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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE DRAFT ELECTION CODE OF THE REPUBLIC OF AZERBAIJAN

by

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I. General presentation

All documents that have been presented for examination and used by the author of these comments, are in English or in an English translation made available by the CoE[1] .

The author has examined and considered the following material:
1. the draft election code of the Republic of AZERBAIJAN
2. the law on parliamentary elections of the Republic of AZERBAIJAN;
3. the comments to the law on parliamentary elections of the Republic of AZERBAIJAN, adopted by the Venice Commission at its 44th Plenary meeting;
4. the Guidelines on Elections adopted by the Venice Commission at its 51st Plenary Session;

The law that is object of the following comments, is titled "Election Code" and, as such, it is a general, organic law that comprises some general sections covering common aspects of elections and referenda and four special sections providing for
1. Holding of referendum
2. the elections of deputies of the Milli Majlis of the Azerbaijan Republic
3. the elections of the President of the Republic;
4. the municipal elections.

The general sections are meant to set the principles for all electoral exercises, while the special sections regulate each type of election and referendum according to its own specific features and relative needs.

The approach is, as a matter of principle, a good one. But its implementation should be improved: repetitions should be avoided; the principles that are stated should be set out clearly together with possible exceptions to the general rule; consistency among provisions within the same law and with other laws should be achieved.

The general part is apparently divided into 4 sections: but the third section heading is missing (at least in the translation available).

A shortcoming in the drafting technique, in the opinion of the author, is that the special sections are largely repetitive: special sections' rules on nomination and registration of candidates or initiative groups, financial provisions and campaign provisions contain very small differences other than setting different limits or thresholds or numbers, for each kind of election; it is hard to understand why a number of norms are repeated even three or four times under each special section, while such repetitions render the text cumbersome for the reader. It is the case with articles 120, 155, 192 and 222; articles 121, 156, 193 and 223; and many other clusters of articles.

Once the legislature has resolved to approve an electoral code, rather than a number of distinct laws, it is a matter of consistency to avoid the sheer compilation of four different texts. The multiple repetitions, often with slight differences in wording (translation problem or meaningful difference?) run against transparency and the right of citizens to have a clear knowledge of the law. To repeat over and over the same text (with slight differences in

[1] The author is not responsible for misunderstandings due to the translation.

wording) makes it difficult to extract the unique principle, if any, regulating the matter and suggests indeed that no common principles are to be found in a matter that is a newly regulated in each special section. But a careful reading of the text, on the contrary, confirms that the structure of the norms is, in most cases under scrutiny, the same; and the same are as well the principles of the law regulating the different kinds of elections. Many chapters of the special sections, indeed, contain a reference to the relevant provisions of the general sections: articles 120, 155, 192 and 222 for instance, all refer in their first paragraph to chapter 13 of the code. And this is normal and consistent with the structure of the code.

What is less acceptable, as an example of the present comment, is that the following paragraphs are a sheer repetition of the same rule:

Article 120.2 Referendum campaign groups independently determine the form of use of TV and radio organizations' airtime and periodicals.

Article 155.2 Registered candidates, political parties and block of political parties define form of using on airtime of broadcasting companies and periodicals in election campaigning independently.

Article 192.2 A registered candidate for the Presidency, political party, block of political parties defines independently forms of using airtime on TV and Radio companies, periodicals during pre-election campaign.

Article 222.2 Candidates for member of a municipality define forms of usage of airtime on TV and radio and periodicals for pre-election campaigning independently.

The single norm could well be expressed, once for all, in the general provisions under chapter 13: this would make the rule clear and avoid that differences in wording might suggest differences in the regulation.

The same can be found in a large number of other cases.

SECTION 1. Main definitions

Article 1

Some terms or locutions of the glossary are of unclear utility and insufficient accuracy:

- *Ensuring suffrage*: the term is not found elsewhere in the code, and its meaning remains uncertain.

