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Professor Wojciech Sadurski
University of Sydney
Faculty of Law

Legal Opinion on Constitutional Amendment in Azerbaijan, 2009, Removing Presidential Term Limits

I am Challis Professor of Jurisprudence in the University of Sydney Faculty of Law and Professor at the Centre for Europe at the University of Warsaw. I am also member of the Global Faculty (visiting professor) at New York University School of Law, and recurrent visiting professor at Cardozo Law School in New York and University of Trento, Italy. I have lectured at a number of other law faculties in the United States, Canada, Asia and Europe. My main field of expertise is comparative constitutional law, human rights and philosophy of law. I have written, edited or co-edited 26 scholarly books, 44 chapters in books and 75 scholarly articles in legal journals. My full profile can be found at: http://sydney.edu.au/law/about/staff/WojciechSadurski/index.shtml.

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This Legal Opinion consists of the following parts: (1) First, I will summarize the legal developments in Azerbaijan, surrounding the adoption of the 2009 Constitutional Amendment, based on sources and information available to me, mainly publicly accessible sources. My account will be limited to legal developments and will not cover any political or other aspects. (2) Second, I will show that the adoption of the amendment violates the principle of transparency because the newly adopted constitutional provisions do not correspond at all to the scope and subject-matter of the former constitutional provision subject to replacement. In this way, those "amendments" have the capacity of misleading the voters about their real meaning and purpose, thus violating the principle of transparency and openness which is at the centre of the democratic state based on law. (3) Third, I will argue that there is a dominant customary norm that limits the number of terms which can be served by one person as president in the systems where president holds strong powers, this customary norm has become part and parcel of principles of democracy.

(4) Fourth, I will argue that under the European Convention of Human Rights (ECHR) all citizens of Council of Europe member states have a right to democratic governance. (5) Fifth, I will argue that under universal international law there is a customary binding rule of a right to democratic governance. The combination of sections (3) and (4) implies that removing presidential term limits violates the law of the European Convention of Human Rights system, and combination of sections (3) and (5) implies that removing term limits is a breach of international law. (6) Sixth, I will argue that the way the amendment was introduced violates the principle of non-retrospectivity of law which is central to the principles of a democratic state based on law. (7) In conclusion, it follows that the removal of term limits in the 2009 constitutional amendment violates the principles of transparency (part 1 of this Opinion) and non-retrospectivity (Part 6), and also constitutes breach of European law under the ECHR (Part 4) and of international law in so far as it recognizes a universal right to democratic governance (Part 5).

Part 1: Account of facts related to the adoption of 2009 Constitutional Amendment

In this Part, I will restrict myself give a short account of the legal questions concerning the Constitutional Amendment of 2009. I will deliberately abstain – both in this and in the remaining Parts of this Opinion – from making any political or other non-legal observations and comments about the situation in Azerbaijan.

Mr Ilham Aliyev succeeded his father as President of the Republic of Azerbaijan in 2003.[1] After re-election in 2008, he almost instantly initiated the procedure to remove the constitutional imposition of presidential term limits. Article 101V at the time had read, "No one can be elected as the President of the Republic of Azerbaijan more than twice".

(1) Procedure for Constitutional Amendment

The general right given to the people of Azerbaijan to alter their Constitution is declared in Art. 3 of the Constitution, in the Chapter titled "People's Power". The primary passage reads:

Article 3. Questions solved by way of nation-wide voting-referendum

I. People of Azerbaijan may solve any questions involving their rights and interests by way of referendum

II. The following questions may be solved only by way of referendum:

1. Acceptance of the Constitution of the Azerbaijan Republic and introduction of amendments thereto;

(...)

[1] Official Website of the President of the Republic of Azerbaijan. http://en.president.az/.

On December 18, 2008, the Milli Jalis (the National Assembly) introduced amendments/changes to the Azerbaijani Constitution, originally ratified in 1995, for the first time in seven years. These alterations were to be subject to a referendum open to all eligible voters, to be held three months later. The sections of the Azerbaijani Constitution relevant to amendments/changes state:

Article 152. Procedure of introduction of changes into Constitution of the Azerbaijan Republic. Changes in the text of the Constitution of the Azerbaijan Republic may be made only by way of referendum.

