



Office for Democratic Institutions and Human Rights

# TURKMENISTAN

## ASSESSMENT OF THE ELECTORAL LEGISLATION



Warsaw  
23 July 2012

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**I. INTRODUCTION**

This assessment of the electoral legislation of Turkmenistan is provided by the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR), upon the request of the OSCE Centre in Ashgabat. This assessment is based on unofficial English translation of the Constitution, amended on 26 September 2008,<sup>1</sup> and other laws, primarily the *Mejlis* Election Law (MEL), adopted on 10 October 2008, the Presidential Election Law (PEL), adopted on 21 May 2011, and the *Halk Maslakhaty* and *Gengesh* Election Law (HM/GEL), adopted on 31 March 2012.<sup>2</sup> In addition, the legal framework for elections includes the Law on Guarantees of Electoral Rights of the People of Turkmenistan of 22 April 1999 and the Law on the Central Commission for Elections and Referenda of 21 May 2011. Relevant provisions from the Civil Procedure Code, Law on Public Association, and Law on Media have been taken into consideration as well for the purposes of this assessment.

The OSCE/ODIHR has previously commented on various aspects of the legal framework for elections in Turkmenistan, both informally and formally, with a published legal assessment in 2008.<sup>3</sup> Additionally, the OSCE/ODIHR has provided comments on the electoral legislation within the context of its mission reports.<sup>4</sup> Previous comments provide a good background for assessing the development of the legal framework for elections in Turkmenistan. However, the legal framework has changed significantly since the first OSCE/ODIHR assessment of the electoral legislation. The Constitution was amended in September 2008 and the new MEL adopted in October 2008. This has been followed by the enactment of new versions of the PEL and HM/GEL in 2011 and 2012, respectively.

This assessment is intended to assist the authorities of Turkmenistan to further develop the legislative framework for the conduct of genuine and democratic elections in order to meet OSCE commitments and other international standards in this regard. Recommendations provided in this assessment should be read in conjunction with past OSCE/ODIHR recommendations that remain to be addressed.

**II. EXECUTIVE SUMMARY**

1. While the legal framework of Turkmenistan recognizes a number of important basic principles pertaining to the conduct of elections, such as the universal, direct and

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<sup>1</sup> The Constitution was amended on 26 September 2008 through the Constitutional Law "On Introducing Amendments and Additions to the Constitution of Turkmenistan."

<sup>2</sup> This assessment does not account for the accuracy of the translations provided, including the numbering of articles, paragraphs, and sub-paragraphs. Any legal review based on translated text may be affected by the quality and accuracy of the translation.

<sup>3</sup> See OSCE/ODIHR Assessment of the Electoral Legislation of Turkmenistan, 18 September 2008 at <http://www.osce.org/odihr/elections/turkmenistan/33453>.

<sup>4</sup> See OSCE/ODIHR Needs Assessment Mission Reports ahead of 12 December 1999 parliamentary elections, 11 February 2007 presidential election, 14 December 2008 early parliamentary elections and 12 February 2012 presidential election at [www.osce.org/odihr/elections/turkmenistan](http://www.osce.org/odihr/elections/turkmenistan).

equal right to elect by secret ballot, a number of crucial aspects of the electoral process are regulated inadequately or not at all.

2. The new provisions in the PEL, MEL and HM/GEL stipulating that elections will be conducted on a competitive or “alternative” basis, along with adoption of the Law on Political Parties, which creates the legal framework for the functioning of political parties, may reflect a very tentative move in the legislation towards some level of political pluralism. It is important that this new law is applied in an equitable and inclusive manner, so that the right of citizens to establish political parties and to seek public office as party representatives or as individuals is duly ensured.
3. The new legislation includes some improvements, particularly removal of undue restrictions on suffrage for citizens held in pre-trial detention facilities and for citizens suffering from mental illness, who have not been deemed incapable by a court.
4. The PEL, MEL and HM/GEL now contain basic rules on how domestic observers from public associations and political parties are appointed and more clearly address the rights of domestic and international observers and representatives of the mass media.
5. However, despite the substantial changes in the legislation, Turkmenistan’s election laws contain a number of serious shortcomings. These include the following:
  - (i) The lacunae and lack of detail in the election laws create a significant risk of inconsistent application on the part of those responsible for organizing the elections. Much more detailed rules need to be enacted to deal with such key issues as the conduct of the campaign, early voting, the use of mobile ballot boxes, as well as counting procedures and tabulation of results and their publication.
  - (ii) The legal framework contains several provisions undermining the principle of proportionality. These include denial of voting rights to convicts without regard to the severity of the crime committed and provisions that allow an election commission to cancel a candidate’s registration for any violation of the law, which allows for outcomes disproportionate to the infractions.
  - (iii) In addition, the legal framework continues to impose lengthy residency requirements for candidates, both for the *Mejlis* (parliamentary) and presidential elections, in contradiction to international obligations and good practice.
  - (iv) There are no mechanisms for ensuring political plurality in election commissions. While there are provisions enabling political parties, public associations and citizens to nominate representatives to election commissions, no guarantees are provided that these nominees will be appointed as commission members. In addition, the fact that the president appoints the members of the Central Commission for Elections and

Referenda (CEC) directly, grants him/her excessive control over the commission, challenging its independence.

