INTERNATIONAL LAW AND INTEGRATION PROBLEMS
(Scientific-Analytical Journal)
№ 1 (56) 2019

CONTENTS

Rustam F. Mammadov. **International Legal Content and Significance of the Convention on the Legal Status of the Caspian Sea of August 12, 2018. International Law and Integration Problems, 2019, №1 (56), pp.4-19**

INTERNATIONAL LEGAL CONTENT AND SIGNIFICANCE OF THE CONVENTION ON THE LEGAL STATUS OF THE CASPIAN SEA OF AUGUST 12, 2018

Rustam F. Mammadov
(*rustam-56@mail.ru*)
Doctor of Laws, Professor
(Baku State University)

Abstract

The article analyzes the provisions of the new Convention on the legal status of the Caspian Sea in 2018. It shows all the new novels, which are the fruit of more than 20 negotiations of representatives of the presidents of the Caspian States. The article identifies all the positive aspects of the Convention, as well as its shortcomings. The author, in General, positively assessed the efforts of the Caspian States to coordinate the "Constitution" of the Caspian sea, indicated that its adoption will have a charitable value in the life of the States surrounding the Caspian sea.

Keywords*: Caspian Sea, sovereign rights, delimitation, water body, navigation, environmental protection, security of the Caspian Sea.*

After years of negotiations (22 years), geopolitical battles and confrontations, the Caspian States finally managed to fully agree on all the provisions regarding the new legal status of the Caspian Sea on August 12, 2018. The key event of the day was the signing by the heads of Azerbaijan, Iran, Kazakhstan, Russia and Turkmenistan of the Convention on the legal status of the Caspian Sea [29].

The leaders also approved the Protocol on cooperation to combat organized crime in the Caspian Sea and the agreement on trade, economic and transport cooperation [10].

"The Convention is a kind of Constitution of the Caspian sea. Having concluded the Convention, we create a basis for cooperation. Special attention is paid to ensuring security, said N.Nazarbayev: "Without each of you, we would not have been able to achieve today's success" [23]. The adopted Convention consisted of a preamble and 24 articles [12].

The preamble of the Convention on the legal status of the Caspian Sea States that the parties to the Convention are the States located on the Caspian Sea coast, - The Republic of Azerbaijan, the Islamic Republic of Iran, the Republic of Kazakhstan, the Russian Federation and Turkmenistan, hereinafter referred to as the Parties, based on the principles and norms of the Charter of the United Nations and international law, taking into account the climate of cooperation, good-neighborliness and mutual understanding between the Parties, guided by the desire to deepen and expand good-neighborly relations between the Parties, based on the fact that the Caspian Sea is of vital importance for the parties and only They have sovereign rights over the Caspian Sea and its resources, stressing, that the resolution of issues related to the Caspian Sea is within the exclusive competence of the Parties, recognizing the political, economic, social and cultural significance of the Caspian Sea, aware of their responsibility to the present and future generations for the preservation of the Caspian Sea, sustainable development of the region, convinced that this Convention will contribute to the development and strengthening of cooperation between the Parties, promote the use of the Caspian Sea for

peaceful purposes, rational use of its resources, study of the Caspian Sea, protection and preservation of its natural environment, seeking to create favorable conditions for the development of mutually beneficial economic cooperation in the Caspian Sea, taking into account the changes and processes in the Caspian sea region at the geo-political and national levels, the existing agreements between the Parties and, in this regard, the need to improve the legal regime of the Caspian Sea [34]. In this Convention, the Caspian States in 24 articles developed a new Charter for the Caspian Sea and agreed on a wide range of relations regarding the situation in the Caspian Sea, in this case concerning the delimitation, the legal status of the water body, shipping, environmental protection, problems of ensuring the safety of the entire sea and the region [11]. Thus, the 1st article refers to the terms used in the preparation of the Convention. For example, they include in this case such terms as "Caspian Sea", "baseline", "normal baseline", "straight baseline", method of establishing straight baseline", "inland waters", "territorial waters", "fishing zone", "common water area", "sector", "water biological resources" joint water biological resources", "fishing", "military ship", "ecological system of the Caspian Sea" and" pollution " [10]. In the Kazakh act, the leaders of Azerbaijan, Russia, Kazakhstan, Iran and Turkmenistan agreed on the legal status of the Caspian Sea – after 22 years of negotiations [5].

"The Convention is a kind of Constitution of the Caspian Sea, it is designed to regulate the whole range of issues related to the rights and obligations of the coastal countries, as well as to become a guarantor of security, stability and prosperity of the region as a whole". [35]. The N.Nazarbayev are not here to share the sea. And to agree to work so that it suited everything. And agreed-still speak the same language. Sea the General, will divide only bottom. Azerbaijani President I.Aliyev said "the determination of the legal status of the Caspian sea will contribute to the division of the bottom and the surface in accordance with the norms of international law," [35]. And most importantly - no military from other countries. 240 million people live in the Caspian countries. And they will not be disturbed. Military bases are banned. The decision is indefinite.

"The settlement of the right status of the Caspian sea creates conditions for bringing cooperation between the countries to a qualitatively new level of partnership, for the development of close cooperation in various areas. Russia is aimed at joint, energetic work on the implementation of six core agreements with all Caspian States," Russian President V.Putin said [18].

According to experts, the Caspian Sea is 19% of the world's oil reserves. 45% of the world's gas reserves. And yet 90% of the sturgeon, and therefore valuable the export of goods – caviar. All together an astronomical sum in any value [22]. After long disputes, in May 2003 Russia, Azerbaijan and Kazakhstan divided the Northern waters of the Caspian Sea. According to the principle of the median, Kazakhstan was left with 27%, Russia 19% and Azerbaijan 18% [32]. It was not possible to divide the southern part of the sea. Iran took a tough position. He demanded to divide the Caspian Sea among the Caspian States in a fraternal way: 20% each [27].

But if you look at the map, it becomes clear that equally does not mean fair. For example, the length of Iran's coastline is several times shorter than Kazakhstan's (Kazakhstan – about 2320 kilometers, Iran – about 724 kilometers). So it turns out that Tehran has encroached on the oil and gas reserves of its neighbors [26]. Kazakhstan and Russia proposed to divide the bottom into national sectors, and leave the sea area in com-

mon use, assigning only coastal zones to the countries. Fishing in neutral waters should be regulated by equal quotas [10]. Turkmenistan's principled position is to challenge Azerbaijan's right to several oil and gas fields, including "Serdar", which the Azerbaijanis call "Kapaz". Its reserves are estimated by experts at 150 million tons of oil [5].

According to the adopted Convention, the main area of the Caspian Sea water surface remains in common use, and the bottom and subsoil are divided into areas by agreement between the countries and on the basis of international law [36]. Each country will have to establish its territorial waters no wider than 15 nautical miles from the baselines.

The Convention also defines the rules of navigation, research and construction of trunk pipelines. This factor becomes important in the light of the plans to lay the TRANS-Caspian gas pipeline, which, providing for the transportation of natural gas from Turkmenistan and Kazakhstan through Azerbaijan to Turkey and Georgia and further to the EU countries is considered part of the expansion of the giant project of the southern gas corridor. Further, the Convention does not allow the presence of armed forces of other States in the Caspian Sea. In terms of fishing, the parties will determine the total allowable catch and allocate it to national quotas. What else gives the Caspian States a document for the development, discussion and adoption of which took more than two decades? First, and most importantly, by putting an end to the long-standing international dispute and becoming the legal basis for discussions and settlement of the whole range of issues related to activities in the Caspian Sea, it will give a powerful impetus to the further development of political and economic cooperation between the coastal countries. Secondly, and equally important, the Convention will serve to strengthen stability and security in the Caspian region. The adoption of such a document is intended to simplify the development of energy resources in the region, strengthen the Caspian Sea to the status of an important TRANS-tailor artery, to improve the ecological situation in the Caspian Sea. In all this, describing the importance of the summit and the signing of the Convention on the legal status of the Caspian Sea, the leaders of all coastal States clearly agreed [27].

By the way, regarding the Caspian Sea or lake, the parties came to the conclusion: neither one nor the other [3].

The second article is devoted to the establishment of sovereignty in the Caspian Sea. The article States that "in accordance with this Convention, the Parties shall exercise sovereignty, sovereign and exclusive rights and exercise jurisdiction in the Caspian Sea". In addition, paragraph 2 of this article "defines and regulates the rights and obligations of the Parties in relation to the use of the Caspian Sea, including its waters, bottom, subsoil, natural resources and airspace over the sea" [16, 21-26]. In accordance with article 3, the principles of the activities of coastal States in the Caspian Sea are defined. The Caspian States agreed to carry out their activities on the basis of the following international legal principles[9]: 1)principles of respect for sovereignty, territorial integrity, independence, sovereign equality of States, non-use of force or threat of force, mutual respect, cooperation, non-interference in the internal Affairs of each other; 2)Principles of the use of the Caspian sea for peaceful purposes, its transformation into a zone of peace, good-neighborliness, friendship and cooperation, resolution of all issues related to the Caspian Sea by peaceful means.; 3) the Principle of ensuring security and stability in the Caspian region; 4) the Principles of ensuring a stable balance of arms of The parties in the Caspian

Sea, the implementation of military construction within reasonable sufficiency, taking into account the interests of all Parties, without compromising the security of each other; 5) the Principles of compliance with the agreed confidence-building measures in the field of military activities in the spirit of predictability and transparency in accordance with the common efforts to strengthen regional security and stability, including in accordance with the international treaties concluded between all Parties; 6) the Principle of non-presence of armed forces not belonging to the Parties in the Caspian Sea; 7) the Principles of non-provision by any Party of its territory to other States for the Commission of aggression and other military actions against any of the Parties; 8) freedom of navigation beyond the outer limits of the territorial waters of each Party, subject to the sovereign and exclusive rights of the coastal States and the rules established by them in this regard with respect to certain activities of the Parties; 9) ensuring the safety of navigation; 10) the right to free access from the Caspian Sea to other seas, oceans and back on the basis of generally recognized principles and norms of international law and agreements of the Parties concerned taking account of the legitimate interests of the Party of transit in order to expand international trade and economic development; 11) implementation of navigation in the Caspian Sea, the passage to/from it exclusively by the courts under the flag of each of the Parties; 12) application of the agreed rules and regulations on the reproduction and regulation of use of shared water biological resources; 13) liability Of the party allowing pollution for damage caused to the ecological system of the Caspian Sea; 14) protection of the natural environment of the Caspian Sea, conservation, restoration and rational use of its biological resources; 15) promotion of scientific research in the field of ecology, conservation and use of biological resources of the Caspian Sea; 16) freedom of flights of civil aircraft in accordance with the rules of the International civil aviation organization; 17) conduct of marine scientific research outside the territorial waters of each Party in accordance with the legal norms agreed by the Parties, while respecting the sovereign and exclusive rights of coastal States, as well as the rules established by them in this regard with respect to certain types of research [12]. In turn, article 4 of the Convention regulates the activities of States in the Caspian Sea for the purposes of navigation, fishing, use and protection of aquatic biological resources, exploration and development of resources of its bottom and subsoil, as well as other activities in accordance with this Convention, compatible with it separate agreements of the Parties and their national legislation [16, 21-23]. According to article 5, the Caspian Sea is delimited by inland waters, territorial waters, fishing zones and common water area. At the same time, it is noted that the sovereignty of each Party extends beyond its land territory and internal waters to the adjacent sea belt, called territorial waters, as well as to its bottom and subsoil, as well as to the airspace above it (article 6). In accordance with article 7, territorial waters not exceeding 15 nautical miles in width, measured from the baselines determined in accordance with this Convention, shall be established for each party. Notes that the outer boundary of territorial waters is a line, each point of which is located from the nearest point of the reference line at a distance equal to the width of territorial waters (paragraph 2 of article 7). In the signed Convention on the legal status of the Caspian Sea, a draft of which was agreed during the preparatory meeting of foreign Ministers in December 2017 in Moscow, five signatories have agreed that the water surface will be legally regarded as the sea, keeping it open for joint use, while the

bottom of the sea is considered a lake and therefore access to it is carried out in accordance with the international legal framework.

Regions up to 15 nautical miles from the coast will be considered the land of each subsequent country, while 25 miles will be defined as a fishing area by adding 10 nautical miles to that distance. Other parts will be neutral areas for General use. This, - according to Alexandra Brzozovsky, however, also means that the exact delimitation of the oil and gas rich bottom of the Caspian Sea will require additional agreements between the coastal countries, although the previous draft Declaration, briefly published on the website of the Russian government in June, assumed a clearer result [30].

For the purposes of defining the outer limits of the territorial waters of the most outstanding in the sea constant port constructions, which are an integral part of a system port, are considered as part of the coast. Coastal installations and artificial Islands are not considered permanent port facilities [1].The outer boundary of territorial waters is the state boundary. According to PZ article 7 of the Convention the distinction between inland waters and territorial waters between States with adjacent coasts shall be made by agreement between them, taking into account the principles and rules of international law. The parties agreed under article 8 that the delimitation of the seabed and subsoil of the Caspian Sea into sectors shall be carried out by agreement of neighboring and opposing States, taking into account the generally recognized principles and norms of international law, in order to realize their sovereign rights to subsoil use and other legitimate economic and economic activities related to the development of (item 1) [1]. It was further agreed that the coastal state had the exclusive right to construct, as well as to permit and regulate the establishment, operation and use of artificial Islands, installations and structures within its sector. The coastal state may establish zones around artificial Islands, installations and structures, where deemed necessary, to ensure the safety of navigation and artificial Islands, installations and structures. The width of the safety zones will not extend more than 50 meters, measured from each point of the outer edge of such artificial Islands, installations and structures (paragraph 2). The geographical coordinates of such structures and the contours of the security zones should be communicated to all Parties [7]. States were instructed that all ships must respect these safety zones (p. 3). Moreover, it was stated that the exercise of the sovereign rights of the coastal state in accordance with paragraph 1 of this article must not lead to infringement of the rights and freedoms of other Parties provided for in this Convention or to cause undue interference to their implementation (p.4). The true novelty was the adoption of article 9 of the Convention, according to which each Party establishes a fishing area 10 nautical miles wide adjacent to territorial waters (article 9, paragraph 1). The delimitation of fishing zones between States with adjacent coasts is carried out by agreement between them, taking into account the principles and norms of international law [4].

According to paragraph 2 of article 9 in its fishing area, each Party has the exclusive right to fish for aquatic biological resources in accordance with this Convention, adopted on its basis by separate agreements of the Parties and with its national legislation.

The parties have agreed on the basis of this Convention and international mechanisms to jointly determine the total allowable catch of joint aquatic biological resources in the Caspian Sea and distribute it to national quotas (paragraph 3. article 9). As noted in the Convention on the legal status of the Caspian Sea, if one of the Parties is not able to master its quota in the total allowable catch, it may, by concluding bilateral agreements

and other agreements in accordance with national legislation, provide other Parties with access to the balance of its quota in the total allowable catch (para. article 9) [12].

At the same time, the procedure and conditions for fishing for joint aquatic biological resources in the Caspian Sea are determined in accordance with a separate agreement between all Parties. Article 10 is devoted to freedom of navigation outside the territorial waters of the Caspian Sea. It States in particular that vessels flying the flags of the Parties shall enjoy freedom of navigation outside the territorial waters of the Parties. Freedom of navigation shall be exercised in accordance with the provisions of this Convention and the separate agreements of the Parties compatible with it, without prejudice to the sovereign and exclusive rights of the Parties defined in this Convention (para. article 10). Within the meaning of this article, it is noted that each Party shall accord to vessels flying the flags of other Parties engaged in the carriage of goods, passengers and baggage, towing, as well as rescue operations, the same treatment as it grants to such national vessels with respect to free access to their ports on the Caspian Sea, their use for loading and unloading of goods, boarding and disembarking of passengers, payment of ship and other port charges and the use of services intended for navigation and ordinary commercial operations (para. article 10). The regime specified in paragraph 2 of this article shall apply to ports in the Caspian Sea open to vessels under the flags of the Parties (paragraph 3) [20].

In this regard, it should be noted that the role of Azerbaijan in the light of the factors reflected in the Convention, in particular as a key player in the transit and logistics component of activities in the Caspian Sea, is noteworthy. President I.Aliyev also spoke about this at the Aktau summit: "Azerbaijan is actively investing in transport infrastructure, and the projects that we have implemented allow us to consider the Caspian Sea as an important transport artery today. The East - West corridor, within the framework of which Azerbaijan presents its transit services to Kazakhstan and Turkmenistan, the North - South corridor, through which transit through Azerbaijan is carried out between Iran and Russia, are projects that strengthen economic cooperation, create new jobs, make our countries even closer to each other and contribute to strengthening stability and security" [20]. The Convention defines the procedure on the basis of the right "to free access from the Caspian Sea to other seas, oceans and from them. To this end, the Parties shall enjoy freedom of transit through the territories of the transit Parties by all means of transport" [33].

The procedure and conditions for such access shall be agreed between the parties concerned and the transit Parties by means of bilateral agreements and, in the absence of such agreements, on the basis of the legislation of the transit Party.

The transit parties, in the exercise of their full sovereignty over their territory, have the right to take all measures necessary to ensure that the rights and opportunities provided for in this paragraph for the Parties do not in any way prejudice the legitimate interests of the transit (Party 4. article 10). "It was the first time that the zones of sovereignty and fisheries were conceptually agreed upon at a high level. The basic principles of cooperation - respect for the sovereignty, independence and territorial integrity of States, the transformation of the Caspian Sea into a zone of peace, good-neighborliness and friendship-have also been agreed. These principles are also reflected in the Convention on the legal status of the sea. According to President I.Aliyev, the determination of the legal status of the Caspian Sea will contribute to the completion of the division

between the parties of its bottom and surface in accordance with the principles and norms of international law" [21]. In order to ensure the interests of the coastal States in the sphere of security, the presidents confirmed the need to develop and adopt coordinated confidence-building measures in the Caspian Sea in the field of military activities at sea. In order to implement the agreement on cooperation in the field of security in the Caspian sea of November 18, 2010, the presidents noted the need to finalize the Protocol on cooperation in the field of combating illegal fishing of biological resources, designed to promote the conservation of fish stocks of the Caspian Sea and to counter poaching, as well as the Protocol on cooperation in the field of safety of navigation. The instruction was also given to finalize the Protocol on combating illicit trafficking in narcotic drugs, psychotropic substances and their precursors [8].

The procedure for passage is interesting in the Convention (article 11). Thus, Vessels flying the flags of the Parties may pass through territorial waters in order to: a) crossing those waters without entering internal waters or getting on the roadstead or port facility outside internal waters; or b) pass in internal waters or out of them or be on this RAID, or at such port facilities (clause 1, article 11). The Convention notes that the procedure and conditions for the passage of warships, submarines and other underwater vehicles through territorial waters shall be determined on the basis of agreements between the flag state and the coastal state and, in the absence of such agreements, on the basis of the legislation of the coastal state. Russian President V.Putin in his speech noted the strategic nature of the Convention signed in Aktau by the heads of the five Caspian States. "It is fundamentally important that the Convention enshrines the exclusive and sovereign rights of the five States to the Caspian Sea, to the responsible development and use of its subsoil and other resources, but guarantees the solution of all relevant issues on the agenda on the principles of consensus and mutual consideration of interests," V.Putin said following the results of the summit of the Caspian States in Aktau [6].

