



Office for Democratic Institutions and Human Rights

REPUBLIC OF TAJIKISTAN

ASSESSMENT OF THE LAW ON ELECTION OF THE PRESIDENT



Warsaw
26 July 2006

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I. INTRODUCTION

This assessment reviews and comments on the Law on Election of the President of the Republic of Tajikistan¹ (herein “Presidential Election Law”). This assessment is based on an unofficial English translation of the Presidential Election Law, as reflected in 38 articles of text on 26 pages, with amendments as of 1 January 2006. The text reviewed by the OSCE’s Office for Democratic Institutions and Human Rights (“OSCE/ODIHR”) has been provided by the OSCE Centre in Dushanbe.

This assessment does not warrant the accuracy of the translation reviewed, including the numbering of articles, paragraphs, and sub-paragraphs. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation. A law can be assessed only on the literal translated text that is provided for review.

This assessment evaluates legal text. Although legal text is a necessary foundation for democratic elections, the extent to which any legal provision has a positive impact will ultimately be determined by the level of good faith exhibited by state institutions and officials responsible for implementing and upholding the law.

II. EXECUTIVE SUMMARY

The Presidential Election Law establishes a basic framework for elections. However, the current text of the Presidential Election Law would need to be significantly improved in order to satisfy OSCE commitments set forth in the 1990 OSCE Copenhagen Document, as well as other international standards for the conduct of democratic elections.

Notably, the Presidential Election Law contains limitations on the rights to be a candidate and to free speech and expression.

Furthermore, the Presidential Election Law would need to be amended to provide for:

- Sufficient details for the process of verifying signatures of voters given in support of a candidate’s nomination;
- An election administration that is pluralistic and inclusive, free from the control of government authorities, and genuinely independent;
- Sufficient details for rules to ensure the fair allocation of state resources to candidates during the election campaign;

¹ The OSCE/ODIHR provides this Assessment before the presidential elections in Tajikistan expected in late autumn 2006.

- Full transparency and possibilities to observe all stages of the election process;
- Sanctions proportional to violations committed;
- Positive voting where voters mark on the ballot only the candidate of their choice;
- A process for filing complaints and appeals to protect adequately suffrage rights; and
- Domestic non-partisan election observers.

Also, there is a need to elaborate and clarify some articles in order to provide completely satisfactory procedures for voting, counting of ballots, tabulation of results, and determination of winning candidates.

Recommendations are offered for consideration by the authorities of the Republic of Tajikistan with the objective of assisting in the development of a sound legal framework for democratic elections in Tajikistan, and supporting the efforts of the authorities and civil society of the Republic of Tajikistan to conduct elections in line with OSCE Commitments for democratic elections.

III. DISCUSSION OF THE PRESIDENTIAL ELECTION LAW

Discussion of the Presidential Election Law is presented under five general topics and not in the numerical order in which articles appear in the law. The five topics are: Candidacy, Election Commissions, Election Rules, Transparency, and Legal Protections.² This thematic approach facilitates evaluation of whether the Presidential Election Law measures up to OSCE commitments for democratic elections and international standards.

IV. CANDIDACY

It is a universal human rights principle that every citizen has the right, on a non-discriminatory basis and without unreasonable restrictions to: (1) take part in the conduct of public affairs, directly or through freely chosen representatives; (2) vote and 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; and (3) have access, on general terms of equality, to public service in his or her country.³ The Presidential Election Law does not fully satisfy this basic

² Candidacy discusses provisions of the law that open and close the door for citizens who seek the opportunity to participate in representative government by being a candidate for public office; Election Commissions discusses provisions that govern the election commissions that are responsible for the administration and conduct of election processes; Election Rules discusses aspects of the campaign, including media, voting, counting of ballots, tallying of results, and declaration of winners; Transparency discusses what mechanisms are in place to ensure that the election processes are open to public scrutiny to ensure that the will of the people is respected and that the election results are not fraudulent; and Legal Protections discusses what mechanisms are in place to ensure that citizens, candidates, and political parties can seek meaningful redress in the event of violation of legal rights.

³ See, e.g., Article 25 of the International Covenant on Civil and Political Rights. This right is also stated in Article 27 of the Constitution of Tajikistan (unofficial English translation).

principle as it contains several provisions that can close the door on a citizen who should have the opportunity to participate in representative government by being a candidate for public office. The limitations on candidacy rights are considered in the order in which they appear in the Presidential Election Law.

A. LIMITATIONS ON CANDIDACY RIGHTS

Article 1 of the Presidential Election Law requires that a candidate “knows the state language”. It is acceptable to require that a candidate have a minimum level of proficiency in the state language. However, the minimum level of proficiency should be measured by objective standards in a transparent manner so that the public and competing candidates can be assured that no unqualified candidate is admitted to the election contest and no qualified candidate is barred. Article 1 should specifically state fair and objective standards for determining state language proficiency so that a candidate will know how he or she will be measured, and so that voters and observers will be able to judge whether a candidate has been treated fairly and in conformity with the objective standards stated in the law. **The OSCE/ODIHR recommends** that Article 1 of the Presidential Election Law be accordingly amended.

Article 24 of the Presidential Election Law, which regulates the nomination procedure, does not clearly provide for self-nominated independent candidates.⁴ According to Paragraph 7.5 of the 1990 Copenhagen Document, citizens have the right “to seek political or public office, individually or as representatives of political parties or organisations, without discrimination”. **The OSCE/ODIHR recommends** that Article 24 be amended to allow the candidacy of self-nominated independent candidates supported by a number of signatures.

