



Strasbourg, 18 October 2016

CDL-AD(2016)029

Opinion No. 864 / 2016

Or.Engl

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AZERBAIJAN

OPINION

**ON THE DRAFT MODIFICATIONS
TO THE CONSTITUTION**

**SUBMITTED
TO THE REFERENDUM
OF 26 SEPTEMBER 2016**

**Endorsed by the Venice Commission
at its 108th Plenary Session,
(Venice, 14-15 October 2016)**

on the basis of comments by:

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I. Introduction

1. By letter of 6 September 2016, the Chair of the Parliamentary Assembly of the Council of Europe, on behalf of the Bureau of the Parliamentary Assembly, requested the opinion of the Venice Commission on the draft modifications¹ to the Constitution of Azerbaijan to be submitted to referendum on 26 September 2016 (CDL-REF(2016)054, hereinafter – the Draft).

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.

3. The present preliminary opinion was prepared on the basis of their comments based on an unofficial English translation of the Draft. The authorities have been unable to provide an official translation.² The unofficial translation may not always accurately reflect the original version in Azeri on all points; therefore, certain issues raised may be due to an inaccurate translation of the Draft.

II. Background information and scope of the analysis

4. Due to time constraints, the rapporteurs were unable to visit Azerbaijan and did not benefit from direct consultations with the authorities, experts and other stakeholders. In this context, the Venice Commission regrets that the authorities of Azerbaijan did not consult it prior to submitting the Draft to the referendum. As a result, the Venice Commission did not have the opportunity to learn more about the intent and the reasoning behind the reform. On 6 September, the Secretariat of the Venice Commission invited the authorities of Azerbaijan to provide written information and comments on the substance and procedure of the reform, but the authorities did not avail themselves of this possibility.

5. The Draft modifies 29 provisions from different parts of the Constitution. The reform is two-fold: first, it modifies a number of human rights provisions of the Constitution, in some cases by introducing various limitation clauses. Second, the reform gives additional powers to the President, increases his term of office and introduces the figure of the Vice-President. Before addressing the substance of the proposed Draft, the Venice Commission will examine the procedure in which this reform was initiated and put to a vote.

III. Some preliminary remarks on the procedure of the reform

6. As the Venice Commission observed in its 2010 Report on Constitutional Amendment (hereinafter the “2010 Report”), there is no single “best model” for the process of constitutional amendments.³ However, certain general principles may be derived from the previous opinions and reports by the Venice Commission, based on the pan-European constitutional heritage.

7. Thus, in its 2001 Guidelines for constitutional referendums, the Venice Commission recommended that the rules on constitutional referendums should be sufficiently regulated at the constitutional level. Any such reform should be based on “broad consensus” in order to

¹ The term “modification” is used throughout the text instead of a term “amendment”, more usual in this context, because in Azerbaijan the Constitution makes a difference between the processes of “amending” and “changing” the Constitution. Hence, when speaking of the current reform, the present opinion will use the term “modification”.

² However, official Russian translation of the text of the Draft is available on the web-site of the Constitutional Court of Azerbaijan at <http://www.constcourt.gov.az/decisions/359>

³ CDL-AD(2010)001, §§ 17 and 107

ensure the “requirement of constitutional legitimacy”.⁴ Furthermore, “to the extent that constitutional change is allowed, then this should preferably be slow and incremental and following other procedures than those of everyday politics”.⁵

8. Constitutional reforms in other “new democracies” previously examined by the Venice Commission indicate that there is a strong risk that referendums on constitutional amendments “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”.⁶ Constitutional amendments strengthening the position of the executive should thus be subject to special scrutiny.⁷ In addition, as follows from the Code of Good Practice on Referendums,⁸ the circumstances of the referendum must guarantee the freedom of voters to form an opinion. This requires *inter alia* that the question put to the referendum is formulated clearly, that sufficient information is given to the voters, and that enough time is left for public debate.⁹

9. In order to understand and assess the procedure of the reform, the existing constitutional framework must first be examined.

