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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE LAW ON FREEDOM OF ASSEMBLY IN AZERBAIJAN

on the basis of comments by

Mr Bogdan AURESCU (Substitute member, Romania)
Ms Finola FLANAGAN, (Member, Ireland)
Mr Peter PACZOLAY (Member, Hungary)

I. Introduction

1. On 14 June 2006, Mr Fuad Alesgerov, Head of the Co-ordination Department of Law Enforcement Agencies within the Office of the President of the Republic of Azerbaijan, requested the opinion of the Venice Commission on the "Law on Freedom of Assembly in Azerbaijan" adopted in November 1998 (CDL(2006)058). Mr Bogdan Aurescu, Ms Finola Flanagan and Mr Peter Paczolay were appointed as rapporteurs.

2. A Round Table on the Freedom of Assembly in Azerbaijan was organised by the OSCE Office in Baku on 19 September 2006. The Round Table focused on the above-mentioned Law and its implementation in practice. Participants in this event included representatives of the Presidential Administration, the Ministries of Justice, Interior and National Security, the Milli Mejlis, the city of Baku as well as international experts and national scholars. Mr Bogdan Aurescu attended the Round table on behalf of the Venice Commission.

3. The present opinion, which was drawn up on the basis of comments by Mr Bogdan Aurescu, Ms Finola Flanagan and Mr Peter Paczolay, was adopted by the Commission at its … Plenary session (Venice, …).

II. General observations

4. These comments are based on an unofficial English translation of the Law on Freedom of Assembly in Azerbaijan provided courtesy of the OSCE Office in Baku. The translation may not accurately reflect the original version on all points and, consequently, certain comments can be due to problems of translation.

5. The current opinion essentially focuses on the wording of the provisions of the Law under consideration (hereinafter referred to as "the Law"). Hence the way in which the Law has been implemented in practice by the competent administrative authorities, the police and the judiciary is in principle not addressed. With a view to advancing the protection of the right to freedom of assembly in Azerbaijan, it is however crucial that improvements in the text of the Law be coupled with progress made in its implementation since serious shortcomings have been noted in this area in recent years.[1] It should be emphasised that how the Law is interpreted and implemented is of great significance in terms of its compliance with international human rights standards. In this regard, the European Court of Human Rights has stated that the right to peaceful assembly should not be interpreted restrictively and any restrictions should be construed narrowly, and that in general, rights must be "practical and effective" not "theoretical or illusory".

[1] See PACE Resolution 1456(2005) ad §§ 4 and 14 ii, which called on the Azerbaijani authorities "*(…), with regard to freedom of assembly, to urgently comply with European standards and practice as regards the organisation of rallies and the keeping of law and order by the police (…)*"; PACE Resolution 1358(2004) ad § 9 iii, which underlined that "*freedom of peaceful assembly still suffers repeated and unacceptable restrictions, and impediments to the right to campaign were again observed during the presidential election (…)"*; PACE Resolution 1305(2002), ad § 6 i.

6. Against this background, it should be borne in mind that the Law does not expressly or at least unambiguously state the presumption in favour of holding assemblies. Its philosophy appears rather restrictive, as evidenced by the numerous comments made in relation to its chapter III (Articles 7-11), which is entirely devoted to the restrictions and prohibition of peaceful assemblies. It is true that several provisions of the Law could in principle be interpreted in a more liberal way. Without awareness-raising measures and adequate training for the authorities and the police, there is however a risk that a more restrictive reading of the Law will continue to prevail.

7. A number of problems raised by the Law have been discussed in the context of a Round Table organised by the OSCE Office in Baku on 19 September 2006. On this occasion, numerous clarifications were made by representatives of the Azerbaijani authorities which helped overcome certain misunderstandings. Reference to such clarifications is made in the current Opinion where appropriate. Following this Round Table, the Azerbaijani authorities have expressed their readiness to continue discussions with the OSCE and the Venice Commission with a view to improving the Law. The Venice Commission stands ready to provide its assistance in this respect.

