

Strasbourg, 23 June 2008

CDL-AD(2008)011
Or. Engl.

Opinion no. 390 / 2006

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**JOINT OPINION
ON THE DRAFT LAW ON AMENDMENTS
AND CHANGES TO THE ELECTORAL CODE
OF THE REPUBLIC OF AZERBAIJAN**

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

**adopted by the Council for Democratic Elections
at its 25th Meeting
(Venice, 12 June 2008)
and by the Venice Commission
at its 75th Plenary Session
(Venice, 13-14 June 2008)**

**on the basis of comments by
Mr Aivars ENDZINS (Member, Latvia)
Mr Peter PACZOLAY (Member, Hungary)
Mr Jessie PILGRIM (Electoral Expert, OSCE/ODIHR)**

I. Introduction

1. *This joint opinion on the amendments¹ to the Electoral Code of the Republic of Azerbaijan (Electoral Code) was prepared by the Organisation for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Council of Europe's European Commission for Democracy Through Law (Venice Commission). The amendments were adopted by the Milli Majlis on 2 June 2008.*

2. *In December 2006, April and November 2007, and February 2008, representatives of the OSCE/ODIHR and the Venice Commission met with the authorities of the Republic of Azerbaijan in order to discuss possible amendments to the Electoral Code on the basis of preliminary draft texts of amendments prepared by the Presidential Administration. Subsequent to the February 2008 meeting, the OSCE/ODIHR and the Venice Commission prepared a joint interim opinion on the draft amendments.² The draft amendments were further revised by the Presidential Administration, and the Milli Majlis adopted the amendments on 2 June 2008. The authorities of Azerbaijan have requested this joint opinion on the adopted amendments.*

3. *The amendments to the Electoral Code of the Republic of Azerbaijan should be considered in the context of previous assessments of the Electoral Code by the Venice Commission and the OSCE/ODIHR, as well as OSCE/ODIHR election observation mission reports. The six most recent and most important documents are the Final Opinion on the Amendments to the Electoral Code of the Republic Azerbaijan of 25 October 2005 (CDL-AD(2005)029), the Final Report of the OSCE/ODIHR Election Observation Mission for the 2005 Parliamentary Election (ODIHR.GAL/7/06), the Joint Final Assessment of the Electoral Code of Azerbaijan of 1 September 2003 (CDL-AD(2003)015), the Final Report of the OSCE/ODIHR Election Observation Mission for the 2003 Presidential election (FR03), the Joint Recommendations of 1 June 2004 (CDL-AD(2004)016rev and JR04) and the interim opinion on the proposed amendments to the Electoral Code of the Republic of Azerbaijan (CDL-AD(2005)018). These documents are interrelated. They contain important suggestions on how to improve the Electoral Code in order to provide a legal framework for elections consistent with international standards. This joint opinion reaffirms the previous recommendations.*

4. *The amendments address some recommendations of the OSCE/ODIHR and the Venice Commission. This is a positive development. However, several important recommendations have not been addressed or have not been addressed adequately. Given the extent of discussions on these issues, it is of concern that these issues have not been addressed in the amendments. One area of concern is the composition of election commissions. No changes in the composition of election commissions have been introduced by the amendments. A Round table on Election Commission composition co-organised by the Council of Europe and IFES took place in Baku on 9 November 2007. Different proposals on the composition of election commissions were discussed.³ However, the amendments do not take into account any of the proposals. Another area of concern is the adjudication of complaints and appeals. Although*

¹ The amendments reviewed consist of 91 articles in an unofficial translation of text (Doc CDL-EL(2008)015). Any opinion based on translated laws may be affected by issues of interpretation resulting from translation. The OSCE/ODIHR and the Venice Commission wish to acknowledge the role of IFES in providing translations of draft amendments throughout the process.

² Joint Interim Opinion on the Draft Amendments to the Electoral Code of the Republic of Azerbaijan, 18 March 2008, CDL-AD(2008)003.