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).

11. The question about the relationship between those two procedures has already been raised in the 2009 Venice Commission opinion on the previous constitutional reform of Azerbaijan.¹⁰ In 2009 the authorities of Azerbaijan claimed that these two procedures are interchangeable.¹¹ However, such reading of the Constitution gives the authorities permission to decide arbitrarily which procedure to choose: either a referendum (which in case of a Presidential initiative does not involve Parliament at all) or voting by a super majority at two subsequent sessions with an interval of at least six months in Parliament. It is not uncommon for a constitution to provide for different procedures for its amendment/change, generally reserving more stringent ones (increased majorities, multiple readings) for the most important modifications. However, the Constitution of Azerbaijan does not appear to be based on this *ratio*, as the “changes” - which are more important than mere “amendments” given that they can “contradict”, hence substantively amend the Constitution – are exempted from any formal parliamentary procedure and are directly submitted to the referendum, in a procedure which is significantly swifter than the procedure for “amendments”.

12. At any rate, the legal characterisation of the constitutional modifications under consideration – “changes” as opposed to “amendments” – is not unequivocal. Some of the proposed modifications appear to be “amendments” rather than “changes”, since they develop, without directly “contradicting” the original text of the Constitution (see, for example, amended Article 47, which extends the definition of hate speech), while others (such as new Articles 98-1 or 101-1) are clearly aimed at significantly altering the Constitution. The choice of launching the procedure for “changing” the Constitution (i.e. the Chapter XI procedure) is therefore not solidly grounded in the Constitution and it does not appear, as it should, as the only possible legal and

⁴ *Ibid*, §§ 16 and 59

⁵ *Ibid*, § 75

⁶ *Ibid*, § 191

⁷ *Ibid*, § 249

⁸ CDL-AD(2007)008rev

⁹ See esp. § 3.1

¹⁰ See CDL-AD(2009)010, Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan, § 7

¹¹ *Ibid*

objective choice. This is regrettable, since it may eventually undermine the legitimacy of the whole reform.

13. Furthermore, Chapter XI of the current Constitution does not provide for any formal involvement of Parliament in the process of constitutional change, if the initiative is taken by the President. This is highly problematic, as it means that, in essence, the President may circumvent Parliament completely, and will only need to obtain a preliminary “conclusion” of the Constitutional Court which, under Article 154, does not have the power to assess the content of the proposed changes.

14. Chapter XI allows the President to put to referendum nearly any proposals, even those which 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 which 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”.¹² 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”.¹³ 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”.¹⁴ The recent opinion on Kyrgyzstan “warns against constitutional referendums without a prior qualified majority vote in Parliament”.¹⁵ 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

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.

17. In addition, another factor which may jeopardise the “constitutional legitimacy” of the reform is the time-frame in which the modifications have been submitted to the referendum. As the Venice Commission has previously stated, the process of amending the Constitution should be marked by the highest levels of transparency and inclusiveness. It is particularly important where the reform, such as the current one, is so heterogeneous and proposes extensive modifications to various key aspects of the Constitution. “Transparency, openness and inclusiveness, as well as adequate timeframes and conditions allowing for a variety of views and proper wide and substantive debates of controversial issues are key requirements of a democratic constitution-making process and help ensure that the text is adopted by society as a whole, and reflects the will of the people. Notably, these [debates] should involve political institutions, non-governmental organisations and citizens’ associations, academia, the media

¹² § 183

¹³ Section II, sub-section M

¹⁴ CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia, § 221

¹⁵ CDL-PI(2016)009, Kyrgyz Republic - Preliminary Joint Opinion on the Draft Law “On Introduction of amendments and changes to the Constitution”, § 25

¹⁶ See also CDL-AD(2009)024, § 132, Opinion on the constitutional reform in Ukraine

and the wider public; this includes proactively reaching out to persons or groups that would otherwise be marginalized, such as national minorities”.¹⁷

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.

