

CURRENT SITUATION ON THE IMPLEMENTATION OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE RIGHT TO FREE ELECTIONS



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I. Introduction

The member states of the Council of Europe have committed themselves to securing the rights and freedoms set out in the Convention within their jurisdictions by signing the Convention on Human Rights and Freedoms. By signing the Convention, Member States have adopted the jurisdiction of the European Court of Human Rights, established under the Convention, whose decisions are binding on member states. In other words, Member States have undertaken to execute the decisions of the European Court concerning them. The Committee of Ministers of the Council of Europe is responsible for the implementation of these decisions. Azerbaijan undertook to fulfill these commitments by becoming a member of the Council of Europe in 2001 and ratifying the Convention. However, there are frequent problems with the execution of the Court's decisions by the Azerbaijani government.

In the 2005 and 2010 parliamentary elections in Azerbaijan, the European Court has made a total of 23 verdicts that the Court has declared that more than 50 applicants' passive suffrage have been violated. Despite the requirements of the EC on the implementation of these decisions, the Azerbaijani government did not comply with the requirements and recommendations of the MC on general measures envisaging the improvement of election legislation to ensure free and fair elections, even though the applicants were paid compensation. Consequently, every subsequent election was more distorted than the free and fair electoral principles and was observed with more electoral violations

The main purpose of this document is to analyze the implementation of the decisions of the European Court of Human Rights on violations of the passive suffrage and to describe the current situation with regard to election law and election practice, to demonstrate the difficulties of implementing the requirements and recommendations of the Council of Europe Cabinet of Ministers and to conclude recommendations for steps to be taken to ensure free and fair elections.

The document was compiled by EMDS on the decisions made by the European Court of Human Rights in respect of Azerbaijan in violation of the electoral right and the decisions adopted by the Council of Europe Cabinet of Ministers, which oversees the execution of these decisions. The document refers to the reports of the OSCE / ODIHR, as well as the reports on EMDS's parliamentary and presidential elections in Azerbaijan.

The EMDS is a non-governmental organization working for holding free and fair elections, as well as development of civil society and democracy in Azerbaijan. EMDS was established by founders and members of Election Monitoring Center (EMC), the registration of which was annulled in 2008.

Besides, EMDS has implemented programs on civil education and political rights (such as electoral rights, right of appeal, freedom of peaceful assembly and freedom of association), citizen participation in public policy, increasing accountability of local and central administrative bodies, as well as protection of political rights. At present, EMDS also deal with protection and promotion of human rights in Azerbaijan.

II. Background of this group of cases

This group, as a whole, consists of the 23 judgments of the Court. The cases are related to the violations of Protocol No. 1 Article 3 of the Convention which found by the Court regarding the 2005 and 2010 parliamentary elections held in Azerbaijan. It reveals from the cases that violations have been the consequence of the decisions of the **election commissions** and the **domestic courts**.

The irregularities found in the conduct of the election commissions were as follows: the applicants' complaints and evidence were dismissed without reasoning; the statements and witness testimony against the applicants were accepted without a proper examination to determine their truthfulness and credibility; the lack of independent examination and reasoning in the decisions cancelling the applicants' registration as candidates or their election; the applicants' lack of participation in the hearing.

The shortcomings revealed in the decisions of the domestic courts were as follows: refusal to examine the evidence submitted and failure to take steps to clarify outstanding issues, owing to excessive formalism stemming from the civil procedure rules; the domestic courts merely and simply reiterated the findings made by the electoral commissions; the applicants did not have sufficient time to prepare their defence in the expedited procedure; the erroneous application of the electoral law.

At the first examination of this group of cases at the 1179th meeting held on September 2013, the Committee of Ministers noted that since the results of elections had been confirmed as final, the effects of the violations could only be eliminated by payment of the compensation awarded by the Court

In December 2015, the CM noted that, although parliamentary elections were held in 2015, the reforms required to bring the elections in line with international standards, to ensure effective review of the complaints and to prevent arbitrary decisions to be delivered, had not been made. The CM, therefore, called on the Government to start reforms in a short time.

In its 1265th meeting held in September 2016, the CM regretted that the Government had not started the reforms so that it reiterated its previous requirements on the reforms.

