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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE LAW ON POLITICAL PARTIES OF THE REPUBLIC OF AZERBAIJAN

(adopted on 3 June 1992; amended by the Laws of 25 June 1992, 5 November 1996, 5 October 2001, 2 July 2002 and 30 December 2003)

by

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GENERAL

1. The Law of the Republic of Azerbaijan on Political Parties is a relatively clear and straightforward piece of legislation. It provides for certain principles which should govern the establishment and functioning of political parties, for the rights and duties of political parties and of the state towards political parties, and for the suppression of particular parties in particular circumstances. While I have some concerns, in general the law seems to be an appropriate one. I set out some detailed observations below.

DETAILED OBSERVATIONS

2. "Political party" is defined as "an association of citizens of the Republic of Azerbaijan pursuing common political ideas and aims, and participating in the political life of the country". This is a clear and appropriate definition.

3. Article 1 refers to political parties "taking as a basis their functions and aims compatible with the constitution and the laws…" and again in Article 4 there is a prohibition on the establishment and functioning of political parties whose purpose "is to overthrow or change forcibly the constitutional order of the Republic of Azerbaijan or to violate its territorial integrity or … to perpetrate other acts contradictory to the constitutional order…"

4. It is important to be clear that while in a democracy it is permissible to ban or suppress organisations which use or advocate violence, the European Court of Human Rights has consistently held that Articles 10 and 11 of the European Convention of Human Rights permit persons to advocate constitutional change and change in the institutions of state, and even secession from a state, and to organize political parties for this purpose. The Court has on many occasions made clear that the right to freedom of expression includes the right to advocate ideas that offend, shock or disturb. In particular the Court has also held that political parties are entitled to campaign in favour of a change in the legislation or in the legal or constitutional structures of the State subject to two conditions 1) that the methods employed for this purpose must in all respects be legal and democratic and 2) the change proposed must itself be compatible with fundamental democratic principles (see *Socialist Party of Turkey (STP) and others v Turkey*, No 26482/95, 12 November 2003, a case which concerned a ban on a political party advocating self-determination for the Kurdhish minority. The Court held that the fact that a particular political proposal was incompatible with the existing principles and structures of the Turkish state did not mean it was contrary to democratic principles. It was of the essence of democracy to permit the advocacy and discussion of different political proposals, even those which would alter the existing structures of a State. (Judgment, §38 and 43)[1]. It is not clear to the writer whether the Azerbaijani law is in compliance with these principles; this clearly would depend on the meaning the courts of Azerbaijan gave to perpetrating acts contradictory to the constitutional order or violating the territorial integrity of the state.

[1] See also *Socialist Party and Others v Turkey* (25 May 1998) European Court of Human Rights decision, para 46-47. *Refah Partisi [Prosperity Party] and Ors v Turkey*, No 41340/98, No. 41342/98, No. 41343/98 and No. 41344/98, 13 February 2003

5. Article 4 lays down other conditions for the establishment of political parties. Generally these seem reasonable. A party is to be established by a constituent congress or general meeting, which adopts its constitution (described as its charter) and sets up the organs of the party. The details of how the congress is to be organized or convened are not prescribed, and I do not think it necessary to do so. For registration, a party must reach a threshold of 1,000 members. This seems a reasonable threshold in a country with a population of slightly less than 8 million.

6. Article 4 also contains a prohibition on the establishment or functioning of foreign political parties as well as their branches and subsidiaries. In itself this is not unreasonable but care would need to be exercised to ensure that it is not abused in order to prevent the establishment or functioning of political parties representing minority ethnic or national groups.

7. Article 4 also states that "political parties shall be constituted upon the territorial criterion". The provision goes on to prohibit "functioning of primary organisations, committees and other organisational structures of political parties in the State bodies…" While these provisions are not altogether clear I assume the intention is to require political parties to be organised in some sort of geographically based branch structure rather than in the workplace or in a vocational manner (for example, a lawyer's branch, or a university branch, or a schoolteacher's branch). I am not sure what the thinking behind such a provision is, other than perhaps to prevent political parties from exercising covert influence in the workplace.

8. Article 5 provides for the manner in which political parties are to carry out their activities. I see no problems with this provision. The provisions are appropriate.

9. Article 6 requires every party to have a constitution (described as a "charter") and sets out in general terms what it should contain. The provisions seem appropriate ones.

