



Office for Democratic Institutions and Human Rights

REPUBLIC OF TAJIKISTAN

**OSCE/ODIHR ASSESSMENT OF DRAFT
AMENDMENTS TO THE LAW ON ELECTIONS
TO THE MAJILISI OLI**



**Warsaw
17 September 2003**

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**ASSESSMENT OF DRAFT AMENDMENTS
TO THE LAW ON ELECTIONS TO THE MAJLISI OLI
OF THE REPUBLIC OF TAJIKISTAN
Warsaw, 17 September 2003**

I. INTRODUCTION

This assessment reviews and comments on pending amendments to the law on elections to the Majlisi Oli of the Republic of Tajikistan.¹ This assessment is based on an unofficial English translation of the amended Election Law, as reflected in 58 articles of current text on 31 pages and nine pages of amendments to 30 articles. The text reviewed has been provided by the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (“OSCE/ODIHR”).

The OSCE/ODIHR has previously commented on the legal framework for elections in Tajikistan.² This assessment should be viewed as complementary to earlier comments and recommendations.

The amended Election Law adopts some of the prior recommendations of the OSCE/ODIHR. This is a positive development in the legal framework for elections in Tajikistan. However, the law requires additional improvement and the purpose of this assessment is not to point out where existing deficiencies have been corrected. The purpose of this assessment is to assist the authorities in Tajikistan in their efforts to continue to develop a sound legal framework for democratic elections. Thus, this assessment is not a scorecard of positives and negatives, but is a discussion intended to highlight areas of the law that require further improvement.

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.

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.

II. EXECUTIVE SUMMARY

Most of the amendments to the law mark improvement and progress. However, the law has some significant problems that will impede the conduct of democratic elections if they are not addressed. As a result, the current text of the amended

¹ For the purpose of this assessment the current law and pending amendments will be referred to collectively as “the amended Election Law”.

² *See* 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).

Election Law needs to be improved to satisfy international standards and OSCE commitments set forth in the 1990 OSCE Copenhagen Document. Notably, the amended Election Law:

- Contains limitations on the right to be a candidate that should be removed in order to meet OSCE commitments and international standards;
- Creates procedures for candidate registration that can be used to prevent legitimate candidates from participating in the elections;
- Needs clarification in some articles to ensure multi-party representation on election commissions;
- Needs clarification in some articles to provide completely satisfactory procedures for voting, counting of ballots, tabulation of results, and determination of winning candidates;
- Needs clarification in some articles to ensure full and complete transparency and observation of all election processes;
- Contains limitations on the rights to free speech and expression that are contrary to international standards and some OSCE commitments; and
- Does not provide a satisfactory process for filing complaints and appeals to protect suffrage rights.

The current text of the amended Election Law requires improvement to provide the necessary framework for democratic elections. Accordingly, recommendations have been made in this assessment with the goal of assisting in the development of a sound legal framework for democratic elections in Tajikistan.

III. DISCUSSION OF THE AMENDED ELECTION LAW

Discussion of the amended Election Law is presented under five general topics and not in the numerical order in which articles appear in the law.³ The five topics are: Candidacy Rights, Election Commissions, Election Rules, Transparency, and Legal Protections.⁴ This thematic approach facilitates evaluation of whether the amended Election Law measures up to OSCE commitments for democratic elections and international standards.

³ The amended Election Law regulates elections of the Majlisi Oli, which consists of two chambers. The Assembly of Representatives is directly elected. The National Assembly is composed through indirect elections and Presidential appointment.

⁴ The Candidacy Rights topic 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 all aspects of the campaign, including media, voting, counting of ballots, tallying of results, and declaration of winners; Transparency discusses what mechanisms are in place to ensure that the election 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.

IV. CANDIDACY RIGHTS

It is a universal human rights principle that every citizen has the right, on a non-discriminatory basis and without unreasonable restrictions to: (1) take part in the conduct of public affairs, directly or through freely chosen representatives; (2) vote and 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.⁵ The amended Election Law does not satisfy this basic principle as it contains several provisions that close the door on a citizen who should have the opportunity to participate in representative government by being a candidate for public office. These impermissible limitations on candidacy rights are considered in the order in which they appear in the amended Election Law.