Article 153. Procedure of submit of proposals on changes in the text of Constitution of the Azerbaijan Republic. If proposals about changes in the text of Constitution of the Azerbaijan Republic are presented by Milli Majlis of the Azerbaijan Republic or the President of the Azerbaijan Republic, then Constitutional Court of the Azerbaijan Republic should give its conclusion beforehand.

(...)

§ 5, Ch. XII "Amendments to the Constitution of the Azerbaijan Republic"

Article 156. Procedure of introduction of amendments to the Constitution of the Azerbaijan Republic

I. Amendments to the Constitution of the Azerbaijan Republic are taken in the form of Constitutional laws in Milli Majlis of the Azerbaijan Republic, by majority of 95 votes.

II. Constitutional laws on amendments to Constitution of the Azerbaijan Republic are put to the vote in Milli Majlis of the Azerbaijan Republic twice. The second voting shall be held 6 months after the first one.

III. Constitutional laws on amendments to Constitution of the Azerbaijan Republic are submitted to the President of the Azerbaijan Republic for signing in an order envisaged in the present Constitution for laws, both after the first and after the second voting.

IV. Constitutional laws and amendments to the Constitution of the Azerbaijan Republic become valid after they have been signed by the President of the Azerbaijan Republic after the second voting.

V. Constitutional laws on amendments are integral part of Constitution of the Azerbaijan Republic and should not contradict main text of Constitution of the Azerbaijan Republic.

Article 157. Initiative on introduction of amendments to Constitution of the Azerbaijan Republic Amendments to Constitution of the Azerbaijan Republic

may be proposed by the President of the Azerbaijan Republic or at least by 63 deputies of Milli Majlis of the Azerbaijan Republic.

As one can see, 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 "amendments" procedure, which is compatible with the original version of the Constitution and must undergo a different parliamentary procedure. Only the former is explicitly subject to review by the Constitutional Court.

The distinction between two types of constitutional revisions in itself is somewhat puzzling and non-typical in modern constitutionalism because what lends itself to a "change" procedure as opposed to an "amendment" procedure must be, ultimately, subjective and potentially arbitrary, the difference being that in the case of the latter, but not of the former, there is a requirement of consistency with the remaining text of the Constitution. This, however, need not detain us here as in the case of the 2009 amendment, a more demanding procedure (including the referendum) was adopted.

(2) The 2009 Referendum

The referendum that took place on March 18, 2009, contained 29 questions.[2] A full text of the effect of the changes is available in English in an unofficial translation.[3] The effected alteration that concerns this Opinion was that of no longer limiting the President to two terms.

Where a previous (prior to the amendment in question) Article 101V had read, "No one can be elected as the President of the Republic of Azerbaijan more than twice," it now reads,

"In case the conduct of the Presidential Election of the Republic of Azerbaijan is not held due to military operations under a state of war, the term of office of the President of the Republic of Azerbaijan shall be extended until the end of military operations. The decision on this matter shall be adopted by the Constitutional Court of the Republic of Azerbaijan on the basis of the

[2] "Protocol on the Voting Results of Central Election (Referendum) Commission of the Republic of Azerbaijan." Republic of Azerbaijan. 2009. (Hereafter "Protocol"). Available at: http://www.cec.gov.az/en/CEC_Referendum_Protocol.pdf

[3] "Proposed Amendments and Changes to the Constitution of the Republic of Azerbaijan." IFES Unofficial. 2009. (Hereafter "Changes.") http://www.cec.gov.az/en/8referendum2009/Amendments%20to%20Constitution_annotated_eng_%20February%202%202009.pdf

application of the state body organizing elections (referendum)". [4]

Based on the official results of the referendum, every single measure passed. 70.83% of eligible voters cast their ballot. To those questions not having to do with extension of term limits for the legislature or President, every result is within .72% of 87.5. A question providing for emergency extension of the terms of the Milli Majlis passed with 89.09%. The measure in question, effectively abrogating all term limits on the President, but in wording only extending his term in cases of emergency, passed by 91.76%. Evidently, voters agreed to roughly the same extent about pretty much everything except that their government should stay in power in a state of emergency, where they agreed even more. Over 9 out of 10 voting Azerbaijanis agreed upon the question of whether the President should be able to maintain power indefinitely, which presumably was asked. Given the voter turnout, at least 63% of the entire eligible bock of eligible voters agreed. Given the entire population of the Republic of Azerbaijan,[5] more than ½ agreed, on paper, that Ilham Aliyev should be eligible for subsequent presidential terms.

