law, Associate Professor, Head of the Department of Private Law, Nakhchivan State University
** Lecturer, Department of Private Law, Nakhchivan State University
*** Student, Law Program, Nakhchivan State University

Pension legal relations also arise as a result of the combination of legal facts, which possess varying degrees of significance. For example, one legal event may create a fundamental reason necessitating the granting of a pension, while another legal fact may provide grounds for the termination of pension rights. These characteristics increase the complexity of pension law and reveal the necessity of regulating its legal aspects within a broader framework. Thus, the proper application of legal facts and the accurate assessment of the role of each fact ensure the correct implementation of pension rights.

In the modern era, labor legislation and social security law are applied in a complex manner in the field of pension provision. One of the main reasons for this synthesis is the absence of a separate normative framework for social security law. In this regard, the proper application of labor legislation, social security law, and relevant legal acts is of great importance in the regulation of pension rights and social security.

The application of relevant legal acts and the implementation of procedures in the fields of pension legal relations and labor law are essential issues. According to legislation and legal theory, submission of the necessary documents by the employer or the citizen to the district (city) branch of the State Social Protection Fund (SSPF) is a requirement for the establishment of pension-related relations. The submission of these documents triggers the application of relevant legal acts and constitutes the object of procedural relations related to the assignment of pensions.

One such issue is the recognition of the period of training undertaken by military servicemen at civilian higher and secondary specialized educational institutions prior to their admission into the relevant law enforcement bodies as part of their employment history based on normative legal acts. The normative and legal assessment of this matter is carried out on the basis of several normative acts.

First and foremost, the foundation of this right is established by Article 42 of the Constitution of the Republic of Azerbaijan (Right to Education) [1]. This article states that every citizen has the right to education. Another relevant provision is Article 38 of the Constitution of the Republic of Azerbaijan (Right to Social Security), which declares that "Everyone has the right to social security" [1]. Clause III of this article specifies: "Everyone has the right to social security upon reaching the age defined by law, due to illness, disability, loss of a breadwinner, loss of working capacity, unemployment, and in other cases provided by law" [1]. These provisions are based on the general principles of the right, such as social justice, humanism, legality, and the legal guarantee of the rights and freedoms of the individual as enshrined in the law [10].

Through social alimentation, the provision of all types of social security and services by the state or under its mandate, without payment, equivalence, or reciprocal labor, is carried out in a manner that reflects the normal standard of living formed at the appropriate level of social development, and without contractual obligations based on labor activity [10].

Taking the above into account, it can be noted that the inclusion of half of the period during which military servicemen received education at civilian higher or secondary specialized educational institutions prior to their admission to the relevant law enforcement agencies as part of their employment record stems from the state's commitment to the principles of social justice and humanism.

Material legal relations in the field of social security have a property character, as they arise in connection with the provision of certain material benefits to individuals (or families) in the form of pensions, social allowances, and social services [10].

When appointing pensions for persons with special ranks, various periods of service are added to the long-term service, i.e., calendar service, and the privileged part outside the calendar is counted as the preferential part of the employment record. Until 1992, the appointment of pensions for persons with special ranks was regulated by the USSR Council of Ministers Resolution No. 1290 dated December 15, 1990 [11]. After gaining independence, since 1992, the procedure for calculating the length of military service was established by the Resolution No. 631 of the Cabinet of Ministers of the Republic of Azerbaijan dated November 23, 1992, "On the Procedure for Calculating Long-Term Service Time for the Appointment and Payment of Pensions to Officers, Warrant Officers, Midshipmen, Contract Military Servicemen, Personnel of Internal Affairs, Justice, Customs, Migration, Emergency Agencies, and Their Families" [7].

Part 12 of Article 1 of this Resolution states that for the appointment of pensions to officers, warrant officers, midshipmen, contract military servicemen, and personnel of internal affairs, justice, customs, migration, courier communication, emergency, and tax agencies, the following periods are counted as long-term service [7]:

When assigning pensions to officers of the internal affairs and justice bodies, customs, emergency agencies, penitentiary and medical services of the Ministry of Justice, as well as to junior, senior, and chief officers of the Main Department for Preliminary Investigation of Tax Crimes under the State Tax Service of the Ministry of Economy of the Republic of Azerbaijan, in accordance with Article 9.5.1 of the Law of the Republic of Azerbaijan "On Labor Pensions," the time spent by these persons in civilian higher education institutions, as well as in secondary specialized educational institutions with military training units, including evening and correspondence departments of higher education institutions, prior to their actual military service and appointment to ordinary and chief positions in internal affairs bodies, is included in the long-term service period. Within a maximum of five years, one year of training is counted as six months [2].

Clause 13 of Part 1 of the aforementioned Resolution states that if such individuals were admitted directly from civilian higher education institutions to special-purpose higher education institutions to continue their education before completing their studies, the period of education at the civilian higher education institutions shall be included in the long-term service under the same conditions [7]. According to the rules of Resolution No. 230 of the Cabinet of Ministers of the Republic of Azerbaijan dated May 20, 2019, individuals who have not completed a bachelor's degree at secondary specialized educational institutions may apply by petition for both admission and transfer to such institutions [4]. However, the legislation of the Republic of Azerbaijan does not provide for admission from civilian higher education institutions to special-purpose higher education or secondary specialized educational institutions to continue education before the completion of studies.

Both during the Azerbaijan SSR period and in the early years of independence, according to the "Law on Education" adopted in 1992 and the aforementioned resolution of the Cabinet of Ministers, when a student did not complete the full course of study at the university, they were not awarded a diploma but were issued an academic certificate for the subjects mastered during the completed semesters and examination sessions. Upon employment, the knowledge and skills of the individual were determined based on this certificate. In 2007, the issuance of this certificate was discontinued, and based on Article 27.3 of the Law of the Republic of Azerbaijan "On

Education" No. N-833-IIIQ dated June 19, 2009, a certificate of attendance began to be issued to individuals who did not complete any level of education for various reasons [3]. The procedure for issuing this certificate is regulated by Resolution No. 12 of the Cabinet of Ministers of the Republic of Azerbaijan dated January 21, 2010 [6]. According to the Resolution, "individuals who have not completed any level or stage of education for various reasons are issued a certificate of attendance with a protective mark and a grade sheet" [6].

Based on this, individuals who have discontinued their studies at civilian higher education institutions and have applied for admission to special-purpose educational institutions, and have been admitted, may be exempted from retaking the courses successfully completed at the civilian higher education institutions [6].

According to Article 9.5 of the Law No. 54-IIIQ of the Republic of Azerbaijan "On Labor Pensions" dated February 7, 2006, the following military personnel (excluding military personnel stripped of military ranks and conscripted servicemen) have the right to a labor pension based on age as military personnel from the day of their discharge from military service [2]:

- Military personnel who have served 25 calendar years or more in military service before discharge;
- Those discharged from military service due to age, who have a total work experience of 30 calendar years or more on the day of discharge, with at least 15 years of that experience served in military service;
- Those discharged from military service due to illness, health limitations, or staff reductions, who are 48 years old or older on the day of discharge, have a total work experience of 30 calendar years or more, with at least 15 years served in military service;
- Military personnel who have served 15 years or more and participated in the Chernobyl Nuclear Power Plant accident consequence mitigation efforts within the relocation zone.

According to the Resolution No. 175 of the Cabinet of Ministers of the Republic of Azerbaijan dated April 28, 2022 [5], and the subsequent amendment by Resolution No. 424 dated November 21, 2023 [7], concerning the "Procedure for the appointment, calculation, recalculation, conversion from one type to another, and payment of labor pensions," for individuals specified in Article 9.5 of the Law "On Labor Pensions," when assigning labor pensions for the period after July 1, 2017, additions determined under Article 20.14.1 of the Law are calculated as 3% of the corresponding provision cost for each year of military service (including the preferential part of military service) completed before July 1, 2017, for military service exceeding 20 years. For the period after this date, the additions are calculated as 2% per year (proportionally for incomplete years based on months of service), except for persons serving within the system of the Ministry of Defense of the Republic of Azerbaijan [2].

The "Rules for Calculating the Provision Cost, Military Service Duration, and Submission of Information on the Provision Cost" approved by the Resolution No. 135 of the Cabinet of Ministers of the Republic of Azerbaijan dated August 27, 2007, establish that the information sheets on military service duration and provision cost of military or special rank personnel (Annex No. 1) must be electronically registered in the relevant electronic information system within 15 working days by an authorized person using a strengthened electronic signature. This registration is done upon the emergence

of the right to labor pension or, in the event of the person's death, upon the application of the family member entitled to receive a labor pension due to the loss of the family head. The information is then transmitted to the State Social Protection Fund under the Ministry of Labor and Social Protection of the Population of the Republic of Azerbaijan [9].

When calculating the 20-year length of service, which is considered as long-term service for pension determination, the military service duration includes up to 5 years-half of the time spent in training at civilian higher education and secondary specialized educational institutions, as stipulated in Part 1 of Resolution No. 631 dated November 23, 1992, of the Cabinet of Ministers of the Republic of Azerbaijan [8].

According to Part II, Clause 8 of the Regulation on the procedure for confirming the length of service for pension assignment, approved by Resolution No. 638 dated November 25, 1992, "On the Entry into Force of the Law of the Republic of Azerbaijan on Pension Provision for Citizens," the full-time education period of persons graduated from higher, secondary specialized, and vocational technical educational institutions, as well as the periods of study in postgraduate, doctoral, and clinical residency programs, and in schools and courses for training, retraining, and qualification upgrading, is confirmed based on diplomas, certificates, attestations, as well as certificates and other documents issued on the basis of archival data [8].

III. Conclusion

Based on the content of the aforementioned normative legal acts, it can be concluded that the period of training attended by military personnel in civilian higher and secondary specialized educational institutions prior to their admission to service in the relevant law enforcement agencies is counted as part of the employment record. Specifically, up to five years of the education period, half of which is added to the long service duration, results in a maximum addition of 2.5 years to the military service employment record. The calculation of half of the training time spent in civilian educational institutions, alongside special educational institutions, as part of the employment record complies with the normative legal acts adopted within the authority of the respective executive bodies, as well as with international agreements ratified or endorsed by the Republic of Azerbaijan concerning labor and socio-economic matters.

References:

1. Constitution of the Republic of Azerbaijan, November 12, 1995. Baku. Hukuk Publishing House, 2021.
URL: https://e-qanun.az/framework/897 (last access: 01.12.2024).
2. Law of the Republic of Azerbaijan on Labor Pensions, February 7, 2006, No. 54-IIIQ.
URL: https://e-qanun.az/framework/11566 (last access: 29.11.2024).
3. Law of the Republic of Azerbaijan on Education, June 19, 2009, No. N-833-IIIQ.
URL: https://e-qanun.az/framework/18343 (last access: 01.12.2024).
4. Resolution No. 230 of the Cabinet of Ministers of the Republic of Azerbaijan, May 20, 2019.
URL: https://nk.gov.az/az/senedler/qerarlar/azarbaycan-respublikasi-nazirlar-kabinetinin-2019-cu-il-20-may-tarixli-230-nomrali-qarari-ila-tasdiq-4797 (last access: 02.12.2024).

5. Resolution No. 175 of the Cabinet of Ministers of the Republic of Azerbaijan, April 28, 2022.
URL: https://e-qanun.az/framework/49537 (last access: 01.12.2024).
6. Resolution No. 12 of the Cabinet of Ministers of the Republic of Azerbaijan, January 21, 2010.
URL: https://e-qanun.az/framework/29152 (last access: 30.11.2024).
7. Resolution No. 424 of the Cabinet of Ministers of the Republic of Azerbaijan, November 21, 2023.
8. Resolution No. 631 of the Cabinet of Ministers of the Republic of Azerbaijan, November 23, 1992.
URL: https://e-qanun.az/framework/49175 (last access: 01.12.2024).
9. Resolution No. 135 of the Cabinet of Ministers of the Republic of Azerbaijan, August 27, 2007.
URL: https://e-qanun.az/framework/44745 (last access: 02.12.2024).
10. M. Aliyev. *Social Security Law*. Textbook. Baku. "Adiloglu" Publishing House, 2007.
URL: http://elibrary.bsu.edu.az/files/books_rax/N_331.pdf (last access: 01.12.2024).
11. USSR Council of Ministers Resolution No. 1290, December 15, 1990.
URL: https://e-qanun.az/framework/7879 (last access: 27.11.2024).

Date of receipt of the article in the Editorial Office
(11.12.2024)

ENSURING LEGAL CERTAINTY AND LIABILITY IN ARTIFICIAL INTELLIGENCE DEVELOPMENT: CONTEMPORARY FRAMEWORKS

Vadiya Alakbarzade*

Abstract

The legal security and liability issues that have emerged with the rapid development of artificial intelligence (hereinafter - AI) technologies have become one of the key legal and scholarly challenges of the modern age in the context of international law and human rights. This article examines the impact of artificial intelligence on human rights, especially the right to respect for private life, the principle of non-discrimination, freedom of expression and data confidentiality. The study analyzes the normative frameworks and guiding principles put forward by influential international organizations such as the Council of Europe, UNESCO and the Organization for Economic Co-operation and Development (OECD) regarding the ethical and legal governance of artificial intelligence. In the light of the general principles of international law, the article emphasizes the imperative to adhere to principles of transparency, lawfulness, and data minimization during the data collection and processing phase. The article thoroughly examines issues such as legal gaps, the concept of technological neutrality, and the legal personhood or status of artificial intelligence. In this context, leading legal scholars and ethical theorists such as Luciano Floridi and Frank Pasquale emphasize that technology is inherently non-neutral and highlight the importance of establishing mechanisms for the legal accountability of artificial intelligence systems based on scientifically grounded principles. The study proceeds by presenting the comparative regulatory models adopted by jurisdictions such as the European Union, the United States, China, and South Korea regarding the legal governance of artificial intelligence. As a result, the article underscores the need to develop flexible, accountable, and human rights-compliant mechanisms at both the international and domestic levels, grounded in the principle of technological neutrality, in order to ensure the safe, lawful, and ethical development of artificial intelligence.

Keywords: *artificial intelligence, legal liability, human rights, ethics of artificial intelligence, international legal regulation, right to privacy, non-discrimination, freedom of expression, technological neutrality, legal personhood, due diligence principle.*

I. Introduction

In the current era of rapid technological evolution, artificial intelligence (AI) has emerged as a transformative force with far-reaching implications for legal systems, fundamental rights, and democratic governance. As AI technologies increasingly influence decision-making processes in areas such as healthcare, employment, finance, law enforcement, and public administration, they simultaneously generate significant legal and ethical concerns. Central among these is the issue of legal certainty—namely, the need to define clear and enforceable legal norms that govern the development, deployment, and accountability of AI systems.

Within the framework of international human rights law, the integration of AI into public and private sectors introduces a new dimension of risk regarding individual rights and state obligations. Emerging technologies have the capacity to infringe upon core rights protected by the Universal Declaration of Human Rights (UDHR), including the right to privacy, the right to non-discrimination, and freedom of expression. Moreover, algorithmic decision-making and data processing systems may operate in

* PhD candidate in Law, Baku State University, Deputy Director for Legal Affairs, Strategy and Digital Management at "Sağlam Ailə" Medical Center

non-transparent ways that undermine due process, legal redress, and procedural fairness. In this context, the concept of legal responsibility—particularly the attribution of liability in cases of harm—must be reconsidered to address the complexities of autonomous and semi-autonomous systems.

International bodies such as the Council of Europe, UNESCO, and the OECD have recognized the urgency of these issues, advocating for governance mechanisms that uphold the rule of law while supporting innovation. For example, the Council of Europe's 2024 Framework Convention on AI, Human Rights, Democracy and the Rule of Law seeks to establish a harmonized legal foundation rooted in technological neutrality, transparency, and accountability. Likewise, UNESCO's 2021 Recommendation on the Ethics of Artificial Intelligence emphasizes the integration of ethical principles—such as human oversight, justice, and fairness—into AI governance models.

This article undertakes a comprehensive analysis of the intersection between AI and international legal norms, with a focus on legal liability, data protection, algorithmic fairness, and state responsibility. It evaluates regulatory models across jurisdictions—including the European Union, United States, China, and South Korea—while highlighting the necessity of a globally coordinated, human rights–based approach. In doing so, the study underscores that legal systems must evolve in tandem with technological advancements, ensuring that the rights, freedoms, and dignity of individuals remain protected in the digital age.