A. LIMITATION ON CANDIDACY RIGHTS

Article 28 limits the right to be a candidate to a person “with higher education”. The OSCE/ODIHR has previously recommended that this discriminatory provision be deleted from the law as it violates OSCE commitments and international standards.⁶ This provision is also contrary to Article 17 of the Constitution of Tajikistan. Once again, **OSCE/ODIHR recommends** that this provision in Article 28 be deleted from the law.⁷

B. LIMITATIONS ON CANDIDACY RIGHTS

Article 33 provides an extensive list of persons who cannot be candidates. Some of these prohibitions are problematic.

Article 33 provides that a citizen who is “a professional servant of a religious organization and union, who continues to exercise his duties” 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.⁸ Further, Articles 17 and 26 of the Constitution of Tajikistan prohibit discrimination on the basis of religion.

⁵ 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).

⁶ See Article 2 of the Universal Declaration of Human Rights; Article 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; Paragraph 7.5 of the OSCE 1990 Copenhagen Document (Citizens have the right “to seek political or public office, individually or as representatives of political parties or organisations, without discrimination”).

⁷ This recommendation also applies to Article 29 requirements for a candidate to the National Assembly.

⁸ 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.

OSCE/ODIHR recommends that Article 33 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.⁹

Article 33 of the amended Election Law also denies the candidacy rights of a citizen whose “previous conviction has not been expunged”. 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 questionable exercise of state power. 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. **OSCE/ODIHR recommends** that Article 33 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.¹⁰ 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.¹¹ 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 33 also bars the candidacy of persons “suspected” of certain crimes. The OSCE/ODIHR has previously expressed concern about disenfranchisement of “suspects” and recommended removal of such a provision from the law.¹² A person should not be stripped of the right of suffrage based on “suspicion” and without a prior judicial finding of guilt made in accordance with procedural and substantive legal guarantees such as the right to a hearing before a fair and impartial tribunal.¹³ Once again, **OSCE/ODIHR recommends** that this provision be removed from the law.

⁹ 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.

¹⁰ Further, the law should specifically list those crimes that are considered to be so serious that forfeiture of a human right – suffrage – is required.

¹¹ The relevant legal provision for expunging a conviction should be considered as well.

¹² See Observations and Recommendations on Draft Law on Elections to the Majlisi Oli of the Republic of Tajikistan (28 November 1999), page 7.

¹³ Forfeiture of a human right, such as the right of suffrage, is a state imposed penalty, the penalty being the forfeiture of the right. Thus, the person subject to such penal punishment must be presumed innocent until proved guilty according to law. Article 11 of Universal Declaration of Human Rights; Article 14(2) of the International Covenant on Civil and Political Rights; Article 6(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms; Article 20 of the Constitution of Tajikistan.

C. LIMITATIONS ON CANDIDACY RIGHTS

Article 35 sets for the requirements for registration of candidates. Article 35 requires that a candidate provide “information about the property belonging to the candidate” and “information about the size and sources of income”. The OSCE/ODIHR has previously expressed concern about such requirements.¹⁴ The need to obtain official documentation from a government authority in order to register as a candidate presents the opportunity for the government authority to prevent registration of a candidate through mere inaction and failure to provide official documentation. **OSCE/ODIHR recommends** that any required disclosure of property or income be made on forms developed by the Central Commission on Elections and Referenda (“CCER”) and which can be completed by a candidate without reliance on another government authority.

The signature verification procedure in Article 35 is of concern. Article 35 can be used to *invalidate* a sufficient minimum number of valid signatures if accompanied by a certain percentage of invalid signatures. This misses the objective of what the verification process is intended for. The verification process is intended to check for a sufficient number of valid signatures in order to establish a minimum level of electoral support. It is not intended to punish or disqualify sufficient signature electoral support just because it also contains a certain percentage of invalid signatures. This can lead to abuse where an election commission may have the goal of finding enough invalid signatures for the sole purpose of rejecting a candidacy instead of finding enough valid signatures to register the candidacy.

An example shows why this method of verification is unacceptable. Article 31 requires a candidate for the Assembly of Representatives to obtain signature support of “not less than 500 signatures” to meet the requirements for candidacy. Candidate A obtains 700 signatures of support. However, 22 of the signatures are not valid. The remaining 678 signatures are valid.

The first signatures checked happen to be the 22 invalid signatures, which is more than three percent of the collected signatures.¹⁵ Article 35 states “If any incorrectness in the signature list is found, which totals more than 3%, the candidate shall be refused registration”. The result is that a candidate, who had 678 valid signatures, when only 500 were needed, is prohibited from being a candidate. Article 35, because of the stated signature verification process, prohibits a candidacy where a candidate obtained 678 valid signatures and only 500 were required.

