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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

JOINT INTERIM OPINION ON THE DRAFT AMENDMENTS TO THE ELECTORAL CODE OF THE REPUBLIC OF AZERBAIJAN

by the Venice Commission and OSCE/ODIHR

Adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008)

on the basis of comments by
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I. Introduction

1. This joint opinion on the draft amendments[1] to the Electoral Code of the Republic of Azerbaijan (Electoral Code) was prepared by the Organisation for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Council of Europe's European Commission for Democracy Through Law (Venice Commission).

2. In April and November 2007 and February 2008, representatives of the OSCE/ODIHR and the Venice Commission met with the authorities of the Republic of Azerbaijan in order to discuss possible amendments to the Electoral Code. The preliminary draft text of amendments was reviewed and discussed in the 2007 and 2008 meetings. At the conclusion of the February 2008 meeting, it was agreed that the OSCE/ODIHR and the Venice Commission would prepare this joint opinion. This joint opinion is based on the draft amendments, previous discussions with authorities, and anticipated additional changes the authorities stated they would include in the final text drafted for consideration by the Milli Majlis.

3. The draft amendments to the Electoral Code of the Republic of Azerbaijan should be considered in the context of previous assessments of the Electoral Code by the Venice Commission and the OSCE/ODIHR. The six most recent and most important documents are the Final Opinion on the Amendments to the Electoral Code of the Republic Azerbaijan of 25 October 2005 (CDL-AD(2005)029, the Final Report of the OSCE/ODIHR Election Observation Mission for the 2005 Parliamentary Election (ODIHR.GAL/7/06), the Joint Final Assessment of the Electoral Code of Azerbaijan of 1 September 2003 (CDL-AD(2003)015), the Final Report of the OSCE/ODIHR Election Observation Mission for the 2003 Presidential election (FR03), the Joint Recommendations of 1 June 2004 (CDL-AD(2004)016rev and JR04) and the interim opinion on the proposed amendments to the Electoral Code of the Republic of Azerbaijan (CDL-AD(2005)018). These documents are interrelated. They contain important suggestions on how to improve the Electoral Code in order to provide a legal framework for elections consistent with international standards. This joint opinion reaffirms the previous recommendations.

4. The draft amendments address some recommendations of the OSCE/ODIHR and the Venice Commission. This is a positive development. Although the amendments constitute progress, there remain areas of concern. Two of them include the composition of election commissions and providing an effective remedy for protection of electoral rights. Regarding the composition of election commissions, no changes have been introduced by the amendments. A Round table on Election Commission composition co-organised by the Council of Europe and IFES took place in Baku on 9 November 2007. Different proposals on commissions' composition were discussed. When considering the draft amendments to the Electoral Code, the Milli Majlis could take into account the results of the above-mentioned round table. Regarding the provision of an effective remedy for the protection of electoral rights, significant amendments have been introduced but remain to be further improved before consideration by the Milli Majlis.

5. In this context it should be reminded that the Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) on "Honouring of obligations and commitments by Azerbaijan" in the chapter on the electoral reform (3.1.2.) also recalled that the Parliamentary Assembly of the Council of Europe noted that the electoral legislation had not been amended in line with the recommendations

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[1] The amendments reviewed consist of 56 proposed articles in an unofficial translation of text (Doc CDL(2008)029). Any opinion based on translated laws may be affected by issues of interpretation resulting from translation.

repeatedly made by the Venice Commission in time for the re-run elections. The Assembly in particular urged the authorities of Azerbaijan to:

"- amend the provisions regarding the composition of the electoral commissions at all levels so as to establish an election administration which enjoys the confidence of the electorate and of all the stakeholders;

- further develop the procedure for an efficient handling of election-related complaints and appeals with the assistance of the Venice Commission.(Art. 52)."

6. As noted above, the amendments address some recommendations and are a positive development. However, the extent to which any amendments to the law can have a positive impact will ultimately be determined by the level of good faith and political will exhibited by state institutions and authorities responsible for implementing and upholding the law.