II. Artificial Intelligence and Human Rights Context

The rapid advancement of artificial intelligence (AI) has rendered its legal regulation one of the foremost priorities on the global governance agenda. As stated in the explanatory memorandum of the "Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law [12], opened for signature by the Council of Europe in 2024, this international treaty aims to ensure that artificial intelligence systems conform fully to the principles of human rights, democracy, and the rule of law throughout their entire lifecycle. The Convention is intended to address regulatory gaps in the rapidly evolving technological landscape and, rather than regulating specific technologies, seeks to maintain technological neutrality [11]. At the same time, the development of AI systems introduces significant legal and ethical risks across various domains of public life, including violations of the right to privacy, discriminatory practices, unlawful interference with personal data, and constraints on freedom of expression [35, Art. 12, 19]. For instance, as emphasized in the Executive Order signed by the President of the United States in 2023 [21], irresponsible use of AI can exacerbate adverse societal effects such as fraud, discrimination, bias, and disinformation. Accordingly, the principles of human rights protection and legal certainty are prioritized in the global governance of artificial intelligence [35, §II.2]. The importance of fundamental values such as the protection of human dignity and rights, transparency, and justice is also underlined in UNESCO's "Recommendation on the Ethics of Artificial Intelligence", adopted in 2021. These guiding principles are intended to promote legally sound and ethically aligned development and deployment of artificial intelligence systems.

The development of AI has introduced new challenges in the implementation of several fundamental human rights. As emphasized in the reports of the United Nations and other international organizations [27], right enshrined in the Universal Declaration

of Human Rights (UDHR)- including the right to life, liberty and personal security (Article 3), the right to an effective remedy (Article 8), the right to privacy (Article 12), and freedom of thought and expression (Article 19) are regarded as core principles that must be integrated into the design and development of artificial intelligence systems. For instance, empirical studies documenting racial and ethnic bias in algorithmic systems such as facial recognition technologies [2] demonstrate the necessity of principles of equality and non-discrimination to ensure fairness in AI outcomes. In this regard, the European Union promotes the development of transparent and explainable algorithms [14; 15] as part of its broader effort to mitigate risks of discrimination and opacity stemming from AI technologies. In light of these developments, it is evident that the impact of artificial intelligence on human rights, including violation of privacy, discriminatory practices, limitations on freedom of expression, and infringements upon the inviolability of private life – has emerged as a matter requiring robust regulatory oversight within the framework of international human rights law [27].

III. Artificial Intelligence and International Legal Norms: Data Protection, Algorithmic Justice and Automated Decision-Making

In the application of AI within the framework of International human rights principles, the rights to privacy, fairness and accountability must be rigorously upheld. Article 12 of the Universal Declaration of Human Rights (UDHR) affirms that everyone has the right to protection against arbitrary interference with their private life, family, home and correspondence. Similarly, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) [32, Art. 17] enshrines the right to be protected from unlawful or arbitrary interference with one's privacy and communications. The Council of Europe Convention 108 (1981) [7] and its modernized "Convention 108+" Protocol (2018) [9] require that the development and deployment of AI systems comply with the principle of privacy and data protection as set forth in Article 8 of the European Convention on Human Rights (ECHR) [6, Art. 8]. At the international level, organizations such as the United Nations [27] and UNESCO [35] emphasize the importance of lawfulness, purpose limitation, transparency and strict adherence to the "privacy by design" approach in the collection, storage and processing of personal data by AI systems. For instance, it is recommended that Data Protection Impact Assessments (DPIAs) be conducted for high-risk AI projects, [20, Art. 35] alongside the implementation of data minimization and strategies and enhanced cybersecurity safeguards. [20, Art. 5]. Furthermore, UNESCO's Recommendation on the Ethics of Artificial Intelligence [35, §III.8] places particular emphasis on the protection of data and the right to privacy throughout the AI lifecycle, calls for the establishment of robust national and international legal frameworks to ensure effective data governance.

The Impact of AI on Data Protection and the Right to Privacy. AI systems process vast volumes of personal data for purposes including profiling, quantitative analysis and automated decision-making. Such practices can ultimately pose significant threats to the right to privacy. According to the Council of Europe's recommendations [9], where AI projects involve the processing of personally identifiable information, they must comply with the principles enshrined of Convention 108+ - lawfulness, fairness, purpose, limitation, proportionality and personal data protection. In addition, the principles of "privacy by design" and "privacy by default" [20, Art. 25] must be applied. These approaches require that only data which is necessary and relevant be

collected, and that it be processed in a manner consistent with legal and transparent standards. Technical and organizational safeguards must be implemented to ensure the transparent and accountable operation of AI systems. The rights of data subjects – including the right to be informed about the collection and use of their data, the right to object, and the right to request human review [20, Arts. 13–15, 22] – must be respected and upheld. At the international level, the European Union's General Data Protection Regulation (GDPR) [20] provides that AI algorithms, whether developed independently or integrated into existing systems, fall within the scope of binding data protection requirements. Users must be informed of how profiling is conducted and must have access to adequate transparency measures in order to minimize the risks of discrimination and error [20, Art. 22]. UNESCO's Recommendation on the Ethics of Artificial Intelligence [35, §III.8] likewise underscores the fundamental importance of data protection and the right to privacy across the entire AI lifecycle. It further calls for the establishment of robust national and international legal frameworks to effectively address these concerns. As a result of the international normative obligations [27] and policy recommendations, national legal systems are required to implement specific safeguards aimed at preventing privacy infringements in AI applications. These may include pre-implementation risk assessment [20, Art. 35], data anonymization techniques, and enhanced cybersecurity protocols [9]. In accordance with access to information and data protection laws, state institutions must also ensure transparency by disclosing how data is processed and must afford individuals the ability to challenge decisions made by automated systems [20, Art. 22]. Ongoing international monitoring, and cross-border cooperation are crucial to ensuring that AI evolves in a manner that is fully compliant with privacy rights [35, §IV.13].

Algorithmic Justice and Non-Discrimination. The application of AI in decision-making systems increases the risk of individuals being subjected to discrimination based on gender, race, religion, disability, and other personal characteristics. This contradicts the fundamental principles of international law, namely the right to equality before the law and protection from discrimination. For instance, Article 7 of the Universal Declaration of Human Rights (UDHR) emphasizes that all individuals are equal before the law, and core UN human rights instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination [31, Art. 2] mandate a comprehensive prohibition of discrimination. Article 14 of the European Convention on Human Rights (ECHR) and Article 21 of the Charter of Fundamental Rights of the European Union [19, Art. 21] enshrine the same principle by prohibiting discrimination. This legal framework requires the integration of fairness and inclusivity into the design and development of AI systems. However, AI models frequently replicate patterns embedded in historical data and may inadvertently reinforce systemic biases. As a result, algorithmic systems can exacerbate discrimination, for instance, in recruitment, credit scoring or law enforcement. The "Fairness and Non-Discrimination" principle in UNESCO's Recommendation on the Ethics of Artificial Intelligence [35, §III.9] underscores that AI systems must promote social justice and avoid discriminatory outcomes. Accordingly, states and private entities should identify potential discriminatory impacts of algorithmic systems at early stages and implement appropriate technical and organizational safeguards.

In international practice, such as the Council of Europe's draft Convention on AI [10], specific measures are envisaged to address algorithmic bias and discrimination

risks. Furthermore, the EU's draft Artificial Intelligence Act highlights fairness as a core criterion in classifying high-risk AI systems, particularly those involving public sector functions and decision-making authority, and imposes obligations to mitigate discrimination.

In particular, for AI systems used in the public sector, human rights impact assessments should be conducted [27], and any resulting discriminatory effects must be thoroughly evaluated. Finally, the reinforcement of remedial legal protections—such as ensuring the right to judicial review of biased automated decisions [20, Art. 22]—plays a vital role in safeguarding the right to equality and justice.

IV. Legal Regulation of Automated Decision-Making and Human Oversight

Although automated decision-making systems can make rapid and large-scale decisions in many areas of life, the complete exclusion of the human factor from these processes raises new ethical and legal concerns. Under international human rights law, individuals have the right not to be subject to significant decisions made solely by automated systems. For instance, Article 22 of the General Data Protection Regulation (GDPR) [20, Art. 22] grants data subjects the right not to be subject to a decision based solely on automated processing that produces legal or similarly significant effects. This provision also requires that the underlying decision-making mechanisms be transparent, include human involvement, and allow for the possibility of post-decision review.

UNESCO's Recommendation on Ethics of Artificial Intelligence [35, §III.10] highlights in its article "Human Oversight and Determination" that primary responsibility must always rest with humans, not with AI systems. In its proposed Artificial Intelligence Act [17, Art. 14], the European Union mandates that high-risk AI systems operate under effective human oversight. For instance, the 2024 text of the European Commission's Artificial Intelligence Act [14, Art. 14(3)] calls for tools to enable active human monitoring of such systems (e.g., a "stop button") and the development of comprehensive human-machine interfaces. The objective is not only to identify technical failures and biases, but also to ensure that humans can consciously intervene in system decisions. Various regulatory measures may be envisaged to strengthen human oversight in automated systems. For instance, where public authorities utilize AI, legislation should require human actors to be actively involved in the decision-making and accountable for the final decision [11, Principle 4]. Whether in the public or private sector, users must have the right to challenge system decisions and request human review [20, Art. 22(3)]. Additionally, administrators and decision-makers should uphold the principle of "necessary human control," gaining a thorough understanding of AI's capabilities and limitations through targeted education and training programs [35, §III.10].

V. Legal Gaps, Ethical Risks and Technological Neutrality

AI applications give rise to a number of regulatory gaps within existing legal frameworks. While modern technological innovation is advancing rapidly, traditional legal systems struggle to adapt to these developments. For example, as emphasized in the Explanatory Memorandum of the Council of Europe's Framework Convention [11, para. 15], mechanisms intended to address the legal gaps emerging from rapid technological change should be technology-neutral-that is, overarching legal principles rather than tailored to specific technologies. However, some experts, including Luciano

Floridi [22, p. 42], challenge this approach. Floridi argues that the prevailing doctrine of technological neutrality is flawed - "no technology is ever neutral" and its design inherently reflects value-laden moral choices. This perspective underscores the legal significance of ethical risks: there is a need for legal frameworks that define principles such as reliability, fairness, and transparency in both the design and application of AI systems Without such regulation, challenges concerning the attribution of liability may arise- i.e., when harm results from a system failure, it becomes difficult to identify who should be held accountable [29, p. 358].

The issue of legal personhood also remains central in AI-related legal discourse. In traditional legal theory, "legal subject" refers to entities such as individuals or corporations, created for an indefinite range of purposes. However, with the evolution of AI systems, discussions have emerged around the potential recognition of AI as a distinct legal person. For example, former US District Judge Katherine Forrest states in her speech that legal subjectivity is a dynamic and inherently political concept, evolving over time as new legal categories are established to protect human interests. She emphasizes that human-like consciousness is not a necessary precondition for legal subjectivity. Corporations, for example, are not human beings, yet they possess rights and obligations granted for the purpose of functional utility [30, p. 1235]. On this basis, some legal scholars suggest that if AI systems achieve advanced cognitive complexity and autonomous reasoning capacity, standardized criteria may be required to grant them legal personhood [1]. Conversely, other perspectives argue that the current legal personhood structure is sufficient for maintaining liability mechanisms, while some advocate for the development of new mechanisms specifically designed to safeguard human accountability in the face of potentially harmful AI outcomes [35, §IV.7]. In scenarios where AI technologies might claim "consciousness" in the future, the legal system may need to expand its theoretical foundations to determine appropriate liability standards. At present, ongoing legal scholarship explores the adaptation of traditional liability theories-such as producer liability and operator liability AI applications. Altogether, this evolving landscape demonstrates that both the principle of technological neutrality and emerging concepts of legal personhood are integral to shaping contemporary approaches to legal responsibility in the context of AI.

VI. International responsibility of the state regarding artificial intelligence

International law establishes obligations that attribute responsibility to states for activities arising from the use of artificial intelligence. According to the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA, adopted by the United Nations in 2001) [36, Art. 2], a state is held responsible for any conduct that qualifies as an internationally wrongful act. Under t of Article 2 of ARSIWA, such conduct consists of a breach of an international obligation attributable to the state. Crimes or violations of international law committed by state organs or individuals acting under state authority in the context of managing AI systems are deemed acts of the state. For example, the emergence of racial discrimination in facial recognition systems implemented by public institutions is considered a violation of the state's international human rights obligations [23, Art. 5]. Article 3 of ARSIWA emphasizes that the fact that an act complies with domestic law does not mean that it is also lawful under international law [36, Art. 3].

Crimes or violations of international law committed by state organs or individuals acting under state authority in the context of managing AI systems are deemed acts of the state. For example, if racial discrimination emerges from facial recognition systems implemented by public institutions, such an occurrence is considered a breach of the state's international human rights obligations. Article 3 of ARSIWA further clarifies that conformity with domestic law does not render an act lawful under international law. Acts involving AI carried out by state bodies are thus indirectly attributed to the state. Articles 4–8 of ARSIWA [36, Arts. 4-8] establish that the conduct of any organ forming part of the state's institutional structure may incur full international responsibility. For example, if a human rights violation occurs through an AI system developed or deployed by experts under state direction or control, that violation is evaluated as part of the state's international legal responsibility [34, para. 4]. Article 11 of ARSIWA also holds a state responsible for conduct that it acknowledges and adopts as its own. In accordance with Article 12, an internationally wrongful act arises when the conduct of a state is not fully in conformity with its binding international obligations [36, Art. 12]. In this regard, states must ensure compliance with core standards such as human rights, non-discrimination, data confidentiality, and transparency when implementing AI systems [35, §IV.5]. Should a state or its authorized institutions fail to uphold these obligations as a result of AI deployment, international legal responsibility will be incurred. Moreover, under Article 14(3) of ARSIWA, the state is obligated to prevent certain adverse outcomes. In other words, a state's failure to act, despite foreseeing that the use of AI may result in unlawful outcomes, may itself constitute a breach of international law. For instance, if a state anticipates that the use of mass automated surveillance will infringe upon human rights, yet fails to take legislative or administrative steps to prevent it, the resulting harm triggers state liability [16, §125]. Articles 28–31 of ARSIWA specify the legal consequences a state faces for committing internationally wrongful acts. According to Article 30, the state must cease the wrongful conduct and offer guarantees of non-repetition. Article 31 requires the state to provide full reparation for the material and moral damage caused. These principles are directly applicable to violations arising from AI use. For example, if the misuse of a state-operated high-tech surveillance system leads to the unlawful dissemination of personal data and harms individuals, the responsible authority must cease the violation, implement institutional safeguards to prevent recurrence, and compensate affected persons.

In sum, ARSIWA clarifies the scope of state responsibility under international law in relation to artificial intelligence. The message to states is clear: while the deployment of AI may fall under national sovereignty, it is simultaneously subject to international legal scrutiny. States must ensure that AI applications within their jurisdiction conform to international law and proactively implement preventive measures to avoid violations. Failure to do so may result in international accountability, including proceedings before international tribunals.

VII. Principles of "Due Diligence" and "Failure to Prevent"

In international law, the principle of due diligence obliges states to exercise maximum effort to prevent harmful events that may occur within their jurisdiction. This means that states are under a duty to take progressive and reasonable measures against any activity that could harm neighboring states, their own citizens, or the international community at large [24]. For example, the Council of Europe's

Recommendation on the Prevention of Violence against Women affirms that states must act with due diligence when responding to acts of violence and must adopt adequate preventive, investigative, and punitive measures. This legal obligation is echoed in instruments such as the CEDAW Committee's General Recommendations, declarations on violence against women [8], and other international human rights documents. The European Court of Human Rights has similarly stressed in its case law that states must take operational preventive measures to protect individuals.

In the context of artificial intelligence, the due diligence principle requires states to implement legislation, standards, and monitoring mechanisms to mitigate risks associated with AI technologies. For example, states should carry out risk assessments, algorithmic bias evaluations, and security audits in AI projects, and adopt preventive regulatory measures to avoid discriminatory or otherwise harmful outcomes. Failure by a state to fulfill its due diligence obligation—that is, not taking the necessary precautions despite being capable of doing so—may constitute a case of failure to prevent under international law [36, p. 66]. In this context, if a rights violation occurs as a result of AI implemented within public or private institutions under the state's jurisdiction, affected individuals may pursue legal remedies, and the state may be held internationally responsible.

