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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

**DRAFT OPINION  
ON THE DRAFT CONSTITUTIONAL LAW  
ON REGULATION OF THE IMPLEMENTATION  
OF HUMAN RIGHTS AND FREEDOMS**

**on the basis of comments made by:**

**Mr Franz Matscher (Member, Austria)  
& Mr Pieter Van Dijk (Member, The Netherlands)**

## **Introduction**

1. Within the framework of the programme of co-operation of Azerbaijan with the Venice Commission, an opinion on the draft law “On Regulation of Implementation of Human Rights and Freedoms in the Azerbaijan Republic” has been requested by the presidential administration of the Azerbaijan.
2. At its plenary meeting, the Venice Commission invited Messrs Matscher and Van Dijk to be rapporteurs for this draft law. Following the meeting in Baku, held on 15 November 2001, whereby the Venice Commission delegation and the Azerbaijan representatives discussed the comments on draft law made by Messrs F. Matscher and J. Van Dijk, the first version of the draft law submitted by the Azerbaijan authorities has been partially amended. This text was afterwards discussed during the meeting of the Venice Commission Working Group on the reform of Azerbaijan constitutional system, held from 28 to 29 November in Strasbourg.
3. The present opinion has been prepared on the basis of the comments by Messrs Matscher and Van Dijk, and the discussion that took place during the November meetings in the presence of Messrs S. Bartole, G. Batliner, A. Endzins, K. Hadjijev, J. Hamilton and the members of the Delegation of Azerbaijan, Messrs, F. Aleskerov, S. Aliyev, R. Guliyev, R. Gvaladze, and S. Mirszoyev.

## **General remarks**

4. Azerbaijan became a member of the Council of Europe on January 25, 2001. At the time of its accession, it also signed the European Convention on Human Rights (hereinafter referred to as “ECHR”) as amended by Protocols Nos. 2 and 11 thereto, and Protocols No 1, 4, 6 and 7. The ratification of the ECHR should take place at the beginning of the next year. The present draft Constitutional law “On Regulation of Exercise of Human Rights and Freedoms in the Azerbaijan Republic” (hereinafter referred to as “draft law”) should therefore be in conformity with the ECHR rules and other Council of Europe standards in the field.
5. The Preamble to the draft law establishes as its aim “to bring the exercise of human rights and freedoms in Azerbaijan in conformity with the ECHR”.
6. The draft law provides for precise rules on: a) restrictions of the exercise of human rights; b) the scope of certain rights and freedoms guaranteed in the Constitution; and c) the right - for individuals and tribunals - to access to the Constitutional Court.
7. The purpose of the draft law appears therefore to be twofold: to establish guidelines for the implementation of provisions of the ECHR concerning restrictions to human rights and freedoms, and to complete provisions on the protection of human rights contained in the Constitution, with a view to ensuring their compatibility with the ECHR.
8. The Venice Commission favours the adoption of the draft law (as modified along the lines which follow) in particular, taking into account that the legal basis for possible restrictions in the Constitution does not seem very clear.

9. The Constitution of the Republic of Azerbaijan provides for some relatively limited restrictions in three of its provisions<sup>1</sup>, and the possibility for some guaranteed rights and freedoms to be restricted “in cases specified by law”<sup>2</sup>.

On the other hand, Article 71.II states that “No one may restrict implementation of rights and freedoms of human being and citizen”.

10. As to the possible derogations from human rights and freedoms, Article 71.III gives the legal grounds without precisising the manner in which the imposed derogations may be exercised.

These provisions give no clear indication as to the scope of discretion the competent authorities dispose of, thus leaving the individual without adequate protection against arbitrary interference.

**11.** The Venice Commission finds it necessary that precise limits to possible restrictions, and legitimate aims for which the restrictions may be imposed, be clearly stipulated in the Constitution, in order to avoid abusive interpretation that could lead to violations of guaranteed rights and freedoms.

**12.** In this context, preparation of a constitutional law that determines the precise limits to possible restrictions and derogations to guaranteed human rights and freedoms, and ensures that they are exercised in accordance with European standards is particularly welcomed.

**13.** Before starting with the analysis of the provisions of the draft law, it should first be clarified what will be the status of the ECHR within the Azerbaijan legal system, once it has been ratified.

#### Status of the ECHR in Azerbaijan legal system

14. According to Article 12 of the Constitution (“The highest priority objective of the State”): “*Rights and liberties of a person and citizen listed in the present Constitution are implemented in accordance with international treaties to which the Azerbaijan Republic is one of the parties*”.