V.Putin added that the Convention "ensures a truly peaceful status of the Caspian Sea, the absence of the armed forces of non-regional States in the Caspian Sea": "we have been moving for many years to develop and adopt this strategic fundamental document" [19]. In the case that the length of a warship in the territorial waters is necessary due to force majeure or distress or for rendering assistance to persons, vessels and aircrafts in distress, at the approach to the territorial waters the commander of a warship delivers a notification to the coastal state and the length is carried out along the route determined by the commander in coordination with the coastal state. After the termination of these circumstances, the warship immediately leaves the relevant territorial waters. The procedure and terms for the calling of the military ships in the internal waters due to force majeure or distress or for rendering assistance to persons, vessels and aircrafts in distress, determined on the basis of agreements between the flag state and the coastal state, and in the absence of such agreements - on the basis of legislation States (p.2, article 11).

It is specifically stated that the passage through territorial waters must not violate the peace, good order or security of the coastal state. The passage through the territorial waters should be continuous and fast. Such passage shall take place in accordance with this Convention (p. 3). In addition, warships, submarines and other underwater vehicles the one Hand, carrying out passage through territorial waters in accordance with the terms and procedure stipulated in paragraph 2 of this article shall not have the right of entering the ports and anchoring within the territorial waters of the other Party except

when it has the appropriate permission, or it is necessary due to force majeure or distress or for rendering assistance to persons, vessels and aircrafts in distress (p.4).

5. Submarines and other underwater vehicles of one Side in the territorial waters of the other side should follow on the surface and raise their flag.

6. Passage through territorial waters shall be deemed to be in violation of the peace, good order or security of the coastal state if any of the following activities is carried out: (a) the threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state or in any other manner contrary to the principles of international law embodied in the Charter of the United Nations; (b) any maneuvers or exercise with weapons of any kind; c) any act aimed at collecting information to the prejudice of the defense or security of the coastal state; d) any act of propaganda aimed at an attack on the defense or security of the coastal state; e) the rise in the air, landing or taking on Board of any aircraft or military device and its management; the descent into the water, under the water or taking on Board of any military device and management; (g)the loading or unloading of any goods or currency, the landing or disembarkation of any person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state; (h) any act of intentional and serious pollution contrary to this Convention; (i)any fishing activity; (j) carrying out research or hydrographic activities; (K) any act designed to interfere with the operation of any communication systems or any other facilities or installations of the coastal state; (1) any other activity not directly related to the passage through territorial waters.

7. A party may take measures in its territorial waters necessary to prevent passage through territorial waters in violation of the conditions referred to in this article.

8. A party may adopt, in accordance with the provisions of this Convention and other rules of international law, laws and regulations relating to the passage through territorial waters, including with respect to all or some of the following matters: (a) safety of navigation and regulation of vessel traffic; (b) protection of navigational AIDS and equipment, as well as other installations or installations; (c) protection of cables and pipelines; (d) conservation of marine biological resources; (e)prevention of violation of fishing laws and regulations of a coastal state; To preserve the environment of the coastal state and to prevent, reduce and control its pollution; (g)marine scientific research and hydrographic surveys; (h)to prevent the violation of customs, fiscal, immigration or sanitary laws and regulations of the coastal state; (i) to ensure national security.

9. The party shall duly publish all laws and regulations relating to the passage through territorial waters.

10. Vessels flying the flags of the Parties shall, when passing through territorial waters, comply with all laws and regulations of the coastal state relating to such passage.

11. Each Party may, where necessary and taking into account the safety of the ship, require vessels flying the flags of other Parties passing through territorial waters to use such sea lanes and traffic separation schemes as it may establish or prescribe to regulate the passage of vessels through territorial waters.

12. In respect of ships bound for inland waters or using port facilities outside inland waters, the coastal state also has the right to take the necessary measures to prevent any violation of the conditions under which these vessels are allowed into inland waters and use port facilities.

13. A party may, without discrimination in form or substance with respect to Vessels flying the flags of other Parties, temporarily suspend passage in certain areas of its territorial waters if such suspension is essential to its security [12]. Such suspension shall take effect only after proper notification thereof.

14. If a warship or a state vessel operated for non-commercial purposes does not comply with the laws and regulations of the coastal state relating to the passage through territorial waters and ignores any requirement to comply with them. The party may require it to leave its territorial waters immediately.

15. A flag party shall be internationally liable for any damage or loss caused to the other Party as a result of non-compliance by a warship or other state vessel operated for non-commercial purposes with the laws and regulations of the coastal state relating to passage through, entering and anchoring territorial waters or the provisions of this Convention or other rules of international law.

16. A party shall not prevent the passage of ships under the flags of other Parties through its territorial waters unless it so acts in accordance with this Convention or the laws and regulations adopted in accordance with it. Including the Party should not: (a) require vessels flying the flags of other Parties to be in practice unreasonably deprived of their rite of passage through territorial waters or to violate that right; or (b) discriminate either in form or in substance against vessels flying the flags of other Parties or against vessels carrying goods to, from or on behalf of any state [12]. A party shall give due notice of any danger known to it to navigation in its territorial waters.

According to article 12, "each Party shall exercise jurisdiction over vessels flying its flag in the Caspian Sea (paragraph 1). Each Party shall, within its sector, exercise jurisdiction over artificial Islands, installations, structures, its submarine cables and pipelines (para.2). Each Party, in the exercise of its sovereignty, sovereign rights to subsoil use and other legitimate economic and economic activities related to the exploitation of the resources of the seabed and subsoil, exclusive rights to fish for aquatic biological resources, as well as for their conservation and management in its fishing area, may take measures against vessels of other Parties, including inspection, hot pursuit, detention, arrest and trial, which may be necessary to ensure compliance with its laws and regulations.

The application of the measures referred to in this paragraph shall be justified. In case of unjustified application of such measures, the vessel shall be compensated for any losses and damage caused [19]. Such measures as inspection, inspection, hot pursuit, detention may be carried out by representatives of the competent state authorities of the Parties who are only on warships or military aircraft or other vessels or aircraft bearing clear markings indicating that they are in the public service and authorized for that purpose (para.3). Except as provided in article 11 of this Convention, nothing in this Convention shall affect the immunity of warships and state ships used for non-commercial purposes" (para.4).

In accordance with article 13, "each Party, in the exercise of its sovereignty, has the exclusive right to regulate, permit and carry out marine scientific research in its territorial waters. Vessels under the flags of the Parties may conduct marine scientific research within the territorial waters of the other Party only with its written permission and on the conditions established by it(paragraph 1). In doing so, Each Party, in the exercise of its jurisdiction, has the exclusive right to regulate, permit and conduct marine scientific research in its fishing area related to aquatic biological resources and in its sector related

to the exploration and exploitation of seabed and subsoil resources. Vessels flying the flags of the Parties may carry out such research in the fishing area and sector of the other Party only on the basis of its written permission and on the conditions established by it (p. 2). That's interesting, that the procedure and conditions for issuing permits shall be determined by each Party in accordance with its national legislation and shall be duly communicated to the other Parties. At the same time, there shall be no undue delay or refusal in the decision to grant permission to conduct marine scientific research in accordance with paragraphs 1.2 of this article (paragraph 4). The Convention warns that the marine scientific research activities referred to in this article shall not unduly interfere with the activities carried out by the Parties in the exercise of their sovereign and exclusive rights under this Convention (para.5). An interesting innovation is that the party conducting marine scientific research shall ensure to the party authorizing the conduct of marine scientific research in accordance with paragraphs 1.2 of this article the right to participate or be represented in such research, particularly on Board research vessels, where practicable, but without any remuneration to the scientists of the authorizing Party and without its obligation to participate in the payment of research costs. It is noted that a party conducting marine scientific research in accordance with paragraphs 1.2 of this article shall provide the party authorizing such research, the results and conclusions after the completion of the marine scientific research, as well as access to all data and samples obtained in the framework of such research (p.7). The party has the right to require the suspension or cessation of any activities on marine scientific research in their territorial waters (p. 8).

A party authorizing the conduct of marine scientific research carried out in accordance with paragraph 2 of this article shall have the right to request its suspension or termination in one of the following cases(paragraph 9): (a) the research activity is not conducted in accordance with the declared information on which it based its authorization; (b) the research activity is conducted in violation of the conditions established by it; (c) in the implementation of the research project, any of the provisions of this article has not been complied with; (d) such suspension or termination is essential to its security. In accordance with paragraph 10, vessels flying the flags of the Parties shall have the right to conduct marine scientific research beyond the outer limits of territorial waters, subject to paragraphs 2, Z of this article. With regard to bilateral and multilateral marine scientific research conducted by agreement of interested Parties (p. 11) [12]. An important innovation of the Convention is also article 14, which States that the parties may lay submarine cables and pipelines along the bottom of the Caspian Sea (p.1). Moreover, the parties may lay underwater trunk pipelines along the bottom of the Caspian Sea, provided that their projects comply with environmental requirements and standards set forth in international treaties to which they are parties, including the framework Convention for the protection of the marine environment of the Caspian Sea and the relevant protocols thereto (p.2) [26]. According to the Convention on the legal status of the Caspian Sea, the parties will be able to lay underwater cables and pipelines along the bottom of the Caspian Sea, as well as underwater trunk pipelines, provided that their projects comply with international environmental requirements and standards. This will not require the approval of the entire" five", but only the agreement of the countries on whose sector the cable or pipe will pass. Thus, the construction of the

TRANS-Caspian pipeline from Turkmenistan to Azerbaijan and further through Turkey to Europe now depends on the agreements between the two States.

An important place is given to the issue of determining the route for laying subwater cables and pipelines, which should be carried out in coordination with the Party through the bottom sector of which an underwater cable or pipeline should be carried out (p.3) [25].

The geographical coordinates of the areas of routes of submarine cables and pipelines, where it is not allowed to anchoring, fishing try would be bottom fishing gear, underwater and dredging works, and swimming with etched anchor chain, should be notified to all the Parties-we are a coastal state, through the sector of which they are laid.

The next article 15 is devoted to the regulation of environmental issues of the Caspian Sea. In particular, in paragraph 1, the parties undertake to protect and preserve the ecological system of the Caspian Sea and all its components. At the same time (p. 2), the parties shall independently or jointly take all necessary measures and cooperate in order to preserve biological diversity, protect, restore, sustainably and rationally use the biological resources of the Caspian Sea, prevent, reduce and control pollution of the Caspian Sea from any source. At the same time prohibits activities that damage the biodiversity of the Caspian Sea (p. 3).The parties are liable for damage in accordance with international law, applied to the ecological system of the Caspian Sea (item 4). This also applies to Azerbaijan. In this regard, the words of President of the Republic of Azerbaijan I.Aliyev are interesting: "Azerbaijan is making an Active and great contribution to improving the environmental situation in the Caspian. As the head of state noted, the measures taken by the Azerbaijani government are aimed at preventing pollution of the Caspian Sea, especially in the implementation of oil and gas operations. He stressed that all oil and gas operations carried out by Azerbaijan in the period of independence comply with international standards ISO [2].

Article 16 of the Convention refers to the cooperation of "the parties to the Caspian Sea with natural and legal persons of States that are not parties to this Convention, as well as with international organizations, shall be carried out in accordance with the provisions of this Convention". According to article 17, the parties shall cooperate in order to counter international terrorism and its financing, illicit trafficking in weapons, narcotic drugs, psychotropic substances and their precursors, poaching, prevention and suppression of smuggling of migrants by sea, as well as other crimes in the Caspian Sea. According to the results of the Summit, the parties have identified a list of new five-party documents, on which the main work will be carried out in the next few years. Thus, a five-party agreement on cooperation in the field of Maritime transport in the Caspian sea will be prepared for the organization of regular five-party cooperation of Maritime administrations of coastal States with a view to effective and mutually beneficial cooperation of States in this area.

Articles 18-24 refer to the final provisions of the Convention. Thus, according to article 18, paragraph 1, the Provisions of this Convention may be amended or supplemented by agreement of all Parties. Changes and additions to this Convention are its integral parts and are made out by the separate protocols entering into force from the date of receipt by the Depositary of the fifth notification on accomplishment by the Parties of domestic procedures necessary for their entry into force (item 2) [12].

And article 19 stipulates that the parties shall, for the effective implementation of the Convention and the review of cooperation in the Caspian Sea, establish a mechanism for five-party regular high-level consultations under the auspices of the ministries of foreign Affairs, which shall normally be held at least once a year in turn in one of the coastal States in accordance with the agreed rules of procedure. First of all, the Caspian countries have decided to establish a mechanism of five-party regular consultations under the auspices of the ministries of foreign Affairs at the level of Deputy Ministers of foreign Affairs/Plenipotentiaries of the Caspian States, the purpose of which will be the effective implementation of the Convention on the legal status of the Caspian Sea and review of various aspects of cooperation in the Caspian Sea. The first consultations of the new format of cooperation should take place no later than six months after the signing of the Convention. As a matter of priority, the countries of the region will agree on a draft agreement on the methodology for establishing direct baselines. After the signing of this document, for the first time in its history, the state border, duly formalized and recognized in accordance with international law, should appear in the Caspian Sea [8].

Article 20 defines the rights and obligations of the Caspian States ("This Convention shall not affect the rights and obligations of the Parties arising from other international treaties to which they are parties").

Disagreements and disputes related to the interpretation and application of this Convention shall be resolved by the Parties through consultations and negotiations (article 21, paragraph 1). Any dispute between the Parties concerning the interpretation or application of this Convention on which agreement cannot be reached in accordance with paragraph 1 of this article may, at the option of the Parties, be referred to other means of peaceful settlement of disputes provided for in international law (paragraph 2). Article 22 deals with the ratification of the Depositary. In particular, it is noted that this Convention is subject to ratification. Instruments of ratification shall be deposited with the Republic of Kazakhstan, acting as the Depositary of the Convention. This Convention shall enter into force on the date of receipt by the Depositary of the fifth instrument of ratification. States that the Depositary shall notify the parties of the date of Deposit of each instrument of ratification and the date of entry into force of the Convention, and the date of entry into force of amendments and additions thereto (paragraph 1 of article 23).It is important that this Convention be registered by the Depositary in accordance with article 102 of the Charter of the United Nations (p.2). According to article 24, this Convention is, by its nature, indefinite.

President of Kazakhstan N.Nazarbayev noted that the adoption of the Convention on the legal status of the Caspian Sea and the signing of a number of documents - "this is evidence of the friendly relations of the Caspian States, our desire to cooperate closely and coordinate the care of our common sea". Calling the Convention a kind of "Constitution" of the Caspian Sea, N.Nazarbayev stressed that in the process of preparing the Convention all countries proceeded from the interests of ensuring political stability, development of the Caspian region, preservation and enhancement of its natural resources. Iranian President Hassan Rouhani, supporting the agreements laid down in the Convention, stated the need to continue negotiations on the delimitation of the seabed and proposed to conclude a separate agreement in this regard. He also expressed readiness to expand cooperation with the Caspian countries in the field of energy. "It is necessary to create and simplify conditions for shipping companies and travel agencies.

Cooperation in the field of energy, including the transportation of energy, energy, swaps operations-important topics of cooperation in the Caspian Sea. We have started work in this area with some Caspian countries and intend to continue and expand cooperation"[31].

Russian President V.Putin stressed that the settlement of the legal status of the Caspian Sea creates conditions for bringing cooperation between the countries to a qualitatively new level of partnership, for the development of close cooperation in various areas. "It is important that the Convention clearly regulates the issues of necessary distinctions, regimes of shipping and fishing, fixes the principles of military-political interaction of the member States, guarantees the use of the Caspian sea exclusively for peaceful purposes and the non-presence of the armed forces of non-regional powers at sea" [24]. According to V.Putin, "the Convention on the legal status of the Caspian Sea, which has been preparing for more than 20 years, enshrines the exclusive right and responsibility of States for the fate of the Caspian Sea, while establishing clear rules for its collective use" [24].

President of Turkmenistan G.Berdimuhamedov stressed that the Caspian Sea should forever become a zone of peace, good-neighborliness, mutual understanding and trust. According to him, today the importance of the Caspian Sea "goes far beyond it", "it turns into one of the key centers of geopolitical and geo-economic processes"[5].

It will be appropriate to recall that Azerbaijan has been proposing a fair "division" of the Caspian Sea on the basis of international legal norms for many years. However, various artificial obstacles prevented reaching a final agreement on the status of the Seas [15, 6-7]. Therefore, the main advantage of the Convention on the legal status of the Caspian Sea can be called the fact of its adoption, which is extremely important, since all parties have certainly benefited from it [38].

And, since we are talking about obstacles, it makes sense to pay attention to another, not directly related to the topic, but an important nuance. On the eve of the Aktau summit, it was possible to observe a significant activation of certain Western circles, including those close to the Armenian lobby. Realizing that the parties are closer than ever to reaching a final agreement on the status of the Caspian sea, they unsuccessfully tested most of their favorite methods in order to achieve the failure of negotiations and the signing of the final document [17]. Here are some provisions that pose challenges for us: there was the most acceptable division for Azerbaijan, and now it can explore in large volumes the Caspian plume for the production and export of energy in large volumes [14, 330-331]. The TRANS-Caspian gas pipeline, which will link the exporting infrastructures of Azerbaijan and Turkmenistan, can only be built with the agreement of the five parties. This situation is extremely important for Russia and Iran. The military presence of a third party in the Caspian basin will be banned, which is also beneficial for Russia and Iran.

In fact, Russia and Iran have agreed to cede more energy resources to Azerbaijan - against strategic and long-term guarantees, which de facto strengthen existing ties between neighbors [37]. The fascination with an artificial domestic political agenda may cost us too much if the strengthening and consolidation of national political capital does not take place on international platforms" [5].

"The Convention is a kind of Constitution of the Caspian sea, it is designed to settle the whole range of issues related to the rights and obligations of coastal countries, as well

as to become a guarantor of security, stability and prosperity of the region as a whole" [21].

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Date of receipt of the article in the Editorial Office
(18.12.2018)

SELF-DETERMINATION OF ABKHAZIA AND SOUTH OSSETIA

Gulu Novruzov
(*qnovruzov@gmail.com*)
Phd, Lecturer of the Department of Public International law
(Baku State University)

Abstract

The article is devoted to the study of the problem of self-determination of Abkhazia and South Ossetia. The aspirations of the peoples of Abkhazia and South Ossetia are shown here, the provisions of national legislation, the norms of International law are analyzed. Established provisions in which young state-like entities can receive the legal right to self-determination, the role of referendums on self-determination, as well as the recognition of such new states in accordance with international law are noted. The article shows the historical chronicle of self-determination of Abkhazia and South Ossetia.

Keywords*: independence, Russian-Georgian war, sovereignty, independence, territorial integrity, federal laws, human rights violations", genocide, genocide intent ethnic cleansing*

Abkhazia and South Ossetia are partially recognized republics in the Caucasus, asserting independence from Georgia [23, 45]. Russia's initial recognition of the independence of Abkhazia and South Ossetia came after the Russian-Georgian war, six months after Western recognition of Kosovo's unilateral Declaration of independence from Serbia in February 2008. This, and the resulting non-recognition by the West of Abkhazia and South Ossetia, led to statements of hypocrisy and double standards on the part of both sides of the gap in recognition.