Consequently, states should adopt a due diligence-based approach to prevent legal risks arising from AI technologies. As part of this approach, they should:

- Conduct preliminary impact assessments for systems with a high risk of misuse [26, §1.4];
- Establish robust oversight mechanisms through regulatory and enforcement bodies [35, §IV.5];
- Enhance access to legal remedies for individuals [33, Principle 11];
- Provide full and effective compensation in cases of violations [25, §57].

Otherwise, state inaction may be regarded as a breach of international law under Article 3 of the Articles on the Responsibility of States for Internationally Wrongful *Acts (*ARSIWA) [36, Art. 3].

VIII. Recommendations from International Organizations and Legal Scholars

International organizations have adopted various instruments to shape the ethical and legal governance framework for artificial intelligence (AI). UNESCO's 2021 Recommendation on the Ethics of Artificial Intelligence prioritizes human rights and human dignity in AI systems, emphasizing the principles of transparency, fairness, accountability, and human oversight. The OECD's 2019 AI Principles adopt a similar position—supporting technological innovation while ensuring that "trustworthy AI" upholds human rights and democratic values [26, Principle 1.2]. These OECD guidelines provide practical regulatory recommendations to help governments and the private sector develop governance environments conducive to the implementation of these principles. It is evident that the overall aim is to establish a human rights-based framework for AI development and use.

In addition to the efforts of international organizations, a number of prominent legal scholars have made significant contributions to this field by conducting theoretical research on the legal normativity of AI. For instance, Frank Pasquale, Professor of Law at Yale University, is widely recognized for his work on "algorithmic judgment" [28, p. 8], in which he underscores the critical importance of ensuring accountability in the

deployment of AI systems. Luciano Floridi, in contrast, advocates the position that "technology is never neutral," [22, p. 42], emphasizing the role of public interest and ethical values in the design and governance of AI systems.

The research conducted by these legal theorists and philosophers illustrates that standardized policy frameworks alone are insufficient to ensure responsible AI governance [5, p. 156]. Instead, a synthesis of legal and ethical approaches is necessary to address the complex challenges posed by AI [38, p. 195].

At the United Nations level, the establishment of a High-Level Advisory Body on Artificial Intelligence in 2023 aims to develop global standards for AI governance and to promote a value-driven, rights-respecting global AI framework [37].

In conclusion, both international documents and expert opinions emphasize the necessity of placing AI under value-based governance, with a strong emphasis on safeguarding human rights at every stage of AI development and deployment [35, §IV.1].

IX. Comparative Regulatory Analysis: EU, US, China, South Korea

There are significant regulatory divergences among regions and countries in the governance of artificial intelligence (AI). The European Union adopted a risk-based legislative framework with its Artificial Intelligence Act in 2024 [18]. This regulation imposes strict technical, transparency, and accountability requirements on AI systems classified as high-risk, with a particular emphasis on the protection of fundamental rights. Furthermore, the European Commission's work plan includes provisions for permanent legal remedies for individuals harmed by AI applications [14; 15].

However, a uniform approach to AI-related liability has not yet been fully developed. As a result, regulatory fragmentation among Member States may persist, compelling affected individuals to seek legal redress on a national basis.

In the United States, AI governance is largely sector-specific and agency-driven. Executive Order 14110, signed in 2023, provides guidance on developing safe, reliable, and accountable AI, instructing federal agencies to update and align existing legal frameworks. U.S. institutions such as the Department of Justice [13], the Federal Trade Commission, and the Civil Rights Commission have sought to apply existing authorities to address discrimination and bias within AI systems. While certain states (e.g., California) have adopted standalone AI regulations, there remains no unified federal legislation. Accordingly, U.S. AI policy continues to operate within the bounds of existing legal norms, while international instruments—such as the AI Bill of Rights—remain non-binding and advisory in nature.

In China, AI regulation is characterized by centralized state control. In 2023, regulatory agencies introduced the Interim Measures for the Governance of Generative AI Services [4, Order No. 15], which constitute the first comprehensive rules for open content generation systems (e.g., ChatGPT-type models). Additionally, separate laws adopted in 2022–2023 address "deep synthesis" (deepfake) technologies [3] and recommendation algorithms, emphasizing data protection and content authenticity. China's broader regulatory framework includes stringent privacy rules under the Cybersecurity Law (2017), Data Security Law (2021), and Personal Information Protection Law (2021). For example, beginning in September 2025, all AI-generated text, audio, and video must be clearly labeled or watermarked, ensuring transparency and accountability. Overall, China is developing a complex regulatory architecture that

simultaneously promotes technological advancement and enforces state-centric oversight mechanisms.

South Korea passed its first comprehensive AI law—the Basic Law on the Development of Artificial Intelligence—in late 2024. This legislation introduces a risk-based model, similar to that of the EU, and includes content labeling obligations for generative AI outputs. In the future, content produced by such systems must be labeled to prevent misinformation and detect deepfakes. The law mandates human oversight in high-risk domains such as healthcare, employment, and essential services, and requires the formulation of risk management protocols. It also promotes infrastructure investments to foster responsible AI innovation. Enforcement bodies have insisted on strict adherence to existing privacy protections, particularly under the Personal Information Protection Act (PIPA). South Korea's regulatory model aims to balance innovation with individual rights protection.

This comparative analysis demonstrates that the EU seeks legal certainty by enacting the first dedicated AI law based on a risk framework; the U.S. relies on adapting existing laws within a fragmented regulatory landscape; China emphasizes state surveillance, content governance, and ideological conformity; and South Korea pursues a balanced, innovation-friendly regime with strong rights protections. These divergent approaches significantly influence the shaping of emerging global AI standards, as each region navigates its own equilibrium between technological development, democratic accountability, and human rights safeguards.

X. Conclusion

The issue of legal certainty and state responsibility concerning artificial intelligence (AI) is increasingly gaining importance within the framework of both international human rights norms and domestic legislation. AI technologies must respect individuals' rights to privacy, non-discrimination, and freedom of expression. International organizations (UNESCO, OECD, Council of Europe, etc.) and leading legal scholars emphasize that the principle of respect for human rights should form the basis for the design and implementation of AI systems. While the application of the technological neutrality principle contributes to the durability and adaptability of regulations, critics such as Luciano Floridi argue that the design of technology is itself an ethical act, inherently embedding values into AI systems. Legal systems are inherently flexible when it comes to legal personhood, having historically created new mechanisms and doctrines when necessary (e.g., corporate liability, intellectual property, legal fiction entities).

Under the UN Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), states may be held internationally responsible for violations committed through or by means of artificial intelligence. In this context, breaches committed by state organs, state-affiliated entities, or individuals acting under state instruction in the development or deployment of AI systems are attributable to the state under international law. In other words, international responsibility arises for any violation linked to the creation or use of state-sanctioned or state-controlled AI technologies.

States must adopt preventive measures grounded in the due diligence principle to mitigate the risks associated with AI. This includes a positive obligation to identify, assess, and minimize potential harms arising from the deployment of AI systems. A state's failure to prevent foreseeable human rights violations, such as the discriminatory

application of AI algorithms, may result in international legal liability for the resulting damages.

Regulatory approaches vary across jurisdictions:

- The European Union favors a risk-based, fundamental rights-oriented regulatory model;
- The United States focuses on adapting existing regulatory frameworks through agency-specific guidance;
- China enforces comprehensive state-led control and content governance;
- South Korea seeks to balance innovation and accountability through comprehensive legislation and robust oversight.

As a result, key principles such as privacy, non-discrimination, freedom of expression, technological neutrality, and state responsibility should be prioritized in legal frameworks governing AI. The development of a multi-level human rights–based legal architecture—nationally, regionally, and globally-is essential to ensure the ethical, transparent, and accountable use of artificial intelligence.

References:

1. Bryson, J. J., et al. (2017). Of, for, and by the people: The legal lacuna of synthetic persons. Artificial Intelligence and Law, 25(3), 273-291.
2. Buolamwini, J., & Gebru, T. (2018). Gender shades: Intersectional accuracy disparities in commercial gender classification. Proceedings of Machine Learning Research, 81, 1-15.
3. CAC. (2022). Provisions on the Administration of Deep Synthesis in Internet Information Services. Order No. 12.
URL: https://www.chinalawtranslate.com/en/deep-synthesis/(last access: 12.01.2025).
4. CAC. (2023). Interim Measures for the Management of Generative AI Services. Order No. 15.
URL: https://www.chinalawtranslate.com/en/generative-ai-interim/(last access: 10.01.2025).
5. Cath, C., Wachter, S., Mittelstadt, B., Taddeo, M., & Floridi, L. (2018). Artificial intelligence and the 'good society': The US, EU, and UK approach. Science and Engineering Ethics, 24(2), 505-528.
6. Council of Europe. (1950). European Convention on Human Rights (ECHR). ETS No. 5.
URL: https://rm.coe.int/1680a2353d (last access: 11.01.2025).
7. Council of Europe. (1981). Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108). ETS No. 108.
URL: https://rm.coe.int/1680078b37 (last access: 08.01.2025).
8. Council of Europe. (2002). Recommendation Rec(2002)5 on the protection of women against violence.
URL: https://www.coe.int/en/web/genderequality/recommendation-rec-2002-5-and-other-tools-of-the-council-of-europe-concerning-violence-against-women (last access: 10.01.2025).
9. Council of Europe. (2018). Protocol Amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+). CETS No. 223.
URL: https://rm.coe.int/16808ac918 (last access: 12.01.2025).

10. Council of Europe. (2023). Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law.

URL:https://internazionale.camera.it/sites/internazionale/files/atti_approv/APCE_Opinion-303_EN.pdf (last access: 09.01.2025).

11. Council of Europe. (2024). Explanatory Report to the Framework Convention on AI, Human Rights, Democracy and the Rule of Law.

URL: https://rm.coe.int/1680afae67 (last access: 12.01.2025).

12. Council of Europe. (2024). Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law. Strasbourg: Council of Europe.

URL: https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence (last access: 07.01.2025).

13. Department of Justice (DOJ). (2023). Algorithmic Justice Initiative: Guidance on AI and Civil Rights.

URL: https://www.justice.gov/archives/crt/ai (last access: 11.01.2025).

14. European Commission. (2024). Artificial Intelligence Act (Final Text). COM(2024) final.

URL: https://data.consilium.europa.eu/doc/document/ST-11625-2024-INIT/en/pdf (last access: 05.01.2025).

15. European Commission. (2024). Proposal for a Regulation laying down harmonized rules on artificial intelligence (Artificial Intelligence Act). Brussels: EU.

URL: https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng (last access: 09.01.2025).

16. European Court of Human Rights. (2018). Big Brother Watch v. United Kingdom. App. No. 58170/13, 62322/14, 24960/15.

URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-210077%22]} (last access: 12.01.2025).

17. European Parliament. (2020). Resolution on a comprehensive European industrial policy on AI. 2020/2016(INI).

URL: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0081_EN.html (last access: 12.01.2025).

18. European Parliament. (2024). Regulation on Artificial Intelligence (AI Act). Regulation (EU) 2024/1689.

URL: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689 (last access: 08.01.2025).

19. European Union (EU). (2000). Charter of Fundamental Rights of the European Union. OJ C 364/1.

URL: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (last access: 09.01.2025).

20. European Union (EU). (2016). General Data Protection Regulation (GDPR). Regulation (EU) 2016/679.

URL: https://gdpr-info.eu/(last access: 06.01.2025).

21. Exec. Order No. 14,110, 3 C.F.R. (2023). Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.

URL: https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence (last access: 12.01.2025).

22. Floridi, L. (2018). Soft ethics and the governance of the digital. Philosophy & Technology, 31(1), 1-8.

23. International Convention on the Elimination of All Forms of Racial Discrimination. (1965). 660 U.N.T.S. 195.
URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial (last access: 09.01.2025).
24. International Court of Justice. (1949). Corfu Channel Case (UK v. Albania). 1949 I.C.J. 4.
URL: https://www.icj-cij.org/case/1 (last access: 10.01.2025).
25. International Court of Justice. (2012). Ahmadou Sadio Diallo (Guinea v. DRC), Compensation. 2012 I.C.J. 324.
URL: https://www.icj-cij.org/node/102047 (last access: 07.01.2025).
26. OECD. (2019). OECD Recommendation of on Artificial Intelligence. OECD/LEGAL/0449.
URL: https://oecd.ai/en/assets/files/OECD-LEGAL-0449-en.pdf (last access: 12.01.2025).
27. Office of the High Commissioner for Human Rights (OHCHR). (2021). The Right to Privacy in the Digital Age. UN Doc. A/HRC/48/31.
URL: https://docs.un.org/en/A/HRC/48/31 (last access: 11.01.2025).
28. Pasquale, F. (2015). The black box society: The secret algorithms that control money and information. Harvard University Press.
29. Scherer, M. U. (2016). Regulating artificial intelligence systems. Harvard Journal of Law & Technology, 29(2), 353-400.
30. Solum, L. B. (1992). Legal personhood for artificial intelligences. North Carolina Law Review, 70(4), 1231-1287.
31. UN General Assembly (UNGA). (1965). International Convention on the Elimination of All Forms of Racial Discrimination. UNTS Vol. 660.
URL: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&clang=_en (last access: 12.01.2025).
32. UN General Assembly (UNGA). (1966). International Covenant on Civil and Political Rights (ICCPR). UNTS Vol. 999.
URL:https://treaties.un.org/PAGES/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=TREATY (last access: 12.01.2025).
33. UN General Assembly. (2005). Basic Principles and Guidelines on the Right to a Remedy and Reparation. A/RES/60/147.
URL: https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf (last access: 12.01.2025).
34. UN Human Rights Committee. (2011). General Comment No. 34 on Freedoms of Opinion and Expression. U.N. Doc. CCPR/C/GC/34.
URL: https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf (last access: 12.01.2025).
35. UNESCO. (2021). Recommendation on the Ethics of Artificial Intelligence. Paris: UNESCO.
URL: https://www.unesco.org/en/articles/recommendation-ethics-artificial-intelligence (last access: 12.01.2025).
36. United Nations. (2001). Articles on Responsibility of States for Internationally Wrongful Acts. U.N. Doc. A/RES/56/83.

URL:https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last access: 10.01.2025).

37. United Nations. (2023). Secretary-General announces creation of new AI advisory board URL: https://press.un.org/en/2023/sga2236.doc.htm (last access: 08.01.2025).

38. Zuboff, S. (2019). The age of surveillance capitalism: The fight for a human future at the new frontier of power. PublicAffairs.

URL: https://www.hbs.edu/faculty/Pages/item.aspx?num=56791 (last access: 09.01.2025).

Date of receipt of the article in the Editorial Office
(23.01.2025)

SURROGASY IN MEDICAL LAW: LEGAL AND ETHICAL PERSPECTIVES

Anara Hajibayli*

Abstract

Surrogacy stands as one of the most complex and widely debated issues in contemporary medical law, intersecting reproductive rights, bioethics, and shifting legal landscapes. With infertility impacting an estimated 15–20% of couples globally, the demand for alternative reproductive pathways, including surrogacy, continues to grow. Yet, regulatory responses vary sharply between jurisdictions. Countries such as Türkiye and Azerbaijan, for example, still lack comprehensive legislation to govern such practices. This paper investigates surrogacy from legal, ethical, and medical perspectives, advocating for a rights-based, interdisciplinary framework that protects all parties involved particularly the child. The study highlights key legal ambiguities concerning the recognition of parenthood, enforceability of surrogacy contracts, and the ethical boundaries of assisted reproductive technologies. Drawing from comparative legal systems, including those of the United Kingdom, the United States, and select Eastern European states, the paper argues for recognition of genetic motherhood and the establishment of ethics committees comprising legal, medical, and psychosocial professionals. It outlines permissible conditions for surrogacy, such as medical necessity, genetic links between the embryo and intended parents, and strict non-commercial intent. Moreover, it addresses biological phenomena like microchimerism and calls for the creation of registries to guard against inadvertent incest. The welfare of the child remains central, and the paper proposes that future surrogacy legislation explicitly address matters of custody, inheritance, and contractual withdrawal. Looking ahead, it acknowledges the transformative potential of technologies such as uterus transplants and artificial wombs. Ultimately, the article urges legislative reform in Türkiye, Azerbaijan, and comparable jurisdictions to ensure transparency, justice, and ethical integrity in surrogacy arrangements.

