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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

COMMENTS

**ON THE DRAFT CONSTITUTION
OF THE
REPUBLIC OF NAKHCHIVAN
(Republic of Azerbaijan)**

by

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Draft Constitution of the Nakhichevan Autonomous Republic

COMMENTS

Introduction

I have been asked to present my observations on a Draft Constitution of the Nakhichevan Autonomous Republic in the Republic of Azerbaijan. My comments are based on an English translation of the Draft.

Nakhichevan is an enclave, separated from the main body of Azerbaijan by Armenian territory. On the other side, Nakhichevan is bordered by Iran.

Basic questions

The existence of the Autonomous Republic is based on, and presupposed in, the Constitution of the Republic of Azerbaijan, 1995 [CDL (96) 52]. The Preamble and Art. 1 of the Draft Constitution also refer to the Moscow and Kars Agreements of 1921. These two agreements have not been at my disposal. I feel myself entitled to suppose that the relevant parts of the two agreements have been faithfully observed in the Draft. The Constitution of the Republic of Azerbaijan states on the other hand simply (Art. 134, Section II), without any reference to the Moscow and Kars Agreements: "The status of the Nakhichevan Autonomous Republic is defined in the present Constitution." It does not appear whether the Republic of Azerbaijan considers itself bound in its relations to the Autonomous Republic by the two agreements.

The Constitution of the Republic of Azerbaijan includes a Chapter (VIII) on the Nakhichevan Autonomous Republic. The Autonomous Republic is in addition specifically mentioned in several provisions of the Constitution of the Republic of Azerbaijan. Section V of Art. 134 of the Constitution of the Republic of Azerbaijan clearly presupposes that the Autonomous Republic shall have a Constitution of its own, accepted by the Supreme Assembly (Ali Majlis) of the Autonomous Republic. It is on the other hand expressly provided in this constitutional provision that the Constitution of the Autonomous Republic shall not contradict the Constitution of the Republic of Azerbaijan.

It follows from this constitutional framework that the Constitution-making Power of the Republic of Azerbaijan is sovereign in determining the extent and content of the Nakhichevanese autonomy (in so far as limitations in this respect cannot be derived from the Moscow and Kars Agreements of

1921). In this respect the autonomy of Nakhichevan differs from, e.g., the autonomy of the Province of Åland in Finland: the Self-Government Act of Åland is both a constitutional Finnish enactment and a provincial enactment approved by the provincial legislature with a qualified majority; and the Self-Government Act can only be amended (or repealed), and the extent and content of the autonomy altered, by identical national and provincial enactments. But the sovereign powers of Azerbaijan to modify the extent, content and even existence of the autonomy of Nakhichevan evidently cannot be influenced by any Nakhichevanese actions in connection with the drafting and approval of the Constitution of the Autonomous Republic. Regard taken, however, of the procedure of amending the Constitution of the Republic of Azerbaijan (Chapter XI of the Constitution), involving a compulsory referendum, the Constitution of the Autonomous Republic can in my opinion be drafted without regard to any risk of fundamental changes in the National Constitution concerning the extent, content and existence of the autonomy of Nakhichevan.

Another fundamental question is in my opinion that, save for the right of the Ali Majlis to adopt the Constitution of the Autonomous Republic, the National Constitution of Azerbaijan does not in principle reserve any matters for the exclusive or priority legislative power of the Ali Majlis. Articles 138 and 139 of the National Constitution do list certain matters concerning which the Ali Majlis may adopt laws and decrees (resolutions), but precedence over these is, according to Section V of Art. 134 the National Constitution, taken not only by the National Constitution but also by all laws of the Republic of Azerbaijan. Several of the matters listed in Articles 138 and especially 139 certainly concern questions in which the Milli Majlis (National Parliament of Azerbaijan) cannot be expected ever to take action; but this expectation cannot be extended to other matters mentioned in Art. 138. A connected problem is that the National Constitution does not at all regulate economic relations between the Republic of Azerbaijan and the Autonomic Republic, e.g. how to divide the taxing power between the two entities, or how to determine eventual subsidies from the National Government to the Autonomous Republic. In drafting the Constitution of the Autonomous Republic as well as in examining the Draft, all these circumstances shall evidently be taken as granted (with regard, nevertheless, to the right of the Ali Majlis of legislative initiative in the Milli Majlis, according to Sec. I of Art. 96 of the National Constitution).

