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OPINION

**ON THE DRAFT CONSTITUTION
OF THE NAKHICHEVAN
AUTONOMOUS REPUBLIC
(AZERBÄIJAN REPUBLIC)**

**prepared by
a Working Group
of the Venice Commission
consisting of:**

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**and approved by the Commission
at its 33rd Plenary Meeting
(Venice, 12 - 13 December 1997)**

Introduction

On 27 September 1997, the Director of Administration of the President of the Azerbaijan Republic submitted a request to the Council of Europe for its opinion on the draft Constitution of the Nakhichevan Autonomous Republic. For this purpose, a rapporteur group was set up within the European Commission for Democracy through Law (Venice Commission), consisting of MM Malinverni, Suviranta and Lesage. The Commission held an exchange of views with the Rapporteurs during its 32nd plenary session (Venice, 16-17 October 1997) on the basis of their preliminary comments (CDL (97)45, 46 and 48 rev.). The Rapporteurs then met in Brussels, on 31 October 1997, in the presence of Mr Hajiyev, President of the Supreme Court and Associate member of the Commission for Azerbaijan and assisted by Mr Giakoumopoulos, Deputy Secretary to the Commission. At the end of the meeting, the Rapporteurs adopted the present Opinion which was approved by the Commission sitting in plenary session, at its 33rd session (Venice, 12-13 December 1997).

1. The autonomy of the Nakhichevan Republic

The status of the Autonomous Nakhichevan Republic, a territory which has no common border with the rest of Azerbaijan, is determined by Chapter VIII (Art. 134) of the Azerbaijan Constitution of 12 November 1995. It is "an autonomous state within the Azerbaijan Republic". In accordance with the International Agreements concluded in Moscow and Kars in 1921, referred to in the Preamble and Article 1 of the draft Constitution of the Nakhichevan Autonomous Republic:

- the Autonomous Republic is not a separate legal entity in international law, but may have contacts with foreign States and international organisations (See Article 37, paragraph 11 of the draft Constitution);
- the territory of the Autonomous Republic is an integral part of the territory of the Azerbaijan Republic which is "inviolable and indivisible" (Article 11 of the Constitution of the Azerbaijan Republic);
- the Autonomous Republic's powers are determined solely by the Constitution of the Azerbaijan Republic, to the exclusion of any agreement between the Autonomous Republic and Azerbaijan; furthermore, the provisions of the Constitution of the Autonomous Republic may not be contrary to the Constitution of the Azerbaijan Republic, which takes precedence over the Nakhichevan Constitution (See Article 134 of the Constitution of the Azerbaijan Republic). Similarly, Article 137 establishes that legislation passed by the Ali Majlis (the Parliament of Nakhichevan, "Supreme Assembly") must be compatible with the Azerbaijan Constitution and with all legislation of the Azerbaijan Republic. It is therefore clear that the constituent power Assembly of the Azerbaijan Republic has the sovereign power to determine the degree of autonomy granted to the Autonomous Republic. The acts of the Autonomous Republic's authorities in no way limit this power of the Azerbaijan Constituent Assembly; in particular, the Nakhichevan authorities' consent is not required in order to modify the rules governing autonomy. The safeguard for these rules lies in the rigidity of

the Azerbaijan Constitution which may only be amended on the basis of a referendum (see Chapter XI of the Azerbaijan Constitution).

On the other hand, it should be noted that according to the Azerbaijan Constitution, relatively important areas are the exclusive competence of the Nakhichevan legislature. In this regard, Article 138 of the Azerbaijan Constitution lists elections to the Supreme Assembly, issues concerning economic development, social protection, environmental protection, tourism, health, the sciences and culture. The Azerbaijan Constitution also grants the legislature of the Autonomous Republic budgetary powers; Article 139 of the Azerbaijan Constitution provides that the Supreme Assembly shall approve the Autonomous Nakhichevan Republic's budget. The Azerbaijan Republic also grants the Supreme Assembly tax-raising powers and the draft Constitution of the Autonomous Republic (Article 29) specifies that the Supreme Assembly is responsible for local taxes.

The Republic of Nakhichevan therefore enjoys a considerable amount of autonomy.

2. Hierarchy of standards and monitoring of constitutionality

Both Azerbaijan national legislation and the Autonomous Republic's own legislation are applicable on the territory of the Autonomous Republic. Articles 135, paragraphs 4 and 5 of the Azerbaijan Constitution and Article 61 of the draft Constitution of the Autonomous Republic determine the hierarchical relationship between the provisions.

The Constitutional Court of the Azerbaijan Republic has the power to determine whether legal acts of the Autonomous Republic are in conformity with those of the Azerbaijan Republic (Article 130, paragraph 3.8). However, neither the Azerbaijan Constitution nor the draft Nakhichevan Constitution refer to the monitoring of conformity of the Autonomous Nakhichevan Republic's standards with its Constitution.

It would be advisable to use the appropriate procedures to attribute this power to the Azerbaijan Constitutional Court.

3. Human rights

The Rapporteurs note that, in accordance with Article 71 of the Azerbaijan Constitution, the rights and freedoms of individuals and of citizens are directly applicable on the territory of the Autonomous Nakhichevan Republic. This could be stated in the Constitution of the Autonomous Republic.

