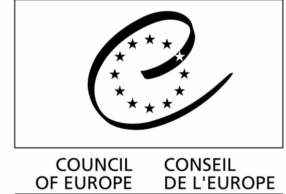

Strasbourg, 5 March 2002 Restricted

<cdl\doc\2002\cdl\ 025rev-e.doc>

CDL (2002) 25 rev

Or.Eng.

N°172 / 2002

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

DRAFT LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAÏJAN

on the basis of comments by:

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

I. Introduction

1. 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, Hamilton, Nolte and Paczolay to act as rapporteurs on this draft. Their comments have become documents CDL (2001) 111, 122, 110 and 114 respectively. On the basis of these comments, 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 on 5-6 November 2001. 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 first draft and direct access for ordinary courts on all levels which the first draft did not yet provide for. On the basis of these discussions, the Constitutional Court prepared a revised draft (CDL (2001) 108rev), which was the subject of further discussions between Messrs. Aliev, Guliyev, Gvaladze, Hajiev and Mirzojev (hereinafter "the delegation") and a group of rapporteurs of the Venice Commission composed of Messrs. Bartole, Endzins, Hamilton and Matscher which took place in Strasbourg on 29-30 November 2001. The present interim opinion on the revised draft takes these discussions into account.

2. An interim opinion was adopted by the Venice Commission at its 49th Plenary Meeting on 14-15 December 2001 (CDL-INF (2001) 28). At the same meeting an opinion on the Draft Constitutional Law on the Regulation of the Implementation of Human Rights and Freedoms (CDL (2001) 88), which is closely linked to the present Draft Law on the Constitutional Court through its Articles 6 and 7 was adopted (CDL-INF (2001) 27). The present, final opinion deals with a new, final draft (CDL (2002) 22 which had been revised on the basis of the interim opinion. In respect of this new draft the rapporteurs dealt mainly with the issue of the relationship between Article 32 of the Draft Law on the Constitutional Court and Article 7 of the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedom (documents CDL (2002) 23, 24 and 28).

3. The Commission wishes to point out that the final draft is again substantially improved in comparison to the first and revised drafts and welcomes that it takes into account comparative international experience. This 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.

4. Even though the final draft has been considerably shortened leaving many details to the rules of procedure to be adopted by the Court as had been suggested by the Commission in its interim opinion (see chapter 4 of CDL-INF (2001) 28) it was necessary to limit the present opinion to certain important and some less important issues.

II. General Comments

1. Constitutional changes

5. This opinion does not address the issue whether it would be advisable not only to amend the Constitution (as intended with 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 additional constitutional provisions (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. The delegation pointed out that at this stage no changes in the Constitution (entailing a referendum) are being considered but that this might be possible at some point in the future.

2. Commitments entered upon accession to the Council of Europe

6. 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; ".

2.1 Individual access

7. As regards access by 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 33 of the final draft by the introduction of a constitutional complaint procedure which gives every person the right to lodge a complaint with the Constitutional Court (after the exhaustion of ordinary judicial remedies) alleging that his or her fundamental rights have been violated through the implementation of a general, normative legal act. The violation of human rights by an individual act which is not based on an allegedly unconstitutional normative act cannot give rise to a constitutional complaint. The ordinary courts are to deal with such cases.

8. Since the constitutional complaint procedure can be initiated by individuals it is possible that the Court will have to deal with a large number of such complaints. According to Article 37 of the draft, which applies to all types of procedures, the Court can refuse to accept manifestly ill-founded cases. This provision might serve as a filter in order to avoid an excessive case-load.

9. Article 33 settles three issues which were raised in the interim opinion:

- The Constitutional Court can accept complaints even without the exhaustion of other remedies if these remedies cannot prevent irreparable damage to the complainant;
- the Constitutional Court can take interim measures to safeguard the position of an applicant and

- the ordinary courts are held to reopen the case which had been decided on the basis of an unconstitutional normative act in accordance with provisions of the Criminal and Civil Procedure Codes (which need to complement the present Law).

10. The constitutional complaint procedure would require more specific regulation especially as concerns the effects of the decision as to the unconstitutionality of the normative act on the individual act which resulted in the alleged violation of human rights (Article 6 of the Draft Constitutional Law on Human Rights). Is the individual decision annulled or only declared as being based on an unconstitutional general norm and sent back for review to the authority which took the decision (in most cases the Supreme Court)? Article 33 seems to imply the second option. This should be spelled out both in this draft law and in the administrative, civil and criminal procedure codes. This authority should be obliged to review the case on the basis of the annulment of the normative act on which it had based its decision.

