



# ALTERNATIVE VIEW OF THE THIRD REFERENDUM IN AZERBAIJAN

ASSESSMENT REPORT

on preparation and results of  
26 September 2016 Referendum on the Amendments to the Constitution of the Republic of Azerbaijan

Baku - 2017

## TABLE OF CONTENT

|              |  |           |
|--------------|--|-----------|
| <b>I.</b>    | <b>SUMMARY .....</b>   | <b>1</b>  |
| <b>II.</b>   | <b>INTRODUCTION.....</b>   | <b>2</b>  |
| <b>III.</b>  | <b>POLITICAL SITUATION PRIOR TO THE REFERENDUM .....</b>         | <b>2</b>  |
| <b>IV.</b>   | <b>OPINION ON ADOPTED AMENDMENTS .....</b>                       | <b>3</b>  |
| <b>V.</b>    | <b>PREPARATIONS FOR THE REFERENDUM AND CAMPAIGNING .....</b>     | <b>12</b> |
| <b>VI.</b>   | <b>THE REFERENDUM DAY .....</b>                                  | <b>14</b> |
| <b>VII.</b>  | <b>OFFICIAL RESULTS AND SITUATION AFTER THE REFERENDUM .....</b> | <b>16</b> |
| <b>VIII.</b> | <b>CONCLUSIONS AND RECOMMENDATIONS .....</b>                     | <b>17</b> |
| <b>IX.</b>   | <b>CONTACTS .....</b>  | <b>18</b> |

## **I. SUMMARY**

Election Monitoring and Democracy Studies Centre (EMDS) is a non-partisan, not for profit and non-governmental organization that aims at promoting democratic elections and human rights, and supporting civil society in Azerbaijan. EMDS believes that free and democratic elections will contribute to the development of democratic traditions, improvement of citizens' welfare and promotion of human rights in Azerbaijan.

This assessment document was prepared by EMDS's members and volunteers based on analysis of the proposed and adopted amendments to the Constitution of Azerbaijan, political situation prior and during the 26 September 2016 Referendum, official information on the Referendum and information submitted by individual observers.

EMDS believes that comprehensive assessment of 26 September 2016 Referendum requires consideration of all stages of the referendum including evaluation of awareness raising among public on proposed amendments, political situation and conditions prior to the referendum, the election legislation, conduct of the Referendum Day and vote tabulation against the legislation of the country and its international commitments.

EMDS notes with regret that there was no significant improvements in the fields of freedoms of speech, association and assembly, along with electoral legislation and opportunities for political participation during the Referendum. Pressure and harassment of political activists continued.

Amendments to the Constitution were submitted to the Constitutional Court and then put for the Referendum without holding any public discussions and without consulting the civil society, the Parliament and the Venice Commission of the Council of Europe representing only the interests of the ruling party.

EMDS notes with concern that opposition parties were denied an opportunity to participate in the Referendum campaigning which was dominated by the ruling party.

Analysis of the information provided by journalists, voters and observers shows that the Referendum Day was marred with violations including ballot-box stuffing, multiple voting, group voting (carousel) and voting of persons without registration, similar irregularities from the previous elections. EMDS observed that voter turnout was artificially raised in majority of polling stations through multiple voting, voting without registration and ballot-box stuffing. The official turnout do not correspond to the real figures.

The Referendum further deepened the political crisis in the country and shaken the public confidence in transition of power through democratic and peaceful elections, as well as in the rule of law and parliamentarism. In order to address the issue, the government should take necessary measures to restore trust of opposing political forces. Such measures should include improvement of the Election Code, lifting the restrictions on political freedoms, halting all forms of political persecution, and the release of all political prisoners.

## **II. INTRODUCTION**

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).

This assessment report analyses the Constitutional amendments adopted in the 26 September 2016 Referendum in Azerbaijan and the conduct of the Referendum. The document examines the political environment, the situation of political freedoms, reasons and motives behind the proposed amendments, as well as compliance of the conduct of the Referendum with the universally accepted standards for free and fair elections.

The document referred to the general principles of the law, academic literature on interpretation of law, research documents on constitutional law and relevant international organizations and the constitutional history of Azerbaijan while assessing the Referendum. The information and opinions provided by the Central Election Commission (CEC), various civil society organizations, political parties, accredited observers, media and international organizations were also used in preparation of this report.

The document was designed with the initiative of EMDS and in cooperation with professionals experienced in human rights and elections.

Election Monitoring and Democracy Studies Centre (EMDS) is a non-partisan, not for profit and non-governmental organization that aims to promote democratic elections and human rights, and to support civil society in Azerbaijan. EMDS was established in December 2008 by founders of the Election Monitoring Centre (EMC), registration of which was illegally annulled in May 2008.

EMDS (and EMC) carried out monitoring of more than ten elections in Azerbaijan, including referendums, presidential, parliamentary and municipal elections during 2001-2015.

Members of EMDS participated in international election observation missions in more than twenty countries together with the OSCE Office for Democratic Institutions and Human Rights (ODIHR), European Network of Election Monitoring Organizations (ENEMO) and European Platform for Democratic Elections (EPDE).

EMDS released its opinion on the proposed amendments after the Referendum was announced and the preliminary statement immediately after the Referendum Day.<sup>1</sup>

## **III. POLITICAL SITUATION PRIOR TO THE REFERENDUM**

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. The authorities continued with repressions against opposition, media and civil society seen in the last three years during the Referendum systematically restricting freedoms of expression, assembly and association.

