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Jurnal haqqında

BDU Hüquq fakültəsi Tələbə Elmi Cəmiyyəti tərəfindən nəşr edilən Bakı Dövlət Universiteti Tələbə Hüquq Jurnalı Azərbaycanda tələbələr tərəfindən təşkil olunan və müvafiq akademik yoxlama qaydası ilə redaktə edilən yeganə jurnaldır. Jurnalın əsası 2014-cü ilin noyabr ayında qoyulmuş və 2015-ci ildən başlayaraq "HeinOnline", 2023-cü ildən etibarən isə ən böyük onlayn məlumat bazalarından biri olan "Scopus"-da yerləşdirilməkdədir. Jurnal milli, beynəlxalq və müqayisəli hüquqda mövcud olan müasir hüquqi problemlərə akademik səviyyədə peşəkar yanaşmanı təbliğ edir. Nəzəri fikirləri, dünya dövlətlərinin məhkəmə və qanunvericilik təcrübəsini ümumiləşdirərək mübahisəli məqamlara aydınlıq gətirmək, hüquq cəmiyyətinə həm elmi, həm də praktiki müstəvidə yaradıcı düşüncə və hüquqi tənqid qabiliyyətini, hüquq mədəniyyətini aşılamaq Jurnalın əsas prinsipləridir. Jurnal tərkibindəki məqalələr vasitəsilə hüquqi əsaslandırma ilə aktual məsələlərə mümkün həllərin irəli sürülməsini və yenilikçiliyi prioritet məqsəd kimi müəyyənləşdirir. Hüquq tələbələrinin hüquqi yazı və hüquqi düşüncə bacarıqlarını üzə çıxararaq inkişaf etdirməklə onları akademik araşdırmaya həvəsləndirmək və bunu sağlam elmi rəqabət ənənəsinə çevirmək Jurnalın daimi məramını təşkil edir.

About the Review

Baku State University Law Review is the only student-run and peer-reviewed academic journal in Azerbaijan and a publication of Student Academic Society of Baku State University Law School. It was founded in November 2014 and has been placed in HeinOnline since 2015, and in Scopus, one of the largest online databases, since 2023. The Review promotes academic and professional approach to contemporary legal issues which exist in national, international and comparative law. Clarification of debatable issues with induction of theoretical concepts, judicial and legislation practice of foreign countries, fostering legal criticism skills, creative thinking, and legal culture on both academic and practical sphere are basic principles of the Review. With its published articles, the Law Review promotes possible solutions to actual legal issues with reference to legal reasoning and opportunities given by legal scholarship and determines avoiding repetition as prior purposes of Review. Encouraging law students to academic research with making them improve their legal writing and legal thinking skills and make this as a fair competition are permanent goals of the Review.

The Search for Standards: A Jurisprudential Analysis of the Ecuadorian Rights of Nature

Thomas Murray & Andrés Martínez-Moscoso[*]

Abstract

On May 6th, 2019, the Constitutional Court of Ecuador selected a case that alleged a violation of the Rights of Nature (RoN), the corpus of legal rights given to Nature, to develop jurisprudence on what the standards of the concept are. Historically, this lack of intelligible standards for the RoN has led many to dismiss the concept as unworkable. Therefore, this article brings together the reasoning of sixteen RoN cases to answer each of the necessary questions to create a standard for the Ecuadorian courts: what is "Nature", what are its rights, what rules and actions may violate these rights, and what mitigating factors may affect whether an action or rule is a violation of these rights. From this, we are able to reason that "Nature" includes non-artificial, mostly biotic beings that usually do not need to be jurisdictionally defined, that are rarely protected from environmentally degradative rules but which are protected from environmentally degradative actions, when those actions lack sufficient economic justification, are not necessary, and are not justified through competing rights. In the end, we find sufficient congealed reasoning to answer the most unique issues the idea faces. We conclude that the RoN is not unworkable, that many of their issues are common to conventional systems of rights, and thus that they hold great potential through their standardized, rational application.

Annotasiya

2019-cu il 6 may tarixində Ekvadorun Konstitusiya Məhkəməsi Təbiətin Hüquqları – Təbiətə verilən hüquqlar toplusunun pozulması iddiası üzrə bir işi seçdi. İşin məqsədi bu konsepsiyanın standartlarının nədən ibarət olduğunu müəyyənləşdirən məhkəmə təcrübəsini inkişaf etdirmək idi. Tarixən Təbiətin Hüquqlarının qorunmasında aydın standartların olmaması bu konsepsiyanı bir çoxlarının qeyri-mümkün hesab etməsinə səbəb olmuşdur. Beləliklə, bu məqalədə Təbiətin Hüquqları ilə bağlı on altı iş üzrə mülahizələr toplanaraq standartın yaradılması üçün zəruri olan suallara cavab verilir: "Təbiət" nədir, onun hüquqları nələrdir, hansı qaydalar və hərəkətlər bu hüquqları poza bilər və hansı yüngülləşdirici amillər hərəkətin və ya qaydanın bu hüquqları pozub-pozmadığını müəyyən edə bilər. Bu mülahizələrə əsasən belə qənaətə gəlmək olar ki, "Təbiət" adətən süni olmayan, əsasən biotik varlıqları əhatə edir, bu varlıqların hüquqi cəhətdən müəyyən olunmasına ehtiyac yoxdur və onlar nadir hallarda ekoloji cəhətdən zərərli qaydalardan qorunur. Lakin bu varlıqlar, kifayət qədər iqtisadi əsaslandırma olmayan, zəruri olmayan və rəqabət hüquqları ilə əsaslandırılmayan ekoloji cəhətdən zərərli hərəkətlərdən qorunur. Sonda belə bir nəticəyə gəlirik ki, bu ideyanın qarşılaşdığı ən çətin suallara cavab vermək üçün kifayət qədər məntiqi əsaslandırma mövcuddur. Həmçinin müəyyən edilmişdir ki, Təbiətin

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Hüquqları qeyri-mümkün deyil, onların bir çox problemləri adi hüquq sistemlərinə də xasdır və buna görə də onların standartlaşdırılmış, məntiqi tətbiqi vasitəsilə ətraf mühitin mühafizəsində böyük potensiala malikdir.

CONTENTS

Introduction

In 2019, the Constitutional Court of Ecuador selected a case for review to develop binding jurisprudence on the Rights of Nature (RoN), specifically to create and review "*standards and limits regarding the exploitation of renewable and non-renewable resources that are managed by the State, the actions of concessionary companies, and their impact on the enjoyment and exercise of collective rights and those of nature*".[1] As the case has worked its way through the nation's appeals system, both sides continued to make two respective arguments: that the action in question must have violated the Rights of Nature because nature was damaged, or that the action in question did not violate the Rights of Nature because not every action of environmental damage inherently violates its rights. These arguments follow the conventional arguments of a RoN case, in which both sides argue using a different, undefined threshold of rights violation. Together, they ultimately make the point that the RoN lacks clear standards of application, explaining the motivation of the Constitutional Court's question.

The aforementioned arguments should sound familiar, they are generic rehashes of deeper issues in jurisprudence. It was nearly two centuries ago that Godwin claimed the whole project of "rights" was misguided, as all rights inherently held the possibility of being in contradictions,[2] thus negating any sound intellectual grounding. Such ideas live on through the likes of Hayek and other libertarians who insist that all rights should be individual.[3] To say the RoN is invalid owing to their conflict with other rights is a possibility, but one that would be explicitly proven. Critics may further claim, that even if these rights are balanceable, it would inherently be an overly subjective balancing act, one that would violate the core of the neutrality of law and thus one of Fuller's eight criteria of law: the constancy of law through time.[4] Yet despite their differences, even Hart and Fuller agreed that all rules have a penumbra.[5] If commands as simple as "no vehicles in the park" and "no sleeping in the train station" can inspire one of the most famous debates of

[1] Sala de Selección de la Corte Constitucional del Ecuador [Selection Chamber of the Constitutional Court of Ecuador], Judgement of May. 6, 2019, No. 502-19-JP.
[2] William Godwin, An Enquiry Concerning Political Justice and Its Influence on General Value and Happiness, 112 (1st ed. 1793).
[3] Friedrich A. Hayek, The Constitution of Liberty, 363 (17th ed. 2011).
[4] Lon L. Fuller, The Morality of Law, 39 (2nd ed. 1969).
[5] Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 73 Harvard Law Journal 630, 630-672 (1958).

modern jurisprudence,[6] we should shy away from damning any rights regime for simply having some ambiguity. Once more, the lack of core meaning would need to be positively demonstrated.

Thus, we may formalise the precedent arguments to ask whether the Rights of Nature are "intelligible" in this context defining it via two prongs: (1) is the rights framework sufficiently harmonious with existing rights to not be considered facially null and (2) is the rights framework meaningful enough to be balanced in a way that is no more subjective than the average rights framework?

Thus, the question of this article is whether we may consider the RoN an intelligible regime. This article does not prescribe to the Court what it should adopt as the exact standards of the RoN, but whether it is possible and what characteristics it would include. To answer this question requires two steps, which form the major parts of the article: firstly, to disprove the pre-existing belief of the unintelligibility of the RoN, and secondly, to affirmatively prove the intelligibility of the RoN. The first step requires an analysis of the conventional RoN narratives in the context of broader jurisprudence to dismiss the corpus of null criticisms and isolate the sui generis questions such a regime actually poses. The second step, which proves intelligibility, involves a review of the existing RoN cases in the nation to see whether individual judges have created sufficient congealed reasoning to demonstrate a conventional pattern of reasoning in such cases, and later answer the previously identified questions.

Part 1 introduces us to the historical context and politics that led to the adoption of the regime. Part 2 attempts to disprove the unintelligibility claim in three parts, using the first part to show how critics have failed to prove unintelligibility and the latter two to affirmatively disprove it. First, we examine the conventional discourse around the RoN and find it confused for either supporting the regime for simple instrumental reasons while ignoring the obvious issues and ambiguities that come with rights regimes, or for damning the regime for the generic ambiguities of rights regimes while ignoring that these issues are common to many if not all rights regimes. Second, we examine the open texture of the RoN in ten randomly selected cases, to show that like many rights regimes, they do not fail to have intelligible influence despite not being solely dependent on falsifiable commands or prohibitions. Third, we isolate the most *sui generis* issues identified in the literature for the RoN to analyse for the following sections. We conclude the section noting that while the RoN may seem unintelligible at first, this impression is only owing to confused narratives and open texture common to rights regimes, and after examining a handful of cases, we can see that the RoN is not inherently unintelligible.

[6] *Id.*, 664.

This leaves us in neutral territory while the RoN is not unintelligible, we still must say they are intelligible. Thus, Part 3 breaks down the concept of the RoN into a series of questions one would necessarily need answers to claim it is an intelligible regime and then provides the answers through a close read and analysis of 16 of the publicisied 64 cases that involve the RoN. First, we ask what is "Nature", both in the sense of at large for the regime and how it is delineated in specific cases. Second, we ask what procedural rights are provided to nature. Third, we ask what substantive rights are provided to nature and how those can create facial challenges to rules. Fourth, we ask how the substantive RoN allows or disallows specific, individual actions, delineated between future potential actions and past actions. Fifth, we ask how the RoN is balanced against competing rights. Together, the cases provide enough information to demonstrate several common concerns, lines of reasoning, and rationalistic weighing from judges that suggest that these questions are handled in a non-fully subjective manner, which allows us to conclude that there is intelligibility to the standard. In Part 4, we demonstrate this intelligibility by using this analysis to finally respond to the questions from the literature.

I. Context

A. Legal Basis of the RoN

The RoN was included in the Ecuadorian Constitution during its 2007 convention in Montecristi, and formally adopted via a national referendum in 2008.[7] Principally, they may be understood in two ways. Firstly, in a more concrete sense, they may be viewed as a reaction to the lack of action and protection provided by the classical environmental law, which has resulted in deforestation, oil pollution within indigenous communities, and a myriad of other environmental issues.[8] Secondly, in a more profound sense, they may also be viewed as a part of Latin American neo-constitutionalism, a stream of legal thought which has contributed to a series of achievements related to rights, social demands, new state structures, and, above all, the recognition of a plurinational state. This intends to realize the "*sumak kawsay*" or good life, the way of life and understanding of the indigenous peoples, for whom the Pacha Mama is a living being.[9] This is given that, during the drafting process,

[7] Tanasescu Mihnea, *The Rights of Nature in Ecuador: the Making of an Idea*, 70 International Journal of Environmental Studies 846, 846 (2013).

[8] *See* Janeen Olsen, *Environmental Problems and Ethical Jurisdiction: The Case Concerning Texaco in Ecuador*, 10 Business Ethics: A European Review 71, 72-73 (2001) (describing the history of the Texaco case as an example of the environmental degradation Ecuador has faced).

[9] *See* Martín Cordovez, et al., *Estado Constitucional de Derechos: Los Conflictos del Pluralismo Jurídico y el Ejercicio de la Justicia Indígena*. [*Constitutional State of Rights: The Conflicts of Legal Pluralism and the Exercise of Indigenous Justice*], 8 USFQ Law Review 119, 119-143 (2021), who defines the indigenous deity of Pachamama as "mother and generator of life" ("madre y

there were numerous influences from a diversity of cultures, an emphasis on community values, and the Andean Cosmovision.[10] This viewpoint has emphasised its principles of relationality, complementarity, correspondence, reciprocity and cyclicity, as well as a dynamic relationship between nature, man and the cosmos.[11]

The attempt to achieve this end has generated great controversy, as some politicians and lawyers consider the recognition of nature as a subject of rights as either a part of legal folklore or a demagogic measure to try to force change, all the while alleging only humans may be the subject of rights. In contrast, others have argued that the RoN should instead be understood as an emancipatory and liberating idea, particularly through the lens of Andean nationality and the perspective of the oppressed.[12] Given that responding to this controversy is the aim of our article, we may briefly recite the actual text of the RoN before turning to the next section to how it has been interpreted.

Articles 71 to 74 of the 2008 Constitution offer four distinct rights, offered partially here:

1. The Right to Exist and Regenerate (Article 71) – "*The right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes*".

2. The Right to Restoration (Article 72) – "*Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems*".

3. The Right to Protection (Article 73) – "*The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles… The introduction of organisms and organic and inorganic material that might definitively*

generadora de vida").

[10] Alberto Acosta, El Buen Vivir, más Allá del Desarrollo [Good Living, Beyond Development], in *Buena Vida, Buen Vivir: imaginarios alternativos para el bien común de la humanidad* [*Good Life, Good Living: Alternative Imaginaries for the Common Good of Humanity*] 21, 47-48 (2014). Centro de Investigaciones Interdisciplinarias en Ciencias y Humanidades, UNAM, 2014. *See* Carlos Santiago Álvarez Rivera, Revalorización de la cosmovisión andina a través de la ilustración [Apprecation of the Andean Worldview through Illustration] (Mar. 11, 2011) (Master theses, University of Cuenca), who defines the Andean Cosmovision as based on "our fundamental principles: complementarity, reciprocity, correspondence and relationality that allow the connection of all" ("cuatro principios fundamentales: complementariedad, reciprocidad, correspondencia y relacionalidad que permiten la conexión de todos los elementos del cosmos desde lo individual y lo colectivo en conformidad con la naturaleza").

[11] Elizabeth Bravo & Melissa Moreano, Whose Good Living? Post-Neoliberalism, the Green State and Subverted Alternatives to Development in Ecuador, in *The International Handbook of Political Ecology* 332, 332 (1st ed. 2015).

[12] Rafael Domínguez et al., *Buen Vivir: Praise, Instrumentalization, and Reproductive Pathways of Good Living in Ecuador*, 12 Latin American and Caribbean Ethnic Studies 133, 143 (2017).

alter the nation's genetic assets is forbidden".

4. The Right to Sustainable Use (Article 74) – "*Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living… Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State*".[13]

B. The Poverty of "Rights of Nature" Discourses

Burdon, writing in 2011, warned that "*if the idea of earth rights is to command reasoned loyalty and gain broader political acceptance then it must be built on a secure intellectual footing*".[14] Given that this intellectual footing was never established, it is not surprising the Constitutional Court of Ecuador is still trying to answer fundamental questions about the RoN. Yet this lack of footing may be based on the fact that a significant portion of the Rights of Nature literature analyses the topic without criticality, both to support and condemn it.

On one hand, scholars of a more activist bent may posit that a number of jurisdictions have passed laws to implement it, that they are phrased in new, and so excitingly, biocentric terms, and so this constitutes a "revolution".[15] What tends to unite such works is that they tend to be comparative (generally referencing US municipalities, Ecuador, Bolivia, New Zealand, India, and to a lesser extent, Colombian court decisions, and US Native American law), include a direct reading of various statutes without much analysis of how they have actually been implemented, and fail to address many of the serious critiques of the idea.[16] They often do not adequately address how such laws may seriously impact the economic well-being of their jurisdictions and often fail to discuss how such subjective concepts as environmentalism could be non-arbitrarily weighed in a judicial setting. This corpus of literature does little to convince the skeptic.

On the other hand, more sceptical scholars may disregard the concept on a number of superficial grounds. For instance, on the grounds that Rights of Nature legal texts are often formulated incredibly broadly and obvious ambiguities remain in their interpretation as if that is not a commonality in rights law. They may also claim certain logical inconsistencies between the

[13] Constitución de la República del Ecuador [Constitution of the Republic of Ecuador], arts. 71-74 (2008).

[14] Peter Burdon, *Earth Rights: The Theory*, 2 IUCN Academy of Environmental Law eJournal 1, 2 (2011).

[15] *See* Guillaume Chapron, et al., *A Rights Revolution for Nature*, 363 Science 1392 (2019); David Richard Boyd, The Rights of Nature: A Legal Revolution that Could Save the World (1st ed. 2017); Valerie Cabanes, *A Legal Revolution for the Rights of Nature,* 19 Green European Journal 118 (2020). Available at: https://www.greeneuropeanjournal.eu/a-legal-revolution-for-the-rights-of-nature/ (last visited April 1, 2025); David R. Boyd, *Recognizing the Rights of Nature*, 32 Natural Resources & Environment 13 (2018).

[16] *Ibid.*

Rights of Nature and human rights,[17] arguing that rights can never be proportionally applied in light of competing rights. They may take advantage of the text's broadness and an, alleged, inability for them to be balanced to argue that they must lead to inane conclusions, such as the illegality of eating.[18] These scholars at least take the argument one step further by addressing the issues that supporters ignore but make an equally fatalistic move by failing to faithfully engage with them. Thus, understanding the superficial narratives and looking to distance ourselves from them, we may turn towards a more substantive analysis.

II. Possible Unintelligibility of the RoN

Now that we have tried to argue that critics have generally failed to prove the unintelligibility of the RoN in Ecuador, we attempt to positively disprove the idea, meaning we must show that it is not the case that the RoN's conflict with other rights means it is facially void and that they cannot be balanced to a sufficiently objective level.

To examine these two points, a random survey of 10 cases was selected out of the 64 available on the Observatorio Jurídico de Derechos de la Naturaleza,[19] to be briefly described and analysed. These cases range from 2009 to 2020, incorporate a variety of legal actions, and go from local courts to the Constitutional Court of the nation.[20]

Methodologically, to analyse the cases, we must make a distinction

[17] *See* Noah Sachs, *A Wrong Turn with the Rights of Nature Movement*, 36 Georgetown Environmental Law Review 39 (2023); Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 Virginia Law Review 1347 (2021); V. A. J. Kurki, *Can Nature Hold Rights? It's Not as Easy as You Think*, 11 Transnational Environmental Law 525 (2022).

[18] Noah Sachs, *A Wrong Turn with the Rights of Nature Movement*, 36 Georgetown Environmental Law Review 39, 61 (2023).

[19] S*ee* Observatorio Jurídico de Derechos de la Naturaleza (an organisation which catalouges judicial cases which invoke or involve the RoN within Ecuador). Available at: https://www.derechosdelanaturaleza.org.ec/ (last visited April 1st, 2024).

[20] In order of analysis, our cases are: Movimiento de Tierras Puyango [Earthworks in Puyango], No. 11317-2016-00059 (2016); Carretera en Santa Cruz [Road Construction in Santa Cruz], No. 269-2012 (2012); Minería en la Cuenca Alta del Río Nangaritza [Mining in the Upper Basin of the Nangaritza River], No. 19304-2019-00204 (2019); Bosque Protector Samama [Samama Protected Forest], No. 12571-2013-0436 (2019); Caso Llurimagua [Llurimagua Case], No. 10332-2020-00418 (2021); Cóndor Mirador, No. 17111-2013-0317 (2013); Incumplimiento del Mandato Constituyente No.6 [Noncompliance with Constituent Mandate No. 6], No. 002-16-SAN-CC (2016); Inconstitucionalidad de la Ley de Minería [Unconstitutionality of the Mining Law], No. 0008-09-IN (2010); Inconstitucionalidad de la Declaración del Triángulo de Cuembí como Bosque Protector [Unconstitutionality of the Declaration of the Cuembí Triangle as a Protected Forest], No. 20-12-IN (2020); Derrame de Petróleo BP [BP Oil Spill], No. 17111-2013-0002 (2013). As a note, Derrame de Petróleo BP (2013) case involved an outlandish legal theory regarding jurisdiction that was thrown out by the court in the most absolute sense, and thus any analysis of it yields nothing beyond common sense, so this case will not be analysed.

between the traits of unintelligibility and intelligibility, as they are not perfect inverses. To say a rights regime, which in our cases is demonstrated in about 60 cases as of July 2024, is "intelligible" means that there exists at least one way of ordering, linking, and interpreting of the logic of the cases to fulfil the previously described criteria. This does not mean that all possible combinations of cases are intelligible, but merely at least one is. In contrast, unintelligibility does not mean that only one ordering, linking, and interpreting the logic of the cases is unintelligible, but that all are. Therefore, in Part 3, when we attempt to prove that intelligibility does exist, we pick and choose the cases in the same way a judge would, framing the question and picking the previous jurisprudence that addresses said question. One may remark that Part 3 does the work for us, that is there exists one intelligible line of reasoning the regime is not unintelligible. Yet this is an argument on thin ice, for if someone disproves (or simply fails to agree with) the line of reasoning meant to prove the intelligibility, then there would be no affirmative reason to not consider the regime unintelligible. Thus, to have the strongest foundation, we must separately demonstrate it is not unintelligible and is intelligible.

As mentioned, to disprove unintelligibility, it must be demonstrated that the conflict between RoNs and other rights does not render it void and that it can be balanced with these rights to a sufficient degree. This requires making the two prongs of the analysis more concrete. For the first prong analysed in subheading A - whether the RoN is facially in conflict with other rights - we may focus mostly on two things. First, the right to legal certainty, which we can interpret to mean that the RoN should not be used to create fully unexpected conclusions, especially in the context of the pre-existing environmental administrative regulations, and second, that they should not trigger the precautionary principle (causing a stop work order on development projects) too readily. For the second prong analysed in subheading B, we may more directly analyse how the cases balance the RoN against other rights.

A. Unintelligibility through Conflicts between Existing Law and the RoN

To the first part of the first prong, three cases demonstrate that the RoN does not pose a threat to the right of legal certainty and instead may help to reinforce it, as we will soon see, by acting as a strong legal principle to reinforce the existing rule system. In addressing the second part of the first prong, we will observe that the RoN does not appear to lead to an overly liberal application of the precautionary principle—a legal mechanism enabling Ecuadorian courts to preemptively halt actions that pose a threat to a right.

In the Puyango Earthworks case,[21] the construction of a community building was causing debris to fall into a local river, alarming a resident. In the trial, it was revealed that the project lacked the needed permits, causing the judge to order the construction to be stayed until those permits were received. Similarly, in the Santa Cruz Highway case, a judge ordered the construction of a road in the Galapagos to be stayed until proper permits were in order.[22] In both cases, the RoN was alleged to have been violated, but the construction would be allowed to proceed following the permitting. Thus, it seems doubtful that the actual environmental damage (or the Rights of Nature violation it generated) was the deciding issue, given that the difference that receiving a permit would make on the overall environmental impact is minimal in comparison to the absolute damage necessary to construct the two features.

More interestingly, the Río Nangaritza case involved a company's mining operation in a biodiverse area. The first instance judge determined that the mining concessions were granted in a protected area and so mandated a stay while various pro-environmental due diligence was taken,[23] while the second instance judge argued the concession could not be confirmed to be in protected areas, and so no Rights of Nature violation could be spoken of, negating the need for the due diligence.[24] The deciding factor and point of contention, in the case was the legal status of the land, not the agreed-upon fact that environmental damage had occurred. As the first instance judge remarked, "*This has a procedure that does not correspond to constitutional justice, but to administrative jurisdiction…based on the law and regulations on mining and environmental management*".[25]

Thus, these cases illustrate that when judges must consider a rights framework with an extremely open texture (that is, one that has a high degree of indeterminacy that comes from a nonexhaustive list of possible usages which cannot be clarified by simply adding more rules[26]), one of the easiest

[21] Unidad Judicial Multicompetente con sede en el Cantón Puyango, Provincia de Loja [Multicompetent Judicial Unit with headquarters in the Puyango Canton, Province of Loja], Judgement of Apr. 15, 2016, No. 11317-2016-00059 [hereinafter *Puyango Earthworks Case*].
[22] Segundo de lo Civil y Mercantil de Galápagos [Second Civil and Commercial Court of Galapagos], Judgement of Jun. 28, 2012, No. 269 – 2012 [hereinafter *Santa Cruz Highway Case*].
[23] Unidad Judicial Multicompetente con sede en el Cantón Centinela del Condor, Provincia [Multicompetent Judicial Unit with headquarters in the Canton Centinela del Condor, Province], Judgement of Jul. 11, 2019, No. 19304-2019-00203 [hereinafter *First Rio Nangaritza Case*].
[24] Minería en la Cuenca Alta del Río Nangaritza [Mining in the Upper Basin of the Nangaritza River], No. 19304-2019-00204 (2019) [hereinafter *Second Rio Nangaritza Case*].
[25] First Rio Nangaritza Case, *supra* note 23.
[26] Stewart Shapiro and Craige Roberts, *Open Texture and Analyticity*, 192-193 *in* Friedrich Waismann The Open Texture of Philosophy (Dejan Makovec, Stewart Shapiro ed., 2019).

ways to pin down its meaning is to associate it with a body of regulations. If anything, such a strategy aids the concept of legal certainty, given that it reinforces the administratively correct decision. Of course, this would be moot if the regulations were perfectly enforced, yet this is a difficult claim to make when Ecuador ranks 115th out of 180 countries in terms of corruption.[27] As the judge in the Santa Cruz highway case remarked, "*The rights of nature… are indisputable normative support to consider and suspend the execution of the work that does not have the permission of the environmental authority*".[28]

Further, one of the most common findings in the large literature contrasting goal-based regulations and rule-based regulations is that rule-based regimes are "*most suited to relatively simple settings with largely homogenous actors, where uncertainty needs to be reduced to a minimum*".[29] Environmental law, which includes a broad class of diverse actions and actors, usually rife with scientific uncertainty, is an unideal candidate for a fully rules-based regulatory regime. Thus, any environmental law regime could benefit from what Fuller termed the "morality of aspiration", the type of rule which "starts at the top of human achievement" and functions as the ends that other rules work towards.[30] By providing greater pressure to enforce existing regulations and a compass toward the teleological ends of those regulations, it seems more reasonable to assume that the RoN helps, not hurts, the right of legal security. In the second part of the first prong, we will see that the RoN does not seem to trigger an overly liberal use of the precautionary principle, the mechanism which allows courts to preemptively pause an action if it threatens a right.

Articles 26 and 38 of the Ley Orgánica de Garantías Constitucionales y Control Constitucional (LOGJCC) sets out the basic framework of how the standard functions. To trigger them, three conditions must be met: first, an "imminent and serious"[31] violation of rights must be present; second, to be serious it must be either due to the irreversible nature of the damage or the intensity or frequency of the rights violation; and third, the violation must not be able to be rectified through administrative or ordinary channels. For the measure to be granted, the judge need only verify that "*the mere description of the facts that the requirements provided for in this law are met*", as "*no evidence will be required to order these measures*".[32] Article 396 of the Constitution further specifies that this is an appropriate remedy in cases of doubt about the

[27] Our Work In Ecuador, Transparency International, https://www.transparency.org/en/countries/ecuador (last visited Apr. 1st, 2025).

[28] Santa Cruz Highway Case, *supra* note 22.

[29] Christopher Decker, *Goals-based and Rules-based Approaches to Regulation*, 8 BEIS Research Paper 8, 48 (2018).

[30] Lon L. Fuller, The Morality of Law, 5-6 (2nd ed. 1969).

[31] Ley Organica De Garantias Jurisdiccionales y Control Constitucional [Organic Law on Jurisdictional Guarantees and Constitutional Control] art. 27 (Asamblea Nacional [National Assembly], Quito, 2009) [hereinafter *LOGJCC*].

[32] *Id.*, art. 33.

environmental impact of an action, even when "*there is no scientific evidence of the damage*".[33] Thus, the fear that the RoN and mechanism may be abused by activists does, admittedly, seem warranted. Yet the cases of Samama Protected Forest and mining in Llurimagua illustrate some bounds to what may be considered an appropriate use of the mechanism.

In the case of the Samama Protected Forest, a landowner sued the government for the confiscation of his land, alleging that there would be an inevitable RoN violation given that the government had not specifically addressed how they would protect the RoN when confiscating the land. The court ruled against him, given that there was no particular reason specified as to why it was believed these violations would occur, other than the fact it was technically possible.[34] The principle required, if not evidence, the plaintiff to at least specifically indicate the threat. On the other side of the reasonability of granting precautionary measures was the case in Llurimagua. This saw a mining company sued owing to the irregularities and alleged inadequacies in their permitting process, such as the lack of attention paid to four endangered species, inappropriate use of water, and overall lack of precautionary actions, creating too great a risk of environmental harm. The judge found the company at fault and moved to revoke the license of the company and suspend all mining activities. While he confirmed "*that there has not yet been a violation of the rights*",[35] the low quality of the science used in the permitting process meant that there was too high of a possibility of such a violation, and so the mining license was suspended until the company addressed these issues.[36] Thus, we see that precautionary measures are superfluous in the least injurious situations, where the type of harm cannot even be predicted, but become necessary in cases which present great possible injury, such as the extinction of species, even if the chance of that injury is unknown.

In more generic terms, these cases show that the RoN may uncontroversially trigger the precautionary principle when the decision to grant or deny them is fully based on the identity of the harm (such as being unknown or causing species extinction), rather than the chance of the harm. Thus, the accusation of an overly (or underly) liberal use may come when judges are asked to assess harms which would have only a moderate impact and only at some moderate possibility.

In the Condor Mirador (Relaves) case, concerned citizens sued a mining

[33] *Supra* note 13, art. 396.

[34] Bosque Protector Samama [Samama Protective Forest], No. 12571-2013-0436 (2013).

[35] Sala Especializada de lo Civil, Mercantil, Laboral, Familia, Niñez, Adolescencia y Adolescentes Infractores de la Corte Provincial de Justicia de Imbabura [Specialised Chamber for Civil, Commercial, Labor, Family, Children, Adolescents and Adolescent Offenders of the Provincial Court of Justice of Imbabura], Judgement of Mar. 29, 2023, No. 10332202100937.

[36] *Ibid.*

company for their construction of two dams meant to hold toxic tailings, which they alleged were being built to subpar standards and would inevitably collapse. They demonstrated that the dam was being built for a maximum design earthquake lower than the area's maximum credible earthquake, and its inevitable collapse would release more than 390 million cubic meters of toxic waste into sensitive, biodiverse areas, and thus violate the RoN. The judge ultimately denied their request for precautionary measures, reasoning that while it was serious, the discussion of decadal timescales meant that it failed the criteria of immanence.[37] This decision shows that in these middle cases, in which the harm is great but possibly does not violate a bright-line rule and which has an indeterminate long-term probability, the judge does act with great discretion. Yet given that the RoN is about as vague as any other right, this discretion must come from the LOGJCC's procedures on the use of the precautionary principle. If the nation's judiciary was overwhelmingly pro-environmental, we would naturally expect this to lean towards an overapplication of the RoN. Yet given there are large financial interests against the environment and a large amount of corruption in the judiciary,[38] the more likely bias would be against the use of the RoN, likely as we see in the Condor Mirador (Revales) case. Yet we will not engage in such a conspiracy, leaving it suffice to note that nothing about the text of the RoN nor of the precautionary principle, nor their exercise as we have seen it, would so far suggest they have been used overliberally.

In the attempt to answer whether or not the RoN is in conflict with the existing law, principally through the right to legal certainty and the use of the precautionary principle, we saw many cases where the text of the law or surrounding rules avoided any need for overly-subjective decisions. Yet the discretionary space of any open texture system will, at some point, necessitate a subjective weighing of values. This is common to all rights regimes, and there is no reason to think this is worse for the RoN. Further, even if many RoN cases can use more objective criteria to be decided in favour of the environment, the RoN still has a role through its expressive function, that is to function as a normative force to support an uncorrupt decision and an ideal end-point to be aimed for. Thus, we can conclude that the RoN is not unintelligible for the first prong and may move on to the second.

B. Unintelligibility through the Balancing of the RoN and other Rights

The second prong deals with the issue of whether the RoN leads to an

[37] Unidad Judicial de Violencia Contra la Mujer y la Familia [Judicial Unit of Violence Against Women and the Family], 3rd of May, 2019, No. 17574-2019-00084.

[38] Quo vadis Ecuador? A brief analysis with a focus on the role of the justice system, https://dplfblog.com/2024/01/24/quo-vadis-ecuador-a-brief-analysis-with-a-focus-on-the-role-of-the-justice-system/ (last visited Apr. 1st, 2025).

abundance of unfair instances of rights balancing. We will show this is not the case, given that many rights conflicts can be solved with objective procedures, as in the cases of the Unconstitutionality of Constitutional Mandate Six and the Unconstitutionality of the Mining Law demonstrate. Even when rights balancing is necessary, the court may attempt to at least minimise the infringement on both rights to create the most objective possible set of solutions, as in the case of the Unconsitutionality of the Cuembi Triangle.

The cases of the Unconstitutionality of Constitutional Mandate Six and the Unconstitutionality of the Mining Law demonstrate the confines of when balancing is even necessary. In the Unconstitutionality of Constitutional Mandate Six, the court faced an issue of a direct conflict between two rules, particularly that the sixth conditional mandate (passed in the run-up to the 2008 Constitution), revoked all mining permits in various natural areas and called for regulations to enforce this, whereas the then-new Mining Law allowed them. The court summarised the situation as "*a problem of antinomies since prima facie, the compliance with one norm would generate non-compliance with the other*",[39] with one side arguing that they had the normative support of the RoN, the other having the normative support of the right to good living (through natural resource wealth). Thus, the court reasoned they were unbalanceable and simply decided in favour of the Mining Law by claiming it could be seen as the regulations called for by Mandate Six.[40] Thus, the court demonstrated that in the case of legal antinomies, balancing is not the appropriate procedure. This is reminiscent of LOGJCC's call for a systematic interpretation, one of the many procedures that the Court may use instead of rights balancing to rectify conflicts between absolutely conflicting norms. Further, by approving of the mining law as the regulatory manifestation of the mandate, despite the acknowledgement of their clear conflict, the court demonstrates a comfortability with allowing a wide latitude of interpretation for secondary-rule-making bodies.

The case of the Unconstitutionality of the Mining Law demonstrates a similar conclusion. In the case, an Indigenous rights group sued the government for the law's unconstitutionality in form, alleging it violated a number of collective rights relating to Indigenous peoples given the liberal way it would allow mining concessions, with some alleging violations to the RoN as well. The court noted that mining did not automatically create rights violations per se, given the need for permitting which required companies to conduct environmental impact studies and reforestation projects, and given that sensitive areas were already statutorily protected.[41] Thus, if two rules are,

[39] Incumplimiento del Mandato Constituyente No.6 [Noncompliance with Constituent Mandate No. 6], No. 002-16-SAN-CC (2016) [hereinafter *Mandate Six Case*].
[40] *Ibid.*
[41] Inconstitucionalidad de la Ley de Minería [Unconstitutionality of the Mining Law], No. 0008-09-IN (2010) [hereinafter *Mining Law Unconstitutionality Case*].

at worst, vaguely conceived of as being in conflict, there is no reason to attempt to balance them.

Together, these two cases demonstrate the conceptual boundaries of when rights balancing is unnecessary, that is when, on one side, the conflict is so significant as to be between logical antinomies of equal status (forcing the court to turn to textual or other more objective methods, as to avoid subjectively choosing one) or on the other side, when the conflict is between norms is highly theoretical that the court doesn't have much to analyse, and so can simply dismiss it by referring to regulations meant to ensure both rights have some degree of fulfillment. Admittedly, some amount of rights balancing may be necessary, conceptually when two norms exist in a state in which the full fulfillment of either would reasonably lead to some non-total yet non-zero infringement of the other. Thus, before concluding on the second prong of intelligibility, we must address these middle cases.

In the case of the Unconstitutionality of the Declaration of the Cuembí Triangle, the national government had declared a protective, national security zone over a broad swath of territory on the Ecuadorian-Colombian border, which would have covered twenty-three indigenous communities. The plaintiffs argued that the declaration would infringe upon a host of collective Indigenous rights, while the defence argued that this was not the case and that such an action was necessary for the RoN and national defence.

