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GARADZHAIEV Dzheihun,

Doctor of Law, Associate Professor of the Department of Constitutional Law
of the Faculty of Law of Baku State University, Judge of the Constitutional Court
of the Republic of Azerbaijan

THE LEGAL FORCE OF THE ACTS OF THE CONSTITUTIONAL COURT OF AZERBAIJAN

The normative nature of the decisions of the Constitutional Court of the Republic of Azerbaijan was studied. Concrete proposals on making amendments and additions to the Law of the Republic of Azerbaijan «On the Constitutional Court» have been formulated with regard to the legal force of the acts of this body, based on the vagueness of the wording contained in the national legislation of the country.

Keywords: constitutional court, constitutional control, acts of the constitutional court, Constitutional Court of the Republic of Azerbaijan, legal force of acts of the constitutional court.

Гараджаяв Д. Юридическая сила актов Конституционного Суда Азербайджана. Исследован нормативный характер постановлений Конституционного Суда Азербайджанской Республики. Сформулированы конкретные предложения о внесении изменений и дополнений в Закон Азербайджанской Республики «О Конституционном Суде» в части юридической силы актов этого органа, исходя из нечеткости формулировок, содержащихся в национальном законодательстве страны.

Ключевые слова: конституционный суд, конституционный контроль, акты конституционного суда, Конституционный Суд Азербайджанской Республики, юридическая сила актов конституционного суда.

Background. In the Republic of Azerbaijan (RA), the Constitutional Court has been functioning quite actively for more than two decades. During this time, its activities were subjected to significant reform, but during the reform the problem of the legal force of the decisions of the Constitutional Court was not completely resolved.

In the Ukrainian legal literature there is very little information on the Constitutional Court of Azerbaijan, while the experience of its reform and functioning can be useful and interesting for theorists and practitioners in Ukraine.

Analysis of recent research and publications. Problems of reforming the Constitutional Court in Ukraine are studied by a whole group of scientists. The legal nature of the acts of the Constitutional Court of Ukraine and its

role in the development of constitutional law is studied by O. V. Marceljak [1]. N. V. Mishyna investigates the constitutional complaint and the possibilities of using the US experience in Ukraine [2]. Thus, the research of Ukrainian scientists touches on an interesting topic, the development of which will contribute to the improvement of the activities of the Constitutional Court in the country.

Analogous studies have not been conducted in Azerbaijani literature yet, which makes it necessary to study the practical experience of reforming the Constitutional Court of Azerbaijan, which can be useful for Ukrainian researchers.

The **aim** of the article is the theoretical justification and normative regulation of the legal force of the acts of the Constitutional Court RA.

Materials and methods. General scientific and special scientific methods of cognition are used in the work. The research is based on the dialectical method, according to which the problems of the activity of the Constitutional Court RA are considered in the unity of their social function and legal form. System-structural and formal-logical methods are used in the process of studying the mechanism for realizing his powers.

Results. The Constitution RA provides that «the Constitutional Court of the Republic of Azerbaijan makes decisions on matters within its competence. Decisions of the Constitutional Court of the Republic of Azerbaijan are binding on the entire territory of the Republic of Azerbaijan. Decisions of the Constitutional Court of the Republic of Azerbaijan shall be published» [3]. In addition, in the Basic Law RA in Art. 148 the list of normative legal acts included in the system of legislation RA is fixed. They are: Constitution; acts adopted by referendum; laws; decrees; Decisions of the Cabinet of Ministers of the Republic of Azerbaijan; normative acts of central executive bodies. It was also noted that the system of Azerbaijan legislation includes international treaties, participant of which is the RA. Acts of the legislation system of the Nakhichevan Republic, normative acts of local executive bodies and municipalities should not contradict the acts included in the system of legislation RA. Thus, one can come to the conclusion that the acts of the Constitutional Court RA do not belong to normative legal acts and are not included in the system of the legislation of the RA established by the Constitution RA.

