

XIV CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

REPLIES TO QUESTIONNAIRE

“PROBLEMS OF LEGISLATIVE OMISSIONS WITHIN CONSTITUTIONAL JURISPRUDENCE”

NATIONAL REPORT OF THE REPUBLIC OF AZERBAIJAN

1.1 - 1.2. Azerbaijani scientists accept the legislative omission (gap) as failure of a concrete legal norm to regulate the legal relations. The wording “legislative gap”¹ is a conditional since some “technical gaps” are filled in legislative order as well. In this sense any gap can be related to legislative one. Moreover, the use of this wording admits to discover gaps, which can be filled by the method of analogy. Our scientific doctrine researches real and supposed gaps, as well as preliminary and consequent gaps within the law. Some can find intentional gaps within the law, i.e. the legislator wittingly keeps an issue unresolved.

1.3. The Constitutional Court of Azerbaijan (hereinafter, the Constitutional Court) being a judicial body of constitutional review has state authorities of special character, which admit to adopt the decisions of binding and normative character. Moreover, it concerns not only “negative lawmaking”, when Constitutional Court finds a concrete provision of a normative act unconstitutional; in many cases the Constitutional Court acts as a positive legislator and forms the legal positions of normative character of high legal effect. Within the process of negative lawmaking the Constitutional Court states its positions according to which the Court does not only decide if a concrete norm is unconstitutional but also proposes the constitutional and legal ways for resolution of social dispute indicated within the considered case in positive and negative lawmaking.

In some cases, the Constitutional Court carries out lawmaking functions and formulates new provisions of normative character, which by their effect are equal to Constitution, acts as a positive legislator.²

From other side, eliminating defective legal norms from the legal system, the Constitutional Court can become a negative or “contradictious” legislator. Thus, not introducing any changes into the text of Constitution, the Constitutional Court by its activity expands the contents of Constitution. As a result, a direct application of norms becomes increasingly impossible without their interpretation given by Constitutional Court.

2.1. The main sources of law are legislative and other normative acts. According to Constitution of Azerbaijan of 1995 (hereinafter, the Constitution) the legislative system consists of the following normative and legal acts: 1) Constitution 2) acts adopted by referendum 3) laws 4) orders 5) decrees of Cabinet of Ministers 6) normative acts of central

¹ “Technical gap” is a case when a law regulates a concrete public relation, but does not give a court all necessary recommendations needed for resolution of the case.

² “Interpretation of norms of Constitution and laws by Constitutional Court”, Dr. Khanlar Hajiyev, Baku, 2002

executive power bodies. International agreements wherein Azerbaijan Republic is one of the parties constitute an integral part of legislative system of Azerbaijan Republic. In Nakhichevan Autonomous Republic Constitution and laws of Nakhichevan Autonomous Republic, decrees of the Cabinet of Ministers of Nakhichevan Autonomous Republic also possess legal power. Legislative system of Nakhichevan Autonomous Republic should conform to legislative system of Azerbaijan Republic. Within the limits of their authority the local bodies of executive power may adopt normative acts, which do not contradict to acts constituting the legislative system.

Within the legal system of Azerbaijan except general laws there are also constitutional ones, which supplement Constitution. Such laws are adopted by the majority of members of the Parliament (95 of 120 members).

Azerbaijani scientific doctrine does not accept Constitution as law, which has no gaps.

2.2. *The Constitution is a base of the state system of the contemporary Azerbaijan. The Basic Law of our country was adopted by referendum on 12 November 1995 and consists of 158 articles. The Constitutional Court guarantees the supremacy of the Constitution.*

The Constitutional Court implements constitutional control by means of review of constitutionality of such legal acts as laws of the Republic, decrees and orders of the President, decrees of the Parliament, decrees and orders of the Cabinet of Ministers, normative and legal acts of central bodies of the Executive, acts of municipalities, judicial acts, interstate agreements of Azerbaijan, which have not entered into legal force, intergovernmental agreements of Azerbaijan as well as laws, decrees of Parliament and Cabinet of Ministers of Nakhichevan Autonomous Republic.

By means of its decisions, the Constitutional Court gives concretization and interpretation of norms of Constitution.

The Constitutional Court forms the positive constitutional law, promoting perfection and development of different fields of legislation.

