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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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)

on the basis of comments by

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I. Introduction

1. The Secretary General of the Council of Europe requested, on 26 January 2009, the Opinion of the Venice Commission on the amendments to the Constitution of the Republic of Azerbaijan proposed by the Government of Azerbaijan (document CDL(2009)025). At its meeting on 29 January 2009, the Monitoring Committee of the Parliamentary Assembly also asked the Opinion of the Venice Commission on these amendments, which had been adopted by the Milli Majlis on 18 December 2008 and approved by the Constitutional Court on 24 December 2008

2. Messrs Lee, Özbudun, Scholsem and Tuori were appointed as rapporteurs in this matter. Mr Özbudun subsequently withdrew from the working group. A draft opinion was prepared on the basis of their comments and sent to the Azerbaijani authorities on 6 March 2009. The Azerbaijani authorities submitted written comments on this draft opinion and presented them to the Commission on 14 March 2009. After careful consideration of the draft opinion in the light of the said comments, the Venice Commission decided to append them to the text of the current opinion.

3. The current opinion was adopted by the Venice Commission at its 78th plenary session on 14 March 2009, that is shortly before the holding of the constitutional referendum in Azerbaijan scheduled on 18 March 2009.

II. General remarks and questions of procedure

4. The draft constitutional amendments contain a range of sectoral changes in the form of 29 questions to which each voter will have to respond by either yes or no. Although one can easily identify the main issues raised by the reform (see Chapter III below), a sense of coherence of the reform as a whole seems to be lacking. As result, it is at times difficult to understand the purpose, necessity and/or interrelations of certain changes. For example, some changes only involve a modest adaptation in terminology (see Article 19 II or Article 109 item 13) while others significantly affect the overall distribution of powers between the branches of state powers (see Chapter III A below).

5. The possibility for the voters to pronounce themselves on each amendment separately will apparently preserve the principle of the unity of substance, although the relatively high number (29) of questions posed will inevitably make the ensuing results and various possible combinations less legible. This confusion is reinforced by the way in which the proposal to remove the two term limit of the President is formulated (see Chapter III A).

6. The Venice Commission notes that various sectors of civil society and some political actors have regretted the insufficient consultation which has taken place before the adoption of the said reform and the limited public discussion on the pros and cons of the various amendments proposed. Although the authorities contend that the reform procedure has been carried out in compliance with the electoral legislation, the pace of the adoption of the reform, from the submission of the draft referendum act on 16 December 2008 to its consideration by the Milli Majlis on 18 December 2008, its approval by the Constitutional Court on 24 December 2008 and its submission to a national referendum on 18 March 2009, appears to be quite expedient given the importance of the issues at stake and the need to enable the population to be fully acquainted with the various implications of the reform.

7. Against this background, concerns have also been raised about the possible lack of respect for the existing procedure of revision of the Constitution in that some aspects of the proposed reform could have been adopted through a parliamentary procedure. The procedure of revision is dealt with in two distinct chapters. Chapter XI (Articles 152 to 155) governs “changes” in the Constitution. Article 152 states that “Changes in the text of the Constitution of the Azerbaijan

Republic may be made only by way of referendum". Chapter XII (Articles 156-158) governs "amendments" to the Constitution. Such amendments are not subject to referendum, but must be enacted as Constitutional Laws according to a complex procedure, which includes qualified majorities and prescriptive deadlines (Article 156). The Azerbaijani authorities, however, consider that these two procedures can be interchangeable.

III. Main issues raised by the reform

A. Removal of the two-term limit and position of the President

8. The most important and controversial draft amendment concerns Article 101(V) on the election of the President. According to the current provision, the President may only be elected for two consecutive terms. The amendment would abolish the limitation on the number of terms.

9. On the procedural level, it is unfortunate that the draft amendment does not remove the two-term limit through an explicit abrogation, but chooses instead an abrogation by substitution: the newly proposed Article 101 (V) actually concerns a completely different question, namely the extension of the term of the President during a state of war. It would have been much clearer for the voters to submit an explicit abrogation in a separate question and include an additional question on the extension.

10. The core of the rule of law is the separation of powers. In a country with a presidential (or sometimes semi-presidential) system, power tends to be concentrated on the President, while that of the Legislature or the Judiciary is relatively weaker. Therefore, the regular change of regime through the process of election is the very method to prevent too strong a concentration of powers in the hands of the President

11. A comparative survey shows that in most states with an elected president, the constitution imposes a limitation on the successive terms a president may serve.[1] The number is either one or two. Limitations have been adopted both in countries where the president possesses extensive powers and in countries where the role of the president is of a more ceremonial character. At present, Belarus is the only European presidential republic which no longer limits the number of consecutive terms.

12. In Belarus, the limitation was indeed eliminated after a referendum held on 17 October 2004. In its Opinion on the referendum, the Venice Commission adopted a critical view of the removal of the limitation. The Commission first appealed to international practice.[2] It then evoked the issue of the distorted balance of power in Belarus.[3] In the case of Kyrgyzstan, the

[1] See for example Angelika Nussberger, "Setting Limits and Setting Limits Aside – The Constitutional Framework of Presidential Power in Post-Communist Countries", in: Liber Amicorum Antonio La Pergola, Istituto Poligrafico e Zecca dello Stato, Strasbourg-Rome, 2008, pp. 206-228.

[2] "*In those democracies where the president exercises important functions of State, a system of constitutional checks and balances ensures that he or she cannot exercise arbitrary power while in office, and in any event the term of office is limited. The constitutions of democratic countries with presidential systems of government, as are to be found in particular in Latin America, generally either prohibit the immediate re-election of an incumbent President or at least limit it to one further term, as is the case in the Constitution presently in force in Belarus. Even democracies where the President's functions are largely ceremonial tend to limit the possibility of continuous terms of office. The undesirability of unlimited terms for the president is recognised in new (e.g. the Republics of Albania, Armenia, South Africa, Lithuania, Poland, Russia, Ukraine, etc. etc.) as well as in old democracies*". (CDL-AD(2004)029, § 12).

[3] "*In Belarus, where the balance of powers between the organs of government is distorted, and there is a preponderance of power in the hands of the President, it is particularly undesirable that a system should be created in which the imbalance of powers is effectively institutionalised in the person of the present incumbent*"(CDL-AD(2004)029, § 13).

Venice Commission also pointed out that in a presidential or semi-presidential system where the powers of the president are almost unrestricted, a constitutional provision providing that the president may be re-elected only once may be the only effective check on presidential powers.[4]

13. Azerbaijan, the Constitution of which provides for a Presidential system of Government, is undoubtedly a country where the President concentrates extensive powers in his hands, given the few checks and balances which exist.[5] It was therefore logical that the original text of the Constitution of Azerbaijan provided for a two-term limit. The Constitution of the Russian Federation opted for a similar solution in its Article 81 § 3 and was not amended to allow the then President to run for a third consecutive term. As a rule, it can be said that the abolition of existing limits preventing the unlimited re-election of a President is a step back, in terms of democratic achievements, as was illustrated by the constitutional referendum held in 2009 in Venezuela and in 2004 in Belarus, where the Venice Commission even pointed to a direct contradiction with European democratic standards.[6] Conversely, the subsequent introduction of such limits in the Constitution goes in the right direction. The example of the United States is interesting in this regard: it is undisputed that the United States had a democratic system of governance even before the adoption of the 22nd amendment in 1951, that is a period which saw Franklin D. Roosevelt be elected or re-elected 4 times. The American lawmaker nevertheless considered it necessary to anchor in legal terms the then moral commitment undertaken by Washington to serve no more than two terms. This was done through the 22nd amendment in 1951. More recently, a similar path was followed by France, which for the first time in the 5th Republic, entrenched a constitutional limit of two presidential terms.[7]

14. It has been sometimes argued that the removal of the two-term limit would strengthen the freedom of the voters to choose their President. While this argument may sound rather attractive at least in theory, explicit limitations are needed in practice, because an incumbent president may easily use various plebiscitary means in order to strengthen his or her position and secure his or her re-election. The constitutional limitations on successive terms are therefore meant to limit the risk of negative consequences for democracy arising from the fact that a same person has the possibility of occupying the presidency for an excessive period of time.

