



Strasbourg, 26 October 2007

CDL-AD(2007)036
Or. Engl.

Opinion No. 442 / 2007

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

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

On the basis of comments by

Mr Egidijus JARAŠIŪNAS (Member, Lithuania)
Mr Kong-Hyun LEE (Member, Republic of Korea)
Mr Péter PACZOLAY (Member, Hungary)

**adopted by the Venice Commission
at its 72nd Plenary Session,
Venice 19-20 October 2007**

1. By letter dated 18 May 2007 addressed to the Secretary of the Venice Commission, the Chairman of the Constitutional Court of Azerbaijan, Mr Farhad Abdullayev, requested an opinion on draft amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code (CDL(2007)92).

2. The present opinion was drawn up on the basis of comments by Mr Egidijus Jarašiūnas, Mr Kong-Hyun Lee and Mr Péter Paczolay, who were invited by the Venice Commission to act as rapporteurs. Their comments figure in documents CDL(2007)088, 089 and 087 respectively.

3. A number of relevant issues were raised during a seminar with the Constitutional Court of Azerbaijan on interrelations between the Constitutional Court and ordinary courts that took place in Baku, Azerbaijan in November 2006. These concern the execution of Constitutional Court judgments, especially with respect to the insufficient regard shown by ordinary courts to the reasoning of the Constitutional Court. This problem will also be covered in this opinion.

4. This opinion was adopted at the 72nd Plenary Session of the Venice Commission (Venice, 19-20 October 2007).

GENERAL REMARKS

5. In the context of the constitutional reforms in Azerbaijan, the Constitutional Court has submitted proposals to the Office of the President of the Republic of Azerbaijan for a number of legislative amendments relating to the Constitutional Court. The latter concern the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code and aim to strengthen the independence of constitutional court judges as well as ensure the execution of judgments of the Constitutional Court.

6. This opinion focuses mainly on the proposed modifications and additions to the Law on the Constitutional Court and a few comments are dedicated to both the Civil and the Criminal Procedural Codes.

7. Although the proposed modifications are generally in line with European standards, a few problems remain.

I. DRAFT AMENDMENTS TO THE LAW ON THE CONSTITUTIONAL COURT

Article 11 Requirements to be met by candidates for the post of judge of the Constitutional Court

8. Draft Article 11.2 reads:

“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.”

9. Draft Article 11.2 has the effect of restricting the category of people that have access to the profession. It does so notably by introducing a longer period of experience for candidates than the one that is foreseen by Article 126.1 of the Constitution, which is 5 years.

10. The Constitution and the current Law on the Constitutional Court already provide for the appointment of judges. Article 126.1 of the Constitution stipulates that *“Judges 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” and Article 11.1 of the Law on the Constitutional Court repeats the content of that provision.

11. Since the requirements for the appointment of a judge are already provided in the Constitution, any modification introduced to these requirements should be made to the provision in the Constitution.

12. The Venice Commission therefore suggests that the period of experience required for candidates should be modified in Article 126.1 of the Constitution rather than in the Law on the Constitutional Court alone.

Article 14 Terms of office of judges of Constitutional Court

13. Draft Article 14 reads:

“14.1. Judges of Constitutional Court shall be appointed for the term of 15 years. The terms of office of judges shall expire when they reach the age of 70.

14.2. The judges shall hold office until replaced. They shall, however, continue to deal with those cases, which they have already under consideration.

14.3. The re-appointment of judge of Constitutional Court shall be inadmissible.”

14. The introduction of an age limit for the retirement of judges is in line with the practice of many European countries, for instance Albania, Armenia, Austria, Bosnia and Herzegovina, Croatia, Hungary, Ireland, Japan, Latvia, Norway, Portugal and Russia. This age limit has also been suggested by the Venice Commission in a previous Opinion 296/2004 on the draft constitutional amendments with regard to the Constitutional Court of Turkey (CDL-AD(2004)024), in paragraph 25 “...The amended Article 147 will increase the retirement age up to sixty-seven. If the aim is really to maximize the profit from the knowledge and experience gained during the membership of the Constitutional Court, the retirement age could be increased even more, for example to the quite common seventy years.”

