



Office for Democratic Institutions and Human Rights

REPUBLIC OF KAZAKHSTAN

ASSESSMENT OF THE CONSTITUTIONAL LAW ON ELECTIONS



Warsaw
24 August 2004

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ASSESSMENT OF THE CONSTITUTIONAL LAW OF THE REPUBLIC OF KAZAKHSTAN “ON ELECTIONS IN THE REPUBLIC OF KAZAKHSTAN”

24 August 2004

I. INTRODUCTION

This assessment¹ of the Constitutional Law of the Republic of Kazakhstan “On Elections in the Republic of Kazakhstan” (The Election Law)² is provided by the Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR). The assessment is based on an unofficial English translation of the text. Any legal review conducted on the basis of translated text may be affected by the quality of the translation.

The Majilis adopted the Constitutional Law on amendments to the then existing Election Law on 16 March 2004, the Constitutional Council approved these amendments on 9 April and President Nazarbaev signed the law on 15 April. The amended Election Law has been drafted with the benefit of an intensive and constructive dialogue between the OSCE/ODIHR, the authorities, and the civil society of the Republic of Kazakhstan.

The OSCE/ODIHR has previously commented on various aspects of laws that affect the conduct of elections in Kazakhstan and offered exhaustive and concrete recommendations.³ Previous comments and recommendations remain relevant, and this assessment, which comments only on the Election Law, should be considered as complementary. The assessment is intended to assist the authorities of Kazakhstan in their stated objective to develop a sound legal framework for democratic elections that meets OSCE commitments and other international standards.

¹ The assessment is available also in Kazakh and Russian language. However, the English version remains the only official document for the purposes of this review.

² The law regulates (1) direct elections of the President, deputies of the Majilis (the lower chamber of the Parliament of the Republic of Kazakhstan), the maslikhats (local government councils), and members of local self-administration bodies, and (2) indirect elections of the deputies of the Senate (the upper chamber of the Parliament).

³ See Conclusions and Recommendations of Needs Assessment Mission, Kazakhstan (21 August 1999); Final Report Republic of Kazakhstan Parliamentary Elections 10 and 24 October 1999 (20 January 2000); Review of the Legal Framework Regulating Election Disputes Resolution Mechanisms, Republic of Kazakhstan (29 February 2000), Review of the Election Legislation for Parliamentary Elections, Republic of Kazakhstan (18 January 2001); Review of the Election Legislation for Election Disputes, Appeals and Penalties, Republic of Kazakhstan (26 April 2001); Review of the Legal Framework for Media Coverage of Elections, Republic of Kazakhstan (15 September 2001); Review of the Presidential Decree for Pilot Local Elections, Republic of Kazakhstan (15 September 2001); Review of the Law on Political Parties Adopted on 15 July, Republic of Kazakhstan (23 July 2002), Comparative Study: Laws and Regulations Restricting the Publication of Electoral Opinion Polls (February 2003); Preliminary Assessment of the Draft Amended Election Law, Republic of Kazakhstan (19 September 2003).

Since 2000, the OSCE/ODIHR and the authorities of the Republic of Kazakhstan, together with other election stakeholders, have exchanged views on how the Election Law can be improved. Between September 2000 and January 2002, four round tables were organized on different aspects of the electoral process. All recommendations formulated at these round tables were summarized in a table prepared by the Central Election Commission for the Parliament's consideration. Throughout 2003 and 2004, OSCE/ODIHR and CEC experts engaged in intensive consultations on the preparation of amendments to the Election Law. The OSCE/ODIHR has provided comments and recommendations on the law and draft amendments that were being discussed with representatives of the authorities, political parties, and civil society. While a number of concerns that have been raised by the OSCE/ODIHR have been positively addressed, there is still room for important improvements.

Also, a number of new amendments were introduced during the third reading of the Election Law in the Majilis, including a possibility for "electronic" (paper-free) voting and counting of the votes (e-voting). Regrettably, this was done without providing opportunities for a broad public debate on this important issue. The OSCE/ODIHR also was not provided with the chance to comment on the new e-voting provisions. The legal provisions for the e-voting fail to provide for a manual audit of the votes and lack a meaningful modality for challenging the results of the voting and counting. Thus, possible changes in results figures occurring during either the counting and/or tabulation phases, and potential deficiencies stemming from hardware, firmware, software, installation and set-up of the e-voting system, may go undetected.

It should further be noted that on several occasions, the assessment refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the International Covenant on Civil and Political Rights (ICCPR). The former is, of course, not binding on Kazakhstan, but serves as a reference point for relevant international standards. As regards the ICCPR, on 17 November 2003, President Nazarbaev approved the State Decree on signing this international covenant. However, ratification by the Majilis is still pending.

II. EXECUTIVE SUMMARY

The OSCE/ODIHR is pleased to recognize that a number of recommendations formulated during the round table process and/or contained in previous OSCE/ODIHR reports and assessments have been taken into account in the final text of the Election Law. However, while some of the amendments represent considerable progress in terms of transparency, formation of more pluralistic election commissions, and creation of more equal conditions for candidates, the Election Law requires further improvement to fully meet OSCE commitments for democratic elections, especially with regard to remaining limitations on civil and political rights.

Improvements in the Election Law that enhance the overall transparency of the election process in meeting OSCE commitments for democratic elections include:

- Elaboration of a mechanism that provides the basic elements of a framework for political consultation, in order to determine the composition of pluralistic election commissions;
- Expansion of the rights of election commissioners, which permits a meaningful opportunity for all members of election commissions to participate in administering the election;
- The prohibition of undue interference in the work of the election commissions by the authorities;
- Prohibition of the presence of unauthorised persons in polling stations;
- Access by observers to the entire election process and the receipt of relevant election documents;
- Posting of election results protocols in precinct and district election commissions for public scrutiny;
- Efforts to provide equal conditions for election contestants during the election campaign;
- Procedures for compilation and verification of the accuracy of voter lists;
- Expansion of the list of prohibited activities that could interfere with the election process;
- Better regulatory framework for the compilation of voter lists;
- Better regulatory framework for signature verification;
- Introduction of transparent ballot boxes;
- Removal of limitations on numbers of party/candidate proxies;
- Provisions for all candidates to run again if an election is declared invalid;
- Removal of possibilities to disqualify candidates on the ground of administrative offences;
- Removal of the possibility for early voting; and
- Removal of the option to mark a ballot “against all”.

