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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT AMENDMENTS
TO THE LAW ON THE CONSTITUTIONAL COURT,
THE CIVIL PROCEDURAL CODE
AND THE CRIMINAL PROCEDURAL CODE
OF AZERBAIJAN**

by

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1. Introductory remarks

1.1. These comments are intended to assess the Draft Modifications and Additions to the Law on Constitutional Court of Azerbaijan.

1.2. The comments on assessing the Draft Modifications and Additions to the Law on Constitutional Court of Azerbaijan have been prepared with regard to the Constitution of the Republic of Azerbaijan (namely Chapter VII titled “Judicial Power” thereof) and the Law on Constitutional Court of Azerbaijan, the Criminal Procedural Code of the Republic of Azerbaijan.

2. General remarks

2.1. While assessing the prepared Draft Modifications and Additions to the Law on Constitutional Court of Azerbaijan, one must elucidate, whether the modifications comply with the Constitution, whether by them one seeks to strengthen the constitutional democracy, to protect the values consolidated in the Constitution and whether upon adoption of these modifications, the present (effective) model of constitutional control will become stronger.

2.2. The assessment of the draft modification of the legal regulation may not be separated from the context of the political and social development of the country. Azerbaijan is the country that does not have long experience of democratic life and it just seeks to consolidate the basis of democracy, thus, ensuring independence of the constitutional control, constitutional court and the judges thereof and ensuring the significance of law while deciding the issues of the state are rather important aspects, according to which, the Draft Modifications and Additions to the Law on Constitutional Court of Azerbaijan should be assessed.

2.3. While assessing the proposed modifications and additions to the Law on the Constitutional Court of Azerbaijan, one should first of all follow the European constitutional standards, assess the compliance of the modifications with the springs of the constitutional democracy which are consolidated in the Constitution of the country, as well as assess the compatibility of the proposed modifications with other provisions of the Law and other laws of the country. Thus, the compatibility of the Constitution of Azerbaijan, the basis of democracy consolidated therein and the provisions of the Law as well as strengthening of the mechanism of the constitutional control and the effectiveness of its functioning are the main criteria for the assessment of the proposed modifications. The Draft Modifications and Additions to the Law on Constitutional Court of Azerbaijan is only significant in the case where its provisions strengthen the principles of activity of Constitutional Court, which are enshrined in the Constitution and stem from the Constitution, as the guarantee of the supremacy of the Constitution and constitutional democracy.

2.4. It needs to be noted that the provisions of the Draft Modifications and Additions to the Law on Constitutional Court of Azerbaijan are not of the same meaning. Some of them are the corrections or specifications of the technical nature, while others—of the essential nature.

3. Comments on the provisions of the Draft Modifications and Additions to the Law on Constitutional Court of Azerbaijan

3.1. The new wording of Article 8.4.5 of the Law of Azerbaijan Republic on Constitutional Court (hereinafter also referred to as the Law), under which the meeting of

the judges of the Constitutional Court shall decide other matters falling within the competence of Constitutional Court but not requiring to carry out the constitutional proceedings modifies the provision that the said meeting of judges shall decide other organizational matters. The new wording is of a larger extent and includes not only purely organizational aspects.

3.2. While analyzing the new Article 11.2 of the Law which proposes that at the selection of candidates to the post of judge of Constitutional Court the preference shall be given to the persons, which have more than 10 years of experience in the field of law-making, law-enforcement or juridical science and enjoying the high morals and big authority within legal community, one should first of all take account of Article 126.1 of the Constitution of Azerbaijan Republic, under which judges of the Constitutional Court shall be citizens of the Azerbaijan Republic not younger than 30, having voting right, higher juridical education and at least 5-year working experience in the sphere of law.

Such modification to the Law essentially denies the constitutional regulation which does not provide for any categories of persons who would be given priority while appointing them to the offices of judges of Constitutional Court.

Not very clear is also the content of the notion "at the selection of candidates <...> the preference <...>". Under Article 130.2 of the Constitution of Azerbaijan and Article 12.1 of the Law on Constitutional Court of Azerbaijan, judges of Constitutional Court shall be appointed by the Milli Majlis (parliament) upon proposals of the President of Azerbaijan Republic.

It goes without saying that the judges of Constitutional Court must be the persons who are known, have the authority and are of high morals. In order to properly solve the issue of the requirements for the candidates for the positions of judges of Constitutional Court in a legal manner, one must correct the constitutional regulation and not try to ignore it by supplementing the Law on Constitutional Court by the provision proposed in Article 11.2. Thus, in such case, I would propose to prepare draft modifications to Article 126 of the Constitution.

3.3. While assessing the proposal to supplement Article 14.1 by the provision that the terms of office of judges shall expire when they reach the age of 70, one must note that the term of office of the judge and expiration of powers must be established not in the Law, but in the Constitution. It is a necessary constitutional guarantee of independence of constitutional justice from other institutions of the state power. Constitutional Court controls the legal acts adopted by the legislator, thus, the controlled institution may not establish and correct afterwards the term of office of judges of the controlling institution.

One must also pay heed to the fact that Article 14.1 of the Law establishes that the judges of Constitutional Court shall be appointed for the term of 15 years. Upon establishing the additional rule that the powers of the judge shall terminate when he turns 70 years old, one must also establish that this provision will be applied only to the judges who were appointed to the office after coming into force of this modification. Otherwise, such modification will be in conflict with the requirements of the principle of a state under the rule of law.

