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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ABOUT OBTAINING INFORMATION ON ACTIVITIES OF THE COURTS OF AZERBAIJAN

by

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I Openness and obtaining information on the activities of courts in general

1. Council of Europe has dealt with the openness on public information in many documents, the most important ones are the European Convention on Human Rights (Articles 6(1) and 10 and relevant case-law of the European Court of Human Rights), Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 and, although not ratified by Azerbaijan Republic and not in force yet, the Convention on Access to Official Documents. The United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters has to be noted also. It is a common European practice to regulate the access to public information in a special law, although a special law on the access to the information on courts is unusual. The present opinion of the Venice Commission takes into notice the case-law on the ECHR and the conventions listed above.

II Content of the Act „About obtaining information on activities of the courts"

1. The law "About obtaining information on activities of the courts" is one of the laws regulating the access to information concerning laws. By Article 2 of the law such regulation is also provided by the law "About providing information" and other legal acts. Such regulation concerning openness of the procedure is provided by laws regulating the court procedure, entry rule of publicity to the buildings of courts are provided by acts regulating internal activities of the courts (see Article 11(2) of the law), acquaintance with the information on the activity of courts which are in archival funds is regulated by special law on archival funds (see Article 16 of the law).

2. Although the regulation is divided between many legal acts, the law reviewed embraces many issues. Most important is the obligation to create Internet websites to publish information concerning courts activities. Such duty is imposed to all courts, to Judicial Legal Council Secretariat as well as to executive power. No centralized webpage is foreseen and it persons trying to find information on courts activities have probably to find relevant webpage by themselves. The list of information to be published in the Internet listed in Article 13 covers all areas of courts activities. Article 14 provides that court rulings are published in the Internet as well, but does not foresee a database to cover all courts (each court has to have its own rulings published on its own webpage).

3. Apart from access to information on courts activities via Internet the law provides other ubiquitous possibilities such as placing relevant information on court sessions and order for reception in court premises and access to information via inquiry (incl. via e-mail). The latter means is regulated in some part in the law "About providing information" though.

4. Special chapter regulates the intercourse between courts and mass media (Articles 20-21).

5. The law does not specify the decision-making procedure within courts on the issues concerning the application of the law. Article 23 provides the control over the application of the law by chairman of court.

III General remarks

1. The law assessed is not lengthy. The regulation to provide information on courts' activities makes in many parts references to other laws or legal acts in general (e.g. Articles 11(2), 16, 17(4), 22 and 24). It is up to the legislator to decide whether to regulate the issues on the access to information to courts activities in a general law on access to public information or to have a separate law on that matter. It has still to be reminded that the question of restricting the openness of the procedure is often a matter to be regulated in the law on court procedure. In

order to avoid discrepancies between different laws it would thus be advisable to combine such regulation on access to information.

2. List of information to be published via Internet and procedure for granting information by an order (inquiry) are practical and have regulatory effect. Still, other regulation in the law might have less practical effect, being too declarative or too general (e.g. Articles 2, 3, 7 and 20-21). Especially the regulation on mutual relations between courts and mass media seems to be without regulatory effect. Openness of court sessions and proceedings in general is a matter of procedural law (criminal, civil or administrative procedure) and should be regulated in court procedure laws. Mass media does not have more advantages to be present in court sessions or have access to information. The main principle for the discourse between courts and mass media should be faster communication, which is missing from the law.

3. The law does not address clearly the question which court rulings are not published or are published only partly in an exhaustive manner. List provided in Article 14(5) is definitely not exhaustive in this matter.

4. It would be advisable to uphold the access to information by providing a common data-base on court rulings. A common database comprising rulings of all courts might help to promote the know-how of legal advisers as it would be easier to find relevant case-law. It would have effect on better management of court statistics and would safeguard the uniformity of case-law in different lower level courts as well, making a better basis for public control mechanisms of courts.

5. The law rightly provides the duties rising from it to the courts to be controlled by the chairman of the court (Article 23(1)), who has authority to organize the work of court administration. Even in questions where the judge or panel of judges should be discussed (e.g. press releases on court rulings), it is not a matter to be regulated by law. Still, the question of openness of procedure or court session is not a matter which could be decided by the chairman of the court or court administration. The control over implementation of the law may not lead to supervision by the chairman of the court over openness of the proceedings or court sessions in individual cases. Refusal to grant information on the basis of Article 19.1.5 may only be decided by judges in individual cases.

IV Specific comments

1. According to Article 9(2) ("… period of placing [the] information …") in conjunction with Article 13.1.2.4 courts have scope of appreciation to decide for how long court rulings are published in Internet. This is probably not the intent of the law, as the case-law should be available endlessly.

