COMMENTS
ON PRELIMINARY OPINION OF THE VENICE COMMISSION
ON THE DRAFT MODIFICATIONS TO THE CONSTITUTION
OF THE REPUBLIC OF AZERBAIJAN
SUBMITTED TO THE REFERENDUM
OF 26 SEPTEMBER 2016

BY THE AUTHORITIES OF AZERBAIJAN

General Remarks

Preliminary opinion of the Venice Commission regarding the Draft Referendum Act 2016 on making amendments to the Constitution of the Republic of Azerbaijan is of an unbalanced nature. The amendments, in the experts' view, are not positive, and would constitute "incompatible with democratic standards". The issues, positivity of which is impossible to deny, are described just as " is welcome " or " is positive ".

Furthermore, it has to be mentioned that the preliminary Opinion is incomplete as the experts themselves note "Due to the time constraints, the comments on the above mentioned provisions will not be exhaustive and will focus on the essential issues related to the modifications introduced by the Draft".

In this regard, the opinion cannot be treated as a complete one, since this is only a partial analysis of draft Act of referendum on amendments to the Constitution. Therefore this point should have been reflected in the title of the draft document CDL-PI(2016)010 of the Venice Commission, and it should have been titled as "Undetailed Preliminary Opinion on the Draft Modifications to the Constitution of the Republic of Azerbaijan".

It also should be noted that, in keeping with its usual procedure, the Venice Commission could, prior to publishing its opinion, contact the Azerbaijani party in order to receive additional information and/or justify its proposals. This time, however, the Venice Commission, for some unknown reason, has violated traditional rules, explanations and/or coordination, and simply provided its opinion regarding the Draft Referendum Act 2016. The Government of Azerbaijan is seriously concerned about this type of conduct.

Paragraph 2

2. Due to the very short time before the upcoming referendum, the Bureau of the Venice Commission authorised the preparation of a preliminary opinion, its transmission to the authorities prior to the plenary session, and its publication. Mr Nicos Alivizatos, Ms Claire Bazy Malaurie, Mr Manuel Gonzalez Oropeza, Mr Ilwon Kang, and Mr Kaarlo Tuori were invited to act as rapporteurs on this opinion.

The Government of the Republic of Azerbaijan does officially state that neither on September 6th nor later has any member of the Venice Commission Secretariat contacted the President Administration of the Republic of Azerbaijani, either by email or by phone or otherwise, in order to provide explanations and clarification concerning the Draft Referendum Act. Neither has the Ministry of Foreign Affairs of the Republic of Azerbaijan received any notifications to this end.

Paragraph 10

10. The current Constitution of Azerbaijan establishes two distinct procedures for constitutional reforms: while "changes" to the Constitution (regulated by Chapter XI) are only possible through a referendum, "amendments" (regulated by Chapter XII) are to be introduced by a "constitutional law" which should be adopted by a supermajority in two consecutive votings in Parliament (Milli Majlis). The difference between "changes" and "amendments" is not entirely clear. It appears that "changes" may deviate from the existing constitutional

regulations, whereas "amendments" are only adopted to develop constitutional provisions, without altering ("contradicting") their meaning (see Section V of Article 156).

Experts have noted that the difference between "changes" to the Constitution (regulated by Chapter XI of the Constitution of the Republic of Azerbaijan) and "amendments" (regulated by Chapter XII of the Constitution of the Republic of Azerbaijan) is not clear for them. The difference, however, is quite clearly set out in the Constitution of the Republic of Azerbaijan. Changes can be brought to the Constitution by means of a referendum, according to Article 152 of the Constitution of the Republic of Azerbaijan. Changes imply making any kind of alterations, including those of the main body of (Constitution's) text as well as amending the main body of Constitution's text through a referendum. Introduction of constitutional laws (whose adoption procedure is stipulated in Chapter XII of the Constitution) that should not contradict the main body of Constitution's text does in no way imply that constitutional law is the only means of amending the Constitution of the Republic of Azerbaijan. Article 3 of the Constitution stipulates that referendum can serve as a means of solving any issue, except for the following: 1) taxes and state budget; 2) amnesty and pardon; 3) election, appointment or designation of state officials, whose election, appointment or designation falls under the competencies of legislative and/or executive bodies.