In total, Abkhazia and South Ossetia were recognized by seven and six UN member States, although Vanuatu withdrew its recognition of Abkhazia in 2013 and Tuvalu in 2014. The two regions recognize each other and also have some recognition from other non-UN States. In May 2018, Syria recognized the independence of both breakaway territories. Georgia and most countries of the world do not recognize them as independent. Georgia officially considers them the sovereign territory of the Georgian state under the military occupation of Russia.

The history of Abkhazia and South Ossetia. South Ossetia declared independence from Georgia during the war in South Ossetia in 1991-1992 on May 29, 1992, and its Constitution concerned the "Republic of South Ossetia"[22, 12-15]. Abkhazia declared its independence after its war with Georgia in 1992-1993. Its Constitution was adopted on 26 November 1994[16, 31-33]. In April 2008, the United Nations Security Council unanimously adopted resolution 1808, which reaffirms "the commitment of all member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders and supports all efforts of the United Nations and The group of friends of the Secretary-General, guided by their determination to contribute to the settlement of the Georgian – Abkhaz conflict only by peaceful means and within the framework of security Council resolutions". The war in South Ossetia in 2008 took place in August 2008 between Georgia on the one hand and South Ossetia, Abkhazia and Russia on the other, resulting in the victory of South Ossetia, Abkhazia and Russia and the expulsion of Georgian troops from both territories [6, 18-28].

On August 21, 2008, rallies were held in Tskhinvali and Sukhumi, where residents of South Ossetia and Abkhazia, respectively, appealed to Russian President Dmitry

Medvedev and the Federal Assembly of Russia for official recognition of their independence as sovereign States. President of South Ossetia Eduard Kokoity arrived in Moscow on August 23, 2008 and addressed the Council of Federation of Russia.in his address he stated that "what the Georgian leadership has done in South Ossetia can only be called the Caucasian Stalingrad" [7, 66-75]. On 25 August 2008, President of Abkhazia Sergei Bagapsh also made a report to the Federation Council. In his address to the Council, Bagapsh said: "I can say with confidence that Abkhazia and South Ossetia will never be [part of] Georgia" [1, 12-18].

Russian recognition. President Medvedev announced that he had signed decrees on recognition of independence of Abkhazia and South Ossetia [13, 14]. After hearing the above-mentioned calls from both the Abkhaz and South Ossetia leaders, on 25 August 2008, the Federation Council and the state Duma adopted proposals for President Dmitry Medvedev to recognize the independence of both States and to establish diplomatic relations. On 26 August 2008, President Medvedev signed decrees recognizing the independence of Abkhazia and South Ossetia as sovereign States and made the following statement: "the Decision must be taken on the basis of the situation on the ground. Taking into account the freely expressed will of the Ossetia and Abkhaz peoples and guided by the provisions of the UN Charter, the 1970 Declaration on principles of international law governing friendly relations between the United States, the CSCE in Helsinki, the 1975 Final act and other fundamental international documents, I signed Decrees on the recognition by the Russian Federation of the independence of South Ossetia and the independence of Abkhazia[21], Russia calls on other States to follow its example. It is not an easy choice, but it is the only way to save lives".

President Medvedev said that "Western countries rushed to recognize the illegal Declaration of independence of Kosovo from Serbia. We have consistently argued that after that it would be impossible to tell Abkhazians and Ossetia's (and dozens of other groups around the world) that good for Kosovo Albanians was bad for them. In international relations, you cannot have one rule for some and another rule for others". [24] Russian Prime Minister Vladimir Putin noted the previous Georgian aggression against Ossetia, and said: "those who insist that these territories should continue to belong to Georgia Stalinists - they stick To Stalin Because of the decision "s", referring to the fact that it was Stalin, an ethnic Georgian who gave the territory of the Georgian Soviet Socialist Republic, the predecessor of the modern Georgian Republic. Russia's NATO representative, Dmitry Rogozin, said that Russia's recognition of the independence of Abkhazia and South Ossetia is "irreversible", but called on "NATO countries to withdraw and revise their decision on the independence of Kosovo", and then "to act on the premise that this is a new political reality"[15].

In addition, he warned that any NATO attacks on regions supported by Russia "would mean a Declaration of war with Russia"[18]. In the UN Security Council, the United States strongly criticized Russia's support for separatist governments, accusing the government of violating Georgia's territorial integrity. In response, Vitaly Churkin, Russia's permanent representative to the UN, attacked the us statement of moral position, Recalling his invasion of Iraq in 2003 [19]. Others accused the United States of hypocrisy, citing its support for the violation of Serbia's territorial integrity when it recognized Kosovo's independence in 2008 [20].

The Russian government also welcomed Nicaragua's recognition of the two States and called on other countries to "recognize reality" and follow Nicaragua's example.

President Daniel Ortega stated that his government "recognizes the independence of South Ossetia and Abkhazia and fully supports the position of the Russian government" [17]. Dmitry Medvedev also signed legal Federal bills ratifying agreements on friendship, cooperation and mutual assistance between his government and the governments of Abkhazia and South Ossetia. The laws provided for the obligations of each state to assist each other if any of them were attacked, to jointly protect the borders of Abkhazia and South Ossetia [9, 12-15].

Georgia's Reaction. Georgian ex-President Mikheil Saakashvili considered Russia's move as an attempt to change the borders of Europe by force. Below are some excerpts from his statement: This is the first attempt on European territory ... since then, both the Hitler regime and the Stalin Soviet Union, where a large state is trying unilaterally with the use of force to completely crush the neighboring country and openly Annex its territory. The question of restoring Georgia's territorial integrity and protecting its freedom is not an internal Georgian problem, but a question of Georgia and Russia. Now we are talking about Russia and the rest of the civilized world. The future of Georgia is not only the future of Georgia; it is the future of the entire civilized world.

Deputy foreign Minister Giga Bokeria said: "this is an undisguised annexation of these territories that are part of Georgia" [11, 12-21]. On 28 August, the Georgian Parliament adopted a resolution on the recognition of Abkhazia and South Ossetia as "Russian-occupied territories" and instructed the government to cancel all previous treaties on Russian peacekeeping. The next day, the government announced that it had severed diplomatic relations with Russia, with the result that the Georgian Embassy in Moscow and the Russian Embassy in Tbilisi had completed their work. Georgia reminded its Ambassador from Russia and ordered all Russian diplomats to leave Georgia, saying that only Russian consular relations would be maintained. The Ministry of foreign Affairs commented on the decision, saying that between 600,000 and 1 million Georgians in Russia will be left to "the mercy of fate".

Later, Georgia also severed diplomatic relations with Nicaragua. Georgia switched to economic isolation of the regions. A ban was issued on economic activity in the regions without the permission of Georgia, and anyone who caught a violation of this ban by the Georgian authorities was prosecuted. Georgian Navy blockaded the coast of Abkhazia, and has seized 23 cargo ships trying to bring supplies to Abkhazia, primarily fuel supply. Abkhazia depends on fuel imports and as a result faces a serious shortage. In response, Russia began deploying boats from its black sea fleet on September 21, 2009 [2, 31-36]. In August 2009, Russia and South Ossetia accused Georgia of destroying Ossetia villages and kidnapping four South Ossetia citizens. Russia threatened to use force until the shelling stopped, and put its troops in South Ossetia with high readiness [4]. Georgia criticized Nauru after the recognition of the Small island state of Abkhazia. Minister of reintegration Temur Yakobashvili said: "Recognition of independence of Abkhazia Nauru is more like a Comedy it does not change anything in the international arena" [8, 43-49]. The European Union, NATO, OSCE, and the US immediately expressed dissatisfaction with Russia's decision [12, 54-56].

Abkhazia is recognized by Russia and four other countries. South Ossetia is recognized by Russia and four other countries.

Conclusion

As this document comes to an end, I will summarize the provisions of international law, the history of Russia's recognition policy, and the triggers for the recognition of Abkhazia and South Ossetia in this Chapter to draw conclusions for this study. International law does not provide for the right of ethnic or religious minorities to self-determination. Where self-determination concerns a sovereign state, self-determination is exercised by the rules against interference in the internal Affairs of the state and in the free choice of its population by the form and composition of the government of the state. Customary law provided that the right to self-determination could not be divided and belonged to the entire population. Both Abkhazia and South Ossetia exercised internal self-determination in Georgia on the basis of the relevant provisions on autonomy. Abkhazians and Ossetia's not only have access to governing bodies in their autonomies, but are clearly overrepresented in local authorities. Access to primary, secondary and higher education in their native languages, as well as to the regional press and television and cultural autonomy, was guaranteed. It can be argued that with the abolition of the South Ossetia Autonomous region, Ossetia's were deprived of the right to internal self-determination. However, this argument has no basis, since the abolition of the death penalty was the result of unconstitutional actions of the leadership of the Autonomous district and throughout the international process of conflict resolution Georgia was ready to re-grant broad autonomy to South Ossetia. It was the South Ossetia side that rejected the proposals for autonomy. Similarly, Abkhazia rejected all proposals for autonomy, including those coming from the UN. The remedies for the internal self-determination of Abkhazia and South Ossetia within the Georgian state have not only not been exhausted (as should be the case in order to claim corrective secession), but have not even been accepted by the separatists. Moreover, both Treaty law and customary law clearly establish the inviolability of the borders of sovereign States and their territorial integrity with regard to self-determination.) Thus, self-determination in independent sovereign States like Georgia is limited only by its internal character – autonomy, unless there are serious human rights violations against a particular racial or ethnic group that could invoke the right to external self-determination-secession. If in the 1990-ies Russian support was mainly indirect, in 2008, it has grown to a total of the Georgian-Russian war. Despite the fact that South Ossetia and Abkhazia held referendums on independence in 1992/2006 and 1999, respectively, they were contrary to the Constitution of Georgia, part of which at that time constituted these entities, and did not cover the entire population of the autonomies, since a significant part of the population had already been expelled.

In addition, these referendums were declared invalid by international organizations. As for the uti possidetis juris, according to this principle, only former constituent parts - such as Georgia – gain independence by dissolving a larger entity - such as the USSR - but not the administrative-territorial units that make up it. In the view of the ICJ, the borders reached at independence are inviolable. Since none of the three principles of due process was respected, the cases of South Ossetia and Abkhazia could not be regarded as normative, even if they met the criteria for redress as a result of the oppression of the metropolis. However, Abkhazia and South Ossetia also do not have the right to re-establish the right to secession. Despite the fact that" human rights violations" were committed by the Georgian side during the armed conflict, there is no evidence that it was attributed to genocide, the intention of genocide or one of its forms

– ethnic cleansing. On the contrary, according to the resolutions adopted by the OSCE and the UN, as well as EU and NATO bodies, the Georgian population suffered from ethnic cleansing both in Abkhazia and South Ossetia.

The third aspect that we need to discuss from an international legal point of view is whether the Russian unilateral act of recognition is in conformity with international law. As described in the section on recognition, a fundamental problem in recognition is the lack of well-defined recognition criteria. This, of course, makes the recognition of the subject of political manipulation.

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Date of receipt of the article in the Editorial Office
(05.01.2019)

THE ROLE OF THE INSTITUTE OF DIPLOMATIC PROTECTION IN INTERNATIONAL INVESTMENT RELATIONS

Amir I. Aliyev
(*al.amir.ibr@gmail.com***)**
Doctor of Law, Professor
(Baku State University)

Mamed Chiragli
(*chiraglimammad@gmail.com*)
Ph.D Candidate
(Baku State University)

Abstract

The article is dedicated to the phenomenon of diplomatic protection which may arise from the injured rights of a natural or legal person on the territory of another state. The historical context of occurrence of diplomatic protection and general approach to this institute which is shown both in doctrine and international legal practice are examined. Author refers to several judgments held by the International Court of Justice in order to describe the tendency concerning the application of diplomatic protection in practice. This has been examined on cases concerning the protection of natural persons and legal persons separately. The role of diplomatic protection in the settlement of international investment disputes of diagonal character was studied.

Keywords*: law, investment, diplomatic protection, international law, international investment law, investment relations, transnational corporation, natural person, legal person, International Court of Justice.*

The principle of state sovereignty, which is expressed by the supremacy and independency of the state in relation to other authorities within the state and in international relations, entitles states for diplomatic protection over their nationals and national legal persons on the territories of other states. According to the Article 1 of Draft Articles on Diplomatic Protection of the International Law Commission "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility" [8]. At the same time it should be noted that diplomatic protection is far from being a right to a state but is an action itself – this is a procedure which is realized by the state in order to restore the injured rights of its nationals on the territory of another state.

The institute of diplomatic protection has a historical context and has been known to the international law back in XVIII century, as in 1758 the Swiss lawyer E.Vattel expressed the fundamental principle of diplomatic protection as following: "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen"[10]. He noted that the sovereign state has to revenge for the injury caused to its national by another State, it has to make that State reimburse the harm, and otherwise the citizen will not be able to get the major wealth of the society which is the safety. Diplomatic protection has traditionally been seen as an exclusive state right in the sense that a state

exercises diplomatic protection in its own right because an injury to a national (no matter whether it is a natural or legal person) is deemed to be an injury to the state itself. This is the general approach which has also been reflected in the report of the United Nations International Law Commission on preparing Draft Articles on Diplomatic Protection [16].

The early rules on diplomatic protection were devised in the context of injuries suffered by US citizens in Latin American states. The struggle again reflected the binary nature of the norms in this area. The United States sought to externalize the norms that governed aliens and their property. It argued for an international minimum standard in accordance with which the foreigner should be treated. It built into the international minimum standard, norms that were favorable to the foreign investor and were, to a large extent, based on US domestic law standards [12].

Today the realization of diplomatic protection varies from one which has been at the rise of the phenomenon. Now diplomatic protection can take two forms: first, that of diplomatic action, whether it takes place according to traditional techniques, or according to more elaborate techniques such as conciliation and, secondly, the form of international judicial action which includes both the recourse to the judge and the recourse to the arbitrator. The exercise of diplomatic protection is at the discretion of the state, as it is at its discretion the choice of means, taking into account of course the rules on the recourse to the international judge and the arbitrator. This point must be borne in mind in order to appreciate the scope of international practice in this area with regard to the case of legal persons.

The twentieth century was the beginning of the globalization of the entire world economy. These processes have gained momentum in Europe since the middle of the last century. Economic integration has turned into a political one and has changed the situation on the European continent for many years. Today, the processes of economic globalization are taking place all over the world. The states themselves, their individuals and legal entities actively cooperate with each other in various areas of economic activity. This impacts development and intensification of investment relations in modern economy and enhancement of legal regulation of international investment relations. Within the context of international investment relations the institute of diplomatic protection has gained a new importance. It seems that the diplomatic protection became one of the means for settlement of international investment disputes.

The international investment presumes transfer of the capital from one state to another. It can be done in a form of a direct investment which includes the direct transfer of cash or property by natural or legal persons in order to provide participation on the territory of another state or in a form of portfolio investment which is realized in a way of purchase of securities of foreign issuers on specialized stock exchange markets. Those two forms are different from each other by several aspects but both provide the international element within a state receiving the investment.

The difference between these types of investments is based on the following: having a portfolio investment the control and administration over the eminent is apart from his shared ownership. The foreign investor does not aim to take part directly in administration over the entity according to securities - his main objective is to receive quick profit from increasing price of those securities. Foreign investor is trying to form such a portfolio which can bring him maximum profit in a short period of time. Investor

which has portfolio investment has to accept all kinds of risks, the same thing cannot be applied to direct investment as this kind of investment has long-term objectives and they usually receive better guarantees and protection in this period of time. Direct investment can have both support from the national law of receiving country and diplomatic protection from their national country.

Generally the distinction of direct and portfolio investment is made based on risks. Portfolio investor can cancel his investment by a simple contract for purchase and sale, which will help him to sell his securities and later to acquire new different ones. Direct investments usually cannot be canceled so much easily as they are considered for mid or long-term. Portfolio investments do not require constant control and administration from investor, while direct investments cannot give profit without proper administration by investor and his presence in receiving country.

Also as a specific characteristic of direct investments we can note their popularity within the activity of Transnational Corporations. Portfolio investment does not let the same advantages considering economic and political influence which are given by direct investments, this is why they are largely used in practice of TNCs and this is the principal form of their economic activity on the territory of another country.

The investment of international character requires a firm ground to be realized as the only purpose of the investor, no matter whether it is a natural or legal person, is to gain profit (except some cases when an international investment becomes sort of foreign expansion realized by the national state of investor). First of all this is based on the necessary security which should be provided for the investment in order that to ensure the investor that he will get the profit. Criterions of safety have different aspects including the political situation in the recipient state, protection from nationalization and confiscation of property, the possibility of repatriation of profit and others.

The elaboration of Draft Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission of the United Nations unquestionably offers an additional argument of weight to the thesis that the responsibility that may be incurred by a State because of the violation of an investment protection agreement is an international responsibility, whose conditions of engagement and content are both governed by the international legal order [9]. Contrary to a practice as constant as it is abundant today, and of a largely concordant doctrine on this point, some authors dispute well the possibility of transposing this instrument in this discipline of the international economic law on the ground that the rules that it intends to codify would only be relevant in the context of "classic" interstate relations. It is true that article 33 (1) of the Draft Articles intends, in principle, to define the scope of this type of relationship to the exclusion of situations in which the responsibility of the State would be questioned by a private entity. This provision, however, reflects, first of all, a bias assumed by the Commission, since the sixties, in order to circumvent the problem of the international status of private persons, which then provoked much more intense controversy than today. It will be noted later that the work of the Commission has been abundantly practice of international courts and tribunals that have to rule in contexts directly - in the case of mixed courts - or indirectly - through diplomatic protection [11]. It is also quite remarkable that the judgment of the Permanent Court of International Justice (PCIJ) in the context of the Chorzów Factory case, which is one of the founding decisions of the customary law of the international responsibility, precisely the situation

of a private person confronted by a State's breach of its international commitments. In that case, the Court also confirmed that state responsibility, in such a "transnational" context, was in accordance with the rules and principles of international law, including the definition of its content and to specify the consequences. Lastly, and above all, it is clear from Article 33 (2) that the relevance of the Commission's draft on State responsibility, in the case where it is invoked by a private individual, is not definitively principle, but that it must be assessed with regard to the primary rules the violation of which is alleged. The commentary to this provision states that "it is the particular primary rule which is to determine whether and to what extent persons or entities other than states may invoke responsibility in their own name" [7]. However, this is precisely the purpose, in general terms, of investment protection agreements: to offer investors a capacity which the diplomatic protection of their state of origin conferred on them until now possibly and indirectly by allowing them to invoke "in their proper name" the international responsibility of the host State for their operation. As for the point of determining the extent to which these instruments actually confer such power to investors, it is appropriate to refer, on a case-by-case basis, to the relevant provisions of these agreements, which may naturally regulate or circumscribe their capacity for action by imposing certain conditions on it or limiting the consequences that may result from violation of their material provisions. In accordance with the principle of lex specialis, customary international law, as codified in the Articles of the Commission, must be deleted in favor of the special provisions contained in the investment promotion and protection agreements.

