

Legal policy research centre**Problems of improving the election legislation of the Republic of Kazakhstan
regarding the issues of Presidential Elections
Analytical Paper******Problems of improving the election legislation of the Republic of Kazakhstan regarding the
issues of Presidential Elections**

The present analysis is caused by necessity to reform the election legislation of the Republic of Kazakhstan in light to its short compliance with international standards and commitments taken by Kazakhstan in respect to provision of fair and impartial elections. This assessment considers the scope of legal norms concerning preparation to and administration of the elections of the President of Kazakhstan. In particular, it considers the issues of formation and activities of election commissions as well as problems of implementation of the rights of candidates and the election process as a whole.

**Chapter I. Legal Analysis of Conducting Early Presidential Elections in the Republic of
Kazakhstan**

The scheduled presidential elections in the Republic of Kazakhstan, in conformity with the Constitution, were due to take place in December 2012. However, as a result of the adoption of amendments to the Constitution of the Republic of Kazakhstan and a number of constitutional laws in February 2011, the elections were set ahead of time for 03 April 2011. A number of events overtook the setting of the early presidential elections.

On 23 December 2010 a group of citizens from the Eastern Kazakhstan Oblast submitted the initiative to hold a national referendum to extend the powers of President Nursultan Nazarbayev up to 2020.¹ More than 5 million signatures supporting the referendum were collected in a record-breaking space of time.² This initiative later served as a political basis to set early presidential elections in Kazakhstan.

From a legal point of view the fact that a group of citizens could initiate the holding of a referendum precisely to extend the powers of the current President was debatable. The Constitution of the Republic of Kazakhstan did not provide for the grounds and mechanisms to extend the powers of the President. In connection with this a group of parliamentarians initiated the adoption of amendments to the Constitution with the purpose of formally securing the possibility of holding a referendum on this issue. On 29 December 2010 the Majilis of the Parliament unanimously voted for the draft Resolution to address the President, about introducing changes into the Constitution

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¹ CEC (Central Election Commission) registered the initiative group of the referendum to extend the powers of the current President // Kazakhstan Today. 27 December 2010.

² According to the Constitutional Law "On the National Referendum" of 02 November 1995 No.2592 it is sufficient to submit signatures of no fewer than 200,000 citizens of the Republic who have the right to participate in the national referendum, in quantitative proportion and equally representative of all Oblasts, the Capital of the Republic and the cities of national status.

and setting up a referendum to extend his presidential powers up to December 2020. On 06 January 2011 the Senate of the Parliament in a plenary session supported the address by the Members of Parliament to the Head of State. On 07 January the President rejected these proposals.³

Despite the negative decision by the President, on 14 January 2011 Parliament unanimously adopted the amendments on the referendum to the Constitution. There was an extremely negative response by the international community and civil society of Kazakhstan to this legislative initiative.⁴ As a result, the President passed on the amendments adopted by Parliament to the Constitutional Council in order for it to determine their compliance with the current Constitution. Representatives of the civil society submitted to the Constitutional Council legal analysis on the unconstitutionality of the proposed amendments. The main conclusion drawn in this analysis came down to the following: "Since the amendments proposed in paragraph 5, Article 42 of the Constitution, due to their legal nature and consequences, entail the deprivation of passive and active electoral rights of all citizens of the Republic of Kazakhstan, such amendments contradict Article 12 of the Constitution of the Republic of Kazakhstan regarding the inalienability of human rights, as well as the requirements of the Constitutional Law of the Republic of Kazakhstan of 02 November 1995 No 2592 "On the National Referendum" regarding the prohibition to submit for the referendum issues, which could entail violation of constitutional rights and freedoms of an individual and a citizen."⁵

The outcome of consideration of this issue by the Constitutional Council was the Resolution of 31 January 2011, in which the amendments to the Constitution providing the possibility of extending the presidential powers through a national referendum were declared unconstitutional.⁶ The Resolution of the Constitutional Council contained only one ground as to why the provisions on the referendum were unconstitutional: "evaluating this legal norm the Constitutional Council states that from Paragraph 1 of the law it is not clear for what period of time presidential powers of the First President (Elbasy) of the Republic of Kazakhstan could be extended. It is not specified whether such an extension would have a one-off or repeated character, or whether the proposal is to completely abolish elections for Head of State."⁷ Meanwhile such ambiguity in the position of the Constitutional Council makes it possible in the future to return to the discussion of the issue on extending the powers of the First President.

³ The decree of the President of RK "On the rejection of the proposal by the Parliament of the RK to submit for national referendum changes and amendments into the Constitution of the Republic of Kazakhstan" was published on 07 January 2011.

⁴ On 17 January the Director of the ODIHR/OSCE, Janez Lenarcic, expressed his concern at the fact that the Parliament of Kazakhstan had adopted the amendments to the Constitution allowing a referendum to be conducted on the extension of the term of presidential powers. URL: <http://www.zakon.kz/195451-obse-obespokoeno-resheniam-parlamenta.html>. On 22 January the EU High Representative for Foreign Affairs and Security Policy, Catherine Ashton, made a statement on behalf of the European Union and called on Kazakhstan to guarantee the holding of presidential elections in conformity with the current Constitution. URL: http://www.zakon.kz/top_news/196190-evrosojuz-prizval-kazakhstan-provesti.html. At the talks with the Minister of Foreign Affairs of Kazakhstan, Kanat Saudabaev, the US Secretary of State, Hillary Clinton, especially emphasised the fact that the national referendum on the issue of extending the term of office of President Nursultan Nazarbaev up to 2020 could be a retrograde step for democracy. URL: <http://www.zakon.kz/197007-klinton-prizyvaet-ne-provodit.html>.

⁵ "Opinion on the Draft Law of the RK "On Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan" regarding the issue of extending the powers of the First President of the RK by way of national referendum". URL: http://www.bureau.kz/data.php?n_id=2589&l=ru (last accessed: 25 March 2011).

⁶ Review of the Law of the Republic of Kazakhstan "On Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan" regarding its compliance with the Constitution of the Republic of Kazakhstan. Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan of 31 January 2011 No.2. URL: <http://www.constcouncil.kz/rus/resheniya/?cid=10&rid=644>. (last accessed: 25 March 2011).

⁷ Ibid.

After the decision of the Constitutional Council N. Nazarbayev announced that he could not ignore the will of the 5 million citizens and the Parliament of Kazakhstan, and in connection with this, stated the necessity to conduct early presidential elections.⁸ Since the Constitution did not provide for the option of calling early elections, the Parliament of Kazakhstan rapidly adopted amendments to the Constitution and a number of constitutional laws.⁹ Thus Article 41 of the Constitution was amended by paragraph 3-1 which stated: “3-1. Early presidential elections are to be called by the decision of the President of the Republic and conducted according to the procedure and terms laid down in the constitutional law”. Thus a formal regulatory framework for holding early presidential elections in the Republic of Kazakhstan was established. It is worth noting that the new amendments to the Constitution do not contain a list of legitimate grounds empowering the President to call early elections. It becomes the sole discretion of the acting president to decide on the need for early elections. It should be reminded that the early text of the Article 48 of the Constitution provided for the option of holding early elections only in case of removal of the President from the office “resulting from enduring inability to perform his duties on grounds of ill-health”. However, in 1998 changes were introduced into this provision, which excluded the possibility of holding early elections.¹⁰

International standards do not directly stipulate specific conditions when early elections have to or can be held. At the same time there exist two criteria which should provide guidance in such situations. First of all, a reasonable frequency of holding elections, established in law, must be adhered to as closely as possible. Thus Paragraph 7.1 of the 1990 OSCE Copenhagen Document¹¹ states: “To ensure that the will of the people serves as the basis of the authority of government, the participating States will hold free elections at reasonable intervals, as established by law”. Second, changes in the law which determine such intervals should be motivated by special circumstances. According to the best practices of conducting democratic elections in OSCE member states: “...amendments to the law may not be made during the period immediately preceding elections, especially if the ability of voters, political parties, or candidates to fulfil their roles in the elections could be infringed”.¹² Principles of the European Commission for Democracy through Law also establish that: “The fundamental elements of electoral law should not be open to amendment less than one year before an election”.¹³ There may be exceptions in special cases: “...in which serious deficiencies have been revealed in the legislation or its application and when there is an effective political and public consensus on the need to correct them...”¹⁴

In Kazakhstan the fact of collecting five million signatures to support the extension of the powers of the current President was used as a political basis for holding early elections. It is obvious that this situation must not be viewed as one of the “special circumstances”, allowed by the international norms, when the deficiencies in legislation entail the acute necessity to change the norms regulating the process of presidential elections. Moreover, holding early elections virtually shortens the term of office of the current President by two years, which diminishes the meaning of the constitutional norm of the presidential term of office.

⁸ The address by the Head of State to the people of Kazakhstan. 31.01.2011. URL: http://www.akorda.kz/ru/speeches/addresses_congratulations/obraschenie_glavy_gosudarstva_k_narodu_kazahstana_31012011g. (last accessed: 25 March 2011).

⁹ The Law of the Republic of Kazakhstan “On Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan” of 02 February 2011 No. 403-IV and the Constitutional Law of the Republic of Kazakhstan of 03 February 2011 No.404-IV “On Introduction of Amendments and Changes into Some Constitutional Laws of the Republic of Kazakhstan”.

¹⁰ The Law of the Republic of Kazakhstan “On Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan” of 07.10.1998 N 284-1.

¹¹ See the official site of OSCE URL: <http://www.osce.org/astana/73701> (last accessed: 25 March 2011).

¹² The Existing Commitments for Democratic Elections in OSCE Participating States. ODIHR/OSCE. Warsaw, 2004. p.14.

¹³ Code of Good Practices in Electoral Matters, Regulatory Levels and Stability of Electoral Law, Article 65, page 26, Strasbourg 23, May 2003, (Adopted by the Venice Commission at its 52nd session, Venice, 18-19 October 2002).

¹⁴ The Existing Commitments for Democratic Elections in OSCE Participating States. ODIHR/OSCE. Warsaw, 2004. p.14.

Subsequent process of introducing amendments into the Constitution and the electoral legislation, allowing the President to call early elections, clearly does not comply with the principles of the democratic state and the OSCE recommendations. First of all, changes to the main law of the country – the Constitution of the Republic of Kazakhstan - took place without serious public discussion. Second, the conditions under which early elections could be called must be directly provided for in the electoral legislation. The new provision in the Constitution, where early elections can be called by the current President at any time on the basis of his initiative only, contradicts the principle of foreseeability of the legal norm and creates a potential and constant threat to the observance of the principle of conducting elections on a regular basis. Third, calling snap elections within a short space of time significantly deprived the potential candidates of the opportunity to properly prepare for their participation in the elections.

II. Formation and Activities of Election Commissions

The provision of fair and transparent elections, in many respects, depends on how the system of bodies responsible for their conduct is organised. In Kazakhstan such a body is the Central Election Commission (hereinafter – CEC) and the corresponding local election commissions. The election commissions are given the key role of moderating the election process at all levels. Years of experience of conducting presidential, parliamentary and local elections in Kazakhstan speaks to the effect that there is significant potential to improve the activities of election commissions. In our opinion, without a root-and-branch overhaul of the procedure of forming such bodies, many other reforms of election legislation cannot be realised in order really and in full to guarantee the fair and impartial character of election procedures in conformity with international standards.

