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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**INTERIM OPINION
ON PROPOSED AMENDMENTS
TO THE ELECTION CODE OF
THE REPUBLIC OF AZERBAIJAN**

**by
the Venice Commission
and
the OSCE/ODIHR**

on the basis of comments by

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**Endorsed by the Council for Democratic Elections
at its 13th meeting
(Venice, 9 June 2005)
and by the Venice Commission
at its 63rd Plenary Session
(Venice, 10 - 11 June 2005)**

Introduction.

1. On 1 March 2005 representatives of the Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR), the Venice Commission and the authorities of the Republic of Azerbaijan met in Strasbourg in order to discuss possible amendments to the Election Code. It was decided that the authorities of Azerbaijan would prepare a draft text and submit it for opinion to OSCE/ODIHR and the Venice Commission before the end of March. The Venice Commission received the draft on 25 April 2005 and transmitted it to OSCE/ODIHR and to its members Messrs G. Nolte and P. Paczolay. The OSCE/ODIHR consulted Mr. R. Maleev for comments.

2. The proposed amendments to the Election Code of the Republic of Azerbaijan must be considered in the context of previous assessments of this Election Code by the Venice Commission and the OSCE/ODIHR. The three most recent and most important documents are the Joint Final Assessment of the Election Code of Azerbaijan of 1 September 2003 (CDL(2003)054), the Final Report of the OSCE/ODIHR Election Observation Mission for the 2003 Presidential election (FR03) and the Joint Recommendations of 1 June 2004 (CDL-AD(2004)016rev and JR04). These documents are interrelated. They contain important suggestions on how to improve the Election Code in order to provide the legal framework for elections conducted in line with international standards. This opinion reaffirms the above recommendations.

3. Unfortunately, the most important suggestions have not been implemented by the authorities of Azerbaijan in spite of the repeated recommendations from the Parliamentary Assembly and the Committee of Ministers of the Council of Europe.

4. The latest proposed amendments (the text submitted by the authorities on 25 April 2005, referred to in the following text as "the draft") reflect the recommendations of 2004 only to a very limited degree, dealing mostly with technical and minor issues. Although some of the proposed amendments are in line with international standards and a number of them even follow previous recommendations by the Venice Commission and OSCE/ODIHR, this *cannot* lead to the conclusion that the Election Law of Azerbaijan will be satisfactory if the suggested amendments are adopted. This will be made clear at the end of this opinion by a list of those previous recommendations from 2003 and 2004 which are still not sufficiently addressed or not reflected in the new proposals.

5. For the purpose of this opinion the following abbreviations will be used:

CEC – Central Election Commission
ConEC – Constituency Election Commission
PEC – Precinct Election Commission

6. The main recommendations as they appear in the document CDL-AD(2004)016rev of the Venice Commission and document JR04 of OSCE/ODIHR will be further referred to as "joint recommendations".

7. Following a meeting held on 31 May 2005 between the authorities of Azerbaijan and the representatives of the Venice Commission and of OSCE/ODIHR, revised draft amendments to the electoral code of Azerbaijan were submitted to Parliament. The Venice Commission and OSCE/ODIHR will deliver a final opinion after the adoption of the amendments.

I. Comments on individual proposed amendments.

8. The original text of each amendment will appear in bold italic characters.

1. Articles of the following language should be made:

1.1.29. voting results – results of calculation of votes in a precinct election commission, during elections (referendum); results of calculation of votes in a constituency election commission, during referendum and Presidential elections;

1.1.30. elections' (referendum) results – results of elections to the Milli Majlis of the Republic of Azerbaijan and municipalities, as specified by the constituency election commission;

1.1.31. election (referendum) returns – determining a nominee that is elected as a Deputy to Milli Majlis, President of the Republic of Azerbaijan or a Councillor at elections, or defining the issue that is (not) adopted through referendum;

1.1.32. elections' general returns – generalization by the Central Election Commission of the Republic of Azerbaijan of returns of the elections to the Milli Majlis or Municipal Elections”.

