



Strasbourg, 1 June 2004
Opinion no. 286 / 2004

CDL-AD(2004)016rev
Or. Engl.

**JOINT RECOMMENDATIONS
ON THE ELECTORAL LAW AND
THE ELECTORAL ADMINISTRATION
IN AZERBAIJAN**

**by the Venice Commission
and the OSCE/ODIHR**

**adopted at the 8th meeting
of the Council for Democratic Elections
and endorsed by the Venice Commission
at its 58th Plenary Session
(Venice, 12-13 March 2004).**

on the basis of comments by

Mr Richard BARRETT (Venice Commission Expert, Ireland)

I. Introduction

1. Mandate

1. *The present recommendations were elaborated following resolution 1320 (2003) of the Parliamentary Assembly of the Council of Europe (PACE), which invites the Venice Commission to formulate opinions concerning possible improvements to electoral legislation and practices in particular member states or applicant countries.*

2. *The Venice Commission was asked to prepare a review of the election legislation and practices, based on the observation reports of the 15 October 2003 presidential election in Azerbaijan published by PACE and the OSCE/ODIHR and on joint assessments of the successive drafts election code drafted by the Venice Commission and the OSCE/ODIHR. This review, prepared by Mr Richard Barrett (Venice Commission, expert, Ireland) and the OSCE/ODIHR, resulted in a set of recommendations for amending the Election Law and changing electoral practice. Many of the suggestions emanated from the Joint Opinion on the Election Code of the Republic of Azerbaijan issued by the OSCE/ODIHR/Venice Commission on 22 October 2003 (CDL-AD(2003)015) prepared 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) and Mr Rumén Maleev (OSCE/ODIHR, election expert).*

3. *Subsequently, Mr Barrett's draft was submitted for comment to the OSCE/ODIHR and to the rapporteurs from the Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities of the Council of Europe.*

4. *These recommendations are not exhaustive and must be read in conjunction with previous observation reports issued by the PACE and OSCE/ODIHR as well as with previous joint assessments prepared by the Venice Commission and the OSCE/ODIHR that contained more comprehensive recommendations. Special attention should be paid to the administration of elections as it has been indicated in election observation reports of OSCE/ODIHR, PACE, CLRAE and other international observers. This document does not supersede or replace recommendations contained in previous reports that should be given due consideration.*

5. *These recommendations adopted at the 8th meeting of the Council for Democratic Elections and endorsed by the Venice Commission at its 58th plenary meeting (Venice, 12-13 March 2004).*

2. Reference documents

6. *These recommendations are based upon:*

- *the Election Code of Azerbaijan (translation) (CDL(2002)147);*
- *Constitution of the Republic of Azerbaijan (CDL(2003)048);*
- *the Election observation report from the Parliamentary Assembly on the presidential elections in Azerbaijan on 15 October 2003 (Doc. 1000327, November 2003), as well as the OSCE/ODIHR Final Report on the Presidential Election (Doc. ODIHR.GAL/78/0313 of November 2003);*
- *the joint OSCE/ODIHR/Venice Commission assessment of the election Code of the Republic of Azerbaijan (CDL-AD(2003)015);*

- *Main recommendations for amendments to the draft electoral code of Azerbaijan of the European Commission for Democracy through Law (Venice Commission, Council of Europe) adopted by the Venice Commission at its 54th plenary session (Venice, 14-15 March 2003) and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE (CDL-AD(2003)003);*
- *Joint Assessment of the Revised Draft Election Code of the Republic of Azerbaijan of 28 November 2002 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): Endorsed by the Venice Commission at its 53rd Plenary Session (Doc. CDL-AD(2002)035);*
- *comments by the OSCE/ODIHR, 2 March 2004;*
- *the Code of good practice in electoral matters adopted by the Venice Commission, including the Guidelines on Elections (CDL-AD(2002)023rev).*

II. Proposed changes to the Election Code

7. The Election Code is still far too complex and contains repetitions. This creates difficulties for candidates, political parties, observers, election officials and for anyone who needs to be familiar with it or wishing to make a complaint. This reduces the transparency of the legislation and goes contrary to the right of citizens to have a clear knowledge of the law. The OSCE/ODIHR/Venice Commission joint assessment (Document CDL-AD(2003)015) identified in particular the provisions on the registration of candidates, and campaign financing in that regard, but further examples are the lists of those entitled to conduct an election campaign, and limitations on the content of election campaign material.

