



Strasbourg/Warsaw, 22 October 2003

CDL-AD (2003) 15
Or. Engl.

Opinion no. 214/2002

JOINT FINAL ASSESSMENT
OF THE ELECTORAL CODE
OF THE REPUBLIC OF AZERBAIJAN

BY

THE OFFICE FOR DEMOCRATIC INSTITUTIONS
AND HUMAN RIGHTS (ODIHR) OF THE OSCE

AND

THE EUROPEAN COMMISSION
FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION, COUNCIL OF EUROPE)

on the basis of comments by

Mr Georg NOLTE (Venice Commission, substitute member, Germany)
Mr Eugenio POLIZZI (Venice Commission, expert, Italy)
Mr Joe MIDDLETON (OSCE/ODIHR, legal expert)
Mr Rumen MALEEV (OSCE/ODIHR, election expert)

CONTENTS

Introduction.....	3
Simplification of the structure of the code.....	4
Registration of candidates.....	4
Registration of voters.....	5
Electoral campaign and finance.....	6
Composition of election commissions.....	7
<i>The “draft model” suggested by ODIHR and the Venice Commission</i>	7
<i>Composition of the Central Election Commission until 2005 – The transitional provisions</i>	8
<i>Provisions under the code</i>	10
Transparency measures and anti-fraud measures (publication of results, election protocols).....	11
<i>Election observation</i>	11
<i>Election day: ballot papers, envelopes and protocols</i>	12
<i>At the end of the election day: turnout, publication and transmission of results</i>	13
Voting, counting and determination of results.....	13
Election disputes, complaints and appeals. Sanctions of election violations.....	14
<i>A global improvement</i>	14
... <i>but a time-consuming procedure</i>	14
<i>Who can file a complaint?</i>	15
Referendums.....	15
Early Elections for the President of the Republic.....	15
Final remarks.....	16

Introduction

1. After a prolonged genesis, the Electoral Code of the Republic of Azerbaijan (below “the code”) was adopted by the national parliament (Milli Majlis) on 27 May 2003. The Code¹ governs the conduct of referendums and parliamentary, presidential and municipal elections in one very substantial and comprehensive document.
2. Over the last year, the Venice Commission and the OSCE-ODIHR (below “the two organisations”) engaged in an intensive dialogue with the drafters of the code in order to improve the successive drafts. Both organisations have produced a series of preliminary assessments (see footnote 1) suggesting a large number of recommendations.
3. Since the first draft emerged more than a year ago, its contents have undergone substantial transformations, partly in response to recommendations and suggestions from the OSCE-ODIHR and the Venice Commission, and from other organisations. The implementation of a large number of these recommendations demonstrated the willingness of the authorities to bring the code closer in line with international standards and best practices. However, some important and other technical recommendations were not taken into consideration and should be considered by the authorities of Azerbaijan in future legislative reforms.
4. This final assessment focuses on substantial recommendations that have been implemented and on major shortcomings still to be remedied. It does not intend to elaborate on technical details already contained in previous joint commentaries.

¹ - CDL (2003) 048, *Constitution of the Republic of Azerbaijan*

- *Previous versions of the electoral code:*

CDL (2002) 130, *Draft Election Code,*

CDL (2002) 147, *Draft revised Election Code of the Republic of Azerbaijan.*

- *Previous assessments:*

CDL (2002) 131, *Preliminary Assessment of the draft Election Code of the Republic of Azerbaijan, October 2002,*

CDL-AD (2002) 035, *Second Joint assessment of the revised draft Election Code, December 2002,*

CDL-AD (2003) 003, *Joint main recommendations for amendments to the draft electoral code of Azerbaijan, March 2003.*

- *The approved code has the following reference: CDL (2003) 048. this document also includes the law on approval and entry into force and the presidential decree on implementation of the Election Code.*

Simplification of the structure of the code

5. In its final form the code remains an exceptionally long and substantial document. Although drafters managed to remove some surplus material (including some unnecessary and non-binding principles) and improved the general layout of much of the content, overall the text remains very cumbersome, detailed and thus difficult to use for election officials, candidates and anyone wishing to make a complaint. Repetitions with slight differences may mislead the reader and violate the right of citizens to a clear understanding of the law. Examples of these redundancies are provisions on the registration of candidates and on campaign and financing provisions. The authorities in Azerbaijan will need to invest considerable effort in publishing concise summaries of the code for voters and election participants and in training election administrators in all aspects of the code at all levels.