In its analysis, the court identified which rights would be and would not be infringed upon, and that "*although environmental conservation and the protection of the rights of nature is a valid objective, it cannot be achieved at the cost of denying the rights of peoples, communities and nationalities but in harmony with such rights*".[42] Instead of allowing or prohibiting the declaration, they ordered it to remain for one year and the government reformulated its terms through additional community consultations.[43] Thus, instead of trying to balance the non-infringement of rights themselves, they ordered the trade-off to be updated so that only the most non-negotiable (and thus necessary) harm remains. Still, one judge issued a dissenting vote emphasising that the other justices failed to properly weigh the importance of national security,[44] highlighting how any act of right balancing is always a normative procedure. Therefore, in the limited cases of the RoN in which rights balancing is the appropriate procedure, the court has demonstrated its commitment to optimising the trade-off between various rights, meaning that it is at least not more subjective than the rights balancing for any other rights regime. Thus, we may consider the second prong of unintelligibility to be disproved, and

[42] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jul. 1, 2020, No. 20-12-IN/20 [hereinafter *Cuembí Triangle Case*], § 128.
[43] *Id*., § 163.
[44] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 1st of July, 2016, Saved Vote of Judge Ponce for Sentence No. 20-12-IN/20.

with the previous part, this analysis suggests the RoN is not unintelligible *per se*.

C. Findings of the Ten Cases

Admittedly, these were only ten cases, yet given this is about a sixth of the cases to use the standard and that they were randomly selected, we have no reason to see them as unrepresentative. These cases demonstrate that, even though the RoN has an incredibly open texture, they have not been abused by misappropriating them into inappropriate sanctions. This is because the RoN does not often lead to sanction themselves, but rather may reinforce regulations or act as the ultimate goal for which more concrete procedures, such as the application of precautionary measures, may be orientated towards. Even in cases of rights conflicts, balancing sensu stricto is not always needed. While this creates the impression of an impotent concept, the language of the judges and the few cases in which the RoN themselves were holding demonstrated that their normative support plays a significant role alongside its ability to sanction.

III. Five *Sui Generis* Issues

If we may now establish that the very concept of the RoN is not, in practice, unintelligible, we must now turn to the genuine and specific issues that the RoN may face. Particularly, the literature has identified five distinct issues that come with such a regime, which we may list below and will return to in the final sections. They are:

1. Anti-human: The RoN may substantially harm human rights, generally by preventing economic development in jurisdictions dependent on environmentally destructive industries.[45]

2. Jurisdictional: It is subjective how one draws the boundaries about what is considered "Nature", both in broad legal terms and in specific court cases.[46]

3. Aggregation: Nature is composed of several distinct entities, and even within a defined jurisdiction, it is ambiguous how one determines the unit of rights bearer, in the same way, that humans are the natural unit of human rights, and how the overall cost-benefit can shift depending on how these constituent parts are aggregated.[47]

4. Multi-dimensionality: The environment contains multiple non-economic values (such as beauty, biodiversity, species health, etc.) which makes it difficult to apply standard government analysis to it, as such analyses often try to boil everything down to monetary values, forcing the question of how

[45] Sachs, *supra* note 18 (2023).

[46] *Ibid.*

[47] Guim & Livermore, *supra* note 17 (2021).

to weigh incommensurable and possibly incomparable values.[48]

5. Interest-having: As a whole, and most organisms individually, cannot be said to have interest in the same way natural people do, begging the question of whether it is even possible to have rights in the first place.[49]

We may now attempt to demonstrate that the RoN is positively intelligible by examining exactly how the rights fit in with the existing legal corpus and how they generally function in instances of rights conflicts.

IV. How to Define Nature?

Now that unintelligibility of the RoN is disproven, we will attempt to show that the RoN is intelligible, such that they are sufficiently harmonious and balanceable with the rest of Ecuadorian law. The harmony between legal regimes depends principally on their content and how they have been used, and thus we must sketch out how the RoN broadly operates. In order to prove intelligibility of RoN by determining what are its rights and how they can be balanced with other rights we must first principally define what is nature and what are its rights. To the latter question, we ask what rules and actions these rights prohibit. We further distinguish between actions that have occurred, and so whose impacts are known, and actions that may occur, and so whose impacts may only be predicted. Finally, once nature and its rights are more deeply understood, we may analyse how the courts have weighed them against competing rights. Methodologically, we analyse a diversity of cases from all levels and numerous provinces. Given that Ecuador is largely a civil law nation, we are not claiming that this interpretation of the RoN is necessarily mandated by precedent, but simply that this understanding is rationally and historically grounded.

A. What is Nature Writ Large?

The most obvious question for the "Rights of Nature" is what constitutes "nature". We can distinguish this into two questions: firstly, what conceptually includes nature and so can be defended under the Rights of Nature, and secondly, in individual cases, how does one delineate a specific entity as the affected "nature". These questions are necessary to understand the scope of the rights regime, and as we will see, the aptness of a subject to being adjudicated under the RoN is based on how biotic and non-artificial something is, and the question of delineation is either moot or out of the court's hands.

The Constitutional Court's guide on the topic gives some comments. To the court, nature is "*where life is reproduced and occurs*"[50] and is an autonomous

[48] *Ibid.*

[49] V. A. J. Kurki, *Can Nature Hold Rights? It's Not as Easy as You Think*, 11 Transnational Environmental Law 525, 547-549 (2022).

[50] Byron Ernesto Villagómez Moncayo, Rubén Fernando Calle Idrovo & Dayanna Carolina

being, meaning its value is not dependent on its use for humans or its instrumental roles. Further, it is a complex and systemic being, meaning it cannot be understood as a unitary whole but instead as a group of interrelated parts. Any effect on one part affects the whole, and so actions must be analysed not just for their direct results but for any secondary ramifications they incur.[51] While important, these concepts do little to help us to say what is or is not covered under the regime.

For instance, given the focus on life and ecosystem processes, would a barren desert count as nature? We may call this the abiotic question.

Further, nature has multiple different definitions regarding how much it can be influenced by humans. One environmental philosopher distinguishes between the "metaphysical" conception of nature, that is the world defined as non-human, and the "surface" conception of nature, that is the plants, animals, and "*ordinary observable features of the world*'' that we tend to associate with the environment.[52] Thus, we can ask how free of human influence must an ecosystem be to be considered "natural"? We may call this the artificiality question.

1. How Are Abiotic and Biotic Components Treated?

Given that the literal definition of nature is "*where life is reproduced and occurs*", one may initially dismiss abiotic components. Yet since its passage, the court has constitutionally stressed that "*Nature is made up of an interrelated, interdependent and indivisible set of biotic and abiotic elements… [that] function as a network*".[53] Thus, the court's wording suggests that abiotic components of the ecosystem receive protection at least because of their influence on biotic components.

We can see this go further in the case of illegal mining in Pastaza. In 2012, a citizen violated the terms of an artisanal mining license, which was found to be a violation of the Rights of Nature.[54] Yet interestingly, the resource being harvested in this case was simply stone and sand. While an important part of the case hinged on the ignored environmental impacts that could result, it was clear the action itself of harvesting these abiotic components was also an issue. This opens the door to asking whether there is an inherent value of abiotic components independent of biotic ones.

In general, some rights of nature theorists have argued against the view of

Ramírez Iza, Guía de Jurisprudencia Constitucional. Derechos de la Naturaleza [Guide to Constitutional Jurisprudence, Rights of Nature] 16. (Centro de Estudios y Difusión del Derecho Constitucional [Center for Education and Outreach of Constitutional Rights] (1st ed. 2023) (hereinafter RoN Guide).

[51] *Ibid.*

[52] Kate Soper, What is Nature? Culture, Politics, and the Non-Human (1st ed. 1995).

[53] RoN Guide, *supra* note 50, 19.

[54] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jul. 9, 2015, No. 218-15-SEP-CC.

valuing abiotic components for their own ends. For example, Nash insists on a "criterion of conation", the idea that to be inherently valuable a thing must have "*a striving to be and to do, characterized by drives or aims, urges or goals, purposes or impulses, whether conscious or unconscious*".[55] This is suspect when one realizes that such an argument, in short, attempts to be a line in the sand, a bright-line rule created not for any internal logic but simply create some order. Yet, it fails specifically because it is in no way clear what can and cannot rightfully be said to have an interest. This is likely why many, including Nash, acknowledge that any system of RoN necessarily includes some gradient of rights. Yet, if an arbitrary dividing line is actually a gradient and difficult to determine where it falls, it fails its only function and is thus unjustifiable. Thus, we can realistically assume that the gradient of rights is in effect, that abiotic rights are partially owed to their support of biotic ones, yet also partially for their own sake.

2. How are Artificially Occurring, Biotic Parts of an Ecosystem Treated?

To the question of artificiality, we may attempt to extrapolate the contours of some standard based on previous court decisions.

To start, we first must acknowledge how little of the Earth is truly free of human influence. Anthropologists have spent considerable time debunking the theory that the environment, particularly the Western hemisphere, was an untouched wilderness before colonization, instead emphasising that the "*Native Americans shaped their environments to suit them, through burning, pruning, tilling and other practices. And the Amazon is no different…*"[56] Thus, the Ecuadorian courts have continually emphasised the "*complementarity between human beings and other species and natural systems*"[57] Following this, we may dissect ecological artificiality deeper, dividing it into two phenomena: artificiality of occurrence, or the passive status of artificial existence, (such as planted crops or non-native farm animals) and artificiality of conduct, or the active status of exercising artificial action (such as how genetically modified plants or pets behave). To the former, we may analyse the court's jurisprudence on pine plantations in paramo regions, and to the latter, we may analyse the Estrellita case.

For the artificiality of occurrence, we may simply ask when there has been too much human influence on the introduction of some ecosystem element to render it "unnatural". While species are often painted as a binary between non-native (or "invasive") and native, significant examples exist in between.

[55] James A. Nash, *The Case for Biotic Rights*, 18 Yale Journal of International Law 235, 243 (1993).

[56] Ben Panko, *The Supposedly Pristine, Untouched Amazon Rainforest Was Actually Shaped By Humans,* Smithsonian Magazine (2017). Available at: https://www.smithsonianmag.com/science-nature/pristine-untouched-amazonian-rainforest-was-actually-shaped-humans-180962378/ (last visited Apr. 1, 2025)

[57] *Supra* note 50, 17.

This varying scale is what Tribe referred to as the "*distortion of natural landscape*"[58] in his Plastic Trees paper, a variable so nuanced he suggested the training to a specialised cadre of government officials to understand this, and similarly nuanced, environmental impacts.[59]

In Ecuador, some of the most common artificially occuring species are those found in pine plantations.[60] Worryingly, many of these pine plantations have been planted in the paramo, a delicate high alpine landscape. Many have pointed out that these trees may disrupt the hydrological cycle and degrade the soil.[61] Given this, the Ecuadorian government declared illegal any pine plantations between 3,500 and 3,000 meters above sea level.[62] This was the inciting issue to the Tangabana Paramo case, in which a company called "ERVIC SA" planted a pine plantation in between these latitudes, which prompted the local community to sue on behalf of the RoN. They pointed to the above regulation, as well as the general protection for the paramos, to argue that such a plantation was illegal. [63] The defence pointed out that they had been given special legal permission, which was enough to have both the first and second instance judge side with them.[64] In the second instance, the plaintiffs added that "*It should also be noted that here we talk about the moors as unproductive lands… [yet] the "Páramo de Tangabana" is a living moorland, which is in a restoration process and fulfils a very important process for all people*".[65]

This case points to two important debates, the value of low-biotic "wastelands" and the various variables that contribute to naturalness in contrast to artificialness.

Wastelands have never had a formal definition, but the causal "*barren or uncultivated land*" is sufficient for our purposes. The word "paramo" can refer to this specific ecological biome, but also may be translated into English as "wasteland, bleak upland, barren plain".[66] The defence in this case argues

[58] Lawrence Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83 Yale Law Journal 1315, 1321 (1974).
[59] *Ibid.*
[60] Context of the Timber Trade, Ecuador Briefing Document (Forest Law Enforcement, Governance and Trade Program of the European Union). Available at: https://www.traffic.org/site/assets/files/8617/flegt-ecuador.pdf (last visited Apr.1, 2025)
[61] Carlos Quiroz Dahik et al., *Contrasting Stakeholders' Perceptions of Pine Plantations in the Páramo Ecosystem of Ecuador*, 10 Sustainability 1, 2 (2018).
[62] Acuerdo No. 010 Plan Nacional de Forestación y Reforestación [Agreement No. 010 National Plan of Forestry and Reforestation] (2013).
[63] Unidad Judicial Multicompetente con Sede en el Cantón Colta [Multicompetent Judicial Unit with headquarters in the Colta Canton], Judgement of Dec. 10, 2014, No. 06334-2014-1546.
[64] Sala Especializada de lo Penal de La Corte Provincial de Justicia de Chimborazo [Specialised Criminal Chamber of the Provincial Court of Justice of Chimborazo], Judgement of Aug. 24, 2015, No. 0633420141546, [hereinafter *Second Paramo Case*].
[65] *Ibid.*
[66] páramo, WordReference,

against this view of the paramo, instead emphasising the community's use of the land to argue that it is not an unproductive area. The defence co-ops this argument, extending it further to say that the community is only arguing against the pine plantation to preserve their ability to harvest tunda. Thus, both sides agree that this land is not barren, but by needing to argue this, they demonstrate the existence of the conservative view on land value, that is, nature's value is partially dependent on what it provides to humans. The defence argues for the parallels between their actions and the afforestation of the nearby Palmira desert.[67] They are attempting to argue that it is a social good to afforest unproductive lands. While it is never explicitly stated by either side, we can see that there is a clear bias against barren, abiotic lands in contrast to lush, biotic lands, and it is reasonable to extend that into our understanding of the Rights of Nature. Further, the differences between paramos and the Palmira desert point towards the first distinguishable variable of artificiality, that is its occurrence.

The Palmira desert is not actually a desert, it is more properly thought of as "*a few hectares heavily eroded by the wind, the dryness of the environment, and intensive grazing, which has allowed the formation of sandbanks with some small dunes*".[68] While the low rates of participation do create the ideal conditions for desertification, the grazing of domesticated animals points to the ultimately anthropogenic origin of the landscape. In contrast, the paramo naturally exists in its current state. Given that there was no issue with attempting to forest the Palmira desert with pines, but that there have been numerous cases taking issue with paramo pine plantations, this points to the fact that the Rights of Nature tend to prioritise landscapes that do not have a human hand in their origin. In short, the former is "restoration" while the latter is a deviation.

Yet these are easy, black-and-white cases. We may further distinguish artificially occurring entities by how likely they would have occurred without the influence of humans. For instance, one may argue that indigenous practices may artificially introduce and order plants on a landscape, comparable to a modern, western-style pine plantation, yet the latter would likely face more scrutiny. This is because the plants that indigenous peoples tend to cultivate tend to be indigenous themselves, while the two most popular tree species for plantation-style forestry in Ecuador, the Pinus Radiata and the Eucalyptus globulus, come from Mexico and Australia, respectively.[69] Non-native plants (such as those from Australia) have a near-

https://www.wordreference.com/es/en/translation.asp?spen=p%C3%A1ramo (last visited Apr. 1, 2025).

[67] Second Paramo Case, *supra* note 64.

[68] Ivan Tomaselli, Country Report: Ecuador, 12 (2019). Available at: https://www.rinya.maff.go.jp/j/riyou/goho/jouhou/pdf/h30/H30report_nettaib_9.pdf (last visited Apr. 1, 2025).

[69] Ivan Tomaselli, *Country Report: Ecuador* 241, 253 (2019). Available at:

zero percent chance of ever randomly happening to grow in Ecuador, while indigenous peoples may be working with plants that grow in the area, which tend to grow together, and which tend to grow in natural patterns. Thus, when considering the artificiality of occurrence, we can distinguish between two aspects: who directly caused the event and how likely the event would have occurred without their involvement.

Further, as seen in the Tangabana Páramo case, both what is introduced into the ecosystem and the state of the ecosystem at the time of introduction is essential in understanding how courts approach the question of artificiality. In other words, if the artificial ecosystem created life where there was none before, it may be more likely to be considered nature, given the aforementioned heavier weight on biotic versus abiotic components. Awkwardly, this also suggests that productive, in human terms, ecosystems are more definable as nature than non-productive ones. That is why introducing the artifice of occurrence is necessary because, prima facie, it seems difficult for the plaintiffs in this case to argue that planting trees violates the Rights of Nature. Yet if one were to frame it along the lines of "industrial timber production", the violation is much clearer. The already ambiguous meaning and thus implementation of the Rights of Nature only becomes more difficult when "Nature" itself is undefined.

While the above discussion primarily applies to plant life and seeks to clarify the concept of artificiality of occurrence, it is also necessary to include animals in the analysis. Including animals allows for an exploration of the concept of the artifice of conduct, which is an essential part of the artificiality question.

3. How Are Artificially Behaving, Biotic Parts of an Ecosystem Treated?

The case of Estrellita involved a chrongo monkey being taken in by a family soon after birth and raised as a pet for nearly two decades, before being confiscated by the authorities. The family sued for habeas corpus, which the court found applied, given that animals are part of the "*protective spectrum of the constitution*".[70] They specified that animals, through the Rights of Nature, have rights not just for their role in the ecosystem but as unique rights-bearing individuals, with "*the right to food of an Andean condor is not protected or guaranteed in the same way as it is with an Amazon pink dolphin*".[71] Wild animals specifically enjoy certain rights to "*free animal behaviour*" which "*protects the general freedom of action of wild animals; that is, the right to behave according to their instinct, the innate behaviours of their species, and those learned and transmitted*

https://www.rinya.maff.go.jp/j/riyou/goho/jouhou/pdf/h30/H30report_nettaib_9.pdf (last visited Apr. 1, 2025).

[70] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jan. 27, 2022, No.253-20-JH/22, [hereinafter *Estrellita case*].

[71] *Id.*, para. 98.

among members of their population".[72] This means that humans cannot force them to act in unnatural ways. Thus, the court specifically took instance with the fact that Estrellita would often wear a diaper and eat what it considered to be "human food".[73]

This contributes to our foundational understanding of what the courts mean when they say "nature", by specifically distinguishing wild and domestic animals, and then awarding wild animals (the more "natural" ones) the right to act the way they naturally do, we see that the court is prioritising conduct as an aspect of naturalness. Thus, beyond origin, we may say that there is an artifice of conduct, that how an animal innately acts affects whether or not it is part of "nature", and that this is a protected status. One cannot move a part of the natural environment and bring it into the artificial by modifying its conduct.

Thus, to summarise the concept of abioticism, it seems the courts are willing to acknowledge the rights of abiotic components both for their inherent value and their instrumental value in supporting the ecosystem processes of biotic components, but overall seemingly less than the value of the biotic components themselves. To summarise the concept of artificiality, the main ambiguity rests on what conception of nature the courts have adopted: the surface view, of all that green stuff and all those animals, or the metaphysical, the ontological absence of human influence. We have seen that when the courts need to consider what is "nature", they have, either explicitly or implicitly, considered the artifice of origin and the artifice of conduct. The artifice of origin includes considerations of what being directly caused the environmental component to be there and how likely it would have arisen without their intervention. The artifice of conduct describes the actions of the being in question itself, whether it would have acted in such a way without the influence of humankind.

B. How is Nature Delineated in Each Case?

Now that we have a clear-as-possible picture of what the court considers "nature" in the abstract, we may move on to the second question, when in specific cases, how does the court determine exactly what the harmed entity is? In other words, if a river is polluted, is the harmed entity the waters of the river, is it all the organisms and the waters of the river, or is it everything in the watershed? In their guide, the constitutional court has said this depends on their "*characteristics, processes, life cycles, structures, functions and differentiating evolutionary processes*".[74] Such an answer does not help us very much. Therefore, we attempt to address the two relevant questions: when does the court need to define the limits of harmed entities and how do they

[72] *Id.,* para. 113.
[73] *Id.,* para. 175.
[74] *Supra* note 50, 30.

do that?

To the first question, we may begin by dividing cases by whether the actions have actually happened yet. If plaintiffs are seeking to prevent future damage *ex-ante*, it may be that only the core subject of the damage must be identified sufficiently to prove the case. Further, the court need not order any restoration efforts, and instead simply halt the action that will hypothetically create harm. For both reasons, the exact limits of the harmed entity need not be delineated, and so we may focus on protective actions which seek to remedy harm *ex-post*.

Thus, focusing on protective actions initiated *ex-post*, we may further divide cases between those focusing on discrete and dispersed harm. We may define instances of discrete harm as ones in which the preponderance of harm affects discrete units of the ecosystem (such as specific plants or animals), while cases of dispersed harm see a gradient of harm stretch across an ecosystem (such as through waterway pollution). Multiple cases demonstrate how the RoN repairs instances of discrete harm. In the case of tree felling in Cuenca, the city cut down dozens of trees along a major road and the city's river. After a lengthy analysis in the second instance, this was found to violate the RoN, and the judge ordered *restitutio in integrum*, which was simply replanting new trees.[75] Similarly, in the case of mangrove removal in Guabo, a shrimp farmer was successfully sued for removing mangroves to expand his farm. The judge resolved that the farmer thus needed to first remove all the farm machinery, water pumps, and the new retaining wall, and then replant the lost mangroves.[76] These demonstrate the point that discrete harm is generally repaired with discrete restoration: if a tree is cut down, just replant it.

Therefore, we may further narrow our analysis to dispersed, *ex-post* environmental harm. Given, by definition, the dispersed nature of the harm across multiple ecosystem elements, these cases would require some delineation of the affected entity. Thus, we may use these specific cases to ask the second question: when nature must be delineated in specific cases, how do courts do it? To this, we may look at the case of the sewer line bursting open and polluting the air and waterways of the Flavio Alfaro Canton, or the case concerning gas flaring in hydrocarbon extraction plants. Both cases addressed instances of pollution that saturated the landscape and may have affected human health. Both judges ordered a comprehensive clean-up, with the judge in the case of the sewage leaking commenting that the government

[75] Sala Especializada de lo Penal, Penal Militar, Penal Policial y Tránsito de La Corte Provincial de Justicia de Azuay [Specialised Criminal, Military Criminal, Police Criminal and Traffic Chamber of the Provincial Court of Justice of Azuay], Judgement of Jan. 10, 2023, No. 01204202205578,[hereinafter *Cuenca Trees case*].

[76] Tala de manglar en cantón El Guabo [Mangrove Deforestation in El Guabo Canton], No. 07317-2020-00466 (2021).

needed to "*carry out a toxicity or toxicological examination due to the contamination caused by the discharge of sewage*" before they began "*the execution of the approved plan*".[77] Similarly, in the Flavio Alfaro case, the judge ordered the relevant ministries to undertake a number of technical studies necessary for a long-term plan to repair the issue.[78]

From such a breakdown, two things are relevant: firstly, rarely must courts actually define exactly what parts of nature are being harmed, and secondly, in the specific cases where this must be done, that being dispersed, *ex-post* environmental harm, it is such a technical endeavor that the judges tend to simply order scientific agencies to determine it. Thus, despite the criticism that the Rights of Nature, by virtue of being a rights-based regime, would need to specifically identify the exact limits of the harmed, enfranchised entity, it instead seems to follow the lead of traditional, administrative environmental law in defining the harmed entity in the most utilitarian manner, that is, only when necessary and using outside scientific expertise.

Therefore, concerning both the questions of what is abstract "nature" in the overall purview of the court and how the court jurisdictionally defines a part of nature to be the plaintiff in specific cases, we may see the court has a workable framework. Nature seems to be the thing that is biotic, and sometimes to a less important extent abiotic, and non-artificial, based on its origin and conduct. Further, in specific cases, the actual plaintiff either needs not be fully delineated either if the damage has not yet occurred, as simply pointing to a sufficient part that will experience harm is enough to have the court order it to be prevented, or if the harm is discrete enough, as the needed repair is thus equally discrete. In cases that deal with large-scale pollution that has already affected the landscape, courts do need to delineate the affected entity of "nature", yet can have scientific, bureaucratic agencies to do that. The lack of deeper theory on the concept does introduce some ambiguities, such as the tensions between the surface and metaphysical conceptions of nature as well as possible tensions between what the court and the scientific agency interpret normative matters of environmental restitution, yet these issues are in no way fatal. Thus, now that "nature" is understood, we can continue to ask what its rights are.

V. Nature's Rights

Now that the concept of nature and how it is delineated is clear, we can determine what its rights are, particularly what rules and actions these rights prohibit. We further distinguish between actions that have occurred, and so whose impacts are known, and actions that may occur, and so whose impacts may only be predicted. Finally, once rights of nature are more deeply

[77] Caso contaminación de ríos y aire en el Cantón Flavio Alfaro [Case of River and Air Pollution in the Flavio Alfaro Canton], No. 13322201900024 (2019).

[78] Mecheros petroleros en el Ecuador [Oil Flares in Ecuador], No. 21201-2020-00170 (2021).

understood, we may analyse how the courts have weighed them against competing rights.

A. What are the Procedural Rights of Nature?

With an adequate understanding of what "nature" is, we may move on to its rights. To begin, we may divide them into procedural and substantive. Procedurally, the Rights of Nature elevates environmental protection in several ways.

Firstly, constitutional rights trump other forms of governmental or judicial guarantees. In the case of Unconditionality of Constitutional Mandate 6, the Constitutional Court reaffirmed the broad hierarchy of Ecuadorian laws: constitutional law is the highest, organic law is in the middle, and normal law is the lowest, a reflection of the legal hierarchy established in Article 425 of the Constitution.[79] Thus, the Rights of Nature may theoretically trump environmentally harmful laws passed by the legislature. Importantly, this means that environmental protection is elevated to the same status as other guarantees for various economic activities, the rights with which environmental protection is most facially in conflict. By putting them on the same level categorically, they may be more equally balanced when in tension.

Secondly, constitutional rights may enjoy faster processing given their importance, as the judge in the Paramo case stated that "*processing must take priority over other actions within the jurisdiction of the judge who is responsible for hearing*".[80]

Thirdly, in the specific case of the Ecuadorian court system, the conventional highest court of cassation is technically the National Court of Justice. Yet when conflicts involve constitutional rights specifically, they may be taken up by the Constitutional Court. The Constitutional Court is the only court to enjoy, albeit limited, precedential-making power,[81] meaning that environmental protection may be strengthened through their decisions in a way that cases involving only technical regulations could not.

Fourthly, the Rights of Nature have universal standing in Ecuador, meaning that one need not prove a sufficient connection to raise an action, theoretically solving the issue of standing that has traditionally plagued environmental law. This is due to Article 71 of the Constitution, which establishes that "*any person, community, town or nationality may demand compliance with the rights of nature from the public authority*".[82]

Fifthly, established in the case of Estrellita and emphasised in the Constitutional Court's guide, these rights are non-exhaustive, meaning that it

[79] Mandate Six Case, *supra* note 39, 12-13.
[80] Second Rio Nangaritza Case, *supra* note 24.
[81] LOGJCC, *supra* note 31, art. 25.4.l.
[82] *Supra* note 14, art. 71.

is "*not reduced to guaranteeing the rights stated in positive regulatory bodies*".[83] Thus, the spirit of law takes a stronger position in relation to the letter, theoretically allowing this legal tool to be used flexibly and to cover fringe cases.

Together, these reasons help to explain why, despite the RoN's open texture and so the theoretical possibility of being only "legal poetry", some may see them as impactful. Yet procedural rights do little to prove their intelligibility, and so we must turn to their substantive components.

B. What are the Substantive Rights of Nature?

In the court's guide, they particularly emphasised two distinct aspects: "*right to existence, maintenance, and regeneration of life cycles*", demonstrated by the aforementioned case concerning stone harvesting, and the "*right to restoration*", demonstrated by the case involving the degraded mangrove, which the court ordered to be restored.[84] Thus, based on this choice of emphasis, we may boil down these rights into two things: environmental protection and, failing this, environmental restoration.

Numerous times the courts have affirmed that the right to restoration simply follows the principle of *restitutio in integrum*, as that court says, "*the full restitution of nature by repairing the damage caused to the physical environment until returning, as far as possible, to the original ecosystem*".[85] The important question should be obvious: what does "*as far as possible*" mean? Given it is legally undefined, we may assume that it is defined scientifically on a case-by-case basis. Yet broadly, one of the purposes of a court system is to function as a mechanism in which, when a right is infringed upon, one may seek redress. To separately guarantee that a right may be restored if it is violated is frankly quite strange. This would be the equivalent of ensuring both the right to free speech and the right to have your free speech restored if something were to infringe upon it. One may argue that the right to restoration has a more specific scope: it ensures that the environment is directly and physically restored rather than simply compensated. Yet compensation is almost always monetary payment, and one cannot hand money to the abstract concept of Nature. Thus, without a more specific meaning to "restoration", it may simply be considered the judicial guarantee to what seems to be the ultimate right of nature: protection. Thus, we may turn to asking what violates this right to protection, first focusing on rules.

C. Which Rules Violate the RoN?

The herculean effort of attempting to collate exactly what rules do or do not violate the Rights of Nature can be largely circumvented when one

[83] *Supra* note 50, 40.

[84] *Ibid.*

[85] *Id.*, 44.

understands the concept in relation to administrative environmental law. In short, the following discussion postulates that the Rights of Nature and traditional environmental law overlap significantly, meaning it is more likely than not that any rule or action will either invoke both or neither regime. Thus, we will attempt to isolate the cases in which the regimes split to understand better where the Rights of Nature change the outcome of a case. Specifically, paying attention to two possibilities: firstly, not violating the Rights of Nature and violating administrative environmental law and, secondly, violating the Rights of Nature and not violating administrative environmental law.

The first case initially seems difficult, given that the casual understanding of the RoN as affording greater protections to the environment than administrative law. On the other hand, many judges have presented a near opposite perspective, declaring the RoN not relevant specifically because administrative law already determines a decisive answer, such as we saw in the first instance ruling of the Río Nangaritza case.[86] Thus, we may ask whether it can violate administrative environmental law without running afoul of the RoN?

To this end, it is worth giving credence to the rhetoric of it being a genuine paradigm shift in environmental law, given its specifically anti-extractivist bent. For context, the most recent environmental code was written in 2017, spanning about 90 pages.[87] It would be extremely zealous to allege any violation of 90 pages of technical codes is a genuine rights violation. This is especially true when one considers that environmental regulations may be influenced by extractist groups, the very ones the Rights of Nature attempts to check. For example, in the environmental code, chapter II is devoted to describing "*the environmental powers of decentralized autonomous governments*", which illustrates the broad powers allowed to local governments.[88] Either side of the ideological debate may argue that decentralized policy making is either good or bad, respectively arguing that local governments may be more subject to corruption or that they are more connected to the issues at hand. Yet the recent controversy over oil drilling in Yasuni National Park, in which most of the citizens of the Amazonian province where the drilling was to happen voted to drill while the nation at large voted against it, is illustrative to the point that decentralization does not necessarily lead to environmental conservation. Therefore, one could easily imagine a host of "environmental" regulations that are in practice deleterious for the environment, being broken without violating the more normative RoN.

Yet admittedly, this situation is likely less important than its inverse, the possibilities of actions that are legal under administrative environmental law

[86] *Supra* note 24.

[87] Codigo Organico Del Ambiente [Organic Code of the Environment] (Asamblea Nacional [National Assembly]), (2017).

[88] *Id.,* arts. 25-28.

and illegal under the Rights of Nature. These situations are the principal ones in which the force of the RoN would theoretically create different outcomes. We may divide such a case into two types: administratively permissible rules which violate the RoN and administratively permissible actions which violate the RoN. The former shall make up the remainder of this section, and the latter the next.

The LOGJCC specifies that these complaints of regulatory incompatibility between norms must be "*clear, certain, specific and pertinent*".[89] Thus, we may review three cases of unconstitutionality the Constitutional Court reviewed specifically owing to possible conflicts with the RoN. Theoretically, we may address that laws fall on a spectrum of unconstitutionality: ranging from completely irrelevant to the rights in question, and so fully legal in its regard, to directly negating a specific, higher law, making it fully illegal in its regard. Yet as we will see, the majority of cases fall somewhere in between, often relying on the broadness of the statutes in question, and their promise to ensure proper permitting, to be deemed constitutional.

In the case of the Unconstitutionality of article 86 and 136 of the Environmental Regulation for Mining Activities (RAAM), the plaintiffs took particular issue with the fact these two articles allowed for the diversion of waterways for mining activities. They alleged such activities pose a higher-than-acceptable amount of risk for environmental well-being and thus should be deemed as in violation of the RoN. The defence argued that such activities could only be performed with the proper permitting, which would ensure any undue harm to environmental quality. The justices ultimately ruled in favour of the plaintiff on procedural grounds, given that the RAAM had wrongly allowed such a practice because it had not been given the express authorization to do so by the organic law above it, the Organic Law on Water Resource Uses and Exploitation (LORHUAA). Yet the justice went further to additionally rule on the merits, and concluded that water diversions "*are not in the abstract incompatible with the rights of the nature to have its existence fully respected… This is because the aforementioned authorizations or permits must necessarily have the objective of ensuring that said rights are not violated*".[90]

Thus we may say that rules may permit actions, no matter how *prima facie* egregious, if those rules include a need for permitting, as seen in the case of the Unconstitutionality of the Mining Law in Part II.B, and such a regime flows from the organic law. The justices defend the breadth and necessity of organic law's power to enable action owing to their "*greater deliberation and democratic legitimation*".[91] Yet they further warn that permitting is no "*mere administrative procedure, since this could lead to irreversible damage and violations*

[89] *Supra* note 31, art. 79.5.b.

[90] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jun. 9, 2021, No. 32-17-IN [hereinafter *Unconstitutionality of the RAAM Case*].

[91] Id., § 49.

of the rights of nature… [and] must ensure the integral respect of nature and the regeneration of its life cycles, structure, functions and evolutionary processes".[92] Such statements now force us to ask, how does one ensure this permitting system is more than a "mere administrative procedure"?

In the case of the Unconstitutionality of the Organic Code of the Environment, restrictions on development in mangrove forests to be skipped with express authorization from the national environmental authority and a promise to reforest, allowed infrastructure to be built in mangroves, allowed monocultures to be established the plaintiffs sued over a number of articles that, in turn, allowed certain to prevent deforestation, and failed to set specific prices for the penalties associated with timber felling violations. The defence rested most of its argument on the idea that anything done under the code required some kind of government oversight and, generally, a permitting procedure, and this oversight would ensure the Rights of Nature would be respected. In turn, the court decided that, firstly, the allowance of development in mangrove forests via exceptions from the government meant that "*discretion is allowed that is contrary to the nature of the constitutional norm that protects the rights of nature*"[93] and so is unconstitutional. Despite this, infrastructure is allowed when permitted, owing to its important public benefit. Further, it is fully illegal to establish monocultures to prevent deforestation, as the constitution expressly prohibits this, thus making it unconstitutional. Lastly, the argument on timber violation prices were ignored, as it is beyond the scope of constitutional analysis.[94]

From this, we can gather important points. Firstly, any amount of government permission, such as through a simple nod, is not inherently a guarantee of the Rights of Nature, meaning the authorization process must have at least some substance. Yet at the same time, environmental laws need not be so granular that they establish specific fees, as that may be devolved to administrative regulations. Further, as is the idea of judicial review, laws cannot be the literal logical negation of higher laws, yet they may go against some of its principles, such as environmental integrity, if it is to balance against a compelling reason, such as development. Thus, we can somewhat narrow down the concept of rules that create a permitting regime with "integral respect" to require a process that requires standardized, non-ad-hoc, steps, but need not go so far as to specify the dollar amount of fines.

Yet this definition is still lacking. One is forced to ask, assuming the rule that allows an activity does not directly contradict a higher rule, and thus respects the concept of legal reserve, *how* substantive must the permitting process be? This will be more specificially addressed in the Los Cedros case.

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[92] Id., § 75.

[93] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Sept. 8, 2021, No. 22-18-IN/21 [hereinafter *Unconstitutionality of the Environmental Case*], § 71.

[94] *Ibid.*

Thus, we may say that environmental laws seem to comply with the RoN if they, procedurally, respect legal reserve and do not violate higher laws, and, substantively, are between the situation of at least having some enforced procedure (in other words, not being able to be ignored with the permission of the authorities) and having specific prices set on violations, with the happy middle probably including things like environmental impact studies and yearly auditing. While the above may sound critical of the court, this regime is likely the optimal situation. Again, the LOGJCC sets a high bar for unconstitutionality as incompatibilities that are "*clear, certain, specific and pertinent*".[95] With the Rights of Nature as open-textured as they are, it is difficult to imagine many clear or certain rule-incompatibilities.

Nor should conflict norms necessarily be sufficient, as if a court were to stray into such grounds as deciding cases based on conflicts between ill-defined norms, they risk becoming judicial activists, thus violating the nonpolitical character of the judiciary that is inherent to the separation of powers. This is not to say they should renounce all attempts to apply for judicial review with the RoN, as even the availability of such a procedure may cause others to take it more seriously. As Jaffe reminds us "*This function [judicial review] may be patently exercised only spasmodically but its availability is a constant reminder to the administrator and a constant source of assurance and security to the citizen*".[96] Thus, we may say that the Rights of Nature do not lend themselves to necessarily forbidding rules whose spirits are anti-environmental, but still serve to prevent those laws who violate basic legal principles, like that of legal reserve and hierarchy. Thus, we may move on to asking what specific actions, even when permitted by the administrative state, violate the Rights of Nature.