15. It has also been argued that there exists no term limit to the appointment of the Prime Minister. This is, however, a different legal situation, which is hardly comparable to that of the presidential (or semi-presidential) regime. In a parliamentary regime, the Prime Minister must constantly enjoy the support from a parliamentary majority, which is not the case for the president in a presidential regime. The personal factor is therefore much stronger in the latter system. Furthermore, the Prime Minister is not the Head of State. His powers are therefore limited, although to a varying extent, by the existence of the Head of State. The temptation of a personal concentration of powers in the hands of the Prime Minister acting in a parliamentary system is consequently much smaller. In sum, it can be said that parliamentary mechanisms usually secure democratic rotation in the office of the Prime Minister, but these mechanisms obviously do not extend their influence on the presidency.

16. Explicit constitutional limitations on the successive terms of a president are particularly important in countries where democratic structures and their cultural presuppositions have not yet been consolidated. In the opinion of the Venice Commission, the elimination of the present limitation in Article 101(V) of the Constitution may therefore appear as a serious set-back on Azerbaijan's road to a consolidated democracy.

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[4] CDL-AD(2007)045, §§ 13, 35 and 37.

[5] CDL-AD(2001)026, §§ 15 and 23.

[6] CDL-AD (2004)029, § 17.

[7] Article 3 of the Constitutional Law n° 2008-724 of 23 July 2008 amending Article 6 of the French Constitution.

B. Extension of the term of the Milli Majlis and the President in case of military operations

17. Articles 84 (I) and 101 (V) provide for the extension of the term of office of the Milli Majlis, respectively the President, in case elections cannot be held due to military operations under a state of war and as long as these military operations have not come to an end.

18. In principle, such a possibility seems reasonable and other countries have similar provisions. For example, Article 78 of the Turkish Constitution makes it possible to defer parliamentary elections for one year in case of war, with a possibility to repeat the same procedure if the grounds for deferment are still present.

19. It is positive that the proposed amendment includes a guarantee against the arbitrary use of the extension of the term of office of the Milli Majlis and President by making it dependent on a decision of the Constitutional Court following a request by the Central Election Commission. Despite these positive elements, the draft amendment contains serious shortcomings mainly due to its lack of precision.

20. Firstly, the expression "military operations" under a "state of war" seems to open too wide a margin of appreciation due to its vagueness. Although it has been clarified that the situation in Nagorno-Karabakh is currently considered a "state of war", but with no "military operations", it may be more appropriate to provide the Constitutional Court with a more stringent standard for allowing an extension of the term. For example, the postponement of elections could be tied to declarations of martial law and a state of emergency in accordance with Articles 111 and 112. Also, the existence of a "state of war" could be tied to the announcement of a war referred to in Article 109.30.

21. Secondly, it is unclear whether the Constitutional Court's authority shall be extended to the decision as to when the military operations come to an end. This is particularly problematic since the proposed amendment, contrary to the corresponding provision of the Turkish Constitution, contains no time limit for the extension of the term. The Azerbaijani authorities consider that the Constitutional Court is vested with the authority to pronounce itself on the end of military operations on request made by the Central Election Commission, but the text of the draft amendment is silent on this.

22. Thirdly, there is no provision fixing a time frame for holding elections following the end of the military operations, although this would seem necessary to avoid a legal gap.

C. Basic Rights and Liberties (Chapter III)

23. The draft amendments submitted to referendum include ~~minor~~ changes to Chapter III, dealing with basic rights and liberties. Although it is up to the State concerned to determine whether a norm is needed at all and whether it should be given constitutional status, the necessity and normative relevance of some of the changes remain questionable. This goes for example for the proposed new paragraphs in Article 25 (Right to equality) which, in normative respect, do not seem to add anything to the existing provisions. On the other hand, it must be acknowledged that certain proposed changes contain some improvements in the field of civil rights. This is in particular the case for Article 32 (II), which lays down a right of protection from unlawful interference in private and family life, as well as Article 48 (V), which states that no one shall be forced to express (or demonstrate) his or her religious faith and belief, to execute religious rituals or participate in religious ceremonies.

24. Apart from the more general procedural problem already mentioned (see Chapter II above), some of the proposed amendments to Chapter III might give rise to interpretations detrimental to basic rights and liberties. According to the proposed amendment to Article 71(II), "rights and liberties of every person are limited on grounds set by this Constitution and legislation, as well as by rights and liberties of others". Such a provision should in no way be interpreted as conferring upon the legislator unlimited powers to enact limitations to the rights and liberties guaranteed in the Constitution.[8] A corresponding reference to "law" is made in the proposed amendments Article 32, para III and V and makes it particularly important that implementing legislation be in future enacted with full respect for the ECHR and its case-law.

25. One particular amendment in Chapter III raises some concerns, namely the Right of Personal Immunity as enshrined in Article 32 (III). It is indeed proposed that this provision provides that "no one shall be followed, filmed, photographed, recorded, or subjected to any other similar actions without his or her knowledge or despite his or her disapproval, except for cases established by law". According to Article 10 ECHR (Right to freedom of expression and information), journalists and media in general should be free to inform and comment on issues of public interest. This applies to reporting on political figures to the extent that their activities or actions have a bearing on matters of general interest and may permit people to form an informed opinion on the candidates they have to vote for in the context of the exercise of their political rights.

26. In this context, the second sentence of Article 32 (III) raises a potential problem in that it provides no exception for recordings at public meetings or meetings of public interest: a journalist would therefore only be entitled to take a photograph or record a video in such meetings with the previous consent or at least knowledge of the person concerned. There is a possibility to provide for exceptions, but this possibility is left entirely to the discretion of the legislator.[9] As a result, Article 32 (III) could be used in practice to exclude unwelcome journalists, especially from the electronic media, from reporting on events of public interest. Also, if a journalist films or records a politician or official in a situation involving the acceptance of a bribe, it would probably lead to the journalist being prosecuted instead of the politician or official. Investigative journalism with respect to corruption allegations could therefore be seriously hampered.

27. The European Court of Human Rights takes a very strict approach to restrictions on media reporting about the activities of politicians. In Radio Twist S.A. v. Slovakia,[10] the Court pointed out the essential function of the press in a democratic society and held that the Slovakian Court's order against Radio Twist violate Article 10 ECHR because the recorded conversation was clearly political and did not contain any aspects relevant to the concerned politician's private life. The interference with the right of a radio broadcasting company to impart information therefore did not correspond to a pressing social need. This case indicates that the media have a right to impart information even though it is obtained without the consent or at least knowledge of the person concerned provided, of course, such information involves political matters.

[8] The Venice Commission already addressed this issue, namely the lack of clarity of the constitutional regime concerning human rights restrictions, in its opinion on the draft constitutional law on regulation of the implementation of human rights and freedoms of Azerbaijan, CDL(2001)027, §§ 8 and 29-30.