9. These definitions appear to be added only for the sake of terminology. If so, they would not be problematic. They should not be read, however, as an assertion that election commissions can conclusively determine a “voting result“, an “election’s (referendum) result”, an “election (referendum) return”, or “elections’ general returns”. This is done through the functioning of the appeals system and the confirmation by the Central Election Commission and a decision of the Constitutional Court.

2. The following should be added in Article 2.4: “Elections of Deputies of the Milli Majlis of the Republic of Azerbaijan and Elections of the President of the Republic of Azerbaijan cannot be held on the same day. Elections of Deputies of the Milli Majlis of the Republic of Azerbaijan and Municipal Elections cannot be held on the same day. Elections of the President of the Republic of Azerbaijan and Municipal Elections cannot be held on the same day.”

10. It is acceptable to provide that different elections cannot be held on the same day.

3. In Article 19.8., phrase “and on issues considered in that meeting” should be added after “of a meeting”; “and list of the issues considered at that meeting, draft decisions and other documents related thereto” be added after “information about meeting”; “and list of the issues considered at that meeting, draft decisions and other documents related thereto” be added after “information about time of the meeting”.

11. The proposed additions are to be welcomed since they are aimed at better preparation of commissions meetings by timely informing the members about the agenda and delivering draft decisions to be discussed and other documents related thereto personally in writing or by means of electronic communication facilities.

4. The word “apparatus” should be replaced by “secretariat”, in Article 19.17.

12. This seems to be a terminological modification. It is therefore legitimate.

5. The following sentence should be added in Article 22.1: “(Restrictions provided for with regard to kinship in this Article, shall not apply to members of precinct election commissions established in the manner specified in Article 36.7 of this Code)”.

13. The drafters propose to remove the general kinship restrictions on the persons eligible to serve in election bodies, provided in Art. 22.1, for the case of special PECs, formed by open vote at general meetings of voters (Art. 36.7). Such procedure for appointment of PECs is allowed for precincts organized in military units (Art. 35.5) located at more than 1 hour distance by public transport from the closest Polling station or in exceptional circumstances to be defined by CEC, in hospitals, sanatoriums (Art. 35.4), in precincts located in impassable places (Art.36.7) etc.

14. Apart from the fact that the procedure itself is highly questionable and the existence of “special” PECs, especially for military units, has previously been described as an issue of concern¹, the proposed amendment introduces an additional and unnecessary element of “exceptionality” for these PECs. It is recommended to delete the amendment.

6. In the Article 22.10.1, after the word “meetings” to add the expression “issues to be discussed during this meeting, draft decisions regarding these issues and other documents.”

15. This amendment is line with proposed amendment 3 - the right of election commission members to be timely informed not only about the next meeting, but also on the issues to be discussed, on the draft decisions, etc.

7. In the Article 22.11, to replace the words “overall results” with the words “returns (general returns)”

16. This change is in line with the proposed amendment 1.

8. In the Article 28.6, after the word “outlet” to add “and internet site”

17. The new addition establishes an obligation for the CEC to support an internet site. This is a codification of the existing situation.

9. To add the following sentence to the Article 34.4: “Number of the permanent staff working for the secretariat of the Constituency Election Commission, their titles and salaries shall be determined by the Central Election Commission of the Republic of Azerbaijan.”

18. This proposed addition appears to be desirable in the interest of the principle of equality.

10. In the Articles 40.12 and 42.7, after the word “returns” to add the words “(general returns)”²

¹ See Joint Assessment of the Revised Draft Election Code of the Republic of Azerbaijan of 28 November CDL-AD(2002)035 (JA02) para 46

² The draft amendment appears to refer to Article 42.2.7, as there is no Article 42.7 in the Election Code.

11. To add Article 41.3: “The observation can start from the date the elections (referendum) are announced and can finish the day when returns (general returns) of elections (referendum) are officially published.”

