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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION  
ON THE DRAFT LAW  
ON AMENDMENTS TO THE LAW ON POLITICAL PARTIES  
OF THE REPUBLIC OF AZERBAIJAN**

**On the basis of comments by**

**Ms Paloma Biglino Campos (Member, Spain)**  
**Mr James Hamilton (Substitute member, Ireland)**  
**Mr Nicolae Esanu (Member, Moldova)**

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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.*

## I. Introduction

1. On 26 May 2011 the Venice Commission was requested by the authorities of Azerbaijan to prepare an opinion on the draft amendments to the law on political parties prepared by the Administration of the President of the Republic of Azerbaijan (CDL-REF (2011) 059) hereinafter, the “draft law”).
2. This draft opinion is based on an unofficial English translation of the draft law provided by the authorities of Azerbaijan. This draft opinion cannot guarantee the accuracy of the translation reviewed, including the numbering of articles, clauses, and sub-clauses. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.
3. The draft law amends the law on political parties (CDL-REF(2011)035) which has been subject to an opinion of the Venice Commission in 2004 (CDL-AD (2004)025). A number of the new amendments are assessed in the light of the recommendations made in 2004.
4. The text of the opinion is based on the comments provided by Mrs Paloma Biglino Campos (Member, Spain) and Messrs Nicolae Esanu (Member, Moldova) and James Hamilton (Substitute Member, Ireland).
5. The opinion assesses the draft law in the light of the relevant international and regional instruments and standards, in particular, the International Covenant on Civil and Political Rights which provides for the freedom of association, as the foundation of political parties<sup>1</sup>, the European Convention on Human Rights which also guarantees the right to associate<sup>2</sup>, the extensive case-law of the European Court of Human Rights which establishes important benchmarks in this field, including on the question of financing of political parties.
6. This opinion should also be read in conjunction with the following documents:
  - a. CDL-AD(2004)025 Opinion on the Law on Political Parties of the Republic of Azerbaijan adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004);
  - b. CDL-INF(2000)001 Guidelines on prohibition and dissolution of political parties and analogous measures, adopted by the Venice Commission at its 41st plenary session (Venice, 10 – 11 December, 1999);
  - c. CDL-INF(2001)008 Guidelines and Report on the Financing of Political Parties adopted by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001);

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<sup>1</sup> Article 21 of the International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>2</sup> Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953).

- d. CDL-AD(2004)007 REV Guidelines on Legislation on Political Parties: Some Specific Issues, adopted by the Venice Commission at its 58<sup>th</sup> Plenary Session (Venice, 12-13 March 2004);
- e. CDL-AD(2004)004 Report on the Establishment, Organisation and Activities of Political Parties on the basis of the replies to the questionnaire on the establishment, organisation and activities of political parties adopted by the Venice Commission at its 57th Plenary Session (12-13 December 2003);
- f. CDL-AD(2006)014 Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources (amicus curiae opinion for the European Court of Human Rights) adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006);
- g. CDL-AD(2009)021 Code of Good Practice in the field of Political Parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008) and Explanatory Report adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009);
- h. CDL-AD (2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission - Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15-16 October 2010).

The opinion also takes into account the work of the OSCE/ODIHR Core Group of Experts on Political Parties.

- 7. On 14 – 15 October 2011 representatives of the authorities of Azerbaijan held an exchange of views with the rapporteurs of the Venice Commission on the first version of the draft law. The meeting was constructive and fruitful since the representatives of the authorities informed the rapporteurs that a number of preliminary observations would be taken into account. The examined text of the draft law indeed introduces a number of recommendations discussed during the meeting on 15 October.
- 8. *This opinion was adopted by the Venice Commission at its...<sup>th</sup> Plenary Session (Venice, December 2011).*

## II. General remarks

- 9. The Venice Commission has already adopted an opinion on the Law on political parties in the Republic of Azerbaijan in 2004. The conclusion of the Commission in its 2004 was as follows:

*“On the whole the law on political parties is a good one and is not over-prescriptive. The major concern is whether the conditions in Article 4 which require a party not to perpetrate acts contrary to the constitutional order could be used to refuse recognition to or to suppress a party which sought fundamental constitutional change by peaceful means. A second concern is whether the provisions of the law relating to corrupt donations to political parties are likely to be effective. Membership in political*

*parties could be an issue to be further considered (a possibility for non-nationals to participate in the activities of political parties). Finally, the question arises whether the provisions relating to donations discriminate against trade unions by comparison with employers and their organisations.*<sup>3</sup>

10. These problems identified in the Venice Commission's opinion in 2004 have not been or have been addressed only partially in the amendments to the law on political parties.
11. On the other hand, the draft law improves some of the articles of the existing law, notably in the field of financing of political parties. The draft creates a new public funding system, aimed at ensuring equal opportunity between political parties and to strengthen political pluralism. The draft also incorporates new guarantees of transparency and accountability in political parties finances.

