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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

**Draft Law on the Ombudsman of the Republic of Azerbaijan**

*Comments by P. van Dijk  
Member, The Netherlands*

In relation to the draft of a Law of the Republic of Azerbaijan on the Ombudsman, as submitted to the Venice Commission for advice, I have the following observations to make:

1. General

It is desirable that the institution of the Ombudsman has its legal basis first of all in the Constitution. Further regulation of the office could then be delegated to the Law.

2. Article 1, first paragraph

In the description of the scope of the function and duties of the proposed Ombudsman there is reference to "the human rights and freedoms as enshrined in the Constitution of the Republic of Azerbaijan". In my opinion there should also be reference to the human rights and freedoms as laid down in the international treaties to which Azerbaijan is a party. The meaning and scope of such a reference depends first of all on the relationship between domestic law and (self-executing) treaty law as regulated in the (constitutional) law of Azerbaijan. Apart from that, however, a reference to international law in connection with the powers of the Ombudsman is of great importance for the future implementation by Azerbaijan of its obligations under the European Convention on Human Rights. Article 1 of the Convention contains the obligation for each Contracting State to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention. Article 13 stipulates that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. The Ombudsman may play an important subsidiary role in providing an effective remedy.

3. Article 1, third paragraph

Is there an obvious and convincing reason why, in addition to the President of the Republic, the Prime Minister is excluded from investigation by the Ombudsman?

In the first paragraph of Article 1 it is laid down that it is the duty of the Ombudsman "to promote the observance of these rights [i.e. the human rights and freedoms] by the government ...". I assume that the activities of the Prime Minister are part of governmental action. Exclusion of the Prime Minister would then mean that an important part of the exercise of executive power would be excluded from investigation by the Ombudsman.

Does the exception for judges also include their legal staff and other staff members? This is not self-evident. One could think of a system whereby the behaviour of judges is supervised by, e.g., the Supreme Court while that of their staff is investigated upon complaint by the Ombudsman. In any case the provision should be clarified on this point.

4. Article 2

This provision is not clear on the issue whether the recommendation by the President of the Republic to the Milli Mejlis could contain just one name or shall contain more than one name. The latter option would seem to be preferable, since it gives the Milli Mejlis a real choice. A recommendation of three candidates would seem the usual model for functions like the present one.

However, in my opinion it would be preferable not to lay the power of recommendation in the hands of the President of the Republic, but in those of a committee of independent persons, among whom the President of the Supreme Court. This would make the appointment less political and would constitute a better guarantee for the independence and necessary qualities of the candidates. An alternative would be to stipulate that the President of the Republic, in making his or her recommendation, will be advised by such a committee of independent persons.

It would seem advisable to also provide for the appointment of a Deputy Ombudsman. It should be made clear in the Law who will perform the function of Ombudsman during a temporary inability of the latter to do so.

5. Article 3, first paragraph

In my opinion the restriction of candidates for the office of Ombudsman to persons with a law degree is not necessary. The Ombudsman is not a court and does not perform his or her functions as a court. Therefore, the qualities required of an Ombudsman may well be different from those required of a judge. A good knowledge of the law is required for the functioning of the Ombudsman, but specific knowledge may be provided by his or her staff. More important for the Ombudsman himself or herself is that he or she enjoys the confidence of a large majority of society and has sufficient authority in government circles and in the Milli Mejlis. In addition he or she must have expertise in the field of the protection of human rights.

6. Article 3, third paragraph

Exclusion of membership of a non-governmental organisation goes a little too far, in my opinion, given the broad category of such organisations, the variety of their purposes and functions, and the often rather loose link of membership. I submit that the exclusion could be restricted to persons with a leading role in a non-governmental organisation.

7. Article 3, new fifth paragraph

A provision should be added that the Ombudsman, at the beginning of his or her term of office, takes the oath or makes the declaration that he or she shall respect the Constitution and the law, shall act in full independence and impartiality, and has not accepted and will not accept any favour in relation to the performance of the office.

8. Article 4, first paragraph

It should be expressly stated that the Ombudsman may be re-appointed by the Milli Mejlis without the necessity of a recommendation by the President of the Republic to that effect. If the Ombudsman depends for his or her re-appointment on the President of the Republic, this may have a negative impact on his or her independent and impartial functioning during the first term of office.

9. Article 5, first paragraph

The "grounds provided for in law" for terminating the powers of the Ombudsman should be further specified. The Article should rather read: "on the grounds provided for in the present Law". The Law on the Ombudsman should expressly list those grounds.