III. The European and international standards on the freedom of assembly

8. The European and international standards on the right to freedom of assembly, which mainly derive from the ECHR and the ICCPR together with the corresponding case-law,[2] have been presented and discussed in earlier opinions of the Venice Commission.[3] These standards can be summarised as follows:

- *The freedom of assembly is a fundamental democratic right and should not be interpreted restrictively.*

- *It covers all types of gathering, whether public or private provided they are "peaceful".*

- *It is a "qualified" right and the state may justify what is a prima facie interference with the right. Article 11(2) ECHR expressly permits limitations provided they are "such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". The State is given a wide margin of appreciation in order to deal with disorder or crime or to protect the rights and freedoms of others.*

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[2] Other international instruments, such as the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Rights of the Child and the Council of Europe Framework Convention for the Protection of National Minorities, are also relevant to this area.

[3] See Opinion on the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the republic of Armenia (CDL-AD(2004)039; Opinion on the Draft Law Making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia (CDL-AD(2005)007. Opinion on the Law Making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, rallies and Demonstrations of the Republic of Armenia; Opinion on the draft law on freedom of conscience and religious entities of Georgia (CDL-AD(2003)20); Opinion on the law on assemblies of the Republic of Moldova (CDL-AD(2002)27).

- *A regime of prior authorisation of peaceful assemblies is not necessarily an infringement of the right but this must not affect the right as such.*

- *The state may be required to intervene to secure conditions permitting the exercise of the freedom of assembly and this may require positive measures to be taken to enable lawful demonstrations to proceed peacefully. This involves arriving at a fair balance between the interests of those seeking to exercise the right of assembly and the general interests of the rest of the community i.e. by applying the principle of proportionality.*

- *The exercise of fundamental rights and freedoms is a constitutional matter* par excellence *and, as such, should be governed in principle primarily by the Constitution.*

- *Fundamental rights should, insofar as possible, be allowed to be exercised without regulation, except where their exercise would pose a threat to public order and where necessity would demand state intervention. A legislative basis for any interference with fundamental rights such as the right of peaceful assembly is required by the Convention. The relevant regulation, in other words, should focus on what is forbidden rather than on what is allowed: it should be clear that all that is not forbidden is permissible, and not vice-versa.*

- *Accordingly, it is not indispensable for a State to enact a specific law on public events and assemblies, as control of such events may be left to general policing and the rights in relation to them may be subject to the general administrative law.*

- *Laws specifically devoted to the right of freedom of assembly, if they are enacted, should be limited to setting out the legislative bases for permissible interferences by State authorities and regulating the system of permits without unnecessary details.*

9. Reference should also be made to the "Guidelines for Drafting Laws Pertaining to the Freedom of Assembly" (Warsaw, December 2004),[4] which have been prepared by the OSCE/ODIHR with a view to helping practitioners involved in the preparation of draft legislation pertaining to the freedom of assembly. It is worth recalling that theVenice Commission has adopted a detailed Opinion on these Guidelines.[5]

IV. Freedom of assembly in the legal order of Azerbaijan

10. The Law concerns the right to freedom of assembly protected, *inter alia*, by Article 11 of the ECHR and Article 21 of the ICCPR.

[4] See CDL(2005)048; a revised version of these Guidelines should be prepared by the OSCE/ODIHR by the end of 2006.

[5] See Opinion on OSCE/ODHIR Guidelines for Drafting Laws Pertaining to Freedom of Assembly (CDL-AD(2005)040).

11. Article 1 of the Law[6] makes specific reference to Article 49 of the Constitution of the Republic of Azerbaijan, which states as follows:

> *"Freedom of Gatherings*
>
> *I. Every person shall have the right to freely gather with others.*
>
> *II. Everybody shall have the right, upon notification of corresponding Government bodies in advance, to peaceful, unarmed gatherings, meetings, demonstrations, street processions, pickets together with others."*

