

Prof. Dr. Amir Aliyev, Dean of Law Faculty,
Head of the UNESCO Chair on Human Rights and Information Law
Shahin Mammadrzali, Lecturer and PhD student
at the UNESCO Chair on Human Rights and Information Law,
Baku State University, Azerbaijan

TO PROTECT HUMAN RIGHTS VIA CRIMINAL LEGISLATION: IMPLICATIONS FOR INFORMATION LAW IN AZERBAIJAN

I. Human rights norms in information law regulations

In the light of international information community challenges and digital globalization, current human rights problems in criminal law is directly linked with information law regulations in Azerbaijan. Indeed, developing information technologies, cost of information and information security issues makes significant impact on modernization of social, legal and political values. [2; p.11] On the other hand, existing criminal law legislation entails gaps and need for better level of ensuring rights of accused persons, juveniles, witnesses along with developments in judicial reforms, court administrative system and good governance. Therefore, theoretical approaches could be divided in discussing application of human rights standards in national criminal law and have dual character:

- a) Information rights and information society challenges in criminal law
- b) Effectiveness of common human rights requirements in criminal law

As the first direction associates criminal law and information law spheres, we suppose that general overview of information rights and freedoms is quite commendable for the reason of tracing the whole legal landscape and aiming further broad discussions. Cooperation in relevant fields of the Republic of Azerbaijan exists with fundamental human rights organizations as UN in universal level as well as CoE, CIS and EU at regional level. International Bill of Human Rights and European Convention on Human Rights are considered the fundamentals for the integration toward universal human rights values. In this respect, national Constitution of the Republic of Azerbaijan plays the role of legal basis for information rights and cyber security reforms towards information society. [8] Article 30 and 51 of the Constitution establish high protection of intellectual property giving freedom for artistic and creative activity. Article 32 ensures constitutional protection and respect to private life including security of correspondence and other types of communication. Consequently, the Constitution stipulates freedom of expression and information in Articles 48 and 50.

Despite of constitutional safeguards, we can find implications of information freedoms and security rights in other normative legal acts too. In this regard, most of special acts are dedicated to the protection of digital

personality and rights in cyber space. Commonly accepted notion of “cyber space” for legislation includes not only internet rights but also rights related to electronic devices and systems. [1; p.11] Therefore, Azerbaijani government defines information law regulations and fight against cyber crimes with the help of complex activities implemented by various ministries and civil society organizations. (for example, Ministry of Communication and Informational Technology, State Security Service and Azerbaijan National Academy of Sciences etc.) Moreover, Azerbaijan is the member of CoE Convention on Cybercrime which is considered as the world’s first treaty for the prohibition of unethical and immoral usages of internet and cyberspace. [3; p.22] In national level, “Law on National Security” [20] and “Law on the Protection of Information Collection” [19] strengthen cyber security and prohibit computer abuses. Programs for cyber attacks and unlawful internet operations are proclaimed illegal according to “Law on Goods Derived From Market Circulation”. [18] The government also supports international fight against use of technologies for terrorism purposes. In this respect, Azerbaijan promotes CIS Cooperation Concept on Fight Against Terrorism and Extremism. [5] In 2012, the President of Azerbaijan signed “Decree on Measures to Improve Information Security” which established Special Communication and Information Security State Agency in the country. [28] In addition, “Law of the Republic of Azerbaijan on Electronic Signature and Electronic Document” [21], “State Program on Formation of Electronic Government” [20] and other relevant documents formulate ground for information society building and further criminal law modernization in the country.