8. The following recommendations deal with a number of provisions which should be reconsidered:

1. Composition of Election Commissions

9. The composition of the Central Election Commission (CEC), Constituency Election Commissions (ConECs) and Precinct Election Commissions (PECs), set out in the Election Code and the transitional provisions, should be revised. The commissions should enjoy the confidence of all major election stakeholders. To achieve this goal they should not be dominated by pro-government forces. The existing provisions are not sufficient to ensure that. The recent presidential election demonstrated that the election commissions do not operate independently enough.

10. The openness of the appointment and the transparency of the work of the commissions are essential to establish the legitimacy of the electoral process.

11. The “draft model” proposed by the Venice Commission – OSCE/ODIHR should be reconsidered.

12. Attention should be paid to other important aspects of election commissions’ composition:

- i) *Leadership of electoral commissions.* The Election Code gives large powers to the Chairperson of an election commission. Hence, it would be preferable to appoint chairpersons representing different political parties. This measure will increase the confidence in the work of the commissions. The ruling party should not monopolise

the chair positions across the election administration. This contributes to the lack of independence of the election commissions from the authorities.

- ii) *Nomination and appointment of commissioners.* The Election Code should provide for a clear and transparent procedure of nomination and appointment of all commissioners.
- iii) *Term of office of commissioners.* The 5 years term of office for regular members of ConECs acting only during election periods and for all PEC members, acting during election periods and annual drafting of the voters' lists, looks excessively long and should be revised. This will decrease the cost of elections.
- iv) The residence restrictions for PEC membership (Art. 36.2) appear artificial and irrelevant for constituencies organised for IDPs and refugees from the occupied territories and should be revised.
- v) Further, decisions of the commissions should require a quorum of two-thirds and a majority of two-thirds. This would require a high level of consensus to make the commissions operative.

2. Signing petitions

13. The Election Code should allow voters to sign petitions on behalf of more than one candidate in presidential elections, as is already the case in elections to the Milli Mejlis.

3. Refusal of candidates

14. The registration of candidates should be dramatically improved. The Election Code should limit and clarify the reasons for refusing candidates for presidential election. Reasoned decisions have to be provided so that aggrieved persons can bring complaints to the courts. This concern was elaborated on in the OSCE/ODIHR Final Report on the 15 October 2003 Presidential Election.

15. The number of 45,000 supporters' signatures required for the registration of presidential candidates should be decreased. The 15 October 2003 Presidential Election confirmed that the number of signatures is not adequate. For instance in the last election, two duly registered candidates gained a number of votes that was less than the number of collected signatures. In addition, the checking of signatures is time consuming and open to abuse.

4. Venue for election rallies

16. Art. 86 of the Election Code should be amended in order to explicitly regulate rallies and open air gatherings. The election commissions should be given specific power to recommend to local authorities to provide venues for election rallies under the same conditions for all contenders. The Law on the Freedom of Assembly should be amended to curtail the unlimited powers given to the local authorities to restrict political gatherings, and to ensure that genuine freedom of assembly is respected during election periods. This was pointed out in the OSCE/ODIHR Final Report published on 12 November 2003.

5. Right to campaign

17. The phrase "notwithstanding the right of freedom of expression" should introduce the list of persons and groups entitled to conduct an electoral campaign set out at the beginning of Art. 74.1. This is to clarify that the right of freedom of expression is universal and the list following

is additional but not limiting. This was fully explained in the OSCE/ODIHR - Venice Commission's joint assessment of the Election Code of the Republic of Azerbaijan (CDL-AD(2003)015, par. 15). It is recommended to add initiative groups of voters nominating candidates, as well as candidates' agents and authorised representatives to the list of subjects entitled to conduct campaign (Art. 74.1).