12. The Second Chapter, Section III Articles 24-71 of the Constitution sets out the "Principles of Human and Civil Rights and Freedoms". This large catalogue of rights and freedoms contains some economic and social rights not guaranteed by the ECHR and some guarantees that seem, in some instances, less extensive than those in ECHR. These include guarantees of rights which are closely connected with the freedom of assembly namely the right to equality (Article 25), right to strike, alone or together with others (Article 36), freedom of thought and speech (Article 47), freedom of conscience and religion (Article 48), freedom of information and the freedom of mass media (Article 50), the right to participate in the political life of society and state (Article 54) and the right to address and criticise Government and Government bodies (Article 57). In addition Article 60 gives a specific guarantee that rights and freedoms of every person shall be guaranteed in a court. Article 71 provides that the executive, legislative and judicial powers shall observe and protect human rights and freedoms fixed in the Constitution and that "no-one shall stop the implementation of human rights and freedoms."

13. Since the coming into force of the Azerbaijan Constitution in 1995, a law entitled "The Constitutional Law on Regulation of the Exercise of Human Rights and Freedoms in the Republic of Azerbaijan" was enacted in December 2002. The purpose of this Constitutional law, whose draft had been submitted to the Venice Commission for an opinion,[7] was to bring "(…) the exercise of human rights and freedoms in the Republic of Azerbaijan in conformity with the European Convention on the Protection of Fundamental Rights and Human Freedoms". The Republic of Azerbaijan has acceded to the ECHR. This Constitutional Law provides that restrictions on human rights and freedoms provided for in the Constitution and in International Agreements shall be restricted "only by law" (Article 3.1).

14. The Constitutional Law requires that restricting laws "shall directly quote the restricted right or freedom, as well as the relevant Article of the Constitution of the Republic of Azerbaijan" (Article 3.2). Restrictions "should not alter the essence of these rights and freedoms" (Article 3.3). The constitutional law expressly provides that the right to freedom of assembly guaranteed in Article 49 of the Constitution "may be subject to restrictions as are necessary in the interest of national security, for the protection of health and morals, for the protection of rights and freedoms of others, for the prevention of crime…". The expressly limited powers of restriction in Article 11(2) ECHR are therefore replicated to a certain extent in the constitutional

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[6] Article 1 of the Law reads as follows:

« *I. Everyone's freedom to assemble together with others is ensured by article 49 of the Constitution of the Republic of Azerbaijan. The realization and limitation of this freedom is determined by this Law.*

II. The state ensures the realization of the freedom of assembly and takes relevant measures for having assemblies organised peacefully and without arms in accordance with the present Law".

[7] See Opinion on the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms of Azerbaijan (CDL-INF(2001)27).

law, with the exception of a reference in the Constitutional Law to 'public safety' as a ground for restriction.

15. Against this background, it appears that the general constitutional framework in Azerbaijan is somewhat peculiar since it is not the text of the Constitution which allows for the limitation of a constitutional right, but rather the Law itself. This approach is not common in Europe since most Constitutions explicitly authorise the legislator to introduce certain limitations to the constitutional right or freedom at issue, with a view to fully complying with the principle of the rule of law. Nonetheless, the Venice Commission was of the Opinion[8] that the ECHR would on ratification be incorporated automatically into Azerbaijan's domestic legal system with ECHR self-executing provisions directly applicable. In the case of conflict ECHR would prevail over the Constitution[9] which would, in any event, be interpreted and implemented in the light of the ECHR. The Constitutional Law reinforced this.

16. Given the relative lack of clarity of the constitutional regime concerning human rights restrictions in Azerbaijan and notwithstanding the concrete improvements brought by the adoption of the Constitutional Law, it is essential to bear in mind that the possibility to restrict the right to freedom of assembly - and closely connected freedoms - should not be left to the full discretion of the legislator.[10] This is all the more important that this constitutional regime contains no express reference to the requirement in Article 11(2) ECHR that restrictions be "necessary in a democratic society" (or some equivalent requirement) or to the need for proportionality which is a matter of some significance having regard to the comments which follow.