However, from the analysis of the norms of the Constitutional Law RA «On normative legal acts» it should be concluded that this Law fixes the possibility for the Constitutional Court RA to carry out norm-setting activities. Paragraph 1.0.13 of the Constitutional Law provides that «norm-setting activities are activities related to the preparation, examination, adoption, amendment, interpretation, suspension, or revocation of regulatory legal acts». Since the Constitutional Court RA is competent to recognize the rule of law as inadequate to the Constitution RA and thus decides the invalidity of this norm, and also interprets the Constitution RA and other normative and legal acts, it can be argued that it carries out norm-setting activities, however not in all cases. This is quite true – as S. V. Shevchuk correctly noted, «the

denial of the normative content of the act of the judiciary, ... in which the interpretation of the law is given is a simultaneous recognition of the inability of judges to resolve conflicts in society with the help of law and exercise justice» [4, p. 101].

On the other hand, it should be noted that the Constitutional Law RA «On Normative Legal Acts» establishes distinctions between normative and legal acts and normative acts. Paragraph 1.0.3 Article 1 of the Law refers to the last official documents of the established form adopted by the state body or the local government body provided for by this Constitutional Law, reflecting generally binding rules of conduct for an indefinite circle of persons and envisaged for repeated application» [5].

Paragraph 4.1.1 Art.4 «Acts of a regulatory nature and their legal force» stipulates that this type of acts includes decisions of the Constitutional Court RA adopted in accordance with paragraphs 1–7 of Part III of Article 130 and Part IV of the Constitution RA [5].

There are no references to other acts of the Constitutional Court RA in the analyzed Constitutional Law, although in the process of exercising its powers the investigating body adopts not only resolutions but also definitions. The relevant issues are regulated by Chapter 8 of the «Acts of the Constitutional Court» of the Law RA «On the Constitutional Court», as well as the internal statutes of the Constitutional Court RA. In these acts, it is a question of generic concept of «decision», as well as the types of decisions of the sole body of the constitutional jurisdiction of the RA – «resolutions» and «definitions».

Like the Constitution RA, the Law RA «On the Constitutional Court» provides that the decisions of the Constitutional Court are binding on the territory of the Republic of Azerbaijan, and also stipulates that «the decisions of the Constitutional Court after the entry into force must be executed unconditionally. Officials who do not comply with the decisions of the Constitutional Court are liable in the manner prescribed by the legislation of the Azerbaijan Republic» [6].

The differences between solutions and definitions are as follows:

- The chambers of the Constitutional Court RA are empowered to adopt only determinations, and the Plenum adopts decisions and definitions;
- the decisions reflect the conclusion reached by the Constitutional Court RA as a result of the consideration of the constitutional case on the merits, the determination of the chambers is made on the issues of accepting the request, appeal or complaint for consideration, and the definition of the Plenum is made for resolving the issues arising in Plenum meetings, and in other cases, not involving the adoption of a resolution;
- Decisions and determinations of the Plenum are ruled by a majority of 5 votes of the judges, unless otherwise provided by the Constitution or by law and the definition of the chambers is ruled by a majority of the judges;
- Decisions of the Plenum have a certain structure. They consist of introductory, descriptive-motivational and a resolutive part, the article 65 of the Law RA «On the Constitutional Court» contains lists of mandatory

requisites for each of these parts. The structure and content of definitions is not established by law.

The possibility of adoption of different kinds of acts by the Constitutional Court of RA is quite typical for the body of constitutional control. V. V. Zakharov marked that «the analysis of current legislation allows making a conclusion about possibility of adoption of acts by the Constitutional Court, different in their characteristics and the legal effect» [7, p. 6]. Examining the acts adopted by the Constitutional Court (decisions and definitions), V. A. Vitushkin marked: «the Definitions have different properties of legal force; therefore, it seems wrong to transfer all properties of legal force from final decisions of the constitutional Court to its determination. In the overwhelming majority of cases, definitions are passed on issues that are subordinate in relation to the resolution of the merits of the case, and only a few of them possess the properties of legal force in the sense in which this relates to final decisions, although its properties are not of a one-order nature» [8, p. 8].