The Constitution provides for application of international norms at filling of legislative gaps. According to article 148, international agreements wherein Azerbaijan Republic is one of the parties constitute an integral part of legislative system of Azerbaijan Republic.

Considering the issue of application of international norms by courts in case of legislative gaps, rules of international agreement shall dominate against domestic legislation (article 151)

The Constitution does not provide for the provision according to which the Constitutional Court shall consider and estimate constitutionality of gaps within the legal regulation of legislative gaps. The Constitution does not provide for specific procedure of consideration of legislative gaps.

2.3. *In some cases, the Constitutional Court without repealing a law or its provisions gives sufficient time needed for adoption of a new law. Legal position of Constitutional Court formed during consideration of a concrete case is important not only in resolution of this case but also in relevant legal situations, that consequently means filling of a gap.*

The Constitution does not provide for the competence of Constitutional Court to explicitly consider legislative gaps. At the same time, Constitution provides for the implicit consideration of legislative gaps by means of interpretation of one or another norm of law as well as by means of negative lawmaking.

During its activity the Constitutional Court developed its own legal position. In case of recognition of a normative act as unconstitutional, there rises a legislative gap within the legal regulation, and in this case the Constitutional Court resorts directly to Constitution. However, direct application of Constitution is not always possible because of specificity of public relations. Therefore, the main task of legislative bodies is to fill the gap raised within the legal regulation as fast as it possible.

2.4. Law “On Constitutional Court” provides for competences of Constitutional Court to consider and estimate legislative gaps within legal regulation by means of negative and positive lawmaking and interpretation of provisions of laws.

As it is evident from practice, while interpreting a Constitution the Constitutional Court implements positive filling of gaps within legal regulations. The Constitutional Court is empowered to give interpretation not only of Constitution but also of laws and other normative acts. Interpretation of Constitution and laws is implemented via procedure of special constitutional proceedings. Implementing its competence on interpretation of Constitution and laws, the Constitutional Court implements positive legislative competence when revealing a legislative gap or if a gap arises as a result of its decision.

It is necessary to note that interpretation of a norm can contain new provisions originated during the process of its interpretation and filling of a gap.

This allows us to consider acts on interpretation as sources of law. These acts have higher legal effect and their level corresponds to level of Constitution. In case of imperfection of legislation these acts can be a measure for overcome of gaps and thus they can contain provisions, which can become the norm of law.

4.1. In case of revealing of a gap during the process of consideration of a case on human rights, the Constitutional Court refers directly to article 147.2 and 149 of the Constitution, according to which laws and other legal acts, decrees of President of the Republic, decrees of the Cabinet of Ministers and acts of central bodies of executive power shall not contradict to Constitution. Laws and other acts, which contradict to Constitution shall not be applied by courts and other law-enforcement bodies.

However, at consideration of concrete cases, in case of absence of provisions regulating relevant legal relations concerning human rights, the Constitutional Court refers directly to norms of international law, which dominate (ad hoc) in concrete case over Constitution (article 12).

The Constitutional Court adopted only one decision concerning separation of powers of public authorities, on 16 February 1999 on disputes concerning separation of powers of authorities in connection with the Order of the Head of executive power of Baku city “On abolition of decision of the Executive Committee of Baku Urban Council of People’s Deputies”.

The Constitutional Court found that the order of the Head of executive power of Baku city contradicts to some provisions of Constitution concerning principle of separation of powers Article 7 of the Constitution says that public authority in Azerbaijan Republic shall be based on principle of separation of powers. This principle implies activity of executive, legislative and judicial powers in frames of their competences. According to article 81 of the Constitution, the legislative power in Azerbaijan shall be executed by the Parliament of the Republic.

As regards the consideration of a legislative gap within the procedural law, we can cite as an example the decision of Constitutional Court of 12 May 1999 concerning definition of

procedure of examination by courts of complaints on use of detention as a preventive punishment by a person holding an inquest, investigator or prosecutor.

The Constitutional Court decided that the procedure of examination of the mentioned complaints by courts shall be defined by the Parliament of the Republic, and recommended to the Parliament to expedite definition of this procedure.

As regards the material law, on 26 October 1999 the Constitutional Court adopted decision on interpretation of article 5 of the Law “On Grants”. The Court concluded that the persons listed within the Law, which participate in implementation of projects and programmes during use of grants shall be exempted from obligatory state payment of social insurance out of remuneration granted by the recipient.