In its 1280th meeting held in March 2018, the CM called on to make reforms deriving from the action plan to implement this group of cases.

III. Recent developments relating to the implementation

Despite these calls by the CM, the Government has failed to take steps in order to improve the operation of election commissions and ensure effective and fair examination of the election-related complaints.

a) Election commissions

The election commissions' operation still remains as before. Any step forward on their improvement is not observable. The recommendations by the Venice Commission targeting amendments to the election code on composition of election commissions have not been considered by the relevant state bodies. It has not been observed that the Government took any step forward addressing shortcomings by amending legislation. The structure of election commissions, which is composed of the representatives of the parties represented in the parliament, remains unchanged. The election commissions are composed of the representatives of majority, minority and independent deputies. The chairmen of the commissions are the representatives of the ruling party. Although this fact raised concerns regarding the impartiality of the commissions and the Government was recommended to remove this mechanism, no change was brought to the relevant provisions of the Electoral Code. The OSCE/ODIHR, in its 2018 Final Report on Presidential Election in Azerbaijan, noted that the formula for appointing election commissions does not provide for impartial election administration in practice, given that there is no political differentiation between these groups in the parliament that nominate the commissioners.¹

One of the concerning issues is related to the registration of candidates. After 2005, more serious irregularities emerged with regard to the registration of the candidates. District Election Commissions rejected to register candidates without proper reasoning, and the Central Election Commission (CEC) upheld the decisions of lower commissions without any effective examination. The domestic courts, in turn, upheld the decisions of the CEC. As a result, in every Parliamentary Election held after 2005, the number of registered oppositional candidates declined. In 2005, oppositional "Freedom", "New Economic Policy" blocs and the Azerbaijan Liberal Party were registered in more than 60 districts each, and thus they obtained the right of free airtime and access to media financed by the state budget.² Candidates nominated by the ALP, NEP and Freedom blocs were registered in 70, 71 and 61 districts, respectively.³ According to the final report of OSCE/ODIHR on Parliamentary Elections held on 7 November, 2010, the APFP–Musavat bloc had 38 registered candidates, out of 88 initially nominated, followed by the 'Karabakh' and 'Reform' blocs, with 34 and 31 registered candidates, out of 95 and 97 initially nominated, respectively, while all 111

¹ Final Report of OSCE/ODIHR on Early Presidential Election, 11 April 2018, page 7.

www.osce.org/odihr/elections/azerbaijan/388580?download=true

² Final Report of OSCE/ODIHR on Parliamentary Election, 6 November 2005, page 8,

www.osce.org/az/odihr/elections/azerbaijan/17946?download=true

³ Ibid, page 18.

candidates nominated by the ruling New Azerbaijan Party were registered.⁴ In the Parliamentary Election held on 1 November 2015, National Council, an umbrella organization which was created by the leading oppositional parties, NGO representatives and activists prior to the Presidential Elections in 2013, considered the pre-election environment antidemocratic and boycotted the election. In these elections, ruling New Azerbaijan Party participated with 117 registered candidates. However, oppositional Musavat Party nominated 73 candidates and only 25 of them were registered. Along with this, the Republican Alternative Movement and Nida Civic Movement registered 17 and 1 candidates, out of 24 and 8 initially nominated, respectively. The application of the member of Nida Civic Movement, Zaur Gurbanli, was turned down and he was rejected to be provided with signature sheets due to his conviction, whereas the application of another member of the movement, Uzeyir Mammadli, who also had a conviction, was accepted. On October 29, 2015, three days prior to the election, the Musavat Party declined to participate in the election due to the lack of democratic electoral reforms, total governmental control over the election commission, discrimination against candidates, unjustified rejection to register a large number of candidates nominated by the party, failure to provide candidates and political parties with free airtime for the first time since the independence of Azerbaijan, unlawful decisions made by the Central Election Commission and the District Election Commissions, the Court of Appeal and the Supreme Court during the election campaign.⁵

A Referendum on amendments to the Constitution of September 26, 2016 was held without the recommendations of OSCE/ODIHR and EMDS having been taken into consideration. Therefore, fundamental irregularities that had taken place in previous elections were repeated during the Referendum as well. EMDS assessed the Referendum and pointed out that due to shortcomings on situation of democracy and political freedoms prior to and during the Referendum, including the voting day, the Referendum was held with serious violations. Some oppositional forces boycotted the Referendum, the "Republic" campaign group of Musavat party was denied registration. Shortcomings concerning the registration during previous elections continued to be the main obstacle for the opposition groups to take part in the Referendum.

