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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

**Comments**  
**On the Draft Law on the Constitutional Court**  
**of the Republic of Azerbaijan**

**by Péter Paczolay**  
**(Substitute Member, Hungary)**

The present opinion has been formulated after that Messrs. Nolte and Endzins had submitted their opinions on the draft law. I assume that with a certain degree of coordination the three draft opinions could be summarized in one common comment. Another option is to circulate the individual opinions.

I agree mostly with the comment of Mrs. Nolte and Endzins, therefore I do not want to repeat those observations with them I agree.

### **Methodological remarks**

The commentator has certain difficulties with the draft law. The basic aim of the proposed amendments to the law on the Constitutional Court is to “re-examine the conditions of access to the Constitutional Court”. Thus, the main focus of the present observations should be Article 30 of the draft law. My distinguished colleagues do not stop at that point, and they comment on the entire law. This raises a serious problem: does it have any sense to comment on the draft law without touching upon the basic constitutional provisions? As the two comments point out politely but consequently, the earlier opinion of the Venice Commission [CDL-INF (1996) 010] were not fully taken into consideration. We cannot avoid to address the necessity of certain constitutional amendments. It seems that the introduction of constitutional complaint needs a constitutional amendment, too. (Article 130.3 of the constitution regulates the competences of the Constitutional Court.)

Furthermore, the issues regulated by the draft law are of very large scale. It is questionable whether experts of the Venice Commission by the occasion of an amendment aimed at introducing individual access to the Court should comment on the very detailed and often casuistic provisions of the law that try to regulate everything with the most possible details.

### **General comments**

My first general comment is an acknowledgement of the efforts made by the drafters of the law to take into consideration all the possible issues to be covered by a law, and to observe the international, comparative experiences. The provisions of the constitution cover a lot of important issues, and the law in its entirety is very much of a procedural character, and its provisions mostly cover topics that should pertain to the internal regulation of the Court. This is by far more than a technical question, rather it is closely related to the independence of the court. It is very dangerous, not only from a theoretical but also from a practical point of view, to authorize the legislature to decide on the peculiar procedural rules. The theoretical point, the violation of the independence of the court seems to me obvious. The legislature has the right in a democracy to determine questions such the competences of the Constitutional Court, the composition of the courts, the recruitment of the judges, even the main, I stress, the main procedural rules. But the detailed regulation of the procedure should pertain to the court itself. The practical difficulty stands in the fact that even slight amendments to the procedural rules should be adopted by the legislature where any amendment could be subject of political debates and controversies. Let me refer to the most obvious example, the case of the Hungarian Constitutional Court. According the Hungarian law, the detailed rules concerning the structure and proceedings of the Constitutional Court shall be established in the Rules of the Constitutional Court that is prescribed by Parliament in an act upon the suggestion of the Constitutional Court. Twelve years proved to be not enough for the Parliament to enact that law. Thus the Hungarian Constitutional Court still works without legitimate rules of procedure. In the case of the draft law we have very detailed rules that probably would be passed by the legislature. Difficulties could occur with the amendment of the law. Therefore it would be more advisable to differentiate better among the different levels of the regulation, and to authorize the

court to decide on all those procedural rules that are not of the importance to be guaranteed by the legislature.

### **Access to the Constitutional Court - constitutional complaint**

There are different solutions to make possible the access of individuals to the Constitutional Court.

One case is when citizens or in general individuals can submit a petition to the Constitutional Court for repressive norm control. This would aim to the constitutional review of legislative and other normative acts, without the purpose of giving remedy to an individual violation. An extreme example of this case is the Hungarian regulation, opening the way to a very large kind of *actio quivis ex populo* (or *actio popularis*) when the petition is directed against the norm as such.

More reasonable is the case when private persons or entities may submit a complaint against laws or other norms that violate their constitutionally guaranteed rights or liberties. In this case the procedure is aimed at a legal remedy in the concrete case of the petitioner.

In the case of article 30 of the draft law definitely the constitutional complaint would be introduced.

