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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON NORMATIVE LEGAL ACTS OF AZERBAIJAN

by

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According to its preamble the draft law deals with the drafting, formalizing, adopting, publishing, coming into force, commenting and classifying normative legal acts. The initiative deserves the warm appreciation of the Venice Commission which is required by the Presidential Administration of the Republic to prepare an opinion on the draft law.

Therefore, first of all, we have to identify which are the normative legal acts covered by the law. Art. 148 of the Constitution of the Azerbaijan Republic contains a list of the normative legal acts. Articles 17, 18, 19, 20 and 21 of the drafts are implementing this constitutional provisions but They give the impression of substantially enlarging the number of the normative acts of the Republic as far as they mention acts which are not inserted in the constitutional list:

decrees of the President of the Republic,
decisions, statutes, charters, rules etc. of the Cabinet of Ministers,
decisions, instructions, statutes, charters, rules of the central executive authority bodies.

It is not clear which is the constitutional basis of the Presidential decrees: perhaps it is art. 113 of the Constitution that offers a basis to the normative legal acts of the President but this constitutional provision is coherent with art. 148 of the Constitution and does not speak about normative legal acts of the President, even if art. 109.8 of the Constitution allows the President to cancel decrees and orders of the Cabinet of the Ministers. Moreover art. 3.2.2 of the draft puts the decrees of the President among the non normative acts. The point is specially important because, according to art. 130.III of the Constitution and art. 19 and 20 of the draft normative legal acts of the Cabinet of Ministers and of the central executive authority bodies are bound to be adopted in conformity with the presidential acts.

Moreover it is not clear which is the relation between the decrees of the Cabinet of Ministers mentioned in the Constitution (art. 148) and all the acts mentioned in art. 19 of the draft: is the list of acts of the draft taking care of the content of the acts of the Cabinet and is the decree the legal form which is required by the adoption of those act? If this is the case, it is evident that a draft dealing with the preparation of the normative legal acts should offer more detailed informations about the differences between the different acts mentioned in its art. 19: statutes, charters, rules etc.. The differences of content and effects could be relevant in the drafting of the concerned acts. Also in this case the draft is confusing because even the decrees of the Cabinet are excluded from the list of the normative legal acts (see art. 3. 2 . 3).

Last but not least, the draft should provide for a list of the central executive authority bodies which are allowed or may be allowed to adopt normative legal acts: it is true that the Constitution does not offer any suggestion on this point, but, if the task of the draft is the implementation of the Constitution, it could be useful and coherent with the principle of legality stating which authorities have the competence or may be authorized to adopt normative legal acts. The point is specially delicate if we consider that, according to art. 20 of the draft, the adoption of normative legal acts by central executive authority bodies depends on predidential decisions, whose normative effects have – as we have previously seen – an unclear constitutional basis.

Eventually art. 4 of the draft introduces another novelty mentioning and listing “acts of statutory nature”. What does “statutory nature” mean? The expression is used with regard to the decisions of the Constitutional Court, on one side, and to decisions of executive bodies (including self – government and local executive bodies), on the another side and it is not easy to understand why completely different acts are apparently treated in the same way.

In the Chapetr 2 the draft deals with the problem of the collision of normative acts. In conformity with the purpose of providing a general regulation of the sources of law the draft contains also rules about the interpretation of the law in case of conflicts or gaps of law, but, unfortunately it does not offer the necessary suggestions about the way of drafting provisions aimed at the

termination or the amendment of a normative legal act. Notwithstanding that some passages require the use of clear expressions in the case of reference to provisions of other acts or of the same act (articles 32 and 33), the draft apparently allows the use of the s.c. implicit or tacit abrogation of the legal provisions: the relevant art. 34 should be amended prohibiting the implicit or tacit abrogation and requiring the use of the s.c. explicit abrogation which implies the clear mention of the provisions or of the parts of a provisions which shall be abrogated.

