



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 12 October 2001

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Restricted
CDL (2001) 110
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF AZERBAÏJAN

**DRAFT LAW
ON THE CONSTITUTIONAL COURT**

Comments by:

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I. General Comments

The draft is a good basis for discussion. It does, however, raise a number of general and specific questions. The following comments limit themselves to the question of whether the provisions of the draft law are in conformity with the Constitution of Azerbaijan, and whether their adoption is advisable in the light of common European standards and practices.

1. Constitutional Amendments

The comments do not address the issue whether it would be advisable to change the Constitution of Azerbaijan either in order to introduce new procedures for the Constitutional Court which would require a constitutional amendment (which might be the case for a right of a parliamentary minority to initiate a review of norms) or to abolish an existing procedure (for example the initiative by the Constitutional Court in the procedure for the removal of the President of Azerbaijan according to Article 107 of the Constitution of Azerbaijan). Such changes have been recommended by the previous Opinion of the Venice Commission CDL-INF(1996)010e by Messrs. Özbudun, Russell and Lesage. These suggestions should be pursued further, in particular the right of a parliamentary minority to initiate a review of norms.

2. Commitments to the Parliamentary Assembly

It should also be borne in mind that Opinion 222 (2000) of the Parliamentary Assembly (<http://stars.coe.int/ta/ta00/eopi222.htm>) states: "15. The Parliamentary Assembly notes that Azerbaijan shares fully its understanding and interpretation of the commitments entered into, as spelt out in paragraph 14 and intends: ... ii. to re-examine the conditions of access to the Constitutional Court and grant access also to the Government, the Prosecutor General, courts at all levels and - in specific cases - to individuals, at the latest within two years of its accession; ". This commitment has been taken up in Article 30 of the present draft by the introduction of a constitutional complaint procedure which gives every person the right to lodge a complaint at the Constitutional Court alleging that his or her fundamental rights have been violated (after exhaustion of legal remedies). It appears that this procedure absorbs the demand by the Parliamentary Assembly to reexamine the „access of ... courts of all levels“ to the Constitutional Court since it the interest of the individual which should be safeguarded through the possibility of access by courts and this interest of the individual is safeguarded by a comprehensive constitutional complaint procedure. For more specific comments on the proposed Article 30 see below.

The other commitment which the Parliamentary Assembly has referred to in its above-mentioned decision, the conditions of access for the Government and the Public Prosecutor, has not explicitly been dealt with in the present draft. Such conditions, however, appear to be provided for in Article 130 (3) of the Constitution of Azerbaijan.

3. Issues not covered

Although the draft law is very long and detailed, there are a number of important issues which are not covered. Not covered are, in particular:

- a) The issue of the exclusion of a judge in a specific case for reasons of conflict of interests (personal relationship with a party to the procedure, prior involvement in the matter, monetary conflict of interest)
- b) Rules on interim measures
- c) Rules on Costs
- d) Rules on how judgments are executed
- e) Rules on the qualifications of those who are permitted to speak before the Court

In addition, there are some issues which are regulated in the Constitution only, but which should also be integrated and specified in the draft law. Such issues are, for example:

- a) The nomination and election procedure for becoming a judge (see Articles 95 (10) and 109 (9) of the Constitution)
- b) The determination which judgments have effect only *inter partes* and which also have effect *erga omnes* (see Article 130 (5) and (6) of the Constitution)

Finally, there should be a clarification concerning the point whether a general (civil or criminal) Procedure Act is applicable in case the law on the constitutional.

4. Issues preferably to be covered in the Internal Regulations of the Constitutional Court

On the other hand, a number of provisions which are included in the draft law concern details which should better be regulated in the Internal Regulations of the Court, as it is the case in most other countries. This is true, in particular, of Articles 32, 33, 41, 42, 43, 44, 51, 55, 57, 63, 65, 66, 67, 90, 100. It is certainly important that the procedure of the court be regulated as clearly and as precisely as possible. It is also important, however, that the Court possesses a certain autonomy with regard to its own procedure. It is also important for the Constitutional Court to have the possibility to modify details in the light of practical experience without Parliament (Milli Mejlis) having to pass a legislation on minor matters. The previous Opinion of the Venice Commission CDL-INF(1996)010e by Messrs. Özbudun, Russell and Lesage has also already pointed out that the draft law contained too many details.

5. Position of the Chairman of the Constitutional Court

Finally, it appears that the position of the Chairman of the Constitutional Court is too strong. In principle, the judges in one judicial body are equal and the Chairman is only the first among equals (*primus inter pares*). This does not exclude certain prerogatives for the Chairman which are necessary for coordination of the work and representation. However, Articles 15 (6) and 17, for example, speak of another judge having „to execute instructions“ of the Chairman. If the translation is correct, this does not appear to be an appropriate terminology. It is suggested that some of the functions of the Chairman which are provided in Articles 16 and 32 should be carried out by a small committee of perhaps three senior judges in order to reconcile the principles of effective administration of the court and the equality of judges.