³ These included proposals submitted in writing by various opposition parties. However, despite formal invitations to participate in the round table on the composition of commissions, some of the opposition parties decided not to attend either this event or the round table on complaints and appeals procedures co-organised by the Council of Europe and IFES in Baku on 7-8 November 2007.

several amendments have been adopted which create groups of experts to make findings and recommendations to election commissions on filed complaints, it is not clear that this additional structure will ensure the fair, efficient and timely adjudication of complaints and appeals filed to protect electoral rights. The true test will be when the new structure is implemented and whether the new structure does in fact provide effective remedies to correct wrongs.

5. Other areas of concern include some amendments which do not respond to previous recommendations and which have the potential to have a negative impact on the election process. Amendments which limit the requirement for equal campaign conditions to “public TV and radio companies” and exempt State funded TV and radio from this requirement are of concern, as State funded TV and radio will undoubtedly provide news coverage and other programming related to the campaign. In addition, the reduction of time for the official campaign period, which was not included in previous drafts, is a concern since this reduction limits the application of provisions for equal campaign conditions. It remains to be seen what effect an amendment incorporating the law on advertising will have on the distribution of air time on TV and radio for election campaigns.

6. In this context it should be reminded that the Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)⁴ on “Honouring of obligations and commitments by Azerbaijan” in the chapter on the electoral reform (3.1.2.) also recalled that the Parliamentary Assembly of the Council of Europe noted that the electoral legislation had not been amended in line with the recommendations repeatedly made by the Venice Commission in time for the re-run elections. The Assembly in particular urged the authorities of Azerbaijan to:

“- amend the provisions regarding the composition of the electoral commissions at all levels so as to establish an election administration which enjoys the confidence of the electorate and of all the stakeholders;

- further develop the procedure for an efficient handling of election-related complaints and appeals with the assistance of the Venice Commission (Art. 52).”

7. As noted above, the amendments address some recommendations. However, the extent to which any amendments to the law can have a positive impact will ultimately be determined by the level of good faith and political will exhibited by state institutions and authorities responsible for implementing and upholding the law.

8. As noted above, some previous recommendations are not addressed in the amendments or are addressed only to a limited degree. Previous recommendations, which are considered important for the 2008 Presidential election, are noted in the conclusion of this joint opinion.

9. The present joint opinion, which was prepared on the basis of comments by Messrs Jessie V. Pilgrim, expert for the OSCE/ODIHR, and A. Endzins and P. Paczolay, members of the Venice Commission, was adopted by the Council of Democratic Elections at its 25th meeting (Venice, 12 June 2008) and by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008). The joint opinion was transmitted to the authorities of the Republic of Azerbaijan immediately after the session.

⁴ Doc. 11226 of the Parliamentary Assembly of the Council of Europe dated 30 March 2007, Resolution 1545 (2007).

II. Discussion of amendments

1. Abbreviated timeframes for the election campaign and election processes

10. A significant set of amendments reduces the amount of time for the official campaign period by more than fifty percent (50%). These amendments were not included in previous drafts discussed with the OSCE/ODIHR and the Venice Commission. The official start of the campaign period in Article 75.2 has been reduced from 60 days to 28 days prior to election day. This means that the equal access provisions to public media will apply only for a few weeks before election day. It also means that any other legal provision which is intended to create equal campaign conditions for registered candidates will only be applicable for a limited time period. While international practice differs in this respect, an abbreviated official campaign period is troublesome when other legal provisions, such as those creating a “level playing field” for campaigning, are tied directly to the official campaign period or when the reduction of the official campaign period negatively impacts the rights of voters. In the case of Azerbaijan these amendments are introduced only a few months before the elections. As noted by the United Nations Human Rights Committee: “[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential”.⁵ If equal conditions for the communication of information to voters are limited to a few weeks before election day, then the right of voters to receive information is significantly limited. In the context of other amendments (*see also paragraphs 11, 16, 34, and 38*), the reduction of the official campaign period, cannot be considered as positive.

