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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**DRAFT LAW
ON THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF AZERBAÏJAN**

Comments by:

Mr James HAMILTON (member, Ireland)

Comments on Draft Law on the Constitutional Court of the Republic of Azerbaijan.

I have read the comments of Mr Nolte and I agree with them subject to the following further observations: -

Article 30. In addition to the provisions of Article 30, which deals only with violations caused by normative acts, Article 6 of the Constitutional Law “On Regulation of Implementation of Human Rights and Freedoms in the Azerbaijan Republic” also provides for an appeal to the Constitutional Court by “anyone” who claims that his or her rights and freedoms are violated by “acts of legislative, executive and judicial authorities and municipal Acts” prescribed in Article 130.II, 1-6 and 8 of the Constitution.

The precise relationship between Article 30 and Article 6 of the Human Rights Law seems to me unclear, and in particular why Article 30 deals only with “nominative acts” thus overlapping in part with Article 6 but not covering the full range of acts which are dealt with there.

The basic rule of Article 30 provides for an application to the Constitutional Court after exhaustion of or in the absence of other remedies. It is understood that courts other than the Constitutional Court will have jurisdiction to deal with these issues.

Article 30 provides by way of exception that in relation to damage “of general importance” or if further delay will entail serious and irretrievable consequences the Court may accept the complaint before exhaustion of remedies.

Subject to clarification of what is meant by damage “of general importance” (is this damage of importance to society as a whole, some substantial section of it, some organ of state or merely somebody other than the applicant?) it seems reasonable to allow for such a fast-track procedure.

However, if a complaint cannot be determined without facts being found, is the Constitutional Court equipped to do this? In a case where domestic remedies have been exhausted the lower court will have determined any applicable facts. It might be desirable to consider a procedure to remit any fact-finding exercise to a lower court even in cases of importance or urgency.

Article 31. The screening procedure by the Secretariat does not seem to me in principle unacceptable since the complainant who disagrees with the unfavourable decision has the right to have that decision reviewed by the Court. However, the procedure suggested by Mr Nolte seems to be more workable than the procedure set out in the draft.

Article 38. I understand this Article to mean that the Chairman would not be a member of either Chamber but this could be clarified.

Article 40. There does not appear to be any rule providing for the allocation of work between the two Chambers.

Article 83. I agree with Mr Nolte’s opinion. This seems to me a question of great importance. The duty to certify the correctness of election results (or to check and

confirm or to check and approve the results of elections, depending on which English translation of the Constitution one consults) imposed by Article 86 of the Constitution is a vital function of the Constitutional Court. It hardly needs to be emphasised that elections which are both fair and are seen to be such are fundamental to the functioning of a democratic state. This is all the more important where the fairness of elections has been a matter of adverse comment in the past. In respect of previous elections the Parliamentary Assembly of the Council of Europe has noted “serious shortcomings” (Opinion No.222 (2000)). A system whereby an election result procured by unlawful means can be challenged in a timely and effective manner is therefore vital.

The draft Article 83 appears to eviscerate the function conferred on the Constitutional Court by Article 86 of the Constitution by providing that the court “shall not be enabled to consider the disputes regarding actual circumstances of holding the elections and calculation of votes”. Elections do not exist in the abstract. What is left for the court to certify in relation to the correctness of an election result if it cannot look at the actual circumstances or the calculation of votes?

Finally, most of the matters referred to in the Commission’s Opinion of 15-16 November 1996 (CDL-INF (96) 10) have not been addressed.

James Hamilton
28 November 2001