Moreover it is not clear which is the basis of the rule of the stability of the law system (art. 37) which allows only exceptionally the changes to a normative legal act "earlier than one year": the Constitution does not provide for such a limitation of the legislative or norm – making initiative. Which are the effects of this provision? Are the effects of the new law suspended as far as the necessary requirements are not present? Is the new law invalid? Or has art. 37 political relevance only?

The draft also deals with the preparation of the normative legal acts. We have to keep in mind that all its rules are written taking into account all the cases of adoption of normative legal acts at the different levels of the organization of the State. Therefore these rules are written in very general terms which allow their application in all different situations of exercise of legislative and norm – making initiative. From this point of view a basic role is played by art. 40: according to its provisions the following parts of the proposal are drafted.

Some of the proposed provisions are apparently the mere repetition of general principles of a democratic government, as in the case of the art. 39.2 allowing subjects, which are not entitled to legislative and norm – making initiative, to submit " suggestions on adoption of normative legal acts or draft of the act to state bodies entitled by relevant authority within the rules identified by Azerbaijani Republic's legislation. It is not clear whether this proposal shall have a formal relevance requiring the opening of a formal procedure ad hoc or shall have only a political relevance. The rule according to which " in this case, it may be possible not to follow Art. 48 of this Law " does not offer a clear suggestion in one or another direction. Other provisions touch aspects which affect the form of the government of the Republic of Azerbaijan. For instance art. 42 provides for the preparation of annual plans of legislation which have to be agreed by the Parliament (the Milli Majlis) and the President: this solution is bypassing the Cabinet , it is coherent with art. 96 of the Constitution which does not give to the Cabinet the right of legislative initiative but it does not take into account the art. 119 of the Constitution which entrusts to the Cabinet the implementation of the State's programs and identifies therefore in the Cabinet the State's body which has the necessary know how to manage the administration of the State. The involvement of the Cabinet is implicitly required by art. 45 of the draft.

Perhaps the patecipation of the Cabinet is required also by art. 46 of the draft according to which " the draft of a normative legal act, before it is submitted to a norm – makin institution, should be agreed with relevant public bodies ". Does this provision regard also the legislative initiative of the President or of the members of the Parliament? If this is the case, it would be really strange excluding the Cabinet from the preparation of the legislative drafts while the agreement of other State's bodies is required. On the other side we have to keep in mind that art. 46.4 of the draft provides for the reaching of an agreement even in the case of the adoption of decisions of the Cabinet of Ministers.

An essential part of the Act regards the mandatory expert review of the normative legal acts. The list of the common requirements is very long (art. 50), but nothing is said to offer more precise suggestion about of the listed items, therefore a lot of discretion is given to the experts: specially points 50.0. 2, 3, 4, 11 should be enriched by reference to the economic and social know how which allows a more precise evaluation of the proposed legislation. The thecnique of the conception and of the drafting of normative legal acts may propose useful arrangements to improve the level of the legal expert review: for instance, at least the moment of the writing of a

conception of the Act and the moment of the drafting of the document should be distinguished in view of differentiating the role of the different experts which have to be consulted.

More space is devoted in the draft to the mandatory linguistic expert review: articles 54, 55, 56 and 57 expressly deal with the writing of the texts: perhaps – as it happened in Italy – it shold be suggested to the authors of the draft to provide for the adoption of more specific rules which don't require a legislative approval but take profit from the experience in the field and may easily put up to date as far as the practical expertise is improving. Moreover the law should clearly state the rule that all these requirements are binding not only the authors of the legislative and normative initiative but also the bodies which are entrusted with the task of approving the legislation and the other normative legal acts. *In primis* the Parliament (Milli Majlis) should comply with the rules concerning the technical requirements of the drafting of the legislation and of its legal review. If the legislator provides for rules which are binding the authors of these legislative and normative initiatives, it is obvious that the legislator should stick to the technical results of the preparation of the draft avoinding to waste it, even if – obviously – the legislator is allowed to amend the proposed text in conformity with its own choices in the matters affected by the proposal of other bodies of the State.

