



Strasbourg, 3 December 2009

Opinion no. 559 / 2009

CDL(2009)182*
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON

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

**Prepared in consultation with
The Directorate General of Democracy and Political Affairs
of the Council of Europe**

on the basis of comments by

**Mr Kong-Hyun LEE (Member, Republic of Korea)
Mr Jean-Claude SCHOLSEM (Substitute member, Belgium)**

I. Introduction

1. *Further to a request by the Secretary General of the Council of Europe, the Venice Commission adopted an opinion on the draft amendments to the Constitution of the Republic of Azerbaijan at its 78th Plenary Session (Venice, 13-14 March 2009). The draft amendments aimed, among other, at strengthening the local self-government in Azerbaijan through in particular, new Article 146.*

2. *By a letter dated 20 October 2009 the Azerbaijan authorities asked the Venice Commission to give an expert opinion on the draft Law on additions to the Law on the Status of Municipalities (CDL(2009)164) aimed at implementing the new Article 146 of the Constitution.*

3. *The present opinion is prepared in consultation with the Directorate of Democratic Institution (Council of Europe Directorate General of Democracy and Political Affairs) and is based on comments by Mr Kong Hyun Lee and Mr Jean-Claude Scholsem. It was adopted by the Commission at itsPlenary Session (Venice, ... 2009).*

II. Preliminary remarks

4. The European Charter of Local Self-Government rests on the premise that local self-government is the vital contribution to democracy and the decentralisation of power, and that local authorities need to be democratically constituted and to enjoy wide-ranging autonomy (Preamble).

5. Azerbaijan ratified the European Charter of Local Self-Government on 15 April 2002 and it entered into force in respect of Azerbaijan on 1 August 2002. In its Resolution 1305 (2002) on the honouring of obligations and commitments by Azerbaijan, the Parliamentary Assembly of the Council of Europe called upon the Azerbaijani authorities to proceed with adapting their legislation to the principles of the European Charter of Local Self-Government as well as to define and implement a genuine decentralisation strategy taking into consideration all the recommendations of Council of Europe Directorate General I and the Congress of Local and Regional Authorities of Europe (§ 5).

6. The draft additions to be incorporated in the existing Law on the Status of Municipalities aim at ensuring the implementation of the new constitutional principles on local self-government introduced by Article 146 of the Constitution, which reads as follows:

- I. *Municipalities are independent to exercise their power; nevertheless it does not exclude their responsibility before the citizens residing in the territory of the municipality. Regulations and order for selection of the municipality members, termination of their power, and regulation for early dissolution of municipalities shall be set forth by law.*
- II. *Independent execution by the municipalities of their powers may not damage the sovereignty of the Azerbaijani state.*
- III. *The state oversees the activities of municipalities.*
- IV. *Municipalities submit reports to the Milli Majlis of the Republic of Azerbaijan in cases and in the manner prescribed by law.*

- V. *Municipalities shall be ensured protection by the court, and ensured reimbursement of additional expenses caused by decisions of the state bodies.*

7. In its opinion on the draft amendments to the Constitution (CDL-AD(2009)010), the Venice Commission found that new paragraphs added to Article 146 raise a number of concerns and do not reflect the standards of the European Charter of Local Self-Government. It also considered that the adoption of *a range of legislative provisions* will be needed to implement the new constitutional principles.

III Comments on the draft additions to the Law on the Status of Municipalities

8. The reform proposed by the Draft Law on Additions to the Law on Status of Municipalities of the Republic of Azerbaijan (the Draft Law) is rather limited and include only three new articles.

Article 22-1. Suspension of powers of members of the municipality

9. Current Article 22 of the Law on the Status of Municipalities lays down the possible reasons for the termination of office of a municipal member (i.e. a municipal councillor). According to its § 6, the term of office of a municipal member may be terminated in advance « *if he/she is absent from municipal meetings without sufficient reason for a period defined in the municipal charter* ». The new draft Article 22-1 is intended to complement Article 22 § 6 by providing that “*in case the member of the municipality fails to attend municipal sessions in terms provided in the Statute of the municipality, his powers shall be temporarily suspended up to verification of its reasons*”.

10. While the law may provide for a duty to attend the council’s meetings and establish the possibility to dismiss a councillor in case of his/her prolonged unjustified absence, the current wording of the draft Article 22-1 may raise some concerns under Article 7 of the European Charter. First, the specific terms for the application of this provision are to be determined by the Statute of the municipality; This may result in a situation in which the conditions under which the powers of a municipal councillor can be suspended vary considerably from one municipality to another (e.g. the number of absences recorded in each municipality, what is considered to be a valid reason). Different circumstances may therefore lead to the same (eventually excessive) sanction, which may possibly go against the principle of proportionality. Equality of treatment of municipal councillors may also suffer.

11. Second, while the Draft Law provides for the verification of the reasons of absence, there is no clear and articulated procedure of verification. It is unclear whether current Article 23 according to which the termination of office of the municipal member shall be decided by a majority vote of the municipal council will also apply to the new Article 22-1 or not. In the latter case, it is not known which authority will be competent to decide upon this issue. Further, in order for the suspension to be truly “temporary”, the Draft Law should establish a reasonable deadline within which a decision on the suspension must be taken. Also, the intervention of the Court is a necessary element of the system, as provided for in the current Article 23 of the Law on the Status of Municipalities. This guarantee should be explicit also in the Draft Law. This would ensure the free exercise of the functions of local elected representatives in conformity with the European Charter (Article 7.1).

12. Finally, an interim sanction such as the suspension should not be applied *before* having assessed the reason of absence of the councillor.