However, outstanding political and civil rights issues remain to be addressed. The Election Law runs contrary to OSCE commitments for democratic elections in the following areas:

- Limitations on the right to be elected;
- Limitations on the rights of candidates to engage in robust political discourse during the campaign;
- Limitations on the right of individuals and political parties to support independent candidates during an election;
- Prohibitions on the right of individuals to receive campaign material printed outside of Kazakhstan;
- Prohibitions on the rights of foreign citizens and stateless persons residing in Kazakhstan to express an opinion during the campaign;
- Limitations on the rights of observers to express opinions concerning the elections;
- Possibility for premature termination of an elected candidate’s mandate;
- Possibility for premature termination of an appointed election commissioner’s term;

- Disproportional sanctions, such as refusal of registration, de-registration and premature termination of mandates, which may be imposed for minor violations;
- Lack of sufficient guarantees for inclusive pluralistic representation on election commissions;
- Establishment of a system for e-voting that does not have sufficient safeguards to protect against tampering or system errors;
- Vague provisions that fail to provide objective legal criteria for the Central Election Commission to apply in determining whether to invalidate election results or refuse the registration into office of an elected candidate; and
- Lack of satisfactory guarantees for a clear, efficient, and expeditious process for election dispute resolution.

The extent to which any amendments to the law can have a positive impact on the election process will, first and foremost, be determined by the level of good faith and political will exhibited by State institutions and officials responsible for implementing and upholding the law in an effective and non-partisan manner.

The recommendations outlined below address the remaining outstanding issues, and offer possible solutions for further improvement of the Election Law.

III. DISCUSSION OF THE ELECTION LAW

This assessment of the Election Law is grouped according to five general categories, including:

- Candidacy Rights,
- Election Commissions,
- Election Rules,
- Transparency, and
- Legal Protections.⁴

In contrast to commenting in the numerical order in which articles appear in the law, such a thematic approach facilitates evaluation of compliance of the Election Law to OSCE commitments and other international standards for democratic elections.

⁴ The Candidacy Rights topic discusses provisions of the Election Law that open and close the door for citizens who seek the opportunity to participate in representative government by being a candidate for public office; Election Commissions discusses provisions that govern the election commissions responsible for the administration and conduct of election processes; Election Rules discusses all aspects of the campaign, including media, voting, counting of ballots, tallying of results, and declaration of winners; Transparency discusses what mechanisms are in place to ensure that the election process is open to public scrutiny and the will of the people is respected, and that the election results are honestly reported; and Legal Protections discusses what mechanisms are in place to ensure that citizens, candidates, and political parties can seek meaningful redress in the event of violation of legal rights.

A. CANDIDACY RIGHTS

It is a universal human rights principle that every citizen has the right, on a non-discriminatory basis and without unreasonable restrictions, to:

(1) take part in the conduct of public affairs, directly or through freely chosen representatives;

(2) vote and be elected at genuine periodic elections which shall be conducted by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and

(3) have access, on general terms of equality, to public service in his country.⁵

The Election Law does not entirely satisfy this basic principle as it contains several provisions that close the door on a citizen who should have the opportunity to participate in representative government by being a candidate for public office. These limitations on candidacy rights are considered in the order in which they appear in the Election Law.

Although the Election Law contains limitations on candidacy rights, the OSCE/ODIHR recognizes that there have been certain positive amendments, such as the lowering of candidate registration fees and deletion of the requirement for a candidate to present a medical certificate on his or her state of mental health. Additionally, upon OSCE/ODIHR recommendation, an amendment to Article 4 has deleted sub-clauses (1) and (2) in clause (4) of Article 4 that, *inter alia*, restricted the right to be elected in case of administrative sanction. This amendment addressed a concern previously expressed by the OSCE/ODIHR regarding Article 4 and is recognized as a positive step for the improvement of the legal framework.

1. Article 4 Limitation on Candidacy Rights

Article 4 of the Election Law sets forth the right of suffrage for citizens of the Republic of Kazakhstan. Clause (4) of Article 4 abrogates the passive right of suffrage of a citizen who has a conviction that “has not been cancelled or remitted” by the time of registration. Under clause (4), the passive right of suffrage is denied based on any conviction, regardless of the nature of the underlying crime. The denial of suffrage, due to a conviction for *any* crime, is a questionable exercise of state power that violates the principle of proportionality, recognized in Paragraph 24 of the 1990 OSCE Copenhagen Document.⁶

The OSCE/ODIHR recommends that Article 4 be further amended and that the denial of candidacy occur only where a person has been convicted of committing a

⁵ See, e.g., Article 25 of the International Covenant on Civil and Political Rights.

⁶ As noted in Paragraph 24 of the Copenhagen Document, “Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law”. A recent decision of the European Court of Human Rights, *Case of Hirst v. The United Kingdom (No. 2)*, Application No. 74025/01 (30 March 2004), is particularly insightful on this issue and should be considered by authorities in Kazakhstan. In *Hirst* the Court found that a blanket prohibition on suffrage rights violated the principle of proportionality and was contrary to Article 3 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

crime of such a serious nature that forfeiture of political rights is indeed proportionate to the crime committed.⁷ The forfeiture should be for an established period of time, likewise proportionate, and restoration of political rights should occur automatically after the expiration of this period of time. Legal barriers to candidacy should always be scrutinized as they limit voter choice and may prevent qualified candidates from seeking public office based on disqualifying conditions.

2. Article 54 Limitation on Candidacy Rights

Clause (2) of Article 54 requires that a candidate for President must have “fluent mastery of the state language”, as determined by the Central Election Commission. This provision should specifically state fair and objective standards for determining fluency in the state language so that a candidate will know how he or she will be measured, and so that voters and observers will be able to judge whether a candidate has been treated fairly and in conformity with the objective standards stated in the law. **The OSCE/ODIHR recommends** that the Election Law be accordingly amended.

