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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

LAW ON PARLIAMENTARY ELECTIONS OF THE REPUBLIC OF AZERBAIJAN

Comments
prepared by Mr G. Nolte (Substitute member, Germany) in co-operation with the Secretariat

Introductory remarks

1. These comments are based on the text of the law only, not taking account of its implementation. Reference may be made on this point to point iii.a of opinion no. 222 (2000) of the Parliamentary Assembly, which recommends not only "to revise legislation on elections…", but also that "the next general elections in autumn 2000 can confirm definitively the progress made and their results can be accepted by the majority of the political parties that will participate in the elections, and can be considered as free and fair by international observers". Reference can be made also to the following documents : CG/BUR (6) 154 Bureau of the Congress (of local and regional authorities of Europe) - provisional report by the CLRAE observation delegation of the partial local elections in Azerbaijan held on 26 March 2000; doc. 8256 of the Parliamentary Assembly, observation of presidential elections in Azerbaijan (11 October 1998); doc. 7430 Addendum III - Addendum III to the progress report of the Bureau of the Assembly and the Standing Committee, Information report on the parliamentary election in Azerbaijan (9-13 November 1995).

2. The request by the authorities of Azerbaijan asks only for comments on the law on elections to the Milli Majlis (not including the annexes mentioned e.g. by Articles 39.3, 40.4 and 42.3) and not on the law on the central election commission. This opinion will not deal with this law, but it should be recalled that a fair composition of the central election commission is an important element of free and fair elections (cf. remarks below on the inferior election commissions). This opinion will also not deal with the legislation concerning political parties.

3. These comments are based on the English translation of the law on elections to the Milli Majlis as well as of the Constitution. The authorities of Azerbaijan provided information on the points the drafters of the opinion had some difficulty in understanding. Most of these points will not be mentioned in the present opinion.

4. This opinion will deal with several points on which the law could be improved, in particular through careful implementation. The various election commissions, the courts and other authorities are invited to implement the law in conformity with international standards. This should make it possible to avoid a large number of the risks of irregularities mentioned below, even if it will be preferable to clarify the law in the long run.

1. Election campaign/media/freedom of expression

It is understood that the CEC interprets the provisions on election campaigns and the media. In general, the CEC should interpret the provisions on election campaigns and the media in particular according to the following principles and remarks.

Freedom of expression and in particular freedom of the press (Article 10 of the European Convention on Human Rights (ECHR), Article 47 of the Constitution of Azerbaijan) are of the utmost importance during an election campaign. Chapter VIII must be interpreted in conformity with these freedoms, and restrictions to these freedoms must be prescribed by law, be motivated by the public interest and respect the principle of proportionality.

In particular, the provisions of Articles 56 and 57 must be interpreted in conformity with freedom of expression. Following provisions have to be mentioned:

Article 56.1: The expression "rules defined by the legislation" is very general and should preferably be replaced by "the law on the mass media and the criminal code". For the time being, it is understood that the expression used refers only to these laws, which are not the object of the present opinion.

Article 56.3-5: It is hardly conceivable that such provisions, which restrict freedom of expression, can ever be "necessary in a democratic society" in order to preserve one of the public interests mentioned in Article 10.2 ECHR. It is legitimate, however, that the name of a person or organisation that is responsible for the publication be indicated in the material. See also comments on Article 56.9.

Article 56.9: This provision relates to “false” material. A reference to criminal law and tort law would be suitable. According to international standards, prior prohibition is in conformity with freedom of expression only in exceptional cases. In any case, a prior prohibition must be decided by a court. Electoral propaganda by its very essence lacks objectivity. That is why only the courts should be able to prohibit such material, and only when a criminal offence or a tort is about to be committed. In general, the limits placed on political speech should be less strict than for ordinary speech.

