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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**Draft opinion
on the Constitutional Law
of the Republic of Azerbaijan
on “Safeguards for the vote of confidence
to the Cabinet of Ministers
by the Milli Majlis (Parliament)”**

based on comments by

**Mr Aivars Endzinš (Member, Latvia)
Mr James Hamilton (Member, Ireland) and
Mr Sergio Bartole (Member, Italy)**

I. Introduction

1. In September 2001 the Authorities of the Azerbaijan Republic have seized the Venice Commission with a request for an opinion on the Draft law on Safeguards for the vote of confidence to the Cabinet of Ministers by the Milli Mejlis (Parliament). The Commission has designated Messrs Endzins, Hamilton and Bartole as Rapporteurs.
2. The Venice Commission examined this question at its 48th plenary meeting (Venice, 19 – 20 October, 2001) on the basis of comments provided by the Rapporteurs. As a number issues remained unclear the Commission's Rapporteurs and representatives of the authorities met first in Baku, on ... November and then in Strasbourg, on 29 – 30 November 2001. Messrs Khanlar Hadjiyev, Chairman of the Constitutional Court and Member of the Venice Commission, S. Mirzoyev, ..., Mr Shahin Aliev, ...and Mr Fouad Aleskerov participated in these meetings.

II. The context of the proposed draft constitutional law

3. Upon accession of Azerbaijan to the Council of Europe, the Parliamentary Assembly took note of Azerbaijan's commitment "to continue reforms aimed at strengthening the independence of the legislature vis-à-vis the executive, so that the former can exercise the right to put parliamentary questions to members of the government" (Opinion 222 of the Parliamentary Assembly of the Council of Europe on Azerbaijan's application for membership of the Council of Europe). Moreover, the Committee of Ministers, in their decision inviting Azerbaijan to become a member of the Council of Europe, invited also the Venice Commission "to give its assistance to the authorities of Azerbaijan with a view to reforming the Constitution (...) in conformity with Council of Europe standards".

III. As to the form of the proposed amendment

4. The Constitution envisages two different procedures whereby amendments can be made. According to Article 3 and Chapter XI (Articles 152-155) of the Constitution changes in the text of the Constitution may be made only by way of referendum. Chapter XII (Articles 156–158) provide a second procedure whereby amendments can be made in the form of Constitutional Laws which then become an integral part of the Constitution but may not contradict its main text. It seems clear from this that this procedure can be used only to adopt additional or supplementary material but cannot be used to make any change in the existing text or in the existing Constitutional structure. Hereafter, the term "amendment" should be understood in this sense, i.e. as an addition to the existing constitutional text.
5. Amendments to the Constitution by way of Constitutional Laws can be put forward either by the President or at least sixty-three Deputies of the Parliament. The present draft is initiated by the President of the Republic.
6. Article 158 provides that the President or the Deputies of the Parliament cannot submit proposals concerning provisions contained "respectively" in Chapters VI and V of the Constitution. It is clear, however, following discussions with the authorities in Baku, that the purpose of Article 158 of the Constitution is to set out that the President may not propose amendments to Chapter VI (Executive Power) – i.e. to his own powers - while the Milli Majlis may not initiate amendments to Chapter V (Legislative Power). This is the significance of the word "respectively" in the Article. It is true that since the

amendment is an addition to the constitutional text it might be difficult to determine whether it is linked to a specific provision of Chapter V or Chapter VI of the Constitution. In the present case for instance, the amendment aims at reinforcing the powers of the Milli Majlis but it could also be seen as a restriction of the powers of the President. However, since from a formal point of view the proposal is directly linked to chapter V it would appear to be within the President's competence to propose it.

7. Article 147 of the Constitution determines that the Constitution has the highest legal force and shall be the basis of the legal system of Azerbaijan. In its turn Article 148 "Acts Constituting the Legislative System of the Azerbaijan Republic" establishes that the legislative system consists of the following normative-legal acts:
 - the Constitution;
 - acts accepted by the referendum;
 - laws;
 - orders etc.
8. The Commission concludes that after its adoption the draft law, being an "integral part of the Constitution" will have highest legal force in the hierarchy of norms of Azerbaijan.

IV. As to the content of the proposed amendment

9. The purpose of the law is to provide for guarantees for the implementation of the Milli Majlis' right under Article 95, par.1 point 14, to take "a decision as to a vote of confidence in the Cabinet of Ministers of the Azerbaijan Republic". This is now explicitly indicated in the Preamble of the law. The draft provides for
 - an annual report by the Cabinet to the Milli Majlis;
 - "requests" addressed by the Milli Majlis to the Cabinet and an obligation to reply within one month;
 - the presence of authorised members of the Cabinet at the sittings of the Milli Majlis to reply to oral or written question by deputies of the Milli Majlis.
10. The draft constitutional law thus sets up procedures whereby the the Parliament will be informed of the activities of the executive. It is assumed that the Milli Majlis on these might express its disapproval by a vote of no confidence.
11. The Commission notes that this development is in line with the commitment taken by Azerbaijan when joining the Council of Europe to enable the Parliament to "to put parliamentary questions to members of the government".
12. It further notes the following as regards the legal effects of such a "vote of no confidence" :
13. The Constitution provides for a Presidential system of Government with a very clear separation of powers between the Executive and the Legislature. Article 7.IV provides that the executive, legislative and judicial powers are independent within the framework of their authority. Article 114 of the Constitution, determines that "the Cabinet of Ministers of the Azerbaijan Republic is the highest body of executive power of the President of the Azerbaijan Republic and is subordinate to the President of the Azerbaijan Republic and reports to him".