More detailed about both decisions and definitions of the Constitutional Court of Azerbaijan is the Internal Charter of this body. Chapter 5 is devoted to the decisions of the Constitutional Court RA (including the issues of preparation and adoption of the decisions of the Plenum of the Constitutional Court RA, the term for the presentation of a special opinion by the judge, the adoption of the definitions, the direction of decisions for publication, the generalization of the practice of implementing the decisions of the Plenum of the Constitutional Court RA, as well as amending the decisions of the sole body of constitutional jurisdiction of the RA if they are related to inaccuracies in their text).

There is no information on the place of the RA Constitutional Court's determinations either in the Constitution or in the Constitutional Law of the Republic of Azerbaijan «On Normative Legal Acts», neither in the Law of the Republic of Azerbaijan «On the Constitutional Court» nor in the Internal Statute of the Constitutional Court of Azerbaijan. Based on the above mentioned normative and legal norms on the definitions of the only body of constitutional jurisdiction of the RA, it is fair to conclude that, in addition to its decrees, all other acts are not normative.

The scientists state that «in the legal science ... until today there is no common opinion as to what the acts of the constitutional court are» [1]. In order to resolve the issue of the legal force of the acts of the Constitutional Court of the Republic of Azerbaijan, it is necessary to determine, firstly, whether this body can create norms of law, secondly, whether all its acts contain rules of law, and thirdly, whether the legal force of acts of the Constitutional Court of the Republic of Azerbaijan containing the norms of law is the same.

The first and second issues in the Republic of Azerbaijan have been resolved at the level of legislation. It has already been mentioned above that the decisions of the Constitutional Court RA on the Constitutional Law RA «On Normative and Legal Acts» are referred to normative documents (in

contrast to the RA Constitutional Court definitions, which are not mentioned in this Constitutional Law, that gives grounds for the conclusion that they are not of a regulatory nature).

At the same time, it should be noted that it would be premature to assign a rule-making function to the Constitutional Court RA. In legal literature, up to the present time there has not been a unified position on whether it is inherent in these bodies and the arguments «for» and «against» are rather convincing. More and more authors not only write about «constitutional and judicial lawmaking» [9, p. 8], but also notice the law-making (or rule-making) function in other judicial bodies. A. S. Khudyntseva even classified the types of norm-setting carried out by it with regard to the International Court of UN, stating that it is involved in the process of international rule-making in two forms: «a) by creating norms of the internal law of the Court (as a system of rules mandatory including for, participants in the dispute); b) in the form of the so-called «Mediated» rule-making, i.e. by concretizing the applied norms and «identifying» international customs in the course of making decisions and advisory opinions» [10, p. 12].

However, it seems premature to talk about the law-making (or rule-making) function of the sole body of constitutional jurisdiction of the RA.

Since the Constitutional Court RA is competent to recognize the rule of law as inadequate to the Constitution RA and thus decides the invalidity of this norm, and also interprets the Constitution RA and other normative and legal acts, it can be argued that it carries out norm-setting activities, however not in all cases. The norms of the Basic Law RA, the Constitutional Law RA «On Normative Legal Acts» and the Law RA «On the Constitutional Court» were analyzed, which led to the conclusion that the definitions of the Constitutional Court RA do not have legal force. At the same time, it is stressed that the Constitutional Court RA, in its definitions on the termination of constitutional proceedings, often described in detail its legal position, which to some extent is binding on the judiciary regarding interpretation or the application of the rule.