Article 24 provides that nominators of candidates “shall have right to cancel their decision on nomination of a candidate any time till election” (sic). Article 24, as currently formulated, presents two problems. First, the absence of a reasonable deadline for a pre-election cancellation of the nomination negatively affects the orderly administration of the election (*e.g.*, the correct printing of ballots) and can lead to voter confusion. Secondly, even if there is a reasonable deadline, pre-election cancellation can result in denial of the right to candidacy of independent candidates since candidates nominated through public assemblies (*see* previous paragraph above) would have no possibility of appearing on the ballot. In order to ensure that ballots are correctly printed and voters are properly informed before elections, and to protect the rights of independent candidates, Article 24 requires amendment. Article 24 should be amended to respect the rights of independent candidates and to state a deadline for nominator cancellation that allows for the timely printing of correct ballots. **The OSCE/ODIHR recommends** that Article 24 be accordingly amended. Alternatively, Article 24 could be amended by deleting this cancellation provision.

Article 24 denies the candidacy rights of a citizen who has “criminal records and the criminal records have not been cleaned in accordance with the established legal

⁴ Article 24 appears to allow, although the translation is not clear, for some type of public assembly nomination under organizational rules established by the CCER. This still does not meet the commitment of Paragraph 7.5 of the Copenhagen Document.

procedure or not cancelled” (sic). Under this provision, the passive right of suffrage is denied based on any conviction, regardless of the nature of the underlying crime. The denial of suffrage, due to a conviction for *any* crime is a disproportionate sanction which is contrary to Paragraph 24 of the 1990 Copenhagen Document. The denial of candidacy should occur only where a person has been convicted of committing a crime of such a serious nature that forfeiture of political rights is indeed proportionate to the crime committed. **The OSCE/ODIHR recommends** that Article 24 be amended so that denial of candidacy can occur only where a person has been convicted of committing a crime of such a serious nature that forfeiture of political rights is indeed proportionate to the crime committed.⁵ The forfeiture should be for an established period of time, likewise proportionate, and restoration of political rights should occur automatically after the expiration of this period of time. Legal barriers to candidacy must always be scrutinized as they limit voter choice and prevent candidates from seeking public office based on disqualifying conditions that may be unrelated to the character of the office.

Article 24 provides that an “official of a religious organization or association” cannot be a candidate. Although this phrase may have a unique meaning in the original language text that might provide a justification, the English translation violates the principles of freedom of religion, the right to seek employment of one’s own choosing, and non-discrimination. Every person has the right of free choice of employment, and such choice cannot be a basis for denying candidacy.⁶ Further, Articles 17 and 26 of the Constitution of Tajikistan prohibit discrimination on the basis of religion. **The OSCE/ODIHR recommends** that Article 24 be amended to conform to international standards and domestic law protecting freedom of religion, choice of employment, and the right to non-discrimination in the application of suffrage rights.⁷

B. VERIFICATION OF CANDIDATE SUPPORT SIGNATURES

Article 24 requires that a candidate nomination be supported by five percent (5%) of the voters. This percentage is excessive. **The OSCE/ODIHR recommends** that this percentage be reduced to a maximum of one percent (1%).⁸ Article 24 should also be amended to make it clear that a voter may support more than one candidacy with his or her signature.

Article 25 provides that “the signatures of citizens supporting the candidate ... are confirmed by chairmen of districts and towns in conditions mentioned in the present

⁵ Further, the law should specifically list those crimes that are considered to be so serious that forfeiture of a human right – suffrage – is required.

⁶ See Article 23 of the Universal Declaration of Human Rights; Article 6 of the International Covenant on Economic, Social and Cultural Rights; Article 1 of the European Social Charter; Article 35 of the Constitution of Tajikistan; Paragraph 7.5 of the OSCE 1990 Copenhagen Document.

⁷ See Paragraph 13.7 of the OSCE 1989 Vienna Document; Paragraphs 5.9, 7.3, and 7.5 of the OSCE 1990 Copenhagen Document; Articles 2, 21, and 23 of the Universal Declaration of Human Rights; Articles 2 and 26 of the International Covenant on Civil and Political Rights; Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 17, 26, and 35 of Constitution of Tajikistan.

⁸ One percent (1%) is recognized as a maximum needed for signature support. See, e.g., Venice Commission *Code of Good Practice in Electoral Matters*, page 25.

Constitutional Law”. However, Article 25 does not provide any guidance on the verification process itself or how a signature is determined to be valid. Nor does Article 25 state the deadline or manner in which “chairmen” convey the results of verification to the CCER. Additionally, Article 25 does not state whether the CCER is bound by the conclusion of a chairperson. Article 25 also fails to state whether there is any right to appeal to the courts a decision of a chairperson on verification. In sum, Article 25 does not provide sufficient detail on the verification process and does not create a single, consistent and uniform procedure for verification. It is also of concern that local government executives and not election commissions are verifying the signatures in support of candidates.

The OSCE/ODIHR recommends that Article 25 be amended to address all of the above problems concerning the verification of signatures in support of candidacy and to establish a verification procedure that ensures uniformity and consistency in application.

C. CANCELLATION OF CANDIDATE REGISTRATION

Article 37 permits the cancellation of registration of a candidate for violation of any of the provisions of the Presidential Election Law. The sanction of cancellation of registration is disproportionate, allows for potential abuse by the election administration, and is contrary to the legal presumption of innocence.⁹ **The OSCE/ODIHR recommends** that the possibility to cancel a candidate’s registration be limited to the situation where the candidate does not possess the legal requirements for candidacy, and that Article 37 be accordingly amended.

