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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT RULES OF PROCEDURE
OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF AZERBAIJAN**

**Comments by
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On the basis of the Constitution of the Republic of Azerbaijan, and there in particular of Articles 125 *et seq.*, and more specifically of Articles 130 *et seq.*, and of the Act on the Constitutional Court of Azerbaijan, the court now intends to enact Rules of Procedure; this opinion is based on a draft English version of these Rules of Procedure. In particular, in the comparison with the Constitution of the Republic of Azerbaijan, of which an English version is also available, and the Act on the Constitutional Court of the Republic of Azerbaijan, some passages gave the impression that the English version has given rise to certain inaccuracies. For these reasons, in parts of the following opinion reference is made to these inaccuracies, which may have arisen as a result of the translation.

The account taken of the hierarchy of legal provisions (Constitution, Act on the Constitutional Court of Azerbaijan and Rules of Procedure enacted by the court) corresponds to the procedure in other democratic and constitutional states and is therefore to be welcomed. It is also welcome that the Azerbaijan Constitutional Court intends to subject itself to Rules of Procedure and will achieve legal clarity and legal certainty as a result of enacting them.

The following opinion is to be understood as an enquiry made in a spirit of cooperation by an outside observer, to whom the following questions occurred during the reading of the draft, and who has also for five years been applying the Rules of Procedure of the Federal Constitutional Court of Germany, which is now almost twenty years old.

I. Provisions on competence

The provisions on competence within the court form an important element of the Rules of Procedure. Here, a number of levels and aspects must be distinguished: firstly, the competence of the President towards the individual judges, but also his or her competences in and towards the Plenum and in the Chambers, and the competence of the President towards the other staff of the court. In addition to a number of individual authorizations, the central provision here is Article 3. Here, the court has chosen to rely on authorization in the individual case.

1. Demarcation of the competence of the President as against that of the Plenum

However, the question arises whether it is not necessary to have a general clause defining the competences of the President as against that of the judges and the Plenum. Just as the Plenum of the Constitutional Court of Azerbaijan now gives itself the present Rules of Procedure, there will in future be decisions that affect all judges and should therefore be discussed in the Plenum, although they will not inevitably result in an amendment of the Rules of Procedure.

In this respect, the Rules of Procedure of the German Federal Constitutional Court contain provisions defining the division of competence between the President and the Plenum in administrative matters and matters relating to the Court as such. The Plenum deliberates and decides on the preparation of the budget of the Court, on all questions directly concerning the judges, their status and their conditions of service, and, as required, on general principles relating to the administration of the Court (section 1.2 of the Rules of Procedure of the Federal Constitutional Court). Thus, for example, the Plenum deliberated on guidelines on making the parties anonymous in decisions, but also on the introduction of time recording with the use of an electronic time recorder. On the other hand, the President is put in charge

of the administration of the court (section 1.3 of the Rules of Procedure of the Federal Constitutional Court).

In order that the annual number of plenary sessions in administrative matters is reduced, section 3 of the Rules of Procedure of the Federal Constitutional Court provides that the Plenum shall set up standing committees; the work of the plenary sessions is reduced as a result of the decisions being taken by these committees. The Rules of Procedure of the Federal Constitutional Court provide for four standing committees: the Committee on the Rules of Procedure, where preliminary discussion of amendments to the Rules of Procedure takes place, although the final deliberation on these is the duty of the Plenum, the Protocol Committee, which makes final decisions on invitations by the court and acceptance of invitations by the court, the Committee on Budgetary and Personnel Matters, which holds the final discussions on the budget of the Federal Constitutional Court and also makes final decisions on important personnel matters (e.g. the appointment of the director and his or her deputy) and the Library Committee, which has supervisory authority over the library. It is doubtful if the Azerbaijan Constitutional Court needs so many committees, and in the last instance no opinion can be given from here in Germany. At the Federal Constitutional Court, the Committee on the Rules of Procedure meets only on the occasion of amendments to the Rules of Procedure, which happens rarely. Other committees, for example the Protocol Committee and the Committee on Budgetary and Personnel Matters, meet once a year. The three last-mentioned committees consist of the President, the Vice-President, and two members each from the two Senates. But since the Azerbaijan Constitutional Court has a smaller number of constitutional judges, a well-designed organization could also do without such committees.