- *Pre-election (referendum) campaign*, as opposed to *election (referendum) campaign (*both locutions are found under article1): the latter is defined as "election (referendum) actions" and seems to be different from the former, both in terms of time (the former stops before election day, while the latter continues till the publication of results) and object; however, to speak of election *campaign* after the election day, seems to be only misleading. Moreover, the tradition in the country (see the recent law on elections to the Milli Majlis) and elsewhere, is to speak of election campaign in the meaning outlined under "pre election campaign", while the *election campaign* meaning is not useful and

indeed is found in the code only three times where could well be replaced by *election activities*.

- *Election constituency* is repeated twice under art.1, with different meanings:

Election constituency – geographical unit where the voters electing a representative (representatives) to any elective state body are registered;
Election (referendum) constituency – an area organized in conformity with the present Code for conducting of elections (referenda),

- *Suffrage*: under this term both active and passive suffrage are jointly explained but, however, they are again explained under specific, distinct items.

Apart from the correction of the mentioned points, the advantage of a glossary rests on the help that offers to the reader; and on the explanation, once for all, of a term or locution which will be found several times in the text, in order not to repeat the explanation. Therefore, it is of little use –for instance- to put the terms *suffrage, active suffrage and passive suffrage* in the glossary, and then to have them again in articles 12 and 13.

Article 5. Direct suffrage

*5.1. Citizens of the Azerbaijan Republic personally vote for a candidate (list of candidates) or against all candidate (list of candidates**)** during elections and for or against issues to be discussed by referendum.*

Article 10. Voting during election and referendum

10.1 Citizens of the Azerbaijan Republic can vote for or against only one candidate (list of candidates) when participating in elections.

10.2. When participating in elections the citizens of the Republic of Azerbaijan can vote against all candidates (lists of candidates)

Probably par. 10.1 is mistaken: the vote can be for only one candidate or against all; not likely that it could be against one candidate.

The indents 1 and 2 of article 10 seem to be contradictory: unless the part "or against" of indent 1 is deleted.

In any case, while the provision to vote "against all candidates (list of candidates)" is a traditional feature of most states belonging to the former USSR, however, it has already prompted negative remarks by the Venice Commission at its 44th plenary meeting, in commenting the Azeri law on parliamentary elections :
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.

Article 9.

A rule is set that suffrage is exercised according to *the permanent place of residence*, but it is also said: "*Unless otherwise stipulated in this Code".* The result is that the rule is unclear for the reader. It should be recommended to avoid such technique.

Moreover**, "***suffrage is exercised"* should more likely be *active suffrage is exercised* .

Article 44 eventually renders article 9 hardly useful, because it states that voters can be included in the voters lists when "*residing in precinct territory at least 6 months out of 12 months prior to announcement of elections*". That is quite different from the "permanent place of residence".

Article 12. Belonging of the active suffrage

Except for the cases stipulated by Article 56 of the Constitution of the Azerbaijan Republic and by this Code, every citizen of the Azerbaijan Republic, who attained 18 on the day of election, having the universal suffrage, has the right to vote in referendum, to observe elections (referendum process), to participate in carrying out of actions related to the election actions and preparation of referendum provided for in this Code.

The norm is unclear since the concept of universal suffrage is not described in the glossary under article 1; moreover, there must be a mistake at least in the translation, since the vote in referendum is openly granted, while the same is not stated for other kinds of elections.

Article 13. Belonging of the passive suffrage

Except for the cases stipulated by Article 56 of the Constitution of Azerbaijan Republic and by this Code, every citizen of the Azerbaijan Republic, having active suffrage, has the right to be elected to elective bodies and to be an initiator of a referendum campaign group, if he meets requirements of the Constitution of the Azerbaijan Republic and this Code concerning candidates.

