

ANALYSIS OF SOME DECISIONS OF THE PLENUM OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN REGARDING REAL ESTATE

Emin Teyyub DADASHOV,

*Postdoctoral student of the Doctor of Science
program of the „Civil Law” department of
Baku State University, Doctor of Philosophy
in Law, associate professor
<https://orcid.org/0000-0002-1245-4726>*

The legal positions of the Plenum of the Constitutional Court of the Republic of Azerbaijan on issues related to real estate have direct legal force and are mandatory for everyone in the territory of the Republic of Azerbaijan as a result of the interpretation of the Constitutional norms, civil law norms, as well as other legal norms. While formulating its legal positions on issues related to real estate, the Plenum of the Constitutional Court referred to domestic legal norms and decisions of the European Court of Human Rights, as well as decisions of the Constitutional Courts of some foreign countries.

Keywords: *Constitutional Court, state, economic, freedoms, article.*

The Constitutional Court of the Republic of Azerbaijan is the supreme body of constitutional justice on the matters attributed to its jurisdiction by the Constitution of the Republic of Azerbaijan. Constitutional Court is an independent state body and does not depend in its organizational, financial or any other form of activity on any legislative, executive and other judicial bodies, local self-government bodies as well as legal and physical persons. Basic objectives of the Constitutional Court are the ensuring of the supremacy of the Constitution of the Republic of Azerbaijan and protection of individual's fundamental rights and freedoms.

The Constitutional Court was set up on 14 July 1998. The legal basis for the activity of the Constitutional Court is the Constitution of the Republic of Azerbaijan adopted on 12 November 1995 (with modifications introduced as a result of referendum held on 24 August 2002), interstate agreements that Azerbaijan Republic is a party to, Law “On Constitutional Court” adopted on 23 December 2003, other laws and the Rules of Procedure of the Constitutional Court.

Articles 86, 88, 102, 103, 104, 107, 130, 153 and 154 of the Constitution regulate the issues of Court's formation and functioning. The functioning of the Constitutional Court shall be based on the principle of supremacy of the Constitution of the Republic of Azerbaijan as well as principles of independence, collegiality and publicity [1].

The Constitutional Court of the Republic of Azerbaijan has adopted a number of decisions related to real estate. Let's look at some of them. The Resolution of the Plenum of the Constitutional Court of the Republic of Azerbaijan “On the Interpretation of Article 178.8 of the Civil Code of the

Republic of Azerbaijan” dated October 25, 2010 states that Article 178.8 of the Civil Code of the Republic of Azerbaijan should be applied in accordance with the provisions of Articles 146.1, 146.2, 178.1 and 178.2 of that Code and Article 113 of the Housing Code of the Republic of Azerbaijan. Members of the cooperative and other persons entitled to collect contributions acquire the right to own and use the property when they pay the full share fee for an apartment, garden, garage, or separate facility provided by the cooperative, and the right to dispose of it after it is registered in the state register of real estate.

The Decision dated October 25, 2010 states that approaches to the issue of the formation of property rights vary. Thus, there are different rules in the legislation of states that belong to the common (Anglo-Saxon) legal system and the continental (Roman-German) legal system.

In countries with a common legal system, the formation, transfer and termination of ownership and other rights over real estate, as well as the restriction of these rights, are not subject to state registration.

In countries with a continental legal system, including the Republic of Azerbaijan, ownership and other rights to real estate, their formation, transfer and termination, as well as the restriction of these rights, are determined by state registration.

According to Article 139.1 of the Civil Code, ownership rights to real estate and other rights, as well as the limitation, formation, transfer and termination of these rights, must be subject to state registration.

It should be noted that the civil legislation of the Republic of Azerbaijan defines the moments of emergence of ownership, use and disposal rights to real estate acquired on the basis of a transaction differently.

The European Court of Human Rights, in its judgment of 13 July 1979 in *Marckx v. Belgium*, stated that the right to dispose of one's possessions is a normal and fundamental aspect of the right to property.

The owner may decide to sell, lease, mortgage, or donate his property at his own discretion. When disposing of property, the owner enters into a legal relationship with a specific person (for example, the buyer of the property, the mortgagee, etc.). However, the exercise of the right of disposal may affect the interests of other subjects of civil relations.

The right of disposal is confirmed by the fact that the party making the disposal has this right according to the state register of real estate. Information on the restriction of ownership of real estate is registered in the state register [3].