2. Competence of the President as against that of the constitutional judges

The competence of the President as contrasted with that of individual judges also appears to be not quite unambiguous under the present draft of the Rules of Procedure of the Azerbaijan Constitutional Court. Article 127 of the Constitution of the Republic of Azerbaijan provides that the judges are independent. Despite this, Article 3 I 6) provides that the President shall “approve service business trips of judges”. If this is to be understood in the sense of consenting to or finding in favour of, then under German law and in comparison with the way the members of the Federal Constitutional Court understand their position this would contradict the independence of the judges. For this reason, section 10.1 of the Rules of Procedure of the Federal Constitutional Court merely provides that the judges must announce official travel to the President. There is no provision for approval by the President. If official travel affects budget funds, then in the last instance the Committee on Budgetary and Personnel Matters of the Federal Constitutional Court decides on it. This is always the case if the travel has to be paid out of the budget of the Federal Constitutional Court. Since the funds available for this purpose in the budget are limited, a budget is provided for each judge, and this is at the judge's own disposal. However, it should also be pointed out that all constitutional court judges have an annual national rail season ticket with the Deutsche Bahn and can therefore travel free of charge by rail, and therefore in the case of business travel inside Germany the only costs are overnight expenses, unless a plane is used.

If the Azerbaijan Constitutional Court should follow this construction, that is, where business travel is merely announced to the President and therefore the constitutional judge can decide freely whether to accept invitations, then in consequence there would have to be a change to the present provision that judges' business travel and decision-making are of equal rank (cf.

Article 1 IV and Article 46 of the Draft Rules of Procedure) to the effect that sessions of the Plenum and of the Chambers, and thus deliberation activity within the court, are always given priority. The Rules of Procedure of the Federal Constitutional Court are to be understood in this way. In practice, the session days of the senates are laid down long in advance (approximately one-and-a-half years in advance). Even if a constitutional court judge's travel follows an invitation from other constitutional courts or academic institutions, this is no justification for failing to be present on session days. The deliberations always have priority.

3. Competence of the President as against the other court staff

Insofar as the Rules of Procedure of the Azerbaijan Constitutional Court provide that the President is the superior of the other staff of the court and therefore has authority to give directions, the exception that applies in Germany might also be desirable for the Azerbaijan Constitutional Court. The law clerks are always assigned only to one judge. That judge is entitled to select the law clerk allocated to him or her independently and without communication with the President; it should be noted that all law clerks have fixed-term contracts and work at the Federal Constitutional Court for only two to three years. In the first years, each judge had only one law clerk. With the ever larger number of incoming proceedings, this figure was gradually increased and is at present four. The European Court of Human Rights in Strasbourg has a different system: here, the law clerks are part of a pool, and the judge may not choose a law clerk either in general or for a specific task. It appears from sources at the Court in Strasbourg that this system is not necessarily regarded as a good one, since doing work for a particular judge in proceedings requires a close relationship between the judge and the law clerk. But the Azerbaijan Constitutional Court will be well informed of this situation, since its former President is now a judge at the European Court of Human Rights in Strasbourg.

An incidental aspect may also be mentioned: Article 2 II provides that law clerks of the court or other persons may be invited to take part in the sessions of the judges of the Constitutional Court. It is not clear whether "sessions" here means the "deliberations" of the judges or the oral proceedings / pronouncements of judgment. If the deliberations are meant, the Court should reconsider this aspect. Under the Rules of Procedure of the Azerbaijan Constitutional Court too, the deliberations are secret. Inviting law clerks or even other persons to attend might violate the secrecy of the deliberations. In Germany, the following approach has stood the test of time: nobody – and this is indeed the practice – may take part in the internal deliberations of the senates. In particular, no law clerk may be present at the deliberations, not even the law clerk who prepared the case. The consequence of this is that the responsibility of the individual judge is preserved. In some other constitutional courts in Europe, the practice is different, but there are occasionally reports of negative effects, for instance that in the deliberations law clerks have contradicted even the rapporteur of the proceedings in question. This is understandable, for a law clerk would like his or her case to be decided in the way it was prepared.

II. Density of provisions

Although it shows the intention of the Azerbaijan Constitutional Court to be bound by rules, and this is to be seen as a positive factor, it must be asked whether the density of rules and the precision of detail of many provisions in the present draft of the Rules of Procedure is appropriate, practical in everyday use at the court and necessary for this. It is here assumed that the Rules of Procedure of the Constitutional Court of Azerbaijan will be published in an

official government publication, so that the binding nature of the Rules of Procedure for outsiders and thus compliance with them, for example by parties to the proceedings, is guaranteed. The following contents of provisions might be reconsidered under the aspect of the density of provisions and the precision of regulations:

1. Repetitions of the Act on the Constitutional Court of the Republic of Azerbaijan

The Rules of Procedure contain some repetitions from the Act on the Constitutional Court of Azerbaijan, for example Article 1 I of the Act and Article 1 I of the Rules of Procedure, although the wording is different - but this may be a result of the translation into English. Such trivial alterations may lead to questions and discussions as to whether the Act and the Rules of Procedure are identical, and these questions and discussions are not helpful. In addition, repetition is unnecessary. Such repetitions should therefore, if possible, not be contained in the Rules of Procedure.