The norm is tautological: it spells that every citizen who has active suffrage has the right to be elected if he can be a candidate; and it is misleading, because it does not apply, however to initiators of referenda as per article 63. It would be better to make clear, directly, who can be a candidate in the different types of elections and who can be an initiator for referenda. Such rules are indeed found in the Code under articles 63.1; 143; 179 and 213.

Article 14. Cases of limitation of the suffrage

The norm provides:

14.1. Pursuant to Part 2 of Article 56 of the Constitution of the Azerbaijan Republic, persons recognized as incapacitated by a court decision do not have the right to participate in elections as well as in referendum, i.e. do not have the active suffrage.

14.2. Limitations related to the passive suffrage shall be established by Articles 56, 85, 100 of the Constitution of the Azerbaijan Republic and by this Code.

14.3. Pursuant to Part 3 of Article 56 of the Constitution of the Azerbaijan Republic the following persons do not have the right to be elected as deputy of the Milli Majlis of

the Azerbaijan Republic, President of the Azerbaijan Republic, member of a municipality, to be an initiator of development of referendum campaign groups, i.e. they do not have the passive suffrage:

14.3.1. Citizens of the Azerbaijan Republic with dual citizenship;
14.3.2. military servants;
14.3.3. judges;
14.3.4. State servants;
14.3.5. clergymen;
14.3.6. people sentenced to prison by an official and valid court decision
14.3.7. persons who did not completely served their sentences or not remitted from the sentences
14.3.8. irrespective to complete serve or remission of sentence, persons sentenced to prison for the crimes indicated in Articles 15.3 – 15.5 of the Criminal Code of the Azerbaijan Republic;
14.3.9. other persons specified by Article 213 of this Code.

The comments of the Venice Commission on the law on parliamentary elections, seem not to have been considered and need to be recalled, being shared by the author:
Article 85 of the Constitution 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.

Yet, in article 14 of the Code there is still no clear distinction between the cases of ineligibility and incompatibility.

Indents 14.3.1,2,3,4 and 5 seem to refer to incompatibility (and it is a mistake to state that such persons *do not have the passive suffrage*) as it appears by the following other norms of the Code: articles 52 and 70 providing that state servants (military servants among them?), are released from their employment according to terms determined in article 70.2; and that nominated candidates must apply for termination of activities incompatible with the elected post. Article 173.1 requires elected candidate to resign *from a position incompatible with his/her deputy status and indicated in Article 85 paragraph 2 of the Constitution.*

<u>The norm of article 14, therefore, should make a distinction between indents 1 to 5 on one hand, as cases of incompatibility; and 6 to 8, on the other hand, as cases of ineligibility.</u>

Indents 14.3. 6, 7 and 8 should also be clarified and made consistent: if the case under indent 6 means that whoever has been sentenced to prison, looses forever his passive suffrage, then

the provision is too hard especially because does not make distinctions among trivial offenses and serious crimes. Moreover, it comprises already indent 7.

Indent 8 suggests that indent 6 has to be interpreted that the passive suffrage is limited just while serving a prison sentence, while it is lost forever for crimes in articles 15.3-15.5 of the Criminal Code. But such important issues have to be clearly stated (unless the uncertainty is due to the translation).

The provisions on the whole issue of incompatibility are not clear (also for translation uncertainty) and should be more direct, stating a principle and possible exceptions in a clear way.

As to dual citizens, the provision of Article 85 of the Constitution would compel persons with dual citizenship to give up their foreign citizenship if they are elected (an incompatibility case). The provision is linked, as we read in the Venice Commission comments, to the transitional period following the dissolution of the USSR. However, it has been remarked that 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 89.2.2 of the Constitution.

Article 15. Prohibition to foreigners, stateless persons and foreign legal entities to participate in elections (referenda)

15.1. Foreigners, stateless persons and foreign legal entities, their branches and representative offices may not assist or impede the nomination, registration of candidates and election of registered candidates during elections.