3. Article 58 Limitation on Candidacy Rights of Independent Candidates

Article 58 regulates creation of campaign funds for candidates in presidential elections. Article 58 permits campaign funds for candidates to come from three separate sources. However, the source in clause (2) is limited to a candidate nominated by a political party. Thus, this article discriminates against independent candidates as it prohibits independent candidates from receiving funds from political parties.⁸ Paragraph 7.5 of the OSCE 1990 Copenhagen Document provides that citizens have the right “to seek political or public office, individually or as representatives of political parties or organisations, without discrimination”. Further, a political party should have the right to provide financial support to an independent candidate in an election where the political party has not nominated its own candidate. A small political party may not have sufficient resources to nominate a candidate for a presidential election. However, it should have the right to support a candidate, financially and otherwise. **The OSCE/ODIHR recommends** that the limiting phrase “that nominated him” be reformulated so that an independent candidate can receive financial support from political parties. However, the article should clearly state that the total amount of contributions from political parties can not exceed the amount stated in the clause.

⁷ The OSCE/ODIHR previously advised that Article 4 should be applied narrowly, to “only serious criminal offences”. See Review of the Election Legislation for Parliamentary Elections, Republic of Kazakhstan (18 January 2001), page 4; Preliminary Assessment of the Draft Election Law, Republic of Kazakhstan (18 September 2003), page 5. Further, the Election Law should specifically list those crimes that are considered to be so serious that forfeiture of a human right – suffrage – is required.

⁸ Clause (2) of Article 92 and clause (2) of Article 106 have similar provisions and should be accordingly amended.

4. Cancellation of Candidacy as Punishment for Exercising Free Speech

Clauses (2) and (4) of Article 50 permit the cancellation of candidacy as a punishment for exercising the right of free speech (“discrediting honour and dignity” of a candidate or political party). These provisions violate a person’s right to free speech and expression and are contrary to OSCE commitments, international standards, and domestic constitutional principles.⁹ **The OSCE/ODIHR recommends** that these provisions be deleted from the law.¹⁰

5. Cancellation of Candidacy as Punishment for Financial Reporting Errors

Several articles in the Election Law contain provisions that permit the cancellation of candidacy as a punishment for financial reporting errors. Examples are found in Articles 34, 59, 73, 89, 104, and 118. Under clauses (9) and (10) of Article 34, the filing of a financial report required by clause (9), one day late and although legally sufficient in all other aspects, can result in the cancellation of candidacy.

Under Articles 59, 73, 89, 104, and 118, a decision to cancel the registration of a candidate can be made “if it is found that information as to income and property declared by such candidate or his/her spouse...is not true.” This phrase is vague, subject to abuse, and creates the potential for a politically motivated application. As an example, the value that one places on certain property belonging to a candidate or spouse is a matter of subjective opinion. One person may legitimately believe that a specific item of property has the value of X and another person may legitimately believe that the value is XX. This provision invites abuse and should be omitted from the law. Punishment for such a legal violation should not include cancellation of candidacy, but should be the imposition of a monetary fine¹¹, in line with the principle of proportionality.

The OSCE/ODIHR recommends that these registration cancellation provisions in the above articles be deleted from the law.¹²

⁹ See Paragraph 9.1 of the OSCE 1990 Copenhagen Document; Paragraph 26 of the OSCE 1991 Moscow Document; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 20 of the Constitution of Kazakhstan.

¹⁰ Similarly troublesome provisions should be deleted from Articles 59, 73, 89, 104, and 118. Article 29, which includes language on “... threatening the State security ...” may also be problematic.

¹¹ Instead of relying on a severe “cancellation” regime, it would be more appropriate to authorise the imposition of a monetary fine based on consideration of several factors, which could include: (a) the amount of the financial error, (b) whether there was one or numerous errors, (c) whether and to what degree there was an effort to conceal the errors, (d) the attitude and conduct of the violator upon discovery of the violation, (e) whether government authorities or public officials or resources were involved in the violation, and (f) the potential harm to free, fair, democratic, and transparent elections in the future.

¹² The introduction of deadlines for cancellation (“two days before polling day”) and the right to contest cancellation in court do not remedy the fundamental underlying problem with these provisions.

6. Article 97-1 Limitations on Candidacy Rights/Abrogation of the Will of Voters

Clause (5) of Article 97-1 provides that “if a political party is liquidated or a person elected to Majilis of the Parliament ceases to be a member of the political party, the term of office of the member of Majilis of the Parliament elected based on the party list of the above political party shall be terminated”(sic). This provision is triggered regardless of whether the member had any role or responsibility for the liquidation of the political party and, in the second situation, regardless of whether the loss of political party membership is voluntary through resignation or follows expulsion from the party.

Clause (5) of Article 97-1 is contrary to the commitment formulated in Paragraph 7.9 of the 1990 OSCE Copenhagen Document: “candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures”. Although Article 97-1 is a legal provision, it is not a legal provision that is in conformity with democratic parliamentary and constitutional procedures.¹³

Clause (5) of Article 97-1 also provides that “the political parties has (sic) the right to change the order of candidates on the party lists by submitting to the Central Election Commission an appropriate application to this effect with the extract from the minutes of the meeting of the supreme body of the political party.” This provision allows post-election change in the order of candidates on the list of a political party. This provision is contrary to the commitment in Paragraph 7.9 of the 1990 OSCE Copenhagen Document, domestic constitutional principles, and international standards.¹⁴ Post-election change in list order misleads voters and abrogates the candidate choice made by voters on election day.

The OSCE/ODIHR recommends that the Election Law be amended to reflect ownership of mandates by elected candidates. In particular, an elected candidate should not forfeit a mandate due to a change in political affiliation, or liquidation of the party, or due to a post-election decision of a political party, regardless of the concrete formula used to allocate seats according to the number of votes (election system).

7. Lack of Deadlines for Withdrawal of Candidacy

The provisions regulating withdrawal of candidacy (Articles 60, 74, 90, and 119) do not provide a deadline for withdrawal. Although the prior electoral framework

¹³ See Articles 47 and 52 of the Constitution of Kazakhstan; *Sadak and Others v. Turkey*, Application Nos. 25144/94, 26149/95, 26154/95, 27100/95 and 27101/95, European Court of Human Rights (11 June 2002) (post-election forfeiture of a mandate due to dissolution of political party is incompatible with the very essence of the right to stand for election and to hold parliamentary office, and infringes the unfettered discretion of the electorate to exercise free and universal suffrage).