- (v) The laws require election commissions to be involved in the organization of candidates' meetings with voters. The line separating independent election administration and partisan campaign activities can easily be crossed when election commissions are involved in organizing and/or facilitating such meetings.
  - (vi) The electoral legislation, particularly for the *Mejlis* elections, lacks mechanisms for guaranteeing the transparency of the electoral process. The stakeholders would have better confidence in the process if certified copies of election result protocols were distributed immediately to candidates, their representatives, accredited observers and journalists. In addition, result protocols of election commissions should include a breakdown of all results, so as to allow tracing of results from precinct to the highest level of commission.
  - (vii) In line with the MEL and HM/GEL, domestic observers may be nominated by political parties, public associations and groups of citizens that nominated registered candidates. Taking into account the current political structure and the affiliation of public associations with the governing party, these provisions in the MEL and HM/GEL essentially undermine the potential for non-partisan election observation and limit the promise of transparent elections.
  - (viii) The MEL provides only a few regulations on the conduct of the campaign that could make ensuring the equality of conditions for all electoral contestants difficult in practice. In addition, neither the MEL, nor the HM/GEL contains sufficient regulation of campaigning in mass media or of campaign finance.
  - (ix) Although the provisions on legal redress in the PEL and HM/GEL constitute an improvement, the legal redress mechanisms in the MEL are insufficiently comprehensive. This may result in uneven application of the law and lack of guarantees for the electoral rights of the citizens.
6. The above listed shortcomings are at odds with the obligations and commitments assumed by Turkmenistan, including under the 1990 OSCE Copenhagen Document and the International Covenant on Civil and Political Rights (ICCPR), to conduct genuinely free elections and to foster political pluralism.
7. The current legal framework requires further improvement. However, amending the legislation alone cannot guarantee an electoral process in line with the OSCE commitments and other international standards. This also requires a commensurate level of political will to fully and effectively implement the law and to develop a pluralistic environment that underpins genuine and democratic electoral processes.

### III. LEGAL FRAMEWORK FOR ELECTIONS

#### A. CONSTITUTIONAL AND ELECTORAL SYSTEM

8. On 26 September 2008, the People's Council of Turkmenistan amended the Constitution. The key changes as relevant to this assessment were:
  - (i) Under the previous version of the Constitution, the *Halk Maslakhaty* (the People's Council of Turkmenistan, or PCT) was the "highest representative organ of popular power" and exercised "supreme state power and control."<sup>5</sup> With some 2,500 members, it held considerable powers, including the right to approve candidates for presidential elections and to dissolve the *Mejlis*. The fact that it only met twice a year raised certain questions about its effectiveness and of genuine political discourse.
  - (ii) Under the Constitution, the PCT has been abolished. Some of its powers and functions, such as appointment of *Mejlis* elections and ratification of international treaties, have been transferred to the *Mejlis*. The power to appoint regional and city mayors and to set the date of referenda has been transferred to the president.<sup>6</sup>
  - (iii) The *Mejlis* now comprises 125 deputies, compared to 65 previously.
  - (iv) The president now appoints the members of the Central Commission for Elections and Referenda (CEC), who were previously appointed by the PCT.
  - (v) The president now also appoints the *khyakims*, the governors and heads of local executive power, who were previously elected by corresponding elected bodies.
9. Although the Constitution asserts that state power is based on the principle of separation of powers,<sup>7</sup> the provisions it contains preserve a strong presidential system of government with weak separation of powers.
10. Executive power is exercised by the Cabinet of Ministers, which is both appointed and chaired by the president.<sup>8</sup>
11. The *Mejlis* is a unicameral legislature. Its deputies are elected for a term of five years in single mandate constituencies.<sup>9</sup> The *Mejlis* enjoys comprehensive legislative powers, although the Constitution provides that in some circumstances several legislative functions may be transferred to the president.<sup>10</sup>
12. Turkmenistan is divided into five regions (*velayats*). The capital, Ashgabat, has equivalent status to a *velayats*. Each *velayat* contains a number of districts (*etraps*). Regional executive power is exercised by *khyakims*, who act as the president's representatives. The Regional People's Councils are elected for four years.

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<sup>5</sup> Article 45 of the previous version of the Constitution.

<sup>6</sup> Article 53.7 of the Constitution.

<sup>7</sup> Article 4, *Id.*

<sup>8</sup> Articles 72-73, *Id.*

<sup>9</sup> Articles 59- 60, *Id.*; Article 1 of the MEL.

<sup>10</sup> Article 64 of the Constitution.

13. The *Gengeshes* and *Halk Maslakhaty* are locally elected representative bodies. Members of the *Halk Maslakhaty* are elected in *velayats* and cities and towns with rights of *velayats*. Members of the *Gengesh* are elected in the territory of a city within an *etrap*, settlement or village. Each elects a leader (*archin*) to direct its work. Members of the *Velayat Halk Maslakhaty* are elected in 40 single mandate districts; members of the *etrap* and municipal *Halk Maslakhaty*, in 20 districts; and members of a *Gengesh*, in 5 to 15 single mandate districts. The legislation requires that electoral districts must have an approximately equal number of voters.<sup>11</sup>
14. There is no Constitutional Court in Turkmenistan. The judicial branch is headed by the Supreme Court. All judges are appointed by the president. Neither the *Mejlis* nor any other body contributes to this process, except that the *Mejlis* “considers the president’s proposal” as to whether to appoint or dismiss the Chairperson of the Supreme Court.<sup>12</sup> While the previous version of the Constitution set five years as tenure of office for judges, now the Constitution merely stipulates that judges’ terms of office “shall be determined by law.”<sup>13</sup>

## B. ELECTORAL LEGISLATION

15. The Constitution is the basic law. The 1999 Law on Guarantees of Electoral Rights sets out some important principles relating to elections, such as the universal, direct and equal right to elect by secret ballot, all of which are also enshrined in the Constitution. In addition, specific laws deal with specific elections, namely:
  - the Presidential Election Law (PEL);
  - the *Mejlis* Election Law (MEL);
  - the *Halk Maslakhaty* and *Gengesh* Election Law (HM/GEL).
16. The principles for the formation and powers of the CEC are stipulated in the Law on the Central Commission for Holding Elections and Referenda, adopted on 21 May 2011.