2. Repetitions within the Rules of Procedure

The Rules of Procedure themselves also contain repetitions and provisions in various places with a similar content, which could be consolidated. An example can be found in Article 9 I and Article 12 I. Article 9 I contains a provision that the rapporteur shall collect the necessary documents, materials and cases and forwards these to the Chamber or the Plenum. Article 12 I again provides that the rapporteur of the proceedings shall keep all the documents in the proceedings. Similarly, in my opinion, there is a repetition in Article 20 VI and Article 25 I. Article 25 I provides that the rapporteur shall state the essential aspects of the case. Article 20 VI contains a similar provision, and the question arises as to whether the more precise definition in Article 25 I is necessary.

3. Provisions on the self-evident

Even if it is an important statement that the activities of the Constitutional Court of Azerbaijan are based on the principles of supremacy, justice, independence, collective nature and openness of the Constitution of the Republic of Azerbaijan (see Article 1 II), this commitment is already contained in the Constitution and in the Act on the Constitutional Court of Azerbaijan, and therefore it should not be repeated in the Rules of Procedure. In the case of other self-evident matters, the question arises as to whether – if the Constitutional Court of Azerbaijan considers that they need to be provided for - they would not better be dealt with in guidelines, rather than in the Rules of Procedure, which are published for general use. This applies, for example, to the provisions on quoting personal data in Article 24 for the translators, in Article 28 for the experts and in Article 30 for the witnesses. The same applies to the procedure at the public hearings in Article 19 of the Rules of Procedure. Such a procedure, for example rising when the judges appear, is self-evident and should be generally known after it has been practised for only a few months. If such detailed provisions are included in the Rules of Procedure, which are to be published for general use, then any change of the procedure is difficult to implement and always requires the Rules of Procedure to be amended immediately. The Federal Court of Justice has general practice directions in this connection; these are issued by the President - sometimes after a consultation in the Plenum - in the exercise of his domiciliary rights and are therefore not contained in the Rules of Procedure. Examples are the rules of conduct for journalists and for the staff of radio and television companies during the oral hearing and when judgment is pronounced.

4. Detailed rules for the inner working of the court

The Rules of Procedure of the Federal Constitutional Court contain some very detailed rules on procedure in the court. For example, section 2 of the Rules of Procedure provides that an administrative plenum must be convened in the spring and in the autumn. Today, the period of time would probably not be laid down so definitely, but there would be a provision that the President shall convene the necessary sessions of the administrative plenum and that a specific number of judges - as is provided in section 2.2 - and the Vice-president have a right to call for a session. In this connection, the provision in Article 17 I that the sessions of the Plenum take place between 11 a.m. and 1 p.m. and between 3 p.m. and 5 p.m. seems very precise and the question arises whether it is necessary to lay down the time so precisely in Rules of Procedure. In addition, it is not quite clear whether this provision applies only to the internal consultations of the Plenum / the Chambers or is also, or even only, intended to apply to the oral hearings and pronouncements of judgment and thus for public sessions. The same applies to the provision in Article 35 III, which provides that the consideration of the case in written proceedings shall take place in the conference room, and the provision in Article 34 I, which provides that shorthand notes may be taken in the oral hearings. In this connection, I should like to draw attention to the tried and tested practice at the Federal Constitutional Court, where every oral hearing and pronouncement of judgment is recorded on tape, and the judges and parties to the proceedings can listen to the tapes. This is technically possible without great use of staff, and it guarantees great precision. This is laid down both in the Federal Constitutional Court Act and the Rules of Procedure of the Federal Constitutional Court. In this way, the Federal Constitutional Court needs no shorthand notes.

III. Final remark

As a whole, the draft Rules of Procedure are impressive in their stringency and clarity. Above, I have made some suggestions of changes. Please regard these as advice from a fellow judicial administrator and always subject to the fact that as an outside observer one is sometimes not able to recognize the reasons for a particular provision from reading a set of legal provisions. There may therefore very well be reasons for the provisions queried above, reasons that the undersigned is not aware of.