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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# DRAFT OPINION

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

**on the basis of comments by**
**Mr Viktor GUMI (Member, Albania)**
**Mr Oliver KASK (Member, Estonia)**

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## INTRODUCTION

*1. By letter dated 3 July 2009, addressed to the Secretary of the Venice Commission, Mr Ramiz Mehdiyev, the Head of the President's Administration of the Republic of Azerbaijan, requested an opinion on the draft Law "about obtaining information on activities of the courts of Azerbaijan".*

*2. The present opinion is prepared on the basis of comments by Messrs Viktor Gumi and Oliver Kask, who were invited by the Venice Commission to act as rapporteurs. Their comments are in documents CDL(2009)166 and 167 respectively.*

*3. This opinion was adopted at the … Plenary Session of the Venice Commission (Venice, … December 2009).*

## GENERAL REMARKS

4. Azerbaijan is a member state of a number of international organisations, a signatory to key international human rights instruments[1] and, as such, is bound by its commitments to respect human rights, including the right to information.

5. As a member state of the United Nations (hereinafter, the "UN") since 1992, Azerbaijan also joined the many states that have decided to abide by 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. The International Covenant on Civil and Political Rights, to which Azerbaijan acceded in 1992, also sets out in Article 19 the "*freedom to hold opinions*" and the freedom "*to seek, receive and impart information and ideas through any media and regardless of frontiers."*

7. Azerbaijan also ratified the UN's Convention on access to information, public participation in decision making and access to justice in environmental matters (the Aarhus Convention) in April 2001 and the European Convention on Human Rights in 2002, Article 10 of which protects the freedom of expression and information.

8. Furthermore, the Constitution of Azerbaijan, in its Article 50.1, specifically guarantees the freedom of information *"Everyone is free to look for, acquire, transfer, prepare and distribute information".* The Constitution also provides for the direct application in domestic law of international instruments, which include the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The Constitution provides, in its Article 148.2, that *"International agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of [the] legislative system of the Azerbaijan Republic".* Article 151 provides that *"Whenever there is disagreement between normative-legal acts in [the] 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".*

[1] European Convention on Human Rights (2001); Convention on the Rights of the Child (1992); International Covenant on Civil and Political Rights (1992); International Covenant on Economic, Social and Cultural Rights (1992).

## COUNCIL OF EUROPE STANDARDS ON THE RIGHT OF ACCESS TO OFFICIAL DOCUMENTS

### Instruments

9. The Council of Europe has dealt with access to public information in a number of its instruments, the most important of which are the European Convention on Human Rights, Articles 6.1 and 10 (including the relevant case-law of the European Court of Human Rights) and the Convention for the protection of individuals with regard to automatic processing of personal data (1981).

10. The right of access to official documents received recognition through Recommendation No. R(81)19 of the Committee of Ministers to member states on access to information held by public authorities. This Recommendation was followed by the adoption of the Declaration of the Committee of Ministers on freedom of expression and information, one year later in April of 1982[2]. Many other legal instruments were drafted since then and in 2002, the Committee of Ministers adopted Recommendation Rec(2002)2 on access to public documents.

11. However, the latest instrument on this issue is the Convention on access to official documents[3], which was adopted by the Committee of Ministers in November 2008 and opened for signature in May 2009. This Convention is based on Recommendation Rec(2002)2 and contains provisions that set a minimum standard for legislation and practice in member states. It refers, in particular, to Article 19 of the Universal Declaration of Human Rights, the UN's Convention on access to information, public participation in decision-making and access to justice in environmental matters and the Council of Europe's Convention for the protection of individuals with regard to automatic processing of personal data.

12. The Convention on access to official documents was signed, but not yet ratified by Azerbaijan, nor has it entered into force[4]. Once it does, it will be the first internationally binding instrument to recognise a general right of access to official documents held by public authorities. It could therefore be considered to be the most advanced instrument in this area internationally. This opinion will, therefore, refer to the fundamental principles contained in this Convention.

### Case-law

13. It is a common European practice to regulate the access to public information in a special law, although a special law on the access to the information on courts is unusual. The present opinion of the Venice Commission takes into account the case-law of the European Court of Human Rights and the conventions listed above.