[9] In its Opinion on the Constitution of Bulgaria, the Venice Commission briefly commented on a similar provision mainly to recall that limitations on Human Rights should preferably be listed in an exhaustive way in the Constitution itself (CDL-AD(2008)009, § 67).

[10] ECHR judgment of 19.12.2006, Radio Twist A.S. v. Slovakia.

28. The Venice Commission also recalls that the "Declaration on freedom of political debate in the media" adopted by the Committee of Ministers on 12 February 2004 offers good guidance on how to strike the right balance between the right of public figures to privacy and the right of the public to be informed.[11]

29. In view of the foregoing and without underestimating the importance of protecting one's private and family life from illegal interferences including from non-state actors, the Venice Commission considers that with the current wording of the proposed amendment to Article32 (III) and bearing in mind the general context of media freedom and journalist activities in Azerbaijan, there is a risk that this provision be implemented in a way contrary to Article 10 ECHR. A clause requiring a balancing between the interest to protect privacy of the individual and the legitimate interest in a public debate, or stating explicitly that Article 32 (III) may be restricted for public interest, would certainly significantly reduce this risk.

D. Local Self-Government

30. Article 146 of the Constitution lays down, in its current wording, a very limited number of guarantees for the independence of municipalities. The draft amendments would complement this provision with 4 new paragraphs, which are supposed to give flesh to the notion of local self-government in Azerbaijan.

31. The Venice Commission recalls that Azerbaijan ratified the European Charter of Local Self-Government on 15 April 2002 and that this treaty entered into force in respect of Azerbaijan on 1 August 2002. It is also worth recalling that Resolution 1305 (2002) of the Parliamentary Assembly on the honouring of obligations and commitments by Azerbaijan explicitly refers to the conclusions of the Congress of Local and Regional Authorities regarding the situation of local democracy in the country. It is therefore largely against these standards that the level of self-governance of the Republic of Azerbaijan must be assessed and the Constitution should properly reflect these standards.

32. The exact scope and implications of the proposed new Article 146 are difficult to anticipate, because the proposed new paragraphs seem to a large extent to go beyond the existing legislation. The adoption of a range of legislative provisions will be needed to implement these new constitutional principles. Much will therefore depend on the way in which the Milli Majlis will give effect to these principles, bearing in mind that the States concerned have a margin of appreciation to implement the principles of local democracy in their domestic legal order. These uncertainties notwithstanding, the draft amendment to Article 146 raises some concern from the point of view of the Charter.

33. As a general point, Article 146 does not explicitly entrench, either in its present or in the amended proposed form, 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" (proposed new para. I), but fails to entrench a number of other equally important principles laid down in the Charter.

[11] Its principle VII. "Privacy of political figures and public officials" reads : "*The private life and family life of political figures and public officials should be protected against media reporting under Article 8 of the Convention. Nevertheless, information about their private life may be disseminated where it is of direct public concern to the way in which they have carried out or carry out their functions, while taking into account the need to avoid unnecessary harm to third parties. Where political figures and public officials draw public attention to parts of their private life, the media have the right to subject those parts to scrutiny.*"

34. More specifically, the proposed amendment to Article 146 (I) does not seem sufficient to ensure that local self-governments will be able to regulate and manage a "substantial share of public affairs" under their own responsibility and that their powers shall be "full and exclusive", as provided for by Article 4 paras 1 and 4 of the Charter.[12]

35. Especially worrying is the proposed amendment in Article 146 (III), according to which "the State oversees activities of municipalities", because the exact scope of this supervision is not further specified in the Constitution. It is therefore essential that this supervision be interpreted as a mere "administrative supervision" for the purpose of Article 8 of the Charter. Such a supervision shall normally aim only at ensuring compliance with the law and with constitutional principles.[13]

36. As concerns the proposed amendment to Article 146 (IV), 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.

IV. Other issues

37. There are a number of other, more specific aspects of the proposed constitutional reform which might give rise to certain comments. It is however not possible to cover all of them in detail in the context of the present opinion. Mention will therefore only be made of some meaningful elements, without aiming to be exhaustive.

38. The proposed reform contains a number of innovations, some of which deserve to be welcome. This is in particular the case for the proposed amendments to Article 96, which extend the right of legislative initiative to 40,000 citizens. Such an instrument of semi-direct democracy would constitute a step forward to promote a more active political participation of Azerbaijani citizens.

39. Another innovation, which must be underlined, is the proposed change in Article 95 I (4), which provides that the Milli Majlis shall in the future be responsible for approving and terminating "intergovernmental agreements containing rules contrary to the laws of the Republic of Azerbaijan". It has been clarified that this provision, which has to be read in conjunction with the proposed amendment to Article 109 (17), entails a reinforcement of parliamentary powers. Azerbaijani legislation distinguishes inter-state and inter-governmental treaties. The former are to be ratified by the Milli Majlis and the latter by the President. The purpose of the amendment is therefore to ensure that, if an intergovernmental treaty provides rules contrary to Azerbaijani law, it will have to be submitted to the Milli Majlis for ratification and not just to the President. In that sense, the amendment would contribute - although in a modest way - to moving towards stronger checks and balances in relation to the powers of the President. The Venice Commission notes, however, that a meaningful reinforcement of parliamentary powers in this matter would also require that intergovernmental agreements not containing rules contrary to the laws be approved and terminated by the Milli Majlis. Indeed, once adopted such intergovernmental agreements could hamper the future development of laws as they automatically prevail over national law.

[12] See also Recommendation 126 (2003) of the Congress on local and regional democracy in Azerbaijan, item 8.2 b.

[13] See also Recommendation 126 (2003) of the Congress on local and regional democracy in Azerbaijan, item 8.2 d.

40. Finally, there seems to be a laudable attempt in the proposed reform to ensure greater transparency in public affairs through the entrenchment of the principle of publicity for the sessions of the Parliament (Article 88 IV) and the obligation to publish the decisions of the Supreme Court, the Constitutional Court (Articles 130 IX and 131 III) as well as the normative legal acts (Article 149 VIII). As concerns the principle of publicity of the sessions of the Milli Maijlis (Article 88 IV), this seems to be a basic requirement as democracy calls for the principle of open sessions. Although this principle is not absolute, the possibility of holding parliamentary meetings in closed session should be permitted only in exceptional cases. While it seems acceptable to hold a closed parliamentary session on request of a qualified two third majority of MPs, it does not seem appropriate to do so on the proposal of the President, as provided for in the proposed amendment to Article 88 IV.

V. Conclusions

41. The draft constitutional amendments under examination embrace a variety of proposals and combine a limited number of important reforms, with some modest adjustments. The overall logic and coherence of the reform is not always evident and the procedure chosen may give rise to some criticism.

42. The present opinion is based on the text of the constitutional amendments and cannot take into account any future implementing legislation. If appropriate legislation is adopted, some of the concerns expressed in the opinion would loose relevance.

43. Some amendments, undoubtedly, constitute important improvements as compared to the existing Constitution and they must be welcome. At the same time, there is reason for concern about a few very negative developments in terms of democratic practice, given the context prevailing in Azerbaijan. This is essentially the case for the removal of the two-term limit of the President, which reinforces his already strong position and does not follow European practice.

44. The Venice Commission is of the opinion that the draft constitutional amendments under examination do not eradicate the need for a more thorough constitutional reform in the future. Such a reform would seem necessary to reach a better distribution of powers between the branches of the state power and the Commission stands ready to provide its expertise at the request of the authorities of Azerbaijan.