Within the framework so determined, the Draft as a whole in my opinion serves well as a basis of the future Constitution of the Autonomous Republic. In the following, I will make some comments on the details of the Draft.

Chapter 1 (Untitled)

Articles 1 to 15 of the Draft are evidently intended to form the first Chapter. The chapter title is, however, lacking in the Draft, or in the English translation.

Article 2: Basis for the autonomy. According to this provision, the Autonomous Republic is independent in passing solutions "on the matters not bound with the general (national) interest of Azerbaijan Republic". From the Nakhichevanese point of view, this provision stresses the independence of the authorities of the Autonomous Republic in making decisions within their competence. The provision can be seen in connection with para. 3 of Art. 3 of the Draft, confirming the independence of the Ali Majlis, the Council of Ministers and the Courts of the Autonomous Republic in deciding issues conferred to their competence by the Constitution and Laws of the Republic of Azerbaijan (and as regards the Council of Ministers, by the Decrees of the President of the Republic of Azerbaijan). These provisions are precise enough, and they correspond to Sec. II of Art. 135 of the Constitution of the Republic of Azerbaijan.

Art. 2 of the Draft, however, seems to have no counterpart in the National Constitution. From the National point of view, it stresses the duty of the authorities of the Autonomous Republic to take into account the general (national) interests of the Republic of Azerbaijan. Moreover, if interpreted *e contrario*, the provision seems to imply that authorities of the Autonomous Republic are not independent in matters which are bound with the general (national) interests of the Republic of Azerbaijan. But from whom are they in such cases dependent? Who defines the general (national) interests and the requirements of these interests, in case they have not been defined in the National Constitution, National Laws and National Decrees as presupposed in para. 3 of Art. 3 of the Draft?

Art. 8: Property. Para. 3 of this article provides that property cannot be used to the detriment of human rights and dignity, the rights and liberty of citizens, as well as against the State and Public interests. There is no corresponding provision in the National Constitution. Despite its worthwhile purpose, the provision is in my opinion too vague to give rise to any real legal rule.

Chapter 2: Legislative power

Art. 20: Requirements with regard to candidates for members of the Supreme Assembly of the Nakhichevan Autonomous Republic. Para. 2 of this article excludes i.a. persons serving at either executive or judicial authorities (except the ones preoccupied with science, arts and creative activities) as well as representatives of clergy from running for membership in the Ali Majlis. This rule is not as restrictive as the corresponding limitation in the National Constitution concerning candidates for membership in the Milli Majlis (Sec. II of Art. 85). The excluded categories are nevertheless fairly large. In my opinion, the rule unduly restricts the freedom of the citizens to elect persons of their choosing to the legislative assembly. Would it not suffice only to exclude the highest grades of the executive, judicial and clerical hier-

archies altogether, while the others should during the electoral campaign refrain from exercising their official functions and after having been elected either resign from their executive, judicial or clerical office or be suspended? (Cf. also para. 1, point d of Art. 24 of the Draft.)

Art. 24: Deprivation of status of member of the Supreme Assembly of the Nakhichevan Autonomous Republic and loss of authorities of member of the the Supreme Assembly of the Nakhichevan Autonomous Republic. Para. 2 of this article provides that the credentials of a members of the Ali Majlis may be cancelled i.a. "in some other cases". There is a corresponding provision for Milli Majlis members in Sec. II of Art. 89 of the National Constitution. Like for Milli Majlis members, the "some other cases" should evidently be specified in legislation. Nevertheless, a bare majority of a legislative assembly should in my opinion not be able to pass rules depriving any of their fellow members of their mandates. Therefore the "some other cases" should be defined in the Constitution.

Art. 25: Immunity of members of the Supreme Assembly of the Nakhichevan Autonomous Republic. I assume that the reference to the members of the Supreme Court of the Republic of Azerbaijan in para. 2 of this article is a translation error.

Art. 29: Basic issues determined by the Supreme Assembly of the Nakhichevan Autonomous Republic. The "basic issues" listed in this article are roughly the same as in the corresponding list in Art. 138 of the National Constitution. The only difference that merits consideration is that the National Constitution mentions "taxes" without any qualification whereas the Draft only mentions "local taxation". It is of course possible for the Autonomous Republic to renounce all republic-wide taxation of its own if it can finance its budget from other sources (e.g. subsidies from the National Government, or a portion of the proceeds from Nation-wide taxes, as determined in National legislation). Legislation on taxation could also be based on the last point of para. 1 of the present article ("Other issues related to its competence by the Constitution of Azerbaijan Republic"); but I do not consider it a good legislative technique to mention local taxation specifically in the text but refer taxation of the Autonomous Republic itself to the catch-all clause.