19. In sum, the reform under examination is being conducted without any parliamentary involvement and within a tight time-frame which does not enable sufficient public debate. This is, in essence, contrary to the notion of representative democracy which is the cornerstone of nearly all modern constitutions, including the Azeri Constitution, in particular its Articles 2 Section II and 7 Section III. It is also contrary to the well-entrenched idea in the European constitutional heritage, that constitutional reform should follow a particular course of action, different from that of “everyday politics”. All this undermines the “constitutional legitimacy” of the reform, and may prevent the people of Azerbaijan from making an informed choice.

IV. Entering into force of the reform

20. The next preliminary question is when the constitutional modifications, if adopted through referendum, should enter into force.

21. The institutional modifications submitted to the referendum, if adopted, will have the effect of considerably strengthening the powers of the President of Azerbaijan. The Venice Commission recalls its remark in § 145 of the 2010 Report, cited above, where it stressed that “to the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, the motivation should be to improve the machinery of government as such – not the personal power and interests of the incumbent. A sound principle would therefore be that such amendments (if enacted) should have effect only for future holders of the office, not for the incumbent”.¹⁹ This rule, which may be regarded as an emergent European standard, can probably be derogated in exceptional circumstances – for example, where a reform is supposed to help overcome a long-lasting political deadlock which paralyses the country – but this does not appear to be the case in Azerbaijan.

22. It therefore seems logical that these powers should only apply to the next President, since it will be during the next presidential elections that the people of Azerbaijan will choose their President in full knowledge of what his or her powers are going to be. Regrettably, this is not the case for the constitutional reform under consideration.

¹⁷ CDL-PI(2016)009, Kyrgyz Republic - Preliminary Joint Opinion on the Draft Law “on Introduction of amendments and changes to the Constitution”, § 27

¹⁸ See the decision of the Constitutional Court (in Russian): <http://www.constcourt.gov.az/decisions/359>

¹⁹ See also CDL-AD(2004)029, Opinion on the Referendum of 17 October 2004 in Belarus, § 10

V. Provisions concerning human rights

23. The Draft modifies a number of provisions of the Constitution on human rights. Some of those modifications expand the scope of protection of the currently recognised human rights or introduce new concepts, such as “personal data”, “human dignity” etc (see, in particular, modified Articles 24, 25, 32, 36, 56, 60, and 68). Other modifications (see, in particular, modified Articles 24, 29, 47, 49, 53, 57, 58 and 59) introduce various limitation clauses, describing situations where specific human rights may be restricted.

24. 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.

A. Compatibility of the Draft with the international human rights obligations of Azerbaijan – a general overview

25. Under Article 155 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.”²⁰

26. That being said, the Commission also acknowledged that “in the future there may be more calls for adjusting or limiting or even reducing the legal reach of some constitutional rights; either because they must be balanced against other conflicting rights, or because they have in some cases been judged as going too far, thereby unduly restricting the legitimate democratic powers of parliament and the government”.²¹ The Venice Commission observed that “if the provisions are formulated in very broad and general terms, it might become necessary to introduce necessary restrictions by way of a constitutional amendment if they are interpreted broadly by domestic courts”.²² Thus, the very idea that some human rights provisions in the Constitution may be circumscribed by limitation clauses introduced at the constitutional level is legitimate, to the extent that it does not breach the country's international obligations (in particular, in the context of Azerbaijan - the European Convention on Human Rights, the ECHR).

27. Most of the “limitation clauses” introduced by the Draft are formulated in broad terms, and are not supposed to be applied directly. That being said, the limitation clauses should be formulated with sufficient precision, to give clear guidance to parliament that may implement them in the legislation, and to the courts (in particular the Constitutional Court) which may be called to interpret them.

