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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION  
ON THE DRAFT AMENDMENTS  
TO THE CONSTITUTION  
OF THE REPUBLIC OF AZERBAIJAN**

**on the basis of comments by**

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Mr Ergun ÖZBUDUN (Member, Turkey)  
Mr Jean-Claude SCHOLSEM (Substitute member, Belgium)  
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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

## I. Introduction

1. *The Secretary General of the Council of Europe requested, on 26 January 2009, the Opinion of the Venice Commission on the amendments to the Constitution of the Republic of Azerbaijan proposed by the Government of Azerbaijan (document CDL(2009)025). At its meeting on 29 January 2009, the Monitoring Committee of the Parliamentary Assembly also asked the Opinion of the Venice Commission on these amendments, which had been adopted by the Milli Majlis on 18 December 2008 and approved by the Constitutional Court on 24 December 2008*

2. *Messrs Lee, Özbudun, Scholsem and Tuori were appointed as rapporteurs in this matter. The following draft opinion was prepared on the basis of their comments and adopted by the Commission in Venice at its .. Plenary Session (Venice, ... 2009).*

## II. General remarks and questions of procedure

3. The draft constitutional amendments contain a range of sectoral changes in the form of 29 questions to which each voter will have to respond by either yes or no. Although one can easily identify the main issues raised by the reform (see Chapter III below), a sense of coherence of the reform as a whole seems to be lacking. As result, it is at times difficult to understand the purpose, necessity and/or interrelations of certain changes. For example, some changes only involve a modest adaptation in terminology (see Article 19 II or Article 109 item 13) while others significantly affect the overall distribution of powers between the branches of state powers (see Chapter III A below).

4. The possibility for the voters to pronounce themselves on each amendment separately will apparently preserve the principle of the unity of substance, although the relatively high number (29) of questions posed will inevitably make the ensuing results and various possible combinations less legible. This confusion is reinforced by the way in which the proposal to remove the two term limit of the President is formulated (see Chapter III A).

5. The Venice Commission notes that various sectors of civil society and some political actors have regretted the insufficient consultation which has taken place before the adoption of the said reform and the limited public discussion on the pros and cons of the various amendments proposed. Also, the pace of the adoption of the reform, from the submission of the draft referendum act on 16 December 2008 to its consideration by the Milli Majlis on 18 December 2008, its approval by the Constitutional Court on 24 December 2008 and its submission to a national referendum on 18 March 2009, appears to be quite expedient given the importance of the issues at stake and the need to enable the population to be fully acquainted with the various implications of the reform.

6. Against this background, there are reasons for concern about the lack of respect for the existing procedure of revision of the Constitution. This procedure is dealt with in two distinct chapters. Chapter XI (Articles 152 to 155) governs “changes” in the Constitution. Article 152 states that “Changes in the text of the Constitution of the Azerbaijan Republic may be made only by way of referendum”. Chapter XII (Articles 156-158) governs “amendments” to the Constitution. Such amendments are not subject to referendum, but must be enacted as Constitutional Laws according to a complex procedure, which includes qualified majorities and prescriptive deadlines (Article 156).

7. As already mentioned by the Venice Commission,<sup>1</sup> there are two distinct procedures to revise the Constitution: one is the so-called “changes” procedure, which modifies the

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<sup>1</sup> See Opinion on the Draft Constitutional Law of the Republic of Azerbaijan on “Safeguards for the Vote of Confidence to the Cabinet of Ministers by the Milli Majlis”, CDL-INF(2001)026, § 5.

constitutional text or the fundamental structure of the Constitution and must be subject to a referendum. The other is the so-called “additions” procedure, which is compatible with the original version of the Constitution and must undergo a specific parliamentary procedure.

8. These two procedures are by no means interchangeable. It appears, however, that the draft amendments under examination combine elements which should be subject to a referendum, since they constitute “changes” (e.g. Article 101 V) with elements which are simple “additions” contradicting neither the wording nor the spirit of the existing Constitution. The latter should therefore in principle not be subject to the referendum, but enacted through Constitutional Laws so as to respect the Constitution of Azerbaijan. Implying that every constitutional amendment can be subject to a referendum means undermining the very concept of a Constitution and questioning its position as the supreme norm of the country.