V. Analysis of the Law

Articles 1 and 3

17. These Articles contain an over-arching guarantee of freedom of assembly in accordance with Article 49 of the Constitution, the application of which guarantee is governed by the Law under examination in accordance with the principles of international law whilst ensuring equality of persons. It might be useful that these provisions mention not only the relevant constitutional provisions, but also the relevant norms of the international and European instruments on the subject matter (ICCPR, ECHR, ICEFRD, the Convention on the Rights of the Child, the FCNM). A reformulation of these references could help ensure that the exercise of the freedom of assembly will be brought in conformity with the relevant international standards and the Constitution as interpreted in the light of Article 11(2) ECHR. These Articles should also refer to the Constitutional Law on Regulation of the Exercise of Human Rights and Freedoms referred to in paragraphs 13 and 14 above.

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8 See Opinion on the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms of Azerbaijan, ad §§ 2-15 (CDL-INF(2001)27).

9 Constitution of Azerbaijan Article 151.

10 See Opinion on the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms of Azerbaijan, ad § 8 (CDL-INF(2001)27).

Article 2

18. The right of assembly covers all types of gathering including assemblies and meetings, demonstrations, marches and processions whether public or private provided they are "peaceful". Furthermore, "an assembly" can be a less formal grouping and for a less defined purpose than is contained in these basic definitions and "it is also an essential part of the activities of political parties in the conduct of elections".[11]

19. It is assumed that the purpose of the detailed definitions contained in Article 2 of the Law is to guarantee freedom of assembly to these types of assembly, which are all mentioned in Article 49 of the Constitution, albeit not necessarily in an exhaustive way. However, it is unlikely that the list of Article 2 covers all possible types of assembly and it is not clear that assemblies that fall outside the definitions are regulated by the Law or, indeed, whether they are prohibited. The limiting nature of this definition is therefore unsatisfactory and unnecessary and there would be great difficulty in differentiating between the various categories. Article 2 not only lists the various types of assembly covered by the Law but also ascribes a specific purpose to each type. The purpose of the assembly should be irrelevant in these definitions. Where an assembly, of whatever kind for whatever purpose is peaceful its restriction can only be justified for the reasons listed in Article 11(2) ECHR which are reproduced in Article 7.I of the Law.

20. The definitions in this provision of the Law are likely to result in arbitrary decision-making in relation to what assemblies are permitted and in unjustifiable restrictions in relation to the holding of peaceful assemblies. So, for instance, "demonstrations", "street processions" and "pickets" relate to "issues connected with social and national life" whereas a "gathering" is "for a joint discussion of any question and for making a decision". This requirement is too vague and could result in unjustified restrictions on the freedom of assembly. For example, assemblies held for economic reasons might be considered as falling outside the scope of "social and national life".

Article 4.I

21. Article 4.I provides for categories of peaceful assembly that shall not be regulated by the Law. These are assemblies "in places which are in private ownership" and "enclosed places especially designed for conducting public events". This distinction between assemblies held in public places as distinct from assemblies held in private or specially designed place is not appropriate since the ECHR applies to all types of assembly. Furthermore, the OSCE/ODHIR Guidelines do not exclude that private property can be used as a venue for a public assembly.[12]

22. The need for control of assemblies is not linked to these distinctions. If the assembly is peaceful it should be allowed. It is nonetheless the case that, where possible, the right should be allowed to be exercised without regulation; but this principle applies to all assemblies and not only to those held on private property. If the purpose of the Law was simply to exclude peaceful assemblies "in places which are in private ownership" and "enclosed places

[11] See Opinion on OSCE/ODHIR Guidelines for Drafting Laws Pertaining to Freedom of Assembly, ad § 14 (CDL-AD (2005)040).

[12] See OSCE/ODHIR Guidelines for Drafting Laws Pertaining to Freedom of Assembly, ad items 3.1 and 5.2 (CDL(2005)048).

especially designed for conducting public events" from the obligation of notification pursuant to Article 5, this could be stated explicitly in the Law, as has been done for "fortuitous assemblies" in part IV of the same provision.