Azerbaijan has clamped down 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 hefty

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<sup>1</sup> You can contact us for the Opinion and the Preliminary Statement

tax punishments and criminal investigation launched against many NGOs forced them to cease their work and even leave the country. These restrictions prevented civil society organizations from meaningfully participating in voter education, protection of election rights and domestic election monitoring.

Despite the release of around twenty imprisoned civil society leaders on suspended sentence earlier in 2016 and with the presidential pardon earlier in March, more than 120 political prisoners remain behind bars.<sup>2</sup>

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 company appealed the suspension to the Court, but its claims were denied. On 21 September, the Supreme Court ruled the final decision revoking the license of the media outlet.

A number of activists were detained and arrested during the Referendum on trumped up connection to the Gulenist movement which is accused in staging the July 2016 coup attempt in Turkey. On 12 August, member of the NIDA citizen movement Elgiz Gahraman was arrested on drug charges and is accused, albeit unofficially, of being member of the Gulenist movement.

Six days later, activist of the opposition Popular Front party Fuad Ahmadli was detained by the State Security Service (SSS) which claims that Ahmadli, who works for one of the mobile operators, helped Gulenist movement tap the phones of Azerbaijanis. The SSS claims to find speeches of Fethulla Gulen, religious literature and list of members of the Gulenist movement in Ahmadli's apartment. The young activist and his family said the books were planted by the security officials during the search.

On 20 August, Faig Amirli, financial director of the opposition newspaper Azadliq and assistant to the opposition Popular Front party's leader, was arrested on charges of inciting religious hatred. The arrest followed by administrative obstacles resulted in suspension of print of the only independent newspaper just a month before the Referendum.

On 12 August, the authorities arrested Natig Jafarli, the executive director of the Republican Alternative (REAL) movement, on charges of illegal entrepreneurship, tax evasion and abuse of power. He was sentenced to four months of pre-trial detention, but was released a month after on a condition of not leaving the country. The criminal case against Jafarli is still pending.

#### **IV. OPINION ON ADOPTED AMENDMENTS**

On 18 July 2016, the Referendum Act proposing amendments to the Constitution 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).

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 Constitutional changes, the Referendum Act has not been subject to

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<sup>2</sup> List of Political Prisoners in Azerbaijan: [https://drive.google.com/file/d/0B\\_uPJrpZyAe\\_V05WYkpJZ3JWVjA/view](https://drive.google.com/file/d/0B_uPJrpZyAe_V05WYkpJZ3JWVjA/view)

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.

Although, the government has not consulted the opinion of the Venice Commission of the Council of Europe regarding the proposed amendments, the Parliamentary Assembly of the Council of Europe (PACE) requested the opinion of the Venice Commission on 5 September. In its preliminary opinion released on 20 September, the Venice Commission expressed concerns over strengthening the presidential powers, and restriction of human rights and freedoms. The opinion noted that "many proposed amendments would severely upset the balance of power by giving "unprecedented" powers to the President".<sup>3</sup>

### **A. Constitutional History**

In order to fully understand the essence of amendments adopted on the 26 September Referendum, one needs to review the brief history of development of the Constitution and previous amendments to the document.

The current Constitution of Azerbaijan was adopted in 1995 and for the first time after the independence from the Soviet Union, it included principles of democracy and rule of law, as well as provisions on human rights and freedoms. However, the Constitution's improvements were shadowed by shortcomings.

First of all, the text of the Constitution was not developed by the Parliament which casts doubt on the legitimacy of the document. The draft constitution was drafted by the President and the commission appointed by him, while elected members of the Parliament did not participate in the drafting process. In order to ensure full legitimacy, the text should have been drafted by elected officials with special mandate from public to develop the main legal document of the country. The President was not elected to develop the text. Furthermore, the government failed to create opportunity for public to take part in discussions of the draft constitution.

The second major shortcoming of the current Constitution is provision of practically unlimited authorities to the President, even for the presidential model of the government. The article 109-32 grants the President a power to settle all matters that are not under the competences of the Parliament and the Courts. The Constitution does not feature any provisions counter-balancing such competences of the executive branch.

Considering the procedural shortcomings during its adoption and provisions granting the executive branch disproportionately wide range of powers *vis a vis* other branches, the current Constitution did not fully corresponded to the principles of democratic division of power and the rule of law at a time of its adoption in 1995. Amendments adopted in 2002 and 2009 further restricted the above-mentioned two principles.

The 2002 amendments to the Constitution abolished the proportional representation system for the parliamentary elections<sup>4</sup> and stipulated the succession of power to the Prime Minister in case of the President's inability to perform his or her duties.<sup>5</sup> Abolishing the proportional representation led to establishment of legal base for weakening the political parties and their role in the state governance.

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<sup>3</sup>European Commission for Democracy through Law (Venice Commission), Preliminary Opinion on the Draft Modifications to the Constitution Submitted to the Referendum of 26 September 2016, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2016\)010-](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2016)010-)

<sup>4</sup> Article 83 of the Constitution of Azerbaijan

<sup>5</sup> Article 105 of the Constitution of Azerbaijan

The proportional representation system was essential for supporting the development of political parties in a newly independent post-Soviet country like Azerbaijan.

The second backward step brought by the 2002 Referendum was the change of the succession of power in case the President is not able to perform his or her duties. Before the amendments, an elected official - the Speaker of the Parliament - was in line for performing the President's duties. But, the amendments stipulated that the Prime Minister, who is appointed by the President and not elected by public, would take the role of the President.