1. Lack of Independent Procedure to Form the Central Election Commission

The Constitutional Law “On Elections in the Republic of Kazakhstan” (hereinafter - the Election Law) stipulates that the CEC shall be composed of a chairman and six members of the commission.¹⁵ In pursuance of Paragraph 7 of Article 44 of the Constitution of Kazakhstan, the President shall appoint the chairman and two members of the CEC, and the other CEC members shall be appointed by either of the two Chambers of the Parliament of the Republic of Kazakhstan (two CEC members from each Chamber).¹⁶ In a situation where the incumbent President is also the Chairman of the Nur Otan Party, whose members constitute an overwhelming majority of the Parliament, the outcome of such appointment procedure is that the key body regulating the electoral process is formed by one political party. The Legislation of the Republic of Kazakhstan has no system of checks and balances to prevent occurrences of such situations.

The international standards say that where there are no longstanding traditions of independence of administrative authorities from political bodies at all levels, from national to the level of individual polling stations, there must be established independent and impartial election commissions.¹⁷

The Venice Commission specifically emphasized that only transparency, impartiality, and independence from politically motivated manipulations would ensure proper management of electoral processes from the start of election campaign to processing of election results. In countries where administrative authorities are traditionally independent from political bodies, state administration would apply election laws without being subjected to political pressure. However, in countries without extensive experience of organizing pluralistic elections, there are substantial risks that the authorities will put pressure on administrative agencies to act at their own convenience. This applies both to central governments and to local authorities.¹⁸

¹⁵ Part 2, Article 11 of the Election Law.

¹⁶ Paragraph 1, Article 5 of the Constitution of the RK.

¹⁷ Paragraph 3.1, Code of Good Practice in Electoral Matters.

¹⁸ Paragraphs 68-70 of the Explanatory Report to the Code of Good Practice in Electoral Matters (adopted by the Venice Commission at its 52nd Plenary Session, Venice, 18-19 October 2002).

URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus) (hereinafter, the Explanatory Report).

Thus, the fundamental requirement to ensure the equality of parties in election campaign is an independent electoral commission formed by all political parties, free from pressure on the part of the governing power. In Kazakhstan, where the CEC is currently formed essentially by one political party, there are reasonable doubts that such setting would ensure unbiased election processes, without jeopardizing the free and fair character of elections.¹⁹

2. Issues of representation of political parties on election committees

As mentioned above, the CEC is a standing body which heads a unified system of election commissions.²⁰ The CEC comprises seven members. The chair and two members of the Commission are appointed by the RK President.²¹ Each of the Chambers of Parliament appoints two CEC members.²² Territorial, District and Precinct Election Commissions are formed by the corresponding Maslikhats.²³

There are no uniform standards to form the bodies responsible for holding elections in international practices. Every political system has its own way of organising the election process with consideration of political tradition and local conditions. At the same time, for example, the general comment by the United Nation's Human Rights Committee states that "an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant"²⁴... waiver of these rights is incompatible with article 25 of the Covenant".²⁵ Thus, whichever system of organising elections a state may choose, it is necessary to provide impartiality of the body overseeing the elections.

There are different models of bodies overseeing the course of elections and providing for their fairness and impartiality, which operate throughout the world. For example, in some countries where the population traditionally trusts the bodies of executive power or judicial system, such functions are placed during the period of elections in the hands of specifically dedicated officials or judges. For example in the USA the appropriate officials of the State Department are responsible for the organisation of elections. Similar systems, where the executive power is involved in conducting elections, exist in Germany, France and Japan. The judicial power, including by the creation of specialised election courts, administers elections in a number of Latin American countries. In continental Europe a similar system exists in Poland where judges also play an important role in organising the election process.

In recent times more and more countries of the world have chosen the model where a fully autonomous body – an election commission – is created, which often has an independent constitutional status allowing it to function independently of other branches of power. Such systems exist in Russia, the RSA, India and other states. It is this independent body which oversees the course of elections that is talked about in the General Comment of the UN Human Rights Committee quoted above. Often the members of such commissions are representative of all, or the majority of, political parties. This is so done in order to guarantee the independence of their activities through the system of mutual checks of all the stakeholders of the political process.

¹⁹ Paragraphs 58-59, Explanatory Report.

²⁰ Para 2 Article 11 of the Constitutional Law "The Elections in the Republic of Kazakhstan"²⁰ of 28.09.1995 N 2464 (hereinafter – the Election Law).

²¹ Para 7 Article 44 of the Constitution of the Republic of Kazakhstan (adopted at the National referendum 30 August 1995) (with changes and amendments as of 02.02.2011) (hereinafter – the RK Constitution).

²² Para 1 Article 57 of the RK Constitution.

²³ Para 3 Article 10 of the Election Law.

²⁴ International Covenant on Civil and Political Rights. Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966. Ratified by the Law of the Republic of Kazakhstan of 28.11.2005 N 91-3 "The Ratification of the International Covenant on Civil and Political Rights. URL: www.un.org/ru/documents/decl_conv/conventions/pact-pol.shtml (hereinafter – ICCPR).

²⁵ CCPR General Comment No. 25: Article 25, Paragraph 20 (Participation in Public Affairs and the Right to Vote). URL: <http://www.unhcr.org/refworld/docid/453883fc22.html>

The Republic of Kazakhstan in its time made a choice in favour of creating a separate body to organise the elections: therefore an attempt was made to provide this body with maximum independence from other branches of power. However the functioning of such a body at the legislative level appeared not to be backed by sufficient guarantees of independence. Thus paragraph 3 of Article 10 of the Election Law states that “each political party is entitled to put forward one nominee in the formation of the corresponding election commission”. Territorial, District and Precinct Election Commissions are to be elected by the corresponding Maslikhats on the basis of submissions by political parties. This norm does not embody a direct requirement that all parties should have their representatives in election commissions. The very mechanism which guarantees the participation of political parties in the work of election commissions on equal terms has not been anchored in the legislation. Moreover, considering the specifics of forming the CEC, parties do not have any mechanisms to influence the composition of the body responsible for the organisation and conduct of the elections at national level. In addition it should be noted that the potential representation of political parties is limited by the fact that the election commissions at all levels are formed only with seven members.²⁶

It should be noted that paragraph 6, Article 20 of the Election Law provides only for the opportunity for political parties “to delegate to the corresponding election commission its representative with the right to an advisory vote”.²⁷ Therefore the law does not resolve the issue of the participation of representatives of political parties in the activities of the election commissions on equal terms. Furthermore this provision has a discriminatory character towards those representatives of political parties not included in the composition of the election commissions by decision of the Maslikhats.

The absence of legislative guarantees for participation of representatives of all political parties in the activities of the election commissions (or their participation on equal terms) in the Republic of Kazakhstan has attracted criticism on more than one occasion on the part of the OSCE Office for Democratic Institutions and Human Rights (hereinafter – OSCE/ODIHR). Recommendations were made to Kazakhstan to introduce corresponding changes into the Election Law so as to provide for the appropriate representation of political parties in the Kazakhstani election commissions.²⁸ The above-mentioned problems of the Election Law concerning the formation of election commissions according to the OSCE/ODIHR experts, mean in reality “lack of guarantees for inclusive pluralistic representation on election commissions at all levels”.²⁹ Up to now the proposed recommendations by OSCE/ODIHR on this issue have not been implemented by Kazakhstan.

To ensure independence of the bodies overseeing the elections (including the CEC) it is necessary that all, or on equal terms the majority, of the major political parties (and representatives of independent candidates in cases provided by law) should be represented in them. To this end the composition of the corresponding local election commissions should be significantly expanded, and the procedure of electing their members should have a fair character, allowing equal representation of all political parties. In Kazakhstan the general number of parties has remained fairly stable. At present nine parties are registered. In this connection election commissions should be formed with representatives from all parties, and in the case of presidential elections allow the participation of representatives of independent candidates.

Considering that the issues of forming election commissions require the introduction of changes and amendments into the RK Constitution, it is assumed that the reform has to be implemented in two stages. In the first stage changes and amendments in the Election Law should be introduced

²⁶ See para 2 Article 11, sub-para 2 of para. 2 Article 13, para 2 Article 15, para 1 Article 17 of the Election Law.

²⁷ It should be noted that such a representative has the right to appeal against the actions (failure to act) of an election commission to the higher election commission or court (para 6 Article 20 of the Election Law).

²⁸ OSCE/ODIHR Assessment of the Constitutional Law of the Republic of Kazakhstan “On Elections in the Republic of Kazakhstan” from 24 August, 2004, page 9. URL: www.osce.org/odihr/elections/35973; Final Report OSCE/ODIHR Election Observation Mission, Parliamentary Elections 18 August 2007, page 31. URL: <http://www.osce.org/odihr/elections/kazakhstan/28438>

²⁹ Preliminary Statement, Early Presidential Elections, 3 April 2011, page 3. URL: <http://www.osce.org/odihr/76345>

and by the following parliamentary elections the functioning of election commissions, on the basis of fair representation of all political parties, should be ensured. In the second stage it is necessary to consider the possibility of reforming the procedure of CEC formation based on the gained experience of functioning of the overhauled local election commissions.

3. Limitation of Activities of Election Commissions

Paragraph 7 of Article 10 of the Election Law states that “activities of an election commission may be terminated by a body establishing an election commission...”. Such provision gives wide possibilities to limit the activities of an election commission and to abandon commission’s decisions by termination of its activities. Because the law has already provided replacement of commission’s staff and possibility to dismiss the commission by a body established it, these provisions are seemed restricting and promoting involvement of the authorities to the activities of a commission.

Sub-paragraph 9 of paragraph 5, Article 19 of the Election Law, regulating the status of a member of an election commission, can be interpreted the similar way. According to this provision, an election commission member “is not bound by a political party or any other public association’s decisions, which he represents, and has no right to defend their interests”. Still it is not clear how a member of an election commission, representing a party or a public association in an election commission, cannot defend their interests if the aim of his membership is to be actively involved in the activities, ask questions and share his opinion.

The OSCE/ODIHR had recommended a wide set of amendments to these law provisions since 2004, that have not been implemented.

4. Election Disputes

The Election Law states that “decisions or actions (failure to act) of an election commission can be appealed to a higher election commission or court within ten days...”.³⁰ Such long terms for appealing the decisions or actions can create inconvenience and red tape, in particular taking into consideration that the issue concerns the elections and must be resolved in the shortest time possible. The OSCE/ODIHR proposal³¹ and the opinion of the Venice Commission of the Council of Europe³² should be accepted regarding the fact that a time limit within 5 days can be established for lodging the majority of such complaints. Exceptions can be directly laid out in the legislation.

The Election Law does not contain a clear-cut system of how the complaints and applications are to be considered and by whom.³³ This can also lead to red-tape and uncertainty and in addition be the subject of various kinds of abuse including giving rise to the notorious problem of searching for ‘convenient’ jurisdiction (forum shopping) as well as foot-dragging the appeal process.

According to the national legislation, practically any applications and complaints can be sent simultaneously, or in any order, to court, prosecution office and election commission. With simultaneous consideration of applications by an election commission and a court, an election commission suspends consideration of the application until the court decision comes into force.³⁴

³⁰ Para 9 Article 20 of the Election Law.