Comments by the Authorities of the Republic of Azerbaijan

on the draft Opinion of the Venice Commission

on the draft Amendments to the Constitution of the Republic of Azerbaijan (document CDL(2009)026) dated 6 March 2009)

General remarks

The draft Opinion of the Venice Commission on the draft amendments to the Constitution of the Republic of Azerbaijan is clearly imbalanced. The amendments, in the experts' view, are not positive, and would constitute "a serious set-back on Azerbaijan's road to a consolidated democracy". The issues, a positive nature of which is impossible to deny, are described just as "…deserving to be welcome" or "a laudable attempt".

Furthermore, the draft Opinion is incomplete since comments are made on a limited number of issues submitted to the referendum. Efforts of the experts are mainly aimed at elaborating upon those amendments, which, in their opinion, are of a negative nature. The experts themselves note that "it is however not possible to cover all of them in detail in the context of the present opinion. Mention will therefore only be made of some meaningful elements, without aiming to be exhaustive".

In this regard, the Opinion cannot be treated as a complete one, since this is only a partial analysis of the draft Act of referendum on amendments to the Azerbaijani Constitution. Therefore this point should have been reflected in the title of the draft document CDL(2009)026 of the Venice Commission, and it should have been titled as "Draft opinion on some amendments to the Constitution of the Republic of Azerbaijan".

The experts have not provided any comments in respect of amendments to Articles 12, 15, 17, 18, 39, 50, 67, 72, 75, 108, 125 and 129 of the Constitution. So, a great amount of issues (12 out of 29) submitted to the referendum have been left with sheer silence.

Paragraph 3

The draft constitutional amendments contain a range of sectoral changes in the form of 29 questions to which each voter will have to respond by either yes or no. Although one can easily identify the main issues raised by the reform (see Chapter III below), a sense of coherence of the reform as a whole seems to be lacking. As result, it is at times difficult to understand the purpose, necessity and/or interrelations of certain changes. For example, some changes only involve a modest adaptation in terminology (see Article 19 II or Article 109 item 13) while others significantly affect the overall distribution of powers between the branches of state powers (see Chapter III A below).

This paragraph notes a lack of sense of coherence of the reform. Approximately seven years have passed since the last amendments to the Constitution of Azerbaijan were made. For this period of time a sufficient number of issues have been accumulated which require relevant amendments to be introduced into the Constitution. Obviously, conduct of a referendum calls for considerable financial expenses. Therefore, the draft Act on amendments to the Constitution of Azerbaijan covers various issues. In this context, the attempt of the experts to find an interrelationship between issues submitted to the referendum is unclear to us. Conditionally, the 29 issues could be divided into 4 groups: 1) those related to human rights; 2) those related to regulation of activities of branches of power, including Judiciary; 3) those related to regulation of activities of municipalities; 4) those related to terminological changes. Unfortunately, the experts failed to analyze the issues submitted to the referendum in the context of groups listed above.

As far as the change in Article 19 (II) is concerned, it cannot be assessed as a terminological one. The term "National Bank" used in the current text of the Constitution might imply that the National Bank is the only bank that belongs to the State, and that the State may not be an owner of the shares of other banks. Therefore it is proposed to replace the term "National" by the term "Central" which more accurately characterizes regulatory functions of this institution.

Paragraph 4

The possibility for the voters to pronounce themselves on each amendment separately will apparently preserve the principle of the unity of substance, although the relatively high number (29) of questions posed will inevitably make the ensuing results and various possible combinations less legible. This confusion is reinforced by the way in which the proposal to remove the two term limit of the President is formulated (see Chapter III A).

On 15 January 2009 the Central Election Commission prepared a document which contained a comparative analysis of the proposed amendments to the Constitution with existing provisions. This document was published in more than 2 million copies and distributed one per each family. Moreover, the same document, made in the form of posters, was posted throughout almost all territory of Azerbaijan in places widely available for voters. The Public television organized (and continuing it for the time being), on a free of charge basis, television debates between the ruling and opposition parties. Wide discussions have taken place in the media. An international conference was arranged in Baku on 5-7 March at which broad discussions on the proposed amendments to the Constitution of Azerbaijan took place. This conference was attended by representatives of a wide range of EU member-states, such as Belgium, France, Spain, Germany, Netherlands, United Kingdom, Bulgaria as well as United States of America and members of the PACE.

According to the resolution adopted at the Conference, the participants "supported this referendum as a demonstration of the sovereign right of the people of the Republic of Azerbaijan to make additions and amendments to express their will on the following issues:

- the necessity to provide for the immunity of private life from interference by state, individual people, mass media or other persons,
- the necessity to guarantee all citizens the right to keep private their correspondence, telephone calls, post, telegraph messages and information transferred by other communication facilities,
- the necessity to improve the protection of individual rights and freedoms of Azeri citizens,
- the limits to the authority of state bodies within their jurisdictions,
- the necessity to improve the social welfare, standard of living and to provide the guarantee of protection of rights and freedoms of Azeri citizens,
- remove the limitation that a person can't be elected more than twice to the post of President of Azerbaijan Republic,
- the applicability of supranational jurisdiction of international agreements that the Azerbaijan Republic is a party to, as a guarantee to political development in accordance with European standards".

Mr Michael Hancock, a member of the Parliamentary Assembly of the Council of Europe from the United Kingdom made a presentation at the conference. In his opinion, amendments proposed to the Constitution of Azerbaijan are quite democratic. "The wish of people to abolish restriction of election of one person to the position of President more than twice is quite democratic and normal", Hancock said (*Zerkalo* newspaper, 7 March 2009). Another participant of the conference, Mr Jean-Paul Mourman, judge of the Constitutional Court of Belgium said that "Azerbaijan is implementing democratic changes. The proposed amendments to the

Constitution will serve to further development of the country. The issues submitted to the referendum are formulated clearly and distinctly. These amendments will facilitate positive changes in Azerbaijan's life and secure stable operation of laws. Steadiness of power shall preserve stability of the country" (www. 1news.az – 6 March 2009).

Paragraph 5

The Venice Commission notes that various sectors of civil society and some political actors have regretted the insufficient consultation which has taken place before the adoption of the said reform and the limited public discussion on the pros and cons of the various amendments proposed. Also, the pace of the adoption of the reform, from the submission of the draft referendum act on 16 December 2008 to its consideration by the Milli Majlis on 18 December 2008, its approval by the Constitutional Court on 24 December 2008 and its submission to a national referendum on 18 March 2009, appears to be quite expedient given the importance of the issues at stake and the need to enable the population to be fully acquainted with the various implications of the reform.

Terms of conduct of a referendum are stipulated in the Election Code of the Republic of Azerbaijan. The Parliament, when taking a decision to hold the referendum, was guided by the relevant provisions of the Code. Furthermore, the draft Act on referendum was published in mass media (on 19 December 2008) before it had been submitted to the Constitutional Court.

Paragraphs 6-8

Against this background, there are reasons for concern about the lack of respect for the existing procedure of revision of the Constitution. This procedure is dealt with in two distinct chapters. Chapter XI (Articles 152 to 155) governs "changes" in the Constitution. Article 152 states that "Changes in the text of the Constitution of the Azerbaijan Republic may be made only by way of referendum". Chapter XII (Articles 156-158) governs "amendments" to the Constitution. Such amendments are not subject to referendum, but must be enacted as Constitutional Laws according to a complex procedure, which includes qualified majorities and prescriptive deadlines (Article 156).