The exercise of the power of amendment is connected by art. 96 of the Constitution to the right of legislative initative. The choice is correct, but we have to underline the fact that the introduction of amendments requires the " consent of the body which used the right of legislative initiative ". Therefore the power of amendment knows limitations which are not provided for the power of initiative. In any case the proposal of binding the exercise of the power of amendment to the respect of the technical rules of drafting does not conflict with the constitutional rules in the matter.

The draft pays special attention to the compliance of the draft normative legal acts with the exigencies of fighting the corruption (Chapter 10). The relevant provisions are apparently richer than the other provisions of the draft concerning the preparation of the initiatives in general. They are specially attentive to the urgency of avoiding gaps, incompleteness and ambiguities of the legal provisions. Their purpose is the implementation of the principle of legality in such a way that the activity of application and implementation of the law is completely covered by the rules of law. Discretion of the authorities should be avoided as far as it leaves to the public officials a power of choice which can create opportunities for corruption.

This attention paid to a problem which is very central in the functioning of the new democracies deserves appreciation. But coherence of design has to be established between these provisions concerning the fight against corruption and the provisions concerning the filling of legislative gaps (Chapter 2) which follow the general doctrine of the legal science in the matter. Reading the draft we have the feeling that the non compliance with the rules concerning corruption has something more than a technical relevance: can the provisions of chapter 10 be used as yardstick in the judgements concerning the constitutionality of the laws and of the other normative legal acts. We can argue that at least those acts which are bound to comply with the parliamentary legislation are subject to such an evaluation.

The draft deals with the preparation of the acts of legislative and normative initiative in very general terms: therefore it does not pay attention with the internal organization of the State's bodies which have the power of the legislative and normative initiative.This choice clearly conflict with the principle of transparency which is explicitly stated in art. 9 of the draft. Organizaning the work of those bodies of the State should have been useful in view of distinguishing the different steps and the relative procedure of the preparation of the acts of initiative, which are described in a very summary way by the relevant provisions of the draft. For instance, it is evident that, if we distinguish the preparation of the conception of a normative legal act from the drafting of the act itself, we can entrust these different tasks to different offices of the same State's body and we can, therefore, differentiate the responsibility of those

offices, which have to have a different know how as far as they are dealing with different problems with different experience and knowledge.

The last chapters of the draft deal with the passage of the normative legal acts, their registration and publication.

The relations between the provisions of the Draft concerning the passage of the normative legal acts and the internal rules of the Parliament are not clear. A law should not interfere apparently with the organization of the parliamentary internal work because art. 92 of the Constitution states that “Milli Majlis of the Azerbaijan Republic determines procedure of its activity, elects its chairman and his deputies, oraganizes permanent and other commissions, establishing Counting Chamber”. It is true that the draft under consideration is aimed at the adoption of a law which has to be approved by the Milli Majlis and, therefore, this body has a substantial say in the matter. But if we formally distinguish the internal rules of the Parliament from the ordinary legislation, we are in a better position to guarantee the independence of the Milli Majlis from the other State’s bodies which participate in the procedure for the adoption of the State’s laws and of the other normative legal acts.

Chapter 12 regards “the changes to the normative legal acts”: we can comment this point making reference to previous comments concerning the abrogation and modification of the laws. In Chapter 14 the draft distinguishes between official and unofficial publication of normative legal acts. The purpose of art. 81 is not clear: is it necessary if we recognize that only the official publication of the normative legal acts produces relevant legal effects. Introducing the unofficial publication in the draft can produce confusiong difficulties.

Chapter 15 is dealing with the problems of the application and implementation of the normative legal acts. As a matter of fact it provides for many rules which regard the interpretation of the legal texts. The efforts of the proposal are aimed at guaranteeing another time the respect of the legality in the Republic of Azerbaijan. The draft does not use the expression “interpretation” and prefers speaking about “commentary”, specially underlining the role of the Constitutional Court (art. 87.1) in accordance with the declared purpose of implementing art. 130 IV of the Constitution. It is evident that in the Republic of Azerbaijan the Constitutional Court displays also in the field of the interpretation of the laws different from the Constitution a role which in other legal systems is entrusted to other supreme judges.