New series of amendments to the Constitution were adopted in 2009 Referendum, which eliminated the two terms limit for the Presidency allowing one person to be elected a president for unlimited number of terms. This single amendment represented significant regression in democracy and the rule of law for the country.

Along with serious shortcomings with regards to democracy and the rule of law from the beginning, the current Constitution was further weakened by the amendments in 2002 and 2009.

### **B. Compliance of the Referendum Act with the Principle of the Procedural Justice**

The process of submission of the Referendum Act and its adoption failed to comply with the procedural justice principle. In a constitutional democracy, the procedure of adoption of a law should be based on pre-determined stable rules and the principle of democratic representation, while public and all interested parties should have an adequate access to the process. The way and timeline of enforcement of adopted laws should be also clearly communicated to public.

The Referendum Act was revealed for public only in July 2016 with the Presidential decree. Amendments to the Constitution proposed in the Referendum Act had not been discussed in any forum and these came as a surprise for public. Neither the President, who proposed the amendments, nor his ruling party provided any justification for amendments or their intentions.

The Venice Commission noted in its opinion that the motives behind the proposed amendments were not clear.<sup>6</sup> The opinion also raised concerns on the Parliament not being involved in the process, including amendments and additions to the Constitution in the same document, and the lack of mechanisms regulating entrance into force of the Constitutional amendments.

### **C. Human Rights and Fundamental Freedoms**

The Referendum brought new amendments to the human rights and liberties guaranteed in the Constitution. Some of the amendments were restrictive, while some appeared to be positive, albeit incomplete in most cases.

#### ***i. Improvement of provisions on human rights***

Some of the adopted amendments improved the guarantees of human rights and fundamental freedoms. For example, Article 24 was added a new provision stating that "Human dignity shall be protected and respected" which is a positive development.

Amendments also replaced the word "nationality" with "ethnic background" in Article 25 which prohibits the discrimination against people. This is a step towards the positive direction. When the Constitution was adopted in 1995, Azerbaijan was under the influence of the Soviet-Russian literature which treats the nationality same as ethnicity, while in European literature, nationality is

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<sup>6</sup> The Opinion of the Venice Commission

often associated with citizenship. The 2016 amendments solved this problem, albeit, not completely. Articles 43 and 47 still uses the wording "national background" and "national" while referring to ethnic background. This contradiction between three articles of the Constitution will lead to confusion during the enforcement.

Another amendment to Article 25 introduced new provision (VI) improving guarantees for the rights of people with disabilities. Amendments stipulate 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". Establishment of rights and guarantees in the Constitution is major positive development for the rights of people with disabilities.

New provision of Article 36 prohibits lockouts, except in cases provided by the law. This provision appears to give additional protection to the workers. However, the need for mentioning the labour relations in the Constitution that is already regulated by the relevant law is not clear. Cases for prohibition of lockouts had been already stipulated in Article 284 and 285 of the Labour Code. Therefore, addition of this new provision does not amount to significant change with regards to the regulated matter. The provision unnecessarily reiterates that the authority to regulate the prohibition of lockouts belongs to the legislative branch, a notion that had been established before the amendments in Article 94-16 of the Constitution. The improvement and expansion of labour rights could have been achieved by reviewing the second provision of Article 36 which grants the unlimited authority to the legislator to restrict the rights of people who work with the labour contracts to strike without imposing any pre-determined principles.

The amendment to the second provision of Article 56 eliminates the restriction for a number of groups (military servant, judges, public officials, religious figures and others) to run as a candidate in elections. This is a positive development that expanded the right to be elected to wider group of the population.

Another amendment that appear to be positive is the modification of Article 59 which stipulates conditions for the state to regulate the entrepreneurship. According to new amendments, the state will no longer regulate entrepreneurship "according to rules established in the law", but will carry it out based on state interests and protection of human life and safety. Amendments make regulation of entrepreneurship based on any other reason unconstitutional.

However, considering that entrepreneurship is a very broad field and occupies all areas of life, restriction of its regulation to only two fields does not appear to be reasonable. New wording restricts the regulation of entrepreneurship based on administrative law, which is very important in modern day. Entrepreneurship is a very complicated area of relations and the executive branch should have more discretion over its regulation in the interest of public. Therefore, this amendment of Article 59 cannot be considered a positive development for human rights.

Modified Article 60 introduces protection of rights and liberties "in the court and by administrative means" mentioning the courts and administrative means in the same Article. In cooperation with the Council of Europe, Azerbaijan carried out reform of administrative execution mechanisms and adopted the Administrative Procedural Code and the law on Administrative Execution. Therefore, the reasoning for noting the administrative means together with the courts is not clear. Inclusion of protection of rights by administrative means in Article 68, which regulates relations between state bodies and citizens, would be more reasonable.

The administrative execution is fundamentally different than the courts. The courts are independent branch of power, while the administrative execution bodies are just extension of the executive power. Also the modified version of the article failed to include notions of independence, equality and fairness as general characteristics of the courts. Therefore, the modification of Article 60 has not been carried out comprehensively and lacks important guarantees for independent judiciary.

The amendments to Article 68 guarantees “a right to the conscientious treatment excluding arbitrariness by the state bodies”, which is a positive development. New provisions added to the article also stipulate that the state and 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”.