11. Moreover, it seems necessary to regulate whether and if so how the annulment of the normative act by the Constitutional Court would effect other, past individual acts with force of *res iudicata* which are based on this normative act. The Constitutional Court might be given the possibility to decide on the effects (abrogation *ex nunc,* annulment *ex tunc*) in each case. In the case of annulment *ex tunc* 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 would become invalid, too. Here, the principles of individual remedy on the one hand and legal security on the other should be balanced.

12. If a solution of abrogation *ex tunc* were chosen, a simple reopening of the current case by the ordinary courts will, however, not be sufficient. Necessarily, the ordinary court would have to base its new decision on the old, unconstitutional provision because this unconstitutional norm still applies to the facts of the case which took place before the abrogation and the abrogation will have an effect only for future cases. Consequently, at least for the case of the complainant the unconstitutional norm must not be reapplied by the ordinary court in the reopening of the proceedings. Otherwise the complainant would have no interest at all to bring a complaint before the Constitutional Court. He would have succeeded in the abrogation of the norm at stake but in his own case the same unconstitutional norm would be reapplied and the same decision as before would be handed down by the ordinary court. In the Austrian constitutional terminology this necessary exception to the *ex nunc* abrogation of the norm is called premium for the initiator *(Ergreiferprämie).* This issue should be addressed both in the current draft law and the relevant procedural codes.

13. At least sentences in criminals cases should be reopened by the ordinary courts following the *ex nunc* abrogation of the penal norm on which they were based. Upon request by prisoners, or better *ex officio*, the ordinary courts of last instance should be obliged to reopen other criminals cases following the annulment of the penal norm on which those sentences were based. It is inconceivable that a person remains in prison on the basis a sentence which was based on an unconstitutional norm and thus another exception to the *res iudicata* rule is necessary. This issue should be addressed in the amendment to the Criminal Procedure Code.

2.2 Access for courts at all levels

14. The issue of providing access to the Constitutional Court for courts at all levels (as required by opinion 222 (2000) of the Parliamentary Assembly) has been addressed both in Article 32 of the Draft Law on the Constitutional Court and Article 7 of the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms.

The latter has been the subject of a separate opinion of the Venice Commission (CDL-INF (2001) 27) which concluded that "this Article only sets out the principle of referral of issues by ordinary courts to the Constitutional Court. It leaves open several questions that should be regulated in a law, possibly the law on Constitutional Court: Can the Constitutional Court refuse to accept a case submitted to it by the ordinary court? Is the Constitutional Court competent to engage in 'concrete' judicial review, in which case it would act as the last judicial instance? Who will be the parties before the Constitutional Court? What will be the effects of the Court's judgments? The law on the Constitutional Court should address these issues and clearly establish the procedure to the followed by the ordinary courts, the scope of the competencies of the Constitutional Court, and the effects of its judgments." Chapter 2.2 of the interim opinion (CDL-INF (2001) 28) already dealt with the different concepts at stake.

15. The Article 7 DCLHR procedure is confined to questions concerning the implementation of human rights and freedoms. The procedure enables the judge to request an interpretation of the Constitution and the laws as regards such a question. The draft does not require that the request should relate to a specific case, but neither does it preclude this possibility.

16. The Article 32 DLCC procedure is not confined to questions involving human rights but refers to any question of whether a normative legal act conforms to a normative legal act of higher force. The procedure can be invoked only where the referring court concludes that this is the case. On the merits, the only issue for the Constitutional Court is the abstract question whether the normative legal act did not conform to the legal norm of higher force.

17. The relationship between the two draft articles depends on the question whether they provide that the pertinent decisions of the Constitutional Court have binding effect. Such an interpretation of Article 7 DCLHR could be authoritatively developed by the Constitutional Court by taking into account the purpose of the specific appeal procedure for 'interpretations'. The purpose of this procedure is clearly to produce legal security and uniformity for the ordinary courts and the legal system as a whole. If interpretations of the Constitutional Court on the basis of Article 7 DCLHR would not be binding, or conclusive, ordinary courts would be free to apply a normative legal act or not. Such a choice would create inappropriate legal insecurity. In practice, however, it would be likely that the ordinary courts would follow an interpretation by the Constitutional Court no matter whether the decision is technically binding or not.

18. Therefore, the proposed Article 7 DCLHR procedure seems to have the potential to go beyond a purely advisory jurisdiction. Under Article 7 DCLHR since the Constitutional Court can interpret *both* the Constitution and the laws of the Republic of Azerbaijan it follows that it's ruling may lead to the necessary inference that a law is in contradiction with the superior human rights norm in question. If this interpretation was binding on all other courts they in turn would be obliged not to apply this norm in all future cases before them. If, on the other hand, it would be clear that decisions of the Constitutional Court under Article 7 DCLHR are not binding, such decisions could not simply be made binding by way of a simple law, such as the DLCC.