II. Improving general human rights norms in legislation

In general, globalization and integration process has created appropriate conditions for adjusting national law system of various states with international human rights norms. One may eye-witness that being the supreme legislative act in the country, the Constitution of Azerbaijan (AR) ensures international human rights standards within the country and guarantees their predominance in all types of social relations including criminal law sphere too. Taking into account that human rights and freedoms have direct force in the territory of Azerbaijan, there are bunch of special legislative acts ensuring full realization and application in different law fields and criminal law in particular. After collapse of Soviet Union, in 1998 the President of the Republic of Azerbaijan issued “Decree on the Measures Regarding Maintenance of Human Rights and Freedoms of a Person and Citizen”. [12] Later in the same year, “State Program on the Protection of Human Rights” was approved by the President. [10] Scientific-Research Institute of Human Rights also was organized according Presidential Decree of 1998. [11] On this democratic legal basis, the Ombudsman institutional was established in Azerbaijan according to the relevant constitutional law. [17] During the second stage of human rights reforms in the country, second “National Action Plan on the Protection of

Human Rights” was approved. [24] During the third period, in 2011 “the National Action Programme on Raising the Efficiency of Human Rights Protection in the Republic of Azerbaijan” was set up. [26]

III. Ensuring human rights in criminal law legislation

Thus, the development of society in the Republic of Azerbaijan, objective social and legal tendencies, globalization and integration require further improvement of the human rights norms. Such kind of needs and social demands are quite sensitive and visual in criminal law too. In order to response effectively to information society calls, Azerbaijan government set up new Criminal Code in 1999. Nowadays, as it is in vast majority of other post-Soviet countries, substantial part of criminal law in Azerbaijan is built on Criminal Code. [13] Article 1 (2) of the Criminal Code of states that this Code is based on the Constitution of the Republic of Azerbaijan, universally accepted norms and principles of international law. Article 2 of the Criminal Code states that the duties of the Criminal Code of the Republic of Azerbaijan are to protect peace and humanity, protect human and civil rights and freedoms, property, economic activity, public order and public safety, environment, constitutional order of the Republic of Azerbaijan from criminal offenses, as well as the prevention of crimes. Article 4 of the Code defines the basic principles of human rights as the fundamental principles of law, the principle of legality, equality before the law, responsibility for guilty, justice and humanism. Subsequently, Article 5 stipulates the principle of legality and the establishment of punishment and other criminal-legal measures for that offense only by this Code, and the inadmissibility of applying the criminal law on analogy; Article 8 conforms to the principle of the equality of justice; Article 9 guarantees the principle of humanism in the context of human rights. The fundamental legal reforms that are required by the legislation of the Republic of Azerbaijan to ensure the harmonization of international standards have also included in criminal law. Criminal Code of the Republic of Azerbaijan "based on universally accepted norms and principles of international law" (Article 1.2), establilhes transformation of elements of international crimes into the Criminal Code, acts of genocide in Special part of the Criminal Code, crimes against peace and humanity, war crimes, etc. with new trends in criminal law.

As in all areas, human rights are fully justified by international law as a factor of improving national legislation (or national law). In general, international law creates favorable conditions for the normal functioning of national law systems and their integration, or it is difficult to imagine the enrichment of national legal systems without international law. Thus, the effectiveness of international law norms depends not only on the implementation of international standards, but also on the implementation of inter-state relations, or, in other words, the human rights system should be considered from the point of view of its effectiveness. In addition, the state must build its own legal system so that it can fulfill its international obligations.

Reference to domestic law does not exempt it from international commitments. Provisions relating to it are also directly specified in Article 27 of the Vienna Convention on the Law of Treaties of 1969. [7] Each State's obligation to respect and observe human rights is directly related to the fundamental human rights and fundamental freedoms set forth in the Charter of the United Nations, which has been further developed by the Helsinki Final Act of 1975. Sufficient international documents adopted in this area have further enhanced the importance of this principle. Thus, Article 1, paragraph 3, of the UN Charter stipulates as UN's major goals as to address international issues of economic, social, cultural or humanitarian character, and to ensure that all people are entitled to the basic rights and freedoms without distinction. [6]

