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Baku, Azerbaijan

ELECTION MONITORING AND DEMOCRACY STUDIES CENTRE

OPINION

on proposed amendments to the Constitution of Azerbaijan and preparations to the 26 September 2016 Referendum

I. EXECUTIVE SUMMARY

Following the proposal submitted by the President on 18 July 2016 and approval by the Constitutional Court on 26 July, Azerbaijan will hold a referendum which proposes to amend 29 articles of the Constitution on 26 September 2016.

Stressing the restrictive impact of proposed amendments to the Constitution on electoral system and division of power, as well as on human rights, Election Monitoring and Democracy Studies Centre (EMDS) notes that proposed amendments do not adequately correspond to needs of Azerbaijani public with regards to rule of law, democracy and free and fair elections. On the contrary, if adopted, it will result in strengthened executive branch with wide powers at the expense of parliament which will see its role as an important legal and political institution diminished.

EMDS notes with regret that existence of political prisoners, including imprisoned journalists, human rights activists and political party members, as well as the situation of freedom of assembly, association and expression raises serious questions about democratic environment required for free and fair referendum.

Political repression, including revoking the license of the ANS TV and radio, and the arrest of executive secretary of the Republican Alternative (REAL) movement Natig Jafarli, that has taken place since the announcement of the referendum cast doubts that the process will be fair or democratic.

The Referendum Act proposes to increase the power of the executive branch at the expense of the legislative branch extending president's term from five to seven years, granting the president with the right to dissolve the parliament and to call for unscheduled parliamentary and presidential elections.

Furthermore, the Referendum Act is set to restrict human rights further by introduced such articles to the Constitution as "abuse of human rights are not permitted" and allowing the restriction of freedom of assembly if it breaches "public moral", as well as limitations on property rights and freedom of expression.

Despite proposing to bring significant changes to the legal and political system of the country, the Referendum Act has not been subject of any parliamentary or public debate and was proposed during the summer recess of the legislature. Moreover, the government has not consulted the Venice Commission of the Council of Europe on the compatibility of proposed amendments with the country's international commitments.

EMDS stresses that according to the national legislation and international commitments of Azerbaijan, the government should provide adequate opportunities for political parties and civil

society to participate in the referendum campaign, and should ensure necessary guarantees and freedoms for holding a democratic vote.

EMDS is a non-partisan, not for profit and non-governmental organization that aims to promote democratic elections and human rights in Azerbaijan. The organization has carried out various projects regarding elections in the country from 2001 to 2013. Following the critical assessment of the 2013 Presidential Elections, criminal investigation was launched against the organization and its chairperson Anar Mammadli was imprisoned for more than two years. Restrictions imposed by the 2014 amendments to the NGO law created legal limitations for the operation of EMDS and currently the organization faces difficulties for activity.

II. LACK OF PUBLIC DEBATE AND HASTY ANNOUNCEMENT

The Referendum Act proposed by the government includes 40 amendments to 29 articles of the Constitution which will alter the political and legal system of the country. However, despite the gravity of proposed changes, the Referendum Act has not been subject to parliamentary debates or public discussions. The government has failed to provide adequate justification to the proposed amendments while other political parties and civil society were denied opportunity to meaningfully contribute to the process. On the contrary, the proposal and scheduling of the referendum took place in a rushed manner barely complying with the timeline set by the law.

On 18 July 2016, the Referendum Act was submitted by the President to the Constitutional Court for review which has confirmed the compliance of proposed amendments with the requirement of the Constitution on 25 July. Just a day after, with the presidential decree, Referendum was scheduled on 26 September the earliest day allowed by the legislation (Election or Referendum should be announced at least 60 days before the voting day).

Furthermore, the government has not consulted the opinion of the Venice Commission of the Council of Europe regarding the proposed amendments. The Venice Commission provided its opinion on the previous 2009 Referendum proposal at the request of the Secretary General of the Council of Europe and stated that *"such a reform would seem necessary to reach a better distribution of powers between the branches of the state power and the Commission stands ready to provide its expertise at the request of the authorities of Azerbaijan"*¹. However, the government has once more failed to consult with the experts of the Venice Commission prior to the proposing amendments to the Constitution.

III. UNDEMOCRATIC ENVIRONMENT AND ONGOING REPRESSIONS

The Referendum is taking place on the backdrop of ongoing repressions and systematic restrictions for civil society and political parties which casts serious doubts on freedom and fairness of the vote. According to the report of local civil society groups, around 70 persons², including journalists, bloggers, rights activists and opposition members remain behind bars for their political views, while non-governmental organizations (NGOs) are not able to operate freely due to legal restrictions imposed by the changes to the law in 2014 and 2015.

Furthermore, the authorities continued with political repressions closing down a TV channel and arresting a prominent opposition member following the announcement of the Referendum Act. On 18 July, National TV and Radio Council suspended the broadcast of the ANS TV and Radio for announcing an interview with Fathulla Gulen, Turkish religious cleric living in exile and accused of staging the coup attempt in Turkey. The Baku Court of Appeal revoked ANS's license on 29 July.