7. Some previous recommendations are not addressed in the amendments or are addressed only to a limited degree. Previous recommendations, which are considered important for the 2008 Presidential election, are noted in the conclusion of this joint opinion.

8. The present joint interim opinion, which was prepared on the basis of comments by Messrs Jessie V. Pilgrim, expert for the OSCE/ODIHR, and A. Endzins and P. Paczolay, experts for the Venice Commission, was adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008). The joint opinion was transmitted to the authorities of the Republic of Azerbaijan immediately after the session.

II. Discussion of amendments

1. Interference in election processes

9. One amendment attempts to address interference in election processes by introducing a new Article 11^1. This amendment prohibits the unlawful interference "by legal entities, officials of state bodies or municipalities and other natural persons" in the work of the election commissions and the election processes. The OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections noted several instances of such interference, and the first recommendation in the report is that the problem of interference be addressed. This amendment, if effectively implemented, could improve the administration of election processes. However, as noted by the OSCE/ODIHR report, two Presidential decrees and other legal provisions prohibiting such interference were not effectively enforced by authorities. Thus, the extent to which this amendment will address past irregularities is dependent upon its good faith implementation by authorities. Nevertheless, the amendment is a positive addition to the Electoral Code.

2. Right to candidacy

10. The interpretation and implementation of Article 13.3.4 of the Electoral Code (liabilities before foreign countries) has been a problem in past elections. The Constitutional Court in its decision delivered on 1 August 2003 interpreted the provision 'having no obligations towards other states' of Article 100 of the Constitution. The provision is one of the requirements to be fulfilled by candidates for the office of President. In its decision the Constitutional Court emphasised that the constitutional electoral right is one of the main characteristics of a democratic state. The right to elect representatives to different state bodies is an essential one in a democracy. The right of citizens to participate in State governance and the electoral right are enshrined in the Constitution (Articles 55 and 56).

11. Concerning the legal meaning of one of the requirements: "having no obligations before other states", the Court explained that depending on the regime granting permission to stay in a country, a foreigner may have different obligations to the State where he/she lives such as: registration, prohibition on leaving the place of residence or the territory of the state for a period exceeding the specified terms, payment of taxes in certain cases, registration for military service upon reaching a certain age, or other obligations in accordance with the legislation of that state.

12. The Constitutional Court considered that the legal meaning of Article 100 of the Constitution "having no obligations towards other states" implied the existence of obligations based on relationships causing a citizen to be bound to and dependent on foreign states. Thus the Constitutional Court decision has not resolved the ambiguity that exists in Article 13.3.4.

13. An amendment to Article 13.3.4 is intended to provide some clarification by giving a definition of an obligation towards a foreign country that would prevent candidacy. Although the amendment does not address the ambiguity issue, it does introduce an element of time to Article 13.3.4 that should provide a clear line when the article *cannot* be applied. The amendment states that the liability must result from “permanent, steady and stable affiliation related to more than 7 years period of living abroad” (sic). Thus, although the scope of the article remains broad, there is a durational element that can limit its application. This amendment should be considered as positive but could be made clearer in the sense that it applies only to persons living abroad at the time of elections.

3. Cancellation of candidate registration

14. An amendment to Article 113.2 requires that cancellation of candidate (or referendum campaign group) registration be based on “a court verdict in force” or “court decision on the administrative offence”. This is an improvement in the current text of Article 113.2. However, the grounds for cancellation remain very broad (12 full paragraphs after amendment). In order to protect the presumption of innocence and right to appeal, the authorities of Azerbaijan have agreed that the final text of the amendments considered by the Milli Majlis will make it clear that cancellation cannot occur until there is a final court judgment after exhaustion of all legal appeals. With this additional clarification, and as long as the same substantive safeguards required for a criminal trial are also required for proceedings on an administrative offence, the amendment can be considered as a significant step.