¹⁴ *Id.*

provided a rather short deadline for withdrawal of candidacy before an election, the amendments to the law have removed this deadline. The lack of such a deadline is problematic as late withdrawals of candidacy confuse voters, complicate election administration, and can significantly impair the counting and tabulation processes. Orderly election processes and the need to prevent voter confusion are sound grounds for requiring a deadline for withdrawal of candidacy. The **OSCE/ODIHR recommends** that the law be amended to provide a reasonable deadline for such a withdrawal of candidacy.

B. ELECTION COMMISSIONS

The OSCE/ODIHR has previously expressed concern that election commissions lack multi-party representation, are subject to the control of government authorities, and do not act independently. Despite inclusion of a mechanism that provides the basic elements of a framework for political consultations, the Election Law does not fully address previous OSCE/ODIHR concerns about formation of election commissions.

An amendment to Article 10 provides that territorial, district, and precinct election commissions “shall be elected by respective maslikhats based on the recommendations of the political parties”. The text envisions an enhanced role for the maslikhats in the formation of the territorial, district, and precinct election commissions as well as raises the possibility that political parties would be able to delegate representatives to election commissions at all three levels. While this is relevant to all levels of the election administration, it is particularly important in regard to the precinct election commissions, which play perhaps the most visible role in terms of public trust in the electoral process.

The decision to provide political parties with a voice in the formation of election commissions through the introduction of political party nominations to the maslikhats is a welcome development. However, the modalities of the nominations/elections of commission members should be further elaborated to ensure inclusiveness and due consideration for the nominations put forth by political parties. It does not appear from the current provisions that there is any binding obligation for the maslikhats to endorse the nominations of political parties and actually include representatives of political parties in the commissions. Nor does the law define the procedures in case the number of political parties exceeds the number of election commissioners to be appointed. Therefore it is not clear if these provisions indeed will result in inclusive multi-party election commissions.

The obligation to consider nominations from political parties cannot be viewed as fulfillment of the obligation to establish multi-party or pluralistic election commissions.¹⁵ **The OSCE/ODIHR recommends** that the Election Law further clarify the articles regulating the appointment of election commissions. The law should be amended to substantially broaden and guarantee an inclusive and adequate representation of political parties on election commissions.

¹⁵ Furthermore, the government appointing body can always control territorial, district, and precinct election commissions as Article 10 allows appointing government bodies to “replace” any member.

Articles 10 and 19 attempt to protect the independence of election commission members by narrowing the grounds for removal. Although this is a welcome development, the text used in clause (7) of Article 19 is vague and subject to abuse, allowing for removal based on “improper performance of professional duties”. This text should be improved and the law should go even further to protect election commission members from undue dismissal. **The OSCE/ODIHR recommends** that the text of clause (7) of Article 19 be revised to require violation of law as the grounds for removal. **The OSCE/ODIHR further recommends** that Article 10 be amended to provide for:

- (1) written notice to the commission member of the proposed grounds for removal; such grounds should be clearly stated in the law,
- (2) hearings before an appropriate tribunal to contest the challenged removal,
- (3) voting requirements greater than a simple majority in order to support the removal, and
- (4) the right to appeal to a court to challenge a decision for removal.

It is also **recommended** that the provision allowing for “termination” of an election commission be removed from the law. As members of an election commission can be dismissed or replaced, including all of the members, there does not appear to be valid justification for this provision. It is of concern that this provision could be applied to invalidate a decision of an electoral commission at a late date by “terminating” the election commission and using the “termination” as grounds that the decision of the election commission was without legal authority.

Despite the significant amendment in clause (6) of Article 10 that “no one shall interfere in the activity of electoral commissions when the latter exercise their authorities”, it is of concern that appointing government bodies could effectively control election commissions, without interfering, simply through the exercise of the new “replacement” and “termination” provisions in Article 10.

An amendment to Article 19 significantly expands the rights of a member of an election commission so that the member has a meaningful opportunity to participate in administering the election. This is a positive amendment. However, the text of sub-clause (9) of clause (5) of Article 19 is problematic. This text provides that a member of an election commission who is a representative of a political party or public association “shall have no right to lobby their interests”. Firstly, this text limits the right of free speech of the commission member. Secondly, it limits the right of the commission member to fully participate in the work of the commission since full participation must include the right to speak and debate issues before the commission. Thirdly, the term “lobby” is difficult to apply as there are no objective criteria to determine when “speech” crosses the line into “advocacy” or “lobby”. **The OSCE/ODIHR recommends** that the phrase “shall have no right to lobby their interests” be deleted from the law. The remaining text in sub-clause (9) of clause (5) of Article 19 is welcome.

An amendment to Article 19 also clarifies situations where it would be improper for a person to be a member of an election commission due to a conflict that would impair

the member's ability to discharge his duties or create an appearance of conflict. This is a positive amendment.

Amendments to clause (6) of Article 20 provide more detail, than previously existed in the law, concerning the procedure for challenging a decision of an election commission. Although this is an improvement, Article 20 should be further amended.

A deadline of ten days for challenging a decision is generally too long, within the context of election disputes. Election disputes should be lodged and decided expeditiously. **The OSCE/ODIHR recommends** that, absent unique local factors, this period be no more than five days in Article 20. It is also *recommended* that Article 20 specifically list those persons who have rights to:

- (1) challenge a decision of an election commission,
- (2) notice of the challenge,
- (3) respond to the challenge, and
- (4) present evidence in support or against the challenge.

As uniformity and consistency in decisions is important, **the OSCE/ODIHR recommends** that challenges to decisions be filed in only one forum designated by the law – either a court or higher election commission. The option of making challenges in different forums will most likely lead to “forum shopping” and inconsistency in decisions. “Forum shopping” is almost certain to be the end result when considering the sentence “The court judgments shall be binding upon the respective electoral commissions”. This phrase suggests that a court judgment is binding upon *all* election commissions. If this is the case, then the authority of higher election commissions, including the Central Election Commission, can be circumvented by filing a challenge with a court instead of an election commission. The vagueness of this sentence underscores other significant problems with Article 20 – the failure to identify the level of “a court” intended (local court, appeals court, or Supreme Court) and the failure to identify what commissions are intended by “respective electoral commissions” and “higher electoral commissions”. **The OSCE/ODIHR recommends** that Article 20 be amended to state a clear and understandable hierarchical complaint process that defines the roles of each level of election commission and each level of courts. It is important that this process be uniform to prevent “forum shopping”. This process should also identify which bodies act as fact-finding bodies of first instance and which bodies act as appellate review bodies.