Article 25-1. Report of municipalities

13. The new Article 25-1 of the Draft Law implements Article 146 § IV of the Constitution on the obligation of the municipalities to submit reports to *Milli Majlis*. It lays down the reporting procedure and establishes the control mechanism over its implementation. It does not seem to establish a *direct* obligation to report to the Parliament.

14. The municipalities are required to transmit their reports once a year “*to the authority implementing administrative supervision over activity of municipalities*”. In this regard, the Venice Commission considers that the supervisory authority should be indicated by Law, either directly (by including its name in the text of Article 25-1) or indirectly, by including the reference to another legal provision (if such a provision exists) where this “authority” is determined.

15. If the procedure laid down is not followed or the report does not reflect the reality, the competent authority will inform “*the relevant body of the executive power*”. In such a case, the bodies having the right of legislative initiative (according to Article 96 of the Constitution referred to in the text) shall submit the issue to the *Milli Majlis* which will decide on the report, according to Article 146 § IV of the Constitution. Should the *Milli Majlis* consider the report “*inadequate*”, the Central Electoral Commission shall pass a decision on the dissolution of the municipal council and shall call the new elections.

16. In view of the Commission, while the obligation of municipalities to draft and publish an annual report on municipal activities may be welcomed, the procedure foreseen raises several concerns.

17. The current wording is neither sufficiently clear nor precise. For example, a non-respect of the purely formal requirements relating to the procedure of the transmission of the report might result in a threat of dissolution. The scope of the content to be examined (i.e. “*on work done, including data on use of financial resources and municipal property*”) is too broad. Moreover, if the content of the report “*does not reflect the reality*” the supervisory authority will inform the relevant body of the executive power. Such a wide discretion given to the supervisory authority seems excessive as it may enable it to conduct a complete supervision over all the activities of the municipality. It is also not in line with the principle of proportionality guaranteed by Article 8 § 3 of the European Charter stating that “*the administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect*”.

18. As regards the role of the *Milli Majlis*, according to the new Article 25-1 it “*shall have a hearing of the report of the municipality*”. It is not clear whether the municipal council concerned will be given the possibility to participate in such a hearing, and how.

19. Eventually, the *Milli Majlis* seems to have no option but doing nothing or concluding that the report is “*inadequate*”, which would entail automatically the dissolution of the municipal council and the organisation of new elections. This seems an excessive sanction.

In its Recommendation R (98) 12 on supervision of local authorities' action, the Committee of Ministers of the Council of Europe - building on Articles 7 and 8 of the European Charter - requested member states to allow administrative sanctions concerning local authorities representatives (including dissolution) only exceptionally. Further, such administrative sanctions should be accompanied with the appropriate guarantees, in order to ensure their compatibility with the free exercise of local electoral mandate.

20. The aim of the reporting obligation should be to ensure that proper and accurate information is given to citizens, and to enhance democratic control. To reach this aim, the procedure should be targeted to the delivery of an improved report and not to a pre-term dissolution of the concerned municipal council. In this sense, the Draft Law should provide for the possibility to *address* the failures in the report such as, the opening of a dialogue with the concerned council and asking it to adjust or complete the information contained therein.

21. The Commission also holds that the Draft Law should expressly provide for the right of recourse to a judicial remedy for the concerned municipality, in order to secure free exercise of its powers and respect for the principles of local self-government, in line with Article 11 of the European Charter.

Article 31-1. Pre-term dismissal of the municipality

22. This new provision deals with the establishment of new municipalities following decisions to merge or split. It refers to the Law of the Republic of Azerbaijan On Joint Activity, Association, Division and Termination of Municipalities, which the Venice Commission did not have the possibility to assess.

23. In general, the dismissal of existing elected bodies and the call for new elections is a normal consequence of the establishment of new municipalities following a territorial change. If this is not provided clearly by the Law on Joint Activity, Association, Division and Termination of Municipalities, it seems justified to correct this by adding a new provision. However, it may be more appropriate to amend directly the Law on Joint Activity, Association, Division and Termination of Municipalities, and not the Law on the Status of Municipalities as envisaged.

24. Having said that, the Commission notes that this provision seems to contradict Article 12 providing that local self government shall be implemented by municipalities "*within territories approved by the legislature of the Republic of Azerbaijan*" and Article 13 of the Draft Law stating that "*determination or changes of borders of municipalities after municipalities have been established /.../ shall be defined /.../ in accordance with the law of the Republic of Azerbaijan*".

IV. Conclusion

25. The present Draft Law has been prepared following the amendments to Article 146 of the Constitution of the Republic of Azerbaijan on “Guarantees for Independence of Municipalities”. These amendments were discussed in the Venice Commission’s opinion CDL-AD(2009)010, where it has expressed a number of concerns. It has also pointed out though, that if appropriate legislation is adopted, some of the concerns expressed in the opinion would lose relevance.

26. In this sense, the Commission wishes to stress the importance of the Draft Law for ensuring the respect of the principle of local self-government, and guaranteeing the independence of municipalities in Azerbaijan in accordance with the European Charter.

27. The Commission finds however, that the Draft Law under examination raises certain issues which need to be addressed. In particular:

- the conditions under which the powers of a municipal councillor can be suspended and the verification procedure should be established in a clear and precise manner, and consistently with the principle that the dismissal of an elected representative is an exceptional measure to be applied only in case of serious failures;
- the supervisory authority should be determined by law, and the exact scope of this supervision clearly specified, in conformity with Article 8 of the European Charter;
- the reporting procedure should allow for the involvement of the concerned municipality, and the delivery of an improved report;
- all procedural guarantees, including the intervention of a court should be expressly guaranteed.

28. The Commission stands ready to assist the authorities of the Republic of Azerbaijan with respect to the further improvement of the Draft Law.