### **III. Comments on the text of the Draft Law**

#### **1. Basic principles**

12. The first amendment proposes to amend the definition of political party in Article 1. The principal change effected by the amendment appears to be to define political parties as non-commercial legal persons. Otherwise, there are no changes of substance effected by the amendment. The proposed amendment does not deal with the criticism made in the earlier Venice Commission report of the law as excluding both foreign citizens and stateless persons from membership of political parties. In that opinion the Venice Commission drew attention to its statement in its "Guidelines on Legislation on Political Parties: Some Specific Issues" (CDL-AD(2004)007REV) adopted at its 58<sup>th</sup> Plenary Session (Venice, 12-13 March 2004) to the effect that general exclusion of foreign citizens and stateless persons from membership of political parties is not justified. According to the guidelines:

*"foreign citizens and stateless persons should to some extent be permitted to participate in the political life of their country of residence, at least as far as they can take part in elections. At the very least, the country of residence should make membership in political parties possible for these persons. In dealing with issues of the participation of foreign nationals in the public life of their country of residence, the member states are invited to apply to the largest possible extent the provisions of the European Convention on the Participation of Foreigners in Public Life at Local Level. Additional measures further extending the guarantees provided for by the provision of this convention would be most welcomed".<sup>4</sup>*

The rapporteurs took note of the explanation of the representatives of the authorities that such participation was not possible because of the specific geographical position of the country, however, they are of opinion that Azerbaijan could continue its work aimed at finding a possible way of meeting this recommendation.

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<sup>3</sup> CDL-AD(2004)025 Opinion on the Law on Political Parties of the Republic of Azerbaijan adopted by the Venice Commission at its 59<sup>th</sup> Plenary Session (Venice, 18-19 June 2004), paragraph 27.

<sup>4</sup> CDL-AD(2004)007 REV Guidelines on Legislation on Political Parties: Some Specific Issues, adopted by the Venice Commission at its 58<sup>th</sup> Plenary Session (Venice, 12-13 March 2004), item "H".

13. It is proposed to add to Article 3 a new second paragraph stating the following:

*“Activity of political parties may not be directed to restriction of fundamental human citizens’ rights and freedoms of their members enshrined in the Constitution of the Republic of Azerbaijan, international agreements which the Republic of Azerbaijan is a party to and other legislative acts of the Republic of Azerbaijan.”*

14. In so far as the proposed amendments to Article 3 prohibit political parties from directing their activities to the restriction of fundamental human and citizens’ rights of their members then it would seem that such a provision is justified and should be welcomed. The Code of Good Practice in the field of Political Parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008) states that:

*“Political parties are major actors in any democratic society, hence they enjoy the benefits of the guarantees of those principles by the State and, accordingly, they must also respect and promote these very same principles. The latter should be taken into account in the parties’ organisation, functioning and financing”* and

*“Political parties must comply with the values expressed by international rules on the exercise of civil and political rights (UN Covenant and the ECHR). Parties must respect the Constitution and the law”.<sup>5</sup>*

15. A number of changes are proposed to Article 4. The original provision seems designed to exclude the functioning of political parties within public organisations, presumably in order to prevent public bodies, which should operate on the basis of the equal treatment of all citizens alike, from becoming the fiefdom of any one political party. No doubt this provision was influenced by the experience of communist states pre-1989. It would seem that the new amendment to Article 4.1 is aimed at prohibiting political parties to have their offices in any state buildings. If this is the right interpretation of the new change it should be welcomed.

16. A further amendment to Article 4 (paragraph 3) proposes to increase the minimum membership of a political party which wishes to be registered from 1,000 to 5,000. In its previous opinion the Venice Commission expressed the view that a figure of 1,000 in a country of a population of eight million was a reasonable number. The new threshold seems to be formidably high and put a burden on citizens trying to exercise their rights under Article 11 of the ECHR which is potentially restrictive and as such would be disproportionate and not necessary in a democratic society. It seems a large threshold particularly for a new party.