³¹ OSCE/ODIHR Assessment of the Constitutional Law of the Republic of Kazakhstan “On Elections in the Republic of Kazakhstan” from 24 August, 2004, p. 11. URL: www.osce.org/odihr/elections/35973

³² Paragraph 95 of the Explanatory Report to the Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52nd session, Venice, 18-19 October 2002. URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus.asp). (hereinafter – Code of Good Practice in Electoral Matters) states that “a time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections”.

³³ Preliminary Statement, Early Presidential Elections, 3 April 2011, p. 6. URL: <http://www.osce.org/odihr/76345>

³⁴ Para 9, Article 20 of the Election Law.

Such an approach to dealing with complaints and applications will delay the resolution of conflict situations related to elections. The Code of Good Practice in Electoral Matters states that “the appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.”³⁵

In Kazakhstan there is no administrative procedure code which would regulate the appeal issues within the framework of administrative procedure. There is also no separate system of administrative justice and no specialised courts dealing with election disputes. Legal conflicts, related to the application of election legislation, are considered within the framework of civil law proceedings which are not geared to the needs of the election process.

Article 49 of the Election Law, dedicated to the issue of considering complaints and applications, which can be related to the election legislation and practices, is worded extremely narrowly. Its title only talks about the appeal and annulment of decisions and actions during the course of an election campaign. In addition, Article 49 states that submissions by citizens and organisations regarding violations of election legislation shall be considered by election commissions, with certain exceptions, within five days of the day the complaint was filed. This time limit, in our opinion, can be reduced to three days on a par with complaints about the decisions and actions (failure to act) of an election commission and its members. The law does not make it clear what kind of complaints can be considered by election commissions of various levels and what decisions they are authorised to take in these cases; for example, can they annul the results of elections within an election constituency, if voting irregularities have affected the distribution of votes, etc.³⁶

Complaints about decisions and actions (failure to act) of an election commission and its members, according to the general rule, are considered by a higher ranking commission within three days from the day the complaint was filed. From the language of the law it is not clear whether such a decision is final or whether it can be further appealed against in a higher authority including the CEC.³⁷ Also, it is not clearly stipulated in which court the CEC decisions are to be appealed against. Clarity only exists with regard to a number of issues related to presidential elections.³⁸

The Election Law says nothing regarding the fact of whether the appellant can be present when his complaint is being dealt with and regarding how consideration of this submission is to be conducted.³⁹

Unlike the Election Law, Article 274 of the Civil Procedure Code (CPC) states that courts have the right to consider submissions regarding the decisions and actions related to violation of the right to vote or to be elected, participate in elections and in a referendum, but not any decisions and actions violating the election legislation. Such wording does not add clarity regarding the issue as to which, in fact, applications and complaints can be forwarded to administrative and judicial bodies.⁴⁰ In our opinion, judicial defence must be guaranteed against any decision, action or failure

³⁵ Sub-para c. para. 3.3. of section 3 “Procedural guarantees” of the Code of Good Practice in Electoral Matters.

³⁶ It is obvious that similar disputes can be considered by courts as well but in conformity with the CPC a complaint can be lodged within a period of three months. Clearly such long time frames for appeal are not acceptable in the election process.

³⁷ Regarding the powers of such commissions para 102 of the Explanatory Report has a special provision that “Where higher-level commissions are appeal bodies, they should be able to rectify or annul *ex officio* the decisions of lower electoral commissions”.

³⁸ See para 8 Article 59, para 3. Article 66 of the Election Law.

³⁹ Sub-para h. para 3.3. “Procedural guarantees” of the Code of Good Practice in Electoral Matters states: “The applicant’s right to a hearing involving both parties must be protected”.

⁴⁰ Sub-para h. para 3.3. “Procedural guarantees” of the Code of Good Practice in Electoral Matters stipulates that the appeal body must have authority to annul elections in cases where there is a danger that irregularities could have influenced the outcome. It also should have the power to annul the entire election

to act of a state body if the rights and legitimate interests of a citizen, public association or another legal entity are infringed upon.⁴¹ Furthermore, taking into consideration the importance of elections in democratic society, fairly flexible rules regarding the acceptability of complaints should be adopted.⁴²

In our opinion, the law should prescribe those cases where administrative remedies have to be exhausted before a complaint goes to court. Considering that many election disputes necessitate prompt resolution, the possibility of an exclusively judicial defence regarding a clearly defined circle of issues can be provided for.

At present all court applications are considered according to the rules of RK CPC within the framework of special proceedings. In the future such disputes should be sent for consideration by the bodies of administrative justice or by specialised judicial bodies. The creation of the system of administrative justice has been anchored as a priority in the Concept of the Legal Policy.⁴³

Court decisions on election cases come into legitimate force immediately and are not subject to appeal or cassation. This situation rules out the possibility of appealing against court decisions in the appeal proceedings, which is unacceptable from the point of view of complying with the principle of due process in judicial proceedings.

III. Verification of compliance of a presidential candidate with the requirements of the Constitution of the Republic of Kazakhstan

This chapter of the assessment of the election legislation of the Republic of Kazakhstan considers in details key provisions that are not complied with commitments taken by Kazakhstan, international standards and best practices⁴⁴ in sphere of elections provision and realization and the implementation of the right to be elected for the Office of the President of the Republic of Kazakhstan. ICCPR is the very first ground to reform and improve the election legislation in conformity with Kazakhstan's commitments. Thus, according to para. 1, Article 2: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Article 25 of the ICCPR provides that "every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

results or, only the results in individual constituencies or polling stations. In those areas where the results have been annulled, new elections must be organised.

⁴¹ In doing so the Venice Commission recommends establishing requirements regarding the minimum number of voters to appeal the results of elections. See para 99 of the Explanatory Report to the Code of Good Practice in Electoral Matters, adopted by the Venice Commission of the Council of Europe.

⁴² Para 96, *ibid.*

⁴³ The Concept of the Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020, approved by the Decree of the President of the Republic of Kazakhstan of 24.08.2009 N 858.

⁴⁴ It means the Document of the Copenhagen meeting of Conference on human dimension of the CSCE. Copenhagen, 29 June 1990. URL: <http://www.osce.org/ru/odihr/elections/14304> (hereinafter, CSCE Copenhagen Document); the Document of the Moscow meeting on human dimension of the CSCE, 1991. URL: www.osce.org/ru/odihr/elections/16378 (hereinafter, CSCE Moscow Document); the Convention of Standards of Democratic Elections, Electoral Rights and Freedoms on the member states of the Commonwealth of Independent States, 7 October 2002, ratified by Kazakhstan by the Law of the Republic of Kazakhstan of 07 July 2007 N 260-3 "On Ratification of the Convention of Standards of Democratic Elections, Electoral Rights and Freedoms on the member states of the Commonwealth of Independent States" (hereinafter, the CIS Convention); Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report. (adopted by the Venice Commission at its 52nd Session, Venice, 18-19 October 2002). Conclusion No. 190/2002, CDL-AD (2002) 23. URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus.asp). (hereinafter, Code of Good Practice in Electoral Matters).

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country”.

The Election Law and the RK Constitution not full comply with these ICCPR provisions in implementation of the right to equal participation in the elections for the Office of President of the RK as a candidate. Details follow.

1. Verification of compliance of a presidential candidate with the requirements of the Constitution of the Republic of Kazakhstan

1.1. Verification of compliance of a presidential candidate with the requirements of para.3, Article 33 of the Constitution

In conformity with para 3, Article 33 of the Constitution, citizens who have been recognised by the court as legally incapacitated, as well as those in places of detention, sentenced by a court, do not have the right to vote and be elected and to participate in a national referendum.⁴⁵ The requirement of the Constitution regarding the legal capacity of a candidate corresponds to the generally accepted practice and international standards.⁴⁶ One debatable rule is that a candidate for President cannot be a citizen held in places of detention, sentenced by a court, because this has a broad interpretation in the Kazakh legislation. Thus, paras.3 and 4, Article 4 of the Election Law state that a candidate for the Office of President cannot be a person with a criminal record, which has not been spent or expunged according to the procedure established in law, or a person found guilty by a court, according to procedure established in law, of a crime or administrative offence involving corruption.⁴⁷

This norm came into force in May 1998.⁴⁸ Prior to its coming into force, there was a decision by the Constitutional Council which established that the provision of the Law - that a person whose criminal record at the time of registration has not been spent or expunged according to the procedure established in law is not eligible for registration as a candidate for the Office of President - does not have a discriminatory character. The Constitutional Council found the restriction of the passive electoral right justified, since this right is not included in the exhaustive list of rights and freedoms of an individual and a citizen, which are not subject to restriction under any circumstances.⁴⁹

This interpretation by the Constitutional Council differs from international standards and principles of a democratic state. Deprivation of the passive electoral right as a result of a conviction for any offence violates the principle of proportionality, laid out in para.24 of the 1990 OSCE Copenhagen

⁴⁵ The Constitution of the Republic of Kazakhstan (adopted at the national referendum on 30 August 1995) (with changes and amendments as of 02.02.2011).

⁴⁶ Subpara 1.1.d (iv, v), para 1, Code of Good Practice in Electoral Matters. Guidelines and explanatory report (adopted by the Venice Commission at its 52nd session, Venice, 18-19 October 2002). Conclusion n° 190/2002, CDL-AD (2002) 23. URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus.asp). (hereinafter – Code of Good Practice in Electoral Matters).

⁴⁷ The Constitutional Law “On Elections in the Republic of Kazakhstan” of 28.09.1995 N 2464.

⁴⁸ Before 1998 Article 4 of the Decree of the President, having the force of the Constitutional Law, “On Elections in the Republic of Kazakhstan” had only requirements similar to para. 3 of Article 33 of the Constitution. The Constitutional Law of the Republic of Kazakhstan of 8 May 1998 N 222-1 “On Introduction of changes and amendments into the Decree of the President of the Republic of Kazakhstan, having the force of the Constitutional Law “On Elections in the Republic of Kazakhstan”” introduced the said amendments into Article 4.

⁴⁹ Resolution of the Constitutional Council of the Republic of Kazakhstan of 9 April 2004 No.5 “On Verification of Compliance of the Constitutional Law of the RK “On Introduction of changes and amendments into the Constitutional Law of the RK “On Elections in the Republic of Kazakhstan” with the Constitution”.

Document.⁵⁰ In particular, according to the Law “a person whose criminal record at the time of registration has not been spent or expunged according to the procedure established in law”⁵¹ is restricted in the passive electoral right despite the seriousness of offence.

The Code of Good Practice in Electoral Matters by the Venice Commission also states that, the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them; the deprivation must be based on a criminal conviction for a serious offence.⁵²

The OSCE/ODIHR repeatedly recommended changing the norm prohibiting the registration of candidates with unspent criminal record with the purpose of bringing it in line with the international standards.⁵³

Undoubtedly, nobody states that the restriction of political rights for committing crimes is not applicable but it should have a fixed time frame and be proportional to offence, including serious criminal offences. Such the restriction of the right for any offence raises concerns about the excessive powers of the state that contradicts the international practice in the electoral law⁵⁴.