The comparison must necessarily be made because, as regards the state responsibility in the field of investment, international law has been developed by a long series of inter-state arbitrations resulting from the exercise of diplomatic protection of the home countries of investors. Are the rules of this international law, which are largely part of customary international law, relevant to arbitrations on the basis of protection treaties? One recent author denies that there is a difference in nature between the rules of State responsibility for internationally wrongful acts in the context of diplomatic protection and those applicable to the implementation of cause of a State on the basis of protection treaties [15].

Thus Z. Douglas argues that "the investment treaty regime for the arbitration of investment disputes [...] cannot be adequately rationalized as a form of international public or private transnational dispute resolution". And indeed, since the dispute between a host State and the investor would always relate to the private interests of the latter, the law applicable to this type of dispute could only be a "hybrid" of international law and domestic law and not only international law as in inter-state arbitration. It follows from this general view that the customary rules of State responsibility in the field of investment, which have been established in the context of inter-State arbitrations set up as a result of the exercise of diplomatic protection, do not would be irrelevant to actions based on investment protection treaties. The customary rules, on which the work of the International Law Commission was based, concerned inter-state relations and not mixed reports between a private person and a state, reports which were, by nature, outside the sphere of international law [15].

It is clear and unmistakable that the foundation of both actions is not the same. On the one hand, with regard to the implementation of diplomatic protection, the widely

accepted pattern is that the state that takes up the cause of its national does not defend its right but the right, which its own, to ensure compliance with international rules concerning the treatment of aliens that the receiving state has violated vis-à-vis one of its nationals. These results in the liability of the latter being put in play by the national state of the investor.

Thus the practice of investment relations demonstrates that investment brings the occurrence of relations between states and nationals (natural or legal persons) of another state. States sign BITs mostly in order to provide protection and security for their own individuals and legal persons who realize investments on the territory of another state party. Contractual rules of international law enlarge limits of possible protection which is provided to investors. This is the essential objective of any BIT - to provide guarantees and protections for investors in order that they could have their economic activity on the territory of another state without violation of their rights. The question is that how this kind of relation which can be referred to as "diagonal relations" are regulated by international law as one party involved is a natural or legal person which is not a subject of international law. In this case the institute of diplomatic protection arises and is aimed to help states to protect their nationals.

The biggest flaw in international customary investment protection law, however, was the lack of an enforcement mechanism. Instead of giving interested investors the direct right to file a lawsuit against the host country at the international level, it was stipulated that they should first have applied to the courts of the host state, which, especially in developing countries, were not necessarily an effective remedy, and then ask their relevant state of origin on the exercise of diplomatic protection. The state of origin could then make claims about the violation of the rights of the investor by the host country at the international legal level, for example, by initiating proceedings in an international court or arbitration. For the "classic" international law, the fundamental idea was that the violation of the rights of foreign investors constituted a violation of the rights of the state of origin. In fact, the International Court of Justice was from time to time forced to deal with investment protection issues; in addition, special tribunals were also established at the international legal level. However, the investor did not have the unconditional right to exercise diplomatic protection by his state of origin and in this respect was completely dependent on the latter's discretion. Concerning the protection of natural persons it should be noted that according to the rules of customary law states themselves can define conditions for conferment of nationality (to give citizenship) based on their national law, but foreign states can recognize this law only if it does not contradict international conventional, international customary law and general principles of law concerning nationality.

Along with that the international law limits realization of diplomatic protection of states. States can apply diplomatic protection only if there is actual connection (close relation) between state and citizen. Nottebohm case [13] is very significant in this aspect. This is the case heard by the ICJ in 1955 between Liechtenstein and Guatemala. Liechtenstein has asked the Court to oblige Guatemala to realize restitution and pay compensation due to illegal acts of Guatemala towards Nottebohm who was citizen of Liechtenstein. But the ICJ has refused to examine this action and motivated it by the fact that the nationality of Liechtenstein was acquired by Nottebohm only in order to change his legal status without a real actual connection between him and the state. The

Court has refused to take into account the procedure and order of acquiring nationality indicating that this is fully the exclusive right provided by national law. This approach has become a classical one and is applied in some international investment treaties. For example the BIT between Germany and Israel stipulates that the notion "Israel national" presumes "national of Israel, who permanently live on the territory of the state".

What if a natural person has more than one nationality? In this case according to the principle of actual connection the right to realize diplomatic protection belongs to state with which the natural person has the closest links. But the international customary law and international practice mostly allow the realization of diplomatic protecttion by any of those countries.

Diplomatic protection is therefore today not the only instrument of international law that may be used by an individual who's personal or property rights have been unlawfully violated abroad by a foreign government. BITs provide protection for the investments of foreigners and human rights treaties offer remedies for the violation of personal human rights. Still diplomatic protection remains a mechanism of international law that is employed by States to secure just treatment for their nationals abroad. Moreover it has largely lost its reputation as a procedure used by rich, developed nations to interfere in the domestic affairs of developing nations. This is evidenced by the manner in which developing nations have not hesitated to invoke international law's oldest mechanism for the protection of aliens abroad. Regarding the realization of diplomatic protection for the legal persons, it is remarkable that the development of business entities in a form of joint-stock companies and the increasing role of foreign investments have led to possibility of diplomatic protection which can be applied to legal persons.

This aspect was examined by the ICJ during the Barcelona Traction Case [5]. The Barcelona Traction, Light and Power Co. Company were registered in Toronto (Canada) in 1911. Subsidiary companies have been established in order to hold business in Spain. After the end of the World War One Belgian natural and legal persons have become stock holders of the company. But civil war in Spain which occurred in 1931-1939 has led the company to the bankruptcy. Spanish stock holders have addressed to the Spanish municipal court with the action on bankruptcy of the Canadian company. The court has accepted the action. After this the ICJ has examined the action of Belgium about the protection of rights of Belgian stock holders of Barcelona Traction. Representatives of Belgium claimed that acts of Spanish authorities concerning the company were the reason of massive damage which was occurred to Belgian stock holders. ICJ by its decision of 5 February 1970 has refused the action, pointing out that "the application of theory of diplomatic protection to stock holders could be the cause of appearance of concurrent objections by different states which could lead to creation of unstable conditions in international economic relations". This is why the Court held the absence of cause of action for Belgium. This is the fact that stock holders of big transnational corporations are nationals of different countries from all over the world. The realization of diplomatic protection by each state could cause great number of disputes. In its decision on Barcelona Traction Case the ICJ has emphasized that according to the generally recognized rule of international law the diplomatic protection can be realized "only by the national state of legal person".

But such kind of approach does not tell us anything about how to define the nationality of legal person. The definition of nationality of a legal person is necessary because they do not have an international legal personality. The ICJ in Reparations Case [14] has given the definition of a subject of international law, which is according to the opinion of the Court is characterized by "the ability to acquire international rights and obligations, and also the ability to realize its rights by submitting an international request". Legal persons can have rights and obligations within the national law this is why they cannot become subjects of international law. Here we have to refer once again to theories of definition the nationality of legal persons: theory of incorporation (states of common law), theory of location of principal organ (Germany), theory of center of principal economic activity (mostly used in combination with other theories), theory of property and control (mostly used in combination with other theories, Switzerland).

In conformity with the theory of incorporation the legal person has the nationality of the state where it is registered, i.e. has the closest legal link with the state. The theory of location of principal organ is based on the legal relation between corporation and state based on the location of its main administrative organ, which hold the general control and management over the administration of the legal person's business activities and its assets. The other one which is the theory of center of principal economic activity leads to definition of nationality of a legal person based on the state on which territory it generally has its business activity and gains profit as a purpose of its general functioning. The last theory defines the nationality of a legal person according to the nationality, more precisely the citizenship of its founders [1].

As we can understand, in Barcelona Traction Case the ICJ addressed the theory of incorporation and refused the theory of property and control which is understandable taking into account the fact as mentioned above – it can mislead states while activating their right on diplomatic protection for their nationals who may be founders of different corporations all over the world, it may bring chaos to the international economic order and provoke big number of unjustified diplomatic protection cases or as the ICJ stated itself "could create an atmosphere of confusion and insecurity in international economic relations". The ICJ stated that "international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules; it has to refer to the relevant rules of municipal law" [6].

Diplomatic protection covers in principal the protection of those nationals which are not engaged in business affairs of international character on behalf of the state itself. These officials are protected by different rules and norms of international law. Here we can refer to the Vienna Convention on Diplomatic Relations of 1961 and Vienna Convention on Consular Affairs of 1963. At the same time in case that diplomats and consuls are injured in relation to activities which are out of their direct functions, they are covered by the rules and norms of the diplomatic protection. Such cases may occur as a result of the expropriation of the property belonging to the official on the territory of the accredited state without compensation. As we can see from the practice of the ICJ it is the link between the injured person (natural or legal) and the state of his nationality which gives rise to exercise of the diplomatic protection.

Diplomatic protection remains an important mean for aliens, rights of which were injured while abroad. It is true, as the International Court of Justice observed in Diallo case (para. 88), that the role of diplomatic protection has "somewhat faded" [2] in respect of investment disputes, and that human rights conventions provide international mechanisms for bringing complaints against governments responsible for violating the rights of aliens. The ILC may have already missed an opportunity to advance the relevance of diplomatic protection when it failed to promote the right to diplomatic protection in respect of nationals subjected to the violation of peremptory norms abroad [3]. Probably, if the articles are transformed into treaty form, states will be encouraged by article 19 of the articles and the "responsibility to protect" doctrine proclaimed by the General Assembly in its 2005 World Summit Outcome Document [4] concerning serious international crimes, to endorse a right to diplomatic protection.

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Date of receipt of the article in the Editorial Office
(25.12.2018)

THE PRINCIPLE OF PROPORTIONALITY AS THE LEGAL BASIS FOR THE LIMITATION OF HUMAN RIGHTS

Mehdi Abdullayev
(*abdullayev@rambler.ru*)
Doctor of Laws
(Academy of Public Administration
under the President of the Republic of Azerbaijan)

Absrtact

The principle of proportionality is the most important criterion for assessing the legitimacy and lawfulness of the limitation of human rights. Despite the lack of a contractual framework, through the practice of international monitoring bodies, especially the European Court of Human Rights, the principle of proportionality has become one of the key principles of the international legal protection of human rights.

The principle of proportionality sets the limits for state intervention in the exercise by individuals of their fundamental rights and freedoms guaranteed by international treaties, determining the relationship between the state and civil society. The principle of proportionality is an important means of control realized by the Strasbourg Court in a concrete and thorough manner with the aim of ensuring an equitable balance between the legitimate aim of the limitation and the guaranteed rights of the individual. It is necessary to consider the principle of proportionality of the limitations of the rights and freedoms of citizens on the basis of a comprehensive analysis of such concepts as necessity, legality, goals, limits, scope, methods and duration of limitation.

Keywords: *proportionality, limitation, human rights, European Court of Human Rights, limits of intervention, civil society, fair balance, legality.*

The principle of proportionality is an inherent element of the theory and practice of human rights [7, 23-35].Though it should be noted that this major principle is reflected only in one international agreement on human rights - the Charter of Fundamental Rights of the European Union of December 7, 2000. Part 1 of Art. 52 of this regional document establishes that a limitation on the exercise of rights and freedoms can be provided by law only if the principle of proportionality is observed, which means the following: any limitation should not go beyond the goals that are put before it [5, 80].

Despite the lack of a contractual framework, through the practice of international monitoring bodies, especially the European Court of Human Rights, the principle of proportionality has become one of the key principles of the international legal protection of human rights. The European Court has repeatedly noted that characteristic of the entire human rights system under the European Convention on Human Rights is "the search for a fair balance between public interests and individual rights". Achieving such a balance necessarily requires proportionality. International human rights bodies recognized that there must necessarily be a proportionality between the goal pursued by the state in interfering with the realization of an individual's right and the mentioned right.

The principle of proportionality is the most important criterion for assessing the legitimacy and lawfulness of the limitation of human rights: the degree of any limitation must be strictly proportional to the need to protect the more important interest protected by this limitation. In this regard, researched principle should be observed not

only in the laws establishing limitations, but also by the executive and judicial authorities in their application.

It follows from the principle of proportionality that between the goals pursued by the state and the means that it chooses for this, as well as the results of their application, there should be a close relationship. In order to protect the interests of society, no means should be chosen that, as a result of the use of which, the participants of legal relations would be imposed an excessive burden or limitations would be imposed, except for those that are really necessary.

Thus, the principle of proportionality sets the limits for state intervention in the exercise by individuals of their fundamental rights and freedoms guaranteed by international treaties, determining the relationship between the state and civil society.

In a large number of its decisions, the European Court of Human Rights emphasized that it must determine whether a fair balance was maintained between the requirements of public interests and the requirements of the fundamental rights of the individual.

The European Court does not define what public interest or public interest is, considering that the national authorities, because of direct knowledge of the living conditions of society and its needs, have advantages over the international court in assessing what public interests are; therefore, it is they who should initially assess whether there is a problem of public concern and whether appropriate measures should be taken. In one of its decisions, the European Court noted the following: "Considering it normal that the legislator has a great margin of appreciation for economic and social policy, the Court respects the legislator's judgment on what is in the public interest, except when such a judgment is not based on reasonable considerations"[4].

The principle of proportionality applied by the European Court of Human Rights means the following:

1) the legitimate aim must be sufficiently significant to justify the limitation of the individual's basic right;

2) measures designed to satisfy a legitimate aim must be reasonably related to the goal - they must not be arbitrary, unfair, or based on unreasonable considerations;

3) the means used to infringe the right or freedom must be necessary to achieve the legitimate aim - the more serious the negative consequences of the measure taken, the more important the goal must be if the measure must be justified in a democratic society.

In the context of the European Convention on Human Rights, the principle of proportionality was first applied in the Belgian Linguistic Case. In its decision, the European Court ruled that Art. 14 of the Convention, which does not allow discrimination in respect of the use of rights guaranteed by the Convention, prohibits not every distinction in the exercise of these rights, and that the principle of equal treatment is violated only when this distinction does not have an objective and reasonable justification. The court, in particular, said: "Different treatment in the exercise of the right enshrined in the Convention should not only pursue a legitimate aim: art. 14 is also violated if it is clearly established that there is no reasonable proportionality ratio between the means used and the goals that the state was striving to achieve"[1].

It is noteworthy that after the decision, the European Court consistently considered the principle of proportionality as an important criterion for determining whether the authorities interfered with the exercise of rights "necessary in a democratic society" or not.

The international legal literature correctly emphasized that the Principle of proportionality is an important means of control exercised by the Strasbourg Court in a concrete and thorough manner in order to ensure a fair balance between the legitimate aim of limitation and guaranteed individual rights[6].

This principle was subsequently repeatedly applied in the practice of the European Court of Human Rights, as well as the Committee on Human Rights.

So, in the case of Mustakim v. Belgium, the European Court found that the expulsion from Belgium of the applicant, who was a citizen of Morocco, was a disproportionate measure in relation to the legitimate aim pursued. The respondent Government indicated that the purpose of the expulsion was to prevent unrest, since the applicant was accused of committing a large number of crimes (147 in total), and also that he continued to commit crimes even under the supervision of a juvenile court. In a word, according to the Belgian government, Mustakim was dangerous for society, and his further presence on the territory of the country was unacceptable.

In its assessment of the fact that the measure of deportation was disproportionate in relation to the legitimate aim pursued, the Court took into account the following facts: a) the applicant was accused of crimes committed during the period when he was a minor, and only 26 and they all covered a relatively short period of time - about 11 months; b) a relatively long time elapsed between the last crime for which the complainant was convicted and the issuance of a deportation order; c) at the time of issuing the deportation order, all of the applicant's close relatives - parents, brothers and sisters - had been living in Belgium for a long time; d) at the time of arrival in Belgium Mustakim was less than two years. From that moment on, he lived there with his family for about twenty years, having received education in Belgium in French. Therefore, the measure taken against him, seriously violated his family life. Accordingly, there was a violation of the applicant's right to respect for his family life[8, 52].

The principle of proportionality was also applied to interventions in the exercise of the right to property, guaranteed by Art. 1 of Protocol No. 1 to the European Convention of Human Rights, although this article does not contain the requirement of an objective need for such interventions. So, in the case of Sporrong-Lonnroth v. Sweden, the European Court stated: "The court must determine whether a fair balance has been observed between the requirements of the public interest and the necessary conditions for the individual's fundamental rights. The pursuit of such a balance is inherent in the entire Convention system"[9, 24-28].

In deciding whether a fair balance was observed, the Court took into account the factor that compensation was not provided for the intervention. The court thus considered that the right to compensation for interference with property rights is an inherent feature of the right to property, since it can be a necessary component in a fair balance between public and private interests.

In the case of Fredin v. Sweden, the applicant complained of a violation of property rights in connection with the revocation of a permit for the extraction of gravel in the territory of the land plot owned by him. The European Court pointed out that the interference should correspond to a fair balance between the general interest of the society and the requirements of protecting the fundamental rights of the individual. The search for such a balance is reflected in the structure of art. 1 in general, as well as in its part 2; there must be a reasonable balance between the means used and the aim pursued. By monitoring compliance with this requirement, the European Court recognizes the state's wide limits of discretion both in finding means to enforce the

relevant laws, and in deciding whether their consequences are justified in the general interest [2, 6].

In the case of Fatullayev v. Azerbaijan, the European Court noted that the internal discretion framework for interventions in press freedom is limited by the interest of a democratic society in ensuring and maintaining a free press. In the same way, this interest will have a lot of weight in determining the proportionality of the limitation of the legitimate aim pursued.

In the case of Mahmudov and Agazade v. Azerbaijan, both applicants were sentenced to five months in prison. This sanction, in the opinion of the European Court, was very harsh, especially since the national legislation provided for milder penalties. The court noted that although the imposition of punishment is in principle a matter for national courts, the sentencing of imprisonment for a crime related to the press will still be compatible with the journalists 'right to freedom of expression, guaranteed by Art. 10 of the European Convention on Human Rights, only in exceptional cases, in particular, in cases where other fundamental rights were seriously infringed, such as in the case of incitement to racial hatred and incitement to violence.

Based on the above, the European Court concluded that the circumstances of this case do not justify imposing a sentence of imprisonment, since such a sanction, by its nature, has a deterrent effect on journalistic freedom. The fact that the applicants did not serve their sentence does not change this conclusion, since the applicants were exempted from serving the sentence due to an amnesty act that was applied to many people convicted of various crimes and which was not adopted with the specific purpose of correcting the situation. It follows that by sentencing the applicants to deprivation of liberty, the national courts violated the principle that the press should be able to fulfill the role of a "guard dog" in a democratic society.

According to the Court, although interfering with the applicants right to freedom of expression could be justified and necessary, the criminal sanction imposed was disproportionate to the legitimate aim that was pursued by condemning the applicants for insult and libel. Therefore, there has been a violation of Art. 10 European Convention [12].

In the case of Hakanssonand Sturessonv. Sweden, in which the applicants claimed to be victims of a violation of the right to property, the European Court of Human Rights stated: "Art. 1 of Protocol No. 1 to the Convention requires a reasonable balance of proportionality between the means used and the goal. This condition cannot be considered fulfilled if the person has undergone a special and excessive limitation"[3].