C. ELECTION RULES

1. Voter Lists

There are a number of amendments to Articles 24 through 26 that appear to be improvements. These amendments include a publication requirement for voter lists, new deadlines for submission of lists, and expedited deadlines for considering applications to correct data, both in election commissions and courts.

Although there are several positive amendments to these articles, the provisions in Articles 23, 24, and 25 for voter lists for members of the military should be improved.

These articles provide for the establishment of voters lists and voting in polling stations “in military units”. Due to the potential influence that commanders of military units may exert over their units, members of the military, in particular conscripts, should be given leave of sufficient time from their post to permit them travel to and from the polling station of their home residence or the nearest civilian polling station. Voting in military units is acceptable only where the military unit is too far from a civilian polling station (such as a naval unit on a ship at sea). **The OSCE/ODIHR recommends** that these articles be amended accordingly.

2. Election Canvassing

There are several amendments to Articles 27 through 32 that address the problem of possible government interference in election processes and partiality in media access and coverage. For instance, Article 28 guarantees equal conditions to media access for election contestants. These are positive amendments. The OSCE/ODIHR recognizes that some of its prior comments and recommendations have been included in the amended law. However, there are additional improvements that should be made in these articles in order to fully meet OSCE commitments.

Clause (5) of Article 28 prohibits the use of certain campaign materials printed outside of the territory of the Republic of Kazakhstan. This provision violates the principle that a citizen has the right to receive and impart information regardless of frontiers.¹⁶ OSCE participating states recognize that citizens have the right “to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts.”¹⁷ OSCE participating states commit themselves “to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded trans-border and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.”¹⁸ **The OSCE/ODIHR recommends** that the clause (5), Article 28 prohibition be deleted from the law.

The provisions in Article 28 on guaranteed access to electronic media should be improved. By limiting this guaranteed access to only one address each on radio and television, with the order of access determined by order of application, there is no assurance that each candidate’s opportunity to address voters will occur when there are sufficient viewers or listeners to hear the candidate’s political message. Thus, this provision fails to ensure that all candidates will have a fair opportunity to reach voters. **The OSCE/ODIHR recommends** that Article 28 be amended to:

(1) Require that all candidates are guaranteed access to electronic media on dates and during hours that ensure that all candidates have the opportunity to reach the same approximate number of voters, and

¹⁶ See Article 19 of the Universal Declaration of Human Rights; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 20 of the Constitution of Kazakhstan.

¹⁷ Paragraph 26.1 of the OSCE 1991 Moscow Document.

¹⁸ Paragraph 26 of the OSCE 1999 Istanbul Document.

(2) Require that the schedule of broadcasts does not begin too early in the campaign or close to election day so that no candidate is disadvantaged or advantaged by the timing of the candidate's access to electronic media.

Articles 27 and 28 permit the purchase of paid political advertisements. However, the law does not require that these broadcasts be identified as being paid political advertisements. It would be a positive decision if it is included in the Election Law as the law places some requirements in this regard, particularly the publication of contract rates in Article 28. **The OSCE/ODIHR recommends** that Article 28 be amended to require proper identification of these advertisements as paid political advertisements, and identify the sponsor of the advertisements.

Although clause (3) of Article 28 provides that the government shall guarantee direct and equal access to TV, radio and newspapers for candidates, there is no provision specifying which state body or the manner in which the media provisions are to be enforced. During elections, the Central Election Commission may be the most appropriate body for enforcement. **The OSCE/ODIHR recommends** that Article 12 of the Election Law be amended to specify that the Central Election Commission has powers to enforce the obligations set out in the law that regulate the media during elections.

Article 28 clause (9) related to the publication of pre-electoral opinion polls implements the OSCE/ODIHR recommendations contained in “the Comparative Study: Laws and Regulations Restricting the Publication of Electoral Opinion Polls.” This is a positive development in the law.

Clause (2) of Article 32 permits printed election materials to remain outside the premises of election commissions and polling stations on election day, if the materials were put on the premises “earlier”. Regardless of when such election materials have been placed on these premises, these materials should not be permitted to remain on or near the premises on election day. **The OSCE/ODIHR recommends** that clause (2) be amended to prohibit such materials on the premises or within a stated distance of the premises, such as fifty (50) metres, on election day. Further, it is **recommended** that clause (6) of Article 28 be amended to include a prohibition on the display of campaign materials within fifty (50) metres of a polling station.

3. Freedom of Expression

Consideration may be given to Article 33, clause (4) to grant the right of free expression to foreign citizens and stateless persons residing in Kazakhstan during the election campaign although they are non-citizens.¹⁹

¹⁹ The rights to freedom of expression and association according to Articles 10 and 11 of the European Convention of Human Rights do not only belong to citizens but to all persons within the jurisdiction of a member State.

4. Voting Procedures

There are several new amendments in the law creating a system for e-voting in some polling stations. Although the concept of e-voting is becoming generally more acceptable, these particular amendments introduce a system that does not include any mechanism for a manual audit of the votes cast and prohibits any meaningful opportunity for challenging the count and tabulation in the context of e-voting. Thus, possible changes in results figures occurring during either the counting and/or tabulation phases, and potential deficiencies stemming from hardware, firmware, software, installation and set-up of the e-voting system, may go undetected.

A new Article 50-1 authorizes the use of “an electronic information system” for “compiling a list of voters, conducting voting, and determining the results of the vote”. Nine new articles of law regulate the electronic information system as it relates to conducting voting and determining the results of the vote. These new articles raise concerns for a number of reasons.