18. By the same token, Art. 88.1 should include the mention "subject to the right of freedom of expression" before the list of limitations on the content of election campaign material. It is all the more important as the limitations refer to "insulting citizens' honour or dignity" that is so general.

6. Financing provisions

19. The election financing provisions in Art. 94 and 95 are too complex and impose a rather cumbersome burden on candidates and parties. This was highlighted in the OSCE/ODIHR - Venice Commission Joint final assessment of the Election Code (Doc. CDL-AD(2003)015, par. 18).

7. Free Air Time

20. Article 194 of the Code establishes a 5% threshold necessary for releasing presidential candidates from the obligation to pay the cost of free airtime and space. The threshold should be reduced to 3% in line with the 3% threshold fixed for parliamentary and municipal elections (Art. 161 and Art. 230). It is recommended to request 3% of valid votes, rather than of the number of voters in the relevant constituency.

8. Return of deposit

21. The Election Code should provide for unconditional return of the voluntary registration deposit to candidates who collected 3% or more of valid votes.

9. Observers

22. The fact that some NGOs receive foreign State funding should not prohibit them from appointing observers as was pointed out in the Parliamentary Assembly of the Council of Europe (PACE) and OSCE/ODIHR reports. This will require an amendment to the Law on Public Unions and Foundations.

23. The Code should specify that observers have a role and a right of access to electoral commissions after polling day until all the electoral tasks are completed. This increases the transparency of the commissions' activities, especially the CEC, in the crucial days before the announcement of the final results.

24. The Election Code should also be amended so as to provide for a simple procedure (at PEC level) for registration of individual observers.

25. The Election Code does not require accreditation by election officials for party or candidates' observers monitoring the work of specific PEC on election day (Art. 40.16). However, during the last presidential election, the CEC issued instructions establishing a

cumbersome and complex registration procedure for such observers as well as for individual observers.

10. Deregistration procedures

26. The “de-registration” procedures are open to abuse leading to the possibility of persons voting at more than one polling station, especially in the absence of a provision for voter marking (inking) on polling day. This was pointed out in the PACE report of November 2003. This procedure should be reconsidered. If the de-registration is kept, the procedure should start after the formal closure of the voter lists (35 days before election day) when amendments and inclusions are made only by court decision. Additionally, PECs should be responsible for the issuance of de-registration cards and not the ConECs. Provision for voter marking (inking) was in earlier drafts of the Election Code. This efficient anti-fraud measure should be looked at again since it diminishes the risk of multiple voting. This was pointed out in the OSCE/ODIHR - Venice Commission assessment (CDL-AD(2003)015, par. 42).

11. Invalid ballot papers

27. It should be made clear, in Art. 200.3, that a ballot paper is invalid if no square is marked (cf. Art. 106.3.4 and 167.3).

12. Protocols

28. It is recommended to shorten the list of items to be included in the results protocols (Art. 100), which would simplify the completion of protocols and limit errors. Art. 100.2.4 and Art. 100.2.6 are redundant – the information requested there duplicates the information contained in Art. 100.2.5, Art. 100.2.7 and Art. 100.2.8.

13. Preliminary declarations

29. The Code should provide for an announcement of preliminary results within 24 hours as was recommended in the PACE report of November 2003. The recent experience proved that this is technically possible. Such a practice can ease the tension surrounding any elections and increase confidence in the results. By the same token, the Code should provide for an explicit obligation – rather than a possibility – for the CEC to post the precinct results on its website immediately after it receives them from the ConECs.

30. While legal provisions for the tabulation procedure at ConEC and CEC level were improved compared to the previous legislation additional clarifications are required on the receipt of PEC protocols and their computerised tabulation. Transparency of the process should be increased in order to limit serious violations and malpractices reported in the past during this crucial election phase.

14. Reference to Constitutional Court

31. The 14-day period in the Election Code during which the CEC can send presidential election results to the Constitutional Court should be reduced, so that the court has time to carry out its function properly, before the end of the 14-day period allowed under Art. 102 of the Constitution. This unsatisfactory clash between the Code and the constitutional provision was pointed out in the OSCE/ODIHR Final Report on 2003 Presidential Election.