The OSCE/ODIHR recommended the Government of Kazakhstan to change Article 4 of the Election Law for the Parliamentary elections in 2001⁵⁵, during preliminary assessment of the Election Law in 2003⁵⁶, during assessment of the Election Law in 2004⁵⁷ and after the Parliamentary Elections in 2007⁵⁸. As of 2011 the recommendations had not been implemented.

In our opinion, it is required to indicate in the Law a list of serious offences execution of which would restrict a person in his electoral right and to fix time frame when the right should be restored.

1.2. Verification of compliance of a presidential candidate with the requirements of para.2, Article 41 of the Constitution

In conformity with para 2, Article 41 of the Constitution, to be elected President a citizen has to be fluent in the state language. The phrase “fluent in the state language”, according to the Resolution of the Constitutional Council of 9 October 1998, should be understood as “competence in reading and writing, expressing thoughts easily and without difficulties and speaking publicly in the Kazakh language”.⁵⁹

⁵⁰ Document of the Copenhagen meeting of the Conference on the human dimension of the CSCE. Copenhagen, 29 June 1990, states in para.24: “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”. URL:<http://www.osce.org/ru/odihr/elections/14304>

⁵¹ Para. 4, Article 4 of the Election Law

⁵² See footnote 2.

⁵³ OSCE/ODIHR, “Republic of Kazakhstan. Assessment of the Constitutional Law on Elections. Warsaw, 24 August 2004”. URL: <http://www.osce.org/ru/odihr/elections/35973>.

⁵⁴ Para. 24 of the OSCE Copenhagen Document and subpara. d, para. 6, Explanatory report to the Code of Good Practice in Electoral Matters (adopted by the Venice Commission at its 52nd session, Venice, 18-19 October 2002). URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus.asp). (hereinafter – Explanatory report).

⁵⁵ OSCE/ODIHR Review of the Election Legislation for Parliamentary Elections in the Republic of Kazakhstan, 18 January 2001, P.4. URL: <http://www.osce.org/odihr/elections/kazakhstan/14799>

⁵⁶ OSCE/ODIHR Review Assessment of the Draft Amended Election Law of the Republic of Kazakhstan, 18 September 2003. P.5. URL: www.osce.org/ru/odihr/elections/26314

⁵⁷ OSCE/ODIHR, “Republic of Kazakhstan. Assessment of the Constitutional Law on Elections. Warsaw, 24 August 2004”. URL: www.osce.org/ru/odihr/elections/35973

⁵⁸ Final Report OSCE/ODIHR Election Observation Mission, Parliamentary Elections 18 August 2007, page 31. URL: www.osce.org/odihr/elections/kazakhstan/28438

⁵⁹ Resolution of the Constitutional Council of the Republic of Kazakhstan of 9 October 1998 No. 9/2 “On the Official Interpretation of Paragraph 2 of Article 41 of the Constitution of the Republic of Kazakhstan” (hereinafter – Resolution of the Constitutional Council No. 9/2).

The decision on a candidate's fluency in the state language is taken by the Linguistic Commission, set up by the Resolution of the Central Election Commission, comprising linguists and other specialists, numbering at least 5 persons.⁶⁰ At the same time the Election Law and the Statute on the Central Election Commission (hereinafter "the Election Commission") do not contain the norms regulating the powers, the setting-up procedure, the main obligations and the working principles of the Linguistic Commission.⁶¹

At present the procedure of testing the candidates by the Linguistic Commission is regulated by the by-law – the Resolution of the Election Commission, which does not prescribe the procedure relating to the composition of the Linguistic Commission itself.⁶² Specifically it does not stipulate the criteria for the selection of the linguistic specialists, does not explain which "other specialists" can be included in the Commission, the length of their professional experience, which areas of knowledge they must represent, the necessity of possessing an academic qualification and so on. The Resolution lacks such important norms as the provision regarding conflict of interest of the members of the Linguistic Commission and the members of the Election Commission when forming the Linguistic Commission; nor does it provide for the opportunity to challenge the members of the Commission.

It was noted in the official commentaries of the Election Commission on the Interim OSCE/ODIHR Report No.1,⁶³ that the Linguistic Commission was composed of the leading linguists of the Republic of Kazakhstan and all the members of the Linguistic Commission are Doctors of Philology and acknowledged academicians in the sphere of Kazakh Philology.⁶⁴

The Resolution only superficially describes the procedure for conducting examination of the knowledge of the state language. It only states that in order to establish fluency in the state language it is required to produce a written assignment of no more than two pages on a topic chosen by the Linguistic Commission; to read a printed text of no more than three pages chosen by the Linguistic Commission; to deliver a public presentation of not less than fifteen minutes on a topic chosen by the Linguistic Commission.⁶⁵ At the same time the text of the Resolution does not describe a clear procedure for selecting the topics of the written and oral assignments, nor does it state whether the candidates are given the topics of the assignments in advance to prepare for the examination; it lacks a distinct system of evaluation of assignments and there is no guidance regarding the number of errors permitted in written and oral submissions. The Resolution does not provide for the opportunity to ask questions of the examinee on the part of the members of the Linguistic Commission. At the same time it is known that in the course of 2011 early presidential elections, in one case a candidate was asked additional questions which affected the decision of the Linguistic Commission.⁶⁶

⁶⁰ Para.2 of Article 54 of the Election Law.

⁶¹ See The Election Law and the Statute on the Central Election Commission (Endorsed by the Decree by the President of the Republic of Kazakhstan of 11 November 1996 N 3205).

⁶² Resolution by the Central Election Commission of the Republic of Kazakhstan of 31 August 2005 No. 12/26 "On the Procedure of Establishing Fluency in the State Language of a Candidate for the Office of President of the Republic of Kazakhstan" (hereinafter – the Resolution).

⁶³ Interim Report No. 1 (1-14 March 2011) by the OSCE/ODIHR Election Observation Mission, 2011 Early Presidential Elections in the Republic of Kazakhstan. URL: <http://www.osce.org/ru/odihr/76207>.

⁶⁴ Commentary by the Central Election Commission of the Republic of Kazakhstan on Interim Report No. 1 (1-14 March 2011) by the OSCE/ODIHR Election Observation Mission, 2011 Early Presidential Elections in the Republic of Kazakhstan.

URL: http://election.kz/portal/page?_pageid=73,1578432&_dad=portal&_schema=PORTAL. (hereinafter – Commentary of the Election Commission on Interim Report No. 1).

⁶⁵ Paragraph 3 of the Resolution of the Election Commission.

⁶⁶ It is noted in the Commentary of the Election Commission on Interim Report No. 1: "Candidate U. Kaisarov was tested by the Linguistic Commission in conformity with Resolution 12/26 of 13 February 2011. The decision about fluency in the state language of the candidate was made jointly by 5 members of the Linguistic Commission. The Linguistic Commission, whose members were Doctors of Sciences, acknowledged specialists in the sphere of Kazakh Philology, found 28 mistakes, while an expert, appointed by the court, who found 17 mistakes, was a teacher of the Kazakh Language. In addition since the day the above-mentioned document had been adopted, no changes regarding testing were introduced. There was

Furthermore, the Resolution does not contain a requirement regarding the mandatory taking of minutes and does not describe the procedure to appeal the decisions of the Commission.

Analysis of the Kazakhstani legislation demonstrates that there are no clear-cut criteria to determine fluency in the state language of presidential candidates, thus allowing the Linguistic Commission to arbitrarily determine the parameters of the examination process in each individual case. The activities of the Linguistic Commission violate the norms of Article 39 of the Constitution with regard to prohibiting the restriction of rights of candidates through the use of by-laws, i.e. the Resolution of the Election Commission.

It should be noted that as early as in 2005, the OSCE/ODIHR Election Observation Mission Final Report regarding the 2005 Presidential Elections pointed out that “the requirement of Article 54 of the Election Law does not state fair and objective standards for determining fluency in the state language so that a candidate will know how he or she will be evaluated. Although the CEC issued a decision in this regard, such criteria should be more appropriately established by law”.⁶⁷ Up to now the Election Commission has not provided official commentary on ODIHR recommendations regarding this issue.⁶⁸

In our opinion, practical application of clear-cut examination criteria or guidelines foreseen in law would assist both, presidential candidates to understand what are the bases to evaluate the fluency in the state language, and voters and participants of political process to determine if the linguistic commission’s decisions are fair in order to avoid unfair decisions.

With regard to the requirement of para.2, Article 41 of the Constitution, which states that in order to be elected President of the Republic of Kazakhstan a citizen must have been resident in Kazakhstan for the preceding fifteen years, the Election Law does not have norms regulating the procedure for confirming the fact of uninterrupted residence. It is not sufficiently clear whether long-term business trips, or being a staff member of a diplomatic corps, that is, activities involving long absences from the territory of the Republic of Kazakhstan, should be considered when calculating this period. A residence requirement for presidential candidates is widely applied in international practice and there are no international standards providing applicable limits. Nevertheless, provisions of the para.2, article 41 of the RK Constitution are excessive.

Imposing an uninterrupted residence requirement, on the one hand, may contradict the norms prohibiting discrimination,⁶⁹ and, on the other hand, the requirement regarding the long period of uninterrupted residence indirectly encumbers the realization of a guarantee regarding the right of citizens to freedom of movement,⁷⁰ clearly entrenched in the Constitution.

no tightening of requirements or increase in the complexity during the test: since candidate Kaisarov failed to demonstrate his knowledge in a conclusive manner, he was asked additional questions.”

⁶⁷ Final Report of the OSCE/ODIHR Election Observation Mission, 2005 Presidential Elections. URL: <http://www.osce.org/ru/odihr/elections/kazakhstan/18153>.

⁶⁸ See Statement of the Central Election Commission of the Republic of Kazakhstan on the Final Report of the OSCE/ODIHR Election Observation Mission, Presidential Elections in the Republic of Kazakhstan of 4 December 2005.

URL: http://election.kz/portal/page?_pageid=73,207307&_dad=portal&_schema=PORTAL; See Conclusion on recommendations reflected in the OSCE/ODIHR Election Observation Mission Report on Elections to the Majilis of the Parliament of the RK on September 19 and October 3, 2004, and on recommendations reflected in the Needs Assessment Report of the OSCE/ODIHR Mission of September 13-17, 2005 regarding the forthcoming presidential elections of 4 December 2005.

URL: http://election.kz/portal/page?_pageid=73,95687&_dad=portal&_schema=PORTAL.

⁶⁹ Article 14 of the Constitution: “1. Every person shall be equal before the law and court. 2. No person shall be subjected to any discrimination on the grounds of origin, social status, professional status or property status, gender, race, nationality, language, religious conviction, beliefs, place of residence or any other circumstances.

⁷⁰ Article 21 of the Constitution: “1. Every person who is legally in the territory of the Republic of Kazakhstan shall have the right to free movement around its territory and free choice of place of residence except for cases stipulated by law. 2. Every person shall have the right to leave the territory of the Republic of

Continuous absence in Kazakhstan due to business or education trips should not be used as a ground for discrimination of such category of citizens. That follows from the Paragraph 15 of the General Comment No. 25 of the UN Human Rights Committee, according to which “persons... should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation”⁷¹.