Keywords*: surrogate motherhood, paternity, surrogacy agreements, infertility, artificial insemination, assisted reproductive technologies, zygote, fetus.*

I. Introduction

The drive to reproduce and ensure the continuity of human life is among the most deeply rooted instincts of individuals and societies. When biological reproduction becomes unattainable, alternative paths to parenthood once regarded as exceptional have gained legitimacy and accessibility thanks to medical innovations. One such path is surrogacy: the process of having a child through a gestational carrier, which has become increasingly common in recent decades. Although the historical origins of surrogacy remain obscure, archaeological findings suggest it dates as far back as 2000 BCE. A clay tablet found in Kültepe, an ancient Assyrian site in modern-day Turkey, contains legal references to infertility, egg donation, and surrogate arrangements, indicating that these practices were once formally regulated. Similarly, biblical narratives such as those of Sarah and Hagar, or Rachel and Bilhah are often cited as early examples of surrogate motherhood. Contemporary surrogacy began to take legal and medical shape in the United States during the late 20th century, with the first formally documented surrogacy arrangement recorded in 1976. Landmark cases such as *Baby M* and *Baby Cotton* ignited fierce legal and ethical debates, exposing the gaps in legislative frameworks and challenging traditional notions of parenthood. Globally,

* PhD candidate in Law, Baku State University, Lecturer of the UNESCO Chair on Human Rights and Information Law

legal responses to surrogacy differ substantially: some jurisdictions ban it outright, while others permit it under strict conditions. In Azerbaijan, however, the legal landscape remains undeveloped and unclear. Neither the Family Code nor existing medical or human rights laws explicitly define the legal standing of surrogacy. This legal vacuum fosters uncertainty, raising ethical dilemmas and practical issues related to parentage, custody, and medical liability.

This paper aims to critically examine surrogacy within a legal-medical framework, with a particular focus on Azerbaijan. It assesses the current state of domestic law, evaluates its alignment with international standards, and proposes reforms to promote ethical and effective governance of surrogacy. By doing so, the article contributes to broader debates on reproductive autonomy, legal personhood, and family rights in evolving legal contexts.

II. The Concept and Definition of Surrogacy

Before exploring surrogacy in detail, it is essential to understand the broader context of artificial insemination a foundational reproductive intervention often linked to surrogacy [2]. Artificial insemination involves introducing sperm into a woman's reproductive system without sexual intercourse, with the goal of achieving fertilization. Modern applications of this technique include gamete transfer and in vitro fertilization (IVF), all of which are designed to facilitate conception outside of sexual reproduction. Artificial insemination is primarily used when natural conception is medically impossible or impractical, including cases involving physical separation of partners (such as military deployment or incarceration), psychological barriers, or complex medical conditions. These technologies are now integral to surrogacy practices [2]. To better understand surrogacy, it is helpful to clarify several biological terms:

- A *zygote* forms when a sperm cell fertilizes an egg, resulting in a single cell with a complete set of chromosomes.

- Within 24 hours, the zygote begins cellular division and becomes an *embryo*, which is classified as a *fetus* beginning in the eighth week of gestation.

In Turkish law, assisted reproductive technologies (ART) which include fertilization and embryo transfer outside the human body are defined under Article 4 of the Regulation on Assisted Reproductive Treatment Practices and Centers (ÜYTE) [6]. This regulation distinguishes between:

- *Homologous fertilization:* Only between married partners using their own gametes (legally permitted).

- *Heterologous fertilization*: Involving donor gametes, often from unmarried third parties (legally prohibited in Turkey) [6].

Surrogacy typically involves a woman, the *surrogate mother*, who agrees to carry and deliver a child for another individual or couple [3]. This often occurs when the intended mother is unable to conceive or carry a pregnancy safely. The arrangement is governed by a formal contract that outlines obligations such as abstaining from harmful substances, undergoing regular medical supervision, and relinquishing the child post-birth. Despite its increasing use, there is no universal agreement on terminology; some prefer terms like *gestational carrier* or *host mother* to reflect the surrogate's limited parental role [13]. Broadly, surrogacy is divided into two types: Genetic Surrogacy and Gestational Surrogacy. *Genetic Surrogacy***-**In this model, the surrogate mother is also the genetic mother, as she provides her egg. The sperm may come from the intended father,

and fertilization can occur naturally or via artificial insemination. Because the child is biologically related to the surrogate, legal motherhood lies with her, and the intended mother must adopt the child to establish legal parental status [12]. *Gestational Surrogacy*- here, the surrogate has no genetic connection to the child. The embryo is created using the intended parents' or donors' gametes via IVF and is then implanted into the surrogate. In principle, no biological bond exists between the surrogate and the fetus [10]. However, recent scientific findings suggest otherwise. The phenomenon of *microchimerism* the transfer of a small number of cells between the surrogate and the fetus may result in subtle and lasting biological links, with implications for immune function and long-term health. These complexities further underscore the need for nuanced legal recognition of surrogacy arrangements.

Surrogacy arrangements are frequently categorized based on whether or not financial compensation is involved:

- *Commercial Surrogacy* (also referred to as compensated or paid surrogacy): In this model, the surrogate mother receives monetary payment beyond the reimbursement of medical and pregnancy-related expenses. Although ethically contentious, such compensation is often justified as acknowledgment for the surrogate's time, physical demands, and potential health risks [4].
- *Altruistic Surrogacy* (also known as unpaid or gratuitous surrogacy): This arrangement occurs when the surrogate agrees to carry the child without receiving financial reward, typically motivated by empathy or familial connection. Such models are more prevalent in jurisdictions with stricter legal controls on reproductive commodification [7].

For consistency and clarity, this paper uses the terms *compensated surrogacy* and *altruistic surrogacy* throughout.

Surrogacy can also be defined by the geographical relationship between the parties involved:

- *Domestic Surrogacy* occurs when both the surrogate and the intended parents reside within the same legal jurisdiction [5].
- *Cross-Border Surrogacy* involves parties from different countries. This model has become increasingly common among individuals or couples from countries where surrogacy is either banned, heavily restricted, or financially prohibitive. High-income families often seek surrogacy arrangements abroad, raising serious ethical questions about exploitation and the global marketization of reproductive labor [11].

The terminology used in surrogacy discourse is itself a subject of debate. Critics argue that the label "*surrogate mother*" fails to adequately reflect the surrogate's limited parental role, proposing alternatives such as *gestational carrier*, *host mother*, or *pregnancy for another* [13]. The South African Law Commission, for example, uses the term *hostess mother* [13]. Such linguistic diversity reflects the legal and cultural complexity surrounding surrogacy, highlighting its evolving nature across medical, ethical, and jurisprudential domains.

Surrogacy generally involves at least three participants and is often undertaken for medically justifiable reasons. Women may turn to surrogacy if they lack a uterus (due to congenital absence or surgical removal), have uterine conditions that preclude safe pregnancy (e.g., Asherman's syndrome, fibroids, septate uterus), or suffer from systemic illnesses such as heart disease, kidney failure, or recurrent miscarriage [6]. Beyond medical necessity, surrogacy is also sought by same-sex couples, single

individuals, or women wishing to avoid the physical and psychological burdens of pregnancy [1].

Historically, surrogacy was performed through natural sexual relations between the intended father and the surrogate. However, advances in assisted reproductive technologies (ART) have introduced more ethical and medical control over the process. Today, surrogates may conceive through artificial insemination or via embryo transfer using IVF [3]. These techniques allow for embryo screening, increase pregnancy success rates, and reduce ethical concerns related to direct sexual involvement.

Modern surrogacy arrangements may differ legally depending on the marital status of the surrogate or intended mother, and whether donor gametes are used. Based on the source of the egg, surrogacy practices are generally categorized as follows:

The Egg is Provided by the Intended Mother-In this gestational surrogacy model, the intended mother's egg is fertilized through IVF, and the resulting embryo is implanted into the surrogate's uterus. This method is typically used when the intended mother is medically unable to carry a pregnancy due to anatomical or health-related conditions, or when she prefers not to undergo pregnancy for personal or professional reasons.

Although the child is genetically related to the intended mother, the legal mother under Turkish Civil Code (TMK) is the woman who gives birth i.e., the surrogate. Consequently, intended parents must complete legal steps such as adoption or paternity acknowledgment (in cases involving sperm from the intended father) to secure parental rights. If the surrogate is married, her husband is presumed to be the child's father unless paternity is legally contested and reassigned.

The Egg is Provided by the Surrogate Mother-In traditional surrogacy, the surrogate provides her own egg, making her both the genetic and gestational mother. Fertilization occurs through artificial insemination or IVF using sperm from the intended father or a donor. This arrangement is frequently used by male couples or single men seeking biological parenthood [12].

According to Turkish law, the surrogate in this model is recognized as the legal mother. If she is unmarried and the sperm is provided by the intended father, paternity can typically be established without legal conflict. However, if the surrogate is married, her husband is presumed to be the child's father under the law regardless of the sperm donor's identity unless that presumption is legally rebutted.

The Egg is Donated Anonymously-When neither the intended mother nor the surrogate contributes the egg, an anonymous donor may be used. The donated egg is fertilized via IVF and implanted into the surrogate. This model is often chosen by women with premature menopause, poor egg quality, or genetic conditions [4]. In this scenario, legal complexities increase. If the surrogate is unmarried and the sperm is provided by the intended father, legal paternity is straightforward. If the sperm also comes from an anonymous donor, then neither parent has a direct biological connection, and adoption becomes necessary. Legal clarity requires that both egg and sperm donors waive all parental claims.

Each of these models whether involving the intended mother's egg, the surrogate's, or a donor's poses unique legal and ethical challenges. Issues surrounding consent, parental recognition, contractual obligations, and reproductive autonomy must be addressed through transparent regulation to prevent exploitation and ensure that the best interests of the child are preserved.

III. Surrogacy in Azerbaijan: legal ambiguity and reform needs

In Azerbaijan, surrogacy is not explicitly prohibited, yet it is not clearly regulated either [1]. This legislative silence creates a legal vacuum with significant consequences for families, medical professionals, and policymakers. Existing laws, such as the Family Code, Civil Code, and the Law on Public Health, fail to define or address surrogacy arrangements. Although the Constitution and Family Code emphasize the protection of children's rights, there are no specific provisions outlining the roles, responsibilities, or rights of surrogate mothers and intended parents. This regulatory gap leads to substantial difficulties, particularly in establishing legal parentage, issuing birth certificates, and obtaining citizenship for children born via surrogacy. Consequently, some Azerbaijani couples seek surrogacy services abroad in countries like Georgia, Ukraine, or the United States where legal frameworks exist [8]. However, these arrangements often face complications when reintegrated into the Azerbaijani legal system. While assisted reproductive technologies like IVF are legally available in Azerbaijan, the absence of surrogacy-specific legislation discourages domestic application due to legal risks and professional uncertainty [1]. Ethical perspectives are also polarized. Some scholars and religious authorities view surrogacy as contrary to natural biological roles, while others, especially legal and medical experts, advocate for its regulated implementation as a means to support individuals affected by infertility.

To address these concerns, Azerbaijan should adopt comprehensive legislation that clearly defines:

- The enforceability of surrogacy contracts [3],
- Legal mechanisms for assigning parentage and registering births [9],
- Medical and ethical criteria for surrogate eligibility, including health status, age, and psychological readiness [6],

Such legislation would enhance legal certainty, protect all parties involved, and ensure ethical and equitable reproductive practices in Azerbaijan.

IV. Conclusion

Infertility, affecting approximately 15–20% of couples worldwide, continues to represent a significant public health and societal challenge. As the innate human drive for reproduction endures, individuals and couples increasingly seek alternative means to build families among them, surrogacy remains one of the most prominent and contentious options. Even in jurisdictions where surrogacy is restricted or prohibited, the practice often proceeds through informal channels or international arrangements, giving rise to the phenomenon of "reproductive tourism."

The absence of coherent legal frameworks particularly those addressing parentage, child status, and contract enforcement fosters ambiguity, legal disputes, and potential harm to all parties involved. This is especially evident in countries such as Türkiye and Azerbaijan, where surrogacy remains legally undefined. These circumstances call for immediate and comprehensive legislative action that embraces the realities of modern reproductive medicine while safeguarding ethical standards.

Future legal reforms should address key issues, including:

- The legal status of embryos
- Restrictions on genetic manipulation and embryo destruction
- Permissible scope of medical interventions
- Regulation of surrogacy contracts

- Legal determination of parentage
- Protection against the exploitation of surrogates

Given that reproductive autonomy is increasingly recognized as a constitutionally protected personal right, surrogacy should be permitted albeit under strict conditions. These should include medical necessity, genetic linkage between the child and the intended parents, and a non-commercial, ethically supervised process. Such oversight should be entrusted to a multidisciplinary ethics or judicial committee comprising legal, medical, and psychosocial experts. The longstanding Roman legal doctrine *mater semper certa est* ("the mother is always certain") is no longer sufficient in the context of gestational surrogacy, where genetic and gestational motherhood may diverge. The law must evolve to recognize genetic maternity where appropriate and provide clarity regarding the rights and responsibilities of all involved.

Furthermore, biological factors such as *microchimerism* the exchange of cells between the fetus and the surrogate demand legal acknowledgment, particularly in preventing unintended incestuous relationships through well-maintained registries [10]. Limiting surrogacy to a single occurrence per surrogate may prove too restrictive, especially if future medical treatments such as stem cell transplants rely on biological relationships formed during surrogacy. It is also crucial to legally recognize the emotional bonds that may develop between the surrogate and the child, as well as to regulate withdrawal rights: intended parents should be permitted to revoke consent prior to embryo implantation, while surrogate mothers especially those with a genetic link should have rights aligned with national abortion laws. In the event of the death or incapacitation of the intended parents, existing guardianship laws, such as those found in Turkish and Azerbaijani civil codes, should ensure continuity of care and preserve the child's link to their genetic origins [1].

Ultimately, surrogacy is a reality of modern reproductive life. While it remains ethically complex and legally divisive, it is essential that countries like Türkiye and Azerbaijan enact forward-thinking, transparent, and inclusive legislation. Looking ahead, technological advances such as uterus transplants and artificial wombs may reshape this landscape. For now, the path forward lies in embracing a rights-based, multidisciplinary approach that upholds the dignity of all participants and prioritizes the welfare of the child.

References:

1. Aliyev, R. (2022). *Family Law and Reproductive Rights in Azerbaijan: A Comparative Legal Study.* Baku Legal Review, 14(3), 102–118.
2. Cook, R. J., Dickens, B. M., & Fathalla, M. F. (2003). *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*. Oxford University Press.
3. Crockin, S. L., & Jones, H. W. (2010). *Legal Conceptions: The Evolving Law and Policy of Assisted Reproductive Technologies*. Johns Hopkins University Press.
4. Deonandan, R. (2015). Recent trends in reproductive tourism and international surrogacy: Ethical considerations and challenges for policy. *Risk Management and Healthcare Policy*, 8, 111–119.
5. Greely, H. T. (2020). *CRISPR People: The Science and Ethics of Editing Humans.* MIT Press.
6. Gürsoy, A., & Baykal, B. (2021). Embryo Ethics and Legal Gaps in Turkish Reproductive Medicine. *Turkish Journal of Bioethics*, 8(1), 45–59.

7. Gupta, J. A. (2012). Reproductive biocrossings: Indian egg donors and surrogates in the globalized fertility market. *International Journal of Feminist Approaches to Bioethics*, 5(1), 25–51.

8. Horsburgh, M. (2021). Regulation and Record-Keeping in International Surrogacy. *Medical Law International*, 21(2), 134–153.

9. Jackson, E. (2022). *Medical Law: Text, Cases, and Materials* (5th ed.). Oxford University Press.

10. Lo, Y. M., & Chiu, R. W. K. (2019). Microchimerism and the legal complexities of maternal-fetal cell exchange. *Nature Reviews Genetics*, 20(3), 147–158.

11. Pennings, G. (2016). Reproductive tourism as moral pluralism in motion. *Journal of Medical Ethics*, 42(3), 211–215.

12. Stoll, J. (2018). From "mater semper certa est" to surrogacy: A legal paradigm shift. *European Journal of Health Law*, 25(4), 387–403.

13. Teman, E. (2010). *Birthing a Mother: The Surrogate Body and the Pregnant Self.* University of California Press.

14. Trimmings, K., & Beaumont, P. (2013). *International Surrogacy Arrangements: Legal Regulation at the International Level.* Hart Publishing.

15. UNICEF. (2020). *Best Interests of the Child in Surrogacy Arrangements.* United Nations Children's Fund.

16. World Health Organization. (2023). *Infertility.*

URL: https://www.who.int/news-room/fact-sheets/detail/infertility (last access: 04.01.2025).