Registration of candidates

6. With regard to the process of candidate registration, a large majority of recommendations have been implemented:
 - i) The number of signatures required to register a candidate for parliamentary elections or a referendum campaign group has been lowered;
 - ii) the number of signatures that a candidate can submit to support his candidature is now unlimited: the previous article 58.6 of 3 December version of the code has been deleted. As a matter of consistency, in the new system not all signatures will necessarily be checked, but the process will stop when the required number of valid signatures has been achieved (article 59.3 and 59.4);
 - iii) during the registration process, candidates will be able to correct minor errors made in submission documents: the new principle applies both in the nomination and the registration of candidates process (articles 53.7, 58.2, 60.4). The English translation is unclear but the spirit is that election commissions should not exclude any candidates for trivial mistakes made in the registration documents².
 - iv) a voter will be able to sign a petition sheet for more than one candidate for parliamentary elections (article 57.4 deleted); it is difficult to understand the rationale for the retention of the different option in case of presidential elections (Article 181.2);
 - v) the list of registered candidates will be published (article 60.7).

² Article 60.4 that allows for the correction of errors and mistakes has an incorrect reference to article 60.2.4 (in our text, "If number of submitted valid (proper) signatures of voters presented in support of a candidate is less than required"), due to the change of numbering of the 3 December version of the code. It should probably read article 60.2.3: "If information submitted by the candidates, political party or blocks of political parties according to Articles 57 and 58 of this Code, is not correct".

7. Other important amendments are as follows:
 - i) The principle of proportionality in the imposition of a sanction was eventually included in the code: article 60.2 that provides for cases when a candidate should be denied registration reflects this important principle also enshrined in a number of other provisions. Moreover, the previous warning has become a requirement in a number of cases before the decision on refusal of the registration is taken into consideration. However, the sanction should be proportional to the mistake, the shortcoming or the violation (article 60.3);
 - ii) limitations of passive suffrage for lesser crimes (article 15.3 of the criminal code) have been cancelled. However, all sentences are to be recorded in the signatures sheets for collecting signatures (article 56.3). For instance, the refusal or cancellation of the candidate (or referendum campaign group) registration still remains a sanction which is adopted in a number of cases specifically determined by the law.
8. A number of provisions are meant to ensure equal status for candidates during the nomination (article 55) and after registration (article 69). It is provided that State officials cannot abuse their position to ease their nomination or to campaign after registration. Such provisions also apply to journalists and “creative persons” who will be prohibited to cover the elections by means of mass media.

Registration of voters

9. The recommendation that the number of registered voters in each polling station should not exceed 1,500 voters has been implemented (article 35.3).
10. The code provides for permanent voters’ lists. In general, it makes important and valuable provisions for the annual updating of the permanent voters’ lists. If properly implemented, this should help to ensure that voters’ lists are accurate for elections and referendums and that any errors or omissions may be corrected in time. The code does not set out explicit obligations for the precinct election commission to verify the accuracy of the information provided by the local authorities (the latter bear responsibility for accuracy of information (article 46.15). However, it is the task of the precinct election commission to amend the list as per article 37.1.2.
11. Voters’ lists will be posted on public display for 30 days (articles 48.1 and 46.1) until 35 days prior to election day; after this date new voters can be added to the list only upon court decision.
12. All citizens who have active suffrage shall be included in the voters’ lists, according to their residence (at least 6 months out of 12 prior to announcement of the elections). It is noteworthy that any voter can warn the precinct election commission about mistakes or errors in the lists, not necessarily related to him/herself, but to any other voter. This will allow political parties to actively participate in the amendment of the voters’ lists and in the improvement of their accuracy.