According to the legal position formulated by the Plenum of the Constitutional Court of the Republic of Azerbaijan in its Resolution dated March 28, 2017 on the interpretation of Article 15 of the Law of the Republic of Azerbaijan “On the State Register of Real Estate”, if it is revealed that the category (purpose) of the land has not been determined during the state registration of rights to the land plot, the registration may be suspended in accordance with Article 14.1 of the Law of the Republic of Azerbaijan “On the State Register of Real Estate”. If the circumstances that led to the

application for state registration of rights to a land plot being left unconsidered or the suspension of state registration of rights are eliminated, the registration authority has the right to make an appropriate decision [4]. The Plenum of the Constitutional Court noted in the aforementioned Decision that the right to property is also reflected in Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The legal position formulated by the Constitutional Court regarding the right to property is that the content of this right should be understood taking into account the provisions of Article 13 of the Constitution. Property, an important institution of civil society, is one of the most important factors underlying economic development. Therefore, property is declared inviolable by Article 13 of the Constitution and is protected by the state. Property rights serve as the basis for the freedom of every individual in society and are a necessary condition for the development of personality and free entrepreneurship. The state must refrain from and prevent unlawful interference with the effective exercise of property rights.

The European Court of Human Rights has noted, in relation to interference with the right to property, that the most important and fundamental requirement of Article 1 of Protocol No. 1 to the Convention is that any interference with property by a public authority must be strictly lawful. From the point of view of the Convention, the requirement of legality means the compliance of domestic legal norms with the principle of the rule of law (Decision of 10 May 2007 in the case of “Kushoglu v. Bulgaria”).

According to Parts I and II of Article 60 of the Constitution of the Republic of Azerbaijan, everyone’s rights and freedoms are guaranteed to be protected administratively and in court. Everyone has the right to have their case treated impartially and to have it considered within a reasonable time in administrative and judicial proceedings.

One of the main goals of administrative justice is the protection of subjective human rights in the field of public administration. Subjective rights in the administrative sphere, as a rule, include a person’s freedom of behavior within the framework established by legal norms, the ability to use certain social benefits, the authority to perform certain actions and demand that others perform certain actions, and the right to apply to administrative bodies and courts for the protection of their rights.

The Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated November 25, 2024 “On the interpretation of the concept of “apartment” reflected in Article 157 of the Criminal Code of the Republic of Azerbaijan in terms of the right to inviolability of housing provided for in Article 33 of the Constitution of the Republic of Azerbaijan” stated that, proceeding from the essence and purpose of the right to inviolability of housing stipulated in Article 33 of the Constitution of the Republic of Azerbaijan, in terms of Article 157 of the Criminal Code of the Republic of Azerbaijan, “dwelling” means a place of residence used for living by one or more persons, regardless of permanent or temporary residence and form of ownership, ensuring personal life (its privacy) and isolated from other areas.

If a yard plot, as well as areas adapted for living, although not intended for residential use, are used as a place for personal and family life, entering that area against a person's will may result in criminal liability under Article 157 of the Criminal Code of the Republic of Azerbaijan [8].

Article 157 of the Criminal Code of the Republic of Azerbaijan, entitled "Infringement of dwelling inviolability", states: "Penetration into a dwelling accomplished without the grounds, provided for by laws of the Republic of Azerbaijan, and against will of the person living in it shall be punishable by fine of one thousand to two thousand manats, or by public works for the term from two hundred forty to four hundred eighty hours, or by corrective works for the term of up to one year. The same action committed with application of violence or with threat of its application shall be punishable by corrective works for the term of up to two years, or restraint of freedom for the term up to one year, or imprisonment for the term up to one year.

The actions provided for by articles 157.1 or 157.2 of the present Code, committed by the official with use of the service position - shall be punishable by restraint of freedom for the term up to two years or imprisonment for the term of up to two years with deprivation of the right to hold the certain position or to engage in the certain activities for the term of up to three years [2].

The Plenum of the Constitutional Court of the Republic of Azerbaijan stated in its Decision dated November 25, 2024 that for any area to be considered a residential area, it is not important whether it is used for a long time or permanently, whether it is movable or immovable, and whether it is built in accordance with the requirements established by legislation, it is also not important whether it is owned by a person or not. That is why the norm defines as a sign of the objective aspect of the crime the penetration into a dwelling against the will of the "resident of the dwelling", not the "owner". In the decisions of the European Court of Human Rights, the concept of "home" is not limited only to apartments registered in a person's name by law (Decision of 29 September 1996 in the case of "Buckley v. the United Kingdom").