D. APPEAL OF A DECISION ON CANDIDATE REGISTRATION

Article 25 of the Presidential Election Law permits a candidate who has been denied registration to appeal to the Supreme Court. However, Article 25 does not permit a registered candidate to appeal to the Supreme Court the wrongful registration of another candidate. **The OSCE/ODIHR recommends** that Article 25 be amended to clearly state that a CCER decision on candidate registration, even one granting registration, may be appealed to the Supreme Court.

Article 25 allows the Supreme Court one week to decide an appeal on a CCER decision that denies candidate registration. This period is too long as certain campaign rights are triggered by candidate registration and a determination of whether an individual satisfies the legal requirements for candidacy should not be time consuming or difficult. **The OSCE/ODIHR recommends** that the deadline for the Supreme Court decision in Article 25 be reduced to a more reasonable period that will allow a successful appellant sufficient time to be involved in the election campaign.

⁹ As an example, exercise of the right of free speech is a ground for cancellation if the speech is considered offensive by the CCER.

E. CORRECTION OF DEFECTS IN CANDIDATE REGISTRATION DOCUMENTS

Article 25 of the Presidential Election Law requires, within three days of receipt of candidate registration documents, that the CCER register the candidate or issue a decision on the refusal to register. The law makes no provision for the possibility of a candidate to correct a simple mistake or defect in documents. Candidates should not be denied registration based on a mistake or defect in documents where the defect can be corrected in a timely manner. **The OSCE/ODIHR recommends** that Article 25 of the law be amended to provide that if the CCER identifies incorrect or incomplete information, it shall immediately notify the applicant, who shall have 48 hours to submit corrected information. The CCER should be required to consider re-submitted documents within 24 hours, and either register the candidate or issue a motivated decision on the refusal to register. Although this would delay the campaign of such a candidate, it would allow the possibility for the candidate to participate in the elections and not be denied candidacy based on a minor defect in submitted documents.

F. CANDIDATE WITHDRAWAL

Article 24 permits a candidate to withdraw from candidacy at any time by addressing a statement to the CCER. In order to ensure that ballots are correctly printed and voters are properly informed before elections, Article 24 should be amended to state a deadline for candidate withdrawal that allows for the timely printing of ballots. Further, Article 24 should require the CCER to make an expeditious decision on the candidate withdrawal statement so that there is no uncertainty as to the candidate's status or how the ballot should be printed. **The OSCE/ODIHR recommends** that Article 24 be accordingly amended.¹⁰

V. ELECTION COMMISSIONS

Article 11 of the Presidential Election Law incorporates the provisions (also Article 11) of the parliamentary election law for the formation of the Central Commission for Elections and Referenda ("CCER"). Articles 13 and 14 regulate the district election commissions and Articles 15 and 16 regulate the polling station commissions. Articles 17, 18, and 19 are applicable to all election commissions.

The OSCE/ODIHR has previously expressed concern that the legal framework does not establish an election administration that is pluralistic, inclusive, free from the control of government authorities, and genuinely independent.¹¹ Under the current legal provisions, the members of the CCER, including the chairperson and deputy chairperson, are elected by the Assembly of Representatives based on a proposal of names submitted by the President. The law does not require the formation of an

¹⁰ Article 35, which regulates repeat (second round) voting, should also be amended to address the issue of candidate withdrawal between rounds.

¹¹ See Final Report on Parliamentary Elections, Republic of Tajikistan, 27 February and 13 March 2005 (31 May 2005); Final Report on Elections to the Parliament, Republic of Tajikistan, 27 February 2000 (17 May 2000); Observations and Recommendations on Draft Law on Elections to the Majlisi Oli of the Republic of Tajikistan (28 November 1999).

inclusive and pluralist election administration and permits one political party to control the election administration as the CCER appoints district election commissions, which in turn appoint polling station commissions. **The OSCE/ODIHR recommends** that the law be amended to provide for election commissions that are truly independent from government and that are sufficiently inclusive and pluralistic to ensure broad confidence in their work. Further, registered political parties should be represented on election commissions at all levels and self-nominated candidates should be represented meaningfully at the district election commission and polling station commission levels.

Article 15 provides that a polling station commission shall be composed of “5-19 members, including the chairman, deputy chairman and secretary. If the commission is created in composition of 7 persons, then chairman and secretary shall be elected” (sic). It is not clear why an election procedure for the chairperson and secretary applies to the “7 persons” polling station commission and not to other size commissions. The original text of this article should be checked to ascertain whether there is an error in the text that requires clarification.

Article 15 also provides that “when there is a necessity, the number of district election commission members may be reduced or increased.” The use of the word “district” appears erroneous as this article regulates polling station commissions. The original text should be checked to ascertain whether this is an error in the text. Further, this provision states no objective criteria on what constitutes “a necessity”¹² or whether any reduction or increase can be outside of the initial “5-19 members” range. **The OSCE/ODIHR recommends** that Article 15 be reviewed and its text corrected and amended to ensure that it can be applied uniformly and objectively. It should also be made clear in the text that “reduction” of the commission’s size cannot be used as means for removing a commission member where there are no legal grounds that would justify removal. In such a “reduction” situation, members who are to be removed should be chosen by lottery.

Article 17 prohibits a candidate for the Presidential office and the candidate’s proxies from being a member of an election commission. This prohibition is too narrow and should be expanded to include all persons who would have an apparent conflict of interest in serving on an election commission. Illustrative, but not exhaustive of this category, would be elected and/or appointed state and local officials. **The OSCE/ODIHR recommends** that this prohibition be expanded to include all categories of persons who would have an apparent conflict of interest. Further, the regular employment and political party affiliation of commission members should be publicized so that voters can be assured that the election administration has been appointed in compliance with the law and that no conflict of interest exists for a particular commission member.