The last amendment appearing to be positive is the addition of the principle of proportionality to Article 71 which stipulates the restrictions of human rights and liberties. The principle of proportionality aims at ensuring that any restrictions of human rights and liberties is proportional to legitimate objectives of state. This principle was not in the original text of the Constitution. Azerbaijan adopted the Constitutional Law for regulating the restrictions on human rights and liberties only after joining the Council of Europe and ratifying the European Convention on Human Rights. The Constitutional Law also lacked the proportionality principle. Although, this is a positive development, it is incomplete. The modified text of Article 71 states that "the restrictions of human rights and liberties should be proportionate to State's expected result". The Venice Commission rightfully states in its opinion that proportionality should refer to the legitimate aims of state and not its interests.

Although, number of amendments to the Constitution appear to be expansive and positive, most of them are incomplete, or feature shortcomings or does not entail any practical guarantees.

*i.*

#### ***Restriction of human rights and liberties***

New amendments include number of restrictions to the human rights and liberties. The first restrictive amendment was modification of Article 24 including prohibition of "abuse of right" to. Such restriction is included in the Universal Declaration on Human Rights (Article 30), the European Convention on Human Rights (Article 17) and other international documents, along with the Constitution of many other countries.

Another restriction of human rights and liberties was introduced to Article 29 which regulates the right to property. The modification of the article adds new provision stipulating that "private property entails social responsibility". The aim, necessity and justification of this modification are not clear. Articles 72 to 80 already stipulate that all individuals bear responsibility. Moreover, the Universal Declaration of Human Rights already stipulates that every individual bears responsibilities while executing their human rights. Therefore, it is now clear why only the property owners are to bear social responsibility. Also, while responsibilities of individuals are expressed in the Constitution using wordings of "duty" and "restriction", the use of the ambiguous term like "social responsibility" is not welcome. The purpose of this amendment has not been clearly communicated to public.

Another provision that was added to Article 29 states that "a land property may be restricted for the sake of social justice and effective use." The restriction of property rights can be found in other legislation of other countries and the Protocol 1 of the European Convention on Human Rights which stipulates "reasonable public interest" for restricting the property rights. However, using an ambiguous terms like "social justice" and "effective use" which can be interpreted very widely is not welcome, and it would have been better to use the case-law of the ECtHR which suggests the wording "reasonable public interest." This amendment could lead to unjustifiable restriction of the property rights of citizens.

Modification of Article 47 adds a new criteria for restricting the freedom of speech namely “hostility based on any other criteria” which is a negative development for human rights and liberties in Azerbaijan. The previous version of Article 47-3 prohibited “propaganda provoking racial, national, religious discord and animosity” with purpose of fighting the hate speech. However, adding a new

undefined and very open criteria to the list of restrictions will only lead to unjustified limitation of freedom of speech.

Another restrictive amendment is modification of Article 49 which introduces two new cases for restriction of the right to peaceful assembly - protection of public order and public moral. Although such restrictions are also proclaimed in Article 11 of the ECHR, amendments to Azerbaijani Constitution do not include proportionality criteria like the one in the ECHR ("necessary in a democratic society"). Therefore, this amendment is a negative development and contradicts with Azerbaijan's international commitments.

Amendments to Article 53 introduced stipulation on deprivation/loss of citizenship "in cases provided by the law" providing legislative branch with powers to define criteria for deprivation of citizenship. The previous text of the Constitution prohibited deprivation or loss of citizenship by Azerbaijani national. This is a very negative development and is in contradiction with the requirements of the UN Convention on the Reduction of Statelessness.

New modification of Article 57 prevents military personnel from lodging collective petitions. The limitation comes on the top of already existing legal and professional restrictions for military personnel (Article 36 of the Constitution prohibits strikes by military personnel). Therefore, the military personnel are in disadvantaged position in comparison with other groups and provisions balancing this should be introduced. This weakens their positions *vis a vis* employees and is a negative development.

Finally, the last restrictive amendment is modification of Article 58 which prohibits associations created for pursuing "intentions considered as a crime by law or using criminal means" replacing the previous wording of "intentions to forcibly overthrow of legal state power on the whole territory of the Azerbaijan Republic or on a part thereof". This is a very negative development. The Venice Commission states in its opinion that "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". Basis for restriction of activities of associations should be clearly defined in accordance with the requirement of Article 11 of the ECHR.

Amendments to Article 32 are both expansive and restrictive when it comes to human rights and liberties. On the one hand, it aims at ensuring protection of personal data, which is a positive development, while on the other hand it limits the freedom of speech and freedom of access to information, which is not welcome. Protection of personal data is a legitimate aim, but newly added provisions to Article 32 are not clear and they should not prevent collection and disclosure of data on "private life" of public figures.

The provision six of Article 32 leaves the restriction of the right to access to and disclosure of information on individuals using electronic and paper sources to the legislator which is more than needed to protect the personal data and is clear limitation of the freedom of speech.

## **D. Institutional Changes to State Administration**

The Referendum also introduced number of institutional changes to state administration including to military forces, legislative branch, executive branch and municipalities.

### *i. . Military forces re-defined*

Modified Article 9 includes “other armed units” to the notion of “Armed Forces” expanding the authorities of the President as commander-in-chief. The Venice Commission considered the amendment as incompatible with democratic standards. "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," according to the Venice Commission.

### *ii. Amendments related to the Legislative branch*

Amendments related to the Legislative branch include lowering the minimum age requirement for being elected as a Member of Parliament (MP), basis of losing the mandate of MP and dissolution of the Parliament by the President.

Modification of Article 85, eliminated the minimum age requirement for becoming an MP restricting it only to the right to vote which is reached at the age of 18 in Azerbaijan. Azerbaijan's Constitution also does not require a university degree for becoming an MP and therefore the minimum age requirement of 25 intended to ensure some social and professional experience for persons joining the legislator. Elimination of such requirement means that a person without any experience could become an MP deciding on very important issues concerning the country. Therefore, this is not a positive development.