The Court recommended to Parliament to define within legislation the procedure of implementation of rights of physical persons for social security, provided for by Law “On Grants”.

4.2. *Within the process of “negative lawmaking” the Constitutional Court sets out its legal position in the frames of which it does not just estimate the constitutionality of a concrete norm but also proposes constitutional and legal resolution of the considered social contradictions and conflicts, both within the positive and negative lawmaking.*

In some cases the Constitutional Court implements lawmaking functions when formulating new provisions of a normative character, which are equal by their effect to Constitution, and therefore becomes a positive legislator.

From the other side, removing defective legal norms out of the legal system, the Constitutional Court can become a negative or “neglecting” legislator³. Thus, without amending the text of Constitution, by its activity the Constitutional Court extends the contents of Constitution. As a result, direct application of a norm becomes impossible without its interpretation, given by Constitutional Court.

For instance, on 12 January 1999 the Constitutional Court adopted a decision based on inquiry of the Prosecutor’s Office of Azerbaijan.

Having recognized as null and void the provision of article 32 of the Criminal Code concerning compulsory gratuitous withdrawal of all property belonging to condemned person in favor of State, the Constitutional Court noted that confiscation of property as additional punishment can cover only the weapons and means of crime as well as property obtained by criminal way

It is worth to mention that new criminal legislation completely reproduced the above-mentioned provision of the decision of Constitutional Court. Before the new Criminal Code entered the legal force, courts applied the mentioned additional punishment precisely according to the decision of Constitutional Court. In this situation, decision of Constitutional Court became a normative and legal basis, which filled the gap raised after recognition of the relevant provision as null and void. Such kind of filling of gaps is called in judiciary as temporary filling. In general, the Constitutional Court in this situation acted from the point that the considered legal relations are within the sphere of legal regulation, since criminal-procedure and civil legislation provide for application of procedural confiscation of weapons and means of crime as well as property obtained by criminal way. The Constitutional Court analyses the contents of the disputed provision within the context of the whole act.

³ “Interpretation of norms of Constitution and laws by Constitutional Court”, Dr. Khanlar Hajiyeu, Baku, 2002

4.3. *In order to fill the gaps within the legislation, the Constitutional Court applies such special methods as analogy of law, provided for by the legislation of the Republic. For instance, application of analogy of law in the field of civil and business relations, protection of human rights and freedoms and other non-material benefits is provided for by the Civil Code of Azerbaijan. According to article 11.1 and 11.2 of the Code if such relations are not regulated by legislation or agreement of parties and there is no traditional business intercourse, which can be applied in regard to such relations, then the civil legislation regulating similar relations (analogy of law) shall be applied, if it does not contradict to their essence.*

Legal position of the Constitutional Court formed during consideration of a concrete case on revealing of a gap is binding not only in this case but in all other legal positions.

When considering and estimating legislative gaps the Constitutional Court frequently refers to international and legal norms. In particular, in many cases the Court is guided by norms of the European Convention on Human Rights and the case-law of the Strasbourg court. For instance, there is a number of cases where Constitutional Court referred to European practice.

Thus, in its decision of 11 May 2004 concerning verification of conformity of judicial acts to Constitution and laws of Azerbaijan Republic, the Constitutional Court noted that rejection of registration of public union without any legal grounds can raise the issue on violation of right for freedom of association as well as formation of and joining the trade unions. Referring to the case of European Court of Human Rights “Sidoroupolos v Greece”, the Constitutional Court emphasized that right to formation of unions is an integral part of the declared right for formation of trade unions, and possibility of formation of legal persons by citizens, in the frames of their interests, is a very important aspect of the right for freedom of association.

Moreover, recommendations of the former European Commission on human rights are of particular interest for the Constitutional Court. They are useful as a source in case of absence of a case of the ECHR on a concrete specific issue.

4.4. *When Constitutional Court finds a legislative gap concerning protection of human rights and freedoms, the Court restores violated rights and freedoms by means of filling this gap, recognizing a norm, which violated rights as unconstitutional, recommending to legislative body to reconsider this provision, obliging courts not to apply this norm and recognizing this norm as null and void.*

As an instance we can cite decision of Constitutional Court of 28 April 2004 on conformity of judicial acts to Constitution and laws of Azerbaijan Republic. Constitutional Court recognized as null and void as well as contradicting to article 60.1 of Constitution the decision of judicial board on civil cases of the Supreme Court on civil case concerning disproof of information defaming honor and dignity of a person.

