Strasbourg, 16 June 2014

CDL-AD(2014)022
Or. Engl.

Opinion no. 752 / 2013

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

JOINT OPINION

OF THE VENICE COMMISSION

AND

THE DIRECTORATE OF DEMOCRATIC GOVERNANCE OF THE DIRECTORATE GENERAL OF DEMOCRACY OF THE COUNCIL OF EUROPE

ON

THE REVISED DRAFT LAW MAKING AMENDMENT TO THE LAW "ON THE STATUS OF MUNICIPALITIES"

OF THE REPUBLIC OF AZERBAIJAN

Adopted by the Venice Commission
at its 99th Plenary Session
(Venice, 13-14 June 2014)

On the basis of comments by

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I. Introduction

1. By a letter dated 5 December 2013, the Presidential Administration of the Republic of Azerbaijan requested the opinion of the Venice Commission on the revised draft law on making amendment to the Law of the Republic of Azerbaijan "On Status of Municipalities" (hereinafter "the draft law" and the "Municipalities Law ", see CDL-REF(2014)018).

2. Mr Il-Won Kang and Mr Jean-Claude Scholsem acted as rapporteurs on behalf of the Venice Commission. Mr Gérard Marcou, France, analysed the draft law on behalf of the Directorate of Democratic Governance (hereinafter "the Directorate").

3. This joint opinion of the Venice Commission and the Directorate, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014).

II. Preliminary Remarks

4. The scope of this opinion is to assess the draft law from the viewpoint of its compatibility with international and constitutional standards on local self-government. The opinion is based on the English translation of the draft law. Since the translation may not accurately reflect the original version, certain comments and omissions might be affected by problems of the translation.

5. It is noted that the draft law submitted for consideration is a revised version of the draft Law on Additions to the Law on the Status of Municipalities of the Republic of Azerbaijan (CDL(2009)164, hereinafter "the 2009 draft law"), aimed at implementing the Article 146 of the Constitution of Azerbaijan.

6. Upon request by the authorities of Azerbaijan, the Venice Commission adopted an Opinion on the 2009 draft law at its 81st Plenary Session (11-12 December 2009) (see CDL-AD(2009)049). In its Opinion, the Venice Commission pointed out various legal problems concerning the suspension of powers of the municipalities' members (Article 22-1) and the report of municipalities (Article 25-1).

7. With regard to Article 22-1 ("*In case if 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.*"), the Commission raised some concerns under Article 7 of the European Charter of Local Self-Government (hereinafter the "European Charter"). First, since the specific terms for the application of this Article are to be determined by the "Statute of the municipality", absences in different municipalities may lead to different results (some suspension, but others not), which may go against the principle of equality or proportionality. Second, while this Article provides for the verification of the reasons of absence, there is no clear and articulated procedure of verification. Third, above all, an interim sanction such as the suspension should not be applied before having assessed the reason of absence of the councillor.

8. Article 25-1 of the 2009 draft law was prescribing the obligation of the municipalities to submit reports to the authority implementing administrative supervision over the activity of municipalities; subsequently, if the report submitted was considered "inadequate" by the Milli Majlis, the Central Electoral Commission was entitled to pass a decision on pre-term suspension of powers of members of the municipality and assignment of new elections.

9. The Venice Commission raised several serious concerns about this Article. In its view, the aim of a reporting obligation should be to ensure that proper and accurate information is given to citizens to enhance democratic control and, in order to accomplish this goal, the procedure should be targeted to the delivery of an improved report, not to a pre-term dissolution of the concerned municipality. According to this Article, however, a mere non-respect of the pure formalities in the reporting procedure could result in a dissolution of the concerned municipality,

and once the report was considered "inadequate" by the Milli Majlis, the powers of the members of the concerned municipality were to be pre-term suspended, which seems to be an excessive sanction under Articles 7 and 8 of the European Charter.