4. Central Election Commission regulation of exit poll organisations

15. A troubling amendment is the introduction of accreditation by the Central Election Commission of exit poll organisations. This amendment introduces Article 25.2.23, which includes accreditation of these organisations within the power of the Central Election Commission. As exit polls are conducted after voting and outside of polling stations, there is no reason to require such organisations to be accredited by the Central Election Commission. This amendment raises concerns about the right of individuals to exercise free speech (protected under Article 47 of the Constitution of Azerbaijan) and the media to gather and present information to the public (Article 50 of the Constitution of Azerbaijan provides that “*every person shall have the right to legally seek, receive, pass and spread information”)*.

16. This amendment does not address any previous recommendation. It is not clear why this amendment is needed and the potential harm it would cause is significant.

5. Polling stations for military voters

17. An amendment to Article 35.5 attempts to address the recommendations in the OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections concerning abuses that took place in the establishment of polling stations for military voters and the appointment of polling staff for military voters.[2] The recommendations raised concern that Article 35.5 was not being applied on an exceptional basis, as it should be, and that it was becoming the general rule instead of the exception. The recommendations were also based on the observation that Article 35.5 (Establishment of Election (Referendum) Precincts) appeared to be applied arbitrarily without application of any consistent and objective criteria. Further, Article 35.5 allows for the creation of special military polling stations where the military authority of Azerbaijan designates a "special regime" for one or more members of the military. As "special regimes" are military secrets, very little is known about them. However, the OSCE/ODIHR Election Observation Mission was able to ascertain that in the 2005 Parliamentary Elections more than 71,000 voters voted in polling stations dedicated to military voting.[3]

18. The amendment to Article 35.5 does not address the recommendations. The amendment merely requires that the establishment of military polling stations be reflected in a decision of the Central Election Commission. One could accept that there are particular security-related concerns in Azerbaijan. However, there is no definition of "special regimes" and, thus, the amendment makes no real change, and the military authority of Azerbaijan retains unlimited power to create "special regime" polling stations.

6. Observer badges

19. An amendment to Article 36.6 provides for observers in the polling station to be given identification badges. This is an appropriate amendment that has the potential to reduce the number of unauthorised persons in polling stations.

7. Ballot envelopes

20. Several amendments remove "envelopes for ballot papers" from the articles regulating voting and counting processes. These amendments abolish the use of ballot envelopes in elections in Azerbaijan. These amendments do not address any previous recommendations. Authorities in Azerbaijan have stated that these amendments are necessary in order to allow for the recounting of ballots and that the use of envelopes has prevented recounts in past elections. Although ballot envelopes can provide a security mechanism, other measures during the voting and counting processes can also provide a sufficient level of security.

8. Election day inclusion on list of voters

21. An amendment to Article 46.1 provides that a decision on whether a person should be added to the voters list on election day shall be made by the Precinct Election Commission in accordance with rules determined by the Central Election Commission, instead of by a court. Although courts are presumed to be more impartial than election commissions, this amendment could provide a greater suffrage opportunity for a person whose name has been omitted from the voters list. Further, it is more likely that observers will be present in election commissions rather than courts on election day. However, it should be reminded that the Code of good

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[2] Recommendation numbers 13 and 14 of the OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections.

[3] OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections, page 9. It is not clear how many of these military voters voted in "special regimes".

practice in electoral matters (Doc. CDL-AD(2002)023rev, I.1.2.iv provides that "*there should be an administrative procedure - subject to judicial control - or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place at the polling station on election day*". Such a solution should therefore be avoided in principle and the emphasis put on the improvement of the lists in order to limit to a minimum the number of contestations. It could be admitted for a short transitory period, implying judicial review if the election commission cannot take a decision unanimously or by consensus, and should address only obvious mistakes such as misspelling of names. After the next elections, an evaluation should be made of its implementation and therefore of the suitability to use it again for another election.

9. Display of addresses of voters

22. An amendment to Article 48.1 addresses a previous concern expressed in the 2005 Final Opinion on the Amendments to the Election Code (CDL-AD(2005)029, para. 23) that the addresses of voters were not contained in the voters list that was publicly displayed locally (as opposed to the list displayed on the Internet). This is a welcome amendment addressing the concern.