14. The European Convention on Human Rights recognises the right to receive and impart information without interference by public authorities under the fundamental right to freedom of expression. The European Court of Human Rights makes a distinction between two components (1) public and media access and (2) individual access to information, including the right of access to documents by those individuals who have a particular interest in obtaining the information.

15. On several occasions, the European Court of Human Rights has recognised "*the right of the public to be properly informed*" and "*the right to receive information*", but until recently the

[2] Adopted by the Committee of Ministers on 29 April 1982, at its 70th Session.
[3] For further information on this Convention, please see Mr Viktor Gumi's comments (CDL(2009)166).
[4] On 2 December 2009 there were 11 signatures and 1 ratification. The Convention requires 10 ratifications to enter into force.

European Court of Human Rights has been very reluctant to derive a right to have access to public or administrative documents from Article 10 ECHR. In the cases of *Leander v. Sweden*[5], *Gaskin v. United Kingdom*[6] and *Sîrbu v. Moldova*[7], the European Court of Human Rights recognised "*that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest*". The European Court of Human Rights, however, was of the opinion that the freedom to receive information basically prohibits a government from restricting a person's access to information that others wish or may be willing to impart to him or her. It was decided in these cases that the freedom to receive information, as guaranteed by Article 10 ECHR, could not be construed as imposing positive obligations on a state to disseminate information or to disclose information to the public.

16. In 2006[8], the European Court of Human Rights applied Article 10 ECHR for the first time 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 in the Czech Republic. Although the European Court of Human Rights found no breach of Article 10 ECHR, it explicitly recognised that the refusal by the authorities to grant access to certain documents represented an interference with the right to receive information guaranteed by Article 10 ECHR, which means that the refusal had to meet the conditions set forth in Article 10.2 ECHR, i.e. it must be prescribed by law, have a legitimate aim and must be necessary in a democratic society.

17. In addition, the European Court of Human Rights has recognised a positive obligation to provide, both proactively and upon request, information related to the enjoyment and protection of other rights in the European Convention on Human Rights, such as the right for the respect to private and family life[9]. The right to a fair trial guaranteed by Article 6 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*" under Article 6 ECHR. On the other hand, the denial of access to information that could assist an individual in establishing a claim for damages could potentially infringe Article 6 ECHR[10].

18. The recent case of *Társaság a Szabadságjogokért v. Hungary*[11] constitutes a landmark decision on the relation between freedom to information and the European Convention on Human Rights. In 2004, the Constitutional Court of Hungary denied the *Társaság a Szabadságjogokért*'s (Hungarian Civil Liberties Union – HCLU) request for access to a complaint lodged by a Member of Parliament, who requested that amendments made to some drug-related offences in the Criminal Code be scrutinised. As HCLU is active in the field of drug policy advocacy, focusing particularly 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 Member of Parliament.

19. According to the European Court of Human Rights' decision, to receive and impart information is a precondition of the freedom of expression, since one cannot form a well-

[5] ECtHR, Leander v. Sweden judgment of 26 March 1987, paragraph 74.
[6] ECtHR, Gaskin v. United Kingdom judgment of 7 July 1989, paragraph 52.
[7] ECtHR, Sîrbu and others v. Moldova judgment of 15 June 2004, paragraph 17.
[8] ECtHR, Decision (Fifth Section), Sdruženi Jihočeské Matky v. Czech Republic, Application no. 19101/03.
[9] See in particular ECtHR, Gaskin v. the United Kingdom of 7 July 1989 and ECtHR, Guerra and Others v. Italy judgment of 19 February 1998.
[10] ECtHR, McGinley and Egan v. United Kingdom judgment of 9 June 1998, paragraphs 85-86, Reports of Judgments and Decisions 1998-
[11] ECtHR, judgment of 14 April 2009.

founded opinion without knowing the relevant facts. The European Court of Human Rights recognised, for the first time, that Article 10 ECHR guarantees the "*freedom to receive information*" held by public authorities. The European Court of Human Rights 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*".[12]

20. The European Court of Human Rights noted that states were 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 concluded that the Constitutional Court's control of the requested information amounted to a similar sort of "*information monopoly"*.

