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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW ABOUT OBTAINING
INFORMATION ON ACTIVITIES OF THE COURTS
OF AZERBAIJAN**

by

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I. Introduction

1. By letter dated 3 July 2009, the Azerbaijan authorities requested the opinion of the Venice Commission on the draft law About obtaining information on activities of the courts (hereinafter “the draft law”).
2. Mr Victor Gumi/---, member of the Venice Commission in respect of Albania, was/were appointed as rapporteur/s and presented his/their comments.
3. The present opinion was drawn up on the basis of the rapporteurs’ comments and was adopted by the Venice Commission at its 80-th Plenary Session (Venice, 9 October 2009).

II. Applicable standards

4. Republic of Azerbaijan is a member state of many international organizations, a signatory to the key international human rights documents and as such is bound by the commitments to respect human rights, including the right to information.
5. As a member state to the United Nations since March 1992, it has also joint the Universal Declaration on Human Rights, which declares in its Article 19 that: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.
6. Azerbaijan acceded to the International Covenant on Civil and Political Rights (ICCPR) (ratified by Azerbaijan 13 August 1992), which sets out in article 19 "freedom to hold opinions" and freedom to "seek, receive and impart information and ideas through any media and regardless of frontiers";
7. In March 2000 Azerbaijan acceded to the Aarhus Convention (Convention on access to information, public participation in decision making and access to justice in environmental matters).
8. Azerbaijan signed on 25 January 2001 and ratified on 15 April 2001, the European Convention on Human Rights (ECHR), Article 10 of which protects freedom of expression and information.
9. Article 50 (1) of the Constitution of Republic of Azerbaijan specifically guarantees freedom of information, providing that: “Everyone is free to look for, acquire, transfer, prepare and distribute information”.

The Constitution of the Republic of Azerbaijan provides the direct application in national law of international agreements, including the ICCPR and the ECHR. Article 148 (2) of the Constitution provides: “International agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of legislative system of the Azerbaijan Republic”. Article 151 provides that: “Whenever there is disagreement between normative-legal acts in legislative system of the Azerbaijan Republic (except Constitution of the Azerbaijan Republic and acts accepted by way of referendum) and international agreements wherein the Azerbaijan Republic is one of the parties, provisions of international agreements shall dominate”.

B. The right of access to official documents

10. The first political recognition of a right of access to official documents was Recommendation No. R (81) 19 of the Committee of Ministers to member States on access to information held by public authorities. One year later, this recommendation was followed by the Declaration of the Committee of Ministers on freedom of expression and information, adopted on 29 April 1982. Other legal instruments were elaborated¹. In 2002 the Committee of Ministers adopted its Recommendation Rec (2002)2 on access to public documents.

11. The Convention on Access to Official Documents is based on recommendation Rec (2002)2 and contains a set of provisions aiming at setting a minimum standard for legislation and practice in the Member States. This instrument refers in particular to Article 19 of the Universal Declaration of Human Rights, The United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.²

12. The Convention on Access to Official Documents has been adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies. It is open for signatures since May 2009. When it enters into force, it will become the first international binding instrument recognising a general right of access to official documents held by public authorities. It can therefore be considered that the above instrument is, at this point in time, the most advanced one at the international level. For this reason, this opinion will refer to the fundamental principles contained in this Convention and outlined below.

13. Articles 1 and 2 of the Convention on Access to Official Documents state that everyone shall have access, on request and without discrimination on any ground, to official documents held by public authorities. The term "Public authorities" covers government and administration at the national, regional and local level, legislative and judicial bodies insofar as they perform administrative functions and natural or legal persons insofar as they exercise administrative authority. Furthermore, the member states are invited to include legislators and courts of law in their entirety. The parties may also opt to include natural or legal persons insofar as they perform public functions or operate with public funds. The term "Official documents" means all information recorded in any form, drawn up or received, and held by public authorities.

14. Article 3 states that possible limitations may be described, which shall be set precisely and only for the protection of certain enumerated interests such as national security, international relations, prevention and investigation of criminal activities, inspection by public authorities, privacy, commercial interests, equalities of parties to court proceedings, environment and internal deliberations of authorities. A harm test shall apply, which means that access shall only be refused if release of information would or would be likely to harm a protected interest. However, even so, release shall

¹ Recommendations of the Committee of Ministers to member States No. R (81) 19 on the access to information held by public authorities, No. R (91) 10 on the communication to third parties of personal data held by public bodies, No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes, No. R (2000) 13 on a European policy on access to archives.

² ETS No. 108.

take place if there is an overriding public interest in the disclosure. Time limits for secrecy are recommended.

15. Article 4 states that formalities shall be kept to a minimum and the applicant shall not be obliged to give reasons for the request. Parties may give the applicant the right to remain anonymous, unless it is essential that the identity be revealed in order to process the request.

16. Article 5 states that the authority shall help the applicant, as far as reasonably possible, to identify the requested document. Applications shall be dealt with promptly by the authority that holds the requested documents. Decisions shall be reached, communicated and executed as soon as possible or within a reasonable time limit which has been specified beforehand. Refusals, in whole or in part, shall contain the reasons for refusal. Manifestly unreasonable requests and requests that are too vague may be refused.