The Venice Commission points out that the right to vote and to be elected may be accorded to citizens residing abroad. According to the experts of the Commission, a length of residence requirement may be imposed on nationals solely for participation in local or regional elections;⁷² the required period of residence must not exceed six months; a longer period may be established only to protect national minorities.⁷³

It is assumed that this requirement can be justified provided that a reduction is made to the required period of uninterrupted residency in the territory of the Republic of Kazakhstan, that potential exceptions from this rule be specified as well as the procedure to verify the information provided by a candidate about the place of his residency. In international practice there is no uniform mechanism to regulate this issue. Nevertheless it is clear that the legislation of the Republic of Kazakhstan should not restrict the opportunity of citizens to be elected to the Office of President to such a significant extent.

To avoid discrimination of candidates in future, it is suggested to decrease the requirement of a minimal residency in the territory of the country for a candidate registration down to 5-7 years. In our opinion, such a period would not allow a presidential candidate to lose connection with his country but would let him understand social and political realities.

2. Collection of signatures to support a presidential candidate standing for the Office of President

After assessing the compliance of a presidential candidate with the requirements of the Constitution and the Election Law, the critical stage is collection of signatures to support a candidate, after which a contender for the office of President is registered as a candidate and allowed to participate in the elections. In conformity with para.2, Article 56 of the Election Law a presidential candidate must be supported by at least one percent of the total number of voters, equally representing at least two thirds of the Oblasts, a city of national status and the capital of the Republic of Kazakhstan. This requirement of the Law corresponds to the international standards.⁷⁴

In order to determine one percent of voters in terms of numbers it is necessary to have a clearly prescribed mechanism for establishing the total number of voters, factoring in changes in the quantitative composition of the population. However, the Election Law does not contain specific requirements as to the procedure for establishing the number of voters. Thus, according to data from the Statistical Agency of the Republic of Kazakhstan as of 1 February 2011 the population of Kazakhstan totals 16, 455, 000 people. The Election Commission, by its Resolution of 7 February

Kazakhstan. Citizens of the Republic of Kazakhstan shall have the right to unimpeded return to the Republic of Kazakhstan”.

⁷¹ CCPR General Comment No.25: Article 25, Paragraph 15 (Participation in Public Affairs and the Right to Vote) URL: <http://www.unhcr.org/refworld/docin/453883fc22.html>

⁷² Sub-para 1.1.c (iii) of para 1, Code of Good Practice in Electoral Matters, It should be noted that the right to vote in local elections is more often also granted to nationals of foreign states permanently residing in the territory of another state.

⁷³ Sub-para. 1.1. c (iv, v) of para 1, Code of Good Practice in Electoral Matters.

⁷⁴ Sub-para. 1.3. (i, ii) of para 1, Code of Good Practice in Electoral Matters, lays out that presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures, but the law should not require collection of the signatures of more than 1% of voters in the constituency concerned.

2011,⁷⁵ established the total number of voters at 9, 101, 000. At the same time, the Resolution does not say on the basis of what calculations the total number of voters was established. Incorrect estimation of the total number of voters may jeopardise the legitimacy of the elections. The lack of clear-cut norms, regarding the sources of ascertaining the number of voters, in the legislation and non-transparency of this process in practice can lead to mistakes and corrupt practices, and also give rise to mistrust of the institution of elections on the part of the society.

When determining the period of time provided for collecting signatures in support of candidates it is necessary to consider several factors. In the course of 2011 pre-election campaign the time frames for preparatory activities were considerably shortened. Nomination of candidates for the Office of President took place from 5 till 20 February 2011. Registration of candidates finished on 2 March 2011.⁷⁶ Within a fairly short period of time, less than a month, candidates were submitting their nomination applications to the Election Commission, taking their exams for the knowledge of the state language, receiving signature sheets and carrying out the collection of signatures in their support. Taking into account the shortened time-frames to prepare and conduct early elections,⁷⁷ to issue the signature sheets and to validate the signatures,⁷⁸ the presidential candidates were supposed to collect 91,000 signatures within a period of up to 13 days. This amounts to more than 7,000 signatures a day, which, in our opinion, is a virtually unattainable requirement, considering the geography of Kazakhstan. Therefore, significant and arbitrary shortening of time-frames to collect signatures indirectly violates the rights of candidates for registration and does not comply with the practices of democratic countries when conducting elections.

The procedure of verification of signatures is regulated by Article 56 of the Election Law. Completed signature sheets in support of candidates for the office of President are submitted to a territorial Election Commission, which, within a 10-day period, carries out validation of signatures with the assistance of the employees of passport services, issues a corresponding protocol and forwards it to the Election Commission. According to the Resolution of 4 February 2011 of the Election Commission verification of signature sheets is to be carried out by enlisting the assistance of the territorial services of the Ministry of Justice and Ministry of the Interior. Meanwhile, the absence of transparency and public scrutiny creates room for corrupt practices and manipulation.⁷⁹ Furthermore the legislation of the Republic of Kazakhstan does not secure the methods of conducting verification and the criteria for declaring signatures invalid.⁸⁰ At the same time international standards unequivocally state that the process of verification must in principle cover all signatures, but after it has indisputably been established that the required number of signatures has been collected the remaining signatures do not need to be verified.⁸¹ The signature verification procedure must follow clear rules, particularly with regard to deadlines, and be applied to all the signatures rather than just a sample.⁸²

⁷⁵ Resolution of the Election Commission of the RK of 07.02.2011 "On Production and provision of signature sheets to candidates for the Office of President of the Republic of Kazakhstan at the early elections for the President of the Republic of Kazakhstan set for 3 April 2011".

⁷⁶ Resolution of the Central Election Commission of the Republic of Kazakhstan of 04.02.2011 No. 16/22 "On the time-frames for conducting election activities for preparation and conduct of the early elections for President of the Republic of Kazakhstan set for 3 April 2011".

⁷⁷ See footnotes 24 and 25.

⁷⁸ Resolution of the Election Commission of the RK of 10.02.2011 No. 19/30 "On the reduction of periods of issuing signature sheets and validation of signatures in support of a candidate for the Office of the President of the Republic of Kazakhstan at the early elections for President of the Republic of Kazakhstan set for 3 April 2011".

⁷⁹ See footnote 27.

⁸⁰ The procedure for validation of signature sheets has already raised doubts with the OSCE/ODIHR Election Observation Mission. Thus, OSCE/ODIHR Interim Report No. 1 noted that "A lack of clear rules for signature verification led to uneven practice. DEC (District Election Commission) verification protocols contained no reasoning for the invalidation of signatures, and candidates or their proxies were routinely not invited to attend the verification procedures. The OSCE/ODIHR EOM was informed by one nominee for the Office of President that one TEC (Territorial Election Commission) rejected signature sheets due to discovery of technical mistakes".

⁸¹ Sub-para. 1.3. (iv) of para 1, Code of Good Practice in Electoral Matters.

⁸² Sub-para.8 of para.1.3, Explanatory Report, Code of Good Practice in Electoral Matters.

In conclusion it must be noted that the procedure of registration of candidates for the Office of President of the Republic of Kazakhstan at the 2011 elections does not comply with the international standards, since there are significant gaps in the legislation with regard to the key aspects of candidate registration process. Thus, the legislation of the Republic of Kazakhstan leaves room for possible manipulation and corrupt practices, while it is necessary for it to establish a clear and transparent mechanism for regulating the process of elections. It is especially important in countries which have no strong tradition for functioning of democratic institutions. This condition is one of the necessary prerequisites for establishing the trust of the society in the institution of democratic elections in the country.

IV. Ensuring equal rights and opportunities for presidential candidates in the Republic of Kazakhstan

In the course of the campaigning period preceding the day of voting during the 2011 Presidential Elections in Kazakhstan, the OSCE/ODIHR Election Observation Mission repeatedly stated about the absence of equal opportunities for all the registered presidential candidates. In particular, the Mission noted that during the election campaign no clear separation was made between the exercise of official duties and campaign activities of the incumbent President.⁸³

The international standards establish requirements in relation to the equality of candidates. Thus, in particular, Article 25 of the International Covenant on Civil and Political Rights⁸⁴ proclaims that every citizen, without unreasonable restrictions, should have the right and opportunity to be elected at genuine periodic elections and to have access in his/her country on general conditions of equality to public service.

OSCE standards indicate that the participant states shall guarantee universal and equal suffrage to adult citizens and shall ensure that the law and public policy permit political campaigning in an atmosphere of freedom and fairness.⁸⁵

The Venice Commission Code of Good Practice in Electoral Matters says that all candidates should be guaranteed equal rights and opportunities. This implies a fair attitude of public authorities to electoral campaigns and coverage in mass media, including in public media, and equal access to public financing of election campaigns.⁸⁶

The electoral legislation in the Republic of Kazakhstan proclaims equal rights and conditions for participation in elections for all candidates⁸⁷ but at the same time puts presidential candidates at disadvantage with the incumbent President participating in the elections as a candidate. The privileged position of the incumbent President is first of all due to his special constitutional status. According to Paragraph 5 of Article 42 of the Constitution of the Republic of Kazakhstan, one and

⁸³ See: Interim Report No. 1 (1-14 March 2011) by the OSCE/ODIHR Election Observation Mission, 2011 Early Presidential Elections in the Republic of Kazakhstan. URL: <http://www.osce.org/ru/odihr/76207> (hereinafter, OSCE/ODIHR Interim Report No. 1). URL: www.osce.org/ru/odihr/76237 (hereinafter, OSCE/ODIHR Interim Report No. 2).

⁸⁴ Adopted by the General Assembly Resolution 2200 A (XXI) dated 16 December 1966. Ratified by the Republic of Kazakhstan Law No. 91-3 as of 28.11.2005 "On Ratification of the International Covenant on Civil and Political Rights." URL: www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml

⁸⁵ Paragraphs 7.3 and 7.7, Document of the Copenhagen Meeting of the Conference on the Human Dimension (*Copenhagen, 29 June 1990*). URL: www.osce.org/ru/odihr/elections/14304

⁸⁶ Paragraph 2.3(a), Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report (adopted by the Venice Commission at its 52nd Session, Venice, 18-19 October 2002). Conclusion No. 190/2002, CDL-AD (2002) 23. URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus.asp) (hereinafter, Code of Good Practice in Electoral Matters).

⁸⁷ Part 3, Article 5 of the Republic of Kazakhstan Constitutional Law "On Elections in the Republic of Kazakhstan" No. 2464 as of 28.09.1995 (hereinafter, the Election Law).

the same person may not be elected President of the Republic more than twice in a row. This restriction, however, does not apply to the First President of the Republic of Kazakhstan⁸⁸, who may be nominated an unlimited number of times as opposed to other citizens of Kazakhstan. In addition, the incumbent President, in accordance with Paragraph 3-1 of Article 41 of the Constitution of Kazakhstan, has the authority to call early elections. The election legislation, however, contains no list of grounds necessary for calling early elections. Combination of the right to stand for elections an unlimited number of times with the authority to hold early elections at any time gives the First President of the Republic of Kazakhstan a significant advantage over any other presidential candidates.

In addition, the provision of equal rights and opportunities for candidates to the Office of the President of the Republic of Kazakhstan is negatively impacted by the lack of a proper degree of independence of the CEC, the unclear separation between the institutional responsibilities of the incumbent President and his activities within the framework of election campaign in the capacity of a presidential candidate, and by the fact that presidential candidates have no effective opportunities to challenge election results.