21. The European Court of Human Rights 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 ECHR, i.e. they need to be provided by law; serve one of the legitimate interests listed in Article 10.2 ECHR and be necessary in a democratic society.

## DRAFT LAW ABOUT OBTAINING INFORMATION ON ACTIVITIES OF THE COURTS

### In general

22. The draft Law *"about obtaining information on activities of the courts of Azerbaijan"* (hereinafter, the "draft Law") is not very long and the provisions dealing with access to information on courts' activities make reference, in many parts, to other laws (e.g. Articles 11.2, 16, 17.4, 22 and 24). The draft Law is therefore merely one of many laws which govern the access to information in Azerbaijan. For instance, Article 2.1 of the draft Law sets out that obtaining information on activities of the courts is also governed by the Law *"about providing information"* and other legal acts. Rules on the public accessibility of the procedure are provided by laws that regulate the court procedure, whereas the access *inter alia* to court buildings are provided by acts that regulate the internal activities of the courts (Article 11.2) and access to information on the activities of courts held in archives is regulated by a special law on archives (Article 16).

23. There seem to be no reasons for treating judicial activities differently from the activities of the executive in Azerbaijan. Many countries have increasingly recognised a public right of access to all or nearly all judicial information, including final and interim case files on criminal investigations and hearings. In some countries, the right is codified in the freedom of information law; in others, access is provided pursuant to the constitutional principles of *"transparency", "publicity"* or *"democratic accountability"* in criminal or civil procedure codes; in regulations or simply in the court's own conclusions that transparency builds public confidence and reduces instances of maladministration and corruption.

24. For this reason, the draft Law should also cover administrative functions of the courts, a practice that is widely followed in Albania, Bulgaria, Croatia, Denmark, Latvia, Moldova, Montenegro, Netherlands, Romania, Serbia, Slovenia, Sweden and "The former Yugoslav Republic of Macedonia".

25. It is of course up to the legislator to decide whether to include all the issues pertaining to access to information on courts' activities into one general law on access to public information or to have a separate law on that matter. However, it should be noted that, in most countries,

[12] *Ibid*, paragraph 36.

the question of restricting access to proceedings is often dealt with by the law on court procedure. Therefore, in order to avoid discrepancies and confusion arising between the various laws on the issue, **the bringing together of all laws dealing with this issue into one single law on access to information might be considered.**

**Article 3**

26. The provision on free of charge access to information in Article 18.5 should be moved to this Article, as it should be a part of the main principles of obtaining information on activities of courts.

**Article 5**

27. With respect to Article 5.0.1, it is important to underline that there are trials that are closed to the public, including the media. The courts should fulfil their duty and find a balance between protecting the conflicting rights of human dignity, privacy, reputation and presumption of innocence on the one hand and the freedom of imparting information on the other. For instance, publishing pictures, identification, or records of convicted minors must be prohibited at all times.

28. In this paragraph, special attention should be paid to the translation of the word "participation". This might be due to a mistranslation, but the public cannot participate in a judicial session in the same way as parties to a trial can.

**Article 9**

29. Although access to information seems to be covered by a number of laws in Azerbaijan, the draft Law still manages to cover a large area, the most important of which is the obligation, under Article 9.1, to create websites to publish information on courts' activities.

30. Under Article 9.2 of the draft Law, this duty is imposed on all courts, including the Judicial Legal Council Secretariat and the executive. **There seems to be no intention of creating a centralised and searchable webpage and those looking for information on courts' activities will probably have to search for the relevant webpages on their own. This might be reconsidered.**

31. Also, Article 9.2 *("… period of placing [the] information …")* seen in conjunction with Article 13.1.2.4, gives courts a scope of appreciation to decide for how long court judgments are to remain on the Internet. **This is probably not the draft Law's intention, as the case-law should remain available on the Internet indefinitely.**

32. On the whole, this provision seems to be in line with Articles 9 and 10 of the Council of Europe's Convention on access to official documents, which includes the duty to inform the public of its right of access to official documents and to make public official documents available to the public.

