Strasbourg, 26 November 2001
<cdl\doc\2001\cdl\116 prov_E.doc>

Restricted
CDL (2001) 116 prov

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAĬJAN

Draft preliminary opinion on the basis of comments by:

Mr. Aivars ENDZINS (member, Latvia)
Mr. Georg NOLTE (substitute member, Germany)
Mr. Peter PACZOLAY (substitute member, Hungary)

I. Introduction

Within the framework of the programme of co-operation of Azerbaijan with the Venice Commission (CDL (2001) 5), Mr. Khanlar Hajiev, President of the Constitutional Court of Azerbaijan, requested an opinion of the Commission on the draft law on the Constitutional Court (CDL (2001) 108) by letter of 7 September 2001. At its 48 Plenary Meeting on 18-19 October 2001, the Venice Commission invited Messrs Endzins, Nolte and Paczolay to act as rapporteurs on this draft. Their comments have become documents CDL (2001) 111, 110, 114 respectively. On the basis of these comments, on 5-6 November a workshop and meetings on the draft law were held in the Constitutional Court and the offices of the Presidential Administration of Azerbaijan in Baku. For the Venice Commission, Messrs. Endzins, Hamilton and Paczolay participated at these meetings. The discussion focussed mainly on the procedures for individual access to the Constitutional Court as envisaged in Article 30 of the Draft and direct access for ordinary courts on all levels which the present daft does not yet provide for.

The rapporteurs pointed out that the draft provides a very good basis for discussion and welcomed that it takes into account comparative international experiences. It does, however, raise a number of general and specific questions. The following preliminary opinion limits itself to the question of whether the provisions of the Draft Law are in conformity with the Constitution of Azerbaijan, and whether their adoption is advisable in the light of common European standards and practices. Given the detailed nature of the draft and the multitude of possible policy options the preceding comments have been limited to certain important and some less important issues.

1. Constitutional changes

The comments do not address the issue whether it would be advisable **to not only to amend the Constitution** (as proposed with Article 6 of the Draft Constitutional Law on the Regulation of the Implementation of Human Rights and Freedoms) but **to change it** either in order to introduce new procedures for the Constitutional Court which would require a constitutional amendment (which might be the case for a **right of a parliamentary minority to initiate a review of norms**) or to **abolish** an existing procedure (for example **the initiative by the Constitutional Court in the procedure for the removal of the President** of Azerbaijan according to Article 107 of the Constitution of Azerbaijan). Such changes have been recommended by the Venice Commission in its previous Opinion based on comments by Messrs. Özbudun, Russell and Lesage (CDL-INF (1996) 10).

The Commission is of the opinion that both suggestions should be further pursued.

2. Access for courts at all levels

It should also be borne in mind that Opinion 222 (2000) of the Parliamentary Assembly (http://stars.coe.int/ta/ta00/eopi222.htm) states: "15. The Parliamentary Assembly notes that Azerbaijan shares fully its understanding and interpretation of the commitments entered into, as spelt out in paragraph 14 and intends: ... ii. to re-examine the conditions of access to the Constitutional Court and grant access also to the Government, the Prosecutor General, courts at all levels and - in specific cases - to individuals, at the latest within two years of its accession; ". As regards access of individuals, this commitment has been taken up in Article 6 of the Draft Constitutional Law on the Regulation of the Implementation of Human Rights and Freedoms in the Azerbaijan Republic (CDL (2001) 88) and Article 30 of the present Draft by the introduction of a constitutional complaint procedure which gives every person the right to lodge a complaint at the Constitutional Court alleging that his or her fundamental rights have been violated (after exhaustion of legal remedies).

The present Draft Law **does, however, not respond to the demand by the Parliamentary Assembly to re-examine the access of ... courts at all levels to the Constitutional Court**. During the discussion of the latter point it became apparent that the Azerbaijan authorities are considering two options in order to comply with this commitment:

(a) either a system of preliminary requests by ordinary courts to the Constitutional Court entailing a suspension of the proceedings before the ordinary court pending the decision by the Constitutional Court followed by a final decision on the merits of the case on the basis of the decision of the Constitutional Court
(b) or a system whereby the ordinary courts are obliged to take a decision on the merits of the case in which they do not apply the general norm (law, decree) which they deem unconstitutional, followed by an obligatory referral of the question of the issue of unconstitutionality to the Constitutional Court.