A. Substantial law safeguarding information rights and cyber security

It is known that developments of information technology have effect on almost all areas of business, society and government in most of the regions of the world. [4] Thus, it should be mentioned that fair implementation of international information rights and the effective protection of freedom of information also were in the cornerstones of criminal sphere reforms. Especially, the last additions and amendments to criminal legislative acts contain provisions related to information security, cyberlaw, digital human rights protection and public access to governmental data. In this regard, Chapter 30 of the Criminal Code is wholly dedicated to information crimes and violations in cyber space. This part of Code comprises of provisions that are defined recently as the result of information law impacts. For example, the Article 271 prohibits illegal access to computer systems including arbitrary entry to computer devices and getting computer data without permission. Article 272 establishes punishment for illegally obtaining electronic information as well as prevents any use of programs for such kind of illegal information search. Illegal interference including unlawful change and additions to digital information is prohibited by Article 273. At the same time, new Article 273-1 proclaims as illegal any producing, formulating or creating programs, devices or other technical tools for committing cybercrimes and Article 273-2 entails punishment for falsification of computer information.

B. Strengthening human rights standards in criminal procedural law

Since joining to universal and regional human rights mechanisms, the government of Azerbaijan issued fundamental acts for bringing international human rights norms to national procedural legislation too. In this regard, Article 4 of the “National Action Plan of Human Rights Protection” recommends to the Supreme and Constitutional Courts to ensure provisions of international human rights documents in court practice and national case law. [26; art.4] At the same time, ensuring the application of national normative legal acts in conformity with international documents was set up as a duty for governmental institutions. Consequently, par.6 of the Decree “On Modernization of Judicial System in Azerbaijan Republic” sets up recommendation for the Supreme Court

and appeal courts of AR to organize the study work on the case law of the European Court of Human Rights and take it into consideration in the courts activity. [22] It should be highlighted that basic procedural safeguards and rights as well as information-related rights and freedoms in Azerbaijani criminal law area are protected in constitutional level in conformity with international instruments. For example, presumption of innocence and inviolability of person, judicial protection of rights and freedoms, the right to receive legal aid, inadmissibility of changing court jurisdiction, right to appeal and repeated appeal, the rights of arrested, detained and criminally accused persons and other guarantees are defined in the Constitution of Azerbaijan. [8; art.57-70] These requirements are furthered in special legislative acts such as “Law on Prosecutor’s Office” [14] and “Law on Lawyers and Lawyer Activities” [15].

Constitutional provisions are also transferred to the Code of Criminal Procedure. [16] It is where Article 2 recognizes international human rights treaties as source of national procedural law. Going further, the new special “Law on Courts and Judges” repeats principles of fair trial like equality of all before the Law, fair and without obstacles judgment by independent courts, presumption of innocence etc. [9] Moreover, in the light of digitalization of other law fields, “Decree on Creating E-Court Information System” puts some requirements on the court administrative system to formulate public database of judgements, relevant laws and normative acts on the example of the European Court of Human Rights and other international courts. [27] In addition, trainings and compulsory courses based on international human rights case law and European Convention on Human Rights are included to judge selection process. These innovations also are enhanced by “Decree on Development of Institutions of Justice”. [23]

Conclusion

It is without doubts that international law has evolved much. Yet, the implementation of international law norms, human rights standards in particular, demands the improvement of national criminal legislation. International law usually does not have direct impact on national legal subjects, their rights and duties. It means that, although international law contains norms for criminal punishment, still basic regulations must be set out in national law level. In this regard, states must take all appropriate measures for the best-level realization of international criminal law obligations. The specific character of treaties as the main source of international criminal law is that they determine criminal character of certain activities providing all subjective and objective elements. But these treaties leave as open question the issue of concrete sanctions, punishment and preventive measures. Therefore, there is a strong need in national criminal law to sistemize punitive measures after incorporating international criminal law norms. On the other hand, exemplary implementation of international criminal law norms into national legislation is very dependent

