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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**OPINION
ON THE RULES OF PROCEDURE
OF THE
CONSTITUTIONAL COURT
OF AZERBAIJAN**

**Adopted by the Venice Commission
at its 59th Plenary Session
(Venice, 18-19 June 2004)**

on the basis of comments by

**Ms E. BARNSTEDT (Expert, Germany)
Mr J. KLUCKA (Member, Slovakia)**

1. *On 21 January 2003, Mr Abdullayev, President of the Constitutional Court of the Republic of Azerbaijan asked the Venice Commission to provide an opinion on the draft rules of procedure that were to be implemented as the result of the new Law on the Constitutional Court (CDL(2004)005) adopted in December 2003, opinion CDL-AD(2002)005, which introduces, inter alia, the possibility of individual complaints before the Constitutional Court.*
2. *On 26-27 February the Venice Commission organised a seminar in co-operation with the Constitutional Court of Azerbaijan on effective case management – examination methods of individual complaints in order to give the Constitutional Court an opportunity to exchange views with representatives of other constitutional courts dealing with high numbers of complaints or experimenting new avenues of case management (see programme CDL-JU(2004)039prog).*
3. *On 5 March the Secretariat received the draft rules of procedure (document CDL(2004)056) and set up a working group made up of Ms Barnstedt, Director of the Federal Constitutional Court of Germany and Mr Klucka, member of the Venice Commission. Both had attended the seminar organised in February and had therefore a chance to get acquainted with the needs of the Constitutional Court.*
4. *The present opinion is based on individual comments by Ms Barnstedt (CDL(2004)068) and Mr Klucka (CDL(2004)067). It was adopted by the Commission at its 59th plenary session (Venice, 18-19 June 2004).*

General comments

5. The legal basis of the activity of each constitutional court is usually formed by three kinds of legal regulations having different positions in the hierarchy of norms of the domestic legal order of the state. They play different roles in the process of the complete and coherent legal regulation of the constitutional body.
6. On the “top” of this triad is usually the constitution establishing the jurisdiction of the court, the parties entitled to appeal as well as the constitutional principles on which the activity of the constitutional court is to be based. Laws on constitutional courts usually transform these constitutional principles into more concrete norms. Finally, the rules of procedure constitute the next and last level of this triad. They fill in practical details of the everyday judicial activity. The Rules of Procedure should be drafted by the constitutional court itself.
7. The Venice Commission notes that in the present case the hierarchy of legal provisions (Constitution, Law on the Constitutional Court of Azerbaijan and Rules of Procedure enacted by the Court) is followed and corresponds to the practice in other states.
8. In order to comply with the requirement of legal certainty of a democratic state ruled by law, it is further welcomed that the Constitutional Court of Azerbaijan intends to subject itself to rules of procedure.
9. By enacting rules of procedure, constitutional courts should enjoy a certain autonomy with regard to their own procedures within the limits of the constitution and the law on the Constitutional Court and have a possibility to modify them in the light of experience without the intervention of the legislator.

I. Provisions on competence

10. 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 vis à vis the individual judges, but also his or her competences within and vis à vis the Plenum and within the Chambers, and the competence of the President vis à vis the staff of the court. In addition to a number of individual authorisations, the major provision here is Article 3 of the draft rules of procedure. Here, the Court has chosen to rely on authorisation in the individual case.

I.1 Demarcation of the competence of the President with regard to that of the Plenum

11. The question arises whether it would be not necessary to have a general clause defining the competences of the President, the judges and the Plenum. Decisions that concern judges and which might be taken in the future and would not automatically result in an amendment of the rules of procedure, should preferably be discussed also in the Plenum, like the rules of procedure which are discussed in the Plenum.

I.2 Competence of the President vis à vis the constitutional judges

12. The competence of the President in regard to that of individual judges appears to be not fully unambiguous under the present draft of the Rules of Procedure. Article 127 of the Constitution provides that the judges are independent. Despite this, Article 3.1.6 provides that the President shall “approve service business trips of judges”. This provision might endanger the independence of the judges who would be dependent on the President. The Constitutional Court could rather follow a procedure where business travel is merely announced to the President and therefore the constitutional judge can decide freely whether to accept invitations. 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 1.4 and Article 46 of the Draft Rules of Procedure) to the effect that sessions of the Plenum and of the Chambers, and thus deliberations within the Court, are always given priority. In principle, the deliberations should always have priority, and therefore invitations from other constitutional courts or academic institutions should never constitute a justification for failing to be present on session days.

I.3 Competence of the President vis à vis the other court staff

13. Insofar as the Rules of Procedure of the Azerbaijan Constitutional Court provide that the President is the superior of the staff of the court and therefore has authority to give directions, an exception that applies in Germany might also be of interest for the Azerbaijan Constitutional Court. There, 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 however be noted that all law clerks have fixed-term contracts and work at the Federal Constitutional Court for only two to three years. 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. The German system has the advantage that it allows for a close relationship between the judge and the law clerk. In the Strasbourg Court the ‘career’ clerks on the other hand become highly competent specialists in the field of human rights.