I. Comments on Specific Draft Articles

Article 2: Only those interstate agreements which have been duly ratified by Parliament (Milli Mejlis) should be capable of being a legal basis for the activity of the Constitutional Court.

Article 5: Perhaps it should be made clear that the principle of the supremacy of the Constitution overrides all other principles which are mentioned in this article. Otherwise this provision might be invoked as a justification of circumventing the Constitution by referring, for example, to (abstract) justice.

Article 6: The Constitutional Court does, in certain ways, depend on the Parliament (Milli Mejlis), in particular with respect to financial appropriations. Perhaps it should be made clear that the independence from Parliament is different than the independence from all other bodies.

Article 10: Perhaps an age limit (75) should be introduced

Article 12: It should be made clear that the immunity of the judge extends to his or her private apartment (this is maybe a translation problem).

Article 13: The reference in Article 13 of the draft to Article 109 (32) of the Constitution effectively means that the President of the Azerbaijan Republic decides by executive order who of the judges shall be the Chairman and the Deputy Chairman of the Constitutional Court. This appears to be problematical for two reasons: First, since the President only nominates the judges but the Parliament (Milli Mejlis) appoints them (Article 95 (10) of the Constitution) it seems that the Constitution gives the Parliament more say about the status of the judges at the Constitutional Court. Second, if the positions of Chairman and the Deputy Chairman of the Constitutional Court could be determined by executive order the danger exists that the President also asserts the right to remove a judge from his position as Chairman or Deputy Chairman from this position whenever the Chairman does not perform his or her function to the pleasure of the President. It must at least be made clear that the President has no such power of removal. The previous Opinion by the Venice Commission CDL-INF(1996)010e by Messrs. Özbudun, Russell and Lesage has already pointed out that it is preferable to leave the choice of the Chairman and the Deputy-Chairman to the judges themselves. This would indeed appear to be the best solution which would contribute to the independence of the Constitutional Court.

Article 18: It should only be possible to suspend the powers of a judge if the arrest has been lawful. Otherwise the provision could be interpreted that the Plenum of the Constitutional Court is obliged to suspend the powers of a judge only on the basis that the judge has been arrested. In addition, not every provisional arrest for a minor (e.g. traffic) offense should be a possible basis for the suspension of the powers of a judge. Article 18 1) should therefore read: „lawful arrest of a Judge on the suspicion of having committed a serious offense...“. The previous Opinion of the Venice Commission CDL-INF(1996)010e by Messrs. Özbudun, Russell and Lesage has also made a similar point. This Opinion required that an arrest of a judge „should only occur in cases of serious in flagrante delicto“. Moreover, the Opinion says, „in case of the arrest of a judge of the Constitutional Court, it is necessary to promptly inform not only the Prosecutor-General of the Republic of Azerbaijan, but also the President of the Con-

stitutional court and, if necessary, the President of the Supreme Court“. This statement is still valid today.

Article 20: It should be made clear that a pre-suspension of the powers of a judge must be decided by the Plenum of the Constitutional Court.

Article 22: The rules on publicity go very far. Perhaps the legislator should also think of the need to protect the court from the public pressure which is connected with live TV coverage. On to this point see also the previous Opinion of the Venice Commission CDL-INF(1996)010e by Messrs. Özbudun, Russell and Lesage, sub. 6.

Article 28: The general formal requirements concerning petitions and complaints are too detailed and will probably be a source of technical mistakes. What is meant by „the other data of the complainant“? It does not appear appropriate to ask the petitioner to provide the Court with the applicable legal provisions and their sources and details. The court knows the law (*iura novit curia*). The prohibition to demand an interpretation of several provisions of the constitution at once is unclear: Does it mean that those questions have to be put separately, or does it mean that the same complainant may only ask one question at a time?

Article 29: It is unclear what are the substantive conditions under which a person has the right to speak at the Constitutional Court.

Article 30: This article introduces the procedure of constitutional complaint by any person as one of the functions of the Constitutional Court. Questions could be raised whether the Constitution actually permits the introduction of such a procedure by way of simple legislation. After all, Article 130 (3) of the Constitution lists a number of specific procedures (among which the constitutional complaint procedure cannot be found) and Article 130 (4) provides that the Constitutional court „shall perform other duties stipulated in the present Constitution“. Since the Constitution does not explicitly provide for the Constitutional Court to perform a constitutional complaint procedure some might argue that it is necessary to change the Constitution before this procedure can be introduced by simple legislation. Such a restrictive interpretation of the Constitution does not, however, seem persuasive. Article 125 (2) of the Constitution provides that „Judicial Power shall be executed by the Constitutional Court“ and Article 125 (3) of the Constitution provides that „judicial power shall be exercised via constitutional, civil, administrative and criminal legal proceedings and in other forms specified by law“. Taken together, these two provisions suggest that the legislator is free to distribute judicial functions among the different Courts, as long as the Courts thereby exercise their basic function. Thus, as long as the Constitutional Court still performs constitutional functions the legislator seems to be free to provide for a constitutional complaint procedure by the Constitutional Court. It is true that the constitutional complaint procedure is different from all other procedures of the Constitutional Court since it can be initiated by every individual and not only by a limited number of high state organs. Still, this difference does not exclude the possibility to introduce this procedure by way of legislation, since it can be considered as a special form of the general judicial function and the basic function of the Constitutional Court.