Electoral campaign and finance

13. The code makes comprehensive provision for all aspects of the election campaign, including rules on equal access to the mass media and prohibitions on its abuse and reasonably detailed regulation on campaign finance. As in other areas, the final text of the code has been amended on a number of points to take into account recommendations on earlier drafts.
14. The repeated recommendation that the expression “Notwithstanding the right of freedom of expression” should be added before “the following have the right to conduct...” in the listing of subjects entitled to conduct pre-election campaign (article 74.1) has not been heeded.
15. Article 74.1 of the code omits authorised representatives, initiative group of voters, and party agents from the list of persons entitled to campaign. These groups of persons, who normally take an active part in the pre-election campaign, should be included in the code.
16. The electoral code imposes important requirements on mass media to provide equal opportunities for all election participants and prohibits the State media from engaging in partisan reporting. Most recommendations have been implemented. Among those that have not been implemented are:
 - i) Private media should be obliged to respect equality when information about candidates is displayed;
 - ii) the recommendation that the words “Subject to the freedom of expression” should be included in article 88.1. It is important since the terms “citizens’ honour and dignity” are imprecise and can be abused. Indeed, who is to decide whether a particular claim by one candidate undermines the prestige of another? (article 88.1 and 88.6).
17. Candidates and political parties will be allowed to use only funds from the “election funds” specially created and regulated for their campaign. Article 95 provides for openness in spending of election funds.
18. The finance provisions in the code make very ambitious provisions for reporting and controlling expenditure during and after election and referendum campaigns. Some of the rules may be too ambitious, such as the requirement to submit three separate campaign finance reports (article 94.3). Similarly the requirement that banks report on campaign expenditure at least once a week and even more frequently just before the election is probably too onerous (article 95.2: this article should in any event indicate precisely what information must be submitted), as is the amount of information required to be submitted about legal entity donors to campaign funds (article 95.4), which will impose a very cumbersome burden on candidates and parties.

Composition of election commissions

19. The formation of electoral commissions has proved to be the most contentious and problematic area in the drafting of the new code. The Law on the Central Election Commission (CEC), which was repealed with the adoption of the new code, gave equal seats on the 18-member CEC to the majority party in parliament, the minority parties and “independent” deputies. Recent election experience suggests that, at the very least, there is a strong perception that the commission members appointed by theoretically “independent” sections of Parliament or some small parties tend, in reality, to vote in line with the governing party. This seemed to give the majority party in Parliament an exceptionally strong influence over not only the CEC but all subordinate commissions.
20. The drafters of the code failed to resolve the most difficult problem to emerge from the drafting process, namely the composition of the electoral commissions. In consequence, the finalised code effectively preserves the pre-existing arrangements which were the source of acute criticism in the past. However, under transitional provisions, which will operate until 2005 and cover the next presidential and parliamentary elections, a solution, close to the model suggested by the two organisations, was eventually adopted. In particular, a greater role in nominating members of the electoral commissions has been given to some opposition parties not represented in Parliament.
21. However, the adopted formula appears to give complete control over the election administration by the parliamentary majority, unlike the “draft model”³ suggested by the two organisations. Whether there will be an effective counterbalance to the otherwise dominant influence of the majority parliamentary party remains to be seen. On other issues, including the rules on decision-making and the qualifications required of CEC members, the transitional provisions closely reflect a number of recommendations set out in a draft model. On the issue of the composition of electoral commissions, it seems clear that the code itself will need revising before the relevant provisions come into force in 2005.