Since the Azerbaijan Constitution contains comprehensive guarantees of human rights, it might seem superfluous to include in the Constitution of the Azerbaijan Republic a provision concerning only the right to property but it can be justified on historical grounds. In any case, if a special provision on this right is incorporated into the Azerbaijan Constitution, it would be wise to emphasise that the right to own property may be subject to restrictions and limitations; Article 1 of Protocol N°1 to the European Convention on Human Rights and also Article 29 of the Azerbaijan Constitution could be used as a model in this regard.

4. Separation of powers - the duties and powers of the President of the Supreme

Assembly

Article 5 of the draft Constitution of the Autonomous Nakhichevan Republic states that the President of the Ali Medjlis is the Republic's highest official; among other duties, he or she is responsible for representing the Republic abroad and for ensuring state succession in the Nakhichevan Autonomous Republic. Article 37 also lists the competences of the President of the Ali Medjlis (Parliament).

Taken together, Articles 5 and 37 result in a concentration of competences in the President of the Ali Medjlis which is difficult to reconcile with the principle of the separation of powers enshrined in Article 3 of the draft Constitution. The Autonomous Republic's Head of State cannot promote cooperation between the executive, the legislature and the judiciary unless he or she is outside and above them; this is not the case of the President of the Ali Medjlis who is also President of the legislature. Article 37 of the draft Constitution lists the competences of the Ali Medjlis which include not only duties relating to the legislature but also functions which traditionally fall to the executive. For example, the President of the Ali Medjlis establishes Central Executive Authorities (paragraph 9), suspends resolutions and decrees of the Cabinet of Ministers (paragraph 10), represents the Republic (paragraph 11), deprives members of the Ali Medjlis of their credentials where necessary (paragraph 12), appoints working groups with a view to preparing drafts of laws and decrees (paragraph 13) and presents proposals for the nomination and dismissal of judges and public prosecutors (paragraphs 16 and 17).

The duties of the President of the Ali Medjlis should therefore be reconsidered, in particular the following provisions of Article 37:

- paragraph 3 which states that the President of the Ali Medjlis shall "promote cooperation" among the various State bodies;
 - the provision contained in paragraph 10 which states that the President of the Ali Medjlis may suspend certain decisions of both central and local executive authorities; in fact, the President must ask the judiciary to suspend the effect of the decisions concerned; moreover, only courts should be able to declare such decisions void;
 - paragraph 23 which apparently repeats paragraph 14 (power of the President to adopt decisions and resolutions);
 - paragraph 18 which states that the President shall appoint the head of the Central Bank of the Nakhichevan Autonomous Republic and paragraphs 19, 26, 27, 28 and 29 which state that the President shall implement the military doctrine of the Azerbaijan Republic, set up and head the Security Council, be responsible for declaring a general mobilisation, take the decision to call up citizens for military service and ensure the implementation of a state of emergency or martial law: all these duties traditionally belong to the executive.
- paragraphs 16 and 17 which give the President of the Ali Medjlis the authority to make proposals for the appointment and dismissal of judges and public prosecutors (see point 6 below).

5. Functioning of the legislature

Some provisions are such as to diminish parliamentary sovereignty. For example, the Ali Medjlis is authorised to amend draft laws submitted to it only with the consent of the body exercising the right of legislative initiative (Article 31, paragraph 3 of the draft).

According to the Rapporteurs, the legislature must remain free to adopt and amend laws, without being subject to the opinion of the bodies which initiated the law concerned.

The provision whereby the Ali Medjlis must adopt a law within one month from the day on which the draft law was submitted to it (Article 31, paragraph 4) also limits parliamentary sovereignty. The Ali Medjlis should have as much time as it considers necessary to legislate.

6. The independence and functioning of the judiciary

While the appointment of judges by the Ali Medjlis on the basis of proposals by its President is a normal procedure, granting the latter the right to propose the dismissal of judges of the Supreme Court (Article 51, paragraph 2) and of the Economic Court (Article 52, paragraph 2) is a serious distortion of the principles of judicial independence and of the separation of powers.

These provisions are also contrary to Article 128 of the Azerbaijan Constitution which, in its final paragraph, determines the procedure for dismissing judges in Azerbaijan.

In addition, Article 53 which empowers the Public Prosecutor's Office to undertake investigations and bring criminal proceedings, may raise serious problems in respect of the requirement of the European Convention on Human Rights that the judicial body responsible for carrying out an investigation should demonstrate its independence and impartiality. This requirement has been interpreted by the European Court of Human Rights in particular in the following judgements: *Schiesser v. Switzerland* of 4 December 1979 (A Series, n°34), *Huber v. Switzerland* of 23 October 1990 (A Series, n°188) and *Brincat v. Italy* of 26 November 1992 (A Series, n°249-A).

Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgements of lower courts, it should not supervise them.

7. Conclusion

The Rapporteurs consider that the draft Constitution, taken as a whole, constitutes a sound basis for determining the rules governing autonomy in Nakhichevan.

The failure to distinguish between the duties of the Head of State and the President of the Ali Medjlis and to attribute them to a single individual and the concentration of important powers in the hands of this one individual raises problems in respect of the separation of powers.

Some provisions of the draft infringe the sovereignty of the legislature, which is deprived of its power to freely amend drafts which are submitted to it.

Similarly, infringements of judicial independence are incompatible with the fundamental principles of a democratic State which respects human rights and the rule of law: they should therefore be removed from the draft.