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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

**Adopted by the Venice Commission
at its 49th Plenary Meeting,
(Venice 14-15 December 2001)**

on the basis of comments made by:

**Mr Franz MATSCHER (Member, Austria)
Mr Pieter VAN DIJK (Member, The Netherlands)
Mr Gerard BATLINER (Member, Liechtenstein)
Mr Aivars ENDZINS (Member, Latvia)
Mr James HAMILTON (Member, Ireland)**

Introduction

1. Within the framework of the programme of co-operation between Azerbaijan and the Venice Commission, an opinion on the draft law “On Regulation of Implementation of Human Rights and Freedoms in the Azerbaijan Republic” was requested by the Presidential administration of the Republic of Azerbaijan.
2. Following a meeting held in Baku on 15 November 2001, whereby the preliminary comments on draft law made by the Venice Commission Rapporteurs Messrs Franz Matscher and Pieter van Dijk were discussed, the first version of the draft law was partially amended. The amended text was then discussed during the meeting of the Venice Commission Working Group on the reform of the constitutional system of Azerbaijan, held in Strasbourg on 28-29 November 2001. Messrs Franz Matscher, Gerard Batliner, Aivars Endzins and James Hamilton took part in this meeting on behalf of the Commission; the Delegation of Azerbaijan was composed of Messrs Khanlar Hadjiyev, Chairman of the Constitutional Court and Member of the Venice Commission, Safa Mirzoyev, Head of the Secretariat of the Milli Majlis, Shahin Aliev, Head of the Legal Department of the Office of the President of the Republic, Rafael Gvaladze, judge of the Constitutional Court and Raouf Guliyev, Head of the International Relations Department of the Constitutional Court.
3. At its 49th Plenary Meeting (Venice, 14-15 December 2001), the Commission adopted the present opinion on the basis of the comments by the Rapporteurs.

General remarks

4. Azerbaijan became a member of the Council of Europe on 25 January 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 the Implementation of Human Rights and Freedoms in the Azerbaijan Republic” (hereinafter referred to as “draft law”) aims at facilitating the implementation of the ECHR in the Azerbaijan Republic by bringing domestic legislation in conformity with the ECHR rules and other Council of Europe standards in the field.
5. In this respect, the Preamble to the draft law clearly sets out 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 address the Constitutional Court in human rights matters.
7. Harmonisation of the human rights protection system in the Constitution of Azerbaijan with the ECHR is effected as follows: first, the draft law provides for guidelines for the implementation of ECHR provisions concerning restrictions on human rights and freedoms; then, it supplements some constitutional provisions, 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 the relative lack of clarity of the constitutional regime concerning human rights restrictions. Indeed, the Constitution of the Republic of Azerbaijan provides for limited possibilities of restrictions in three of its provisions (Article 28 on the right to freedom, Article 32 on personal inviolability and Article 48 on the freedom of belief), while at the same time for some other guaranteed rights and freedoms, for example, the right to strike (article 36), the right to preserve personal and family secrets (article 32), the right to secure life (article 31) or the inviolability of residence (article 33), the possibility to be restricted is generally left to the discretion of the legislator (“*in cases specified by law*”). On the other hand, Article 71.II states that “*No one may restrict implementation of rights and freedoms of human being and citizen*”. Moreover, Article 71.III sets out the legal grounds for possible derogations from human rights and freedoms without however specifying the manner in which these derogations may be implemented. In general, the constitutional provisions concerning restrictions on and derogations from human rights give no clear indication as to the scope of discretion of the competent authorities, thus leaving the individual without adequate protection against arbitrary interference.

9. The Venice Commission finds it therefore necessary that conditions under which restrictions may be imposed be clearly stipulated in the Constitution, in order to avoid improper interpretation that could lead to violations of guaranteed rights and freedoms. In this context, the enactment of a constitutional law that will set precise limits to possible restrictions and derogations and will ensure that these restrictions do not go beyond what is accepted in accordance with European standards is particularly welcomed.

Status of the ECHR in the legal order of Azerbaijan

10. 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*”. Article 148 concerning “Acts Constituting the Legislative system of the Azerbaijan Republic” reads:

“The 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.*

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

11. As to the legal force of the international agreements, Article 151 (“Legal Force of International Acts”) reads: “*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 prevail*”.

12. It follows from the above provisions that, once ratified by Azerbaijan, the ECHR will be incorporated automatically in the domestic legal system and its self-executing provisions will be directly applicable.