## C. COMMITMENT TO INTERNATIONAL ELECTION STANDARDS

17. The laws contain an explicit commitment to international norms in the conduct of elections, including reference to the constituent documents of the OSCE. The latter includes the 1990 Copenhagen Document.<sup>14</sup> The Constitution gives direct effect to Turkmenistan’s international treaties, subject to the overriding primacy of the

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<sup>11</sup> Article 10 of the HM/GEL.

<sup>12</sup> Article 63(7) of the Constitution.

<sup>13</sup> Article 100, *Id.*

<sup>14</sup> Final Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, July 1990, <http://www.osce.org/odihr/elections/14304>.

Constitution itself.<sup>15</sup> The Law on Guarantees of Electoral Rights of the People of Turkmenistan provides:

“Turkmenistan, being a full-fledged subject of the world community and strictly following the principles and norms vested in the UN Charter, constituent documents of OSCE and other universally recognized international organizations, shall, when organizing and holding the elections, adhere to the provisions of international treaties, conventions, agreements to which it is a party, and provide observance/enforce thereof.”<sup>16</sup>

18. Turkmenistan has acceded to the ICCPR, which recognizes the right of every citizen:

“(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....”<sup>17</sup>

These provisions are reflected in the Constitution.<sup>18</sup>

#### IV. RECENT ELECTIONS

19. Following Turkmenistan’s independence in 1991, former President Saparmurat Niyazov, who had led Turkmenistan since 1985, first as a Soviet republic and then as an independent country and who had run unopposed in presidential elections in 1990 and 1992, was declared “president-for-life” in 1999 by the PCT. After his death in 2006, a presidential election took place on 11 February 2007. Mr. Gurbanguly Berdimuhammedov, who was appointed Acting President following President Niyazov’s death, was subsequently declared the winner with 89 per cent of the vote. He was re-elected on 12 February 2012 with the 97 per cent of the vote.
20. The current 125 members of the *Mejlis* were elected on 14 December 2008. Elections to the regional and local people’s councils were held on 5 December 2010.

#### V. ELECTION ADMINISTRATION

21. The responsibility for organizing elections and referenda lies with the CEC and subordinate election commissions. The CEC comprises a chairperson, deputy chairperson, secretary and 12 other members. All members are appointed by the

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<sup>15</sup> Article 6 of the Constitution provides: “Turkmenistan recognizes the priority of universally accepted norms of international law. If an international treaty of Turkmenistan establishes rules other than those stipulated by the laws of Turkmenistan, the rules of the international treaty shall be applied.”

<sup>16</sup> Article 11.

<sup>17</sup> Article 25 of the ICCPR

<sup>18</sup> Articles 2, 32, 32.

- president, based on proposals by political parties and public associations. The chairperson must be confirmed by the *Mejlis*.
22. Subordinate to the CEC are 5 Regional Election Commissions (REC), 125 District Election Commissions (DECs) and Precinct Election Commissions (PECs).<sup>19</sup>
23. The president's appointment of CEC members further reinforces the influence enjoyed by the president and his/her nominees over the electoral process. The following factors contribute to this:
- (i) There is a hierarchical mechanism for appointing election commissions. Subordinate commissions are appointed by the superior commission. Thus, the president's appointments at the CEC level have the potential to influence appointments at every level of election commissions.
  - (ii) There is no mechanism in the law to ensure political plurality and balance of interests in the composition of election commissions. While the legislation grants the right to political parties, public associations and group of citizens to nominate election commission members, no guarantees are provided that these nominees will be appointed.<sup>20</sup>
  - (iii) While the law provides the possibility for candidates, groups of citizens and political parties to nominate representatives to election commissions, the laws do not define the powers of such representatives. It would appear that their authority is limited, since they are not considered members of election commissions.
24. In these circumstances, the current legal framework gives the president extensive control over the organization and administration of elections in Turkmenistan. This raises questions about the independence and impartiality of election commissions, while the administration of democratic elections requires that election commissions/bodies are independent and impartial.<sup>21</sup>
25. **The OSCE/ODIHR recommends** that the procedures for the formation of election commissions at all levels be revised so as to ensure a more inclusive and politically balanced composition and to avoid the domination by one party. This would likely increase public confidence in the process.

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<sup>19</sup> The precise number of PECs varies for each election.

<sup>20</sup> Commission members can be nominated by groups of citizens in the event that at least 30 voters residing on the territory of the respective electoral district attend the initiative group's meeting. International good practice suggests that such political plurality can be one effective mechanism to provide for greater impartiality of election administration.

<sup>21</sup> Paragraph 10 of the Human Rights Committee's Comments on Article 25, ICCPR provided 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."  
<http://www.legislationline.org/legislation.php?tid=57&lid=4282&less=false>

## VI. GENERAL OBSERVATIONS ON ELECTION LAWS

### A. POLITICAL PARTIES AND POLITICAL PLURALISM

26. Under the Constitution, citizens have the right to form political parties and public associations. The only currently registered political party is the Democratic Party of Turkmenistan (DPT), which is led by President Berdimuhamedov. Until 15 December 2011, the DPT jointly operated under the National Revival Movement (*Galkynysh*) umbrella, with several prominent public associations, including the Women's Union, Veterans' Union and Youth Union, also led by the president.<sup>22</sup>
27. On 10 January 2012, for the first time, the Law on Political Parties was adopted. The adoption of the law as such is a positive step, creating the legal framework for the functioning of political parties. Absence of this law and the lack of legal foundation for the establishment of political parties did not meet OSCE and other international obligations undertaken by Turkmenistan.<sup>23</sup> Before the Law's adoption, there was no identifiable or regulated procedure for citizens to establish new political parties. Nor was there any legal basis for citizens to enforce, if need be, through courts, their constitutional right to form political parties.<sup>24</sup> The legislation now provides a basic framework for the registration and functioning of political parties; **the OSCE/ODIHR recommends** that this new law be applied in an equitable and inclusive manner, so that the right of citizens to associate and to seek political or public office as party representatives is duly ensured.