The “draft model” suggested by ODIHR and the Venice Commission

22. The Venice Commission and the OSCE-ODIHR put forward a series of suggestions by way of a possible compromise between the majority party and the opposition. These recommendations proceeded on the basis that real progress could only be made on the basis of political consensus. The draft model was advanced as a transitional solution in the event that the majority and opposition were unable to reach long-term agreement. It was discussed in the Milli Majlis and included the following key proposals, each of which was explored in some detail:
 - i) a broader role in nominating CEC members for political parties that had not secured seats in the Milli Majlis;

³ *In extenso: the “Draft Possible Model of the Formation of the CEC in Azerbaijan”.*

- ii) a requirement for two-thirds attendance at a session of the CEC to make it quorate; and
 - iii) a requirement that CEC decisions are taken by at least two thirds of participants.
23. The two organisations have also recommended that at least half the CEC members should have a higher education in law. Moreover, a role should be found in the CEC for judges, or at least former judges, recognising that there might be a constitutional obstacle to acting judges serving within electoral commissions.

Composition of the Central Election Commission until 2005 – The transitional provisions

24. As previously stated, the provisions in the code itself on the formation of the CEC and subordinate electoral commissions do not substantially depart from the pre-existing arrangements. However, those provisions will not enter into force until after the election of the next Parliament in 2005.
25. In the interim, transitional provisions are set out in the *Law of the Azerbaijan Republic On Approval and Entry into Force of the Electoral code of the Azerbaijan Republic*. It brings the code into effect and contains at the same time the rules on the composition of the election commissions until 2005.
26. The transitional provisions provide a number of significant changes to the existing system.
- i) The CEC comprises of 15 members. In the formula for their nomination a distinction is made between the results of voting at the last parliamentary election in single-mandate and multi-mandate constituencies. There are effectively four nominating groups.
 - ii) Six members represent the party which secured the most seats in the multi-mandate election for parliament (the majority party); three represent the parties which secured seats in the multi-mandate election and are in the minority in parliament; three represent the deputies elected from single mandate constituencies whose parties failed to gain seats in the multi-mandate election and ‘independent’ deputies elected in single-mandate constituencies; three represent the four most successful parties that participated in the multi-mandate election but failed to secure seats.
 - iii) Each of the four nominating groups must nominate as a candidate either an ex-judge or a representative from a public organisation with a specialisation in democracy and human rights.
 - iv) At least half of the CEC nominees must be lawyers.
 - v) The chairman and deputy chairman of the CEC represent the majority party. One secretary represents the minority parties; a second represents the four parties that secured the most votes but failed to secure seats in parliament.

- vi) A meeting of the CEC is quorate if 10 members (i.e. two thirds) attend. The formula for decision making indicates that at least two thirds of the votes of members present are required for a decision to be adopted.
 - vii) The rules on the appointment of the constituency and precinct electoral commissions follow similar principles.
27. The proposals in the draft model on the rules of decision making, the use of former judges and the qualifications required of CEC members, have all been incorporated.
28. Nevertheless, the draft model was only partly respected. The weakness of this adopted Law, in comparison with the draft model, is that the parliamentary majority can always obtain a *de facto* majority of members if one considers that:
- i) Significantly, the number of CEC members was reduced from 16 to 15. Although this change may seem insignificant, it is indeed crucial since it removes the blocking minority for the opposition parties;
 - ii) the representatives of opposition, not represented in the Milli Majlis, have 3 instead of 4 members foreseen in the CEC draft model;
 - iii) moreover, 3 members represent both independent MPs and parties which are represented in the Milli Majlis only by MPs elected in single-mandate constituencies which tend to vote in line with the parliamentary majority.
29. It should be noted, however, that the drafters of the code were confronted with a dilemma:
- i) the possibility for the CEC opposition members to obstruct the CEC activities;
 - ii) the possibility of permanent control of the CEC decision making process by the parliamentary majority.
30. There is no ideal model that could force members to work in a consensual manner if both the majority and the minority are determined to use their voting power to pursue purely partisan interests. The two organisations had proposed to solve the described dilemma by composing the CEC in a way which would have given the opposition parties a significant position in the decision making process. At the same time, it would have ensured the continuing functioning of the CEC by a fallback mechanism that would have lifted potential blockage. The Parliament decided not to follow this suggestion and instead opted for a model which combines an almost assured majority with a mechanism to lower the majority threshold if decisions are urgent.
31. The question of the composition of the Central Election Commission has a dimension of electoral legitimacy and a more strictly legal dimension. The dimension of electoral legitimacy consists, in the general interest of Azerbaijan and the international community, that the electoral system and its administration are considered fair and legitimate by all political actors. This is particularly important in Azerbaijan due to the past experiences. The two organisations have therefore constantly insisted on the importance of finding a solution which would be based on the consensus of all significant political actors. Unfortunately, it seems that it proved impossible to find such a consensual solution. However, the fact that the result is unsatisfactory from the perspective