10. Withdrawal of group from referendum campaign

23. The new Article 73 appears to be a technical amendment to make the procedure for withdrawal of a referendum campaign group similar to the procedure for withdrawal of a candidate. It would appear that this amendment ensures that withdrawn referendum campaign groups do not receive public resources during the referendum campaign. As long as withdrawn referendum campaign groups maintain their rights of expression, speech, association, and assembly, depriving them of public resources for the referendum campaign due to their official request for withdrawal is acceptable. Referendum voters have the right to receive information from such groups notwithstanding that some groups could decline the benefit of public resources for conveying information to voters.

11. State TV and radio in the campaign

24. An amendment to Article 77.1, which currently requires equal conditions for the conduct of the campaign on all media receiving funds from the State, limits the application of Article 77.1 to "public TV and radio companies", thereby excluding the current State funded TV and radio from the article's application. The authorities in Azerbaijan have explained that this amendment is made in anticipation of the enactment of new legislation regulating "public TV and radio" and that the new sentence "No election campaign is conducted by the TV and Radio companies that belong to the State" address any concern about the exclusion of State funded TV and radio from the article. Although the amendment could be evaluated again when new media legislation is enacted, in the meantime, State TV and radio remain important media outlets that should meet the same obligations in campaign coverage as Public TV and radio and, therefore, should remain within the terms of Article 77.1. The current amendment would limit the scope of election-related information and political views available to voters, which are crucial in order for voters to make informed choices on election day. The amendment cannot be considered as positive.

25. An additional concern with Article 77.1 is that it does not address the issue of equal treatment in State owned or controlled media. Equality in advertising may be respected while unfair advantage and treatment is given to a political party or candidate in news coverage. News coverage, political coverage, forums, or editorials in the State TV and radio should respect the principle of fairness and equality. Biased coverage or treatment in State-funded media should be prohibited, and authorities should be required to immediately act upon any violation.

12. Paid advertisements on TV and Radio

26. An amendment, creating Article 81.11, incorporates by reference application of legislation on advertisement to paid air time for election campaigning on TV and radio. The legislation on advertisement has not been reviewed, and no opinion is expressed as to whether this is a positive or negative amendment.

13. Venue of election rallies

27. The 2004 Joint Recommendations of the OSCE/ODIHR and the Venice Commission identified problems encountered by candidates and political parties when attempting to hold election rallies. Article 86 of the Electoral Code, as well as the Law on the Freedom of Assembly, were identified as requiring amendments in order to address the problems. Concerning the Law on the Freedom of Assembly, a new law is pending in the Milli Majlis and it is hoped that the final text of the enacted law meets OSCE commitments and Council of Europe standards and is implemented in a non-discriminatory and inclusive manner that allows candidates and political parties to gather for rallies in venues that are adequate for campaign purposes. Concerning Article 86 of the Electoral Code, the authorities in Azerbaijan state that the problem is not with the text, but rather with its implementation. Thus, it would appear that these are issues of good faith implementation of the law by authorities.

14. Inking of voters

28. Several amendments, but primarily the amendment to Article 102 of the Electoral Code, introduce the inking of voters, which is a previous recommendation for security against fraud and increasing public confidence.[4] These are welcome amendments. The introduction of this measure also provides for safeguards regarding the provisions for inclusion of voters on the voter list at polling stations on election day (para 17).

15. Reduction of hours for polling

29. An amendment to Article 104.1 reduces the hours for polling. Polls will now close at 18:00 hours, which is one hour earlier than stated currently in the Electoral Code. The reduction of polling hours might be regarded as a negative development as it reduces the timeframe of the access to the polling stations. This negative effect might be counterbalanced with the fact that the counting procedure can start earlier, and that diminishes the pressure on the electoral commissions. However, it would be interesting to know whether the proposal is based on statistical data that show what percentage of those who voted cast their vote during the last hour. The practical effect of this amendment should be closely followed in future elections to determine if the amendment negatively impacts voters.