Article 57.1: Here again, prohibition should not go further than what is forbidden by ordinary criminal legislation and tort law. The incitement to change the constitutional basis of government may be forbidden, according to international standards, only when it is proposed to introduce such a change by force. Proposing changes in the constitution is part of the normal political debate. Incitement to violate the territorial integrity of the country should also be understood as referring to violent action or to similarly aggressive methods which pose comparably grave dangers and contradict the law. In general, the specific nature of political speech during an election campaign has to be taken into account and the authorities have to be rather tolerant, in particular the general prosecutor when applying Article 46.5.

Article 57.3: Like all provisions on limitations to fundamental freedoms, this provision has to be interpreted restrictively; that means that the only advertisements subject to this provision are advertisements that let a link with a candidate or a party appear clearly.

Article 57.4: The provision should be reformulated, or, at least, interpreted so that it is made clear, first, that the primary obligation of TV companies is to create conditions for candidates to defend their dignity and honor and second, that only when clear violations of penal law or tort law occur and no conditions to defend the honor and dignity exist do sanctions apply. In any case, this provision must not be misused and must not go further than what is forbidden by ordinary penal legislation or tort law. If equal conditions are provided for the lists/the candidates according to law, they will have the possibility of defending their prestige, dignity and honour and of disproving misinformation. Electoral propaganda will very often impugn at least the prestige of the opponents. Prior prohibition is in general contrary to international standards (cf. comments on Article 56.9).

Article 57.5: The cancellation of the registration of a candidate or a political party is a very severe sanction and sufficient grounds to provide for it are not given. Criminal sanctions for violation of the law should be sufficient. The courts should take these principles into account when applying the law.

2. Nomination and registration of candidates

Article 22.6.2., 34.6, 37.4, 39.3, 40.5, see also Article 67.3 2nd paragraph: The rules on candidates who have been sentenced apply to people who have been sentenced for a certain period before or after their sentence has been served. They look rather complicated. The provisions on persons with dual citizenship could be in contradiction with international standards: see below, section 6 Ineligibility/Incompatibility, comments on Article 4.4.

Article 38.2.4: The exceptions provided for by the legislation of the Azerbaijan Republic "On State Service" should not leave the door open to inequalities between candidates.

Article 41.2: According to the explanations given by the authorities of Azerbaijan, this provision applies to people whose unsoundness of the mind has been authoritatively confirmed by a court upon proper medical advice.

Article 41.11: This provision has to be interpreted in such a way that, if there is a sufficient number of valid signatures, it is no longer necessary to check the other signatures.

Article 43: the scope of this rule is to know whether the required number of valid signatures has been reached. The only ways to give a correct answer to this question are either to check all signatures on the sheet or to count the valid signatures until the necessary number has been obtained, even if this process is lengthy. What is important is the number of valid signatures and not the number of invalid signatures. See also comments on Article 43.14.

Article 43.10: The rule of Article 43.7 has to be applied in that case too, that means that the signature by the person for him/herself must be considered valid.

Article 43.14: The invalidity of 15 % of signatures can result from the action of political opponents who introduce invalid signatures in order to eliminate a candidate or a list. That is why all signatures should be checked or a minimum number of valid signatures be determined in order to know how many valid signatures have been collected. Article 43.14 should therefore be deleted and replaced by a rule which proceeds from the basis of valid signatures.

Article 43.15: if only 10 or 20 % of signatures are checked, it will be rare that the number of invalid signatures is so high that the total number of signatures is insufficient. On the contrary, if all signatures are checked, such a situation will be more frequent.

In sum, the check of only a part of the signatures according to the present rules could lead to the non-registration of a list when the necessary number of valid signatures has been reached (see comments on Article 43.14) as well as to the registration of a list when the necessary number has not been reached (see comments on Article 43.15). The only way to avoid such a situation is to check all signatures and to declare the list of signatures valid when and only when the required number has been reached. However, for practical reasons, the checking of all signatures could be stopped when it seems that a sufficient number of signatures has been reached after checking 10 % of signatures; it is less serious to register a list with an insufficient number of signatures than not to register a list with a sufficient number of signatures.