Part 2: Transparency and openness in constitutional amendments

One of the main principles of democracy and the rule of law is that of transparency and openness: citizens should know clearly what is expected of them by law, and should also know clearly what legal proposals are submitted to them, when they act in the capacity of voters. This has an especially important place in the case of referenda and plebiscites: when citizens are asked to vote on a particular proposal, they should know very clearly what the proposal is, what law is being amended or nullified, and what exactly is at stake in the proposal.

From this point of view, the constitutional amendment referendum of 2009 raises some very important and legitimate objections because of the substitution of the lengthy new text for the simple, declarative, former article may appear deceptive. The ballot form only stated the new text, not what was being replaced. Thus, it was manifestly unclear what was happening unless you had a copy of the old Constitution in front of you: an unlikely action for an average citizen. Also, that particular change (the removal of term limits) was question 21 of 29, buried in the middle of changes both great and small. The changes also included a prohibition on child labour, a ban on recording anybody without their permission (including elected representatives performing official functions), an ability for the President to make meetings of the Mili Majlis secret, the ability for domestic law to trump international law, the right of 40,000 citizens to introduce legislation into the Mili Majlis, a provision requiring a constitutional law for the "material security of the person who was elected President of

[4] Id. p. 11

[5] Indexmundi.com quoting International Monetary Fund. Accessed 2013.http://www.indexmundi.com/azerbaijan/population.html

the Republic of Azerbaijan in the past", a provision allowing "appointment" (rather than "recommendation", a word used in the same paragraph) of the Chairman of the Central Bank, a new article that "The state oversees the activities of municipalities," and an explicit abrogation of bills of attainder, or in their words, "a regulation that was not published." In fact, there was such a lack of equivalence between any single constitutional provision which was being removed and the very large number of constitutional provisions that were being proposed for adoption that this incongruence between the old and the new text suggests a deliberate will to confuse and even deceive the voters about what really was at stake in the referendum. (The only provision in the new text remotely similar to the text being expunged was about the extension of presidential term until the end of military operations in the case of war, but even under the most generous reading it cannot be seen as equivalent to being a reversal of the term limits provision). It is as if – to make a deliberate extreme hypothetical example – a lawmaker wanted to remove the death penalty prohibition from the constitution by submitting to the voters a large number of new provisions, on the topics ranging from full-employment policies to a new procedure for appointment of judges, but none explicitly restoring death penalty. Everyone, I contend, would consider such an official action disingenuous.

That there was lack of clarity in the referendum, was lucidly stated by the Venice Commission in its Opinion on the Constitutional Amendment of 2009: "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".[6]

In its Opinion, the Venice Commission also stated, in its introductory remarks: "Although one can easily identify the main issues raised by the reform ..., 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."[7] One has to agree with this judgment. By adopting a technique of substituting a single, clear and determinate provision with a great number of new provisions, almost all of them far removed in their substance from the subject-matter of the provision being expunged, the referendum designers created a situation in which ordinary voters, most of whom are not trained lawyers and are not expected to compare the old text of the Constitution with new proposals, could hardly appreciate what was at stake. Hence, the principles of openness and transparency of the referendum proposals were seriously damaged.

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[6] European Commission For Democracy Through Law (Venice Commission), *Opinion on the Draft Amendments To The Constitution Of The Republic Of Azerbaijan*, adopted at the 78th Plenary Session (Venice, 13-14 March 2009) para. 9.(to be referred to later as: Venice Commission)

[7] Venice Commission, para 4.