Who can submit the constitutional complaint? The draft says that “any person”. This language suggests that the circle of petitioners is not limited to citizens but any private person (non-citizens, too) may submit constitutional complaint.

Under what conditions can a person submit a constitutional complaint? Alleging that his or her fundamental rights guaranteed by the constitution have been violated at application of normative legal act. Certain questions occur here. First, what kind of application can be considered as a ground for constitutional complaint? Judicial or administrative decisions can be challenged as well? It would be more precise to expressly state that both judicial and administrative acts, or all acts of domestic public authority can be challenged by constitutional complaint. Secondly, the vague formulation of the provision on the other hand does not exclude application of normative legal acts by private persons, and could be applied against an act of a private person. This aspect of the regulation should be made more precise, too. (Normative legal acts are defined by article 149 of the constitution.)

The procedure of the constitutional complaint raises further questions. The general rules of procedure apply for the registration and the acceptance of the complaint. Similarly do apply the rules of the constitutional proceedings. It is surprising that in such a detailed law there are no particular rules for this very special procedure. One could have the impression that the drafters of the law might be not fully aware of the fact that the constitutional complaint is very different from the competences and the related procedures exercised so far by the Constitutional Court of Azerbaijan.

It is not clear the relation and the role of the parties in this specific procedure. The private person submitting the constitutional complaint is the petitioner. But who is the respondent of whom the draft law speaks? Thus I fully agree with the comment of Mr Endzins that the Constitutional Court procedure should be shifted from the adversary system towards a more specific, administrative-like procedure.

It is missing the regulation of the effects of the decision. In the case of a constitutional complaint the effect of the decision in its capacity as legal remedy for the individual is of outstanding importance. The draft law does not say anything on the subject. As far as it is not clear that the “application of normative legal act” what does refer to, it remains unanswered whether the Constitutional Court is authorized to the cassation of the challenged judicial decision or administrative act? In this case the Constitutional Court would quash the decision of a court or administrative authority.

Moreover, it seems necessary to regulate how the cassation by the Constitutional Court would effect legal relationships that has developed prior the publication of the decision. Here the principles of individual remedy and legal security should be balanced. Furthermore, one might ask whether this sort of retroactive effect of the Constitutional Court's decision would prevail only in criminal cases, or in other jurisdiction (civil, etc.) as well. For example, the Hungarian law on the Constitutional Court makes this remedy possible only in criminal cases, by reducing or putting aside the punishment (Art. 43 para 3 of the Hungarian law). In other (civil, administrative, labour etc.) procedures the Constitutional Court may decide on the retroactive effect of its decision if it is justified by a particularly important interest of legal security or of the person who initiated the procedure.

The constitutional review may lead to the declaration of the unconstitutionality of legislative acts, too. In this case the individual constitutional complaint results in a decision that has erga omnes effect because the legal norm on which the challenged judicial or administrative act was based is declared null and void. Thus other acts based on the same norm are invalid, too. Anyway, it would be desirable to regulate expressly all these matters in the law.

Finally, there are no procedural rules on the filtering of the petitions in general. Introducing the institution of the constitutional complaint, the jurisdiction and the workload of the constitution will dramatically change. Therefore, besides the clear provisions on the constitutional complaint, it would be necessary to regulate some sort of filtering procedure.

### **Comments on other specific articles**

#### **Article 10**

The reappointment of the judges may threaten the independence of the judges. They may seek, especially at the end of their first term, seek for reappointment, and for that purpose try to please to those political forces that are involved in the appointment procedure.

#### **Article 13**

This article refers to article 109.32 of the constitution. This seems to me to be a very vague reference, as the text of the constitution says nothing more than the President of the Republic has the power to settle those questions.

#### **Article 15**

There is a cross-reference to article 9.2 of the present law. The draft does not contain such an article.

#### **Article 20**

In case of death of a judge his powers are not suspended before the end of his term but terminated.

#### **Articles 87 and 95**

The two articles repeat superfluously the same provision on the inadmissibility of the official interpretation of the resolutions of the Constitutional Court.