13. It is also clear from the above provisions that where the provisions in the ECHR conflict with domestic law other than the Constitution, the former will prevail.

14. As regards the position of the ECHR vis-à-vis the Constitution, the following should be noted: 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. Because of the direct effect of the ECHR, it must be assumed that behaviour that amounts to a violation of the ECHR will be prohibited in Azerbaijan even though there is no specific constitutional prohibition of this behaviour. Furthermore, in the light of Article 151 read together with Article 12, it can be assumed that even in the case of an apparent “disagreement” between the ECHR and the Constitution, the latter’s provisions will be interpreted and implemented in the light of the ECHR provisions. Consequently, the essence of the ECHR guarantees will be safeguarded.

15. The draft constitutional law does not affect the privileged position that the ECHR will have, after its ratification by Azerbaijan, in the domestic legal order. Its provisions should be read and interpreted taking into account the stated aims of the constitutional law, i.e. to bring the legislation in Azerbaijan in conformity with the ECHR.

Remarks with respect to specific articles

As to the expression “implementation of human rights”

16. 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.

Article 1

17. This article combines the idea of Article 17 of the ECHR, that is, the prohibition of the abuse of rights (paragraph 2), and general restrictions on guaranteed human rights and freedoms – with the protection of human rights and freedoms of others (paragraph 1). The Venice Commission would favour adopting a new formulation that would reproduce more closely the text of Article 17 of the ECHR¹.

18. In any case, the second sentence of paragraph 1, which establishes a general basis for human rights restrictions, could be misleading. Although logical in its essence, the request to “*abide to the Constitution and laws of Azerbaijan*” could be interpreted as a condition for the enjoyment of guaranteed rights and freedoms. This should not be the case, as persons that have infringed the law also may and should invoke the guaranteed human rights and freedoms (for example, the

¹ The new wording could perhaps be as follows: “*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.*”

right to respect for correspondence). On the other hand, it could also be that a law may be unconstitutional itself.

19. Therefore, the Venice Commission suggests deleting the second part of the sentence, i.e. the words “and shall abide to the Constitution and laws of the Republic of Azerbaijan”.

20. 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 to the end of the draft law.

Article 2

21. The Venice Commission warmly supports the prohibition of the restriction on the right to life guaranteed by 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 5².

22. 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 general right to freedom. As there is no specific provision on slavery 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 Azerbaijan authorities that participated in the Strasbourg meeting on 29-30 November 2001.

23. 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 in Article 2 of the draft constitutional law

24. As regards the wording of the article, the use of the term prohibition of “restriction” on 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

25. The Commission welcomes the drafters’ wish to specify in the constitutional law the requirements for restricting rights and freedoms through laws. In accordance with the ECHR’s provisions and the jurisprudence of the European Court of Human Rights, any restriction on guaranteed human rights and freedoms must have a precise and accessible legal basis, pursue a legitimate aim and be proportionate to this aim. The first paragraph of Article 3 rightly requires that laws restricting fundamental rights and freedoms contain a reference to the fundamental right concerned. This requirement may increase the legislator’s vigilance when adopting norms

² “/.../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.”

that affect the exercise of human rights. The Commission also welcomes the provision in the second paragraph, according to which limitations on human rights should not “alter the essence of these rights and freedoms”. Paragraph 3 refers to the requirements of legality. However, in the Commission’s view, this provision, as it presently stands, is too vague. The Venice Commission would therefore suggest replacing the last part of the sentence starting with “imposed by law...” with “shall pursue 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.

26. 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 would suggest reformulating it into: “*Requirements for restrictions on human rights and freedoms*”.

Article 4

27. This 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 underline the need to respect the principle of legality, the Commission finds that the following should be included in the first paragraph: “and in accordance with a procedure prescribed by law”.

28. The Commission welcomes the introduction into the present draft law of the provisions in Article 4 paragraphs 2 to 5, corresponding to Article 5, paragraphs 3 to 5 of the ECHR that were missing in the first draft following the suggestion made by the Rapporteurs.

Article 5

29. The first paragraph of this Article sets out the principle that restrictions to guaranteed human rights and freedoms can be imposed “only by the law”. This provision is thus in line with the general doctrine on restrictions on human rights in the ECHR as expressed in particular in the second paragraph of Articles 8 to 11 of the ECHR and should be read in conjunction with Article 3. The Commission further recalls that, pursuant to the jurisprudence of the European Court of Human Rights any law restricting human rights and freedoms must be adequately accessible and formulated in a manner that enables citizens to regulate their conduct.