4.5. *Constitutional Court at consideration of a case via constitutional proceedings puts a question on constitutionality of one or another legal act, and in case of recognition of this act as unconstitutional there raises a legislative gap within legal regulation, which is filled by means of Court’s activity as a positive legislator. In case of recognition of an act as unconstitutional, the Constitutional Court obliges courts of general jurisdiction to suspend consideration of a case if the norm recognized by Constitutional Court as unconstitutional is applied within this case.*

Sometimes by means of recommendations to the Parliament the Constitutional Court without abolishing a law or its provisions, grants sufficient time needed for adoption of a new law or its provision (usually 6 months).

In its descriptive-declaratory part the Constitutional Court establishes the presence of a legislative gap, and in conclusive part the Court states obligation of a legislator to fill this gap.

4.6. *Having established in descriptive-declaratory part of its decision the presence of legislative gap, the Constitutional Court in conclusive part shall:*

- establish duties of legislator (or another subject of lawmaking) to fill the gap within the law (with or without indication of the gap itself);*
- recognize a law (or another legal act) as contradicting to Constitution;*
- recognize relevant provisions of a law (act) as contradicting to Constitution;*
- oblige courts of general jurisdiction and specialized courts to suspend consideration of cases and not to apply the existent legal regulation until filling of a gap by legislator (or another subject of lawmaking);*

4.7. *When filling of a gap and consideration of a case concerning constitutionality of one or another norm, the Constitutional Court can refer to its legal position developed during consideration of the similar case in the past. However, the Constitutional Court has not yet considered similar cases.*

4.8. *See 4.3*

5.1. *Being competent to positive lawmaking, the Constitutional Court actively assists to Parliament in implementation of its legislative powers. This is evident, first of all, from recommendations to legislator to hold necessary normative and legal regulation in accordance with the legal position of Constitutional Court, indicated in its decisions, which are binding for all.*

5.2. *A body, which adopted normative and legal act recognized by Constitutional Court as contradicting to Constitution or law of Azerbaijan Republic must reconsider the mentioned act via procedure indicated in decision of Constitutional Court.*

Until now there remain a number of gaps in legislation of our Republic, filling procedure of which was recommended to the legislator by Constitutional Court.

6. *Competences of Constitutional Court are provided for by article 130 of the Constitution of Azerbaijan Republic. Among these competences the main of them are: establishing of conformity of normative and legal acts to Constitution; resolution of disputes on separation of powers; interpretation of laws and Constitution of Azerbaijan Republic. If to refer to the text of the mentioned article one may find that frames of constitutional review contain a wide scope of normative and legal acts of different levels.*

Emphasizing the importance of the recent changes within the legislation of Azerbaijan, according to which citizens have been granted with the right to apply directly to Constitutional Court, the past period of activity of Constitutional Court can be characterized as tendency to constitutionalisation of legislation, influence on legislative activity of the Parliament and establishment of necessity to regulation of public relations in its decisions. Such activity of Constitutional Court was very important particularly during

the first years of its activity since new Constitution, which is mainly formed on contemporary doctrines of constitutional law, required essential renewal of legislation.

Evidently the Parliament could not realize this within the short period of time, especially taking into account that after the set up of the Constitutional Court realization of competence of the “negative legislator” created gaps, which had to be filled.

The Constitutional Court uses its competences for elimination of gaps within the legislation and for renewal of legal institutes on the basis of democratic values provided for by the Constitution. The Court does not limit itself with frames of petitions, which contain issues concerning verification of constitutionality of norms or interpretation of Constitution or laws. It is evident first of all from the cases where if the considered norm is within the system relation with norms of another law the Constitutional Court referred to the text of these norms. Secondly, when Constitutional Court considers the issue on constitutionality of normative and legal act or interpretation, depending on its conclusions, the Court applies competences rendered to it by Constitution.

When interpreting the laws or Constitution, Constitutional Court implements positive legislative competences in case of reveal of a gap or if a gap raises as a result of the adopted decision, however, the Court tries to avoid formation of new legal norms since this falls within the competence of legislator. Only within its competence the Constitutional Court participates in lawmaking process, filling the interpreted norm with the new constitutional and legal content.