10. Article 5, second paragraph

The immunities mentioned in sub-paragraph a) should be further specified in the following sense: "... shall enjoy the immunities provided for in the present Law".

The same holds good for sub-paragraph b): "there shall be those restrictions as provided in the present Law ...".

Sub-paragraph d) should read: "... with adequate financial and social guarantees".

11. Article 6, second paragraph

It is not clear whether the words "save in cases where he or she was arrested while committing a crime" refer to all the foregoing or only to "arrested or detained".

12. Article 7

If the recommendation of the President of the Republic is *conditio sine qua non* for termination of the powers of the Ombudsman, this would seem too restrictive. The Milli Mejlis, which appoints the Ombudsman, should also have the power to terminate his or her office at its own initiative.

Under reason b) it should be clarified that this concerns not only convictions in criminal cases but also judgements in civil cases such as the deprivation by court of management of one's affairs and the pronouncement of bankruptcy.

Reason d) - loss of citizenship - is already covered by reason a), since citizenship is one of the requirements.

In addition to termination of powers there should be a provision for temporary suspension of powers for reasons expressly listed in that provision.

13. Article 8, first paragraph

To the words "with consent of the person concerned" should be added: "if possible". The person concerned may be in a situation where he or she is not in the position to give his or her consent.

14. Article 8, second paragraph

To avoid immature complaints and complaints which could have been remedied at the administrative level, it may be advisable to require for admissibility that previously a complaint has been lodged with the administrative authority against whom the complaint is directed.

15. Article 8, fourth paragraph

An extension of the period of thirty days should be possible for very complicated investigations and for periods of an exceptional work load.

16. Article 9, first paragraph

The drafting of this provision implies that complaints can only be lodged in written form. In practice it may make the Ombudsman more accessible if the possibility is left open that a complainant visits the office of the Ombudsman and expresses his or her complaint which will be noted down by a staff member.

It should be stipulated that the complaint shall also set out the contents of the complaint.

17. Article 9, second paragraph

The possibility for the Ombudsman to investigate complaints which originally are anonymous should not be totally excluded. Fear of reprisals may make persons very hesitant to bring a complaint under their name. During the investigation the identity of the complainant may be determined by the Ombudsman, who may then keep it secret if safety requires so.

18. Article 10, first paragraph

If a complaint is accepted by the Ombudsman, the complaint shall be communicated to the authority against whom the complaint is directed for a reply.

For the action referred to in sub-paragraph b) -return of the complaint - specific criteria should be defined.

19. Article 10, second paragraph

There should be a possibility for extension of the period of ten days in very complicated matters.

20. Article 11, first paragraph

As said before, anonymous complaints should not be totally excluded.

Not only court proceedings but also the fact that other (administrative) remedies have not been exhausted may be a reason to refuse to start investigation.

21. Article 12, first paragraph

For the sake of clarity there should be a reference to Article 15 concerning confidentiality of information.

22. Article 12, third paragraph

If the Ombudsman makes investigations of violations at his or her own initiative, the consent of the alleged victim should be sought unless the investigation concerns massive violations.

If the investigation is not within the Ombudsman's competence, in appropriate cases he or she should also have the power to refer the case to the competent criminal court or prosecuting authority, or to direct the alleged victim to the competent court.

23. Article 13, first paragraph

The applicant should also be informed about the measures taken if any, as well as about any information submitted to the Ombudsman under sub-paragraph 4) of the second paragraph. He or she should be given the possibility to submit his or her views on the results.

24. Article 13, second paragraph

The "other measures" referred to at the end of sub-paragraph 4) should be further specified.

Under sub-paragraph 5) there should also be reference to the institution of criminal procedures.

The text under sub-paragraph 7) - in the English translation - creates the impression that the Ombudsman may only address the Milli Mejlis with the permission of the President of the Republic. This would be contrary to parliamentary autonomy and to the special relation which exists between the Ombudsman and the Milli Mejlis.

25. Article 15, second paragraph

In my impression the protection of personal data is too absolute. The Ombudsman should have the power to strike a fair balance between the general interest served by publicity and the interest of personal privacy. Moreover, there may be a conflict between the interest of the applicant in publicity of certain personal data of a third person, e.g. the violator of his or her right, and the interest of the third person concerned.

26. Article 18

This provision only mentions the financial source but does not give any guarantee that the financial means will be adequate.