Solution (b) is based on the assumption that all courts in Azerbaijan are capable to control constitutionality of laws (diffuse control system) and have the power not to apply a law they deem contrary to the Constitution). The Commission is of the opinion that such a system cannot be merely based on the principle of direct applicability of the Constitution (Article 147) but should result from a clear constitutional provision (such as, for example, Article 100 of the Greek Constitution: Courts shall not apply laws that contradict the Constitution). Moreover, solution (b) obviously can create problems when the Constitutional Court in its decision comes the conclusion that the general norm is not unconstitutional. Then the decision taken by the ordinary court would have to be reviewed. The problem could be further complicated if in the meantime the decision by the ordinary court was appealed against and the instance of appeal would not come to the conclusion of unconstitutionality of the general norm and apply the norm to the case but now the Constitutional Court would find such an unconstitutionality and confirm the finding of unconstitutionality of the first instance court. Then the decision by the appeal court would have to be set aside and a new appeal would have to be open to the parties on the basis of the established unconstitutionality of the norm. Both solutions (a) and (b) require specific regulation both in the law on the Constitutional Court but probably also in the codes of criminal and civil procedure. Model (a) works satisfactorily in many countries, model (b) would establish a new system which might prove difficult in practice.

The main argument advanced in support for the model (b) is that according to the Constitution of Azerbaijan all State organs including ordinary courts are to apply the Constitution directly and that ordinary courts should not be released from this obligation. It could be argued, however, that by referring cases to the Constitutional Court they are precisely doing that, i.e. directly applying the Constitution because they are obliged to take a decision that they have serious doubts about the constitutionality of the norm. Only direct application of the Constitution can result in a serious doubt about the unconstitutionality.

Another argument in favour of solution (a) is that in many countries practice has shown that ordinary courts which have to deal with an array of substantive and procedural provisions in their daily work are usually reluctant to assume the unconstitutionality of a law. Constitutional Courts which have been established precisely for that purpose are in a better position to accomplish this task. Forcing ordinary courts to take a definite position on the unconstitutionality rather than to let suffice a serious doubt might set the threshold too high and could result in a very low number of findings of unconstitutionality.

3. Access for other public bodies

The other commitment which the Parliamentary Assembly has referred to in its above-mentioned decision, the conditions of access for the Government and the Public Prosecutor, has not explicitly been dealt with in the present draft. Such conditions appear to be provided for in Article 130 (3) of the Constitution of Azerbaijan and could be referred to in the present draft law for the sake of **providing a complete picture of all persons and bodies with access to the Constitutional Court**.

5. Issues not covered

Although the draft law is very long and detailed, there are a **number of important issues which are not covered**. Not covered are, in particular:

a) The issue of the exclusion of a judge in a specific case for reasons of conflict of interests (personal relationship with a party to the procedure, prior involvement in the matter, monetary conflict of interest)
b) Rules on interim measures
c) Rules on Costs
d) Rules on how judgments are executed

In addition, there are some issues which are regulated in the Constitution only, but which should also be integrated and specified in the draft law. Such issues are, for example:

a) The nomination and election procedure for becoming a judge (see Articles 95 (10) and 109 (9) of the Constitution)
b) The determination which judgments have effect only *inter partes* and which also have effect *erga omnes* (see Article 130 (5) and (6) of the Constitution)

Finally, there should be a clarification concerning the point whether a general (civil or criminal) procedure act is applicable in a supplementary way in the proceedings before the Constitutional Court.

6. Issues preferably to be covered in the Internal Regulations of the Constitutional Court

On the other hand, a number of provisions which are included in the draft law concern **details which should better be regulated in the Internal Regulations of the Court**, as it is the case in most other countries. This is true, in particular, of Articles 31, 32, 33, 37, 41, 42, 43, 44, 51, 55, 57, 63, 65, 66, 67, 90, 100. It is certainly important that the procedure of the court be regulated as clearly and as precisely as possible. It is also important, however, that the Court possesses a certain autonomy with regard to its own procedure. It is also important for the Constitutional Court to have the possibility to modify details in the light of practical experience without Parliament (Milli Mejlis) having to pass a legislation on minor matters. The previous Opinion of the Venice Commission by Messrs. Özbudun, Russell and Lesage (CDL-INF (1996) 10) has also already pointed out that the draft law contained too many details.