### B. CANDIDACY RIGHTS

28. The principal qualifications to stand as a candidate for the presidency are set out in the Constitution. Candidates must be citizens by birth and aged between 40 and 70. They must have permanently and consecutively resided in Turkmenistan for at least 15 years and worked for the same period in state structures, public associations, enterprises, institutions or organizations.<sup>25</sup> The Constitution and the MEL also impose a 10-year residency requirement on candidates for *Mejlis* elections. This is a substantial restriction and is difficult to reconcile with OSCE commitments and other obligations, such as General Comment No. 25 of the United Nations Human Rights Committee, which provides: "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation."<sup>26</sup>
29. For each election, candidates are nominated by political parties, public associations or meetings of citizens. The legislation contains some regulations on the procedures

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<sup>22</sup> The *Galkynysh* was dissolved on 15 December 2011.

<sup>23</sup> Also see paragraphs 3, 5.4, 7.5 and 7.5 of the 1990 OSCE Copenhagen Document and Article 25 of the ICCPR.

<sup>24</sup> Following the adoption of the Law on Political Parties, reportedly two new parties – Agrarian Party and the Party of Entrepreneurs of Turkmenistan – are in the process of formation.

<sup>25</sup> Article 51 of the Constitution.

<sup>26</sup> In addition, although Turkmenistan is not a member state of the Council of Europe, the Commission for Democracy through Law (Venice Commission) "Code of Good Practice in Electoral Matters" CDL-AD(2002)023rev, I.1.1 c. iii and iv states that a length of residence requirement may be imposed on nationals solely for local or regional elections; and the requisite period of residence should not exceed six months except in order to protect national minorities.

for the nomination of candidates by groups of citizens; however, they are insufficiently detailed and clear. Absence of clear provisions may foster arbitrary decision-making and may unduly limit citizens' participation in elections. **The OSCE/ODIHR recommends** that the rules on nominations by groups of citizens are reviewed to ensure that no undue restrictions are imposed.

30. In addition, meetings of groups of citizens require the participation of at least 200 voters residing within the electoral district for *Mejlis* candidate nominations.<sup>27</sup> This number, for *Velayat Halk Maslakhaty*, municipal *Halk Maslakhaty*, and *Gengesh* elections is 200, 150, and 50 voters, respectively. Such restrictions, in practice, are likely to impede the nomination of genuinely independent candidates. **The OSCE/ODIHR recommends** that these legal provisions be amended so that all citizens have the right to stand as candidates, in line with paragraph 7.5 of the 1990 Copenhagen Document and other international standards.<sup>28</sup>
31. Similar restrictions apply to presidential elections. The nomination of presidential candidates must be supported by signatures of at least 10,000 voters, with no less than 300 signatures to be collected in each of one third of the 125 districts and cities.<sup>29</sup> The law stipulates procedures for the collection of signatures and provides that the CEC may refuse registration if signatures are found to be invalid.<sup>30</sup> Signatures can be considered invalid for a variety of reasons, such as omission of data on the signature form, completion of the form in pencil, or corrections in the form.
32. Although the collection of signatures in support of candidacy is an accepted practice in many jurisdictions, burdensome procedures for their collection and the subjective invalidation criteria may negatively impact on political competition and result in unequal conditions and potential malpractice. While the requirement of 10,000 signatures to be collected by presidential candidates may be regarded as reasonable given the overall number of voters in the country, **the OSCE/ODIHR recommends** that the legislation regulating conduct of presidential elections can be further enhanced by simplifying signature collection requirements and the inclusion of safeguards against invalidation of signatures due to minor errors or omissions.
33. In addition, election legislation includes provisions, which may be regarded as challenging the principle of proportionality. This includes provisions that allow election commissions to cancel a candidate's registration for any violation of law.<sup>31</sup> **The OSCE/ODIHR recommends** that this provision be reviewed to ensure that the de-registration of candidacy is applied as a measure of last resort and only in cases of serious violations of the law, pursuant to clearly defined procedures, including judicial oversight.

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<sup>27</sup> Article 313 of the MEL.

<sup>28</sup> Paragraph 7.5 of the 1990 Copenhagen Document provides to "respect the right of citizens to seek political or public office, individually or as representatives of political parties or organization, without discrimination." See also Article 25 of the International Covenant on Civil and Political Rights.

<sup>29</sup> Article 29 of the PEL.

<sup>30</sup> Article 29.11 of the PEL specifies that the candidate for presidency may be denied registration if the verification of the signatures finds that more than two percent of the signatures are inauthentic.

<sup>31</sup> Article 30.8 of the PEL; Article 40.7 of the HM/GEL.