30. Paragraph 3 of Article 5 sets out the grounds that are recognised as legitimate 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

31. This Article supplements Article 60.II of the Constitution by providing for a *constitutional complaint* in case of an alleged violation of guaranteed human rights and freedoms. It also constitutes the legal basis for corresponding provisions in the draft law on the Constitutional Court that establish the competence of that Court to examine individual constitutional complaints and regulate the relevant procedure.

32. 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.

33. The Venice Commission warmly supports this provision enabling "anyone" to appeal to the Constitutional Court. The individual complaint will allow the Constitutional Court to become an important player in the protection of human rights and freedoms in Azerbaijan.

34. It became clear from the discussions in Baku and Strasbourg concerning both the draft constitutional law under consideration and the draft law on the Constitutional Court that the drafters did not wish to extend the competence of the Constitutional Court in such a way as to comprise the examination of all cases in which a violation of human rights is alleged, but rather to focus on those cases in which it is alleged that a "legal norm" that applied in a case is in contradiction to the fundamental rights enshrined in the Constitution. In this respect, the Commission would draw the drafters' attention to the fact that 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 a decision is based, but also to examine whether it has been applied in a constitutional manner. Apparently this was not intended by the drafters. Although much of the details on the procedure and effects of decisions on individual complaints will be addressed in the law on the Constitutional Court, the Commission finds it necessary that the scope of the individual complaint be set out clearly in Article 6 of the Constitutional Law.

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 agreements³ 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. In order to avoid possible restrictive interpretation of Article 6, it might 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 closely to the proclaimed aim of the draft law.

Article 7

36. The purpose of this article is 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 courts⁴ to refer to the Constitutional Court issues as to the constitutionality of norms regulating 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. On the basis of this provision the Constitutional Court will be able to provide interpretation of human rights provisions in the Constitution and ensure interpretation of laws of Republic of Azerbaijan in accordance with the Constitution.

³ The term "interstate" could be replaced with "international".

⁴ The delegation of Azerbaijan confirmed at the Strasbourg meeting that the term « any judge » in this Article should be read as "*any court*".

37. As it presently stands, this Article only sets out the principle of referral of issues by ordinary courts to the Constitutional Court. It leaves open several questions that should be regulated in a law, possibly the law on Constitutional Court: Can the Constitutional Court refuse to accept a case submitted to it by the ordinary court? Is the Constitutional Court competent to engage in “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 be the effects of the Court’s judgments? The law on the Constitutional Court should address these issues and clearly establish the procedure to be followed by the ordinary courts, the scope of the competences of the Constitutional Court, and the effects of its judgments.

CONCLUSIONS

The Venice Commission is satisfied that the draft constitutional law determines the precise limits of possible restrictions and derogations to guaranteed human rights and freedoms and thus contributes to improving the legal framework of human rights protection in Azerbaijan.

38. In order to ensure the conformity of the law with the European standards in the field of human rights protection, 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;
- In the same Article, delete the second part of the last sentence starting with “and shall abide to the Constitution and laws of the Republic of Azerbaijan”;
- In Article 2, a reference to Article 71.VIII of the Constitution should be included;
- 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 a legitimate aim, as prescribed in the Constitution and this law, and be proportionate to this aim”;
- Add the following sentence in Article 4.1: “and in accordance with a procedure prescribed by law”;
- The wording in Article 6 should be reconsidered in order to clarify the scope of the review undertaken by the Constitutional Court when dealing with individual constitutional complaints and to ensure that the Constitutional Court will examine the challenged acts in the light of both the Constitution and international human rights treaties to which Azerbaijan is a party.

APPENDIX

Draft Constitutional Law of the Republic of Azerbaijan on Regulation of the Exercise of Human Rights and Freedoms in the Republic of Azerbaijan

The present Constitutional Law is adopted with a view of bringing the exercise of human right and freedoms in the Republic of Azerbaijan in conformity with the European Convention on Protection of Fundamental Human Rights and Freedoms.

Article 1. Basic conditions of the exercise of human rights and freedoms

1.1. Human and civil rights and freedoms stipulated in the Constitution of the Republic of Azerbaijan shall not be used by anybody for restriction of human rights and freedoms of others, and shall not justify these acts. Everyone in exercise of his/her rights and freedoms shall not violate rights and freedoms of others, and shall abide to the Constitution and laws of the Republic of Azerbaijan.