16. Fact-finding groups for complaints and appeals

30. Several amendments introduce new articles that create “fact-finding groups” to be actively involved in the complaints and appeals processes. These articles are an attempt to improve the existing articles, which have been implemented with no success in past elections.

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[4] Inking of voters was recommended by the OSCE/ODIHR and the Venice Commission in the Joint Final Assessment, CDL-AD(2003)015, para. 42); Recommendation number 4 of the OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections.

31. Previous OSCE/ODIHR election reports and the joint opinions of the OSCE/ODIHR and the Venice Commission have commented extensively on the failure of the legal authorities, both election commissions and courts, to fairly, efficiently and timely adjudicate complaints and appeals filed to protect electoral rights.[5] The OSCE/ODIHR and the Venice Commission have recommended that the legal framework "ensure effective and prompt protection of electoral rights".[6]

32. Authorities in Azerbaijan have stated that the primary reason for the failure to provide an effective process for the protection of electoral rights is that election commissions do not have the capacity to develop the facts upon which an adjudication of legal rights can be based. According to authorities, this lack of capacity has a domino effect, likewise preventing courts from adjudicating appeals involving electoral rights. The amendments attempt to address the lack of fact-finding capacity by creating "fact-finding groups composed of lawyers" within the election commission structure. Although authorities in Azerbaijan remain convinced that a fact-finding apparatus will solve the problems, it is not clear that this additional structure will ensure the fair, efficient and timely adjudication of complaints and appeals filed to protect electoral rights. The true test will be when the new structure is implemented and whether the new structure does in fact provide effective remedies to correct wrongs.

33. If this additional fact-finding apparatus is to be used, then there are areas that must be clarified and the amendments require additional development. The authority of these fact-finding groups must be clearly delineated. Some provisions of the text indicate that the authority of these groups goes beyond mere fact-finding and that their conclusions are a form of decision with legal significance. The authorities of Azerbaijan have stated that it is intended to limit the authority of fact-finding groups to (1) fact-finding and (2) formation of opinions and recommendations that are not legally binding. The authorities of Azerbaijan have stated that these issues will be addressed in the final text of the amendments to be considered by the Milli Majlis.

34. Although having a lawyer on a fact-finding group is helpful for formulating legal conclusions and making recommendations to an election commission, it is not clear why all the members have to be lawyers. The determination of basic facts does not require legal training and a major part of the group's responsibility is simply to determine facts. Consideration should be given to allowing some non-lawyers to be members of fact-finding groups.

35. The appointment process for the groups of fact-finders must also be addressed. These groups will undoubtedly play an important role as they will be making factual determinations and recommendations that can influence the election results. Due to the very important role the fact-finding groups will have, they must be appointed in an inclusive manner that provides public confidence in their work. The authorities of Azerbaijan have stated that this issue will be addressed in the final text of the amendments to be considered by the Milli Majlis.

III. Conclusion

36. The proposed amendments have addressed some recommendations of the OSCE/ODIHR and the Venice Commission. This is a positive development. Although the amendments constitute progress, there remain areas of concern.

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[5] *See* Joint Final Assessment of the Electoral Code of the Republic of Azerbaijan of 1 September 2003, CDL-AD(2003)015 (JFA03) para 52-53; Recommendations number 5 through 10 of the OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections.

[6] Joint Final Assessment of the Electoral Code of the Republic of Azerbaijan of 1 September 2003, CDL-AD(2003)015 (JFA03) para 52-53.

37. Some recommendations contained in the former Joint Final Assessment (CDL-AD(2003)015), in the Joint Recommendations (CDL-AD(2004)016rev (JR04)), and in the Final Opinion (CDL-AD(2005)029), which are important for the 2008 Presidential election and have not been addressed or are insufficiently addressed, include[7]:

1. Composition of Election Commissions (paragraphs 9-12 of the Joint Recommendations);
2. Signing petitions for Presidential elections (paragraph 13);
3. Refusal of candidates for Presidential elections (paragraphs 14-15);
4. Financing provisions (paragraph 19);
5. Declaration of invalidity (paragraph 36).

38. It is also necessary to reiterate that 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.

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