15. The Venice Commission understands that this provision intends to cut short the mandate of judges who were appointed at the age of 56 or later. This is in line with European standards.

16. The Venice Commission welcomes the introduction by Article 14.2 of the possibility for a judge to remain in office after the 15 year term or the 70 years age limit, until a new judge is appointed to replace him or her. This should ensure the continuity of the work of the Constitutional Court and is in line with the principle referred to in the Venice Commission’s Opinion no. 377/2006 on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the constitutional court of Ukraine (CDL-AD(2006)016). In that Opinion, paragraph 13 states that:

“A safeguard may be established through a provision allowing a judge to continue to sit at the Court after his/her term of office has expired until the judge’s successor takes office. Such a mechanism is currently in place for example in Bulgaria, Germany, Latvia, Lithuania, Portugal, and Spain. Such a system prevents that a stalemate during the appointment process blocks the activity of the Court. As this is the case in the countries mentioned, it seems that in Ukraine such a solution could be introduced by amendments to the law on the Court. This will however not be sufficient in case of retirement for health reasons or death of a judge.”

Article 29 Language of Constitutional Proceedings

17. Draft Article 29.2 reads:

“29.2 Participants to cases considered by Constitutional Court who do not speak the language of 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.”

18. The modifications rephrase the previous provision and introduce more details by mentioning the services of an interpreter during court sessions. Although it is not clear whether *“the right to get acquainted completely with the materials of case”* also implies the translation of these materials into the party to the proceedings’ language, this provision is in line with European standards.

Article 66 Legal force of resolutions of Constitutional Court

19. Draft Article 66 reads:

“66.1. According to Article 130.9 of the Constitution of Azerbaijan Republic, the resolutions of Constitutional Court shall have binding force throughout the territory of Azerbaijan Republic for the legislative, executive and judicial power bodies, municipalities, official authorities, all individuals and legal entities.

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.

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.

66.2. Resolutions of Constitutional Court shall be binding after their adoption. Officials who do not comply with resolutions of Constitutional Court shall bear the responsibility according to procedure specified by the legislation of Azerbaijan Republic. 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.”

20. The proposal for modification repeats and refines provisions that already exist in the Constitution and the Law on the Constitutional Court. For instance, Article 130.9 of the Constitution sets out that the decisions of the Constitutional Court are applicable throughout the territory of Azerbaijan and Article 66.3 of the Law on the Constitutional Court states that laws and other acts or their specific provisions and intergovernmental agreements of Azerbaijan that are not in line with decisions of the Constitutional Court become null and void.

21. In the light of the issues raised during the seminar on interrelations between the Constitutional Court and ordinary courts, which was held in Baku in November 2006, these proposals for Article 66 are however welcome. **Instead of referring to “legislative, executive and judicial power bodies, municipalities, official authorities”, a general reference should be made to “all state bodies” in order to avoid excluding entities which might not be mentioned explicitly in the list.**

22. The seminar notably revealed that in practice, a number of problems persisted with respect to the execution of judgments of the Constitutional Court of Azerbaijan. Ordinary courts still have the tendency to respect only the operative part of these judgments and to discard the reasoning of the Constitutional Court. In this respect, it is important to stress the relevance of the Constitutional Court’s reasoning, which should guide ordinary courts. Respect shown by the ordinary courts for the Constitutional Court’s reasoning is the key to providing an interpretation that is in conformity with the Constitution. This is due to the fact that only the interpretation by the Constitutional Court is constitutional. Ordinary courts or state bodies will only be able to apply a given law in a manner that is in line with the Constitution if they base themselves on this interpretation.

Article 68 Rulings of Constitutional Court

23. Draft Article 68.3 reads:

“Article 68.3. Explanation of decisions.

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.

The case concerning explanation of decision shall be examined in the session of the Plenum of Constitutional Court with the participation of state body or person submitting a request. The bodies and persons being the interested parties of the case are also invited to the session.

There shall be adopted a ruling on explanation of decision and the text of this ruling shall be published along with this decision.”