14. An incidental aspect may also be mentioned: Article 2.2 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 might reconsider this aspect. Under the draft Rules of Procedure of the Azerbaijan Constitutional Court too, the deliberations are secret. Inviting law clerks or even other persons to attend might touch upon the secrecy of the deliberations. In some constitutional courts in Europe, law clerks or assistants participate in the deliberations, 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. Completeness of the provisions

15. The draft of the Rules of the Procedures observes the specific references of the legislator of Article 6.4 (Session of the Plenum) and Article 38 (Study of the petitions of the petitions, complaints and applications). As regards the Plenum, the detailed regulations are contained in Articles 13-34 of the Draft Rules and with respect to the preliminary study of the complaints by the staff of the Constitutional Court, a more detailed regulation of its activity is contained in Article 6 of the Draft (Article 6.4 and 6.5).

16. The draft of the Rules of Procedure however lack a detailed regulation concerning the organisation and activity of the chambers of the Constitutional Court. With respect to these constitutional bodies and this legislative reference it should be pointed out that the legislator (Article 6.8 of the Law) expressly presupposes that the procedure for the organisation of Chambers etc... "shall be determined by the Rules of Procedure".

17. Taking into account the completeness of its content the draft Rules of Procedure cover not only the mutual relationships and the rights and obligations of the organs of the Constitutional Court but (to a certain extent) also the position, rights, obligations and responsibilities of "external" subjects namely the parties of the proceedings and other interested subjects (Articles 41-45). The requirement of an early and proper notification (publication) of the Rules of Procedure arises urgently and immediately after their approval by the meeting of the judges. According to Article 8.5 of the Law the Rules of Procedure shall have the form of a resolution of the meeting of judges but neither the Law (Articles 62-69) nor the draft of the Rules of the Constitutional Court include specific regulations concerning the publication of resolutions adopted by the meeting(s) of the judges. It seems useful to clarify if Article 69.2 of the Act includes also the publication of the resolutions of the meeting of constitutional judges (publication of "other materials connected with the activity of Constitutional Court").

18. It is worth noting that the draft Rules of Procedure provide their own mechanism for their amendment contained partly in Article 51 (Commission Established by the Constitutional Court) and in Article 56 (Amending the Rules of Procedure of the Constitutional Court). It seems however useful to note the relationship between these articles from various angles. The first question which should be answered concerns the "organisational" aspect of the procedure for amending the Rules of Procedure. Does the temporary or standing commission (to which reference is made in Article 51) form a necessary precondition for amending the Rules of Procedure of the Constitutional Court or not? Provided that such a commission has to be established, the starting point of each procedure for the amending of the Rules of Procedure

would depend exclusively on the Chairman of the Court who alone is entitled to establish such an organ.

III. Density of provisions

19. Although it shows the positive 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. Here, it is assumed that the Rules of Procedure of the Constitutional Court 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.

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

20. The Rules of Procedure contain some repetitions from the Act on the Constitutional Court of Azerbaijan, for example Article 1.1 of the Act and Article 1.1 of the Rules of Procedure, although the wording is different - but this may be a result of the translation into English. Such 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.

III.2 Repetitions within the Rules of Procedure

21. 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 9.1 and Article 12.1. Article 9.1 contains a provision that the rapporteur shall collect the necessary documents, materials and cases and forwards these to the Chamber or the Plenum. Article 12.1 again provides that the rapporteur of the proceedings shall keep all the documents in the proceedings. Similarly, there seems to be a repetition in Article 20.6 and Article 25.1. Article 25.1 provides that the rapporteur shall state the essential aspects of the case. Article 20.6 contains a similar provision, and the question arises as to whether the more precise definition in Article 25.1 is necessary.

III.3 Provisions on the self-evident

22. 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 1.2), 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.

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.

III.4 Detailed rules for the inner working of the court

23. The provision in Article 17.1 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 35.3, which provides that the consideration of the case in written proceedings shall take place in the conference room, and the provision in Article 34.1, which provides that shorthand notes may be taken in the oral hearings. An alternative to shorthand notes could be the tape recording of the hearings.

IV. Conclusions

24. The Venice Commissions welcomes the fact that, in compliance with the principle of legal certainty the Constitutional Court of Azerbaijan intends to adopt Rules of Procedure, which fit into the classical triad of regulations on constitutional courts, i.e. rules on the level of the constitution, the law on the constitutional court and rules of procedure adopted by the Court itself. The draft Rules of Procedure are concisely drafted and coherent. Nevertheless, the Commission makes the following remarks:

1. The Court could introduce general clauses delimitating the respective competencies of the Plenum of the Court, the President and the judges. This might help to deal with issues which are not or could not be regulated in the Draft.
2. The Court might consider instituting a system of notification instead of authorisation for judges' business trips, which do not involve budgetary means and do not interfere with deliberations of the Court.
3. All issues reserved by the Law on the Court for the Rules of Procedure should be dealt with by the latter.
4. On the other hand, the Rules of Procedure should avoid repeating principles and regulations from the Constitution and the Law on the Court.