Article 4 II

23. Article 4.II provides that "wedding and funeral ceremonies, holiday and mourning events and religious ceremonies" shall not be regulated by the Law. In the context of the above-mentioned Round Table, it has been clarified that by excluding such assemblies from the scope of the Law, the authorities intended not to unduly complicate their holding, particularly through the notification requirement. While this is perfectly understandable given that hundreds of such events take place every day without any problem, a blanket ban of these events should they become an "assembly" within the meaning of Article 2 is excessive and not such as to provide a proper link to a permissible reason for restriction under Article 11(2) ECHR.[13] Indeed it can be that people might wish to express an opinion at such an event and the distinction must be difficult to draw in practice. In any case, the events listed in Article 4.II do not of themselves present the likelihood of "disorder" or "crime" and they do not necessarily present any danger for the rights and freedoms of others.

Article 5

24. This Article provides for a "notification" procedure before convening an assembly. During the above-mentioned Round Table, representatives of the Government have made it clear that the requirement in the Law was for *notification* and not for a *permission* to hold the assembly. The Venice Commission welcomes this confirmation since other provisions of the Law could, as they currently stand, encourage the competent authorities to issue a blanket prohibition as soon as the notification process proves incomplete.

25. For example, Article 14 I items 1) and 2) of the Law provides that the police have power to suspend when necessary an assembly held without written notification as well as an assembly which does not meet the conditions stipulated in a written notification. In this context, it is important to stress that any system of notification for holding assemblies must not impair or prevent the lawful exercise of the right to assembly. Any restriction must therefore be proportionate and the Law should make clear that automatic suspension is not the necessary consequence of defective notification or failure to comply fully with a notification: consideration of the individual circumstances of each case remains necessary.

26. Notification 5 days in advance might remove the impact of an assembly designed to respond to a significant political event. Hence failure to comply with a requirement for 5 days notice should not necessarily justify suspension. Nor is it clear why an assembly must have a name, and its purpose, provided it is lawful, should be able to change or expand without a risk of prohibition or suspension.

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[13] Article 4 II provides that :

« *Using wedding ceremonies, holiday and mourning events and religious ceremonies for organising gatherings, meetings, demonstrations, street processions and pickets shall be prohibited".*

27. The notification also requires the approximate number of participants. This may sometimes be possible but equally an organiser, despite providing a best estimate, may prove to be significantly wrong in the numbers that participate. This should not lead to any consequences for the demonstration unless they are linked to legitimate reasons for restriction detailed in Article 11(2) ECHR.

28. All in all it seems that the notification procedure, which is in itself admissible, imposes excessive bureaucratic requirements not justifiable within the meaning of Article 11(2) ECHR. A provision allowing organisers to supplement information submitted and fix any flaws to allow for notification to become valid should therefore be provided for.

29. As concerns spontaneous demonstrations, which are guaranteed by Article 11 ECHR, the Law should include an express provision allowing them. This possibility is only implied by Article 5.IV., which merely states that a written notification is not required for "fortuitous" assemblies. Also, the right to counter-demonstrations should be regulated (see related comments under Article 9).

Article 6

30. Article 6.II prohibits "persons under 18 or persons whose capability is restricted by the court decision" to be organizers of an assembly. This provision is too restrictive, since the UN Convention on the Rights of the Child sets forth in its Article 15 the right of the child to freedom of assembly. The authorities must therefore ensure conditions that permit those under 18 and of restricted capacity to exercise their right to freedom of assembly and this may require positive measures. The law could provide for these persons the right to freedom of assembly under certain conditions, for instance the consent of the parents or legal guardians.

31. Article 6.III prohibits "foreigners and stateless persons" to be organizers of an assembly pursuing political goals. If the imposition of certain restrictions on the political activity of aliens is not forbidden (according to article 16 of the ECHR), preventing stateless persons with stable and legal residence in a given State from organizing an assembly (including for pursuing political goals) is an excessive restriction of the freedom of assembly and should be reviewed.