Art. 30: Basic issues solved by the Supreme Assembly of the Nakhichevan Autonomous Republic. The English translation of para. 2 of the present article refers to "Laws" passed by the Ali Majlis. In the English translation of the National Constitution (Sec. IV of Art. 140) they are called "decrees", and in the French translation *résolutions*.

Art. 31: Rights for legislative initiative. According to paras. 2 and 3 of the present article, all legislative initiatives submitted by the Prime Minister or Supreme Court of the Autonomous Republic shall be put to the vote by the Ali Majlis unaltered, unless otherwise agreed by the Ali Majlis and the initiator. Paragraphs 4 and 5 provide further that all

initiatives, those presented by individual members of the Ali Majlis included, shall be put to the vote within one month from their presentation, and if declared urgent by their initiators, within 15 days. These provisions correspond to the rules concerning the Milli Majlis, except that the maximum delays are still shorter in Nakhichevan (Art. 96, Secs. II to V of the National Constitution). The rules are throughout possible, although they seem strange to a person from a different parliamentary tradition, where the fate of a legislative initiative is in the hands of the Parliament, which can make (usually through its Committees) wide changes in the propositions and also handle the initiatives for as long a time as it finds appropriate.

Chapter 3: Chairman of the Supreme Assembly of the Nakhichevan Autonomous Republic

Art. 38: *Signing of the Laws*. It must be a translation error to mention in para. 1 of the present article "the Chairman of the Nakhichevan Autonomous Republic" (in stead of "the Chairman of the Supreme Assembly of the Nakhichevan Autonomous Republic").

The Chairman is according to the present article duty bound to sign the Laws submitted to him within 15 days from their presentation. The Chairman accordingly lacks the right of the President of the Republic of Azerbaijan (and the similar prerogatives of many other executives) to return laws for reconsideration to the Milli Majlis (Art. 110 of the National Constitution). As the Chairman of the Ali Majlis holds office upon the discretion of the Ali Majlis, it may have been considered inappropriate to confer him any independent position in the legislative process; but it might nevertheless be useful to endeavour to find a procedure to correct any inadvertencies in the decision-making of the Ali Majlis (without, of course, restricting the competence of the Ali Majlis).

Art. 39: *Legal documents (instruments) adopted by Chairman of the Supreme Court of Nakhichevan Autonomous Republic*. The reference to the "Supreme Court" in the English title of his article is obviously erroneous.

I assume that the competence of the Chairman of the Ali Majlis to adopt Resolutions and Decrees only refers to the matters referred to his competence in Art. 37 or other provisions of the Constitution of the Autonomous Republic. Should this matter not be specified explicitly in the Constitution?

Chapter 4: Executive authorities

Art. 43: *The Prime Minister of the Nakhichevan Autonomous Republic*. According to this article (in the English translation), the Prime Minister is appointed by the Ali Majlis "following recommendation" of the President of the Republic of Azerbaijan. The translations of the National Constitution (Art. 140, Sec. II) use the expressions "on recommendation" and *sur la base d'une proposition*. The Constitution of the

Autonomous Republic should evidently use the same locution as the National Constitution, which cannot be interpreted by the Constitution of the Autonomous Republic.

Chapter 5: Judicial authorities

Art. 50: Implementation of judicial authorities. In the National Constitution, the judicial authorities of the Autonomous Republic are only mentioned in the provision (Sec. I of Art. 135) stating that the judicial power is in the Autonomous Republic implemented by the law courts of the Autonomous Republic. This constitutional provision can in my opinion be regarded as a sufficient base to include fundamental provisions on judicial authorities of the Autonomous Republic in the Constitution of the Autonomous Republic. There is on the other hand an express provision in para. 3 of the present article confirming that judicial powers are implemented in conformity with the National Constitution.

The provisions of the Draft, as well as of the National Constitution, on remedies against unlawful executive and administrative decisions (and omissions) are in my opinion defective or at least unclear. The President of the Republic of Azerbaijan is competent to cancel decrees and orders of i.a. the Cabinet of Ministers of the Autonomous Republic and acts of central and local executive power bodies (Art. 109, point 8 of the National Constitution), and Art. 37 of the Draft authorizes the Chairman of the Ali Majlis to suspend resolutions and decrees of the Cabinet of Ministers and of central and local executive authorities and to apply for their cancellation. Regard may also be had to the competence of the (National) Constitutional Court to handle matters mentioned i.a. in points 5 and 8 of Art. 130 of the National Constitution.