**Article 11**

33. According to Article 11.2 of the draft Law, the rule for persons to enter court buildings and court sitting halls is defined by acts which regulate internal activities of the courts. Although the draft Law does not explain the nature of such acts (whether they are adopted by Parliament or not), it could be understood that such acts are adopted by courts. **These norms restrain the right to a public hearing (Article 6.1 ECHR) and such limitations must only stem from laws that are adopted by Parliament.**

**Article 12**

34. Article 12.1 of the draft Law states that second, third level or Constitutional Court judgments are to be published no later than one month from the day they have been handed down. With respect to judgments of cassation and appeal courts, whether or not they quash and set aside judgments of lower instance courts, should also be published. It is not clear whether *"court statements"* have a different meaning from *"court acts"* (judgments) in these provisions (see Article 216.1) of the Civil Procedure Code, it seems however not to be the case.

35. The Supreme Court makes decisions in civil proceedings, (it is not clear whether they are considered *"statements"* under Article 14.1). **Nevertheless, the aim of providing different deadlines for publishing court decisions should be clarified.**

**Article 13**

36. This Article provides a list of information that is to be published on the Internet and covers all the areas of a court's activities.

37. Under Article 13.2 of the draft Law, the Supreme Court must publish texts of draft laws presented to the *Milli Majlis* (Parliament) for discussion on legislative initiative on its website. It should be the legislator's task to guarantee access to the legislative process and ensure that draft laws are published, unless this concerns draft laws that are proposed by the Supreme Court.

38. According to Article 13.4.2.3 of the draft Law, the Judicial Legal Council Secretariat must publish on its webpage, *inter alia*, information on results of written and oral examinations for the selection of nominees to the position of judges, appraisals of nominees after long-term trainings and of final interviews. It has to be noted that information on the depth of the legal knowledge of judges or candidates for judges should be of limited access to avoid unwanted impacts on the independence of judges after they enter into office. For this reason, the Venice Commission considers that the draft Law should be interpreted in such a way as to **only make information on the results of examinations and interviews available to indicate a pass or a fail, without providing further details.**

39. Furthermore, **this Article is too long and might be divided into three separate articles**. This Article includes the Judicial Legal Council Secretariat, which is not a court *per se* (see definitions). This fact might need to be reflected in the title of the draft Law and in the respective articles mentioning this body.

**Article 14**

40. This Article provides that court judgments are also published on the Internet, but does not foresee a database to cover all courts (each court has to have its judgments published on its own webpage). Once again, as for Article 9.1 above, **the creation of a common database containing the judgments of all courts should be encouraged.** This would contribute to increasing the knowledge of legal practitioners by providing easy access to existing case-law. This would also improve the management of court statistics and would promote the consistency of the case-law of lower level courts.

41. It is difficult to assess a time-schedule for the publishing of court judgments *via* the Internet. Article 14.1 of the draft Law states that verdicts and other *"court statements*" should be placed on the corresponding official website from the date of enforcement (it seems that this applies to verdicts) and within 3 days of the date of enforcement (whereas this applies to other court statements). In exceptional situations, resolutions on especially difficult cases are placed on the corresponding official website within 10 days from the date of enforcement.

42. Article 14.4 sets out exceptions to the publication on the Internet of *"court statements"* (judgments). As there are no other provisions stating otherwise, it seems that the decision on whether to place a judgment on the Internet in whole or in part is made by the court (led by its chairman) and not by the judge deciding the case.

**Article 19**

43. Article 19.1.5 of the draft Law provides that the information on courts' activities is not given if the granting of information does not sufficiently provide for the safety of the parties to the proceedings. The Council of Europe's Convention on access to official documents provides that certain limitations may be brought, 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, equality 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. **Therefore, the enforcement of this provision should be carefully monitored in order to guarantee the efficiency of the draft Law, as the safety of participants to proceedings may be handled in very different ways and the provision provides a wide margin of appreciation.**

44. According to Article 19.1.7, no information is provided under an inquiry if it brings with it the task of interpreting the *"rule of law"*. **It is important to underline that it is not the courts' task to interpret laws or give legal advice without any formal complaint being made or proceedings being instituted. This task is only fulfilled by courts through decision-making.**