D. Which Future Actions May Violate the Substantive Rights of Nature and How Does Regulatory (Non-)Compliance Affect This?

In the question of the legality of discrete actions in the purview of the Rights of Nature, we may divide them into two types, to populate the next two sections: future actions, which tend to invoke the precautionary principle, and past actions, which tend to invoke protective actions. To analyse future actions, we may look at the Los Cedros case, one of the most noteworthy examples of the RoN being used by the Ecuadorian Constitutional Court. As we will see, the case also allows us to examine the relationship between regulatory environmental law and the RoN, as well as demonstrates different conceptions of scientific probability.

Factually, Los Cedros is a protected forest, which acts as a buffer zone to

[95] *Supra* note 31, art. 79.5.b.

[96] Louis Leventhal Jaffe, *Judicial Control of Administrative Action*, 325 (1st ed. 1965).

the Cotacachi-Cayapas National Park. ENAMI EP, the national mining company, was granted a permit for mineral exploration. In the first instance, local government officials sued on the grounds that the granting of such concessions and licenses ignored the protected forest status of the area, [97] the required steps to receive the permit were improperly met, and together these issues amounted to a violation of the RoN.[98]

In the first and second instances, both sides were largely talking past each other. The community's arguments focused partially on technical, regulatory violations, such as building footpaths too large. Yet they focused more so on the argument that no matter if the regulations were fulfiled or not, the RoN was still being violated by the end result of environmental destruction. They claimed that successful permitting does not equate to a non-violation of rights, and that "*the National Environmental Authority must verify that mining activities are sustainable and do not affect the rights of nature"*.[99] One amicus curiae takes this further, by explaining that "*there is a deficient normative premise, which includes an analysis of legal regulations (Mining Law, Secondary Environmental Regulations) that account for an analysis of legality unrelated to the nature of the protection action…. there is no chain of argument that allows reaching profound conclusions regarding the violation or not of certain rights*".[100]

In contrast, the Corporation's arguments barely touched any consideration of rights or the spirit of the law, focusing strictly on their compliance with license requirements and technical regulations. [101]

In both cases, the judges agreed with the Corporation, with the first explaining that a rights violation is something that violates the "minimum core" of a right, causing serious and irreparable damage, while this case only sees a limitation of a right, which, given the need to balance rights, is justifiable.[102] The second follows similar reasoning, agreeing with the Corporation given that nothing that explicitly goes against the regulations of a protective forest occurred.[103]

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[97] Unidad Judicial Multicompetente con Sede en el Cantón Cotacachi [Multicompetent Judicial Unit with Headquarters in the Cotacachi Canton], Judgement of Jul. 23, 2019, No. 10332-2018-00640 [hereinafter *First Instance of Los Cedros*].

[98] As an aside, there was some confusion over the actual status of the land throughout the case (particularly between "what is a protective forest, a protected area, and an intangible zone"), but in the end, it was determined to be a protective forest, meaning that it has a higher level of protection without any unique, categorical protections, thus having little impact on the case. From: First Instance of Los Cedros, *supra* note 97, 5.

[99] *Ibid.*

[100] *Id.*, 31.

[101] *Id.*, 5.

[102] *Id.*, 8.

[103] Sala Multicompetente de la Corte Provincial de Imbabura [Multicompetent Chamber of the Provincial Court of Imbabura], Judgement of Jul. 25, 2019, No. 10332-2018-00640 [hereinafter *Second Instance of Los Cedros*], 93.

In the third and final instance, the plaintiffs appealed on the grounds of legal certainty, arguing broadly that sporadically and forcefully applying imprecise laws, such as that of the RoN, degrades the certainty people have in their legal system. The Constitutional Court disagreed with the first instance judge's perspective that these issues were "*purely administrative matters whose judgment corresponds to the ordinary justice system*",[104] and instead chose to analyse this in the framework of a precautionary principle being employed to safeguard a constitutional right. Thus, based on Constitutional articles 396 and 73, they divided the exercise of the principle into three parts: 1) the verification of a serious threat; 2) the verification of a lack of scientific certainty; and thus 3) the necessity for the state to take timely and effective protective measures. After establishing that the first two conditions are present, the court ordered a stop to all mining activities in Los Cedros to fulfil the third step.[105]

This ruling ultimately presented an unclear perspective on the relationship between the RoN and the environmental regulations necessary to grant permits. While RoN operates as constitutional rights, permitting is governed by regulations or laws, making them theoretically independent, though they are intertwined in practice.[106] Particularly, if we believe the court that this is a matter outside of ordinary justice then there are two distinct ways to view the theory of the case: either that the compliance with the regulations was so minimal that it was void, meaning the permits were granted illegally in the purview of administrative law, and this contributes to the rights violations or that the letter of the regulations was technically followed to a minimal extent, meaning that they were granted legally in the purview of administrative law, yet the actions themselves ended up being constitutionally illegal through their effects. Both the Constitutional Court's reasoning in the final instance and the defence's reasoning in the second instance seems ambiguous to this point.

The first interpretation is shown when the court reminds the defence that "*the mere granting of a permit or license does not replace the obligation to carry out technical and independent environmental studies that guarantee the rights of nature*".[107] In other words, they are saying the established, legal obligations for environmental impact studies had not been met, and give the example of the possible impacts on the endangered Andean bear as a bright-line violation of Article 73 of the Constitution, which expressly prohibits the extinction of species.[108]

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[104] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Nov. 10, 2021, No. 1149-19-JP/20 [hereinafter *Final Instance of Los Cedros*], § 41.

[105] *Id.*, § 348.b.

[106] *Supra* note 39, 12-13; *Supra* note 13, art. 425.

[107] *Id.*, § 131.

[108] Constitución *supra* note 13, art. 73.

The second interpretation is seen in the judge's lamentation over the conduct of the mining company, stating that the process of environmental investigation was "*reduced to the entry of data into a computer system and the automatic issuance of said record, without verifying that there was an analysis*".[109] The judge further says that the Environmental Management Plan is insufficient because it is "*limited to listing in a general way activities to be carried out by the company involved, without further analysis*".[110] Thus, much like the defence of the second instance claiming that the company violated its own plan by promising to only build footpaths violated, which must mean that there is no issue and so no point to the case, or if a when "strictly necessary" and, in the end, building a large number of them, one can see how the above actions feel like they are invalidating the spirit of the regulations, even if they are not dispositive violations.

Of course, the defence's line of reasoning throughout the entire case consistently inverts this: they claim that either no regulation was violated, or if it was, the issue should be reduced to a mere regulatory matter, and therefore fall under ordinary jurisdiction rather than constitutional. Such an understanding of the case, or even of legal rights in general, would make no room for the Constitution and would thus render every right that has corresponding regulations to be non-judicial, an impossible and absurd conclusion.

Ultimately, the distinction between these two lines of reasoning depends on what it means to violate a rule, specifically whether an egregious violation to the spirit of a regulation is sufficient to declare it breached. Whereas the first instance judge recited paragraph upon paragraph of technical regulations the mining company needed to follow and had complied with,[111] the final instance judges interpreted this compliance as mere data entry into a computer, an act of fulfillment so minimal it was possibly illegal.[112] Even if we cannot decide between these two interpretations, at least without trying to find an affirmative answer to what vehicles aren't allowed in the park, we may at least comment on what each actually makes illegal.

To the interpretation that the permits themselves were void owing to the minimal level of compliance, we may note that the court orders all its "*infralegal regulations*" about the Rights of Nature to be adopted, without ever codifying or specifying what those are supposed to be. From a close reading of the case, we may attempt to systemise these infralegal regulations as demands that for the issuance of mining permits:

1. "*each individual case… must be evaluated, with technical and scientific*

[109] *Id.*, § 137.
[110] *Id.*, § 140.
[111] *Supra* note 97, 6.
[112] Final Instance of Los Cedros, *supra* note 104.

information",[113] and be…

2. "*preceded by studies of environmental assessment or risk that accounts for the biodiversity of the respective ecosystem*"[114] which include…
3. "*specific and substantiated scientific information on the impacts on the rights of the nature*",[115] which aim to…
4. "*ensure that the authorization will not lead to the extinction of species, the destruction of ecosystems and permanent alteration*"[116]

In contrast, the court does not allow the issuance of mining permits from,

1. "*listing in a general way activities to be carried out by the company involved, without further analysis appropriate to the reality of the biodiversity,*"[117] or…
2. "*the entry of data into a computer system and the automatic issuance of said record, without verifying that there was an analysis by the environmental authority,*"[118]

Given that this interpretation specifically finds issue with violating the spirit of the regulations, it seems appropriate that it was not a bright-line standard that was issued, but a series of warnings. If a bright-line standard had been issued, that would amount to a substantive change of what the regulations actually are. These infralegal regulations may be especially helpful given the nature of the contested regulations themselves. In the first instance ruling, the judge almost exclusively focuses on procedural regulations, with little care to their outcomes or ends. It is about going through the motions.[119] As the previously discussed issue of solely rule-based regimes made clear, some end goal is necessary to orient and contextualise the procedures. Thus, we may say that it seems that the RoN functioned to reemphasise the intent of the regulations by reminding the court of their constitutional importance, thus inviting stricter scrutiny of their fulfillment, even if there is no bright-line rule of what that fulfillment is. This would cause the unconstitutionality and administrative illegalness to be self-reinforcing states.

To the interpretation that the permits were valid but the action was nevertheless constitutionally illegal, we may now return to the question of what makes an action illegal to the RoN even if it is fully legal under administrative environmental law. This returns us to the precautionary principle, which in Los Cedros, the court breaks it down into three parts: 1) a potential impact; 2) a lack of scientific certainty that this impact will occur; 3)

[113] *Id.*, § 218.
[114] *Id.*, § 131.
[115] *Id.*, § 130.
[116] *Id.*, § 218.
[117] *Id.*, § 140.
[118] *Id.*, § 137.
[119] *Supra* note 97, 6.

and if the previous conditions are met, a necessity of the state to take time and effective protective measures.[120] When asking what triggers the principle, we may combine them to ask, how do the level and potential of threat combine to approach or surpass the threshold necessary for judicial action.

The potential, or uncertainty, of the harm is interchangeably used to refer to two distinct concepts in this case. Firstly, in the sense that there is some, theoretically determinable, percentage chance that this is the true value of how likely the harm is to occur. This seems to be what the court is referring to as "*relatively clear or possible effects of an activity or product*".[121] Yet, this seems to switch meaning when the majority opinion later says that the high degree of ecosystem complexity would rule out the possibility of scientific certainty, even with the appropriate studies.[122] Of course, in reality, ecosystem complexity has no effect on what the true value would be, it would only affect how close our estimations could be to the true value, in other words, the margin of error of any study. Judges Quevedo and Marin's concurrent vote, take clear issue with this, pointing out it is contradictory to fault someone for not having certain studies when, if they did have those studies, they would be insufficient anyway. The dissent is further correct in stating that "*The ruling does not explain why the Court, without relying on technical support, would have the ability to decide a priori what is scientifically demonstrable and what is not*".[123]

Thus, the court is not just suggesting that the traditional understanding of the precautionary principle is at play, in which the courts have to respond to an established risk with an eye towards prevention, but moreover, even the possibility of a possibility of risk may be too much, particularly when that second-order possibility is particularly large (in other words, there is an expectation of a large margin of error).

Thus, it seems we cannot determine any bright-line rule for how small a chance of harm surpasses the threshold for a company to prevent the application of precautionary measures to ensure the RoN. We may at least conclude that independent of that percentage chance, the margin of error of this chance must be fairly low.

We may now focus on what level of harm, independent of bright-line rules and without the doubt that comes from unenthusiastic regulatory compliance, is enough to violate the RoN. Given that the level of harm and the probability of that harm are inseparable when determining if a violation will occur in the context of the precautionary principle, we instead must look at cases where the probability of harm is 100%, to independently isolate the threshold of harm necessary to violate the RoN is. This forces us to consider instances of past harms, in which courts have been asked to decide whether they deserve

[120] *Supra* note 104, § 62.
[121] *Id.*, § 62.2.
[122] *Id.*, § 125.
[123] *Id.*, § 115.

protective actions, specifically because they violate the RoN.

E. Which Past Actions May Have Violated the Substantive Rights of Nature?

To understand what level of harm needs to have occurred to trigger a protective action under the RoN, independent of administrative law violations or unenthusiastic fulfillment of permitting requirements, one may turn to the case law to try to find some threshold, only to find immediate inconsistency: in the aforementioned case of earthworks in Puyango, a RoN violation was declared owing to the deposition of the rock and soil into a river from the digging of a foundation for a single building,[124] while the later RoN case of Condor Mirador (Mining) concerned the deposition of the rock and soil from an entire mining operation being dumped into a river, yet found not to be a violation of the RoN![125]

Yet even if we cannot create such a rule, we may possibly ask if there is a lower bound for sufficiency, in other words, is there a lower threshold, the smallest amount of harm that may still be a violation? As an example, in the aforementioned case of the tree fellings in Cuenca, we saw the city was held in violation of the RoN owing to the felling of only dozens of trees.[126] As another, the singular act of a family keeping a wild animal as a pet was enough to violate these rights in the case of Estrellita.[127] Admittedly, these cases do not inherently create the lower threshold, given that there may be other, lower cases that the author is unaware of, or that future cases may find a violation of these rights owing to even less severe instances of harm. Yet they do give us a sense that judges are willing to entertain, even confirm, instances of rights violation that are seemingly miniscule. So why not entertain cases of vastly larger scales of damage? Two lines of reasoning seem present in the aforementioned cases which may contribute to this seeming inconsistency.

Firstly, economic cost-benefit analysis may not be formally calculated by judges, but one need only be passively familiar with the Tellico Dam controversy[128] to understand the basic principles of rational decision-making lend themselves to some proportionality in environmental protection. Statutorily, Article 283 of the constitution recognises that "*The economic system is socially oriented… it tends towards a dynamic, balanced relationship among society, State and the market, in harmony with nature*".[129] This is seized upon by a number of judges, not least Judge Martinez in a dissenting vote to Los Cedros,

[124] Puyango Earthworks Case, *supra* note 21.

[125] Primera Sala Civil, Mercantil, Inquilinato y Residuales de Zamora Chinchipe [First Civil, Commercial, Tenancy and Residual Chamber of Zamora Chinchipe], No. 1711120130317.

[126] Cuenca Trees case, *supra* note 75.

[127] Estrellita case, *supra* note 70.

[128] Louis P. Cain & Brooks A. Kaiser, *Public Goods Provision: Lessons from the Tellico Dam Controversy*, 43 Natural Resources Journal 979 (2003).

[129] *Supra* note 13, art. 283.

who councils that "*it is not feasible to grant these rights [the RoN] an all-embracing, absolute or prevalent nature over other rights or constitutional norms, reaching the point of excluding all extractive activity*".[130] In short, the Rights of Nature must be applied with a consideration of the economy.

Secondly, we may consider the influence of negligence, or a failure to exercise reasonable care. This is relevant when one acknowledges that extractive projects always require some minimal amount of unavoidable environmental harm, such as the removal of the metals from the earth that mining operations seek, and often tend to involve other amounts of negligent harm, whether from cost-cutting, reckless, or accidental behaviour. The large rhetoric around economic-environmental balance in the constitution contributes to the idea that unavoidable harms should not be subject, or at least be less subject to scrutiny. On the other hand, damages coming from negligence have, by definition, less defence to them, given that they were not necessary, and so are likely more applicable to Rights of Nature violation charges. This mirrors the additional scrutiny that negligent harm (specifically "due to accidents, incidents or poor application of environmental management plans, or due to major non-conformities"[131]) invites in the context of having mining permits revoked. This further fits with the theory of the Cuembí Triangle case,[132] given that the court's order to reformulate the plan was to allow them more time for due diligence, which could have led to an optimisation, and so less non-necessary infringement, of the rights in question.

This is more obvious when we look at the weakness of RoN arguments which allege a RoN violation from the necessary harms of an extractive project. For instance, take the Condor Mirador (Mining) case, in which the plaintiffs tried to allege that mining activity in the area should be prevented owing to the possibility of "*contamination of soil and water, noise and air pollution, elimination of vegetation cover, elimination of forest in an area of at least 2000 hectares…*"[133] This is equivalent to arguing that a specific dam is in violation of the RoN for reducing the downstream water flow. Without any damningly negligent details about that harm, judges are effectively being asked to outlaw entire industries. These damages, while unfortunate, are at least partially inherent to the activity in question, to rule them as illegal would be a dramatic use of judicial power.

As its logical inverse, presenting negligent environmental damages

[130] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 10th of November, 2021, Saved Vote by Judge Martinez for Sentence No. 1149-19-JP/20, § 20.

[131] Reglamento Ambiental de Actividades Mineras [Environmental Regulation on Mining Activities], § 140 (Asamblea Nacional [National Assembly], Quito, 2016).

[132] Cuembí Triangle Case, *supra* note 41.

[133] First Civil, Commercial, Tenancy and Residual Chamber of Zamora Chinchipe, *supra* note 125.

provides a stronger case for RoN violations. Take the case of the Biodigesters in the Tsáchila Peripa Commune. A corporation had established several pig farms, whose pollution was affecting the community. The company announced they were building biodigestores, to turn the pigs' methane into fuel, which caused the community to allege this would cause a violation of the RoN. The court decided that "*the concern of the plaintiffs about the impact on the environment is legitimate not because of the installation of the biodigesters, but because of the way in which they could function, if the essential, adequate and timely monitoring is not carried out*"[134] In other words, the issue was not the unavoidable harm, but the risk of negligent harm that could arise from the improper conduct.

This further helps to explain the theoretical confluence of administrative environmental law and the RoN. Given that the point of environmental regulations is largely to limit the avoidable environmental damage of extractive projects, when a party only complies with them in the most box-checking fashion possible, the likelihood of negligent damages is likely to rise. In short, the less necessary the harm is, the less defensible it is.

Thus, while there is no bright-line rule for how much harm triggers the RoN, we know that it is modulated by the economic benefit and the level of negligence of the harm. Interestingly, recalling our earlier examples of some of the smallest harms that have successfully violated the RoN, we can see the dynamic between these three variables play out. In the case of tree felling in Cuenca,[135] the level of absolute harm was quite low, yet there was little justifying economic benefit (given it was done for aesthetic reasons), and could be said to be fully negligent, given that it was a completely avoidable action that city voluntarily undertook and could have chosen to rectify at any time (via replanting) prior to the case. Similarly, in the case of Estrellita,[136] which also had an overall quite low level of total harm, given it had to do with the attempted domestication of a single animal, also displayed no justifying economic benefit nor was the harm in any way unavoidable, and on the contrary, was likely a completely-economically neutral and optional exercise of harm. Therefore, we may treat these three principles, the absolute level of harm, its economic justification, and its negligence, less as prongs of any test, but as independent variables and so, even if one is low, the high degree of the others may counter to still create a violation.

Returning to our question on future violations, we saw that it was principally based on both the probability and severity of harm. We dissected the variable of probability into the probability itself and its margin of error and then to isolate and understand how the level of harm is treated, we turned

[134] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jul. 16, 2009, No. 0567-08-RA, 8.

[135] Cuenca Trees case, *supra* note 75.

[136] Estrellita case, *supra* note 70.

to cases that hinged upon past, discrete action. In these cases, we saw the severity of harm was modulated by how economically justifiable and how negligent it was. Altogether, these five considerations – 1) probability of harm, 2) margin of error in probability, 3) level of harm, 4) economic justifiability, and 5) negligence - present a, if not taxonomical, list of considerations that courts seem to consider when considering if an action will result in a violation of the RoN. This naturally prompts us to ask exactly how the RoN is balanced with competing rights.

VI. How are the Rights of Nature Balanced Against Competing Rights?

Finally, we may take up the challenge of the Galapagos Carretera case judge, who noted the necessity to "*go a little deeper*"[137] on the balance of the RoN and competing rights. Some have argued that proportionality in constitutional law is a "*universal standard of rationality*", such that "*the interference with rights must be justified by reasons that keep a reasonable relation with the intensity of the interference*".[138] This is relevant if one considers Duarte's ideas on social claim rights, meaning those that depend on some positive, government action that enforces one's rights by enforcing another's duty to not infringe on those rights, such as the rights of nature. He explains that the common situation is one of economic scarcity, and thus these rights will not be fully enacted.[139] Thus, the question is what does that RoN balancing concrete look like? While the earlier section showed when balancing is not necessary, and when it is how the procedure may minimise non-necessary infringement, we have yet to address cases in which the Court substantively balanced competing rights. To date, Ecuadorian Courts have, at least, considered how the RoN interacts with a plethora of cultural rights, various property rights and the right to free internal migration.

A. Balancing between the Core and Periphery of Rights

We previously identified that courts need not practice balancing when the norms were in direct logical conflict, as such norms cannot be balanced, or when they were so vague that any conflict is theoretical at best, leaving little to actually balance.[140] We found that balancing was the realm of "middle cases", which hinged upon substantive norm conflicts whose full fulfillment of either would lead to non-total yet non-zero infringement of the other.

This is further refined in the case of the Ley de Galapagos, in which the

[137] Santa Cruz Highway Case, *supra* note 22.

[138] Jan Sieckmann, Proportionality as a Universal Human Rights Principle, in *Proportionality in Law: An Analytical Perspective* 3, 3 (2018).

[139] David Duarte, Gains and Losses in Balancing Social Rights, in P*roportionality in Law: An Analytical Perspective* 49, 62 (2018).

[140] *See supra* note 90, Part II.B.

plaintiff sued the Federal government for a law which restricted internal migration to the islands, accusing this of being a form of unconstitutional discrimination.[141] For context, this law was actually implementing Article 258 of the current constitution, and similar provisions existed even in the prior constitution.[142] Given this, the plaintiff argued for a near-natural law type of argument, claiming the discrimination went against a laundry list of constitutional rights (1, 3, 4, 6, 10, 11, 40, 61, 64, 66, and 424), while the defence simply pointed out that the action is constitutionally approved and that restricting migration to the fragile Galapagos islands was important for the RoN. In response, the court found that this really was not a case of rights balancing, given that the constitution plainly states that this is a legal behaviour, and given that the law itself was explicitly constitutionally enabled and important for the RoN as a norm, it was not unconstitutional.[143]

From this case, we can observe an interesting interpretation of the idea of balancing. The fundamental case contrast in the case is between Article 11, part 2, which reads "*All persons are equal and shall enjoy the same rights, duties and opportunities. No one shall be discriminated against for reasons of ethnic belonging… migratory status*"[144] and Article 258[145] which explicitly discrimination based on migratory status. While the court's decision about the specific law is understandable, in light of the desire to apply the highest and most specific rule available, it largely ignores the broader issue that the constitution itself seems to include a severe contradiction, which should naturally lend to rights balancing. Yet the court seems to oscillate on the question of whether any rights have been infringed or not, stating in the conclusion that the law "*does not threaten the unity of the Ecuadorian State, nor the rights, freedoms and opportunities of citizens; nor against the principle of equality before the law, nor the mobility or migration, which, as has been analysed, the limits [which] arise from one's own Constitution*".[146]

This argument is strongly reminiscent of the first instance judge in Los Cedros, who made a distinction between the "*minimum core*"[147] of a right and the whole of the right, only the infringement of the former being an actual violation, given that rights are not absolute. In the case at hand, the judge seems to consider that the law does limit the more generalized rights of equality (such as in regard to migratory status), but does not infringe on their core, likely because it is not the generalized right to migration which is at

[141] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Apr. 26, 2012, No. 017-12-SIN-C [hereinafter *Galapagos Law Case*], 2.
[142] *Id.*, 3.
[143] *Id.*, 9-17.
[144] *Supra* note 13, art. 11.2.
[145] *Id.*, art. 258.
[146] Galapagos Law Case, *supra* note 141, 17.
[147] First Instance of Los Cedros, *supra* note 97, 8.

issue, but a very specific instance of it. Analogously, the right to free speech in the US may be rightfully infringed by rules which prohibit speech that leads to imminent public harm, but is wrongfully infringed by rules that prohibit a substantial amount of constitutionally protected speech. Applying the logic of the overbreadth doctrine, we may understand proportionality to allow for the limitation of a right in the form of specified, peripheral carve-outs. Thus, it seems that the Court may also be uninterested in balancing rights in some of the aforementioned "middle cases", those of substantive norm conflicts whose full fulfillment of either would lead to non-total yet non-zero infringement of the other. Yet important, this is because the above case is not truly one of the middle cases. This is owing to the fact that the full fulfillment of the Ley de la Galapagos would only infringe on the periphery of the right to free migration, given that the vast majority of instances of internal immigration would be unchanged, yet the full fulfillment of the right to free migration would fully infringe upon the core of the Galapagos Authorities' special right to control migration, as it would simply remove that privilege from them and give it the migration-governance privileges of any other government. There is an asymmetry between the two rights, given that the core meaning of one is located within the periphery of another, thus forcing the judiciary to decide for the one whose core is in peril when they are in conflict. Yet the core of any right is more identifiable when it is more narrow and specific, thus it seems to emphasise that *lex specialis derogat legi generali.*

B. Balancing the Core of Rights

As a whole, this case gives a paradoxical perspective on the RoN. On one hand, the court did rule in favour of the RoN, given that it upheld the migratory restriction to the Galapagos and so could be said to have upheld its conservation.[148] On the other hand, it suggests that rights balancing only needs to be performed when both the cores of two rights are in conflict. Yet it also seems to suggest the court privileges rights with narrower or more identifiable cores, which is difficult for the RoN given its open texture. Imagine that, as allowed by Art. 407,[149] the president and assembly approve of the extraction of natural resources in a protected area, such as what was recently done for oil drilling in Yasuni National Park. For activists to sue on the grounds of the RoN seems an uphill battle, as deciding against the President would be to directly violate the core and straightforward meaning of one constitutional rule, while deciding for the President could easily be seen as a permissible limit to the periphery of another constitutional set of rules, the RoN. Thus, it seems the severity of a rights infringement in the context of another rights infringement has less to do with the action itself or the importance of each right, but the scope of the rights. Thus, genuine rights

[148] Galapagos Law Case, *supra* note 141, 17.

[149] *Supra* note 12, art. 470.

balancing seems to occur most appropriately when both rights symmetrically infringe onto each other's core meanings when fulfiled. Thus, we may ask what the Court's requirements are in these cases.

One example of such a case involves a shrimp farmer in Cayapas, who had a farm in the mangroves that was eventually decided to be a part of the Mataje-Cayapas Reserve. Unlike his neighbours, he held out from being evicted, arguing that his constitutional rights to work and property defend him against government eviction, something which in the first and second instances judges agreed with. Yet in the Constitutional Court, the judges argued that the past judges failed to consider the RoN, forcing them to ask whether these judges violated due process of the use of public powers. This was broken down into three considerations, whether the previous rulings were reasonable, or based on constitutional principles, logical, implying a coherence between premise and conclusion, and understandable, enjoying clarity of language.[150]

They found the previous courts failed the reasonability standard, given that they "*did not at any time examine the existence or not of a violation of the constitutional rights of nature,*" for instance they "*should have included the study of the potential impacts that the production process in aquaculture generates on nature*". [151] Thus, the ruling was overturned and the case was sent to be retried, and by establishing that the "*reasonable, logical, and understandable*"[152] standard was applicable to the RoN, the Court set the precedent that cases involving environmental harm must at least consider the RoN in their analysis. This is further seen in the recent selection by the Constitutional Court of the Dulcepamba Dam case for their review, in which their reasoning was the same, that the second instance judge failed the reasonability prong by failing to consider the RoN.[153] Now that we are sure courts must consider the RoN in relevant cases of rights conflicts, we can move on to asking how they do so.

For this, we may look again at the Cuembí Triangle case previously described, where the government attempted to create a protective area on the lands of indigenous peoples, which would have, not formally but in practice, restricted their rights. In this case, the technical, text-based, non-conflict of norms was not enough. Instead, the court took a more *de facto* understanding of the situation, for instance acknowledging that many historic communities lack formal titles to their land, and despite this introducing certain legal issues, they were still the owners of that land, and so the exception for communities with titled land was not sufficient to ensure their rights.[154] In a

[150] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of May. 20, 2015, No. 0507-12-EP, 8.

[151] *Id.*, 14.

[152] *Id.*, 9.

[153] *Id.*, 15.

[154] Cuembí Triangle Case, supra note 42, § 105.

similar vein, the exception for sustainable "harvesting" activities was simply too vague to count as genuine assurance that they would be able to maintain their food-gathering practices and collective way of life.[155] Thus, clear instances of potential rights violations cannot be hand-waved away with technicalities. This *de facto* understanding is further likely a necessary component of the previous point on ensuring the only the most necessary infringement of each right occurs in the context of rights balancing.

C. The Panoply of Factors when Balancing Nature's Rights

Thus, in summary, as we previously established, the RoN is transversal and *erga omnes*, and so all competing rights have the potential to be balanced against them, including various rights concerning culture and autonomy for indigenous peoples, the right to migration, equality before the law, property, and work. The balancing procedure should lead to conclusions that are reasonable, logical, and understandable, and specifically to be reasonable, the RoN should be analysed in cases where it is contextually appropriate. Yet even then, balancing need not always be necessary, as to be balanced, the rights must infringe each other in the same way, either both to the periphery or both to the core. When balancing is done, the severity of the violations to each should be unavoidable, in other words, one right should not infringe on another in an unnecessary way. This necessitates a de facto, practical understanding of how each right will be limited, rather than relying on theoretical promises that any given right will be respected.

In the previous section, we identified that when a court was asked whether a RoN violation had occurred, specifically allowing us to momentarily skip questions of future possibility and scientific uncertainty, their analysis included elements of the total level of harm, the economic benefit of that harm, the negligence of that harm, and the rights balancing of the case, the final aspect of which we now have a more complete understanding of.

In the section prior to the previous, we attempted to identify the elements that courts analysed when asked to consider whether a future action would violate the RoN. This effectively boiled down to the likelihood of the harm and the severity of the harm. We identified that the likelihood meant not just the chance of the harm in question, but the margin of error of that understood chance.

Together, these three sections attempt to present a taxonomical description and analysis of the elements that Ecuadorian courts, especially the Constitutional Court, have paid attention to over nearly two decades of analysing the Rights of Nature.

Further, in a much earlier section, we attempted to understand what the court considers to be nature, and found it rested principally on two variables: being free from human influence and including biotic life. Further, the

[155] *Id.*, § 147.

previous discussion of how these two variables combine in creating "nature", was telling in so far as how the Rights of Nature can be analysed. For instance, we may say that there is evidence that when courts analyse the RoN, they at least sometimes pay attention to the absolute amount of harm, its economic justifiability, its negligence, and how it affects rights balancing, but we cannot actually say how these variables are themselves weighed against each other. Thus, we may admit that this analysis leaves much unanswered. Yet, even from such a limited analysis, we have been able to start to understand how courts reason on these questions and what variables they include. We may put the utility of such an analysis to the test by asking whether it allows us to answer the questions posed at the beginning of the piece.

VII. Responses to the Initial Five Sui Generis Issues

We may finally address, in turn, the five criticisms of the concept of the RoN presented earlier.

A. Anti-Human Rights

The first criticism was that the RoN is anti-human, usually framed in such a way as to argue that they hurt human well-being by hurting their economic well-being. To this, we have seen that the Ecuadorian courts are willing to consider competing human rights and reprimand lower courts for failing to properly balance them, as in the Cuembí Triangle case.[156] Further, as we saw in Los Cedros, judges have argued to consider the economic considerations of applying the RoN.[157] Together, these examples reinforced via practice the statutory obligation that the RoN be applied transversally, in conjunction with the existing corpus of rights. Limiting and violating rights are not the same, and to balance rights inherently involves competing rights being infringed to some, theoretically acceptable, extent. Therefore, we may say this criticism is partially true, the RoN is often antagonistic to human interests, but to allege that they overpower or trump human interests would be unfounded.

B. The Limits of Nature

The second criticism was that the RoN suffers from jurisdictional issues, firstly by using the vague notion of "the environment" and secondly by failing to include an intuitive notion of who, exactly, the party is in a RoN case. To the first point, we may observe that the RoN has been used largely for biotic and non-artificial beings, and that while ambiguities may exist about exactly how those variables fit together, this is not a fatal flaw. To the second issue, we exhaustively divided theoretical cases of environmental destruction into four types: discrete *ex-ante*, dispersed *ex-ante*, discreet *ex-post*, and dispersed *ex-ante*, and reasoned that in only cases of dispersed *ex-post* harm is this

[156] *Ibid*.

[157] Corte Constitucional [Constitutional Court], Judgement of Nov. 10, 2021, No. 1149-19-JP/20, § 20.

question even relevant. In these cases, the judges have a large scientific bureaucracy to assist them in answering this question. The reason this may seem to even be an issue in the first place is that, in most rights regimes, a specific party must be identified and delineated for reasons of standing, yet given the universal standing of Ecuadorian RoN, this is not an issue. Therefore, we may say this issue is, in practice, moot.

C. The Aggregation of Distinct Entites into "Nature"

The third criticism was that the RoN suffers issues of aggregation, that is even if the jurisdiction of "nature" at large is defined and the part of "nature" that suffers harm has been defined in a specific case, we cannot say how the rights are dispersed amongst the individual entities within the part of "nature" we are paying attention to. Further, the individual entities within any part of "nature" may be helped or hurt by a given remedial action, and thus the net outcome of the action may be reframed as either positive or negative, depending on the, ultimately arbitrary, way the entities are grouped together.

Given the highly theoretical nature of these criticisms, we may contextualise them with a hypothetical case. Imagine a section of rainforest was being polluted by a mining company that had received mining permits under dubious conditions. The aggregation question asks how we conceptualise the right's bearers, for instance, is the whole of the affected area one cohesive entity, does each ecosystem have individual rights, does each species, each animal? Further, we must ask how we weigh the rights of these different parts together. Imagine one remedial plan that helps two of the three watersheds and hurts the last one, but the last watershed contains the majority of distinct species. One may ask whether this is a net good or bad, and further, are these rights inviolable such that the courts may not sacrifice a small number of them for a greater number?

The Constitutional Court has consistently emphasised the systemic idea of nature, that there exist emergent rights that exist for nature greater than the sum of its parts.[158] Thus, to the aggregation question, we may say that all individual entities in the ecosystem have rights, but stronger rights exist for the ecosystem as a unitary whole. Thus, we need not try to divide the rights between its entities. This of course becomes problematic in light of the watershed-species question posed above. If the entities are put in conflict, how is this resolved? Again, the court's emphasis on the systemic perspective is necessary. If the good of the whole is larger than the good of each of its parts, the well-being of the whole should be appropriately prioritised. This is further in line, conceptually, with the concept of balancing previously discussed, if the rights of humans and nature should be balanced, it is difficult to imagine that the rights between aspects of the environment should not either. To the

[158] RoN Guide, *supra* note 50, 40.

hypothetical above, the court thus need not count the plus and minus to watersheds, species, and individual animals and plants, and then decide which category to consider the most important. Instead, the court must consider all the degrees of benefits and harms to the entire, jurisdictionally defined part of "nature" to come to a proper conclusion. Sometimes this may privilege the watershed, and other times the species, but it is never either on a categorical basis.

This may be an unsatisfying response, detractors may claim this is to simply harken to some notion of the "greatest good". Thus, we may further refine the response by adding that in the Estrellita case, we saw the court decide that animals have individual rights distinct from the RoN as a whole. Now this may seem to throw a wrench in the argument, especially if one considers that some animals thrive in degraded and human-influenced environments. Yet this would be to confuse the notion of individual animal rights with the overarching notion of human rights. While human rights generally exist to ensure that humans are better off, animal rights seem to ensure they are able to perform their natural role in an ecosystem. It is the re-emphasis of the systemic view, necessary due to the outsized role that animals play in maintaining ecosystems. In the Estrellita case, the specific rights given to animals do nothing to ensure their well-being in the natural world, but are the right to exist and to free animal behaviour.[159] It is the gazelle's right to be eaten by the lion. Thus, the "greatest good" clearly points to "good" as akin to an environment free of human influence.

To the most dismissive, those who believe that rights must be distributed in an individual, discreet manner, and the conflict between holders must be more defined, they may well ask: "*If an ecosystem would be better off without some species, can the species be reduced? Does that not generate a rights conflict?*". Yet such questions betray a fundamental misunderstanding of what ecosystem health is. One may claim that, in some sense, an ecosystem is better without certain higher trophic levels, as they reduce the overall biomass. Yet this understanding of ecosystem health is not what "nature" means in this context, in this paradigm, nature is the thing that is biotic, and more importantly, absent of human influence. Nature cannot be, *ceteris paribus*, better off without some species, as by the definition of Nature in this regime, given that the presence of natural species is a key component of Nature's health. In total, the system's perspective is absolute, given that while animals seem to enjoy increased rights over other parts of the ecosystem, these rights are only to maintain their natural function within the ecosystem. Thus, the aggregation question is answered quite simply, as it is the ecosystem (as the highest aggregation) that is the most highly valued.

