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OPINION

ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN

adopted by the Commission
at its 29th Plenary Meeting?
(Venice, 15-16 November 1996)

on the basis
of comments by
Mr ÖZBUDUN (Turkey)
Mr RUSSELL (Ireland)
Mr LESAGE (France)

1. Introduction

The present opinion was requested by the authorities of the Republic of Azerbaijan. It relates to the text of the draft law on the Constitutional Court in its English version sent to the Commission on 3 September 1996 (document CDL(96)64).

A first discussion on this draft took place at the Commission's 28th Plenary Meeting (13-14 September 1996), following which a Commission delegation composed in particular of the rapporteurs Messrs Özbudun, Russell and Lesage went to Baku from 16 to 19 September 1996 to meet the persons and the authorities involved in the drafting of the law in question and the authorities which would have the task of implementing the law on the Constitutional Court of Azerbaijan following its adoption.

The present opinion drafted on the basis of the comments presented by the rapporteurs was adopted by the Commission at its 29th Plenary Meeting (15-16 November 1996).

2. General observations

The Commission finds that the draft shows the will of Azerbaijan to guarantee the principle of the supremacy of the Constitution by creating a Constitutional Court composed of independent members, in accordance with the standards of the modern democratic state and entrusting it with the tasks of protecting human rights and respecting the principle of the rule of law. Of course, the text of the draft contains several details which could as such be included in the text of the Rules of Procedure to be adopted by the Constitutional Court itself, in accordance with the procedure provided for in Article 88 of the draft law. However, regulating questions relating to the procedure before the Constitutional Court in an Act does not raise any problem vis-à-vis the pertinent European standards.

3. Constitutional judges

As regards **the term of office** of Constitutional Court judges, the draft law has two variants. In accordance with the first variant, judges of the Constitutional Court shall be appointed for a period of 15 years and may not be re-appointed for a second term. The second variant provides that constitutional judges shall be irremovable and will cease to exercise their functions on attaining retirement age (75 years). Either variant is acceptable since the independence of judges is sufficiently guaranteed. However, the first alternative has the advantage of allowing a renewal of the composition of the Court from time to time.

Article 11 of the Constitution provides in its second paragraph that a judge accused of a criminal offence may be removed from office, in accordance with the procedure provided for in Article 128, paras. 4 and 5 of the Constitution. This provision could be interpreted as allowing the definitive removal of the Constitutional Court judge when he is merely accused of having committed an offence before he has been found guilty. Such an interpretation affects both the independence of the Court and the principle of presumption of innocence and must, therefore, be excluded. The provision should be formulated in such a way as to provide that a constitutional judge charged with a **serious** offence be **provisionally suspended** from duties without being removed from his office in the Court before he has been found guilty by a final court decision.

The same goes as far as the arrest of judges of the Court is concerned. This should only occur in cases of serious *in flagrante delicto*. Moreover, in case of the arrest of a member of the Constitutional Court, it is necessary to promptly inform not only the Prosecutor General of the Republic of Azerbaijan, but also the President of the Constitutional Court and, if necessary, the President of the Supreme Court.

4. The President of the Constitutional Court

As regards the appointment of the President of the Court (Article 12 of the draft), the Commission finds that in order to ensure maximum independence to the Constitutional Court it is preferable to leave the choice of the President and the Vice-President to the judges themselves who should elect the President and the Vice-President for a limited but renewable term of office (variant *D* of the draft).

Variant *A*, in accordance with which the President should change every year, seems to be the less advisable. Institutions are symbolised by their President and a symbol which changes every year is not a symbol.

Moreover, variants *B* and *C* present a serious political inconvenience: the risk of public disapproval of the choice of the President of the Republic either by the Parliament (variant *B*) or by the judges of the Court (variant *C*).

5. As regards the competences and the procedure for bringing a case before the Court

Particular attention should be paid in order to avoid that the Court being overburdened with work it would have difficulty in assuming. Such a risk exists when, as in the present case, the Constitutional Court not only deals with issues of constitutionality but is also required to ensure respect for the entire hierarchy of norms in Azerbaijan's legal system, a task which, in the European continental legal system, is more often attributed to administrative tribunals.

