



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 26 February 2002

Restricted
CDL (2002) 23
Eng.Only.

Opinion N°. 172 / 2001

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT LAW
ON THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF AZERBAÏJAN

Comments by

Mr Georg NOLTE
(Substitute member, Germany)

General Comment:

The question has been raised whether Art. 32 of the Draft Law on the Constitutional Court (DLCC) is compatible with Article 7 of the Draft Constitutional Law on Human Rights (DCLHR).

This would clearly be the case if the term “interpretation” in Article 7 DCLHR would mean a binding, or conclusive, interpretation of the constitutionality of a particular legal act. Even if this understanding is presently not the intention of the authors of the draft, such an interpretation of Article 7 DCLHR could later be authoritatively developed by the Constitutional Court by taking into account the purpose of the specific appeal procedure. The purpose of this procedure is clearly to produce legal security and uniformity for the ordinary courts and the legal system as a whole. If interpretations of the Constitutional Court on the basis of Article 7 DCLHR and Article 32 DLCC would not be binding, or conclusive, ordinary courts would be free to declare a normative legal act void or not. Such a choice would create inappropriate legal insecurity. In practice, however, it would be likely that the ordinary courts would follow an interpretation by the Constitutional Court no matter whether the decision is technically binding or not.

If, on the other hand, it would be clear that decisions of the Constitutional Court under Article 7 DCLHR are not binding, such decisions could not simply be made binding by way of a simple law, such as the DLCC. Article 32 DLCC, however, does not expressly declare that decisions of the Constitutional Court under this provision are binding. It is true that Article 80 DLCC provides that “resolutions of the Constitutional Court shall have binding force”, but this provision could be interpreted as meaning that the binding force only extends as far as the decision in a specific procedure is designed to have binding effect. Since, in this understanding, decisions under Article 32 DLCC, as interpreted in the light of Article 7 DCLHR, would not be designed to have binding effect, no incompatibility between Article 7 DCLHR and Article 32 DLCC would result.

In conclusion, it is suggested not to recommend to change either Article 7 DCLHR or Article 32 DLCC. Since it seems to be politically difficult to achieve any modification or clarification of Article 7 DCLHR to the effect that interpretations under this procedure are binding (or conclusive), this question should be left open. Article 32 DLCC is broad enough to conform to both of the two possible interpretations of Article 7 DLCC. In this situation it should be left to the Constitutional Court itself, and its practice, to clarify the effects of its judgments under the procedure “Petition of the Court” according to Article 32 DLCC.

It should finally be noted that Articles 7 DCLHR and 32 DLCC do not exactly complement each other because Article 7 DCLHR only deals with procedures which concern the implementation of human rights while Article 32 DLCC is concerned with the possible incompatibility of any normative legal act with (any) higher law (not necessarily limited to human rights).

This comment does not deal with the first part of the interim opinion (Introduction, Constitutional changes, Commitments (Individual access, Access for courts at all levels, Access for other public bodies). These parts of the interim opinion should be retained as appropriate.

The following comments relate to the second part of the interim opinion (the articles quoted relate to those from the interim opinion, thus from the previous draft)

Comments on Specific Draft Articles

Article 4: The Constitutional Court should protect fundamental rights and freedoms of any person, not only of any individual. The difference is important because legal persons may also be holders of fundamental rights and freedoms.

Article 5: The comment referring to “ascertaining the truth” should be maintained. The suggestion of the second part of the comment seems to have been complied with by the choice of the term “participants of constitutional proceedings”.

Article 14: Option 2 of the latest draft is preferable since it better ensures the independence of the judges.

Drop the last sentence which refers to Article 95.10.10

Article 15: Drop comment, concern has been met.

Article 16: Drop comment but include the following new comment with respect to Article 17:

Article 17: 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. It is suggested that some of the functions of the Chairman which are provided in Articles 17 (in particular: to arrange the work of the Constitutional Court, to distribute the cases among Judges and Chambers, and to handle the funds allocated from the state budget) 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.

Article 20: Comment now relates to draft Article 21. Retain the first paragraph. The second paragraph does not seem to fit anymore. The third paragraph has been complied with. Retain the last paragraph.

Article 22: Retain comment, it now relates to Article 24

Article 26: Retain comment, it now relates to Article 27

Article 28 (now 30), The comment should now read: Some formal requirements concerning petitions and complaints are too detailed and will probably be a source of technical mistakes. It does not appear appropriate to ask the petitioner to provide the Court with the exact source of the applicable legal provisions, see (6). The court knows the law (*iura novit curia*).

Article 29 (now 31): drop comment

Article 32 (now 34): drop comment

Article 37: Retain the comment at the appropriate place

Article 39: Retain the comment at the appropriate place

Chapter VIII: Drop comment

Article 84 : Retain comment at the appropriate place

Article 89 : Retain comment at the appropriate place

Article 93 (now Article 80): Retain comment

Article 94: Retain comment (now Article 81 (1)).