32. As imposed by the 2002 constitutional changes the long time postponed amendments to the Constitutional Court Law aimed to put into effect the citizens' right to appeal to the Constitutional Court should be enacted urgently by Milli Majlis.

15. Complaints and appeals

33. The complaint procedure should allow direct and speedy complaint to a court, whether the issue could lead to criminal liability or not. This is to provide an effective remedy to protect the electoral right. It is unacceptable that the subtle difference between complaints which could lead to criminal liability and those which could not, should determine venue especially when the time for bringing complaints is so short. Further Art. 112.1 should be rewritten to clarify whether the right to file a complaint is intended to be universal in relation to all decisions, and the three-day limit should be extended. As suggested by the Joint final assessment of the Election Code of the Republic of Azerbaijan (CDL-AD(2003)015, par. 54), the first appeal could be made to an election commission.

34. The OSCE/ODIHR final Report on the Presidential Election pointed out the necessity of amending the Code by requiring more expeditious investigations of election-related issues by the Prosecutor's Office.

16. Declaration of invalidity

35. The cancellation of results, declared on a large scale after the recent presidential election, should only be made in a reasoned manner following a transparent process, as they effectively cancel the votes of voters. Only an open and reasoned process leading to invalidity can protect the electoral right, determine responsibility for violations, and provide lessons for future elections. As pointed out in the OSCE/ODIHR-Venice Commission joint assessment (CDL-AD(2003)015, par.48), it is difficult to find the results of an election acceptable if due to irregularities the election results in 40% of the relevant precincts were declared invalid.

36. It was also pointed out in that assessment that sanctions should be proportional to the mistake, shortcoming or violation committed. For example it is highly disputable whether all votes cast at a polling station should be declared invalid merely because a voter has omitted to sign the voters' list (Art. 106.2). This consequence is too drastic and does not respect the principle of proportionality.

17. Intimidation of election staff

37. Stronger sanctions are needed against threatening and intimidating electoral staff. In particular consideration should be given to putting in place a presumption that when officials involved in the electoral process are dismissed from public employment during a specific period before or after Election Day, there should be a presumption that the dismissal arises from their conduct at the election, so that the authorities would have to prove the contrary. The scale of this problem after the recent presidential election was highlighted in the OSCE/ODIHR final Report of November 2003.

18. Referendum turnout

38. The 25% turnout requirement for a referendum to be valid (Art. 139.1) is too low and should be increased.

III. Changes in practice

39. As soon as possible the authorities should undertake steps towards the transformation of the State TV into an independent public service broadcaster, with balanced reporting, including when covering executives' activities during election periods. (OSCE/ODIHR Final Report on Presidential Election)

40. The CEC should take a broader view of its mandate, and in particular should ensure the implementation of Article 17.4 of the Election Code, which states that election commissions' decisions and acts within their authority are obligatory for state bodies and municipalities. This provision puts the CEC in a position to insist on adequate co-operation from other State bodies to ensure that all elements of the Election Code are implemented adequately.

41. CEC Instructions and Regulations should be clear, simple, genuinely explanatory and consistent with the Code. They should not be a mere repetition of the Election code's provision.

42. Detailed CEC instructions are needed to regulate the use of the State Automated Information System for maintaining the voter register, preparation of the voter lists for forthcoming elections and for tabulation and publication of the election results on the CEC Internet site.

43. During election periods (before the start of the campaign) the CEC should create an independent media council with professional and non-partisan composition, with a clear mandate to oversee the campaign through mass media. (OSCE/ODIHR Final Report on Presidential Election).

44. There must be better training for PECs and ConECs members to ensure the best practice across the whole country.

45. All decisions of electoral commissions should be clear and reasoned so that aggrieved persons can judge whether to make a formal complaint.

46. There must be more co-operation with observers and in particular there should be no instruction from officials that observers have to stand in one place only in polling stations, as suggested in the PACE report of November 2003.

47. All electoral protocols should be published and publicly posted within the specified time limits.

48. The election commissions have to remain available to observers, the media and possible complainants in the period following the election until the whole process is completed.

49. Safeguards should be instituted to ensure that Executive Committees (local authorities) do not interfere in the electoral process or direct the work of election commissions.