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COMMENTS

**ON THE DRAFT
LAW OF THE REPUBLIC OF AZERBAIJAN
ON THE OMBUDSMAN
OF THE REPUBLIC OF AZERBAIJAN**

by

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COMMENTS ON THE DRAFT LAW OF THE REPUBLIC OF AZERBAIJAN ON THE
OMBUDSMAN OF THE REPUBLIC OF AZERBAIJAN

I. General Comments

1. In order to appreciate this Draft Law I examined:
 - 1.1 THE CONSTITUTION OF THE REPUBLIC OF ARZERBAIJAN – 1995 – (translated in French);
 - 1.2. THE “*PROGRAMME DE COOPERATION AVEC L’AZERBAÏDJAN*” — CDL (2001) 5;
 - 1.3. THE “*PROJECT OF THE INSTITUTION ON OMBUDSMAN IN AZERBAIJAN*”.
2. The Constitution of Azerbaijan does not contemplate the Institution of the Ombudsman.

However, in the Document CDL (2001) 5, above referred to under 1.2, an alteration to the Constitution is foreseen to create an organ of mediation whose independence be confirmed by the Constitution. The text of Doc. CDL (2001) 5 says: “*la mise en place d’un organe de médiation dont l’indépendance doit être assuré par des garanties constitutionnelles.*”

Furthermore, the “*PROJECT OF THE INSTITUTION ON OMBUDSMAN IN AZERBAIJAN*” proposes amendments to the Constitution of the Republic of Azerbaijan and a new wording to article 72 of the Constitution stating: “*Control on observance and protection of human rights and freedoms in the territory of the Republic of Azerbaijan is being realised by Ombudsman – People’s Protector*”.

In fact, this institution shall have a greater strength if it is enshrined in the Constitution.

One article with three or four points stating the main lines of the institution would be enough. Then, a specific law, based in this Draft Law with the alterations deemed necessary, would determinate the functions, competencies and further regulations of the Ombudsman.

II. COMMENTS ON THE DRAFT LAW

Chapter 1 – Appointment of the Ombudsman of the Republic of Azerbaijan

1. Article 1. Powers of the Ombudsman

1.1 Article 1. First Paragraph

The Draft says that the institution of the Ombudsman is “*set up to protect the human rights and freedoms as enshrined in the Constitution*”.

Considering that the Constitution states (*article 12*):

I - “*La garantie des droits et libertés de l’homme et du citoyen est le but supérieur de l’Etat.*”

II - “*Les droits et libertés de l’homme et du citoyen, énumérés dans la présente Constitution, sont appliqués conformément aux traités internationaux auxquels la République azerbaïdjanaise est partie.*”

Considering that *article 151* of the Constitution states:

Au cas où survient une contradiction entre des actes juridiques normatifs faisant partie du système de la législation de la République azerbaïdjanaise (y compris la Constitution de la République azerbaïdjanaise et les actes adoptés par voie de référendum) et les traités internationaux auxquels la République azerbaïdjanaise est partie, les traités internationaux s’appliquent.

Considering these two articles of the Constitution of Azerbaijan it could eventually be defended that, in the end, the reference to the Constitution of Azerbaijan, in first paragraph of Article 1., should not be read as a limitation to the powers of the Ombudsman, in what regards the human rights and freedoms as laid down in the international treaties to which Azerbaijan is a party.

However, I think that it is of the utmost convenience to prevent doubts and conflicts of law and of interpretation.

With this scope, a reference could be made to the human rights and freedoms contained in the international treaties to which Azerbaijan is a party.

Another way of solving the problem could be to omit, in first paragraph of article 1., the words “*as enshrined in the Constitution of the Republic of Azerbaijan.*”

In this way, the Ombudsman would be an institution *set up to protect and defend the human rights and freedoms, and to promote the observance of these rights...*

These rights would be the rights enshrined in the Constitution of Azerbaijan, the rights laid down in the international treaties to which Azerbaijan is a party and, eventually, the rights contained in other laws of the Republic of Azerbaijan promulgated after the Constitution of Azerbaijan.

2. Article 1. Third Paragraph

2.1 This paragraph states that the President of the Republic of Azerbaijan, the deputies of the Milli Mejlis, the Prime Minister and the judges shall not be subjected to the powers of the Ombudsman.

If this restriction can be accepted regarding the President of the Republic of Azerbaijan it is problematic as far as the other entities are concerned.

This paragraph represents a serious restriction to the powers of the Ombudsman. It is important to say that the exercise of those powers would not, in any way, interfere with the function of governing or with the function of judging.

3. *Article 2. — Appointment of the Ombudsman*

The way according to which an Ombudsman is appointed is of the utmost importance as far as the *independence* of this institution is concerned.

And the independence of the Ombudsman is a crucial foundation stone of this institution.

In order that the Ombudsman investigations will be credible to both public and government, the procedure of appointment must be a transparent one.

Although Article 2. says that the Ombudsman is appointed by the Milli Mejlis, it is not clear how is he appointed.

Anyhow, I think that the procedure of appointment can not be but an election.

It would be most convenient to request in the law a majority necessary to the appointment.

The election of the Ombudsman by a specific majority of the Milli Mejlis (two thirds of all the members, for instance) could be a warrant that the person chosen is supported by a large part of society, with the consequences thereof like independence and impartiality.

3.3 Article 2 says, also, that the Ombudsman is appointed “*following a recommendation of the President of the Republic of Azerbaijan.*”

Does the President of the Republic recommend just one name? Or does he recommend more than one name, in order to make possible a choice?

