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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Consolidated Opinion

**On the Law on Ombudsman in the
Republic of Azerbaijan**

Based on the comments of:

Mr P. Van Dijk
(Member, The Netherlands)

and

Mrs M. Serra Lopes
(Substitute Member, Portugal)

Introduction

1. Following a request from the authorities of Azerbaijan of 26 March to give a legal opinion on the Draft Law on the Ombudsman of the Republic of Azerbaijan (Doc. CDL (2001) 40), the Commission asked Mrs M. Serra Lopes and Mr P. van Dijk to give their comments on the first draft (Docs. CDL (2001) 41 and 44). The individual opinions of the Rapporteurs were sent to the authorities of the Republic of Azerbaijan on 11 May 2001.
2. After receiving the individual opinions of the Rapporteurs the Parliament of Azerbaijan continued its work on the draft law. The Venice Commission has been informed about the adoption of the text of the Law on Ombudsman in the first reading (Doc. CDL (2001) 57) and a few weeks later in the second reading (Doc. CDL (2001) 77). Both drafts progressively integrated comments and recommendations given by Mr P. van Dijk and Mrs M. Serra Lopes.
3. The Venice Commission discussed the individual opinions of the Rapporteurs and the draft law adopted in the second reading during its 47th Plenary Meeting (Venice, from 6–7 July 2001). The Commission noted with satisfaction that the Draft Law on Ombudsman in the Republic of Azerbaijan had incorporated almost all observations and suggestions made by the Venice Commission Rapporteurs.
4. The comments made by the Rapporteurs and the discussion at the Commission's plenary meeting can be summarised as follows:

Chapter I: Powers of the Ombudsman of the Republic of Azerbaijan

5. The Commission welcomes the amendment to the third draft that the Ombudsman has competence to protect human rights as enshrined not only in the Constitution but also in international agreements to which Azerbaijan is a party (**Article 1 par. 1**).
6. The Commission considers that, except for matters of internal functioning of the Government, the Ombudsman should have the power to control acts of the executive. The deletion of the Prime Minister from the list of persons whose activities are outside the Ombudsman's investigation powers (**Article 1 par. 3**) is an important positive amendment to the new draft. The President remains in this list. The Commission hopes that activities exercised by the President and/or the Presidential administration in his/her capacity as head of the executive are not out of reach for the Ombudsman. Activities of the President, unless they are of an exceptional nature (e.g. declaration of war) or of a political nature (e.g. appointment of the Prime Minister) should fall within the monitoring competence of the Ombudsman.
7. The Commission welcomes the introduction in **Article 1 par. 5** of the provision that "*the Ombudsman shall have the right to propose to the Milli Mejlis of the Republic of Azerbaijan to adopt or to revise the legislation with the purpose of ensuring the human rights and freedoms*" and to propose that the Milli Mejlis announces an amnesty.
8. The Commission welcomes the new provision in **Article 2 par. 1** that "*The Ombudsman shall be elected by 83 votes of the deputies of the Milli Mejlis of the Republic of Azerbaijan of*

*three candidates proposed by the President of the Republic*¹. The election by the increased majority² in the Parliament will certainly strengthen the Ombudsman's impartiality, independence and legitimacy. This is a very positive change compared to the provision of the first draft, which stated that *"the Ombudsman shall be appointed by the Milli Mejlis of the Republic of Azerbaijan following a recommendation of the President of the Republic of Azerbaijan"*³.

The proposal to also involve other persons (such as academics and/or judges of the highest judicial authorities) in the selection of persons proposed for the office of Ombudsman to the Milli Mejlis has not been retained.

9. The requirements concerning the candidatures for the office of Ombudsman have been clarified in the last draft. The Commission notes with satisfaction that **Article 3 par. 1 and 2** now only require that a candidate to the office of Ombudsman should have "higher education, high morals and experience in the field of human rights protection" and that such restrictions as a degree in law and the prohibition for a candidate to be a member of an NGO that appeared in previous drafts have been lifted.

10. Following the recommendation by the Rapporteurs of the Commission the authors of the draft have introduced the Ombudsman's oath that he has to take in the Parliament in **Article 3 par 5**.

11. The Commission welcomes the provision in **Article 4** extending the Ombudsman's mandate to seven years and the provision according to which the Ombudsman cannot be re-elected. The first draft presented to the Rapporteurs stipulated that:

"The Ombudsman shall be appointed for a period of 5 years. While in office, he or she shall not be replaced.

*The same person may not hold the post of Ombudsman more than twice [...]"*⁴.

The Rapporteurs expressed their concern that such a provision could endanger the independence of the institution of the Ombudsman. If this provision were kept there could be a great risk that the independent action of the person holding the post is compromised by considerations of future re-election.