¹ OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF AZERBAIJAN, the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009) -

² See "the List of political prisoners in Azerbaijan", prepared by local civil society groups - <http://nopoliticalprisoners.org/politicalprisonersaz.PDF>

ANS management denies all allegations and announced that they will appeal the decision to the Supreme Court.

On August 12, on the third week of the referendum, Natig Jafarli, executive secretary of the Republican Alternative (REAL) opposition movement was detained and sentenced to four months of pre-trial detention on charges of illegal entrepreneurship and abuse of power. Similar charges were used to imprison civil society leaders in 2013-2014, including Anar Mammadli, Rasul Jafarov, Intigam Aliyev, Khadija Ismayil and others. Natig Jafarli is leading the REAL movement which announced plans of campaigning against the proposed changes during the referendum in the absence of imprisoned chair of movement Ilgar Mammadov. Two other REAL activists Elshan Gasimov and Togrul Ismayilov were arrested on charges of not subordinate police. Judgments about the arrest of the two activists will be appealed to the Court of Appeal.

Despite the release of number of imprisoned civil society leaders earlier this year, legal and political restrictions on operation of non-governmental organizations remain not addressed. Azerbaijan has clampdown on civil society following the 2013 elections imprisoning number of civil society leaders and introducing amendments to the NGO legislation that blocked access to all foreign funding. International organizations and donors were forced to leave the country, while criminal investigation launched against many NGOs forced many to cease their work and even emigrate. These restrictions prevent civil society organizations from meaningfully participating in the referendum. As a result, unlike in 2002 and 2009 referendums, civil society organizations are not able to engage in voter education, protection of election rights and domestic election monitoring.

Moreover, restrictions of freedom of expression, assembly and association have not been lifted and continue to obscure the conduct of democratic vote in Azerbaijan. This is also a serious breach of the Code of Good Practice on Conduct of Referendum³ by the Venice Commission which states that *"democratic referendums are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the country, freedom of assembly and freedom of association for political purposes, including freedom to set up political parties"*

IV. PROPOSED RESTRICTIONS OF HUMAN RIGHTS AND FREEDOMS

The Referendum Act proposes to limit human rights and freedoms further going against Azerbaijan's commitments before international organizations including the United Nations, the Council of Europe and the Organization for Security and Cooperation in Europe.

Amendments include adding provisions like "abuse of human rights are not permitted" to the Constitution which will increase the chances for authorities to limit the human rights on the pretext of "abuse". The amendments also stipulate a number of restrictions on human rights with regards to property rights, freedom of expression, freedom of assembly and right for citizenship.

Property rights: Proposed amendments to the Constitution will limit the property rights by stipulating additional and ambiguous conditions for restrictions. Article 29 of the Constitution on property rights is proposed to be amended as following (additions coloured in red):

V. Private property shall entail social responsibility.

VI. Land ownership may be restricted by law due to social justice and for efficient use of the land.

³ Code of good practice on referendums, the Council for Democratic Elections and the Venice Commission, CDL-AD(2007)008rev

New amendments are to burden private property owners with "social responsibility" without clarifying the meaning of the term. Such ambiguity could lead to broad interpretation of the "social responsibility" and could result in forced confiscation or restriction of private property. The amendments also fail to clarify with regards to whom private property owners carry "social responsibility" and does not define how such responsibility will change the property rights.

Definition and regulation of "social justice" and "efficient use of lands" are also not provided in the proposed amendments creating more legal ambiguity with potential to restrict the property rights which is against Azerbaijan's international commitments including those arising from the European Convention on Human Rights and its Protocols. The Protocol 1 of the convention stipulates that *[E]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*⁴

Freedom of expression: Amendments will also add new restrictions to the Constitution with regards to freedom of expression through following amendment of the Article:

III. Propaganda provoking racial, national, religious and social discord and animosity or hostility based on any other criteria is prohibited.

Addition of "based on any other criteria" which entails a very broad interpretation of the restriction allows for abuse of the provision by authorities. New amendments do not clarify the limits of the restriction and could lead to restriction of freedom of expression at the discretion of the state bodies in a country with already very poor record of free speech.

The Referendum Act also proposes to make it more difficult to access information by adding following provisions to Article 32 on Right to Personal Immunity:

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.

VII. Information technologies cannot be used for disclosing information about private life, including faith, religion and ethnic identity except in the cases when the concerned person has openly expressed his consent or when the statistic data of anonymous nature are being processed without discrimination and other cases provided by law.

VIII. Scope of the personal information, as well as the conditions of their processing, gathering, passing, use and protection is defined by law.

Unlike the general legal practice, these proposed amendments are aimed at in lining the Constitution, the highest legal document of the country, with other laws. Such restrictions have been introduced to the law earlier to limit the access to information on commercial entities and businesses through changes to the "law on State Register of Property" and "law on State Registration and State Registry of Legal Entities". Such restrictions have been used to hide the information on commercial entities, particularly on their founders and shareholders.

Freedom of assembly: Proposed amendments include two new very ambiguous conditions for limiting the right to freedom of assembly by amending the Article 49 on freedom of assembly as follows:

II. Everyone has the right, having notified respective governmental bodies in advance, and with condition of not disrupting public order and public morale, peacefully and without arms, meet with other people, organize meetings, demonstrations, processions, pickets.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950

As with other amendments, the wording "with condition of not disrupting public order and public morale" allows for a very broad interpretation of limitation one of the fundamental freedoms of every person.