24. The wording of this provision is unclear. The judgment rendered by the Constitutional Court is a valid and integral part of the legal system and it is binding for everyone (see Article 130.9 Constitution). It is therefore unusual to create a new constitutional procedure in order to explain judgments rendered by the Constitutional Court. The reasoning of the Constitutional Court’s judgment itself has to explain the ruling, and this should not be the task of another, additional, judgment. **While it is true that such a procedure exists in a number of countries, it seems that in new democracies, where legal culture is not yet settled, such a provision could even be used to pressure a constitutional court into changing a previous judgement in substance.**

25. **Judgements should be straightforward to understand and should not need further explanation.** Nonetheless, it may indeed happen that the Constitutional Court, in its judgment, was not able to solve the constitutional problem or it may even have created a new problem. In such cases, a new judgment in a new procedure should be delivered, but not as an explanation of the former ruling.

26. **It is true that Protocol 14 to the Convention on Human Rights, provides in Article 46.4 ECHR that if “the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving**

formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1". This provision is however much narrower than the Azeri proposal and does not provide for 'explanations' of an existing decision but rather a separate procedure on execution.

27. For these reasons, Article 68.3 should **perhaps** be deleted.

Article 70 Financing of Activity of Constitutional Court

28. Draft Article 70.4 reads:

"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."

29. The financial security of the Constitutional Court and its judges is an important guarantee of the independence of this court. However, basing the calculation of the "costs of the functioning" of a judge on the model used for the heads of central executive bodies is unclear. This may be, however, a question of translation. It seems that this rule merely serves as a basis for an estimated sum of money. It should therefore be clarified by giving the constitutional judge the same status as, for instance, a cabinet member, or prime minister, as is done in other countries.

Article 73 Other guarantees for the judges of Constitutional Court

30. Draft Article 73 reads:

"73.6. Judges of Constitutional Court shall be paid cash benefits tax free at the rate of two-month wages for the medical treatment via procedure provided for by the relevant body of the Executive.

...

73.8. The retired judge of Constitutional Court who had not reached the pension age shall be paid monthly cash benefits tax free from the state budget at the rate of 80 % of monthly wages of the functioning judge of Constitutional Court, if he/she worked not less than 2/3 of his/her term of office.

73.9. In case of death of the Judge of Constitutional Court during his/her term of office his/her family members – widow (widower), mother (father), the unemployed children under his/her patronage, who have not yet reached the age of 22, shall be paid the monthly pension at the rate of 80% of monthly wages of this judge.

73.10. In case of death of retired Judge of Constitutional Court his/her family members – widow (widower), mother (father), the unemployed children under his/her patronage, who have not yet reached the age of 22, shall be paid the monthly pension or other cash benefits of this judge."

31. The modifications made to this provision need to be clarified. For instance, what is meant by a 2/3 of a term of office, does it mean 10 years in all cases?

32. This provision should also clarify its relationship with Article 14.1, which provides that judges are appointed for a term of 15 years. It does not seem reasonable to deny a judge a full pension simply because s/he was not able to serve a full term, since s/he was appointed at the age of 56 or later.

II. DRAFT AMENDMENTS TO THE CIVIL AND CRIMINAL PROCEDURAL CODES

33. The proposed amendments to Articles 13.8, 418.4.9 and 424.2 of the Civil Procedural Code and those made to Articles 10.3, 416.0.22 of the Criminal Procedural Code aim to guarantee the respect for the judgments of the Constitutional Court and to foster their execution in appellate and review proceedings. These proposals are therefore welcome.

CONCLUSION

34. In principle, the modifications and additions to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code are acceptable. However, there are a number of adjustments that need to be made:

- If really deemed necessary, the change in the qualifications of a judge in Article 11.2 should only be made after Article 126 of the Constitution has been amended accordingly.
- Article 68.3, which introduces a new constitutional procedure to explain a decision rendered by the Constitutional Court, should perhaps be deleted.
- Article 70.4 needs to be clarified in order to explain the basis for the calculation of the salaries of the Constitutional Court's judges.
- Article 73.8 needs to be clarified with respect to the length of the term of office of Constitutional Court judges and this provision's relationship with Article 14.1.

35. The Venice Commission welcomes the draft modifications to the Civil Procedural Code and the Criminal Procedural Code as they aim to guarantee the respect for the judgments of the Constitutional Court and to foster their execution in appellate and review proceedings.

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