11. In addition to the reduction of the time for the official campaign period, these amendments reduce the deadline for announcing the elections and subsequent timeframe for preparation of the election processes. Article 8.1 has been amended to reduce the deadline for announcing the elections from 120 to 75 days before voting day. Article 29.6 has been amended to reduce the deadline for the organization of election constituencies from 115 days to 70 days before voting day. Similarly, other deadlines have been reduced, such as for candidate registration and the transfer of funds to constituency election commissions. It remains to be seen whether any of these reduced deadlines will have a negative impact on voters, candidates, or the orderly administration of election processes.

Interference in election processes

12. One amendment attempts to address interference in election processes by introducing a new Article 11¹. This amendment prohibits the unlawful interference “by legal entities, officials of state bodies or municipalities and other natural persons” in the work of the election commissions and the election processes. The OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections noted several instances of such interference, and the first recommendation in the report is that the problem of interference be addressed. This amendment, if effectively implemented, could improve the administration of election processes. However, as noted by the OSCE/ODIHR report, two Presidential decrees and other legal provisions prohibiting such interference were not effectively enforced by authorities. Thus, the extent to which this amendment will address past irregularities is dependent upon its good faith implementation by authorities. Nevertheless, the amendment is a positive addition to the Electoral Code.

⁵ See General Comment No. 25, Paragraph 25, of the United Nations Human Rights Committee (adopted 12 July 1996). The United Nations Human Rights Committee has adopted a General Comment (General Comment No. 25) interpreting the principles for democratic elections set forth in Article 25 of the International Covenant on Civil and Political Rights.

2. Right to candidacy

13. The interpretation and implementation of Article 13.3.4 of the Electoral Code (liabilities before foreign countries as a limitation on candidacy rights) has been a problem in past elections. The Constitutional Court, in its decision delivered on 1 August 2003, applied the provision 'having no obligations towards other states' of Article 100 of the Constitution to a specific case before it. The provision is one of the requirements to be fulfilled by candidates for the office of President. In its decision the Constitutional Court emphasised that the constitutional electoral right is one of the main characteristics of a democratic state. The right to elect representatives to different state bodies is an essential one in a democracy. The right of citizens to participate in State governance and the electoral right are enshrined in the Constitution (Articles 55 and 56).

14. The Constitutional Court considered that the legal meaning of Article 100 of the Constitution "having no obligations towards other states" implied the existence of obligations based on relationships causing a citizen to be bound to and dependent on foreign states. Concerning the legal meaning of one of the requirements: "having no obligations before other states" in Article 13.3.4 of the law, the Court explained that depending on the regime granting permission to stay in a country, a foreigner may have different obligations to the State where he/she lives such as: registration, prohibition on leaving the place of residence or the territory of the state for a period exceeding the specified terms, payment of taxes in certain cases, registration for military service upon reaching a certain age, or other obligations in accordance with the legislation of that state. Although the Constitutional Court provided these specific examples, it also stated that "obligation" means "the necessity to carry out something". The phrase "necessity to carry out something" is ambiguous and, even with the specific examples given, whether there exists "necessity" to act depends on the domestic law of the specific country. Thus the Constitutional Court decision has not resolved the ambiguity that exists in Article 13.3.4.

15. An amendment to Article 13.3.4 is intended to provide some clarification by giving a definition of an obligation towards a foreign country that would prevent candidacy. Although the amendment does not address the ambiguity issue, it does introduce an element of time to Article 13.3.4 that should provide a clear line when the article *cannot* be applied. The amendment states that the liability must result from "permanent, steady and stable affiliation related to more than 5 years period of living abroad" (sic). Thus, although the scope of the article remains broad, there is a durational element that can limit its application. This amendment should be considered as positive but could be made clearer in the sense that it applies only to persons living abroad at the time of elections.