Paragraph 14-16

14. Chapter XI allows the President to put to referendum nearly any proposals, even those that may significantly affect the balance of powers. Indeed, Article 155 of the Constitution sets some reservations, which prevent changing some introductory Articles of the Constitution (those that give definition to the political regime of Azerbaijan). However, it would not prevent reforms re-distributing some important competencies in favour of the executive, and that may be done without any formal involvement of the legislature.

15. In the 2010 Report the Venice Commission expressed opinion that "the national parliament is the most appropriate arena for constitutional amendment, in line with a modern idea of democracy". In the 2001 Constitutional Referendum Guidelines the Venice Commission recommended the following: "When a draft constitutional revision is proposed by a section of the electorate or an authority other than Parliament, Parliament must state its opinion on the text submitted to vote". In its opinion on the new Constitution of Tunisia the Venice Commission reiterated that "[…] there is a strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies. As a result, constitutional amendment procedures allowing for the adoption of constitutional amendments by referendum without prior approval by parliament appear in practice often to be problematic, at least in new democracies". The recent opinion on Kyrgyzstan "warns against constitutional referendums without a prior qualified majority vote in Parliament". Moreover, such referendums enable the people only to say yes or no to the reform proposed, without any possibility of changing any of its elements. Thus, it is a well-established approach of the Venice Commission that a popular referendum should not be the only mechanism of approval of the President's proposal on constitutional reform.

16. While the reform under consideration must follow the applicable constitutional provisions, the above shortcomings in the Constitution itself affect the legitimacy of the process, and the authorities have done nothing to mitigate these concerns by e.g. consulting Parliament on a voluntary basis.

The President of the Republic of Azerbaijan initiated the Referendum in line with the right he is granted by Clause 18 of Article 109 of the Constitution of the Republic of Azerbaijan. The Constitution of the Republic of Azerbaijan envisages no mechanism whereby the President of Azerbaijan should consult Azerbaijani Parliament in order to implement the foregoing right. The 2009 Referendum on amendments to the Constitution of the Republic of Azerbaijan was directly initiated by the Parliament of Azerbaijan that, notably, never consulted the President either.

Paragraph 18

18. The Referendum Act, proposed under Chapter XI, was submitted by the President to the Constitutional Court for review on 18 July 2016. The Constitutional Court confirmed the compliance of the proposed modifications with the Constitution on 25 July. 18 The next day the referendum was scheduled for 26 September. Two months is too short a period by itself to allow the general public, politicians, civil society and experts to analyse and discuss the reform which modifies 29 articles of the Constitution, even more so as there were no parliamentary debates. The Venice Commission notes in this respect that while Chapter XI, as explained above, grants both the President and parliament the power to initiate constitutional changes, it does not as such require the formal involvement of parliament when the initiative is presidential. Assuming that nothing in the Constitution or in the rules of procedure prevent parliament from examining an issue outside a procedure formally provided by the Constitution, the President could have at least informally consulted the Milli Majlis before calling such an important referendum. Parliamentary debates would also have usefully fed public discussion. Some NGOs in Azerbaijan have expressed concerns that the launching of the reform has not been preceded by any wide public discussion. The fact that the reform had been initiated just before the summer break has reduced the possibility of a meaningful discussion even further.

The Draft Referendum Act on amending Azerbaijani Constitution was published on July the 18th, 2016. There was enough time from July 18 through 26 for every citizen of Azerbaijan and every organization to have provided their feedback on the Draft. On 26 July, the approved Draft was published yet again, this time together with some recommendations of the Constitutional Court. We believe that 70 days was enough of a period for anyone to consider and even study the Draft Referendum Act. At the same time, we believe that 14 days was clearly too short a period for the Venice Commission experts to have prepared their opinion that covered 29 items of the Draft Referendum Act on amendments to the Constitution of the Republic of Azerbaijan.

Paragraph 25

25. Under Article 159 of the current Constitution of Azerbaijan, modifications which restrict human and citizens' rights and freedoms envisaged in Chapter III of the Constitution and which go beyond the restrictions on human rights and freedoms permissible under international treaties to which Azerbaijan is a party cannot be proposed for adoption at a referendum. It is, therefore, in the

first place, a requirement of the national Constitution that newly introduced provisions do not contradict international obligations of Azerbaijan. In addition, in its 2010 Report, the Venice Commission noted that "it is widely seen as problematic and impractical to amend national constitutional bills of rights in a way that would diminish the protection of the individual."

As regards this aspect of the Venice Commission's opinion, we would like to emphasise the fact that Constitution of the Republic of Azerbaijan comprises 158 articles; i.e. there is no Article 159 in the Constitution.