In the case of Raimondo v. Italy, the claimant contested the legality of confiscating several land plots, buildings and automobiles prior to the presentation of evidence that this property was acquired illegally. The complainant was suspected of having links with the mafia. The European Court noted that the confiscation pursued a goal that meets common interests and was intended to ensure that the use of this property did not give the applicant or the mafia, in which he was suspected, any benefits at the expense of the public interest. Confiscation, which aims to impede the movement of capital obtained by criminal means, is a necessary and effective means in the fight against the mafia, therefore, this measure appears to be proportionate to the aim pursued [13].

Case Soltysyak v. Russia, also considered by the European Court of Human Rights, concerned a Russian soldier who worked with top-secret information. When Soltysyk resigned from work to reach retirement age, his passport was confiscated so

that he could not go abroad. Before the European Court, the Russian government claimed that the reason for the interference with freedom of movement, guaranteed by Art. 2 of Protocol No. 4 to the European Convention on Human Rights, was the need to protect national security and prevent the dissemination of confidential information. The Court considered that the exit ban could hardly be considered an effective means to achieve this goal: "The confidential information held by the applicant could have been transferred to other people in various ways, and the applicant did not have to be abroad or even enter into direct contact with someone ... The status of the applicant as a soldier does not change the conclusion that the limitation imposed did not reach its protective function, which was initially pursued by the authorities [10].

The Human Rights Committee, in its General Comment No. 27, noted that restrictive measures regarding freedom of movement should be in line with the principle of proportionality; they must be adequate to achieve their protective function; they should be the least restrictive tool among those that can achieve the desired result; and they must be proportionate to the protected interest.

In the opinion of the Committee, the principle of proportionality should be observed not only in the legislation providing for limitations, but also by administrative and judicial authorities when applying this legislation. States should ensure that any procedures relating to the exercise or limitation of these rights are carried out as soon as possible and that reasons be given to justify the use of restrictive measures.

The Human Rights Committee further noted that the application of limitations in each case should be explained by clear legal grounds and must meet the criterion of necessity and the requirements of proportionality. These conditions will not be met, for example, if a person is denied to leave the country only on the grounds that he knows "state secrets", or if the person concerned is denied movement in the country without specific permission.

In the case of Shin v. Republic of Korea, the Human Rights Committee noted that when a State party refers to legitimate grounds for imposing limitations on freedom of expression, it must clearly and in detail demonstrate the specific nature of the threat, and also that specific measures meet the criteria of necessity and proportionality in particular by establishing a direct and immediate link between the form of expression and the threat [11].

It is necessary to consider the principle of proportionality of the limitations of the rights and freedoms of citizens on the basis of a comprehensive analysis of such concepts as necessity, legality, goals, limits, scope, methods and duration of limitations. Changes in the content of human rights should not concern their essence, and that the limitation of the right is possible to the extent that it does not conflict with the true purpose of the right itself. Otherwise, the purpose for the sake of which certain limitations on the rights and freedoms of citizens would be significantly distorted would be significantly distorted. Restrictive measures are applicable if they do not prohibit the legitimate exercise of fundamental rights and if a particular restrictive measure is least detrimental to basic rights.

In conclusion, we note that the principle of prohibiting the limitation of the essence of law is enshrined in the constitutions of a number of countries (Poland, Turkey, Switzerland, etc.) or developed by constitutional practice (Portugal, Romania, Estonia, etc.), according to which the meaning of the principle of proportionality is to establish additional guarantees against excessive limitations.

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Date of receipt of the article in the Editorial Office
(10.01.2019)

THE LEGAL STATUS OF LEGAL ENTITIES AS SUBJECTS OF ENTREPRENEURIAL ACTIVITY

Aysel Abbasli
(ayselabbasli@yahoo.com)
Ph.D of law
(Baku State University)

Abstract

The present article covers a research on legal status of legal entities as subjects of entrepreneurial activity with a brief historical observation of theories on judicial nature of legal entities. Based on the research the author comes to the conclusion that enterprises in Azerbaijan are not independent legal categories.

Also it is proposed to make necessary changes in the legislation according to which the enterprise will be perceived neither as the subject of law, nor as a real estate. The author offers his own version of "enterprise" term definition. It is proposed to add to the legislation a common norm along the lines of: "Parties are entitled to enter contracts with enterprises as property complexes in subject. By the will of parties any kind of property can be part of such an enterprise. In this case facilities that form such an enterprise must respond the purposes of this enterprise and must be transferred in condition suitable for these purposes."

Keywords: *criminal liability, crime, object of crime, criminal and legal protection, cultural heritage object, destruction, damage, ruining, historical value, cultural value, public morality, punishment.*

According to Article 3 of the Law of the Republic of Azerbaijan "On entrepreneurial activity", legal entities, regardless of the form of ownership, may engage in entrepreneurial activities.

The concept of a legal entity emerged later than that of individual form of business activity. Roman lawyers did not develop it fully - Roman Law did not consider the concept of "legal entity" itself, yet, there existed associations of individuals (corporations), created for entrepreneurial activities, with the analogy of segregated property, yet whose debts were not the debts of their founders [22 , 115-116]. Basically, their activities were regulated by public law.

The very concept of a legal entity and its first serious development belong to the glossators of the Middle Ages. The activities of corporations were compared to the activities of individuals. The "theory of fiction" (the 13th century) originates from here. This theory claims that a human can only possess features of a subject of law (such as will, consciousness). However, as practice shows, the existence of numerous cases where property rights belong to a group of people, a corporation rather than an individual, the legislator recognizes the individual's features of a corporation, while being aware of the fact that a corporation cannot be a person, allowing a fact of a fiction in this particular case [11, 50].

Further in history, we can note a certain "bust" in the development of the concept of a legal entity caused by objective historical conditions in Europe, culminating in the French bourgeois revolution of 1789, when the category of legal entity fell out of scientific use for decades and was not applied in legislation [23, 154].

Active understanding of the concept of a legal entity started only nearly at the

end of the 19th - the beginning of the 20th centuries. Therefore, F.C Savigny and other scientists developed the theory of fiction (the theory of impersonation) in their works in the nineteenth century. It was attached by such theories as: the theory of destinators (R. Ihering, N. M. Korkunov), the core of which stated since only a person can be a carrier of rights, a legal entity is no more than a way of existence of legal relations of its person-members (Destinators of right); the theory of property impersonation (the theory of combined (selected) property), which, in the framework of the theory of fiction, was developed by A. Brinz and others, according to which, a legal entity represents a continuing state of property management, separate from all other properties; the theory of collective ownership (M. Planiol, Yu. S. Gambarov, Bertel, Mollengraf) - even if a person can be a legal entity, this does not mean that only one individual should be granted the legal right, the form of granting right can be one-man as well as collective, such "collective entities" are legal entities; theory of the official or collective property is also listed in this group (Hölder and Binder, etc. [10, 122]).

In modern conditions, a legal entity is defined as one of the full legal entities, differing from an individual person with its collective nature, expressed in special requirements established to it by law.

According to Art. 43.1 of the Civil Code of Azerbaijan Republic, a legal entity is a specially created, state-registered structure that owns separate property and is liable for its obligations with this property, can, on its own behalf, acquire and exercise property and personal non-property rights, bear obligations, act as a plaintiff or a defendant in court. A legal entity must have an independent balance (sheet) [1, 82].

Legal capacity of legal entities had variously been interpreted at different stages of market relations' development. Specific capacity of legal entities was typical for the first period of capitalism, that is, they could only enter into such legal relations that were required to achieve the goals defined by the law or statute.

Non-commercial organizations with activities not aimed at making profit have such legal capacity until nowadays. In contrast, the modern period of developed capitalist turnover is characterized by the legalization of general legal capacity with respect to commercial organizations. It promotes the free movement of capital in search of the most profitable spheres of application, unlocks the initiative of the economic entity.

This tendency is most clearly observed in Switzerland, the law of which states that legal entities can acquire all rights and assume any obligations, except for those for which the prerequisite is a human trait such as gender, age or kinship (Swiss Civil Code, 51) [4, 105-107].

In one form or another, the tendency to legalize general legal capacity is also observed in the legislation of other countries with developed capitalist relations (Germany, England, USA, etc.). For example, in Germany, despite a number of decrees of a Civil Code, stipulating the conditionality of legal capacity to the purpose stipulated in the statute, and requiring obtaining relevant permission of the competent state authority to change this goal, judicial practice and doctrine assume that the purpose stipulated by the statute is for internal relations only. Hence, transactions made by a legal entity in excess of statutory rights are considered valid with respect to a third party [8, 107].

A similar practice can be observed in all developed capitalist countries. In contrast, in the Soviet legal doctrine and practice, the legal capacity of legal entities was treated as strictly special one. The starting point for this was the creation of each entity to perform strictly defined functions in a production or socio-cultural area and for these purposes carried out one or another strictly defined activity.

Accordingly, a legal entity needs to acquire not rights of any type in general, but only those civil rights and obligations that are associated with the implementation of the tasks assigned to it. This provision was secured in part II. Art. 25 of the Civil Code of Azerbaijan SSR of 1964, which states that "a legal entity has legal capacity in accordance with the established aims of its activities," that is, the legal capacity of a legal entity was special. Strictly observed specialization of legal capacity of a legal entity was treated as an effective mechanism serving to strengthen the rule of law in the field of economic activity, ensure the implementation of national economic plans and the proportional development of the national economy as a whole [4, 105-107].

At the same time, the literature emphasized that the principle of special legal capacity does not mean that the rights and obligations that a legal entity can acquire are absolutely limited and exhaustive. Prof. D.M. Genkin wrote that an organization could perform a wide variety of single transactions, if these transactions accompanying the main activities of the organization are required by the purpose of this organization established in its charter or in the regulation on it [6, 43].

However, this tolerance did not in any way weaken the principle of the special legal capacity of a legal entity, since transactions outside the limits defined by the charter or the legal entity's order were recognized as non-statutory and, as such, did not produce legal consequences, that is, were invalid [4, 108].

These rules did not allow for any exceptions. This explains the fact that in a planned economy, when the bulk of economic entities were state enterprises, the term "competence" rather than "legal capacity" was used to characterize the rights and obligations of subjects of economic law. The strict specialization of the legal capacity of legal entities neutered their initiative, standing in the way of the development of cost-accounting relations.

Along with the implementation of radical transformations in the economy in our country and the transition to market relations, the task was to bring legislation in line with new economic realities, including with regard to the legal status of a legal entity.

In Azerbaijan, this task was performed with the adoption of a new Civil Code, enacted on September 1, 2000. Art. 43 of the Civil Code "The concept of a legal entity" has involved a new classification of legal entities - dividing them into commercial organizations pursuing profit as their main goal, and non-profit organizations that do not have profit as such a goal, hence do not distribute the profit among the participants. This classification has determined the differences in the legal capacity of both.

Art. 44.2 of the Civil Code has enacted that "legal entities that are commercial organizations may have civil rights and bear civil obligations necessary to carry out any activities not prohibited by law", that is, the legal capacity of a commercial legal entity is classified as general (universal). As a result, there is no need to specify the objectives of its activities in the charter of a commercial organization. This require-

ment of the Civil Code applies only to non-profit organizations (Article 47 of the Civil Code "Charter of a legal entity").

Such transformation has removed many bureaucratic barriers that were neutering the economic initiative of entrepreneurs, contributed to the development of the private sector of the economy, as well as the growth of small and medium-sized businesses. It is important to note it considering that private commercial organizations prevail numerically in the country's economy.

In contrast, non-profit organizations that pursue specific social, cultural, and other generally useful goals still carry not common, but special legal capacity. The state unitary enterprises, whose subject of activity is clearly defined in their statutes, must be listed among them. Preserving the special legal capacity of these organizations enables the founders to exercise targeted control over their activities in order to implement the tasks set forth in the statutes.

The general rule on the universal legal capacity of commercial legal entities allows for certain reservations. Thus, some commercial non-governmental organizations (banks, insurance companies), which are prohibited from consolidating their main activity with any other, have special legal capacity in accordance with the law.

Another factor limiting the legal capacity of commercial legal entities is the need to obtain a license to engage in certain types of activities provided for by law.

Moreover, if the condition for obtaining a license involves the requirement to engage in such activities as exceptional, then during the period of its validity the license recipient does not have the right to carry out other activities beyond those allowed by the license. Thus, obtaining a license converts the general legal capacity of a commercial organization into a special one [12, 35].

Another issue that requires some clarification regarding a legal entity as a business entity is the ambiguous use of the concept of "enterprise" in legal acts and legal literature as not only an organizational and technical category or object of law, but also as a synonym or type of legal entity.

Some authors have indicated the need to replace or supplement the category of "legal entity" with the term "enterprise" in relation to a collective business entity coordinated by management and regulation bodies. Moreover, this refers to the enterprise as a synonym or the main type of commercial organization, i.e., a collective entrepreneurial entity in its pure form, not just a legal entity [15, 15-18; 16, 5].

Another approach, based on current Civil Law, assumes that only those commercial organizations that do not have ownership rights to the property assigned to them and use it on the basis of economic management or operational management (state or municipal unitary enterprises) are considered an enterprise as a subject of law, in the rest cases the "enterprise" should be considered as a property complex, an object of law [20, 80 —82].

The fundamentals of the development of the modern concept of the enterprise were established back in the era of Roman law. The Roman law developed the concept of "entire property complexes united by an economic purpose": "the earliest definition of a citizen's property is given in the laws of XII tables under the term "familia pecuniaque" - originally a collection (unity) of slaves and cattle (pecuspecunia). Later, familia also denoted the entire aggregate of property [21 p, 154].

As we know, the norms and institutions of Roman law in practice acted on the territory of a number of German lands prior to the beginning of the unification process. However, the development of the concept of an enterprise as an object of rights falls mainly on the period of industrial growth, the intensification of commodity-money relations, that is, the middle of the XIX - early XX centuries.

Some German legal scholars of the first half of the XIX century started to consider an enterprise as a legal entity. However, this opinion was rejected. Since then, the opinion has prevailed that the enterprise is an object of rights [8, 112; 5, 3]. It acts as the central anchor point of trade law, recognized as an alienable and inheritable unit [9, 13].

According to M. Sharifov, the definition of an enterprise as a subject of law is inherent in Soviet law (as well as in the legal systems of some post-socialist countries) [24, 6].

The concept of an enterprise is used in both economic and legal sciences. It is obvious that an enterprise primarily acts as an economic category, being an instrument of entrepreneurial activity, the main element of an organization of productive forces and production relations, created in the course of activity of an initiative subject of the process of social production.

From an economic point of view, an enterprise is a "property-separated economic unit designed to solve economic and production tasks (production of consumer-oriented goods and services) and capable of self-reproduction (ensuring its life cycle)"; "Sometimes,"-as per Y. M. Osipov and Y.Y.Smirnova, an enterprise is called a commercial organization, in order to deliver the main purpose of its activity, to separate it from a non-commercial organization... " [19, 22].

In Western economic science, the collective concept of an enterprise is described as "economic unity, in which human and material factors of economic activity are combined and coordinated" [16, 15].

From this approach, actual domination over the means of production, the actual possibility of exercising control and managing over the economic unit containing these means of production, is of primary importance for answering the question about the ownership of an enterprise by a particular person. Issues of legal registration of these relations are largely beyond the scope. In addition, the question is not whether the enterprise is a subject or an object of legal relations, no distinction is made between an enterprise and a subject of rights to it. As a rule, economics considers the owner of the factors of production and the factors of production, its material base, as a whole. Meanwhile, legal science is not indifferent to how the rights for a given economic unit are formed, how they are exercised, what rights a subject of law has in relation to it.

This case is also relevant for the legislation of Azerbaijan Republic. Thus, a number of legal acts of Azerbaijan Republic consider an enterprise not as an object, but as a subject of law. In particular, for example, according to Art. 13.2.9 of the Tax Code of Azerbaijan Republic, an enterprise is primarily a legal entity, along with its branches, representative offices and other units having an independent balance sheet [2, 34].

Meanwhile, the Civil Code of Azerbaijan Republic itself often uses the concepts of "educational enterprise ", "medical enterprise" (art. 1112), "medical enterprise" (35, 362, 1103, etc.), etc. in terms of a legal entity (art. 1119, 1121, 1181, etc.), In the

Civil Code of the Republic of Azerbaijan there are other examples of using the concept of an enterprise in terms of a legal entity. For example, in Art. 723 of the Civil Code of the Republic of Azerbaijan definition of the concept of a franchise agreement is given by means of an "independent enterprise". In Art. 1048-1.2.3 of the Civil Code of Azerbaijan Republic, "enterprises and organizations" are mentioned as recipients of treasury bills. Art. 1048-2.2 of the Civil Code of the Republic of Azerbaijan mentions "financial and investment enterprises" along with credit organizations that are legal entities.

However, there is only one case, where the Civil Code of Azerbaijan clearly refers to the enterprise as an object of law - Chapter 34 "Leases". Art. 700.2 states: "The subject of a lease may be land plots, buildings, movables, rights and enterprises." This approach is met in the following articles of the named chapter of the Civil Code: 701.1, 703, 704, 711.2, 712.3, 714.2, 720.1.1, 720.1.2 and 720.3.3.

Another example refers to a custodial services agreement: "The owner of a hotel or restaurant is considered to be a person who provides shelter to other persons (guests). The owner of a hotel or restaurant is responsible for any damage or theft of things stored by the guests in the premises of the owner of the hotel or restaurant or in another place outside the enterprise determined by the owner of the hotel or restaurant or his staff, or otherwise accepted for storage by the owner of the hotel or restaurant or its staff "(Art. 831.1 of the Civil Code of the Azerbaijan Republic). Obviously, the subject (owner) and the object (hotel, restaurant) are differentiated here.

At the same time, there are provisions in the Civil Code of Azerbaijan Republic where it is impossible to understand unambiguously the exact meaning of the concept of an enterprise. For example, Art. 815.2, regulating the commission agreement, states: "The amount of commission is established by a commission agreement, and if there is no such clause in it, according to the local customs of business turnover, if commission transactions relate to the subject matter of the commissioner's enterprise."

In the context of the issue studied, the Rules of Keeping the State Register of Real Estate, approved by Decree No. 135 of the President of the Republic of Azerbaijan dated October 14, 2004, are indicative. Thus, clause 20.2 of these Rules de facto implies that an enterprise is considered an object of law if only it belongs to an individual entrepreneur. Otherwise, the enterprise is a legal entity, that is, a legal entity.

Given the above, we can conclude that the legislation of Azerbaijan contains a controversial approach to the definition of an enterprise: it appears either as a subject or as an object of law. In addition, despite the fact that the latter approach is becoming increasingly widespread, there are too many legal acts with the first approach in the legislation of Azerbaijan.

Yet, the legislation of Azerbaijan also does not provide a direct definition of an enterprise as an object of law. At the same time, as per Art.202. of the Law of the Republic of Azerbaijan "On the State Register of Real Estate" it indirectly implies that an enterprise is a complex of tangible and intangible assets, including buildings, structures, facilities, equipment, inventory, raw materials, finished goods, claims, patents and other exclusive rights.

An enterprise is not just a certain property of an entrepreneur, but in a certain way, a property segregated in economic circulation, which acts as a single object of law. Thus, under the influence of subjective rights on an enterprise, not several, but one object of law is influenced. The property, perceived as an enterprise, is subject to a single legal regime [24, 6].

