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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

ON

**THE DRAFT LAW ON ADDITIONS TO
THE LAW ON THE STATUS OF MUNICIPALITIES
OF THE REPUBLIC OF AZERBAIJAN**

by

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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.*

1. Introduction

The European Charter of Local Self-Government (hereinafter referred to as “Charter”), as an international treaty with thirty-eight signatories and ratified by Azerbaijan on 15 April 2002 and entered into force on 1 August 2002, is aimed to set a standard for local self-government in order to overcome differences in implementing the principle of local self-government with basic premises such as: 1) the vital contribution of local self-government to democracy, effective administration and the decentralization of power; and 2) the need for local authorities to be democratically constituted and enjoy wide-ranging autonomy (“Charter”, Explanatory Report, C. Commentary on the Charter’s provisions, Preamble).

In this opinion, therefore, I will evaluate the proposed Additions to the Law of the Republic of Azerbaijan on Status of Municipalities of the Republic of Azerbaijan under the standard of “Charter.”

2. Article 22-1.

(1) Article 22-1, indicating the suspension of powers of members of the municipality, is redundant to some extent, because current Article 22 (Termination of terms of office of municipal member) already prescribes similar provision¹.

(2) Article 22-1 is problematic because the ‘suspension’ is auto-executed without any other action such as the votes of municipal meetings.

Under the current provisions, Articles 22-23, the term of a municipal member can be early terminated following a decision adopted by a majority of votes in a municipal meeting. However, the suspension of power of member is auto-executed by adopting the language of “shall be temporarily suspended” and without the decision of municipal meeting because Article 22-1 is not within the purview of Article 23 which stipulates the process of terms-termination.

According to Article 22-1, municipal member is only given the opportunity to verify reason after the suspense was auto-executed by the law.

Therefore, Article 22-1 raises the problem of excessive interference of national legislature with municipal member’s service and of encroaching on the spirit of self-government.

(3) Article 22-1 is problematic due to lack of procedural system to verify the reasons for absence. Although, Article 22-1 seems to provide opportunity to verify the reasons of absence by the wording “...suspended up to verification of its reasons,” there is no articulated process of verification.

(4) Suspension of member’s power as a sanction against absence set forth in Article 22-1 is likely to be an excessive sanction, and possibly violates the principle of proportionality. The principle of proportionality is regarded as one of non-written legal principles as clearly mentioned in the provision that “disqualification from the holding of local office should only be based on objective legal criteria and cases have been noted of firmly entrenched, non-written legal principles”(“Charter”, Explanatory Report, C. Commentary on the Charter’s provisions, Article 7 Paragraph 3). Therefore, Article 22-1 is likely to violate “Charter.”

¹ Article 22, 6) prescribes “The term of office of a municipal member may be terminated in advance if the member is absent from municipal meetings without sufficient reason for a period defined in the municipal charter”

3. Article 25-1.

(1) According to “Charter” Article 8 Paragraph 2, “administrative supervision should normally be confined to the question of the legality of local authority action and not its expediency” except for the delegated powers (“Charter,” Explanatory Report, C. Commentary on the Charter’s provisions, Article 8 Paragraph 2). Under the European standard, the supervision of the expediency of decisions is not permitted because it deals with the merits of acts which involve many different elements of acts beside the legality of the acts. This non-allowance of the supervision of the expediency of decisions is also true under the Korean standard (“Competence Dispute over Inspection of Autonomous Affairs of Local Government Case,” 21-1(B) KCCR 418, 2006 Hun-Ra 6, May 28, 2009).

(2) Under the Article 25-1, the supervisory authority is empowered to examine the content of the report after it is first reported to voters. Further, the supervisory authority informs a relevant body of the executive power if the **content of the report does not reflect reality** (*emphasis added*). Here, two questions arise; 1) the scope of the content to be examined, and 2) the meaning that the content of the report does not reflect reality.

First, Article 25-1 does not seem to specify the scope of the supervision when it prescribes “authority implementing administrative supervision over activity of municipalities shall examine content of the report.” Here, the report to be examined is on “work done including data on use of financial resources and municipal property.” Thus, all the work of a municipality is subject to the examination of a supervisory authority and it creates a problem. Unless the languages in the proposed Additions are narrowly defined, they may grant the wide discretion to the supervisory authority in interpreting and applying the law. Once granted, this wide discretion may enable the supervisory authority to conduct a complete supervision over all the activities of the municipality including expediency of acts.

Second, Non-reflection of reality is too vague and therefore needs to be clarified to avoid possible misinterpretation. As expediency deals with merits of acts, inexpedient work may be interpreted to be the deviation from reality. Given these inherent dangers of misinterpretation, we fear that the European as well as the Korean standard may be violated here.

(3) Article 25-1 also prescribes a penalty provision for violation of this provision. It says, in case of finding a violation by supervisory authority, “the Milli Majlis of the Republic of Azerbaijan, according to the part IV of Article 146 of the Constitution of the Republic of Azerbaijan, shall pass a decision on hearing of the report of the municipality.” It further says, “in case if the report of the municipality is considered by the Milli Majlis of the Republic of Azerbaijan as inadequate, the Central Election Commission of the Republic of Azerbaijan shall pass a decision of pre-term suspension of powers of members of the municipality and assignment of new elections.”

It is generally true that supervisory authority may impose an administrative sanction against a local self-government upon finding of a violation. However, the sanction of Article 25-1 seems to be such an extreme one that it may infringe on the spirit of “Charter” when it gives Parliament the power of pre-term suspension of the power of members of the municipality. Even in case of the annulment of local authority’s decision, which undoubtedly is a lighter sanction than the pre-term suspension of Article 25-1, it is often criticized by being the most severe measure under the European standard. (“Supervising and auditing of local authorities’ action”: report by the Steering Committee on Local and Regional Democracy on supervision and auditing of local authorities’ action, p. 47). It is also true in the Korean standard (“The Local Autonomy Act of Korea,” Article 169, “Correction of violation, inappropriate order and acts”). Article 25-1, when evaluated under these standards, deprives the municipality of a chance to correct any violation and thus possibly threatens the spirit of the autonomy of local government by dissolving the municipality.

4. Article 31-1.

Article 31-1 provides a mandatory pre-term dismissal of municipalities by prescribing “the Central Election Commission of the Republic of Azerbaijan **shall pass** (*emphasis added*) a decision on pre-term dismissal of municipalities” in certain condition, but I would like to recommend that this mandatory provision be changed to discretionary provision in order to respond to the problem derived from various forms and steps of municipality association and division.