Part 3: Constitutional term limits as a norm in contemporary democracy

An overview of contemporary constitutionalism shows that the principle of limiting the number of terms which can be served by the same person as president is standard in contemporary democracies, in particular in those systems where the top executive (the President) holds a real and significant power, deriving his/her legitimacy from direct ballot rather than being an emanation of the parliamentary majority. Comparison with parliamentary systems (as opposed to presidential or semi-presidential) in which the top executive is the leader of a winning parliamentary party is less relevant because such leaders rarely have a set "term" at all: rather, they serve as long as they have the confidence of the parliament, and theoretically can be removed from office at any time.[8]

In Europe (which, as many will agree, should properly serve as a standard for assessing democratic arrangements, not least because of the membership of Azerbaijan in the Council of Europe) the only states which do *not* contain in their constitutions any term limits upon the top executive are: Azerbaijan, Belarus (the only European non-member of the CoE), Serbia and the United Kingdom (the most paradigmatic parliamentary system in the works, where the head of government changes as a function of the results of parliamentary elections, and the Queen is a purely ceremonial office). In some of the European constitutions, term limits are established in a weaker form, restricted to consecutive terms, which means that after staying for some time out of office (usually, one presidential term) a person becomes again eligible; this is the case of Austria, Bosnia & Herzegovina, France, Portugal, Russia, San Marino, Switzerland and Ukraine.

Looking outside Europe, constitutional term limits can be found in countries such as, in Northern America: the United States (since 1951 when the 22nd Amendment to the US Constitution was adopted), and Mexico (Canada is a typical parliamentary system, modelled on the UK); in Central and Southern America: in all states except for Venezuela (though in a number of states the limits are restricted to consecutive terms or two consecutive terms, this is the case of Argentina, Chile, Costa Rica, Haiti, Panama, Peru and Uruguay); in Asia: term limits are adopted in most of the states other than Japan, India, Sri Lanka and Singapore); in Oceania: everywhere except for Australia, which is a typical parliamentary Westminster-style democracy, and where the Governor-General (whose powers are purely ceremonial) traditionally serves for one five-year term or at the 'pleasure' of the Queen of Australia (similar is the case of New Zealand). Also, in Africa the principle of term limits has been adopted everywhere except of Angola and Uganda.

[8] As Venice Commission has correctly observed: "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", Venice Commission, para. 15.

As this brief overview shows, the principle of adopting term limits (or, in a weaker form, of adopting limits on consecutive terms of office) is predominant in contemporary constitutionalism. This, as already said, is particularly true of the states with a presidential or semi-presidential system of government, and in particular, of the "transitional democracies", i.e. newly-democratized systems. Azerbaijan definitely belongs to both these categories, as transitional system with very strong presidential powers. As the Venice Commission noted: "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. It was therefore logical that the original text of the Constitution of Azerbaijan provided for a two-term limit"[9]. It is not without reason that the Parliamentary Assembly of the Council of Europe noted, in 2010, that in Azerbaijan "much remains to be done to further strengthen parliamentary control over the executive and improve checks and balances in a state with a strong presidential system".[10] Subsequently, and only very recently, the Parliamentary Assembly again called upon the Azerbaijani authorities to "reinforce the actual application of the constitutionally guaranteed principle of the separation of powers and strengthen parliamentary control over the executive".[11]

In comparing the constitutional design in Azerbaijan, one should focus on presidential or semi-presidential systems, disregarding the parliamentary systems (where the problem of political alternation is automatically solved by frequent parliamentary elections) when ascertaining whether term limits are a democratic norm in the world today. An empirical study conducted by Gideon Malts is very significant in this regard.[12] In a set of 92 countries which had a population of more than 2 million, at least a modest degree of political openness and a presidential or semi-presidential system, he found that all but five (87 out of 92) had experience with presidential term limits during the period of 1992 to 2006. However, in that period, 26 presidents contravened their term limits. In 14 countries, such as Belarus, Kazakhstan and Uganda, constitutional term limits were simply eliminated, while in another 12 countries, such as Kyrgystan, Namibia and Peru, relevant office-holders stayed in office in excess of the tenure the constitution had initially mandated, without eliminating term-limit provisions. (This occurred either by securing judicial rulings that the first term would not count, or by the securing the passage of constitutional amendments that increased the permissible number or duration of presidential terms). As this study shows, (a) having term limits is predominant in contemporary democracies; and (b) states which do not have or have abandoned term limits for their top executive can hardly be characterized as democratic.

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[9] Venice Commission, para. 13.
[10] PACE Resolution 1750 (2010) "The functioning of democratic institutions in Azerbaijan", para. 4.
[11] PACE Resolution 1917 (2013) "The honouring of obligations and commitments by Azerbaijan", para18.1..4.
[12] Gideon Malts, "The Case for Presidential Term Limits", *Journal of Democracy*, 18 (1) (2007): 128-142.