Article 18 provides, concerning voting on issues in an election commission, “In case of equal voting, the vote of the presiding person shall be final.” Although deadlock should be avoided, giving the chairperson a weighted vote effectively gives tie breaking power to the political party that controls the appointment process for the

¹² Similarly, there are no objective criteria for “necessary” in Article 17.

election commission chairperson. The use of a weighted vote also allows adoption of a proposal that does not have sufficient support to garner a simple majority. **The OSCE/ODIHR recommends** that Article 18 be amended so that the principle of one person-one vote in the decision making process in election commissions, regardless of whether there is a tie vote, is respected and in order to ensure that adopted proposals have at least the support of a simple majority.

VI. ELECTION RULES

A. VOTERS LISTS

Article 2 of the Presidential Election Law denies voting rights to persons who are “confined”. It is assumed that this provision is intended to deny the voting rights of persons serving a criminal sentence in a penal institution. Under this provision, voting rights are denied due to “confinement” status, regardless of the nature of the underlying crime. The denial of voting rights, due to confinement and without regard to the seriousness of the specific crime, is a disproportionate sanction which is contrary to Paragraph 24 of the 1990 Copenhagen Document. **The OSCE/ODIHR recommends** that Article 2 be amended and that the denial of voting rights occur only where a person has been convicted of committing a crime of such a serious nature that forfeiture of political rights is indeed proportionate to the crime committed.¹³ The forfeiture should be for an established period of time, likewise proportionate, and restoration of political rights should occur automatically after the expiration of this period of time, regardless of “confinement” status.

Articles 20 through 23 of the Presidential Election Law regulate voters lists. Article 22 requires that voter’s lists are submitted for public inspection 15 days before election day for regular polling stations and two days before for “other polling stations”. It is not clear whether “other polling stations” is intended to reference the special polling stations in clinics, preventoriums, rest homes, hospitals, and other health facilities, military units, and abroad (Articles 9, 20, and 21). This text should be clarified in Article 22.

Article 22 allows a person whose name has been omitted from the voters list to apply to the polling station commission for inclusion. Article 22 provides “if a positive decision is taken with regard to the applicant, the polling station commission shall immediately amend the list”. Articles 22 and 23 permit a person to be added to the voters list on election day upon the presentation of documentation establishing the right to vote in the respective polling station. These articles could be improved by clearly stating the acceptable forms of documentation to establish identity.

B. ELECTION CAMPAIGN PROVISIONS

Article 3 of the Presidential Election Law states that “Citizens of the Republic of Tajikistan shall participate in the pre-election campaign and voting for the

¹³ Further, the law should specifically list those crimes that are considered to be so serious that forfeiture of a human right – suffrage – is required.

President...”. This could be applied to limit the rights of free speech and association of non-citizens during the period of the pre-election campaign. The rights of freedom of expression and association, according to international human rights principles, belong to all persons within the jurisdiction of a state. Even if non-citizens (stateless and alien residents) do not have the right to vote, they do have the right to freely express their opinion, associate and participate in political discussions. Article 3 could be applied to limit the fundamental rights of non-citizens residing in the Republic of Tajikistan. Such an application would conflict with the basic human rights protected by the global and regional international conventions recognized in OSCE commitments.¹⁴ Similar limiting text is found in Article 4, which guarantees the rights of “citizens”. **The OSCE/ODIHR recommends** that Articles 3 and 4 of the Presidential Election Law be amended to state that neither article is to be interpreted or applied to limit the rights of free expression, speech, assembly, or association.

Article 27 provides: “A candidate to the post of the President cannot be called for criminal responsibility, arrested, detained, or be subject to official reprimand judicially without the consent of the Central Commission for Elections and Referenda.” The CCER should not have the responsibility or authority to make a pretrial determination, which is judicial in nature, as to whether existing facts justify interference with a candidate’s campaign through arrest, detention or reprimand. **The OSCE/ODIHR recommends** that the phrase “without the consent of the CCER” be deleted from Article 27 and this responsibility be placed with an appropriate judicial institution that can conduct an independent factual determination that satisfies international legal principles respecting the presumption of innocence and due process in court proceedings. Alternatively, Article 27 could be amended to prohibit the arrest, detention or reprimand of a candidate until after the outcome of the election has been officially certified in accordance with the law.

Article 37 establishes legal liability for “persons who knowingly publish or by some ways disseminate information derogating the fame and dignity of a candidate to the President of the Republic or offend the members of election commissions” (sic). This limitation on free speech prevents a robust and vigorous campaign, which is critical to election campaigning in a democracy. Outside the context of a political campaign, a government may limit freedom of expression in order to protect the reputation or rights of others.¹⁵ However, in the context of a political campaign, a law for the protection of the reputation or rights of others cannot be applied to limit, diminish, or suppress a person’s right to free speech and political expression.¹⁶ **The OSCE/ODIHR recommends** that Article 37 be reformulated in order to comply with international norms that protect the right of free speech and political expression.

¹⁴ See Paragraph 5.21 of the OSCE 1990 Copenhagen Document; Paragraphs 10 and 11 of the OSCE 1992 Prague Document; and the Human Dimension section of the Charter of Paris of 1990.

¹⁵ See, e.g. Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁶ See, e.g., *Oberschlick v. Austria*, Case No. 6/1990/197/257, European Court of Human Rights (23 May 1991); *Lopes Gomes Da Silva v. Portugal*, Application No. 37698/97, European Court of Human Rights (28 September 2000); *Bowman v. The United Kingdom*, Case No. 141/1996/760/961, European Court of Human Rights (19 February 1998); *Incal v. Turkey*, Application No. 41/1997/825/1031, European Court of Human Rights (9 June 1998).