According to F.F.Mamedov only a tangible thing can be considered immovable property, yet an enterprise is not a thing; therefore, the existing legislative assignment of an enterprise to real estate is incorrect. According to him, in the Republic of Azerbaijan, buildings that are part of an enterprise are not only registered as separate real estate objects, but formally, the enterprise registered in the State Register of Real Estate includes only immovable objects: land and buildings. It is curious that almost all such enterprises are privatized [16, 15].

According to S.R.Minikayeva, "enterprise" as a kind of subject of law is the "inertia" of thinking. As per him, the use of the term "state and municipal unitary enterprise" is already an established expression, however, to streamline legal terminology, it makes sense to change the term "enterprise" to "organization", indicating that there are "full" organizations based on the right of ownership, and there are unitary organizations that own property on the right of economic and operational management [17, 18].

An enterprise in Azerbaijan is nothing more than a synonym for complex property, that is, a real estate complex consisting exclusively of land plots and buildings on them. Consequently, an enterprise is not a property complex in the classical definition of this term that the legislator tried to consolidate in the Law of the Republic of Azerbaijan "On the State Register of Real Estate". In other words, an enterprise in Azerbaijan is not an independent legal category.

Considering the above, we consider it appropriate to make the necessary changes in the legislation, according to which the enterprise will be defined neither as a subject of law, nor immovable property. For legislation, it will suffice to have a general rule of the following content: "The parties may enter into transactions, the subject of which is an enterprise as a property complex. The structure of such an enterprise as per the will of the parties may include any type of property. In this case, individual objects that are part of an enterprise must meet the purpose of such an enterprise and be transferred in a state corresponding its purpose. "

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Date of receipt of the article in the Editorial Office
(22.12.2018)

COMPARISION OF TURKISH PRESIDENTIAL GOVERNMENT WITH US SYSTEM: ANALYZE BASED ON CONSTITUTIONS

Zuriya Garayeva
(*zuriye.babayeva@hotmail.com*)
Ph.D Candidate
(Academy of Public Administration
under the President of the Republic of Azerbaijan)

Abstract

There are three types of democratic republic governance forms: presidential system, where executive and legislative branches are elected by people, without any responsibility to each other; parliamentary system, where legislative branch or even more head of the state are elected by people, but government takes responsibility before parliament, semi-presidential system, which consists of the mixed properties of these two forms of government. Transition of these systems, particularly between presidential and parliamentary government forms, is one of the topical issues of recent times. The article is devoted to the comparative analysis of the presidential government applied on the proposal of the Justice and Development Party (AKP) with US sample. The aim of the study is to analyse the main features of this form of government in Turkey in the context of US government system and to demonstrate its results in terms of democracy. In this context, firstly the principles of the Turkish and US presidential administration forms had been examined based on constitutions, and then the comparative analysis had been conducted and probable results had been put forward. It is still unclear for many people what to expect from the so-called 'Turkish type of presidential system'. This analysis was based on the study of the sources related to the subject, the analysis of the results obtained, the analysis and synthesis of the arguments, and also the comparative analysis method.

Keywords: *presidential government form, transition, Turkey, Justice and Development Party, USA*

Introduction

Respublican forms of government are parliamentary system in which executive and legislative powers possess to one person, presidential system in which these powers are separately independent, and semi-presidential system which involves prinsiples of first two systems. One of the topical issues of recent times, both from experience and theoretical point of view is the transition to presidential type of government. Before 1980s, transition to parliamentary government was more prominent, and later this tendency changed towards presidential one. While the US system plays a precedent in this process, the results in the countries which are lack of opportunities making system as successful as American governance, are differed from expected ones and the authoritarian government of the executive has emerged. Despite the fact that the leaders of Turkey, such as Najmeddin Erbakan, Alparslan Turkes, Turgut Ozal and Suleyman Demirel, offered the transition to the presidential government, Recep Tayyip Erdogan carried out this process on April 16, 2017 with the support of the Nationalist Movement Party (MHP) leader Devlet Bahceli. Those who want presidential administration have been mostly representatives of the right wing in politics and have said that changes will create a successful governance.

Government system of Turkey

Turkey had been governed with parliamentary system since 1924. The constitution of 1924, which has had a significant impact on the modernization of republic and national sovereignty concepts, contributed to the transition to a pure parliamentary system adopted by the constitution of 1961. Having removed unity of powers, the 1961 Constitution introduced a 'Westminister' parliamentary government system based on a soft separation of powers [2, 258]. However, different conclusions had emerged during the period of the constitution in the political history of Turkey, chaotic coalition governments had been launched. Coalition governments had resulted in a military coup after the third power of Suleyman Demirel. After the coup d`etat of March 12, 1971, the executive power was further strengthened and the Cabinet of Ministers was empowered to adopt a decree with force to the law. [8, 84-85] Thus, parliamentary governance has been abandoned from pure principles. From the second half of the 70s, it was even more difficult to protect stability. The political crisis led to the subsequent coup d`etat on September 12, 1980 headed by the Chief of the General Staff of the Turkish Armed Forces, Kenan Evren. After coup d`etat Kenan Evren was elected as president of Turkey [4, 145-146].

But with this constitution, the powers of the parliament and the government were less than the powers of the president. The executive branch with powerful president was strong than parliament. The strong influence of the Security Council on the drafting of the constitution and presence of Kenan Evren in the coup d`etat had led to a strong president [4, 149-150]. As a result, the form of government abandoned from the pure parliamentary administration in 1961. The only difference between previous constitution in the powers of the President regarding the legislature is about the president's ability to present constitutional amendments to the people's vote. Powers of president regarding to both executive and judicial branches were more than the previous period. This constitutional reform, which has changed 17 times until the 2017 referendum[5, 6], has raised the debate on the transition to the new system after it has been removed from the parliamentary system. Turgut Ozal is the first political leader to propose this idea. While being both prime minister and president, Ozal claimed that presidential government would lead to Turkey's rapid development [6, 276].

The debate over the transformation to the presidential one has been boosted since coming power of the Justice and Development Party (AKP) in 2002. A constitutional referendum was held in 2007 to adopt amendment about election of president by people [14, md.79], which resulted in the emergence of a double executive power and ultimately changed the direction of the parliamentary system, which was designated by the president. Within the framework of the amendments the duration of parliamentary elections has been reduced from 5 to 4 years. [14, md.77] In 2012, the presidential administration was brought up again by Prime Minister Recep Tayyip Erdogan. The AKP offered the Constitutional Reconciliation Commission a change in the government system that year. The attempted military coup in Turkey on 15 July 2016 brought the AKP closer to the MHP and led to the acceleration of the system change process.

51% of voters voted in favor of changes on April 16, 2017. A part of the package, which included 18 amendments were implemented immediately after the referendum, and other part after the November 2019 election. However, the date was changed and at the June 24, 2018 elections candidate of AKP and MHP Recep Tayyip Erdogan was the 12th president in the history of Turkey with 52.9% of the votes. The AKP has partici-

pated with the slogan "Strong Parliament, Strong Government, Strong Turkey". The AKP and the MHP participated in the elections under the name of "Republican Union", Republican People's Party (CHP), Iyi Party and Saadet Party (SP) established "National Unity". The Great Union Party (BBP), which did not participate in the elections, supported the Republican Union, and the Democratic Party (DP) supported the 'National Unity' [10, 48].

With the constitutional amendment parliamentary government replaced with presidential one. The number of members of parliament increased from 550 to 600 and their minimum age lowered to 18. The president can issue decrees about executive. If legislation makes a law about the same topic that President issued an executive order, decree will become invalid and parliamentary law become valid. Parliamentary terms are extended from four to five years. Parliamentary and presidential elections will be held on the same day every five years, with presidential elections going to a run-off if no candidate wins a simple majority in the first round. This two branches can send each other to election. The independence and impartiality of the Court were also reflected in the constitutional amendments [13, 159]. Let's analyze the changes separately, based on the three branches of power.

The major change in the executive body was the elimination of the prime minister's institution, the conversion of the president to the chief executive being the head of both state and government and the forming new post of vice president. The president has the power to appoint and dismiss ministers and Vice President. With the change in 2017, the rule of disconnection with the party after the election of the president was eliminated. The President may issue decrees with the force of law on issues related to his executive powers. However, these decisions can not be adopted in relation to fundamental rights and freedoms, nationality, political rights. The new version abolishes any assembly control over the executive law making. Presidential decrees cannot be issued on topics that are clearly regulated by legislation. If there were to be a contradiction between the two, legislation would overrule presidential decrees. The president will be able to declare a state of emergency for up to six months and no longer require cabinet approval to do so. During the emergency case, the president will be able to issue decrees on fundamental rights and freedoms. President proposes fiscal budget to Grand Assembly 75 days prior to fiscal new year. It is approved by the Budget Commission within 55 days and is discussed at the General Assembly and comes into force from the beginning of the year. Budget Commission members can make changes to budget but Parliamentary members cannot make proposals to change public expenditures. If the budget is not approved, then a temporary budget will be proposed. If the temporary budget is also not approved, the previous year's budget would be used with the previous year's increment ratio. The opening of a parliamentary investigation may be requested by the absolute majority of the full membership of the parliament, concerning allegation of a crime connected with their office committed by the assistants of the President of the Republic and the ministers. The Assembly may decide to open the investigation by the secret vote of the three-fifth majority of its full membership. The parliament may decide to send the person concerned to the High Court by the secret vote of the two-thirds majority of its full membership. [13, 104-105]

President shall give message to the Assembly regarding domestic and foreign policies of the country; shall promulgate laws; shall send laws back to the Grand National Assembly of Turkey to be reconsidered; shall appeal to the Constitutional

Court for the annulment of all or certain provisions of laws and the Rules of Procedure of the Grand National Assembly of Turkey on the grounds that they are unconstitutional in form or in content; shall appoint and dismiss the high ranking public executives, and shall regulate the procedure and principles governing the appointment thereof by presidential decree; shall accredit representatives of the Republic of Turkey to foreign states and shall receive the representatives of foreign states appointed to the Republic of Turkey; shall ratify and promulgate international treaties; shall submit laws regarding amendment to the Constitution to referendum, if deems it necessary; shall determine national security policies and take necessary measures; shall represent the Office of Commander-in-Chief of the Turkish Armed Forces on behalf of the Grand National Assembly of Turkey; she shall decide on the use of the Turkish Armed Forces; shall commute or remit the sentences imposed on persons, on grounds of chronic illness, disability or old age; shall appoint half of the members of the Higher Education Council and university rectors [13, 104].

The functions of Parliament are making, changing, removing laws; accepting international contracts; discussing, increasing or decreasing budget (on Budget Commission) and accepting or reject the budget on General Assembly; appointing 7 members of HSYK and using other powers written in the constitution [13, md.87]. The age requirement to stand as a candidate in an election has been lowered from 25 to 18, while the condition of having to complete compulsory military service has been removed. Individuals with relations to the military would be ineligible to run for election.

Regarding the changes in the judiciary, Article 9 of the Constitution adds the word "impartial" after the word "independent". Supreme Board of Judges and Prosecutors (HSYK) is renamed to "Board of Judges and Prosecutors" (HSK) , members are reduced to 13 from 22, departments are reduced to 2 from 3. 4 members are appointed by President, 7 will be appointed by the Grand Assembly. Board of Judges and Prosecutors candidates will need to get 2/3 (400) votes to pass first round and will need 3/5 (360) votes of parliament members in second round to be a member of HSK. (Other 2 members are Minister of Justice and Ministry of Justice Undersecretary, which is unchanged). The President used to appoint one Justice from High Military Court of Appeals, and one from the High Military Administrative Court. As military courts would be abolished, the number of Justices in the Constitutional Court would be reduced to 15 from 17. The cause of this is eliminating of the rule about appointment one member by High Military Administrative Court and other one by High Military Court of Appeals. Consequently, presidential appointees would be reduced to 12 from 14, while the Parliament would continue to appoint three. [13, md.159] In addition, president has the power to appoint one-fourth of the members of the Council of State, the Chief Public Prosecutor and the Deputy Chief Public Prosecutor of the Higher Court of Appeals. Military courts shall not be established except for disciplinary matters, a military court will be set up only for crimes committed by military servicemen in the war-time. [13, md.142]

Changes in Turkey after the 16 April 2017 referendum involves only these issues mentioned above. Some of those who are against the amendment had set up their non-campaign campaigns on fictitious allegations. These allegations are mainly due to the fact that the republic will disappear and the kingdom will be created and the unitary structure will be replaced by federalism. According to Article 1 of the Constitution, "the Turkish state is the Republic" and this rule can not be changed in any way. The most

appropriate form of government for the kingdom is a parliamentary system, and a monarchy can not be established through presidential government. For the application of the federal structure, not only executive administration, but also the legislature and the judiciary must also be divided into states. [7, 45-47] In short, none of these claims are the correct criteria for criticism.

Differences between presidential government of Turkey and US

The US political system was adopted as an example when preparing a package of amendments on transition in government system proposed by AKP. However, new government has led to controversy as it has different features from the US system. The first of these differences is that in the United States, parliamentary and presidential elections are held at different times, with the fact that the two branches of the power are inevitable. The duration of both branches is different. President is elected for 4 years, House of Representatives is elected for a two-year term; the Senate is elected for a six-year term and 1/3 of them go out every second year. [12, md.1/2] By this rule, the majority of the House of Representatives and the President are likely to be from different parties, in the context of respect for the majority, the rights of the minority are protected. This is the basis of the democratic principles of the American system. In the system proposed by the AKP and the MHP, the parliamentary and presidential elections are held at the same time and the terms of office are the same [13, 77].

One of the factors that led to the president's influence on the parliament in this type of government is related to the political party structure. Being undisciplined of the US political party system, lack of tough organization is one of the reasons for parliament's independence. There was a tough ideological contradiction and polarization among political parties in Turkey while parliamentary system was aplied. Therefore, it was difficult for parties in parliament to accept each other's proposals and delay their legislative activities. But with new government system will change structure of parties and make it similar with US one. President`s affiliation to his party is critisized that it can also leads diciplined party system, while in the United States the president can not be a party leader. But it is not relevant to reality. Because, one who electing as president may not cut relations with party regardless the rule of officially disconnecting with party [7, 69]. The Parliamentary Electoral Code also adopted a rule that contributed to the leadership of party leaders. Thus, election regions with up to 18 MPs are perceived as one constituency, from 19 to 35 - two, 36 and more MPs are divided into three constituencies. So, the party chairpersons who make up the list decide who will be elected, and the elected MPs put their ideas out and fall under the influence of the leader. As a result, Robert Michel's system of "iron law of oligarchy" emerges. On the other hand, the reason for the establishment of a diciplined structured party in Turkey was parliamentary government and proportional type of voting system. The use of the presidential administration and the majoritarian election system can have a positive effect on Turkey's party structure. Because the consistency of the list determined by the leader of the party in the parliamentary elections based on the previous election system was important, and as a result party members were dependant of the chairman [11]. In the new electoral system, the possibility of voting for the personal reputations of party members may increase as the voter identifies this list.

In addition, in US list of candidates for parliament are determined with close and open elections at the first stage. At the close election candidates are determined by party

members, at the open elections candidates are elected by voters regardless its party affiliation. This pre-election stage relieves Congress members of the party's influence. As a result, candidates are elected for their personal reputation, not their party affiliation [1, 33]. Therefore, the party chairman and candidates do not know which candidate will be elected in the constituency. The reason for the existence of undiciplined party system in America is that. Candidates for MPs in Turkey are not determined within pre-election stage as in the United States.

Another aspect that differentiates presidential government of Turkey from the US model is having authority of president and parliament to send each-other to election. The reason for this innovation is the prevention of a government crisis that may arise when the president and the majority in the parliament belong to a different party and in other cases [3, 280]. Even in the United States, which is an ideal example of this governance, where consensus culture is formed, party democracy exists, the diverse political position of the president and the parliament can lead to double legitimacy, mutual claims between the government and parliament, and power struggles. In 1995 Bill Clinton from Democratic Party and Republican-controlled Congress did not even agree on the budget project [3]. President Donald Trump, who was fighting a Congress controlled by the Democrats for funding the construction of a US-Mexico border wall, all executive departments and federal agencies were shut for 21 days and it has broken Clinton's record with 26 day-period [15].

The other difference is that the parliament in the US consists of two chambers, while Turkish legislative is unicameral. Being bicameral of Congress leads reflecting the interests of the majority in the legislative process. Another reason for this is the representation of all states at the federal level in parliament. As a result, This system represents pluralism not majoritarism [1, 53]. But unitary structure of Turkey doesn`t make this factor important. The presence of decentralization in the United States also makes a difference in the scope of parliaments' powers. Thus the powers of the US Congress are lower than the parliaments of unitary states such as Turkey, as Congress distributed its legislative powers with the legislatures of the states.

In the new system offered by the AKP, the president's own powers without need of parliament confirmation are carried out, but in the United States with the consent of the Congress. International obligations in the form of US contracts, appointment of ministers, appointing senior officials in the state apparatus are in the form of "Senate's advice and consent". When ratifying international treaties, there is a need for consent of 2/3 of the members of the Senate [12]. The Senate examines those who will be appointed, interviews with them, and gives apportunity to the most worthy ones. In Turkey, these powers are directly executed by the president. Although the president and members of the Supreme Court in the US are appointed by the president, the Senate's approval is important [12]. Turkish president appoint 6 members of "Board of Judges and Prosecutors", members of Constitution Court. There is a difference in the appointment of the vice-president. In America, the vice president is appointed through elections and becomes the head of the Senate [12]. In Turkey, the Vice President is appointed directly by the President and dismissed from office, if deems.

US president can affect to legislative power through veto. Two chambers can overcome veto with 2/3 majority of members [12]. In Turkey, to overcome a presidential veto, the Parliament needs to adopt the same bill with an absolute majority [2017, md.77] In the United States, all federal officials, including the president, may be dis-

missed by impeachment as a result of crimes such as betrayal, bribery, abuse of power. In Turkey, impeachment can only be applied to the president. [12]

One of the main differences in the new system of Turkey is that it gives the president the power to make a decree. Article 23 states that the President may issue decrees with the force of law on issues related to his executive powers. Before the amendment, such decrees were issued only in emergency circumstances. But now the president can make a decree on any matter except for fundamental rights and freedoms, nationality, political rights and on topics that are clearly regulated by legislation [13, 104]. In the United States, an executive order is only accepted on issues related to foreign policy and in emergency case. The Senate may approve or change it by law [12]. Political conditions and processes make it important to Turkish president fast decision making and that`s why this change will cope the problems occured in the past in terms of limits about adopting orders by the head of country.

Professor Burhan Kuzu, a member of the Constitutional Council who made the project, acknowledged that the changes were made to prevent the problems emerged in US system. Burhan Kuzu calls this system applied in Turkey as "Turkish type presidential government" and admittes that this model is closer to some the systems used in Latin American countries. Kuzu said that they don`t accept the federal system in the United States and they apply a model that strengthens local governance based on a unitary system in Turkey [9, 126]. According to him, not having authority of the US president to issue executive order causes government crises and this situation will be prevented in Turkey.