15.2. Foreigners, stateless persons and foreign legal entities, their branches and representative offices (hereinafter – foreign legal entities) during referendum do not have the right to conduct a campaign for or against issues to be discussed by referendum, to be a member of referendum campaign groups, including their initiators or to take part in their activity in any form.

The foreigners, stateless persons and foreign legal entities not following the requirements shall be called to account in accordance with the Law.

The Venice Commission at its 44th plenary meeting already commented on a similar clause: *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*.

SECTION 2. General provisions

Article 16 states the principle of independence of election (referendum) commissions from the State, local self-government bodies, as well as from political parties and ngo's. The wording is not accurate (apart from possible translation problems) because the commissions

are State institutions themselves and it would be important to rule out any interference by the Government rather than by private entities like political parties or NGO's.

Article 16.4 does not mention state organs, together with municipalities and private parties, as entities bound by the election commissions' acts and decision. It is probably a mistake that must be corrected. Also public order forces should be bound to election commissions decisions, within the boundaries of their authority.

Article 16.6.13, that commissions "should not explain decisions made" is not a good norm. It can be accepted in a limited number of cases, but not as a general rule, and especially not in cases when the commission acts upon an appeal or when its decision is not taken by consent. Moreover, it appears contradicted by articles 18.9 and 18.12

About Election Commissions

Article 24 sets the rule of formation of the Central Election Commission (CEC). The law on the CEC, according to the authorities of Azerbaijan, will be abrogated by the adoption of the Code; in such case, the new rules of formation of the CEC are not very clear or detailed enough: on one side, half the members of the CEC are appointed by the Milli Majlis, and half by the President of the Republic; on the other side, one third will represent the majority group of the Parliament, one third the minority and one third, the non partisan deputies. Nowhere is explained in the code, how the political distribution will affect the appointing bodies or how such distribution will it be implemented. Probably, both bodies should respect the 1/3 distribution, but it is not stated; nor it is explained through what steps the appointing bodies will reflect the will of the parties that are supposed to be represented in the CEC.

The issue of the independence and impartiality of the election commissions is of paramount importance, as it is stressed also in the Guidelines on elections: an impartial body must be in charge of applying electoral law.

The composition of the CEC appears to be pluralistic, but not balanced, since it largely depends from the President of the Republic and his own majority party. Which, in most cases, gives the President's party an unfair advantage.

The Venice Commission, commenting on the lower commissions composition according to the law on the election of the Milli Majlis, has written:
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.

The comment is still valid with respect to the composition of the CEC: because even a small number of independent candidates could end up being represented by 1/3 of the CEC; because all deputies associated to political parties elected in single member constituencies are deprived of any representation in the CEC; because the majority and minority according to the multi-member national constituency do not necessarily reflect the actual overall composition of the parliament but only the results of the multi members constituency.

Article 20

Second paragraph allows the election commissions not to approve a candidate representative to the commission itself. The code does not clarify what are the legal grounds for such a refusal.

It is strongly recommended that the provision be openly stated.

Article 21 numbers all categories of people who cannot be members of election commissions with decisive voting rights.

Provisions should be made to regulate the incompatibility of such categories with the post that is the source of incompatibility: terms for release from such post, and clarification that incompatibility is strictly related to the term of office. In the same way, the incompatibility of election commission member status with the role of Judge has to be made consistent with the CoE provision that CEC should include at least one member of the Judiciary.

Article 21.11. appears to be the same as article 22.14 of the law on the election of the Milli Majlis, although the translation of the code under comment makes it more difficult to understand the meaning. In any case, the first part of 21.11 seems to contradict the second part.

Article 29

A new power has been given officially to the CEC: to form, every 5 years, 100 election constituencies.