10. Article 7 requires that the name, abbreviator of the name and party symbols should differ from those of other registered parties. This provision is desirable in order to avoid confusion, particularly at elections.

11. Article 8 refers to membership in political parties. Its most noteworthy feature is the prohibition on certain office holders being members of political parties. These include the President of the Republic, the judiciary, the ombudsman, all military servicemen, the staff of the prosecutor's office, much of the civil service, the state-owned press (except for technical and service staff), the leadership and creative staff of the State Broadcasting Company, and religious figures.

12. Undoubtedly there is scope for argument about the precise content of such a list. Any such rule necessarily trenches on the rights of the person affected to take part in political life. There are, however, offices where the necessity for impartiality is such that they could not properly be filled by persons who at the same time played an active part in politics. This is clearly the case for the judiciary and the ombudsman. With regard to some of the others the situation is more problematic.

13. In the case of prosecutors Article 6 of the Recommendation REC (2000) 19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the

criminal justice system provides that states should take measures to ensure that public prosecutors have an effective right to freedom of expression and assembly, have the right to form and join lawful organisations and attend their meetings in a private capacity. These rights can only be limited in so far as is prescribed by law and necessary to preserve the legally established aims and powers of the public prosecutor. Notwithstanding these provisions it seems to the writer that a strong case can be made for the prohibition of involvement in party political activities by senior prosecutors, particularly those responsible for making prosecutorial decisions. To permit such involvement risks compromising the necessary impartiality and independence of the prosecutor. The considerations apply with particular force in emerging democracies, in particular those with a history of political interference in the prosecution of criminal offences. On the whole, therefore, I tend to the view that the prohibition in question can be justified, insofar as it relates to senior decision-makers, although it may be questioned why it is necessary to apply it to all the staff of the prosecutors office.

14. Similar considerations apply to the various other categories of persons precluded from political activity. The inclusion of servicemen is presumably designed both to discourage the armed forces from intervention in politics and to protect the armed forces from party factionalism and political interference. The inclusion of major elements of the public service and in particular the security services may have a similar justification. So far as state-owned media are concerned, if the State is to play a role in the media it is desirable to limit the scope for political advantage. On the other side, however, it may be objected that a ban on membership of political parties may simply conceal the extent to which supporters of a political party may exercise influence without necessarily being paid-up members. Finally, the ban on membership by religious figures may serve the interest of attempting to maintain a separation between church and state, though whether it is likely to be effective in a society where religious leaders have great influence may be doubted.

15. Articles 9, 10 and 11 deal with the rights of members of political parties and the right of parties to join international non-governmental organisations. These provisions seem appropriate.

16. Articles 12-16 deal with the relationship between political parties and the State, and the only comment I propose to make concerns the provisions relating to registration of and liquidation of political parties. Article 14 provides that State registration of a political party shall be refused if its charter is inconsistent with the provisions of Article 3, 4 or 5. Article 16 provides that if a party commits the acts referred to in paragraph 4 of Article 4 it shall be liquidated by a court decision. These two provisions therefore depend on the meaning which is to be attached to violating territorial integrity or perpetrating acts contrary to the constitutional order discussed in paragraphs 3 and 4 above and reinforce the importance of those Articles.

17. There is a further procedure whereby a political party may be liquidated which involves, firstly, the issue of a warning by the Ministry of Justice to a party which "commits an act that deviates from the aims and tasks determined in its charter or runs counter to the existing legislation, followed by an application to court by the Ministry to liquidate the party if it again commits the acts referred to (Article 15.3 and 16.2 and 3). While the necessity for a court decision on liquidation is to be welcomed, the absence of any sanction other than liquidation poses a problem, since the provisions in question appear capable of being invoked even for minor breaches of the charter or legislation. It would be desirable

to provide for sanctions short of liquidation and to provide that liquidation was to apply only in cases of serious and deliberate violation of the charter or legislation where no other sanction was appropriate.

18. Articles 17 to 21 deal with the financing of political parties. Parties are to be financed from their own resources, donations, membership dues and so forth, without State subvention. Financing by foreign States or foreign persons or bodies is forbidden. Donations may not be made by State agencies, exclusively charitable or religious bodies, trade unions, or mass movements. Parties may not own land, industrial enterprises, nor engage in business or commerce.