28. The modifications introduced by the reform into the human rights provisions of the Constitution, taken as such, do not directly contradict the international obligations of Azerbaijan (for more specific comments see below). The practical effect of this reform will largely depend on the development of these new constitutional provisions in the national legislation and their interpretation by the courts.²³

²⁰ § 166

²¹ § 157

²² § 159

²³ CDL-AD(2009)010, § 42

29. At the time of accession of Azerbaijan to the Council of Europe, the Constitution did not provide for the principles derived from the ECHR that any restrictions to fundamental rights and freedoms should be *lawful*, should pursue a *legitimate aim* and be *proportionate* to this aim. In 2002, following Azerbaijan's accession to the Council of Europe on 25 January 2001, the authorities of Azerbaijan adopted a Constitutional Law "On Regulation of Implementation of Human Rights and Freedoms in the Azerbaijan Republic", which aimed at bringing the legislation of Azerbaijan into conformity with the ECHR and other Council of Europe standards in the human rights field. The relevant Draft Law had been examined by the Venice Commission which recommended in its opinion that "the conditions under which restrictions [on human rights] be imposed be clearly stipulated in the Constitution [...]".²⁴

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.²⁵ 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".²⁶ 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.

32. Finally, the need for the national legislation to "take into account international legal obligations as well as the legitimate role of national and international courts in developing and protecting human rights" should be underlined.²⁷ The compatibility of the Draft (and of any further implementing legislation) with the international obligations of Azerbaijan should not be assessed solely on the basis of the formal compliance of the text of the Constitution with the texts of the international conventions and treaties to which Azerbaijan is a party. It should be done also in the light of the well-established case-law of the international jurisdictional organs which were created to interpret and apply those conventions and treaties – such as, in the first place, the European Court of Human Rights (ECtHR).

²⁴ CDL-INF(2001)027, Opinion on the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms of Azerbaijan, § 9

²⁵ See the text (in Russian): <http://www.meclis.gov.az/?/ru/topcontent/84>

²⁶ CDL-AD(2009)010 § 24

²⁷ 2010 Report, § 177

B. Detailed analysis

33. Modified Article 24 Section I proclaims that “human dignity is protected and respected”. “Human dignity” is protected in certain European constitutions – for example, it is the foremost right in the 1949 German Constitution (*die Würde des Menschen*). The European Union Charter of Fundamental Rights proclaims “human dignity” as a cornerstone guarantee in its Article 1. Thus, inclusion of this concept in the Constitution of Azerbaijan is positive.

34. Modified Article 24 Section III stipulates that “abuse of the right is not allowed”. It is standard practice that abuse of rights is not defensible, but as a subject it is to be defined by administrative or jurisdictional authorities on a case-by-case basis. Further implementation of this clause in the legislation and in the case-law should ensure that the courts do not interpret the notion of “abuse” too broadly, and that they start from the assumption that those seeking protection of their human rights act *bona fide*.

35. Modified Article 25, in describing prohibited grounds for discrimination, replaces the notion of “nationality” with “ethnicity”. It appears to be a minor terminological change;²⁸ that being said, the Venice Commission recalls that distinctions based on “nationality” in the sense of “citizenship” would be often legitimate, while “ethnicity” is rarely, if ever, a legitimate ground for distinction between individuals and its use as a ground for distinction between individuals would almost inevitably lead to discrimination. In addition, Section VI stipulates that people with physical and mental disabilities “are entitled to all rights and carry all duties” except in cases where enjoyment of rights and performance of duties is “impeded on their limited abilities”. The central message of this modification is to prevent limitations on rights which are driven by prejudices about people with disabilities, and not by their actual physical and mental condition. This development is positive.

36. Modified Article 29 provides that the right to property will be limited by “social responsibility” of the owners, with a special provision on land property which may be restricted for the sake of “social justice and effective use” of the land. Modified Article 29 reinforces the idea of the non-absolute character of property rights, which is legitimate. However, such notions as “social responsibility”, “social justice” and “effective use” are very broad and must be developed in the implementing legislation.