Paragraph 30-31

30. The 2002 Constitutional Law provides, in Article 3.1, that all limitations to basic rights and freedoms should be established by law, and, in Article 3.4, that they should follow a "legitimate aim provided by the Constitution" and be "commensurate" to this aim. The Constitutional Law thus duly reflects the concepts of "lawfulness", "legitimate aim" and "proportionality". In 2009, the principle of legality was introduced into Article 71 Section II of the Constitution as follows: "Rights and liberties of every person are limited on grounds set by the Constitution and legislation, as well as by rights and liberties of others". To-date, instead, the principle of proportionality to a legitimate aim is only recognised at the level of the constitutional law, and has not been constitutionalised.

31. Today, the proposal put to the referendum is to elevate the principle of proportionality to the constitutional level. Thus, one of the modifications proposed by the Draft is an addition to Section II of Article 71, to read as follows: "Restrictions of human rights and liberties must be proportionate to the State's expected results". This addition is welcome, since it goes in the direction of the recommendations of the Venice Commission made back in 2001. However, the term "expected results" is not identical to the concept of "legitimate aims" used by the ECHR (see also the Russian translation of the Draft) and by the 2002 constitutional law. Without the "expected result" being also a "legitimate aim", the proportionality principle has a far more reduced meaning. Not every result which the State may expect to reach from introducing restrictions on human rights would be a "legitimate aim" from the standpoint of the European Convention. It is thus necessary to amend the wording of Article 71 in order to duly reflect the concept of "legitimate aim". In this respect, the formula used by the 2002 constitutional law ("a legitimate aim provided by the Constitution") is clearly preferable and ought to have been reproduced in modified Article 71 of the Constitution.

The experts' proposal to change the wording embedded in part II of Article 71 of the Constitution is meaningless. Because in accordance with Article 7 of the Constitution of the Republic of Azerbaijan, in terms of internal issues state power in the Azerbaijan Republic is limited by law

Paragraph 37

37. The exact meaning of modified Article 32 Section VI, as well as the intent behind it, are unclear; under these circumstances, this provision will not be commented upon.

This modification concerns protection of personal data, and Azerbaijani party does not understand the reason for experts' perplexity.

Paragraph 51

51. As concerns Azerbaijan, the Venice Commission did not receive any argument explaining why there is a need to increase the length of the President's mandate. Such reforms may sometimes be explained by the electoral cycles of other State bodies, by a long-lasting political crisis etc.; however, neither of these situations seems to apply in Azerbaijan.

The Venice Commission did not receive any argument explaining the need to increase the length of the President's mandate simply because, as noted above, the Azerbaijani party was not in any way requested to provide such appropriate explanations.

Paragraph 52

52. In the concluding paragraphs of the 2009 Opinion on Azerbaijan, the Venice Commission emphasised that the removal of the two-term limit reinforced the President's already strong position and represented a "very negative development in terms of democratic practice, given the context prevailing in Azerbaijan". Unfortunately, since 2009 the "prevailing context" has not improved, at least not in this sphere. As noted in Resolution 2062 of the Parliamentary Assembly, the Azerbaijani institutional structure grants particularly strong powers to the President of the Republic and the executive. PACE also noted the limited competence of Parliament (Milli Mejlis) under the Constitution, the weakness of the opposition forces and the vulnerability of NGOs and of independent media. Moreover, other proposals contained in the Draft under examination give to the President of Azerbaijan supplementary powers (for more details on this point see below).

In response to the opinion of the Venice Commission on the Draft Referendum Act 2009 (Opinion no. 518/2009, Strasbourg, 10 March 2009), the Government of Azerbaijan has, appropriately, provided explanations for removal of the two-term limit on holding the office of President by a citizen of the Republic of Azerbaijan.

Paragraph 53

53. In such circumstances, the modification to Article 101 which extends the Presidential mandate for longer than is the European practice, coupled with the previous removal of the two-term limitation, concentrates power in the hands of a single person in a manner not compatible with the separation of powers.

Extension of Presidential mandate from 5 to 7 years has nothing to do with separation of powers. Based on the Constitution of the French Fifth Republic, the President of France could, prior to the year 2000, be elected for a 7-year term, and nobody asserted that this kind of presidential mandate was incompatible with separation of powers. There exist no clear international standards pertaining to the term of presidential mandate. Indeed, the mandate of Azerbaijani President was extended to a 7-year term simply because 3 of every 5 years the country goes through election "fever", when presidential, municipal and parliamentary elections are held successively. This kind of situation is unacceptable, since being in the state of

war with neighboring Armenia primarily requires consolidation and mobilization of the state in any time.