C. EQUAL ACCESS PROVISIONS

Article 27 requires that candidates have access to media and other state resources on “equal” terms and conditions. However, this article provides no details on how this is accomplished. Without more concrete language providing guidance as to how “equality” is to be achieved, it is extremely difficult to ensure that this “equality” principle is enforced during a campaign.

Article 27 should be amended to state the rules that are to be applied in order to accomplish the goal of “equal” access to media and state resources. These rules for equal access should be clearly stated, understandable, and capable of objective application. Additionally, concerning the allocation of media time, the rules should take into account the desirability of having slots at different times during the election campaign. Each media outlet should be required to distribute party slots fairly throughout the campaign so that candidates and political parties can communicate their messages “equally” throughout the course of the entire campaign period.¹⁷ The timing of these access slots should also be fair, balanced and non-discriminatory. **The OSCE/ODIHR recommends** that Article 27 be accordingly amended. **The OSCE/ODIHR also recommends** that the amount of broadcast time distributed on an equal basis be sufficient to enable all political parties and candidates to compete effectively in the elections.

The Presidential Election Law fails to regulate paid political advertisements. **The OSCE/ODIHR recommends** that law be amended to require that the same commercial rate for paid political advertisements be offered to all political parties and candidates, and that the times and location of the advertising be on similar terms. Further, this rate should be consistent with commercial rates available for any form of advertising. Finally, the law should require identification of these advertisements as paid political advertisements.

The law should also require that state owned or controlled media must show complete impartiality in news coverage of the campaign. State owned or controlled media should refrain from campaigning for or against any party or candidate and should be impartial in the news coverage and treatment of candidates and political parties. **The OSCE/ODIHR recommends** that the law be amended to include this requirement and provide for sanctions for any violation.

D. FINANCING OF POLITICAL CAMPAIGNS

The Presidential Election Law should adequately address the issue of financing of political campaigns. Article 27 provides that “equal material, technical and financial conditions in the election campaign shall be provided to all registered candidates to the post of the President.” However, the law does not state when, how much, or the manner in which “equal financial conditions” will be provided to candidates. Nor does

¹⁷ The law does not appear to distinguish between state and privately owned media. It is assumed that the term “media” means state owned media and private media which offer to sell time and space for political advertising.

the law state whether additional private contributions could be made in support of a candidate.

The OSCE/ODIHR has previously expressed concern that campaign funding has been inadequate in past elections. Political parties and candidates must have sufficient resources for conveying their political messages to voters. Paragraph 7.6 of the OSCE 1990 Copenhagen Document requires that political parties and candidates have the necessary legal guarantees “to enable them to compete with each other on a basis of equal treatment before the law and by the authorities”.

Campaign financing by the government must be on the “basis of equal treatment before the law”. However, Article 27 merely states a principle without providing concrete details on how this principle is to be achieved and under what procedures. Article 27 gives no guidance or method to realizing the principle. **The OSCE/ODIHR recommends** that the law be revised to provide specific guidelines for the public finance of political parties and registered candidates in elections. The basic principle behind funding election campaigns is to create equal opportunity so that *all* contestants can compete effectively in the election process. To create equal opportunity, the law should require that political parties and registered candidates be provided a minimum amount of funding to enable *all* registered candidates to compete effectively in the election.

The law should also require periodic pre-election and post-election reporting of campaign contributions and expenditures. This should include disclosure of all contributions received, the source of those contributions, and the amount and type (cash or in-kind) of the contributions; and disclosure of expenditures made by an electoral contestant, the identity of the recipient of the expenditure, and the amount expended. **The OSCE/ODIHR recommends** that the Presidential Election Law include these requirements. Campaign finance regulation is not effective without clearly designating the agency responsible for this oversight role, and effective and proportionate sanctions for those who transgress the legal regulations.

E. EARLY (ABSENTEE) VOTING

Article 30 of the Presidential Election Law allows a voter, “who in (sic) the day of election may not be present in the area of residence” to receive a ballot from the polling station commission and “make his/her choice” on the ballot. Article 30 also requires the voter to sign “the list of voters about the ballot received”. Article 30 needs to be improved for several reasons. First, Article 30 provides no details on what days, during what hours, or in the presence of which polling station election commission members is this early voting process administered. Secondly, it is not clear if the referenced “list of voters” is the regular voter’s list or a special list of early voters. Thirdly, it does not appear that candidates have the right to have observers present for the early voting process. Finally, the early voting process can vastly increase the opportunity for possible electoral fraud. It places a burden on election administration and can significantly hinder observation efforts. **The OSCE/ODIHR recommends** that the law be amended to regulate early voting through a prior written request based on justified reasons and to ensure that the early voting process is secure, transparent and accountable. For example, the turnout figures for early voting,

including a day by day record of the number of votes cast, which should be separately established and reflected in the final results protocol at all levels of the election administration.

F. MOBILE VOTING

Article 30 of the Presidential Election Law permits mobile voting for voters who cannot attend a regular polling station “due to the health or other conditions”. Mobile voting, although acceptable as a method for ensuring the voting rights of persons who cannot attend due to age, health, or infirmity, must be carefully regulated in order to minimize the possibility of electoral fraud. In this respect, Article 30 needs safeguards. **The OSCE/ODIHR recommends** that Article 30 be amended to include the following safeguards for mobile voting:

- Mobile voting should be used only in cases where it is physically impossible for the voter to travel to the polling station to vote. This fact should be established by the voter, making a written application to the polling station committee, explaining why it is physically impossible for the voter to travel. The application must be acted upon by the polling station committee, within a deadline established by law. This deadline should be sufficiently in advance of Election Day to permit observers to plan to observe mobile voting.
- The number of ballot papers taken out for mobile use and the number later returned should be formally recorded in all protocols.
- The number of ballot papers taken out should accord with the number of requests received, plus a specified limited number of extra ballots to allow for voters who may spoil their ballot paper. If such cases occur, they should be accounted for in the protocol of the respective polling station.
- The number of persons who have used the mobile box should be recorded in the polling station and successive protocols. This makes it possible to identify particular areas where the proportion of votes cast using mobile boxes is unusually high, which may indicate fraud.
- At least two members of the polling station committee should administer mobile voting jointly within the geographical territory covered by a polling station and, where possible, members should not be from the same political party.