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.²⁹

38. Modified Article 32 Section VII is aimed at protecting personal data. Personal data protection is a legitimate concern and its elevation as a constitutional matter is a positive development. However, this norm should not prevent collection and disclosure of data on “private life” of public figures, within the limits set by the ECtHR case-law under Article 10 of the European Convention. Further, collection and systematisation of data (by the State and private actors) should be possible for other legitimate purposes. It should be recalled in this respect that “there is a certain tendency to accept that the right to receive information as element of the right of freedom of expression implies in principle the right of access to information of the administration - information which must be made public at a specific request and subject to the usual grounds of limitation.”³⁰

²⁸ The Russian translation uses the word “*натционалност*” which is grossly an equivalent of “ethnicity”

²⁹ “VI. It is prohibited to enter information resources carried on the paper or in electronic form in order to obtain information on third party, except in the cases provided by law.”

³⁰ CDL-INF(2000)015, Opinion on Freedom of Expression and Freedom of Access to Information as Guaranteed in the Constitution of Bosnia and Herzegovina, § 20

39. New Section IV of Article 36 prohibits lockouts, except in cases provided by law. This provision appears to give additional protection to the workers; however, the legislator retains a wide discretion in regulating situations where lockouts should be possible. The Venice Commission draws the authorities' attention to the interpretation given by the European Committee of Social Rights to the revised European Social Charter, ratified by Azerbaijan in 2004.³¹ A comment to Article 6 § 4 of the Charter (which guarantees the right of workers and employers to collective actions) stipulates that "a general prohibition of lock-out is not in conformity with Article 6 § 4".³²

40. Current Article 47 Section III prohibits hate speech which is defined as "propaganda provoking racial, national, religious discord and animosity". The proposed modification supplements this definition with reference to "hostility based on any other criteria". In principle, it is legitimate to combat hate speech;³³ however, such an open-ended clause may justify far-reaching restrictions on freedom of expression, guaranteed by Article 10 of the ECHR. Hence, the choice of wording needs to be dealt with very carefully: not every statement which may arguably "provoke hostility or animosity" would amount to hate speech.³⁴ The Venice Commission recalls in this respect that "it is [...] incumbent on the press to impart information and ideas on political issues, including *divisive* [italics added] ones."³⁵

41. Modified Article 49 provides that public assemblies should not "disrupt public order and public morals". It is possible, and almost inevitable, that peaceful gatherings may somehow disrupt "public order (for example, by creating obstacles for traffic, commercial and industrial activity, etc.), and yet be permissible under Article 11 of the European Convention on Human Rights. Further, the message of such gatherings may be "disturbing" for somebody's views on morality – and, again, be permissible under Article 11. The State should allow such gatherings and even facilitate them provided that those disturbances are not excessive and help convey the message of the public event. This provision should therefore be cautiously interpreted in the light of the *proportionality* principle, set out in new Section II of Article 71 in order not to absolutize "morality" and "public order".³⁶ It is also unclear why "morality" and "public order" are singled out as specific grounds for limiting freedom of assembly, while other legitimate aims, mentioned in Article 11 (such as, for example, public safety and health) are not in the text of the Constitution. It would be wise to fully align the formula used in Article 49 to the language of Article 11 of the European Convention. The Commission also stresses that the notification requirement, contained in current Article 49, should not be automatically applied to spontaneous assemblies or assemblies of a certain size which do not cause much disruption.³⁷

42. Modified Article 53 provides for the deprivation/loss of citizenship "in cases provided by the law". Unlike some other limitation clauses introduced by the reform, this Article represents a *net and clear retrogression* if compared to the norm currently in force (which prohibits withdrawal of citizenship in absolute terms). The proposed modification to Article 53 entails an open delegation to the legislator to regulate grounds for deprivation of citizenship. It creates a risk of

³¹ See http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=AGCoLkmo

³² See the 2008 Digest of the case-law of the European Committee of Social Rights, p. 55, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f>

³³ See, for example, CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, § 42

³⁴ See CDL-AD(2015)015, Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, § 30, with further references