12. In the Article 44.5, to replace the words “general results” with the words “(referendum’s) returns (general returns)”

19. The proposed amendments in the three paragraphs above seem to be an attempt to meet the OSCE/ODIHR’s and Venice Commission’s joint recommendations that the Election Code guarantee the right for observers until all the electoral tasks are completed. While explicitly establishing that the observation can start from the date the elections are announced and finish the day when returns (general returns) are officially published, the amendments fail to specify that observers shall have the right of access to electoral commissions after polling day. This appears necessary in order to avoid different interpretations of the legal provisions taking into account that the understanding of the notions “observation” and “observer” (including as defined in Art.1.1.18-19) is usually very narrow and concentrates on election day. Moreover, the right of access to electoral commission meetings is provided especially for the pre-election period and only to a special category of observers (Art. 40.13).

20. The second argument is that the proposed date for the end of observers’ authority prevents their participation in the process of complaints and appeals. It is one of the main tasks of election observers to comment on the official publications of election returns, that is *after* their publication. Election observers should be allowed to play a role in the period during which challenges to the official determinations of the election results are being brought and decided upon. Article 41.3 could be completed as follows: “*and after the judicial remedies for appeals and complaints against the returns are exhausted*”.

13. To add the following sentences to the Article 46.1: “The voters list can be posted on relevant website of the Central Election Commission in conformity with the rules established by the Central Election Commission. In this case, the voters’ addresses must not be displayed.”

21. In principle, the publication of the voters list (without addresses) on the internet is a welcome addition, but only if it is not subject to the free discretion of the Central Election Commission. It is therefore suggested to exchange “can” for “shall”.

14. To add the following sentence to the Article 60.2.3: “(this provision can be applied to the political parties, blocs of political parties in case if the given information is inaccurate due to the fault/mistake of the candidate)”.

22. This is a very problematic proposal since it opens the possibility to punish a political party for faults or mistakes of individual candidates. The proposal therefore violates the principle of proportionality which the Election Code itself expresses in Article 60.3. The proposed amendment should be deleted.

15. To add the following sentence before the word “pre-election” in the Article 74.1: “Election Campaign is held in accordance with the Article 47 of the Constitution of the Republic of Azerbaijan”.

23. The drafters are proposing reference to Art. 47 of the Constitution,³ for introducing the list of persons and groups entitled to conduct an electoral campaign. This formulation unfortunately does not fully address the joint recommendation to use the phrase “notwithstanding the right of freedom of expression.”⁴ There remains a need to clarify that the right of freedom of expression is universal, thus emphasizing that the list in Art. 74.1 is additional but not limiting. It is advised to adopt the phrasing recommended by OSCE/ODIHR and the Venice Commission.

16. To remove the following Articles 100.2.4; 100.2.6; 100.2.12 and 100.2.13. To consider the Article 100.2.5 as 100.2.4; the Articles 100.2.7-100.2.11 as 100.2.5-100.2.9; the Articles 100.2.14-100.2.19 as 100.2.10-100.2.15.

24. The removal of Art. 100.2.4, 100.2.6 is proposed as recommended in CDL-AD (2004) 016rev. (JR04), para 28 in order to shorten the list of items to be included in the results protocols. However, the drafted amendment provides in addition for the removal of Art.100.2.12-13, which is inappropriate. These articles refer to two important numbers, which provide crucial information about the total number of votes cast in the precinct – the number of envelopes for ballot papers found in the stationary ballot box and the number of envelopes for ballot papers found in the mobile ballot box. As envisaged by the Election Code (Art. 106.2), the first number is checked against the number of electors who have voted in the polling station (the number of signatures in the Voters List extract plus the number of voting cards attached to it), while the second –number is checked against the number of requests for mobile box voting. If more envelopes are found in the stationary (mobile) ballot box than the number of voted electors in (outside) the polling station, all votes cast in the relevant box should be considered invalid. Moreover, the removal of Art. 100.2.12-13 would make impossible an important check for each election result – namely, that the number of votes cast should equal the sum of valid and invalid votes.