If we now restrict our attention to Europe only, it is worth noting that no other member state of the CoE with a fundamentally presidential system has abolished term limits for their executive. (Even after Putin's extension of term limits, Presidents of Russia may only serve two non-consecutive terms). Two countries conspicuously denied entry to the Council of Europe because of human rights violations, Belarus and Kazakhstan, also happen to have eliminated term limits.

In a purely statistical sense of the word, term limits may be therefore safely described as a "norm" of democracy today. This is for good reasons. Term limits protect the population and the political system against evolving into autocracy, into a form of despotism, and into a system the legitimacy of which is centred on one person. These dangers are real, not just speculative, especially in transitional, post-authoritarian system where it often happens that a charismatic leader, with legitimacy acquired in the struggle for democracy or for national independence (or both), naturally becomes the top executive of the newly democratized system, immediately or soon after the transition (think about personalities such as Lech Wałęsa, Vaclav Havel or Nelson Mandela). Term limits are an institutional device which counters the temptations to entrench power and postpones indefinitely the rule of a charismatic leader.

In addition, it should be said that there is a difference between *not adopting* the principle of term limits in the first place (perhaps a constitutional defect which can be mollified by an evolving custom, as in Australia) and *removing* the principle of term limits after they had been already adopted. The latter scenario (as was the case of Azerbaijan) seems to raise more serious objections because it undermines and reverses an original design based, as one may properly speculate, on rational and deliberate reflection. As an aside, perhaps it is useful to list the states which (to my knowledge), between 1990 and 2010, relaxed their term limits for the executive, they were: Bolivia, Venezuela, Nicaragua, Algeria, Cameroon, Chad, Gabon, Namibia, Tunisia, Uganda, Belarus, Tajikistan, Kazakhstan, and Uzbekistan. None of these states may be considered to be a healthy, functional democracy.

Perhaps it is useful to conclude this Part of the Opinion with some rationales for adopting presidential term limits, and it is proper to begin with the oldest constitutional democracy: that of the United States. In the 1944 presidential election, during World War II, President Franklin Delano Roosevelt won a fourth term but suffered a cerebral hemorrhage and died in office the following year. Thus, Franklin Roosevelt was the only President of the United States to have served more than two terms, which was largely related to the fact that in 1944 the US was at war. Even though no explicit constitutional obstacle had existed prior to 1951, the limit was seen as a constitutional convention. However, the convention is fairly strong, and it began from the Presidency of George Washington, when in 1796 he refused to run for a third term. Near the end of the 1944 campaign, Republican nominee Thomas E. Dewey, the governor of New York, announced his support of an amendment that would

limit future presidents to two terms. According to Dewey, "Four terms, or sixteen years, is the most dangerous threat to our freedom ever proposed."

Much more recently, and not without alluding to the situation in Azerbaijan (and also in Venezuela, where President Hugo Chavez won a referendum in the beginning of 2009 which allowed him to run for re-election indefinitely after the expiry of his tenure in 2012), a scholar Farid Guliyev observed wisely: "Although the non-reelection rule does not guarantee democracy, ending term limits erodes one of the essential pillars of presidentialism – a fixed period of time in office. It makes it harder for opposition candidates to compete for the presidency, leaving almost no chance for meaningful political change".[13] As Mr Galieyv anticipated: "Exempted from the obligation to step down, the president would solidify his governing coalition, extend his control of the state and media, and circumscribe political competition".[14]

Presidential term limits can be therefore seen as the main guarantee of individual alternation in office. As Gideon Maltz correctly observed: "a long tenure leads to a dangerous accumulation of power in the president's hands, and also a greater arrogance and tendency to abuse it".[15] But political alternation applies also to political parties, not just to individuals: "Term limits entail the periodic exit of the incumbent president and the corollary that a successor candidate from then president's party must face the opposition".[16] In turn, party alternation is central to democracy, so much so that it is often taken as a definitional element of democracy. Term limits have also a visible effect upon general political culture by creating incentives for possible candidates for office to develop their political skills. As Professor Tom Ginsburg *et al.* notes: "term limits assume that ultimately no individual, no matter how competent and exalted, has a monopoly on the skills needed to govern. By forcing even highly competent and popular leaders to stand down, term limits encourage the cultivation of successors. They also encourage the creation of robust political parties to maintain the leader's policies into the future".[17]

In conclusion, both as a matter of a statistical generalization and also as a matter of plausible normative justification, term limits for office of top executive officials can be regarded as a norm and standard of contemporary democracy.