³⁵ *Erdođdu and Ince v. Turkey*, nos. 25067/94 and 25068/94, 8 July 1999, § 48

³⁶ CDL-AD(2010)016, Joint Opinion on the Act on Public Assembly of the Sarajevo Canton (Bosnia and Herzegovina) by the Venice Commission and OSCE/ODIHR, § 11

³⁷ See CDL-AD(2010)020, Joint Guidelines on Freedom of Peaceful Assembly, prepared in cooperation with the OSCE/ ODIHR, revised in 2010, pp. 9 and 10. See also CDL-AD(2010)049, Interim Joint Opinion on the Draft Law on Assemblies of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, § 44: "It is good practice to require notification only when a substantial number of participants are expected, or not to require prior notification at all for certain types of assembly".

discriminatory and unjustified deprivations of citizenship.³⁸ Although international standards do not confer a right to citizenship as such, they prescribe that deprivation of citizenship may be possible only in cases of conduct seriously prejudicial to the vital interests of the State Party, it may not be arbitrary or discriminatory, and statelessness should be avoided.³⁹ Article 53 in its current form corresponds to the 1961 UN Convention on Reduction of Statelessness, to which Azerbaijan acceded, and there does not seem to be any reason to change it. If such reasons exist, it cannot be done by way of a blanket reference to the implementing legislation. The Constitution itself should describe, at least in general terms, circumstances in which a person may be deprived of the citizenship, and contain a reference to the international obligations of Azerbaijan in this sphere, in particular to the 1961 UN Convention on stateless persons.

43. Modified Article 56 narrows down the limitation set in the current Constitution on the electoral rights of civil servants, judges, military personnel, prisoners and clerics: it is proposed that only their passive right (i.e. the right to be elected) may be limited by law. This modification is welcome to the extent that it leads to the broadening of the category of people who vote in elections. As concerns the restrictions on passive electoral rights, the question of whether they should take the form of incompatibility as opposed to ineligibility could be raised.

44. Modified Article 57 Section IV prevents military personnel from lodging collective petitions. The Venice Commission recalls that, to the extent that “collective petitions” can be assimilated to “collective actions”, Article 11 of the Convention contains a special exception for “members of the armed forces, of the police or of the administration of the State”, whose freedom of association and assembly may be limited by “imposition of lawful restrictions”. That being said, an absolute and blanket character of such restriction at the Constitutional level may be problematic;⁴⁰ it would be advisable to add flexibility to this provision by leaving to the legislator the possibility of regulating such matters (“The right of the military personnel to lodge collective petitions may be restricted by law”).

45. Modified Article 58 prohibits associations created for pursuing “intentions considered as a crime by law or using criminal means”. The proposed wording may be interpreted as giving the legislator a *carte blanche* to define any activity as “criminal” and, hence, to prohibit any association which pursues it or even “carries an intention” to do so. In its opinion on the Law on non-governmental Organisations (Public Associations and Funds) of Azerbaijan, the Venice Commission noted that a similar provision of the Law on NGOs is acceptable “since associations shall be free in the determination of their objectives within the limits provided for by laws in line with international standards”.⁴¹ It should be stressed that the restriction introduced by modified Article 58 would be legitimate *only to the extent* that the criminal laws at issue are “in line with international standards”, and that the notions of “crime” and “criminal means” should be defined by the legislator with reference to those standards.

46. Modified Article 59 provides that business activities may be regulated in order to preserve “state interests” and “protect people’s life and health”. Again, this limitation clause is legitimate under condition that the extent of any such limitation is described in the law, and, again, is not disproportionate to the stated legitimate aims.

47. Modified Article 60 introduces protection of rights and liberties “in the court and by administrative means” and proclaims certain principles of fair trial (impartiality, reasonable time, right to be heard). This modification goes in the right direction; however, this provision, for whatever reason, does not mention other basic guarantees of Article 6 of the ECHR, such as fairness, independence of the courts, publicity of the trial, and equality of arms. It is noteworthy that under the current Constitution “independence of the courts” and “fairness” of the

³⁸ See in this respect CDL-AD(2016)006, Opinion on the Draft Constitutional Law on "Protection of the Nation" of France. §§ 78 et seq.