1. Separation between the President's official duties and Campaign Activities in the Course of 2011 Elections

Article 47 of the Election Law allows presidential candidates, from the date of their registration and until publication of election results, to be released from their direct official duties. Nevertheless, in the history of presidential elections in Kazakhstan the incumbent President has never exercised this right.

During the 2011 Presidential Elections, the un-registered presidential candidate, Salim Oten, by referring to the equal rights of candidates and violations of Articles 12 and 14 of the Constitution of the Republic of Kazakhstan, and Article 50 of the Election Law, addressed the President with the offer to go on vacation for the period of the election campaign. The CEC Chairman responded that the President Nursultan Nazarbayev was the acting President of the country and that there were no violations whatsoever in his actions.⁸⁹

At the same time, the OSCE/ODIHR Election Observation Mission noted that the mass media actively covered the incumbent President's activities in his official capacity. In all major cities, ODIHR observers recorded large numbers of campaign posters and billboards of the incumbent President mounted on public and private buildings.⁹⁰

With regard to the election campaign issue, the CEC stated that on the first day of the campaign the incumbent President announced his decision not to pursue active campaigning in person but instead he decided to focus on important issues of state policy implementation. Such position did not mean that the President completely abandoned the election campaign. All the campaigning activities were carried out by his election agents.

According to the CEC, the President's decision created additional opportunities for other presidential candidates to conduct election campaigns in their favour. Commenting on this issue, the CEC also stressed that the Election Law did not prevent the candidates from exercising their official duties as public servants, and the media coverage about the acting President does not relate to elections, but has informative nature, covering his activities of a public official fulfilling his

⁸⁸ The Constitution of the Republic of Kazakhstan (adopted at the nation-wide referendum on 30 August 1995) amended on 02.02.2011 (hereinafter, the Constitution of the RK).

⁸⁹ The Kazakhstan presidential candidate Salim Oten requests exclusion of Nursultan Nazarbayev from the number of participants in the election campaign.

URL: http://panorama.kz/index.php?option=com_content&task=view&id=11330&Itemid=1

The self-promoted candidate requests exclusion of Nazarbayev from presidential candidates//24News.kz. Source: KazTAG. URL: <http://24news.kz/politics/58537.html>

⁹⁰ See: OSCE/ODIHR Interim Report No. 1 and OSCE/ODIHR Interim Report No. 2.

direct responsibilities. The CEC decided that in this context the OSCE/ODIHR would be more correct and logical to note the incumbent President's personal withdrawal from the election campaign rather than the lack of clear distinction in the status of the incumbent President from his status of a presidential candidate.⁹¹

In our opinion, these arguments of the CEC are invalid because the fact of withdrawal of the President from the election campaign in no way provided for additional favourable environment for other candidates. In fact, the resulting situation extremely limited the implementation of the principle of equality of candidates. In practice, the campaign activities for the President were held both by his election agents during the official election campaign and by way of propaganda in the state media, which unquestionably supports the policies and activities of the President in his capacity as the Head of the State. Therefore, the OSCE/ODIHR rightly pointed out the need for a clear-cut separation of the status of the incumbent President from his status of a presidential candidate.

The issue of separation between the functional responsibilities of state officials and the activities of presidential candidates within the framework of an election campaign is relevant not only for Kazakhstan but also for other countries of the region where the tradition of democratic elections has not yet emerged as the primary means of political struggle.

For example, during the 2008 Presidential Elections in Russia, the First Deputy Prime Minister Dmitry Medvedev, after his official registration as the candidate for the Office of the President of the Russian Federation, did not go on vacation although he could well exercise that right. The Russian Federation CEC gave the following explanation in that regard: the requirement to leave for vacation applies to state and municipal employees as well as mass media, but not to persons holding public offices.⁹² The candidates registered by the Russian Federation CEC to participate in the election campaign, who held public offices, also included the LDPR leader V. Zhirinovskiy, the incumbent Vice Speaker of the Duma, and the leader of the Communist Party faction G. Zyuganov. With regards to these candidates, the Head of the Russian CEC V. Churov stated that since they held public offices they had obvious advantages.⁹³

During the election campaign at the 2010 Presidential Elections in Ukraine, the Prime Minister Timoshenko was reproached by mass media that she did not take advantage of the opportunity to go on an unpaid pre-election leave and abused her official position during the campaigning events.⁹⁴ In March 2011, President V. Yanukovich of Ukraine introduced a draft law on public service to the Verkhovna Rada. The proposed changes included the granting of special pre-election leave to presidential candidates.⁹⁵

The above examples of the Russian and Ukrainian politics illustrate the problems of the emerging constitutional democracies, to which Kazakhstan also belongs. We believe that one of the most effective measures to ensure the principle of equality of all presidential candidates in Kazakhstan can be the mandatory suspension of the incumbent President from the exercise of public duties, for the period of election, so that he would participate in an election campaign on an equal footing with other candidates.

⁹¹ Comment by Central Election Commission of the Republic of Kazakhstan to Interim Report No. 2 OSCE/ODIHR Election Observation Mission, 2011 Early Presidential Elections in the Republic of Kazakhstan (15-21 March 2011).

URL: http://election.kz/portal/page?_pageid=73,1581865&_dad=portal&_schema=PORTAL

⁹² CEC of Russia: Medvedev, Zyuganov, and Zhirinovskiy are not required to take leaves for the time of the presidential campaign//Prime-TASS, 17 January 2008. URL:<http://www.kreml.org/news/171067693>

⁹³ The presidential candidates will not leave for pre-election vacation//Pravda.Ru, 23 January 2008.

URL: <http://www.pravda.ru/news/politics/23-01-2008/252934-zik-0/>

⁹⁴ Mikhail Podolyak. Yu. The Buyer-up//Observer, 31 December 2009.

URL: <http://www.obozrevatel.com/news/2009/12/31/342445.htm>

⁹⁵ The Law on Civil Service is to be amended// Femida Centre, 30.03.2011.

URL:<http://femidacenter.info/novosti-saieta/v-zakon-o-gosudarstvennoj-sluzhbe-budut-vneseny-popravki.html>

2. Cancellation of Candidate's Registration for Implementation of the Right to Freedom of Speech

Sub paragraph 3 of paragraph 7, Article 59 of the Election Law provides that the CEC denies in registration or cancel a decision on a candidate's registration when it is proved in trial that a candidate or his representative distributes false information discrediting another candidate's honour and dignity, damaging his reputation. This article does not comply neither with international standards nor the KR Constitution and violates a fundamental human right to freedom of speech, receiving and distributing information. In particular, it contradicts to para. 1-2 of Article 20 of the RK Constitution, that guarantees the freedom of speech, right to receive and distribute information and forbids censorship, as well as to para. 9.1 of the OSCE Copenhagen Document and to para. 26 of the OSCE Moscow Document protecting and guaranteeing the right to speech.

It should be noted that apart from Article 59, sub-para. 5 of para. 2 of the Articles 73, 89, 104 and 118 of the Election Law, regulating elections to the Senate, the Majilis, Maslikhats and self-governance bodies, contain the same restrictions. The OSCE/ODIHR reviewed article 29, which regulates an election program of a candidate, a political party, where it states that an election program "should not proclaim ideas... of undermining the security of the state" that is also questionable in the context of implementation of the right to freedom of speech⁹⁶.

In addition, provision of Article 46 of the RK Constitution proclaims that honour and dignity of the RK President are immune; that may lead to cancellation of registration of a candidate who is opposed to the President. First of all, it restricts the freedom of speech and second of all, it makes candidates unequal to the incumbent President; it does not comply with the OSCE standards.⁹⁷ Above articles of the Election Law and the RK Constitution, all together, restrict a candidate or his representative in the freedom of speech excessively and put at risk his participation in elections by means of denial in or cancellation of registration.

The Government of Kazakhstan was recommended to change the legislation in 2004 and 2005⁹⁸ and to comply it with international standards and OSCE commitments, guaranteeing the freedom of speech, and to widen the bounds for possible critics and do not deprive a candidate of his registration. Nevertheless, up to now the recommendations have not yet implemented.

3. Equal Access to the Mass Media

Equal access to the mass media is the key to managing competitive elections and informing voters about candidates. The Election Law stipulates that the state guarantees equal funding to candidates to speak in the media with their election programs.⁹⁹ At the same time, provision of airtime on TV and radio and order of speeches correspond to applications received. Such approach violates the principle of equal access to the audience because it does not guarantee that all candidates will be provided with on-air in prime time. This article does not guarantee that all candidates will have equal possibilities to address to voters even for state funds. It is quite possible that officially equal airtime for speech will have different audience because some speeches will be broadcasted in prime time and others, for example, in early morning or late evening. Guidelines and Explanatory Report of the Venice Commission point that is it "important... to provide candidates and parties with enough balanced airtime".¹⁰⁰

⁹⁶ Footnote 9 of OSCE/ODIHR Assessment of the Constitutional Law of the Republic of Kazakhstan "On Elections in the Republic of Kazakhstan" from 24 August, 2004, page 7. URL: www.osce.org/odihr/elections/359973

⁹⁷ Paragraph 7.5 and 9.1 of the OSCE Copenhagen Document. 1990.

⁹⁸ OSCE/ODIHR Assessment of the Constitutional Law of the Republic of Kazakhstan "On Elections in the Republic of Kazakhstan" from 24 August, 2004, page 7. URL: www.osce.org/odihr/elections/359973

⁹⁹ Paragraph 3 of Article 28 of the Election Law

¹⁰⁰ Chapter I, 2.3, para. 19 of the Guidelines and Explanatory Report

In its turn, the OSCE/ODIHR recommended changing article 28 of the Election Law to “guarantee access to electronic mass media to all candidates on days and in hours when it is possible to address to approximately equal number of voters; not to address program speeches too early right after election campaign starts or too close to the election day in order candidates would have equal conditions in time to access electronic mass media”.¹⁰¹ The OSCE/ODIHR reminded of the necessity of changes once again in 2007, during its observation mission for parliamentary elections.¹⁰²

4. Powers of the Incumbent President of the Republic of Kazakhstan to Review the Election Results

In conformity with Article 49 of the Election Law, courts and prosecution authorities are required to accept claims by members of election commissions, citizens, and representatives of legally registered public associations on the issues of electoral rights, including on violations of the electoral legislation. Chapter 25 of the Civil Procedure Code of the Republic of Kazakhstan provides for the general procedure of judicial protection of electoral rights of citizens and public associations participating in elections and referendums.¹⁰³ Court decisions shall be the basis for restoration of violated electoral rights but they do not provide for annulment of election results.¹⁰⁴ Whereas the international standards require that a body to review complaints should have the authority to annul the election results in those cases where there exists a danger that the committed violations could have affected their outcome.¹⁰⁵ Thus, presidential candidates have no effective mechanisms to challenge election results.

The right to challenge the results of counting of votes in the presidential elections along with other authorized agencies is vested with the incumbent President, which can be exercised by way of applying to the Constitutional Council.¹⁰⁶ Furthermore, under certain conditions, the incumbent President can veto the decisions of the Constitutional Council.¹⁰⁷

Since the legislation does not clearly separate the powers of the incumbent President from his rights of a presidential candidate, as far as the issue of challenging election results is concerned, the President has an equal position as compared with other contenders for the Presidential Office.