16. The reduced timeframe for election processes is also of concern due to the amendments that delete existing Articles 58.5 and 60.5. These two articles had allowed for candidates to register by paying a deposit should an insufficient number of valid signatures be submitted in support of candidacy. Due to the reduced timeframes introduced by the amendments, there is a greater likelihood that potential candidates will be rejected due to signature irregularities. However, such potential candidates will no longer be able to avail themselves of the possibility to register by paying a monetary deposit. The deletion of Articles 58.5 and 60.6 cannot be considered as positive.

17. An amendment to Article 181.1 reduces the number of signatures required for presidential elections from 45,000 to 40,000. This reduction is positive and partially addresses a previous recommendation. However, the OSCE/ODIHR and the Venice Commission have also recommended that Article 181.2 be amended to permit each voter to provide signatures for more than one potential candidate. The elimination of the possibility for candidates to pay a deposit in lieu of collecting signatures makes the failure to address this recommendation of

potentially greater impact for the registration of candidates, despite the reduction in the number of required signatures.

3. Cancellation of candidate registration

18. An amendment to Article 113.2 requires that cancellation of candidate (or referendum campaign group) registration be based on “an order established by the legislation if there is a court verdict in force on the criminal case” or “a court decision on the administrative offence”. This is an improvement in the current text of Article 113.2. However, the grounds for cancellation remain very broad (12 full paragraphs after amendment). In order to protect the presumption of innocence and right to appeal, the authorities of Azerbaijan have stated that the amended text is clear in the original language version that cancellation cannot occur until there is a final court judgment after exhaustion of all legal appeals. With this additional clarification, and as long as the same substantive safeguards required for a criminal trial are also required for proceedings on an administrative offence, the amendment can be considered as a significant step. However, the previous recommendations have not been fully met as the grounds for cancellation are very broad and disproportionate.

4. Designation of authorised representatives

19. An amendment to Article 54.5.4 changes the requirements for designating representatives of political parties during the candidate nomination process. Instead of requiring formalization by a notary, the amendment now requires “an order established by the Civil Code”. This procedure may be more burdensome than formalisation by a notary. Thus, this new procedure might not be clear enough and prevent some political parties from designating representatives to protect their interests, including the filing of electoral complaints. It is also not known if there are any costs required. As the proposed procedure would appear to be more burdensome than a simple formalization by a notary, and it is not clear why the change is necessary, the amendment it has to be seen how this new provision will be put into practice.

20. There is also an amendment (number 75), which appears to make a technical change in the Appendix 1A, 2A and 3A signature sheet forms annexed to the Electoral Code. However, this amendment, which substitutes “candidate” with “representatives of political parties, bloc of political parties”, does not appear to take into consideration the possibility of independent candidates. This amendment should be checked to ensure that it does not preclude the printing of signature sheet forms for independent candidates.

5. Central Election Commission regulation of exit poll organisations

21. The introduction of accreditation by the Central Election Commission of exit poll organisations could be a troubling amendment. This amendment introduces Article 25.2.23, which includes accreditation of these organisations within the power of the Central Election Commission. If the procedure concerns a simple notification in order to inform the Commission about the intent to conduct an exit poll it is acceptable. However, if the intent is to introduce a possibility for the Central Electoral Commission to take a decision on whether an exit poll can or cannot take place, this amendment raises concerns about the right of individuals to exercise free speech (protected under Article 47 of the Constitution of Azerbaijan) and the media to gather and present information to the public (Article 50 of the Constitution of Azerbaijan provides that “*every person shall have the right to legally seek, receive, pass and spread information*”).

22. This amendment does not address any previous recommendation. It is not clear why this amendment is needed.

6. Polling stations for military voters

23. An amendment to Article 35.5 attempts to address the recommendations in the OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections concerning abuses that took place in the establishment of polling stations for military voters and the appointment of polling staff for military voters.⁶ The recommendations raised concern that Article 35.5 was not being applied on an exceptional basis, as it should be, and that it was becoming the general rule instead of the exception. The recommendations were also based on the observation that Article 35.5 (Establishment of Election (Referendum) Precincts) appeared to be applied arbitrarily without application of any consistent and objective criteria. Further, Article 35.5 allows for the creation of special military polling stations where the military authority of Azerbaijan designates a “special regime” for one or more members of the military. As “special regimes” are military secrets, very little is known about them. However, the OSCE/ODIHR Election Observation Mission was able to ascertain that in the 2005 Parliamentary Elections more than 71,000 voters voted in polling stations dedicated to military voting.⁷