2. By Article 11(2) entry rule of persons to the buildings of courts and sitting halls of courts is defined by acts which regulate internal activities of the courts. Although the law does not explain the nature of such acts (whether it is adopted by parliament or not), it could be understood that such acts are adopted by courts. These norms are restraining the right to public hearing (ECHR Article 6(1)) and such limitations should stem from laws adopted by parliament.

3. By Article 13(2) the Supreme Court has to publish in its website texts of law projects presented to Milli Majlis for discussion about legislative initiative. It should rather be the task of legislator to guarantee the openness of legislation process and publish draft laws or law projects.

4. By Article 13.4.2.3 Judicial Legal Council Secretariat has to publish on its webpage inter alia information on results of written and oral examinations for the selection nominees to the

position of judges, appraisal of nominees as a result of long-term trainings and of holding the final interview. It has to be noted that information on the depth of the legal knowledge of judges or candidates for judges should be of limited access to avoid unwanted impacts on the independence of judges after they enter upon their office. Thus the Venice Commission considers the law to be interpreted in a way that information on the results of examinations and interview is published only as far as the result is "passed" or "not passed". Same problem persists with the possibility for the representatives of mass media to take part in the examinations of candidates for the judges (Article 20.2.4). It should be recommended to delete that paragraph partially and keep the examination proceedings in closed proceedings.

5. It is difficult to assess the time-schedule for the publishing of court rulings via Internet. By Article 14.1 the texts of verdicts and texts of other court statements are placed on the corresponding official site accordingly from the date of enforcement and within 3 days from the date of enforcement. In exceptional situations, resolutions on specially difficult cases are placed within ten days from the date of enforcement. By Article 12(1) court acts of second or third level or Constitutional Court acts are published not later than one month since the day it has been passed. With the resolutions of cassation and appeal instance courts, abolished and changed resolutions of lower instance courts should also be published. It is not clear whether 'court statements' have different meaning than 'court acts' in these provisions (by Article 216(1) of Civil Procedure Code it seems not to be the case. Supreme Court makes decisions in civil proceedings, it is not clear whether they are considered as statements by Article 14.1). Still, the aim for providing different deadlines for publishing court decisions is not clear. If the court decision is enforced, its publication should not depend on the difficulty of the case, as the text of resolution is already present. There shouldn't be any difference in technology for the publishing of a decision.

6. Article 14 foresees the exceptions for publishing court statements. As it is not otherwise provided, it seems to be the decision of the court (leaded by the chairman of the court), not a judge deciding on the case, who makes the decision on whether to publish it fully or partly. Even without names, addresses, working places etc it could be sometimes possible to identify the person, based on the circumstances of the case). Decision on publication of such personal data in the statements of courts should be left to the judge(s) deciding the matter. So the participants in the proceedings could present their objections on publication of decision. The regulation in Article 14 is in most cases proportional, but a possibility for a judge to decide on the publication of court resolutions in other matters with some room for appreciation could lead to a better balance between personal and public interests.

7. Article 19.1.5 provides that the information on courts activity is not given if granting of information does not allow provide safety of participants of proceedings. Enforcement of that provision has to be carefully observed in order to guarantee the efficiency of the law, as the safety of participants of proceedings may be handled in very different ways and the norm gives wide room for appreciation.

8. By Article 19.1.7 the information is not given based on inquiry if in the inquiry is brought a task on interpretation of the rule of law. It might be a problem of interpretation, but the provision might not be efficient when only the rule of law as one of very many principles of law (democracy, equality, sovereignty etc) has to be interpreted n order to answer for the inquiry. It is not the task of courts to interpret the laws or give legal advice without any formal complaint or proceedings. Courts have to fulfill this task only by decision-making.

9. Article 21 states that the chairman of court or chief or Judicial Legal Council Secretariat or proper executive body or other persons that has been given authority by the chairman is the official representative of the court or Judicial Legal Council Secretariat or proper executive body in relationship with editorial offices of mass media. The aim of that article could be understood that persons not authorized by the chairmen are not authorized to keep contacts with

journalists. It would lead to limitation of publicity of courts activities. It has to be noted that chairman of court has no authority to intervene into the decision-making process and statements of courts are public. It is thus difficult to find any reason to limit the communication between judges and journalists.

V Conclusions

The assessed law is mainly conformity with the standards common to Council of Europe Member States. Still, the law remains in many parts very declarative does not in itself guarantee the openness of courts activities in Azerbaijan. The law has to be implemented in good faith and in accordance with the principles laid down in European conventions on this subject-matter. Only by that the access to the information on courts activities can be efficiently realized.

The need to regulate the access to information on courts activities could be regulated in a general law on access to public information. This is the practice in most Council of Europe Member States.

It would be advisable to leave more room for appreciation to the courts / judges on questions how far should the adjudication be published. Thus it would be better guaranteed to achieve the balance between private and public interests.