In general, the reasons to revise the voting results should be clearly specified in the legislation both for the President and for candidates and political parties thereby avoiding future political manipulation of election results.

5. Challenging the Voting Results

In accordance with Article 66 of the Election Law, the CEC based “on submissions of election commissions, on applications of citizens, may deny in registration of the elected President if elections have been annulled in less than one-fourth of a total number of polling stations or administrative districts or if violations took place during elections or counting of votes, or determination of voting results...”. The article does not contain clear-cut definitions and it is not consistent. It is not clear what body is authorized to decide on “nullity of elections in less than one-fourth of a total number of polling stations or administrative districts” based on what the CEC denies in registration of the elected President. The second issue of this article is the wording “one-

¹⁰¹ OSCE/ODIHR Assessment of the Constitutional Law of the Republic of Kazakhstan “On Elections in the Republic of Kazakhstan” from 24 August 2004, pages 12-13. URL: www.osce.org/odihr/elections/35973

¹⁰² Final Report OSCE/ODIHR Election Observation Mission, Parliamentary Elections 18 August 2007, page 32. URL: www.osce.org/odihr/elections/kazakhstan/28438

¹⁰³ The Civil Procedure Code of the Republic of Kazakhstan as of 13 July 1999 No. 411 (hereinafter, CPC of the RK).

¹⁰⁴ Article 274, CPC of the RK.

¹⁰⁵ Paragraph 3.3, Code of Good Practice in Electoral Matters.

¹⁰⁶ Article 68 of the Election Law.

¹⁰⁷ Part 4, Article 73 of the Constitution of the RK.

fourth of a total number of polling stations or administrative districts” which consists of only one-fourth of territory of the country but it does not equal to one-fourth of real voters. In addition, it is not clear what decisions follow the “denial in registration of the elected President”; if it is a decision on cancelation of the elections, what are the consequences of such a decision made by the CEC.

V. Problems in Funding of the Election Campaigns of the Candidates for the Office of the President of the Republic of Kazakhstan

1. Problem Related to the Definition of “Election Campaign Funding” Concept

Paragraph 3.3, Article 34 of the Election Law¹⁰⁸ provides for the possibility to make “voluntary contributions by the citizens and organizations” to the candidate’s election fund. However, the Election Law does not contain the concepts (definitions) of what is meant under funding and voluntary contribution in favour of the candidate’s election campaign, though it is a key aspect that determines what forms of the election campaign funding are legal and what forms are illegal.

The meaning of the concept of funding may be drawn from related legal notions, for example, voluntary contribution. The “voluntary contribution” concept is defined in the Civil Code of the Republic of Kazakhstan. According to this concept “A voluntary contribution shall be recognised as the gift of an item or of a right for common useful purposes”.¹⁰⁹

The international standards in the area of democratic elections include wide range of benefits to the meaning of the concept of funding. Thus, the Council of Europe has adopted the Council of Europe’s Recommendation of the Committee of Ministers on Common Rules against corruption in the funding of Political Parties and Electoral Campaigns¹¹⁰. Article 2 of the said Rules provides the following definition of voluntary contribution in favour of a political party: “Voluntary contribution is the conscious granting of advantages of economic or another nature to the political party”.

As is seen, the concept of funding through voluntary contributions in the CE member states is not limited by provision of the property benefits as distinct from one in the Kazakhstani legislation and covers a relatively wide range of benefits, which naturally includes monetary contributions and other economic benefits.

From the practical point of view, when the legislation lacks a clearly defined concept of funding of the election campaigns, it means that the issue of responsibility for engaging into the election campaign human resources, for example, from government financed organizations, including educational institutions and large companies of any form of ownership, remain unregulated.

In this context, it will be reasonable to incorporate in the legislation of the Kazakhstan a clear definition of what constitutes “funding of an election campaign”, which excludes any ambiguity when rendering financial aid or any other support to presidential candidates from individual persons or organizations.

2. Unequal Possibilities to Fund an Election Campaign for a Party Candidate and Independent Candidate

The Election Law provides for the possibility of state and non-state funding of a candidate’s election campaign. The presidential candidates have the right to set up an election fund, where the

¹⁰⁸ The Constitutional Law of the Republic of Kazakhstan “On Elections in the Republic of Kazakhstan” from 28 September 1995 No.2464

¹⁰⁹ Article 516 of the Civil Code of the Republic of Kazakhstan (General Part). Enacted by the Decree of the Supreme Soviet of the Republic of Kazakhstan of 27 December 1994 as amended as at 15 June 2010.

¹¹⁰ International standards of funding of political parties and election campaigns. — Almaty: The Legal Policy Research Centre, 2009 — P. 83.

money for the election campaign is accumulated. Article 58 of the Election Law stipulates the origin and size of an election fund of a presidential candidate as follows:

“1. The candidate’s own funds, the total amount of which should not exceed the national minimum wage rate¹¹¹ by more than five thousand times;¹¹²

2. funds allocated to the candidate by a national public association, which has nominated the given candidate, the total amount of which should not exceed the national minimum wage rate by more than seven thousand times;¹¹³

3. voluntary contributions of citizens and organizations of Kazakhstan, the total amount of which should not exceed the national minimum wage rate by more than fifteen thousand times”.¹¹⁴

Paragraph 2 of Article 58 of the Election Law discriminates an independent candidate as it deprives him (her) of the opportunity to rely on the financial aid from a political party as one of the three sources of funding. This provision contradicts to the international standards. Paragraph 7.5 of the Copenhagen document establishes that the member states “respect the right of citizens to contest the political and government offices in a private capacity or in capacity of the representatives of political parties or organizations without discrimination”.¹¹⁵ Moreover, Paragraph 2 of Article 58 in its current wording prevents small political parties, which do not have substantial funds to nominate their own candidate, to take part in the election campaign of another independent or party candidate through funding or rendering other support.

A discriminatory nature of Article 58 of the Election Law may be avoided if the amount of funds from the candidates own sources and voluntary contributions are not strictly limited by the requirements stated in the Law. This would allow to compensate the lack of funding from the other the source, i.e. public associations. However, with the current wording of this legal provision the interests of an independent candidate are infringed as he/she may not rely on one of the sources of funding. Thus, an independent candidate has fewer funds for an election campaign.

In 2004, the OSCE/ODIHR recommended to indicate clearly in Article 58 of the Election Law that the total amount of contributions from political parties may not exceed the amount specified in Paragraph 2 and “revise the wording “that has nominated a candidate”, which has a restrictive nature, to enable the independent candidates to obtain financial support from political parties”.¹¹⁶ Up to date the Government of Kazakhstan has not put into effect the OSCE ODIHR recommendation concerning Article 58 of the Election Law.

To our opinion, increase of the election fund threshold through a share of non-state funding will have positive impact on the nature and content of elections and will be commensurate to the aims of presidential candidate to increase the transparency of their funding. Election campaign of presidential candidates may not and should not be restricted to the densely populated regions only due to limited funds. Taking into account the geography of Kazakhstan, it is necessary to create conditions for the full involvement of the population in the lection process, while the financial restrictions provided for in the law¹¹⁷ prevent from such involvement.

¹¹¹ In accordance with the Law of the Republic of Kazakhstan “On the National Budget for 2011-2013” No. 357-IV of 29 November 2010, effective from 1 January 2011 the minimum wage is 15,999.

¹¹² The threshold amount under this item is KZT 79,995,000 (seventy nine million nine hundred ninety five thousand tenge).

¹¹³ The threshold amount under this item is KZT 111,993,000 (one hundred eleven million nine hundred ninety three thousand tenge).

¹¹⁴ The threshold amount under this item is KZT 239,985,000 (two hundred thirty nine million nine hundred eighty five thousand tenge).

¹¹⁵ Document of the Copenhagen meeting of the Conference on the human dimension of the CSCE (Copenhagen, 29 June 1990). URL: www.osce.org/ru/odihr/elections/14304

¹¹⁶ OSCE/ODIHR Assessment of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» from 24 August, 2004. URL: www.osce.org/odihr/elections/35973

¹¹⁷ Not more than KZT 431,973,000 for an election camping in 2011. See footnotes 4-7.

3. Inflexible Government Funding of an Election Campaign

The government guarantees equal funds from the state budget for all candidates to cover the election campaign in mass media. In particular, a candidate is guaranteed to have airtime on TV and radio, as well as printing space for two articles, holding of public events and issuing of campaign materials.¹¹⁸

In accordance with Paragraph 2 of Article 28 and Paragraph 2 of Article 33 of the Election Law, the CEC sets the norms of spending of the budget funds appropriated for the presidential elections. The following norms were set for the early presidential elections held on 3 April: televised address with an election program – KZT 4,625,000; radio address – KZT 169,000; publishing of two articles – KZT 810,000; rent of premises to hold meetings with the electors – KZT 200,000; production of campaign materials – KZT 290,000; transportation expenses – KZT 200,000.¹¹⁹ The funding procedure is determined by the budget legislation of the Republic of Kazakhstan.¹²⁰

This provision does not contradict the international standards and complies with the principle of “strict” equality, which implies equal opportunities for all candidates irrespective of the level of support on the part of electorate. According to the Code of Good Practice in Electoral Matters by the Venice Commission “It must apply to the use of public facilities for electioneering purposes (for example bill posting, postal services and similar, public demonstrations, public meeting rooms)”.¹²¹

However, the use of funds from the state budget gives rise to criticism on the part of participants of the election process, as these funds are not transferred directly to a candidate’s election fund but are paid, in case of presidential elections, through CEC upon the provision of services. Such practice creates difficulties in the use of the allocated funds as it is necessary to submit a bill for service payment to CEC, then CEC makes a wire transfer and only after that a candidate may use, for example, an office to meet the electors. Certainly according to the principle of “strict” equality, the funds appropriated from the state budget should be thoroughly regulated; however, a scheme under which the funds are transferred directly to the election fund and used without the CEC intermediation would be more effective and suitable for the participants of elections and would not contradict the above-mentioned principle of equality. CEC should act as an independent and competent arbitrator. Any form of CEC involvement in distribution of funds among the presidential candidates may endanger its objectivity and equidistance from all participants of the election campaign.

4. Poor Transparency of Financial Reports

Transparent financial reports of the election campaign are one of the key elements of fair elections and the best evidence of absence of corruption during elections. Each candidate to the office of the President should publish his (her) financial reports in order to inform the electors, to the fullest extent, about the sources of funding of his (her) election fund and spending thereof. In the country where there is no stable democratic practice, nor political tradition of the transparent elections, it is necessary to establish legal mechanisms to ensue transparency in the issue of formation and spending of the elections funds. Moreover, the Venice Commission underlined that “such transparency is important irrespective of the level of political or economic development of one country or another.”¹²²

¹¹⁸ Paragraphs 3—5 of Article 28 of the Election Law.

¹¹⁹ Decree of the Central Election Commission No. 31/52 of 26 February 2011 URL: http://election.kz/portal/page?_pageid=73,1569401&_dad=portal&_schema=PORTAL

¹²⁰ Paragraph 1 of Article 33 of the Election Law.

¹²¹ Section I, 2.3, paragraph 18 of the Code of Good Practice in Electoral Matters. Guidelines and explanatory report

(adopted by the Venice Commission at its 52nd session, Venice, 18-19 October 2002). URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus) (hereinafter – the Explanatory Report).