### **III. Main issues raised by the reform**

#### **A. Removal of the two-term limit and position of the President**

9. The most important and controversial draft amendment concerns Article 101(V) on the election of the President. According to the current provision, the President may only be elected for two consecutive terms. The amendment would abolish the limitation on the number of terms.

10. On the procedural level, it is unfortunate that the draft amendment does not remove the two-term limit through an explicit abrogation, but chooses instead an abrogation by substitution: the newly proposed Article 101 (V) actually concerns a completely different question, namely the extension of the term of the President during a state of war. It would have been much clearer for the voters to submit an explicit abrogation in a separate question and include an additional question on the extension.

11. The core of the rule of law is the separation of powers. In a country with a presidential (or sometimes semi-presidential) system, power tends to be concentrated on the President, while that of the Legislature or the Judiciary is relatively weaker. Therefore, the regular change of regime through the process of election is the very method to prevent too strong a concentration of powers in the hands of the President

12. A comparative survey shows that in most states with an elected president including outside Europe, the constitution imposes a limitation on the successive terms a president may serve. The number is either one or two. Limitations have been adopted both in countries where the president possesses extensive powers and in countries where the role of the president is of a more ceremonial character. At present, Belarus is the only European presidential republic with no limitation on the number of consecutive terms.

13. In Belarus, the limitation was eliminated after a referendum held on 17 October 2004. In its Opinion on the referendum, the Venice Commission adopted a critical view of the removal of the limitation. The Commission first appealed to international practice.<sup>2</sup> It then evoked the issue

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<sup>2</sup> “In those democracies where the president exercises important functions of State, a system of constitutional checks and balances ensures that he or she cannot exercise arbitrary power while in office, and in any event the term of office is limited. The constitutions of democratic countries with presidential systems of government, as are to be found in particular in Latin America, generally either prohibit the immediate re-election of an incumbent President or at least limit it to one further term, as is the case in the Constitution presently in force in Belarus. Even democracies where the President’s functions are largely ceremonial tend to limit the possibility of continuous terms of office. The undesirability of unlimited terms for the president is recognised in new (e.g. the Republics of Albania, Armenia, South Africa, Lithuania, Poland, Russia, Ukraine, etc. etc.) as well as in old democracies”. (CDL-AD(2004)029, § 12).

of the distorted balance of power in Belarus.<sup>3</sup> In the case of Kyrgyzstan, the Venice Commission also pointed out that in a presidential or semi-presidential system where the powers of the president are almost unrestricted, a constitutional provision providing that the president may be re-elected only once may be the only effective check on presidential powers.<sup>4</sup>

14. Azerbaijan, the Constitution of which provides for a Presidential system of Government, is undoubtedly a country where the President concentrates extensive powers in his hands, given the few checks and balances which exist.<sup>5</sup> It was therefore logical that the original text of the Constitution of Azerbaijan provided for a two-term limit. The Constitution of the Russian Federation opted for a similar solution in its Article 81 § 3 and was not amended to allow the then President to run for a third consecutive term. As a rule, it can be said that the abolition of existing limits preventing the unlimited re-election of a President is a step back, in terms of democratic standards, as was illustrated by the constitutional referendum held in 2009 in Venezuela and in 2004 in Belarus. Conversely, the subsequent introduction of such limits in the Constitution goes in the right direction. The example of the United States is interesting in this regard: it is undisputed that the United States had a democratic system of governance even before the adoption of the 22<sup>nd</sup> amendment in 1951, that is a period which saw Franklin D. Roosevelt be elected or re-elected 4 times. The American lawmaker nevertheless considered it necessary to anchor in legal terms the then moral commitment undertaken by Washington to serve no more than two terms. This was done through the 22<sup>nd</sup> amendment in 1951. More recently, a similar path was followed by France, which for the first time in the 5<sup>th</sup> Republic, entrenched a constitutional limit of two presidential terms.<sup>6</sup>