A proper balance must be maintained between facilitating the voting rights of citizens and ensuring the integrity of election processes. The above safeguards would create such a balance.

G. VOTING PROCEDURES AND BALLOTS

Article 9 of the Presidential Election Law establishes that a polling station should accommodate between 20 and 3,000 voters. The latter number is high and could place an administrative burden on the polling station election commission. **The OSCE/ODIHR recommends** that the maximum number of voters allocated to a polling station be decreased to a more manageable number, such as between 1,000 and 1,500.

Article 9 also provides that the locations of polling stations and the “voting premises” are determined on the proposals of local executive authorities. As the location of a polling station can directly affect the willingness of voters to participate in the election, consideration should be given to empowering the district election commission to decide on possible complaints in this regard in order to better accommodate potential voters.

Article 26 of the Presidential Election Law requires the preparation of ballots no later than 10 days before the election and the delivery of ballots to polling stations no later than two days before election day. Article 26 does not define who can observe the printing of ballot papers or be present when the ballot papers are delivered to respective polling station election commissions. The printing and delivery of ballots, as well as the destruction of defective ballots and printing plates, should be open to the same level of transparency as other parts of the election process. Accordingly, **the OSCE/ODIHR recommends** that the law be amended to explicitly allow the printing and delivery of ballot papers to election commissions, as well as the destruction of defective ballots and printing plates, be open to observers and representatives of the media. Further, the law should require that a proper record of the total number of ballots issued to precinct election commissions should be kept not only at the district election commission but also at the precinct election commission. The number of received ballots must be counted and checked against this record prior to the opening of the polling station and entered into the protocol. Copies of all these protocols should be provided to the CCER.

Articles 30 and 31 of the Presidential Election Law regulate the voting process, but do not define who may be present in the polling station during the voting. Failure to define who may be present is an implicit “invitation” to those persons who should not be present. This could likely result in the presence of state or local government officials and other persons who, by the nature of their positions, should not be present during the voting process due to real or perceived possibility for intimidation of voters. **The OSCE/ODIHR recommends** that the law be amended to clearly state who may, at any time during elections, be present in the polling station. Access to a polling station should be strictly limited to a person who has a legitimate reason for being in the polling station for reasons clearly stated in the law. It is also recommended that, where the presence of police are deemed necessary by the polling station commission to address a threat to voters or the commission, the police should leave the polling station premises immediately after situation has been properly addressed.

Article 30 requires that a voter, before voting, present a passport or “other identification card”. Article 30 does not specify what documents are acceptable for identification purposes or whether the identification document must contain a photograph of the voter. **The OSCE/ODIHR recommends** that Article 30 be amended to specify what documents are acceptable for establishing the identity of a voter.

Article 31 allows a person who is not on the voters list on election day to be entered in the “additional list of voters based on their documents, which prove their identity and place of residence”. Article 31 does not specify what documents are acceptable for

this purpose. **The OSCE/ODIHR recommends** that Article 31 be amended to specify what documents are acceptable for establishing identity and place of residence.

Article 31 of the Presidential Election Law, which governs the voting process, requires *negative voting*. Negative voting works against the interests of voters, candidates, and efficient election administration. The voter must cross out the names of all the candidates he/she votes against rather than indicating the candidate of his or her choice. Negative voting defeats objectives such as ensuring ease and simplicity of the vote and facilitating the vote counting process. Negative voting increases the chances of spoiled ballots because of the increased opportunity to make errors by not marking off all the names except one or by marking them off in an incorrect fashion. Negative voting requires a much more complex and comprehensive voter education program for certain officials, political parties and the public than would be required for positive voting. Furthermore, negative voting requires time consuming calculations in order to determine the number of votes for and the number of votes against each candidate – also increasing the risk of error during the count.

Negative voting also raises a concern as to secrecy of the vote. Where there is only one candidate standing, voters will not need to mark the ballot paper at all to vote for that candidate. In such cases, a voter can walk straight through the voting booth, or room for voting, to the ballot box; indeed, they have no reason to pause on the way. Those voters who stop to mark the ballot paper in any way will be clearly voting against the only candidate on the ballot. It will thus be clear to all persons present how the voter is voting and the secrecy of the ballot will be violated.

Negative voting also misleads voters. Article 31 leads voters to believe that they can vote for more than one candidate as it states that “a voter crosses out the names of those candidates whom he/she does not vote for”. Yet, Article 32 provides that a ballot where the voter “voted for support of more than one candidate shall be considered invalid”. Thus, a voter is led to believe that a ballot marked consistently with the terms of Article 31 (which does not instruct the voter to cross out “all but one name”) will be counted, when in fact it will be considered invalid under Article 32.

For the above reasons, **the OSCE/ODIHR recommends** that the law be amended to establish a positive voting system and procedures for marking ballot papers that requires the voter to vote “for” a candidate instead of “against” one or more candidates.

The law does not describe the voting procedures for voting outside of a regular polling station (*e.g.* military, out-of-country, mobile voting). **The OSCE/ODIHR recommends** that the law be amended to describe all procedures for identifying a voter, issuing a ballot, and conducting the vote in all polling stations, regardless of the type of polling station.