24. The amendment to Article 35.5 does not address the recommendations. The amendment merely requires that the establishment of military polling stations for special regimes be reflected in a decision of the Central Election Commission made at least 5 days prior to election day. One could accept that there are particular security-related concerns in Azerbaijan. However, there is no definition of “special regimes”, and thus, the amendment makes no significant change.

7. Observer and representative badges

25. An amendment to Article 36.6 provides for observers in the polling station to be given identification badges. This is an appropriate amendment that has the potential to reduce the number of unauthorised persons in polling stations.

26. An amendment to Article 72.2 requires that registered agents of candidates, political parties, and blocs of political parties be issued a verification badge instead of a verification card. This is an appropriate amendment that should make it easier to determine which persons are authorised to be present in the polling station.

8. Ballot envelopes

27. Several amendments remove “envelopes for ballot papers” from the articles regulating voting and counting processes. These amendments abolish the use of ballot envelopes in elections in Azerbaijan. These amendments do not address any previous recommendations. Authorities in Azerbaijan have stated that these amendments are necessary in order to allow for the recounting of ballots and that the use of envelopes has prevented recounts in past elections. Although ballot envelopes can provide a security mechanism, other measures during the voting and counting processes can also provide a sufficient level of security.

⁶ Recommendation numbers 13 and 14 of the OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections.

⁷ OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections, page 9. It is not clear how many of these military voters voted in “special regimes”.

9. Election day inclusion on list of voters

28. An amendment to Article 46.1 provides that a decision on whether a person should be added to the voters list on election day shall be made by the Precinct Election Commission in accordance with rules determined by the Central Election Commission, instead of by a court. Although courts are presumed to be more impartial than election commissions, this amendment could provide a greater suffrage opportunity for a person whose name has been omitted from the voters list. Further, it is more likely that observers will be present in election commissions rather than courts on election day. Nothing in the amendment restricts the scope of the rules to be determined by the Central Election Commission. Thus, the rules could allow for not only the correction of mistakes but also the addition of new voters. The amendment also appears to exclude judicial review of questionable decisions to add voters on election day.

29. It should be recalled that the Code of good practice in electoral matters (Doc. CDL-AD(2002)023rev, I.1.2.iv) provides that *“there should be an administrative procedure - subject to judicial control - or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place at the polling station on election day”*. Such a solution should therefore be avoided in principle and the emphasis put on the improvement of the lists in order to limit to a minimum the number of contestations. It could be admitted for a short transitory period, implying judicial review if the election commission cannot take a decision unanimously or by consensus, and should address only obvious mistakes such as misspelling of names. It will be important for the rules determined by the Central Election Commission to consider these points. Further, after the next elections, an evaluation should be made of the implementation of the Central Election Commission rules and the suitability to use this procedure again for another election.

10. Voter lists and electoral precincts for accused persons and inmates in penitentiaries

30. An amendment to Article 46.6 provides that the Precinct Election Commission shall prepare voter lists, in addition to members of the military and their family, for accused persons detained in investigative facilities and inmates in penitentiaries. Such lists are provided to the Precinct Election Commission by investigative facilities and penitentiaries at least 25 days prior to election day. An amendment to Article 46.9 provides for the establishment of electoral precincts in penitentiaries at least 35 days prior to election day. These amendments may facilitate voting by persons in detention.

31. An amendment creating a new Article 47.5¹ requires that newly arrested or detained persons shall be included in the voter lists. Information on these persons is to be submitted to the Precinct Election Commission at least 2 days prior to election day by the court that made a decision on arrest or the executive authority that made a decision on detention. This amendment should be considered, as are the amendments to Articles 46.6 and 46.9, as potentially facilitating voting by persons in detention.