15. It has been sometimes argued that the removal of the two-term limit would strengthen the freedom of the voters to choose their President. While this argument may sound rather attractive at least in theory, explicit limitations are needed in practice, because an incumbent president may easily use various plebiscitary means in order to strengthen his or her position and secure his or her re-election. This is all the more the case when effective guarantees securing free, honest and truly competitive elections are lacking. The constitutional limitations on successive terms are therefore meant to limit the risk of negative consequences for democracy arising from the fact that a same person has the possibility of occupying the presidency for an excessive period of time.

16. It has also been argued that there exists no term limit to the appointment of the Prime Minister. This is, however, a different legal situation, which is hardly comparable to that of the presidential (or semi-presidential) regime. In a parliamentary regime, the Prime Minister must constantly enjoy the support from a parliamentary majority, which is not the case for the president in a presidential regime. The personal factor is therefore much stronger in the latter system. Furthermore, the Prime Minister is not the Head of State. His powers are therefore limited, although to a varying extent, by the existence of the Head of State. The temptation of a personal concentration of powers in the hands of the Prime Minister acting in a parliamentary system is consequently much smaller. In sum, it can be said that parliamentary mechanisms usually secure democratic rotation in the office of the Prime Minister, but these mechanisms obviously do not extend their influence on the presidency.

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<sup>3</sup> *"In Belarus, where the balance of powers between the organs of government is distorted, and there is a preponderance of power in the hands of the President, it is particularly undesirable that a system should be created in which the imbalance of powers is effectively institutionalised in the person of the present incumbent"*(CDL-AD(2004)029, § 13).

<sup>4</sup> CDL-AD(2007)045, §§ 13, 35 and 37.

<sup>5</sup> CDL-AD(2001)026, §§ 15 and 23.

<sup>6</sup> Article 3 of the Constitutional Law n° 2008-724 of 23 July 2008 amending Article 6 of the French Constitution.

17. Explicit constitutional limitations on the successive terms of a president are particularly important in countries where democratic structures and their cultural presuppositions have not yet been consolidated. In the opinion of the Venice Commission, the elimination of the present limitation in Article 101(V) of the Constitution would therefore constitute a serious set-back on Azerbaijan's road to a consolidated democracy.

### **B. Extension of the term of the Milli Majlis and the President in case of military operations**

18. Articles 84 (I) and 101 (V) provide for the extension of the term of office of the Milli Majlis, respectively the President, in case elections cannot be held due to military operations under a state of war and as long as these military operations have not come to an end.

19. In principle, such a possibility seems reasonable and other countries have similar provisions. For example, Article 78 of the Turkish Constitution makes it possible to defer parliamentary elections for one year in case of war, with a possibility to repeat the same procedure if the grounds for deferment are still present.

20. It is positive that the proposed amendment includes a guarantee against the arbitrary use of the extension of the term of office of the Milli Majlis and President by making it dependent on a decision of the Constitutional Court following a request by the Central Election Commission. Despite these positive elements, the draft amendment contains serious shortcomings mainly due to its lack of precision.

21. Firstly, the expression "military operations" under a "state of war" seems to open too wide a margin of appreciation due to its vagueness. Although it has been clarified that the situation in Nagorno-Karabakh is currently considered a "state of war", but with no "military operations", it may be more appropriate to provide the Constitutional Court with a more stringent standard for allowing an extension of the term. For example, the postponement of elections could be tied to declarations of martial law and a state of emergency in accordance with Articles 111 and 112. Also, the existence of a "state of war" could be tied to the announcement of a war referred to in Article 109.30.

22. Secondly, it is unclear whether the Constitutional Court's authority shall be extended to the decision as to when the military operations come to an end. This is particularly problematic since the proposed amendment, contrary to the corresponding provision of the Turkish Constitution, contains no time limit for the extension of the term. It has been suggested that the Constitutional Court is indeed vested with the authority to pronounce itself on the end of military operations on request made by the Central Election Commission, but the text of the draft amendment is silent on this.