Right for citizenship is also proposed to be restricted by allowing for loss of citizenship "in the cases provided by law" by amending the Article 53 in a following form:

1. ~~In no circumstances~~ A citizen of the Republic of Azerbaijan may **not** be deprived of citizenship of the Azerbaijan Republic **except when losing the citizenship in the cases provided by law.**

Proposed amendments leave the details of conditions of loss of citizenship to be determined by the laws and contradict Azerbaijan's commitments under the "Convention on Reduction of Statelessness" which stipulates that "*if the law of a Contracting State provides for loss of its nationality by a person's spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality.*"⁵

V. ELECTORAL SYSTEM AND DIVISION OF POWER

The Referendum Act proposes to significantly increase the power of the executive branch at the expense of the legislative branch depressing the division of power. Extending the President's term from five to seven years, granting the President with the right to dissolve the parliament and call for unscheduled parliamentary and presidential elections, as well as appointing Vice-Presidents without consulting the parliament will boost the executive branch and weaken the legislature overall negatively affecting the democratic transition of Azerbaijan.

Eliminating age limit: Amendments are also to scrub the age limits for the high level positions including the post of president, prime-minister, ministers, judges and the members of the parliament. If the amendments are adopted, the Constitution will have no age limit for any posts in the country allowing for everyone above 18 (right to vote) to occupy very high level posts. Age limits have never been noted as an obstacle for political participation by political parties or civil society and there has been no discussion or major interest group, including the ruling party advocating for lifting the age limit. On the contrary, the ruling party MPs and executive appointments have been criticized for being well over the current age limits and offering few opportunities for youth. Therefore, without creating opportunities for younger candidates within the existing system, the government has failed to provide convincing justification for such complete elimination of age limits

Strengthening executive branch at the expense of legislative one: The Referendum Act also proposes to extend the president's term from five to seven years which is case only in two Council of Europe countries - Ireland and Italy. However, unlike Azerbaijan, both countries have parliamentary system with limited powers for presidents. Extension of term will hinder the process of democratic transition in Azerbaijan and will lead to more authoritarian governance.

Another proposed amendment will grant the president the power to dissolve the parliament and call for unscheduled presidential elections. If the amendments adopted, the parliament can be dissolved by the president if the parliament, more than twice in a year, does not provide a vote of confidence to the Cabinet of Ministers, does not approve the appointments by the president of the candidates for the Constitutional Court, the Supreme Court, Board of Central Bank or when the parliament is not able to implement its duties. The president will be able to dissolve the parliament if the latter is not able to present the adopted laws for signing to the president within 14 days.

⁵ Article 6, Convention on Reduction of Statelessness, 1961

These drastic and undemocratic amendments will negatively impact the independence of the legislative body from the executive branch, if adopted. Amendments will provide the executive branch with formal mechanisms of control over the legislature resulting in complete loss of independence of the parliament.

Creation of new Vice-Presidents posts: The Referendum Act also proposes the establishment of new posts of the First Vice-President and Vice-Presidents who will be appointed by the president. The first vice-president is to replace the prime minister in the line of succession of power in case the president is not able to perform his or her duties. However, unlike the prime minister, the first vice-president's appointment by the president does not require the parliament's approval. As a result, the post of the president can be assumed by someone who has not received a public vote or approved by the parliament. The power of vice-presidents is not indicated in the amendments and is likely to be defined by the president.

VI. CONCLUSION AND RECOMMENDATIONS

Stressing the restrictive impact of proposed amendments to the Constitution on electoral system and division of power, as well as on human rights, EMDS notes that proposed amendments do not adequately correspond to the needs of Azerbaijani public with regards to rule of law, democracy and free and fair elections. On the contrary, if adopted, it will result in strengthened executive branch with wide powers at the expense of parliament which will see its role as an important legal and political institution diminished.

EMDS notes with regret that existence of political prisoners, including imprisoned journalists, human rights activists and political party members, as well as the situation of freedom of assembly, association and expression raises serious questions about democratic environment required for free and fair referendum.

Therefore, EMDS proposes following recommendations in order to ensure holding free and democratic referendum on 26 September:

- In order to inform voters on upcoming Referendum and proposed amendments to the Constitution, Azerbaijani government should create necessary conditions for non-governmental organizations and political parties to freely engage in referendum campaigning, including fully guaranteeing freedoms of expression, association and assembly, as well as the rule of law;
- The authorities should end all instances of harassment of activists, political party members and others campaigning against the proposed amendments to the Constitution;
- Azerbaijani government should consult the Venice Commission on proposed amendments and their compatibility with the country's commitments before international documents, including the European Convention on Human Rights;
- The Secretary General and the Parliamentary Assembly of the Council of Europe should appeal to the Venice Commission for their expert opinion on compatibility of proposed amendments with the European Convention on Human Rights and other European standards.

**The Board of Management,
Election Monitoring and Democracy Studies Center (EMDS)**