



Strasbourg, 18 March 2002

Opinion no. 177/2001_aze

Restricted
CDL (2002) 46
Or. Eng.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS
OF THE WORKING GROUP OF THE VENICE COMMISSION
ON THE AMENDED DRAFT CONSTITUTIONAL LAW
ON REGULATION OF THE EXERCICE
OF HUMAN RIGHTS AND FREEDOMS
IN THE REPUBLIC OF AZERBAÏJAN

Prepared on the basis of comments by:

Mr Gerard BATLINER (Member, Liechtenstein),
Mr Aivars ENDZINS (Member, Latvia)
Mr Franz MATSCHER (Member, Austria),
Mr Pieter VAN DIJK (Member, the Netherlands)
Mr Georg NOLTE (Substitute Member, Germany)

On 7 March 2002, the Permanent Representative of the Republic of Azerbaijan submitted an amended version of the Draft Constitutional Law of the Republic of Azerbaijan on Regulation of the Exercise of Human Rights and Freedoms in the Republic of Azerbaijan, to be examined by the Venice Commission. During its 50th Plenary Meeting (Venice, 6 – 8 March 2002), the Commission established a Working Group, consisting of Messrs G. Batliner, A. Endzins, F. Matscher, P. Van Dijk and G. Nolte, to examine the amended draft law. The Working Group's observations are as follows:

1. As a general remark, the Working Group notes that the submitted draft law incorporates most of the suggestions made by the Venice Commission in its opinion of December 2001 (CDL-INF (2001) 27). The following observations are made with the aim at improving the clarity of the text and ensuring its conformity with European standards in the field of human rights protection.

2. As regards Article 1, paragraph 1, the Working Group understands that it takes up the idea of Article 17 of the ECHR, as suggested by the Venice Commission in its opinion of December 2001, and assumes that the lack of clarity of the present formulation results from the translation of the original text into English.

3. Concerning the general restriction on human rights and freedoms for the protection of rights and freedoms of others laid down in paragraph 2 of the Article, it was observed that the same provision is again stated in paragraph 5 of Article 3.

➤ With a view to avoiding repetition, the Venice Commission Rapporteurs suggest deleting Article 1.2.

4. With respect to Article 2, it was pointed out that the absence of a prohibition on derogating from the human rights and freedoms referred to could give rise to misunderstandings.

➤ The Venice Commission Rapporteurs therefore consider that a reference to “derogation” in the text as well as in the heading of the Article should be added. The heading of Article 2 should thus read as follows: “*Human Rights and Freedoms that may not be restricted or derogated*”. The text of Article 2 should read: “*Rights and freedoms provided in may be neither restricted nor derogated*”.

5. As to Article 3, the Venice Commission considered that the requirements for restrictions on human rights and freedoms should also include the proportionality requirement. The final draft law should therefore seek to complete paragraph 4 in this sense, in order to ensure its conformity with the ECHR.

➤ It is suggested that the last part of paragraph 4, starting with “imposed by law”, be replaced with “shall pursue a legitimate aim, as prescribed in the Constitution and this law, and be proportionate to this aim”.

6. With regard to restrictions on arrest, detention and deprivation of liberty of the person, the present formulation of the second part of Article 4.1 appears to cause some problems of understanding, probably due to translation of the original text into English. The Working Group assumes that the said paragraph aims to ensure that a person may only be arrested, detained or deprived of liberty in accordance with a procedure prescribed by law.

7. Concerning the amended Article 5, the Working Group observed that it remains open to a broad interpretation, allowing the Constitutional Court to review not only the constitutionality of the legal norm on which a decision that allegedly violated a guaranteed human right or freedom is based, but also to examine whether it has been applied in a constitutional manner. Following explanation by the Azerbaijan delegation, it seems that the intention of the drafters is to confine competence of the Constitutional Court to review the constitutionality of the general normative act.

- Consequently, the Venice Commission Rapporteurs would recommend the following wording of the Article: “ *Everyone claiming to be the victim of a violation by legislative, executive and municipal normative acts set forth in the items 1-6 and 8 of the Para III of Article 130 of the Constitution of the Republic of Azerbaijan, of his/her human rights and freedoms may appeal to the Constitutional Court of the Republic of Azerbaijan in respect of the alleged violation*”.

8. Finally, as to the provision on the right of courts to refer questions to the Constitutional Court (Article 6), the Working Group noted that it remains confined to questions concerning the implementation of human rights and freedoms. In this respect, it recalled Article 130.IV of the Constitution, providing for the competence of the Constitutional Court to give interpretation “*of the Constitution and laws of the Azerbaijan Republic...*”. The Working Group therefore considers that, having regard to the Constitution, a reference to human rights and freedoms should be replaced by a reference to the Constitution of the Republic of Azerbaijan. In such a way, a problem of relationship between Article 6 and Article 32, as to the scope of the right of courts to refer questions to the Constitutional Court, would also be resolved.

- It is therefore suggested that the reference to “implementation of human rights and freedoms”, be replaced with a reference to “implementation of the Constitution”.