10. In terms of follow-up to the 2009 Opinion, it is noted that, while the proposed article 22-1 on the suspension of powers of the municipalities' members was temporary abandoned, the proposed article 25-1 of the 2009 draft law is to some extent - as far as reporting is concerned - reflected in the current version of the Municipalities Law, following amendments subsequently introduced (see current article 52-2 on "Reports of municipalities"). At the same time, through an amendment to paragraph 6 of article 22, more detailed provisions have been introduced on the pre-term dismissal of a municipal member for repeated absence to the municipalities' meetings.

11. The current draft law once more proposes the suspension of powers of the municipalities' members in the context of the dismissal procedure for repeated absences (under the revised paragraph 6 of article 22), and amendments to current article 52-2, entailing pre-term dismissal (instead of suspension in the 2009 draft amendments) of the municipality in case of inadequate reporting (see specific comments below).

III. Standards

12. The most relevant international instrument is the European Charter of Local Self-Government. Azerbaijan ratified the European Charter on 15 April 2002. The Charter entered into force in respect of Azerbaijan on 1 August 2002.

13. Article 7 of the European Charter states that "*[t]he conditions of office of local elected representatives shall provide for free exercise of their functions*".

14. With regard to the administrative supervision of local authorities' activities, article 8 of the European Carter stipulates:

> *"1. Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.*
>
> *2. Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.*
>
> *3. 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."*

15. 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 as well as to define and implement a genuine decentralisation strategy taking into consideration all relevant recommendations of the Council of Europe.

16. In its Recommendation 326 (2012) on local and regional democracy in Azerbaijan[1], the Congress of Local and Regional Authorities of the Council of Europe, noting that most of the

[1] https://wcd.coe.int/ViewDoc.jsp?id=1982467&Site=COE#P74_5480

recommendations it had addressed to Azerbaijan in 2003[2] had not been implemented, expressed concern, inter alia, with regard to *"the lack of clarity of the law on the status of municipalities, regarding the procedure of supervision of municipalities, and notably the local governments' obligation provided by Article 146-IV of the constitution, to report to the parliament about their own operations"*. In this connection, the Congress recommended the Committee of Ministers to invite Azerbaijan to *"abolish the obligation on local governments to report to parliament about their own operations and limit the supervisory authority of central government to the control of lawfulness of municipal acts"*, as well as to "*clarify the legislation and determine the exact role of the administrative authorities which are empowered to exercise legal supervision over municipalities, thereby eliminating the uncertainty in the current legislation which contradicts the European Charter of Local Government"*.

IV. Constitutional and Legal Framework

17. The basis for the local government system of Azerbaijan has to be found in Chapter IX of the 1995 Constitution of the Republic of Azerbaijan, devoted to "Municipalities". According to article 142, paragraph 1, "*local self-government is carried out by municipalities*".

18. Constitutional principles for regulating local self-government are provided by Article 146 of the Constitution (as amended), 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."*

19. The new principles introduced in article 146, were assessed by the Venice Commission, in the light of the European Charter, in its Opinion adopted in 2009[3] on the amendments to the Constitution of Azerbaijan. In the Commission's view, Article 146 does not explicitly entrench such guarantees for local self-government which would clearly meet the standards established by the Charter. It barely sets out the principle that "municipalities are independent to exercise their power", but fails to entrench a number of other equally important principles laid down in the Charter. The Commission however pointed out though, that if appropriate legislation is adopted, some of the concerns expressed in the opinion would loose relevance.

20. The law of 1999 on the status of municipalities of Azerbaijan (the "Municipalities Law") regulates institutional aspects of municipal government. It has been the subject of several rounds of amendments since its adoption, the most recent ones in 2010 and 2011. This law was completed by the law on local elections, also in 1999, and by a series of other laws adopted mainly between 1999 and 2003 (see paragraphs 10 and 11 above).

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[2]See Recommendation 126 (2003) on local and regional democracy in Azerbaijan, https://wcd.coe.int/ViewDoc.jsp?id=36939&Site=COE

[3] See (CDL-AD(2009)010), *Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan adopted by the Venice Commission at its 78th Plenary Session* (Venice, 13-14 March 2009), §§ 30 to 36.

V. Comments on the draft law

21. The Municipalities Law includes provisions aimed both at protecting councillors in the execution of their mandate (article 20), and at securing their accountability before the voters, and before the law, for the case of misconduct (articles 21 to 23).