32. Article 6.V prohibits an assembly if the organizers cannot attend. It is excessive to ask for all organizers to be able to attend an assembly as a precondition for allowing it. Sometimes the *force majeure* or a fortuitous situation might prevent one or more organisers to attend an assembly. The provision might be used by certain interested groups even to block an assembly by simply preventing an organiser to attend the respective assembly. The law should therefore provide for a certain flexibility, for example by allowing the assembly to be held with at least half of the organizers being present at the event, or by giving the organisers the possibility to be replaced by representatives in case of necessity. If there is adequate organising presence and sufficient control and communication with the police or other authorities so as to allow for a peaceful assembly, then the failure of all organisers to attend should not result in prohibition of the event.

Article 7

33. Article 7.I contains the competing interests that justify the restrictions. The six points closely follow the corresponding elements of Article 11(2) ECHR, which is positive. However, the Law provides in Article 7 II that the restriction can take "any form including

change of time and place of an assembly", without prescribing the proportionality test. This affords far too wide a discretion to the authorities to restrict assemblies. The Law should therefore elaborate on the nature and extent of restrictions permissible in order to remove the possibility of arbitrary and discriminatory restrictions.

34. Article 7.III and IV introduce the proportionality and the necessity test, respectively. This approach follows European standards and is to be welcomed. Article 7.III and IV reflect that all restrictions applied must be absolutely necessary and allow for a balance of interests between the freedom of assembly and the State or public interest, including the rights of other persons. However, many specific rules in other parts of the Law are excessively restrictive and do not, in practice, allow sufficient flexibility for the application of the principle of proportionality. A wider discretion to make arrangements to facilitate the right of assembly is required.

Article 8

35. Article 8.III item 3) provides for prohibition of an assembly "during the period of preparation for international events of state importance determined by the decision of the relevant body of executive power and on days of holding them on the territory of cities and regions where they are conducted". This provision affords too broad a discretion in deciding what is "an international event of state importance". The obligation to prohibit such a demonstration once it has been decided to be an "international event of state importance" is unconnected with any permitted reason for restriction in Article 11(2) ECHR. The discretion so to define a particular event contains the potential for disproportionate and discriminatory restrictions being imposed on certain protests. People are entitled to protest peacefully at international events unless, in particular circumstances under consideration, one of the permitted reasons for restriction applies.

36. Article 8.IV introduces the notion of "relevant body of executive order" that is used in Articles 8.V, 9.VI and VII, 10 and 13.VII. During the above-mentioned Round Table, representatives of the Government have indicated that the body (bodies) concerned was (were) clearly identified in other sectoral legislation. Since it is very important to avoid uncertainties in this regard - including for the public -, consideration could be given to mentioning the name of the public bodies concerned in the Law, or at least making precise cross-references to the relevant legislative provisions.

37. Article 8.IV allows for prohibition of an assembly "in important cases in a democratic society observing restrictions provided for in part 1 of Article 7…". This provision is too vague and its purpose cannot be determined. It seems that Article 8 VI, which states that prohibition shall be considered a measure of last resort, should suffice.

Article 9

38. Article 9.II provides that if two events are to take place at the same place and time organisers are provided with the possibility of determining another place and time. However the entitlement to counter-demonstrate is protected by the ECHR. There is a danger that this provision would be used to prohibit counter-demonstration even where there is no danger of confrontation between opposing sides. It is essential that the right to counter-demonstrate should only be limited in connection with genuine security or public order considerations (see comments under Article 5).

39. Article 9.III prohibits assemblies in a list of places. This provision uses the expression "shall be prohibited", which entails a disproportionate limitation on the exercise of freedom of assembly by virtually excluding the use of the proportionality test on a case by case basis. People may have a particular desire to demonstrate in the vicinity of the places concerned[14] and a provision allowing for more flexibility in the decision-making by the competent authorities would be preferable. The same holds true for Article 9.IV, V and VI: in all these cases, should restriction be placed on the holding of assemblies it requires to be justified within the meaning of Article 11(2) ECHR and the restriction should be the less intrusive measure, not necessarily a prohibition. As regards Article 9.VI in particular, the Law should at least provide for a procedure allowing for the modification of the list of places designed for the holding of assemblies, including at the initiative of individuals, should the list be too limited. Article 9.VIII seems too restrictive in that it excludes the holding of assemblies after 17.00 (19.00 in summer time): the text should be reviewed in order to allow for more flexibility.