Articles 44.4, 84.2: the CEC should comply with following guidelines: the list of cases of refusal must be considered as exhaustive. The rejection of a candidate or a list of candidates should take place only in rare cases, in conformity with the principle of proportionality. In particular, in the

case mentioned in Article 44.1, only serious violations should lead to such a sanction (that is, in the cases in which there is clear evidence to indicate that an insufficient number of signatures would probably have been reached if these rules had been respected). In the case of Article 44.4.2 and 44.4.4, a time limit should be given in order to correct the erroneous data. It is necessary to bear in mind that it is much more serious, from the point of view of democracy, to prevent someone from standing as a candidate, than to allow someone who has violated some technical provisions of the law to stand as a candidate. In the latter case, the last word will belong to the voters. The second part of Article 44.4.3 should be dropped (cf. comments on Article 43.14-15). Concerning Article 44.4.5, only serious violations should lead to such a sanction; in the other cases, restitutio in integrum should be ordered, and non-registration could be a sanction of the violation of such a rule. In Article 44.4.6 again, minor violations should not be taken into account.

3. Election commissions

A provision should be included in the law which obliges the members of election commissions to conduct their office impartially and not to divulge improperly information which they obtained in the course of their activity. Since, it would be preferable that the members of election commissions have no political activity.

Article 19: it must be recalled that the composition of the Central Election Commission will not be dealt with in this document.

Concerning the composition of lower election commissions, Article 19.2 provides for the appointment of three members of the Territorial Election Commission (TEC) by the CEC members representing the majority party (even if it only has a relative majority), three members by the CEC members representing the minority parties, and three members by CEC members representing non-partisan deputies. One of the members of the TEC designated by the last group has to be agreed by the first group and one by the second group. Furthermore, majority and minority are defined according to the results of the vote at the level of the single multi-member constituency, and not according to the total number of deputies of each party in Parliament. Such an intricate system is perhaps most suitable in the present situation, but could become unsuitable in case of changes in the composition of the Milli Majlis (for example, if there are very few independent deputies, or if the majority is composed of several parties). It would be preferable to enact rules in the future which are likely to function notwithstanding a particular composition of the Milli Majlis.

Article 20: similar remarks to those made with respect to Article 19 apply.

Article 22.6.3: the term "disability" should be interpreted restrictively and be applied only to conditions which are of comparable gravity to mental incapacity.

Article 22.7: during the election period, a period of ten days for replacing a member of an election commission appears to be too long. For example, according to the new Albanian law, the time-limit is 48 hours.

Article 27.2: The practice regarding the participation of observers should be as liberal as possible. Relevant authorities should normally take into account proposals by organisations mentioned in Article 27.3 and send invitations in accordance with these proposals.

Article 27.12: this provision must be applied in conformity with the principle of proportionality.

Article 28.9: the election commissions should preferably sit only when all their members have been appointed, unless nomination of some members did not take place within the normal time-limits due to non-cooperation of the appointing or proposing body.

4. Data protection

Articles 7.4, 15.9, 63.4, 63.6, 79:

The law deals on several occasions with the use of state automated information systems. According to the information given by the authorities of Azerbaijan, for the time being, a state automated information system has not yet been created. Computer systems are used only for calculation purposes. As soon as such an information system exists, these provisions should be made more precise in order to be in conformity with Article 32.3 of the Constitution.

The following indications can already be given on how to deal with the question of data protection after the creation of a state automated information system.

The constitutional provision (Article 32.3) does not allow the use of information relating to a person's life without consent. If exceptions are admitted, they should at least be based on a clear legislative provision. Such provisions exist in the election law, but in order to safeguard individual rights with regard to the automatic processing of personal data, the law itself should make clear a certain number of points.

In particular, it is necessary to define in the law:

- the exact purposes of the collection of the data;
- the sources and the catalogue of the data which can be consulted by the election commissions; in particular, sensitive data like data revealing religious beliefs, ethnic origin, political opinions, criminal convictions, health or sexual orientation and which are of no interest for electoral purposes should be excluded from consultation (see Article 6 of Convention ETS N° 108); only data which are necessary should be open to consultation if provided for by the law and according to appropriate safeguards. An indication on data which can be collected appears for example in Article 41.7;
- the time period during which the data are kept; personal data should not be kept longer than is necessary for fulfilling the original purposes of the collection;
- the individual’s rights of access to and rectification of the data concerning them;.
- the appeals and sanctions available in cases where the data were collected or used for a purpose other than the purpose of the law.