Amendments to Article 89 and Article 93 added two new cases when an MP can be deprived of his or her seat at the parliament: “blunt violation of the code of ethical conduct” and for "delegated voting".

The first condition for the loss of seat in the parliament is not compatible with democratic principles. The code of ethical conduct should be regulated by laws and not the Constitution. Such provision would allow a parliamentary majority to deprive minority MPs from their seat in the parliament or silence them threatening with such actions. Loss of the seat as a sanction for delegated voting is excessive. Delegated voting can be prevented by changing the technique and rules of voting in the parliament and there is absolutely no need for introducing such harsh sanctions for delegated voting in the Constitution.

The Referendum also gave the President wide powers to dissolve the parliament with the new Article 98-1. Now, the President could dissolve the Parliament in cases of no confidence in the cabinet twice in one year, failure of the Parliament to confirm the nominees of the President for the Constitutional Court, Supreme Courts and the Central Bank's Executive Board within a timeframe defined by the law, and failure to carry out its responsibilities related to legislative activities due to reasons beyond the control of parties.

This provision is not compatible with democratic principles. Countries with Presidential Republic systems usually do not provide the President with the power to dissolve the legislator. Parliamentary systems, where the President has very limited powers, usually feature such provisions which is aimed at eliminating a political deadlock.

Furthermore, the conditions for dissolving the Parliament are not proportionate. The Constitution recognizes the power of the Parliament 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. Otherwise, dissolving the Parliament for the vote of no confidence by which does not affect the powers of the executive branch is not a proportionate action.

The Constitutional Court and the Supreme Court belong to the third branch of power and should be independent from two other branches. Therefore, their appointment should be carried out together by the executive and legislative branches. The independence of the Central Bank also requires the similar approach for appointment of members of its Board of Directors. Two branches may not agree on their composition, but such disagreement should be solved via compromises and political discussions. New amendments grant the President with additional power to influence the decision of the legislators in such important appointments by threatening to dissolve the Parliament. This is a significant damage to independence of the Parliament from the executive branch, as well as the independence of the judiciary branch. Therefore, these provisions are in contradiction with principles of democratic governance.

The third condition for the dissolution of the Parliament is failing to perform its duties related to law-making, appointments, international relations within time-limits specified in the Constitution for reasons that cannot be overcome. This includes very technical details such as submitting the bill for signing to the President within 14 days of its adoption which is a technical matter overseen by the administrative staff of the Parliament and not MPs. In principle, the President could dissolve the Parliament if the bill does not come to his office in specified time due to shortcomings in the work of the Parliament's staff members. Hence, MPs who received their mandate from public could lose their seat in the Parliament due to mistakes of the technical staff of the legislator. Therefore, this provision is also not compatible with democratic principles.

### *iii.*

#### *Amendments related to the Executive branch*

The Referendum further extended the powers of the President and the executive branch. Amendments extended the President's term from five to seven years, eliminated 35, 30 and 25 years of age limitation for the posts of presidency, prime minister, deputy prime minister, ministers and other high level positions in the executive branch. The Referendum also provided the President with powers to declare an early presidential elections and to establish posts of the First Vice-President, who will succeed the President in case the latter is not able to perform his or her duties, and posts of other vice-presidents.

The Venice Commission warned that lowering the of the minimum age limit to 18 years for important positions in the executive branch could lead to deterioration of the quality of state governance.

Modification of Article 101-1 of the Constitution provide extension of the President's term from five to seven years, the longest among the Council of Europe countries with presidential or semi-presidential political systems. The principles of democratic governance stipulate more powerful positions to be limited in term and to be replaced regularly. However, this amendment is against the principle of the democratic governance. Only Italy and Ireland among the Council of Europe member states have seven year terms for presidency, but both countries are parliamentary republics where president have limited powers. Azerbaijan eliminated term limits for the presidency in the 2009 Referendum.

The President also obtained the power to declare early presidential elections with the modification of Article 101-1. Elections to elected bodies should be carried out in line with principles of stability and continuity, and in accordance with rules independent from those bodies. Therefore, the President

should not declare early and scheduled presidential elections. This new provision gives the President with power of manipulating the date of elections for his or her personal benefit. The Venice Commission criticised the provision stating that this provision is "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."

New Article 103-1 of the Constitution allows the President to appoint the First Vice-President, who would succeed the President in case he or she is not able to perform his or her duties, and posts of Vice-Presidents. Being appointed and dismissed by the President, the First Vice-President and other Vice-Presidents will be dependent on the head of the executive branch. Unlike the Vice-Presidency in the United States, the vice-presidents in Azerbaijan are not elected together with the President and therefore do not have the same legitimacy. Moreover, there could be more than one vice-presidents.

Appointed vice-president are granted with similar immunities and privileges as the elected President by Articles 106-1 and 108-1, which is against the democratic principles.

Also, the new Article 110-1 provides the right to sign intergovernmental and international agreements to the First Vice-President, a member of the Cabinet of Ministers or other person identified by the President. This is against the requirements of representative democracy. The right to sign such agreements should be given only to persons with elected legitimacy. Although, the elected President possesses the legitimacy, he or she should not delegate this legitimacy to unelected official.