14. Article 93.IV provides that the Parliament cannot in its laws and decrees give specific orders to executive organs and courts. Article 95 (5), however, provides that the Parliament is responsible for approval of the State budget (on the recommendation of the President) and is responsible for control over its execution. There are no detailed provisions in the Constitution as to how this budgetary control is to be exercised. However, the Milli Majlis has an Account Chamber that controls the budget process and the use of State property. There are a number of provisions relating to the requirement that the Parliament consent to various appointments to senior executive positions. The Parliament must consent to the appointment by the President of the Prime Minister. However, if they refuse to do so on three occasions the President may appoint a Prime Minister without their consent in any case. The Parliament's consent is also required to the removal of the Prime Minister (Article 109 (4) and 128 V.). Judges of the Constitutional Court, the Supreme Court and the Economic Court are appointed by the Parliament on the proposal of the President (Articles 130.II, 131.II and 132.II) The Parliament can remove the President by impeachment but only on the recommendation of the Constitutional Court (Article 95 (12)). The Parliament can remove Judges from holding positions for various reasons on the proposal of the President (Article 95 (13)). Similarly the Parliament can appoint and remove members of the National Bank (Article 95 (15)) on the proposal of the President. The General Procurator is appointed and removed by the President with the consent of the Parliament (Article 133.III). In all of these cases it may be noted that the Parliament has no right itself to initiate anything and its powers extend no further than the giving or withholding of consent.
15. Article 114 expressly provides that the President forms the Cabinet of Ministers who are the supreme executive organ, subordinate and accountable to the President. Article 109 (5) provides that the President appoints and removes from their position members of the Cabinet of Ministers. There is no provision requiring the consent of Parliament either to the appointment or removal of the Cabinet and given that there are many provisions in the Constitution which expressly require the consent of Parliament for various appointments or removals no such consent can be implied.
16. It seems clear from the foregoing that any constitutional provision which was to provide for a vote of no confidence in a Cabinet Member or the Cabinet as a whole and which would require the Minister or Ministers to resign would amount to a clear change in the Constitutional structure and one which could therefore be implemented only through the Referendum procedure. It follows that in the absence of a textual amendment of the Constitution by referendum any procedure providing for a vote of no confidence implemented by means of Constitutional Laws cannot be other than recommendatory in nature. The authorities in Baku have confirmed that this is the intention of the law. In order to avoid any misunderstandings the Commission would suggest that this "recommendatory" nature of the vote of no confidence be clearly indicated in the constitutional law.
17. As to the political effects of the vote of no confidence, it has been argued that it will be difficult for the President to ignore the expression of the will of the legislative assembly and that therefore the vote of no confidence, despite being legally non binding - will have a clear impact in the political life of the country. In this respect the Commission observes the following:
18. There are no procedures in the Constitution to resolve any deadlock between the President and the Parliament. The Parliament is elected for a fixed term of five years and

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- there are no procedures whereby it can be dissolved at an earlier date. Similarly, the President is elected for a fixed term and while he can be removed by a process of impeachment for misbehaviour he cannot be removed by the Parliament because the Parliament disapproves of his policy or lawful actions within his sphere of competence. Because the terms of the President and Parliament are not synchronised there must be scope in the future for President and Parliament to represent different political tendencies.
19. The scheme of the Constitution is to avoid any such 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.
 20. 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.
 21. Consequently, while it is clearly desirable to increase the supervisory powers of the Parliament over the executive, which are very weak under the existing structure, introducing a recommendatory (non binding) vote of no confidence may be in practice less adequate than it would seem from the outset. In any case it should not be regarded as a long term solution but should rather be the starting point for further reflection on the balancing of powers in Azerbaijan.

V. As to the procedure for the vote of no confidence

22. The draft Law provides now for limitations on the right of the Milli Majlis to vote no confidence to the Cabinet. Such a voting can only take place six months after a previous voting on confidence to the Cabinet. No vote of confidence take place six months prior to Presidential or Parliamentary elections.
23. The Draft law does not specify further the procedure for the vote of no confidence. Admittedly the details of the procedure are regulated in the Internal Rules of the Milli Majlis as follows:
24. Any member of the Milli Majlis can initiate a vote of no confidence. However, in order for the vote to be put on the Milli Majlis' agenda a majority of present members is required. As the quorum is 63 members, the inscription on the agenda would require at least 32 votes. The vote of no confidence is passed with a majority of members of the Milli Majlis, i.e. 63 votes. It is envisaged that after the passing of the Constitutional Law a special chapter on the vote of no confidence will be added to the Internal Rules of the Milli Majlis.
25. The Commission would first suggest that a reference be made in the Constitutional Law that details of the procedure should be regulated in the Internal Rules of the Milli Majlis.

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26. Moreover, the Commission would suggest that the initiative for a vote of no confidence be a collective rather than an individual initiative. Moreover, it finds unusual the requirement of a majority of members present to have the point of no confidence included in the agenda. A less cumbersome procedure should be envisaged.

IV. Conclusion

27. The Commission observes that the draft Constitutional Law does not introduce any changes to the political system of Azerbaijan. It aims at providing for a mechanism whereby the Milli Majlis will be enabled to exercise, by means of a “recommendatory” vote of no confidence, some control over the executive. Any substantial strengthening of parliamentary control would however require a revision of the Constitution by referendum.
28. The draft Constitutional Law sets out the framework of the mechanism. However important procedural details, still need to be regulated. This can be done in the Constitutional Law or, preferably, upon instruction by the Constitutional Law, in the Internal Rules of the Milli Majlis.