H. DETERMINATION OF ELECTION RESULTS

Article 32 regulates the process of ballot counting in the polling station. Article 32 provides that “Before opening the ballot boxes, the polling station commission in the

presence of election commission members cast the glued envelopes with ballots into the ballot boxes.” It would appear, but is not clear, that the “glued envelopes” contain ballots cast through early voting and mobile voting processes. **The OSCE/ODIHR recommends** that Article 32 be amended to clarify this point. Further, Article 32 states that “ballots in which voter (sic) have added names shall not be taken into account”. Although it would appear that this means the ballot is an “invalid” ballot, it is not clear that the phrase “not taken into account” is the same as “invalid”. It is recommended that this phrase be clarified in Article 32.

Article 32 does not require that the results protocols be completed in ink, in the polling station premise. Article 32 only requires that the protocol be signed and sent to the immediate superior election commission. **The OSCE/ODIHR recommends** that Article 32, and all articles¹⁸ in the law that relate to results protocols, be amended to require completion of the results protocols in ink, in the premise of the respective polling station.

There is no requirement in Article 32 for the results protocols to be publicly posted or given to observers. **The OSCE/ODIHR recommends** that Article 32, and all articles in the law that relate to results protocols, be amended to require that the official results protocols be publicly posted at the polling station, all superior election commissions, and copies of protocols provided to observers at all levels of election administration.

Article 34 of the Presidential Election Law provides that the election is “valid if more than 50 per cent of voters included in the list have participated”. Although intended to ensure public confidence in the election results, such a requirement can undermine the confidence of the public in the legitimacy of elections. In a second round run-off election, it is quite possible for a candidate to receive substantially more of the votes than the other candidate, but be deprived of the Presidential mandate because the voter turnout was one person less than the required 50%. Such a situation thwarts the will of those voting in the election and undermines their confidence in the legitimacy of elections, and may additionally invite electoral malfeasance. Those citizens taking the responsibility to vote and participate in elections should not have their collective will thwarted by a single person who does not vote in the elections. The person who does not vote in the elections should not be able to undermine the will of those who do vote by merely staying at home. In fact, the current voter turnout requirement grants those who choose to stay at home significant power to veto election results. Understandably, this undermines public confidence in elections. Further, the requirement for a voter turnout of at least 50% of the registered voters can become impracticable. Periods of “voter fatigue” are always possible and there will be some elections where the voter turnout is low. However, a President elected by the express will of those voting, regardless of the turnout level, would be preferable to a possible cycle of failed elections resulting from low turnout. **The OSCE/ODIHR recommends** that consideration should be given to eliminating the 50% voter turnout requirement.

¹⁸ This would include Articles 33 and 34 of the Presidential Election Law.

Article 34 provides that “Election in general or in constituencies and polling stations can be considered invalid due to violations occurred in the process of election or ballot counting, which had an impact on the result of election” (sic). This article permits the invalidation of results for a violation of law, regardless of whether the violation affected the determination of the winning candidate. Although a violation could “impact” the result, it does not necessarily *affect the determination of the winning candidate* due to the margin of victory. Additionally, the law does not provide any procedures regulating a request for invalidation or the degree of proof necessary to sustain a request for invalidation. **The OSCE/ODIHR recommends** that Article 34 be amended to establish a procedure for invalidation of election results that is fair, can be applied objectively, and results in invalidation only where it is impossible to determine the will of voters (*i.e.* the violation could have affected the determination of the winning candidate).

Article 34 also provides that “in cases of invalid recognition of election in a district and a polling station, the results of voting in such districts and polling stations shall be excluded from the general result of election by decision of the CCER in condition if the election is recognized valid no matter of results of these” (sic). It is not clear what is intended by this text. It is also not clear how this text affects the legal requirement of a 50% voter turnout. **The OSCE/ODIHR recommends** that this text be clarified in Article 34.

Article 34 regulates the publication of election results. Article 34 requires the CCER to publish in the press “information” on the election results no later than ten days after the election. Article 34 requires improvement in several areas. First, publication should not be limited to the press, but should also include broadcast media. Secondly, the CCER should be required to announce and publish in broadcast media preliminary results as they become available. Finally, the “information” on all results, both preliminary and final, should be in the form of tables with all relevant details broken down to the level of the polling station, which will enable all interested parties to audit the outcome of the elections from polling stations, through intermediate levels, to the CCER level. The tables should include the number of voters in each polling station who used the mobile ballot box and other alternative voting procedures in order to identify particular areas where the proportion of votes cast using mobile or other alternative voting procedures is unusually high, which may indicate possible fraud.¹⁹ **The OSCE/ODIHR recommends** that Article 34 be accordingly amended.

Article 35 requires repeat (second round) voting between the top two vote receiving candidates if no candidate secures a majority of the votes in the first round of voting. Article 35 also provides that “if due to withdrawal of candidates, only one candidate remains, repeat voting shall take place on his/her candidacy” (sic). However, Article 35 does not explain what will be the form of the ballot if there is only one candidate remaining. Nor does Article 35 explain how a voter is to mark a single candidate

¹⁹ The same information for early voting should be included if the early voting process is retained in the law.

ballot, single candidate ballots are to be counted, and the results determined. **The OSCE/ODIHR recommends** that Article 35 be clarified to address these issues.²⁰

The law does not describe the procedures for counting and tabulating votes outside of a regular polling station (*e.g.*, military, out-of-country, mobile voting). **The OSCE/ODIHR recommends** that the law be amended to describe all procedures for counting and tabulating votes, regardless of the type of polling station.