11. Display of addresses of voters

32. An amendment to Article 48.1 addresses a previous concern expressed in the 2005 Final Opinion on the Amendments to the Election Code (CDL-AD(2005)029, para. 23) that the addresses of voters were not contained in the voters list that was publicly displayed locally (as opposed to the list displayed on the Internet). This is a welcome amendment addressing the concern.

12. Withdrawal of group from referendum campaign

33. The new Article 73 appears to be a technical amendment to make the procedure for withdrawal of a referendum campaign group similar to the procedure for withdrawal of a candidate. It would appear that this amendment ensures that withdrawn referendum campaign groups do not receive public resources during the referendum campaign. As long as withdrawn referendum campaign groups maintain their rights of expression, speech, association, and assembly, depriving them of public resources for the referendum campaign due to their official request for withdrawal is acceptable. Referendum voters have the right to receive information from such groups notwithstanding that some groups could decline the benefit of public resources for conveying information to voters.

13. State TV and radio in the campaign

34. An amendment to Article 77.1, which currently requires equal conditions for the conduct of the campaign on all media receiving funds from the State, limits the application of Article 77.1 to “public TV and radio companies”, thereby excluding the current State funded TV and radio from the article’s application. The authorities in Azerbaijan have explained that this amendment is made in anticipation of the enactment of new legislation regulating “public TV and radio” and that the new sentence “No election campaign is conducted by the TV and Radio companies that belong to the State” address any concern about the exclusion of State funded TV and radio from the article. Although the amendment could be evaluated again when new media legislation is enacted, in the meantime, State TV and radio remain important media outlets that should meet the same obligations in campaign coverage as Public TV and radio and, therefore, should remain within the terms of Article 77.1. The current amendment would limit the scope of election-related information and political views available to voters, which are crucial in order for voters to make informed choices on election day. This is especially true in view of amendments limiting the length of the official campaign period. The amendment cannot be considered as positive.

35. An additional concern with Article 77.1 is that it does not address the issue of equal treatment in State owned or controlled media. Equality in advertising may be respected while unfair advantage and treatment is given to a political party or candidate in news coverage. News coverage, political coverage, forums, or editorials in the State TV and radio should respect the principle of fairness and equality. Biased coverage or treatment in State-funded media should be prohibited, and authorities should be required to immediately act upon any violation.

14. Paid advertisements on TV and Radio

36. An amendment, creating Article 81.11, incorporates by reference application of legislation on advertisement to paid air time for election campaigning on TV and radio. The legislation on advertisement has not been reviewed, and no opinion is expressed as to whether this is a positive or negative amendment.

15. Venue of election rallies

37. The 2004 Joint Recommendations of the OSCE/ODIHR and the Venice Commission identified problems encountered by candidates and political parties when attempting to hold election campaign rallies. Article 86 of the Electoral Code, as well as the Law on the Freedom of Assembly, were identified as requiring amendments in order to address the problems. Concerning the Law on the Freedom of Assembly, a new law was adopted by the Milli Majlis in May 2008 and it is hoped that the final text of the enacted law meets OSCE commitments and Council of Europe standards and is implemented in a non-discriminatory and inclusive manner that allows candidates and political parties to gather for rallies in

venues that are adequate for campaign purposes. Concerning Article 86 of the Electoral Code, the authorities in Azerbaijan state that the problem is not with the text, but rather with its implementation. Thus, it would appear that these are issues of good faith implementation of the law by authorities.

16. Display of campaign materials on private property

38. An amendment to Article 87.7 provides: "Except for rooms, display of pre-election materials against the requirements of the Civil Code of the Republic of Azerbaijan on buildings, other places shall be prohibited." The Civil Code has not been reviewed. Therefore, no opinion can be expressed as to whether this amendment, which incorporates the provisions of the Civil Code, establishes unreasonable restrictions on the right to express political support for a candidate by the display of campaign material on private property. The prior version of Article 87.7 allowed the display of campaign materials if the owner gave consent. Owner consent is no longer the controlling factor for the display of campaign materials on private property. It remains to be seen whether the application of this amendment raises questions of compatibility with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47 of the Constitution of Azerbaijan.