Paragraph 54-55

54. Modified Article 101 gives the President the power to order early presidential elections, before the expiry of his/her term.

55. The idea of an "extraordinary", i.e. anticipated, election of the President of the Republic is unacceptable. In all political systems the head of State symbolises and guarantees stability and continuity of State action and has a fixed term of office. By providing that the right to hold an "extraordinary" election falls under the exclusive and discretionary power of the President – with no guarantees whatsoever as to how and when that right will be exercised – the Constitution gives an additional prerogative to the outgoing chief of State by enabling him/her to choose the most beneficial moment for the next elections and thus to promote a successor or to renew his/her own term, and this in a country where an incumbent President has never lost an election. This provision is therefore incompatible with democratic standards – it would allow the President to seek a new and strengthened mandate directly from the electorate, which may turn elections into plebiscites on the leadership of the country and provide legitimacy to authoritarian tendencies.

We would like to note that the President's power to order extraordinary elections, as suggested by modified Article 101 of the Constitution of the Republic of Azerbaijan, results from the extension of Presidential mandate to a 7-year term. To gain support necessary for undertaking any kind of radical steps in political and/or economic realm within a 7-year presidential term, the President was granted the right to invite the electorate unto the vote of confidence.

Paragraph 56-64

56. New Article 98-1 gives the President wide powers to dissolve Parliament. As a first ground for dissolution new Article 98-1 mentions two consecutive votes of no-confidence in the Cabinet within one year.

57. On 25 July 2016 the Constitutional Court of Azerbaijan recommended adding Section II to new Article 98-1. Section II provides that in cases of extraordinary elections following dissolution of the previous legislature by the President the new Parliament may sit less than five full years, which, as a general rule, is the normal Parliament's term according to Article 84 Section I. This addition is essentially of a technical character, and, as such, serves to harmonise new Article 98-1 with Article 84. The Venice Commission will thus focus on the essential modification, namely on the power of the President to dissolve Parliament.

58. Indeed, dissolution of parliament is provided by some constitutions, especially in parliamentary regimes. This procedure also exists in certain countries with semi-presidential systems of government. Thus, in the French 5th Republic model, the President of the Republic, directly elected by the people, may dissolve Parliament.

59. However, this power should be assessed not *in abstracto* but in the light of the other powers the President has within the system. If a very strong President, in a super-presidential regime, has a wide discretion to dissolve

Parliament, this may disturb the balance of power between the two branches. For example, in the period when the Republic of Korea was under an authoritarian regime, the President had the power to dissolve Parliament. However, that power of the President was abolished after the transition to democracy. In the context of Azerbaijan, the extraordinary power of dissolution of parliament adds to other powers accumulated in the hands of an already very powerful President. It weakens Parliament even further.

60. Normally, the aim of the dissolution is to secure harmony between the executive and the legislature. The voters speak and arbitrate a potential or actual conflict between the two branches of government. The dissolution, however, has not much practical meaning when the executive does not really answer to the legislature.

61. The Venice Commission notes that the Constitution of Azerbaijan proclaims, in Article 7, that "State power in the Azerbaijan Republic is based on a principle of division of powers". It defines, in Articles 7 and 99, that "executive power in the Azerbaijan Republic belongs to the President of the Azerbaijan Republic". The President is, at the same time, the "Head of the Azerbaijanian state" (Article 8). In the system of Azerbaijan, the Prime-Minister, the Cabinet and individual ministers are answerable to the President, and have very few institutional links to Parliament. Thus, under Article 109 of the Constitution of Azerbaijan, the Prime-Minister is appointed by the President "with the consent" of Parliament. However, pursuant to Article 118, Section III, Parliament has only a *suspensive veto* in respect of this appointment. As to the *dismissal* of the Prime Minister, it is fully in the hands of the President – at least, Article 109, p. 4 does not mention "consent of the Milli Majlis" as a pre-condition for the *dismissal* of the Prime-Minister. All other members of the Cabinet are appointed and dismissed by the President at his/her will, and the President may also "take decision on resignation of the Cabinet of Ministers". The President also has the power to "terminate decisions and ordinances of the Cabinet of Ministers". Under Article 114, "Cabinet of Ministers is subordinate to the President of the Azerbaijan Republic and reports to him" (under Article 115, Cabinet includes, in particular, the Prime-Minister).