[159] Estrellita case, *supra* note 70, § 175.

D. Comparing Multi-Dimensional Values

The fourth criticism has to do with multi-dimensionality. This is the issue that describes the fact that the value of nature in law is traditionally boiled down into dollar amounts, which allows the possibility of comparing two things, while the RoN forces one to consider multiple, dissimilar values (ranging from the sanctity of species existence to the beauty of the environment to the health of the ecosystem), which forces decision-makers to act, at least before any precedents are set, in an arbitrary fashion.

This is a much larger and much more often debated issue than strictly in the context of the RoN, and so we may start by employing more generalised arguments. Firstly, to ignore a variable is equivalent to setting it at zero. If we acknowledge that the true value is some nonzero, unknown, and intermittent value, then some infinitesimally small estimated value is more likely than zero to be closer to the true value. Secondly, some may take issue with this, arguing that there is no true value, as the importance of any of these disparate values is fully normative. Thus, any estimation is as close as any other estimation, given there is no target. This is true, but only so far as to say that any values our legal systems gesture towards is normative (freedom, democracy, equality, etc.). Thirdly, just because values are incommensurable (meaning they cannot be compared on the same scale) does not mean they are incomparable. Decisions as simple as choosing between restaurants to eat dinner require choosing between numerous incommensurable variables, such as food quality and price.

These abstracted lines of reasoning may seem suspect in the context of the RoN though, given that conventional environmental law already has mechanisms to estimate the dollar value of environmental quality, and so shifting away from it would be a downgrade. Yet this line of reasoning is somewhat confused, given that the RoN simply shifts where the arbitrariness resides. In the RoN, the arbitrary decision is between the intrinsic value of the environment and the dollar value of some environmentally degrading project. In conventional environmental law, if one wants to employ some cost-benefit analysis, the arbitrary decision is how to estimate the intrinsic value of the environment into dollars, which is then non-arbitrarily compared to the dollar gain of the environmentally degrading project. The RoN simply shifts the arbitrariness from a scientific bureaucracy to a judge, and so the criticism that the RoN introduces new arbitrariness is simply to pretend the system was not arbitrary, to begin with.

E. Nature as Having Interests

The fifth criticism has to do with interest having, the idea that inanimate and unconscious entities cannot be properly thought of as having an interest, and so cannot bear rights. This rests on the conception of rights that is status-based, that given some characteristic, some group is rightfully enfranchised.

We can briefly respond in two ways: by arguing that the environment does have interests or by claiming that non-interest-having beings can have rights.

To the idea that the environment does have interest, we can point to the obvious fact that biotic life uses energy and work to further the existence of its genes, whether that be through surviving itself or ensuring the survival of its offspring. Admittedly, this does not apply to abiotic beings, which may be part of the reason the court presents an ambiguous stance on them.

To the idea that non-interest-having beings can have rights, we cannot properly formulate an argument. This is because status-based conceptions of rights, the idea that some group is rightfully enfranchised owing to some quality or characteristic, is also not an argument. These are simply assertions, with the obvious historical context being that what qualities allow enfranchisement has been arbitrarily restricted for the entire history of rights. We may also point out that the negative argument, that the environment cannot have rights because it does not have interests, is an outright "no true Scotsman" fallacy. Given there is no argument to make, we may at least point out that corporations do not, themselves as distinct entities, have interests. Admittedly, one may argue they only have a simplistic interest in generating profit, but this is no less mechanical than an animal's interest in surviving and reproducing.

More importantly, this criticism is a binary argument about the abstract validity of the rights, while the other four issues were about the efficacy of these rights. This criticism, by making a status-based argument about the validity of Nature having rights at large, can be most succinctly shut down by the sheer fact that Nature, at least in Ecuador, does have rights. Any argument that x status cannot hypothetically exist is false when one can observe that x status does exist. À la Popper, one black swan is enough to prove that not all swans are white.[160]

F. Remaining Questions

Thus, the first four criticisms point to some important points. To the anti-human question, the Ecuadorian court system has yet to enumerate taxonomical guidelines on what is an acceptable level of tradeoff between human and natural interests. Whether they ever will seem unlikely, in the same way that few courts have ever tried to enumerate the precise trade-offs between competing values, such as between security and liberty. To the jurisdictional question, it is still ambiguous exactly what is the proper role of the judge and the scientific bureaucracy in determining what characteristics are sufficient to cause an entity to be included as a part of nature in particular suits. To the aggregation question, the relationship between the unique rights of animals and the rights of Nature as a whole, in the rare case they are in conflict, is possibly open. To the multidimensionality question, how the

[160] Karl Popper, The Logic of Scientific Discovery, 373 (2nd ed. 2005).

judiciary can avoid subjectivity when dealing with inherently subjective values is equally open, but to attempt to provide an objective answer to subjective value weighing may simply be a logical contradiction. Thus, while these questions promise future scholarship within the Rights of Nature framework, the adequacy of the answers and exceedingly theoretical gaps left over demonstrate that the RoN is an intelligible framework.

Conclusion

We began by noting the common stereotype of the RoN, that they were just legal poetry, sounding nice but lacking real meaning. This was formalised into our formulation of intelligibility, asking whether these rights were too in conflict with the existing Ecuadorian legal system to be valid and whether they were able to be objectively enough balanced within that legal system. Through an analysis of the metanarrative of the RoN and a slate of random cases, we could see this was not the case and disproved that they were unintelligible. Then, to demonstrate the intelligibility of the regime, we broke it down into logical steps. We first identified what characteristics make something "Nature" and how it as an entity is defined in specific cases. We then determined the procedural and substantive rights that these entities were entitled to, what factors may lead to the idea that actions or rules have violated these rights, and how these rights are balanced against competing ones. Thus, we were able to appropriately answer the literature questions, yet with some questions remained.

Yet our inability to perfectly answer the five literature questions points to a broader point, that we cannot formulate and weigh all of these factors without straying into the realm of legislating. Thus, the Constitutional Court will inevitably be forced to legislate to some extent. The aghastness of legal formalists to such an idea points to the ultimate issue the RoN faces, that by being a novel and sentiment-based rights regime, we cannot employ what Austin termed "*the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody*".[161] New administrative regulations may be novel, yet they are seen as less problematic given their more objective criteria of fulfillment. Established rights regimes may be based on sentiments, yet their storied nature, societal acceptance, and foundation of congealed reasoning lend them credibility. The fatal combination of being both novel and sentiment-based means that the RoN often commands little respect. Yet throughout these cases, we have seen judges show restraint in their rulings, largely only castigating lower courts when they have entirely failed to even consider the RoN, not for any improper weighing of them. Further, the intertwining of regulations and rights frees the courts from fully being legislators, even if they need to make the law to some

[161] John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law, Vol. 2, 634 (5th ed, 1885).

minimum extent. Thus, we concluded that a continual development of this concept of rights is not a fool's errand, but a consequential step in the ongoing history of the development of legal rights.

Relationship between the Supreme Court and Constitutional Court of the Republic of Azerbaijan after Recent Reforms – Conflict or Cooperation?

Ibrahim Ismayilov[*]

Abstract

This article will cover the recent developments in the judicial system of Azerbaijan regarding the relationship between the Supreme Court and the Constitutional Court. After the recent reforms, the Supreme Court's role in establishing uniform law application gained importance in the legal system of Azerbaijan. On the other hand, these developments paved the way for the conflict between the Supreme Court and the Constitutional Court of Azerbaijan. By analysing legislation and recent cases, this article examines the root causes of this jurisdictional clash and considers possible institutional solutions to ensure coherence between the functions of both courts.

Annotasiya

Bu məqalədə Azərbaycanda son məhkəmə-hüquq islahatlarının Ali Məhkəmə ilə Konstitusiya Məhkəməsi arasında münasibətlərə təsirini təhlil ediləcək. Belə ki, son islahatlardan sonra Azərbaycan hüquq sistemində Ali Məhkəmənin vahid məhkəmə təcrübəsi yaratmaq səlahiyyəti və bunun hüquqi müəyyənliyə təsiri aktual mövzuya çevirilmişdir. Bununla belə, Ali Məhkəmənin bu səlahiyyəti Konstitusiya Məhkəməsi ilə münasibətlərdə müəyyən zidiyyətlərə yol açmışdır. Hazırkı məqalə müvafiq qanunvericilik və məhkəmə qərarları konteksintdə hər iki məhkəmənin səlahiyyət ilə bağlı yaranmış zidiyyətlərin səbəbini və aradan qaldırılması üçün tətbiq ediləcək institusional mexanizmləri təhlil edir.

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[*] ADA University, LL. B'23.

Introduction

Imagine a situation where you are confidently bringing a claim into the court and referring to the established case law of the Supreme Court. Suddenly, when your proceedings continue, the Constitutional Court decides that the position of the Supreme Court is incorrect. In this scenario, the judicial system left you with two conflicting decisions, and you cannot certainly rely on the Supreme Court's decision. This uncertainty occurred after the recent reforms in the judicial system of Azerbaijan.

Under the Constitution of the Republic of Azerbaijan, the Supreme Court is vested with the authority to issue clarifications on matters related to judicial practice.[1] In practice, this provision proved insufficient for the Supreme Court to develop consistent case law necessary for maintaining legal certainty. Consequently, lawmakers introduced more comprehensive legislation to address this issue, thereby granting the Supreme Court extensive powers to ensure the uniform application of law.[2] New amendments enabled the Supreme Court to issue decisions on clarification regarding judicial practice and uniform application of law. Additionally, specific mechanisms were implemented to monitor the lower courts' adherence to the case law.

In essence, these reforms significantly augmented the Supreme Court's powers and underscored its public function. However, these changes also introduced new uncertainties concerning the delimitation of competencies between the Supreme Court and the Constitutional Court of Azerbaijan. As a result of these developments, a conflict has emerged between the Supreme Court and the Constitutional Court.

It must be mentioned that such a problem is not peculiar to the judicial system of Azerbaijan. It is inherent to every legal system that uses a centralized model of judicial review according to which a specialised

[1] The Constitution of the Republic of Azerbaijan, art. 148 (I) (1995).

[2] "Məhkəmə-hüquq sistemində islahatların dərinləşdirilməsi haqqında" Azərbaycan Respublikası Prezidentinin Fərmanı [Decree of the President of the Republic of Azerbaijan "On Deepening Reforms in the Judicial and Legal System"], art. 3.2 (2019). Available at: https://e-qanun.az/framework/41813 (last visited Apr. 20, 2025). *See also* Law of the Republic of Azerbaijan "On Courts and Judges", art. 79-1 (1997); Civil Procedural Code of the Republic of Azerbaijan, art. 418-1 (1999); Administrative Procedural Code of the Republic of Azerbaijan, art. 98-1 (2019).

constitutional court with the exclusive authority assesses the constitutionality of laws and invalidates those deemed unconstitutional. Soon most countries in Western Europe adopted the centralized model of judicial review. Moreover, new democracies in Eastern Europe and the Caucasus, including Azerbaijan also adopted this model. As can be observed, the centralized model of judicial review became an important feature of continental constitutionalism.[3]

Since constitutional courts started to develop their case law and interpretation of the statutes, they naturally stepped into the jurisdiction of the ordinary courts. In certain jurisdictions, this problem escalated into a significant institutional crisis between them. In order to refrain from such problems, constitutional courts had to balance their relationship with the ordinary courts and most importantly with the supreme courts. Nevertheless, examples of effective and peaceful cohabitation exist between the constitutional courts and supreme courts.[4] This resulted from the mixed labour of constitutional courts, ordinary courts, and legislators. Therefore, special procedures and mechanisms must be implemented to prevent institutional crises within the judiciary and promote uniform application of the law.

The present article will cover the recent developments in the judicial system of Azerbaijan in terms of the relationship between the Supreme Court and the Constitutional Court. More precisely, the article will discuss, firstly, how the uniform application of the law gained importance in the legal system of Azerbaijan and how it affected the relationship between the Supreme Court and the Constitutional Court. Finally, the legislative and institutional mechanisms will be proposed to set effective boundaries between these two courts.

I. Uniform Application of Law

A recent clash between the Supreme Court and the Constitutional Court emerged after the introduction of new legal reforms in 2019.[5] New reforms emphasised the Supreme Court's public function and several mechanisms were initiated to develop uniformity of case law. Before exploring the conflict between the Supreme Court and the Constitutional Court, it would be helpful to discuss the importance of uniform application of the law, as well as the role of the Supreme Court in its development.

[3] Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 International Journal of Constitutional Law 44, 45 (2007).

[4] *Ibid*.

[5] *Supra* note 2.

A. The Concept and Importance of Uniform Application of Law

Uniform application of the law is essential from the perspective of advancing legal certainty and, more broadly, in the establishment of the rule of law. As observed by the European Court of Human Rights, divergences and inconsistencies are an inherent part of the judicial systems, which are based on the network of the courts.[6] This development must be accepted with a certain degree of understanding since different courts may arrive at divergent but logical conclusions about the same legal issue raised by similar factual circumstances. Moreover, pluralism and difference of opinion must be embraced for the dynamic development of the legal system.[7] However, such development should not interfere with the predictability of the case law. Therefore, the courts must formulate consistent case law.[8] In this sense, uniform application of law is an effective tool for protecting stability within the legal system.

Principally, uniform application of the law has three effects on the legal system.[9] Firstly, it has an institutional impact, meaning that uniform application of law increases the public confidence in the judicial system by enhancing the public perception of fairness and justice. Secondly, the uniform application of the law is essential to the principle of equality before the law. In a functioning legal system, citizens reasonably expect to be treated as others and rely on similar cases to foresee and plan their future behaviours. Finally, the formation of uniform case law also has an economic effect. This effect happens because the litigants may refuse to go to court when there is established case law. Thus, if there are clear precedents, judicial intervention can be minimised, which would increase the legal system's efficiency. These positive effects of unifying judicial practice have been reflected in recent reforms, as the Azerbaijani judicial system needed mechanisms to ensure legal certainty and the smooth operation of the judicial economy.

For this reason, the growing importance of the uniform application of law was also acknowledged by both the Supreme Court and the Constitutional Court. On a number of decisions, the Constitutional Court reaffirmed that

[6] Tudor Tudor v. Romania, ECHR No. 21911/03, § 29 (2009).

[7] Nejdet Şahin and Perihan Şahin v. Turkey, ECHR No. 13279/05, § 86 (2011).

[8] İnzibati məhkəmə icraatında kassasiya şikayətinin mümkünlüyünə dair Azərbaycan Respublikası Ali Məhkəməsinin İnzibati Kollegiyasının Qərardadı [Writ of the Administrative Collegium of the Supreme Court of the Republic of Azerbaijan on the possibility of cassation appeal in administrative court proceedings], No. 01/2023, § 46 (2023). Available at: https://supremecourt.gov.az/storage/pages/1970/kassasiya-sikayetinin-mumkunluyu-06112023-yenilenmis-son-1.pdf (last visited Apr. 15, 2025).

[9] Consultative Council of European Judges, Questionnaire for the Preparation of the CCJE Opinion No. 20 (2017): The Role of Courts with Respect to Uniform Application of the Law, 5-8 (2017).

uniform application of law and consistent case law are essential factors in the development of legal certainty.[10] The Supreme Court also expressed a similar opinion and embraced the earlier mentioned three effects of uniformity of case law in the legal system.[11] Especially the effect of minimization of judicial intervention is one of the goals of the recent reforms since the courts were overwhelmed by the workload.[12] In summary, the recent reforms on the uniform application of law are the natural result of the development of the legal system of Azerbaijan. As the system became more complex and the number of cases increased, the judicial system needed stability to establish legal certainty. In this connection, the Supreme Court had to play a significant role in this development. Hence, the nature and function of the Supreme Court had to be rethought.

B. Judicial Decisions and the Uniform Application of Law

Before going to the new function of the Supreme Court, it would be helpful to define the status of judicial decisions in Azerbaijan and generally in civil law jurisdictions. Being a civil law jurisdiction, Azerbaijan's legal system does not recognise judicial precedents as a legal source.[13] Moreover, the Constitution of Azerbaijan explicitly provides that the judges are bound only to the Constitution and laws of the Republic of Azerbaijan.[14]

This stems from the peculiar understanding of the concept of judicial independence in the continental legal system. Concepts such as the separation

[10] *See* S.Süleymanovanın şikayəti üzrə Azərbaycan Respublikası Ali Məhkəməsinin Mülki işlər üzrə məhkəmə kollegiyasının 01 oktyabr 2009-cu il tarixli qərarının Azərbaycan Respublikasının Konstitusiyasına və qanunlarına uyğunluğunun yoxlanılmasına dair Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun Qərarı [Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan on the verification of the compliance of the decision of the Civil Collegium of the Supreme Court of the Republic of Azerbaijan dated October 1, 2009 with the Constitution and laws of the Republic of Azerbaijan on the complaint of S.Suleymanova] (2010). Available at: https://e-qanun.az/framework/19812 (last visited April 21, 2025); Klark Qordon Morrisin (Clark Gordon Morris) şikayəti üzrə bəzi normativ hüquqi aktların Azərbaycan Respublikasının Konstitusiyasına uyğunluğunun yoxlanılmasına dair Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun Qərarı [Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan on the verification of the compliance of certain normative legal acts with the Constitution of the Republic of Azerbaijan on the complaint of Clark Gordon Morris] (2017). Available at: https://e-qanun.az/framework/38502 (last visited April 21, 2025).

[11] Azərbaycan Respublikası Ali Məhkəməsinin İnzibati Kollegiyasının Qərardadı [Writ of the Administrative Collegium of the Supreme Court of the Republic of Azerbaijan], № 2-1(102)-14/2022, § 17 (2022). Available at: https://sc.supremecourt.gov.az/storage/Inzibat/2022/9_14+02.03.2022.pdf (last visited Apr. 22, 2025).

[12] *Supra* note 8, § 72. *See also* İnzibati məhkəmələrdə iş yükü niyə çoxdur və necə azaltmaq olar? (2021), https://www.e-huquq.az/az/news/mehkeme/31717.html (last visited Apr. 1, 2024).

[13] *Supra* note 1.

[14] *Id.*, art. 127 (I).

of powers and judicial independence were interpreted to mean that courts should resolve disputes before them rather than create new laws.[15] This approach to the continental legal system was significantly influenced by thinkers like Montesquieu, who famously proclaimed that "*judges are no more than the mouth that pronounces the words of the law*".[16] As a result, courts were bound solely by the Constitution, laws, and international treaties, rather than by the past judgements of other courts. This tradition stands in stark contrast to the common law tradition, where the judiciary was viewed as a protector of individual rights. Thus, it was granted certain authority to control both the legislative and executive branches.[17]

In contemporary civil law systems, court decisions are indirectly used as a source of law. One example is the decisions of constitutional courts. Although they are not directly defined as a "source of law", they modify the text of the Constitution and legislation. This results in lower court judges being forced to apply the constitutional court's case law. [18]

In addition, lower courts follow the rulings of the highest courts, which are generally tasked with ensuring the uniform application of the law.[19] For instance, the Basic Law of Germany grants this power to the Supreme Federal Courts.[20]

Therefore, we can conclude that civil law jurisdictions indirectly use judicial decisions as a source of law. As mentioned in the previous chapter, as judicial systems evolve, court decisions play a pivotal role in ensuring the uniform application of the law. Consequently, the status of judicial decisions was reconsidered, and with the introduction of the Supreme Court's new public function, they became key to developing a uniform application of law.

C. Public Function of the Supreme Court

The present chapter will examine the public function of the Supreme Court. Before analysing its new role, a brief review of its status before the reforms would be helpful.

1. Status of the Supreme Court before the reforms

Prior to the reforms, the legal system of Azerbaijan did not possess sufficient mechanisms under which the Supreme Court could develop uniformity of case law. This limitation arose from the wording of the

[15] Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 International Review of Law and Economics 519, 522 (2006).

[16] Charles Louis de Secondat, Baron de Montesquieu, Spirit of the Laws (translated by T. Evans) 223 (1777).

[17] Hans Kelsen, General Theory of Law and State, 281 (2005).

[18] Andrii Varetskyi, *The Role of Precedent in the System of Sources of Law*, 4 Veritas Iuris 57, 59 (2021).

[19] *Supra* note 9, 11-12.

[20] Basic Law for the Federal Republic of Germany, art. 95 (1949).

Constitution of Azerbaijan, which only grants the Supreme Court the authority to issue clarifications related to judicial practice.[21] Until 2019, following the practice of its predecessor (Supreme Court of Azerbaijan SSR), the Plenum of the Supreme Court was issuing decisions on the judicial practice. Nevertheless, these decisions had no binding effect as they had an advisory character.[22]

As mentioned earlier, the evolution of the legal system necessitated adequate mechanisms for developing the uniformity of the case law. The Constitutional Court of Azerbaijan acknowledged this necessity in two decisions dated to 2010[23] and 2012.[24] The Constitutional Court pinpointed that the Supreme Court is not only obliged to correct errors of lower courts, but it is also tasked with the power to establish and preserve the uniform application of the law. Interestingly, the Constitutional Court of Azerbaijan supported the public function of the Supreme Court. It comes in great contrast to certain Eastern European jurisdictions. For example, the Constitutional Court of Hungary and the Constitutional Court of the Czech Republic feared that by increasing the public function of the Supreme Court, the right to access the court would be limited. Usually, the increasing public function of the Supreme Court goes with the limitation of the right to access the court with the introduction of mechanisms such as the leave-to-appeal system. Thus, in those jurisdictions, the constitutional courts were sceptical about reforms that emphasised the public function of the Supreme Court.[25]

However, the Constitutional Court of Azerbaijan did not have such reservations and supported the increase of the public functions of the Supreme Court.

2. Effect of the Reforms on the Role of the Supreme Court

[21] *Supra* note 1, art. 131 (I).

[22] Ramiz Rzayev, Azərbaycan Respublikasının Ali Məhkəməsi: Bir Əsrlik Yol, 390 (2023).

[23] V.Q. Teryoxinin şikayəti ilə əlaqədar Azərbaycan Respublikası Ali Məhkəməsi Mülki işlər üzrə məhkəmə kollegiyasının 02 iyun 2009-cu il tarixli qərarının Azərbaycan Respublikasının Konstitusiyasına və qanunlarına uyğunluğunun yoxlanılmasına dair Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun Qərarı [Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan on the verification of the compliance of the decision of the Civil Collegium of the Supreme Court of the Republic of Azerbaijan dated June 2, 2009 with the Constitution and laws of the Republic of Azerbaijan on the complaint of V.Q. Teryokhin] (2010). Available at: https://e-qanun.az/framework/19469 (last visited Apr. 20, 2025).

[24] Azərbaycan Respublikası Mülki Prosessual Məcəlləsinin 420-ci maddəsinin şərh edilməsinə dair Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun Qərarı [Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan on the interpretation of Article 420 of the Civil Procedure Code of the Republic of Azerbaijan] (2012). Available at: https://e-qanun.az/framework/23176 (last visited Apr. 20, 2025).

[25] Aleš Galič, *A Civil Law Perspective on the Supreme Court and its Functions*, 81 Studia Iuridica 44, 64-68 (2019).

Though the Constitutional Court acknowledged the power of the Supreme Court to create and preserve uniform application of the law, necessary legislative mechanisms were not implemented until the recent reforms. After those amendments to legislation, the Supreme Court develops and preserves the uniform application of the law by four mechanisms:[26]

- By decision of the ordinary cassation chambers or the Plenum of the Supreme Court on individual cases;
- By decision of the Plenum of the Supreme Court on uniform application of law;
- By special writs of the Chambers of the Supreme Court on uniform application of law;
- By decision on jurisdictional issues from a mixed board of judges from the Supreme Court's civil, commercial, and administrative chambers.

The Supreme Court dynamically used all the above-mentioned methods to ensure the uniform application of law. The Administrative Chamber of the Supreme Court even went further by adopting the leave-to-appeal system and introducing specific requirements for the admissibility of cassation appeals. To determine the admissibility, the Supreme Court introduced two key criteria: (1) the legal issue must be of fundamental significance and the further development of the law; (2) the case must present a necessity for judicial intervention to promote uniform application of law.[27]

As a result of the reforms, the Supreme Court broadened its powers and role, and its function transformed within the judiciary. The new function of the Court meant that as the highest court, it did not act only as the court of the last instance but also as the Court, which has the power to develop and preserve the uniformity of law. Although initially, the Constitutional Court supported the increased public function of the Supreme Court, inevitably, these courts started to clash on the application and extent of this power.

II. The Inevitable Conflict between the Constitutional Court and the Supreme Court

As was noted earlier, the conflict between the constitutional and ordinary jurisdictions is inevitable in the Kelsenian model of judicial review. Because the judicial system is based on a network of courts, judges are not obliged to follow the judgements of other courts. Naturally, the independent courts will have diverging opinions regarding their competencies and interpretation of law.

These differences can be attributed to various reasons: the professional background of the judges, the legal and political environment under which

[26] Rzayev, *supra* note 22.

[27] *Supra* note 8, 48-61.

the courts operate.[28] Mostly, the judges of the Constitutional Court come from academia, therefore, they are more likely to decide on different issues from a more theoretical perspective and concern themselves with the protection of constitutional rights.[29] Alternatively, judges of the ordinary courts are engaged in the day-to-day application of the law, and they can go to certain compromises for the sake of judicial expedience to ensure the pragmatic functioning of the judicial system.[30]

Historical, political and legal developments may also affect the relationship of these two institutions. In many European countries, supreme courts were much older and established institutions. Hence, they were sceptical about newly established constitutional courts. Conversely, the constitutional courts viewed themselves as guarantors of fundamental rights and distrusted supreme courts with their reserved view on constitutional rights and freedoms.[31]

As mentioned above, these divergences were further intensified by legal developments such as the institution of constitutional complaint[32] and the constitutionalisation of the law.[33] In the former case, the Constitutional Court gains the power to review the decisions of ordinary courts based on individuals' applications, which can create conflicts between the courts.

A. Constitutional Complaint as a Tension Point between the Supreme Court and the Constitutional Court

The institution of the constitutional complaint opens the possibility for a conflict between the Constitutional Court and the Supreme Court. In this way, constitutional courts enter the realm of ordinary courts by reviewing their decisions. As a result, they gain the opportunity to impose their interpretation on ordinary courts.[34] By doing so, they are inevitably clashing with the supreme courts over the interpretation of the statutes.

Initially, out of concerns that the Constitutional Court might effectively function as a fourth-instance court, the Constitution of the Republic of Azerbaijan did not establish the institution of the constitutional complaint.[35] However, the 2002 referendum on the Constitution introduced this

[28] Garlicki, *supra* note 3, 64.

[29] *Ibid.*

[30] John Henry Merryman & Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 The American Journal of Comparative Law 665, 682-683 (1966-1967).

[31] *Supra* note 3, 65.

[32] *Id.*, 48-49.

[33] Galič, *supra* note 25, 71.

[34] *Ibid*.

[35] Jeyhun Qarajayev, *Individual Constitutional Complaint in the Republic of Azerbaijan*, International Humanitarian University Herald 34, 35 (2023).

institution.[36] The litigants gained the right to challenge decisions made by ordinary courts directly in the Constitutional Court. Based on the referendum, the "Law on the Constitutional Court" granted the Constitutional Court broad powers to review decisions by the ordinary courts.[37] In its 2005 decision,[38] the Constitutional Court affirmed that it would not function as a "*reexamination court*" and would limit itself only to the review of protection of constitutional rights by the ordinary courts. However, in the same decision, the court set up a broad test under which it could review the decisions by the ordinary courts. The Constitutional Court noted that it has the power to review whether the court decided arbitrarily, which resulted in an erroneous decision. The Constitutional Court went even further by reviewing whether the ordinary courts had lawfully assessed the factual circumstance of the dispute.[39] In practice, it transformed into an unusual situation in which the Constitutional Court actively struck down decisions of the Supreme Court.[40]

Although there was some friction between these institutions, due to the lack of mechanisms, the Supreme Court initially refrained from challenging the authority of the Constitutional Court.[41] However, following the introduction of new reforms, the Supreme Court began developing its own interpretations on certain issues, ultimately leading to a confrontation between the two Courts.

Again, it must be stressed that the Constitutional Court recognised and supported the Supreme Court's expanding public function. Simultaneously, in many decisions, both the Plenum and the different divisions of the Supreme Court used the opinions of the Constitutional Court to form the uniform

[36] Azərbaycan Respublikasının Konstitusiyasında dəyişikliklər edilməsi haqqında Azərbaycan Respublikasının Referendum Aktı [Referendum Act of the Republic of Azerbaijan on Amendments to the Constitution of the Republic of Azerbaijan], art. XVI (2002). Available at: https://e-qanun.az/framework/972 (last visited Apr. 19, 2025).

[37] Law of the Republic of Azerbaijan "On the Constitutional Court", art. 34.2 (2003).

[38] "Azərbaycan Respublikasının bəzi qanunvericilik aktlarına əlavələr və dəyişikliklər edilməsi barədə" 11 iyun 2004-cü il tarixli, 688-IIQD saylı Azərbaycan Respublikası Qanununun III hissəsinin 9-cu bəndinin və IV hissəsinin 7-ci bəndinin Azərbaycan Respublikası Konstitusiyasının 130-cu maddəsinin I hissəsinə uyğunluğunun yoxlanılmasına dair Azərbaycan Respublikası Konstitusiya Məhkəməsinin Plenumunun Qərarı [Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan on the verification of the compliance of Paragraph 9 of Part III and Paragraph 7 of Part IV of the Law of the Republic of Azerbaijan No. 688-IIQD dated June 11, 2004 "On Amendments and Additions to Certain Legislative Acts of the Republic of Azerbaijan" with Part I of Article 130 of the Constitution of the Republic of Azerbaijan]. Available at: https://e-qanun.az/framework/17775 (last visited Apr. 20, 2025).

[39] *Ibid.*

[40] Eldar Mammadov, *The Constitutional Court and Courts of Ordinary Jurisdiction in Azerbaijan: Theoretical and Practical Problems of their Interrelations*, 1 The Caucasus and Globalization 6, 22 (2007).

[41] *Id.*, 16.

application of law. In this regard, the contradictions between these courts do not manifest themselves directly, nor does one court entirely annul the decision of the other. However, the differing positions and conclusions reached by the courts in the following two cases serve as clear examples of this contradiction. The ambiguity surrounding the retroactive application of pension legislation and set-off clauses in the second case led to constitutional complaints from individuals.

1. Judicial Conflict Over Pension Rights: Retroactive Application of Pension Legislation[42]

Before the amendments to the Law on Labour Pensions, the pensioner could obtain the aggregate amount of the pensions for the whole unpaid period from the date of application. However, under the new system, the pensioner who obtained the right to pension would receive the pension and aggregated amount for the last three years from the date of application.[43] The issue arose about the applicability of this provision to the pensioners who obtained their rights before the amendments but did not apply for the benefits.[44]

1.1. Writ of Administrative Chamber of the Supreme Court No. 03/2020

Regarding this issue, the Supreme Court developed the case law by affirming that, under the principle of non-retroactivity, this provision could not be extended to pensioners who obtained their rights before the reforms. However, in 2021, it reversed its earlier case law, and the Administrative Chamber of the Supreme Court issued the writ on a uniform application of article 32.1-1 of "Law on Labour Pensions".[45]

The Supreme Court ruled that the State has broader discretion in regulating social and economic issues. Therefore, the State can enact retroactive legislation in the field of social security to ensure the stability of the economy and to build a sustainable social security system. Moreover, recent changes to the legislation did not drastically change the legal status of the pensioners. The rationale was that the necessary mechanisms had been implemented for

[42] Azərbaycan Respublikası Ali Məhkəməsinin İnzibati Kollegiyasının "Əmək pensiyaları haqqında" Azərbaycan Respublikası Qanununun 32.1-1-ci maddəsinin tətbiqinə dair Qərardadı [Writ of the Administrative Collegium of the Supreme Court of the Republic of Azerbaijan on the application of Article 32.1-1 of the Law on Labour Pensions of the Republic of Azerbaijan], No. 03/2020 (2020). Available at: https://supremecourt.gov.az/az/media/xeberler/azerbaycan-respublikasi-ali-mehkemesinin-inzibati-kollegiyasinin-emek-pensiyalari-haqqinda-azerbaycan-1228 (last visited Apr. 20, 2025).

[43] "Əmək pensiyaları haqqında" Azərbaycan Respublikasının Qanunu [Law of the Republic of Azerbaijan "On Labour Pensions"], art. 32.1-1 (2006). Available at: https://e-qanun.az/framework/11566 (last visited Apr. 20, 2025).

[44] *Supra* note 42, § 75-76.

[45] *Id*., § 6.

pensioners who gained their rights under the previous regime, allowing them to exercise these rights during the transition period, which involves the time between the adoption of the law and its entry into force.[46]

Following the approach of the Supreme Court, the lower courts started to apply the above-mentioned provision to the pensioners who obtained their rights before the amendments. Subsequently, two applicants lodged a constitutional complaint against the decisions based on the Supreme Court's writ.[47] They alleged that the Supreme Court's approach disregards the fact that, in certain situations, the application can be missed without the fault of the pensioner. Primarily, it can happen in cases where the administrative bodies have made mistakes regarding the calculation of retirement years. Therefore, the approach by the Supreme Court violated their constitutional right to social security under Article 38 of the Constitution.

1.2. Decision of the Constitutional Court on Verification of Conformity of Rulings Dated October 14, 2020, and November 20, 2020 of the Supreme Court of the Republic of Azerbaijan with Constitution and laws of the Republic of Azerbaijan based on complaints of R.Hajiyev and R.Akhundov[48]

In the final decision, the Constitutional Court overruled the Supreme Court's decision concerning the applicants. The Constitutional Court reiterated its earlier position by affirming the Supreme Court's authority to preserve uniformity of the law. Nevertheless, the Constitutional Court criticized how the Supreme Court exercised this power. In the Constitutional Court's opinion, the case law must be developed taking into account fundamental rights and freedoms enshrined in the Constitution. The Constitutional Court pointed out that the impugned decision set a precedent where the lower courts would automatically deny the right to social security for pensioners who obtained their rights before reforms. The emphasis was that the administrative courts have an *ex officio* duty to investigate why certain applicants missed the statutory period of application for the pensions.

[46] *Id*., § 105.

[47] «Əmək pensiyaları haqqında» Azərbaycan Respublikası Qanununun bəzi müddəalarının tətbiqi ilə bağlı R.Hacıyevin və R.Axundovun şikayətləri üzrə Azərbaycan Respublikası Ali Məhkəməsinin İnzibati Kollegiyasının 20 noyabr 2020-ci il və 14 oktyabr 2020-ci il tarixli qərarlarının Azərbaycan Respublikasının Konstitusiyasına və qanunlarına uyğunluğunun yoxlanılmasına dair" Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun Qərarı [Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan on the verification of the compliance of the decisions of the Administrative Collegium of the Supreme Court of the Republic of Azerbaijan November 20, 2020 and October 14, 2020, regarding the application of certain provisions of the Law on Labour Pensions of the Republic of Azerbaijan, with the Constitution and laws of the Republic of Azerbaijan on the complaints of R. Hajiyev and R. Akhundov] (2021). Available at: https://www.constcourt.gov.az/az/decision/1244 (last visited Apr. 20, 2025).

[48] *Ibid.*

Otherwise, it would breach the due process rights of the pensioners, which would infringe their right to social security.

Interestingly, the Constitutional Court took a more cautious approach and did not overturn the writ of the Supreme Court. The Constitutional Court only reversed the two decisions of the Supreme Court concerning the applicants. A certain part of the Constitutional Court was dissatisfied and expressed willingness to overrule the whole writ of the Supreme Court.[49]

This decision demonstrated that the Constitutional Court supported the expansion of public function and accepted the precedent formed by the Supreme Court. Nevertheless, it reiterated its position as a supreme constitutional body that checks the observance of constitutional rights and freedoms by ordinary courts. Although in this decision, the Constitutional Court tried to set an effective boundary between itself and the Supreme Court, it later abandoned this position.

2. Conflicting Views on Set-Off Clauses and Workers' Constitutional Rights[50]

Recently, a significant legal controversy arose between the Supreme Court and the Constitutional Court concerning the impact of set-off clauses in loan and surety agreements on debtors' wages. The dispute was triggered when a bank deducted more than fifty percent of the debtor's wage pursuant to a surety agreement.[51] Consequently, the debtor filed a claim in court, seeking the annulment of the bank's actions on the grounds that they violated his constitutional rights to life and work.[52]

2.1. Writ of Civil and Commercial Chambers of the Supreme Court No. 03/2022

The Supreme Court found itself divided on this matter. On one side, a part of the court invoked the principle of freedom of contract, which grants parties the right to regulate set-off clauses as per their agreements. This group argued that enforcing such clauses is consistent with the parties' autonomy and contractual intentions.[53] Conversely, another group of justices expressed concerns about adopting this position, asserting that it could result in the infringement of constitutional rights, particularly the right to life and the right to work. Particularly, they emphasised that the set-off clauses can undermine

[49] *Id.*, *see also* the dissenting opinion of Justice Kamran Shafiyev.