from the effectiveness of global fight against criminality. These concepts lay down in the cornerstone of interrelation between criminal legislation of the Republic of Azerbaijan and international law too. Bearing in mind the modernization process within the national legislation, the aforementioned ideas stand as the significant research problems for criminal law and human rights law sciences. Of course, Azerbaijani national criminal law does not violate primary requirements of international criminal legislation and recognizes all of international crimes as the most grave crimes against fundamental human rights. However, current trends of information society, calls of international institutions towards knowledge society add complexity to traditional theories offering to review the whole criminal legislation on human rights basis. Therefore, we need to look at the national criminal law as the system for protection of human rights and freedoms. This look highlights the importance of criminal law not only because of its protective function over security and peace in society, but also for defending individual rights and legal interests. Thus, bearing in mind the information (knowledge) society perspectives, protection of individual security, rights related to development and morality must be the highest standard for the integration of national criminal legislation and science.

Bibliography

Literature

1. Eric A. Fischer. Creating a National Framework for Cybersecurity: An analysis of issues and options. New York: Nova Science Publishers, 2009
2. Heather H. Dinniss. Cyber Warfare and the Laws of War. Cambridge University Press, Cambridge, 2012
3. Jonathan Clough. Principles of Cybercrime. Cambridge: Cambridge University Press, 2010
4. Richard O. Hundley, The Global Course of the Information Revolution: Recurring Themes and Regional Variations. 2003. National Defense Research Institute, RAND, Santa Monica

Legislation

International

1. CIS Cooperation Concept on Fight Against Terrorism and Extremism, 2008 (in Azerbaijani - <http://www.e-qanun.az/framework/15113> last access 16.02.19)
2. UN Charter, 1945 (<http://www.un.org/en/charter-united-nations/> last access 16.02.19)
3. Vienna Convention on the Law of Treaties of 1969 (<https://treaties.un.org/doc/publication/unt/volume%201155/volume-1155-i-18232-english.pdf> last access 16.02.19)

National

The Constitution of the Republic of Azerbaijan, 1995. As amended by 2002, 2009 and 2016 referendums. <https://static2.president.az/media/W1siZiIsIjIwMTgvMDMvMDkvNHQzMWNrcGppYV9Lb25zdGl0dXNpeWFfRU5HLnBkZiJdXQ?sha=c440b7c5f80d645b> last access 17.02.19)

Law of the Republic of Azerbaijan on Courts and Judges, 1997 (in Azerbaijani - <http://cis-legislation.com/document.fwx?rgn=2765> last access 15.02.19)

1. Decree of the President of Azerbaijan on Approval of the State Program on the Protection of Human Rights, 1998 (in Azerbaijani - <http://un.mfa.gov.az/content/34> last access 17.02.19)

2. Decree of the President of Azerbaijan on Organizing Scientific-Research Institute of Human Rights, 1998 (in Azerbaijani - <http://www.e-qanun.az/framework/3278> last access 17.02.19)

3. Decree of the President of Azerbaijan on the Measures Regarding Maintenance of Human Rights and Freedoms of a Person and Citizen, 1998 (in Azerbaijani - <http://www.e-qanun.az/framework/4981> last access 17.02.19)

4. Criminal Code of the Republic of Azerbaijan, 1999 (<http://www.legislationline.org/download/action/download/id/1658/file/4b3ff87c005675cfd74058077132.htm/preview> last access 16.02.19)

5. Law of the Republic of Azerbaijan on Prosecutor's Office, 1999 (<http://cis-legislation.com/document.fwx?rgn=2800> last access 15.02.19)

6. Law of the Republic of Azerbaijan on Lawyers and Lawyer Activities, 1999 (<http://cis-legislation.com/document.fwx?rgn=10556> last access 15.02.19)

7. Code of Criminal Procedure of the Republic of Azerbaijan, 2000 (<http://policehumanrightsresources.org/wp-content/uploads/2016/08/Criminal-Procedure-Code-Azerbaijan-2004.pdf> last access 15.02.19)

8. Constitutional Law of the Republic of Azerbaijan on Human Rights Commissioner, 2001 (in Azerbaijani - <http://www.commission-anticorruption.gov.az/upload/file/Law%20Ombudsman.pdf> last access 17.02.19)