Another concern related to excessive powers of the executive branch is the issue of succession of the power. Before the 2002 Referendum, the elected speaker of the Parliament was in line to succeed the President in case the latter is not able to perform his or her duties. This was in line with requirements of representative democracy because the speaker was elected as an MP by public. The 2002 Referendum brought the Prime Minister to replace the speaker in the line of succession. Although, the Prime Minister is appointed by the President, the Parliament plays some role in the process and therefore there can be partial legitimacy in succession of power by the Prime Minister.

However, new amendments to Article 105 provides the First Vice-President who is appointed by the President without even consulting the Parliament with power to succeed the President. This, albeit temporarily, would make it possible for the country to be led not by an elected, but by an appointed official.

*iv.*

#### ***Amendments related to Municipalities***

Newly added Article 146-1 stipulates that municipalities and municipal officials are liable 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. This is a positive development similar to amendment of Article 68. This provision could have been mentioned in Article 68 for the sake of precision and brevity.

## V. PREPARATIONS FOR THE REFERENDUM AND CAMPAIGNING

The Central Election Commission (CEC) started the preparations for the Referendum following the announcement of the Referendum Day in accordance with the requirement of the legislation.

### A. Preparations for the Referendum and Public Awareness Campaign

The CEC adopted a list of indoor and outdoor venues for the campaigning period as stipulated in the "law on Freedom of Assembly. 128 indoor and 128 outdoor venues available for the referendum campaigning did not include any of central streets and squares in Baku and other cities.

Web cameras allowing the real-time online observation of the voting process through the CEC's website were installed in 1000 polling stations in 119 constituencies. The CEC produced and disseminated awareness raising materials on the Referendum and provided all constituency and precinct commissions with necessary documents.

Some of the awareness raising materials produced and disseminated by the CEC failed to follow the impartiality and could be characterized as campaigning in favour of proposed amendments. Azerbaijani legislation stipulates 25% turnout for the Referendum to be considered as valid. The posters produced by the CEC included slogans like "Use your active election right (voting)" and "Be active in the Referendum" promoting participation in the Referendum.

Ongoing crackdown on civil society, criminal investigations against some domestic and foreign NGOs, hefty tax sanctions and restrictive legislation regarding NGOs and grant making limited the work of civil society during the Referendum. These restrictions prevented civil society organizations from meaningfully participating in voter education, protection of election rights and domestic election monitoring.

### B. Referendum Campaign Groups

Azerbaijan's Election Code requires signatures of 40,000 voters residing in the territory of at least 60 election constituencies in order to register a referendum campaign group that can participate in the campaigning process. 500 persons with the right to vote can form the initiative group which can collect the signatures. The CEC registers a campaign group after inspecting and validating the authenticity of provided signatures.

The CEC registered only three pro-governmental campaign groups all of which are in favour of proposed changes:

- "New Azerbaijani Party" established by the ruling party;
- "Civil Society" established by Confederation of Trade Unions and group of pro-governmental NGOs;
- "Municipality" established by Municipal Councils.

Opposition Musavat party submitted 41,128 signatures in order to register the "*Republic*" campaign group, but was denied the registration by the CEC which deemed 3604 of signatures invalid. Musavat party stated that the decision was groundless and noted that its authorized representative was not informed about invalidity of signatures during their inspection.

Republican Alternative (REAL) movement led by currently imprisoned Ilgar Mammadov had started the signature collection process, but was forced to withdraw from the process after several of its members were detained and harassed. The movement announced the suspension of signature collection process on 22 August following the arrest of its executive secretary Natig Jafarli and

administrative detention of two other members Toghrul Ismayilov and Elshan Gasimov. Jafarli, who was one of the main faces of the movement, was sentenced to four months of pre-trial detention for tax evasion and illegal entrepreneurship. Ismayilov and Gasimov were detained by police on their way to the publishing house to pick up campaigning materials. Both were sentenced to seven days of administrative detention and police also confiscated the campaigning materials. Jafarli was released a month after, but cannot leave Baku and the criminal charges are still pending.

Another opposition force the National Council refused to participate in the Referendum due to lack of competitive environment and violations of political freedoms, and called for boycotting the Referendum.

Some political parties pointed at insufficiency of 26 days for creation of initiative groups, collection of 40,000 signatures and registration of campaign groups.

### **C. The Referendum Campaigning**

Referendum campaign started 22 days before the voting day (3-25 September) and featured only campaign in favour of proposed changes in state and private TVs. All three registered campaign groups refused to benefit from the free air time on the Public TV stipulated by the law. Overall, the Referendum campaign was accompanied with environment lacking any alternatives.

Being under control of the government, TVs and radios did not offer any space for campaigning against the proposed amendments. Only some opposition parties and civil society groups campaigned against proposed amendments via statements, articles and comments on some newspapers and social media.

Posters and other print materials produced by registered campaign groups were displayed on special spaces allocated by the CEC. However, some of the CEC's print materials interfered with campaigning in favour of taking part in the referendum. For example, the CEC published posters with "*Your vote is crucial*" calling citizens to participate in the referendum. Unlike other elections, the Referendum requires the voter turnout to reach the 25% threshold and encouraging voters to participate in voting is interfering with campaigning.

During the campaign period, Musavat party organized one rally (18th September), and the National Council organized two rallies (11th and 17th September) protesting against the proposed amendments to the Constitution. While two rallies took place in a peaceful manner, the one held on 17 September by the National Council was followed by an incident between police and activists resulting in detention of some 40 rally participants including several journalists from Turan information agency, Radio Free Europe/Liberty and other media outlets. 12 of detained activists were sentenced to up to 8 days of administrative detention, while the rest were released on the same day. Before the rally, 86 persons were detained or summoned to the police across the country 6 of who were sentenced to administrative detention. Overall, 185 opposition members and activists were detained before and after the 11th and 17th September rallies.