17. There is also a proposed change to the Article 4.4, which until now prohibits the establishment and functioning of political parties which aim to overthrow or change forcibly the constitutional order of the republic, or to violate its territorial integrity, to advocate war, violence or brutality, to instigate racial, national or religious hatred, to perpetrate other acts contradictory to the constitutional order of the republic and incompatible with its international legal obligations. This provision has been recast somewhat. The principal change appears

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<sup>5</sup> See CDL-AD (2008) 021 Code of Good Practice in the field of Political Parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008) and Explanatory Report adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), part 2, par 15.

to be to remove the word “forcibly” from the sentence, so that it now appears that any advocacy in the change of the constitutional order will be prohibited. This provision seems to be problematic in the light of previous recommendations of the Venice Commission.

18. A second change to Article 4.4 appears to be to add a specific provision preventing advocacy for a change in the secular nature of the Republic.
19. Article 11.2 of the ECHR that no restrictions shall be placed on the exercise of the freedom of assembly and association “*other than 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*”.
20. In its 2004 opinion the Venice Commission was critical of the existing Article and the proposed amendments do nothing to address that criticism and indeed they exacerbate the problem. To reiterate the basis of the earlier criticism, the Commission previously stated the following concerning the jurisprudence of the European Court of Human Rights:

*“The court has on many occasions made clear that the right to freedom of expression includes the right to advocate ideas that offend, shock or disturb. In particular the court has also held that political parties are entitled to campaign in favour of a change in the legislation or in the legal or constitutional structures of the state subject to two conditions (1) that the methods employed for this purpose must in all respects be legal and democratic and (2) the change proposed must itself be compatible with fundamental democratic principles ... the Court held that the fact that a particular political proposal was incompatible with the existing principles and structures of the state did not mean it was contrary to democratic principles. It was of the essence of democracy to permit the advocacy and discussion of different political proposals, even those which would alter the existing structures of a state. (See Socialist Party of Turkey (STP) and Others v Turkey, No. 26482/95, 12 November 2003.)”*

21. It does not seem that the proposed Azerbaijani law is in compliance with these principles. The draft law would prohibit the establishment of a party which campaigned for a peaceful change in the constitutional order.

## **2. Rules relevant to internal organisation of political parties**

22. Article 5 deals with the manner in which political parties are to carry out their functions. In its previous opinion the Commission did not see any problems with this provision. The amendments to the provision are not of a fundamental nature and do not appear to give rise to any problems.
23. Article 6 deals with the charter of a political party. The provisions set out in general terms what that charter (which is in effect a constitution for the party) should contain. Again, the proposed changes seem to be of a technical nature and are not objectionable.
24. Article 7 deals with the name of a political party. Again, the proposed changes to this article are minor and technical and give rise to no objection.

25. Article 8, which deals with membership of a political party, proposes to add a provision that no-one may be forced to join a political party or remain in its membership. This is obviously an acceptable provision. It is perhaps noteworthy that Article 8 contains a prohibition on various persons being members of a political party, including the president, the judiciary, the ombudsman, the military, the prosecutors, much of the civil service, the state-owned press and religious figures. In its previous opinion the Commission commented that there was scope for argument about the precise content of such a list, remarked that any such rule necessarily trenched on the rights of the person affected to take part in political life, but nonetheless concluded that there were offices where the necessity for impartiality was such that they could not properly be filled by persons who at the same time played an active part in politics. The Commission believed that to be the case for the judiciary and the ombudsman, and also thought that a strong case could be made for the prohibition of involvement by senior prosecutors, and that these considerations applied with particular force in an emerging democracy such as Azerbaijan.
26. Another issue is membership of non-nationals in political parties. Although the *Guidelines of Political Party Regulation* by OSCE/ODHIR and Venice Commission<sup>6</sup> recognise that citizenship is a reasonable restriction on political participation rights, they also state that human rights instruments tend to provide foreign nationals with the same general rights protection as their citizens.
27. Article 9 deals with the rights of members of a political party. There are some technical changes. There are new provisions stating that members of political parties shall be entitled to elect or be elected to its leading bodies, obtain information about the activities of the party and its leading bodies, and lodge appeals against decisions of its leading bodies. This seems unexceptionable.
28. Article 10 deals with the expression of will in the bodies of political parties. The existing Article 10 merely provides that the manner of expression of will of a political party is to be set forth in its charter. It is now to be provided that a congress should be held at least once every five years and that the congress would be the supreme leading body of the party. The congress would adopt the charter and programme of the party as well as amendments to it, elect its other leading bodies, and adopt decisions on reorganisation and dissolution of a party. It would seem that there is no particular problem with this form of organisation as it is the way in which most democratic political parties would operate. An argument could, however, be made that it is up to parties to regulate their own precise forms of organisation provided that they are organised on democratic lines and that states should not be unduly prescriptive in this respect.