As far as referral to the Court is concerned, the Commission focused its attention on the following two points:

1) It is not provided in the Constitution that **a minority in the Parliament can refer a case** to the Constitutional Court. Article 130.III of the Constitution provides that a case can be referred to the Court by the Parliament as a whole, i.e. by a decision taken by the majority of its members. However, the Constitutional Court can play an important role in the establishment of the rule of law and the reinforcement of law through the protection of the rights of a minoritarian group in the Parliament. When the case is brought before the Constitutional Court by a group of members of Parliament, the Court's decision may result in avoiding political conflict on the passing of a bill (see, for example, the Constitutional revision of 1974 in France which granted to groups of 60 members of the Parliament or 60 members of the *Sénat* the right to refer a case to the *Conseil constitutionnel*; see also the Constitution of the Russian Federation of 12 December 1993 which gives to groups representing one fifth of the members of the Federation Council or one fifth of the members of the State *Duma* the right to refer a case to the Constitutional Court).

The Commission is nevertheless aware that since the persons and institutions which can refer a case to the Constitutional Court are defined in Article 130.III of the Constitution, adding a new category of persons entitled to bring a case before the Constitutional Court can only be done by means of a constitutional law supplementing this provision of the Constitution (see below).

2) The question was also raised whether the draft law allows citizens who feel that their constitutional rights are violated by legal acts to bring their case, be it indirectly, before the Constitutional Court (**individual applications, *in concreto* control of the constitutionality of norms**).

In order to decide whether it is advisable to introduce at this stage this way of referral of cases to the Constitutional Court, it would first be desirable to evaluate the risk of a very large number of applications being brought before the Court. A solution which seems to be permitted under the Constitution and under the draft text consists in authorising the Supreme Court (and also any other jurisdiction through the Supreme Court) to submit to the Constitutional Court any objection of unconstitutionality raised before it. This will allow the Constitutional Court to control not only *in abstracto* the constitutionality of norms (a control which is already foreseen in the Constitution), but also *in concreto* within the framework of incidental control procedures. In other words, in a given case, every tribunal of the Republic of Azerbaijan before which the constitutionality of a legal act is challenged would stay the proceedings until the Constitutional Court has given its decision on this issue.

Another point which created some concern within the Commission, relates to the **initiative of constitutional judges in the procedure for the removal of the President from office**. Article 74 of the draft gives the Constitutional Court "power of initiative" to remove the President of the Republic of Azerbaijan from office; this power directly brings the Court into the centre of political struggle. In fact, if the Court can take initiative on this question, the part of the public opinion which contests the President's policy will directly put into question the Court's responsibility and will blame it for remaining inactive. However, the Constitutional Court is not a kind of Constitutional super Prokuratura and the role of judges is not to initiate proceedings but to judge.

6. Relations of the Constitutional Court with the Press

In accordance with Article 20 of the draft law, the mass media shall not have the right to interfere in the Constitutional Court's activities nor directly or indirectly exert influence on the judges of the Court. Persons committing such acts bear legal responsibility in the established legal order. The Commission does not overlook the fact that sometimes a virulent press campaign may exercise some influence on the judiciary. It also recognises that the provision of Article 20 aims at safeguarding the judiciary from such interferences. However, a very cautious approach is required in order to obtain a fair balance between the interests some administration of justice and those of freedom of expression guaranteed under Articles 47 and 50 of the Constitution of Azerbaijan. The case-law of the European Court of Human Rights in this field could provide guidelines on this issue.

7. Some observations concerning Article 130 of the Constitution

The Commission would like to make some observations concerning a possible amendment of Article 130 of the Constitution.

Enabling a minoritarian group in the Parliament to refer a case to the Constitutional Court requires, as we have seen (point 4 above), supplementing Article 130.III by means of a constitutional law as provided in Article 156 of the Constitution. This requires that the constitutional law will be adopted by the Parliament by a majority of 95 votes over two ballots, the second ballot being held six months after the first; it also requires the President's agreement. Such a procedure for the amendment of Article 130.III does not fall under the scope of Article 11 of the transitory provision of the Constitution which sets a one-year time limit for the adoption of the law on the Constitutional Court. The two operations, adoption of the law and amending Article 130.III, can take place at separate times.

If a procedure for the amendment of Article 130.III of the Constitution is opened with a view to enabling a minority in the Parliament to bring a case before the Court, one could also envisage inserting into the Constitution the fundamental provisions concerning the term of office of the constitutional judges and the method of electing the President and Vice-President of the Court.