[50] *See* Əqdə əsasən borclunun əmək haqqından akseptsiz qaydada tutmanın mümkün hədləri ilə bağlı qanunvericiliyin tətbiqi üzrə Azərbaycan Ali Məhkəməsinin Mülki və Kommersiya Kollegiyalarının Qərardadı [Writ of the Civil and Commercial Collegiums of the Supreme Court of Azerbaijan on the application of legislation concerning the permissible limits of non-consensual deductions from the debtor's wages under the contract], No. 03/2022 (2022). Available at: https://supremecourt.gov.az/storage/pages/1013/qerardad-14-12-2022.pdf.

[51] *Id.*, § 2.

[52] *Ibid.*

[53] *Id.*, § 4.

employees' ability to maintain a minimum standard of living, thereby conflicting with broader social and constitutional obligations of the State.[54]

Ultimately, the Supreme Court decided that, under the Labour Code, set-off clauses may only cover up to twenty percent of an employee's wages.[55] The Court reasoned that although the Civil Code enshrines the principle of freedom of contract, this principle can be curtailed to protect the weaker party and to uphold the State's responsibility to safeguard the worker's right to life and work.[56] The Court further noted that this approach aims to ensure employees maintain a minimal standard of living.[57] Therefore, set-off clauses permitting lenders to seize more than twenty percent of an employee's wages were deemed invalid.[58]

2.2. Decision of the Constitutional Court on the Interpretation of the Article 176 of Labour Code[59]

The Constitutional Court rejected the position of the Supreme Court regarding set-off clauses. While the Constitutional Court agreed with the Supreme Court on the importance of protecting debtors' constitutional rights to life and work, it also pointed out that the rights of the lenders must be safeguarded. In this context, the Court noted that the Labour Code permits courts to mandate wage seizures up to fifty percent. Consequently, there is no justification for limiting set-off clauses to twenty percent in contracts. Therefore, the amount specified in set-off clauses may extend to fifty percent of the wage.

Finally, the Constitutional Court held that wage deductions can be made following the procedure in the reasoning section of the decision. Most notably, the Constitutional Court directly instructed the ordinary courts to follow this procedure in the pending cases.

As observed, in the former case, despite some dissenting voices on the Plenum, the Constitutional Court did not completely disregard the Supreme Court's interpretation. Instead, it recommended that, while applying the Supreme Court's interpretation, lower courts fulfil their *ex officio* duties in investigating why pensioners missed the deadlines for the application. In contrast, in a later dispute, the Constitutional Court entirely abandoned the

[54] *Id*., § 52.
[55] *Id*., § 16.
[56] *Ibid*.
[57] *Id*., § 26.
[58] *Id*., § 27.
[59] *See* Azərbaycan Respublikası Əmək Məcəlləsinin 176-cı maddəsinin bəzi müddəalarının şərh edilməsinə dair Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun Qərarı [Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan on the interpretation of certain provisions of Article 176 of the Labour Code of the Republic of Azerbaijan] (2023). Available at: https://e-qanun.az/framework/54824 (last visited Apr. 19, 2025).

Supreme Court's position and imposed its own interpretation on the ordinary courts.

These cases illustrate how constitutional complaints impact the relationship between the Supreme Court and the Constitutional Court. A constitutional complaint serves as an effective mechanism for constitutional courts to intervene in the realm of ordinary jurisdiction and impose their interpretations.[60] On one hand, this mechanism provides a robust framework for the protection of constitutional rights. Nevertheless, it presents a pitfall in the form of prolonged litigation and can transform the Constitutional Court into a de facto fourth-instance court.[61] As can be seen, despite the Constitutional Court's statement, sometimes it acted as a "*reexamination court*" by not exercising self-restraint. Therefore, the Constitutional Court's role had to be reassessed.

That's why in 2023, the "Law on the Constitutional Court" was amended.[62] The shift was made from an individual constitutional complaint to a normative constitutional complaint system. In this regard, the approach taken by the Azerbaijani lawmakers is similar to that of Poland and Hungary, which use the normative constitutional complaint model.[63] This model narrows the scope of the constitutional complaint. Now, instead of directing review to the entire decision, the Constitutional Court focuses on the statute that underpins the ordinary court's decision.[64] In other words, the Constitutional Court does not assess procedural or substantive violations in judicial proceedings. Rather, it focuses solely on norms that create the possibility for such infringements.

Additionally, these cases illustrate a broader issue in the relationship between the Supreme Court and the Constitutional Court: the overlap between constitutional and ordinary jurisdictions.

B. Constitutionalisation of Law and the Overlap between Constitutional and Ordinary Jurisdictions

The original rationale behind the Kelsenian model of judicial review was that the Constitutional Court would address issues and disputes arising under the Constitution, while ordinary courts would deal with matters of ordinary legislation.[65] However, the introduction of incidental review and

[60] *Supra* note 25, 71-73.

[61] *Ibid*.

[62] "Konstitusiya Məhkəməsi haqqında" Azərbaycan Respublikasının Qanununda dəyişiklik edilməsi barədə Azərbaycan Respublikasının Qanunu [Law of the Republic of Azerbaijan on Amendments to the Law of the Republic of Azerbaijan "On the Constitutional Court"], art. 2 (2023). Available at: https://e-qanun.az/framework/54709 (last visited Apr. 20, 2025).

[63] European Commission for Democracy through Law (Venice Commission), *Draft Study on Individual Access to Constitutional Justice,* CDL-AD(2010)039rev, § 77 (2010).

[64] *Supra* note 37, art. 32.2.

[65] *Supra* note 3, 46.

constitutional complaints has blurred the line between constitutional and ordinary adjudication.[66] This process is known as the "constitutionalisation of law". As Professor Martin Loughlin noted, "constitutionalisation involves the attempt to subject all governmental action within a designated field to the structures, processes, principles, and values of a 'constitution'".[67] This process has had three significant effects on the legal system:[68]

Firstly, the Constitution's text is no longer limited to its original wording; instead, it has been modified through the Constitutional Court's case law. Hence, the protection of fundamental constitutional rights and freedoms is enforced by applying the Constitutional Court's opinions.[69] Secondly, the Constitutional Court started to enter different branches of law, including private law. The Constitutional Court was tasked with reviewing the conformity of the legislation and judicial decisions to the Constitution. This led to the fact that ordinary judges and legislators had to look up and take into consideration the case law of the Constitutional Court. Moreover, to review the conformity of the legislation, the Constitutional Court had to clarify the meaning of the statute, which also would become part of case law.[70] Finally, as constitutional provisions, principles, and values started to affect individual statutes, not only the Constitutional Court but also the ordinary courts had to apply them.[71]

In this regard, the aforementioned cases concerning the interpretation of certain provisions of the Labour Code are pretty illustrative in terms of constitutionalisation. Instead of focusing on a uniform interpretation of this provision, the Supreme Court has entered into the realm of constitutional Court by assessing the constitutionality of practices between parties concerning the application of that provision in the loan and surety agreements. Simultaneously, in subsequent decisions, the Constitutional Court went beyond determining constitutional issues and provided its interpretation of the provisions of the Labour Code. Although the Supreme Court's decisions can be scrutinized for constitutional interpretation, such scrutiny does not grant the Constitutional Court the power to offer its interpretations and encroach upon the realm of ordinary courts.

This problem does not solely arise from the practices and relationship between the Constitutional Court and the Supreme Court. The situation is further complicated by the constitutional demarcation established by the Constitution of Azerbaijan. Under Article 130 (IV) of the Constitution, the Constitutional Court not only addresses issues of constitutionality but is also

[66] *Ibid.*

[67] M.Loughlin, What is Constitutionalisation?, in *The Twilight of Constitutionalism?*, 47 (2010).

[68] *Supra* note 3, 47.

[69] *Id.*, 48.

[70] *Ibid.*

[71] *Id.*, 49.

required to provide interpretations regarding legislation. In practice, this has resulted in a situation where ordinary courts and public bodies refer issues to the Constitutional Court for legal interpretation and the establishment of uniform application of provisions.[72] This was not problematic until recent reforms. However, after new reforms emphasising the public function of the Supreme Court, the situation has hindered its ability to develop its case law. Even within the hierarchy of ordinary courts, the Constitutional Court is viewed as the institution responsible for establishing the uniform application of law.

These developments are natural in the legal systems that use the Kelsenian model of judicial review. Thus, it demonstrates that a complete separation between constitutional and ordinary jurisdictions is challenging.[73] For example, in certain jurisdictions, the supreme courts have openly declared that the Constitutional Court's interpretations do not bind them.[74] At the same time, constitutional courts have attempted to block legislative reforms aimed at enhancing the public function of the Supreme Court.[75] Additionally, these conflicts are not only limited to Europe, but can be seen in Asia.[76]

However, certain arrangements can be made to minimise overlaps and establish an effective working relationship between the Courts. Otherwise, the system may face an institutional crisis where each court claims supremacy.

III. How to End the Conflict between the Courts?

As evidenced, the Kelsenian model of judicial review unavoidably leads to the competition between the Supreme Court and Constitutional Court. In this regard, judicial system of the Azerbaijan was no exception. Therefore, following institutional mechanisms must be implemented to prevent crisis within the judicial system and ensure the legal certainty.

A. Repealing the Article 130 (IV) of the Constitution of Azerbaijan

Firstly, Article 130 (IV) of the Constitution should be amended to revoke the Constitutional Court's authority to interpret ordinary legislation. This article provides that:

"*The Constitutional Court of the Republic of Azerbaijan shall interpret the Constitution and laws of the Republic of Azerbaijan on the basis of requests submitted by the President, the Milli Majlis, the Cabinet of Ministers, the Supreme Court, and*

[72] Qarajayev, *supra* note 35.
[73] *Ibid.*
[74] *Id*., 61.
[75] *Supra* note 25, 68.
[76] Seokmin Lee & Fabian Duessel, *Researching Korean Constitutional Law and the Constitutional Court of Korea*, 16 Journal of Korean Law 265, 269-270 (2016).

the Prosecutor's Office of the Republic of Azerbaijan, and by the Ali Majlis of the Autonomous Republic of Nakhchivan".

This provision is problematic as it contradicts the traditional Kelsenian model of judicial review, creating a conflict between constitutional and ordinary jurisdictions. As noted earlier, civil law jurisdictions indirectly use judicial decisions as a source of law, with decisions by specialised constitutional courts being among them. However, such decisions hold a specific value—namely, that the Constitutional Court acts as a "negative legislator" by assessing the constitutionality of legislation.

Kelsen's original idea was that centralising judicial review in a single specialised court would prevent inconsistencies and divergent views on constitutional matters, thereby ensuring legal certainty.[77] For example, although the Russian Constitution established the Constitutional Court for judicial review, until 1998, it lacked the power to fully impose its views on legislative constitutionality. This led to an uncertain situation where the Supreme Court and Supreme *Arbitrazh* Court expressed differing opinions on constitutional questions. Consequently, the Constitutional Court had to assert its dominance over constitutional issues.[78] This illustrates how the unclear status of the Constitutional Court can lead to legal uncertainty.

However, the power of judicial review over the constitutionality of the legislation was never intended as a tool for constitutional courts to provide their interpretations regarding ordinary legislation. First, such a development would contradict the nature of civil law, where judges are bound by statutory law rather than past precedents. More importantly, ordinary courts are practically better equipped to interpret statutes, as they handle legal disputes daily and are actively engaged in applying the law. Finally, it would make any interpretative development by the Supreme Court futile since the Constitutional Court would disregard them, as seen in its decision on the set-off clause.

Therefore, Article 130 (IV) must be repealed (*with respect to the interpretation of the laws*) to ensure that both courts remain within their respective jurisdictions.

B. "Living Law" Concept and Schumann Formula

Secondly, since the Constitutional Court will no longer interpret ordinary legislation, its dynamics with ordinary courts must also change. Although the Constitutional Court will not interpret laws itself, it will inevitably assess their constitutionality and how ordinary courts interpret them. Therefore, in this

[77] Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation,* 2 International Journal of Constitutional Law 461, 466 (2004).

[78] *See* Decree of the Constitutional Court of the Russian Federation In the Case Concerning Interpretation of Specific Provisions of Articles 125, 126, and 127 of the Constitution of the Russian Federation, No. 19-P (1998).

context, the Constitutional Court must act with caution, as the above-mentioned developments limit its ability to intervene in the jurisdiction of the ordinary courts. It may challenge this and further escalate conflicts with ordinary courts. However, in doing so, it risks further isolation and questioning of its prestige by them.[79] Instead, it would be in the best interest of both the Constitutional Court and the entire legal system for it to guide and coordinate the application of the Constitution.[80]

To achieve this, the Constitutional Court must exercise a sufficient level of self-restraint.

One way to do so is through the adoption of the "living law" doctrine. This doctrine encompasses the notion that once ordinary courts have developed certain case law and a uniform interpretation of a statute, the Constitutional Court would not intervene in that practice.[81] The Constitutional Court would only review the constitutionality of the interpretation by the ordinary courts.

However, this doctrine cannot fully resolve the conflict between these courts. It is effective when the Constitutional Court lacks institutional mechanisms to impose its views on ordinary courts and instead relies on their referrals. The Italian Constitutional Court widely uses this technique. It stems from the fact that the Constitutional Court cannot impose its view through constitutional complaints. It primarily depends upon ordinary courts' referrals. Hence, the Italian Constitutional Court had to establish a careful relationship with ordinary courts.[82]

On the other hand, when the Constitutional Court is not solely dependent on referrals from ordinary courts and can receive constitutional complaints, the situation can become problematic. For instance, "Federal Constitutional Law on the Constitutional Court of Russia" stipulates that the Constitutional Court of the Russian Federation considers the constitutionality of a normative act evaluating both its literal meaning and the meaning given to it by official or other interpretations or by law-application practice that has been developed.[83]

Based on this, the Constitutional Court of the Russian Federation widely applied this norm to impose its interpretation on the ordinary courts.[84] It did so by declaring the interpretations of ordinary courts unconstitutional and

[79] *Supra* note 3, 68.

[80] *Ibid*.

[81] *Id*., 56, 60.

[82] David Kosař, Sarah Ouředníčková, *Responsive Judicial Review "Light" in Central and Eastern Europe – A New Sheriff in Town?*, 48 Review of Central and East European Law 445, 452-453 (2023).

[83] Federal Constitutional Law on the Constitutional Court of the Russian Federation, art. 74 (1994).

[84] William Burnham & Alexei Trochev, *Russia's War between the Courts: The Struggle over the Jurisdictional Boundary between the Constitutional Court and Regular Courts*, 55 The American Journal of Comparative Law 381, 400 (2007).

ordering the reopening of cases. Unsurprisingly, this angered the Supreme Court and the Supreme *Arbitrazh* Court of Russia, leading them to refuse compliance with the Constitutional Court's orders.[85] In contrast, the Italian judiciary has not faced a similar experience because the function and activity of the *Corte Costituzionale* heavily depend on referrals from ordinary courts. When citizens can lodge complaints directly before the Constitutional Court, the court gains greater leverage.

In other words, when the Constitutional Court relies on referrals from ordinary courts, it must maintain a balanced relationship with them. Otherwise, ordinary courts may refrain from addressing constitutional issues, thereby limiting its ability to manoeuvre. In contrast, when citizens can directly lodge constitutional complaints, the Constitutional Court is not solely dependent on ordinary courts and thus has greater flexibility to challenge their interpretations.

Therefore, the "living law" doctrine alone cannot fully demarcate the boundary between constitutional and ordinary jurisdictions. This raises a crucial question: How far should such a review extend?

In this regard, the jurisprudence of the Federal Constitutional Court of Germany may give a perspective. Typically, it uses the *Schumann formula* for reviewing the constitutionality of interpretations by ordinary courts. Under this formula, the Federal Constitutional Court may review a judgement by an ordinary court under the pretext of the constitutionality of the court's interpretation. This means that if the interpretation by the ordinary court were theoretically transformed into legislation, would it still be constitutional? If it would be constitutional, then the interpretation is acceptable. By narrowing the scope of the review, the Court focuses on the constitutionality of the interpretation rather than correctness.[86]

While the recent implementation of a more limited model of constitutional complaints has eased tensions between the Courts in Azerbaijan, additional steps must be adopted to establish an effective boundary between them. In this connection, the endorsement of the "living law" concept, combined with the application of the Schumann formula, can be effective in delineating clear lines between constitutional and ordinary jurisdictions. More precisely, the Constitutional Court can use the "living law" concept to adopt the Supreme Court's interpretations. Subsequently, the scope of reviewing these interpretations can be limited through the application of the *Schuman formula*.

Like its Italian and German counterparts, the Constitutional Court can endorse and integrate these concepts into its case law. Alternatively, amending the "Law on the Constitutional Court" could formalise these

[85] *Id*., 444-445.

[86] *See* European Commission for Democracy through Law (Venice Commission), *The Decisions of the German Federal Constitutional Court and Their Binding Force for Ordinary Courts*, CDL-JU(2006)047 (2006).

principles in a statutory law. In this regard, the norm can be added to the law to define the scope of the review by the Constitutional Court.

Conclusion

As Professor Anthony D'Amato observed, the legal system inherently gravitates towards uncertainty.[87] Therefore, it is vital to implement effective mechanisms to mitigate this uncertainty and fortify legal certainty. Although the primary objective of recent reforms was to advance legal certainty, subsequent developments have impeded this progress. It is important to recognise that, to some extent, these developments are an inherent part of the Kelsenian model. However, it is crucial that these developments should not escalate into an institutional crisis between the courts, thereby undermining legal certainty.

Fortunately, during the initial phase of the reforms, the judicial system successfully navigated this stress test, and the relationship between the Constitutional Court and the Supreme Court remained largely intact. The Constitutional Court endorsed the expansion of the Supreme Court's public functions and refrained from directly overturning decisions regarding the uniform application of the law. Similarly, the Supreme Court acknowledges the Constitutional Court's jurisprudence, consistently referencing its opinions in its rulings. Furthermore, ordinary courts actively refer constitutional questions regarding statutes and their interpretation to the Constitutional Court. Nevertheless, as previously highlighted, challenges may emerge from the flawed delineation of competencies between the courts.

To address these challenges, the following reforms should be enacted: Firstly, Article 130 (IV) should be amended to repeal the Constitutional Court's authority to interpret ordinary legislation. The Constitutional Court must exercise self-restraint and avoid functioning as a de facto fourth-instance court. Instead, it should assume the role of a coordinator, directing the application of constitutional principles and values. This can be achieved by adopting the "living law" doctrine and applying it in conjunction with the Schuman Formula.

Finally, the Supreme Court and the Constitutional Court must establish an effective relationship through cooperation to enhance legal certainty. Such a collabourative approach will ensure the stability and predictability of the legal system, thereby reinforcing public confidence in the judiciary.

[87] Anthony D'Amato, *Legal Uncertainty*, 71 California Law Review 1, 1 (1983).

Startap və investor arasında hüquqi körpü: Azərbaycan və ABŞ yanaşmasının müqayisəli təhlili

Aysun Zeynalova[*]

Annotasiya

İnnovasiya və sahibkarlıq mühitinin sürətlə inkişaf etdiyi dövrdə startapların hüquqi tənzimlənməsi və maliyyələşdirilməsi məsələləri aktuallıq qazanmaqdadır. Startaplar qeyri-müəyyən və dinamik şəraitdə fəaliyyət göstərdiyindən onların hüquqi statusunun dəqiq müəyyənləşdirilməsi və investorlar üçün əlverişli maliyyə mexanizmlərinin yaradılması bu sahənin davamlı inkişafı üçün vacibdir. Dünyada bu sahədə müxtəlif yanaşmalar mövcud olsa da, xüsusilə ABŞ-nin startap ekosistemində tətbiq etdiyi hüquqi alətlər və maliyyələşdirmə mexanizmləri diqqət çəkir. Azərbaycanda isə startap mühitinin formalaşmasına baxmayaraq, onun hüquqi və maliyyə çərçivəsi tam yetkinləşməmişdir. Buna görə də, məqalədə ABŞ və Azərbaycan təcrübələri müqayisəli yanaşma ilə araşdırılaraq, startapların hüquqi statusu, dövlət dəstəyi və investisiya mexanizmləri təhlil edilir. Bundan əlavə, Azərbaycanın mövcud qanunvericiliyindəki boşluqlar nəzərdən keçirilərək, beynəlxalq təcrübəyə əsaslanan hüquqi və institusional islahat təklifləri irəli sürülür.

Abstract

In an era of rapidly evolving innovation and entrepreneurship, the legal regulation and financing of startups have become increasingly relevant. Given that startups operate in uncertain and dynamic environments, it is crucial to establish a clear legal framework defining their status and to develop financial mechanisms that facilitate investment. While various approaches to startup regulation exist globally, the legal instruments and financing models implemented within the U.S. startup ecosystem stand out as particularly noteworthy. In Azerbaijan, despite the emergence of a startup ecosystem, its legal and financial framework remains underdeveloped. Therefore, this article adopts a comparative approach to analyse the regulatory frameworks, government support mechanisms, and investment models for startups in the U.S. and Azerbaijan. Furthermore, existing gaps in Azerbaijan's legislation are examined, and legal and institutional reform proposals based on international best practices are put forward.

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Giriş

Müasir iqtisadi sistemlərdə innovasiya və texnologiya əsaslı inkişaf getdikcə daha mühüm rol oynayır. Qlobal miqyasda startapların artan rolu iqtisadi inkişafa töhfə verməklə yanaşı, müxtəlif sahələrdə innovasiyaları təşviq edir və iş yerlərinin yaradılması ilə məşğulluq artımını da təmin edir.[1]

Startaplar rəqəmsal tendensiyalara meyilli təbiətləri ilə ənənəvi biznes modellərindən fərqlənirlər.[2] Belə ki, müasir startaplara daha çox süni intellekt, proqram təminatı, biotexnologiya, elektron ticarət, onlayn ödəniş platformaları və s. sahələrdə rast gəlmək mümkündür. Nəticədə, startap ekosistemləri rəqəmsal iqtisadiyyatın ayrılmaz hissəsinə çevrilərək, biznes mühitində çevikliyin və risk qəbulunun yeni standartlarını müəyyənləşdirir.

Startapların uğurlu inkişafı təkcə yeni ideya və texnologiyalarla deyil, onların hüquqi çərçivədə kommersiyalaşdırılması və texnoloji transformasiyası ilə də bağlıdır. Buna görə də dövlətlər hüquqi və iqtisadi maneələri aradan qaldırmaq üçün müxtəlif mexanizmlər tətbiq edir.[3] Qlobal rəqabətin artdığı şəraitdə sosial-iqtisadi dayanıqlılığı gücləndirən dövlət tənzimləmələri zəruri hesab olunur.[4]

Azərbaycanda da bu istiqamətdə sosial-iqtisadi strategiyalar və qanunvericilik aktları mövcuddur, lakin hüquqi və praktiki yanaşmaların yetkin olmaması startapların inkişafına əngəl yaradır. Xüsusilə ABŞ-də formalaşmış maliyyə və hüquqi mexanizmlərin ölkəmizdə tam tətbiq edilməməsi bu sahədəki təşəbbüslərin ləngiməsinə və potensial iqtisadi faydaların itirilməsinə səbəb olur.

Məqalənin əsas məqsədi startapların hüquqi tənzimlənməsi və maliyyələşdirilməsi sahəsində mövcud çətinlikləri araşdırmaq, xüsusilə investisiya proseslərinin hüquqi aspektlərini və maliyyə alətlərinin tətbiqini təhlil etməkdir. Beləliklə, məqalənin birinci hissəsində startap anlayışına izah veriləcək, habelə beynəlxalq sferada və ölkəmizdə startapların keçdiyi yoldan

[1] How Startups Benefit The Economy (2012), https://carnegie3.org.za/how-startups-benefit-the-economy/ (son baxış 25 aprel 2025).
[2] Vüsal Qasımlı və digərləri, İnnovasiya və Sahibkarlıq: Startap Ekosistemi, 113 (2023).
[3] Yenə orada, 212.
[4] Yenə orada.

qısa şəkildə bəhs olunacaqdır. İkinci hissədə startapların maliyyələşdirilməsi üçün tarixən istifadə edilərək inkişaf yolu keçmiş maliyyə alətləri və müqavilələrə toxunulacaqdır. Daha sonra dünyanın startap mərkəzlərindən biri sayılan ABŞ-də startaplara tətbiq olunan güzəştlər, qanunvericilik aktları və digər aidiyyəti hüquqi tənzimləmələr barədə danışılacaq, belə hüquqi tənzimləmələrin Azərbaycan Respublikasının qanunvericiliyinə nümunəvi tətbiqinə dair təkliflər qeyd ediləcəkdir.

Sonuncu hissədə isə Azərbaycan Respublikasında startap ekosistemini əhatə edən konkret hüquqi tənzimləmələr və onların əhatə dairəsi, eləcə də normaların tətbiqinin startaplara yaratdığı maneə və məhdudiyyətlərdən bəhs ediləcəkdir. Məqalədə belə maneələr kimi ölkəmizdə maliyyə alətləri və müqavilələrdən istifadənin məhdud yayılması, habelə startaplara investisiyanın həyata keçirilməsində qarşılaşılan hüquqi məhdudiyyətlər tədqiq olunacaq, bu problemlərin konkret həll yolları göstəriləcəkdir.

I. Startap nədir?

Startaplara sahibkarlar tərəfindən qurulan və şirkətin inkişafı üçün innovativ ideyalarla zəruri resursları bir araya gətirən yeni təsis edilmiş biznes kimi anlayış verilə bilər.[5] Eyni zamanda startaplara unikal məhsul və ya xidmət hazırlamaq, onu bazara çıxarmaq və müştəriləri həmin məhsul və xidmətlərdən istifadənin vacib olmasına inandırmaq üçün yaradılmış şirkət və ya layihələr kimi də tərif verilir.[6] Ənənəvi bizneslərdən fərqli olaraq startaplar ölçüsünə, fəaliyyət sahəsinə və ya sənayesinə görə deyil, innovasiyaya və yeni dəyər yaratmağa verdiyi üstünlüklə müəyyən edilir. Bu innovasiya elmi kəşflər, yeni biznes modelləri və ya mövcud texnologiyaların fərqli tətbiqi şəklində özünü göstərə bilər. Startapları digərlərindən fərqləndirən əsas cəhət onların yüksək qeyri-müəyyənlik şəraitində fəaliyyət göstərməsidir ki, bu da onların uğurunun proqnozlaşdırılan icradan daha çox çevikliyə əsaslanmasını tələb edir.[7]

Azərbaycanda isə startap ekosisteminin inkişafı 2012-ci ildən sonrakı dövrü əhatə edir. Sözügedən dövr Azərbaycanda innovativ fəaliyyətlərin formalaşması və inkişafı baxımından xüsusi əhəmiyyət daşıyır. Belə ki, ölkədə yüzlərlə startapın formalaşması, hətta onlarla startapın qlobal bazarda tanınması da bu dövrdə baş vermişdir.[8]

Qanunvericiliyimizdə startapların tərifinə Vergi Məcəlləsində rast gəlinir. Belə ki, Məcəllənin 13.2.80-ci maddəsinə əsasən, *startap – innovativ təşəbbüsə əsaslanaraq həyata keçirilən, müvafiq icra hakimiyyəti orqanının müəyyən etdiyi*

[5] Boyoung Kim et al., *Critical Success Factors of a Design Startup Business*,10 Sustainability (2018). Burada bax: https://doi.org/10.3390/su10092981 (son baxış 25 aprel 2025).

[6] Qasımlı və digərləri, yuxarıda istinad 2,112.

[7] Eric Ries, The Lean Startup: How Today's Entrepreneurs Use Continuous Innovation to Create Radically Successful Businesses, § 1 (2011).

[8] Yuxarıda istinad 2, 236.

orqan (qurum) tərəfindən müəyyən edilmiş meyarlara cavab verən və mikro, kiçik və orta sahibkarlığın inkişafını dəstəkləyən müvafiq icra hakimiyyəti orqanının müəyyən etdiyi orqan (qurum) tərəfindən "Startap" şəhadətnaməsi verilmiş şəxslərin həyata keçirdiyi sahibkarlıq fəaliyyətidir.[9] Qeyd edilən maddədə adıçəkilən müvafiq icra hakimiyyəti orqanı qismində isə Kiçik və Orta Biznesin İnkişafı Agentliyi (bundan sonra "Agentlik") nəzərdə tutulmuşdur.

Müasir dünyada biznes sahəsinin əhəmiyyətli qollarından biri olan startap terminologiyada ilk dəfə innovativ və texnologiya yönümlü şirkətləri təsvir etmək üçün 1960-1970-ci illərdə istifadə olunmağa başlanıb.[10] İlk "startap" sözünün vurğulanması da 1976-cı ildə "Forbes" tərəfindən dərc edilmiş məqaləyə təsadüf edir.[11] Bununla belə, startapların ilkin formalarına artıq XX əsrin əvvəllərində ayrı-ayrı iş adamlarının sürətlə genişlənən və yüksək qazanc gətirən müəssisələr yaratmağa başlaması ilə rast gəlinirdi. Müasir dövrdə isə süni intellekt proqramlarından tutmuş onlayn otel rezervasiyalarına, müxtəlif şirkətlərin rəqəmsal səhifələrindəki çatbotlara qədər bir çox layihə ilkin mərhələdə startap kimi meydana çıxmış və yeni texnologiyanı insanların istifadəsinə təqdim etmişdir.

Startapların inkişafı üçün əlverişli hüquqi mühitin yaradılması istənilən ölkənin iqtisadi tərəqqisi baxımından mühüm əhəmiyyət kəsb edir. Startap ekosisteminin yaratdığı imkanlar sayəsində ölkədə şirkətlərin böyümək və inkişaf yolu açıq olur, bu da öz növbəsində iqtisadi və texnoloji inkişafı sürətləndirir. Startap sahəsindəki ilk sahibkarlıq tənzimləmələri 1990-cı illərin əvvəllərində Finlandiya, Niderland və Şotlandiya kimi ölkələrdə meydana gəlib. Belə bir sahənin aktuallaşması nəticəsində bir çox ölkə xüsusi olaraq startaplara yönəlmiş yeni hüquqi tədbirlər tətbiq etsə də, bu tədbirlərin əhatə dairəsi təbii olaraq məhdud idi və startaplarla bağlı bütün məsələləri tam şəkildə əhatə etmirdi. Sonrakı illərdə Avropa, Amerika və Asiya ölkələri də startap layihələrini dəstəkləyən tənzimləmələr tətbiq etdilər. 2004-cü ildə Fransa gənc innovativ şirkətlər *(Jeunes Entreprises Innovantes)* üçün vergi güzəşti təqdim etdi və startap yaratmaq potensialı olan şirkətləri dəstəkləmək üçün *"ad hoc"* proqramlar təklif etdi. ABŞ-də isə "Startup America" təşəbbüsü çərçivəsində, federal hökumət tərəfindən sahibkarlığa yönəlik hüquqi tənzimləmə tədbirləri həyata keçirilirdi. Startap sahəsində tənzimləməni həyata keçirən dövlətlərə Hindistan, İsrail və bir sıra Asiya ölkələri də qoşuldu ki, onların strategiyaları klassik sahibkarlığın hüquqi tənzimləməsi çərçivəsinə uyğun tədbirlərin, proqramların və qanunvericilikdəki dəyişikliklərin birləşməsini əhatə edirdi.[12]

[9] Azərbaycan Respublikası Vergi Məcəlləsi, mad. 13.80 (2000).

[10] Amar Bhidé, The Origin and Evolution of New Businesses, 149 (1999).

[11] Rui Pedro Campos Magalhães, What is a Startup? A Scoping Review on How the Literature Defines Startup, 9 (2019).

[12] Yenə orada.

Startapların miqrasiyası yenilik və inkişaf gətirməklə yanaşı, maliyyə cəlbini də daim özündə saxlayır. Startap şirkətləri adətən fəaliyyətlərinə yüksək xərclərlə və məhdud gəlirlə başladığından, risk sərmayədarları (venture capitalists) kimi müxtəlif mənbələrdən kapital cəlb edirlər.[13] Məsələnin ilkin mərhələsini təşkil edən investisiya məbləğinin startapın təsisçisinə ötürülməsi, maliyyələşdirmə alətləri, şirkət və investorun hüquq və vəzifələri, eləcə də onların qarşısında duran məhdudiyyətlər və şərtlər kimi mühüm məsələləri əhatə edir. Növbəti başlıqda startapların inkişafı ilə paralel olaraq formalaşan və investorla təsisçi arasında hüquqi münasibətlərin əsasını təşkil edən maliyyələşdirmə alətlərindən bəhs ediləcəkdir.

II. Tətbiq olunan maliyyə alətləri – konvertasiya edilən veksellər, "SAFE" və "KISS" müqavilələri

Maliyyə dəstəyi startapın inkişafı üçün yanacaq rolunda çıxış edir. Startap ekosisteminin təkamülünün ilkin dövrlərində kapital cəlb etmək məqsədilə startap yaradıcıları müxtəlif üsullara müraciət edirdilər. Zamanla startapların ilkin mərhələləri üçün konkret maliyyə alətləri formalaşmağa başladı ki, bunları da yaranma ardıcıllığına, ehtiva etdikləri şərtlərə və tərəflər üçün səmərəlilik dərəcəsinə görə qruplaşdırmaq olar: konvertasiya edilən borclar, veksellər, "SAFE" (Simple Agreement for Future Equity) və "KISS" (Keep It Simple Security) müqavilələri. Bu alətlər şirkətin qiymətləndirilməsini təxirə salmağa və investisiyaları minimal hüquqi və əməliyyat xərcləri ilə strukturlaşdırmağa imkan verir.

Startapların inkişafı zamanı keçdikləri maliyyələşmə mərhələləri onların texniki hazırlıq səviyyəsinə, bazar mövqeyinə və böyümə hədəflərinə uyğun olaraq inkişaf edir. "Pre-seed" mərhələsi ilkin mərhələ hesab edilir və əsas məqsəd ideyanın formalaşdırılması, ilkin bazar araşdırmasının aparılması və məhsulun prototipinin hazırlanmasıdır. Bu mərhələdə sərmayə qoyuluşu adətən təsisçilər, yaxın çevrə və fərdi investorlar tərəfindən təmin edilir, habelə məbləğ 250 000 ABŞ dollarına qədər çata bilir. "Seed" mərhələsində isə məhsulun ilkin versiyasının (Minimum Viable Product – MVP) hazırlanması və müştəri bazasının yoxlanılması əsas prioritet hesab edilir. Bu mərhələdə yalnız "mələk investorlar" deyil, həm də risk fondları vasitəsilə 500 000 – 3 milyon ABŞ dolları həcmində maddi resursun təmin edilməsi mümkündür.[14] Şirkətin ilkin maliyyələşməsinin təşkil edildiyi bu mərhələlərdə əsasən məqalədə qeyd ediləcək olan "SAFE" və "KISS" müqavilələrindən, eləcə də konvertasiya edilən veksellərdən istifadə edilir.

[13] What Startup Is and What's Involved in Getting One Off the Ground (2024), https://www.investopedia.com/terms/s/startup.asp (son baxış 25 aprel 2025).

[14] Lyazzat Sembiyeva et al., *Current Status and Prospects for the Development of Venture Financing*, 3 Reports of the National Academy of Sciences of the Republic of Kazakhstan 235, 240 (2020).

"Pre-seed" və "seed" mərhələlərində artıq öz effektivliyini nümayiş etdirə bilmiş, lakin layihəni daha da inkişaf etdirmək və mənfəəti artırmaq üçün vəsaiti olmayan şirkətlər iştirak edir. Böyümə mərhələsində olan şirkətlər "Series A", "B" və ya "C" mərhələlərində investisiya cəlb edə və hər birində əhəmiyyətli həcmdə kapital əldə edə bilər. Belə ki, "Series A" mərhələsində investisiya məbləğləri adətən 5–10 milyon dollar, "Series B" mərhələsində 10–20 milyon dollar, "Series C" mərhələsində isə orta hesabla 100 milyon dollar və ya daha çox ola bilər. Bu mərhələlərin hər birində toplanan vəsaitlər müştəri bazasının və əhatə dairəsinin genişləndirilməsi, həmçinin yeni bazarlara çıxışın təmin edilməsi üçün istifadə olunur.[15] Qeyd edilən mərhələlərdə kapital qoyuluşu üçün isə "Convertible preferred stock", "Preferred Shares" adlanan mürəkkəb formalı razılaşmalardan və ya bu raundlarda az rast gəlinsə də "SAFE" müqavilələri kimi maliyyə alətlərindən istifadə edilir.[16]

İlkin startap mühitinin formalaşmağa başladığı dövrdə istifadə edilən maliyyə aləti konvertasiya edilən borclar idi. Həmin borcların əsaslandığı razılaşmaya əsasən, investor startap layihəsinin həyata keçirən şəxsə borc verməyi öz öhdəsinə götürür və qarşılığında gələcəkdə layihənin uğurlu olması nəticəsində şirkətin səhmlərinə sahib olur. Başqa sözlə, investor layihə təsisçisinə verdiyi borcu gələcəkdə uğurlu startapın səhmlərinə çevirərək mənfəət əldə edir. Həmçinin bu razılaşma borc pulun miqdarı və konvertasiya şərtlərini, eləcə də hər bir səhmin qiymətini müəyyən edir.[17] Startapçılar bu yolla öz dost və ailələrindən, daha çox "mələk qruplar"[18] adı ilə rast gəldiyimiz qruplardan vəsait cəlb edirdilər.[19] Qeyd edilən maliyyələşdirmə üsulu bəzi cəhətlərinə görə riskli hesab edilirdi. Yuxarıda göstərildiyi kimi konvertasiya edilən borcların meydana çıxması əvvəlki dövrlərə təsadüf edir və ilkin maliyyə aləti rolu oynayırdı, təkmil struktur və şərtlərə malik deyildi. Belə ki, konvertasiya edilən borclara dair razılaşma borc müqaviləsi şəklində tərtib edilirdi. Yeni yaranan şirkətlər uğursuz

[15] Yenə orada.