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 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 procedural rules. But the detailed regulation of the procedure should pertain to the court itself. The practical difficulty of regulating the whole procedure by law is that even slight amendments to the procedural rules would have to be be adopted by the legislature where any amendment could be subject of political debates and controversies. Therefore it would be more advisable to differentiate among the different levels of the regulation, and to authorize the Constitutional Court to decide on all those procedural rules that are not of an importance to be guaranteed by the legislature.

7. Position of the Chairman of the Constitutional Court

Finally, it appears that the position of the Chairman of the Constitutional Court is too strong. In principle, the judges in one judicial body are equal and the **Chairman is only the first among equals (*primus inter pares*)**. This does not exclude certain prerogatives for the Chairman which are necessary for coordination of the work and representation. However, Articles 15 (6) and 17, for example, speak of another judge having to execute instructions of the Chairman. If the translation is correct, this does not appear to be an appropriate terminology. It is suggested that some of the functions of the Chairman which are provided in Articles 16 and 32 should be carried out by a small committee of perhaps three senior judges in order to reconcile the principles of effective administration of the court and the equality of judges.

I. Comments on Specific Draft Articles

Article 4: The Constitutional Court **shall protect the rights and freedoms** not only of citizens, but also **of any person** (see Article 30).

Article 5: Perhaps it should be made clear that the principle of the supremacy of the Constitution overrides all other principles which are mentioned in this article. Otherwise this provision might be invoked as a justification of circumventing the Constitution by referring, for example, to (abstract) justice.

It is possible that this is just a problem of the translation but the term collegiality would be better than the collective responsibility.

Incorporation of the notion adversary system in the text is misleading. The adversary system, which the civil proceedings shall unequivocally be based upon, seems problematic as a fundamental principle in constitutional proceedings. One should take into consideration that the constitutional court process shall be based on ascertaining the truth as it has been stated in the second part of Article 23. The notion adversary system would be substituted **by the principle of ascertaining the truth.**

Besides it is difficult to speak about parties in the classical meaning of the term, especially about the petitioner and the respondent (see also Article 46). Not denying that equal rights of the participants in the case have to be ensured, the Court should have the possibility to freely assess the value of the contribution of a participant to the constitutional issue which is at stake.

Article 6: The Constitutional Court does, in certain ways, depend on the Parliament (Milli Mejlis), in particular with respect to financial appropriations. Perhaps it should be made clear that the independence from Parliament is different than the independence from all other bodies.

Article 7: If there are so many references to Articles of the Constitution, it would be logical to make a reference to Article 126-128 of the Constitution as well.

Article 10: An age limit (70) should be introduced.

The reappointment of the judges may threaten their independence because they could be under pressure by those political forces that are involved in their reappointment. In accordance with the report of the Venice Commission on the Composition of Constitutional Courts (Science and Technique of Democracy, no. 20, p. 19) consideration should be given to the possibility of life or long term appointments for the judges instead of reappointments.

Article 13: The reference in Article 13 of the draft Republic Article 109 (32) of the Constitution effectively means that the President of the Azerbaijan decides by executive order who of the judges shall be the Chairman and the Deputy Chairman of the Constitutional Court. This appears to be problematical for two reasons: First, since the President only nominates the judges but the Parliament (Milli Mejlis) appoints them (Article 95 (10) of the Constitution) it seems that the Constitution gives the Parliament more say about the status of the judges at the Constitutional Court. Second, if the positions of Chairman and the Deputy Chairman of the Constitutional Court could be determined by executive order the danger exists that the President also asserts the right to remove a judge from his position as Chairman or Deputy Chairman from this position whenever the Chairman does not perform his or her function to the pleasure of the President. It must at least be made clear that the President has no such power of removal. The previous Opinion by the Venice Commission by Messrs. Özbudun, Russell and Lesage (CDL-INF (1996) 10) has already pointed out that it is **preferable to leave the choice of the Chairman and the Deputy-Chairman to the judges themselves**. This would indeed appear to be the solution which would contribute the best to the independence of the Constitutional Court.

Article 15: There is a cross-reference to article 9.2 of the present law. The draft does not contain such an article.