of electoral legitimacy does not mean it is unacceptable from a strictly legal point of view. However it may be acceptable from a formal legal point of view if sufficient other safeguards. These need to ensure the independence from the executive branch, political impartiality of the Central Election Commission (and the other election commissions), and the transparency of its activities. This, in turn, mainly depends on the rules on the rights of observers and the appeals system (see below). Therefore, it will be fundamental to ensure good implementation of all provisions of the code, both by election commissioners, proxies and observers. In a democratic country, the legislature has a rather broad discretion on how to structure the electoral institutions. As the Venice Commission recommends in the Code of Good Practice in Electoral Matters⁴:

70. However, in states with little experience of organising pluralist elections, there is too great a risk of government's pushing the administrative authorities to do what it wants. This applies both to central and local government...

71. This is why independent, impartial electoral commissions must be set up from the national level to polling station level to ensure that elections are properly conducted, or at least remove serious suspicions of irregularity.

...

80. There are many ways of making decisions "by electoral commissions". It would make sense for decisions to be taken by a qualified (e.g. 2/3) majority, so as to encourage debate between the majority and at least one minority party. Reaching decisions by consensus is preferable.

32. According to the present rules, decisions are in principle taken by 2/3 majority, but exceptions (simple majority) are possible if a decision has to be taken before a certain deadline. This fallback mechanism should only be used in very exceptional circumstances. Otherwise the necessary public confidence will be understandably destroyed.
33. The Venice Commission and the OSCE-ODIHR regrets that all attempts of political dialogue on the electoral code failed to yield results and that the composition of election commissions does not enjoy broad political support. A large consensus on this issue would have increased confidence in the electoral process.

Provisions under the code

34. It is of concern that the code simply reflects the pre-existing arrangements according to which the CEC shall comprise 18 members, six nominated by the majority party in parliament, six by the minority parties, and six by the so-called "independent" deputies in the Milli Majlis. In addition, recommendations implemented in the transitional provisions are not reflected in the code: for instance, there is no requirement that any members have a legal background nor is any role envisaged for former members of the judiciary. Moreover, the definition of the minority is omitted, thus leaving room for further disagreement. Unless there is a substantial change in the political climate between now and 2005, the implementation of this part of the code is likely to represent a significant step backwards.

⁴ The Code of Good Practice in Electoral Matters was adopted by the Venice Commission, and approved by the Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities of Europe in 2002. Document reference: CDL-AD (2002) 23 rev.

35. The principle of independence of election commissions from State bodies is stated in the code and their decisions are binding for all entities within the territory. Additionally, decisions of superior election commissions are mandatory for lower commissions. These are positive developments.