Data protection concerns principally physical persons. However, it might be useful, therefore it could be envisaged to extend it to legal entities (as mentioned in the law) (this may depend on the interpretation of Article 32.3 of the Constitution).

5. Appeals

The law does not provide for a clear and straightforward appeals system. It should be revised in order to be more coherent.

The question of judicial appeals is mainly dealt with by the law "on courts and judges" which was not at the disposal of the drafters of the present opinion; at any rate, in order to make the

reading of the law easier, it would be preferable to mention all the appeals available, judicial and non-judicial, in a special section of the electoral law. For example, the expression "the relevant court" (Articles 44.7, 85.3, 85.4) could be avoided and replaced by the indication of the competent court. The authorities of Azerbaijan have confirmed that appeals are always open against a decision of an election commission to the superior election commission - up to the central election commission -, and that appeals are also possible against a decision of an inferior court to a superior court, up to the supreme court. Furthemore, the deadlines for appeals are not shorter than in other fields. Electoral legislation is actually one of the fields in which appeals must be dealt with as quickly as possible: this principle is given concrete expression by Article 83.12, for example.

Article 17.3, 18.6, 44.7: there is a choice for the voter between appealing to a superior election commission or to a court. This could lead to contradictory decisions of election commissions and courts. According to the interpretation given by the authorities of Azerbaijan to Article 129 of the Constitution, the decisions of the courts would prevail in that case (cf. Article 83.11 of the law). If simultaneous appeals to an election commission and to a court are admitted, the appeal to the election commission may be useless and may overload this authority.

Article 83.10 does not seem to be consistent with Article 83.3, on the one hand and Articles 17.3 and 44.7, on the other hand. According to the authorities of Azerbaijan, there is a choice between appealing to a court or to a superior election commission.

According to the explanations given by the authorities of Azerbaijan, the Constitutional court, when acting under Articles 85 of the Constitution and 75 of the election law, deals only with the formal validity of the documents submitted to it by the central election commission. Ordinary courts have the competence to deal with appeals on other points.

Article 85 allows ordinary courts to cancel the results of the elections without any deadline if irregularities are found. The authorities of Azerbaijan informed us that such a rule applies only when new facts appear, so that a ground for retrial arises. It would be preferable to provide for a deadline after discovering the new facts for asking for such a retrial.

6. Ineligibility/incompatibility

Article 4.4 makes a reference to Article 85 of the Constitution. However, this provision does not make a clear distinction between the cases of ineligibility and of incompatibility. This shortcoming could be partially corrected if the law were more precise on this point.

Article 85 of the Constitution can reasonably be understood as follows (cf. also Article 56 of the Constitution): Ineligibility applies to persons whose incapacity has been confirmed by a court and persons who serve their sentences in places of confinement by a court's verdict.

The other cases mentioned in Article 85 of the Constitution are cases of incompatibility. Persons who are in State service in other countries, work in executive or judicial bodies, persons engaged in a different paid activity…, ministers of religion have to give up these functions if elected. Persons with dual citizenship have to give up their foreign citizenship if elected.

Such an interpretation has been confirmed by the authorities of Azerbaijan.

The provision of Article 85 of the Constitution compelling persons with dual citizenship to give up their foreign citizenship if they are elected is linked, according to the authorities of

Azerbaijan, to the transitional period following the dissolution of the USSR. However, at least in the long run, such a provision could conflict with international standards, and in particular with Article 17 of the European Convention on Nationality, which provides that "nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party". Discrimination against persons belonging to national minorities has to be avoided. The same problem arises with Article 81.2 of the law and Article 89.2.2 of the Constitution.