### C. SUFFRAGE AND VOTER LISTS

34. Citizens aged 18 years or older by election day enjoy the right to vote. In a positive development, citizens suffering from mental illness, unless they have been deemed incapable by a court, and those in pre-trial detention have been granted the right to vote.<sup>32</sup> However, citizens serving a prison sentence remain deprived of this right, irrespective of the gravity of the crime committed.
35. The denial of suffrage due to a conviction for any crime, regardless of gravity, is not in line with emerging international good practice, which provides that the denial of the right to vote should be possible only when a person has been convicted of committing a crime of such a serious nature that forfeiture of political rights is considered a reasonable punishment for the crime committed.<sup>33</sup> In addition, voting rights may be revoked only for a set period of time, which should be proportionate to the seriousness of the offence committed. The restoration of political rights should occur automatically after the expiration of this period of time. **The OSCE/ODIHR recommends** that the Constitution and similar provisions in other laws be amended so that suffrage rights may only be withdrawn if a person has been convicted of committing a crime of such a serious nature that the forfeiture of political rights is indeed proportionate to the crime committed.
36. There is no centralized voter registry. Voter lists are compiled ahead of each election and PECs bear primary responsibility for their preparation, based on the information provided by local executive bodies. Voter lists are made available for public scrutiny at least 10 days before the *Mejlis* elections.<sup>34</sup> This deadline is 15 days for presidential, *Halk Maslakhaty* and *Gengesh* elections.<sup>35</sup> This allows little time for voters to review voter lists, to apply for any corrections and to challenge, if necessary, any failure to amend the list to a superior commission or to a court. **The OSCE/ODIHR recommends** that the deadline for publishing voter lists be brought forward to allow voters more time to make any necessary corrections and to lodge any relevant complaints and appeals.
37. In addition, it is not in line with good practice that any such corrections be made on polling day itself, since this constitutes an additional burden for PECs and may result in unwarranted inaccuracies. The possibility to request corrections on election day also leaves too little time for voters to pursue legal action in case of a refusal to amend the voter list. In the absence of a centralized voter register, **the OSCE/ODIHR recommends** establishing procedure for cross-checking voter lists across administrative units to control for potential multiple entries.

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<sup>32</sup> Article 3 of the PEL, Article 2 of the MEL; Article 3 of the HM/GEL.

<sup>33</sup> This principle has also been confirmed by various case laws of the European Court of Human Rights, see the case of *Hirst v. the United Kingdom* (No. 2; Application no. 74025/01; judgement of 6 October 2005); the case of *Frodl v. Austria* (Application no 20201/04; judgement of 8 April 2010); and the case of *Scoppola v. Italy* (No. 2; Application no. 10249/03; 17 September 2011). For these judgments of the European Court of Human Rights please see <http://www.echr.coe.int/echr/en/hudoc/>.

<sup>34</sup> Article 28 of the MEL.

<sup>35</sup> Article 26 of the PEL; 28 of the HM/GEL.

#### D. TRANSPARENCY OF THE ELECTORAL PROCESS

38. The new electoral legislation includes provisions regulating election observation by domestic and international observers. It sets out the procedures for the accreditation of international observers in more detail and stipulates the rights of both domestic and international observers, including the observation rights of media outlets. The PEL stipulates that domestic observers may be nominated by political parties, public associations, and groups of citizens.<sup>36</sup> In contrast, the MEL and HM/GEL provide that domestic observers may be nominated by political parties, public associations and groups of citizens that nominated registered candidates. Given that public associations have been under the same umbrella as the DPT for many years, provisions in the MEL and HM/GEL essentially undermine the potential for non-partisan election observation and limit the scope for transparent elections. **The OSCE/ODIHR recommends** that the laws be amended accordingly.
39. Candidates for *Mejlis* elections are entitled to appoint up to six proxies,<sup>37</sup> candidates for *Halk Maslakhaty* elections up to five proxies,<sup>38</sup> and candidates for *Gengesh* elections may appoint up to three proxies.<sup>39</sup> Candidates for the presidency may have only three proxies in each *etrap*, city and town.<sup>40</sup> **The OSCE/ODIHR recommends** that consideration be given to allowing all candidates to also nominate non-voting members to election commissions as a means of enhancing transparency. Having a broader and equitable representation of all election stakeholders could also ensure greater confidence in the process.

#### E. CAMPAIGNING

40. The lack of a comprehensive legal framework for the conduct of a campaign constitutes one of the biggest shortcomings of the electoral legislation. The MEL provides remarkably slim regulation on the conduct of campaigns, summarizing it in a single Article 38. The PEL and HM/GEL are more detailed, yet they still do not regulate all important aspects. This lack of regulation is likely to pose challenges both for those administering elections in ensuring the equality of campaign conditions and for electoral contestants alike.
41. In addition, while the electoral legislation provides that the cost of preparing and holding elections shall be covered entirely by the state,<sup>41</sup> none of the laws regulates campaign finance. Specifically, there are no rules addressing such issues as how the costs incurred by candidates in the course of their campaigns are to be declared, including the cost of political advertising, the extent to which candidates may fund their campaigns from their own resources, restrictions on the size of campaign funds or on donations. In light of the provision about the state funding of elections and in the absence of regulations on campaign financing of contestants, questions arise as to whether the legal framework provides a basis for the conduct of genuine campaigns, independent from state-managed activities.

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<sup>36</sup> Article 9.4.

<sup>37</sup> Article 37 of the MEL.

<sup>38</sup> Article 34 of the HM/GEL.

<sup>39</sup> *Id.*

<sup>40</sup> Article 34 of the PEL.

<sup>41</sup> Article 8 of the MEL and PEL; Article 10 of the HM/GEL.