62. Article 95 p. 14 gives Parliament the power to adopt a resolution of no confidence in the Cabinet of Ministers. However, this resolution is nothing more than a recommendation addressed to the President, who may ignore it. The Venice Commission had already examined this situation in the 2001 Opinion on the Draft Constitutional Law of the Republic of Azerbaijan on "Safeguards for the Vote of Confidence to the Cabinet of Ministers by the Milli Maljis". In particular, the Venice Commission stressed that the vote of no confidence, under the Constitution of Azerbaijan, would only have the "recommendatory" nature. The Opinion further stressed that "the scheme of the Constitution is to avoid any […] conflicts between the decisions of the President and the Parliament by assigning to each their respective roles so that a deadlock in the political system should not occur. In practice this risk is avoided by granting unusually wide legislative competencies to the President and by limiting the Parliamentary control over the executive." The Venice Commission continued as follows:

"In these circumstances, a procedure for a vote of confidence which is not binding and is merely recommendatory in nature runs the risk of causing destabilisation without in fact securing the means to resolve conflict between the executive and legislative branches. Effectively it would confer on the

Parliament a limited power which could be exercised without responsibility. If at some future date President and Parliament are from different political viewpoints this may present a problem."

63. Under the current reform, the non-binding procedure of "no confidence" will henceforth be supplemented with a real power of the President to dissolve the Parliament. It would be very difficult for the opposition to risk raising an issue of no confidence if they know that the opinion of parliament may be easily ignored, and that a vote of no confidence may ultimately lead to the dissolution of Milli Majlis. In such circumstances giving the President this additional power will only provide a strong deterrent to the opposition to exercise any kind of dissent.

64. Article 7 – which is an unamendable provision by virtue of Article 155 of the Constitution – proclaims in Section III that the State in Azerbaijan is based on the principle of division of powers and in Section IV that "legislative, executive and judicial power interact and are independent within the limits of their authority". It is true that the principle of "division of powers" is not immovable; exact limits of the presidential power vis-à-vis parliament cannot be defined once and for all. However, the reform under consideration is weakening the legislature to the extent that it may deprive the foundational principle of "division of powers" in the Constitution of Azerbaijan of any practical meaning.

Under the system of the division of powers, the legislative and executive branches of a presidential republic fall under different realms of institutional responsibility. Theoretically, the Parliament can adopt a resolution of no confidence in the Cabinet of Ministers on an unlimited number of occasions and during any period. This can virtually bring about mere incapacitation of the executive power, which is even more unacceptable for a country that for almost three decades has been in a state of war with Armenia. The aim of this amendment is to enhance political responsibility of the Parliament concerning the issue of expressing confidence in the Cabinet of Ministers.

Paragraph 65-66

65. Another ground for dissolution of Parliament under new Article 98-1 is the second refusal of Parliament to approve a person nominated by the President for the position of a judge of the Constitutional Court or the Supreme Court.

66. This provision represents a serious threat to the independence of the judiciary. In its Report on the Judicial Appointments the Venice Commission stressed that "as long as the President is bound by a proposal made by an independent judicial council […], the appointment by the President does not appear to be problematic." However, as follows from the text of existing Article 130, Section II (on Constitutional Court) and Article 131, Section II (on the Supreme Court), the involvement of "an independent judicial council" in the process of nomination of judges by the President is not guaranteed at the constitutional level. In the current system Parliament should approve a candidate proposed by the President, so, the President's power to nominate is restrained by Parliament's power to approve (or not). However, if new Article 98-1 enters into force, the appointment of all judges of the two top courts will be in the hands of the executive. This new provision renders Parliament's power to block presidential nominations to the top judicial posts ineffective, since the risk of dissolution will deter Parliament from voting against the

candidates proposed by the President. In essence, it would increase even more the dependence of the judiciary on the President.

Both the Constitutional Court and Supreme Court are collegial bodies that adopt decisions on a collegial basis. The Constitutional Court passes decisions in the course of its general proceedings while the Supreme Court makes decisions at plenary sessions. In order to ensure collegial function of the courts, the Parliament must nominate more than a half of these courts' judges. Based on Article 86 and Article 102 of Constitution of the Republic of Azerbaijan, the Constitutional Court is entitled to approve the results of Parliamentary and Presidential elections. However, this Constitutional requirement can easily be violated by Parliament's failure to nominate 5 out of 9 members of the Constitutional Court thus making its function obsolete.