As already mentioned by the Venice Commission,[14] there are two distinct procedures to revise the Constitution: one is the so-called "changes" procedure, which modifies the constitutional text or the fundamental structure of the Constitution and must be subject to a referendum. The other is the so-called "additions" procedure, which is compatible with the original version of the Constitution and must undergo a specific parliamentary procedure.

These two procedures are by no means interchangeable. It appears, however, that the draft amendments under examination combine elements which should be subject to a referendum, since they constitute "changes" (e.g. Article 101 V) with elements which are simple "additions" contradicting neither the wording nor the spirit of the existing Constitution. The latter should therefore in principle not be subject to the referendum, but enacted through Constitutional Laws so as to respect the Constitution of Azerbaijan. Implying that every constitutional amendment can be subject to a referendum means undermining the very concept of a Constitution and questioning its position as the supreme norm of the country.

[14] See 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 Majlis", CDL-INF(2001)026, § 5.

According to the Constitution of Azerbaijan, any issues which are not forbidden by paragraph III of Article 3 of the Constitution of Azerbaijan may be submitted to a referendum. This Article contains an exhaustive list of issues which may not be subject to a referendum. These are: 1) taxation and state budget; 2) amnesty and pardon; 3) election, appointment or approval of the officials, whose election, appointment or approval has been accordingly referred to the competences of the legislative and (or) executive bodies.

Changes which can be made only by a referendum are any modifications in the text of the Constitution. The text of the Constitution can be changed by replacing a word or sentence by another one or by adding a new word or sentence. By adding a single word or phrase one can change the whole content of a constitutional provision. In other words, an addition can modify the content of a text to much more extent than a replacement of one text by another one. Therefore any addition to the text of the Constitution can be possible only by a referendum. Thus, the phrase "additions and changes to the Constitution" should be understood as "making changes in the text of the Constitution" within the meaning of Article 152 of the Constitution.

As far as *additions* are concerned, they can be adopted both by way of referendum and by means of Constitutional laws. In the latter case they are adopted by the Milli Majlis *to complement* the Constitution. Constitutional laws are similar to organic laws in some European countries. They are adopted separately and are not included into the text of the Constitution. Constitutional laws must not contradict the Constitution.

Moreover, Article 158 of the Constitution, which regards additions to the Constitution as Constitutional laws, contains direct prohibition of adoption of such additions in respect of Chapter I of the Constitution. Chapter I may only be complemented by means of referendum. Therefore, the opinion of the experts that "these two procedures are by no means interchangeable" is incorrect. Moreover, Article 152 of the Constitution has a provision that the changes to the Constitution shall be made exclusively by means of referendum. Article 156 of the Constitution does not contain such a direct indication of exclusiveness of the procedure of introduction of amendments to the Constitution by means of Constitutional laws.

Paragraphs 9-17

The most important and controversial draft amendment concerns Article 101(V) on the election of the President. According to the current provision, the President may only be elected for two consecutive terms. The amendment would abolish the limitation on the number of terms.

On the procedural level, it is unfortunate that the draft amendment does not remove the two-term limit through an explicit abrogation, but chooses instead an abrogation by substitution: the newly proposed Article 101 (V) actually concerns a completely different question, namely the extension of the term of the President during a state of war. It would have been much clearer for the voters to submit an explicit abrogation in a separate question and include an additional question on the extension.

The core of the rule of law is the separation of powers. In a country with a presidential (or sometimes semi-presidential) system, power tends to be concentrated on the President, while that of the Legislature or the Judiciary is relatively weaker. Therefore, the regular change of regime through the process of election is the very method to prevent too strong a concentration of powers in the hands of the President

A comparative survey shows that in most states with an elected president including outside Europe, the constitution imposes a limitation on the successive terms a president may serve. The number is either one or two. Limitations have been adopted both in countries where the president possesses extensive powers and in countries where the role of the president is of a more ceremonial character. At present, Belarus is the only European presidential republic with no limitation on the number of consecutive terms.

In Belarus, the limitation was eliminated after a referendum held on 17 October 2004. In its Opinion on the referendum, the Venice Commission adopted a critical view of the removal of the limitation. The Commission first appealed to international practice.[15] It then evoked the issue of the distorted balance of power in Belarus.[16] In the case of Kyrgyzstan, the Venice Commission also pointed out that in a presidential or semi-presidential system where the powers of the president are almost unrestricted, a constitutional provision providing that the president may be re-elected only once may be the only effective check on presidential powers.[17]

Azerbaijan, the Constitution of which provides for a Presidential system of Government, is undoubtedly a country where the President concentrates extensive powers in his hands, given the few checks and balances which exist.[18] It was therefore logical that the original text of the Constitution of Azerbaijan provided for a two-term limit. The Constitution of the Russian Federation opted for a similar solution in its Article 81 § 3 and was not amended to allow the then President to run for a third consecutive term. As a rule, it can be said that the abolition of existing limits preventing the unlimited re-election of a President is a step back, in terms of democratic standards, as was illustrated by the constitutional referendum held in 2009 in Venezuela and in 2004 in Belarus. Conversely, the subsequent introduction of such limits in the Constitution goes in the right direction. The example of the United States is interesting in this regard: it is undisputed that the United States had a democratic system of governance even before the adoption of the 22nd amendment in 1951, that is a period which saw Franklin D. Roosevelt be elected or re-elected 4 times. The American lawmaker nevertheless considered it necessary to anchor in legal terms the then moral commitment undertaken by Washington to serve no more than two terms. This was done through the 22nd amendment in 1951. More recently, a similar path was followed by France, which for the first time in the 5th Republic, entrenched a constitutional limit of two presidential terms.[19]

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[15] "*In those democracies where the president exercises important functions of State, a system of constitutional checks and balances ensures that he or she cannot exercise arbitrary power while in office, and in any event the term of office is limited. The constitutions of democratic countries with presidential systems of government, as are to be found in particular in Latin America, generally either prohibit the immediate re-election of an incumbent President or at least limit it to one further term, as is the case in the Constitution presently in force in Belarus. Even democracies where the President's functions are largely ceremonial tend to limit the possibility of continuous terms of office. The undesirability of unlimited terms for the president is recognised in new (e.g. the Republics of Albania, Armenia, South Africa, Lithuania, Poland, Russia, Ukraine, etc. etc.) as well as in old democracies*". (CDL-AD(2004)029, § 12).

[16] "*In Belarus, where the balance of powers between the organs of government is distorted, and there is a preponderance of power in the hands of the President, it is particularly undesirable that a system should be created in which the imbalance of powers is effectively institutionalised in the person of the present incumbent*"(CDL-AD(2004)029, § 13).

[17] CDL-AD(2007)045, §§ 13, 35 and 37.

[18] CDL-AD(2001)026, §§ 15 and 23.

[19] Article 3 of the Constitutional Law n° 2008-724 of 23 July 2008 amending Article 6 of the French Constitution.

It has been sometimes argued that the removal of the two-term limit would strengthen the freedom of the voters to choose their President. While this argument may sound rather attractive at least in theory, explicit limitations are needed in practice, because an incumbent president may easily use various plebiscitary means in order to strengthen his or her position and secure his or her re-election. This is all the more the case when effective guarantees securing free, honest and truly competitive elections are lacking. The constitutional limitations on successive terms are therefore meant to limit the risk of negative consequences for democracy arising from the fact that a same person has the possibility of occupying the presidency for an excessive period of time.