Transparency measures and anti-fraud measures (publication of results, election protocols)

36. In numerous areas the code includes provisions to enhance transparency in the conduct of elections.

Election observation

37. The rules on who may act as a domestic observer are set out in the code itself (rather than CEC regulations) and appear to be remarkably broad (article 40.6-40.7).
38. The rules and practice concerning election observation are crucial for the success of elections, particularly if the issue of the election commissions has not been solved on a consensual basis. It appears that the rules concerning election observation are now generally satisfactory with one major exception. Although the code now foresees the right of non-governmental organisations to accredit observers (article 40.5), public associations, including those receiving foreign State funding, continue to be prevented from observing the electoral process. Although this prohibition is not contained in the electoral code itself but rather in article 2.4 of the “Law on Public Unions and Foundations”, it is a rule which substantially affects (and modifies) the electoral code. The two organisations are seriously concerned by this shortcoming that breaches paragraph 8 related to domestic observation and paragraph 10.4⁵ related to civic organisations contained in the 1990 OSCE Copenhagen Document. A provision should be added to allow all non-governmental organisations (NGOs), irrespective of their funding, to observe elections. Alternatively, this prohibition should be removed from the NGO Law.
39. Despite the fact that the prohibition of foreign funding of local NGOs does not seem to violate the Constitution of Azerbaijan⁶, the objections against such a rule stem from the opinion that comprehensive observation by domestic and international observers promotes transparency and increases public confidence in the electoral process. Funds are needed to organise a comprehensive domestic election observation effort and these also seem to be lacking for a number of capable, serious NGOs in Azerbaijan. Therefore, foreign funding should be permitted, ensuring at the same time that they not be abused for other purposes, in a particular party or campaign financing. If this prohibition on funding is

⁵ This article allows members of such groups and organisations to have unhindered access to and communication with similar bodies within and outside their countries and with international organisations, to engage in exchanges, contacts and co-operation with such groups and organisations and to solicit, receive and utilise for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law.

⁶ Articles 56 and 71 of the Constitution of Azerbaijan, in particular, do not contain any specific guarantees concerning the financing of election observation.

taken into consideration alongside the rules on the composition of the Central Election Commission, it appears that the code lacks important safeguards to ensure the necessary public confidence in the regularity and integrity of the electoral process.

40. Of particular importance are the wide-ranging rights of candidates, party agents and their representatives, together with journalists and observers, to attend electoral commission meetings, access election documents, obtain copies of decisions, and observe the voting and counting process (Article 40). They are also allowed to observe the work of election commissions on election day and to include their observations on the commissions' protocols. Finally, they can observe the transfer of election documents from the constituency election commissions to the CEC. The code, however is unclear as to whether observers can observe the printing of ballot papers and protocols. Significantly, no provision was included on the possibility to observe distribution of ballots papers.

Election day: ballot papers, envelopes and protocols

41. Over the months preceding the adoption of the new code, a range of other measures to enhance transparency were discussed. It is noteworthy that many of these measures have now been incorporated into the code and little has been overlooked. These changes include the following:
- i) The safeguards related to the use of the mobile ballot have been reinforced and should therefore limit possible abuse and fraud.
 - ii) Ballot paper envelopes will be used as a means of enhancing ballot security and secrecy (article 102).
 - iii) Ballot papers will be sequentially numbered, which will also enhance ballot security (article 99.3).
 - iv) The use of transparent ballot boxes has been a welcome innovation and, despite having been removed from subsequent drafts, was eventually put in the code (article 103.2).
 - v) Precinct results are required to be published within two days of the election (article 109.3) as a summary table to the constituency protocol. This will allow observers and other interested parties to cross-reference protocols issued at the precinct with the results relied upon by the constituency commission. It would be preferable, however, if a summary table were produced immediately, at the same time the constituency protocol is drawn up, and issued to observers and other interested parties at that time. It is difficult to see any real objection to such a practice, which would enhance public confidence in the electoral process. The same considerations apply to the use of summary tables at the CEC.
 - vi) Provisions on transparency have been strengthened regarding the issuance of protocols to interested parties and the mandatory display of election protocols at all election commissions' levels.
 - vii) It is mandatory to post precinct election commissions' protocols on the notice board of the constituency election commissions.