The comments on the issue of the Venice Commission have been partially considered in the new law: the body in charge is now officially identified in the CEC, while the Venice Commission suggested *it would 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.*

Guidelines on elections (I.2.b.vii.) advise:

> *When constituency boundaries are redefined – which they must be in a single-member system – it must be done:*
>
> - *impartially;*
> - *without detriment to national minorities;*
> - *taking account of the opinion of a committee, the majority of whose members are independent; this committee should preferably include a geographer, a sociologist and a balanced representation of the parties and, if necessary, representatives of national minorities.*

There is no provision of such a boundary commission, that should be provided for in the Code.

Article 29.2

With respect to distribution of voters residing abroad in the election constituencies, the Venice Commission comments were: *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.*

Although some criteria of distribution have been openly stated as requested by the Venice Commission, however, the equality and proportionality of distribution is not enshrined in the law, as it was also suggested.

Articles 31 and 35

The composition of ConstEC and Precinct election commissions follows the model of CEC and relevant comments by the Venice Commission apply also to lower commissions.

About Observers

The code has specific norms on domestic observers and international observers (article 38). While accredited domestic observers may be present at the meetings of election commissions "up to the day of election"; international observers' rights seem to be limited to observation on election day and to determination of voting results in superior election commissions (articles 38.8 and 9; 40).

It is a serious limitation not to be allowed to observe the election campaign and the election administration in the run up to the election day. Hopefully, it is only a mistake, that should be corrected before the adoption of the law.

On the other hand, article 40.1.9 provides that observers, including international observers, have the right to file complaints about actions (lack of actions) or decisions of the Precinct or other election commissions directly with superior election commissions or the court.

It is a clear breach of the international observer's code of conduct, and its non interference obligation.

About Voters' lists

It appears from article 43.1 that voters lists are approved by PECs on 10th of March of every year and at least 35 days prior to election day, on the basis of information by executive authorities. Article 23.4 confirms that voters lists are updated every year on a regular basis.

Guidelines on elections by the Venice Commission under I.1.b. advise that electoral registers must be permanent, and there must be regular updates, at least once a year. Such rules seem to have been implemented.

According to article 25.1.16, CEC *forms a unified registration system for voters together with relevant executive authorities and local self-governance bodies; gets information from relevant executive authorities and local self-governance bodies about issues related to preparation and holding of elections;*
Relationship between the unified registration system and the voters' lists is not regulated.

Because of the importance of voters' registration in the electoral exercise, it is recommended that the procedures and steps of formation of the unified registration system, be clearly stated giving each party and citizens in general the right of control of the lists in a permanent way, not depending only from the approaching election exercise, according to the suggestion of the quoted guidelines.

About Participation of Political Parties and Blocks in Elections

Article 46.1

It is hard to understand why a political party that is already established according to law, and is also registered with the relevant administrative authorities, should need a new registration with CEC in order to be able to nominate lists of candidates in an election exercise. It appears a cumbersome and unnecessary requirement. In the same way, it is hard to accept that a newly established party (registered with the relevant administrative authorities less than 6 months before the announcement of the election day) should not be allowed to participate in an election.

Article 48

The article numbers 22 principles that should be followed by political parties and blocks which participate in elections or referendum campaign. Second paragraph states that "*follow of the principles mentioned...is voluntary, except compulsory circumstances defined by the law*". The second paragraph makes the list of principles legally useless. But indeed most of the principles are provided for in other parts of the code, and find there a proper sanction. Most of the same "voluntary" principles are listed under art. 62 as *Activity principles of Campaign Groups on Referendum a*nd again under art. 72 as *Participation Principles of Registered Candidate in Elections.* It is a clear case of multiple repetition that should be avoided.

About nomination and registration of candidates

The whole content of article 52 is repeated in articles 53 and 54. As already mentioned, repetitions in a text of law are not a good thing.

Articles 53.7 and 54.10 state the conditions for refusal of certification of nomination of a candidate (with slight differences in wording that are not justified) by election commissions. Irregularities in the documents should in a first instance allow for a late regularisation; while "violation of rules defined by the code" is too vague for implying a refusal of nomination certification without making any difference between minor violations and serious offences.