15. Article 148 concerning “*Acts Constituting Legislative system of the Azerbaijan Republic*” establishes that “*Legislative system of the Azerbaijan Republic consists of the following normative-legal Acts:*

1. *the Constitution;*
2. *Acts accepted by referendum;*
3. *Laws;*
4. *Orders;*
5. *Decrees of the Cabinet of Ministers of the Azerbaijan Republic;*
6. *Normative Acts of central Executive power bodies.*

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<sup>1</sup> Article 28 on the right to freedom, Article 32 on personal inviolability, and Article 48 on the freedom of consciousness.

<sup>2</sup> For example, the right to strike (article 36), the right to preserve personal and family secrets (article 32), right to secure life (article 31), or the inviolability of residence (article 33).

*International agreements to which the Azerbaijan Republic is one of the parties, shall be an integral part of the Legislative system of the Republic”.*

16. Therefore, once ratified by the Azerbaijan Republic, the ECHR will be incorporated automatically in the Azerbaijan legal system, and its self-executing provisions will be directly applicable.

17. As to the legal force of the international agreements, Article 151 (“*Legal Force of International Acts*”) says that “*Whenever there is disagreement between normative-legal Acts included in Legislation system of the Azerbaijan Republic (except the Constitution of the Azerbaijan Republic and the Acts adopted by way of referendum) and International agreements to which the Azerbaijan Republic is a party, provisions of international agreements shall dominate*”.

18. Section II of the Constitution of Azerbaijan provides for a large catalogue of rights and freedoms. Although some economic and social rights that are not guaranteed by the ECHR are provided for, the guarantees laid down in the Constitution are, in some instances, less extensive than those enshrined in the ECHR.

In the light of the previously quoted Constitutional provisions, it can be assumed that in case of an alleged violation of a human right or freedom guaranteed by the ECHR, and not by the Azerbaijan Constitution, the ECHR will take precedence.

Furthermore, in the light of Article 151 read in conjunction with Article 12, it can also be argued that even in case of an apparent disagreement between the ECHR and the Constitution, the latter’s provisions shall be interpreted and implemented in the light of the ECHR provisions. Consequently, the essence of the ECHR guarantees will be safeguarded. Indeed, Article 12 can be regarded as a specific rule that establishes the equal status of the ECHR and the Constitution of Azerbaijan.

19. Finally, with regard to what has been previously said, the Venice Commission understands that the word “*implementation*” in the title as well as in the preamble to the draft law does not imply that the self-executing provisions of the ECHR have no direct effect within the domestic legal order of Azerbaijan.

## **Remarks with respect to specific articles**

### **Article 1**

20. This article combines the idea of Article 17 of the ECHR that is the prohibition of the abuse of rights (paragraph 2), and general restriction to guaranteed human rights and freedoms – protection of human rights and freedoms of others (paragraph 1).

The wording of the text could however be improved. The Venice Commission would favour adopting a new formulation that would reproduce more closely the text of Article 17 of the ECHR<sup>3</sup>.

21. In any case, the second sentence of paragraph 2 that establishes a general basis for human rights restrictions could be misleading. Although logical in its essence, the request to “*abide to*

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<sup>3</sup> The new wording could eventually be the following: “*Nothing in the Constitution or the present law may be interpreted as implying for any State body, group or person a right to engage in any activity or perform any act aimed at the destruction of any of the guaranteed rights and freedoms, or at their limitation to a greater extent than is provided for in the Constitution and the present law.*”

*the Constitution and laws of the Azerbaijan*” could be interpreted as a condition for the right to enjoy guaranteed rights and freedoms. This should not be the case, as also persons that have infringed the law may and should invoke the guaranteed human rights and freedoms (for example, the right to respect for correspondence). On the other hand, it could also be that a law may be unconstitutional itself.

Therefore, the Venice Commission suggests deleting the second part of the sentence.

22. As to the prohibition of the abuse of rights, such a provision is usually put at the end in international legal instruments concerning human rights and freedoms.

Paragraph 2 of this Article could therefore be transferred at the end of the draft law.

## **Article 2**

23. The Venice Commission warmly supports the prohibition of the restriction to the right to life guaranteed by the article 27 of the Constitution, in accordance with the abolition of the death penalty in 1998. Nevertheless, it would be advisable to clarify the meaning of “*death in the time of war*”. To this respect, the Venice Commission would recall the Parliamentary Assembly Recommendation n° 1246 (1994) on the abolition of capital punishment and in particular its paragraph 5<sup>4</sup>.

24. Article 15.2 of the ECHR does not allow for any derogation from *inter alia*, the prohibition of slavery or servitude (Article 4.1) and the principle *nulla poena sine lege* (Article 7) .