### **3. Rights and duties of parties and their relations with the State**

29. Article 12 deals with the rights and duties of political parties. There are a number of changes but they appear to be technical and do not give rise to any obvious concerns. Article 12.1.4 provides that the parties can submit proposals for elaboration of draft normative acts - it is a positive development, however, it remains to be seen how it is implemented in practice.
30. Article 13 deals with the rights and obligations of the state *vis-à-vis* political parties. This is being amended to remove the obligation on the state to provide security for the leading bodies of parties, and also to require the state to render financial assistance to political

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<sup>6</sup> See document CDL-AD (2010)024.

parties through the allocation of funds from the state budget. These provisions do not seem to give rise to any difficulty.

31. There are a number of changes proposed to Article 14 of the law which deals with the registration of parties.
32. Firstly, the existing detailed provisions concerning documents to be lodged on registration, and the signatures on applications for registration, are removed from this Article and will now be contained in a separate law "On State Registration and State Registry of Legal Persons". This law was not sent to the Venice Commission so it is not possible to comment on this change.
33. Secondly, it is now proposed to add a new provision as follows: "*14.2 Political parties which have not undergone state registration may not speak in public or act on behalf of political party which has undergone state registration.*" It is not clear why a given association of citizens which aspires to become a political party would speak on behalf of an existing party.
34. Article 15 is to be removed. It provided for criminal, administrative, financial and other liability for breach of the legislation. It has been replaced by a new Article 22 which provides for "liability" for breach of the law but does not specify what this entails or who may seek to enforce the law.

#### **4. Dissolution of political parties**

35. Article 16 deals with the liquidation and suppression of political parties. Firstly, it provides for voluntary liquidation. Secondly, it provides for the "relevant body of executive power" to issue a warning where there is a breach of the legislation, and power to apply to a court of law to liquidate a party where Article 4 is breached or where a party fails to comply with a warning. As has been already mentioned, Article 4 includes rules that prohibit parties to establish their offices within state or local government bodies, to be created on professional, racial, ethnic or religious criteria. The same article sets the minimum threshold for membership, prohibits the establishment of parties which: a) aim at changing the constitutional order and secular nature of the State, b) advocate violation of territorial integrity of the state, c) advocate war or violence, d) instigate racial, national or religious hatred, or carry out other acts contrary to the constitutional order.
36. It is not clear what exactly the "relevant body of executive power" is. For example, the Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission state that "*there should be a clear delineation of which bodies are responsible for the regulation of political parties as well as clear guidelines establishing their functions and the limits of their authority*"<sup>7</sup>. In addition, the Guidelines require that, "*regulatory authorities must remain neutral and objective in dealing with the process of political party registration (where applicable), political party finance, and regulation of party activities*"<sup>8</sup>. It is clear that it is more difficult to meet these requirements if the monitoring body is an organ of the executive, linked by hierarchy to political actors, rather than an independent institution.

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<sup>7</sup> CDL-AD (2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission - Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15-16 October 2010), paragraphs 218 and 219.

<sup>8</sup> Idem, paragraph 160.



37. It is important that any body exercising such a power be impartial and for this reason independent of government or ministers who would have a vested interest in defeating their political rivals.
38. Apart from the problems related to Article 4, the provision in Article 16 allowing for suppression of a party which fails to comply with a warning is potentially disproportionate, since even a trivial breach of the warning would seem enough to trigger this provision.

## **5. Financing of political parties**

39. Article 17 deals with the financing of political parties. The Draft in general meets the requirements laid down in the *Guidelines on political party regulation*<sup>9</sup>. Indeed, it contains sufficient restrictions on private contributions, balance between private and public funding, and fair criteria for the allocation of public financial support.
40. Funds are to be allocated from the State budget as well as privately. Private donations may not be made by State and municipal bodies and legal persons owned by them, foreign states and foreign and stateless persons and legal persons owned by them, international organisations and movements, military units, public associations, religious entities, trade unions and anonymous persons.
41. A new Article 17 - 1 is a positive addition since it provides allocation of funds for political parties from the state budget, as a public funding system strengthens political pluralism and enables political parties to compete in elections in accordance with the principle of equal opportunity<sup>10</sup>. The Article foresees this funding under a complex formula: 10% of funding is divided proportionately to the vote at the previous parliamentary elections between parties which obtained at least 3% of the vote but are not represented in the parliament. Forty per cent is divided equally between those parties which are represented, and a further 50% to represented parties proportionately to the number of deputies. The formula seems fair except that it takes no account of newly formed parties. Some mechanism should be found at least to provide retrospective funding for a party between its founding and the next election where it reaches the 3% threshold or secures seats in the parliament.
42. There is no control provided for in the law as to how state funds may be used although there is a requirement to submit financial statements. This needs to be addressed, possibly dealing with the funding of parties.
43. Article 19 deals with the right to receive private donations. There is a prohibition on: accepting donations granted for the purpose of gaining economic or political benefit, giving any privilege or advantage to donors, or proposing or promising the same and donors from demanding or accepting the same. However worthy this may seem there is no indication how this is to be enforced. There is no provision creating an offence or providing for administrative penalties in case of breach of the provisions, nor are there provisions requiring publication of details of individual donations. The amount of donations has to be contained in a financial statement as well as the identity of donors, but the law does not state that this financial statement must be published or the amount contributed by each individual donor revealed. Nor is there any ceiling placed on the amount of a donation which may be made. The safeguards to prevent abuse are for all these reasons inadequate. The