Paragraph 69

69. New Article 98-1 makes Parliament largely ineffective as a countervailing power to the President. It makes it practically impossible for Parliament to use its power of expressing no confidence to the Government, however feeble that power might be in the current system. In addition, this provision is prejudicial for the independence of the top courts vis-à-vis the executive. It is dangerously vague and may be interpreted as allowing dissolution of Parliament whenever the President deems that Parliament does not "perform its duties". New Article 98-1 is therefore incompatible with democratic standards.

It is the experts' conclusion qualifying the President's right, envisaged by Article 98-1, to dissolve the Parliament as contradicting democratic standards that, per se, violates principles of the constitutional law. Article 12 of French Constitution empowers the President to dismiss the National Assembly after holding proper consultations with the Chairperson of the Senate and the Chairperson of the National Assembly. Moreover, the Constitution of France makes no mention of whether the President of France must be guided by the outcomes of these consultations in deciding the issue of Parliament's dissolution. Nobody can assert that this provision of French Constitution is inconsistent with democratic standards. Unlike the Constitution of France, the new Article 98-1 contains a detailed list of all potential cases in which the Parliament may fail to fulfill its constitutional duties: if the same convocation of the Parliament of the Republic of Azerbaijan should twice within the same year express distrust toward the Cabinet of Ministers or fail to assign proper number of nominees - after double nomination of candidatures by the President of the Republic of Azerbaijan - for collegial activity of the Constitutional Court, Supreme Court and Board of Central Bank, or, for unavoidable reasons, failed to fulfill its duties as specified in Articles 94 (passing laws in appropriate sectors) and 95 (adoption of ordinances on specific issues), Article 96/Part II (draft laws or decisions submitted to the discussion of the Milli Majlis of the Republic of Azerbaijan by way of legislative initiative by the President of the Republic of Azerbaijan and other constitutional parties are put to the vote as they have been presented), Article 96/Part III (changes to such laws or decisions may be made with the consent of the subjects exercising the right of legislative initiative), Article 96/Part IV (draft laws or decisions presented by way of legislative initiative by the President of the Republic of Azerbaijan and other constitutional parties shall be put to the vote in the Milli Majlis of the Republic of Azerbaijan within a period of two months) and Article 96/Part V (if the adoption of a draft law or decision has been declared a matter of urgency by constitutional parties, this period shall be 20 days), Article 97 of the Constitution (the laws are submitted to

the President of the Republic of Azerbaijan for signing within 14 days from the day of adoption; a draft law which has been declared urgent is submitted to the President of the Republic of Azerbaijan for signing within 24 hours from its adoption). As the head of the State, the President of the Republic of Azerbaijan must ensure proper functioning of all state institutes.

Paragraph 70-72

70. New Article 103-1 provides for the creation of a position of First Vice-President and Vice-Presidents of Azerbaijan, appointed and dismissed by the President. In case of incapacity of the President to perform his duties, his functions are performed by the First Vice-President and, in the case of the latter's incapacity – by other Vice-Presidents according to the order of succession set by the President.

71. Vice-presidents are usually elected jointly with the presidents as their running mates. The president's power to appoint vice-presidents is a rare, if not unique, constitutional phenomenon, which increases the president's position of power even further, and intimating that the vice-presidents derive their positions from the president personally and that they are in a relation of loyalty to him or her. This impression is enhanced by granting the President the power to lift the immunity of vice-presidents (new Article 106-1, Section III), and define the order of succession in case of his or a Vice-President's incapacity to perform their functions.

72. The Draft does not specify the number of Vice-Presidents, their powers (including powers which may be shared amongst them), and the mechanism to distinguish the first vice-presidency from the others (except the President's decision to rank them for the situation of succession). Modified Article 105 allows unelected persons to temporarily carry out the highest office in the country. If Vice-Presidents are going to govern, they should have an electoral mandate and not take office by appointment of the President. In addition, since Vice-Presidents may temporarily exercise the powers of the President pending new presidential elections, they will be in a privileged position to win these elections. The possibility for the President to designate a Vice-President therefore gives to the incumbent President a lot of influence on the choice of his or her successor. New Article 103-1 is therefore incompatible with democratic standards.