The European Court of Human Rights has noted in its decisions that the term "home" usually refers to a physically distinct area in which private and family life can take place (Decision of 16 February 2005 in the case of "Morena Gomez v. Spain").

It was also noted in the Decision of the Constitutional Court of the Republic of Slovenia dated 12 October 2017 that the concept of housing (home) has several meanings. Housing is a physical space that protects an individual from the environment. At the same time, housing is a personal space where an individual lives as he or she wishes and thus can realize himself or herself.

Regarding whether the yard land plot, as well as the fenced land plot, is included in the definition of "apartment", the Constitutional Court of the Republic of Azerbaijan indicated that, taking into account the circumstances of the case, such as measures being taken to separate the land plot from the

external environment (fencing), the placement of areas there to meet the person's household needs, the person organizing a certain part of his/her personal life in that area, for example, recreation, etc., it is possible to consider such an area as housing in terms of values protected by Article 157 of the Criminal Code.

According to the legal position reflected in the Decision of the European Court of Human Rights in the case "Guta v. Moldova" dated June 7, 2007, entering a courtyard without a legal basis constituted a violation of the right to inviolability of the home.

When adopting the Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated November 25, 2024, 2 (two) judges of the Constitutional Court expressed their dissenting opinions. They expressed their views in this way: "The justification does not refer to the case law of the European Court of Human Rights regarding the concept of "housing". Although the European Court of Human Rights has indicated in numerous decisions which objects are included in the definition of "dwelling". The decisions of the European Court of Human Rights referred to in the decision relate to property rights and are not relevant to the subject matter of the application.

Since the land is an open space, it is not possible to ensure the right to privacy there. Therefore, the fenced courtyards of residential buildings cannot be considered as housing. However, fenced courtyards of residential buildings must be protected by law from illegal encroachment as private property.

The decision included the concept of "dwelling" in the case where the backyard land is used as a place for personal and family life. The existence of private and family life in the courtyard land area was associated with measures taken to separate that area from the external environment (fencing). In this case, the consideration of the courtyard land area as a dwelling was made dependent on the presence of the fence and its height. This criterion is not objective and precise. It leaves room for broad and vague interpretation and application.

The following paragraphs should have been included in the decision: The definition of "dwelling" reflected in Article 157 of the Criminal Code of the Republic of Azerbaijan includes an apartment (Article 13.3 of the Housing Code of the Republic of Azerbaijan), a residential house (Article 13.2 of the Housing Code), a summer house, and a room in a hotel, resort house, hostel, camping, tourist camps, and social service institutions for the elderly and disabled.

The concept of "apartment" includes verandas, terraces, galleries, balconies, common areas (other areas used for recreation, storage of property, or other needs of people), garages, warehouses, basements, etc., which form a single complex with a residential building. Fenced courtyards of residential buildings, auxiliary buildings separated from residential buildings and not used for human habitation, warehouses, basements, garages and other areas are not included in the definition of "apartment".

This list is by no means exhaustive. When determining whether each area falls within the definition of “dwelling”, the courts must proceed from the legal positions reflected in the descriptive-substantiating part of this Decision, the case law of the European Court of Human Rights, and the specific circumstances of the case”.

It is the subjective right of a judge of the Constitutional Court to remain in a separate opinion. In countries where the judicial system is democratic, a loyal attitude is shown to different opinions. A special opinion issued on a specific case contains opinions that do not agree with the majority of judges present at the hearing. At the same time, the fact that one judge disagrees with the majority of judges should not be associated with the issuance of a decision that is contrary to the law.

In legal literature, different authors have demonstrated different approaches to the formation of a judge’s dissenting opinion. According to some researchers, the special opinions of the judges of the Constitutional Court constitute extensive scientific material based on legal experience, which helps to provide an alternative approach to the interpreted norms, as well as allows to reveal and expand the potential of the Basic Law. By their very nature, the special opinions of the judges of the Constitutional Court are interplay of authoritative (professional) and doctrinal (scientific) interpretation, which has a fundamental basis in the field of scientific worldview.