**Articles 20**

45. This Article on the mutual relationship between courts and mass media does not seem to have any practical or regulatory effect as it is too declarative. Also, the same problem as mentioned for Article 13 of the draft Law, persists with the possibility for the representatives of mass media to take part in the examinations of candidates for judges (Article 20.2.4). **This paragraph should be partially deleted so as to keep the exam proceedings closed.**

46. Principle 14 of Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings, provides that *"Live reporting or recordings by the media in court rooms should not be possible unless and as far as expressly permitted by law or the competent judicial authorities. Such reporting should be authorised only where it does not bear a serious risk of undue influence on victims, witnesses, parties to criminal proceedings, juries or judges."*

47. All the information provided to the media by the court should be imparted in a transparent manner and without discrimination. The principle of public proceedings means that citizens and the media should have access to courtrooms in which trials are held. However, there is a risk that the presence of TV cameras in the courtrooms could disturb the proceedings and influence the behaviour of the parties involved in the trial.

48. Where TV coverage of court proceedings is allowed, fixed cameras should be used and it should be possible for the presiding judge to decide on the conditions under which recording may be allowed. Presiding judges should also have the power to interrupt the recording at any time. Similarly, when making decisions, the opinion of the other parties involved should be taken into account.

**Articles 21**

49. This Article states that the chairman of the court, chief, Judicial Legal Council Secretariat, proper executive body or other persons that has been given authority by the chairman is the official representative of the court or Judicial Legal Council Secretariat or proper executive body in relationship with editorial offices of the mass media.

50. The aim of this Article could be understood as being that persons who have not received an authorisation by the chairman are not allowed to be in contact with journalists. This would limit the publicity of courts' activities. Furthermore, it should be noted that the chairman of the court has no authority to intervene in the decision-making process and statements of courts are public.

**Article 23**

51. The draft Law rightly provides that the duties arising for courts therefrom should be controlled by the chairman of the court (Article 23.1), who has the authority to organise the administration of the court. However, the question of access to proceedings or court sessions is not a matter which could be decided by the chairman of the court or the court administration. **The control over the implementation of the draft Law should not lead to the supervision by the chairman of the court over the access to proceedings or court sessions in individual cases. A refusal to grant information on the basis of Article 19.1.5 may only be decided by judges in individual cases.**

**CONCLUSION**

52. On the whole, the draft Law seems to be in line with European standards, even if some parts are mostly declarative, which does not in itself guarantee the public access to information. Much will therefore depend on its implementation.

53. The Venice Commission would like to make, *inter alia*, the following recommendations:

- all laws on this topic could be united into one general law on access to public information, which is the practice in most Council of Europe member states;
- important principles such as the presence of the public and mass media in court proceedings and the publication of court acts could be included (if not already) in codes of criminal and civil procedure;
- Articles 9 and 14: to consider setting up a centralised webpage for all courts that will eventually bring together the case-law of all courts of Azerbaijan. The case-law, once published on the Internet should remain available indefinitely;
- Article 11: "*acts that regulate internal activities of the courts*" which restrain the right of access to public hearings should stem from laws that are adopted by Parliament (the draft Law does not specify whether these acts are adopted by the courts or by Parliament);
- Article 12: to clarify the existence of different deadlines for publishing court decisions;
- Article 13: information on the results of examinations and interviews should only provide whether the candidate has passed or failed and no further details should be given. This Article could be divided into three separate provisions to make it more manageable;
- Article 14: decisions regarding the publication of personal data in the "*statements of courts*" should be left to the judge(s) deciding the case. This would also give the participants to a case the opportunity to object to the publication of the decision;
- Article 19: the enforcement of this provision, which sets out that information on the courts' activities need not be given if no sufficient safeguards are provided to the parties

to the proceedings, should be carefully monitored in order to guarantee the efficiency of the law;

- Article 20.2.4: with respect to mass media taking part in the examination of candidates for judges should be partially deleted so as to keep the exam proceedings closed;
- Article 23: the control over the implementation of the draft Law should not lead to the supervision by the chairman of the court over the access to proceedings or court sessions in individual cases. A refusal to grant information on the basis of Article 19.1.5 may only be decided by judges in individual cases.

54. The Venice Commission remains at the disposal of the authorities of Azerbaijan for any further assistance in this matter.