22. The amendments under examination are aimed at strengthening the accountability of councillors, and the compliance of municipalities to their obligation of reporting to the voters. While the proposed art. 22-1 provides for the temporary suspension of the powers of municipal councilors in case of repeated absences, the proposed art. 22-2 enables the Parliament (Milli Majlis) to decide the dissolution of municipal councils, under certain circumstances detailed under Article 52-2, Part 3 of the Municipalities Law. It is noted from the outset that, despite their limited scope, these amendments may seriously affect the operation and the very existence of elected bodies of local self-government in Azerbaijan.

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

23. The Municipalities Law provides for the status of municipal members (councillors) (art.20), the circumstances/grounds for forfeiture of office (art.21) or termination of the mandate (art.22) of a municipal member as well as for relevant procedural rules (art.23).

a. The termination of the mandate

24. According to the Municipalities Law, the mandate of a councillor may be terminated before the term of office in several cases listed by article 22. Under the revised terms of paragraph 6 of article 22[4], this may occur if the councillor "*is absent at municipal meetings without good excuse three times consecutively or absent for more than half of the meetings during the year without good excuse*". According to the previous text of paragraph 6, as considered by the Commission in 2009, the termination of the terms of office was possible in case of absence of the councillor from the municipal meetings "*without sufficient reason for a period defined in the municipal charter*".

25. At first take, the revised paragraph 6 of Article 22, more precise and no longer dependent on the charter of each municipality, appears as an improvement compared to the previous version. It is noted however that, by contrast with other cases listed by article 22 of the Municipalities Law (such as vote miscounting in the municipal election, resignation, non-qualification, holding concurrent office, and disability for medical reasons), the assessment - whether the absent member has "good excuse" for his/her absence - belongs only and directly to the municipality (even in cases of medical disability) and is not referred to the court. As required by article 23, the mandate "*shall be (…) terminated following a decision adopted, by a majority of votes by a municipal meeting, in accordance with articles 144 and 145 of the Constitution of Azerbaijan*"[5].

26. Such provisions can hardly be considered as compatible with article 7 (paragraph 1) of the European Charter, according to which: "[t]*he conditions of office of local elected representatives shall provide for free exercise of their functions*". While the other (objective) grounds for early termination listed by Article 22 are linked to serious failures, the three-time-consecutive-absence requirement (paragraph 6) seems to be a less serious ground and can be justified if there exists "good excuse". It is also noted that Article 144 and 145 of the Constitution and article 22 and 23 of the Municipalities Law give no guarantee of a fair hearing to the councillor and, in case of a conflict in a municipality, the conditions for terminating the mandate of a councillor can be easily manipulated, for example when obstacles prevent the councillor to attend meetings. While in principle, "*the State shall secure that municipal members may*

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[4] See CDL-REF(2014)018.

[5] Article 144 (par. I, point 1°) of the Constitution provides that the municipality has authority on *"recognition of authority of municipality members, loss of their authority and termination of their authority according to legislation*".

implement their powers efficiently and without obstacles" (article 20, paragraph 1 of the Municipalities Law), the law provides no remedy to enforce this provision.

27. In order to fully guarantee the free and independent exercise of the municipal member's powers in accordance with the European Charter, these provisions should be narrowly interpreted and only applied to exceptional cases.

b. The temporary suspension of powers

28. The draft law provides for a new article 22-1, following article 22. According to this new article, the powers of a councillor, subject to a pre-term dismissal for having been absent three times consecutively/more than half of the meetings during the year are suspended[6] until the verification of the reasons for his/her absence, even though there still remains a possibility that his/her absence can be vindicated by the municipality in accordance with Article 22.

29. The criticism expressed[7] by the Venice Commission in its previous opinion remains essentially valid.

30. First, the draft law does not take into account the comment of the Venice Commission, in its 2009 Opinion, that "*an interim sanction such as the suspension should not be applied before having assessed the reason of absence of the councillor*" (§ 12).