The content of special opinions is often based on previously established theoretical constructs. They do not encompass the entire scientific worldview, but focus only on a specific model of constitutional and legal regulation.

A special opinion published together with a decision of the Constitutional Court is a unique phenomenon, which helps to clarify and substantiate the interpretation often determined by the Constitutional Court at the level of the judge’s individual legal thinking.

According to K. Kelemen, the judge’s dissenting opinion can be considered a specific form of exercising the right to freedom of expression [5, p. 1360].

From law to democracy, the Venice Commission, in its Report “On the special opinion of judges of constitutional courts” at its 117th plenary session held in Venice from 14 to 15 December 2018, highlighted both the positive and negative aspects of the institution in question. The Venice Commission states that its practical implementation is supported in terms of considering the position and individual motives of the members of the court, ensuring the clarity and unambiguousness of final court decisions, demonstrating the shortcomings identified in the legal analysis of the majority, and increasing the level of judicial responsibility in decision-making and the quality of the reasoning of the court decision.

At the same time, the publication of judges’ dissenting opinions is also associated with a number of significant negative manifestations, expressed in the decline in the level of legitimacy and public trust in judicial decisions,

the lowering of the court's authority, the distortion of legal certainty, and the personalization and politicization of decisionmaking.

According to the Venice Commission, dissenting opinions may express the political views of judges, which negatively affects their independence (for example, a judge may agree or disagree with a court decision based on the interests of certain subjects). Thus, the judge's impartiality is at risk [6].

We believe that although a judge's dissenting opinion does not directly lead to legal consequences, it has a certain impact on public opinion, the position of the court in the system of separation of powers, the position of the legislator, and the practice of applying law, and contributes to the development of legal science as a theoretical and applied research.

We consider it necessary to announce that the Plenum of the Constitutional Court has adopted a number of important decisions regarding the inquiries of the Supreme Court, the Prosecutor General's Office and the Commissioner for Human Rights (Ombudsman), appeals of the courts and constitutional complaints of citizens that entered 2024 [7]. A total of 2,049 (two thousand forty-nine) petitions and constitutional complaints were received by the Constitutional Court during the reporting year, of which 859 (eight hundred fifty-nine) petitions and constitutional complaints were submitted via online application. A number of important decisions and resolutions were adopted regarding the constitutional matters considered by the Plenum. In those decisions, the Plenum of the Constitutional Court gave official interpretations to the norms of criminal and criminal procedural legislation, civil and civil procedural legislation, as well as labor, administrative offenses and a number of other laws, and in its rulings, provided practical explanations for implementing bodies. Constitutional complaints on other issues were sent to the relevant authorities with appropriate explanations or were rejected as not falling within the competence of the Constitutional Court.

References

1. Constitutional Court of the Republic of Azerbaijan: [Electronic resource] / <https://www.constcourt.gov.az/en/about>
2. Criminal Code of the Republic of Azerbaijan: [Electronic resource] / <https://e-qanun.az/framework/46947> (in Azerbaijani)
3. Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan "On the interpretation of Article 178.8 of the Civil Code of the Republic of Azerbaijan" dated October 25, 2010: [Electronic resource] / <https://e-qanun.az/framework/20512> (in Azerbaijani)
4. Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated March 28, 2017 on the interpretation of Article 15 of the Law of the Republic of Azerbaijan "On the State Register of Real Estate": [Electronic resource] / <https://www.constcourt.gov.az/az/decision/363> (in Azerbaijani)
5. Kelemen K. Dissenting opinions in Constitutional Courts // - German Law Journal, - 2013. Vol. 14, - No. 08, - p. 1345-1371.
6. Report on Separate Opinions of Constitutional Courts, adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018): [Electronic resource] / <https://is.gd/AdpCup>

7. The Constitutional Court Office held a reporting meeting for 2024: [Electronic resource] / <https://www.constcourt.gov.az/en/details/1813> (in Azerbaijani)

8. The Resolution of the Plenum of the Constitutional Court of the Republic of Azerbaijan “On the interpretation of the concept of “apartment” reflected in Article 157 of the Criminal Code of the Republic of Azerbaijan in terms of the right to inviolability of housing provided for in Article 33 of the Constitution of the Republic of Azerbaijan” dated November 25, 2024: [Electronic resource] / <https://www.constcourt.gov.az/az/decision/1446> (in Azerbaijani)