In its **Gahramanli and others v. Azerbaijan** judgment, the Court urged the Government to increase an effort to reform the structural composition of the election commissions with the aim of improving the effectiveness of examination of individual election-related complaints. However, no step has been taken in this respect.

In its 1310th meeting, the CM noted that in the communication to the CM dated 20 February 2018,⁶ the Azerbaijani Government informed it that the Central Election Commission of Azerbaijan regularly organised professional courses on election rights with the aim of increasing the level of professionalism of lower election commission members and for

⁴ Final Report of OSCE/ODIHR on Parliamentary Election, 7 November 2010, page 10,

www.osce.org/az/odihr/elections/azerbaijan/75655?download=true

⁵ <https://www.azadliq.org/a/27331385.html>

⁶ 1310th meeting (March 2018) (DH-DD(2018)178),

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168078af9e

improving their professional skills and capabilities. Such training courses, however, are ill suited to remove systemic problems. Because shortcomings are not mostly related to the professionalism of commission members but related to gaps in the legislation and absence of political will to reform the legislation.

It was observed in the 11 April 2018 presidential election, the composition of the elections commissions stayed untouched. According to the report of OSCE/ODIHR on this election, shortcomings regarding the composition of expert groups verifying the authenticity of the signatures were the reason why two of the presidential candidates were denied registration. Despite irregularities observed by the OSCE/ODIHR and confirmed in the judgments of the Court, nobody among the member of the commissions was held responsible.

Complaints to the election commissions are reviewed by expert groups who were not independent, giving rise to concerns. According to the Election Code, the Central Election Commission forms Expert Groups within the Central Election Commission and the Constituent Election Commissions in order to hear complaints and objections to the relevant commissions on individual cases. The working groups are chaired by members of commissions establishing the group. The Expert Groups also include independent experts, specialists from the relevant state bodies. Therefore, in practise, members of working groups are not independent, as a result they decide in favour of commissions.⁷ Notwithstanding, the government did not appear to have considered amendments to the composition of expert groups.

As a result of the above-mentioned reviews, we witness that the number of applications to the Court and judgments of the Court concerning Azerbaijan regarding violations of the right to free election is increasing after each parliamentary election. The Court examined 11 complaints concerning the Parliamentary Election of 2005 and found a violation of Article 3 of Protocol No. 1. Seven other similar applications were struck out by the Court after the Government's unilateral declaration acknowledging the same violations. Concerning the presidential election in 2010, the Court delivered 12 judgments which found a violation of the right to participate in the election of 50 applicants. 8 cases covering 31 applicants are related to the refusal of candidate registration and denial of the effective examination of the complaints from lower election commissions to higher election commissions and courts. 4 cases covering 19 applicants concerned the violations and irregularities on voting day including interference with the election process by electoral commission members, obstruction of observers and ballot-box stuffing, etc.

b) Domestic courts

Despite the fact that the right to stand as a candidate in elections concerned the applicant's political rights and did not have any bearing on his "civil rights and obligations" within the

⁷ Assessment Report of OSCE/ODIHR on Parliamentary Election of 01 November 2015, page 9, Complaints and Appeals, paragraph 2, available at <https://www.osce.org/odihr/elections/azerbaijan/179216?download=true> ,

meaning of Article 6 § 1 of the Convention, the violation of the right to a fair trial, in a broad meaning, is also the case in the complaints on electoral rights.

Non-compliance of the domestic courts' decisions with the fair trial requirements is not only observed in the election-related cases but also in all politically-motivated cases.

Judicial bodies' decisions on alleged violations of all kind of rights, including electoral rights, are almost always in favor of the bodies from which the complaints are lodged. These bodies include election commissions, prosecution authorities, law enforcement agencies, etc. This issue has always been raised before the relevant authorities but to no avail.⁸ In such cases, the complaints to the domestic courts are not subjected to fair and effective scrutiny. The domestic courts fail to comply with positive obligations of the State deriving from international and regional human rights instruments such as the European Convention to which Azerbaijan is party. The applicants are not given adequate time to prepare their defence and the petitions are not granted as a rule. This is also the case in all politically-motivated cases.