31. Furthermore, the suspension can be justified in the case of a criminal offence or even of serious misconduct of a councillor, whose behaviour would damage the municipality, in order to prevent or stop this damage. Yet, it is more difficult to argue for suspension in the case of a councillor who did not fulfil the obligations of his mandate. For example in France, the dismissal of a councillor failing to fulfil the duties of his mandate is declared by the administrative court, following a judicial procedure, not by the municipal council (Code général des Collectivités territoriales: art. L.2121-5).

32. Second, the specific terms of application of the proposed article 22-1 are problematic. For example, one may wonder whether the suspension is or is not an automatic one ("*shall be temporarily suspended*"[8]), and, if this is not the case, who is empowered to pronounce this "temporarily suspension". One may infer from other provisions that the decision would be taken by the municipality, which aggravates the risk of abuses at the local level.

33. Also, as the previous comments by the Venice Commission pointed out, while the draft law provides for the verification of the reasons of absence, there is no clear and articulated procedure of verification. It is still unclear whether Article 23 of the Municipalities Law according to which the *termination of office* of the municipal member shall be decided by a majority vote will also apply to the *temporary suspension* under the proposed new Article 22-1. Also, 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. Again, as in the case of article 22, there is no guarantee of a fair hearing for the councillor.

34. In addition, the suspension means that, from that moment, the councillor subject to the termination procedure will be no longer entitled to turn to citizens as a councillor in public meetings (for example to report to his voters, as it is provided by article 15, paragraph 4), or to address questions to executive bodies of the municipality. This means that the possibility to defend himself / herself will be even more limited during the time required to issue the final decision on the termination of the mandate.

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[6] "*shall be temporarily suspended until the verification of reasons of cases referred to in paragraph 6 of Article 22 of the present law* ."

[7] See CDL-AD(2009)049, § 11.

[8] Emphasis added

35. For the reasons mentioned in the previous paragraphs, the whole system introduced by the proposed article 22-1 is likely to impede the freedom of action of municipal councillors guaranteed under Article 7 paragraph 1 of the European Charter. It is thus recommended that this amendment be set aside.

B. Article 22-2. Pre-term dismissal of the municipality

a. Legal context: current framework

36. Article 52-2 implements Article 146 of the Constitution as amended in 2009. According to article 146, municipalities "are independent to exercise their power", subject to their responsibility before citizens residing in their territory and State oversight as organised by the law. According to Article 146 (IV), "Municipalities submit reports to the Milli Majlis of the Republic of Azerbaijan in cases and in the manner prescribed by law."

37. As previously mentioned, the Venice Commission had, at that time, criticized the new constitutional text in light of its lack of harmony with the European Charter (, As regards more specifically section 146 (IV), the Commission pointed out that *"the rationale behind the obligation for the municipalities to submit reports to the Milli Majlis is unclear. It suggests some form of control by the Legislature, which would go beyond the administrative supervision mentioned above. This unusual form of supervision may undermine the independence of local self-government"* (see CDL-AD (2009) 010, § 36).

38. Current article 52-2, resulting from an amendment passed between 2010 and 2012, provides that municipalities report on their activities to the Milli Majlis in two cases:

1) On the implementation of additional powers granted to the municipality by the parliament in accordance with part II of article 144 of the Constitution: according to this constitutional provision, municipalities may be given additional powers of legislative or executive nature, and the implementation of these powers will be controlled respectively by these legislative and executive bodies. This refers to article 4, paragraphs 1 and 5 of the European Charter, dealing with delegated tasks.

2) "*On the use of funds allocated to local budgets from the state budget (..) in cases established by the law on the status of municipalities*". In the law, one can identify three legal bases for the transfer of funds from the State budget to the local budgets: a) earmarked grants deemed to cover the part of expenditures not supported by own incomes (art.41, par.2); b) allocations deemed to support living standards of the population when it is below the State's social standards in relevant fields of municipal activities (art.41, par.3); c) financial means necessary for performing the tasks delegated to municipalities under article 144.II of the Constitution.

39. These reports must be made by April 1 of each year. No direct sanctions are foreseen in their respect.

b. Proposed amendments

40. The new proposed amendments to article 52-2 are of two kinds. The first ones, restructuring the article into numbered paragraphs 1 and 2, do not call for comments.