¹²² Section II, 3.2, paragraph 108 Explanatory Report.

Paragraph 9 of Article 34 of the Election Law states: “Not later than in five days after establishment of the results of the elections, the candidate... is obliged to present to the respective election commission a report on spending of his (her) election fund...” Then Paragraph 4 of Article 34 clarifies that “Information about the total sum of money which has been received by the fund and of its sources shall be published in mass media within ten days after publication of the results of elections... by the Central Election Commission.”

The CEC RK, based on the result of elections held on 3 April, published in mass media the information about the amounts of election funds of presidential candidates and their sources:¹²³

Full name	Amount received	Candidate's own funds	Funds allocated by political parties that have nominated the candidates	Voluntary contributions of citizens and organization of the Republic of Kazakhstan
1. Akhmatbekov, Zhambyl Auzhanovich	40,524,110	279,800	—	40,244,310
2. Yeleusizov, Mels Khamzayevich	21,791,326	—	—	21,791,326
3. Kasymov, Gani Esenkeldyuly	22,290,645	—	—	22,290,645
4. Nazarbayev, Nursultan Abishevich	431,972,577	79,995,000	111,993,000	239,984,577

However, the information provided is extremely scarce in terms of the sources of finding and absolutely fails to disclose the expense side of the candidates' election campaigns. In addition, the information published within ten days after publication of the voting results does not provide a regular update and disclosure of information about transfers to the candidate's election fund. These factors reduce the transparency of the financial component of election campaigns.

The purposes and amounts of funds appropriated from the state budget are spelt out and may be used for the state guaranteed airtime on TV and radio and production of campaign materials. The CEC has a full access to the reports on use of said funds but unfortunately the law does not obligate the candidate to publish this information, which may become a reason of incomplete awareness of electors about how different candidates have used the taxpayers' money and in what amount.

We think that, firstly, all expenses for election campaign should be properly detailed in the reports and these reports should be publicly available for electors. Since the CEC already has all information and control over the spending of candidate's election fund¹²⁴, it is preferable that the

¹²³ Information of the Central Election Commission of the Republic of Kazakhstan // Kazakhstanskaya Pravda No.150—151 (26571—26572) 07 May 2011.

¹²⁴ In case of the presidential election the Central Election Commission exercises control in accordance with the Decree of CIC No.19/222 of 7 August 1999 “On approval of the Rules for Spending Money of the Election Funds and Submission Reports on Spending thereof in case of elections of the president, Deputies of the Parliament and Maslikhats of the Republic of Kazakhstan”. Clause 8: “The Banks shall submit to the respecting election commission a weekly report on the funds transfer to the special temporary accounts and on spending thereof...” Claus 10: “ Within five days after establishment of the results if elections, a candidate

same information is provided simultaneously to the electors. Secondly, the candidates should be obligated to provide information about incoming transactions to their election funds on a regular basis, for example, once per ten days; this will allow informing the electors in time about the funds accumulated on the accounts of the candidates. These recommendations comply with the best practice of holding elections.¹²⁵

5. Sanctions for Errors in Financial Reports

Paragraphs 9 and 10 of Article 34 of the Election Law provides for the possibility to cancel the registration of a candidate and after the elections – to cancel registration of a candidate as the President. Specifically, according to the requirement set out in Paragraph 9 a candidate “within five days from the confirmation of the results of elections” should provide the financial reports on spending of the election fund. However, a delay in submission of financial reports even for one day, provided that the reports are correct, may entail the cancellation of the candidate’s registration.

Such sanctions, in our view, are disproportional to the violation and are overly strict. In cases when the reports are submitted with minor financial errors or not in time, the CEC may restrict itself to a fine, which is commensurable with a financial error made, rather than cancel the candidate’s registration.

According to sub-paragraph 3-1 of para. 7, Article 59 of the Election Law, that effects similarly, the CEC “cancels a decision on registration of a candidate in case the information on incomes and property is acknowledged invalid at a moment when a declaration is submitted by a candidate or his spouse...”. Such legal provision can be interpreted quite widely and minor financial errors could cost a candidate’s registration. As it mentioned above, the sanction for “invalidity” must be proportional and only cases of the grossest violations might be followed by a candidate’s withdrawal. In addition, “such wording may lead to politically motivated decisions”.¹²⁶

In 2004 the OSCE ODIHR recommended the Government of the RK to abolish these provisions on cancellation of registration,¹²⁷ but the recommendation has not been implemented.

As we have mentioned above, the issues of election campaign funding are the cornerstone for the elections to be recognized as fair. The precision of the statutory regulation based on the international standards and best practice of holding elections may promote higher transparency and strengthen the spirit of democracy. Therefore, the extent of reducing abuses and level of corruption in politics will directly depend on the extent of public’s participation in control and regulation of the financial aspects of elections. It is required to introduce a scale of sanctions for violations of financial reporting of an election fund and invalidity of income information. Fine may be considered as an alternate sanction.

shall be obliged to submit to the respective election commission the report on spending of his (her) election fund and state the sources of cash inflows to the elections funds and all expenses thereof...”

¹²⁵ Section II, 3.2, paragraph 109 Explanatory Report.

¹²⁶ OSCE/ODIHR Assessment of the Constitutional Law of the Republic of Kazakhstan “On Elections in the Republic of Kazakhstan” of 24 August, 2004. URL: www.osce.org/odihr/elections/35973

¹²⁷ OSCE/ODIHR Assessment of the Constitutional Law of the Republic of Kazakhstan “On Elections in the Republic of Kazakhstan” of 24 August, 2004. URL: www.osce.org/odihr/elections/35973

VI. General Recommendations

1. Conditions under which early presidential elections could be called must be directly provided for in the electoral legislation.
2. The Kazakhstani legislation should be introduced with a direct prohibition to make changes and additions to the Election Law less than a year before holding elections, excluding strictly negotiated cases.
3. Deprivation of the passive electoral right as a result of any conviction as well as for series of offences violates the principle of proportionality, laid out in para. 24 of the 1990 OSCE Copenhagen Document. In accordance with the RK Constitution and international standards, it should be provided that deprivation of such the right should follow only committing serious and heavy offences and toward persons who are imprisoned.
4. It is required to clearly prescribe in the law the powers, the setting-up procedure, the main obligations and the working principles of the Linguistic Commission on evaluation of fluency in the state language of a presidential candidate. Respectively, in by-laws there should be adopted the rules defining clear procedure of selection of themes for written and oral tasks, evaluation criteria. In the end, set of law provisions and normative acts should allow setting up fair and objective criteria so that a candidate will know how he/she will be evaluated. It is more appropriate if such criteria are to be established by law.
5. It is required to provide with a clear term of the requirement of uninterrupted residence in the territory of Kazakhstan. There should be provided exclusive circumstances in the law that must be considered when calculating the required uninterrupted residence in Kazakhstan. It is worth to mention that a 15-year period of uninterrupted residence is excessive. It should be either rejected or calculated a reasonable number of years (for example, three years). In accordance with international standards a length of residence requirement may be imposed mainly on national or regional elections and must not exceed six months. The procedure of verification of information about place of residence, provided by a candidate, should be also prescribed in the law.
6. In order to determine one percent of voters of the total number of voters which must support a presidential candidate, equally representing at least two thirds of the Oblasts, a city of national status and the capital of the Republic of Kazakhstan, a transparent mechanism for establishing the total number of potential voters must be set up on a period before the process of collecting signatures starts.
7. The law should contain a direct prohibition to shorten time frames by any excuse, to apply for nomination to the office of President, to collect and verify signatures. Such period must not be less than three months.
8. The signature verification and the criteria for declaring signatures invalid must follow a clear procedure. A mechanism of public control over this process should be established, that would let to achieve the highest transparency. The verification procedure must cover all the signatures, but after it has indisputably been established that the required number of signatures has been collected, the remaining signatures do not need to be verified.
9. Certain legal norms must be entered to Kazakhstani legislation that would provide with a clear separation between the institutional responsibilities of the incumbent President and his propaganda activities within the framework of election campaign. This important condition comes from the requirement to provide equal rights and opportunities for all candidates participating in electoral campaign. Also, this condition gives premises to provision of political campaigns in the atmosphere of freedom and honesty.

10. Legislation provisions that create a priori unequal opportunities for candidates by giving the First President the right to stand for elections an unlimited number of times, must be abandoned. Combination of such right with the authority to hold early elections at any time gives the First President a significant advantage over any other presidential candidates.
11. Election commissions, including the CEC, must be formed that way in order to provide impartiality, independence and transparency in their activities. It is more appropriate to form election commissions with participation in this process of all political parties registered in Kazakhstan. During presidential elections, independent candidate's representatives also should be involved in commissions' formation.
12. The incumbent President must be obliged to go to vacation for the period of the election campaign that will let to avoid the risks of usage of administrative resources by him during the election campaign and let the voters to separate his activities as a candidate to the Office of President and as an incumbent President.
13. A state body authorized to review complaints challenging the election results should have the authority to annul the election results in those cases where it is proved that the committed violations have affected their outcome.
14. The incumbent President, in case he is participating in the election campaign, should have the equal conditions with other candidates to challenge the election results. The situation when the incumbent President has the right to apply to the Constitutional Councils along with other authorized agencies to challenge the election results and other presidential candidates are deprived of such the right, indicates that equal rights and opportunities for presidential candidates are not provided.
15. It is required to define in the Election Law what is meant under funding and voluntary contribution in favour of the candidate's election campaign. These definitions are the key aspect to determine what forms of the election campaign funding are legal or illegal. Also it is necessary to incorporate in the legislation a notion of wide definition of voluntary contribution in favour of a political party in line with the Council of Europe's definition given in the Recommendation of the Committee of Ministers on Common Rules against corruption in the funding of Political Parties and Electoral Campaigns. Such definition would allow not to limit voluntary contributions by provision of the property benefits as it is stipulated now in the legislation of the Republic of Kazakhstan.
16. It is required to revise Paragraph 2 of Article 58 of the Election Law, which discriminates an independent candidate as it deprives him of the opportunity to rely on the financial aid from a political party as one of the sources admitted by the Law. Alternatively, there might be prescribed in the Law the possibility not to limit such a candidate in using his own sources and voluntary contributions.
17. It is necessary to increase the election fund threshold through a share of non-state funding. It will have positive impact on the nature and content of the elections and will be commensurate to the aims of presidential candidate to increase the transparency of their funding.
18. The CEC should not be involved in any form in distribution of funds among presidential candidates. The control of disbursements may be provided through other methods that, from one side, would disengage the CEC's resources during the elections period and, from other side, it would not endanger the CEC's objectivity and equidistance from all participants of the election campaign.
19. The information provided is extremely scarce in terms of the sources of funding and absolutely fails to disclose the expense side of the candidate's election campaigns. In addition, the legislation does not contain the requirements to publish information in course

of incoming transactions are made to the candidates' election funds as well as information about spending of the state-funds. It is required that financial information as to the presidential election campaigns should be properly detailed. It is also required to oblige candidates to publish information about incoming transactions to their election funds on a regular basis, for example, once per ten days.

20. Minor financial errors should not lead to overly strict sanctions such as a cancellation of a candidate's registration. In many cases, such mistakes may be sanctioned with fines.



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