1.2. No one should abuse of his/her rights and freedoms.

Article 2. Human rights and freedoms that might not be restricted

Rights and freedoms provided for in the Article 27 (save in death in the time of war), Para I of the Article 28, Para III of the Article 46, and Article 63 might not be restricted.

Article 3. Requirements to the laws restricting human rights and freedoms

3.1. The Law restricting human rights and freedoms shall directly quote the restricted right or freedom, as well as the relevant Article of the Constitution of the Republic of Azerbaijan.

3.2. Restrictions on human rights and freedoms should not alter the essence of these rights and freedoms.

3.3. Restrictions on human rights and freedoms imposed by law should be compatible to the aims of that law.

Article 4. Restrictions on arrest, detention and deprivation of liberty of the person

4.1. No one shall be arrested, detained or deprived of liberty, save in the following cases:

4.1.1. the lawful detention of a person after conviction by a competent court;

4.1.2. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

4.1.3. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

4.1.4. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

4.1.5. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

4.1.6. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

4.2. Everyone arrested or detained in accordance with the provisions of Article 4.1 of the this Law shall be brought promptly before a judge or other officer authorised by law to exercise judicial power. This person shall be entitled to trial within a reasonable time or to release pending trial.

4.3. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

4.4. Release may be conditioned by guarantees to appear for trial.

4.5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

4.6. No one shall be arrested, detained or deprived of liberty for impairment of civil obligation.

Article 5. Requirements to the legal restrictions on human rights and freedoms

5.1. Human rights and freedoms, provided for in the Constitution of the Republic of Azerbaijan and in the international agreements, acceded by the Republic of Azerbaijan shall be subject for restriction only by the law.

5.2. Beside on the grounds, stipulated in the Para II of the Article 71 of the Constitution of the Republic of Azerbaijan, human rights and freedoms may be subject to restrictions for security and protection of human rights and freedoms of other individuals.

5.3. Beside on other grounds, stipulated in the Constitution of the Republic of Azerbaijan, rights and freedoms, provided for in the Para III of the Article 28, Articles 32, 33, 47, 49, 50, 51 and 58 of the Constitution of the Republic of Azerbaijan may be subject to restrictions as are necessary in the interests of national security, for the protection of health or morals, for the protection of rights and freedoms of others, for the prevention of crime; rights and freedoms, provided for in the Articles 32, 33, 47, 49, 50 and 58 of the Constitution of the Republic of Azerbaijan – for the prevention of disorder or crime as well; rights and freedoms, provided for in the Para III of the Article 28, Articles 47, 48, 49, 50 and 58 of the Constitution of the Republic of Azerbaijan – in the interests of public safety as well; rights and freedoms, provided for in the Para III of the Article 28, Articles 32, 33 and 48 of the Constitution of the Republic of Azerbaijan – for the protection of public order as well; rights and freedoms, provided for in the Articles 32 and 33 of the Constitution of the Republic of Azerbaijan – in the interests of economic well-being of the country; rights and freedoms, provided for in the Articles 47 and 50 of the Constitution of the Republic of Azerbaijan – in the interests of territorial integrity, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary as well; rights and freedoms, provided for in the Article 48 of the Constitution of the Republic of Azerbaijan – in the interests of public safety, for the protection of public order, for the protection of health or morals, for the protection of the rights and freedoms of others as well.

Article 6. Right to appeal to the Constitutional Court of the Republic of Azerbaijan of individuals claiming to be a victim of a violation by legislation, decisions of executive and judiciary, municipal acts of his/her human rights and freedoms

Everyone claiming to be the victim of a violation by legislation, decisions of executive and judiciary, municipal acts set forth in the items 1-6 and 8 of the Para III of the Article 130 of the Constitution of the republic of Azerbaijan, of his/her human rights and freedoms may appeal respectively to the Constitutional Court of the Republic of Azerbaijan.

Article 7. Right of judges to appeal to the Constitutional Court

Any judge⁵ may file the Constitutional Court of the Republic of Azerbaijan a request on interpretation of the Constitution and the laws of the Republic of Azerbaijan as regards the matters, concerning the implementation of human rights and freedoms, in accordance with the procedure provided for by the laws of the Republic of Azerbaijan

⁵ The delegation of Azerbaijan confirmed at the Strasbourg meeting that the term « any judge » in this Article should be read as “*any court*”.