41. According to the second proposed amendment, article 52-2 will be completed by a third paragraph aimed at reinforcing the obligation of the municipalities to report to their voters, with an extension of the administrative supervision to the adequacy of this reporting. The municipalities are required to submit an annual report to "the authority implementing administrative supervision over activity of municipalities". This authority, which seems to be in charge only of assessing the procedural aspects (the compliance, with form and drafting requirements, of the protocols of the municipality's meeting having concluded to the inadequacy of the report), transmits the report of the municipality to "the relevant body of executive power".

In case the relevant executive body considers the report as inadequate, it shall address to the Milli Majlis with a view to a pre-term dismissal of the municipality. If the Milli Majlis confirms the inadequacy, it refers the case to the Central Electoral Commission, vested with the power to "*pass a decision on pre-term dismissal of the municipality*". This amendment calls for comments both on its content and on the way it is articulated in the draft law.

1. Reporting obligations before citizens

42. As previously indicated, the purpose of paragraph 3 is to implement the constitutional provision on the responsibility of municipalities before citizens (art.146, paragraph 1). This is in accordance with article 3, paragraph 2, of the European Charter on citizens' participation: the exercise of local self-government rights by elected councils "*shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute*". Reporting to the voters is another form of direct citizen participation.

43. The scope of the report is wide compared to the scope of reporting to the Parliament under current article 52-2: it is on the "work done", including information on the use of financial resources (hence, in that case, all resources, not only State budget transfers) and municipal property. This idea is in itself welcome[9]. This activity report has to be a written document, approved by the municipality, and has to be published in different forms in order to make sure that citizens will take knowledge of it. It has to be presented on the first Monday of the third week of January every year. This is another positive aspect, although one may wonder whether it can really be possible to report on financial issues so rapidly after the end of the budget year. The third week of February or March might be, especially for very small municipalities, more realistic.

44. The provisions of this first part of paragraph 3, reflecting an attempt to integrate voters in the administrative control process, are thus a welcome proposal, which partially answers the recommendations expressed in the 2009 opinion of the Venice Commission.[10]

45. Parts 2 and 3 are dealing with the scrutiny of the report by meetings of citizens and subsequent steps. First, the report is presented to citizens meetings, giving them the opportunity to "*vote "for" consideration of the report as inadequate*". This is the novelty introduced by the 2013 draft. The report is transmitted to the supervisory authority within 10 days from its approval. Second, if 25% of the citizens residing in the territory of the municipality and having voting rights have attended such meetings and if more than 50% of the present citizens have voted the report as inadequate, the attendance and the results of the votes have to be registered in the protocol of the meeting, which is then transmitted to the authority implementing administrative supervision over activity of municipalities. It is regrettable that, like in 2009[11], this authority is not better specified, either directly (by indicating its name) or indirectly, by reference to another legal provision.

46. Part 2 and part 3 do not raise any critics of principle. The aim seems to be that of combining the control of voters and the administrative control, which in itself is not without interest. It is noted that the Municipalities Law already contains certain provisions (see Chapter IV, articles 26-31) which are designed to regulate and encourage processes of direct democracy.

47. However, the procedure must be specified in a number of key points which, although of a technical nature, may affect the very existence of the local self-government body. The Venice Commission and the Directorate underline that this procedure concerns a very peculiar situation where municipal authorities *a priori* have a position and interests opposed to those of a part of the population. The municipal authorities have no interest in their report being challenged. Many questions remain therefore unanswered: for example, who shall convene a meeting of voters?

[9] See CDL-AD(2009)049, § 16.
[10] See CDL-AD (2009)049, § 20.
[11] See CDL-AD(2009)049, § 14.

when? who checks whether the majority requirement and the 25% threshold have been reached? why does the text speak of "meeting / meetings" and "protocol / protocols"?

48. Also, while it is fully justified to set out strict requirements for the consideration of votes and for the drafting of protocols, the law does not specify who should have the chair of such meetings and who should have the responsibility for writing down the protocols. In case the general procedural rules provided for meetings of the municipalities by article 16 of the Municipalities Law – in particular its paragraphs 5 and 6 - are applicable, it is recommended, for the purpose of clarity, that this be specified by the draft law.