Conclusion

The processes that took place in Turkey's political history over the past 50 years: the successive coalition governments, government crises, terrorism, military coups and separatism have created a need for strong presidential government in Turkey. Transition to new system was inavitable particularly after 2007 referendum which brought change about electing president by people and removed parliamentary system. The main discussing issue about new presidential government proposed by Justice and Development Party is about differences with US system. Having made successful steps in the political, economic, and regional politics of the country, Recep Tayyib Erdogan has tried to establish a democratic system and to ensure the integrity of Turkey through transformation to strong presidential government. Having the right working mechanism of checks and balances system due to historical conditions of the country, party system, presence of pressure groups, political culture away from ideological and ethnic polarization is the success reason of not only presidential government, but also federal system and local government in US. The coexistence of these factors is not observed in all countries. Thus, while saying “presidential” government, first of all US comes to mind. In Turkey, the new presidential system will eliminate all this problems and will lead to undisciplined-democratic party system, improved political culture, democratic election system and will give opportunities to the president of Turkey to cope with regional and global problems that this country faces recent years. Through this way the AKP tries to create a political concept to push Turkey to the path of democracy, with abolishing existing shortcomings, plus the right of president to issue decree with force of law, holding of the presidential and parliamentary elections at the same time, and the right of Assembly and the head of state to send each other to elections will avoid

Turkey from problems that negatively affect US system. With one word, if these steps will be implemented properly, the transition to presidential government would be a turning point in Turkey's political history and make it one of the most democratic states over the world.

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Date of receipt of the article in the Editorial Office
(07.01.2019)

Kaysin Khubiyev, Amil Maharramov, Hadjiaga Rustambayov, Emin Garibli **Issues of Modernization of National Economic Models in the Context of Globalization. International Law and Integration Problems, 2019, №1 (56), pp.56-64**

ISSUES OF MODERNIZATION OF NATIONAL ECONOMIC MODELS IN THE CONTEXT OF GLOBALIZATION

Kaysin Khubiyev,
(*khubiev48@mail.ru*)
Doctor of Economic Sciences
(Moscow State University)

Amil Magerramov,
(amagerramov@gmail.com)
Doctor of Economic Sciences
(Baku State University)

Hadjiagha Rustambayov,
(*haji_@mail.ru*)
Doctor of Economic Sciences
(Baku State University)

Emin Garibli
(*egaribli@hotmail.com*)
Ph.D in economics
(Azerbaijan University of Economy)

Abstract

This article focuses on the modernization of national economic models in the context of globalization. In this article, the tendencies of the world economy development are considered, including the struggle for a new trade and economic division of the world, the countercyclical and debt nature of the world economy movement. In fact, the political economic approach presupposes the interrelation of economic development with national interests. This is very important for achieving the optimal balance between national and supranational mechanisms of progress in the economic and social fields.

The article substantiates the need to use a nationally oriented approach in the political economy, which is a national economic system of market relations in unison with the national factors characteristic of the country. Each national economy can be defined as an institutional model, open to external relations in various degrees, but adhering to evolutionary claims that have evolved over the centuries under the influence of economic, political and cultural factors. In addition, the article shows that progress in the global economic space will reflect a fuller manifestation of interests in those countries where national economic interests are fully integrated into the network of economic processes of a sovereign country that has an institutional system for ensuring national security and citizens' rights, as well as a more complete manifestation these interests. In the context of these trends, the article discusses the impact of global economic trends on the national economy.

Keywords: *economic model, competitiveness, institutions, national interests, national model of economy, economic integration*.

Humanity entered the 21st century with the hope that it will leave in the past and get rid of everything that is destructive, unfair, alarming, and dangerous to the outlook

and fates of people and individuals. Hopes have not come true. With the collapse of the USSR the world became unipolar and the total responsibility for the global development passed over to the side of developed capitalism. The so-called "evil empire" was destroyed and it seemed, no one was impediment in creating "the empire of good". However, a quarter of a century is an enough historical period to have shown the world the results of good deeds. The world observed the following "good" things: destruction of impunity of the whole countries, including by military means; turning them into a testing ground for the implementation of the technology of internal strife; deployment of a new wave of economic wars, etc. Attempts to spread "liberal values" of the capitalist social order throughout the world did not make the world safer and fairer. Capitalism has not only failed to overcome the accumulated problems of the global economic development, but also saddled them with new ones: ethnic and religious conflicts, terrorism, and mass migration of the population. However, the old problems of poverty and increased differentiation, worsening of environmental problems have been preserved acquiring a global scale. Awareness of these facts receives becomes fairly widespread, at the same time doubts are intensified about the prospects of the dominance of the unipolar world values. The need to change the foundations of the social order is placed even in international forums organized by the elite of the capitalist countries, in particular, the Davos Forum.

In the economic field, new types of crises are raging: financial, debt, mortgage; the volatility of stock markets increased, the influence of world energy prices sharply increased, which significantly affects the "well-being" of the world economy. The question of the need to change the foundations of the social order is posed even at world forums organized by the elite of the capitalist countries [8].

According to Klaus Schwab, the founder and president of the World Economic Forum in Geneva, if in the 1990s the total capitalization of the three largest companies of Detroit was $ 36 billion with revenues of 250 billion and the number of employees to 1.2 million. And in 2014, the aggregate market capitalization of the three largest companies in the Silicon Valley was more than $ 1 trillion, with a profit of $ 247 billion, but the number of employees is almost ten times less. This fact testifies to the intensive growth of technological unemployment in national economies [9].

Economic science is far behind the theoretical analysis of the current world economic trends, which is closely linked to the national economies of sovereign states in the context of globalization. And, though the world economy for today has grown according to the rules of the market globalization, it is more and more clearly seen as the compositional system, which main parts are the national economies. They differ today – not by the formation-typical characteristics but more obviously seen in the most different forms of institutional-model specification. From this point of view, it can hardly be reconciled with the idea that "in our days the boundaries of the national economy are being eroded" [1].

Political economy approach supposes the correlation of the economic development's global determinants with the national interests, obtaining the optimal balance between national and supranational mechanisms of progress in economic and social fields. That's why in this article the analysis of the objective processes in the world economy is accompanied by the determining the factors and institutes that influence the formation of the national economy's advantages.

In the politico-economic aspect of the research the world economic processes are closely correlated with motivation in integration of countries - subjects of the world economy, and their national economic interests. The concentration of attempts on the primacy of the national economic interests forms the context approach to the processes of globalization for each national economy. In particular, the national context of globalization problems leads to putting forward the aims and tasks, realization of what implements in the vector of multiple methods such as political, diplomatic and self-affirmative in the modern world.

Based on the need to use a nationally oriented approach in the political economy, one can say that the representation of a national economic system as a system of market relations in unison with the national factors characteristic of the country. Taking this into consideration the following point of view is drawn – there is an existence of a very important "dimension" of economic globalization, which has two circles of problems. First of them is the set of parameters, using what it is possible to predetermine the lead tendencies of globalization in the world economy; and, the second one is related to figuring out the degree of realization the national economic interests in the process of globalization. National economic interests represent the economy of a certain country as an economy of a subject of the world economy; and the degree of their realization determines the efficacy of the external economic relations. In particular, in this context the questions on providing a rational integration of Azerbaijan into the world economy are also interesting. To get this result it is needed to clearly understand the tendencies of development of the world economy in the contemporary conditions and in perspective.

Although there is a certain similarity – in general frames – of the market typology among the existing economies of the countries, each national economy is the unique organism. They have their own, different evolutional paradigm, because the resource potential, production factors structure and the forms of the economic organization are different to various extents. The differences in the main productive power – in a human, his way of thinking and behavior, traditions and manners, preferences and values, the choice of the goals and methods of their achievement act as a fundamental principle of such a variety. All this directly impacts the quality and ethics of the production relations, modifying the economy in the national forms.

Friedrich List in the beginning of the XIX century wrote that "as it is acknowledged the existence of nations with their living conditions and interests, it is important to assume the corresponding change in the economy of the human society according them" [11].

In this case we are referring to the forms that add specifics to the economic system, but do not limit its integrity. Therefore, due to the objective laws interest in global communications for all the subjects of the world economy, and also research on the appropriate directions and methods of the foreign economic relations organization more and more increases.

Only the national economy representing an integral organism is capable to express and protect its interests in a concentrated way, and also to effectively realize the purposes of economic residents.

Obviously, the last ones act as market entities in such a perspective, but, first of all, as the domestic market entities, which have their own characteristics of macroeconomic

balance on a national scale and functional purposes. Thus, world economy acts as a sphere of contradictory interaction of certain countries national economic models. The global economic interests are formed in this dialectical interaction (ecological, food, energetic and so on), but they are secondary in relation to the national interests. It is connected with the fact that in the sphere of global economy national economic interests face the strongest competition which in a most accurate way reveals the strong and weak points of national economies and, at the same time, differentiates them on macro-economic parameters of development. The advantage in such a competitive environment is associated with what quantity of world GDP shares each country appropriates during global interactions. From this point of view we can talk about donor countries and recipient countries in the world economy. But despite of it, the process of globalization naturally promotes economic development of all countries.

It results from the fact that in a globalization algorithm micro-subjects of national economies (entrepreneurs, firms, corporations), joining the world economic process, reach the success that depends on the macro-subject development level, which is open in the appropriate ways for the global connections of their residential allocations. In these conditions it is very important not just to state, but to provide the real mechanism of factors interaction:

a) Integral, but not fragmentary development of economy;

b) Optimum, but not absolute or chaotic exposure in foreign economic relations;

c) Competitive, but not conjectural benefits in the world markets.

In total, they substantially increase realization opportunities of national economic interests by means of foreign economic relations, building-up of efforts in order to increase the international competitiveness of the country and, therefore, to ensure the national security. A lot of things here depend on the state economic development strategy by taking into account the fact that in the global economy the great number of other reproduction factors interacts, rather than in micro or macro economy.

For example, it is necessary to interact with such subjects of the world economy as the international economic organizations, the transnational capitals, regional integration associations. They also have their own straightforward market or engaged interests. The answer to a question in what degree these interests match with the national economic interests of the certain countries as well with global ones is far from clear. It is one of the reasons of an aggravation of the uneven economic development tendency between countries and regions and, therefore, intensification of contradictions in the process of globalization. How to resolve this contradiction in the world and for each country in order to make inevitability of inclusion in the global economic communications have a positive effect by increasing the degree of national economic interest's implementation causes discussions. In most cases, the solution of this problem is shifted on the global institutes; the inconsistency of activities consists of insufficient assessment made by them of national (informal) economic development factors in certain countries and regions of the world. This, in its turn, promotes strengthening of the transnational corporations' position in the world economy, indifferent to national interests. Such a model of the global relations revives the ghosts of the past. But if in the last centuries it was followed by colonial conquests and political subordination of resources of other national space, then in modern conditions these objectives are achieved by implementtation in one or another resource environment with the help of economic methods.

Therefore, there is a need "to watch closely a contour of the global interests." **[10]** With the purpose of the country's external economic interests optimization. Id est., we can speak about the presence of own global interests in each country integrated with national economic interests. In this case the mechanisms of implementation of these interests shall be determined. Generally, this mechanism suggests the strategy of the economic model development of the country as the adapted environment of activities in which each subject joins prerequisites and results of implementation of own interests as the integral parts of the national ones.

The promotion in the world economic space will reflect more complete manifestation of the interests in those countries where the national economic interests are integrally plait into the web of sovereign country's economic processes possessing institutional system of ensuring national security and the rights of citizens, also more complete manifestation of these interests.

The implementation of individual interests is in a causal relation and dependence with functional wellbeing of microeconomic structures of a higher level (partnerships, corporations). The implementation of the integrated interests of the companies and their effective functioning, in its turn, depends on the macroeconomic environment and economic policy (inflation rate, currency rate, interest rate, taxation and customs policy). The implementation of non-corporate entrepreneurs' and households' individual interests also depends on the macroeconomic level. In the harmonization of the emphasized three-level areas of interest matures the national economic interest. The same interest, already conceptualized on a macroeconomic level, enters the global economic sphere and due to it obtaining an opportunity to pursue interests of all subjects of national economy. And in this space the potential of economic opportunities, thanks to which the access to mechanisms of a world product assignment is provided, starts to show itself. First of all, it is the mechanism of the international economic competition. Its action is many-sided, not always visible, can be disguised as political or ideological slogans. But the fact that there are serious distinctions in spatial and high-quality economic parameters which look contrast in the modern world is still immutable.

It is important to note the reverse-connected chain of developments. The economic cataclysms of the world scale: the world financial crises, volatility of financial markets, fluctuation of exchange rates of the reserve currency, economically important political happenings influence directly on the macroeconomic climate within the national economies, and, as it was mentioned above, on the prosperity of the individuals. Leading countries of the world economy in their economic policy should also distinguish the interests of others, less developed. Something can be beneficial to one, but not to everyone. For example, the devaluation of the US dollar by 1% reduces China's foreign exchange reserves by 10 billion dollars, Japan by 7 billion dollars, Russia by 3 billion dollars [4]**.**

The main contradiction of the global economic system, or to be exact, a contradiction between interests of different levels is reflected in it. Coordination of these interests is difficult, but opportunities for this purpose exist, and they are connected not only with universal approval of the formal and market principles of economic development, but also with their model modification, taking place under the influence of informal (sociocultural) institutes. From this point of view, each national economy can be deter-

mined as an institutional model, open for external relations to various extents, but adhering to the statements of evolution which developed for centuries under the influence of economic, political and cultural factors. One of the most famous modern economists Hernando De Soto notes that the key factor of a progress is the recognition of countries' specifics, but not a transfer of the clichés that were previously used by others. In his opinion, it is necessary "to learn to absorb that knowledge and those practices that exist in other countries and to use both them and modern technologies, for the benefit of their nations" [3]**.** The same thing must be taken into consideration by all the global actors, the centers of industrial technology development, the international economic organizations. Eventually, more equal development of the countries and the world regions is in a range of their long-term interests. But there are no sufficient prerequisites for institutional and organized resolution of conflicts between the global and national economic interests yet; the independent efforts of the states on ensuring quick and successful economic development shall be more and more active. There are examples of alternative approaches to the selection of the development models providing the achievement of competitive positions in the world economy. We must understand that the national state remains the most important force in shaping the world economy [6]**.**

Globalization, according to Mrs. M. Thatcher, "opened national economic systems for the international competition" [12]. But this competition, even in case of an assumption of the economic relations equivalence, won't be mutually beneficial as the interacting national economies aren't equivalent.

Economies of many countries of the world aren't ready for the free competition on a considerable circle of the produced products and need therefore, protectionist measures for identification and creation their own benefits in the foreign trade. It is interesting that particularly protectionist countries have been increasing most quickly not a share of the GDP commodity exports, but the countries practicing the free trade which isn't able to reach the increase in export and high growth rates. The new industrial countries (NIC) taking considerable positions in the world economy today can be taken as an example.

Basically, NIC demonstrate groundbreaking exit from discrepancy of the world economic environment, which looked like a complicated one for many countries. National modification of economy with simultaneous introduction of innovations from the outside and protectionist measures provided the high level of the production development.

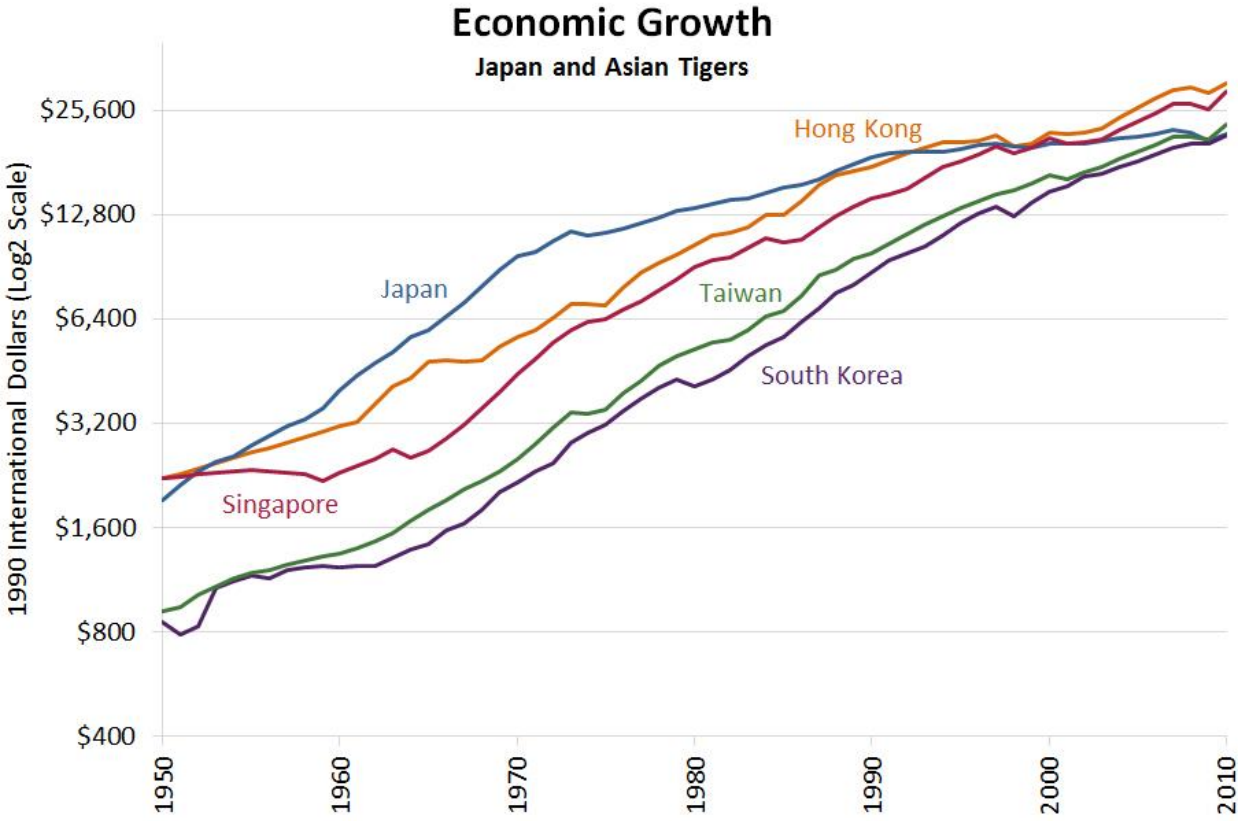
Additionally, all the newly industrialized countries have determined some characteristic features in their development, particularly, the following ones. They show the highest tempo of economic growth (8% a year at 1st wave NIC), and at the period of a global crisis most of them didn't suffer deep recession, just a declining in a growth rate has been observed. At the same time, with the assistance of state, the national capital of these countries grew quickly and began to master the world markets. In these countries the closest involvement into the global system of interdependence was followed by preserving and enhancement of variety potential in the organization of economic life, available only under the conditions of national economy. We can also note a practice of economic development in Azerbaijan possessing considerable resources in the form of the rich natural reserves, the developing industrial base and a skilled labor force. At the

present stage there is an intensive concentration of these factors in the direction of diversification of the external economic capacity of the country. Close attention is paid to the positions strengthening concerning a number of the traditional directions of industrial specialization. For example, before the collapse of the USSR the oil mechanical engineering in Azerbaijan provided with the machinery and equipment satisfying up to 70% of fuel and energy complex requirements of the common state. **[5]** Today the country can become a large exporter of these products on the world markets. In this plan creation of the cluster which is pulling together mining, metallurgic, metalworking and machine-building spheres of economy of Azerbaijan with target financing of its scientific base, infrastructure, project service, insurance service by establishing the state preferences according to the government program acts as priority one. A correlation of a triad "science-innovation-industry" in this regard becomes more and more urgent. We must not forget that today Azerbaijan remains one of the important players on the global energy market. Since more than 200 promising structures, in total, in the Azerbaijani sector of the Caspian, 145 promising structures have been identified, including 40 structures at a sea depth of 60 m, 33 structures - at a depth of sea of 60-200 m, 72 structures - at the depth of the sea more than 200 m. [2]**.**

State patronage over strategically important spheres of economy and bringing them to a competitive export condition shall be followed by methods of selective protectionist restriction on the delivery of identical products from abroad. The world practice confirms that some of the production or technological innovations can be introduced in the economy from the outside, but in applied value not the parameters of their "progressiveness" will play a role in general plan released from specific conditions, but from the point of view of perception at one or another national economic environment. Such an environment as it has already been noted is specific, first of all, institutionally, and, therefore, the economic activity is performed on the basis of those adapted regulations and rules which are specific for each described country. The competition of national economy models in which informal institutes will play the increasing role for the approval of world economic system positions of each country's system.