## VI. THE REFERENDUM DAY

### A. Domestic and International Observers

According to the CEC, 53,531 domestic and 117 international observers from 33 countries were registered to monitor the Referendum. The government has not formally invited the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE).

Seven person strong assessment mission from the Parliamentary Assembly of the Council of Europe (PACE), along with small delegations from the European Peoples Party, the Commonwealth of Independent States and Austrian Parliament monitored the Referendum day. However, international observers did not meet with all stakeholders and failed to provide assessment of situation of political freedoms prior to the voting day. Some of international observers, particularly members of the PACE delegation gave a positive assessment of the Referendum day before the closing of polling stations violating the requirements of international observation.

The CEC created necessary conditions for some pro-governmental NGOs to carry out "exit-polls" during the Referendum day. However, these organizations did not disclose sources of their funding and methodology raising serious questions about their impartiality.

Number of independent NGOs, including EMDS could not engage in voter education and comprehensive domestic election monitoring due to restrictions of freedom of assembly and ongoing crackdown on civil society.

### B. The Referendum Day

EMDS carried out the monitoring of the Referendum Day based on information collected from voters observing the voting process with their own initiative, journalists and activists, along with monitoring of web cameras installed by the CEC.

**Analysis included in this report is based on monitoring of opening of polling stations, beginning of voting and vote counting in 51 polling stations, and monitoring of voting and voter turnout in 135 polling stations across the country. EMDS received several reports from mobile group of observers during the Referendum Day.**

#### *i. Opening and layout of polling stations*

Monitoring of 51 polling stations noted shortcoming in some polling stations with regards to opening and their layout. 84% of monitored polling stations were opened for voters from 8:00 AM and were equipped with necessary documents and equipment.

#### *ii. Voting process*

The voting process was marred with violations which significantly influenced the results and legitimacy of the Referendum, including ballot-box stuffing, group voting (carousel), voting multiple times and voting without registration. All of the above mentioned violations were observed in around 40% of 135 polling stations monitored.

| <b>Violations</b>                  | <b>Observed in % of polling stations</b> |
|------------------------------------|--|
| Ballot-box stuffing                | <b>38%</b>                               |
| Voting in groups (carousel)        | <b>43%</b>                               |
| Voting multiple times              | <b>37%</b>                               |
| Voting without registration        | <b>39%</b>                               |
| Violation of the secrecy of voting | <b>43%</b>                               |

Ballot-box stuffing was observed in 38% (51 polling stations), while cases of voters being brought to polling stations in groups (which is known as carousel) took place in 43% (58 polling stations) of 135 observed polling stations. Ballot-box stuffing, which directly affects the results of voting and entails a criminal liability, took place with participation or under the directions of member of Precinct Election Commissions (PEC). Similarly to previous elections, group of voters were brought to polling stations by local authorities during the Referendum Day. Beside, influencing the results of the voting, carousel voting was also aimed at increasing the voter turnout artificially.

One person voting multiple times and voting of persons without being registered on the voters' list were recorded in 37% (50 polling stations) and 39% (52 polling stations) of observed polling stations respectively. The members of the PECs were responsible for ensuring that every voter use their rights to cast a ballot once. Both violations occurred with oversight or direction of PEC members.

Many voters indicated their choices on the ballot box without entering the voting cabin which was violation of the principle of secrecy of voting. In 43% of polling stations observed (58 polling stations), the PECs failed to ensure the secrecy of voting process.

### **iii. Voter Turnout**

Azerbaijani legislation stipulates 25% voter turnout threshold for the Referendum to be considered valid,<sup>7</sup> unlike other elections. Therefore, voter turnout was crucial for the results. The CEC announced the turnout at 69.7%, but EMDS believes the official figures do not correspond to the reality.

EMDS compared the official voter turnout figures with the information received from observers for three time periods on the Referendum Day - 8:00-10:00AM, 12:00-15:00PM and 17:00-19:00PM. Observers stayed in polling stations during the noted hours and counted the voters receiving the ballot box, while the official voter turnout was published on the CEC's website. The table below include the aggregate (total) number of official and observed voter turnout in observed 135 polling stations.

| <b>Source of Information</b>                 | <b>Hours</b>           |                         |                         |
|--|------------------------|-------------------------|-------------------------|
|  | <b>8:00 - 10:00 AM</b> | <b>12:00 - 15:00 PM</b> | <b>17:00 - 19:00 PM</b> |
| Official Voter Turnout                       | 6,718                  | 11,134                  | 2,994                   |
| According to Observers                       | 3,955                  | 3,868                   | 1,784                   |
| Difference between two sources               | <b>2,763</b>           | <b>7,266</b>            | <b>1,210</b>            |
| Difference between two sources in percentage | <b>+70%</b>            | <b>+ 188%</b>           | <b>+ 68%</b>            |

<sup>7</sup> The Election Code, Article 139.1

As it can be seen on the table above, the CEC's figure for voter turnout was 70% more than the turnout counted by the observers during the first two hours of voting in 135 polling stations monitored. Figures diverge even more during 12:00 - 15:00 PM when official turnout was almost twice as high as turnout reported by observers. The last two hours of voting displayed similar divergence as the first two hours - 68%.

As indicated by the observation results, the authorities artificially increased the voter turnout through fraudulent actions like ballot-box stuffing, multiple voting, bringing voters in groups and allowing people without registration to vote.