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<sup>9</sup> Idem, paragraphs 159 - 192.

<sup>10</sup> CDL-AD (2010)024 *Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission - Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15-16 October 2010)*, par 176.

Venice Commission and OSCE/ODIHR indicated in some of their standard-setting documents that reasonable limits on the total amount of contributions may be imposed so that there is not distortion in the political process in favour of wealthy interest and that corruption or purchasing of political influence is made impossible<sup>11</sup>.

44. Article 21 requires political parties to keep accounts and financial statements in accordance with the law "On Accounting". These financial statements are to be submitted annually to the relevant body of executive power. They must contain the number of members paying membership dues. Annual financial statements are to be published in the mass media as well as the auditor's opinion. However, it is not clear how much detail must be given in the statements published in the media. It should be provided that donations over a particular threshold have to be individually identified and published.
45. Article 21 paragraph 2 states that political parties shall submit an annual financial statement to the relevant body of executive power. The authority competent for the revision of political parties' finances should be an independent body. This principle has been stated by the Council of Europe Committee of Ministers in its Recommendation (2003) 4<sup>12</sup>. The nature and powers of such body of executive power are not clear from the text of the law.

#### **6. Liability of political parties for violation of legislation**

46. Finally, the law provides that breaches of the law incur liability under the Azerbaijani legislation. It is not clear whether this refers only to civil or also to criminal liability and who has power to enforce the law (Article 22).

#### **IV. Conclusions**

47. The law on political parties covers a wide range of matters. In some respects, however, the law does not provide more detailed description of the procedures. The proposed amendments try to give a more detailed regulation of certain aspects of operation of political parties without addressing other lacunae in the law. For example, there is an absence of control over how political parties spend their funds as well as of private donations and an absence of effective measures to prevent corruption. There is a lack of clarity concerning what financial information must be put into the public domain.
48. A number of problems identified in the Venice Commission's previous opinion in 2004 have not been addressed. These include the ineffectiveness of measures to prevent corrupt donations, already referred to, as well as possible discrimination against trade unions as compared to employers' organisations in relation to private donations. A third criticism is related to the exclusion of foreign citizens and stateless persons from political life.
49. The 2004 opinion also questioned whether the provisions in the law requiring a party not to perpetrate acts contrary to the constitutional order could be used to refuse recognition to or to dissolve a party which sought fundamental constitutional change by peaceful means. The amendments to the law have increased rather than diminished those concerns and it appears to be beyond argument that the draft law would prohibit the establishment of a

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<sup>11</sup> Guidelines and Report on the Financing of Political Parties of the Venice Commission (CDL-INF(2001)8, par b.6(a) and Guidelines on political party regulation, CDL-AD(2010)024, paragraphs 170 and 175.

<sup>12</sup> Recommendation Rec (2003) 4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns, notably, Article 14 of the Common rules against corruption in the funding of political parties and electoral campaigns.

political party which sought a peaceful change in the constitutional structure of the state. Such a prohibition would be contrary to principles established by the jurisprudence of the European Court of Human Rights.

50. The proposed increase in the minimum membership of a political party from 1,000 to 5,000 is not justified.
51. The law could make it difficult to establish a political party whose objectives were to represent and to support and defend the rights of ethnic minorities.
52. The law relating to dissolution of political parties does not specify what “body of executive power” is to enforce the law. Such a body should be impartial and independent of government. Some of the provisions relating to dissolution seem capable of being applied disproportionately. The Commission is of an opinion that there is a need for some of these provisions to be further clarified.
53. The Venice Commission stands ready to assist the authorities of Azerbaijan in their efforts to create a legal framework for political parties in conformity with Council of Europe and other international standards in the field of freedom of association in political parties.