17. Articles 6 and 7 states that where access is granted to the document as a whole or parts of it the applicant shall be able to choose whether to inspect an original or copy of the document or receive a copy in any available format. Access can also be granted by referring the applicant to other easily accessible sources. Fees may be charged for copies, based on the self-cost of reproduction and delivery.

18. Article 8 states that an applicant, whose request has been refused, in part or full, shall have access to a review procedure before a court of law or another independent and impartial body established by law.

19. Article 9 states that certain complementary measures are prescribed, such as the duty to inform the public of its right of access to official documents, an undertaking to educate public officials about their obligations and to manage documents efficiently as well as to apply clear rules for storage and destruction of documents.

20. Article 10 states that the authorities shall, when appropriate, proactively make such official documents that they hold public at their own initiative in order to promote administrative transparency and efficiency and to encourage informed participation by the public in matters of general interest.

21. As concerns the European Convention on Human Rights (ECHR), it recognises under the fundamental right to freedom of expression under the right to receive and impart information without interference by public authorities. The European Court of Human Rights (ECtHR) has distinguished two components: a) public and media access and b) individual access to information, including the right of access to documents by those individuals who have a particular interest in obtaining the information.

22. The ECtHR has recognized on several occasions “the right of the public to be properly informed” and “the right to receive information”, but until recently the ECtHR has been very reluctant to derive from Article 10 of the ECHR a right to have access to public or administrative documents.

In the cases of *Leander v. Sweden*³, *Gaskin v. United Kingdom*⁴ and *Sîrbu v. Moldova*⁵, the ECtHR recognized “that the public has a right to receive information as a corollary of

³ *Leander v. Sweden*, Judgment of 26 March 1987, § 74.

the specific function of journalists, which is to impart information and ideas on matters of public interest". The ECtHR however was of the opinion that the freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. It was decided in these cases that the freedom to receive information as guaranteed by Article 10 could not be constructed as imposing on a State positive obligations to disseminate information or to disclose information to the public.

23. In 2006⁶ the ECtHR applied for the first time Article 10 of the ECHR to a case where a request of access to administrative documents was refused by the authorities. The case concerned a refusal to give an environmental protection NGO access to documents and plans regarding a nuclear power station in Temelin, Czech Republic. Although the ECtHR found no breach of Article 10, it explicitly recognised that the refusal by the authorities to grant access to certain documents represents an interference with the right to receive information guaranteed by Article 10 ECHR, which means that the refusal has to meet the conditions set forth in Article 10 § 2: it must be prescribed by law, have a legitimate aim and must be necessary in a democratic society.

24. In addition, the ECtHR has recognised a positive obligation to provide, both proactively and upon request, information related to the enjoyment and protection of other ECtHR rights such as the right to respect private and family life⁷. The right to a fair trial guaranteed by Article 6 of the ECHR gives the parties to court proceedings a right to have access to documents relevant to their case held by the court. However, the right for an individual to obtain information that is not personally related to him or her is unlikely to give rise to a "civil right or obligation" so as to engage Article 6. On the other hand, the denial of access to information that could assist an individual in establishing a claim for damages can potentially infringe Article 6⁸.

25. The most recent decision in the case of *Társaság a Szabadságjogokért v. Hungary*,⁹ constitutes a landmark decision on the relation between freedom to information and ECHR.

In 2004, the Constitutional Court of the Republic of Hungary denied the *Társaság a Szabadságjogokért* (Hungarian Civil Liberties Union – HCLU)'s request for access to a complaint submitted by an MP who suggested to restrict some drug-related parts of the Criminal Code. Because HCLU is active in the field drug policy advocacy, particularly focused on harm reduction, the NGO wanted to form an opinion on the particulars of the complaint before a decision was handed down. The Constitutional Court denied HCLU's request, explaining that a complaint pending before the Court could not be made available to uninvolved parties without the approval of its author. The Constitutional Court never consulted the MP.

According to the ECtHR's decision, to receive and impart information is a precondition of freedom of expression, since one cannot form a well-founded opinion without knowing the relevant facts. The ECtHR recognized for the first time that Article 10 of the

⁴ *Gaskin v. United Kingdom*, Judgment of 7 July 1989, § 52.

⁵ *Sîrbu and others v. Moldova*, Judgment of 15 June 2004, § 17

⁶ Decision by the ECtHR (Fifth Section), *Sdruženi Jihočeské Matky v. Czech Republic*, Application no. 19101/03.

⁷ See in particular judgments in the case of *Gaskin v. the United Kingdom*, 7 July 1989, and in the case *Guerra and Others v. Italy*, 19 February 1998.