The amendments to the Azerbaijani legislation (Code of Civil Procedure, Code of Administrative Procedure as well as Law on Lawyers and Legal Practise) on 31 October 2017 regulating the representation of citizens in the domestic courts. According to the amendments, citizens can be represented in courts only by lawyers who are a member of the Azerbaijan Bar Association. Considering that the number of bar members in the country with 10 million people is app. 1500 and the Azerbaijan Bar Association is under the influence of the authorities, these amendments left the majority of people before the domestic courts alone. As a result of the amendments, more than 5000 lawyers were unable to act as legal representative in the civil and administrative courts of first and appellate instances. In order to increase the number of bar members, two-stage exams were held by the Azerbaijan Bar Association. The lawyers who had been actively involved in representing political prisoners and who had the prospect to continue the defence as bar members were subjected to arbitrary decision so that all of them were put aside in the second round of the exam.

Since the end of 2017, pressure on and persecution of the lawyers involved in the defence in politically motivated cases have intensified. In 2018 two lawyers were disbarred from the Azerbaijan Bar Association, four lawyers' legal practise was suspended, two lawyers were reprimanded. In 2019, at least one lawyer's legal practise was suspended. As a result, the majority of the political prisoners were deprived of the right to defence. The Working Group on Unified List of Political Prisoners which was established by and composed of human rights defenders, lawyers, journalists and experts (EMDS chairman Anar Mammadli is a member of the group) has requested the Human Rights Commissioner of the Council of Europe to urge the European Court of Human Rights to proceed the human rights cases from Azerbaijan without exhaustion of domestic remedies due to the lack of professional independent legal representation in the local courts.

⁸ Politically Motivated Administrative Detentions in Azerbaijan, published by EMDS, a part of the document so-called ' Court rulings on administrative detentions', available at <https://smdtaz.org/en/politically-motivated-administrative-detentions-in-azerbaijan/>

As a result of lack of independence and impartiality and safeguard against arbitrariness in the domestic courts, there are 70 political prisoners including 5 journalists, 31 political activists, journalists and civil society representatives right now who are under travel ban in the country.⁹

The same shortcomings are also encountered in the politically-motivated administrative arrests. In its 21 judgments on the cases in the Gafgaz Mammadov Group, the Court concluded that 71 applicants had been administratively arrested due to unfair trial in which the complaints and evidence were not duly examined and the courts relied only on the police versions and denied all other evidences submitted by the applicants. In the last year, up to 150 persons were sentenced to up to three months of administrative politically-motivated arrest.¹⁰ In these cases, first instance courts automatically upheld the decisions of police and appellate courts. In turn, the appellate courts upheld those of the first instance courts without due examination.

On 1 March 2019, Azerbaijan President, in his speech, finally acknowledged that reforms were needed in the judicial system of Azerbaijan. On 3 April 2019, he issued a presidential decree on deepening judicial and legal reforms.¹¹ However, at the same time it is observed that the political activists are still persecuted and punished through the domestic courts. On 30 March 2019 Bayram Mammadov, former political prisoner also known as a prisoner of graffiti was detained and sentenced to 30 days of administrative arrest only 13 days after he was released by presidential pardon decree.¹² Besides, on 30-31 March 2019, four Popular Front Party members were sentenced to up to 30 days of administrative arrest due to the prospect of an authorised rally planned to be held on 7 April.

All these arbitrary decisions are the consequence of impartiality and non-neutrality of the courts, which remains a serious unsolved problem in Azerbaijan. These issues can be solved only through judicial reforms and political will.