³⁹ See CDL-AD(2016)006, Opinion on the Draft Constitutional Law on "Protection of the Nation" of France, § 47

⁴⁰ See the ECtHR judgment in the case of *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, 4 July 2013

⁴¹ CDL-AD(2014)043, § 48

proceedings are presented as general characteristics of the judicial proceedings but not as a human right (see Article 127 Section II of the Constitution). It is recommended that “independence” of the courts and the general requirement of “fairness” should be mentioned along with other procedural rights, contained in Articles 60 et seq.

48. Modified Article 68, Section I, guarantees “a right to the conscientious treatment excluding arbitrariness by the state bodies”.⁴² This is a very important principle of good State governance, and, as such, its introduction into the text of the Constitution is welcome. Section IV of this provision proclaims that the State, “along with its officials”, will have civil liability “for the damage to civic rights and liberties and violation of the state guarantee of the civic rights and liberties as a result of the illegal actions or inaction of the state officials”. Again, this is a very welcome provision: it stresses that the State’s liability is not limited to cases of direct interference by State officials, but also covers situations where the State fails to meet its positive obligation to “guarantee” respect for human rights (by “inaction”). That being said, it needs to be stressed that the State should be a primary defendant in cases where its officials committed illegal acts/inaction on duty. Personal civil liability of State officials is also possible, in some situations, but should not replace the liability of the State as a whole. And, indeed, this norm should not be interpreted as excluding other forms of liability (for example criminal or disciplinary liability of State officials for illegal acts).

VI. Institutional changes proposed by the reform

A. Extension of the presidential term of office

49. The constitutional reform of 2009 removed the two-term limit to the presidential mandate, which was one of the most important checks on presidential power. In its 2009 Opinion,⁴³ the Venice Commission criticized that development. Modified Article 101 now increases the term of the Presidential mandate from five to seven years.

50. Most European countries limit the President’s term of office to two consecutive mandates, and provide for a shorter term for each mandate. Among the member states of the OECD, no countries with presidential or semi-presidential systems currently adopt a seven-years’ presidential mandate.⁴⁴ A seven-year term is provided for the Italian, Israeli and Irish Presidents – but Italy, Israel and Ireland are parliamentary republics and the President’s position there is rather weak. In a purely parliamentary regime the duration and the number of mandates of the President are not of major importance. A six-year term is applicable to the Austrian and Finnish Presidents, but their powers are also much weaker than the powers of the President of Azerbaijan. By contrast, the French and Portuguese Presidents, who enjoy a strong position amongst other branches of the government serve a five-year mandate. A five year-term is provided for the Greek President (who is a “weak” one), and a four-year term is set in the respective constitutions for the Presidents of Iceland and the USA (both of whom are “strong presidents”).

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.

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

⁴² The term used in the Russian translation of the Azeri text is closer to “considerable” or “respectable” treatment.

⁴³ CDL-AD(2009)010, Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan

⁴⁴ It was the case in France previously, but since 2002 a five years’ mandate for both president and parliament was introduced.

the context prevailing in Azerbaijan”.⁴⁵ Unfortunately, since 2009 the “prevailing context” has not improved, at least not in this sphere. As noted in Resolution 2062 of the Parliamentary Assembly⁴⁶ 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).

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.

B. Power to declare early presidential elections

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.

C. Power of the President to dissolve Parliament

1. Vote of no confidence in the Cabinet

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.⁴⁷ 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.

⁴⁵ *Ibid*, § 43

⁴⁶ 2015, The functioning of democratic institutions in Azerbaijan, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21953&lang=en>

⁴⁷ Section II reads as follows: “The term of office of the Milli Majlis of the Republic of Azerbaijan elected via extraordinary elections of Milli Majlis’s convocation may be less than five years. In such case the regular elections to the Milli Majlis of the Republic of Azerbaijan shall be held on the first Sunday of November of the fifth year of a term of office of the Milli Majlis of the Republic of Azerbaijan elected on extraordinary elections of Milli Majlis’s convocation.”