23. Thirdly, there is no provision fixing a time frame for holding elections following the end of the military operations, although this would seem necessary to avoid a legal gap.

### **C. Basic Rights and Liberties (Chapter III)**

24. The draft amendments submitted to referendum include minor changes to Chapter III, dealing with basic rights and liberties. Although it is up to the State concerned to determine whether a norm is needed at all and whether it should be given constitutional status, the necessity and normative relevance of many of the changes remain questionable. This goes for example for the proposed new paragraphs in Article 25 (Right to equality) which, in normative respect, do not seem to add anything to the existing provisions. On the other hand, it must be acknowledged that certain proposed changes contain at least some improvements in the field

of civil rights. This is in particular the case for Article 32 (II), which lays down a right of protection from unlawful interference in private and family life, as well as Article 48 (V), which states that no one shall be forced to express (or demonstrate) his or her religious faith and belief, to execute religious rituals or participate in religious ceremonies.

25. Apart from the more general procedural problem already mentioned (see Chapter II above), some of the proposed amendments to Chapter III may give rise to interpretations detrimental to basic rights and liberties. According to the proposed amendment to Article 71(II), “rights and liberties of every person are limited on grounds set by this Constitution and legislation, as well as by rights and liberties of others”. Such a provision might be interpreted as conferring upon the legislator unlimited powers to enact limitations to the rights and liberties guaranteed in the Constitution.<sup>7</sup> A corresponding interpretation of the legislator’s unlimited powers might be made of the reference to “law” in the proposed amendments Art. 32, para III and V.

26. One particular amendment in Chapter III raises some concerns, namely the Right of Personal Immunity as enshrined in Article 32 (III). It is indeed proposed that this provision provides that “no one shall be followed, filmed, photographed, recorded, or subjected to any other similar actions without his or her knowledge or despite his or her disapproval, except when such actions are prescribed by law”. According to Article 10 ECHR (Right to freedom of expression and information), journalists and media in general should be free to inform and comment on issues of public interest. This applies to reporting on political figures to the extent that their activities or actions have a bearing on matters of general interest and may permit people to form an informed opinion on the candidates they have to vote for in the context of the exercise of their political rights.

27. In this context, the second sentence of Article 32 (III) raises a potential problem in that it provides no exception for recordings at public meetings or meetings of public interest: a journalist would therefore only be entitled to take a photograph or record a video in such meetings with the previous consent or at least knowledge of the person concerned. There is a possibility to provide for exceptions, but this possibility is left entirely to the discretion of the legislator, who must somewhat surprisingly “prescribe” them and not “authorise” them.<sup>8</sup> As a result, Article 32 (III) is likely to be used in practice to exclude unwelcome journalists, especially from the electronic media, from reporting on events of public interest. Also, if a journalist films or records a politician or official in a situation involving the acceptance of a bribe, it would probably lead to the journalist being prosecuted instead of the politician or official. Investigative journalism with respect to corruption allegations could therefore be seriously hampered.

28. The European Court of Human Rights takes a very strict approach to restrictions on media reporting about the activities of politicians. In *Radio Twist S.A. v. Slovakia*,<sup>9</sup> the Court pointed out the essential function of the press in a democratic society and held that the Slovakian Court’s order against Radio Twist violate Article 10 ECHR because the recorded conversation was clearly political and did not contain any aspects relevant to the concerned politician’s private life. The interference with the right of a radio broadcasting company to impart information therefore did not correspond to a pressing social need. This case indicates that the media have a right to impart information even though it is obtained without the consent or at

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<sup>7</sup> The Venice Commission already addressed this issue, namely the lack of clarity of the constitutional regime concerning human rights restrictions, in its opinion on the draft constitutional law on regulation of the implementation of human rights and freedoms of Azerbaijan, CDL(2001)027, §§ 8 and 29-30.