Article 18: **It should only be possible to suspend the powers of a judge if the arrest has been lawful**. Otherwise the provision could be interpreted that the Plenum of the Constitutional Court is obliged to suspend the powers of a judge only on the basis that the judge has been arrested. In addition, not every provisional arrest for a minor (e.g. traffic) offense should be a possible basis for the suspension of the powers of a judge. Article 18 1) should therefore read: lawful arrest of a Judge on the suspicion of having committed a serious offense.... The previous Opinion of the Venice Commission CDL-INF (1996) 10 by Messrs. Özbudun, Russell and Lesage has also made a similar point. This Opinion required that an arrest of a judge should only occur in cases of serious in flagrate delicto. Moreover, the Opinion says, in case of the arrest of a judge of the Constitutional Court, it is necessary to promptly inform not only the Prosecutor-General of the Republic of Azerbaijan, but also the President of the Constitutional court and, if necessary, the President of the Supreme Court. This statement is still valid today. In addition, it seems inadmissible to suspend the powers of the Judge for the reasons mentioned in items 2 and 3.

Article 18a: Article 18 of the current Law should be incorporated into the draft. It reads: "When considering matters related to the competence of the Constitutional Court, all the judges of the Constitutional Court, including the President and Vice-President, shall have equal rights".

Article 20: According to Article 128 (5) it the for the Milli Mejlis to decide with a qualified majority upon the termination of the mandate of a judge of the Constitutional Court.

Article 22: The rules on publicity go very far. Perhaps the legislator should also think of the need to protect the court from the public pressure which is connected with live TV coverage. On to this point see also the previous Opinion of the Venice Commision by Messrs. Özbudun, Russell and Lesage (CDL-INF (1996) 10, sub. 6). **Hearings should be held in cases declared admissible and when necessary**. Obliging the Court to hold oral proceedings in every case would most probably result in an overburdening of the Court. Publicity can also be achieved by publishing decisions in the Court's digest, the official gazette and the media.

Article 23: See comments on Article 5 concerning the adversarial system.

Article 26: This regulation goes probably too far. See also If there is a possibility to get acquainted with the materials they should not be announced.

Article 28: The general formal requirements concerning petitions and complaints are too detailed and will probably be a source of technical mistakes. What is meant by the other data of the complainant? It does not appear appropriate to ask the petitioner to provide the Court with the applicable legal provisions and their sources and details. The court knows the law (*iura novit curia*). The prohibition to demand an interpretation of several provisions of the constitution at once is unclear: Does it mean that those questions have to be put separately, or does it mean that the same complainant may only ask one question at a time?

Article 29: Only persons capable to contribute to the settling of the constitutional issue should have the right to be heard at the Constitutional Court which ought not to be burdened with issues of facts.

It should not be necessary to enclose officially published documents (like the text of laws) to the petition. References would be sufficient.

Article 30: This article introduces the procedure of constitutional complaint by any person as one of the functions of the Constitutional Court. Since the constitutional complaint procedure can be initiated by every individual it is possible, and even likely, that the Court will have to deal with a large number of such complaints. The experience of Constitutional Courts of other countries which know the constitutional complaint procedure for violations of fundamental rights (e.g. Germany and Spain) shows that it is **advisable to introduce a special screening procedure to filter out inadmissible or manifestly ill-founded complaints** and even to find a special expedited procedure to deal with obviously well-founded complaints. However, it may perhaps be advisable to wait with the introduction of such special screening procedures until a certain practical experience has been acquired with the actual significance of this constitutional complaint procedure in Azerbaijan.

It should be expressly stated that **both judicial and administrative acts, or all acts of a domestic public authority can be challenged by constitutional complaint**. Secondly, the vague formulation of the provision on the other hand does not exclude the application of normative legal acts by private persons, and could be applied against an act of a private person which is probably not intended. This aspect of the regulation should be made more precise, too.

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. This special procedure would require **more specific regulation especially also as concerns the effects of the decision on the unconstitutionality** both for the individual act under review and the general norm on which the decision was based (if itself was found unconstitutional). Is the act under review annulled (preferable) or only declared unconstitutional and sent back to the authority for review? Does the Constitutional Court in exceptional cases have the powers to take a new decision on the merits itself? 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 Courts decision would prevail only in criminal cases, or in other jurisdiction (civil, etc.) as well. 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.