Articles 10 and 11

40. These provisions deal with decision-making and judicial review of administrative decisions on the holding of assemblies. Whilst the relevant bodies of the executive power must give their decision in writing at least two working days prior to the intended event and the decision must be clear and grounded, nonetheless an appeal to a court must be considered by the court within three day and there can be further appeals. Such a timetable would allow the original intended date of the assembly to be passed before a court would give its decision thus requiring the assembly to be postponed.

41. Time limits should be so set that the decision of the executive body and the decision of the court at first instance can be delivered in time to allow the assembly to take place on the original intended date should the court find in favour of the organisers.[15] Representatives of the Government have indicated in the Round Table held in Baku on 19 September 2006 that they were aware of this shortcoming of the Law and willing to remedy it.

Article 12

42. In Article 12.II, the reference to "the right of freedom of thought and speech orally and in written in accordance with the Constitution of the Republic of Azerbaijan" should be completed with a reference to international and European documents. Otherwise, the text is unbalanced (the only reference in the text to international treaties to which the Republic of Azerbaijan is a party is done in connection to the restriction of such fundamental rights).

43. The requirement in Article 12.IV that participants in an assembly should have "clearly visible signs" distinguishing them is unusual and excessive. It is also impractical in the case of "fortuitous" assemblies. Furthermore it effectively means that it is difficult for people spontaneously to join a notified assembly.

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[14] See Opinion on the Law on conducting meetings, assemblies, rallies and demonstrations in the Republic of Armenia, ad § 38 (CDL-AD(2004)(039)).

[15] See OSCE/ODHIR Guidelines for Drafting Laws Pertaining to Freedom of Assembly, ad item 4.5.

44. Article 12.VIII is almost the only provision that deals with the State's duty to protect the right to freedom of assembly. Indeed, the only other provision in the Law which places a positive duty on state authorities is that contained in Article 9.VIII in relation to the provision of a special area for conducting gatherings etc. It is characteristic that this single sentence ("the government shall have the responsibility for ensuring the security of an assembly") is part of an article on the duties of organizers. The State's duty to protect an assembly should be treated in greater detail by the Law. Moreover, the second sentence of this paragraph makes it possible for the organisers to request additional police force but on the condition that they pay for this service. This financial obligation seems at variance with European standards.[16]

Article 13

45. Article 13.V provides that "a participant of a lawful assembly cannot be later brought before responsibility for participation in such an assembly. Only the participants of a lawful assembly who violate the law can be brought before responsibility". The text should be completed in order to clearly specify that participants in unlawful assemblies should be exempted from liability when they had no prior knowledge that the assembly had not been authorized. Also, the text should mention that if an authorized demonstration turns out to be non-peaceful, individual participants who did not commit any violent act cannot be prosecuted solely on the ground of participation in an illegal gathering.[17]

Article 14

46. This provision regulates the powers of the police in connection with assemblies. Generally speaking, the powers granted to the police are very extensive and one may wonder whether general policing powers could not suffice. In any case, it is essential that expressions such as "relevant means" and "special means", which the police are entitled to use according to Article 14 III and V,, are clearly defined and limited. In this context, representatives of the Government have indicated in the aforementioned Round Table that the use of "relevant means" and "special means" by the police were regulated in detail in other pieces of legislation, namely the 1999 Law on Police and the 1994 Law on Internal Service.

47. Another cautious word should be made in relation to the use of force - especially to suspend and disperse an assembly - as provided for by Article 14. This provision lacks clear references to the proportionality principle, in particular to ensure that no undue use of force is made where an assembly proceeds peacefully.

48. As regards Article 14 I item 3), comments have already been made concerning the lack of proportionality in the power to suspend where there is no or lack of compliance with a written notification (see related comments under Article 5).

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16 See OSCE/ODHIR Guidelines for Drafting Laws Pertaining to Freedom of Assembly, ad item 4.3.