25. It is recommended to keep both Art. 100.2.12-13 and to amend Art.106.2 so as to provide for the obligation of PEC to announce and record in the result protocol the number of envelopes found in each box immediately after the count of the envelopes in the ballot box has been completed. The CEC instructions for the count should provide next for mixing the envelopes from all boxes before starting to open the envelopes one by one in order to determine the validity of the vote.

17. After the word “signs” in the Article 104.6, and after the word “approves” in the Article 105.2, to add the following sentence: “The person who issues a ballot paper to a voter stamps the voter’s card with a special seal which indicates the voting date.”

26. An additional safeguard is proposed against possible misuse on election day of the voter cards, issued to voters to prove their inclusion in the Voter List (Art. 46.2). The draft amendment provides for the PEC member issuing the envelope and ballot paper(s) to the voter to stamp his/her voter’s card with a special seal, which indicates the voting date. Such a measure could be

³ Article 47. Freedom of thought and speech :
 I. Everyone may enjoy freedom of thought and speech.
 II. Nobody should be forced to promulgate his/her thoughts and convictions or to renounce his/her thoughts and convictions.
 III. Propaganda provoking racial, national, religious and social discord and animosity is prohibited.

⁴ See joint recommendations, para 17 and OSCE/ODIHR document JA02, para 87.

meaningful only if the printing and distribution of the voter's cards is subject to strong control and accountability. More detailed information is needed in order to consider this procedure as a real alternative to the reintroduction of the provision on inking voters' fingers as has been previously suggested by OSCE/ODIHR and the Venice Commission (Joint Final Assessment, CDL(2003)54, para. 42).

18. To add the words “as a result of relevant investigation” after the words “all votes” in the 2nd and 4th sentences of the Article 106.2.; to replace the words “is counted” with the words “can be counted.”.

27. The sentence numbers referenced in the amendment do not correspond with the present Article 106.2. The exact place of the amendment needs clarification.

28. It appears that the purpose of the first part of this proposal is to make clear that the determination of whether the number of envelopes exceeds the number of requests is subject to an additional verification procedure by the relevant Election Commission (recount). This would be a legitimate purpose.

29. On the other hand, it is difficult to understand the purpose of the second part of the proposal: Since it is important to determine whether the number of envelopes exceeds the number of requests and since this determination should be made beforehand, it is unclear what reasons could exist to determine the number later.

30. At the same time, the proposed amendment is a response to the joint recommendations, para.36, suggesting that sanctions should be proportional to the mistake or violation committed and that to invalidate all the votes cast in a polling station merely because a voter has omitted to sign the Voter List is a disproportionately severe sanction. Unfortunately, the amended text of Art. 106.2 does not change the result of the application of the article, because it only provides for the decision of invalidation to be taken “as a result of relevant investigation,” not leaving space for a different decision in the case of a minimal discrepancy.

19. To add a sentence to Article 108.2 in the following edit: “The Central Election Commission of the Republic of Azerbaijan shall draw up protocols on general results of elections to the Milli Majlis and municipalities”.

31. This provision needs a technical clarification. While amendments states that this sentence is added, it contradicts the previous sentence, which is assumed is to be deleted, but this is not clear. Without further editing of the previous sentence to correspond to the new definition in Article 1.1.31, confusion could arise.

20. To replace figure “5” with figure “2” in Article 109.1.

21. To replace words “2 days” with words “24 hours” in Article 109.3.

32. The OSCE/ODIHR and Venice Commission recommendation⁵ to shorten to 24 hours the deadline for publication of preliminary results is partially implemented by amending Art.109.1 with a provision obliging CEC to publish the unified voting results of the ConECs within 2

⁵ See JR04 or CDL-AD(2004)016rev, para29

(instead of 5) days starting from the voting day. Analogously, the deadline for publication of the results per PSs by ConECs in Art. 109.3 is shortened to 24 hours (instead of 2 days) after the polling day. However, the recommendation to amend the Electoral Code with the explicit obligation of CEC to post the results by polling station on its website immediately after receiving them from ConECs is not addressed.