- viii) The prohibition of any other persons than voters, commission members, accredited observers and the police (if called upon by the Chairman) at polling stations on election day is a clear improvement that should prevent undue interference in election day proceedings.
42. Nevertheless, it is regrettable that the provision on inking voters' finger (article 104.6) was not reintroduced in the finalised code. This anti-fraud measure is effective solution to avoid multiple voting, in a country where the accuracy of voter registers is still of concern. This provision was introduced in one of the drafts and subsequently removed without a convincing explanation.

At the end of the election day: turnout, publication and transmission of results

43. With regard to transparency during the post-election-day stage, the code incorporated recommendations from the two organisations:
- i) the code now provides clearer procedures for delivery to and receipt of election protocols and other documents from lower level commissions by the Central Election Commission and constituency election commissions⁷;
 - ii) the constituency election commissions will have to publish detailed preliminary results for each polling station (article 109.3);
 - iii) concerning the full publication of the results and their breakdown, the publication of the precinct breakdown was suppressed and later reintroduced in articles 107.7, 109.3 and 109.5. The recommendation that "Constituency election commissions must be required to issue certified copies of protocols with a full breakdown of results for each precinct within the constituency", however, is no longer clearly formulated.

Voting, counting and determination of results

44. Again, a number of recommendations arising from earlier draftings of the code have been implemented. For instance, the code no longer envisages negative voting (voting against candidates or parties). It also includes comprehensive measures to facilitate special voting (voting outside the polling station using the mobile ballot box, voting in a different area for work or other reasons and the like) which include safeguards to enhance transparency and preserve the ballot security.
45. In an earlier draft of the code, it was envisaged that representatives of the local executive authority might be permitted to attend the polling station. This provision, which posed an obvious risk of interference in the electoral process, did not remain in the final text (article 104.14).

⁷ In addition, articles 106.7 and 107.4 provide that material should be accompanied by the chairman and two members representing different parties (article 106.7 for precinct election commissions) and by the chairman and representatives of various political parties (article 107.4 for constituency election commissions). In both cases it should be clarified by the CEC regulations that the representatives of political parties should belong to the majority and minority groups.

46. Another feature of a previous draft was that the precinct election commission, having completed its work, should be able to reconstitute itself on its own motion and issue a repeat protocol if it believed that an error had occurred. This was a highly unusual provision raising obvious possibilities for abuse, not least as observers would be unlikely to be present at such a further session. Fortunately this provision has also been omitted from the final text of the code.
47. It is highly disputable whether all votes cast at a polling station should be declared invalid merely because an elector has omitted to sign the voters' list. Such step is too drastic and does not apply the principle of proportionality (article 106.2).
48. It is difficult to consider the results of an election as acceptable if the election results were cancelled in 40% of the precincts due to violations. This provision applies to presidential, parliamentary, municipal elections, and referenda (articles 204.1.1; 170.2.2; 240.2.1; and 139.2.1).

Election disputes, complaints and appeals. Sanctions of election violations

A global improvement...

49. While provisions guarantying the citizens' right to challenge decisions of the election commissions related to specific important stages of the electoral process, such as nomination and registration of candidates, registration of voters, etc., were previously dispersed throughout the code, they have now been unified in a single article (article 113).
50. The complaint system shows some improvements in the sense that as a rule, complaints are filed, only to the election commission that took the decision (or should have done so). Nevertheless, the scheme for election appeals and complaints in the code remains both unusual and problematic.