Article 2 of the draft law refers instead to Article 28.I of the Constitution, which guarantees the right to freedom in general. As there is no a specific provision in the Constitution, it may reasonably be assumed that Article 28.I also covers the prohibition of slavery or servitude. This assumption has been confirmed by the representatives of the Azerbaijan authorities that participated to the Strasbourg meeting in November (see Para. 2 *supra*).

On the other hand, Article 2 of the draft law makes no reference at all to the right guaranteed by Article 7 of the ECHR (no punishment without law). A reference to Article 71.VIII of the Constitution should therefore be added.

25. As regards the wording of the article, the use of the term prohibition of “restriction” to certain guaranteed human rights and freedoms could create some confusion. A reference to prohibition of *derogation* from these rights and freedoms (as provided for by Article 15 of the ECHR) in the title as well as in the text of the article itself might be necessary.

## **Article 3**

26. The wish to specify the requirements for the laws restricting rights and freedoms is to be welcomed.

27. Any restriction to guaranteed human rights and freedoms must be in conformity with the ECHR’s provisions and the European Court of Human Rights jurisprudence, i.e. have a precise legal basis, pursue legitimate aim and be proportionate to this aim.

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<sup>4</sup> “/.../The Assembly holds that there is no reason why capital punishment should be inflicted in wartime, when it is not inflicted in peacetime. On the contrary, it finds one very weighty reason why the death penalty should never be inflicted in wartime: wartime death sentences, meant to deter others from committing similar crimes, are usually carried out speedily so as not to lose their deterrent effect. The consequence, in the emotionally charged atmosphere of war, is a lack of legal safeguards and a high increase in the risk of executing an innocent prisoner.”

The second and third paragraphs aim to providing for the requirement of legality and proportionality. However, the paragraph 3 as it presently stands, is too vague.

The Venice Commission would therefore suggests replacing the last part of the sentence starting with “*imposed by law...*” with “*shall pursue the legitimate aim, as prescribed in the Constitution and this law, and be proportionate to this aim*”, in order to ensure its conformity with the ECHR.

28. Finally, it should also be noted that the proportionality requirement does not concern only legal provisions, but also their implementation. As it refers only to “laws”, the present title of the article risks limiting its scope. Consequently, the Venice Commission suggests reformulating it into: “*Requirements for restrictions to human rights and freedoms*”.

#### **Article 4**

29. The article follows relatively closely the text of Article 5, Para 1 of the ECHR, and Article 1 of Protocol no. 4.

However, in order to stress the principle of legality, the following should be included in the first paragraph: “*and in accordance with a procedure prescribed by law*”.

The Venice Commission welcomes the introduction of the provisions corresponding to Article 5, paras 3 to 5 of the ECHR that were missing in the first draft into the present draft law, following the suggestion made by the rapporteurs.

#### **Article 5**

30. The first paragraph of this Article establishes the principle of lawfulness of the imposed restrictions of guaranteed human rights and freedoms, and should be read in conjunction with Article 3.

However, there is no reference to the need for the law restricting human rights and freedoms to be adequately accessible, foreseeable and sufficiently precise as to the scope of restriction and the manner of its exercise. It would be advisable to indicate that the law restricting a human right or freedom must be adequately accessible and formulated in a manner that enables citizens to regulate their conduct.

31. Paragraph 3 of this provision establishes the grounds for restricting the exercise of human rights and freedoms guaranteed by the Constitution. It corresponds, *grosso modo*, to Para. 2 of Articles 8 to 11 of the ECHR, and other substantive rights guaranteed in the Protocols.

#### **Article 6**

32. The purpose of this article seems to be to complete Article 60.II of the Constitution by providing for *constitutional appeal* in case of an alleged violation of guaranteed human rights and freedoms. It also constitutes a constitutional basis for Article 31 of the draft law on the Constitutional Court, which establishes the procedure of constitutional complaint as one of the functions of the Constitutional Court.

33. It also responds to the Parliamentary Assembly requirement stated in its Opinion 222 (2000) on Azerbaijan’s application for membership of the Council of Europe, to grant access to the Constitutional Court also to individuals.

The Venice Commission warmly supports this provision enabling “anyone” to appeal to the Constitutional Court, as it could enable the Constitutional Court to become an important player in the protection of human rights and freedoms in Azerbaijan.

34. However, the present formulation can give rise to misunderstandings and be interpreted as allowing the Constitutional Court to review not only the constitutionality of the norm on which the decision is based itself, but also to examine whether it has been applied in a constitutional manner, which is not intended by the drafters.

It is therefore suggested to modify the sentence as follows: “...*violation by legislative, executive, judicial or municipal acts...*”.