IV. Conclusion and Recommendations

As it was previously mentioned, despite the numerous calls by the Committee of Ministers, general measures applied in the process of the implementation of the judgments concerning the Namat Aliyev group were not comprehensive, actions were superficial and did not contribute significantly to the resolution of the problem. It is clear that the main reason of irregularities taking place in election commissions and courts is not a lack of professionalism of commission members and the judges, but that the problems are more fundamental. The main reason for the violations is the composition of the commissions and domestic courts,

⁹ EMDS issued assessment report on politically-motivated travel bans on 14 February 2019, available at <https://smdtaz.org/wp-content/uploads/2019/02/EMDS-160119.pdf>

¹⁰ EMDS issued assessment report on politically-motivated administrative detentions on 15 April 2019, available at <https://smdtaz.org/wp-content/uploads/2019/04/AD-doc.pdf>

¹¹ <https://president.az/articles/32587>

¹² <https://www.hrw.org/news/2019/04/03/azerbaijan-youth-activist-freed-then-re-arrested>

their dependence on the outside influence and the absence of mechanism to shield them from such an influence which leads to arbitrary decisions being delivered. Despite the recommendations by OSCE/ODHR as well as EMDS, on making reforms regarding election commissions, ensuring effective examination of the complaints before the local courts, calls for the implementation of judgments the Court, shortcomings remained unchanged as the government implemented only cosmetic changes and did not take any serious steps. There are two ways to eliminate these irregularities and prevent them from happening in the future: political will and reforms in the judicial and legal system.

Taking into consideration the aforementioned, EMDS calls on the Azerbaijani government to include the following recommendations into its action plan. EMDS believes that it is important to start the implementation of these recommendations as soon as possible, so the next elections can be free and fair.

On election commissions:

- The election commissions should be formed based on political parity principle in order to ensure their independence.
- Refusal to register candidates should be well-grounded, reasoned and based on facts. Authorities should carry out an effective and thorough investigation on all complaints and violations happening during any stages of the elections, and hold accountable all responsible persons including commissions members who are involved in violations.
- Transparency of signature verification process should be ensured offering information to candidates about the deficiencies and providing a genuine opportunity to correct them.
- The recommendations of local and international institutions on the improvement of the Election Code, including those of the Venice Commission of the Council of Europe and the OSCE/ODIHR, should be properly addressed by the government.
- Complaints to the election commissions should be reviewed by experts groups that are independent from the executive. The candidates should be given an opportunity to participate both at the process of evaluation of their cases by the experts and at the process of examination of their complaints.
- The composition of election commissions should be reformed. Those who played any role in violations in previous elections should be held responsible and replaced.

On the local courts:

- Courts should examine the cases objectively and comprehensively, substantiate their conclusions and indicate the legal basis for their decisions. Results of the elections should not be confirmed by the Constitutional Court unless the examination of the complaints concerning election results has been finished, provisions allowing this procedure directly or implicitly should be taken out of the legislation and provisions which can prevent this mechanism should be enacted instead.

- In order to prevent interference of the executive power with the work of judicial power, the judges should be chosen directly by the judicial system and procedural rules should be determined by the court system. If the legislation allows appointment of judges by the Government, in this situation the appointment should be implemented in a highly transparent environment, it should be obvious that the decisions were made according to objective criterias and the legislation should be provided with the special mechanism in order to prevent cases of arbitrariness during the appointment process.
- An Independent Judicial-Legal Council should be established. The significant part of the composition of this Council should be chosen by the judicial power.
- Independent Judicial-Legal Council should play a key role not only in appointment of judges, but also their appointment to higher judiciary positions or their punishment if required. If the judges would be subjected to disciplinary responsibility it should be implemented by the judicial power.
- It is necessary to provide for sanctions and penal measures to protect judges from external influence they may be subjected. The punishment should be more strict if the interference is made by other power branches. Accountability of the judges before outside body should be eliminated both in theory and practice.

On the advocacy institution

- Admission to the Bar should be implemented by the body established by the Bar Association and the role of the executive power in the admission process should be minimised.
- Admission to the Bar should be transparent, the presence of the third person as an observer should be ensured and video of the exams should be recorded. In this case the complaints of the candidates who were not admitted to the Bar Association on political grounds can be investigated more fairly.
- Law offices should have certain autonomy. The role of Bar Association Presidium in their establishment should be minimised. The consent of the Presidium should not be required, they should be just informed about the start of a new law office. This mechanism is very important for the autonomous work of the lawyers and this will prevent them from being influenced by the Presidium management.
- Provision related to penalty measures imposed on lawyers should be very clear in legislation and should not give a way to any abuse of power, provisions restricting autonomous activity of the lawyers should be repealed from legislation regulating bar institution.
- Political will should be demonstrated along with legal reforms ensuring autonomy of the Bar Association.

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