



Office for Democratic Institutions and Human Rights

**REPUBLIC OF AZERBAIJAN**

**REVIEW OF THE LAW ON PARLIAMENTARY  
ELECTIONS**



Warsaw  
22 August 2000



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### **FINAL COMMENTS ON THE LAW ON PARLIAMENTARY ELECTIONS OF THE REPUBLIC OF AZERBAIJAN**

**Warsaw, 22 August 2000**

#### **INTRODUCTION**

Since 1998, the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) has been assisting the authorities of Azerbaijan to develop election legislation in line with OSCE commitments. In particular, in the course of 2000 the ODIHR provided assistance for the drafting of the Law on the Central Election Commission and the Law on Parliamentary Elections (the Law).

On 30 May 2000, the ODIHR submitted to the authorities and representatives of political parties Preliminary Comments on the Law on Parliamentary Elections of the Republic of Azerbaijan (the Preliminary Comments), based on a draft Law provided by the authorities of Azerbaijan. Further discussions were subsequently held between the ODIHR experts and relevant authorities to clarify a number of the provisions contained in the draft Law.

The following are Final Comments based on an unofficial translation of the Law, provided by the International Foundation for Election System. This document supplements the Preliminary Comments and is intended to be read in conjunction with that report. It provides comments on the final text as enacted on 5 July 2000 and amended on 21 July. The analysis emphasises some of the major areas of concern with the law and contains a number of recommendations for amendments and clarifications to improve the election legislation, in line with international standards and, in particular, the OSCE commitments formulated in the 1990 Copenhagen Document on the Human Dimension.

These comments are submitted to the authorities, political parties and civil society representatives in Azerbaijan as a contribution to the debate on the election legislation.

The ODIHR analysis includes an executive summary listing major concerns. Further detail is provided in the comments prepared by a prominent international lawyer and election expert, Mr. Joseph Middleton, in co-ordination with the ODIHR Election Section. The ODIHR stands ready to provide further assistance to authorities of Azerbaijan in this area.

ODIHR stresses that the conduct of elections in line with OSCE commitments is conditional not only on the improvement of the election legislation, but also on the proper implementation and interpretation of this legislation. Moreover, this commentary relates only to the law on parliamentary elections and does not include comments on other legislation relevant to elections, including the Law on the Central Election Commission.

## **SUMMARY OF CONCERNS**

The Law on Parliamentary Elections of the Republic of Azerbaijan provides a comprehensive legislative framework for the conduct of elections. In addition to the general advantage of more detailed legislation, in a number of areas, such as strengthened controls over the administration of the entire electoral process, the Law provides significant improvements as compared to the previous law. Several concerns raised in the ODIHR Preliminary Comments have been addressed in the final text. However, a number of serious shortcomings (in particular points 1, 2, 3, 4, 5 below) remain and should be addressed urgently by the authorities of the Republic of Azerbaijan. Additionally, the Central Election Commission is urged to work on a consensual basis, and to issue Rules and Regulations to clarify the provisions of the law in line with OSCE commitments.

1. The requirement for political parties to be registered six months prior to the announcement for election is unnecessarily restrictive and contrary to basic legal principles in view of its retroactive application.
2. The method for appointment of Members of Territorial Election Commissions (TECs) and Precinct Election Commissions (PECs) largely provides for a multi-party representation in the election administration. However, it is regrettable that, following the adoption of an amendment on 21 July, the appointment of TEC members will not be based on broad consensus between the main political interests, as previously agreed. As this amendment was adopted together with a similar significant change in the law on the Central Election Commission, the current legislation does not provide for the full participation of all main political interests in the election administration's decision-making process and is therefore a step back compared to the legislation initially adopted. These amendments to the Parliamentary Election Law and the CEC Law were introduced following an earlier decision of CEC members nominated by the opposition parties to boycott the CEC sessions. As opposition CEC members subsequently decided to and are now attending the CEC sessions, a return to the earlier compromise should be sought.
3. There are no provisions to secure an observation of the election process by domestic non-partisan observers. This is a serious shortcoming of the election legislation and is contrary to the spirit of the Copenhagen Document.
4. The tabulation procedures at the TEC level lack transparency. Substantial arrangements have been made in the Law to ensure that observers are provided with copies of protocols at the PEC level. The failure to extend such openness to the TECs is bound to raise understandable suspicion about how the results are processed. Also, the Law fails to set deadline for the delivery of the TEC protocols to the CEC. The lack of transparency in the work of the TECs at this stage will inevitably risk the loss of public confidence in the election results. In addition, each election commission can issue a new protocol if it finds inaccuracies after the protocols have been signed. This is of concern and should be regulated in greater detail with a view to ensuring transparency and sound electoral practices.
5. The imbalance between the norms of representation for MPs elected in the single mandate constituencies (approximately 40,000 voters) and for MPs elected in the multi-mandate constituency (approximately 160,000 voters) has not been addressed at all. The threshold for parties to be eligible to participate in the allocation of parliamentary seats through the

proportional system has been decreased to 6% of the total of valid votes cast nation-wide, but still remain relatively high. A 3-5% would have allowed for a more inclusive election system.