9. Law of the Republic of Azerbaijan on Goods Derived From Market Circulation, 2003. (in Azerbaijani - <http://www.e-qanun.az/framework/4790> last access 16.02.19)

10. Law of the Republic of Azerbaijan on the Protection of Information Collections, 2004. (in Azerbaijani - <http://www.e-qanun.az/framework/5537> last access 16.02.19)

11. Law of the Republic of Azerbaijan on National Security, 2004 (<https://guam-organization.org/en/the-law-of-the-republic-of-azerbaijan-on-national-security-extraction/> last access 15.02.19) - Original text in Azerbaijani – <http://www.e-qanun.az/framework/5455>

12. Law of the Republic of Azerbaijan on Electronic Signature and Electronic Document, 2004 (<http://www.e-imza.az/downloads/qanunlar/E-signature%20law/e-Signature%20Law%20English.pdf> last access 16.02.19)

13. Decree of the President of Azerbaijan on Modernization of Judicial System in Azerbaijan (in Azerbaijani - <http://www.e-qanun.az/framework/11357> last access 15.02.19)

14. Decree of the President of Azerbaijan on Development of Institutions of Justice, 2006 (<https://rm.coe.int/decreed-of-the-president-of-the-republic-of-azerbaijan-on-development-o/168078eb9c> last access 15.02.19)

15. Decree of the President of Azerbaijan on Approval of the State Program on the Protection of Human Rights, 2006 (in Azerbaijani - <http://www.e-qanun.az/framework/12582> last access 16.02.19)

16. Decree of the Cabinet of Ministers on State Program for Formation of Electronic Government, 2010 (in Azerbaijani - <https://www.e-gov.az/en/content/read/2> last access 16.02.19)

17. National Program for Action to Raise Effectiveness of the Protection of Human Rights and Freedoms in the Republic of Azerbaijan, 2011 (<https://www.ohchr.org/Documents/Issues/NHRA/NPAAzerbaijan.pdf> last access 16.02.19)

18. Decree of the President of Azerbaijan on Creating E-Court Information System, 2014 (in Azerbaijani - <http://www.e-qanun.az/framework/26996> last access 15.02.19)

19. Special Communication and Information Security State Agency to be set up in Azerbaijan (https://azertag.az/en/xeber/Special_Communication_and_Information_Security_State_Agency_to_be_set_up_in_Azerbaijan-226803 last access 16.02.19)

УДК 341(043.2)

Анар Панахов, диссертант,
Бакинский Государственный Университет,
г. Баку, Азербайджанская Республика

НЕФТЯНОЕ ПРАВО ИЛИ НЕФТЕГАЗОВОЕ ПРАВО? ПУБЛИЧНО- И ЧАСТНОПРАВОВЫЕ ПОДХОДЫ

Нефтегазовое право представляет собой сочетание элементов договорного права, права собственности и деликтного права. Нефтегазовое право уникально, учитывая саму природу нефти и газа, а термины и фразы в этой области права одинаково уникальны. Нефтегазовое право также отличается от права, который применяется к владению, аренде и добыче других видов полезных ископаемых, поскольку нефть и природный газ не являются цельными и не остаются в одном месте. Эти минералы могут перемещаться из одного места в другое, в зависимости от того, насколько пористая порода и что происходит вокруг месторождения. Например, человек может пробурить нефтяную скважину на своем участке и получить доступ к большому объему нефти. Однако это нефтяное месторождение может находиться не только в его собственности: оно может распространяться на собственность другого лица. Чья нефть добывается? Происходит ли нарушение?

Нефтегазовое право, в отличие других отраслей права, в частности, от полуотраслей экономического права, исследовался довольно мало. После двадцати лет научных исследований по данной дисциплине, которую мы называем «нефтегазовое право», кажется, что многие из недостатков, связанных с этим «специализированным» сводом законов, связаны с его «особым» статусом. Юрисдикционные недостатки возникли по мере того, как суды отходят от базового договорного, имущественного или