[16] What Is Series Funding A, B, and C? (2024), https://www.investopedia.com/articles/personal-finance/102015/series-b-c-funding-what-it-all-means-and-how-it-works.asp (son baxış 25 aprel 2025); Series B Financing: Definition, Examples, and Funding Sources (2021), https://www.investopedia.com/terms/s/series-b-financing.asp (son baxış 25 aprel 2025).

[17] BDC Glossary, Convertible debt, https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/convertible-debt (son baxış 25 aprel 2025).

[18] "Mələk qruplar"a gəldikdə isə brokerlər, satıcılar və ya investisiya məsləhətçilərindən ibarət investorlar qrupu başa düşülür və bu qrupa üzv şəxslər mütəmadi görüşlər keçirir, investisiya qoyuluşları barəsində müzakirələr aparır və qərarlar qəbul edir, həmçinin erkən mərhələdə olan şirkətlərə kapital yatırmağa maraqlıdırlar.

[19] Penn Carey Law School, *Convertible Notes Overview*, [i]. Burada bax: https://www.law.upenn.edu/clinic/entrepreneurship/startupkit/convertible-note.pdf (son baxış 25 aprel 2025).

olduqları halda maddi cəhətdən zəif olduqlarına görə investorlarına borclu qalır, borclarını ödəyə bilmədikdə müflis ola bilirdi.[20] Bunlarla yanaşı, startap mühiti inkişaf etdikcə vasitə rolu oynayan maliyyə alətinin təkmilləşməsi də istisna deyildi. Nəticədə, konvertasiya edilən borcdan bir neçə imtiyazı eyni razılaşmada cəmləşdirən yeni maliyyə aləti - konvertasiya edilən veksellər meydana çıxdı.[21] Həm konvertasiya edilən borcların, həm də veksellərin oxşar cəhətini isə hər ikisinin borc aləti olması təşkil edirdi.

1980-ci və 1990-cı illərdə texnologiyaya dair startapları maliyyələşdirmək istəyən investorların bir hissəsinin seçimi konvertasiya edilən veksellərdən yana olsa da, 2000-ci illərin ortalarında startap yaratma xərclərinin azalması nəticəsində bu maliyyələşmə aləti daha da təkmilləşirdi. Xüsusilə də konvertasiya edilən veksellərdən texnologiya şirkətlərinə ilkin mərhələdə edilən investisiyada istifadə edilirdi. Üstünlüyün veksellərə verilməsi qismən onun sənədləşmə xərclərinin az olması ilə əlaqədar olsa da, digər səbəblər kimi konvertasiya edilən veksellərin 3 əsas yeni imtiyazı çıxış edirdi – yetkinlik tarixi, faizlər və üstün səhmlər.[22]

Yuxarıda da vurğulandığı kimi konvertasiya edilən veksellər özündə bir-biri ilə vəhdətdə olan 3 şərti ehtiva edir. Bu şərtlərdən birincisi yetkinlik tarixi ilə bağlıdır. Xarici mənbələrdə "maturity date" kimi təqdim olunan bu şərt borcun verilməsindən sonra müəyyən zaman aralığında (adətən 18 və ya 24 ay ərzində) müəyyən edilir və razılaşmanın qüvvədə qalma dövrü kimi qəbul edilirdi. Müvafiq müddət başa çatdıqda veksel avtomatik şəkildə şirkətin səhmlərinə konvertasiya olunur, əgər göstərilən müddət ərzində bu baş verməzsə, borcun investora geri qaytarılması nəzərdə tutulurdu.[23]

İkinci şərt kimi investisiya edilmiş məbləğin üzərinə hesablanan *faizlər* çıxış edirdi. Bu şərt bir növ dividend xarakteri daşıyır, faizlər sabit dərəcədə ilkin investisiya məbləğinə hesablanmağa davam edirdi. Faiz və maliyyə periodu isə tərəflərin öz istəyindən asılı olaraq müəyyən edilirdi. Nəticədə, yetkinlik tarixinin uzanması investora daha çox faiz gəliri, investisiya subyektinə isə vaxt qazandırırdı. Məsələn, şərti olaraq tərəflər 10 000 dollarlıq investisiya qarşılığında əsas məbləğə hesablanan 8% ödəniş barədə razılığa gəlirlər və investor müddətin sonunda borc verdiyi məbləğə hesablanan 8%i, yəni 800 dolları da əldə etmiş olur.

[20] Brad Feld, Jason Mendelson, Be Smarter Than Your Lawyer and Venture Capitalist, Venture Deals, 120-121 (2016).

[21] John F. Coyle & Joseph M. Green, *The SAFE, the KISS, and the Note: A Survey of Startup Seed Financing Contracts*, 103 Minnesota Law Review 101, 103-104 (2018).

[22] Yenə orada.

[23] SAFE Note and Convertible Note: The Differences (2024), https://www.growthlabfinancial.com/safe-note-vs-convertible-note-the-differences (son baxış 25 aprel 2025).

Üçüncü və sonuncu əsas şərt isə investorun digər səhmdarlara nisbətən müəyyən üstünlüklərə malik olması idi.[24] Həmin üstünlük şirkətin səhmlərinin alınmasında investora verilən endirim faizləridir ki, endirimlər 15%-dən başlayaraq 25%-dək qalxa bilirdi. Məsələn, yeni investorlar müvafiq şirkətin hər səhmi üçün 1 dollar ödəyirlər. Belə olan halda, vekselinin 20% endirimi olan investor hər səhm üçün 0.8 dollar ödəyəcəkdir. Başqa sözlə desək, veksel sahibi 100 000 dollar qarşılığında 125 000 səhm əldə etdiyi halda, yeni investorlar eyni məbləğlə yalnız 100 000 səhm əldə edəcəklər.[25]

Bununla belə, veksellərin bütün müsbət cəhətləri ilə yanaşı bir sıra mənfi cəhətləri də var idi ki, həmin mənfi cəhətlər hər iki tərəfi yeni razılaşma forması axtarmağa sövq edirdi. Bunlardan biri startapın razılaşmada göstərilən yetkinlik tarixinə çatdığı mərhələdə kapital cəlb edə bilməməsi ilə bağlıdır. Veksel borc aləti olduğu üçün investisiya edilən məbləğ borc olaraq qalmağa davam edir, qaytarılması tələb edildikdə isə maliyyə cəhətdən zəif olan şirkətlərin müflisləşməsinə gətirib çıxarırdı.[26] Məsələn, ilkin maliyyələşmə mərhələsində investor startapa 2 il müddət (yetkinlik tarixi) və 1 000 000 $ hədəf məbləğ *(müddətin sonuna qədər startapın cəlb etməli olduğu pul məbləği. Bu məbləğin toplanması mərhələnin sonunda investisiyanı səhmə çevirir)* şərtləri ilə 200 000 $ kapital qoyur. Müddət sona çatdıqda startap cəmi 500 000 $ investisiya cəlb edə bilir və hədəfə çatmadığından konvertasiya baş vermir. Nəticədə, şirkətlər investorlara borclu qalır və ya daha ağır şərtlərlə (səhmlərdə əlavə endirim və s.) yeni razılığa gəlməli olurdular.

Digər bir mənfi cəhət də əvvəlki abzasda nümunə gətirilmiş səhmlərin qiyməti ilə bağlıdır. Şirkət maliyyələşmənin sonrakı mərhələlərində səhmlərin qiymətini qaldırdıqda ilkin mərhələdə kapital qoyan investorlar yeni investorlardan fərqli olaraq əvvəlki qiymətə səhm əldə edə bilir, nəticədə eyni vəsait qarşılığında yeni investorlardan çox səhmə sahib olurdular.[27] Eyni məbləğ qarşılığında daha az səhmin əldə edilməsi və şirkətin səhmlərinin qeyri-bərabər şəkildə bölüşdürülməsi yeni investorlar üçün balansızlığa səbəb olur, onlar üçün şirkətə investisiya qoyuluşunun cəlbediciliyini azaldırdı.[28] Beynəlxalq praktikaya əsasən, razılaşmanın bir parçası olan və investisiya məbləğinə hesablanan faiz ödənişləri startap şirkətlərinə

[24] Yuxarıda istinad 19, 2 (Term Sheet).

[25] Yenə orada.

[26] For Founders Raising Capital: Thinking Through the Implications of Convertible Notes (2018), https://www.toptal.com/finance/startup-funding-consultants/convertible-note (son baxış 25 aprel 2025).

[27] The advantages and disadvantages of convertible notes (2025), https://fastercapital.com/content/The-advantages-and-disadvantages-of-convertible-notes.html (son baxış 25 aprel 2025).

[28] Brenton Twitchell, For Attorneys Advising a New Tech Startup: An Introduction to Convertible Notes, What They Are and Why You Should Consider Using Them, 1 (2015), https://www.ryanswansonlaw.com/wp-content/uploads/2016/06/Intro-to-Convertible-Notes.pdf (son baxış 25 aprel 2025).

banklardan götürülən kreditin ödəniş faizindən baha başa gəlirdi və bu da qeyd edilən maliyyə alətinin şirkətlərə mənfi təsir edən yanlarından idi.[29]

Borc aləti funksiyasını yerinə yetirən veksellər yuxarıda qeyd edilən mənfi və çatışmayan tərəflərinə görə səmərəsiz hesab olunurdu, həmçinin şirkətlər üçün də müflisləşmə riskini daşıdığından səmərəsiz idi. Beləliklə, startapların ilkin mərhələlərində kapital toplamaq məqsədilə istifadə olunan maliyyələşmə alətlərindən biri kimi "SAFE" (Simple Agreement for Future Equity) müqavilələri meydana çıxdı.[30] Sözügedən müqavilə ilk dəfə 2013-cü ildə Amerika startap akseleratoru[31] "Y Combinator" tərəfindən təqdim edilmişdir.[32] Hal-hazırda isə "SAFE" və ona oxşar müqavilələrdən bir çox yurisdiksiyalarda istifadə olunur.[33] Bu cür maliyyə aləti beynəlxalq səviyyədə konvertasiya edilən veksellərə nisbətən daha sahibkar dostu bir alternativ kimi qəbul edilir. Konvertasiya edilən veksellər və "SAFE" müqavilələri mahiyyətcə oxşar olsa da, standart müqavilə forması və konkret müddəaları olan "SAFE" hər iki tərəf üçün daha əlverişli hesab olunur. "SAFE" əsasında ilkin mərhələdə olan startap *qiymətləndirmə* və ya emissiya təyin etmədən vəsait cəlb edir, investor isə sərmayə qoyuluşu edir, müqavilədə əvvəlcədən müəyyən edilmiş hadisənin baş verməsi nəticəsində isə onun sərmayəsi səhmə çevrilir.[34] Qeyd edilən fərqin anlaşılması üçün qiymətləndirmə və emissiya təyin edilməməsinin mahiyyətini vurğulamaq zəruridir. Belə ki, qiymətləndirmə bir startapın bazar dəyərinin müəyyən edilməsi, emissiya isə şirkət tərəfindən səhmlərin buraxılması prosesidir. Qiymətləndirmə və ya emissiyanın təyin edilməsi şirkətin gəliri, bazar payı və proqnozlara əsaslanır. İlkin mərhələdə olan şirkətlər isə bu xüsusiyyətlərə hələ malik olmadığından qeyd edilən proses onlara çətin gəlir. "SAFE" modelinin tətbiqi sayəsində şirkət başlanğıcda dəyər təyin etmədən və səhm buraxılışını həyata keçirmədən vəsait cəlb edə bilir. Sözügedən maliyyə alətinin bu xüsusiyyəti onu veksellərdən fərqləndirir və borc xarakteri daşımaqdan uzaqlaşdırır. Digər bir üstünlük isə "interest rate", yəni investisiya məbləğinə hesablanan faizlər şərtinin aradan qalxmasıdır. Konvertasiya edilən veksellərə məxsus sərmayəyə faizlərin hesablanaraq investora ödənilməsi şərtinin mövcud olmaması şirkətlərin maliyyə yükünü azaltdığından onları SAFE-ə bir addım da yaxın edir. Bu razılaşmanı borc müqaviləsindən və vekseldən fərqləndirən sonuncu əsas məqam isə "yetkinlik tarixi"nə malik olmamasıdır. SAFE-ə

[29] KPMG, Interpreting Convertible Notes, 7 (2023).

[30] Jeff Perry et al., *SAFEs as (New) Financing Instruments*, 23 Business Law International 249, 249 (2022).

[31] Startaplara sürətli inkişaf üçün mentorluq, maliyyə və şəbəkələşmə imkanı təqdim edən intensiv proqramdır.

[32] Perry, yuxarıda istinad 30.

[33] Yenə orada.

[34] Simple Agreement for Future Equity (SAFE): Definition, Benefits, and Risks (2025), https://www.investopedia.com/simple-agreement-for-future-equity-8414773 (son baxış 25 aprel 2025).

əsasən, investisiya edilən məbləğ müqavilədə razılaşdırılmış hadisənin baş verməsi (raund[35] üçün hədəf məbləğin toplanması, startapın başqa bir şirkətə satılması və s.) ilə səhmə konvertasiya edilir. Razılaşdırılmış hadisə baş vermədikdə münasibət açıq qalır, çünki "SAFE" borc hesab edilmədiyindən şirkətin onu geri qaytarmaq öhdəliyi yoxdur.[36] Yəni investor üçün ya razılaşdırılmış hadisə baş verir və sərmayə səhmə çevrilir, ya da investor hadisənin baş verməsini qeyri-müəyyən müddət ərzində gözləməyə davam edir. Hadisənin baş verməməsi nəticəsində kapitalın itirilməsi isə investorların münasibətlərin əvvəlində razılaşdıqları şərt idi. İnvestorların "SAFE" müqavilələrindən yana olmasının əsas səbəbi isə bu maliyyətinin sadə struktura sahib olması və az xərclərlə başa gəlməsi idi.[37] "SAFE" həqiqi səhmlərə investisiya kimi qəbul edilir və "Y Combinator" tərəfindən irəli sürülən standartlaşdırılmış formalar geniş istifadə olunaraq şirkətlərə investorlar tərəfindən daha ucuz və səmərəli şəkildə kapital toplamağa imkan verir.[38]

Məqalənin indiyə qədərki hissəsində artıq geniş yayılan maliyyə alətlərindən danışılsa da, xronoloji olaraq sonuncu, yəni 2014-cü ildə 500 Startap şirkəti tərəfindən irəli sürülmüş "KISS" (Keep It Simple Security) modelini də vurğulamaq lazımdır.[39] Bəzən şirkətlər uzun çəkən danışıqlara girmək istəmir, qısa müddətdə və aşağı dəyərdə maliyyə cəlb etmək istəyirlər. Bu zaman "KISS" onların köməyinə çatır.[40] Bəziləri "KISS"-i "SAFE" və veksellərin hibridi adlandırırlar. Buna səbəb isə "KISS" müqavilələrinin həm SAFE, həm də veksellərin xüsusiyyətlərinə malik olmasıdır. Belə ki, bu forma SAFE-də olduğu kimi investorlardan birbaşa kapital toplamağa kömək edə və ya veksellərdə olduğu kimi yetkinlik tarixi, faiz və s. şərtləri özündə ehtiva edə bilər. Eləcə də, həm KISS, həm də "SAFE" tərəflər arasında müəyyənləşmiş gələcəkdəki bir hadisə əsasında səhmlərə çevrilir, hər iki alət sadə quruluşuna görə az vaxt ərzində kapital cəlb etməyə imkan verir. Qeyd edilənlər KISS-in fərqini ilk baxışdan aydınlaşdırmağa imkan verməsə də, onun əsas cəhəti digər iki formanın xüsusiyyətlərini birləşdirməsi və nəticədə daha sadə struktura malik olmasıdır. "KISS" müqaviləsinin veksellərin və SAFE-in hansı şərtlərini özündə ehtiva edəcəyi isə tərəflərin mülahizələrinə uyğun müəyyən edilərək razılaşmada öz əksini tapır. Beləliklə, sadə razılaşma ilə maraqlarını təmin etmək istəyən tərəflər

[35] Startapın böyüməsi və inkişafı üçün investorlar tərəfindən kapital cəlb etdiyi müəyyən maliyyələşdirmə mərhələsidir. Məsələn, Pre-Seed, Seed, Series A, B və s.

[36] Coyle & Green, yuxarıda istinad 21, 105.

[37] Yuxarıda istinad 30, 250.

[38] Yenə orada, 249.

[39] SAFE vs. KISS: Key Differences. What's Best For Your Startup? (2022), https://sharpsheets.io/blog/safe-vs-kiss-key-differences/ (son baxış 25 aprel 2025).

[40] KISS or Keep It Simple Security Convertible Note Calculator (2020), https://eqvista.com/kiss-or-keep-it-simple-security-convertible-note-calculator/ (son baxış 25 aprel 2025).

uzun çəkən danışıqlara girmədən "KISS" vasitəsilə 1-2 səhifəlik razılaşmanı bağlayırlar.[41]

Qeyd edilənlərdən göründüyü kimi, müxtəlif dövrlər ərzində startapların maliyyələşdirilməsi sahəsində bir sıra maliyyə alətləri formalaşmış və tətbiq edilmişdir. Hazırda isə bu alətlərin ən optimal hesab edilən formaları geniş şəkildə istifadə olunmaqdadır. Bu alətlər investorlar və şirkətlər üçün çevik və riskləri optimallaşdıran maliyyə mexanizmləri təqdim edir, tərəflərin hüquqlarını qorumaqla yanaşı, həm də onların müxtəlif mənfəətlər əldə etmələrini təmin edir. Startapların maliyyələşməsi bir tərəfdən startap ekosisteminin əsas amili hesab olunur, digər tərəfdən bu məqsədlə tətbiq olunan maliyyə alətləri bu sahənin inkişafını sürətləndirməklə innovativ texnologiyaların sayının artmasına təkan verir. Beləliklə, startapların erkən mərhələlərində maliyyələşmənin əsas hüquqi alətləri — borc, veksel, "SAFE" və "KISS" — həm hüquqi struktur, həm də risk bölgüsü baxımından fərqli yanaşmalar təqdim edir. Növbəti başlıqda isə qeyd olunan alətlərin ABŞ təcrübəsində tətbiq xüsusiyyətləri və müvafiq normativ hüquqi çərçivə ilə uyğunluğu təhlil ediləcək.

III. ABŞ-də startaplara tətbiq edilən güzəştlər və məhdudiyyətlər

ABŞ startap sahəsindəki praktika və qanunvericiliyinin bir çox nümunəvi xüsusiyyətləri ilə yanaşı, hazırda dünyada startapların sayına görə ilk sıralardadır. San-Fransisko, Nyu-York kimi dünyanın startap mərkəzi hesab edilən şəhərləri, eləcə də "Amazon", "Facebook", "Google", "Apple" kimi nəhəng şirkətlərə çevrilmiş startapları ABŞ-nin bu sahədəki qabaqcıllığının göstəricilərindəndir.[42]

Ölkənin startap sahəsindəki uğurunun əhəmiyyətli hissəsini özəl və dövlət sektorunun sözügedən sahəyə olan dəstəyi təşkil edir. Özəl sektor startapların inkişafına investisiya qoyuluşunu təmin etməklə dəstək olarkən dövlət də öz növbəsində bir sıra güzəştlər, təqaüd prqramları və s. kimi imkanlar yaratmaqla bu sahədə stimullaşdırıcı siyasət tətbiq edir.[43]Bununla belə, əksər dövlətlərdə olduğu kimi ABŞ-də də mövcud olan, ölkənin təhlükəsizliyinin təmin edilməsinə yönəlmiş bir sıra normalar startap sahəsinin inkişafı zamanı maneələr yarada bilər. Bu cür normalardan biri də ABŞ-nin Bank sirri Aktıdır. Bu Akt ölkənin maliyyə sistemini qanunsuz fəaliyyətlərdən qorumaq və şəffaflığı təmin etməyə yönəlmiş, təhlükəsizliyin mühafizəsi xarakteri daşıyır. Akt xüsusilə startapların maliyyələşməsi zamanı

[41] The Importance of KISS and SAFE Notes in Start-up Financing: Addressing Shortcomings and Proposing Legal Solutions: Part 1 (2023), https://www.pcalaw.com.my/wp-content/uploads/2023/12/Raising-money-for-a-start-up-can-take-many-different-forms.pdf (son baxış 26 aprel, 2025).

[42] Yuxarıda istinad 2, 147.

[43] Yenə orada, 145.

məhdudiyyətlərə səbəb ola biləcək müddəalar əhatə edir. Bununla belə, bu tənzimləmələr startaplara xüsusi tətbiq edilən qaydalar sayəsində onların fəaliyyətini məhdudlaşdırmır. Belə ki, startaplara dair xüsusi tənzimləmələrin mövcudluğu dövlətin və maliyyə təhlükəsizliyinin təmin edilməsinə yönəlmiş normaları startaplar üçün istisna edir, nəticədə kapital qoyuluşunu, eləcə də kapital cəlbini tərəflər üçün asanlaşdıraraq iqtisadiyyata öz töhvələrini vermələrinə şərait yaradır.

A. BSA-ın yaratdığı məhdudiyyətlər

Yuxarıda adıçəkilən olan ABŞ-nin Bank sirri Aktının (Bank Secrecy Act of 1970) (bundan sonra "BSA") əsas məqsədi maliyyə sistemində şəffaflığı təmin etmək, pul vəsaitlərinin qanunsuz istifadəsini, o cümlədən çirkli pulların yuyulması, vergidən yayınma və terrorizmin maliyyələşdirilməsi kimi fəaliyyətlərin qarşısını almaqdır.[44] Aktın normaları maliyyə institutlarını şübhəli maliyyə əməliyyatlarını qeyd etməyə və FinCEN-ə (Financial Crimes Enforcement Network-missiyası maliyyə sistemini qanunsuz fəaliyyətlərdən qorumaq olan dövlət təşkilatı[45]) məlumat verməyə məcbur edir.[46] BSA-nın müddəalarına əsasən, hər hansı maliyyə qurumu $10,000 və ya daha çox məbləğdə əməliyyatlar üçün Currency Transaction Reports (CTR-çirkli pulların yuyulması ilə mübarizənin təmin edilməsi üçün doldurulmalı olan bank forumu) təqdim etməlidir.[47] Bu prosedur yeni startap şirkətlərinin əməliyyat sürətini yavaşlada, innovasiyanı ləngidə və maliyyə institutları ilə əməkdaşlıqda çətinliklər yaradaraq dolayı yolla şirkətlərin işini çətinləşdirə bilər.[48] İkinci bir müddəa maliyyə institutlarının müştərilərin kimliyini yoxlamaq üçün "müştəri identifikasiya proqramı" (Customer Identification Program - CIP) prosedurlarının tətbiq etməsidir. Bu qayda yeni hesabların açılması zamanı müştərilərin şəxsiyyətini təsdiqləmək və məlumatlarını saxlamaq üçün minimum tələbləri müəyyən edir.[49] Qeyd edilən proses də startapların müvafiq əməliyyatlarında ləngiməyə, nəticədə, hətta müştərilərini itirilməsinə gətirib çıxa bilər.[50] BSA-ın normalarına görə, maliyyə institutları qanunsuz maliyyə əməliyyatlarına qarşı mübarizə aparmaq üçün Anti-Money Laundering (AML) proqramları hazırlamalı və həyata keçirməlidir. Həmçinin bu proqramlar risklərin müəyyən edilməsi, nəzarət mexanizmlərinin tətbiqi və müvafiq hesabat prosedurlarını əhatə

[44] 31 U.S.C. § 5311 (2011).

[45] Financial Crimes Enforcement Network, *Mission*, https://www.fincen.gov/about/mission (son baxış 28 aprel 2025).

[46] Daha ətraflı bax: Yuxarıda istinad 44, § 5318(g).

[47] Yenə orada, § 5313.

[48] Dirk A. Zetzsche et al., *From FinTech to TechFin: The Regulatory Challenges of Data-Driven Finance*, 7 University of Hong Kong Faculty of Law Research Paper 1, (2017).

[49] Daha ətraflı bax: 31 C.F.R. § 1020.220 (2023).

[50] Zetzsche et al., yuxarıda istinad 48.

etməlidir.[51] Yeni yaranmış startap şirkətləri isə AML proqramların yoxlamasından çətinliklə keçə, bank hesabı yaratmaqda maneələrlə qarşılaşa bilərlər.[52] Buna baxmayaraq, ABŞ startap münasibətlərini tənzimləyən spesifik hüquqi aktlar qəbul etmişdir. Startapların bilavasitə bu aktlarla tənzimlənməsi nəticəsində startaplara investisiya xarakterli pul köçürmələrinin hüquqi statusu bəlli olduğundan yuxarıda qeyd edilmiş dövlətin təhlükəsizliyini təmin edən normalar startapların investisiya cəlb etməsinə maneə yaratmır, habelə mövcud tənzimləmələr startaplara köçürmələri məhdudlaşdırmır. Başqa sözlə, startaplar barəsində aparılan pul əməliyyatlarının təyinatı qanunvericilikdə təsbit edildiyindən risk obyekti kimi dəyərləndirilmir.[53]

B. Məhdudiyyətlərin istisnası – mövcud startap tənzimləmələri

ABŞ-də startapların inkişafına və böyüməsinə şərait yaradan ən mühüm amillərdən biri də müxtəlif məhdudiyyətlərin bu sahədən yan keçməsidir. Belə ki, startap sahəsini tənzimləyən xüsusi qanunvericiliyin olması bu sahə ilə bağlı müxtəlif prosedurların rəsmiləşdirilməsinə, dolayısı ilə xüsusilə də maliyyə sahəsində BSA kimi normaların hədəfindən yayınmasına gətirib çıxarır.

Startapların hüquqi tənzimlənməsini həyata keçirən bir sıra normativ aktları dərc etmiş qurumlardan biri ABŞ-də Böyük Depressiya dövrlərinə təsadüf edən,[54] 1934-cü ildə investorları qorumaq və kapitalın formalaşmasını asanlaşdırmaq üçün təsis olunmuş[55] "Securities and Exchange Commission" (bundan sonra "SEC")-dır. Bu hüquqi sənədlərdən biri 1933-cü ilə aid Qiymətli kağızlar haqqında Akta (Securities Act of 1933) əlavə olaraq 5 aprel 2012-ci ildə qəbul edilmiş "The Jumpstart Our Business Startups Act" (bundan sonra "JOBS Act")-dır.[56] Bu aktın məqsədi şirkətlərin ictimai kapital bazarlarında maliyyə toplamasını asanlaşdırmaq üçün tənzimləyici tələbləri

[51] Yuxarıda istinad 44, § 5318(h).

[52] Brian Stoeckert & Maria Potapov, Risk and Compliance Insights for FinTech Startups, Banks and Investors, 4 (2019), https://www.stratisadvisory.com/wp-content/uploads/2019/06/StratisAdvisory_WP_FinTechInnovation_111115v2.pdf (son baxış 25 aprel 2025).

[53] Charles D. Vaughn, Private Placements after the JOBS Act, 13 (2013), https://www.nelsonmullins.com/storage/3386e84679023465432c48fe8587c9d5.pdf (son baxış 27 aprel, 2025).

[54] Ötən əsrin 30-cu illərində baş vermiş kütləvi işsizlik, yoxsulluq və əhəmiyyətli maliyyə sabitsizliyi ilə xarakterizə olunan qlobal iqtisadi böhran. Daha ətraflı bax: The Great Depression (2013), https://www.federalreservehistory.org/essays/great-depression (son baxış 28 aprel 2025).

[55] U.S. Securities and Exchange Commission, *Mission*, https://www.sec.gov/about/mission (son baxış 28 aprel 2025).

[56] Jumpstart Our Business Startups (JOBS) Act (2024), https://www.sec.gov/rules-regulations/jumpstart-our-business-startups-jobs-act (son baxış 25 aprel 2025).

minimuma endirməkdir. Aktın hazırkı məqalə və startaplar üçün vacib məqamı isə onun "Crowdfunding"[57], hərfi mənada "kütləvi maliyyələşdirmə" adı altında dərc olunan 3-cü bölməsidir.[58] Belə ki, JOBS Aktı "crowdfunding" anlayışını gətirməklə startaplar və kiçik bizneslərin onlayn olaraq qiymətli kağızlar təklifləri verib kütləvi maliyyələşdirmə yolu ilə kapital cəlb etmələri üçün tənzimləyici struktur yaradır.

ABŞ-nin kraudfundinq qaydaları kimi tanınan və SEC tərəfindən tənzimlənən SEC Regulation CF 15 U.S.C. § 77d(a)(6) (bundan sonra "Regulation CF")[59] startaplar, kiçik bizneslər, eləcə də investorlar üçün kütləvi maliyyələşdirmənin bir sıra tələblərini tənzimləyir, ayrı-ayrı normaları investorların hüquqlarını qorumaqla yanaşı, bizneslərə sərmayə əldə etməyi asanlaşdıran imkanlar da yaradır. Digər sözlə, kiçik müəssisələrə və startaplara SEC-də qiymətli kağızların qeydiyyatı prosesindən keçmədən kraudfandinq vasitəsilə pul toplamağa imkan verir. Qaydada müəyyən edilən şərtlərə əsasən, crowdfunding vasitəsilə vəsait cəlb etmək istəyən startaplar, SEC tərəfindən təsdiqlənmiş bir broker-dealer (vasitəçi) və ya *crowdfunding portalı* vasitəsilə fəaliyyət göstərərək[60] bir təqvim ili ərzində maksimum 5 milyon ABŞ dollarına qədər vəsait cəlb edə bilərlər. Habelə, crowdfunding vasitəsilə vəsait cəlb etmək istəyən şirkətlər *investorlara risk faktorlarını açıqlamalı, startapın maliyyə vəziyyəti və hədəfləri haqqında ətraflı məlumatı özündə əks etdirən Form C*[61] *adlı sənədi* təqdim etməlidir. İnvestorlara isə bir qayda olaraq, illik gəlirlərinə və ya xalis sərvətlərinə nisbətlə kapital qoyuluşu limitləri müəyyən olunur.[62]

Beləliklə, sözügedən müddəalar startaplara onlayn platforma vasitəsilə yetəri qədər yaxşı məbləğdə kapital toplamağa, investorlara isə bəyəndikləri layihə və ya şirkətə sərmayə qoyuluşunu həyata keçirməyə imkan verir. Burada startaplardan şirkətin maliyyə vəziyyətinin açıqlanmasının tələb edilməsi, investorlara isə onların illik gəlir və ya xalis sərvətinə münasibətdə qoyulan limitin müəyyən edilməsi hər iki tərəf üçün daha güvənli mühit yaradır. Həmçinin investorun gəlirinə uyğun limit müəyyən edilərək çirkli pulların yuyulması məqsədilə saxta yollarla investisiya edilməsi riskinin də qarşısı alınaraq dövlət təhlükəsizliyinə təhdid yaratmır.

Əlavə olaraq, hər iki tərəf üçün xüsusi istisnalar və üstünlüklər təqdim edən qaydalardan biri də SEC Regulation D, 17 CFR §230.506 (bundan sonra "Regulation D")-dir. Bu qayda kapital cəlb etmək istəyən şirkətlər üçün

[57] Layihə və ya startapların geniş bir kütlədən onlayn platformalar vasitəsilə kapital topladığı bir maliyyələşdirmə modelidir.

[58] Daha ətraflı bax: Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 301-305 (2012).

[59] Daha ətraflı bax: 15 U.S.C. § 77d (2008).

[60] 15 U.S.C. § 77d(a)(6)(C) (2008); 17 C.F.R. § 227.100(a)(3), (1982).

[61] 17 C.F.R. § 227.201.

[62] Yenə orada, § 227.100(a)(2).

müəyyən hüquqi imkanlar yaradır və rəsmi qeydiyyat məsələsini tənzimləyir. Belə ki, ABŞ-nin 1933-cü il tarixli Qiymətli kağızlar Aktı (Securities Act of 1933) SEC-də qeydiyyat prosesini tamamlamadan qiymətli kağızların ictimaiyyətə təklifini və ya satışını qadağan edir.[63] Qeyd edilən Aktın tələblərinə əsasən, şirkətlər S-1 adlı standart formanı[64] SEC-ə təqdim edərək tam qeydiyyat prosesini həyata keçirirlər.[65] Bu forma vasitəsilə şirkətlər SEC-ə və potensial investorlara öz maliyyə vəziyyəti, biznes fəaliyyəti, kənar audit hesabatı, vergi məsələləri və s. barədə məlumatları təqdim edirlər.[66] Şirkətlər yalnız təqdim edilən sənədlər SEC tərəfindən yoxlanıldıqdan və təsdiq edildikdən sonra qiymətli kağızların təklif və satışını həyata keçirə bilirlər. Əhatə etdiyi məlumatlardan da göründüyü kimi, S-1 standart formasının hazırlanması, təqdim olunması və əskikliklərin aradan qaldırılması uzun vaxt və xərclərə gətirib çıxarır.[67] Beləliklə, Regulation D çərçivəsində startaplar üçün istisna təşkil edən birinci imkan onlara SEC-də tam qeydiyyatdan keçmədən maliyyə vəsaiti cəlb etmək imkanının verilməsidir ki, bu da prosesin xeyli sürətlənməsi və ucuzlaşmasını təmin edir.[68] Adıçəkilən qayda şirkətlərə daha az vaxt və xərclə başa gələn Form D[69] adlı sənədin təqdim edilməsi ilə qiymətli kağızlara dair ictimai təkliflər verməyə şərait yaradır.[70] Xərc və vaxt cəhətindən sərfəli olması ilə yanaşı, Form D sənədi tam qeydiyyat üçün tələb edilən S-1 standart formasından sadə quruluşu ilə fərqlənir və şirkətin rəhbər heyətinin adları və ünvanları, o cümlədən təkliflə bağlı əsas məlumatları əhatə edir.[71]

Digər əsas imkan isə akkreditə olunmuş investorlar *(sözügedən qaydaya görə, 200,000 USD və ya daha çox illik gəlir (son 2 il ərzində) və ya 1 milyon USD-dən çox sərvət əldə edən fərdi şəxslər və müəyyən ölçülərə cavab verən maliyyə qurumları və ya etibarlı investisiya təşkilatları olan şirkətlər nəzərdə tutulur[72])* saylarında məhdudiyyət olmadan, akkreditə olunmamış investorlar *(SEC tərəfindən investorlar üçün tətbiq olunan şərtlərə cavab verə bilməyən investorlar)* isə yuxarı həddi 35 nəfər olmaqla, hətta ümumi məbləğ limiti olmadan investisiya cəlb

[63] Daha ətraflı bax: Securities Act of 1933, sec.5

[64] Bax: Form S-1, Registration Statement under the Securities Act of 1933 (2024). Burada bax: https://www.sec.gov/files/forms-1.pdf (son baxış 25 aprel 2025).

[65] SEC Form S-1: What It Is, How to File It or Amend It (2022), https://www.investopedia.com/terms/s/sec-form-s-1.asp (son baxış 25 aprel 2025).

[66] Securities Act of 1933 (2023), https://www.law.cornell.edu/wex/securities_act_of_1933 (son baxış 25 aprel 2025).

[67] Yuxarıda istinad 65.

[68] Yuxarıda istinad 61, § 230.506(a)-(c); yuxarıda istinad 63, sec. 4(a)(2).

[69] Bax: Form D (2017). Burada bax: https://www.sec.gov/files/formd.pdf (son baxış 25 aprel 2025).

[70] Form D, U.S. Securities and Exchange Commission (2024), https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/form-d (son baxış 25 aprel 2025).

[71] Daha ətraflı bax: yuxarıda istinad 69.