Article 54.3 provides details of minutes of meetings by political parties where decisions on nomination of candidates have been taken. Such details appear to be an internal affair of the political party and the interest of the Election commission in them is disputable.

Article 55.1

Possible exceptions to the principle of equality among candidates are provided by the norm. But the exceptions are vaguely referred to, while they should be better determined in a strict number, if any.

Article 56.1

It is not clear why independent candidates (self nominated or nominated by initiative groups) can start collecting signatures from the day of the notification of the initiative (53.2) and before the decision of the commission, while political parties have to wait for the decision of the commission (56.1). In fact, articles 147 and 148 of the code, have a different and contradictory provision for elections to Milli Majlis, referring the difference in the initial term of collection to single mandate candidates on one side; and list of candidates, on the other. Article 183.1 for election of President of Republic, provides that collection of signatures commences, in all cases, on the day the CEC is informed.

Therefore, article 56.1 is unclear, unnecessary, contradictory with other norms and should be deleted.

Articles 57 and 66

Collection of signatures can be contracted to citizens 18 years old and fully capacitated, but not to companies (legal entities) that are listed together with state, government bodies and municipalities as subjects not permitted to collect signatures. While the ratio of the exclusion of public bodies is clear, the same cannot be said about private companies, once it is accepted that the job can be contracted upon payment and it is not a voluntary exercise.

Articles 58.5 and 60.3

It appears that candidates have the possibility to make a registration deposit, in the amount of 25% of the relevant election fund threshold. If a candidate (or list of candidates) is refused registration for problems related to the collection of signatures, registration can be obtained upon application for *registration on condition of return (?) of the registration deposit*.

It seems to be a provision similar to the Russian Federation Duma election law, where candidates can choose to skip altogether the collection of signatures and opt for the registration deposit. In the present case, the solution appears to be more a back up solution, rather than a clear alternative, but the overall meaning is not different.

There is no provision for refund of such registration deposit, should the candidate or party exceed a certain score (guidelines on elections I.1.c.vi advise that the deposit should be refunded at least if the party has faired well in the elections).

Article 59

The procedure for checking the signatures is substantially the same in the Code as under art. 43 of the Milli Majlis law. The relevant Venice Commission comments have not been implemented and are still valid and shared by the author: *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.

Article 59.14

The new norm deserves the Venice Commission comment under article 43.14: *The invalidity of 15 %* (now 10% in the code) *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 60 (and 69 that largely repeats 60 for Campaign groups on referendum)

Comments by the Venice Commission under article 44 do not seem to have been thoroughly considered and deserve to be re presented, as article 60 is not very different from article 44: *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* (now in the code: 60.2.1)*, 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* (now in the code: 60.2.2) *……, 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. ……. Concerning Article 44.4.5,* (now in the code: 60.2.4) *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* (now in the code: 60.2.5) *again, minor violations should not be taken into account.*

Article 60.5

Provides that the election commission can cancel the candidate registration during the pre election campaign up to 10 days prior election day, when should emerge that information submitted by the candidate was "invalid", while after that term can apply to the court for an order of cancellation by the judicial body.

The norm is repeated again under article 108.2.1, where it is specified that the "invalidity" must be of importance. It is suggested that repetitions are avoided and the indent 60.5 be deleted. The issue is treated more thoroughly under article 108.

Article 108.2 lists a number of cases when the election commission can refuse to register a candidate, in case of specific violation of rules of conduct provided by the code. Violations are rather specific, thus heeding previous Venice Commission's suggestions, and their number has to be considered *exhaustive*. It would be better, however, to specify the obligation of refusal, rather than the power to do it, and to limit such obligation only to

serious offences, after a first public warning. However, the cases under 108.2.9, 108.2.11 and 108.2.12 seem too vague under several aspects, for such a sanction as the refusal of registration: the indents must be re phrased and the last one should be deleted.