... but a time-consuming procedure

51. Indeed, if citizens are dissatisfied with the act or omission of a precinct electoral commission, they may only appeal to the constituency commission once they have made a complaint to the precinct commission, that the complaint has been considered and that the decision on the complaint has been communicated (article 112.3). Equally, they can only complain to the CEC once the constituency commission has considered and rejected the complaint. Only then can they apply to a court (the Court of Appeal) for a remedy.
52. The election dispute system is therefore a very time-consuming scheme which is likely to deprive voters, candidates and other interested parties of an effective remedy. The code should ensure direct access to a court to ensure effective and prompt protection of electoral rights.
53. In addition, when the decision "can cause criminal liability" then complaints are filed with relevant courts or prosecutor's office. However, the relationship between the criminal proceeding and the necessary redress of the electoral rights by the election commission remains unclear. Article 112.4 would suggest that

the election commission reviews the complaint in parallel to the criminal proceeding. In such a case, article 112.2 should then be interpreted not as setting an alternative forum, but only a further venue that is added to the election commission.

54. The code should make it clear that, once a complaint has been made to an electoral commission, the commission (including the CEC) must consider the complaint. It should be clear that electoral commissions do not have the power to refuse to consider a properly made complaint and refer it to a court. The court considering a complaint should not only have the power to quash the decision of an electoral commission but also to order the electoral commission to comply with its duties under the code.

Who can file a complaint?

55. Article 112.1 lists all subjects who can file a complaint. The list is very broad but it is not at all clear if a subject can file a complaint only related to his own interest or to the overall regularity of the process. The presence in the list of observers and election commissions would suggest that any complaint can be filed by any of the listed subjects. In such case, there should be no need for such a long list where the term “voters” encompasses most of the others subjects. Under Article 112.1 the deadline for submitting complaints is reduced from seven to three days from the date of the act or omission complained of (or notification thereof). This may prove to establish a too stringent a timescale, particularly where a candidate or political party is investigating a number of reported violations of voters’ rights from different parts of the country⁸.

Referendums

56. Under article 139.1, referendums on amendments to the Constitution or the adoption of a new Constitution are invalid if less than 25% of registered voters have participated (note reference to article 153 of the Constitution in the translation provided: this should probably be to article 152). This appears to be a remarkably low turnout requirement for a matter as fundamental as adopting a new constitution or amending the existing one: in practice, such changes could be made with the approval of only 12.5% of registered voters.

Early Elections for the President of the Republic

57. On 15 August 2003, the Constitutional Court considered a request of the General Prosecutor’s Office related to the interpretation of article 179.1 of the code. It stipulates that if the incumbent dies or loses the capacity to fulfil

⁸ *Another unclear point concerning complaints and appeals: article 116 provides that precinct election commissions and constituency election commissions (besides CEC) “shall have the right to prepare a protocol of administrative offences and apply penalties in accordance with the code of administrative offences”. One can presume that the provision is a translation problem: it would be advisable to be confirmed that only the CEC could, perhaps and under specific circumstances, “prepare a protocol of administrative offences”, based on code of administrative offences’ provisions.*

his/her obligations the election process should stop and early elections should be conducted within three months.

58. The Constitutional Court declared the controversial article constitutional. The Court's official interpretation stated that if the acting President was unable to fulfil his/her duties less than 90 days before election day, the election process must not be discontinued. Their main argument was that the aim of an early election was to shorten the period during which the country is without a Head of State as much as possible.

Final remarks

59. The adopted election code provides a comprehensive framework for the conduct of elections and referenda which in most respects appears to meet international standards and best practice. Naturally, this does nothing to detract from the need to ensure proper implementation, a need which has been acutely felt in recent years.
60. Several months of cooperation between the Azeri authorities and the Venice Commission, jointly with the OSCE-ODIHR, have proven invaluable and resulted in the submission of a much improved electoral code. However, some shortcomings still persist and the code should be further amended after the presidential elections.
61. The OSCE-ODIHR and the Venice Commission stand ready to continue the dialogue on the election code and to assist the authorities of the Republic of Azerbaijan on further reforms through diverse forms of assistance. The forthcoming election will be the first conducted under the new improved legislative framework. They will be a test for the new election legislation the implementation of which will undergo close international scrutiny.