It has also been argued that there exists no term limit to the appointment of the Prime Minister. This is, however, a different legal situation, which is hardly comparable to that of the presidential (or semi-presidential) regime. In a parliamentary regime, the Prime Minister must constantly enjoy the support from a parliamentary majority, which is not the case for the president in a presidential regime. The personal factor is therefore much stronger in the latter system. Furthermore, the Prime Minister is not the Head of State. His powers are therefore limited, although to a varying extent, by the existence of the Head of State. The temptation of a personal concentration of powers in the hands of the Prime Minister acting in a parliamentary system is consequently much smaller. In sum, it can be said that parliamentary mechanisms usually secure democratic rotation in the office of the Prime Minister, but these mechanisms obviously do not extend their influence on the presidency.

Explicit constitutional limitations on the successive terms of a president are particularly important in countries where democratic structures and their cultural presuppositions have not yet been consolidated. In the opinion of the Venice Commission, the elimination of the present limitation in Article 101(V) of the Constitution would therefore constitute a serious set-back on Azerbaijan's road to a consolidated democracy.

The experts note that the elimination of limitation of re-election of one person as a President more than twice "would… constitute a serious set-back on Azerbaijan's road to a consolidated democracy". Furthermore, they believe that such amendments to the Constitution do not comply with international and European practice. It is also noted that elimination of limitation of re-election of President in Azerbaijan is inadmissible also because "this is all the more the case when effective guarantees securing free, honest and truly competitive elections are lacking".

We would like to emphasize that the existence of limitations of re-election of person as a President is not the only and generally accepted practice both in the world and in Europe. As experts note, France introduced a similar limitation just last year. It does not mean that France was an undemocratic state right up to last year. Furthermore, a similar limitation does not exist for the positions of President and Vice-President in Cyprus, an EU member-state as well as for the President in Iceland. Moreover, the experts' assessment of the elections in Azerbaijan is very much different from the one provided by the international organizations involved in a full-scale observation, according to which "while the presidential elections marked considerable progress towards meeting OSCE commitments and other international standards, in particular with regard to some technical aspects of election administration, the election process failed to meet some OSCE commitments."

It is also noteworthy that the EU member-states with limitations of re-election of President have different practices. For instance, according to the Constitutions of Latvia, Slovakia and Czech Republic, the same person may not be re-elected to a two consecutive terms. In other words, it is possible to repeatedly re-elect a person, if he/she runs for President not for third term, but for the subsequent one. In other European states, this prohibition is of absolute nature. For instance, in Macedonia, the same person may not be elected as President more than two terms.

Arguments of experts on possibility of usurpation of the power, using "plebiscitary means", in case of elimination of election limitation, are questionable. The danger of usurpation of power also exists in parliamentary republics and emanates from parliamentary majority by using aforesaid plebiscitary means. To this end, domination of Parliament is not better at all than Presidential domination. The possibility of usurpation of power by any of branches should not be prevented by clearly speculative restrictions, the existing practice of which in the modern world derives from the legislative practice of the only country, but should be prevented by establishing an efficient system of checks and balances between the branches of power.

Paragraphs 18-23

Articles 84 (I) and 101 (V) provide for the extension of the term of office of the Milli Majlis, respectively the President, in case elections cannot be held due to military operations under a state of war and as long as these military operations have not come to an end.

In principle, such a possibility seems reasonable and other countries have similar provisions. For example, Article 78 of the Turkish Constitution makes it possible to defer parliamentary elections for one year in case of war, with a possibility to repeat the same procedure if the grounds for deferment are still present.

It is positive that the proposed amendment includes a guarantee against the arbitrary use of the extension of the term of office of the Milli Majlis and President by making it dependent on a decision of the Constitutional Court following a request by the Central Election Commission. Despite these positive elements, the draft amendment contains serious shortcomings mainly due to its lack of precision.

Firstly, the expression "military operations" under a "state of war" seems to open too wide a margin of appreciation due to its vagueness. Although it has been clarified that the situation in Nagorno-Karabakh is currently considered a "state of war", but with no "military operations", it may be more appropriate to provide the Constitutional Court with a more stringent standard for allowing an extension of the term. For example, the postponement of elections could be tied to declarations of martial law and a state of emergency in accordance with Articles 111 and 112. Also, the existence of a "state of war" could be tied to the announcement of a war referred to in Article 109.30.

Secondly, it is unclear whether the Constitutional Court's authority shall be extended to the decision as to when the military operations come to an end. This is particularly problematic since the proposed amendment, contrary to the corresponding provision of the Turkish Constitution, contains no time limit for the extension of the term. It has been suggested that the Constitutional Court is indeed vested with the authority to pronounce itself on the end of military operations on request made by the Central Election Commission, but the text of the draft amendment is silent on this.

Thirdly, there is no provision fixing a time frame for holding elections following the end of the military operations, although this would seem necessary to avoid a legal gap.

Constitutional provisions on impossibility to hold elections due to military operations can be found in the Constitutions of a number of European states, but not only in Turkey. Such possibility is foreseen in the Constitutions of Hungary, Serbia, Greece, Slovenia, Moldova and Georgia. However, the wording proposed for being introduced into the Constitution of Azerbaijan is the only one which provides a specific mechanism for using this possibility. This constitutional provision could only be applied when the fact of impossibility to hold parliamentary or presidential elections is ascertained by the Constitutional Court upon a respective request of the Central Election Commission.

According to the draft amendments, 3 material conditions must exist cumulatively for elections to be postponed: 1) event of war; 2) military operations or to put it in a better way - hostilities; and 3) the impossibility of holding the elections caused by the two previous conditions. If any of these conditions is not there, the elections may not be postponed.

For clarity, the term “military operations” or “hostilities” should not be taken separately, but in conjunction with the two other elements only. Otherwise it might appear to be vague. Here we are talking about the hostilities taking place during a war and necessarily causing impossibility of conducting an election. We should emphasise and you would agree with me that this circumstance can emerge in very exceptional cases. Furthermore, any decision on impossibility should be clearly based on the current legislation relating to electoral matters, thus leaving no room for arbitrary interpretation. For example, conduct of elections to the Milli Majlis would prove impossible, if hostilities have covered more than 42 constituencies; because according to the Constitution (Article 87(III), the Milli Majlis can start its functions only after mandate of 83 out of 125 deputies has been approved. Similarly, presidential elections cannot be held, if hostilities are being conducted in the territory of more than 65 constituencies; because under Article 181.1 of the Electoral Code, 40.000 signatures in at least 60 constituencies must be collected in support of a presidential candidate. One can see that the standard for the Constitutional Court for deciding on the extension of the term is sufficiently stringent. We do not see how the clear wording of the proposed amendment could create any ambiguity for the Constitutional Court to take a proper decision.

Specifically, in light of foregoing, reference in the draft opinion to “the situation in Nagorno-Karabakh” would be entirely irrelevant.

As concerns how the proposed procedure will be implemented at the end-of-hostilities stage, we think that the perceived “lack of precision” can be easily avoided by a simple logical approach: *First,* the Central Election Commission will request the Constitutional Court so that the latter takes a decision for elections to be held; *second,* although the time-limit for holding elections is not specified in the proposed amendments, the time element is clearly implied, i.e. as soon as the geographic scope of hostilities has fallen below the threshold, that is, the critical number of the constituencies referred to above.

We would also like to recall that the Venice Commission in its Opinion on the Serbian Constitution which the Commission adopted in 2007 did not express any critical observations on a similar provision contained in Article 109 (7) of that Constitution.