12. **Article 5** on the independence of the institution of the Ombudsman of the draft passed in the third reading is very precise as to the guarantees of such independence. The Commission particularly welcomes the introduction of paragraph 3 providing that: *"the declaration of state of emergency or martial law shall not entail the termination or restriction of the activity of Ombudsman"*⁵.

13. After having studied the first draft the Rapporteurs recommended that the Azerbaijani authorities clarify certain provisions of **Article 6** on immunities of the Ombudsman. The original wording did not specify what majority was required in the Parliament to lift the immunity of the Ombudsman and did not foresee the Ombudsman's immunity for opinions

¹ Doc CDL (2001) 77, p.2.

² The Milli Mejlis is composed of 125 deputies. Article 82 of the Constitution of the Republic of Azerbaijan.

³ Doc. CDL (2001) 40, p. 2

⁴ *idem*, p. 3.

⁵ Doc. CDL (2001) 77, p. 4

held or action taken while in office after the expiry of the term of office. The Commission is satisfied that the draft adopted in the third reading solves both problems. It establishes a requirement of 83 votes in Milli Mejlis for lifting the immunity and includes a special paragraph on immunity for opinions held or action taken while in office.

14. **Article 7** of the first draft of the Law had a number of shortcomings concerning the termination of powers of the Ombudsman before the expiry of his/her term of office. According to the Rapporteurs certain provisions had to be further clarified. Among other issues, in the first draft the President of the Republic could terminate the powers of the Ombudsman by his decision. The Venice Commission was of opinion that “*as the Ombudsman was appointed by the Milli Mejlis, it was 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 the law*”⁶. The Commission welcomes the new formulation of the **Article 7**, which integrates the above suggestion.

Chapter II: Investigation of complaints

15. The Commission takes note, with approval, of the new version of **Article 8** on submission of complaints. Among other issues it welcomes the decision to drop from **Article 8 par. 1** the requirement for foreigners and stateless persons to live temporarily or permanently in Azerbaijan in order to lodge a complaint.

16. A provision in **Article 8 par. 2** that “*a complaint may also be lodged by a third person or a non-governmental organization by consent of the person concerned*” is a positive amendment aimed at protecting of victims of mass violations of human rights. Moreover, the drafters of the Law give additional protection against violations of rights by introducing a very innovative provision stating that “*in cases where it is impossible (because of his/her death, loss of capability, etc.) to get the consent of a person whose rights had been violated, the complaint may be lodged by the third person or a non-governmental organization without a consent of the person concerned*”⁷. Fear of reprisals may make people very hesitant to bring a complaint under their name and the above-mentioned norms introduce the possibility of giving them protection even if they are fearful of complaining themselves. These guarantees are further extended in Article 9.

17. It follows from **Article 9 par. 2** that the Ombudsman is not obliged to investigate anonymous complaints. This does not mean of course that he/she cannot initiate an investigation *ex officio*, under **Article 9 par. 3** (and Article 11 “c”), if he/she believes that the information in the anonymous complaint is credible and sufficiently serious to justify an *ex officio* investigation. This is a very good compromise between considerations of not overloading the institution with examination of cases of dubious nature and the necessity to grant an investigation into any facts of serious violations where victims are fearful of disclosing their identity. The Commission considers that the wording of **Article 9 par. 2** of the initial draft stating, “*if the full name and address of an applicant are not in a complaint, the latter shall be considered to be anonymous and shall not be pursued*”⁸ was too rigid.

18. One of the shortcomings of the first draft was the investigation procedure. The Commission welcomes the new wording of **Article 12** remedying to the problems indicated by the

⁶ Doc. CDL (2001) 41, p.4 par. 12 and Doc. CDL (2001) 44, p. 6 par. 6.

⁷ Doc CDL (2001) 77, p. 9.

⁸ Doc CDL (2001) 40, p. 6

Rapporteurs. The investigative powers of the Ombudsman are exhaustive and include, for example, the right to request all necessary information from any state or municipal body and officials (par. 2.2), to be received without delay by heads and other officials of state and municipal bodies (par. 2.7) and “*may on his/her own initiative investigate the cases of special public importance or where the interests of persons who are unable to protect their rights themselves had been affected*”⁹ (par. 3).

19. The Commission welcomes the introduction of the provision in **Article 13 par. 8** whereby the Ombudsman can “*apply to the Constitutional Court of the Republic of Azerbaijan in cases where the rights and freedoms of a person had been violated by legislative acts in force*”. It further welcomes the constitutional nature of the law, as this is necessary to allow the Ombudsman to bring cases before the Constitutional court.

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20. The Commission finds that the Draft Law on the Ombudsman of the Republic of Azerbaijan adopted in the second reading is in general compatible with European standards and expresses its hope that this text will be the basis for creation of an independent and efficient institution of the Ombudsman. At the same time the Commission hopes that the creation of such an important institution will be duly reflected in the Constitution of the country through corresponding amendments.

⁹ *Idem*, p.