Institutions of a mega – trend plan exists that have the general destination for all the human civilization. For example, the financial institutions, such as money turnover or the banking functions, occur everywhere in different forms. The same could be attributed to the relations in the field of formation the fundamental demands, the reproduction processes, the property relations, goods exchange etc. All they could be attributed to display the world "mainstream" – the main direction of the development of a human civilization, including also its economic evolution. With that, doubtless, it is needed to emphasize the "nation-streams", that choose the ways of adaptation of a man and humanity to the concrete spatial environment and obtaining a special forms in the process of economic development of the separate societies.

Tab 1. **[7]**



In the frames of a national institutional system factors of "mainstream" and "nation-stream" are performing in the dialectic unity. This leads to the modification of the production relations and, finally, to the model changes in economies of different countries. The model here plays the role of a protective shield for the national global interests. In this aspect it is very important the formation of a point of view on the world economy from "the window of native home"; the priorities and perspectives of development in global, but contradictory world in the prism of interests. In turn, this supposes the objective estimation of possibilities and the elaboration of methods of the most profitable usage of competitive advantages on the international arena connected with the technological achievements generated in the country and acquiring from abroad that play as the production base for the modernization of a national economic model.

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Date of receipt of the article in the Editorial Office
(18.01.2019)

Ramin Aliyev. **Freedom of Religion and Belief (forb) in Azerbaijan: Current Legal Rgime, Contemporary Challenges and Safeguards. International Law and Integration Problems, 2019, №1 (56), pp.65-72**

FREEDOM OF RELIGION AND BELIEF (FoRB) IN AZERBAIJAN: CURRENT LEGAL REGIME, CONTEMPORARY CHALLENGES AND SAFEGUARDS

Ramin Aliyev
(*raminlev@gmail.com*)
Ganja State University

Abstract

This article has been dedicated to one of the significant problems of our times. It discusses several aspects of the FoRB regime in Azerbaijan Republic. First of all, the author takes a look at the historical roots of FoRB very briefly. Then, he provides analysis of the four pillars of the Azerbaijani legal FoRB regime and discusses the appropriate legal principles. Furthermore, he compiles a list of challenges for FoRB in Azerbaijan. He also reviews factors mitigating and or aggravating those challenges

Keywords: *freedom of religion and belief, pillars of the Azerbaijani FoRB regime, principles of the Azerbaijani FoRB regime, challenges for the Azerbaijani FoRB regime, factors mitigating of aggravating challenges for the Azerbaijani FoRB.*

Introduction

It is worth noting that this article does not pretend to be an exhaustive treatment of all FoRB-related issues in Azerbaijan. It merely intends to provide a brief overview of the legal FoRB regime in Azerbaijan Republic. However, it seems fit-for-purpose to start with a very short passage on the roots of the FoRB phenomenon.

FoRB is a relatively new legal concept, which is designed to embrace a wide range of complex and challenging realities in the religious domain in the current turbulent environments. Obviously, it has numerous ancestors each of which met the requirements of its time. For example, we may refer to Syncretism [1, 1-25] as a dominant ideology within the community of traders or the Muslim tradition of dhimmis [2, 50, § 2]. Appropriate provisions of numerous legal instruments including but not limited to the Cyrus Cylinder, the Edicts of Ashoka, the Edict of Torda, Virginia Statute for Religious Freedom etc. did also provide a certain level of legal protection for the religious freedom.

In modern ages, the constitutions and other legislative acts of almost all countries contain appropriate provisions regarding the equivalent protection of the freedom of religion [3, 191-559]. What about international law, one of the first and most significant legal instruments with global effect was the 1948 Universal Declaration of Human Rights, which recognised "*everyone's right to freedom of thought, conscience and religion*" in its Article 18. The 1981 Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief is another international legal document with its three potentially far-reaching non-discrimination provisions [4, 42-43].

The legal FoRB regime in Azerbaijan Republic

Getting back on FoRB in Azerbaijan, I find it appropriate to underline two important issues. *First of all*, despite the fact that Azerbaijan stands today shoulder

to shoulder with the civil law countries and its legal system is based on civil law, in my humble opinion, this country can be considered as a part of a unique legal geography where material sources of law usually prevailed formal sources throughout the centuries until the XX century. In particular, material legal sources, which emerged thanks to the influential and widely respected representatives of various religions, including Zoroastrianism, Tengrism, Judaism, Christianity and Islam played an exclusive role in decision-making and socio-political life of the country in general [5, 60].

As history witnesses, this approach to law, society and state proved to be highly effective in Azerbaijan, thus contributing to the evolution of reliable governing practices and multicultural environments. Otherwise, it would be extremely difficult and almost impossible to cope with the challenges and threats of our times. Because there are a number of factors continuously affecting FORB environments in Azerbaijan. They will be discussed in the last two sections of this article.

Thanks to effective governing practices, contemporary Azerbaijani society is highly tolerant and friendly towards the representatives of all other cultures, despite the country's extremely sensitive geographical location, which makes Azerbaijan to face with a wide range of trans-border challenges, such as separatism, terrorism, regional conflicts etc. [6, 5, Articles 3.2 to 3-11], including attempts against the independence, sovereignty, territorial integrity, and constitutional order of the Republic of Azerbaijan [7, 5, Article 3.1].

Undoubtedly, it would be extremely difficult to manage those challenges without appropriate legal tools. The country possesses a valid and effective legal regime, which helps it in dealing with them. The national legal FoRB regime in Azerbaijan is constructed on the following four separate pillars.

Constitutional pillar. This pillar is the foundation of the legal hierarchy and pyramid, which sets forth the fundamental legal norms and principles related to the freedom of religion and belief in the most important legal instrument of the country. It is based upon the appropriate constitutional provisions [8, the last item in the Preamble and the provisions in the Article 18 of the Constitution] and can be divided into two sub-categories. The first sub-category consists of several principles. I would prefer to start the discussion of the constitutional pillar with a declarative statement in the Preamble of the Constitution. It includes in the list of the constitutionally declared aims of the Azerbaijani people: "to remain faithful to universal values, to live in friendship, peace and security with all the nations of the world, and to cooperate with them for this purpose".

I may humbly admit that humanism is the very first fundamental principle of the constitutional pillar. Furthermore, the Constitution of Azerbaijan Republic separates religion from the state while making all religions equal before the law. Thus, we may conclude that secularism constitutes the second principle of the constitutional pillar of the Azerbaijani FoRB. As it becomes obvious from the above postulate, secularism is followed by the principle of inter-religious equality. The next principle is 'tolerated' (or 'required') restriction, which allows the state authorities to prevent the dissemination of the inhuman and degrading religious

ideologies. This principle does also require that the education system must be based upon the principle of secularism, which makes Azerbaijan one of few among the members of the Council of Europe that has a direct legal constitutional reference to the secularity of public education [8, 42].

If the first subcategory of the constitutional pillar concentrates on the regulation of state-religion relationships in general, then its second subcategory aims at dealing with the human-religion-state triangle [7, Article 48 of the Constitution]. Therefore, the very first principle under the second subcategory is the principle of human freedom in determining his approach to religion. This kind of freedom encompasses the right to be free from being forced to get involved, by words or by deeds, a part of any religion.

However, here again, the state enjoys a set of exclusive legal opportunities designed to protect three fundamental values: a) public interests; b) morality; c) and the law. The realisation of any religious right that disturbs public order, is contrary to public morals, or violates the law will not be constitutionally tolerated on the territories of Azerbaijan Republic. Thus, we may just discover the second principle of the second subcategory of the constitutional pillar, which is the principle of protection.

Finally, the third principle under the second subcategory is privacy stipulating that it can never be allowed to force someone to proclaim his religion, thoughts and belief [7, Article 71].

Legislative pillar. Obviously, legislation is a continuous process and it is therefore a little bit more effective and flexible pillar of FoRB in any country. The reason is that the contemporary FoRB-related issues are highly dynamic and changing phenomena, which requires instant and case-by-case reaction in order to deal with its challenges properly. From this perspective, the legislative pillar creates a more practical legal regime capable of coping with a wide range of FoRB-related problems.

The importance of the legislation is also in the fact that its separate instruments (in particular, laws) contain numerous legal provisions detailing the constitutional principles on FoRB, identifying the scope and limits of their application, eliminating the gaps, and dealing with a number of other issues of practical-legal importance.

The legislative pillar of the legal Azerbaijani FoRB regime is based upon several laws and other legislative acts, the most important of which is 'the Freedom of Religious Belief' Act [9]. On the basis of Article 1 of the mentioned Law, we may take into consideration the following legislative standards applied within the FoRB regime in Azerbaijan:

- The constitutional religious freedom can be realised individually or collectively;
- Forcible propaganda of religion is prohibited;
- Dissemination of religious ideas is strictly linked to the 'nationality' principle;
- The law recognises the right of parents to educate their children in accordance with their religious belief.

Restorative pillar. This pillar consists of appropriate legal norms and standards too. However, this pillar is organised of 'post factum' norms and rules. They start operating from the moment of violation of the principles and norms, which form the previous two (constitutional or legislative) pillars. Their major task is to restore the pre-violation status quo to the maximum extent possible or recover damages and sufferings. Consequently, restorative norms possess a different structure than the norms forming previous pillars. As a rule, it is quite possible to locate not only hypothesis and disposition, but also a sanction – coercive element [10, 50-51] in the structure of the restorative norms. The sanction part of the norm does also define all possible variants of necessary legal action to be taken by the proper governmental authority. In my humble opinion, we may consider the following subcategories of the restorative pillar:

a) Administrative legal pillar. Administrative norms and standards are rules of general applicability, which both facilitate or constrain the realisation of administrative policy objectives of the government [11, 49]. In principal, those norms and standards can be found in a huge single legal instrument, usually called a code [12]. The Azerbaijani administrative legal pillar declares unlawful the following actions:

- violation of order of establishment and activity of religious structures may lead to the imposition of penalty in amount of 10-15 manats (on natural persons) and of 40-70 manats (on official persons) [12, Article 299];
- spreading the religious ideologies in violation of the 'nationality' principle (may lead to the deportation or imposition of money penalty in amount of 20-25 manats) etc [12, Article 300].

b) Criminal legal pillar. Apparently, this sub-pillar is not less important than the administrative legal pillar. It also consists of a set of solid legal norms and standards, which start operating as soon as the FoRB regime, established by the first (foundation pillar) and second (medium pillar) pillars, fail to operate properly. Thus, criminal legal pillar may be described as the top of the legal hierarchy and pyramid designed to protect the legal FoRB regime in Azerbaijan Republic.

Of course, there is an essential difference between the two sub-pillars of the restorative pillar. The mentioned difference is very closely linked with the differences between 'administrative violations' and 'crimes'. Obviously, all offences are socially dangerous, illegal, guilty and punishable. However, the signs like object, nature and degree of social danger, nature of illegality, and nature of results allow to differ the crime from other offences [13, 44-45].

The major legal instrument forming the criminal legal pillar in Azerbaijan is Criminal Code of Azerbaijan Republic. According to its provisions, the perpetration of any crime on the grounds of national, racial or religious hatred is one of the circumstances aggravating punishment [14, Article 61.1.6]. Furthermore, the Code criminalises the act of genocide [14, Article 103], discrimination [14, Article 109], violation of laws and customs of war [14, Article 115], deliberate murder on motives of national, racial, religious hatred or enmity [14, Article 120.2.12], impending implementation of religious activities [14, Article 167], forcing others to

embrace any religion [14, Article 167-1], producing or publishing, importing, selling or distributing religious literature, things or other informative materials illegally [14, Article 167-2], encroaching on the rights of others under the pretext of implementation of religious rituals [14, Article 168], and causing hatred and enmity on national, racial, social or religious grounds [14, Article 283].

Institutional safeguards for FoRB in Azerbaijan

I did not cover the fourth pillar of the Azerbaijani legal FoRB regime in the previous section, as it possesses several distinctive features. First of all, the elements constituting the fourth pillar may be considered as the material sources of law, as they hold enormous practical opportunities to give birth, directly or indirectly, to new legal standards and rules. Secondly, they are 'alive' organisms acting on behalf of the state. Thirdly, the mentioned elements must always act in accordance with the requirements of the first, second and third pillars. They have no autonomy to violate already existing norms of law.

Briefly speaking, the fourth pillar encompasses appropriate public and private agencies operating to ensure the well-being of the national FoRB regime in Azerbaijan. We may put those institutions into appropriate categories, including public and private agencies, executive, legislative and judicial agencies, secular and religious institutions, governmental and non-governmental institutions etc. However, I would like to focus on the following institutional safeguards for the purposes of this article.

The Milli Majlis of Azerbaijan Republic is a key legislative body, which takes an active part in the creation and improvement of the first, second and third pillars. The Milli Majlis adopts constitutional laws, laws and resolutions concerning issues falling under its competence [7, Article 93.1]. The Milli Majlis has updated the Azerbaijani Law on the Freedom of Religious Belief 76 times [9] since its adoption in 1992.

The President of Azerbaijan Republic is the central figure not only for the improvement of the first, second and third pillars, but also for the operation of the many state agencies included in the fourth pillar. The President signs laws, constitutional laws [7, Article 110], issues decrees and orders [7, Article 113]. Besides that, Article 96 of the Constitution enables the President of Azerbaijan Republic to submit draft laws and other questions for the consideration of the Milli Majlis (the right to legislative initiative). Assistant to the President of Azerbaijan Republic for Multinational Relations, Multiculturalism, and Religious Issues fulfils important tasks by preparing appropriate reports, providing expertise, holding meetings etc.

The State Committee for Work with Religious Organizations is in charge of regulation of activities of religious organizations and ensuring freedom of religion in Azerbaijan. The Committee is a kind of bridge between the secular state system and religious communities in the country. Thus, one should not underestimate the Committee's role, as it is a central executive body responsible for the formation of the governmental policies in the given domain [15]. The Committee works in close cooperation with a number of religious organizations, which represent their

subsequent religions, including the Spiritual Board of Caucasian Muslims, the Russian Orthodox Church, the Jewish Community, the Catholic Church and many others.

Finally, it is necessary to mention the Azerbaijani law enforcement agencies successfully operating in the sphere of combatting religious extremism and radical religious ideologies. Different ministries, committees and services (Ministry of Internal Affairs, Ministry of Justice etc.) of Azerbaijan Republic join together to reveal and prevent religiously motivated acts of violation in a timely manner. Azerbaijani courts are also active guards of the third – restorative pillar widely discussed in the previous section.

Thus, the number 4 is a central, crucial and operative pillar in dealing with numerous challenges directed against the FoRB regime in Azerbaijan.

Challenges for FoRB

The vast majority of those challenges are of the political, military, even geopolitical etc. character. Therefore, a detailed discussion of such elements in an article dedicated to the legal aspects of the freedom of religion does not seem fit-for-purpose. In this section, I find it appropriate to provide a short list of challenges threatening the national legal FoRB regime in Azerbaijan Republic, which includes but is not limited to the following:

- Unresolved/frozen Conflicts;
- Politically motivated radical separatism;
- Religiously motivated radical ideologies;
- Religious Extremism;
- Terrorism;
- Transnational Organized Crime.

Furthermore, I would like to draw a line between the positive and negative factors mitigating or aggravating the above challenges. So, the long history of multiculturalism (factor 1), well-established state practices of respecting multiculturalism (factor 2), and high levels of interreligious/interethnic tolerance within the civil society (factor 3) can be considered as the positive factors, whereas the last two interconnected and interrelated factors Nos. 4 and 5 - balancing national security interests of the state and surviving 'geopolitical waves' are factors which may have negative impacts on the legal FoRB regime in Azerbaijan Republic.

Conclusions

In the current section, the previously enumerated 'mitigating' or 'aggravating' factors are to be detailed in the light of the previous section on challenges. First of all, the history of the progress of the Azerbaijani religious economy needs to be taken into account. This country has been a land of clashes and dialogues between/among several religions, particularly, various practices of heathenism (animism, shamanism etc.) and Zoroastrianism, Judaism, Christianity, Islam, 'Imposed Atheism' and finally Secularism throughout centuries until recently [16] [17]. In my humble opinion, this centuries-old and persistent, even though

sometimes involuntary, example of multi-religious (and multi-ethnic) co-existence has always been the major reason behind the remarkable level of multiculturalism and tolerance existing in Azerbaijan. The history of Caucasus Albania is an important proof of the hard and non-stable religious practices in the nowadays territories of the Republic of Azerbaijan due to its geographical location [18, 147-149].

Secondly, all state formations and political, religious and legal systems, once established in Azerbaijan in the course of centuries, have usually stacked to the policy of multiculturalism and done their best to preserve and respect the multicultural environments and tolerance atmosphere in the lands under their jurisdiction due to objective reasons (particularly, the need for peace, widely spread inter-religious and inter-ethnic royal/noble marriages etc.). And, of course, several exceptions [19, 46-51; 20, 87] to this general rule, which took part in the past, should not damage a generally positive image, as in the majority of cases, they were directed towards the goal of protection of the established beliefs.

Thirdly, current multi-religiosity has a two-fold impact on the religious economy of modern Azerbaijan society: first of all, the government and society has developed an admirably tolerant model and best practices of multiculturalism; moreover, it is not always an easy task to maintain the achieved status quo in the sphere of the FoRB due to the phenomena of exported religious extremism.

Fourthly, Azerbaijan is a comparatively young independent state and its national security has become a target of a number of direct threats and crime and the National Security Concept (2007) of the Republic of Azerbaijan encompasses a non-exhaustive list of those threats [6].

Fifthly, although it may seem repetitious, one should mention that regional and global geopolitical dynamics do also play here their role [21, chapters 4, 5, 6 and 7].

Finally, the existence of numerous non-legal challenges is not considered as an obstacle for the realization of the highest objective of the Azerbaijani state. Under Article 12 of the Azerbaijani Constitution, the state ensures rights and freedoms of man and citizen, and a proper standard of living to the citizens. Moreover, the rights and freedoms, including religious rights enumerated in the Constitution are applied in accordance with not only the domestic legislation, but also the norms of international law contained in international treaties to which Azerbaijan Republic is a party.

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Date of receipt of the article in the Editorial Office
(08.11.2018)