22. Articles 112.2 and 112.3. to be given in the following edit:

112.2. The persons indicated in Article 112.1 of this Code may submit their complaints to the superior election commissions.

112.3. If complaints of the persons indicated in Article 112.1 are initially not considered by a superior election commission, consequently they can file complaints on the decision or the action (inaction) of the constituency election commission to the relevant district court, and on the decision or the action (inaction) of the Central Election Commission to the Court of Appeal.

33. These proposals are welcomed as an attempt to simplify and to clarify the appeals process, as has been suggested in the joint recommendations.

34. However, it remains unclear (perhaps due to translation) whether the phrasing used in the new Art. 112.3 “If complaints of the persons indicated in Art.112.1 are initially not **considered** by a superior election commission, consequently they can file complaints on the decision or the action (inaction) of the constituency election commission...” should be understood as permitting the submission of a complaint against a decision, action (inaction) of a ConEC directly to the District Court, without previously submitting a complaint to the CEC.⁶

35. The joint recommendations to amend Art.112.1 by clarifying that the right to file a complaint is universal in relation to all decisions and by extending the three-day limit for lodging complaints are not addressed.

23. To add the following sentences to Article 112.4:

“In any case, an election commission must make a grounded decision on transfer of a complaint to the prosecuting body. The relevant prosecuting body must consider the complaint within 3 days”.

36. One element of this proposal is problematic, as it does not seem to be in line with the previous proposals to simplify the appeals procedure. The application by an election commission to a public prosecutor in cases of alleged criminal activity is legitimate, but this must not necessarily entail the full “transfer” of the complaint to the public prosecutor. Rather, the election commission should continue to be competent to inquire into the effect of the subject of the complaint on the election results while leaving the criminal prosecution to the public prosecutor.

37. Another element of the proposal, the establishment of a timeline for action to be taken by prosecutorial bodies, would seem to strengthen the process and is therefore welcome.

⁶ It is unclear whether “**considered**” should be understood as “**satisfied**”.

24. To replace figure “25%” with figure “1/3” in Article 139.1

38. The recommended increase of the turnout condition for valid Referendum⁷ to 1/3 of the number of the registered voters (from 25%) is insufficient. A turnout requirement of 1/3 is still very low for a matter as fundamental as adopting new constitution or amending the existing one.

39. The option of acceptance by a minimum percentage of the electorate rather than a requirement of a minimum turnout should be considered (as suggested in the Venice Commission’s Guidelines on constitutional referendum at national level (Doc.CDL-INF (2001) 10, paragraph “O”).

25. To add the following words to Articles 139.2.1, 170.2.2., 204.1.1 and 240.2.1: “(under the condition that the number of registered voters in the election precincts exceeds ¼ of all voters registered in the constituency).”

40. A provision of the Electoral Code, contained in Art.139.2.1, Art. 170.2.2, 204.1.1 and 240.2.1 orders the invalidation of the result of an election or Referendum by a ConEC or CEC in practice only if due to irregularities the election results in more than 40 per cent of the relevant precincts are declared invalid. This provision has been the subject of previous recommendations.⁸ The draft amendment now introduces as an additional condition for the application of this provision the requirement that the number of registered voters in the precincts where the results were invalidated exceeds ¼ of the total number of voters registered in the relevant constituency.

41. The amendment does not provide for any redress of a situation in which the results in less than 40 per cent of the precincts are invalidated, while the number of voters in those precincts is much larger than ¼ of the voters registered in the constituency.