49. The draft law furthermore stipulates that the supervisory authority shall verify compliance of the protocol with the form and drafting requirements. If the protocol does not comply with these rules, it must be returned. The text does not specify to whom or for what purpose.

50. Finally, the statement that "*[f]orm and drafting requirements of protocol shall be defined by the relevant body of executive power*" is far from sufficient. These rules have to be the same for the application of the law in the whole country and cannot be left to local authorities of the executive power. It is recommended that all these various points be clarified either in the text itself, or by reference to other legislation.

2. The power to dissolve a municipality (local authorities)

51. First, the idea of early dissolution is not new, since it was already contained in the 2009 draft amendments. The 2009 criticism[12] remains largely valid.

52. Part 4 of paragraph 3 states: "*In case the relevant body of the executive power considers the report of the municipality as inadequate, it shall address to the Milli Majlis of the Republic of Azerbaijan with regard to pre-term dismissal of the municipality*". This provision is problematic for several reasons.

2.1. Scope of the administrative supervision: compliance with the law / expediency

53. First, it is not clear in the draft law what is meant by an "inadequate" report. The draft law gives no standard, no criterion of "inadequacy". Literally, "inadequacy" refers to the purpose. Yet, there are two possible levels of inadequacy: a) the report is inadequate because it is not well done, and does not provide the information it should: yet, we cannot infer automatically from this that the activity of the municipality is "inadequate"; b) the report is inadequate because it reflects that the activity of the municipality was inadequate, as a whole or in specific matters.

54. Second, the vagueness of the wording, and in particular of the world "inadequate" could be accepted, if the reporting process was only a "political" process, e.g. an opportunity for citizens to assess the activity of the municipality, to raise critics, to address questions, to engage a dialogue with local councils. However, as stated in part 4, the "relevant body of executive power" will also assess the report and, if it considers it as inadequate, it will refer it to the Milli Majlis, opening in that way a pre-term dismissal procedure. Hence, this body will issue an appreciation of the merits of the activity the municipality, and not only of its lawfulness.

55. However, article 8, paragraph 2 the European Charter, to which the Republic of Azerbaijan is a party, states that supervision should be limited to the compliance with the law: "*Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities*". Adequacy is part of the expediency, as it can be understood from article 8, paragraph 2. Hence, to the extent that is not limited to the delegated tasks, the control of the "inadequacy" of the activities of a municipality by the State supervisory authority is not compatible with the European Charter. When assessing

[12] See CDL-AD(2009)049, §§ 17-21.

the 2009 constitutional amendments, the Commission emphasized, in connection with article 146. III of the Constitution stating that "the State oversees the activities of municipalities", that this supervision should be interpreted as a mere "administrative supervision", and should normally aim only at ensuring compliance with the law and with constitutional principles[13].

56. Moreover, as in the case of the "authority implementing administrative supervision over activity of municipalities", "the relevant body of executive power" which is entitled to assess the report of the municipality (local authorities) is not identified in the draft law. In any case, the Venice Commission and the Directorate consider that a mere judgment by an executive body that the report submitted by a municipality is "inadequate", which is likely to lead to a serious disruption of the operation of local government elected bodies, including their pre-term dismissal, is problematic from the standpoint of the constitutional protection provided to municipalities under 146. I of the Constitution, as well as of Article 8 of the European Charter.

57. As regards the procedure before the Milli Majlis, the text is unclear: the assessment expressed by the parliament is said to be the result of "hearing of the report of the municipality". It is not quite clear, whether the municipality (local authorities) has the opportunity to be heard before the decision is taken, or only the report of the municipality referred by the local State executive body has to be heard.

58. Anyhow, irrespective of the supervisory authority, since it is based on an assessment of the expediency of activity of the municipality, including in its fields of competence, this procedure not compatible with the European Charter.

59. Finally, one may also raise the - more technical - issue of the lack of consistency of the arrangement under which the authority that has to pronounce itself on the inadequacy is not entitled to decide on the dissolution, and the authority vested with the power to dissolve the municipality (local authorities) - the Central Election Commission - cannot scrutinise the grounds that can justify the dissolution.