42. Moreover, it makes it impossible for those wishing to engage in genuine campaigning to know the scope of their right or to obtain protection of that right, if need be, through the courts. Ultimately, the absence of specified limits on campaign financing may lead to unequal conditions for contestants, while the lack of regulation on the sources may lead to an abuse of state resources in the pursuit of political goals. **The OSCE/ODIHR recommends** that the legal framework be revised in order to regulate financing of campaigns by candidates. This would create the necessary framework for ensuring equal opportunities so that all contestants could effectively compete in an electoral process on an equal footing.
43. The legislation also does not provide sufficient details and regulation with regard to the oversight of campaign financing. A newly established Revision Group under the CEC is mandated to oversee campaign expenditures; however, relevant provisions do not contain any requirements for reporting on campaign financing and the verification of the accuracy of such reports.<sup>42</sup> **The OSCE/ODIHR recommends** that the legislation be revised to include detailed requirements on systematic and comprehensive campaign finance reporting by electoral contestants. The disclosure of contributions received, including sources, and of expenditures incurred during the campaign should be included.
44. Under the previous legal provisions, candidates and parties were not permitted to organize their own meetings with voters. Rather, the legislation stated that “candidates for deputy of the *Mejlis* shall meet with their voters both at meetings and in other forms convenient for voters. Meetings with voters shall be organized by the DEC’s together with the respective bodies of local executive power and local self-government.” This represented an unduly bureaucratic and limiting approach to campaign meetings.
45. Under the new MEL, the second sentence of the above quoted provision has been omitted.<sup>43</sup> However, the new MEL states in Article 19(9) that DEC’s “provide assistance” in organizing meetings with voters.” **The OSCE/ODIHR recommends** clarifying this article in order to ensure that candidates have complete freedom to organize their own campaign events and that DEC’s play a purely administrative role in providing technical support to candidates, e.g., finding adequate venues, when and if requested by candidates.
46. Similarly, the PEL and HM/GEL provide that “state authorities and local self-governance bodies shall render assistance to candidates in organizing gatherings and meetings with voters, public debates and discussions, and ensure safety when conducting these events.”<sup>44</sup> In a genuinely free election, candidates must be free to organize campaign events when and where they wish, without the involvement of local state bodies or election commissions. **The OSCE/ODIHR recommends** that provisions in PEL and HM/GEL be clarified to ensure that candidates are permitted to campaign free from any administrative hindrance.

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<sup>42</sup> Under Article 59.2 of the PEL, this group consists of employees of the CEC and other state bodies.

<sup>43</sup> Article 38 of the MEL.

<sup>44</sup> Article 40 of the PEL; Article 38 of the HM/GEL.

## F. MASS MEDIA

47. The electoral legislation contains very few provisions on the role and responsibilities of mass media, whether private, public or state-owned, in their coverage of elections and candidates' campaigns. While the PEL regulates some aspects of campaigning on television (TV) and radio, the MEL and HM/GEL contain no specific references to campaigning via the mass media. **The OSCE recommends** that the MEL and HM/GEL be amended to include media-related regulations for the respective elections.
48. The PEL provides in Article 35 that “the content of information materials placed in the media or distributed in any other way shall be objective and reliable, and shall not violate the principle of equality of candidates...” Article 38 grants candidates free broadcasting time on state TV and radio. The law specifies that no less than one hour of free broadcasting time is to be allocated on state TV and radio (the law does not make clear whether this is the quota per one day) and that this time is to be distributed among candidates on an equal basis. These provisions are welcome and may contribute to a more equitable media campaign environment.
49. Despite the introduction of certain provisions in the PEL designed to regulate campaigning through TV and radio, the framework remains incomplete. The law should identify mechanisms for ensuring that the principle of equality is guaranteed in practice. For instance, the legislation and rules issued by the CEC should include provisions related to paid airtime, requirements for balanced news coverage, oversight of media conduct and legal avenues that might be pursued. **The OSCE/ODIHR recommends** that the law be supplemented with more detailed provisions on the conduct of campaigning via mass media. This would improve the regulatory framework for media during election campaigns and would better ensure the equality of opportunities of contestants.

## G. PRECINCTS

50. Under the previous versions of the MEL and PEL, the number of voters in a precinct could range from 20 to 3,000.<sup>45</sup> In a welcome development, the new MEL has reduced the maximum number of voters within a precinct to 2,000.<sup>46</sup> This amendment has been extended to the remaining electoral legislation in the newly adopted PEL and HM/GEL.
51. Election precincts may now be formed abroad for presidential and *Mejlis* elections.<sup>47</sup> However, the legislation does not stipulate the procedures that are to be followed in this process. Neither does it determine the constituencies in which such voters would be voting or how their votes are to be incorporated into the overall election results. **The OSCE/ODIHR recommends** that these lacunae are addressed in the respective laws.

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<sup>45</sup> Article 12 of the old MEL.

<sup>46</sup> Article 12 of the new MEL.

<sup>47</sup> Article 11 of the MEL; Article 11.4 of the PEL.