An invalid signature should be merely what it is – an invalid signature. An invalid signature should not invalidate other signatures or the signature list. Instead of being barred for presenting invalid signatures, candidates should be required to submit a

¹⁴ See Observations and Recommendations on Draft Law on Elections to the Majlisi Oli of the Republic of Tajikistan (28 November 1999), page 7.

¹⁵ It is not clear in Article 35 whether the invalidation is based on three percent of the collected signatures (700) or three percent of the required signatures (500). In the example given, this could be interpreted to mean either 15 (3% of the required number) or 21 (3% of the number of signatures actually collected).

quantum of valid signatures. **OSCE/ODIHR recommends** that the Article 35 be amended accordingly. A verification process that provides the possibility for an election commission to “invalidate” a candidacy by looking for a small number of invalid signatures (3%) is not acceptable.

Article 35 should also be expanded to provide greater detail on the verification process itself. The article should clearly state “how” a signature is determined to be valid. **OSCE/ODIHR recommends** that Article 35 be accordingly amended.

D. LIMITATIONS ON CANDIDACY RIGHTS

The final part of Article 39 permits the cancellation of registration of a candidate (or list of candidates) for violation of any of the provisions of the article. The sanction of cancellation of registration is disproportionate, in light of the conduct in Article 39 that can be a basis for cancellation.¹⁶ In addition to potential abuse by election commissions, these provisions may lead to efforts to “cancel” an election opponent as part of the quest for electoral victory. Democratic elections should be premised on election in one’s own right rather than defeat of opponents through “cancellation”. **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 39 be accordingly amended.¹⁷

E. LIMITATION ON CANDIDACY IN REPEAT ELECTIONS

Article 53 requires a repeat election in a single member constituency of the Assembly of Representatives if “not more than two persons have promoted their candidacies ... and if none of them has been elected, or if the elections have been recognized invalid or in the unified republican constituency none of the political parties has gained the right for the distribution of mandates”. Article 53 prohibits candidates who ran in the elections from running in the repeat elections. As the OSCE/ODIHR has previously noted, there is no legitimate basis for this prohibition.¹⁸ Once again, **OSCE/ODIHR recommends** that this prohibition in Article 53 be deleted from the law.

F. CORRECTION OF DEFECTS IN CANDIDATE REGISTRATION DOCUMENTS

The amended Election Law requires, within five days of receipt of candidate registration documents, that the respective election commission register the candidate or issue a resolution 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. **OSCE/ODIHR recommends** that Article 35 of the law be amended to provide that if the respective

¹⁶ As an example, “misuse of the freedom of media” is grounds for revocation of registration.

¹⁷ The amendment to Article 35, which provides that “cancellation of registration or repeated registration may be realized only via court”, does not remedy this problem.

¹⁸ See Final Report on Elections to the Parliament, Republic of Tajikistan, 27 February 2000 (17 May 2000), page 27.

election commission identifies incorrect or incomplete information, it shall immediately notify the applicant, who shall have 48 hours to submit corrected information. The election commission should be required to consider re-submitted documents within 24 hours, and either register the candidate or issue a resolution 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.

V. ELECTION COMMISSIONS

The OSCE/ODIHR has previously expressed concern that election commissions are not pluralistic, are subject to the control of government authorities, and do not act independently.¹⁹ Although amendments to the law make some changes in the formation of election commissions, the amendments do not completely address previous concerns about the formation of election commissions.

The amendments to Articles 10 to 19 address the formation and functioning of election commissions. Amendments to Articles 11 to 16 appear to provide for “equal representation” of political parties on all election commissions.²⁰ **OSCE/ODIHR recommends** that the amendments be reviewed in the original language text so that it is clear that the requirement applies to all members of an election commission, including the chairman and deputy chairman.

The amendments fail to address the procedure for nominating representatives to election commissions. Further, the amendment to Article 11 does not require that the “proposal of the President” on the membership of the CCER must include the political party appointees contemplated by the “equal representation of every political party” amendment. It is also not clear whether the President or the Assembly of Representatives has any role in how the right to recall a member of the CCER is exercised by a political party.²¹ Once a person is nominated to represent a political party on an election commission, he/she should not be recalled by the nominating party for taking decisions in favour of electoral integrity, even if such a decision may not favour the nominating party. It is also not clear whether the right of recall can be exercised independently by a political party without regard to the Article 18 provision that grants a government organ the right to remove a member of an election commission. Does a government organ still have the right to remove a political party appointee by virtue of the language of Article 18? **OSCE/ODIHR recommends** that these matters be addressed in the law to ensure that the goal of “equal representation of every political party” is achieved in a timely manner, sufficiently in advance of

¹⁹ See 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).