6. A reduction of the number of required signature for registration of candidates both for the single-mandate and the multi-mandate constituencies is an improvement. However, the requirement that the 50,000 signatures necessary to register a list for the multi-mandate constituency should be collected in at least 75 out of 100 constituencies limits the positive effects of the amendment. It is a further concern that the CEC, on 11 August 2000, adopted a regulation requiring that a minimum of 250 signatures be collected in each of the 75 constituencies, thus making the registration requirement more restrictive. The ODIHR welcomes the deletion of the requirement of an election deposit as this complies with the ODIHR recommendations to remove completely one mechanism to limit the number of registered candidates.
7. The law allows a candidate nominated by voters to indicate his/her party affiliation. This provision creates confusion and can be abused, as it should remain the prerogative of political parties to indicate the affiliation of candidates nominated by them.
8. Article 48.11 provides that the registration of an entire candidate list of a party or parties block can be cancelled merely because one of the first three candidates on the list has withdrawn from the election without compelling reasons. This is a disproportionate restriction on the party or block and an unjustifiable infringement on the rights of parties, candidates and voters. Likewise, the possibility to de-register candidates or party lists for violations of campaign requirements, including offences to the citizen's honour and dignity (article 57.1 and 57.5), can be abused.
9. The election law restricts eligible voters to signing registration petition for only one candidate. During the collection of signatures, a political party could face problems in qualifying as it has no means to control whether a voter has already signed another petition. This provision raises concerns as it could be misused and open the door to electoral malpractices.

#### **COMMENTS AND OBSERVATIONS PREPARED BY JOSEPH MIDDLETON**

1. The new parliamentary election Law provides a comprehensive regulatory framework for the conduct of contested parliamentary elections. It is substantially longer and more detailed than the preceding Law adopted in 1995. In addition to the general advantage of having more detailed regulation in primary legislation, in many respects the new Law provides significant improvements as compared to the previous Law. Those involved in drafting the text have clearly sought to increase and strengthen controls over the administration of the entire electoral process with a careful eye on international standards.
2. Concerns were expressed in the author's previous reports that not all of the changes were positive. In particular, a number of provisions risked inhibiting the development of political parties and their full participation in the electoral process. A number of these concerns have been addressed in the final text. The proposed use of election deposits has been dropped. So have proposed provisions which would have increased significantly the number of signatures required in support of candidates and party lists. However, a serious

issue remains in Article 48.11 regarding the possible cancellation of an entire party list as the result of just one of its top three candidates withdrawing from the election.

3. Probably the most important change in the new Law is a completely revised approach to forming territorial and precinct electoral commissions (TECs and PECs). As indicated below, this is invariably a difficult task in any emerging democracy. From a purely legislative point of view, provision to promote transparency and accountability have been incorporated in the present Law through such institutions as non-voting members, broad access for agents, observers and representatives of the media and the ability to challenge decisions of the electoral commissions in a court.
4. There remain a number of concerns about the new Law, which are set out below. These include the lack of transparency at the TEC level, an issue which raises obvious questions about the risk of malpractice. It is strongly recommended that this issue is addressed before the next elections.
5. A separate problem is the sheer length and, at times, the lack of clarity with which some provisions are drafted. Many parts of the law would benefit from simplification or even the simple omission of extraneous material.
6. However, in general the Law reveals numerous amendments to the draft Law which have the effect of implementing recommendations made in the previous report.

#### **Distribution of seats**

7. The Constitution does not determine how many of the 125 deputies are elected by a majority system and how many are elected by proportional representation. The previous law reserved 100 seats for the former and 25 for the latter. The position remains unaltered in the new Law. As noted in the previous report on the draft Law, an increase in the number of seats allocated by way of proportional representation would have provided a welcome opportunity to redress an apparent imbalance and promote the development of political parties.