Date of receipt of the article in the Editorial Office
(16.01.2025)

ADMINISTRATIVE ACTS AND ISSUES RELATED TO THEIR LEGAL FORCE

Zarifa Mammadova*

Abstract

Administrative proceedings are understood as activities carried out by the relevant administrative bodies within the framework of the procedural rules established by this Law on the adoption, execution, amendment or cancellation of an administrative act, as well as consideration of administrative complaints, upon the application of individuals or legal entities or on the initiative of administrative bodies. As can be seen from the definition, the main activity of an administrative body is related to the adoption of an administrative act. When interested persons against whom an administrative act has been adopted apply to the court to protect their rights and interests, first of all, whether an administrative act has been adopted in this regard is investigated. From this it is clear that the activities of administrative bodies and their regulation are related to administrative acts. In this regard, the legal force of administrative acts, as well as the validity of administrative acts, are checked in the courts based on the principles of legality and protection of the right to trust. In addition to conducting research on the legal force of administrative acts in theory and legislation, the practice of administrative bodies and court cases were also studied.

Keywords*: administrative law, management, administrative bodies, administrative proceedings, administrative act, unfavorable administrative act, interested party, classification.*

I. Introduction

The adoption of an administrative act is taken as the final result of administrative proceedings in administrative bodies. In this sense, an administrative act is understood as a decision, order or other type of power measure adopted by an administrative body in order to regulate or resolve a specific (concrete) issue related to the general (public) field of law and creating certain legal consequences for the legal or natural person (s) to whom it is addressed. The fact that the concept of "administrative act" began to be regulated in a single concept in legislation later led to the use of a unanimous form and methods in practice for administrative bodies. Currently, as we have seen from judicial practice, it is being investigated whether an administrative act should be adopted in relation to interested persons whose rights and interests are affected as a result of the actions of administrative bodies. In this sense, there is a need to investigate the concept of administrative acts and their legal force. The article examines the concept and essence of administrative acts,and examines the gaps and proposals in the existing legislation. The article consists of an introduction, 2 paragraphs and a conclusion.

II. Concept and essence of administrative acts

Administrative proceedings are primarily governed by the language of the agency's authorizing act, the relevant administrative procedural act (APA)29, and the procedural rules adopted by the agency. Many agencies use specific procedures for individual issues, so it is dangerous to overgeneralize the decision-making process of a particular agency. In some cases, courts have required agencies to follow specific procedures. There are essentially three components to agency decision-making:

* PhD candidate in Law, Baku State University

decision-making, adjudication, and administrative action. Administrative proceedings usually vary depending on the type of decision-making the agency is engaged in [5, p. 18].

The concept of an administrative act is of significant substantive and procedural importance. In the past, since there was no single concept of an administrative act, various concepts and forms were used in the conduct of administrative proceedings (for example, order, decree, decision, etc.). As a result of the formulation of legislation on administrative proceedings, the concept of "administrative act" began to be applied by defining a general rule. An administrative act is understood as an important form of activity of administrative bodies and as the implementation of the law. For this reason, an administrative act is considered one of the central concepts of administrative law. An administrative act, being a singular act of "applying law", determines the legal status of the persons to whom it is addressed, that is, what is obligatory for them, etc. [3, p. 46].

The term "administrative legal act" is also referred to as "legal act of administrative bodies" in the administrative law of post-Soviet countries. However, in post-Soviet administrative law, legal acts of administrative bodies do not include acts of administrative bodies in the field of special law (such as contracts). Although not all legal acts of administrative bodies are considered administrative acts in the theoretical sense, acts that do not fall into this category are included in the subject of administrative contracts in the administrative law of the CIS countries. These are listed below. Legal acts of administrative bodies are divided into normative, individual and general acts. [2, p. 191].

It is also possible to consider the concept of administrative act in the legislation of other countries. According to Article 35 of the German Administrative Procedure Act, administrative acts and individual acts are adopted only in the field of general law and they represent unilateral and enforceable instructions and decisions that regulate individual relations directed towards the outside world. The United States Administrative Procedure Act of 1946, Section 2, uses the term "order" to describe a final decision of an administrative agency, including licensing, not otherwise provided for by law. According to Article 2, Subsection 2 of the Federal Administrative Procedure Act of 2001 of the Federal Democratic Republic of Ethiopia, an administrative order is "any decision or order of an agency, the purpose or effect of which is to impose a sanction or to grant or withhold a relief, including a decision to take or refrain from taking any other action or work of an administrative nature…" [10, p. 130].

Administrative act is a central concept in Spanish administrative law. The existence of an administrative decision is essential for the creation of rights and obligations within the framework of administrative law. In addition, judicial review requires the challenge of a previous decision (explicit, implicit or simply inaction). Therefore, administrative jurisdiction has traditionally been considered as a supervisory jurisdiction [6, p. 84].

Just as the legislative function is performed by legislative acts and the judicial function by court decisions, administrative proceedings are carried out on the basis of administrative acts. In order to clarify the importance of an administrative act, it is necessary to look at its functions. The executive, concretizing, enforcement, procedural and legal protection functions of an administrative act can be distinguished. It should be borne in mind that we may not observe each of these functions in a single administrative act. For example, a determinative administrative act does not have an executive function, since this type of administrative act does not require the performance of certain actions. When we say executive function, the administrative

proceedings are concluded with the adoption of that administrative act. The function of concretization means the determination of specific rights and obligations for the interested person by adopting an administrative act. Another function of an administrative act is its executive nature. Thus, one of the main functions of an administrative act is the executive function. With the adoption of an administrative act, it is immediately directed to execution. And the failure to execute an administrative act ultimately leads to a violation of the rights of interested persons. The function of administrative procedural and legal protection includes the possibility of filing an administrative lawsuit against an administrative act.

The Federal Democratic Republic of Ethiopia also drafted a Federal Administrative Procedure Act in 2001. The term decision-making is not mentioned at all in the Federal Administrative Procedure Act. The term "administrative decision" defined in Article 2, Subparagraph 2 of this draft is as follows: an administrative decision is "any decision, order or rule of an authority having a purpose or effect, including a decision to issue or refuse to issue a decision on its execution or refusal to execute [4, p. 130].

The importance of an administrative act can be considered in the formal and substantive sense. Thus, in the formal sense, an administrative act is understood as its external form, that is, its structure and form. Articles 57-59 of the Law "On Administrative Proceedings" regulate the formal requirements for an administrative act. However, the fact that an administrative act is marked with a decision or order does not mean that it is an administrative act. Thus, even if an administrative act meets formal requirements, it cannot be considered an administrative act if it does not provide for any regulatory rules.

In theory, to understand the essence of an administrative act, it is possible to note the following features:

1. The fact that an administrative act has binding legal force for interested persons. An administrative act is adopted by an administrative body as a result of administrative legal relations between an administrative body and interested persons. In administrative law, the relations that arise between an administrative body and interested persons are imperative in nature. This means that there are not equal, but subordinate relations between the administrative body and the interested person. Due to the superiority of administrative bodies over citizens, administrative acts adopted by them must be executed in a mandatory manner. In this regard, Chapter VIII of the Law "On Administrative Proceedings" entitled "Execution of Administrative Acts" regulates the means of mandatory execution of administrative acts.

2. The basis of an administrative act on the law. Of course, the binding nature of an administrative act does not mean that it is a condition for the possibility of abuse of authority by administrative bodies. Thus, when an administrative act is adopted by an administrative body, the adoption of that administrative act must be based on the law. This feature stems from the essence of the principle of legality, which is one of the basic and important principles of administrative proceedings. When an administrative act is adopted by an administrative body, the provision on which law it is based must be reflected in that act. This, in turn, is contained in the mention of the legal basis of the administrative act. Thus, if an administrative act adopted by an administrative body does not have a legal basis, that administrative act is considered invalid.

3. Adoption of an administrative act by a person with authority. An administrative act must be adopted by a person with authority to adopt it. Otherwise, that administrative act is considered invalid. According to Article 2.0.1 of the Law "On Administrative Proceedings", an administrative body means the relevant executive authorities of the Republic of Azerbaijan, their local (structural) and other bodies, municipalities, as well as any natural or legal person authorized to adopt an administrative act in accordance with the law. As can be seen from this, an administrative act must be adopted by an administrative body in the manner prescribed by law. As a legislative body, the Milli Majlis of the Republic of Azerbaijan and courts, like judicial authorities, also have the authority to adopt an administrative act. For example, the decision of the chairman of the court on intra-judicial norms, the decisions of the chairman of the parliament on the organization of parliamentary sessions are considered administrative acts.

4. Determination of an administrative act as a measure of power. The unilateral adoption of an administrative act by an administrative body characterizes its "power" feature. A power measure is a unilateral expression of will. From this it becomes clear that an administrative act can be adopted in written, oral, gesture, or signal form. For example, a decision "on refusal to grant a labor pension" adopted by the State Social Protection Fund as an administrative body is an administrative act adopted in written form, a traffic policeman's request to stop a car is an administrative act adopted in oral form, and a car stopping as a result of a red traffic light is an administrative act adopted in the form of a gesture. The nature of an administrative act as a measure of authority is understood as a measure taken by an administrative body in the field of public (general) law. It should be borne in mind that not all measures taken by an administrative body belong to the field of general law. For example, decisions adopted by the Personnel Department of the Ministry of Internal Affairs as an administrative body cannot be accepted as an administrative act.

5. The administrative act creates legal consequences by determining the regulatory procedure. From the above-mentioned feature, it is clear that an administrative act, like a regulatory procedure, must create certain rights and obligations for interested persons. From this it is also clear that if the administrative subregulation adopted by the administrative body does not have a purpose, then the decision is excluded from being an administrative act. For example, the decision of the administrative body on inviting an interested person to administrative proceedings. Decisions of this type are also called intermediate administrative acts.

III. Types and legal force of administrative acts

In order to clarify the essence of an administrative act, it is necessary to consider its types. In administrative legislation, administrative acts are divided into administrative and intermediate administrative acts according to their scope of application, into legal and illegal administrative acts according to their legal force, and into favorable and unfavorable administrative acts according to their consequences. According to Article 2.0.2 of the Law "On Administrative Proceedings", an administrative act is understood as a decision, order or other type of power measure adopted by an administrative body in order to regulate or resolve a specific (concrete) issue related to the field of general (public) law and creating certain legal consequences for the legal or natural person (persons) to whom it is addressed. The concept of an

administrative act is specifically regulated in the legislation and it is clear from the essence of the article that an administrative act creates certain rights and obligations for the persons to whom it is addressed. The concept of an intermediate administrative act is also established in the legislation. Thus, according to Article 2.0.9 of the Law "On Administrative Proceedings", an intermediate administrative act is intended as an act adopted by an administrative body in connection with the organization and implementation of a specific proceeding. An administrative body may adopt certain interim administrative acts in the course of administrative proceedings. Interim administrative acts are administrative acts adopted in connection with the organization and implementation of proceedings, having an auxiliary nature. For example, the decision of the State Medical Social Expertise and Rehabilitation Agency under the Ministry of Labor and Social Protection of the Population on inviting an interested person for a physical examination, the decision of the State Service for Property Issues under the Ministry of Economy of the Republic of Azerbaijan on appointing an expert, etc. such acts are considered interim administrative acts. Another classification of administrative acts is related to favorable and unfavorable administrative acts. According to Article 2.0.10 of the Law "On Administrative Proceedings", a favorable administrative act is considered an act that grants a right to an interested person or confirms his right, or takes away the duty (duties) assigned to him. Favorable administrative acts are administrative acts that alleviate the situation of individuals or legal entities or do not change it at all. The essence of a favorable administrative act is related to the legal significance of its favorability. According to Article 2.0.11 of the Law "On Administrative Proceedings", an unfavorable (burdensome) administrative act is considered an act that deprives the interested person of a right or restricts his right, or imposes certain duties (responsibilities) on him. Favorable and unfavorable administrative acts, in turn, can be legal and illegal acts. The legal force of an administrative act implies the beginning and continuation of the validity of the administrative act, which regulates how and for what period the administrative act has the ability to affect the interested persons to whom it is addressed. An administrative act enters into legal force from the moment the person to whom it is addressed or the person whose interests it affects is informed about it, or from the moment it becomes known to those persons. An administrative act enters into legal force in the content of which it was informed and is considered legally valid. An administrative act shall retain its legal force and be considered legally valid until it is recalled, annulled, amended, expires or is deemed invalid for any other reason in accordance with the procedure established by law. The administrative body shall be obliged to inform interested persons about the recall, annulment, amendment or invalidation of an administrative act. An invalid administrative act has no legal force. Its legal force begins from the moment the interested person is informed about the adopted administrative act. Since the period before the interested person is informed about the administrative act is of no legal significance, the administrative body may cancel or amend the administrative act during that period. The legal significance of an administrative act here is expressed in the fact that it creates the opportunity to use legal remedies from the moment the interested person receives the adopted administrative act, and its beginning is calculated from the moment it reaches the interested person. It would not be correct to consider the beginning of the legal force of an administrative act only from the moment the interested person is informed about the administrative act. Because in practice,

preliminary actions related to the execution of an administrative act can be taken by the administrative body until the person to whom it is addressed is informed about the administrative act. For example, a pension payment can be made in a new amount until the decision "on pension recalculation" is sent to the citizen. An administrative act has legal meaning from the moment the pension amount is transferred to the citizen's card account.

According to their legal force, administrative acts are divided into legal and illegal administrative acts. An administrative act may be considered illegal if it was adopted on the basis of an incorrect legal norm or incorrect facts of the case. Illegal administrative acts are divided into an illegal favorable administrative act and an illegal unfavorable administrative act. The most concise explanation of an unfavorable administrative act is the change of the "status quo" to "status quo minus". An unfavorable administrative act establishes instructions or prohibitions, or rights are canceled or withdrawn or changed to the detriment of the interested person, responsibilities are specified, or other significant burdens are determined or approved. A favorable administrative act, on the contrary, changes the "status quo" to "status quo plus". A favorable administrative act establishes and approves rights and privileges in favor of the interested person [3, p. 380]. It is impossible to cancel an illegal favorable administrative act by its nature. However, the legislation provides for the cancellation of an illegal favorable administrative act under certain conditions. The possibility of this legal position is regulated by the principles of legality and protection of the right to trust. One of the indicators of the fact that administrative bodies are bearers of public interests and subjects of public law is their discretionary powers. According to the current legislation, discretionary powers are the right granted by law to an administrative body or official to choose one of the possible lawful decisions [1, p. 433].

According to Article 67.5 of the Law "On Administrative Proceedings", in cases where the interested party trusts the content and this trust is protected by law, as well as does not harm the rights or legally protected interests of other persons, state interests or public interests, the cancellation of an illegally favorable administrative act that provides for one-time or current monetary or material obligations in relation to the interested party or that has led to the emergence of such obligations is not allowed. In cases where the interested party spends the funds or uses the property granted to him and is therefore unable to return them or will suffer significant damage if he returns them, that person has the right to protection of trust by law. According to Article 67.6 of the Law, an interested person cannot invoke the right to protection of trust in the following cases:

1. 67.6.1. if he achieved the adoption of an administrative act by means of bribery, intimidation or deception;
2. 67.6.2. if he achieved the adoption of an administrative act by submitting documents reflecting incorrect or distorted information;
3. 67.6.3. if he knew that the administrative act was illegal or did not know it as a result of gross negligence.

In the practice of administrative bodies, we witness the cancellation of illegally favorable or illegally unfavorable administrative acts, regardless of the type of those acts. In court practice, there are usually no cases of re-adoption and restoration of illegally favorable administrative acts that were subsequently canceled. However, administrative acts adopted by administrative bodies in connection with the restoration of the previous legal situation as a result of an illegally favorable administrative act are

canceled. This is associated with the right of the interested party to protect their trust. The trust of individuals or legal entities in the administrative practice of administrative bodies is protected by law. The decision of the Baku Administrative Court against the State Social Protection Fund under the Ministry of Labor and Social Protection of the Population dated 21.08.2024 No. 2-1(112)-6727/2024 states: "Thus, there is a favorable administrative act in force regarding the plaintiff, the plaintiff's martyr's family member card has not been canceled, and this circumstance also did not exclude the plaintiff's recognition as a martyr's family member on the basis of that card during the past period, and the right of legitimate trust to benefit from the benefits and privileges provided by the defendant on his own initiative arising from this status. Therefore, the claim must be satisfied, and the defendant must be entrusted with the task of determining the pension of the President of the Republic of Azerbaijan for the martyr's family from 27.02.2023, the date of his application to the plaintiff."