7. Voting procedures

Article 68.4, 68.6, 70.8, 71.7.3, 71.8.3, 72.2.2, 78.4 last indent: the vote "against all single lists of candidates" is completely out of the ordinary in established democracies. It is strongly advised to abolish this possibility, at least in the long run, since it may lead to challenges of the legitimacy of the elections and may thereby undermine the democratically elected regime. The authorities of Azerbaijan informed us that such a provision is linked to the threshold provided for by Article 72.2.1. It would be preferable to give up both rules.

Article 68.13: changes, or at least changes made in handwriting, should be avoided. They will easily lead to violation of the secrecy of voting. The deadline for withdrawing lists/candidates should expire early enough before the elections to allow printing of ballot papers after it has expired. Another possibility is to publish the list of candidates who have withdrawn.

Article 68.14: the condition according to which such a solution is applied "only in exceptional cases" has to be strictly respected.

Article 70.3 and 70.10: these provisions were understood as meaning that the possibility of voting up to 10 days before election day is limited to the cases mentioned in the second sentence of Article 70.3, whereas in the other cases it is possible only on election day. The fact of staying in a "remote place" without further incapacity should not be a ground for using a mobile ballot box. The central election commission should provide for the cases in which the use of a mobile ballot box is allowed in "remote places".

Article 70.6: freedom of vote has to be respected. The way in which a ballot paper has been cut can allow it to be recognised. The authorities of Azerbaijan explained that the ballot includes a part which can be easily removed, so this problem would not arise if the ballots do not include numbers. The simple fact that the ballot paper has been touched by people other than the voter (including members of the electoral commission) could lead to violation of the secrecy of vote (for example, a ballot paper could be slightly torn up, creased, stained…). It would be preferable to allow the voter to take the ballot paper him/herself and to give him an envelop in which he/she has to put the ballot or a stamp to be affixed to a particular part of the ballot paper.

Article 71.10, 72.7, 73.9: it should be clear that, if a member of the Election Commission was offered the possibility of signing, but refused to sign, the protocol is nonetheless valid.

Article 72.2.1: the need for such a provision could be reconsidered, because turnout tends to decrease when elections are repeated. At any rate, repeated elections should be valid whatever the turnout.

Article 72.2.3: in order to avoid to repeat elections, the question of tied votes could be settled by declaring elected the oldest candidate or by drawing lots.

Articles 72.3.1, 73.8.1, 85.2: here it is necessary that violations could have affected the result. It would be better to state this expressly.

Article 73.3: since only 25 seats are allocated by (proportional) voting in the multi-seat constitutency it appears that a 6% quota is unnecessarily high. The purpose of the quota can only be to ensure that Parliament is able to form coherent governing majorities. This purpose is already enhanced by the fact that three quarters of all seats are allocated through elections in single-seat constituencies, a rule qhich favours bigger parties. Under the current system it is necessary to receive at least 4% of the votes in order to obtain one seat in Parliament. If the law aimed to prevent sengle member representations of parties in Parliament it would therefore have to set an 8% threshold. Such a threshold would clearly be too high. It is therefore suggested to lower the threshold to 5%.

Article 73.4: the case in which the remainder for the last seat is the same for two or more lists should be settled, e.g. by allocating the last seat to the list with the highest number of votes.

Article 76: this rule applies also to the case in which a candidate refuses his/her election.

Article 76.1: the time limit provided for by the last sentence should be reconsidered: it appears very long and might be cut by half. The same question arises in Article 82.4.

8. Prohibition of foreigners, persons without citizenship or foreign legal entities from participating in the elections

Article 11:

This rule should contain a clause that the prohibitions apply notwithstanding the freedom of expression and freedom of information. Such a clause would, in particular, be important for those foreigners who reside in Azerbaijan and who wish to participate in political debates and election campaigns. As to dual citizens, see comments with respect to section 6 : Ineligibility/Incompatibility.

However, according to the authorities of Azerbaijan, this rule applies only to financial questions (see chapter IX). It would be preferable to state this expressly.