19. There is a provision prohibiting political parties from receiving donations granted with the purpose of gaining economical or political benefit. While this is a worthy objective, there is no indication how it is to be achieved. Parties are required to include the amounts of donations and the names of donors in their financial accounts, but the legislation does not provide that these be published. It would seem desirable to consider other measures such as (a) putting an upper limit on the amount of donations (b) making public the names of donors and amounts above a certain level (c) prohibiting donors from receiving state contracts within a certain period of the donation (d) applying severe sanctions for breach of the legislation.

20. Trade unions are prohibited from making donations. This might be regarded as discriminatory when there is no corresponding limitation on employers or their organisations doing so. It is, of course, open to argument that a trade union should not in effect require its members to subsidise a party of which the members do not approve, but there are mechanisms to prevent this happening which fall short of a total ban on trade union donations. It might also be pointed out that donations by companies similarly require the shareholders to subsidise a political party of which they may not approve. There is something to be said for a law which would require donations by a company to a political party to be approved by a resolution of its shareholders.

21. Some countries do place restrictions on trade unions funding political parties. For example, the United States, a member of the International Labour Organisation ,[2] has had long-standing restrictions on the funding of political parties by trade unions (although it has been possible to circumvent these restrictions whereby trade unions could establish funds made up of voluntary individual contributions).[3] Historically, the labour movement in the US has tended to provide financial support to the Democratic Party. More recently, the Bipartisan Campaign Finance Reform Act of 2002 has sought to ban large-scale donations to national political parties and has placed a ceiling on individual donations.

22. However, taking the United States as an example, it is significant that US laws have applied equally to workers' and employers' representatives and corporations i.e. there is no discrimination between them in terms of freedom or otherwise to make political contributions, at least since the passing of the Taft-Hartley Act of 1947 (the Tillman Act of

[2] A meeting of ILO delegates in Philadelphia in 1944 gave rise to the Philadelphia Declaration, which is considered one of the founding constitutional documents of the ILO.

[3] See the Taft-Hartley Act of 1947; for general background information, see, e.g. the following Web page from the Web site of the US Federal Elections Commission: < http://www.fec.gov/pages/ch1.htm > .

1907 had actually banned political funding of parties by businesses and corporations, but its provisions could also be circumvented and were largely ineffective). Both corporations and trade unions are equally subject to restrictions under political finance laws.

23. One of the main International Labour Organisation Conventions relating to trade unions, the Freedom of Association and Protection of the Right to Organise Convention of 1948,[4] does state in one of its primary provisions that:

> *Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rule of the organisation concerned, to join organisations of their own choosing without previous authorisation.*

Interpreted broadly, the provision could be taken as authority that all acts of discrimination as to the functioning of employer and employee representatives are prohibited. On the one hand, the provision could be interpreted as relating to joining organisations only. On the other hand, it could be argued that if the prohibition on discrimination were to stop at the mere function or act of joining, all kind of other discriminatory measures could be put in place that would effectively put employees on a lesser footing than employers in terms of collective representation. This broader view of the scope of the provision is supported by the use of "without distinction whatsoever".[5]

CONCLUSION

24. On the whole the law on political parties is a good one and is not over-prescriptive. The major concern is whether the conditions in Article 4 which require a party not to perpetrate acts contrary to the constitutional order could be used to refuse recognition to or to suppress a party which sought fundamental constitutional change by peaceful means. A second concern is whether the provisions of the law relating to corrupt donations to political parties are likely to be effective. Finally, the question arises whether the provisions relating to donations discriminate against trade unions by comparison with employers and their organizations.

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[4] No. 87, adopted 9 July 1948, entry into force 4 July 1950.

[5] A further ILO convention may be relevant. The Right to Organise and Collective Bargaining Convention of 1949[5] states in Article 2(1) that:

> Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each others' agents or members in their establishment, functioning or administration.

Article 2(2) states that

> In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article".

These provisions appear to aimed at preventing attempts to "control", by employers' organisations or their agents, the functioning of employees' organisations. It could be argued that a prohibition on the funding by trade unions of political parties that was not equally applicable to funding by employers would effectively permit employers to gain the upper hand on employees in terms of political representation and influence. On the other hand, the use of the words "control" and "agents" in the above provisions may suggest that a more direct form of influence and interference by employers is what is envisaged. Nonetheless, the provisions at a more general level at least, are consistent with a view that there should be no discrimination between employee and employer representatives to the detriment of the former.