#### *iv. Vote counting*

As in previous elections, observers noted violations during the vote counting process in 51 monitored polling stations. In 66% of observed polling stations, the results were not accurately reflected in the final protocol. Members of PECs deliberately wrote in false information in the protocol. In 47% of observed polling stations, copies of final protocols were not displayed in the public place or were not handed to observers in a breach of the requirements of the Election Code.

## **VII. OFFICIAL RESULTS AND SITUATION AFTER THE REFERENDUM**

### **A. Official Results**

On 11 October, the CEC approved the results of the Referendum with all the proposed amendments to the Constitution adopted. More than 3.6 million voters participated in the Referendum reaching the turnout to 69.7% according to the CEC.<sup>8</sup>

The CEC annulled the results of 3 polling stations and partially annulled the results of 1 polling station due to irregularities noted during the voting and vote counting. Overall, 6 precinct election commissions were suspended.

On 12 October, the President signed a decree on preparation of legal acts necessary for enforcing the adopted amendments to the Constitution as a result of the Referendum.

### **B. Political Situation after The Referendum**

The Assessment Mission of the PACE concluded in its preliminary statement that "the referendum was organised in accordance with "the national legislation and the Constitution of Azerbaijan and is considered legal and legitimate"<sup>9</sup>. Given the noted irregularities and the political situation during the Referendum, the statement provoked some concerns from domestic and international organizations. The European Platform for Democratic Elections called the conclusion of the PACE mission an attempt to whitewash the fraudulent Referendum.<sup>10</sup>

Domestic organizations like EMDS and Civil Society Platform stated that the Referendum was carried out in an undemocratic environment and with restrictions of political freedoms. Main

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<sup>8</sup> The Final Protocol of the CEC at [http://www.msk.gov.az/uploads/Referendum2016/Protokol\\_referendum\\_2016.pdf](http://www.msk.gov.az/uploads/Referendum2016/Protokol_referendum_2016.pdf)

<sup>9</sup> The Preliminary Statement of PACE Mission at - <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6326&lang=2&cat=31>

<sup>10</sup> The Statement of the EPDE at - <http://www.epde.org/en/newsreader/items/international-election-observers-whitewash-fraudulent-referendum-in-azerbaijan.html>

opposition forces - Musavat party, National Council and Republican Alternative Movement called the results of the Referendum illegitimate due to gross violations during the process.

Speculations of early presidential elections following the Referendum were dispersed by the President Ilham Aliyev in his interview to the Russian Sputnik news agency on 18 October. Aliyev said the government did not plan to move the 2018 Presidential Elections to an earlier date. He also did not exclude the possibility of running for the fourth term in 2018 saying: "if the public continues to support me like today, I will of course try to live up to it."

## VIII. CONCLUSIONS AND RECOMMENDATIONS

### A. Conclusions

- The amendments to the Constitution was put up for the Referendum without adequate justification, open debates at the Parliament and public discussions, as well as without consulting the Venice Commission of the Council of Europe. Therefore, the process of the development and the announcement of the Referendum Act failed to meet the principle of procedural justice.
- Some of the adopted amendments on human rights have been partially positive, but technical shortcomings regarding many of them remain. The Referendum also introduced a number of restrictive and ambiguous provisions to the Constitution with regards to human rights and liberties which could lead to even more preventive enforcement. These restrictive amendments are in contradiction with the European Convention of Human Rights and the precedent regime of the European Court of Human Rights.
- The Referendum disproportionally increased the powers of the executive branch at the expense of powers of the legislator. Adopted amendments make it nearly impossible for the Parliament to function in full independence from the Presidency. The limitation of powers of newly established unelected positions of vice-presidents are not indicated in the adopted amendments. Also, elimination of minimum age requirement for number of high level positions will negatively impact the quality of state governance.
- The Constitutional amendments have been a regressive step for Azerbaijan with regards to democracy and the rule of law.
- Restrictive political situation prior to the Referendum was not conducive for the democratic and free vote, and political-civic activists continued to face harassment and arrests prior, during and after the Referendum. Reforms ensuring the situation of freedoms of expression, assembly and association necessary for democratic vote were not carried out by the authorities.
- There were no public discussions adequately informing Azerbaijani voters about proposed amendments to the Constitution during the campaign period.
- Authorities pressured opposition parties during the process of registration of campaign groups interfering with signature collection process. None of the groups campaigning against the proposed amendments were registered resulting in an campaign environment lacking alternatives.

- The Referendum Day was marred with number of violations noted in previous elections – unauthorised interference into the voting process, ballot-box stuffing, multiple voting, voting in groups, voting on behalf of others and fabrication of results of the voting.
- There are serious doubts about the authenticity of the official voter turnout figures reported by election commissions, while in some polling stations the voter turnout was artificially increased through irregularities.

## **B. Recommendations**

- All persons violating the election rights of citizens, particularly the local executive authorities should be held liable for their actions.
- Authorities should take necessary steps for improvement of the Election Code and democratization of election environment in consultation and cooperation with domestic and international organizations.
- The government should demonstrate political will to restore mutual confidence in relations between the state and public, release all political prisoners, take necessary measures to ensure freedoms of speech, assembly and association, create conducive environment for civil society and political parties to take active, meaningful and free participation in the governance process in order to solve the current political crisis.
- The election commissions should be formed based on political parity principle in order to ensure their independence.
- The government should ensure to address the shortcomings in the assessment of the Referendum results, as well as in the Election Code and other relevant legislation including the rules for filing complaints regarding the violation of the election rights.

## **Executive Board of the Election Monitoring and Democracy Studies Centre**

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