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[13] Farid Galiyev, "End of Term Limits, *Harvard International Review*, February 28, 2009, http://hir.harvard.edu/end-of-term-limits.
[14] Id.
[15] Maltz at 131.
[16] Id at 131.
[17] Tom Ginsburg, James Melton & Zachary Elkins, "On the Evasion of Executive term Limits", *William and Mary Law Review* 52 (2011): 1809, 1822.

Part 4: A right to democracy as a European legal norm under the European Convention of Human Rights

The European Convention on Human Rights, to which Azerbaijan is a party, adopts a principle of democracy as the binding standard upon all European states. This may be viewed both as a standard with which all states must comply and also as a right of all citizens of the member states of the ECHR. In particular, the principle of democracy as a binding European standard, may be seen in (1) the Preamble to the ECHR, in (2) the text of Article 3 of Protocol 1, in (3) the case law of the European Court of Human Rights (especially, under Art 3 Protocol 1), and in (4) the dominant and generally accepted scholarly doctrine of the ECHR.

Ad (1): The Preamble to the ECHR states emphatically: "Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand *by an effective political democracy* and on the other by a common understanding and observance of the human rights upon which they depend."[18] "An effective political democracy" is declared as one of the main preconditions of maintenance of rights and freedoms announced in the Convention. A right to democracy may be therefore seen as a "meta-right": a right which underlies and guarantees the protection of all other rights.

Ad (2). Art 3 of Protocol 1 states: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[19] It is clear that "free elections" make sense only if there is an efficient and functioning political democracy in place. Election of a body which is non-accountable, or powerless (for instance, because it is dominated by another institutions), or without proper separation of powers and other principles of contemporary democracy, would be pointless.

Ad (3) This much is acknowledged by the case law of the ECtHR. The European Commission and Court of Human Rights have given an expansive interpretation to Art., 3 as providing guarantees substantially similar to those contained in ICCPOR (see below, Part 5 of the Opinion). They have done so by viewing the Protocol's language through the lens of the European states' common democratic heritage, and held, for instance, that "[d]emocracy is without doubt a fundamental feature of the European public order" and that democracy "appears to be that only political model contemplated by the Convention and, accordingly, the only one compatible with it".[20] The Court maintained that it would apply Art, 3, Prot. 1 to political institutions so as to ensure that "effective political democracy" is maintained.[21] The Court made it clear that the reach of Art. 3, Prot. 1 is not only limited to the very act of

[18] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950, emphasis added.
[19] Id. Protocol 1 Article 3. 1952.
[20] *United Communist Party of Turkey and Others v. Turkey*, E.H.H.R. 26 (1998), para. 45.
[21] *Matthews v United Kingdom*, App. 24833/94 (1999) para. 40.

elections but also to the nature of the political system within which those elections take place. In a significant decision applying this doctrine, the Court found that the European Parliament, which is established by separate multilateral treaty, has become sufficiently involved in the legislative process of the European Union to constitute a "legislature" for purposes of Art. 3.[22]

Much of the Court's jurisprudence of Art 3, Prot. 1 refers to the landmark case *Matheieu-Mohin and Clerfayt v. Belgium*.[23] In that case, the Court stated that "the *travaux preparatoires* also frequently refer to 'political freedom,' 'political rights,' the political rights and liberties of the individual,' 'the right to free elections' and 'the right of election.'[24] These general statements certainly go towards the overall spirit of democracy which can be found in the ECHR. Significantly, these types of pronouncements found their way into the cases in which Azerbaijan was a party. In *Hajili v. Azerbaijan*, the Court declared, inter alia: "The Court has consistently highlighted the importance of the democratic principles underlying the interpretation and application of the Convention and has emphasised that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law"[25].