In the decision of the Administrative Collegium of the Supreme Court of the Republic of Azerbaijan dated 04.12.2024 No. 2-1(102)-3037/2024 on behalf of the Republic of Azerbaijan on the case against the defendant State Social Protection Fund Central Branch for Appointment with Special Conditions, it is noted: "It should be taken into account that administrative bodies are obliged to comply with the requirements of the law and may interfere with the rights and freedoms of a person only in cases and in the manner prescribed by law. These requirements established by the legislator also arise from the principles of the rule of law and legality in a legal state. The purpose of this approach of the legislator is to ensure that, after an investigation by an administrative body obliged to make a legal decision in a legal state, only a comprehensive and objective investigation is conducted on the administrative proceedings that meet the requirements of the law to the extent that it allows for a correct decision to be made, and that the principle of legality is upheld on this basis, especially in the event of a dispute, the court effectively verifies the legality of that decision on the basis of the administrative proceedings materials."

According to the case-law of the European Court of Human Rights, the principle of "good administration" should not prevent the authorities from promptly correcting their own mistakes, even those resulting from their own negligence. However, the need to correct an old "mistake" should not disproportionately hinder the new right of a conscientious individual to rely on the lawfulness of the action of a public authority. In other words, public authorities that do not apply or comply with their own procedures should not be entitled to benefit from their own wrongdoing or to evade their duties. The risk of any mistakes made by public authorities must be borne by the State itself and the mistakes must not be corrected at the expense of the individuals concerned (Beinarović and Others v. Lithuania, judgment of 12 June 2018, § 140).

IV. Conclusion

Taking into account the above, if we analyze the current legislation and judicial practice, when canceling illegal favorable administrative acts by administrative bodies, the administrative body should refrain from actions related to the restoration of the previous legal situation due to the administrative act it adopted. The mentioned case is essentially connected with the principle of protection of the right of trust of the interested person. Consequently, the cancellation of an illegal favorable administrative act adopted by the administrative body limits the exercise of its discretionary powers.

References:

1. Aliyev S. Administrative law. Textbook. Baku: Baku University Publishing House, 2016, 686 p. (in Azerbaijani).
2. Mehdiyev F. (2010). Administrative law. Qafqaz University. Page 515. (in Azerbaijani).
3. Karimov S., Aliyeva G. Commentary on the Law of the Republic of Azerbaijan on Administrative Procedure. Baku: Legal Literature Publishing House, 2006, 464p. (in Azerbaijani).
4. Endicott T. (2009). Administrative law First Edition. Oxford University Press. 643
5. Fox W.F. (2000). Understanding Administrative Law Fourth Edition. Matthew Bender & Company, Inc., a member of the LexisNexis Group.
6. Giménez A.M. (2013). Administrative law. University of Alicante. Spain.Law School.
7. Gellhorn E. & Robinson G.O. (1975). Perspectives on Administrative Law. 75 Colum. L. Rev. 771.
8. Long N.E. (1949). Power and administration. Public Administration Review. pp. 257-264
9. Stewart R. (2003). Administrative law in the twenty-first century. New York University Law Review. 437.
10. Yohannes A. (2009). Administrative Law Teaching Material. Indore Institute of Science & Technology. 1- 247.

Date of receipt of the article in the Editorial Office
(05.12.2024)

PROTECTION OF PERSONAL NON-PROPERTY RIGHTS IN THE DIGITAL ENVIRONMENT

Gozal Huseynzade*

Abstract

The rapid expansion of the digital environment has significantly impacted the protection of personal non-property rights, leading to new legal challenges related to privacy, online defamation, and identity theft. Unlike material damages, moral damage resulting from such violations is difficult to quantify, making compensation mechanisms complex and inconsistent across jurisdictions. This article examines the legal frameworks governing the protection and compensation of moral damage in digital violations, focusing on Azerbaijan, the European Union (EU), and the United States (US). A comparative analysis highlights the differences in legal approaches, including statutory regulations, judicial precedents, and the role of international courts such as the European Court of Human Rights (ECtHR). In Azerbaijan, the protection of personal non-property rights is primarily based on constitutional and civil law provisions, with increasing reliance on ECtHR jurisprudence. However, national courts face challenges in ensuring consistency in moral damage compensation, particularly in digital violations. In the EU, the General Data Protection Regulation (GDPR) provides a structured mechanism for addressing moral damage, reinforced by ECtHR case law on privacy rights and data protection. The US, in contrast, follows a common-law approach, where compensation largely depends on judicial discretion and constitutional principles such as the First Amendment. The study emphasizes the need for harmonization of legal standards to enhance the effectiveness of digital rights protection. The growing influence of ECtHR rulings and international legal instruments suggests a trend toward stronger safeguards for individuals affected by digital rights violations. The findings underscore the importance of developing clear and enforceable guidelines for compensating moral damage in the digital space.

Keywords: *moral damage, personal non-property rights, digital rights, compensation, legal framework, ECtHR, online defamation, privacy violations.*

I. Introduction

The digitalization of modern life has introduced new risks to personal non-property rights, particularly in areas such as privacy protection, online reputation, and digital identity security. The rapid expansion of social media, data-driven technologies, and online communication platforms has created unprecedented legal challenges, as individuals increasingly face moral damage from cyberbullying, unauthorized data collection, and defamatory online content. The lack of uniform legal mechanisms to address such harm complicates the enforcement of personal rights and the determination of fair compensation.

The relevance of this topic is growing as digital interactions become an integral part of everyday life, leading to increased cases of privacy violations, reputation damage, and online harassment. The absence of clear, universally accepted standards for moral damage compensation creates legal uncertainty and discrepancies in judicial practice. While some jurisdictions have developed robust mechanisms for digital rights protection, others lack comprehensive legal frameworks, leaving victims with limited

* Master's student, Baku State University

avenues for legal recourse. The challenge lies in balancing the right to freedom of expression with the need to protect individuals from moral harm in the digital space.

National legal systems vary significantly in their approaches to moral damage compensation in the digital sphere. While some jurisdictions, such as the European Union, have developed strict regulatory frameworks like the GDPR, others, including the US, rely on case law and constitutional principles, particularly the protection of free speech under the First Amendment. In Azerbaijan, legal developments have been influenced by post-Soviet civil law traditions and the growing impact of European Court of Human Rights jurisprudence. These differences raise important questions about the effectiveness of legal remedies available to victims of digital rights violations.

II. Legal framework and judicial practice in the protection of personal non-property rights

The protection of personal non-property rights is a fundamental aspect of civil law, ensuring individuals' dignity, privacy, and reputation are safeguarded. As digital interactions increasingly shape social and economic relations, legal systems must adapt to address emerging risks such as unauthorized data usage, online defamation, and cyber harassment. The challenge lies in establishing clear legal standards that provide effective remedies for victims while balancing competing rights, such as freedom of expression.

Azerbaijan's legal system has gradually developed mechanisms to address moral damage, with key provisions found in the Constitution of the Republic of Azerbaijan, the Civil Code, and various national regulations. While the recognition of moral damage as a compensable harm represents a significant legal advancement, inconsistencies in judicial practice persist due to the absence of detailed statutory guidelines for assessing compensation. Courts retain broad discretion in determining compensation amounts, often leading to variability in rulings.

The Constitution of Azerbaijan, particularly Article 24, guarantees the right to dignity, while Article 32 establishes the right to privacy and prohibits unlawful interference with personal life and data. The Civil Code, in Article 1097, provides a legal basis for compensating moral damage, allowing claims for emotional distress and reputational harm. However, as noted by Allahverdiyev S., the absence of clear legislative criteria results in inconsistent judicial interpretations. He argues that introducing structured compensation guidelines would contribute to greater legal certainty and uniformity in court decisions [1, p. 274-275]. Similarly, Mehdiyev R. highlights the evidentiary challenges faced by plaintiffs in moral damage cases, advocating for courts to adopt more flexible approaches in assessing psychological and reputational harm [12, p. 126].

Judicial practice in Azerbaijan demonstrates a growing acknowledgment of moral damage, particularly in cases involving defamation, privacy breaches, and digital rights violations. The Resolution #7 of the Plenum of the Supreme Court of Azerbaijan (2008) provides general principles for awarding compensation, emphasizing factors such as the severity and duration of emotional suffering, the nature of the violation, and the financial position of the defendant [20]. However, court decisions often lack consistency, as compensation amounts vary significantly across cases.

Legal scholars argue that Azerbaijan must refine its approach to moral damage compensation to ensure greater judicial consistency and stronger protection of digital rights. Aslanov A. emphasizes the need for comprehensive legislative reforms, including codified compensation criteria and improved judicial training on non-

material damage assessment [2, p. 223-227]. Additionally, aligning domestic legislation with international best practices would enhance the effectiveness of legal remedies for victims. By addressing these challenges, Azerbaijan can develop a more robust framework for protecting personal non-property rights in the digital era.

The EU has established one of the most comprehensive legal frameworks for the protection of personal non-property rights, particularly in the context of privacy, data protection, and defamation. The EU's approach is characterized by strong regulatory mechanisms, such as the GDPR , as well as the role of national courts and the Court of Justice of the European Union (CJEU) in interpreting and enforcing these rights. The EU legal system ensures that individuals who suffer moral damage due to privacy violations, reputational harm, or data breaches have access to compensation, though the criteria for awarding such compensation vary among member states.

The foundation of personal non-property rights protection in the EU is found in Article 7 (Right to Private Life) and Article 8 (Protection of Personal Data) of the Charter of Fundamental Rights of the European Union (CFR). Additionally, Article 82 of the GDPR explicitly grants individuals the right to claim compensation for both material and non-material damage resulting from data protection violations. However, the GDPR does not define how moral damage should be quantified, leaving national courts to determine compensation amounts based on their respective legal traditions.

Several key legal scholars have analyzed the challenges of moral damage compensation in the EU. Ravenstein H. argues that the absence of uniform standards for assessing moral damage leads to discrepancies in national court rulings, as different legal systems apply varying methodologies for evaluating non-material harm [15, p. 156]. Similarly, Baglaridu M.F. emphasizes that judicial discretion plays a crucial role in determining compensation, particularly in cases where privacy violations cause significant emotional distress without tangible financial losses [3, p. 143].

EU judicial practice regarding moral damage compensation is shaped by CJEU rulings and national case law. A landmark decision in this area is Google Spain SL v. Agencia Española de Protección de Datos (2014, CJEU), which established the right to be forgotten, allowing individuals to request the removal of outdated or irrelevant personal information from search engine results (CJEU Case C-131/12). While the case primarily addressed data erasure, it also reinforced the idea that prolonged exposure to harmful online content can justify moral damage compensation.

When it comes to mechanisms for compensating moral damage resulting from privacy breaches in the European Union, the GDPR provides one of the most structured ones. Article 82 of the GDPR explicitly grants individuals the right to claim compensation for both material and non-material damage caused by violations of data protection rules [8]. However, the GDPR does not provide a standardized formula for assessing non-material harm, leaving national courts to determine compensation on a case-by-case basis. A significant ruling in this regard is Österreichische Post AG , where the Court of Justice of the European Union held that non-material damage under GDPR does not require proof of economic loss but must demonstrate actual emotional or psychological harm (CJEU Case C-300/21). This decision reaffirmed the right of individuals to seek compensation for distress caused by unlawful data processing, but also raised questions about the threshold for proving such harm.

National courts within the EU have developed different standards for awarding compensation. For example, in Germany, courts tend to apply a restrictive approach,

requiring claimants to demonstrate significant distress resulting from a data breach, while in France, courts have awarded moral damage compensation for the mere violation of privacy rights, even without substantial emotional suffering [15, p. 245]. This divergence in legal interpretations has led to inconsistencies in GDPR enforcement, prompting legal scholars to advocate for greater harmonization of moral damage compensation standards across EU member states [3, p. 194].

Despite these advances, legal scholars argue that the lack of standardized compensation criteria remains a challenge. Smithson J. suggests that EU-wide guidelines for assessing moral damage could improve consistency in judicial decisions while ensuring adequate protection for victims [16, p. 297]. The European Commission has considered proposals to further clarify compensation mechanisms under the GDPR, particularly regarding non-material harm caused by AI-driven data processing and algorithmic decision-making.

In comparison the United States follows a significantly different approach to the protection of personal non-property rights, largely due to its common law tradition and strong emphasis on constitutional freedoms. The First Amendment to the U.S. Constitution, which protects freedom of speech and the press, often limits the scope of moral damage claims, particularly in defamation and privacy-related cases. Unlike the GDPR in the EU, the U.S. lacks a comprehensive federal data protection law, relying instead on sector-specific regulations and state-level privacy laws. As a result, compensation for moral damage varies widely depending on the jurisdiction, legal context, and nature of the violation.

The legal foundation for personal non-property rights protection in the U.S. is found in constitutional law, tort law, and statutory regulations. Defamation law, for example, is largely shaped by New York Times Co. v. Sullivan (1964), a landmark Supreme Court case that established the "actual malice" standard, requiring public figures to prove that defamatory statements were made with knowledge of falsity or reckless disregard for the truth. This high burden of proof significantly reduces the number of successful moral damage claims by public figures.

In the area of privacy protection, the U.S. legal system recognizes four traditional privacy torts, as defined by William Prosser in Restatement (Second) of Torts (1977):

- intrusion upon seclusion – unauthorized invasion of one's private affairs.
- public disclosure of private facts – dissemination of personal information that is not of public concern.
- false light – presenting an individual misleadingly in a highly offensive manner.
- appropriation of likeness – unauthorized use of a person's name or image for commercial purposes (restatement (second) of torts, § 652).

Despite these legal principles, compensation for moral damage in privacy cases remains inconsistent due to the absence of federal privacy laws similar to the GDPR. However, some state-level regulations, such as the California Consumer Privacy Act (CCPA) of 2018, grant individuals the right to sue for non-material harm caused by data breaches or privacy violations.

Several legal scholars have analyzed the limitations of the U.S. legal framework in compensating moral damage. Smithson J. argues that American courts often prioritize economic harm over emotional distress, making it difficult for plaintiffs to obtain compensation unless they can demonstrate measurable financial loss [16, p. 302]. Similarly, Maleina M.N. notes that jury awards for emotional distress can be highly

unpredictable, as U.S. courts lack fixed guidelines for determining non-material damage [11 p. 217].

Looking ahead, U.S. legal scholars and policymakers continue to debate the need for stronger federal protections for personal non-property rights, particularly in the digital sphere. Lebedev V.V. suggests that the U.S. could benefit from clearer compensation standards, similar to those found in EU data protection law, to provide greater legal certainty for victims of privacy and defamation-related moral damage [10, p. 108]. While legislative efforts such as the proposed American Data Privacy Protection Act (ADPPA) aim to establish stronger privacy protections, the absence of a federal framework continues to create inconsistencies in moral damage compensation across different states.

As digital interactions increasingly shape social and professional life, online defamation, cyberbullying, and online harassment have become major threats to personal non-property rights. While all three involve harm to an individual's dignity and psychological well-being, they differ in intent, legal classification, and enforcement mechanisms. Defamation focuses on false statements that damage reputation, whereas cyberbullying and online harassment involve persistent digital abuse, intimidation, or threats, regardless of the truthfulness of the content.

Comparative overview of legal approaches:

Aspect	**Online Defamation**	**Cyberbullying**	**Online Harassment**
Definition	False statements that harm an individual's reputation.	Repeated, intentional harm directed at minors through digital platforms.	Persistent digital abuse, threats, or intimidation targeting individuals of any age.
Primary Victims	Any individual, including public figures, private persons, and businesses.	Primarily minors in school or social settings.	Any individual, including employees, activists, and public figures.
Common Platforms	News websites, social media, blogs, forums.	Social media, messaging apps, gaming platforms.	Emails, forums, workplace communication tools, social media.
Legal Response	Civil or criminal defamation laws, privacy laws.	Often covered by anti-bullying laws and school policies.	Criminalized under cybercrime, stalking, or harassment laws.
Intent & Effect	Damages reputation and professional standing.	Aims to isolate, intimidate, or humiliate the victim.	Seeks to cause distress, instill fear, or damage mental well-being.