19. Article 32 DLCC, as well, does not expressly declare that decisions of the Constitutional Court under this provision are binding. It is true that Article 80 DLCC provides that "resolutions of the Constitutional Court shall have binding force", but this provision could be interpreted as meaning that the binding force only extends as far as the decision in a specific procedure is designed to have binding effect. Under the second of the above-mentioned

interpretations, decisions under Article 32 DLCC, as interpreted in the light of Article 7 DCLHR, would not be designed to have binding effect, no incompatibility between Article 7 DCLHR and Article 32 DLCC would result.

20. While the two procedures differ both in form and in scope, it is possible to envisage questions which could be asked under either or both procedures as well as questions which can only be asked under one or the other. It is possible that the two procedures could be invoked in the same case, either at the same time or in succession. Furthermore, the fact that the two procedures are different does not mean that they are incompatible.

21. A question concerning the interpretation of a human rights provision contained in the Constitution or an international instrument as well as the interpretation of a law of lesser force and the compatibility of the two legal norms seem to have the potential to be raised under either procedure.

22. A question not relating to an actual case could be raised only under Article 7 DCLHR whereas a question relating to the compatibility of norms in an area other than human rights could be raised only under Article 32 DLCC.

23. Given that Article 32 DLCC is in some respects wider in its scope than Article 7 DCLHR, then Article 7 DCLHR does not seem capable of being regarded as providing a constitutional basis for all possible applications to the Constitutional Court under Article 32 DLCC. The provisions of Article 130 of the Constitution do not appear to provide a basis for applications by a court other than the Supreme Court. However, the question of whether there is a proper constitutional basis for Article 32 DLCC in circumstances other than those covered by Article 7 DCLHR or Article 130 of the Constitution seems to be a matter for the Constitutional Court to determine.

24. In order to avoid this possible problem it seems advisable to adapt Article 7 DCLHR to cover the scope of Article 32 DLCC. Even though the binding effect of both articles can be authoritatively developed by the Constitutional Court, it would be better if Article 7 DCLHR spelled out that an interpretation of a norm is binding and can result in the abrogation of the norm.

2.3 Access for other public bodies

25. 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, appear already to be provided for in Article 130.III of the Constitution of Azerbaijan. Article 28 of the draft now gives a complete picture of all persons and bodies with access to the Constitutional Court.

3. Other general issues:

26. Chapter I.3 of the Interim Opinion mentioned the following issues some of which were settled in the final draft:

a. The issue of the exclusion of a judge in a specific case for reasons of conflict of interests: settled in Article 52.
b. Rules on interim measures: The procedure for the individual complaint in Article 33 now contains a provision for a "temporary resolution". Interim measures may, however, be necessary also in also in other cases. A separate article applying to all types of procedure is, therefore, suggested.

c. Rules on costs: settled in Article 56 to the effect that all costs are borne by the budget of the Court.
d. The determination which judgments have effect only *inter partes* and which also have effect *erga omnes*, and as a corollary rules on how judgments are executed: obviously, all decisions on the abrogation or annulment of a normative act have effect erga omnes and "Article 82. Loss of Legal Force or Non-Entry Into Legal Force of Laws and Other Acts upon Resolutions of Constitutional Court" may be sufficient with respect to the effect of such judgments. This does not conclusively dispose of the question of execution of judgments which should be decided at the discretion of the Court.
   For constitutional complaints and requests from courts see points 2.1 and 2.2 above. Moreover, some other types of procedures (e.g. suppression of political parties or disputes concerning the division of powers) may need further elaboration in this respect.
e. The nomination and election procedure for becoming a judge: now settled in Article 10.
f. 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.

III. Comments on Specific Draft Articles

Article 4: The Constitutional Court shall protect the rights and freedoms not only of 'individuals', but of any person including legal persons. Legal persons should also benefit from the protection of rights and freedoms as appropriate. This might be a problem of translation, though.

Article 11: Both options for the terms of office of the judges (life terms or single 15 year terms) are to be welcomed because reappointments of the judges might threaten their independence as the judges could come under pressure by those political forces that are involved in their reappointment. At least appointments for life time (option 1) should be accompanied by an age limit. A transitory provision should clarify the status of current judges. Such a provision could provide for the possibility of reappointment of the current judges (for life time or prolonging their current mandate up to a 15 year term). If the second option were chosen the transitory provision should avoid that all members change at the same time when their 15 years terms ends.