[72] Yuxarıda istinad 61, § 230.506(c).

edən, ictimai təkliflər verən şirkətin maliyyələşdirilməsində iştirak edə bilərlər.[73] Qısaca akkreditə və akkreditə olunmamış investorların fərqinə nəzər saldıqda görünür ki, akkreditə olunmamış investorlar digərlərindən fərqli olaraq daha az gəlirlərlə işləyir, nəticədə şirkətlərə yatırdıqları kapital da digərlərinə nisbətən ümumi məbləğin az hissəni təşkil edir. Buradan başa düşmək olar ki, SEC tərəfindən qoyulan tələblərə cavab verən, yəni akkreditə olunmuş investorların sayında limitin olmaması startaplar üçün əlverişli hesab edilir.[74] Akkreditə olunmamış investorların sayına limitlərin qoyulması isə bu investorların maliyyə və biznes sahəsində kifayət qədər bilik və təcrübəyə sahib olmaması, perspektiv investisiyanın mahiyyətini və risklərini qiymətləndirmək qabiliyyətinin hüquqi standarta cavab verməməsi ilə əlaqədardır. ABŞ qanunvericiliyinə əsasən, şirkətlər akkreditə olunmamış investorlarla investisiya münasibətləri yaratdıqda onlara müvafiq məlumatları ehtiva edən sənədləri[75] təqdim etməlidirlər. Akkreditə olunmuş investorlara bur cür sənədin təqdim edilməsi öhdəliyi yoxdur. Bununla yanaşı, şirkət potensial akkreditə olunmamış investorların suallarını cavablandırmalıdır. Bu öhdəliklər isə şirkətlərdən əlavə vaxt və iş yükü tələb edir. Nəticədə, akkreditə olunmamış investorların say limiti həm onları gələcək itkilərdən qoruyur, həm də şirkətlərin bu qəbildən sadəcə 35 nəfərlə münasibətlərə başlamasını tənzimləyərək onların iş yükünü azaldır.[76] Ümumilikdə, Regulation D-nin tətbiqi sayəsində şirkətlər sadə və qısa prosedur ilə qeydiyyatdan keçərək göstərilən həcmdə investorların cəlbini həyata keçirə bilirlər. Əvvəlki abzasda qeyd edildiyi üzrə, Regulation D-dən kənar tənzimləmələrin əhatə dairəsində eyni prosedur müddət və xərc tələb edirdi.

Göründüyü kimi, ABŞ-nin startap sahəsindəki tənzimləmələri dövlət dəstəyinin və stimullaşdırıcı siyasətinin müsbət nəticələrini özündə əks etdirir. Bu baxımdan, ABŞ təcrübəsi Azərbaycanda da yeni-yeni inkişaf edən startap sahəsi üçün milli hüquqi çərçivənin formalaşdırılmasına töhfə verə bilər.

IV. Startapların AR qanunvericiliyi çərçivəsində tənzimlənməsi

Azərbaycanda startap mühitinin inkişafı 2012-ci ildən sonrakı dövrü əhatə edir. Sözügedən dövr Azərbaycanda innovativ fəaliyyətlərin formalaşması və inkişafı baxımından xüsusi əhəmiyyət daşıyır. Belə ki, ölkədə yüzlərlə

[73] Yuxarıda istinad 61, § 230.506(b)(2)(i).

[74] Non-Accredited Investor: Definition, SEC Rules, vs. Accredited (2025), https://www.investopedia.com/terms/n/nonaccreditedinvestor.asp (son baxış 25 aprel 2025).

[75] "Regulation A" adlı tənzimləmə çərçivəsində tələb olunan məlumatlarla eyni məzmunlu sənəd.

[76] Yuxarıda istinad 61, § 230.506(b)(2)(i).

startapın formalaşması, hətta onlarla startapın qlobal bazarda tanınması da bu dövrdə baş vermişdir.[77]

Startap ekosistemi Azərbaycan Respublikasının formalaşmaqda olan sahələrindən biri olduğundan dövlətin daha aktiv iştirakı zəruridir. Təsadüfi deyildir ki, ekosistemin inkişafında tənzimləyici çərçivə ilə yanaşı, maliyyələşdirmə və təşviq mexanizmləri baxımından da dövlət mühüm rol oynayır. Buna səbəb, Azərbaycan iqtisadiyyatının neft sektorundan asılılığının azaldılması üçün KOB-ların, o cümlədən startapların inkişafının dövlətin marağında olmasıdır.[78] Bu baxımdan, xüsusilə Kiçik və Orta Biznesin İnkişafı Agentliyi (KOBİA), İnnovasiya və Rəqəmsal İnkişaf Agentliyi kimi qurumların innovativ lahiyələrə dəstək xarakterli fəaliyyətlərinin genişləndirilməsi əhəmiyyətlidir.

KOBİA kiçik və orta bizneslərin fəaliyyətini tənzimləyən, KOB sektorunun davamlı inkişafına nail olmaq və onun ölkə iqtisadiyyatındakı rolunun artırılmasına çalışan publik hüquqi şəxsdir.[79] Agentliyin fəaliyyəti "Azərbaycan Respublikasının Kiçik və Orta Biznesin İnkişafı Agentliyinin fəaliyyətinin təmin edilməsi haqqında Azərbaycan Respublikası Prezidentinin Fərmanı" və nizamnaməsi ilə tənzimlənir. Adıçəkilən Fərmanda KOBİA-ın startap sahəsindəki fəaliyyətlərinə dair də konkret müddəalar öz əksini tapmışdır.

Belə ki, startapların və sahibkarların maliyyə resurslarına (kreditlərə, investisiyalara, qrantlara, biznesə dəstək (venture) kapitalına və s.) çıxış imkanlarının genişləndirilməsi KOBİA-nın əsas fəaliyyət istiqamətlərindən biridir.[80] Agentlik yeni biznes ideyası olan şəxslərə və startaplara ilkin biznes fəaliyyətinin təşkilində maliyyə dəstəyi göstərir. Eləcə də, xarici qrantlar hesabına layihələrin maliyyələşdirilməsini təşkil edir, bu istiqamətdə müxtəlif proqramlar hazırlayır və müsabiqələr keçirir.[81] Bunlarla yanaşı, Agentlik innovativ sahibkarlığın inkişafını da dəstəkləyir. Belə ki, startapların qeydiyyatı, istehsal məhsullarının (xidmətlərin) satışı, patentləşdirilməsi və xarici bazarlarda təşviq olunmasına dəstək layihəsini həyata keçirir ki, bu da müsabiqə yolu ilə baş tutur.[82] KOBİA-nın digər bir fəaliyyət istiqaməti isə

[77] Yuxarıda istinad 2, 236.

[78] Yenə orada, 221; Daha ətraflı bax: Azərbaycan 2030: sosial-iqtisadi inkişafa dair Milli Prioritetlər (2021), https://president.az/az/articles/view/50474 (son baxış 26 aprel, 2025).

[79] Azərbaycan Respublikasının Kiçik və Orta Biznesin İnkişafı Agentliyinin Nizamnaməsi, mad. 1.1. (2018). Burada bax: https://e-qanun.az/framework/39263#%C9%99lav%C9%991 (son baxış 26 aprel, 2025).

[80] Azərbaycan Respublikasının Kiçik və Orta Biznesin İnkişafı Agentliyinin fəaliyyətinin təmin edilməsi haqqında Azərbaycan Respublikası Prezidentinin Fərmanı, 3.1.41-ci yarımbənd (2018).

[81] Yenə orada, 3.1.42-ci yarımbənd.

[82] "Mikro, kiçik və orta sahibkarlığın inkişafı ilə əlaqədar təhsil, elm, tədqiqat və dəstək layihələrinin maliyyələşdirilməsi Qaydası"nın təsdiq edilməsi barədə Azərbaycan Respublikası Nazirlər Kabinetinin Qərarı, 6-cı bənd (2020).

beynəlxalq əməkdaşlığın əlaqələndirilməsidir. Agentliyin bu funksiyası "Sahibkarlığın dəstəklənməsi məqsədilə xarici dövlətlərin və beynəlxalq təşkilatların maliyyələşdirdikləri proqramların (layihələrin) əlaqələndirilməsi haqqında" Azərbaycan Respublikasının Prezidentinin Fərmanı[83] ilə müəyyən olunmuşdur. Fərmana əsasən, Agentlik xarici dövlətlər və beynəlxalq təşkilatlarla imzalanan kredit, texniki yardım və qrant sazişləri çərçivəsində həyata keçirilən proqramlarda iştirak edir.[84] Həmin proqramlara dair məlumatlar "Mikro, kiçik və orta sahibkarlıq subyektlərinin vahid reyestri haqqında Əsasnamə"nin təsdiq edilməsi barədə Azərbaycan Respublikasının Prezidentinin Fərmanına[85] əsasən yaradılması nəzərdə tutulmuş reyestrdə toplanır və bu reyestr vasitəsilə KOB subyektlərinə göstərilən dəstəyin istiqamətləri, məqsəd və məzmunu, gözlənilən nəticələr, belə dəstəklə əhatə edilən KOB subyektlərinin sayı barədə məlumatlar müəyyən edilir.[86] Qeyd edilənlərdən göründüyü kimi, KOBİA Azərbaycan Respublikasında startapların, eləcə də innovativ texnologiyaların maddi dəstəyinin təmin edilməsində əhəmiyyətli rol oynayır. Ölkədə bu fəaliyyət istiqamətindəki xüsusiyyətləri KOBİA-nın məhz ABŞ-nin Securities Exchange Comission (SEC) ilə ortaq cəhətini təşkil edir.

KOBİA-nın startapların dəstəklənməsi sahəsində əhəmiyyətli fəaliyyət istiqamətlərindən biri olan "Startap" şəhadətnaməsinə müraciət forması və verilməsi qaydası "Startapın müəyyən olunması meyarları"nda öz əksini tapır.[87] "Startap" şəhadətnaməsinin əldə edilməsinin bir sıra üstünlükləri mövcuddur. Azərbaycan Respublikasının Vergi Məcəlləsinin vergidən azadolmaların və güzəştlərin müəyyən edildiyi normalarına əsasən, "Startap" şəhadətnaməsi almış fiziki və hüquqi şəxslər bir sıra vergi öhdəliklərindən azaddırlar. Belə ki, şəhadətnaməni aldığı tarixdən etibarən fiziki şəxslərin innovasiya fəaliyyətindən əldə etdikləri gəlirlər 3 il müddətinə gəlir vergisindən azaddır.[88] Hüquqi şəxslərin innovasiya fəaliyyətindən əldə etdikləri mənfəət isə şəhadətnaməni əldə etdikləri tarixdən etibarən mənfəət vergisindən 3 il müddətinə azaddır.[89] Şəhadətnamə startaplara vergi güzəşti

[83] Daha ətraflı bax: "Sahibkarlığın dəstəklənməsi məqsədilə xarici dövlətlərin və beynəlxalq təşkilatların maliyyələşdirdikləri proqramların (layihələrin) əlaqələndirilməsi haqqında" Azərbaycan Respublikasının Prezidentinin Fərmanı (2019). Burada bax: https://e-qanun.az/framework/42790 (son baxış 25 aprel 2025).

[84] Yenə orada, 2.1-ci yarımbənd.

[85] Bax: "Mikro, kiçik və orta sahibkarlıq subyektlərinin vahid reyestri haqqında Əsasnamə"nin təsdiq edilməsi barədə Azərbaycan Respublikasının Prezidentinin Fərmanı (2024). Burada bax: https://e-qanun.az/framework/56864 (son baxış 25 aprel 2025).

[86] Yuxarıda istinad 84, 3-cü bənd.

[87] Bax: "Startapın müəyyən olunması meyarları"nın təsdiq edilməsi barədə Azərbaycan Respublikası Nazirlər Kabinetinin Qərarı (2021). Burada bax: https://e-qanun.az/framework/46782 (son baxış 25 aprel 2025).

[88] Yuxarıda istinad 9, mad. 102.1.31.

[89] Yenə orada, mad. 106.1.23.

tətbiq etməklə, onların əldə etdiyi gəliri layihənin inkişafına yönəltməyə imkan yaradır. "Startap" şəhadətnaməsi həmçinin startapa yerli və xarici investorların marağını artırır, xarici bazarlara çıxışını asanlaşdırır.[90] Vergi qanunvericiliyi ilə tənzimlənən güzəştlər və azadolmaların "Startap" şəhadətnaməsi ilə məhdudlaşmasına baxmayaraq, təbii ki, ölkədə startapların dəstəklənməsi və təşviq edilməsində müsbət yanaşmalardan biridir.

Əlavə olaraq, Azəraycan Respublikasının startap sahəsindəki tənzimləmələri sadəcə yuxarıda sadalanan müddəalarla məhdudlaşmır. Belə ki, 22 iyul 2022-ci il tarixli Prezident Sərəncamı ilə qüvvəyə minmiş "Azərbaycan Respublikasının 2022–2026-cı illərdə sosial-iqtisadi inkişaf Strategiyası"[91] startapların ölkədəki fəaliyyətinin təkmilləşdirilməsinin gələcək istiqamətlərinin müəyyənləşdirilməsi üçün əhəmiyyətli aktdır. Strategiya özündə ölkə gündəmində olan bir sıra məsələlərlə yanaşı, innovasiyaların təşviqi, müasir texnoloji həllərin tətbiqinin genişləndirilməsi, bu əsasda iqtisadiyyatın effektiv inkişafı və rəqabətədavamlılığının təmin edilməsi yönündə inkişaf planını əks etdirir.[92] Strategiyanın nəzərdə tutduğu plana əsasən, uğurlu ölkələrin təcrübələri əsasında biznes startaplarının və inkubatorlarının, ixracyönümlü istehsal və xidmətlər üzrə biznes layihələrinin dəstəklənməsi mexanizmləri təkmilləşdiriləcək, nəticədə, sahibkarlıq fəaliyyətinə başlamaq və mövcud fəaliyyətini genişləndirmək istəyənlər, xüsusilə kiçik və orta bizneslər üçün yeni maliyyələşmə mexanizmləri yaradılacaqdır. Bu çərçivədə sahibkarlara dəstək üzrə sərf olunan maliyyə vəsaitinin 20–30%-nin mikro, 35–45%-nin kiçik və 25–35%-nin orta sahibkarlara yönəldilməsi hədəflənir.[93] Eləcə də, startapların bütün inkişaf mərhələləri üzrə maliyyələşmə mexanizmlərinin formalaşdırılması hədəflənmişdir. Belə ki, startaplar və investorlar üçün məqsədli fiskal imtiyazlar sistemi hazırlanacaq, zəruri sayda istedad ehtiyatı təmin ediləcək, bu sayədə startapların sayı ilbəil artacaqdır.[94]

Sözügedən hüquqi aktda innovasiya ekosisteminin inkişafı istiqamətində vençur fəaliyyəti və kraudfandinq maliyyələşməsinə dair normativ hüquqi çərçivənin yaradılması nəzərdə tutulmuşdur. Bu istiqamətdə qarşıya qoyulan hədəfə çatmaq üçün isə müvafiq normativ hüquqi aktların hazırlanması və qəbulu mərhələlərinin həyata keçirilməsi müəyyən edilmişdir.[95]

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[90] "Startap" şəhadətnaməsini kimlər və necə əldə edə bilər? (2021), https://invest.smb.gov.az/az/news/single/966/who-can-get-a-startup-certificate-and-how (son baxış 25 aprel 2025).

[91] Bax: "Azərbaycan Respublikasının 2022–2026-cı illərdə sosial-iqtisadi inkişaf Strategiyası"nın təsdiq edilməsi haqqında Azərbaycan Respublikası Prezidentinin Sərəncamı (2022). Burada bax: https://e-qanun.az/framework/50013 (son baxış 25 aprel 2025).

[92] Yenə orada, Xülasə.

[93] Yenə orada, 3.1-ci yarımbənd.

[94] Yenə orada, 3.3-cü yarımbənd.

[95] Yenə orada, 3.2.1.2-ci yarımbənd.

Yuxarıda qeyd edilənlərdən belə nəticəyə gəlmək mümkündür ki, startapların inkişafı və təşviqi istiqamətində qanunvericilik və müxtəlif qurumlar tərəfindən müsbət yanaşmalar, o cümlədən güzəştlər mövcuddur. Bunlarla yanaşı, gələcəkdə innovativ ekosistemin təkmilləşməsi, xüsusilə də startapların əhatəsinin genişləndirilməsi, saylarının artırılması istiqamətində hədəflər müəyyən edilmişdir. Qanunvericiliyin mövcud yanaşmasındakı bu məqamlar ölkəmizdə sözügedən mühitin inkişafında müsbət amildir. Bununla belə, göstərilənlərə baxmayaraq startapların inkişafını ləngidən və fəaliyyətini məhdudlaşdıran digər məqamlar da mövcuddur.

V. Azərbaycan Respublikasının startapların inkişafını məhdudlaşdıran hüquqi normaları

Əvvəlki başlıqda göstərildiyi kimi Azərbaycan Respublikasının qanunvericiliyinin müxtəlif sahələrində startaplar və onlara dair münasibətlərin bir hissəsinin tənzimləmələri mövcuddur, lakin bu tənzimləmələrin çatışmayan cəhətləri və tənzimlənməyən faktorların vurğulanması da zəruridir. Startap sahəsində ölkə qanunvericiliyində mövcud olan boşluq əsasən maliyyələşmə məsələləri ilə bağlı olub, sözügedən sahəyə bank köçürmələri zamanı müxtəlif məhdudiyyətlərə məruz qala bilir. Bu məhdudiyyətlər startaplarla bağlı maliyyələşmə prosedurlarının qanunvericilik tərəfindən əhatəli tənzimlənməməsindən qaynaqlanaraq bir sıra problemlərə yol açır. Bu problemləri şərti olaraq 2 geniş qrupa ayırmaq mümkündür: 1. Yerli investor tərəfindən xarici startapa investisiya qoyuluşu zamanı yaranan; 2. Xarici investor tərəfindən yerli startapa kapital qoyuluşu zamanı yaranan problemli məsələlər.

A. Yerli investor-xarici startap məsələləri

Xaricdə - daha inkişaf etmiş və qabaqcıl startap ekosisteminə sahib ölkələrdə yüksək potensiallı, yaxud gəlirli startap layihələrinə rast gəlinir. Bu cür qazanclı sahənin yerli investorların marağına səbəb olması olduqca təbiidir. Bununla belə, bu zaman yerli investorun sözügedən layihəyə kapital qoyuluşu necə tənzimlənir?

1. Problemlər

Tərəflərdən biri kimi sərhədləri daxilində əməliyyatlar həyata keçirilən dövlət çıxış edir. Dünyanın bir çox yerində inkişaf etməkdə olan innovativ çağırışların ölkənin qanunvericiliyində hələ tam mənada tənzimlənməməsi ölkədə dövlətin təhlükəsizliyinə zərər vura biləcək potensial halların qarşısının alınması üçün müdafiə mexanizmini labüd edir. Bu məqamda da startapçı və investor üçün hərəkətlərini məhdudlaşdıran normativ aktlar meydana çıxır. Belə mexanizmlərin konkret təzahürlərindən biri də Azərbaycan Respublikasının Mərkəzi Bankının "Azərbaycan Respublikasının rezidentlərinin xarici valyutada, habelə qeyri-rezidentlərin milli və xarici valyutada əməliyyatlarının aparılması Qaydaları" ilə təsbiq edilmiş

Azərbaycan Respublikasından kənarda yerləşən startaplara investisiyanın edilməsini tənzimləyən normasıdır. Azərbaycan Respublikası Mərkəzi Bankının müvafiq Qaydasına[96] edilmiş əlavəyə əsasən, Azərbaycan Respublikasından kənarda startapların nizamnamə kapitalında gələcək iştirak payının (səhmin) əldə edilməsi məqsədilə investisiyaların qoyulması *("SAFE" (simple agreement for future equity) müqavilələri)* üzrə rezident və qeyri-rezident fiziki və hüquqi şəxslərin müvafiq təsdiqedici sənədlər əsasında bank hesablarından xarici valyutada köçürmələr etməsi mümkündür. Belə köçürmələr müvafiq investisiya obyekti ilə investor arasında bağlanmış müqavilə təqdim edilməklə və *bir investor tərəfindən təqvim ili ərzində cəmi məbləği 100000 (bir yüz min) ABŞ dollarından çox olmamaqla aparılır*.[97] Sözügedən dəyişikliyə qədərki dövrdə isə həmin Qaydaya əsasən köçürmənin yuxarı həddi *təqvim ayı ərzində cəmi 20000 (iyirmi min) ABŞ dolları ekvivalentinədək*[98] müəyyən olunurdu.

Qaydaya edilmiş əlavə müsbət bir addımdır və yeni təşəbbüslərə yol açır. Bununla belə, burada da toxunulması zəruri olan bir neçə məqam mövcuddur. Belə ki, investor tərəfindən startapa edilən investisiyanın cəmi məbləği təqvim ili ərzində 100000 (bir yüz min) ABŞ dolları ilə məhdudlaşır. Bu cür məhdudiyyət investorun fəaliyyətini çərçivəyə salır. Belə ki, 100000 dollardan daha çox kapital qoyuluşu həyata keçirmək istəyən investor bank köçürməsi zamanı bu müddəa səbəbindən məhdudiyyətlə üzləşəcək və sadəcə bu limit həcmində sərmayə qoyuluşu edə biləcək. Nəticədə, investorun əldə edəcəyi mənfəət aşağı düşmüş olacaq.

Bu isə təkcə yerli investorun potensial mənfəətini məhdudlaşdırmaqla kifayətlənmir, həm də Azərbaycan Respublikasının kapital axınında iştirak imkanlarını zəiflədir. Belə ki, ölkə daxilində fəaliyyət göstərən investorların beynəlxalq texnoloji bazarlara çıxışı, xüsusilə də yüksək risk və gəlir potensialına malik olan xarici startaplara sərmayə yatırmaq imkanları məhdudlaşır. Halbuki, bu cür investisiyalar vasitəsilə əldə edilən gəlirin ölkəyə gətirilməsi və yerli iqtisadiyyata reinvestisiya edilməsi perspektivi həm maliyyə dövriyyəsinin artmasına, həm də vergi bazasının genişlənməsinə səbəb ola bilər.

Qeyd olunan limit həmçinin yerli investorların qlobal startap ekosistemində iştirakını çətinləşdirir, nəticədə Azərbaycan kapitalının beynəlxalq bazarlarda səmərəli yerləşdirilməsi, digər sözlərlə Azərbaycandan xaricə çıxarıla bilən və daha yüksək gəlir gətirə biləcək kapitalın inteqrasiyası imkanı azalır. Belə şəraitdə investorlar hüquqi imkanları geniş olan ölkələrə üz tutur, bu isə potensial kapital axınının Azərbaycanın maliyyə sistemindən

[96] Azərbaycan Respublikası Mərkəzi Bankının İdarə Heyətinin Qərarı № 45/1 (2016), 4.3.13.1-1-ci yarımbənd. Burada bax: https://e-qanun.az/framework/34248 (son baxış 25 aprel 2025).

[97] Yenə orada.

[98] Yenə orada, 4.3.8.3-cü yarımbənd.

kənarda qalması deməkdir. Nəticə etibarilə, mövcud limitin aradan qaldırılması və ya artırılması həm investorların maraqlarına uyğun olar, həm də dövlətin iqtisadi maraqları ilə uzlaşaraq daha açıq və çevik investisiya mühitinin formalaşmasına xidmət edər.

Onu da nəzərə almaq lazımdır ki, Azərbaycan Respublikasının vergi qanunvericiliyinə əsasən, rezident və qeyri-rezident fiziki şəxslər gəlir vergisinin ödəyiciləridir[99] və rezident vergi ödəyicisinin gəliri onun Azərbaycan Respublikasında və *Azərbaycan Respublikasının hüdudlarından kənarda əldə etdiyi gəlirdən* ibarətdir.[100] Habelə faiz gəliri, dividend, vergi ödəyicisinin aktivlərinin ilkin qiymətinin artdığını göstərən hər hansı digər gəlirlər də[101] şəxslərin vergi ödəmə öhdəliyini müəyyən edən kateqoriyalardandır. Göstərilənlərdən belə qənaətə gəlmək mümkündür ki, Azərbaycan Respublikasının rezidenti olan fiziki şəxs tərəfindən xarici startaplara yatırılan sərmayə nəticəsində əldə edilən gəlirlər vergi tutulan gəlir hesab oluna və müvafiq olaraq Azərbaycan Respublikasının dövlət büdcəsinə gəlir vergisi şəklində daxil ola bilər. Beləliklə, bu cür investisiyaların stimullaşdırılması yalnız fərdi investorun deyil, dövlətin də iqtisadi maraqlarına xidmət edir.

Digər bir məqamı da qeyd etmək lazımdır ki, məqalənin ikinci başlığında da vurğulandığı kimi "SAFE" müqavilələri əsasən startapların ilkin mərhələlərində — "pre-seed" və ya "seed" raundlarında istifadə olunan investisiya alətidir. Halbuki startap inkişaf etdikcə, xüsusilə "Series A", "B" və "C" investisiya mərhələlərində daha mürəkkəb hüquqi və maliyyə strukturlarına malik investisiya alətləri və müqavilə modelləri ön plana çıxır. Bu mərhələlərdə investorlar artıq startapın qiymətləndirilməsi, səhmdar hüquqları, iştirak payları və çıxış strategiyaları kimi daha spesifik və dəqiq şərtlər əsasında, daha yüksək məbləği özündə ehtiva edən investisiya qərarları verirlər.[102]

Bu baxımdan, Azərbaycan Respublikasının qanunvericiliyinin müvafiq tənzimləməsi tətbiq sahəsi və normativ açıqlığı baxımından yalnız "SAFE" müqaviləsinin istifadə edildiyi *ilkin mərhələ* investisiyalarına şamil edilmək niyyətini daşıyır. Beləliklə, "Series A" və sonrakı mərhələlər üçün tələb olunan daha böyük həcmli investisiya əməliyyatlarının hüquqi rejimi aydın şəkildə müəyyən olunmamışdır. Nəticədə, bu hüquqi qeyri-müəyyənlik startaplara pul köçürməsini həyata keçirməklə investorlara xidmət edən banklar üçün əməliyyatın hüquqi əsasını müəyyənləşdirməyi qəlizləşdirir. Bu isə "Series A", "B", "C" mərhələlərində olan startaplara yerli investorlar tərəfindən investisiyaların hüquqi statusu olmayan riskli əməliyyat kimi

[99] Yuxarıda istinad 9, mad. 95.

[100] Yenə orada, mad. 97.1.

[101] Yenə orada, mad. 99.3.1, mad. 99.3.2, mad. 99.3.8.

[102] Yuxarıda istinad 16.

qiymətləndirilməsilə yanaşı, tərəflərin fəaliyyətini məhdudlaşdırır və ümumilikdə startap ekosisteminin inkişafına maneə yaradır.

2. Həll yolları

Mərkəzi Bankın müvafiq qaydası yerli investorun xarici startap mühitində iştirakını məhdudlaşdırsa da, bir sıra düzəlişlərlə normanın xarakteri dəyişə və əks-təsir göstərə bilər. Bu məqsədlə hüquqi rejimin startap ekosistemində mövqeyi güclü olan ABŞ təcrübəsi əsasında formalaşdırılması xüsusi əhəmiyyətlidir.

Bu istiqamətdə ABŞ-in Qiymətli Kağızlar və Birja Komissiyasının (SEC) tətbiq etdiyi tənzimləmə modeli nümunəvi xarakter daşıyır. Belə ki, "JOBS Act" çərçivəsində SEC tərəfindən startaplara yönəlik investisiyalarda investorun statusu (akkreditə olunmuş və ya olunmamış), riskə davamlılığı və kapital tutumu nəzərə alınmaqla diferensial yanaşma tətbiq olunur.[103] Belə bir model investorun hüquqi statusunu əsas götürərək daha yüksək məbləğdə və daha çevik investisiyalara imkan yaradır. Yerli investorların qlobal startap bazarlarında effektiv iştirakını təmin etmək və kapital axınını stimullaşdırmaq məqsədilə qanunvericilikdə startaplara kapital qoyuluşuna tətbiq olunan illik 100 000 ABŞ dolları həcmində investisiya limitinin akkreditə olunmuş və olunmamış investorlar qrupu müəyyən edilərək hər ikisinə münasibətdə dəyişdirilməsi vacibdir. Azərbaycan Respublikasının qanunvericiliyi də ABŞ yanaşmasını mənimsəyərək akkreditə olunmuş investorlar üçün limitlərin ləğvi və ya artırılması ilə bağlı geniş imkanlı hüquqi çərçivə tətbiq edə bilər.

Bu istiqamətdə akkreditə olunmuş investor anlayışı çərçivəsində meyarların müəyyən edilməsi (illik dövriyyəsi və s.), bu meyarlara cavab verən investorlar üçün limitin aradan qaldırılması və ya artırılması məqsədəuyğun olacaqdır. Həmçinin Mərkəzi Bankın Qaydasında sözügedən normanın ilk cümləsində adıçəkilən "SAFE" müqavilələrindən əlavə "Series A", "B", "C" mərhələlərindən birində olan startaplara kapital qoyuluşunun həyata keçirilməsi üçün istifadə olunacaq müqavilə formasının vurğulanmasına dair müvafiq dəyişikliyin edilməsi də zəruridir. Belə ki, "Series A", "B" və "C" mərhələlərində istifadə olunan investisiya alətlərinin (Convertible preferred stock, Preferred Shares və s.)[104] tanınması və bu əməliyyatlara dair müqavilələrin normativ əsaslarla dəstəklənməsi pul köçürməsini həyata keçirən maliyyə institutları üçün də hüquqi müəyyənlik yaradacaqdır. Təklif edilən dəyişiklik normanı aşağıdakı redaksiyada təqdim edəcəkdir (dəyişikliklər kursivlə fərqləndirilir):

"4.3.13.1-1. Azərbaycan Respublikasından kənarda startapların nizamnamə kapitalında gələcək iştirak payının (səhmin) əldə edilməsi məqsədilə investisiyaların qoyulması ("SAFE" (simple agreement for future

[103] JOBS Act, Title III.

[104] What Is Series Funding A, B, and C? by Nathan Reiff; Series B Financing: Definition, Examples, and Funding Sources by Tim Smith.

equity) müqavilələri və ya *startapın mərhələsindən asılı olaraq digər müqavilə forması*) üzrə köçürmələr. Belə köçürmələr müvafiq investisiya obyekti ilə investor arasında bağlanmış müqavilə təqdim edilməklə və ~~bir~~ *Qaydanın 4.3.13.1-2-ci yarımbəndində göstərilən qaydada akkreditə olunmuş* investor tərəfindən ~~təqvim ili ərzində~~ limitsiz olaraq, *akkreditə olunmayan investor tərəfindən isə təqvim ili ərzində* cəmi məbləği 200000 (iki yüz min) ABŞ dollarından çox olmamaqla aparılır;

4.3.13.1-2. Akkreditə olunmuş investor dedikdə aşağıdakı meyarlara cavab verən investisiya fəaliyyətini həyata keçirən yerli və xarici investor nəzərdə tutulur:

- son iki il ərzində 300 000 ABŞ dolları (şərtidir) və ya daha çox illik gəlir əldə edən fiziki şəxslər;

- müvafiq icra hakimiyyətinin müəyyən etdiyi tələblərə cavab verən (şərtidir) hüquqi şəxslər və s.

4.3.13.1-3. Akkreditə olunmayan investor dedikdə 4.3.13.1-2-ci yarımbənddə müəyyən edilmiş meyarlara cavab verməyən investisiya fəaliyyətini həyata keçirən yerli və xarici investor nəzərdə tutulur".

Göstərilən redaksiyadakı meyarların müəyyən edilməsi isə ölkənin aidiyyəti orqanları tərəfindən araşdırılaraq həyata keçirilə bilər.

Nəticə etibarilə, ABŞ modeli əsasında formalaşdırılmış çevik və investor yönümlü hüquqi rejim həm investor və dövlətin iqtisadi maraqlarını balanslı şəkildə təmin edəcək, həm də Azərbaycanın beynəlxalq startap investisiya bazarındakı iştirakını gücləndirəcəkdir.

B. Xarici investor-yerli startap məsələləri

İkinci sual isə belədir: Yerli startapların kapital cəlb etməsi hansı normalarla tənzimlənir? Azərbaycan Respublikasından kənarda startapların nizamnamə kapitalında pay əldə edilməsinin normativ aktlarla tənzimlənməsi investorların fəaliyyət imkanlarını genişləndirsə də, bu qaydalar ölkə ərazisində fəaliyyət göstərən startapların səhminin alınmasını əhatə etmir. Beləliklə, ölkənin sərhədləri daxilində mövcud olan startapın kapital cəlb etməsi prosesi yenə də tənzimlənməmiş olaraq qalır.

1. Problemlər

Azərbaycan Respublikasının innovativ iqtisadi inkişafı çərçivəsində xarici investisiyaların yerli startap ekosisteminə cəlb olunması mühüm əhəmiyyət kəsb edir. Bu əhəmiyyətin nədən ibarət olduğunu bir neçə səbəb göstərməklə izah etmək olar. İlk növbədə, bu cür investisiyalar ölkəyə xarici kapital axınını təmin etməklə yanaşı, iqtisadi artım və maliyyə dayanıqlığına da töhfə verir. Xarici investorların iştirakı isə yerli startaplar üçün həm beynəlxalq təcrübənin, həm də innovativ texnologiyaların ötürülməsi baxımından mühüm əhəmiyyət daşıyır.

Bununla belə, mövcud qanunvericilikdə yerli startapların xarici investorlardan kapital cəlb etmələri ilə bağlı spesifik hüquqi mexanizmlərin olmaması bu sahədə müəyyən hüquqi qeyri-müəyyənliklərə səbəb olur. Bu

cür tənzimləmənin olmaması yerli startapların maliyyə resurslarına çıxış imkanlarını məhdudlaşdırır.

Xarici hüquqi və ya fiziki şəxs olan investorlardan maliyyə cəlbini tənzimləyən hüquqi rejimin olmaması yerli startapların işini dövlət təhlükəsizliyini təmin edən qaydalar tərəfindən də çətinləşdirir. Mərkəzi Bankın müvafiq qaydasına əsasən, rezidentlərin və qeyri-rezidentlərin xarici valyutada olan bank hesablarına nağd və nağdsız qaydada daxil olan xarici valyuta banklar tərəfindən məhdudiyyət olmadan onların hesablarına mədaxil edilir.[105] Göründüyü kimi, pulun hesaba mədaxilində məhdudiyyət yoxdur. Ancaq AR-in "Cinayət yolu ilə əldə edilmiş əmlakın leqallaşdırılmasına və terrorçuluğun maliyyələşdirilməsinə qarşı mübarizə (bundan sonra "ƏL/TMM") haqqında" Qanununun[106] ƏL/TMM sahəsində önləyici tədbirləri ehtiva edən fəslində[107] müəyyən olunmuş tələbə əsasən, maliyyə institutları üç haldan ən az birinin baş verməsi nəticəsində müştəri uyğunluğu tədbirləri tətbiq etməlidirlər. Bu tədbirlər iyirmi min manat məbləğində (bu məbləğ limit hesab edilir) və ya limitdən artıq məbləğdə həyata keçirilməsi gözlənilən hər hansı birdəfəlik əməliyyatdan əvvəl, əmlakın cinayət yolu ilə əldə edilməsinə və ya terrorçuluğun maliyyələşdirilməsində istifadə edilməsinə şübhə yaradan bütün hallarda, habelə əldə edilmiş məlumat və sənədlərin doğruluğuna və ya uyğunluğuna dair şübhələr olduğu halda həyata keçirilir.[108] Risk əsaslı yanaşmanın nəticəsi olaraq pulun hesaba mədaxil edilməsindən sonrakı mərhələdə maliyyə institutları tərəfindən təyinatı bəlli olmayan vəsaitin məqsədi və tərəfləri araşdırılır. Vəsaitin təyinatının hüquqi əsası olmadığından əməliyyat əmlakın cinayət yolu ilə əldə edilməsinə və ya terrorçuluğun maliyyələşdirilməsində istifadə edilməsinə şübhə yaradan hal kimi dəyərləndirilərək müştəri uyğunluğu tədbirləri həyata keçirilir. Bu kimi proseslər uzun çəkir və startaplar üçün ləngiməyə səbəb olur, eləcə də vəsaitin təyinatını müəyyənləşdirmək üçün sənədlərin təqdim edilməsini zəruri edir.[109] Yazılanlardan yerli startapın cəlb etdiyi investisiya məbləğinin (əksər hallarda startapın maliyyələşdirmə raundunun limitdən çox daha yüksək məbləğ tələb edəcəyi praktikadan aydın görünür) haqlı olaraq şübhəli əməliyyat kimi görünəcəyi qənaətinə gəlmək mümkündür. Çünki maliyyə institutlarında əməliyyatın konkret təyinatını müəyyən etməyə imkan verən hər hansı norma və ya işgüzar adət mövcud deyildir. Nəticədə, maliyyə institutları

[105] Yuxarıda istinad 96, 4.1-ci yarımbənd.

[106] "Cinayət yolu ilə əldə edilmiş əmlakın leqallaşdırılmasına və terrorçuluğun maliyyələşdirilməsinə qarşı mübarizə haqqında" Azərbaycan Respublikasının Qanunu.

[107] ƏL/TMM haqqında Qanun, 2-ci fəsil.

[108] AR Maliyyə Monitorinqi Xidmətinin "Müştəri uyğunluğu və yeni texnologiyaların tətbiqi zamanı verifikasiya tədbirlərinə, risk faktorlarının müəyyən edilməsinə və müştəri profilinin risk qruplarına aid edilməsinə dair Qaydalar"ı, 2-ci bənd.

[109] ƏL/TMM haqqında Qanun, 4.2, 4.2.2, 4.2.4, 4.2.5.

üçün hüquqi rejimi olmayan əməliyyatın təyinatını tapmaq çətinləşir, müəyyən olunmuş hallardan ən az birinin mövcudluğu ilə tətbiq olunan prosedur isə innovativ texnologiyanın inkişafında gecikməyə səbəb olur.