The Presidential Election Law does not contain a provision for a recount of votes. The possibility to have a recount of votes is common in election legislation as it permits the correction of obvious counting errors without requiring resort to judicial action in courts. **The OSCE/ODIHR recommends** that the law be amended to provide a fair procedure for requesting and conducting a recount of votes where the result of the recount could affect the determination of the winning candidate.

VII. TRANSPARENCY

The Presidential Election Law does not provide for domestic non-partisan observers. The presence of domestic non-partisan observers enhances the transparency of the electoral process and has a positive impact on public confidence. **The OSCE/ODIHR recommends** that the Presidential Election Law be amended to provide broad rights of observation for domestic non-partisan observer groups. These observation rights should be broad, as an election is a process that includes activities before and after polling. Observers must have the right to inspect documents, attend meetings, and observe election activities at all levels, and to obtain copies of decisions, protocols, tabulations, minutes, and other electoral documents, at all levels, during the entirety of the election processes, including processes before and after election day.²¹ Further, observers should receive appropriate credentials a sufficient period of time prior to elections to enable them to organize their activities effectively. Observers should be given unimpeded access to all levels of election administration, effective access to other public offices with relevance to the election process, and the ability to meet with all political formations, the media, civil society, and voters.

Article 4 of the Presidential Election Law permits observers from other states and international organizations “if necessary”. However, the law provides no objective criteria explaining when it is deemed “necessary”. Further, the law does not state any rights of such observers even where their presence is deemed “necessary”. **The OSCE/ODIHR recommends** that the law be amended to provide greater detail concerning the presence and rights of international observers. Further, international observers from OSCE participating States who are invited by the authorities, in line

²⁰ Although it might be inferred that the principles in Article 35 applicable to two candidates second round voting also apply to single candidate second round voting, this should be clearly stated in the law.

²¹ Regarding domestic partisan observers and international observers, Article 7 of the Presidential Election Law provides that “preparation and conducting of elections shall be exercised openly and publicly by electoral commissions.” However, this text is not sufficient to guarantee full and complete transparency.

with Paragraph 8 of the OSCE 1990 Copenhagen Document, should be able to attend all stages of the election process.

Article 4 requires that “all decisions of relevant bodies on preparation and conducting of election of the President shall be published and aired by TV and radio within 7 days of its adoption.” There is no justification for delaying publication of these decisions in broadcast media for a period of seven days. **The OSCE/ODIHR recommends** that this deadline be shortened in order to ensure that relevant election information is conveyed to the public expeditiously and without undue delay.

There are no requirements in Articles 32, 33, and 34 for the results protocols to be publicly posted or given to observers. **The OSCE/ODIHR recommends** that Articles 32, 33, and 34 be amended to require that the official results protocols be publicly posted and provided to observers at all levels of election administration.

VIII. LEGAL PROTECTIONS

A. LACK OF A SINGLE AND UNIFORM PROCESS FOR LEGAL PROTECTIONS

Article 19 of the Presidential Election Law allows for complaints against a decision of an election commission to be challenged in a superior election commission *or* in a court. Article 19 also includes a right to appeal decisions of the CCER to the Supreme Court. However, Article 19 does not specify who has the right to file complaints or appeal to the Supreme Court. **The OSCE/ODIHR recommends** that this be clarified in Article 19.

One concern with Article 19 is that it allows for a complaint to be lodged with a superior election commission *or* a court. This provision creates the possibility of inconsistency in decisions. As uniformity and consistency in decisions is important, **the OSCE/ODIHR recommends** that challenges to decisions be filed in only one forum designated by the law – either a court or higher election commission. If the forum designated by the law is an election commission, then the law must provide that the right to appeal to a court is available after exhaustion of the administrative process.

Article 19 should be amended to state clear procedures for a uniform complaint process that defines the roles of each level of election commission and each level of courts. This process should identify which bodies act as fact finding bodies of first instance and which bodies act as appellate review bodies. This process should include the possibility for voters, candidates, political parties, and proxies to file a complaint against a broad range of violations, including against the inactivity of election commissions or against inappropriate actions by government officials. Complainants must have the right to present evidence in support of the complaint, receive a fair and public hearing by an impartial tribunal in transparent proceedings, and be provided an

effective and speedy remedy.²² The law should also clearly state that the CCER and other election commissions must officially rule on complaints, in public session, expeditiously, and within deadlines established by the law. Complainants should also be notified, in writing, of the decision reached on the complaint. The complainant should also be informed of appeal rights, including where the appeal should be filed, and what documentation is required to file the appeal. **The OSCE/ODIHR recommends** that Article 19 be amended to provide a complaint and appeal process that addresses, at a minimum, the above matters.

B. DEADLINE FOR COMPLAINTS AND APPEALS

Article 19 provides that the deadline for challenging a decision of an election commission or appealing to the Supreme Court is ten days. This period, within the context of an election dispute, could be considered as lengthy since such disputes should be lodged and decided expeditiously. **The OSCE/ODIHR recommends** that consideration be given to reducing the number of days within which to file a legal challenge or appeal of an election commission decision.

IX. CONCLUDING REMARKS

The OSCE/ODIHR offers these recommendations for consideration by the authorities of the Republic of Tajikistan with the objective of assisting in the development of a sound legal framework for democratic elections in Tajikistan. The OSCE/ODIHR remains ready for cooperation with the authorities and civil society of the Republic of Tajikistan in support of their efforts to conduct elections in line with OSCE Commitments and other standards for democratic elections.

²² See Articles 8 and 10 of the Universal Declaration of Human Rights; Paragraph 13.9 of the OSCE 1989 Vienna Document, Paragraphs 5.9 through 5.12 of the OSCE 1990 Copenhagen Document, and Paragraphs 18 through 21 of the OSCE 1991 Moscow Document.