Article 13: Following explanations by the delegation, it seems that Article 128.IV and V of the Constitution deal with the suspension of the powers of judges including judges of the Constitutional Court even though the English text of the Constitution speaks about ways to "stop" the authority of a judge and his "dismissal" when a judge has committed a crime. If this understanding is correct, the decision about such a suspension is to be taken by the Milli Majlis with a qualified majority of 83 votes based upon a proposal of the President and an opinion by the Supreme Court. The word 'dismissal' in Article 13, therefore, relates to the 'suspension' of the powers of the judge. This seems to be a problem of translation both in the Constitution and the draft Law.

Article 14: The reference in Option 1 of Article 14 of the draft to Article 109.32 of the Constitution means that the President of the Azerbaijan Republic alone would decide by executive order who of the judges shall be the Chairman and the Deputy Chairman of the Constitutional Court. This appears to be problematical, since the President only nominates

the judges but the Parliament (Milli Meijlis) 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.

Already the 1996 Opinion by the Venice Commission (CDL-INF (1996) 10) had pointed out that the choice of the Chairman and the Deputy-Chairman should be left to the judges themselves. Therefore, in comparison to Option 1, Option 2 is preferable since it better ensures the independence of the judges.

Article 17: 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. It might be considered that some of the functions of the Chairman which are provided in Article 17 (in particular: to arrange the work of the Constitutional Court, to distribute the cases among Judges and Chambers, and to handle the funds allocated from the state budget) could 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.

Article 21: As opposed to Article 13, Article 21 of the draft deals with the final termination of the powers of the judge of the Court. The requirement of a proposal by the Constitutional Court itself seems sufficient to deal with the concern, expressed in the interim opinion in relation to the then Article 20, that the role of the executive would be too strong in the termination of the powers of a judge.

Article 24: Article 24 enables the Court to decide that a case can be dealt with via a written procedure. This seems to depend, however, also on a 'rejection' of the oral hearings by the parties, i.e. the rule are oral hearings and only if all parties and the court agree that no hearing is necessary a written procedure can be followed. However, hearings should only be held in cases declared admissible and when necessary. The Court should not depend on the parties in its decision for a written procedure except in cases relating to civil and criminal matters in the sense of Article 6 ECHR.

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 Commission (CDL-INF (1996) 10, sub. 6).

Article 30: Some formal requirements concerning petitions and complaints are too detailed and will probably be a source of technical mistakes. It does not appear appropriate to ask the petitioner to provide the Court with the exact source of the applicable legal provisions (item 6 of Article 30). The court knows the law *(iura novit curia).*

Article 40: This Article establishes two chambers within the Constitutional Court: one composed of four, the other composed of five judges. According to Articles 41 and 42, the division of competences between the Plenary and the chambers depends on the normative act complained about. Consequently, individual complaints would be dealt with either by the Plenary or a chamber, according to the subject of review. This could result in a danger of overburdening the Plenary with individual complaints against the normative acts stipulated in Article 40 of the draft. The provision of Article 37 which allows for the rejection of manifestly ill-founded complaints might serve as a remedy for this problem (see also point 2.1 above).

The distribution of cases between the two chambers is a prerogative of the Chairman according to Articles 17 and 36. The Commission suggests, however, a provision on this issue which relates to objective criteria.

Article 51: It is an elementary rule that criminal provisions must be laid down and specified in a law (*nullum crimen sine lege*). This article would have to provide further substantive guidelines for the Constitutional Court when it makes a ruling on the imposition of an administrative fine.

Article 62: For the sake of 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.

Article 73: The Constitution (Article 86) enables (but does not compel) the Constitutional Court to consider all aspects of the disputes in election matters. According to the explanations provided by the delegation, the electoral legislation does not require the Constitutional Court to deal with matters regarding actual circumstances of holding elections and calculations of votes but leaves this task to the electoral commissions and the ordinary courts. The Constitutional Court takes its decision on the basis of electoral reports without entering into questions of facts. If Azerbaijan opts to maintain such a division of jurisdiction between the Constitutional Court on the one side and the electoral commissions and ordinary courts on the other side in order not to overload the Constitutional Court, this should be spelled out very clearly both in the present draft law and the electoral legislation. The present situation is unsatisfactory and leads to negative conflicts of jurisdiction (it could even lead to positive conflicts of jurisdiction). As had been suggested by the Venice Commission, the last paragraph of Article 73 obliges the Constitutional Court to take its (final) decision on the formal aspects of the elections only after all factual disputes have been settled by the electoral commissions and ordinary courts. Partial decisions can obviously already be handed down for electoral districts where no complaints are pending with the electoral commissions and the ordinary courts after the expiry of the deadline for the introduction for such complaints.

Article 77: Perhaps the rules of procedure should regulate the order of voting (age or seniority).

Article 81.1: should read: "shall enter into force after their publication from the date specified in the resolutions themselves“.