Conclusion. The decisions of the Constitutional Court of Azerbaijan are referred to normative acts. Unlike the definitions, all decisions of the Constitutional Court RA have legal force. These acts are of a regulatory nature and apply to a wide range of subjects. Exceptions may be only decisions related to special production, which more closely resemble an individual legal act (for example, the decision of the Plenum of the Constitutional Court RA «On giving a conclusion on the Draft Act of the Referendum of the Republic of Azerbaijan» On Amending the Constitution RA «of July 25, 2016 or «On the Results of Elections of the Members of the Milli Majlis of the Azerbaijani Republic of the Fifth Convocation, Conducted on November 1, 2015» dated November 24, 2015). The proposal on introducing amendments and additions to the Law RA «On the Constitutional Court» is formulated. Article 66 is supplemented with «Legal force of decisions of the Constitutional Court» with the following paragraph:

«66.6 Legal positions stated in the decisions of the Constitutional Court of the Republic of Azerbaijan are binding for execution». Article 67 «Procedure for the entry into force of the Constitutional Court decisions» shall be supplemented with the following paragraph: «67.1. Decisions on the interpretation of normative legal acts from the position of their compliance with the Constitution of the Republic of Azerbaijan are not limited in retrospective application». Article 68 «Definitions of the Constitutional Court» shall be supplemented with the following paragraph «Definitions of the Plenum of the Constitutional Court containing material requirements shall be binding».

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Articles submitted to editor office of 29.08.2018.

Гараджасєв Д. Юридична сила актів Конституційного Суду Азербайджану.

Постановка проблеми. В Азербайджанській Республіці (далі – АР) Конституційний Суд досить активно функціонує протягом більше двох десятиліть. З точки зору України, можливо, найцікавішими є питання, пов'язані з юридичною силою рішень цього органу. Як і в Україні, діяльність Конституційного Суду АР була піддана суттєвій реформі, однак, під час реформи проблема законної сили рішень Конституційного Суду не була повністю вирішена. Тому цей досвід буде цікавим теоретикам та практикакам, які займаються дослідженнями проблем конституційного правосуддя в Україні. Крім того, в українській юридичній літературі дуже мало інформації про Конституційний Суд АР, а досвід її реформ та функціонування може бути надзвичайно корисним.

Аналіз останніх досліджень і публікацій. В азербайджанській та українській літературі це питання наразі ще не досліджено. Тому можна визнати, що це

дослідження включає нерозвинену тему, отже, її результати можуть претендувати на науковий інтерес. Для обґрунтування висновків та пропозицій використано матеріали С. В. Шевчук, В. В. Захарової, В. А. Вітушкіної, О. В. Марцеляк, А. А. Малюшиної, А. С. Худинцевої, Н. В. Мішиної та ін.

Метою статті є формулювання положень щодо подальшого вдосконалення теоретичного обґрунтування та нормативного регулювання юридичної сили актів Конституційного Суду АР.

Матеріали та методи. Використано праці вчених, переважно фахівців з конституційного права, а також законодавства АР. Основними методами дослідження є системний та формально-логічний.

Результати дослідження. Визначено, що рішення Конституційного Суду АР в національному законодавстві називають нормативною силою. Усі рішення Конституційного Суду АР мають юридичну силу. Ці акти мають регуляторний характер і застосовуються до широкого кола питань. Виняток може бути зроблено лише за рішеннями, пов'язаними з особливими процедурами, які більше нагадують індивідуальний правовий акт. З огляду на невизначеність відповідних норм національного законодавства, стаття формулює конкретні пропозиції щодо внесення поправок та доповнень до Закону АР «Про Конституційний Суд» щодо юридичної сили актів цього органу.

Висновки. Обґрунтовано внесення змін та доповнень до Закону АР «Про Конституційний Суд», зокрема: ст. 66 «Юридична сила постанов Конституційного Суду» доповнити таким пунктом: «66.6 Правові позиції, викладені у постанові Конституційного Суду АР мають обов'язковий характер для виконання», ст. 67 «Порядок вступу в силу постанов Конституційного Суду» доповнити пунктом: «67.1 Постанова про тлумачення нормативно-правових актів з позиції їх відповідності Конституції АР не обмежені в ретроспективному провадженні», ст. 68 «Визначення Конституційного Суду» доповнити «Визначення Пленуму Конституційного Суду, які містять вимоги матеріального характеру, мають обов'язкову силу».

Ключові слова: конституційний суд, конституційний контроль, акти конституційного суду, Конституційний Суд Азербайджанської Республіки, юридична сила актів конституційного суду.