⁸ See *McGinley and Egan v. United Kingdom*, 9 June 1998, §§ 85-86, Reports of Judgments and Decisions 1998-

⁹ *Application no. 37374/05, judgment* 14 April 2009

Convention guarantees the "freedom to receive information" held by public authorities. The ECtHR found that when the state has information of public interest in its possession, and is requested to disclose such information to a "watchdog" group - whether the press or NGOs that serve a watchdog role - it is obliged "not to impede the flow of information".¹⁰

The ECtHR notes that states are obliged to "eliminate barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities," and concludes that the Constitutional Court's control of the requested information amounted to a similar sort of "information monopoly."

The ECtHR found that the right of access to government information may be restricted at times to protect other rights, such as personal privacy, but any such restrictions must meet the three-part test set forth in Article 10(2): they need to be provided by law; serve one of the legitimate interests listed in Art. 10(2); and be necessary in a democratic society.

III. Specific comments

26. Venice Commission did not have for the purpose of consultation the report of the draft law.

27. The aim of this opinion is not to provide an expertise of the law on freedom to obtain information (2005) of the Republic of Azerbaijan. However, the subject that covers the law (2005) and this draft law are very much related to each other; as a consequence the present opinion is inevitable connected and must take in consideration some articles of the law in force "Freedom to obtain information" (2005)

Article 3. Definitions

3.0. The following definitions are used in this Law with the meanings specified:

3.0.1. information – any facts, opinions, knowledge, news or other sort of information produced or acquired as a result of any activities, irrespective of the date of producing, presentation form and classification;

3.0.2. private information or information on family life (hereinafter 'the private life') – any facts, opinions, knowledge on events, activities and circumstances directly or indirectly facilitating the identification of the person;

3.0.3. public information - any facts, opinions, knowledge produced or acquired during performance of duties provided by legislation or other legal acts;

3.0.4. information services – activities aimed at provision of any person filing request with the requested information;

3.0.5. information owner – state authorities, municipalities, legal entities irrespective of the ownership type, and individuals as determined by Article 9 hereof to guarantee the right of information access;

3.0.6. request for information – written or oral application to acquire the information;

3.0.7. information requester (hereinafter referred to as 'the requester') – legal entity or individual applying in writing or verbally to acquire the information;

3.0.8. information disclosure - distribution of information via mass media, official

¹⁰ Ibid, para.36.

publications, questionnaires and reference books; placement with Internet Information Resources; declaration at briefings, press-releases or conferences; disclosure during official or public events without any request for information;

Article 9. Information Owners

9.1. The below listed are considered the information owners:

9.1.1. state authorities and municipalities;

9.1.2. legal entities implementing the public functions, as well as private legal entities and individuals engaged in the spheres of education, healthcare, cultural and social sphere based on legal acts or contracts.

9.2. Information owner's obligations, established by the present Law, pertain to legal entities and individuals defined in Article 9.1.2. hereof only in relation to the information produced or acquired as a result of public duties carried out, or services provided in the spheres of education, healthcare, cultural and social sphere based on the legal acts or contracts.

28. As a general rule in Europe, the scope of bodies covered by freedom of information laws has been steadily increasing, with more recent laws applying to more bodies. The most recent laws apply to government and administration at the national, regional or local level; all executive and administrative bodies (save for those expressly excepted); all legislative and judicial bodies; state-owned or otherwise controlled companies, and private bodies that perform public functions or receive substantial government funding.

For example, the legislation of FYROM, the last country in the Europe to adopt a Freedom of Information law (2006), encompasses the government and administration at national and local level, but also legislative bodies and judicial authorities, private bodies (natural and legal persons) that perform public functions and all other bodies and institutions that are established by law (different independent Commissions, Regulatory bodies, etc.).

29. Venice Commission in the present draft law considers no principled reasons for treating judicial activity differently than the executive bodies in the Republic of Azerbaijan.

Many countries have increasingly recognized a public right of access to all or virtually all judicial information, including final and interim case orders, case files, criminal investigations and hearings. In some countries, the right is codified in the freedom of information law; in others, access is provided pursuant to constitutional principles of "transparency," "publicity" or "democratic accountability;" criminal and civil procedure codes; regulations; or simply the court's own conclusion that transparency builds public confidence and reduces opportunities for maladministration and corruption.

As a consequence the law on the freedom of information must also cover the administrative function of the courts. Such a practice is also in other countries like Bulgaria, Croatia, Albania, Denmark, Latvia, FYROM, Moldova, Montenegro, Netherlands, Romania, Serbia, Slovenia, Sweden.

30. The existing legal framework of the freedom to information in Azerbaijan does not delegate any power to a separate law on the freedom of information to the court activity.

On the contrary article 3 does not exclude the courts activity; public function also covers the courts activity.

IV. Conclusions

31. The administrative function of the courts in the Republic of Azerbaijan, according to the national law, must be covered by the freedom of information legislation. The provisions like way of obtaining information on the activity of the courts, the form of granting this information, basic requirements on maintenance access to the information, granting of information etc. must be viewed from the freedom to information law and its subsidiary legislation.

32. The important principles like the presence of the public and media in the judicial sessions and the publication of the court acts must be (if not) part of the respective criminal procedure code and civil procedure code of Azerbaijan.