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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Draft Law on the Constitutional Court of the Republic of Azerbaijan

Comments by Mr Aivars Endziņš (Member, Latvia)

On the Constitutional Court of the Republic of Azerbaijan
Draft Law

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Before expressing the viewpoint I have acquainted myself with the comments of Mr Georg Nolte. I fully agree to his general comments and back the absolute majority of his point of view on particular issues and Articles of the Draft. Not to repeat I shall not mention the items touched upon by Mr Nolte, which I agree to. I shall speak of those items about which I am of a different opinion. Thus this document could be regarded as a supplement to Mr Nolte's viewpoint.

General comments

3. Issues not covered

I do not want to agree with Mr Nolte's viewpoint, expressed in Item "e". The fact that the Draft law does not include "Rules on the qualifications of those who are permitted to speak before the Court" does not mean "the issue is not covered". To my mind this issue has been solved by not determining the formal qualification limitations to persons who are permitted to speak before the Court. During the period of transition this solution could be the right one. The Latvian Constitutional Court process is analogous and we have learned that during the transitional period the formal criteria, like the status of a sworn advocate, do not guarantee that the person is sufficiently qualified in issues to be reviewed at the Constitutional Court.

6. On the Constitutional Court process

1) I would like to add one more item to Mr Nolte's general comments. The influence of the civil proceedings is strongly felt in the Draft Law. With time it could inconvenience the Court procedure. The Constitutional Court process cannot be based on the adversary system (see comment on Article 5), as has been correctly stated in the second part of Article 23. Besides it is problematic to speak on the "parties" in the classical meaning of the term, especially about "the petitioner" and "the respondent" (see

Article 46). Not denying that equal rights of the participants in the case are to be ensured, still, greater possibilities of ”manoeuvring” should be envisaged for the Court.

2) No efficient procedure for initiating a case has been established. The procedure envisaged in the Draft Law does not ensure efficient ”filter” for the constitutional claims. As a result the following problems could arise:
   - by determining what is a constitutional issue and in which cases the rights of a person have or have not been violated as well as by ”sifting” constitutional claims not only by evidently formal features but also on their merit, the secretariat undertakes ”the role of the Court”. The officials – the secretariat should not be entitled to the role;
   - the Court might be overburdened with constitutional claims.

3) If the Law envisages reviewing of constitutional claims, then even in case the mechanism of initiating a case is efficient, the norm determining that the Constitutional proceedings shall always be oral seems unreal and contradictory with the term established in the Draft Law for reviewing a case.

Comments on Specific Draft Articles

Article 4:

Constitutional Court shall protect the rights and freedoms not only of citizens, but also of any person (see Article 30).

Article 5:

1) It is possible that this is just a problem of the translation but the term ”collegiality” would be better than ”the collective responsibility”.
2) Incorporation of the notion ”adversary system” in the text is misleading. ”The adversary system”, which the civil proceedings shall unequivocally be based upon, seems problematic as the fundamental principle in the constitutional court cases. One should take into consideration that the constitutional court process shall be based on ascertaining the truth. It has been precisely formulated in the second part of Article 23. The notion ”adversary system” would be substituted by ”the principle of ascertaining the truth”.

Article 7:

If there are so many references to Articles of the Constitution, it would be logical to make a reference to Article 126-128 of the Constitution as well.

Article 12:

Repeating of the same text should be avoided: the last sentence of the second part (Immunity of the Judge spreads upon his/her apartments and office, means of transportation and communication, postal and telegraph correspondence, private property and documents) is duplicating the fifth part (The inviolability of Judges of the Constitutional Court shall cover also their home, office, means of transport and communication, correspondence, private property and documents).

Article 15:

1. Possibly it is just the problem of the translation but it could be discussed if instead of the term ”responsibilities” the term ”obligations” would be used.
2. The obligation ” to execute instructions of the Chairman and the Deputy Chairman of the Constitutional Court connected with preparation and examination of the matters related to jurisdiction of the Constitutional Court” is incompatible with the independence of the judge. Therefore the item should be deleted. The Constitutional Court Law of the Republic of Latvia determines the opposite condition: ” The Chairperson of the Constitutional Court and his/her Deputy may give orders to justices of the Constitutional Court in matters of performing organisational duties of office only”.

Article 18:

Agreeing with the viewpoint of Mr Nolte I would like to stress that it would be inadmissible to suspend the powers of the Judge for the reasons mentioned in Items 2 and 3.

Article 18a:

It would be advisable to incorporate into the Draft Law Article 18 of the Azerbaijan Constitutional Court Law, which consolidates equality of the judges.

Article 23:

See the Comments on Article 5. By including the notion ”adversary system” in the title, an incorrect impression may arise that the above principle shall be applied.

Article 25:

As has been already mentioned ”collegiality” should be a better choice than ”collective responsibility” (see Article 5).

Article 26:

I doubt if such a detailed regulation is necessary. Besides, if there exists a possibility of getting acquainted with the materials, they should not be announced.

Article 29:

I also doubt if there is a necessity to enclose officially published documents (like the text of the Constitution or laws) to the petition.

Article 61:

See the comment on Article 48. To my mind the submitted documents should not be announced at the Court session but their copies could be handed out to the participants in the case.

Article 91:

Reaching the judgment of the case takes some time. It would not be right if the participants in the case and the audience should sit in the Court hall for days and wait for the judgment to be announced. A norm could be elaborated, stating that the Court, when leaving to reach a judgment, informs about the time when the judgment shall be announced.