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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT LAW
ON THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF AZERBAÏJAN**

Comments by:

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(Member, Ireland)**

Comment on Article 32 of the Draft Law on the Constitutional Court (DLCC) of the Republic of Azerbaijan and Article 7 of the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedom (DCLHR) in the Azerbaijan Republic.

1. The question of the compatibility of these two draft laws has been raised. Since this raises questions which depend on interpretations of the Constitution and laws of Azerbaijan which only the Constitutional Court could answer, it is with the greatest of hesitancy that I offer some tentative comments.
2. It is not clear to me whether it is intended that either of the two draft laws will be subject to the provisions of Article 130.VI of the Constitution to the effect that decisions of the Constitutional Court have binding effect. Since Article 7 (DCLHR) is contained in a draft constitutional law, it will be part of the Constitution and it would seem Article 130.VI could apply. This would depend on whether a response to a request for an interpretation amounted to a “decision” or not. Only the Constitutional Court itself could determine this question. So far as Article 32 (DLCC) is concerned, however, the problem of its legal basis may complicate the question.

Article 7 (DCLHR)

3. 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.
4. In a formal sense and in principle this provision seems to allow merely for an interpretation of the Constitutional or legal provisions in question, leaving it to the judge who has referred the question to draw any necessary conclusion for the case before him, for example, the annulment of a law which fails to comply with a human rights requirement of the Constitution or of a relevant international agreement.
5. In practice, however, the Court’s decision could leave the referring court no alternative but to annul the impugned law. This may depend on the form of the question asked. If the question asked, for example, is “What does human rights provision x in the Constitution mean? Can law y be interpreted in a manner which is consistent with provision x as interpreted by the Court?” then if the Court answers no to the second question the referring court will have no alternative but to annul the offending law. Even if the Court’s ruling is not regarded as having binding effect it is hard to see how the referring court, having asked such a question, could ignore the answer it got.
6. It would seem, however, that it would be open to the referring court only to ask a question on constitutional interpretation. If it did so, then the answer given as to the meaning of the constitutional provision would not necessarily be determinative of the question whether the

law impugned was consistent with it, and the lower court would have the option to examine the law in question in the light of the Constitutional Court's interpretation of the meaning of the constitutional provision and to decide whether the law could be interpreted consistently with that provision or alternatively had to be annulled.

7. Therefore, the proposed Article 7 (DCLHR) procedure seems in practice to have the potential to go beyond the type of purely advisory jurisdiction conferred, for example, on the Court of Justice of the European Union to interpret the Treaty or community acts under the Article 234 procedure (formerly Article 177). Under Article 7 (DCLHR) since the Constitutional Court can interpret both the Constitution and the laws of the Republic of Azerbaijan it follows that its ruling may lead to the necessary inference that a law is in contradiction with the superior human rights norm in question. In principle, however, the formal act annulling the law could remain with the referring court.

Article 32 (DLCC)

8. 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.
9. The procedure can be invoked only where the referring court concludes that this in fact is the case.
10. The only question for the Constitutional Court is whether the referring court's decision, which must be a decision that the normative legal act did not conform to the legal norm of higher, was correct.
11. While the draft is silent as to whether, if the Constitutional Court agrees with the referring court, the formal decision of invalidity of the legal act is that of the Constitutional Court or the referring court, it would seem that a decision that the lower court was correct would lead to the lifting of the suspension on its decision that the legal act was invalid which would thereupon have effect. In principle, therefore, it is the referring court which annuls the offending law. The decision that the referring court was wrong means the legal act which has been questioned remains in force.

Conclusion

12. 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.
13. 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 seems to have the potential to be raised under either procedure.

14. A question not relating to an actual case could be raised only under Article 7 (DCLHR).
15. A question relating to the compatibility of norms in an area other than human rights could be raised only under Article 32 (DLCC).
16. 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 legal basis for Article 32 (DLCC) in circumstances other than those covered by Article 7 (DCLHR) or Article 130 of the Constitution seems to me a matter for the appropriate judicial authorities in Azerbaijan to determine.

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