17 See OSCE/ODHIR Guidelines for Drafting Laws Pertaining to Freedom of Assembly, ad item 7 § 2 (CDL(2005)048); See also ECHR judgment of 18 March 1991, *Ezelin v. France*, ad § 50.

Article 16

49. This provision provides that persons who violate provisions of this Law "shall bear responsibility in accordance with the legislation of the Republic of Azerbaijan". It would be necessary to have further information on what other legislation, whether imposing civil or criminal liability, is involved and how it is implemented in practice. The Round Table discussions of 19 September 2006 suggested that at least two provisions of the criminal code are of particular relevance in this context, that is Article 169 ("Infringement of rules on implementing meetings") and Article 233 ("Organization of actions promoting infringement of a social order or active participation in such actions").[18] The way in which these provisions - the scope of which seems wide - are applied in practice by the competent authorities is likely to have a chilling effect on the population's readiness to avail itself of the right to freedom of peaceful assembly. It is however not possible to comment further without this additional information.

50. Article 16 offers another example of the restrictive perspective of the Law: there is neither a mentioning of the liability for unlawful or excessive use of force by police, nor a general provision on the responsibility of the State. With a view to reaching a better overall balance, the Law may thus be completed accordingly, in Article 14 or in a separate provision.

VI. CONCLUSIONS

51. It is positive that there are correct statements of principle governing freedom of assembly in the Constitution, the Constitutional Law and the Law under consideration. However the Law sets out with excessive details the conditions for exercising the constitutionally guaranteed right of assembly, especially where its exercise would pose no threat to public order and where necessity does not in fact demand state intervention. The relevant regulation should focus on what is forbidden rather than on what is allowed: it should be clear that all that is not forbidden is permissible, and not vice-versa. The philosophy of the Law should therefore be changed.

52. The Law presents certain substantial shortcomings: it entails excessive differentiation between categories of assemblies in a manner which is not properly linked to permissible reasons for restrictions; furthermore, the procedural requirements in relation to the notification process are too onerous and the time frame allowing judicial review lacks coherence.

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[18] Article 169 (1) of the criminal code provides that:

"*The organization, implementation or participation in assemblies, in the cases forbidden by the law, which brought to essential infringement of rights and legitimate interests of citizens – is punished by the penalty at a rate of up to three hundred of nominal financial unit, or restriction of freedom for the term up to one year, or corrective works for the term up to two years, or imprisonment for the term up to two years*".

Article 233 of the criminal code provides that:

"*Organization by group of persons of actions, roughly breaking a social order or connected to insubordination to legal requirements of the authority representative, or entailed on infringement of normal activity of transport, enterprise, establishment and organization, as well as active participation in such actions – is punished by the penalty at a rate from five hundred up to one thousand of nominal financial unit, or corrective works for the term up to two years, or restriction of freedom on the same term, or imprisonment for the term up to three years*".

53. The principle of proportionality is not properly respected: the Law ensures too broad a discretion for State authorities and provides for numerous cases of automatic prohibition of holding an assembly. Prohibition is often used as the only response, and not as a last resort. The proportionality and the necessity test should be more consistently reflected in the Law so as to ensure, on a case by case basis, that the restriction - including the use of force - is justified within the meaning of Article 11(2) ECHR as the less intrusive measure.

54. The Law does not adequately reflect the fact that the state may be required to intervene to secure conditions permitting the exercise of the right to freedom of assembly, which may require positive measures to be taken to enable lawful demonstrations to proceed peacefully. Important issues would merit being addressed by the Law, such as the right to hold spontaneous assemblies, the right to counter-demonstration, the State's duty to protect peaceful demonstrations and the liability for unlawful or excessive use of force by police.

55. It is important that improvements in the text of the Law be coupled with progress made in its implementation, which may justify awareness-raising measures and adequate training for the competent authorities so as to avoid too a restrictive reading of the Law. Indeed the way in which the Law is interpreted and implemented is of great significance in terms of its compliance with international human rights standards.

56. The Venice Commission stands ready to assist the Azerbaijani authorities to improve the Law.