The EU provides a structured legal framework for defamation, cyberbullying, and online harassment, balancing freedom of expression with the protection of personal

dignity. Defamation cases are handled under national laws, while the European Court of Human Rights interprets Article 10 of the European Convention on Human Rights (ECHR) to balance free speech and reputational harm [7, Article 10]. A key ruling, Delfi AS v. Estonia (2015, ECtHR), held that digital platforms may bear liability for defamatory or harmful content if they fail to remove it promptly [5].

In cases of cyberbullying and online harassment, the EU Digital Services Act (DSA) mandates that platforms take proactive measures to remove harmful content and provides for sanctions against non-compliant service providers [6]. Compensation for moral damage caused by digital abuse varies across national legal systems, with countries like France and Germany awarding damages for emotional distress caused by prolonged exposure to harmful content [15, p. 228].

The U.S. approach prioritizes free speech over reputational harm, making defamation claims particularly difficult to prove. New York Times Co. v. Sullivan (1964) established the "actual malice" standard, requiring public figures to prove that defamatory statements were made with reckless disregard for the truth [14]. For private individuals, courts apply a lower burden of proof, requiring only negligence [9]. However, jury awards for reputational harm can vary widely, often depending on public sympathy toward the claimant [16, p. 299].

Cyberbullying laws in the U.S. vary by state, with no federal law specifically addressing digital bullying. However, online harassment is covered under state-level stalking and cyberstalking laws, which allow victims to seek protection orders and, in some cases, damages for emotional distress [13].

Azerbaijan maintains both civil and criminal liability for defamation, with Article 147 of the Criminal Code allowing for criminal penalties, including fines or imprisonment, and Article 1097 of the Civil Code allowing individuals to seek compensation for reputational harm [18]. However, legal scholars such as Allahverdiyev S. argue that criminal defamation laws can suppress free speech and should be replaced with stronger civil remedies [1, p. 203].

Cyberbullying is not explicitly defined in Azerbaijani law, but Article 148-1 of the Criminal Code criminalizes online harassment, imposing penalties for threats and intimidation in digital spaces [19]. Mehdiyev R. notes that Azerbaijani courts lack a systematic approach to determining compensation for cyber harassment cases, often relying on broad interpretations of general harassment laws [12, p. 145].

The regulation of personal non-property rights in the digital space varies significantly across jurisdictions, creating challenges for legal harmonization, particularly in cross-border cases. One key issue is the variation in liability thresholds and compensation standards. While EU courts generally place a lower burden of proof on claimants, the US legal system prioritizes free speech, making defamation and harassment claims harder to prove [12]. Azerbaijan combines both civil and criminal liability, raising concerns about potential misuse of defamation laws and lack of clear civil compensation criteria [1, p. 212].

Another challenge is platform liability for harmful content. The EU Digital Services Act (DSA) mandates strict content moderation, whereas US law shields platforms from liability under Section 230 of the Communications Decency Act (CDA) [4]. Azerbaijan lacks clear regulations on platform responsibility, making content removal and victim compensation difficult [12, p. 157]. Addressing these gaps requires

stronger civil remedies, clearer liability rules for platforms, and better-defined compensation mechanisms to ensure effective digital rights protection.

Despite these challenges, there are several pathways for improving legal coherence across jurisdictions:

1. Developing international guidelines on moral damage compensation: Organizations such as the United Nations (UN) and the Council of Europe (CoE) could establish recommendations for harmonizing compensation criteria, ensuring that victims of online abuse receive equitable remedies regardless of jurisdiction.

2. Enhancing cross-border cooperation in digital law enforcement: Governments could implement mutual legal assistance agreements (MLAAs) to facilitate faster content removal, prosecution of cross-border cyber harassment, and compensation enforcement.

3. Reforming national laws to balance free speech and reputational protection: Azerbaijan, for example, could decriminalize defamation while strengthening civil compensation mechanisms, similar to EU legal models, ensuring greater predictability in damage awards and better access to justice for victims.

4. Reevaluating platform liability standards: The US could consider amending Section 230 of the CDA to increase accountability for social media companies, particularly in cases involving repeated failures to remove harmful content. Similarly, Azerbaijan could introduce specific obligations for online platforms to prevent and address cyber harassment and defamation cases.

The protection of personal non-property rights in the digital space remains a complex legal issue, as jurisdictions adopt different approaches to balancing freedom of expression, privacy, and reputational rights. As digital interactions continue to evolve, legal systems must adapt to provide more effective safeguards for personal non-property rights. By strengthening legal frameworks, refining compensation mechanisms, and fostering international legal harmonization, jurisdictions can ensure that victims of online defamation, cyberbullying, and harassment receive adequate legal protection in the digital era.

III. Conclusion

The analysis of theoretical and practical aspects of moral damage compensation in the digital space has led to several key conclusions:

1. The study has shown that Azerbaijan has recently incorporated the concept of moral damage into its civil legislation. While legal norms continue to evolve, the lack of uniform compensation criteria remains a significant issue. To improve the practice of moral damage compensation, it is necessary to clarify and standardize compensation assessment criteria, ensuring greater predictability and fairness in judicial decisions. A crucial step in this direction is the development of case law that aligns with international standards, helping Azerbaijan strengthen its legal framework for personal non-property rights protection.

2. To ensure effective and fair moral damage compensation, a comprehensive and balanced system should be developed that eliminates existing legal gaps. This system must account for various factors influencing compensation assessment, ensuring both victim protection and efficiency in judicial proceedings. Courts can play a key role in developing unified compensation standards by issuing judicial guidelines and consolidated rulings on moral damage cases. Such recommendations would serve as

guiding principles for courts, contributing to a more stable and consistent legal precedent, ensuring predictable and fair outcomes for all parties.

3. The analysis indicates that continental legal systems strictly regulate moral damage compensation, focusing on protecting dignity, honor, and reputation. In contrast, the Anglo-American legal system adopts a more individualized approach, allowing punitive damages in certain cases to punish the offender and deter future violations. Integrating elements of both systems could provide greater clarity and predictability in legal norms while maintaining flexibility to consider individual case specifics. For example, introducing punitive elements into moral damage compensation could serve as an effective deterrent against digital rights violations.

4. Judicial precedents, particularly from the European Court of Human Rights, play a crucial role in shaping international standards for protecting personal non-property rights. The Court emphasizes that moral damage compensation should reflect the level of emotional suffering and uncertainty experienced by the victim. Since moral damage cannot always be quantified in precise monetary terms, courts must consider the psychological impact and severity of distress when determining compensation. ECtHR rulings have significantly influenced the formation of international legal standards, particularly in ensuring that moral damage awards are "sufficient" to restore justice but not excessive. These decisions serve as guidance for national courts in establishing reasonable and fair compensation amounts.

5. The study highlights that statutes of limitations for moral damage claims remain a debated issue, depending on whether the claim is classified as a protective or financial demand. In Azerbaijan, personal non-property rights are not subject to limitation periods, whereas claims for monetary compensation may be time-barred. This creates a balance between protecting rights and ensuring legal certainty. In common law jurisdictions, the "delayed discovery rule" allows statutes of limitations to start when the victim becomes aware of the harm, ensuring fairness in cases where the damage is not immediately evident. This approach could be a valuable solution for resolving disputes related to limitation periods, ensuring greater protection for victims of digital rights violations.

References:

1. Allahverdiyev, S. Compensation for Moral Damage: Legal Foundations and Features. Baku: Azerbaijani Legal Publishing House, 2010, 374 p. (in Azerbaijani / Allahverdiyev S. Mənəvi Zərərin Kompensasiyası: Hüquqi Əsasları və Xüsusiyyətləri. Bakı: Azərbaycan Hüquqi Nəşriyyat Evi, 2010, 374 s.)

2. Aslanov, A. Non-Material Damage in Azerbaijani Civil Law. Baku: Law and Society Press, 2018, 312 p. (in Azerbaijani / Aslanov A. Azərbaycan Mülki Hüququnda Qeyri-Maddi Zərər. Bakı: Hüquq və Cəmiyyət Nəşriyyatı, 2018, 312 s.)

3. Baglaridu, M.F. Compensation of Non-Pecuniary Damage in European Human Rights Court Cases. Cambridge: Cambridge University Press, 2016, 312 p.

4. Communications Decency Act (CDA), 47 U.S.C. § 230.
URL: https://www.law.cornell.edu/uscode/text/47/230 (last access: 06.01.2025).

5. Delfi AS v. Estonia, ECtHR Case No. 64569/09 (2015).
URL: https://hudoc.echr.coe.int/eng?i=001-155105 (last access: 05.01.2025).

6. EU Digital Services Act (DSA).
URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065 (last access: 09.01.2025).

7. European Convention on Human Rights (ECHR), Article 10.
URL: https://www.echr.coe.int/Documents/Convention_ENG.pdf (last access: 06.01.2025).
8. General Data Protection Regulation , Article 82.
URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679 (last access: 08.01.2025).
9. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
URL: https://supreme.justia.com/cases/federal/us/418/323/ (last access: 09.01.2025).
10. Lebedev, V.V. Theoretical and Practical Aspects of Moral Damage Compensation. St. Petersburg: Juridical Center Press, 2007, 389 p. (in Russian / Лебедев В.В. Теоретические и Практические Аспекты Компенсации Морального Вреда. Санкт-Петербург: Юридический Центр Пресс, 2007, 389 с.)
11. Maleina, M.N. Compensation for Moral Harm: Legal Theory and Judicial Practice. Moscow: Statut, 2020, 421 p. (in Russian / Малейина М.Н. Компенсация Морального Вреда: Теория и Судебная Практика. Москва: Статут, 2020, 421 с.)
12. Mehdiyev, R. Legal Issues of Moral Damage in Civil Law. Baku: Academy of Justice, 2015, 295 p. (in Azerbaijani / Mehdiyev R. Mülki Hüquqda Mənəvi Zərərin Problemləri. Bakı: Ədliyyə Akademiyası, 2015, 295 s.)
13. National Conference of State Legislatures (NCSL), Cyberstalking and Cyberharassment Laws.
URL: https://www.ncsl.org/civil-and-criminal-justice/cyberstalking-and-cyberharassment-laws (last access: 06.01.2025).
14. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
URL: https://supreme.justia.com/cases/federal/us/376/254/ (last access: 09.01.2025).
15. Ravenstein, H. Moral Damages in Civil Law Systems. Berlin: Springer, 2018, 267 p.
16. Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).
URL: https://supreme.justia.com/cases/federal/us/578/330/ (last access: 08.01.2025).
17. Smithson, J. Pain and Suffering in Anglo-Saxon Law. Oxford: Oxford University Press, 2005, 297 p.
18. The Civil Code of the Republic of Azerbaijan (in Azerbaijani / Azərbaycan Respublikası Mülki Məcəlləsi).
URL: https://e-qanun.az/framework/46944 (last access: 06.01.2025).
19. The Criminal Code of the Republic of Azerbaijan (in Azerbaijani / Azərbaycan Respublikası Cinayət Məcəlləsi).
URL: https://e-qanun.az/framework/46944 (last access: 05.01.2025).
20. The Resolution #7 of the Plenum of Supreme Court on Experience of Applying the Legislation on the Compensation of Moral Damage by the Courts, 03.11.2008 (in Azerbaijani / Azərbaycan Respublikası Ali Məhkəməsi Plenumunun 7 nömrəli, 03 noyabr 2008-ci il tarixli "Mənəvi zərərin ödənilməsi barədə qanunvericiliyin məhkəmələr tərəfindən tətbiqi təcrübəsi haqqında" Qərarı).
URL: https://e-qanun.az/framework/16647 (last access: 06.01.2025).

Date of receipt of the article in the Editorial Office
(19.01.2025)

CRIMINOLOGICAL CHARACTERISTICS OF CRIMINAL OMISSION

Vuqar Gadimov*

Abstract

In contemporary criminological science, a unified and consistent theoretical approach to criminal omission has yet to be established. This is primarily due to the fact that the question of whether criminal omission that is, the failure to fulfill a legal duty constitutes a legal and social reality remains a subject of academic debate. The normative, social, and philosophical aspects of this category are interpreted differently across various legal schools and criminological approaches. Scholars and authors hold divergent views regarding the essence of this concept. Some authors emphasize that criminal omission, understood as the non-performance of a specific legal obligation, lacks material expression in objective reality and therefore hesitate to recognize it as an independent form of conduct in the legal sense. According to their perspective, the foundation of legal wrongdoing lies solely in active conduct namely, a volitional act that can be observed in the external world. Passivity, in contrast, is not a form of conduct in the material sense, but merely the absence of such conduct. This viewpoint is largely rooted in formalist and positivist theories of law. Nevertheless, according to the prevailing position in criminology, denying the existence of passive conduct i.e., the failure to fulfill a legal obligation as a valid legal category is scientifically unfounded. In some instances, the consequences of omission may pose a greater threat to public safety than those resulting from active conduct, thereby providing sufficient grounds for the imposition of legal liability. Such an approach allows for a broader interpretation of criminal behavior, particularly within the frameworks of social functionalism and normative legal theory.In this regard, omission as it reflects the breach of a certain duty to act both legally and socially has evolved into an independent object of criminal law and criminological analysis. On this basis, the present article will examine the criminological characteristics of criminal omission from multiple perspectives.

Keywords: *public dangerousness, elements of a crime, objective aspect, criminal omission, criminological characteristics, passive conduct, criminological prevention, latent crime.*

I. Introduction

In criminology, some scholars argue that criminal omission, i.e., the failure to perform a specific legal duty, does not have a tangible expression in objective reality, and thus hesitate to recognize it as a distinct form of conduct in legal terms [17, p. 354]. Nevertheless, according to the prevailing view among scholars, denying the existence of passive conduct as a real legal category is scientifically unfounded. From this perspective, although omission may not be directly observable in the physical world, its consequences and the liability it entails must be taken into account in legal analysis. Omission, defined as the failure to fulfill an obligation arising from law or other legal grounds, may be accompanied by socially dangerous consequences; therefore, omission also functions as a criminological category.

Among the authors, Associate Professor H.Qurbanov states that regardless of whether a crime is expressed through omission, this act violates the social values protected by criminal law and infringes upon the interests of the individual or society. Furthermore, omission leads to the commission of a crime and the occurrence of its

* PhD candidate in Law, Department of Criminal law and Criminology, Baku State University, member of Azerbaijani Bar Association

consequences, and is regarded as an act contrary to society and its moral principles [4, p. 8]. Although omission cannot be measured solely in physical terms, its legal aspects and social danger necessitate its recognition as a subject of criminological analysis. This indicates that the criminological characteristics of passive conduct, its social consequences, and normative-legal framework must be studied more thoroughly and systematically organized based on unified theoretical foundations.

II. Main provisions of criminal omission

The analysis of the criminological characteristics of omission is often shaped by various legal customs, theoretical approaches, and the material conditions of society. Each individual acquires knowledge of the prevailing legal and moral norms in society primarily through the initial stage of socialization within the family [9, p. 47]. The family performs the function of social control over existing behavior. However, when the family environment is unfavorable and the psychological climate unhealthy, the initial socialization process fails. All these factors negatively influence the individual's future behavioral patterns. The choice to adhere to legal norms is closely related to the characteristics of the individual's legal consciousness [7, p. 128].

Deficiencies in legal consciousness lead to legal negativism and indifferent attitudes toward the requirements of the law. For example, court practice shows that the crime of failure to report a crime is committed with the following motives: 33.9% criminal solidarity; 1.5% mercy; 13.8% fear; 36.9% false loyalty; 9.2% kinship feelings; and 4.6% other motives. In this context, based on certain demographic indicators, the crime of non-execution of court judgments, decisions, or other acts can also be noted. Due to the absence of direct statistical data on crimes committed by omission in the country, a direct inquiry was made to the court. According to information obtained from the Yasamal District Court, between 2022 and 2023, the majority of individuals held criminally liable under Article 306 of the Criminal Code (non-execution of court judgments, decisions, or other acts) were between 40 and 50 years old. During this period, a total of 13 cases were filed under Article 306 [2, p. 67].

The process of internalizing legal and moral norms in an individual’s interactions with society primarily begins within the family institution. Each person acquires initial knowledge and understanding of the prevailing legal and moral norms in society through the early stage of socialization within the family environment. In this regard, the family functions not only as an educational institution but also as a fundamental social structure that exercises social control over potential behavioral forms, whether active conduct or omission.

However, when an unfavorable educational environment and an unhealthy psychological climate exist within the family, the initial socialization process is disrupted, creating significant difficulties for the individual in developing law-abiding behavior in the future. Deficiencies in the family’s value system, as well as the presence of violence, neglect, or antisocial models, negatively affect the individual’s social adaptation. These circumstances ultimately hinder the development of legal consciousness. Defects in legal consciousness, in turn, lead to legal negativism, characterized by indifferent or negative attitudes toward laws and legal norms [15, p. 688].