The arguments used by experts to infer that Vice-President's designation for temporary performance of Presidential duties in case of the President's incapacity to do so contradicts democratic standards seems inexplicable. We would like to know where have these democratic standards been recorded. In the US, for instance, in case of the President's incapacity to perform his duties, his functions are performed by an elected Vice-President and, if he is incapable – by ministers/secretaries that are successively designated by the President, as opposed to being elected. To-date, nobody has ever suggested that the US practice might be in contradiction with democratic standards.

Paragraph 73-75

73. Modified Article 89 Section I p. 7 provides for the loss of a parliamentary seat in cases of the "blunt violation of the code of ethical conduct" by a MP.

This is too vague a motive. First, ethical rules are usually not defined in the law, which is supposed to create legal obligations as opposed to ethical rules. Second, even if the "code" is established by law, it may contain a wide variety of offences. It is unclear what sort of ethical rules such a code may contain, and to what extent they will be compatible with the independence of Parliament and its members, freedom of speech in Parliament, whether they respect the privacy of parliamentarians, etc.

74. Modified Article 89 also provides for the loss of a parliamentary seat as a sanction for delegated voting (see Article 93 Section III to which modified Article 89 refers). It is excessive to deprive an MP of his or her mandate for every violation of that kind, a milder disciplinary sanction should suffice.

75. Finally, it is unclear who is empowered to take a decision on revoking the mandate. The Constitution is silent on this matter referring the question to primary legislation. If such decisions are taken by a simple majority of votes in Parliament, without a clear constitutional basis, this clause may be used abusively against parliamentarians belonging to the minority. The modifications to Article 89 of the Constitution are therefore not in line with democratic standards.

Whereas the loss of parliamentary seat and mandate by a MP is regulated by Article 89 of currently effective Constitution of the Republic of Azerbaijan, it is the Parliament of Azerbaijan that possesses the power to deprive a MP of their seat and mandate in line with the Law of the Republic of Azerbaijan "On the Status of the Member of the Milli Majlis". Modified Article 89 simply expands the grounds for the application of this sanction by the Parliament. Article 93 of Azerbaijani Constitution requires deputies to exercise their voting right personally at Parliamentary sessions. There have frequently been cases, however, when a MP would have violated this constitutional requirement by having his/her electronic voting card used by another MP to vote, thus avoiding any responsibility whatsoever. As touching the rules of conduct, it was not seldom that Parliament members in many countries have insulted their colleagues and entered fistfights knowing that their country's legislation is devoid of any liability for such behavior. The new modification will serve to deter this kind of conduct.

Paragraph 76-79

76. The Draft decreases lower age limits for such positions as Member of Parliament (Article 85), President and Vice-Presidents (Articles 100 and new Article 103-1), Prime-minister, deputy Prime-minister, minister, the head of other central body of executive power (Article 121), and judge (Article 126).

77. The voting age of 18 is more or less universal. However, the minimum age of eligibility for parliamentary or presidential offices is higher than 18 in many countries. Still, in certain countries there is no gap in age required to vote and to run for election for a member of a parliament or President (like in France). In principle, it is therefore possible to align the voting age and the minimum age of eligibility.

78. The removal of the lower age-limits means that, in theory, nothing would prevent a 23-year old person, freshly graduated from university, to become President, Vice-President or Prime Minister of Azerbaijan, while the same person would not yet be eligible to become a lower-court judge, since for that

position, in addition to a university degree, the candidate should also have at least five years of work experience in the field of law.

79. In sum, the elimination of the lower age limit may negatively affect the overall quality of the State governance in the country.

We believe that introduction of age limits for any position falls under the notion of age discrimination. Eligibility for positions and/or offices can only be restricted by one's insufficient work experience. A person, for example, can be designated a judge only after they have gained a certain practical experience in the field of law. This, however, should have nothing to do with their age. Nobody can affirm that a 24-year member of the Parliament should be less effective that a 25-year old MP. The Constitution of France, for instance, contains no age limits for constitutional offices/positions. Its only requirement is for a candidate to be at least 18 years of age.

Paragraph 80

80. Modified Article 9 includes "other armed units" to the notion of "Armed Forces". In this scenario, the President of the Republic automatically becomes their "Commander in Chief" (see Section III of this Article). In that way, it is possible that the police as well other militarized units will fall under the responsibility of the President. This reference may entail full control of all security forces under presidential, uncontrolled command, even those which are usually under the direction of local authorities or are preventive or civic in nature. Modified Article 9 is therefore incompatible with democratic standards.