2. Həll yolları

Göründüyü kimi, ƏL/TMM Qaydasının yerli startaplar üçün gətirdiyi məhdudiyyətin səbəbi qanunvericiliyimizdə bu prosesin hüquqi rejiminin müəyyən olunmamasıdır. Belə ki, əməliyyatın hüquqi əsasının olmaması onun maliyyə institutları tərəfindən də tanınmamasına gətirib çıxarır. Bu baxımdan "Sahibkarlığın dəstəklənməsi məqsədilə xarici dövlətlərin və beynəlxalq təşkilatların maliyyələşdirdikləri proqramların (layihələrin) əlaqələndirilməsi haqqında" Azərbaycan Respublikası Prezidentinin Fərmanı əməliyyatın tanınmasında mühüm rol oynaya bilər. Belə ki, Fərmanda müəyyən olunan qaydaya əsasən, xarici dövlətlərin və beynəlxalq təşkilatların Azərbaycan Respublikasında mikro, kiçik və orta sahibkarlığın dəstəklənməsi məqsədilə kredit, texniki yardım və ya qrant formasında maliyyələşdirdikləri proqramlar (layihələr) Azərbaycan Respublikasının Kiçik və Orta Biznesin İnkişafı Agentliyi ilə əlaqəli şəkildə həyata keçirilməlidir.[110] Bununla belə, əvvəlki başlıqda qeyd edildiyi kimi mikro, kiçik və orta sahibkarlıq subyektlərinin vahid reyestrinin yaradılmasına dair Azərbaycan Respublikasının Prezidentinin Fərmanı[111] mövcuddur. Sözügedən reyestrin Əsasnaməsinə[112] görə, dəstək göstərmiş və ya dəstək infrastrukturunu təşkil edən qurumun, habelə xarici dövlətin və beynəlxalq təşkilatın adı, o cümlədən göstərilmiş dəstəyin növü, forması, məzmunu, məbləği, müddəti və tarixi reyestrə daxil edilməli olan məlumatlar sırasındadır.[113] Reyestr hökümət informasiya sistemi ilə əlaqəli olmaqla yanaşı, fəaliyyətinin nəticələrinin izlənilməsinə və təhlil edilməsinə də imkan verir.[114]

Göstərilən bəndlərdən belə nəticəyə gəlmək olar ki, yerli startaplar xarici dövlət orqanı (qurum), xarici dövlət, eləcə də xarici təşkilat vasitəsilə kredit, texniki yardım və ya qrant formasında kapital cəlb edə bilər, o şərtlə ki, Agentliklə əlaqələndirilsin və reyestrə daxil edilsin. Təklif edilən müddəa isə dövlət qurumu, dövlət və beynəlxalq təşkilatdan cəlb edilən kapitalın hüquqi rejimi ilə yanaşı, hüquqi və ya fiziki şəxs olan investorlarla bağlı qeydin də Əsasnamədə əks etdirilməsi ilə əlaqədardır. Belə ki, xarici investisiya statuslu

[110] "Sahibkarlığın dəstəklənməsi məqsədilə xarici dövlətlərin və beynəlxalq təşkilatların maliyyələşdirdikləri proqramların (layihələrin) əlaqələndirilməsi haqqında" Azərbaycan Respublikası Prezidentinin Fərmanı, 1.

[111] "Mikro, kiçik və orta sahibkarlıq subyektlərinin vahid reyestri haqqında Əsasnamə"nin təsdiq edilməsi barədə Azərbaycan Respublikası Prezidentinin Fərmanı.

[112] Mikro, kiçik və orta sahibkarlıq subyektlərinin vahid reyestri haqqında Əsasnamə.

[113] Yenə orada, 5.1.10.

[114] Mikro, kiçik və orta sahibkarlıq subyektlərinin vahid reyestri haqqında Əsasnamə, 1.4, 1.5, 5.2.

bütün vəsaitlərin vahid reyestrdə qeydə alınması dövlətin təhlükəsizlik tədbirləri baxımından daha güvənli olar. Digər tərəfdən maliyyə institutları bu reyestrə giriş əldə edərək hesaba köçürülmüş vəsaitin təyinatını müəyyən edə bilər. Müvafiq dəyişikliyi bəndə bu formada tətbiq etmək mümkündür:

"KOB subyektinə dəstək göstərmiş dövlət orqanının (qurumunun) və ya mikro, kiçik və orta sahibkarlıq subyektlərinə dəstək infrastrukturunu təşkil edən qurumun, habelə xarici dövlətin və beynəlxalq təşkilatın, xarici hüquqi və ya fiziki şəxsin adı, ... müddəti və tarixi;".

Müvafiq dəyişikliyin xarici vəsait hesabına maliyyələşən layihələrin Agentliklə əlaqələndirilməsinə dair müddəaya da tətbiq edilməsi xarici hüquqi və ya fiziki şəxs olan investorun Agentliklə əlaqəli şəkildə kapital qoyuluşunu həyata keçirməsi, eləcə də bu maliyyə axınında dövlət nəzarətinin tətbiq olunmasına imkan verərdi.

Əlavə olaraq, Mərkəzi Bank tərəfindən maliyyə bazarlarında innovativ xidmət və məhsulların təqdim olunması üçün həmin məhsulların test rejimində sınaqdan keçirilməsi və uğurlu nəticə əldə olunduğu təqdirdə davamlı olaraq təqdim olunması üçün normativ hüquqi bazanın təkmilləşdirilməsi istiqamətində müvafiq tədbirlərin görülməsi məqsədi daşıyan "Xüsusi tənzimləmə rejiminin tətbiqi" Qaydası qəbul edilmişdir.[115] Qaydaya əsasən, innovativ məhsulu təhlükəsiz təqdim etmək üçün ərizəçi yetərli maliyyə və insan resurslarına, habelə zəruri infrastruktura (texnoloji avadanlıq, informasiya sistemi və s.) malik olmalıdır.[116] İlkin mərhələdə olan startapın hələ bunlara sahib ola bilməyəcəyindən irəli gələrək demək olar ki, müvafiq qayda ilkin maliyyələşməyə ehtiyacı olan startapları əhatə etmir. Qaydanın 4.3-cü bəndinə əsasən, tələb olunan sənədlər və məlumatların Elektron Hökumət İnformasiya Sistemi vasitəsilə müvafiq dövlət orqanından (qurumundan) əldə edilməsi mümkün olduqda həmin sənədlər və ya məlumatlar ərizəçidən tələb edilmir.[117] Yuxarıda qeyd edilən vahid reyestrə dair dəyişikliklərin tətbiq edilməsi və xaricdən investisiya əldə edən startapların məlumatlarının həmin reyestrdə qeydə alınması nəticəsində bu startaplar Mərkəzi Bankın Qaydasının əhatə dairəsinə düşmək şansını da əldə edə bilər. Belə ki, Mərkəzi Bank ilə Agentliyin startapların fəaliyyətinə dair təşəbbüslərdə birgə inteqrasiyası nəticəsində Mərkəzi Bankın vahid reyestrində qeydiyyata alınmış startapların 3.1.7-ci bəndin tələblərinə cavab verməsi ilə bağlı hüquqi əsas formalaşa və bu da "pre-seed" və "seed" mərhələsində olan startapların layihədə iştirakını mümkün edə bilər.

Qeyd olunan dəyişikliklər nəticəsində yerli startapların xarici investorlardan vəsait cəlb etməsi üçün hüquqi rejim müəyyən edilə bilər. Bu isə cinayət yolu ilə əldə edilmiş əmlakın leqallaşdırılması və terrorçuluğun

[115] Xüsusi tənzimləmə rejiminin tətbiqi Qaydası,1.2.

[116] Yenə orada, 3.1.7.

[117] Yenə orada, 4.3.

maliyyələşdirilməsi kimi görünən şübhəli əməliyyatların, həqiqətən də startaplara kapital qoyuluşu məqsədi daşıyan əməliyyatlardan asanlıqla fərqləndirilməsinə imkan verər.

Nəticə

Müasir iqtisadi dövrdə texnoloji və innovativ inkişaf sürətlə davam etməkdədir. Bu inkişaf startaplara da öz təsirini göstərir. Mütəmadi təkmilləşən və yayılan startap ekosistemi isə dövlətə kapital axınını təmin edir, iqtisadiyyatını gücləndirir və onu innovativ ideyalarla zənginləşdirir. Azərbaycan Respublikasında da bu sahənin təşviqi və həvəsləndirilməsi, o cümlədən mövcud tənzimləmələrə bir sıra dəyişikliklərin edilməsi labüddür. Dünyada startapların sayına görə ən çox olduğu ölkə hesab edilən ABŞ təcrübəsindən nümunə götürülməsi ölkəmizdə müvafiq sahənin daha sürətli və səmərəli inkişafına təkan verəcəkdir. Xüsusilə ABŞ-nin Qiymətli Kağızlar və Birja Komissiyasının (SEC) tətbiq etdiyi texnologiya yönümlü və risk əsaslı tənzimləmə modeli Azərbaycanın hüquq sisteminə uyğunlaşdırılaraq tətbiq oluna bilər. Belə ki, qanunvericilikdə xarici startaplara kapital qoyuluşuna tətbiq olunan illik 100 000 ABŞ dolları həcmində investisiya limitində ABŞ yanaşmasını mənimsəyərək akkreditə olunmuş investorlar üçün müəyyən meyarlar əsasında limitlərin ləğvi və ya artırılması ilə dəyişikliyin edilməsi sayəsində tənzimləmə daha effektiv olacaqdır.

ABŞ-in startaplara dair güzəştləri tətbiq edən orqanı SEC-in fəaliyyətini Azərbaycan Respublikasında startaplara dair layihə və proqramların həyata keçirilməsi, eləcə də maliyyələşməsini təşkil etməyə yönəlmiş KOBİA ilə eyniləşdirmək mümkündür. SEC-in yanaşmasının KOBİA-ya inteqrasiyası yerli qanunvericiliyin təkmilləşdirilməsinə töhfə verə bilər. Nəticə etibarilə, startap-investor münasibətlərində hüquqi çərçivənin ABŞ yurisdiksiyasına uyğun dəyişdirilməsi Azərbaycanın startap mühitinin təkmilləşməsinə və yerli startapların beynəlxalq bazara çıxışına şərait yaradacaqdır.

Əlavə olaraq, yerli startapların xarici maddi resurslara çıxışının təmin edilməsi baxımından da KOBİA-nın müvafiq hüquqi aktlarında təklif edilən dəyişiklikliyin edilməsi Azərbaycan Respublikasının məhsulu olan innovativ texnologiyaların xaricə çıxışını təmin edəcək, ölkəyə kapital axınını dəstəkləyəcəkdir.

Ümumilikdə, istər yerli investor–xarici startap, istərsə də yerli startap–xarici investor münasibətlərinin hüquqi əsaslarının təkmilləşdirilməsi üçün mövcud qanunvericiliyə dəyişikliklərin edilməsi, bu zaman isə beynəlxalq təcrübə və tənzimləmələrin nəzərə alınması mühüm əhəmiyyət kəsb edir.

Panel Discussion: How do Law Reviews Contribute to the Development of Law?

Preface

On April 18, 2025, an event was held to celebrate the 10th anniversary of the Baku State University Law Review. The event aimed to highlight the achievements of the Law Review over the past ten years and to discuss its future directions.

During the event, individuals who had supported the activities of the Law Review, including the founding Editor-in-Chief, Orkhan Abdulkarimli, delivered speeches and shared their valuable insights and recommendations.

Subsequently, a panel discussion titled "How Do Law Reviews Contribute to the Development of Law?" was held. The discussion, moderated by the current Editor-in-Chief, Jamal Azimov, featured the participation of former Editors-in-Chief and editors of the Law Review.

It should be noted that this discussion could also have been organised with the participation of the Law Review's experienced authors.

However, it was considered that, for such a topic, gathering the perspectives of editors who are closely familiar with the Review's activities would ensure a broader and more comprehensive viewpoint.

Ön söz

18 aprel 2025-ci il tarixində Bakı Dövlət Universiteti Tələbə Hüquq Jurnalının 10 illik yubileyinə həsr olunmuş tədbir keçirilmişdir. Tədbir Jurnalın ötən 10 ildə əldə etdiyi nailiyyətləri qeyd etmək və onun gələcək fəaliyyət istiqamətlərini müzakirə etmək məqsədi daşımışdır.

Tədbirin gedişatında Jurnalın fəaliyyətinə dəstək göstərmiş şəxslər, o cümlədən qurucu baş redaktor Orxan Abdulkərimli çıxış edərək dəyərli fikir və tövsiyələrini bölüşmüşlər.

Növbəti hissədə isə "Hüquq jurnalları hüququn inkişafına necə töhfə verir?" mövzusunda panel müzakirə baş tutmuşdur. Jurnalın cari baş redaktoru Camal Əzimovun moderatorluğu ilə keçirilən müzakirədə Jurnalın əvvəlki Baş redaktor və redaktorları iştirak etmişlər. Qeyd edilməlidir ki, bu müzakirə Jurnalın təcrübəli müəlliflərinin iştirakı ilə də qurula bilərdi, lakin düşünürük ki, belə bir mövzuda məhz Jurnal fəaliyyəti ilə yaxından tanış olan redaktorların mövqelərini öyrənmək daha geniş perspektivin təmin olunmasına gətirib çıxaracaqdır.

Participants:

Jamal Azimov, moderator

Editor-in-Chief of the Baku State University Law Review

Rufat Naghiyev

Lawyer at the Innovation and Digital Development Agency under the Ministry of Digital Development and Transport

Editor-in-Chief of Volume 9 of the Baku State University Law Review

Elvin Isayev

Senior Lawyer at "Azersilah" CJSCo

Editor-in-Chief of Volume 5 of the Baku State University Law Review

Ilham Zulfugarli

Senior Investigator of the Khazar District Prosecutor's Office

Editor of Volume 1 and Volume 2 of the Baku State University Law Review

Mansur Samadov

Chairman of the Student Academic Society of Baku State University Law School

Editor-in-Chief of Volume 10 of the Baku State University Law Review

Jamal Azimov: We will have discussions on the topic "*How Do Law Reviews Contribute to the Development of Law?*". In the first part of our two-part discussions, we will address issues on the international level, and in the second part, we will focus on matters within the Azerbaijani context. I believe that if we are speaking about contributing to the development of law, we must first clarify what we mean by contribution: is it a contribution to the academic environment, to legislation, or to legal policy? Let's begin with you, Rufat.

Rufat Naghiyev: Thank you. In my opinion, from an international perspective, it is important to first highlight the contribution of law reviews to the academic community. Researchers, doctoral candidates, and students often begin by publishing several articles on their chosen topics before eventually preparing their dissertations based on these articles. The key point is that authors turn to law reviews both to engage in scholarly discussions and to "formalize" their research findings. In this regard, I highly value the contribution of law reviews to the development of the academic environment.

Jamal Azimov: Thank you, Rufat. Ilham, you were the editor of the Law Review from 2014 to 2016, and now it's been about 10 years since that time. Based on your experience from 10 years ago, how would you answer this question?

Ilham Zulfugarli: That's a very good question, thank you. If you had asked me this question 10 years ago, I would have answered it quite differently. In general, a law review is, after all, a scientific journal. In order to expect development from a journal, one must first work toward its advancement. We read about the scientific revolutions that took place in the 19th and 20th centuries. If we delve a little deeper, we can see that debates based on scientific articles occurred not only in law, but also in mathematics, physics, and other scientific fields, through journals, newspapers, and other printed publications. For example, in the early 20th century– a dynamic period for intellectual exchange, scientists like Einstein and Tesla would formulate a thesis, publish it in a journal, and shortly after, another scientist would refute it with a different article presenting a counterargument.[1]

In my opinion, even the smallest advancement in a journal can be considered a contribution. The key factors here are time, place, and existing conditions. It is possible that the articles selected for publication at a certain

[1] The article "*Can Quantum-Mechanical Description of Physical Reality Be Considered Complete?*" by Albert Einstein, Boris Podolsky, and Nathan Rosen was published in the Physical Review journal. A few months after this event, Niels Bohr published his counter-argument article, bearing the same title, in the same journal. In this way, the scientific environment was formed. *See* Albert Einstein, Boris Podolsky, Nathan Rosen, *Can Quantum-Mechanical Description of Physical Reality Be Considered Complete?*, 47 Physical Review 777 (1935); Niels Bohr, *Can Quantum-Mechanical Description of Physical Reality Be Considered Complete?*, 48 Physical Review 696 (1935).

time may not address topics that seem particularly relevant or important at that moment; however, as time passes, all fields evolve, and circumstances may arise where those topics become top priorities. When future researchers examine these matters, they may find that the first seeds of the topic were reflected in earlier articles and journals. Just as people accumulate capital to ensure a better life for future generations, these journals also serve as a kind of legacy. Just as today's literature often refers to the ideas of ancient Roman jurists, future generations will likewise be able to use the articles published in these journals as valuable sources.

Jamal Azimov: Thank you, Ilham. As you emphasised, academic discussions were once conducted largely through journals. Today, there is no unanimous stance on the idea that "*academic articles should be solely for academia,*" and it remains an open topic for discussion. Some people support the view that there is no need for non-lawyers to understand legal articles when reading them. Others believe that the language of academic legal articles is becoming increasingly complex, making it harder for non-lawyers to understand their content. Elvin, what do you think — which approach is more appropriate?

Elvin Isayev: First of all, I would like to thank the Student Academic Society for the invitation. Regarding the question, I believe that journals bring together several different categories of people: authors, readers, and the editorial board. Let us first consider the relationship between authors and readers: when an author writes an article, they determine both the topic and the target audience. For example, an author may decide to write on a topic that would primarily attract the interest of highly specialised academic experts.

Alternatively, they may write an article addressing an issue that concerns the daily problems of the general public. From this perspective, whether an academic article is simple or complex depends on the author and the audience they have chosen. If an author aims to target the general public but still uses heavy and complicated expressions in the article, it will not be successful — at least, it will not effectively reach the intended audience.

Jamal Azimov: Thank you very much for your thoughts. Mansur, do you have anything to add?

Mansur Samadov: Thank you. I will try to answer this question from a student's perspective. I believe that both law reviews and articles should be written in a way that is understandable not just for law students but also for non-lawyers. For example, even a student studying in the Faculty of Mathematics should be able to understand a legal article when reading it. Personally, I comprehend articles written in simple language much better, and I think other students would agree with me. One of our goals as the Law

Review is to increase legal literacy, so the articles we publish aim to address not only the legal academy but also Azerbaijani society and the international sphere.

***Jamal Azimov*:** Thank you very much, Mansur. My final question on this topic is addressed to Rufat. Rufat, when I read your recently published article in our Law Review, I noticed that it concerns artificial intelligence and the ethical conduct of advocates.[2] Upon reading it, I realised that it is written in an incredibly simple language that even a non-lawyer could easily understand. After all, subjects like artificial intelligence are generally of a more complex nature and therefore arguably require a proportionally sophisticated style. What is your perspective?

***Rufat Naghiyev*:** This, of course, depends somewhat on the author's choice. For instance, in my own writing experience, although part of the article discussed the practice in the United States, I deliberately set out to write the article in Azerbaijani. I intentionally used clear and straightforward sentences that everyone could understand, without unnecessary complexity, in order to form a coherent understanding of artificial intelligence, a new trend that has also become widespread within Azerbaijani society. Sometimes, academic articles employ convoluted sentences or complex vocabulary. However, I sought to avoid this as much as possible and aimed to write the article in Azerbaijani.

This approach corresponds with broader discussions in legal scholarship regarding accessibility. Excessive complexity in academic legal writing can obscure meaning and limit the reach of scholarly work, as well as cause time-wasting for readers to understand.[3] For that reason, modern academic standards increasingly encourage the use of plain language to decrease the difficulties faced by the readers in understanding. The researcher advocates for a clear and precise writing style, particularly in areas where broad comprehension is essential. Since artificial intelligence has become an accessible tool for almost everyone, access to information on this subject should likewise be available to all.

***Jamal Azimov*:** Understood, thank you very much, Rufat. You also mentioned the issue of accessibility. Mansur pointed out that as academic journals, one of our objectives is to contribute to legal education. Rufat

[2] *See* Rüfət Nağıyev, *Vəkilin süni intellektli köməkçisi və peşə davranış qaydaları: Azərbaycan və ABŞ qanunvericiliyinin müqayisəli təhlili [Lawyer's Artificial Intelligence Assistant and Rules of Professional Conduct: Comparative analysis of Azerbaijani and US Legislation]*, 10 Baku State University 121 (2024). Available at: https://bsulawreview.org/en/buraxilis-10/buraxilis-101/vəkilin-suni-intellektli-koməkcisi-və-pesədavranis-qaydalari-azərbaycan-və-absqanunvericiliyinin-muqayisəli-təhlili/ (last visited Apr. 29, 2025).

[3] Cüneyt Demir, *The Needless Complexity in Academic Writing: Simplicity vs. Flowery Language*, 19 The Reading Matrix: An International Online Journal 13, 25 (2019).

similarly noted that information is now widely accessible. We also observe that most legal scholars now publish their articles and writings on open-access platforms. In a context where there is such an abundance of accessible information and publication opportunities, why do we still need journals? After all, a professor could publish an article on LinkedIn and perhaps present even higher-quality ideas than those found in journal articles. I would like the person with the most experience, Ilham, to respond to this question.

***Ilham Zulfugarli*:** Thank you. It is indeed a thought-provoking question. Today, internet platforms have spread rapidly and are accessible to almost everyone. It is practically impossible to imagine life without a Wi-Fi network. Nevertheless, despite this widespread access, academic journals continue to maintain their distinctive character within the intellectual ecosystem. If we are committed to professionalism, we must consider that there is no organised, collective publication of articles scattered across various individual platforms or statuses.

Here we should apply economic reasoning. What is an article? It is an economic product, a product of an author's intellect. Why are products created? From an economic perspective, they are created for sale. However, in the realm of science, the primary goal is not to profit from the sale of the product but to contribute to its development. Product sales are based on supply and demand. Journals play a critical role in structuring this intellectual market. Just as lawyers, we consult a compilation or a code to more quickly find necessary information, researchers and practitioners who seek knowledge can more effectively obtain results by consulting journals. It serves their interest, and they do not disregard the writings; rather, they view them as a necessity. Therefore, journals must identify these needs and publish topics that contribute to the development of the field.

***Jamal Azimov*:** Understood, thank you very much, Ilham. Does anyone have anything to add on this matter?

***Elvin Isayev*:** In fact, I would like to highlight two factors. One of these was mentioned by Ilham, namely the marketing aspect. As a second factor, I would like to draw attention to reliability. What do we mean by reliability in this context? For example, I consider it more reliable to read an article that has undergone peer review, editorial processing, and revisions based on feedback from other reviewers, rather than an article shared by someone on a social media platform or published on a personally created website. The reason is that a peer-reviewed article is not merely a reflection of a single individual's ideas; it is a product shaped through rigorous evaluation and collective academic scrutiny. As emphasised in scholarly discussions, academic journals not only disseminate knowledge but also uphold standards of quality control

through peer review and editorial oversight. This process substantially enhances its credibility.

Moving back to the marketing side, I believe that even though an author's main objective may be to contribute to the advancement of science, their motivation also includes the desire for their article to be read. The increase in readership stems from several factors. One scenario is where you search for the author's name within a journal to see which new topics they have addressed. Another scenario is where the journal itself has such a strong reputation that you trust the journal and search within it to find out which authors are featured. In other words, you recognise the author because of the journal. In this regard, I believe the importance of journals still remains and will continue in the future, at least for the two reasons I have mentioned: reliability and recognition.

***Jamal Azimov*:** Thank you very much. I hope that the journal's activities will continue in the coming years. We also touched upon another point, namely that authors often want their articles to be read. For this reason, they sometimes choose topics that are new or likely to attract attention. For example, during the COVID-19 pandemic, a large proportion of academic research was devoted to COVID-19. In recent years, there has also been a considerable number of articles on artificial intelligence, particularly concerning its legal regulation. How do such articles impact the development of academia? More broadly, should academic research follow trends? From what I understand, the period of both COVID-19 and the rise of artificial intelligence coincided with Mansur's tenure as editor-in-chief. Mansur, what is your view? Do you think academic research should follow trends?

***Mansur Samadov*:** This is a very interesting question. We also discussed this issue extensively among ourselves. I served as editor-in-chief during the 10th Volume, which corresponded roughly to the years 2023–2024. It was during this time that artificial intelligence became very popular. It is no coincidence that two articles on artificial intelligence, specifically about ChatGPT, were published in the second issue of the 10th Volume.[4] I had read a study on this topic, which showed that during the COVID-19 pandemic, a large portion of research was related to the pandemic.[5]

[4] *See* Nağıyev, *supra* note 2; Kanan Naghiyev, *ChatGPT from a Data Protection Perspective*, 10 Baku State University Law Review 1 (2024). Available at: https://bsulawreview.org/en/volume-10/volume-101/chatgpt-from-a-data-protectionperspective/ (last visited Apr. 29, 2025).

[5] It was revealed that, during the pandemic, about 48% and 37% of all research papers on respectively Scopus and Web of Science were dedicated to Covid-19. *See* Jaime A. Teixeira da Silva, Panagiotis Tsigaris & Mohammadamin Erfanmanesh, *Publishing Volumes in Major Databases Related to Covid-19*, 126 Scientometrics 831 (2021).

In my opinion, this is not a very successful trend. Articles written based on trends are products intended for a very short lifespan. Accordingly, we can say that such articles lose their relevance once the specific trend, such as the pandemic, comes to an end. If we do not expect our article to remain relevant for at least the next five years, it may not even be worth publishing. In academic publishing, sustainability of relevance is a critical indicator of the quality and value of research. In my view, the most successful article is the one that remains relevant over a long period. Therefore, we should not always write about trends. Rather, we should sometimes create relevance ourselves by addressing issues outside of current trends.

***Jamal Azimov*:** This is a very interesting approach. It seems to me that the point Mansur raised is particularly relevant to Rufat Naghiyev since you recently wrote an article on artificial intelligence. Do you share Mansur's view? Was your article also intended to be short-lived?

***Rufat Naghiyev*:** When OpenAI introduced ChatGPT in November 2022, articles on this topic slowly began to emerge. At that time, ChatGPT, as a model, was not yet highly developed, so its sentence structures and patterns were still quite evident and distinguishable. However, as the model developed, the academic community's concerns also increased because of the emergence of plagiarism cases and the use of ChatGPT and other AI tools in article writing. The problem got so bad that recently, articles that were unmistakably created by ChatGPT were found in the databases of Elsevier and Scopus. This triggered serious alarm within the academic community.[6] As a result, the publisher Elsevier had to update its editorial policies to emphasise transparency regarding the use of generative AI tools, as noted in its 2023 statement on publishing ethics.[7]

As for the matter of trends, it largely depends on the author's objectives. For instance, if an author writes an article about the COVID-19 pandemic, it may be considered innovative and useful for only a few years, during which time relevant legislation may change. However, after losing immediate relevance, such an article may regain its significance later. For example, in the context of COVID-19, it is possible that 20, 30, or even 50 years from now, in the event of a new pandemic, articles discussing how quarantine legislation was implemented could once again become highly relevant. This logic applies analogously to other topics as well.

[6] The Latest "Crisis" — Is the Research Literature Overrun with ChatGPT- and LLM-generated Articles? (2024), https://scholarlykitchen.sspnet.org/2024/03/20/the-latest-crisis-is-the-research-literature-overrun-with-chatgpt-and-llm-generated-articles/?utm_source=chatgpt.com (last visited Apr. 29, 2025).

[7] *See* Elsevier, Publishing ethics (2023), https://www.elsevier.com/about/policies-and-standards/publishing-ethics#0-publishing-ethics (last visited Apr. 29, 2025).

***Jamal Azimov*:** Since we are discussing articles written about artificial intelligence, we must also address articles produced by means of artificial intelligence. One of the major challenges currently faced by editorial boards is articles generated through artificial intelligence. In general, how should journals approach this issue? Why should, or should not, articles produced with the help of artificial intelligence be considered a violation of academic ethics? I would like Elvin to respond to this question.

***Elvin Isayev*:** This issue may vary depending on the journal's editorial policy. If an article written with the help of artificial intelligence is presented as such, there might not be a significant problem. If the journal publishes an article created through artificial intelligence and clearly indicates that the article was authored with the support of artificial intelligence, then, in my view, this would not constitute a serious ethical violation. At the very least, the reader is not misled, and no breach of ethics occurs.

However, from a legal standpoint, a more complex issue arises. From a formal perspective, an article must have an author. Current intellectual property frameworks were developed on the assumption that authors are natural persons.[8] Although those instruments do not explicitly control AI-generated works, the general agreement among law scholars is that authorship would presume an intellectual work by the human mind. The World Intellectual Property Organisation (WIPO) noted in its recent discussion that whether AI systems could be considered as having authorship rights or not is still open and a subject of international debate.[9]

Here, a question arises: who can claim authorship rights over an article written by artificial intelligence? The artificial intelligence itself? However, artificial intelligence cannot be an author, as it does not yet fall within the concept of a legal person. In that case, who should be considered the author? Should it be the person who provided the data, the source, or the topic of the artificial intelligence? If a person merely provides prompts or topics to an AI system, can they rightfully be considered the author? Or does true authorship require deeper intellectual engagement and creativity?

Furthermore, we may consider whether artificial intelligence had any intellectual process that would allow it to claim authorship rights over the article. After all, it does not engage in original thought processes: It just recombines existing data patterns without genuine creativity or critical reflection. It merely selects sources and presents topics. From this perspective, the matter could be approached as a potential ethical violation. Articles

[8] *See* Berne Convention for the Protection of Literary and Artistic Works (1886). Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20828/volume-828-I-11850-English.pdf (last visited Apr. 29, 2025).

[9] *See* WIPO, *Artificial Intelligence and Intellectual Property: An Economic Perspective,* No. 77/2024 (2024).

written solely through the use of artificial intelligence or those shared with a note indicating they were prepared with the assistance of artificial intelligence might be acceptable to the reader in terms of transparency. In such cases, we would not be violating ethical standards.

***Jamal Azimov*:** Thank you for your insights, Elvin. Does anyone have anything to add? If not, we can move on to the next questions. As we have already discussed the broader international trends, now we can move on to the local context. In Azerbaijan specifically, the main goal of the law reviews is to achieve increasing influence in the academic sphere. This influence may manifest itself in legislative updates, judicial practice or in academia itself. What strategies should we adopt to strengthen the influence of our journals across these areas?

***Ilham Zulfugarli*:** If we have a goal of changing the entire system toward positive, it can not be done in a short timeframe. As they say, Rome was not built in one day. First of all, legal thinking must be developed within society, including within the legal community itself. As lawyers, we must begin by developing legal thinking within ourselves.

Secondly, there is an issue with the practical manifestation of legal thinking within the legislation. This issue is intrinsically linked to broader social-public problems. When addressing social problems via legislation, we encounter certain realities. It is necessary for our articles and journals to reflect these realities and solutions in the face of them. If we succeed in establishing legal thinking in society, then, of course, this will be reflected in our textbooks.

Additionally, in Azerbaijan, the interpretation and application of law are shaped by judgements of the Supreme Court and the Constitutional Court. In those judgements, distinguished legal scholars frequently take part as expert advisors. It would be valuable to invite these scholars to contribute articles addressing pressing legal issues—or, where such work already exists, to prioritise their publication in our journals. As these individuals are well-recognised within the legal community, their contributions could play a critical role in shaping legal thought, influencing legislative reforms, and ultimately affecting practical legal developments. Nevertheless, this is not a transformation that can occur within one or two years. Consistency is crucial. Through sustained effort, we can achieve meaningful progress.

***Jamal Azimov*:** Thank you very much, Ilham. I would like to direct my final question on this topic to Mansur. As a young lawyer, do you believe that academic articles will, in the future, be cited or considered by national courts when rendering decisions?

***Mansur Samadov*:** Generally speaking, I believe that the concept of "law journal" does not exist in Azerbaijan.[10] When we say law journal, we are actually translating the concept of "law review." It is essential not to confuse it with normal law journals. In order to understand what "Law Review" means, it is important to look at its history.

Law reviews first emerged in the 19th century under the auspices of bar associations. However, they were not law reviews as we know them today. They were mainly intended to provide information by covering recent court rulings, legal developments, changes in legal education, codification efforts, and related news, presented in a journalistic rather than an academic style.[11] Although some short articles were included, they were usually buried in the middle sections; these practitioner-focused journals generally opened with comments or editorials, continued with short articles and case reports, and ended with digests and book notices.[12]

The origins of the modern law review can be traced back to 1887 with the founding of the Harvard Law Review. It began with a small group of Harvard students, members of a club devoted to legal writing, who envisioned a new platform for serious academic debate. From these modest beginnings, they established the first student-run law review dedicated to publishing scholarly work—an initiative that would later shape legal education and scholarship across the world.[13]

Although early reactions to student-edited law reviews were sceptical, with some judges dismissing them as the "*work of boys*", their influence steadily grew.[14] By the late 19th century, law review articles had begun to appear in U.S. Supreme Court opinions.

However, the citation of law review articles by courts became the norm following President Franklin D. Roosevelt's appointments to the Supreme Court. Statistics from various sources showcase this clearly.[15] This shift is evident from the notable increase in the frequency and prominence of legal scholarship in judicial opinions during that period.[16]

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[10] Although the notions of "law journal" and "law review" differ from each other, in the Azerbaijanian language both terms are translated as the same.

[11] Michael I. Swygert, Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 Fla. St. U. L. Rev. 229, 760–63 (2009).

[12] *Id.*, 759.

[13] Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 Akron Law Review, 10–11 (1997). Available at: https://ideaexchange.uakron.edu/akronlawreview/vol30/iss1/2/ (last visited Apr. 28, 2025).

[14] *Id.*, 6.

[15] Philippa Strum, Louis D. Brandeis: Justice for the People, 364 (1984).

[16] During the 1939 Court term, 27 opinions cited 66 legal periodicals, compared to just 7 opinions citing 27 periodicals the previous year. Between 1939 and 1943, approximately 17% of Supreme Court opinions cited legal scholarship, a figure that rose to 28% from 1944 to

In other words, as a product of that system, Law Reviews met the standards of their time and were often cited in court decisions. In the American experience, one way to assess the success of an academic article was to examine how often it was cited by courts and used in practice.

However, the situation in Azerbaijan is different. Even if we create our own version of a law review, we can not apply the same system directly. We must chart a different course here. While the main objective of a traditional law review can be to influence court decisions, our focus should instead be on contributing to academic discourse and public debate. In my opinion, we should not aim to influence court decisions because it is not fit for our system. Instead, we should aim to disseminate ideas within the academic community and society more broadly. Over time, as these ideas spread, they may indirectly influence legislative changes or inspire new policy initiatives.

***Jamal Azimov*:** Thank you, Mansur. I would like to address the final question of our panel discussion to Rufat. Rufat, the *Baku State University Law Review* was indexed in Scopus during your tenure as Editor-in-Chief. A crucial aspect of being indexed in Scopus is that it signifies our journal's integration into the international academic discourse. With that in mind, my question is, what steps do you believe Azerbaijani journals should take to better integrate into the international discourse and to contribute to it more actively?

***Rufat Naghiyev*:** Thank you for such an interesting question. I believe there are several ways to achieve this goal. First, in order to contribute meaningfully to the international arena, Azerbaijani authors should interpret and present our national legislation in English for an international audience. Second, we can advance this effort by conducting comparative analyses between Azerbaijani legislation and the laws of other countries.

Furthermore, we can contribute to the global legal debate by collaborating with foreign authors and by actively participating in international conferences. Likewise, we should encourage partnerships with foreign universities, researchers, and doctoral students, inviting them to publish their articles and research in our journals. Through these strategies, we can build a law review that is reliable, shaped by years of experience, and widely recognised. Over time, both domestic and international scholars could view the journal as a platform for legal discussion, and the resulting increase in citations would significantly enhance our influence.

***Jamal Azimov*:** Thank you, Rufat. Does anyone have anything to add?

***Ilham Zulfugarli*:** I would like to add a point. If we want our law review to become part of a legal discussion or mechanism abroad or to exert influence on such developments, we must ensure that the articles we publish address

1948. *See* Chester A. Newland, *Legal Periodicals and the United States Supreme Court*, 3 Midwest Journal of Political Science 58 (1959).

the needs of the international audience. Let us assume that a particular article is the result of years of diligent effort and demonstrates high scholarly quality. Nevertheless, if the article's topic lacks relevance within the foreign legal sphere, it will have limited impact, as there will be little incentive for anyone abroad to engage with it. Therefore, the careful selection of article topics is a critical factor. In short, an article should address developments occurring in foreign jurisdictions and capture the interest of the key actors involved in those processes.

***Jamal Azimov*:** This point further connects with the idea of aligning ourselves with emerging trends, as we discussed earlier. We must follow these developments to position ourselves at the centre of international legal discourse.

If our panellists have no additional remarks, I would like to extend my sincere thanks to all the panellists for their valuable insights and to the audience for their attention. We hope that this panel discussion will contribute to our own growth, to the future of the Baku State University Law Review, and to the broader development of law review culture in Azerbaijan. Thank you all once again, and have a great day!