Since the constitutional complaint procedure can be initiated by every individual it is possible, and even likely, that the Court will have to deal with a large number of such complaints. The experience of Constitutional Courts of other countries which know the constitutional complaint procedure for violations of fundamental rights (e.g. Germany and Spain) shows that it is advisable to introduce a special screening procedure to filter out inadmissible or manifestly ill-founded complaints and even to find a special expedited procedure to deal with obviously

well-founded complaints. However, it may perhaps be advisable to wait with the introduction of such special screening procedures until a certain practical experience has been acquired with the actual significance of this constitutional complaint procedure in Azerbaijan.

It is sufficient that the constitutional complaint must be submitted within three months after the decision of the court of last instance. In addition, it is unclear what is meant by „explanations and documents required for clarification of the circumstances of the case“. Such evidence should be gathered by the Constitutional Court. Also, the Constitutional Court can and should normally determine itself whether all other legal remedies have been exhausted.

Article 31: The screening procedure by the Secretariat and the appeal against its decisions do not appear to be satisfactory. The Secretariat should not be entitled to check whether all „requirements of the present law“ are complied with but only whether the formal requirements have been complied with. It is perhaps advisable that the Secretariat be given the duty to advise the complainant on how to correct his or her complaint. This would reduce the work of the Chairman and the other judges when reviewing the complaints against the decision by the Secretariat. The principle should be that complaints are not rejected immediately because of formal mistakes.

Article 35: The difference between nos. 1 and 2 is not clear.

Article 36: It is perhaps wise to leave the question under which circumstances a petition can be revoked open and subject to the jurisprudence of the Court.

Article 38: According to Article 130 (1) of the Constitution the Constitutional Court shall consist of 9 judges. Article 38 (1) and (4) of the draft provide that there shall be a Plenum and two Chambers, each Chamber being composed of 4 judges. This raises two questions: May a particular judge only be a member of one Chamber or of both? And is it the intention of the drafters that there is always at least one judge of the Constitutional Court who not a member of a Chamber? If so, this would mean that there are two classes of judges, a result which would contradict the principle of equality of judges.

Article 47: it should read „and bodies and individuals whose interests are affected by such petitions.

Article 48: This is a very liberal regulation of the status of „interested subjects“. They seem to have a procedural status which is largely similar to that of the parties to the dispute themselves. This raises practical and theoretical difficulties.

Chapter VIII: It is unusual that the Court should have the duty to consider a case within certain specified time-limits (comp. Articles 69, 71, 73, 75, 77). Experience in other countries shows that the workload cannot always be addressed chronologically and in a timely fashion. The Court may have so many cases to deal with at the same time that it is impossible to keep within the time limits. Perhaps it would be advisable to include a clause such as „shall, if possible, within 15 days consider ...“. It is, however, possible to demand immediate action upon certain particularly important and urgent petitions, such as the verification of information concerning the complete inability of the President of the Azerbaijan Republic (Article 80).

Article 83: Why should the Constitutional Court not be enabled to consider the disputes regarding actual circumstances of holding elections and calculations of votes? According to Article 88 of the Constitution this would seem to be its most important task. Of course it can

call the help of others to gather the evidence and it can refuse to gather evidence if, assuming the complaint would be true, it would not have changed the result.

Article 86: The terminology and the translation is a bit confusing. It is assumed that „resolution“ means „decision (or judgment) on the merits“, while rulings means „decisions on admissibility and other decisions“

Article 87: The „resolution“ is not the written document itself but the decision which has been duly promulgated and which is embodied in that document. The rule that resolutions shall be adopted by a majority of no less than 5 judges is sometimes unnecessarily repeated in other provisions.

Article 88: Perhaps the order of voting should be regulated completely (age or seniority).

Article 92: It is highly problematical that non-compliance with a decision of the Constitutional Court should lead to criminal responsibility. It is an elementary rule that criminal provisions must be laid down and specified in a law (*nullum crimen sine lege*). It is certainly possible to authorize the executive to specify certain generally formulated criminal provisions. It is not possible, however, to give such an authorization without any substantive guidelines, as it is the case in the present draft. The problem of execution of judgments must be solved differently.

Article 93: (1) should read: „shall enter into force after their publication from the date specified in the resolutions themselves“.

Article 95: This present formulation can give rise to misunderstandings. It is suggested to read: „No person or body is competent to provide a binding interpretation of the resolutions of the Constitutional Court.“

II. Conclusion

The present draft still raises a number of technical problems. Given the detailed nature of the draft and the multitude of possible policy options the preceding comments have been limited to certain important and some less important issues. This opinion does not claim to be a comprehensive evaluation of the draft law. It is suggested that the present draft is being reworked with the participation of experienced practitioners from the well-established Constitutional Courts.