## H. VOTING AND BALLOT PAPERS

52. The legislation contains some appropriate provisions on the organization of the voting process and of the counting of results, for instance rules designed to facilitate the secrecy of the ballot. However, various important aspects of these processes are not regulated adequately, if at all. For instance, there are no provisions to ensure strict accountability for the production, transportation, issuance and cancellation of ballot papers. The absence of such provisions detracts from the transparency and may impact the integrity of the voting process. **The OSCE/ODIHR recommends** that this aspect be more adequately developed in the legislation.
53. The election laws do not stipulate the hours of voting on polling day, but provide that they be established by the CEC. **The OSCE/ODIHR recommends** that the hours for voting be expressly stated in the laws.
54. Voting outside of polling stations is envisaged for those who are unable to go to polling stations for health “or other reasons.”<sup>48</sup> However, the MEL lacks detailed rules on how mobile voting is to be organized or what safeguards need to be in place in order to protect the integrity and secrecy of the vote. In addition, the meaning of “other reasons” as grounds for mobile voting needs to be clarified and the format and deadlines for making requests for the use of a mobile ballot box stipulated. The legislation should also state how many members of the PEC are to accompany the mobile ballot box and outline the steps that need to be taken to ensure strict accountability for ballot papers which have been removed from the polling station for this purpose.
55. Positively, the PEL and HM/GEL do address many of these issues. However, both the PEL and HM/GEL allow requests for mobile voting to be made as late as six hours prior to the closing of the polls and through oral requests. The possibility of late verbal requests for mobile voting makes the process vulnerable to possible abuse. **The OSCE/ODIHR thus recommends** that provisions on mobile voting be amended to include sufficient safeguards and to address issues identified above.
56. The legislation also envisages early voting; however, relevant regulations need to be clarified in order to ensure the integrity and the transparency of the process. There is no fixed rule in the MEL as to when early voting begins and it would appear to be subjectively determined by the CEC. The MEL only provides that voters may vote early from the moment that voter lists are put on public display,<sup>49</sup> an event which is required to take place no later than 10 days before the *Mejlis* elections,<sup>50</sup> but could also happen prior to that date.

In contrast, both the PEL and HM/GEL provide that early voting cannot commence “sooner than 10 days prior to elections”; however, no end date is indicated. A further problem with this process is that according to the legislation, if PECs have not yet received the ballot papers by the time early voting starts, they may issue a

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<sup>48</sup> Article 40.5 of the MEL; Article 40 of the HM/GEL.

<sup>49</sup> Article 42.2 of the MEL.

<sup>50</sup> Article 28 of the MEL.

“form for recording the electors’ opinion.”<sup>51</sup> Unless such forms are also deemed official documents and are duly safeguarded and accounted for, such a practice should be avoided. Voters should only use officially produced ballot papers. **The OSCE/ODIHR recommends** that early voting provisions are amended and made fully secure, transparent and with relevant accountability requirements in place.

57. In a positive development, negative voting has been abolished by the PEL and HM/GEL. It also appears that there has been an effort to remove “against all voting” from the MEL, as it now requires voters to mark the ballot paper by placing a mark against the name of the chosen candidate.<sup>52</sup> However, in Article 43 it is further stated that votes are counted on the bases of “the total number of voters who participated in voting, [...] and the number of votes cast against all candidates.” **The OSCE/ODIHR recommends** that this Article is clarified and harmonized with the rest of the legislation.

#### I. COUNTING OF BALLOT PAPERS AND PROCESSING OF ELECTION RESULTS

58. There is a significant lack of transparency in the procedures for counting and tabulation of election results. Clear rules are required to guide members of election commission during the counting process. For instance, the legislation should provide rules for deciding on spoiled or invalid ballots and on how disputes over such issues are to be resolved.
59. The legislation should also stipulate an effective and transparent procedure for the sorting and counting of ballot papers. The MEL includes a provision that observers must be permitted to visually familiarize themselves with both filled and unfilled ballot papers during the counting of votes and the tabulation of results.<sup>53</sup> A similar provision is found in the PEL and HM/GEL.<sup>54</sup> To make this right effective, certain additional procedures could be useful. Particularly, members of PECs could be required to hold up each ballot paper as the ballot papers are being sorted in such a way that any observer could confirm that it is being allocated to the correct pile. **The OSCE/ODIHR recommends** that consideration be given to incorporating these safeguards in the laws.
60. The new PEL and HM/GEL require the results of counting to be reflected in the minutes of the PEC, which are to be signed by each member. Dissenting opinions of commission members are to be attached to the minutes. The minutes are then to be displayed in the premises of the polling station. The law obliges higher-level commissions to follow the same procedures; result protocols and minutes are to be made public at each level. These provisions in the PEL and HM/GEL significantly enhance the transparency of the process and could contribute to raising the confidence in the procedures. **The OSCE/ODIHR recommends** that similar requirements related to the compilation and publication of results protocols at all levels of the election administration be also included in the MEL.
61. The transparency of the process is enhanced if certified copies of result protocols

<sup>51</sup> Articles 42.2 of the MEL; 40.2 of the PEL.

<sup>52</sup> Article 41 of the MEL.

<sup>53</sup> Article 23.5 of the MEL.

<sup>54</sup> Article 9.7 in both laws.

are also made available to domestic and international observers, candidate proxies and representatives and other interested parties immediately after the protocol is signed and stamped. While this right is granted to observers and proxies by the PEL and HM/GEL, the relevant provisions are absent in the MEL.<sup>55</sup> **The OSCE/ODIHR recommends** that the MEL is amended accordingly.