#### **Constituencies and precincts**

8. The provisions relating to voters who reside outside Azerbaijan remain largely unchanged.
9. In the draft Law the number of voters in remote constituencies was permitted to deviate from the standard norm by as much as 15%. This has now been reduced to 10%.
10. The previous law set the maximum number of voters as 1,500 per precinct. The draft Law proposed to double this limit. The undesirability of such an increase was described in the earlier report. It is therefore reassuring to see that the final Law has preserved the existing rule.
11. It was suggested in the earlier report that lists of precincts should be published by the TEC rather than the heads of municipalities. This recommendation has been incorporated in the

Law, which also now provides that the lists should be published 45 days rather than 25 days prior to the election.<sup>1</sup>

### **Election administration**

12. The Law now contains the important declaration that state and local government bodies must not interfere with the work of electoral commissions.<sup>2</sup>
13. The inconsistency between Article 28.2 and 28.6 of the draft Law has now been resolved.
14. The most fundamental change in the entire Law, as compared to the draft, concerns the formation of TECs and PECs. As noted in the earlier report, the procedure for forming the CEC is regulated by a separate law. Under the draft Law, the TECs and PECs were to be formed by the casting of lots between candidates nominated by local parties, local associations and voters. The Law reverts to a system of direct appointment: the CEC appoints the TECs, which in turn appoint the PECs. Of the nine members of a TEC, three are appointed by the CEC members who represent the party with the largest number of the 25 proportional representation seats in parliament. Three are appointed CEC members representing the minority parties with PR seats. The remaining three are appointed by CEC members who represent non-partisan deputies. A similar rule operates for the appointment of PEC members.
15. It will be appreciated that the formation of electoral commissions is a difficult and sensitive task in any emerging democracy. In itself, a procedure such as the one which has now been chosen is not necessarily inherently defective. Equally, voting rules which effectively prevent the opposition from boycotting decisions of TECs and PECs are not inherently objectionable. Whatever system is chosen, the key concerns must be to ensure that the electoral commissions function independently from the executive authorities, with the maximum possible transparency, are accountable for their actions, and enjoy the confidence of the principal political forces in the country.
16. It is regrettable in this regard that the amendment adopted on 21<sup>st</sup> July introduced a significant change according to which the TEC members would not be appointed on the basis of a wide consensus among all political interests. This is considered a backward step since all political forces will not share responsibility for the decision making process in the TECs.
17. Perhaps the most important aspect of institutionalised fairness is that parties and candidates may appoint members with a consultative right to electoral commissions, a feature preserved in the Law. Apart from a number of obvious and appropriate restrictions, these members enjoy the same rights as full voting members, in particular, to attend and participate at all meetings and to familiarise themselves with relevant materials.
18. As considered below, the most important defect in this respect is the inadequate provision made to ensure transparency in the work of the TECs immediately after voting ends.

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<sup>1</sup> Article 14.7

<sup>2</sup> Article 7.2

### **Timescale**

19. The deadline for defining constituency borders has now been reduced from 150 days prior to the election to 110 days.<sup>3</sup> Unsurprisingly, this has had an adverse effect on other stages of the campaign election timetable, which were already stringent. The campaign for parties in the PR contest is 45 days long. Campaigning for the individual candidates in the single mandate constituencies is now a mere 25 days.<sup>4</sup>

### **Openness and transparency**

20. Article 26.1 now includes a right of electoral commission members, candidates, their representatives and others (not including observers) 'to obtain copies of the decisions of the Territorial and Precinct Electoral Commissions and other election documents (except copies of voters lists, de-registration cards for voting, ballot papers, signature papers)'. This is obviously a positive move towards greater openness in the administration of the elections.
21. By far the most serious concern in this area concerns the transparency of proceedings at the TECs during the processing of the results. Substantial arrangements have been made in the Law to ensure that observers are provided with copies of protocols at the PEC level. The failure to extend such openness to the TECs is bound to raise understandable suspicions about the way the results are processed. There can be no sustainable justification for cloaking the work of the TECs in secrecy at this stage. Doing so will inevitably risk the loss of public confidence in the election results.

### **Suffrage and voter lists**

22. Article 4.2, which refers to the general active voting right, now cross-references to Article 56 of the Constitution, which sets out limitations according to mental incapacity, criminal conviction and the like.
23. Voter lists must now be prepared (as a general rule) at least 35 days before the election rather than 25;<sup>5</sup> this will obviously allow more time for voters to check the accuracy of the lists and effect any necessary amendments. A deadline for the preparation of voter lists has now been imposed in Article 15 for ships and other special cases.
24. The rule allowing for voter lists to be compiled by hand 'in exceptional cases' has now been improved by indicating that such cases will be defined by the CEC.<sup>6</sup>
25. It was suggested in the earlier report that the special rules<sup>7</sup> relating to refugees and internally displaced persons were unnecessary, given that in any event, such persons must be recognised citizens before they can vote. Those provisions have been omitted from the Law.