35. Regarding the legal basis for the evaluation of the norm by the Constitutional Court, paragraph III of Article 130 of the Constitution to which Article 6 of the draft law refers, requires the Constitutional Court to decide on the conformity of a normative act with the Constitution of the Azerbaijan Republic or with a superior normative act.

On the other hand, according to Article 2 of the draft law on Constitutional Court, the legal basis for its activity are: “*Constitution of Azerbaijan Republic, interstate agreements<sup>5</sup> which Azerbaijan Republic is a party to, present Law and other laws*”. Therefore, once Azerbaijan ratifies the ECHR, the latter will also form a legal basis for the action of the Constitutional Court.

36. In order to avoid possible restrictive interpretation of Article 6, it would be advisable to add a reference to international treaties in the field of human rights and freedoms. In such a way, Article 6 would also conform more to the proclaimed aim of the draft law.

37. Finally, some important differences in the scope of the constitutional complaint exist between this article and Article 31 of the draft law on Constitutional Court (establishing a procedure for introducing the constitutional complaint) that should be regulated before the adoption of the respective laws.

## **Article 7**

38. This article aims to respond to the demand by the Parliamentary Assembly to “*re-examine the conditions of access to the Constitutional Court and grant access ... to courts at all levels*” (Opinion 222 (2000)). It introduces the possibility for ordinary courts to refer to the Constitutional court issues as to the constitutionality of norms regarding human rights or freedoms.

By doing so, it enlarges the list of persons that can request the Constitutional Court to give an *interpretation* of the Constitution and laws of the Azerbaijan established in Article 130.IV of the Constitution.

39. The purpose of this article seems therefore to be to provide the official and binding interpretation of the Constitution with a view to establishing uniformity of understanding of the content of constitutional norms, and ensure interpretation of laws of Republic of Azerbaijan in accordance with the Constitution.

40. However, as it presently stands, the article leaves number of questions open that should be regulated in a law (possibly the law on Constitutional Court):

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<sup>5</sup> The term “interstate” could be replaced with “international”.

Can the Constitutional Court refuse to accept a case submitted to it by the ordinary court ? Has the Constitutional Court a competence to engage in a “concrete” judicial review, in which case it would act as the last judicial instance ? Who will be the Parties before the Constitutional Court ? What will the effects of the Courts’ judgements be ?

41. The procedure established in Article 30 of the draft law on Constitutional Court appears to imply that the ordinary courts are to apply the Constitution directly, and should refer to the Constitutional Court only after having reached a conclusion that a general norm on which a decision on the merits depends is unconstitutional (diffuse control system). As such it appears not to be in harmony with Article 7 (see draft preliminary opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan, doc. CDL (2001) 116 prov).

As to other questions, it does not provide a precise answer.

42. It would therefore be necessary to review the relation between Articles 6 and 7, the relevant articles of the draft law on Constitutional Court (Articles 30, 31 and 45), and of the Constitution (in particular, Article 130.III, IV and VII), and clearly establish the procedure to follow by the ordinary courts, the scope of the competences of the Constitutional Court, and the effects of its judgements.

## CONCLUSIONS

43. The Venice Commission welcomes the adoption of the constitutional law that will determine the precise limits to possible restrictions and derogations to guaranteed human rights and freedoms, and thus contribute to improve the legal framework of human rights protection in Azerbaijan.

44. However, in order to ensure the conformity of the law with the European standards in the field of human rights, it is suggested that following changes be made:

- In Article 1.1, replace the first sentence by a new formulation that reproduces more closely the text of Article 17 of the ECHR, and delete the second part of the last sentence starting with “and shall abide...”;
- In Article 2, add words “or derogated” in the title, and at the end of the text, and include a reference to Article 71.VIII of the Constitution;
- The title of Article 3 should read as follows: “Requirements for restrictions to human rights and freedoms”;
- In paragraph 3 of Article 3, the last part of the sentence starting with “imposed by law...” should be replaced with “shall pursue the legitimate aim, as prescribed in the Constitution and this law, and be proportionate to this aim”;
- Add the following in Article 4.1: “and in accordance with a procedure prescribed by law”;
- Clearly indicate in the first paragraph of Article 5 that the law restricting a human right or freedom must be adequately accessible and foreseeable;

- In Article 6, replace “a violation by legislation, decisions of executive and judiciary” with “a violation by legislative, executive, judicial ...”, and add after “human rights and freedoms” a reference to the Constitution and international treaties in the field of human rights;
- Reconsider Articles 6 and 7 in the light of the relevant Constitution articles (in particular, Articles 130. III, IV and VII) and the draft law on the Constitutional Court (Articles 30, 31 and 45), taking into account the opinion of the Venice Commission on the draft law on the Constitutional Court (document CDL (2001) 116).