17. Mobile voting

39. An amendment to Article 105.2 changes the deadline for requests for mobile voting from 2 days before election day to "12 hours before". Although mobile voting increases the opportunities for voting, it can also increase the possibilities for fraud since the mobile ballot box is not contained in a controlled voting environment. Past election observation reports indicate that there is already a significant level of mobile voting. In the 2005 repeat parliamentary elections, where voting occurred in only ten constituencies, more than 3.1 per cent of the votes were cast by mobile voting.⁸ There has been no indication that the current deadline of 2 days is insufficient. Implementation of this amendment should be observed closely in the next elections.

18. Inking of voters' fingers

40. Several amendments, but primarily the amendment to Article 102 of the Electoral Code, introduce the inking of voters' fingers, which is a previous recommendation for security against fraud and increasing public confidence.⁹ These are welcome amendments. The introduction of this measure also provides for safeguards regarding the provisions for inclusion of voters on the voter list at polling stations on election day (para 17).

19. Election day

41. An amendment to Article 8.2 changes election day to a non-working day. This amendment should be considered as a positive amendment as it may result in greater voter participation.

⁸ Final Report Partial Repeat Parliamentary Elections, 13 May 2006, Republic of Azerbaijan, OSCE/ODIHR Limited Election Observation Mission, Annex to the Final Report on 6 November 2005 Parliamentary Elections, page 12.

⁹ Inking of voters was recommended by the OSCE/ODIHR and the Venice Commission in the Joint Final Assessment, CDL-AD(2003)015, para. 42; Recommendation number 4 of the OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections.

20. Submission of preliminary constituency election results

42. An amendment to Article 109.3 changes the deadline for submission of preliminary constituency election results to the Central Election Commission and mass media from “24 hours starting from the voting day” to immediately “after acceptance of protocols on voting results of election precincts by the Constituency Election Commission”. This amendment also deletes the text that the summarised schedule of results “integrates voting results for election precincts”. It is not clear whether the deletion of the text “integrates voting results for election precincts” will change the format of the preliminary constituency election results that are provided. As the format of the results is critically important for transparency and tracing of individual precinct election results into subsequent tabulations at a higher level, it should be verified whether this amendment will negatively affect transparency or the ability to check the tabulated results against the original election precinct results for each individual polling station.

21. Expert groups for complaints and appeals

43. Several amendments introduce new articles that create “expert groups” to be actively involved in the complaints and appeals processes. These articles are an attempt to improve the existing articles, which have been implemented with no success in past elections.

44. Previous OSCE/ODIHR election reports and the joint opinions of the OSCE/ODIHR and the Venice Commission have commented extensively on the failure of the legal authorities, both election commissions and courts, to fairly, efficiently and timely adjudicate complaints and appeals filed to protect electoral rights.¹⁰ The OSCE/ODIHR and the Venice Commission have recommended that the legal framework “ensure effective and prompt protection of electoral rights”.¹¹

45. Authorities in Azerbaijan have stated that the primary reason for the failure to provide an effective process for the protection of electoral rights is that election commissions do not have the capacity to develop the facts upon which an adjudication of legal rights can be based. According to the authorities, this lack of capacity has a domino effect, likewise preventing courts from adjudicating appeals involving electoral rights. The amendments attempt to address the lack of fact-finding capacity by creating “expert groups”, composed of relevant experts¹² within the election commission structure, to make factual findings and recommendations on electoral complaints. Although authorities in Azerbaijan remain convinced that an expert groups apparatus will solve the problems, it is not clear that this additional structure will ensure the fair, efficient and timely adjudication of complaints and appeals filed to protect electoral rights. The true test will be when the new structure is implemented and whether the new structure does in fact provide effective remedies to correct wrongs.