Paragraph 24

The draft amendments submitted to referendum include minor changes to Chapter III, dealing with basic rights and liberties. Although it is up to the State concerned to determine whether a norm is needed at all and whether it should be given constitutional status, the necessity and normative relevance of many of the changes remain questionable. This goes for example for the proposed new paragraphs in Article 25 (Right to equality) which, in normative respect, do not seem to add anything to the existing provisions. On the other hand, it must be acknowledged that certain proposed

changes contain at least some improvements in the field of civil rights. This is in particular the case for Article 32 (II), which lays down a right of protection from unlawful interference in private and family life, as well as Article 48 (V), which states that no one shall be forced to express (or demonstrate) his or her religious faith and belief, to execute religious rituals or participate in religious ceremonies.

According to the experts, the amendment proposed to Article 25 reading that it shall be inadmissible to apply discrimination by means of granting privileges irrespective of race, sex, social status and etc. adds nothing to this Article. In this case it is unclear why a number of European states stipulated in its Constitutions inadmissibility of granting of selective privileges to their citizens that breach principle of equality. By way of example, Article 13 of the Constitution of Portugal, Article 12 Constitution of Slovakia, Article 45 of Constitution of Malta, Article 29 of the Constitution of Lithuania and Article 6 of the Constitution of Bulgaria can be mentioned here.

Paragraph 25

Apart from the more general procedural problem already mentioned (see Chapter II above), some of the proposed amendments to Chapter III may give rise to interpretations detrimental to basic rights and liberties. According to the proposed amendment to Article 71(II), "rights and liberties of every person are limited on grounds set by this Constitution and legislation, as well as by rights and liberties of others". Such a provision might be interpreted as conferring upon the legislator unlimited powers to enact limitations to the rights and liberties guaranteed in the Constitution.[20] A corresponding interpretation of the legislator's unlimited powers might be made of the reference to "law" in the proposed amendments Art. 32, para III and V.

The purpose of this amendment is rather obvious: to introduce into the text of the Constitution a well-established principle, both in International and Constitutional law (*see* e.g., Constitutions of Poland (Article 31), Spain (Article 53), Switzerland (Article 36), Croatia (Article 16), Romania (Article 49)), according to which human rights set forth in the Constitution and international treaties can be restricted by law. Furthermore, if this amendment is adopted at the referendum, executive bodies will be prevented from regulating the implementation of human rights and freedoms by passing normative acts.

We would like to recall that a similar provision is contained in the Constitutional Law of Azerbaijan "On regulation of the implementation of human rights and freedoms" adopted in 2001. Article 5.1 of this Constitutional Law reads as follows: "Human rights and freedoms, provided for in the Constitution of the Republic of Azerbaijan and in the international agreements, acceded by the Republic of Azerbaijan shall be subject for restriction only by the law". In its Opinion on the draft of this Law the Venice Commission stated the following: "…this Article sets out the principle that restrictions to guaranteed human rights and freedoms can be imposed "only by the law". This provision is thus in line with the general doctrine on restrictions on human rights in the ECHR as expressed in particular in the second paragraph of Articles 8 to 11 of the ECHR" (*emphasis added*).

[20] The Venice Commission already addressed this issue, namely the lack of clarity of the constitutional regime concerning human rights restrictions, in its opinion on the draft constitutional law on regulation of the implementation of human rights and freedoms of Azerbaijan, CDL(2001)027, §§ 8 and 29-30.

Paragraphs 26-30

One particular amendment in Chapter III raises some concerns, namely the Right of Personal Immunity as enshrined in Article 32 (III). It is indeed proposed that this provision provides that "no one shall be followed, filmed, photographed, recorded, or subjected to any other similar actions without his or her knowledge or despite his or her disapproval, except when such actions are prescribed by law". According to Article 10 ECHR (Right to freedom of expression and information), journalists and media in general should be free to inform and comment on issues of public interest. This applies to reporting on political figures to the extent that their activities or actions have a bearing on matters of general interest and may permit people to form an informed opinion on the candidates they have to vote for in the context of the exercise of their political rights.

In this context, the second sentence of Article 32 (III) raises a potential problem in that it provides no exception for recordings at public meetings or meetings of public interest: a journalist would therefore only be entitled to take a photograph or record a video in such meetings with the previous consent or at least knowledge of the person concerned. There is a possibility to provide for exceptions, but this possibility is left entirely to the discretion of the legislator, who must somewhat surprisingly "prescribe" them and not "authorise" them.[21] As a result, Article 32 (III) is likely to be used in practice to exclude unwelcome journalists, especially from the electronic media, from reporting on events of public interest. Also, if a journalist films or records a politician or official in a situation involving the acceptance of a bribe, it would probably lead to the journalist being prosecuted instead of the politician or official. Investigative journalism with respect to corruption allegations could therefore be seriously hampered.

The European Court of Human Rights takes a very strict approach to restrictions on media reporting about the activities of politicians. In Radio Twist S.A. v. Slovakia,[22] the Court pointed out the essential function of the press in a democratic society and held that the Slovakian Court's order against Radio Twist violate Article 10 ECHR because the recorded conversation was clearly political and did not contain any aspects relevant to the concerned politician's private life. The interference with the right of a radio broadcasting company to impart information therefore did not correspond to a pressing social need. This case indicates that the media have a right to impart information even though it is obtained without the consent or at least knowledge of the person concerned provided, of course, such information involves political matters.

The Venice Commission also recalls that the "Declaration on freedom of political debate in the media" adopted by the Committee of Ministers on 12 February 2004 offers good guidance on how to strike the right balance between the right of public figures to privacy and the right of the public to be informed.[23]

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[21] In its Opinion on the Constitution of Bulgaria, the Venice Commission briefly commented on a similar provision mainly to recall that limitations on Human Rights should preferably be listed in an exhaustive way in the Constitution itself (CDL-AD(2008)009, § 67).

[22] ECHR judgment of 19.12.2006, Radio Twist A.S. v. Slovakia.

[23] Its principle VII. "Privacy of political figures and public officials" reads : « *The private life and family life of political figures and public officials should be protected against media reporting under Article 8 of the Convention. Nevertheless, information about their private life may be disseminated where it is of direct public concern to the way in which they have carried out or carry out their functions, while taking into account the need to avoid unnecessary harm to third parties. Where political figures and public officials draw public attention to parts of their private life, the media have the right to subject those parts to scrutiny*"

In view of the foregoing and without underestimating the importance of protecting one's private and family life from illegal interferences including from non-state actors, the Venice Commission considers that with the current wording of the proposed amendment to Article32 (III) and bearing in mind the general context of media freedom and journalist activities in Azerbaijan, there is a strong risk that this provision be implemented in a way contrary to Article 10 ECHR. A clause requiring a balancing between the interest to protect privacy of the individual and the legitimate interest in a public debate, or stating explicitly that Article 32 (III) may be restricted for public interest, would certainly significantly reduce this risk.

> ***The amendment proposed to Article 32 of the Constitution should be considered in close relation with Article 50, which deals with freedom of information. The amendment to Article 32 can not be implemented in breach of provisions of Article 50. Furthermore, this amendment suggests that the manner of application thereof shall be determined by law. With a view to attaching weight to their comments about inadmissibility of such an amendment, the experts refer to a judgment of the European Court of Human Rights. Besides, the issue of conflict of rights was a subject of consideration of the Council of Europe. Resolution 428 (1970) of the Parliamentary Assembly of the Council of Europe containing a declaration on mass communication media and human rights, in the part dealing with "Measures to protect the individual against interference with his right to privacy" reads that there is an area in which the exercise of the right of freedom of information and freedom of expression may conflict with the right to privacy protected by Article 8 of the Convention on Human Rights. The exercise of the former right must not be allowed to destroy the existence of the latter.***

The Resolution goes on to say that the right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honor and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially.