<sup>8</sup> In its Opinion on the Constitution of Bulgaria, the Venice Commission briefly commented on a similar provision mainly to recall that limitations on Human Rights should preferably be listed in an exhaustive way in the Constitution itself (CDL-AD(2008)009, § 67).

<sup>9</sup> ECHR judgment of 19.12.2006, *Radio Twist A.S. v. Slovakia*.

least knowledge of the person concerned provided, of course, such information involves political matters.

29. The Venice Commission also recalls that the “Declaration on freedom of political debate in the media” adopted by the Committee of Ministers on 12 February 2004 offers good guidance on how to strike the right balance between the right of public figures to privacy and the right of the public to be informed.<sup>10</sup>

30. In view of the foregoing and without underestimating the importance of protecting one’s private and family life from illegal interferences including from non-state actors, the Venice Commission considers that with the current wording of the proposed amendment to Article 32 (III) and bearing in mind the general context of media freedom and journalist activities in Azerbaijan, there is a strong risk that this provision be implemented in a way contrary to Article 10 ECHR. A clause requiring a balancing between the interest to protect privacy of the individual and the legitimate interest in a public debate, or stating explicitly that Article 32 (III) may be restricted for public interest, would certainly significantly reduce this risk.

#### **D. Local Self-Government**

31. Article 146 of the Constitution lays down, in its current wording, a very limited number of guarantees for the independence of municipalities. The draft amendments would complement this provision with 4 new paragraphs, which are supposed to give flesh to the notion of local self-government in Azerbaijan.

32. The Venice Commission recalls that Azerbaijan ratified the European Charter of Local Self-Government on 15 April 2002 and that this treaty entered into force in respect of Azerbaijan on 1 August 2002. It is also worth recalling that Resolution 1305 (2002) of the Parliamentary Assembly on the honouring of obligations and commitments by Azerbaijan explicitly refers to the conclusions of the Congress of Local and Regional Authorities regarding the situation of local democracy in the country. It is therefore largely against these standards that the level of self-governance of the Republic of Azerbaijan must be assessed and the Constitution should properly reflect these standards.

33. The exact scope and implications of the proposed new Article 146 are difficult to anticipate, because the proposed new paragraphs seem to a large extent to go beyond the existing legislation. The adoption of a range of legislative provisions will be needed to implement these new constitutional principles. Much will therefore depend on the way in which the Milli Majlis will give effect to these principles, bearing in mind that the States concerned have a margin of appreciation to implement the principles of local democracy in their domestic legal order. These uncertainties notwithstanding, the draft amendment to Article 146 raises some concern from the point of view of the Charter.

34. As a general point, Article 146 does not explicitly entrench, either in its present or in the amended proposed form, such guarantees for local self-government which would clearly meet the standards established by the Charter. It barely sets out the principle that “municipalities are independent to exercise their power” (proposed new para. I), but fails to entrench a number of other equally important principles laid down in the Charter.

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<sup>10</sup> Its principle VII. “Privacy of political figures and public officials” reads : « *The private life and family life of political figures and public officials should be protected against media reporting under Article 8 of the Convention. Nevertheless, information about their private life may be disseminated where it is of direct public concern to the way in which they have carried out or carry out their functions, while taking into account the need to avoid unnecessary harm to third parties. Where political figures and public officials draw public attention to parts of their private life, the media have the right to subject those parts to scrutiny*”

35. More specifically, the proposed amendment to Article 146 (I) does not seem sufficient to ensure that local self-governments will be able to regulate and manage a “substantial share of public affairs” under their own responsibility and that their powers shall be “full and exclusive”, as provided for by Article 4 paras 1 and 4 of the Charter.<sup>11</sup>

36. Especially worrying is the proposed amendment in Article 146 (III), according to which “the State oversees activities of municipalities”, because the exact scope of this supervision is not further specified in the Constitution. It is therefore essential that this supervision be interpreted as a mere “administrative supervision” for the purpose of Article 8 of the Charter. Such a supervision shall normally aim only at ensuring compliance with the law and with constitutional principles.<sup>12</sup>

37. As concerns the proposed amendment to Article 146 (IV), the rationale behind the obligation for the municipalities to submit reports to the Milli Majlis is unclear. It suggests some form of control by the Legislature, which would go beyond the administrative supervision mentioned above. This unusual form of supervision may undermine the independence of local self-government.