46. The text of the adopted amendments is an improvement over previous draft versions. The current text provides greater clarity regarding the role of the expert groups. However, it remains to be seen whether the current text is of sufficient clarity to limit the role of these expert groups to recommendations and to ensure that real legal authority is exercised by the election commissions. This is an issue that should be closely observed in the next elections.

¹⁰ See Joint Final Assessment of the Electoral Code of the Republic of Azerbaijan of 1 September 2003, CDL-AD(2003)015 (JFA03) para 52-53; Recommendations number 5 through 10 of the OSCE/ODIHR Final Report on the 6 November 2005 Parliamentary Elections.

¹¹ Joint Final Assessment of the Electoral Code of the Republic of Azerbaijan of 1 September 2003, CDL-AD(2003)015 (JFA03) para 52-53.

¹² The amendments also state that “Commissions’ lawyer members may be included in the composition of these groups”.

47. The rules for establishing expert groups are to be determined by the Central Election Commission. Due to the very important role these expert groups will have, it would have been preferable to regulate the rules for appointment in the law instead of subsequent Central Election Commission rules. Expert groups should be appointed in an inclusive manner that provides public confidence in their work. The Central Election Commission should make every effort to ensure inclusiveness in these expert groups and promote public confidence in their work.

22. Amendment related to potential recounts

48. An amendment creating a new Article 170.3 provides:

170.3. If voting in a single mandate election constituency is considered invalid due to the miscount of ballot papers, the Central Election Commission shall make a decision on recount of votes. In such a case, the recount shall be provided by the relevant constituency election commission in a manner determined by the Central Election Commission.

It is not clear how this article could be applied in an election. Under existing Article 170.2, an election in a constituency is invalid in three situations: (1) violations of law during voting or counting “that make it impossible to determine the voters’ will”; (2) cancellation of voting results exceeds 2/5ths of the number of precincts in the constituency and the number of registered voters in the precincts exceed 1/4th of voters registered in the constituency; and (3) on the basis of a court decision. The new Article 170.3 requires a recount “if voting in a single mandate election constituency is considered invalid due the miscount of ballot papers”. However, a miscount of ballot papers is not a ground in Article 170.2 for invalidation. Thus, it would not appear that there would ever be a legal basis for requiring a recount since a miscount of ballots is not a ground for invalidation under Article 170.2. Although the amendment appears to attempt to address a previous recommendation that a recount of ballots should be taken before results are invalidated, application of the amendment in an election would be difficult due to the grounds for invalidation stated in Article 170.2. The issue of recount is an important one that has previously been raised as efforts to recount ballots should be taken before election results are invalidated. As the application of Article 170.3 is prevented by the existing text of Article 170.2, the recommendation remains unaddressed.

III. Conclusion

49. The adopted amendments have addressed some previous recommendations of the OSCE/ODIHR and the Venice Commission. This is a positive development. However, some of the new amendments are problematic. In addition, several previous recommendation remain unaddressed or insufficiently addressed.

50. Some recommendations contained in the former Joint Final Assessment (CDL-AD(2003)015), in the Joint Recommendations (CDL-AD(2004)016rev (JR04)), and in the Final Opinion (CDL-AD(2005)029), which are important for the 2008 Presidential election and have not been addressed or are insufficiently addressed, include¹³:

1. Composition of Election Commissions (paragraphs 9-12 of the Joint Recommendations);
2. Signing petitions for Presidential elections (paragraph 13);
3. Refusal of candidates for Presidential elections (paragraph 14);
4. Financing provisions (paragraph 19);

¹³

The original numbers of the issues and recommendations from CDL-AD(2004)016rev (JR04) are kept.

5. Declaration of invalidity (paragraph 36).

51. Given the extent of discussions with the authorities on these issues, it is of concern that these issues have not been addressed in the amendments.

52. It is also necessary to reiterate that the Electoral Code remains far too complex with unnecessary repetitions, especially in the provisions on the registration of candidates, campaign financing, lists of persons entitled to conduct pre-election campaign and limitations on the content of election campaign material.