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.⁴⁸ 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.⁴⁹ 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 Majlis”.⁵⁰ In particular, the Venice Commission stressed that the vote of no confidence, under the Constitution of Azerbaijan, would only have the “recommendatory” nature.⁵¹ 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.”⁵² The Venice Commission continued as follows:⁵³

⁴⁸ This Article provides that “should [...] [the] candidatures proposed by the President [...] for the post of Prime-minister [...] be rejected three times, then the President [...] may appoint Prime-minister [...] without consent of Milli Majlis [...]”

⁴⁹ This reading is also confirmed by Article 95 Section I p. 9 of the Constitution, which, in describing the powers of the Parliament, speaks of “giving consent to appoint Prime Minister [...] upon the recommendation of the President [...]”, but does not mention giving consent to the dismissal of the Prime Minister, while, in respect of other top state officials (like the General Prosecutor, for example – see p. 11) the Constitution describes the power of the Parliament to “giving consent to appoint and dismiss”.

⁵⁰ CDL-INF(2001)026

⁵¹ *Ibid*, § 18

⁵² *Ibid*, § 21

⁵³ *Ibid*, § 22

“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.

2. Failure to appoint top judges

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.⁵⁴

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.”⁵⁵ 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.⁵⁶ 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.⁵⁷

⁵⁴ The logic expressed below applies *mutatis mutandis* to the appointments of the members of the board of the Central Bank.

⁵⁵ CDL-AD(2007)028, Report on Judicial Appointments, § 14

⁵⁶ At the legislative level the situation is slightly different: the law established a Judicial Selection Committee which participates in the selection of candidates to the vacant judicial posts (see http://www.judicialcouncil.gov.az/e_hsk_haqqinda.php; see also the law on judges and courts (in Russian only) http://base.spinform.ru/show_doc.fwx?rgn=2765). However, it is unclear to what extent this Committee is independent from the executive, and whether the President has to follow its recommendations.

⁵⁷ This effect is aggravated by the quasi-automatic dissolution of Parliament provided by new Article 98-1, which stipulates that “the President [...] dissolves”, and not “may dissolve”.

3. Other situations where dissolution is possible

67. Finally, under new Article 98-1, the President may dissolve Parliament when the latter “fails to perform its duties specified in Articles 94 and 95, Article 96 Sections II, III, IV and V, and Article 97 of the present Constitution for reasons that cannot be overcome”.

68. Article 94 and 95 of the Constitution define the competency of Milli Majlis in the spheres of law-making, appointments, international relations etc. Articles 97 and 98 set time-limits for the adoption of bills submitted to Parliament by the President and certain other actors, and for their further submission to the President for signing. It is unclear what would amount to failure by Parliament to perform its duties in this context. This formula is too vague; for example, it may be interpreted as penalising any delay in the legislative process with the dissolution of Parliament, which would be clearly excessive, especially given very short time-limits set in Article 97.⁵⁸

4. Conclusions on the power of the President to dissolve the Parliament

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.

D. Introduction of the figure of the Vice-President

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.

E. Deprivation of the MPs of their mandate

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 an 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

⁵⁸ For example, 20 days for a bill introduced by the President under the urgent procedure

opposed to ethical rules.⁵⁹ 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.

F. Elimination of lower age limit for acceding top State offices

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.

G. Re-definition of the “Armed forces”; special guards for the First Vice-President

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.

81. Under new Article 108-1, security of the First Vice-President of the Republic of Azerbaijan and his/her family is protected by “special guard services”. While it is perfectly legitimate for the top officials of the State to have their guards, it is unclear why the status of those guards should be regulated at the constitutional level.

⁵⁹In CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 25, the Venice Commission observed that “[...] generally, given the nature of rules of professional ethics, they should not be equated with a piece of legislation and directly applied as a ground for disciplinary sanctions. [...]”

VII. Conclusions

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.