Article 108.3

Provides that candidate registration can be cancelled in all cases when it could have been refused, and some other cases specifically listed. The same comments already recorded, apply to the case.

Article 63.1

Establishes that citizens with active suffrage can be initiators of a campaign group on referendum. The norm is apparently contradictory with art. 12 that requires for initiators "passive suffrage", but this latter norm is probably mistaken.

Article 64

Appears to be a repetition of article 14.3

Article 65.7

The norm spells: *The authorized representatives of a campaign group on referendum, still working as state and municipality officials, cannot use from their duties or official position during the process of referendum.*

But according to article 65.3 which refers to 64, authorized representatives cannot be state servants.

Article 70.3 seems to consent candidates to retain their job in state positions, in contradiction with previous indent (70.2) that requires them to be released from their employment; but it could be a translation mistake. Indent 70.5 is clear on the prohibition of campaign by these candidates. Apparently, therefore, there could be candidates who work in state positions that can retain their job as long as they do not campaign. But such campaign limitation for registered candidates who are state servants does not apply to free air time on TV.

About Election Campaign

The rules about election campaign (often called pre-election campaign) are very similar, if not identical to those stipulated in the law on elections to Milli Majlis. The Venice Commission's comments largely still apply to the draft code and are shared by the author of these notes:
article 88.1 (former 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 88.3-5 (former 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 88.9 (former 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 89.1 (former 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.

The only change in the draft code that reflects the recorded comment is, in article 89.1, the new requirement of "force" in the call to change the constitutional system. It is an improvement, but not sufficient to protect the basic freedoms of speech during an election campaign.

Article 89.3 (former 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 89.4 (former 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 89.5 (former 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.*

The free air time and space in the election campaign.

In the special sections it is provided that only elections/referendum participants who have achieved a fixed threshold can retain the funds allocated by the election commissions for them and not to pay the cost of free air time and space allocated. The threshold is, in some cases, quite high as for referendum campaign groups (articles 125-126). The risk of fully paying the fees of "free air time and space" amounts to a deterrent for campaign groups from taking part in the referendum campaign.

For candidates to Milli Majlis the 3% threshold for single member constituencies and 1% for the nation wide constituency (article 160.1) is a way to reduce the number of weak candidates and parties and push them towards coalitions.

SECTION 4. Holding of elections

Article 101

In order to allow voters to vote wherever they will be on election day, a voting card has been devised, that will allow a voter, upon presentation, to cast a ballot in any voting station although he/she is not registered in the list. Such card is to be issued by the relevant election commission where a voter is registered upon his/her application and entails de-registration from the original list.

A strict accountability of voting cards must be kept, and their number strictly limited, in order to avoid possible frauds.

Article 104

When voting hours end, the precinct election commission chairperson announces loudly: "only voters who have already received ballot papers and those in the voting compartments (booth) can vote." It is a generally accepted rule that voters already in the queue are allowed to vote. And indeed such solution would avoid that people who have been queuing up for long time, should remain frustrated and disenfranchised.

Articles 104.8-11 (and 135)

While first copies of counting protocols are to be sent immediately to Constituency EC, and second copies are to be kept by the secretary of the PEC, the third copy is displayed on the board for information.

Only in the special sections (articles 174.1, 209.1)it is provided that upon requests by observers, registered candidates, agents of political parties and blocks, protocols are submitted to the requesting parties, a*fter members of election commissions approve information on voting results in electoral precincts and voting results in the constituency and the relevant protocols.*

The quoted rule should be moved in the general section, being valid for each election.

Besides, it is recommended that the norm be clarified in the sense that observers and other subjects entitled, are to be given a copy of the protocol immediately after its signature and delivery to the superior commission.

The issue of aggregation of results has been of great importance in the past elections in the Republic, and the law must give any interested party or observer the possibility to double check the regularity of the aggregation process from PEC to ConstEC.