26. To replace figure “5” with figure “3” in Article 194.

42. The draft amendment provides for the recommended reduction⁹ from 5 per cent to 3 per cent of the threshold necessary for releasing presidential candidates from the obligatory payment of the costs of free airtime and space. While welcomed, the amendment fails to fully address the recommendation, as it fixes the threshold for all kinds of elections (Art.161, Art.194, Art.230) to 3 per cent of the number of registered voters instead of 3 per cent of the number of valid votes as advised. It should be noted that especially for municipal elections, where the turnout could be rather low, the actual formulation of the threshold condition based on the number of registered voters might appear unnecessarily strong. It is recommended to implement the proposed threshold of 3 per cent of the valid votes, which would put it in line with the threshold condition for return of the registration deposit in Art. 60.5.

⁷ See CDL-AD(2004)016rev or **JR04**, para38

⁸ idem, para35

⁹ idem, para20

27. *To replace figure “14” with figure “10” in Article 203.1. , to add the phrase “pursuant to Article 102 of the Constitution” before the word “for”.*

43. The draft amendment sets a 10 day deadline (instead of the present 14 day deadline) for the CEC to deliver the results of the presidential election to the Constitutional Court. This removes the conflict between the present Art.203.1 of the Election Code and Art.102 of the Constitution, thus following the joint recommendation of OSCE/ODIHR and the Venice Commission.¹⁰

II. The Election Code as a Whole

44. The OSCE/ODIHR and the Venice Commission regret that a considerable number of the previous recommendations from 2003 and 2004 were not reflected in the proposed draft or were reflected only to a very limited extent.

45. The following crucial recommendations contained in CDL-AD (2004) 016rev. (JR04) on important issues are not addressed at all:¹¹

1. Composition of Election Commissions (para. 9-12);
2. Signing petitions (para.13);
3. Refusal of Candidates (para.14-15);
4. Venue for election rallies (para.16);
5. Right to campaign (para. 18);
6. Financing provisions (para. 19);
7. Observers (para. 24-25);
8. De-registration procedures (para. 26);
9. Preliminary Declarations (para. 30);
10. Intimidation of Election Staff (para. 37).

46. There are some additional issues of concern that are not subject to regulating provisions of the Code (at least in a direct way) which could compromise the organisation of democratic elections such as:

- an extremely high deposit fee for candidates, and
- restrictions on certain NGOs to act as observers (para 9 of the CDL-AD (2004) 016rev).

47. Finally, the Electoral Code remains far too complex with unnecessary repetitions, especially in the provisions on the registration of candidates, campaign financing, lists of persons entitled to conduct pre-election campaign and limitations on the content of election campaign material.

III. Conclusion

48. This opinion on the Draft Law on Amendments to the Election Code shows that most of the important recommendations of OSCE/ODIHR and the Venice Commission were only partially implemented or not considered at all.

¹⁰ idem, para31

¹¹ The original numbers of the issues and recommendations from CDL-AD(2004)016rev (JR04) are kept.

49. Along with mostly technical changes, only a very limited number of substantial amendments are being proposed in response to the 2003 and 2004 joint recommendations of OSCE/ODIHR and the Venice Commission. These include:

- improvement of the administrative practices related to the creation of normal conditions for the work of the election commissions (amendments 3 and 6);
- increase of the transparency of the process of up-dating of the Voters list by posting it on a specific CEC web site (13);
- introduction of additional safeguard against possible misuse of the voter's cards (17);
- increase of the public confidence in the election process by timely announcement of preliminary results (20-21);
- much simplified procedures for lodging complaints and appeals, which establishes clear demarcation of the jurisdictions of the courts, prosecution bodies and election commissions (22);
- expeditious investigation of election-related issues by the prosecution (23).

50. The OSCE/ODIHR and the Venice Commission are of opinion that if the remaining recommendations of 2003 and 2004 are not duly taken into consideration, the examined draft will not be sufficient to develop public confidence in the electoral legislation and practice in Azerbaijan.