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<sup>3</sup> Article 12.5

<sup>4</sup> Article 50.1

<sup>5</sup> Article 15.1

<sup>6</sup> Article 15.9

<sup>7</sup> Article 16.6 of the draft Law

26. It was also suggested that if voters are to be included in the voter list on election day, their application must be considered immediately, not within a two hour period. This suggestion has been given effect in the Law.<sup>8</sup>

### **Nomination and registration of candidates**

27. Political parties still have to have been registered for six months prior to the calling of an election in order to nominate candidates.<sup>9</sup> As noted in the earlier report, this is a substantial increase on the present deadline of 70 days. It is difficult to see any substantial justification for such an amendment, given that it is bound to hamper the participation of political parties in the electoral process. Moreover, the retroactive character of this provision is deplorable since it contravenes basic legal principles and de facto prevents from running in the elections political parties registered well before the law's entry into force. There are also a number of other points of concern in this area which were raised in the earlier report and which have not been addressed.<sup>10</sup>
28. However, a whole range of other important observations appear to have been acted upon. A suggestion that the CEC should be expressly prohibited from refusing to receive nomination documents is now reflected in the Law.<sup>11</sup> The proposed doubling of the number of signatures required to support a candidate nominated by voters has been dropped.<sup>12</sup> Similarly, a proposal to increase the number of signatures required to support a list of candidates from 50,000 to 80,000 has been dropped, although the positive effect this has on promoting vigorous party development is limited by a new requirement that these signatures must be collected from at least 75 of the 100 constituencies.<sup>13</sup>
29. A concern was raised in the earlier report about the high level of the proposed election deposit. The justification for levying a deposit in addition to a requirement to collect signatures was also questionable. In the new Law it has been decided not to use election deposits at all (although a reference to them has survived at Article 59.7.4).
30. A further concern was raised that if there was any prospect of a signature list being rejected on the basis of violations of the relevant rules, such violations should be proved in a court. This concern is now met in Article 41.1 of the Law.

### **Vulnerability of party lists**

31. At various stages in the electoral process the draft Law envisaged drastic consequences for a party list as the result of the conduct of a single candidate on that list. Some of these difficulties remain.

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<sup>8</sup> Article 17.2

<sup>9</sup> Article 29.1

<sup>10</sup> See paragraphs 29-32 and 37 of the report

<sup>11</sup> Article 37.6

<sup>12</sup> Article 39.2

<sup>13</sup> Article 40.2



32. Article 48.11 provides that the registration of an entire candidate list of a party or party block can be cancelled merely because one of the first three candidates on the list has withdrawn from the election without ‘compelling reasons’. This appears to be a wholly disproportionate restriction on the party or bloc and unjustifiably impinges on the rights of voters who support it. Moreover, it creates a dangerous means to sabotage the entire election prospects of a particular party; all it requires is to persuade one of the first three candidates to switch allegiance to another party.
33. A similar problem in Article 77.2 now appears to have been resolved. In the draft text, if one of the first three candidates on a party list failed to give up a position which, under the Constitution, is incompatible with the status of deputy, all the mandates from that list would be re-allocated to another party. The adopted Law simply provides that in such a situation that candidate’s mandate is given to another candidate. Under Article 81.1 this appears to mean another candidate on the same list.
34. Similarly, the earlier draft of Article 81.3 provided that a deputy who has taken up his/her mandate but then engages in activities incompatible with the status of deputy would lose that mandate. The draft provided that the vacant mandate would be given to a different party list if that deputy was one of the first three names on the list. In the Law this provision simply provides that the deputy loses his/her mandate. Again, the apparent effect of Article 81.1 is that this mandate is given to another candidate on the party list.

#### **Campaign: general**

35. The author’s earlier report suggested that campaign activities should not be permitted in military units at all, and that if they were, the military authorities should be placed under an express duty to ensure that all candidates and parties were afforded equal campaign opportunities. The latter recommendation has been incorporated in Article 55.6 of the Law.
36. The earlier report also suggested that state-financed media should be prohibited from campaigning for or against any candidate or party. Such a provision has now been included in the Law.<sup>14</sup>
37. In other respects there appear to have been few significant amendments on this subject as compared to the draft.