As concerns the deadlines, seems sufficient that the constitutional complaint must be submitted within three months after the decision of the court of last instance. Obviously, the complainant should present in the appeal the previous instances of his case. The clause explanations and documents required for clarification of the circumstances of the case might be too large in this respect. Such evidence could be gathered by the Constitutional Court. Also, the Constitutional Court should ascertain whether all other legal remedies have been exhausted.

Article 31: The screening procedure by the Secretariat and the appeal against its decisions do not appear to be satisfactory. The Secretariat should not be entitled to check whether all requirements of the present law are complied with but only whether the formal requirements have been complied with. **The Secretariat should be given the duty to advise the complainant on how to correct his or her complaint**. This would reduce the work of the Chairman and the other judges when reviewing the complaints against the decision by the Secretariat. The principle should be that complaints are not rejected immediately because of formal mistakes.

Article 36: The Court should have the **possibility to continue the proceedings even after the withdrawal of an appeal if it is of the opinion that the case raises an issue of general interest**.

Article 38: According to Article 130 (1) of the Constitution the Constitutional Court shall consist of 9 judges. Article 38 (1) and (4) of the draft provide that there shall be a Plenum and two Chambers, each Chamber being composed of 4 judges. This raises two questions: May a particular judge only be a member of one Chamber or of both? And is it the intention of the drafters that there is always at least one judge of the Constitutional Court who not a member of a Chamber? If so, this would mean that there are two classes of judges, a result which would contradict the principle of equality of judges. A solution might be to institute three chambers with three judges each. Thus each judge would belong to one chamber and the workload could be distributed even better between the chambers. When chambers disagree on points of law the issue should be referred to the plenary.

Article 40: Individual complaints and referrals from ordinary court and the ombudsman should be dealt with in chambers due to the high possible number of such cases. When the constitutionality of a law is at stake (as opposed to the unconstitutionality of a decree or an individual act) that very issue could be referred to the Plenary for decision. On the basis of this decision of the plenary the chamber could take the final decision in the individual case.

Article 47: it should read and bodies and individuals whose interests are affected by such petitions.

Article 48: This is a very liberal regulation of the status of interested subjects. They seem to have a procedural status which is largely similar to that of the parties to the dispute themselves. This raises practical difficulties in particular in the context of oral proceedings.

Article 61: See comments on Article 48. For the sake a proceedings within reasonable time, copies of submitted documents should rather be sent to the other participants of a case to enable them to reply in writing.

Chapter VIII: It is unusual that the Court should have the duty to consider a case within certain specified time-limits (comp. Articles 69, 71, 73, 75, 77). Experience in other countries shows that the workload cannot always be addressed chronologically and in a timely fashion. The Court may have so many cases to deal with at the same time that it is impossible to keep within the time limits. Perhaps it would be advisable to include a clause such as shall, if possible, within 15 days consider .... It is, however, possible to demand immediate action upon certain particularly important and urgent petitions, such as the verification of information concerning the complete inability of the President of the Azerbaijan Republic (Article 80).

Article 83: Why should the Constitutional Court not be enabled to **consider the disputes regarding actual circumstances of holding elections and calculations of votes? According to Article 88 of the Constitution this would seem to be its most important task**. Of course it can call the help of others to gather the evidence and it can refuse to gather evidence if, assuming the complaint would be true, it would not have changed the result.

Articles 87 and 95: The two articles repeat unnecessarily the same provision on the inadmissibility of the official interpretation of the resolutions of the Constitutional Court.

Article 88: Perhaps the rules of procedure should regulate the order of voting (age or seniority).

Article 91 : Reaching the judgment takes some time. It would not be appropriate that the participants in the case and the audience should sit in the Court hall to wait for the judgment to be announced. The Court, when leaving to reach a judgment, could inform about the time when the judgment is to be announced.

Article 92: It is an elementary rule that criminal provisions must be laid down and specified in a law (*nullum crimen sine lege*). While it is possible to au thorize the executive to specify certain generally formulated criminal provisions, it is not possible to give such an authorization without any substantive guidelines, as it is the case in the present draft. Both resolutions and rulings could be covered by a detailed specific provision.

Article 93: (1) should read: shall enter into force after their publication from the date specified in the resolutions themselves.

Article 95: This present formulation can give rise to misunderstandings. It is suggested to read: No person or body is competent to provide a binding interpretation of the resolutions of the Constitutional Court.