Furthermore, the social groups and immediate environment to which an individual belongs directly influence their behavior, whether action or omission. It is no coincidence that the renowned American expert Jim Rohn observed that a person is

essentially the average of the five individuals with whom they spend the most time [19]. If the social environment is permeated by criminogenic, marginal, or unlawful tendencies, the individual may come to perceive criminal behavior or illegal activity as normal. In such cases, the person loses the sense of social responsibility and, through omission, is unable to properly assess their own actions. In certain instances, the individual struggles to free themselves from the stereotypes created by their social environment and fails to adopt behavior consistent with legal norms [8, p. 348].

Alongside social factors, biological factors also play a significant role in the formation of criminal behavior, whether through action or omission. Throughout the history of criminology, various, sometimes contradictory, theories have been proposed regarding this issue. Some theories attribute the emergence of criminal behavior solely to biological factors such as hereditary predispositions, neurophysiological disorders, or anatomical structures, often denying or relegating the influence of social factors to a secondary role. Conversely, opposing theories emphasize the absolute role of social factors while disregarding biological influences [18, p. 118]. Contemporary criminological approaches recognize the interaction between these two factors.

In scholarly literature, the biological causes of criminal behavior are primarily interpreted within the context of psychological anomalies. These anomalies do not reach the level of mental illness but are characterized by deviations in personality traits that may lead to delinquent behavior. Such conditions reduce an individual's resilience to extreme situations, weaken social adaptation, impair self-control mechanisms, and ultimately give rise to impulsive, irrational, and often unlawful actions. According to author I. Rahimov, fear is a psychological state that arises within an individual and cannot be externally imposed. For fear to emerge, there must be a basis or cause. While the threat of loss of life can be one such cause, "a person can only be reasonably threatened over an action or omission that is contingent upon the will of the individual to whom the demand is directed." [5, p. 90].

As a result, the emergence of criminal behavior stems from the complex interplay of defects in the socialization process, the influence of the social environment, and biological factors. In this regard, combating criminality requires not only legal mechanisms but also comprehensive approaches aimed at improving the social and psychological environment.

In criminology, there are various theories concerning the causes of criminality and the criminal personality. One of the most prominent researchers of the 20th century, Austrian psychologist and psychiatrist Sigmund Freud (1856–1939), occupies a special place in this field with his psychoanalytic theory − Freudianism. According to Freud, human behavior is not determined by the laws of social development, but rather by irrational (Latin: irrationalis – not governed by reason) and unconscious psychic forces. He believed that a person is in a constant, hidden state of conflict with their environment. Freud introduced new concepts into psychological science, such as the unconscious and the subconscious. He explained the structure of personality through three primary components [13, p. 112]. According to Freud, the primary source of human behavior lies in the impulses arising from the id. However, the realization of these impulses is subject to certain restrictions imposed by the ego and the super-ego. A person's criminally inclined behavior may be driven by the urges of the id, but the stronger the super-ego, the more these impulses are kept under control.

According to this approach, the more developed a person's super-ego is (as a result of successful socialization, possession of high moral and legal values, and strong intellectual and volitional qualities), the more resistant they become to the impulses of the id, and thus are less likely to exhibit a tendency toward criminal omission.

In addition, Russian researcher O.E.Petruniya also identifies biological and natural factors among the stimuli leading to criminal behavior. According to him, chemical changes, radiation, the impact of atomic energy, and other environmental factors influence human psyche and, consequently, affect behavior [10, p. 68].

Despite all these explanations, we still encounter a controversial issue surrounding the "problem of punishment for omission." One possible explanation is that in the absence of an act, it may appear as if a person is being punished merely for their thoughts. This touches upon a sensitive and contentious matter within the criminal justice system. It seems universally accepted that punishing someone solely for their thoughts without any act would constitute a distortion of the legal institution. The question, however, is whether punishment for omission raises this problem. Apparently, it might, because if omission is defined as the "absence of voluntary bodily movement," then there is no act to be punished. In reality, we do not impose punishment merely for the omission itself, but rather for an omission that has created the conditions for a dangerous event usually resulting in the death of a helpless person. In this respect, a crime of omission manifests itself in the external world through the occurrence of an undesirable event.

When analyzing the criminological characteristics of criminal omission, it is also essential to pay special attention to its latent nature. Crimes committed through omission are often not detected in time, evidence may be lost, and other negative circumstances may arise, all of which further reinforce their latent character. This, in turn, undermines the effectiveness of criminal prosecution and, in a broader sense, results in a violation of constitutional rights. Moreover, the uncertainty surrounding the imposition of liability for offenses committed by omission sometimes leads to such acts remaining outside the attention of law enforcement authorities, thereby contributing to increased latency. According to Article 68 of the Constitution of the Republic of Azerbaijan, the rights of a person who has suffered harm as a result of a crime shall be protected by the state [1, p. 22]. The failure to detect and punish the crime in a timely manner hinders the realization of these rights.

In criminology, omission is analyzed as a broader concept characterized by the failure of an individual to fulfill legal obligations established either by legislation or social relations. Such passive behavior, resulting in socially dangerous consequences, is highlighted as one of the main factors causing crime. In particular, when a person has a specific duty to act or perform a certain behavior but fails to fulfill this duty, inactivity may constitute a cause of crime.

In the majority of criminal cases related to inactivity, duties that do not raise legal or moral disputes such as parental obligations towards children or spousal duties are involved, and courts generally do not find it necessary to engage in detailed discussions about the normative character of these duties. Accordingly, a view has developed in criminology that the mere existence of a legal duty is sufficient for establishing the act [16, p. 211].

The Michigan Court of Appeals in the United States has stated in its ruling that if a homicide is committed by means of inaction, such inaction must be the cause of death,

and the death must result from the failure to perform a clear legal duty established by law or contract [12, p. 22].

Omission as a criminal-legal category has been established in the scholarly literature since the 19th century. The German jurist and criminologist Adolf Feuerbach noted in this regard that, unlike crimes committed by action (delicta commissionis), offenses characterized by the failure to fulfill a legal duty (delicta omissionis) manifest in the form of omission [11, p. 147].

It is well established that for any behavior of a person to be regulated by law or classified as a criminal offense, there must be a certain number of similar and recurrent instances of omission within society that are characteristic of such conduct [3, p. 5]. In the criminological classification of latent criminality, offenses committed by omission are predominantly categorized under natural latency. This is primarily due to factors such as the failure to report the crime in a timely manner, the victim's or witnesses' fear of the perpetrators, unwillingness to provide information, and similar reasons [6, p.90].

In criminological victimology, omission holds a significant place. Within this field, omission is analyzed as a form of passive behavior exhibited by the victim. Although less frequent than active behavior, such passivity can, in certain cases, contribute to the offender's entry into psychological or social conflict, ultimately provoking the commission of a crime. For instance, the deliberate failure to fulfill mutual obligations within domestic relationships may act as a catalyst, provoking the other party and leading to aggressive behavior.

When objectively analyzing the personality of individuals who commit crimes through omission, it is often observed that such persons lack the ability to foresee and evaluate the consequences of their behavior in advance. In other words, individuals falling within this category commit acts of omission without fully realizing their socially dangerous nature and face difficulties in anticipating the legal consequences, thereby finding themselves in situations that entail criminal liability. These circumstances should be taken into account when determining sentencing.

This situation can primarily be attributed to the individual's low level of psychological maturity and legal awareness. Consequently, such persons are unable to anticipate the negative consequences their behavior may cause to society in advance, which in turn contributes to the formation of their criminogenic potential.

The legal qualification of criminal omission and the grounds for liability for such acts are regulated differently in the criminal legislations of various countries. In some legal systems, criminal liability is imposed solely for the omission of a person who has a specific legal duty. In other legal systems, additional conditions are required for the application of such liability; for example, the individual's prior awareness of a concrete danger or the possibility of preventing the consequences of their conduct.

These differences necessitate that the legal and criminological nature of omission be assessed not only within the framework of formal legal norms but also in the context of the psychological and social characteristics of the criminogenic personality.

Normative clarity regarding the legal recognition of crimes of omission should be enhanced: In Azerbaijan and other countries, the concept of a specific legal duty for defining crimes committed by omission must be unequivocally articulated with practical criteria. This would enable law enforcement agencies to more accurately identify such acts.

Preventive mechanisms should be strengthened to counteract the latent nature of criminal omission: Crimes committed by omission often escape the attention of law enforcement authorities. Therefore, the responsibilities of individuals working especially in healthcare, education, family, and social service sectors must be more clearly defined, and their legal awareness should be actively promoted.

Empirical research on the psychological and social characteristics of persons committing acts of omission should be expanded in criminological studies: A deeper understanding of the motives behind omission and the behavioral patterns of such individuals may assist in developing effective strategies for preventing this phenomenon.

The comparison of the public danger element of omission with that of action remains a contentious issue in criminology: For example, Ambos considers that an individual who actively kills another person with a bullet generally appears to bear greater responsibility than one who merely allows another person to drown by failing to prevent the death [12, p. 20].

For example, consider the argument critically discussed above: active conduct and omission differ in their nature, which is true from a naturalistic perspective. However, the conclusion drawn from this difference that omission is never morally wrong in itself or is less wrongful than acts is incorrect. Certainly, causing someone's death is a more serious and wrongful behavior than slapping someone in the face. Yet, the moral and motivational distinction between these two forms of conduct does not stem from whether they are acts or omissions but rather from the gravity of the harm resulting from them. If the harm were equivalent such as shooting someone fatally versus allowing them to drown and if, in both cases, there existed a duty to prevent the harm, then both forms of conduct should be considered equally wrongful.

In other words, the critical distinction lies not in the naturalistic dichotomy between "act" and "omission," but in the normative status of the behavior under discussion and the severity of the harm caused by it. Even if someone considers a passive individual less culpable than an active wrongdoer, this does not imply that the former bears no responsibility at all; rather, the responsibility may be lesser or of a "secondary" degree. This is particularly relevant in cases of "failure to rescue," where the behavior consists merely of not providing assistance to someone in need.

In criminology, some authors broadly conceptualize the criminality of offenses committed by omission as a restriction on the right to freedom and choice. Specifically, there are perspectives asserting that prohibiting criminal omissions imposes greater limitations on personal liberty and entails more significant interference in individuals' daily lives compared to the prohibition of active conduct [14, p. 379].

The United States Supreme Court, in its ruling, emphasizes that duties arising from legal grounds must be demanded in accordance with the principle of legal certainty. Specifically, the Court states that every ordinary citizen must have a reasonable opportunity to understand what criminal law requires or prohibits, and that the meaning of criminal statutes should not be based on speculation or conjecture.

The specification of a concrete legal duty limits the scope of liability for criminal omission and prevents the unjustified expansion of the scope of criminal law. This requirement aims to ensure consistency and legal certainty by clearly distinguishing for individuals which forms of omission may give rise to criminal liability and which do not warrant intervention by the criminal justice system.

III. Conclusion

Enhancing individual responsibility plays a crucial role in the prevention of crimes committed by omission; in this regard, it is essential to instill not only the legal but also the moral responsibilities of individuals, such as the concept of the "duty to assist." Within the framework of legal awareness campaigns, the legal consequences of omission should be widely communicated through media, educational institutions, and public events. Simultaneously, criminological training should be provided to students in schools and universities particularly those studying law, medicine, and social work to ensure their understanding and internalization of these responsibilities. For this purpose, members of society should not remain indifferent to dangerous situations (such as violence, neglect towards children, or appropriate conduct in case of accidents, etc.); awareness-raising efforts must be undertaken to inform them about the legal and moral responsibilities associated with such circumstances.

Alongside the principle of legal certainty, legal transparency specifically, statistical accessibility is also a highly significant issue. It is essential that the official crime statistics in the country objectively include data on crimes committed by omission. The separate categorization of crimes by omission in statistical reports would provide law enforcement and criminological agencies with several advantages: analyzing the actual scale and dynamics of omission crimes; more accurately assessing latent crime in this area; identifying gaps in the application of legislation; and planning preventive measures more effectively, among others.

References:

1. Constitution of the Republic of Azerbaijan. Baku: Law Publishing House, 2024, 64 pages (in Azerbaijani / *Azərbaycan Respublikasının Konstitusiyası. Bakı: Hüquq Yayın Evi, 2024, 64 s.*).
2. Guleliyeva R. Crimes Against Justice in Theory and Legislation of the Republic of Azerbaijan. Baku: "Law and Human Rights Institute" public legal entity, 2023, 98 pages (in Azerbaijani / *Güləliyeva R. Nəzəriyyədə və Azərbaycan Respublikası qanunvericiliyində ədalət mühakiməsi əleyhinə olan cinayətlər. Bakı: "Hüquq və İnsan Haqları İnstitutu" publik hüquqi şəxsi, 2023, 98 s.*).
3. Qurbanov H.S. Cases Excluding the Criminality of an Act. Baku, "Education", 2014, 176 pages (in Azerbaijani / *Qurbanov H.S. Əmələn cinayət olmasını istisna edən hallar. Bakı, "Təhsil", 2014, 176 s.*).
4. Rzayeva S.N. Socially Dangerous Act. Scientific Legal Journal of the Police Academy. Baku, 2019, pp. 5-12 (in Azerbaijani / *Rzayeva S.N. İctimai-təhlükəli əməl. Polis Akademiyasının Elmi Hüquq Jurnalı. Bakı, 2019, s. 5-12*).
5. Rakhimov I.M. Immortal Death Penalty. Garb-Sharg, Baku, 2022, 134 pages (in Azerbaijani / *Rəhimov İ.M. Ölməz ölüm cəzası. Qərb-Şərq, Bakı, 2022, 134 s.*).
6. Samandarov F.Y. Criminology. Textbook, Baku: Translator, 2012, 168 pages (in Azerbaijani / *Səməndərov F.Y. Kriminologiya. Dərs vəsaiti, Bakı: Mütərcim, 2012, 168 s.).*
7. Artuk E., Alşahin E. Criminology. Ankara Publishing House, Ankara, 2018, 463 pages (in Turkish / *Artuk E., Alşahin E. Kriminoloji. Ankara Yayın evi, Ankara, 2018, 463 s.*).
8. Demirbaş T. Criminology. Seçkin Hukuk, Ankara, 2016, 424 pages (in Turkish / *Demirbaş T. Kriminoloji. Seçkin Hukuk. Ankara, 2016, 424 s.*).
9. Ignatiev M.E. Forensic Theory of Causation: Theoretical Foundations: Scientific-Practical Manual. Belgorod, 2017, 115 pages (in Russian / *Игнатьев М.Е.*

Криминалистическая теория причинности: теоретические основы: научно-практическое пособие. Белгород, 2017, 115 с.)

10. Petrunya O.E. Legal Psychology – Moscow: EAUI, 2007, 171 pages (in Russian / *Петруня О.Э. Юридическая психология – М.: ЕАОИ, 2007, 171 с.).*
11. Urubzhurov M.S. The Concept and Boundaries of Inaction in Russian Criminal Law // Trends in the Development of Science and Education. Rostov-on-Don, pp. 147-150 (in Russian / *Урубжуров М.С. Понятие и границы бездействия в уголовном праве России // Тенденции развития науки и образования. Ростов-на-Дону. с.147-150).*
12. Ambos K. Core concepts in criminal law and criminal justice: omissions. University of Göttingen, 2020, 39 p.
13. Heiner R. Criminology in Brief. Routledge, 2020, 240 p.
14. Kugler I. "Could any statute imposing a duty to act give rise to a conviction of affirmative offenses based on an omissive conduct?", Mechkarey Mishpat, 2004, 404 p.
15. Newburn T. Criminology. 4th edition. New York: Routledge, 2017, 1168 p.
16. Reed A., Sarahne M. Anglo-american perspectives on omissions liability: theoretical and substantive contours of criminalisation and optimal reform pathways. Journal of International and Comparative Law, 2021, pp.206-248
17. Simester A.P., Sullivan G.R. Criminal Law: Theory and Doctrine (Juridical Studies). Hart Publishing, 768 p.
18. Vata G. Understanding the causes of criminal behaviour, Routledge, 2019, 155 pp.
19. Quote by Jim Rohn
URL: https://www.goodreads.com/quotes/search?q=jim+rohn. (last access: 12.01.2025)

Date of receipt of the article in the Editorial Office
(25.01.2025)