And finally, a particular problem arises as regards the privacy of persons in public life. The phrase "where public life begins, private life ends" is inadequate to cover this situation. The private lives of public figures are entitled to protection, save where they may have an impact upon public events. The fact that an individual figures in the news does not deprive him of the right to a private life.

According to Article 8 of the European Convention, the State has two obligations: a negative obligation, i.e. obligation of State authorities to refrain from actions which would violate the right to privacy and family life; and positive obligations. Positive obligations include: firstly, the State, in its legislation, must create conditions for free realization of the right to privacy and family life, i.e. to ensure appropriate regulation of this sphere and, secondly, in case of violation of this right by individuals, the State must grant adequate remedies.

Interestingly, in its Opinion on the Constitution of Bulgaria adopted in March 2008, the Venice Commission did not express any critical observations on the same provision set forth in that Constitution (Article 32).

Although the main focus of the Commission in that Opinion was on the provisions dealing with the judiciary, however, comments of the Commission also related to the human rights provisions (*see* Paragraph 8). The Commission did criticise certain human rights provisions, but did not pronounce any criticism on Article 32. The final conclusion of the Commission was that "the provisions of the Constitution of the Republic of Bulgaria, including its recent amendments, are generally in conformity with European standards" (*see* paragraph 90).

Paragraphs 31-37

Article 146 of the Constitution lays down, in its current wording, a very limited number of guarantees for the independence of municipalities. The draft amendments would complement this provision with 4 new paragraphs, which are supposed to give flesh to the notion of local self-government in Azerbaijan.

The Venice Commission recalls that Azerbaijan ratified the European Charter of Local Self-Government on 15 April 2002 and that this treaty entered into force in respect of Azerbaijan on 1 August 2002. It is also worth recalling that Resolution 1305 (2002) of the Parliamentary Assembly on the honouring of obligations and commitments by Azerbaijan explicitly refers to the conclusions of the Congress of Local and Regional Authorities regarding the situation of local democracy in the country. It is therefore largely against these standards that the level of self-governance of the Republic of Azerbaijan must be assessed and the Constitution should properly reflect these standards.

The exact scope and implications of the proposed new Article 146 are difficult to anticipate, because the proposed new paragraphs seem to a large extent to go beyond the existing legislation. The adoption of a range of legislative provisions will be needed to implement these new constitutional principles. Much will therefore depend on the way in which the Milli Majlis will give effect to these principles, bearing in mind that the States concerned have a margin of appreciation to implement the principles of local democracy in their domestic legal order. These uncertainties notwithstanding, the draft amendment to Article 146 raises some concern from the point of view of the Charter.

As a general point, Article 146 does not explicitly entrench, either in its present or in the amended proposed form, 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" (proposed new para. I), but fails to entrench a number of other equally important principles laid down in the Charter.

More specifically, the proposed amendment to Article 146 (I) does not seem sufficient to ensure that local self-governments will be able to regulate and manage a "substantial share of public affairs" under their own responsibility and that their powers shall be "full and exclusive", as provided for by Article 4 paras 1 and 4 of the Charter.[24]

Especially worrying is the proposed amendment in Article 146 (III), according to which "the State oversees activities of municipalities", because the exact scope of this supervision is not further specified in the Constitution. It is therefore essential that this supervision be interpreted as a mere "administrative supervision" for the purpose of Article 8 of the Charter. Such a supervision shall normally aim only at ensuring compliance with the law and with constitutional principles.[25]

[24] See also Recommendation 126 (2003) of the Congress on local and regional democracy in Azerbaijan, item 8.2 b.

[25] See also Recommendation 126 (2003) of the Congress on local and regional democracy in Azerbaijan, item 8.2 d.

As concerns the proposed amendment to Article 146 (IV), 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.

Supervision by the State over the activities of municipalities comprises only two cases established in the current legislation: *First*, Article 144 of the Constitution of Azerbaijan provides that the implementation of additional powers granted by the legislative and executive powers to municipalities shall be supervised by those authorities. *Second*, according to the European Charter on Local Self-Government (Article 8) and Law on Administrative Control of 2003, administrative control is carried out over the activities of municipalities.

Thus, if only administrative control were mentioned in the Constitution, it would not cover the above-mentioned first case of possible supervision stipulated in the Constitution.

Paragraphs 40

Another innovation, which must be underlined, is the proposed change in Article 95 I (4), which provides that the Milli Majlis shall in the future be responsible for approving and terminating "intergovernmental agreements containing rules contrary to the laws of the Republic of Azerbaijan". It has been clarified that this provision, which has to be read in conjunction with the proposed amendment to Article 109 (17), entails a reinforcement of parliamentary powers. Azerbaijani legislation distinguishes inter-state and inter-governmental treaties. The former are to be ratified by the Milli Majlis and the latter by the President. The purpose of the amendment is therefore to ensure that, if an intergovernmental treaty provides rules contrary to Azerbaijani law, it will have to be submitted to the Milli Majlis for ratification and not just to the President. In that sense, the amendment would contribute - although in a modest way - to moving towards stronger checks and balances in relation to the powers of the President. The Venice Commission notes, however, that a meaningful reinforcement of parliamentary powers in this matter would also require that intergovernmental agreements not containing rules contrary to the laws be approved and terminated by the Milli Majlis. Indeed, once adopted such intergovernmental agreements could hamper the future development of laws as they automatically prevail over national law.

Instead of analyzing the amendments to Articles 95 and 109 of the Constitution, the experts propose that all intergovernmental agreements must be ratified by the Parliament. According to the Constitution, the President has his own field of competence within which he concludes intergovernmental agreements while complying with the Constitution and laws of Azerbaijan. The proposal of the experts relates more to Parliamentary republics, but not to Presidential ones. If to follow the logic of experts, then it would be necessary to provide that all Presidential acts must be approved by the Parliament.

Paragraphs 42-44

The draft constitutional amendments under examination embrace a variety of proposals and combine a limited number of important reforms, with some modest adjustments. The overall logic and coherence of the reform is not always evident and the procedure chosen may give rise to some criticism.

Some amendments, undoubtedly, constitute important improvements as compared to the existing Constitution and they must be welcome. At the same time, there is reason for concern about a few very negative developments in terms of democratic standards, given the legal culture and context prevailing in Azerbaijan. This is essentially the case for the removal of the two-term limit of the President, which reinforces his already strong position and does not follow international and European practice.

The Venice Commission is of the opinion that the draft constitutional amendments under examination do not eradicate the need for a more thorough constitutional reform in the future. Such a reform would seem necessary to reach a better distribution of powers between the branches of the state power and the Commission stands ready to provide its expertise at the request of the authorities of Azerbaijan.

As noted above, the experts have formulated detailed comments only on those amendments, which, in their opinion, are of a negative nature. The reasons of such a selective approach are not clear. In a number of cases, without admitting that specific laws are to be adopted to give effect to the relevant amendments, the experts focus exclusively on possible negative consequences. They assume in advance that the Parliament is lacking good will to regulate the implementation of the amendments proposed, based on the international obligations of Azerbaijan. It is hard to explain such a subjective approach. This subjective approach is particularly seen from the assessment of the experts of the level of “the legal culture and context prevailing in Azerbaijan”. It would have been more productive to propose to the Azerbaijani Government an expert assistance in drafting of respective laws, if the amendments proposed to the Constitution enjoy support of voters on 18 March 2009.