The new articles fail to require that the e-voting system produce a permanent²⁰ record with manual audit capacity, directly understandable by each voter without special expertise in e-voting. As a result, there is no *effective* mechanism for challenging results or conducting a recount. Articles 50-8.1 and 50-9 confirm that there is no *effective* mechanism for challenging results or conducting a recount as these articles provide that the e-voting device itself is the *only* “evidence” that can be used to challenge results. These articles operate on the assumption that all errors in the e-voting device or programming will be revealed from a physical examination of the device.

However, this assumption may be false since source code defects, whether due to intentional or unintentional acts, as well as other potential defects, too numerous to describe in this assessment, and which could change the results, will not always be revealed by examining the electronic voting device (hardware). Thus, there must always be a permanent record that can be used for manual recounts and for challenging the e-voting results. The law must contain safeguards to protect against the source code failing, errant programmer, sophisticated hacker, hardware defect, or human malfeasance that escapes all initial inspection and testing.²¹ The law must require the contemporaneous production of a permanent record with manual audit capacity.²²

Further, although the secrecy of the vote is ensured by the election law, it is unclear via what mechanism the e-voting system will be able to guarantee this right. In fact,

²⁰ E.g., a paper record.

²¹ It is common knowledge that malicious codes, bugs, and viruses often escape close inspection and testing of software. For example, it is possible that the system may contain an undiscovered error, triggered, for instance, by the Nth voter, which then triggers a reallocation of votes from Party B to Party C in some structured fashion.

²² The OSCE/ODIHR has previously recommended: “Whether manual, mechanical, or electronic processes are used, *procedures for audit* and inspection to ensure accuracy and reliability *must be in place*. See Preliminary Assessment of the Draft Amended Election Law, Republic of Kazakhstan (19 September 2003), page 17.

initial enquiries seem to indicate that the e-voting system may be, by design, predisposed to creating electronic connections between individual votes cast and the identities of the voter concerned.

Article 50-5 provides that a voter “confirms his/her choice” on the device for e-voting. However, the voter has no real way to know that the choice was correctly “confirmed”. Thus, the voter has no opportunity to change a vote that has been incorrectly recorded. A voter who receives a paper ballot, however, has the opportunity to return an incorrectly marked ballot to the polling station commission, which places the ballot with the “spoiled ballots”, and gives the voter a new ballot.²³ Similarly, the voter must have an opportunity to change an e-vote or correct an error in the vote before the vote is recorded. This can only be done effectively with the producing of a permanent record that the voter is able to see before confirming the vote.

The new articles conflict with Article 43, which requires that “when counting the voting ballots, the chairman or a certain member of the commission shall show a voting ballot to those present and announce the will of the voter” and “ballots shall be piled separately for each candidate and each political party, which have put forward a party list, and a separate pile for invalid ballots.” Article 43 provides a fundamental building block of transparency – **observation of the count of the votes**. The new articles completely undermine this fundamental building block of transparency.

Article 50-1 fails to provide a deadline for introducing e-voting in a given polling station. This permits e-voting to be imposed in a polling station on the eve of an election without sufficient opportunity for training of election commission members, education of voters, and the possibility for inspection by observers, assuming any qualified people are even available to inspect software, firmware and hardware for e-voting devices.

Article 50-5 requires the chairman of the polling station election commission, thirty minutes prior to voting, to “check whether the electronic system is operational”. This provision may not be realistic. It is questionable whether a sufficient number of individuals trained in software and hardware diagnostics will emerge from the appointment processes of Article 10 in order to fill chairman positions in polling station election commissions.

The OSCE/ODIHR recommends that Articles 50-1 through 50-9 be amended to:

- (1) provide the safeguards described above for e-voting,
- (2) reconcile the conflicts between these new articles and Article 43,
- (3) ensure sufficient transparency so that observers’ groups have full and unimpeded access to all components of the system in order to assess its reliable and proper performance, and
- (4) provide adequate training and education for election commission members and voters.

²³ Article 42 of the Election Law also requires clarification to address how “spoiled” paper ballots are handled by the polling station commission.

E-voting should not be implemented in any polling stations until these recommendations are fully met.

There are additional problems in the articles regulating voting procedures. They are discussed as they appear in Articles 37 through 42.

An amendment to clause (3) of Article 37 provides for delivery of ballots to precinct election commissions no later than one day before elections. However, the amendment does not state the earliest possible date on which ballots may be delivered. It is preferable that the law state the precise time period within which ballots must be delivered. This time period should consider not only administrative and logistical needs, but should also consider the high importance of maintaining security of the ballots. In this context, deadlines for withdrawal of candidates should also be taken into account.

An amendment to clause (2) of Article 39 prohibits the presence of unauthorised persons in a polling station during the election process. This is a positive amendment that addresses previous OSCE/ODIHR concerns.

The removal from the ballot of the option to vote “against all” is also a welcome amendment since the idea of a “negative” vote fails to comply with fundamental principles of representative democracy²⁴. Technically, “negative” votes could matter in a limited number of circumstances and consequently the presence of such options tends to mislead voters and could further undermine their confidence in the election process.

The provisions for “mobile voting” in clause (6) of Article 41 have been amended. This amendment partially addresses previous OSCE/ODIHR concerns about mobile voting. However, the amendment does not go far enough to ensure the prevention of abuse. **The OSCE/ODIHR recommends** that the following safeguards be incorporated for mobile voting:

(1) the law should state that all other procedures for identifying a voter and issuing a ballot are applicable to the mobile voting procedure,

(2) the number of persons who have used the mobile ballot box must be recorded in polling station and successive protocols and tabulations by election commissions in order to identify particular areas where the proportion of votes cast using mobile ballot boxes is unusually high, which may indicate fraud, and

(3) the members of the polling station commission who administer mobile voting within the geographical territory covered by a polling station can not be members of the same political party or coalition blocks.

It is also *recommended* that Article 41 include a general provision requiring that all procedures for identifying a voter and issuing a ballot are applicable for voting in “special” precincts (military, ships, hospitals, distant pastures, foreign states, *etc.*).

²⁴ Even in parliamentary proceedings, it is the “yes” votes that count in decision making.