9. Sanctions

Articles 7.2, 11.2, 22.8, 86: the sanctions for violation of the law are not all dealt with in the law. This would be suitable from a point of view of clarity and legislative technique. Another possibility would be to make a reference to the criminal code and the code for administrative offences. The sanctions must in any case be proportionate to the gravity of the infraction.

Article 84: Article 44 already provides for the refusal to register candidates and single lists of candidates, Articles 72.3 and 73.7 deal with invalidity of elections.

Article 84.1: Information through the mass media about violations of the law should be limited to a short publication, if it is really considered necessary. Otherwise, the election commission could appear to be biased. The comprehensive information of the public should be left to the electoral propaganda of the political opponent.

The principle of proportionality has to be respected. For example, refusal to register based on a very small excess in expenditure (Article 84.2.5-8) is clearly contrary to this principle. Such a small excess could even be due to a calculation mistake. The principle of proportionality has to be respected also in the application of Articles 84.2.11, 84.3 and 84.5. For example, the mere fact that an agent of a political party violates Article 56.3-4 should not lead to cancellation of registration (see Article 84.3.3). Art. 84.5. contains the (…) vague expression « abuse » of the mass media, a term which should be exchanged or must be restrictively interpreted as encompassing only violations of penal law and tort law (see, in addition, comments with respect to no. 3, Articles 56 and 57). The authorities of Azerbaijan declared that Article 84.5 refers only to violation of the law.

Article 85.1-2: do these provisions refer to Article 84 or Article 86 of the law? The last solution would be more logical.

Article 86: it would be preferable to deal with criminal prosecutions and sanctions in the same law, either in the election law or in the legislation on criminal or administrative sanctions (cf. Article 86.2). The act of voting or attempting to vote twice could be mentioned.

Article 86.1.6: the term "misinformation" must be understood in conformity with freedom of expression. This means that the misinformation must have been brought about intentionally. Cf. comments on Article 57.4.

See also comments on Article 57.5.

10 Other points

Article 12.1: This is an important point: it would be be more appropriate to give a boundary commission the task of drawing the limits of the electoral districts. See e.g. Article 68 of the new Albanian electoral code: there, the boundary commission consists of the secretary of the CEC, the director of the institute of statistics, the head registrar of immovable property and the director of the centre of geographic studies of the academy of sciences. The inclusion of a judge could also be contemplated. The boundary commission would report for final decision to the CEC.

Article 12.2: The distribution of voters residing abroad among the constituencies should be dealt with in an abstract and more precise manner in the law itself. According to the authorities of Azerbaijan, voters residing abroad are distributed equally and proportionally among the constituencies. It would be preferable to state this expressly and, in that case, to state that the distribution is done by lot.

Article 14.5: Here too, the "exceptional cases" should be very few.

Article 20.7, 26.8: It would be suitable to allow neutral (non partisan) national observers too (e.g. from non-governmental organisations).

Articles 26.11, 72: observers should have access to the protocols of the territorial election commission. According to the authorities of Azerbaijan, this results from Article 26.1 3rd indent, which has to be interpreted in such a manner that transparency is guaranteed at this level, since it is very important to provide for transparency at all levels. It would be suitable to set the deadline for the delivery of the TEC protocols to the CEC in the law; if not, the CEC should fix a short deadline.

Article 29.1: according to the authorities of Azerbaijan, this provision has no retroactive effect (see Article 149 of the Constitution). That means that parties created before the entry into force of the law, and e.g. in the month following its entry into force, should be delivered the certificate.

Article 48.11, 84.4: these rules appear very drastic; apparently, the withdrawal of only one candidate can prevent registration of a whole list. According to the authorities of Azerbaijan however, only the withdrawal of all of the three first candidates of the list (and not of one of these three candidates) can prevent registration. It is true that the significance of the list for the voter changes significantly when one of the leading candidates drops out but it seems that this fact will be brought to the attention of the voters by the election propaganda of the political opponents. This should be a sufficient check against abuse.

Article 59.4-5: the limits on funds for parties and blocks of parties appear rather low in comparison with the limits for individual candidates (Article 59.2-3). However, they could be justified by the rather limited financial means of most parties.