3.4. The new wording of Article 14.2, under which the judges shall hold office until replaced; they shall, however, continue to deal with those cases, which they have already under consideration, should ensure the continuity of work of Constitutional Court.

3.5. The modification of Article 29.2 of the Law is related to the language of the proceedings. According to the said modification, the participants to cases considered by Constitutional Court, who do not speak the language of the proceedings, shall be provided

with the right to get acquainted completely with the materials of case, to participate at the sessions of Constitutional Court with interpreter and to make statements in their native language.

While comparing it with the effective wording, under which the translation of all materials of the case into language the person speaks must be ensured, we see that now a person will be able to familiarize with the case only with the help of a translator. Thus, in this aspect, the modification is dual: on the one hand, the help of the translator speaking the person's native language will be ensured, on the other hand, the provision "the translation of all materials of the case into language the person speaks shall be ensured" will no longer be included. In my opinion, in both cases, the rights of person should be guaranteed to the maximum.

3.6. The modification to Article 66.1, under which the provision that Constitutional Court resolutions shall be binding through out the territory is supplemented by the words "for the legislative, executive and judicial power bodies, municipalities, official authorities, all individuals and legal entities" is to be assessed positively, because in the country which does not have the experience of constitutional democracy, disputes often arise regarding the obligation of the act to one or another institution. Thus, in such case, naming of the institutions and persons is meaningful. It would emphasize the effect of Constitutional Court resolutions *erga omnes*.

Because of the previously mentioned reason, also the proposed provision of Article 66.2 that it shall be inadmissible to adopt repeatedly, contrary to the legal positions of Constitutional Court, in any form the acts, which had been cancelled as contradicting to Constitution or other acts, is meaningful.

The additions to Article 66.4 are to be assessed in an analogous way.

3.7. Financial security of Constitutional Court and its judges is an important guarantee of independence of Constitutional Court. Thus, additional Article 70.4, under which the calculation of financial means to be allocated for the material and technical maintenance of the Judges of Constitutional Court shall be carried out via the norms prescribed for the heads of central executive bodies, is essentially to be assessed as positive.

3.8. Article 73 establishes other guarantees of the judge of Constitutional Court, thus, the proposed provisions of Articles 73.6, 73.8, 73.9 and 73.10 should be assessed as targeted to strengthen the guarantees of independence of the judge (and, at the same time, Court).

3.9. The provided for new Article 68-1 titled "Combination of cases in one set of proceedings" and Article 68-2 titled "Correction of errors committed in decisions and rulings" of the Law on Constitutional Court need to be considered as supplementing the present regulation.

The proposed Article 68-3 titled "Explanation of decisions" provides that decisions of Constitutional Court may be explained only by Constitutional Court on the basis of request of a subject entitled to submit inquiry, request or complaint or other subjects against whom this decision is directed. In my opinion, Article 68-3 titled "Explanation of decisions" should establish that when interpreting its decision, Constitutional Court may not change its content.

The proposed provisions of Article 66-1.1 ("If any act completely or partly is recognized as contradicting to Constitution by the decision of Constitutional Court and there is a need for elimination of shortcomings in the legal regulations following the decision of Constitutional Court or Constitutional Court gave the recommendations in its decision, the

competent body or state authority shall, taking into account the legal positions of Constitutional Court on this matter, take measures to adopt a new act or to introduce necessary additions or modifications into the act in force. Constitution of Azerbaijan Republic shall be applied directly until the new legal regulations are adopted”) and the provisions of Article 66-1.2 (“The recognition of act examined by Constitutional Court or its some provisions as contradicting to Constitution of Azerbaijan Republic shall constitute the basis to cancel via the specified procedure the acts or its some provisions, which are based on the norms recognized as contradicting to Constitution”) should be assessed, taking account of little experience of the constitutional democracy of the country, as positive. On the other hand, the formulas must be precise — for example, the terms (periods of time) must be provided, in which the questions related to the adoption, modification or addition of the new act must be decided. Otherwise, such regulation will not reach its objectives.

3.10. The proposed Additions and Modifications into the Criminal Procedural Code of Azerbaijan Republic are related to the provisions of the Law on Constitutional Court.

4. Instead of conclusions

While in principle agreeing that modification and addition to the Law on Constitutional Court of Azerbaijan is necessary, one needs to note the following:

- (1) first of all, the constitutional grounds of the activity and independence of Constitutional Court should be strengthened (thus, for example, the proposed modifications to Articles 11.2 and 14.1 must be consolidated on the constitutional level), as only the constitutional level ensures sufficient protection;
- (2) increase of the guarantees of the activity and independence of Constitutional Court and its judges is not an end in itself, it must be related with a larger possibility to defend the constitutional order, the rights of the political majority and the constitutional rights and interests of a person.
- (3) the legal regulation must properly solve the problems, thus, some provisions of the proposed modifications and amendments must be corrected or supplemented with new elements (Articles 29.2 and 68-3, etc.).

Only in such case, it will be possible to state that the Draft Modifications and Additions to the Law on Constitutional Court will undoubtedly create preconditions to strengthen constitutional justice in Azerbaijan.