Ad (4) These developments gave rise to a strong doctrinal view which emphasizes the expansive and evolving understanding of 'democracy" under Prot. 1 Art. 3 which goes beyond the narrow literal meaning of the Article. As a British scholar Alastair Mowbray concluded "{I]n contemporary times the Court has generally developed and applied its concept of democracy in a progressive manner which has sought to enhance and safeguard the vitality of the political processes operating in member-States".[26] The authors of a leading treatise on the ECHR emphasize, when discussion Art. 3 of protocol 1, that "[t]he democratic ideal permeates Convention jurisprudence", and they point out the strong link between the right to free elections and the ideal of "effective political democracy".[27] Various commentators also emphasize the link between the Convention's visikon of democracy and the principle of political pluralism.[28]

In conclusion, both as a matter of citizen's rights and as a matter of standard for the proper structure of government, democracy became a binding norm upon the member states of the Council of Europe. Any departures from the standard can be seen as violations of the European Convention of Human Rights.

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[22] Id. para 54.
[23] *Mathieu-Mohin and Clerfayt v. Belgium.* 9267/81
[24] Id. para 49.
[25] *Hajili v. Azerbaijan*, App. 6984/06 para. 45. See similarly *Kerimli v. Azerbaijan*, App. Nos. 18475/06 and 22444/06 para. 34.
[26] A. Mowbray, "The Role of the European Court of Human Rights in the Promotion of Democracy", *Public Law* (1999) 703 at 725.
[27] Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press 2009, at 712-13.
[28] Leszek L. Garlicki, ed., *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* (Beck: Warsaw 2011, vol. 2) at 696-97 [in Polish].

Part 5: A right to democratic governance as an international legal norm

A right to democratic governance has been increasingly recognised, in recent decades, to exist not only at the regional level of the ECHR system but also universally, mainly in the framework of the United Nations (UN) system. The UN Charter, in its Chapters XI and XII, laid the groundwork for the principle of democracy as binding upon member states; the latter chapter, for instance, bestowed upon the UN an express legal right to intervene in and validate the democratic process in trust territories. The right to political participation is grounded in Article 21 of the Universal Declaration of Human Rights (UDHR), Article 25 of the International Covenant on Civil and Political rights (ICCPR), and many counterpart articles of regional human rights instruments. It should be emphasized that Article 21 of the UDHR, in a manner dissimilar to that of the documents other Articles, speaks not only of the individual right to take part in government, but also of the principle that "[t]he will of the people shall be the basis of the authority of the government". The status of the right to political participation has been enhanced by the pronouncements of, inter alia, the ICCPR Human Rights Committee[29] and the UN General Assembly.[30] In 1999, the UN Commission on Human Rights promulgated a resolution affirming that "democracy fosters the full realization of all human rights", and enumerating a list of "rights of democratic governance" that includes ICCPR rights as well as "transparent and accountable governmental institutions".[31] Significantly, the Resolution is entitled "Promotion of the Right to democracy", and it recalls "the large body of international law and instruments ... which confirm the right to full participation and the other fundamental rights and freedoms inherent in any democratic society".[32]

These developments have given rise to the doctrinal conclusions in international-law scholarship about "The Emerging Right to Democratic Governance", the title of the path-breaking article by Professor Thomas Franck of New York University Law School.[33] As Professor Franck concluded in his article, "The democratic entitlement ... already enjoys a high degree of legitimacy, derived both from various texts and from the practice of global and regional organizations, supplemented by that of a significant number of non-governmental organizations. ... [T]he international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance." A leading commen tator on the ICCPR, professor Manfred Nowak observed n ot long time ago, that "the main components of democracy, i.e., the right of the people to sovereignty, internal self-determination and equal participation in political decision-making processes together with the protection of

[29] Human Rights Committee, General Comment 25 (57), UN Doc. CCPR/C/21/rev.1/Add.7 (1996).
[30] GA Res. 45/150 (1990) on "Enhancing the effectiveness of the principle of periodic and genuine elections".
[31] UNCHR Res. 1999/57.
[32] Id. Preamble para. 6.
[33] Thomas M. Franck, "The Emerging Right to Democratic Governance", *Amer. J. Int'l Law* 86 (1992) 46.

minorities against the 'tyranny of the majority', are already part of the international law of human rights".[34]

In conclusion, the right to a democratic governance can be seen as an emerging individual right and a standard for political structure at the level of international law.