These procedures do not in my opinion suffice to meet the requirement of effective remedies included e.g. in Articles 6 and 13 of the European Convention on Human Rights. This defect might at this stage be remedied by adding to Art. 50 of the Draft a provision stating that acts of the executive and administrative authorities and municipalities of the Autonomous Republic may be judicially contested as determined by Laws. If this solution be regarded as a too big deviation from the system of the National Constitution, it might be alternatively possible to lean on Sec. III of Art. 125 of the National Constitution, which according to the French translation provides that the judicial power is implemented *par l'intermédiaire... d'autres formes prévues par la loi*. If this translation be correct, para. 3 of the present article of the Draft might be amended accordingly. This solution does not make it a constitutional right of individuals to contest executive and administrative action judicially, but does make it possible that the international requirements concerning judicial remedies against actions of public authorities be fulfilled by means of ordinary legislation.

Art. 51: *The Supreme Court of the Nakhichevan Autonomous Republic.* According to para. 1 of the present article, the Supreme Court of the Autonomous Republic is "the higher body" of judicial power in the republic. Under Chapter VII of the National Constitution it is in my opinion clear that the Supreme Court of the Autonomous Republic is an intermediate court under the Supreme Court of the Republic of Azerbaijan (although it is not constitutionally necessary to make every decision of the Supreme Court of the Autonomous Republic reviewable by the National Supreme Court).

According to para. 2 of the present article, the judges of the Supreme Court of the Autonomous Republic are discharged by the President of the Republic of Azerbaijan upon recommendations of the Chairman of the Ali Majlis. Articles 127 and 128 of the National Constitution concerning the independence and immunity of judges provide, however, that judges are independent, that they cannot be replaced during the term of their authority, that their authority might be stopped only based on reasons and rules envisaged by the law (*Il ne peut être mis fin au mandat des juges que conformément aux motifs et règles prévues par la loi*), and that judges may be dismissed only by the Milli Majlis on the initiative of the President of the Republic. These rules entail that the Chairman of the Ali Majlis may recommend the involuntary discharge of a Supreme Court judge only in cases envisaged in Sec. III of Art. 128 of the National Constitution and that the President of the Republic cannot in such a case himself dismiss the judge but only recommend his dismissal to the Milli Majlis. Para. 2 of Art. 51 of the Draft should be amended accordingly.

Art. 52: *The Economic Court of the Nakhichevan Autonomous Republic.* My comments to para. 2 of Art. 51 of the Draft apply correspondingly to the involuntary discharge of Economic Court judges (para. 2 of the present article).

Art. 53: *The Public Prosecutor's Office of the Nakhichevan Autonomous Republic.* The English translation of the locution in para. 4 of the present article that the local and special public prosecutors are appointed and dismissed "upon recommendations made by Chairman of the Supreme Assembly of Nakhichevan Autonomous Republic and approved by the President of Azerbaijan Republic" seems to me misleading (cf. Sec. V of Art. 133 of the National Constitution: "on agreement with the President of the Azerbaijan Republic").

Chapters 8 and 9: Alterations and amendments to the Constitution of the Nakhichevan Autonomous Republic

The use of the terms 'alterations' and 'amendments' in the English translation does not correspond to the usual juridical usage. The same applies to the corresponding terms ('changes' and 'amendments') in the English translation of the National Constitution. The terminology of the French translation of the National Constitution (*modifications and compléments*) seems to me more accurate. Once adopted, the

"amendments" (*compléments*) are in the Draft called 'Constitutional Laws'. They seem to correspond to what are in many constitutional systems called "organic laws".

The Draft does not specify in which cases an enactment must be adopted as an "amendment" (*complément*, Constitutional Law, organic law) and not as an ordinary law. Only so much seems clear that an enactment that has been adopted as an "amendment" cannot be modified or repealed except by means of a new "amendment".

Art. 63: *Restriction of proposals concerning alterations to be made in the Constitution of the Nakhichevan Autonomous Republic.* The English translation of this article is obviously false. What is intended is evidently that no propositions concerning alterations of Articles 1 to 7 may be submitted to the Ali Majlis. (Cf. Art. 155 of the National Constitution.)

Transitional provisions

I wonder whether the reference to the Supreme Court of the Autonomous Republic in para. 1 of the transitional provisions is a correct translation.