5. Determination of Election Results

An amendment to Article 43 requires that the count of the votes at the polling station be completed within 12 hours. This is an improvement in the law. **The OSCE/ODIHR recommends** that Article 43 be further amended to require that the results of the counting be submitted by those means available to the polling station, which may include telephone, facsimile, or physical delivery, to the district election commission as soon as practicable after the count is completed. Further, the law should require that the district election commission submit the tabulations of the results to the respective higher election commission as soon as is practical after the tabulation is completed.

Article 43 clause (8) of the Election Law requires that a copy of the protocol summarising the results of the vote count be posted in each polling station for two days, and allows observers to receive a copy of the protocol complete with the signatures of the Chairman and Secretary of the precinct election commission and its seal. This is a welcome development.

Under Article 43 clause (8-1), the district election commission holds a meeting at a predetermined polling station (whose location is announced in the media no later than 10 days before voting) in order to tabulate the election results for a given district on the basis of the protocols submitted by precinct election commissions. This clause also foresees that a copy of the protocol of the tabulated election results for a given electoral district is posted at the polling station at which the district election commission meets for at least three days. This is a positive change.

Article 43, clause (8-2), requires that district election commissions prepare an “unofficial summary table” of the results of voting by polling station within five days after the elections. Each district election commission posts this document within the polling station at which it conducted its meeting to tabulate the election results. This clause also calls for the district election commissions to prepare and post an official summary table on the basis of the polling station protocols.

Clause (9) of Article 43 relates to a new vote count. **The OSCE/ODIHR recommends** that this clause be amended to state that observers shall be provided timely notice of a recount and have the opportunity to observe the recount.²⁵

Clause (5) of Article 44, regulating the announcement of results, has been amended. However, it should be amended further to require that the announcement of results includes all information on the results of mobile voting and all information is broken down to the precinct level so that all results can be traced from the lowest level of voting through the tabulations at each level of election commission, including the Central Election Commission. This degree of detail is necessary to enable observers to track results and locate specifically where fraud has occurred, in the event that the numbers are unlawfully changed during the tabulation processes.²⁶

²⁵ The current text is limited to “applicants who reported the fact of incorrect count” (sic).

²⁶ Although a “summary table” is required in Article 44, the content of the table is not defined.

It is also *recommended* that Article 44 include a general provision stating that all procedures for counting and tabulating votes are applicable in “special” precincts (military, ships, hospitals, distant pastures, foreign states, *etc.*).

Notably absent from the Election Law is a specific and clearly stated process that permits a voter, candidate, and political party to challenge the election results and seek invalidation of the results in one or more polling stations, or to challenge the tabulation of results by one or more election commissions. This shortcoming is compounded as the law has vague provisions that fail to provide objective legal criteria for the Central Election Commission to apply in determining whether to invalidate election results or refuse the registration into office of an elected candidate. Articles 66 and 98 appear to give the CEC the power to arbitrarily refuse the registration into office of an elected candidate. Articles 66 and 98 suggest that this power of the CEC is triggered once some authority or authorities declares elections invalid “in one-fourth part of the total number of precincts or administrative units”. However, the articles do not identify this authority. The articles provide that the CEC adopts a decision not to register the election of the candidate if elections have been recognised as invalid in at least one-fourth of the total number of precincts or administrative territorial units. This provision is not only vague, but relies on an arbitrary fraction of one-fourth, without regard to the actual number of votes involved. Articles 66 and 98 do not provide clear objective legal criteria and a process for challenging results. Further, these articles create uncertainty and potential for protracted post-election lawsuits due to their extreme vagueness and lack of detail. In addition, it is not clear whether the power to refuse registration of an elected candidate is the same power as the power to invalidate results and require repeat polling. These concerns are also applicable to Article 126 and the power of the territorial election commissions in local elections. **The OSCE/ODIHR recommends** that these articles be amended to:

(1) clearly provide a specific process that permits a voter, candidate, and political party to challenge the election results and seek invalidation of the results in one or more polling stations, or to challenge the tabulation of results by one or more election commissions,

(2) state objective legal criteria for the Central Election Commission (and territorial election commission) to apply in determining whether to invalidate election results or refuse the registration into office of an elected candidate, and

(3) limit the power of the CEC to invalidate results where the electoral irregularity or misdeed could not have affected the allocation of a mandate.

The Election Law permits the President of the Republic (and the Chairpersons of the Senate or Majilis) to submit a challenge to the Constitutional Council disputing the results of the counting of votes in elections for the President (Article 68), Senate (Article 84), and Majilis (Article 100). The President of the Republic should not have the power to challenge before the Constitutional Council the regularity of these elections. Articles 68, 84, and 100 should be amended, as well as Article 72 of the Constitution. Considering that the President may veto the decision reached by the Constitutional Council, and that his veto requires a two-thirds majority in the Council to be overruled, the President has the power to obstruct the electoral process on a scale that may virtually invalidate the elections, be they Parliamentary or Presidential.

The OSCE/ODIHR recommends that the legal framework be accordingly amended.²⁷

D. TRANSPARENCY

The introduction of a separate article on transparency is a welcome and necessary addition to the law. The new Article 20-1 addresses a number of previous OSCE/ODIHR concerns regarding observers and transparency of the electoral processes. Additional amendments should be made in this new article and other articles of the Election Law to ensure transparency of all electoral processes.

Observation is no longer restricted to election day procedures but covers all phases of the election process (Article 20-1 clause (1)). Candidates, their proxies, observers, representatives of mass media are allowed to attend meetings of election commissions and to receive information about the election process.

The phrase in clause (5) of “number of the polling station” implies that an observer will only be permitted to observe in one polling station. Effective observation requires that observers be able to attend several polling stations and election commissions on election day. **The OSCE/ODIHR recommends** that clause (5) be accordingly amended.

The requirement in sub-clause (5) of clause (7) that observers “justify their remarks and comments by documented, valid and verifiable facts” violates principles protecting the right to free speech and expression.²⁸ Further, any legal provision that hinders legitimate observation and reporting is questionable. This is especially applicable to any provision that attempts to “muzzle” observers or prevent them from reporting or releasing information that has been obtained by observation efforts. **The OSCE/ODIHR recommends** that Article 20-1 be amended to conform to OSCE commitments and international standards.

Under clause (8) of Article 20-1, the deadline for accreditation of international observers was reduced from 15 before election day to 5 days. This is a welcome development.