#### **Campaign: finance**

38. It was suggested that there was no clear justification for preventing legal entities from making donations to campaign funds on the basis that they had not been registered for a year or more.<sup>15</sup> This requirement has now been removed.
39. It was also pointed out that one of the references to the TEC in Article 60.5 should presumably be to the CEC. Unless this a translation error, this apparent oversight has not been corrected.

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<sup>14</sup> Article 52.1

<sup>15</sup> Article 59.6.13 of the draft Law

40. As noted above, the decision not to require the payment of an election deposit in addition to the collection of signatures is a welcome move, as it makes participation in the election process less onerous. Notwithstanding this amendment, concerns remain about the recoupment of campaign expenses for those who receive few votes in the election.<sup>16</sup> As they stand, the rules may well serve to dissuade participants with modest resources from taking any part in the election process.

### **Voting**

41. It was suggested in the previous report that all authorised persons in the polling station should be required to wear official badges. An amendment has now been made to Article 26.15 to this effect. A suggestion that it should be permitted to print ballot papers in a second language other than the national language has also been given effect.<sup>17</sup>

42. It was also recommended that state officials and law and order personnel should be excluded from polling stations except when they are voting and when the latter are required to restore order. In a significant amendment to the Law this recommendation has been effected in full.<sup>18</sup>

43. A number of other suggestions in the earlier report, all largely technical, like the sequential numbering of the ballots, have not been effected in the Law.

### **Counting the votes and processing the results**

44. It was suggested in the earlier report that the number of signatures of voters who have received ballot papers should be counted before the ballot boxes are opened. This has been effected in Article 71.1.

45. Concern was expressed at the relatively high threshold for the allocation of seats in the proportional contest. This has now been reduced from 8% to 6%.<sup>19</sup>

46. A number of other recommendations in this area have not been implemented. Apart from a suggestion that TEC protocols be provided to observers, these were again of a mainly technical nature.

### **Appeals and offences**

47. There are number of minor amendments on this subject which have the effect of increasing the scope of judicial oversight of the complaints procedure.

48. The Law retains a provision permitting observers, including international observers, to file formal complaints with electoral commissions and even with a court. As pointed out in the

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<sup>16</sup> See Article 64 of the final Law and paragraph 52 of the author's previous report.

<sup>17</sup> Article 68.8

<sup>18</sup> Article 70.12

<sup>19</sup> Article 73.3

previous report, this does not appear to be an appropriate function for observers, particularly international observers.

49. The draft text of Article 83.10 provided the important rule that '[i]t is not necessary to appeal to the superior election commission before applying to the court'. In the Azeri and Russian final version of the Law the word "not" has disappeared. This provision is a backward step compared to the draft text that made it possible to challenge electoral commission decisions which appeared to be unlawful directly to a court, without having first to appeal up through superior electoral commissions. This was an important rule. The constitutional order of Azerbaijan embraces the separation of powers between legislative, executive and judicial branches. This obviously implies a role for checks and balances between the different branches. Where a state agency adopts a decision which appears to violate its lawful powers, particularly in an area such as election law which touches on fundamental civil rights, it should be possible to challenge that decision directly to a court as a means of obtaining prompt and effective protection of the citizen's rights. Such protection should not be delayed by requiring citizens first to appeal to a superior electoral commission. Depending on when the appeal takes place, the citizen may not have time to appeal both to a superior electoral commission and to a court. The option of appealing to a court would accordingly be denied. It is therefore very unfortunate that the rule in the final text has now been amended so that direct appeal to a court is not permitted.
50. There appears to be an error in Article 85.2 and possibly in Article 85.1 of the Law. Article 85.2 provides that certain election results can be cancelled if, owing to violations envisaged in Article 84 of the Law, it is impossible to determine the voters' intentions. This should probably be a reference to Article 86, which deals with violations of voters' rights, rather than Article 84, which deals with violations of campaign spending restrictions and similar issues.
51. As in the draft text, Article 86 of the final Law envisages a wide range of violations which will entail accountability. Presumably this provision has been or will be accompanied by corresponding amendments to the administrative and criminal codes. Rather surprisingly this list does not include the act of voting or attempting to vote twice ('creating conditions to obtain more than one ballot paper'<sup>20</sup> is not quite the same); it may be that this is something already envisaged in the administrative and criminal codes.
52. As noted in the previous report, it would not be appropriate to punish voters who find that their names have been included in more than one voter list, as this could easily happen through no fault of the voter.

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<sup>20</sup> Article 86.1.18