2.2. The proportionality principle

60. Regrettably, there is no possibility provided by the draft law to take into account whether the report at issue is a very serious case of inadequacy or, on the contrary, a rather venial one: the decision will be the same regardless of the seriousness of the inadequacy: referring the case to the Central Election Commission, which can only dissolve the municipality (local authorities), once the parliament has decided that there is an inadequacy.

61. The Venice Commission and the Directorate reiterate the concern expressed in the 2009 Opinion of the Commission, that such a wide discretion given to the supervisory bodies, enabling these bodies to conduct a complete supervision over all the activities of the municipality, is also in breach of 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*". The Commission and the Directorate recommend that the principle of proportionality be adequately taken into account and clearly stated by the law. It recalls that, as recommended by the Committee of Ministers - building on Articles 7 and 8 of the European Charter - in its *Recommendation R (98) 12 on supervision of local authorities' action*, administrative sanctions concerning local authorities representatives (including dissolution) should only exceptionally be allowed, and associated with effective guarantees to enable the free exercise of the local electoral mandate.

62. The Commission and the Directorate also stress the importance of a positive and constructive approach in regulating the supervision and accountability of local self-government bodies. As stated in the 2009 Opinion, "*the aim of the reporting obligation should be to ensure*

[13] See (CDL-AD(2009)010), § 35.

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." The Commission and the Directorate recommend that provision be made in the draft law for the possibility to address shortcomings resulting from the report through dialogue with the concerned municipality and citizens.

2.3. Remedies

63. No specific information is provided by the draft law with regard to the judicial remedy available to local councils in the course of the pre-term dismissal procedure. However, access to court ("to overturn acts violating local self-government rights") is available to municipalities, municipal bodies and municipal officials, as well as to citizens living in the territory of a municipality, under article 50 of the Municipalities Law on guaranteeing "[j]udicial protection of local self-government". It is recalled that Article 146 (V) of the Constitution of the Republic of Azerbaijan clearly states that municipalities shall be ensured protection by the court. This being said, adding a specific reference to this judicial protection in connection with the pre-term dismissal procedure could help increase clarity.

VI. Conclusions

64. The Venice Commission and the Directorate welcome the efforts made by Azerbaijan to complete and improve, pursuing Article 146 of the Constitution, the legal framework pertaining to the operation of local self-government. They reiterate, in the light of the Commission's 2009 remarks on the constitutional provisions on local self-government, the importance of the implementing legislation, including the present 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 of Local Self-Government.

65. The aim of the draft law amendments - strengthening the accountability of local elected councils and its members, including through the requirement of reporting to the voters - is to be welcomed.

66. The Venice Commission and the Directorate however find worrying that, in spite of previous criticism - including recent recommendations of the Congress of Local and Regional Authorities of the Council of Europe - if the purpose of the proposed amendments appears to be in line with the European Charter, their translation into legal provisions fails to meet the applicable standards, and relevant constitutional principles, and may have a negative impact on the very existence of certain local elected bodies.

67. The proposal allowing pre-term dismissal of local elected bodies, based on an expediency assessment, and the related procedure, raise serious issues of compatibility with the European Charter. It enables abuse and arbitrary dismissal of local elected bodies and, due to the vagueness of the wording, gives the central government a strong mean of pressure upon municipalities likely to oppose to its policies. The Venice Commission and the Directorate recall that procedures and powers of State authorities directed to a kind of political tutelage of municipalities are in breach of the European standards on local self-government. Also, while the involvement of the local population may be welcomed, increased clarity is needed as to the framework of their participation.

68. To address the above issues in accordance with the applicable standards, the Venice Commission and the Directorate recommend:

- reviewing the procedure for dismissing local councillors in case of repeated absence and withdrawing draft article 22-1 allowing their temporary suspension;

- reviewing the reporting procedure in order to make it more precise;
- reviewing the supervision system allowing pre-term dismissal of local authorities if their activity report is assessed as inadequate.

69. The Commission and the Directorate remain at the disposal of authorities the authorities of the Republic of Azerbaijan should they need further assistance.