#### **IV. Other issues**

38. There are a number of other, more specific aspects of the proposed constitutional reform which might give rise to certain comments. It is however not possible to cover all of them in detail in the context of the present opinion. Mention will therefore only be made of some meaningful elements, without aiming to be exhaustive.

39. The proposed reform contains a number of innovations, some of which deserve to be welcome. This is in particular the case for the proposed amendments to Article 96, which extend the right of legislative initiative to 40,000 citizens. Such an instrument of semi-direct democracy would constitute a step forward to promote a more active political participation of Azerbaijani citizens.

40. Another innovation, which must be underlined, is the proposed change in Article 95 I (4), which provides that the Milli Majlis shall in the future be responsible for approving and terminating “intergovernmental agreements containing rules contrary to the laws of the Republic of Azerbaijan”. It has been clarified that this provision, which has to be read in conjunction with the proposed amendment to Article 109 (17), entails a reinforcement of parliamentary powers. Azerbaijani legislation distinguishes inter-state and inter-governmental treaties. The former are to be ratified by the Milli Majlis and the latter by the President. The purpose of the amendment is therefore to ensure that, if an intergovernmental treaty provides rules contrary to Azerbaijani law, it will have to be submitted to the Milli Majlis for ratification and not just to the President. In that sense, the amendment would contribute - although in a modest way - to moving towards stronger checks and balances in relation to the powers of the President. The Venice Commission notes, however, that a meaningful reinforcement of parliamentary powers in this matter would also require that intergovernmental agreements not containing rules contrary to the laws be approved and terminated by the Milli Majlis. Indeed, once adopted such intergovernmental agreements could hamper the future development of laws as they automatically prevail over national law.

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<sup>11</sup> See also Recommendation 126 (2003) of the Congress on local and regional democracy in Azerbaijan, item 8.2 b.

<sup>12</sup> See also Recommendation 126 (2003) of the Congress on local and regional democracy in Azerbaijan, item 8.2 d.



41. Finally, there seems to be a laudable attempt in the proposed reform to ensure greater transparency in public affairs through the entrenchment of the principle of publicity for the sessions of the Parliament (Article 88 IV) and the obligation to publish the decisions of the Supreme Court, the Constitutional Court (Articles 130 IX and 131 III) as well as the normative legal acts (Article 149 VIII). As concerns the principle of publicity of the sessions of the Milli Majlis (Article 88 IV), this seems to be a basic requirement as democracy calls for the principle of open sessions. Although this principle is not absolute, the possibility of holding parliamentary meetings in closed session should be permitted only in exceptional cases. While it seems acceptable to hold a closed parliamentary session on request of a qualified two third majority of MPs, it does not seem appropriate to do so on the proposal of the President, as provided for in the proposed amendment to Article 88 IV.

## **V. Conclusions**

42. The draft constitutional amendments under examination embrace a variety of proposals and combine a limited number of important reforms, with some modest adjustments. The overall logic and coherence of the reform is not always evident and the procedure chosen may give rise to some criticism.

43. Some amendments, undoubtedly, constitute important improvements as compared to the existing Constitution and they must be welcome. At the same time, there is reason for concern about a few very negative developments in terms of democratic standards, given the legal culture and context prevailing in Azerbaijan. This is essentially the case for the removal of the two-term limit of the President, which reinforces his already strong position and does not follow international and European practice.

44. The Venice Commission is of the opinion that the draft constitutional amendments under examination do not eradicate the need for a more thorough constitutional reform in the future. Such a reform would seem necessary to reach a better distribution of powers between the branches of the state power and the Commission stands ready to provide its expertise at the request of the authorities of Azerbaijan.