What happens if the Milli Mejlis does not elect the name recommended?

Will there be a new start of the procedure of appointment with recommendation of a different name and a new election?

Or that cannot happen?

If the name recommend can not but be accepted and appointed, there will not be a warrant that the person chosen will act with impartiality and independence.

The only provision in the Constitution of Azerbaijan I can remember foreseeing and regulating a possible disagreement between the President of the Republic and the Milli Mejlis, is article 118 — *The Procedure of Appointment of the Prime Minister.*

This provision says that the President of the Republic proposes one candidate to the Milli Mejlis. It adds also that if, after three times consecutively, the Milli Mejlis does not agree to the candidates proposed, the President of the Republic of Azerbaijan can appoint the Prime Minister without the agreement of the Milli Mejlis.

This is not, of course, an identical situation. Anyhow, article two of the Draft should be clarified, as it is of the utmost importance regarding the strength, the transparency and the credulity of the institution of the Ombudsman.

The President of the Republic should recommend two or three names. It would add transparency to the institution if the recommendation was made both by the President of the Republic and the President of the Milli Mejlis.

4. Article 3. Requirements Concerning the Candidature of the Ombudsman

4.1 Article 3. First Paragraph

I agree with the requirements for the function stated in this paragraph.
But I think that something more should be added.

Having in mind the special nature of the functions of the Ombudsman, it should be said, for instance, that the appointment of the Ombudsman could only fall upon **a citizen who enjoys a well – established reputation for integrity and independence**, or any other similar formulation.

4.2 Article 3. Third Paragraph

Everything I said under numbers 3.2, 3.3 and 3.4 above, could be said here.

Anyhow, the wording of this paragraph should be reformulated, as it seems to contain a contradiction with paragraph two.

In fact, if the same person may hold the post twice, **only** when his reappointment is not desired or has already occurred shall the President of the Republic (or the President of the Republic and the President of the Milli Mejlis, as said above) submit the name or names of the new candidate or candidates.

5. Article 5. Independence of the Ombudsman

5.1 Article 5. First Paragraph

This provision should be altered, as the grounds on which “*the powers of the Ombudsman may be terminated*” must be stated in this “*Law on the Ombudsman of the Republic of Azerbaijan.*”

And, indeed, they are in Article 7.

So, the last sentence of this paragraph should read: “... *on the grounds provided for in this law.*”

Article 5. Second Paragraph

Identically to what was written above under 5.1, a reference should be made here to the immunities provided for in Article 6 of this Draft.

A rewording of Article 5 with references to articles 6 and 7 would be advisable.

6. Article 7. Termination of Powers of the Ombudsman Before Expiry of his or her Term of Office

As the Ombudsman is appointed by the Milli Mejlis, it is correct to confer to this same organ the competence to terminate the powers of the Ombudsman before expiry of his or her term of office, on the grounds provided for in this law.

However, it is difficult to envisage why the Milli Mejlis needs, to act, of a recommendation of the President of the Republic.

This restriction could even be faced as a “*capitis deminutio*” of the Milli Mejlis.

7. Article 8. Submission of Complaints

7.1 Article 8. First Paragraph

7.1.1 The reference to complaints “*from citizens*” excludes complaints from legal persons?

The rights of legal persons can also be violated.

7.1.2 Regarding complaints lodged by a third person, I assume that the consent of the person concerned is **presumed**, as it is not always possible to get it formally.

7.2 Article 8. Fourth Paragraph

The delay of thirty days may, in some cases, prove to be too short.

8. Article 9. Contents of a Complaint

Article 9. First Paragraph

It is a current practice in most countries to accept oral complaints which are written down by a deputy or a member of the staff of the Ombudsman and then signed by the applicant.

This procedure makes the institution of the Ombudsman more accessible to those who have less possibilities of expressing themselves through written language.

Article 9. Second Paragraph

I agree with the principle of non pursuance of anonymous complaints.

Anyhow, in the appreciation of a complaint, all the formalities that are non essential should be excluded. In the same line, only when it is absolutely impossible to know who the applicant is should a complaint not be accepted.

9. Article 10. Taking a Decision in Respect to a Complaint

9.1 The accomplishment of the delays stated in:

Last paragraph of Article 8
Last paragraph of Article 10
First paragraph of Article 13

may prove to be too difficult.

Besides,

- the obligation to submit to the applicant a “*substantiated written information*” of the decision taken under the three items of Article 10 in **10 days**,
- the obligation to take all the necessary steps, in case of acceptance of the investigation, in **30 days** (Article 8), and
- the obligation to submit to the applicant written information of the results of the investigation in **5 days** (Article 1)

may require a large staff.

10. Article 13. Results of Investigation

10.1 Article 13. Second paragraph – 4)

The Draft speaks of “*other measures*”.

Which are those measures?

They should be specified in this Law.

10.2 Article 13. Second Paragraph – 7)

Maybe due to a problem of translation, I don't understand quite well if the Ombudsman asks the President of Republic to hold a speech before the Milli Mejlis, or if the Ombudsman asks to the President of the Republic permission to address himself to the Milli Mejlis.

Having in mind that the Ombudsman is appointed by the Milli Mejlis,
Having in mind the provision of first paragraph of Article 14,
Having in mind the relations that should exist between the parliament and the Ombudsman, it would seem rather odd if the Ombudsman had to ask permission to the President of Republic to address himself to the Milli Mejlis.