Article 62 provides that the results of counting the votes in a presidential election are recorded in protocols of the territorial election commissions. **The OSCE/ODIHR recommends** that Article 62 be amended to provide that each observer present at the meeting is entitled to a copy of the protocol and that the protocol must be publicly posted at the office of the territorial election commission.²⁹

²⁷ The text in clause (3) of Articles 68, 84, and 100 should also be reviewed as it is not clear whether the clause addresses precincts or larger administrative units.

²⁸ See Paragraph 9.1 of the OSCE 1990 Copenhagen Document; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 20 of the Constitution of Kazakhstan.

²⁹ This concern is also applicable to similar provisions in Articles 78, 94, 108, and 122 of the Election Law. Although the amendments in Article 20-1 grant observers the right “to receive in electoral commissions any information about the electoral process” and the right to a copy of the polling station election commission “voting protocols”, it is not clear that these

Article 65 provides that the results of territorial election commission protocols in a presidential election are tabulated by the Central Election Commission to establish the results of the presidential election. **The OSCE/ODIHR recommends** that Article 65 be amended to provide that each observer present at the Central Election Commission meeting is entitled to a copy of the tabulation of the protocols and that the tabulation must be publicly posted at the office of the Central Election Commission.³⁰

The last two recommendations remain valid regardless of the text of Art.20-1, clause 6, subclause 10, which states the right of proxies, observers and representatives of mass media to be informed of the results and receive certified copies of protocols of election commissions due to possible interpretations that may lead to an abrogation of the mentioned right.

E. LEGAL PROTECTIONS

Article 20, which regulates the activity of election commissions, provides some legal protections for challenging the decision of an election commission. Article 20 has been discussed *supra*. The concerns, comments, and recommendations previously stated about Article 20 are applicable to all articles of the law that relate to legal protections for suffrage rights.

Articles 47 through 51 provide additional legal protections for suffrage rights. Although each of these articles has been amended, the most significant amendments are in Article 50. The list of prohibited activities that could interfere with election processes has been expanded substantially. For the most part, this is a positive improvement. However, clause (2) of Article 50 is too broad and could be applied in a manner that would violate a person's right to free speech and expression. This limitation on free expression and speech could prevent a robust and vigorous campaign, which is critical to election campaigning in a democratic system of governance. Such a broad prohibition is not in compliance with OSCE commitments, international standards, and domestic constitutional principles.³¹ **The OSCE/ODIHR recommends** that clause (2) of Article 50 be deleted.

An amendment to Article 49 requires that government authorities, including election commissions, maintain hours on weekends and the day of voting to ensure that it is possible for such challenges to be accepted and considered. This is a positive amendment.

amendments include the right to receive a copy of the Article 62 "tabulation" protocol of the territorial election commission.

³⁰ This concern is also applicable to similar provisions in Articles 81, 97, 97-1, 111, and 125 of the Election Law. Although the amendments in Article 20-1 grant observers the right "to receive in electoral commissions any information about the electoral process" and the right to a copy of the polling station election commission "voting protocols", it is not clear that these amendments include the right to receive a copy of the Article 62 "tabulation" protocol of the territorial election commission.

³¹ See Paragraph 9.1 of the OSCE 1990 Copenhagen Document; Paragraph 26 of the OSCE 1991 Moscow Document; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 20 of the Constitution of Kazakhstan.

Although there are positive amendments that address legal protection concerns previously expressed by the OSCE/ODIHR, the Election Law fails to provide a clear, efficient, and expeditious process for the lodging, consideration, and appeal of election related complaints. At a minimum, the Election Law should be amended to clearly define the procedures for complaints and appeals, including the respective competent bodies and the times by which *all* complaints and appeals must be lodged and adjudicated. In order to comply with international standards, these procedures should provide the following for voters, candidates, and political parties:

- The right to file a complaint to protect suffrage rights
- The right to present evidence in support of the complaint
- The right to a public hearing on the complaint
- The right to a fair hearing on the complaint
- The right to an impartial tribunal to decide the complaint
- The right to transparent proceedings on the complaint
- The right to an effective remedy
- The right to a speedy remedy
- The right to appeal to an appellate court if a remedy is denied³²

Clause (7) of Article 73 and clause (2) of Article 82, regulating the registration of deputies of the Senate, fails to identify to which court a decision of the Central Election Commission should be appealed. Similar provisions are stated in clause (10) of Article 89 and clause (2) of Article 98 for registration of deputies to the Majilis, clause (7) of Article 104 and clause (2) of Article 112 for maslikhat elections, and clause (7) of Article 118 and clause (2) of Article 126 for elections to bodies of local self-administration. **The OSCE/ODIHR recommends** that these articles be amended to specifically state the level of court to which the decision is appealed.

IV. CONCLUSION

The OSCE/ODIHR assessment of the Election Law of the Republic of Kazakhstan is provided with the intention of assisting the authorities in their stated objective to improve the legal framework for democratic elections, and to bring the law more closely in line with OSCE commitments and other international standards for the conduct of democratic elections. The OSCE/ODIHR wishes to acknowledge the constructive dialogue with the national authorities and the civil society of the Republic of Kazakhstan during the process of amending the election legislation.

³² See, e.g., Articles 8 and 10 of the Universal Declaration of Human Rights; Paragraph 13.9 of the OSCE 1989 Vienna Document, Paragraphs 5.9 through 5.12 of the OSCE 1990 Copenhagen Document, and Paragraphs 18 through 21 of the OSCE 1991 Moscow Document. Further, the comments and recommendations stated in the OSCE/ODIHR Review of the Election Legislation for Election Disputes, Appeals and Penalties, Republic of Kazakhstan (26 April 2001) should be considered when the legislature considers additional amendments to the Election Law.

The OSCE/ODIHR recognizes that the Election Law includes significant improvements in the areas of transparency, formation of more pluralistic election commissions and the creation of more equal conditions for campaigning. However, a number of outstanding concerns remain to be addressed, as indicated in the Executive Summary.

The OSCE/ODIHR continues to stand ready to assist the authorities in their efforts to create a legal framework for democratic elections in conformity with OSCE commitments and other international standards for democratic elections.