The experts' comment on modifications to Article 9 of Azerbaijani Constitution resulted from their insufficient knowledge of the legislation of the Republic of Azerbaijan. In Azerbaijan, there are no armed forces subordinated to local authorities, including the police Based on the Law of Azerbaijan Republic "On Police," police forces do not fall under the category of armed forces. In the Republic of Azerbaijan, the notion of the armed forces encompasses internal security troops, border-security forces and the National Guard. Recent military engagement on the frontline, in April 2016, has revealed that there is a real need to establish effective mechanism of interaction between these kinds of armed forces. Since Azerbaijani President is, currently, the Commander in Chief over the country's armed forces, he is not entitled to give direct orders to the Commander of Internal security troops that operate under the direct charge of the Ministry of Internal Affairs. Adoption of the new modification will afford the opportunity to establish a Combined Chiefs of Staff Committee.

Paragraph 82-88

82. It is regrettable that the Venice Commission did not have a chance to comment on the proposed modifications earlier, before their finalisation, and to obtain more information about the motives behind the reform. In the light of the available information, some serious concerns should be raised related to the procedure as well as to the substance of the reform.

83. As regards the procedure, it is regrettable, although permitted by the current procedure for modifying the Constitution, that the Draft was put to referendum directly, without any involvement of Parliament. The time given to the population and experts to understand and discuss the Draft was certainly

insufficient, especially given the complexity of the proposed reform and the absence of proper deliberations in Parliament. This undermines the legitimacy of the reform. In addition, if the Draft were adopted, the institutional reform would come into force immediately, and the balance of powers would be shifted in favour of the President already in the current electoral cycle.

84. As regards the human rights chapter of the Constitution, most of the modifications – for example, as regards the introduction of the concept of "human dignity", of the right to "conscientious treatment excluding arbitrariness" by the State bodies and of certain procedural rights – are generally positive. The constitutionalisation of the principle of proportionality of restrictions to human rights in a specific provision (modified Article 71 Section II) is welcome, although the text should stipulate that the restrictions should be proportionate to the State's legitimate aims (and not the State's "expected results"). However, the limitation clauses introduced by the Draft, in particular those which may affect the freedom of speech, the freedom of assembly and the freedom of association (modified Articles 47, 49, and 58) need to be interpreted in the light of the proportionality principle, and in strict compliance with the case-law of the ECtHR, in order to avoid abuses. The introduction of provisions on citizenship (modified Article 53) reduces the scope of the currently existing guarantee and clearly is a step backwards.

85. The Venice Commission is particularly concerned by the institutional reform proposed by the Draft. The extension of the term of the presidential mandate to seven years cannot be justified, and, given the already very strong position of the President, and new powers added by the reform, it is at odds with the European constitutional heritage.

86. The new powers of the President introduced by the Draft are unprecedented even in comparative respect; they reduce his political accountability and weaken Parliament even further. The Venice Commission is particularly worried by the introduction of the figure of unelected Vice-Presidents, who may at some moment govern the country, and the President's prerogative to declare early presidential elections at his/her convenience.

87. The new power of the President to dissolve Parliament makes political dissent in Parliament largely ineffective. This will also affect the independence of the judiciary, since Parliament's role in the approval of judges will be reduced. All those proposals further consolidate power in the hands of the President and make the executive even less accountable to Parliament.

88. If the proposed institutional changes are therefore clearly to be assessed negatively, this does not mean that constitutional reform in Azerbaijan is neither necessary, nor desirable. On the contrary, the Venice Commission invites the authorities to undertake a constitutional reform which would strengthen and not weaken parliament including with respect to the procedure of modifying the Constitution.

The experts' opinion provides a negative assessment of modifications contained in the Draft Referendum Act, and calls them unacceptable. The Azerbaijani party deems this selective and subjective approach of experts unclear and questionable.

In addition, the Azerbaijani party remains perplexed about the reason for experts to have adopted their resolution so fast, without receiving appropriate arguments from the Azerbaijani party and/or requesting it to provide necessary information.

If experts would have received necessary information and/or held consultations, their preliminary opinion could be, possibly, less negative as they would have many modifications and amendments to the Constitution of the Republic of Azerbaijan properly explained to them. The approach that was taken by the Venice Commission is, therefore, difficult to explain.