62. The transparency of the process could be further enhanced by requiring each higher-level election commission to publish a detailed breakdown of results from all lower-level election commissions as part of its protocol. Candidates' proxies or representatives, observers and other interested parties would thereby be able to check that the results contained in a certified copy of the protocol obtained from a lower-level commission have been correctly recorded by the higher-level commission. Election results could thus be traced from the precinct to the national level. **The OSCE/ODIHR recommends** amending laws accordingly in order to enhance transparency and the integrity of the electoral process and to foster public confidence in election results.
63. Election laws allow election commissions to invalidate election results in case of violations of the law in the process of voting or counting; however, they do not stipulate what types of violations could lead to invalidation.<sup>56</sup> These provisions are thus potentially problematic as they leave significant decisions on the validity of results in a particular constituency or nationally at the discretion of election commissions. **The OSCE/ODIHR recommends** that such decisions not be a matter of broad discretion, but are taken according to clearly identified criteria.
64. In addition, to reduce the risk of undue interference in the electoral process, **the OSCE/ODIHR recommends** that the election legislation contains a requirement that no persons may be present in polling stations during voting, counting and tabulation of results other than those authorized by law.
65. In all elections, a candidate must obtain at least 50 percent of the vote in order to be elected.<sup>57</sup> However, the **OSCE/ODIHR recommends** further clarification on the provisions for possible repeat and second rounds of elections. In particular:
  - (i) In presidential elections, if three or more candidates stand and no candidate has the majority, the two leading candidates face a run-off in a second round where the candidate getting the plurality of votes wins.<sup>58</sup> At the same time, the law provides that repeat elections will be held if no more than two candidates stood and no one has been elected, if the election was recognized invalid, or if the second round vote has not determined the winner.<sup>59</sup> It is not clear in which way the second round may fail to determine the winner if it is said that the candidate obtaining the majority of votes will win.
  - (ii) In *Mejlis* elections, if there is no outright winner in the first round of voting and at least three candidates were on the ballot paper, a second round of

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<sup>55</sup> Article 48.1 of the HM/GEL; Article 51.2 of the PEL.

<sup>56</sup> Article 44 of the MEL, Article 51 of the PEL and Article 44 of the HM/GEL.

<sup>57</sup> Article 44.2 of the MEL, Article 51.4 of the PEL. and Article 48.2 of the HM/GEL.

<sup>58</sup> Article 54.3 of the PEL.

<sup>59</sup> Article 55, *Id.*

voting is held between the two leading candidates. However, it is not entirely clear what happens if there is no immediate winner and only two candidates were on the ballot paper. Even assuming that the “votes of the electors who took part in the voting” does not include spoiled ballots, which is not obvious from the laws, it does not follow that one of the two candidates will receive more than half of those votes, as there might be a draw. Under the previous version of the MEL, if no more than two candidates stood for election and neither was elected in the first round, this was a basis for the CEC to direct a repeat election. It is not clear why this provision has been deleted in the new version of the Law or whether the same rule is intended to still apply.

## J. COMPLAINTS AND APPEALS

66. Under the Constitution, as with the previous version, citizens have the right to challenge the decisions and actions of state bodies and officials in court.<sup>60</sup> With regard to elections, the legislation permits decisions and actions of an election commission to be appealed to a higher-level election commission or court. Such appeals may be brought by candidates, their proxies or by electors as far as the *Mejlis* elections are concerned.<sup>61</sup> The PEL and HM/GEL provide that complaints may be lodged by voters, candidates, their proxies, election commissions, as well as observers and representatives of mass media.<sup>62</sup>
67. As the law does not specify a single hierarchical structure for dealing with complaints and appeals, it appears that a complainant has discretion of filing the complaint either with election commissions or with the court, or simultaneously with both. As an exception, the PEL and HM/GEL provide that voting results may be appealed to court only after the complaint about the results has been considered by the relevant superior election commission.<sup>63</sup>
68. Election-related complaints during the preparation of presidential and local election are to be considered within three days by both election commissions and courts. This term may be prolonged to five days if the circumstances of the case require. Complaints received on election day or on the day preceding the elections are to be reviewed immediately.<sup>64</sup>
69. In contrast to the PEL and HM/GEL, the MEL does not regulate the complaints and appeals process. The requirement to consider complaints received on election day immediately, as included in the PEL and HM/GEL, has been removed from the MEL by the latest amendments. The MEL should thus be amended to set out clear complaints and appeals procedures, ensuring timely and effective legal redress and due process. It should indicate which courts may deal with electoral disputes and the mechanisms by which redress will be provided. The procedures should also include deadlines within which complaints must be submitted and decided upon, and the outcome communicated to a complainant. The law should also explicitly

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<sup>60</sup> Article 43 of the Constitution.

<sup>61</sup> Article 25 of the MEL.

<sup>62</sup> Articles 60-62 of the PEL; Articles 58-59 of the HM/GEL.

<sup>63</sup> Article 61.7 of the PEL; Article 59.7 of the HM/GEL.

<sup>64</sup> Articles 59.5 and 61.5 of the PEL.

permit complaints to be brought not only against decisions and actions of election commissions, but against their inaction. Finally, the requirement for the immediate review of complaints lodged on election day or the day preceding it should be restored in the law in order to ensure effective and timely protection of complainants' rights.

70. Lastly, it is also of concern that the Code of Civil Procedure provides conflicting Articles (Articles 233-237) on the contestation of decisions of election commissions. Deadlines established by the Code of Civil Procedure are different from those set out in the electoral legislation. Provisions on complaints and appeals in the Code of Civil Procedure and the election legislation should be harmonized with each other to ensure a uniform approach.
71. **The OSCE/ODIHR recommends that** the legislation be amended to provide a complaints and appeals process that fully ensures timely and effective legal redress for citizens.

## **VII. CONCLUSION**

72. The current legal framework requires considerable improvement in order to serve as a sufficient basis for the conduct of democratic elections that are in line with OSCE commitments and other international standards. To this end, the concerns and issues discussed in this assessment require a comprehensive review of the legislation.
73. This assessment is offered by the OSCE/ODIHR with the aim of assisting the authorities in their stated aim of improving the legal framework for elections in line with OSCE commitments and international standards, and to apply good practice in the administration of a genuinely democratic electoral process. The OSCE/ODIHR stands ready to assist the authorities in their efforts in this regard.