Part 6: Non-retrospectivity as a standard of the of rule of law in a democratic state

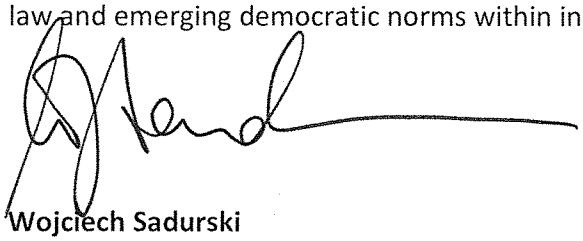
As an additional point, not central, but worth considering in this context, it should be observed that there is a sense of retrospectivity to the 2009 Constitutional Amendment in Azerbaijan. The principle of non-retrospectivity (*lex retro non agit*) is generally accepted as a cornerstone of the principle of rule of law in a democratic state. It has been, for instance, emphatically restated in subsequent decisions of the Hungarian Constitutional Court which declared that it follows from the principle of legal certainty which demands, inter alia, "the protection of vested rights, non-interference with legal relations already executed or concluded and limiting the possibility of modifying existing long-term legal relations".[35] Most often, the objectionable retrospectivity is found in criminal law when some provisions affect an alleged criminal's situation to his or her detriment. Nevertheless, it is not the only possible instance of objectionable retrospectivity, as the mention of "modifying existing long-term legal relations" indicates. When a person in power proposes, and strives to adopt, a law which significantly improves his or her status, already having been elected or appointed to a position with a particular status, then it can be seen as a case of retrospectivity. Unfairness (in the case of an elected position) to voters occurs if they had voted a particular politician to power based on the knowledge of a particular description of competences and of status, and then they find themselves confronted with an increase of that status. To be sure, the increase itself, as in the case of Azerbaijan, comes in the form of a referendum in which those same voters participate, and legally speaking, were free to refuse the extension of status of the President. But it this irrelevant: perhaps if voters had known that after the election the proposal would emerge to strengthen so substantially the position of the President, they would have voted for a different person or abstained from voting. This is of course merely a speculation – but in my view, not without foundation.

Part 7: Conclusions

In this Legal Opinion, having summarized the legal circumstances surrounding the Constitutional Amendment in Azerbaijan in 2009 (Part 1), I argued that the abolition of presidential term limits in Azerbaijan in 2009 violated the principles of openness and

[34] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR: Commentary* (Kehl am Rhein: Engel, 2005, 2nd rev. ed.) at 565, footnotes omitted.
[35] Decision 11/1992 of 5 Match 1992 Part III para. 4.

transparency because the change was opaque and hidden among more than twenty new provisions having nothing to do with a single provision (presidential term limits) which was meant to be replaced (Part 2). As such, the substance of the referendum offended against the principle of the rule of law, of which transparency and openness are central tenets. I then argued that the principle of presidential term limits is a norm, both in a statistical and in a normative sense, in contemporary democracy, especially in systems where presidents have strong powers (Part 3). I then argued that, within the system of the ECHR, to which Azerbaijan had acceded, democracy is a binding principle, both as an individual right of citizens of member states of the CoE, and as the only form of government (Part 4). A combination of Parts 3 and 4 supports a conclusion that any presidential or semi-presidential European country which does not have, or which has abandoned, term limits breaches the ECHR. I then argued that a principle of democratic governance and democratic participation has become a right under the universal, UN-centered international law (Part 5). A combination of Part 3 and Part 5 supports a conclusion that a state which does not have, or has removed, presidential term limits, is in violation of the emerging standards of international law. Finally, as an auxiliary argument, I have suggested that there is a strong aspect of retrospectivity in the 2009 Constitutional Amendment, which runs counter to a general principle of legal certainty which is properly seen as crucial to the rule of law (Part 6). In sum, the removal of presidential term limits by a constitutional amendment in Azerbaijan in 2009 can be viewed as contrary to the principles of transparency, openness, legal certainty and non-retrospectivity, as well as to the norms of European human rights law and emerging democratic norms within international law.



Wojciech Sadurski
Challis Professor of Jurisprudence
The University of Sydney