Articles 132, 167, 204 and 234

The counting protocols do not include information on the number voters casting their ballot with voting cards. For the sensitivity of the matter, it is suggested that the number of voters who voted with voting cards, not being in the voters list, be added in each protocol (cfr. comment under article 101).

About Appeals and complaints

The whole chapter 13 is dedicated to complaints and accountability on active suffrage violations.

The issue is not clearly dealt with: according to the heading, the whole chapter and article 107 in particular, deal only with violations of "citizens' rights to elect"; however, article 107.8 hints that the court might be examining issues that deal with passive suffrage:

- *issues on cancellation of registration of list of candidates, registered candidates, referendum campaigning groups;*
- *issues on refusal of registration of candidates, list of candidates, referendum campaigning groups;*
- *appeals on invalidation of election of a registered candidate or list of registered candidates.*

Apparently there is no harmonisation between article 107 and article 45.3 on complaints about decisions on voters' lists. Terms are different, and no regulation is set about relationship between complaint to superior commission and to court.

It would be useful to clarify that complaints can be filed without formalities both to election commissions and to Courts. Especially for complaints to Court, it should be provided that no need of a lawyer is requested, and that ordinary civil code procedures do not apply. Last, but not least, it should be provided the obligation for any election commission to a prompt decision and to deliver the decision in writing to the interested party, in order to allow him/her to file an appeal to the competent body.

No rule is found about appeals by candidates or parties on violations of their passive suffrage: refusal of registration or cancellation of registration, or related actions. Yet, art.149.5, article 184.3, and article 217.5 all provide (with a clear case of commented repetition) that in case of decision on refusal to register a candidate, the relevant commission informs the interested person and submits a copy of the decision. Specific and clear rules should be entered to

protect the candidates' rights against such a decision, providing their right to appeal either to superior election commission or to the Court.

Special Sections
SECTION 5.

116.The draft Code should clarify the role of Milli Majlis and the President in the decision on conduct of a referendum. Both constitutional provisions (95 and 109) quoted by the article 116 of the code provide that Milli Majlis and the President "appoint" a referendum. There has to be a difference or a distinction in respective roles.

The limitations under articles 112 and 116.2 are fair.

Also unclear is the moment when the proper Authority will accept to register the referendum issue: something similar to the ruling from the Constitutional Court as per article 113 on changes to the Constitution. No mention of the matter is made in chapter 11 of the code, under registration of referendum campaign group. And it appears unreasonable that a decision be left to the Milli Majlis or the President, because it would happen after the collection of signatures.

If it is meant that CEC has such a preliminary power, then a specific provision should be entered in the code.

Section 6.

Article 169.14 provides that CEC can decide to recount the votes in the relevant constituency in case of mistakes, corrections or discrepancies in the protocols.

The solution of recounting is not, in this case, a proper one: in fact the Constituency Commission protocol is only the aggregation of PECs' protocols. There is no need to recount, but only to re-aggregate the results of the PECs' proto cols within that constituency.

On the contrary, a similar norm should be entered under article 168, for Constituency Commissions: and in such case, the decision to recount would be a necessary consequence of corrections or discrepancies in PECs' protocols.

Article 175.4

Such a provision that registered political party activities may be prohibited and its deputies lose their mandate (disbandment of the party ex article 89 Constitution) should not be entered in the law. There is a basic freedom of political association that must be respected, whose limits are to be found only in criminal law. To disband a party that has sent its deputies in the parliament is not a decision that can be taken easily. The norm, as it stands, without proper guarantees is not acceptable, even according to the Constitution that requires that the law set up the rules of disenfranchisement.

SECTION 8.

Article 211.1

Municipal councils are elected by the citizens of the Republic of Azerbaijan, on the basis of a majoritarian system with multi mandate constituencies.

There is no mention of the Venice Commission suggestion (Guidelines on elections) according to which “it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence”.