²⁰ It appears that the amendment to Article 10 intends to state the general principle that all election commissions shall be formed on the principle of “equal representation of political parties.” However, this is not absolutely clear in the English text.

²¹ Article 11 grants the right to “propose” to the President and the right to “elect” to the Assembly of Representatives.

elections, so that the right is meaningfully exercised. **OSCE/ODIHR also recommends** that the law address the situation of where the President fails to “propose” members or the Assembly of Representatives fails to “elect” “within three days after the date of elections has been set”. If the details of implementing this new equal representation right are not stated clearly in the law, then the possibility exists for circumvention of the right through mere inaction or omission on the part of the President or the Assembly of Representatives.

The above recommendations are also applicable to Articles 13 and 16. The amendment to Article 13 provides that a political party loses its “right of equal representation” if it fails to make a “suggestion” of its member of the district election commission. **OSCE/ODIHR recommends** that Article 13 be amended to provide details on the procedures for this process. The phrase in the amendment, “determined by the Law”, does not sufficiently address this concern. Article 13 should state the deadline and the manner in which a political party should provide the names of its appointees to the district election commission. Similar provisions should be included for Article 16.

Article 18 prohibits a candidate for the Assembly of Representatives from being a member of an election commission. **OSCE/ODIHR recommends** that this prohibition be expanded to include a candidate for a locally elected office.

Article 19 appears to have contradictory provisions on the voting requirements for an election commission to adopt a decision. The second sentence of the *second paragraph* of Article 19 provides “If the votes are equally divided, the chairman’s vote will be deciding”. However, an amendment to the *first paragraph* of Article 19 states: “Decision of Committee is accepted by open voting, if it had received 2/3 of votes from total number of all members present”. This amendment suggests that the chairperson does not have a weighted vote for the purpose of breaking a deadlock. **OSCE/ODIHR recommends** that Article 19 be further amended so that these provisions are consistent and 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.

An amendment to Article 19 also provides that an election commission cannot be located in the premises of state authorities. This is a positive amendment. An amendment to Article 3 prohibits the intervention of executive bodies in the processes of organizing and conducting the elections and from interfering with election commissions. This is also a positive amendment that addresses previously expressed OSCE/ODIHR concerns.

Some members of election commissions will be appointed by state authorities where a political party fails to provide a timely “suggestion” or appointment of a member. In order to prevent a member of an election commission appointed by a state authority, from being removed for political reasons unrelated to performance of duties, **OSCE/ODIHR recommends** that the provision for replacement of such an election

commission member be amended.²² The amendment should provide for (1) written notice to the state authority appointed commission member of the proposed grounds for removal, (2) a hearing before an appropriate tribunal to contest the challenged removal, (3) a voting requirement greater than simple majority in order to support the removal, and (4) the right to appeal to a court to challenge a decision for removal.

A. FORMATION OF ELECTORAL CONSTITUENCIES

Article 21 regulates the formation of electoral constituencies. There is an inconsistency concerning the number of constituencies for the Assembly of Representatives. Article 21 states there are 41 constituencies. The amendment to Article 28 recognizes 60 constituencies. These articles should be reconciled.

It is important that electoral constituencies be established sufficiently in advance of elections. This is necessary to ensure that political parties and prospective candidates have the opportunity to become familiar with the demographics of constituencies in order to determine the viability of competing in a particular constituency and to engage in preliminary planning for the election campaign. Article 21 provides that the CCER, which establishes constituencies, must publish the list of constituencies five days after setting the date of elections. **OSCE/ODIHR recommends** that the law be amended to provide that all constituencies are established not later than one year before an election.²³

Article 21 establishes a permissible deviation of 15% from the average constituency population. This percentage is rather high, especially since an additional 5% deviation is allowed for “remote regions” and consideration of existing administrative-territorial divisions of the country is permitted. **OSCE/ODIHR recommends** that the permissible deviation of 15% be lowered to 10%.

VI. ELECTION RULES

A. VOTERS LISTS

Articles 23 through 26 regulate voters lists. An amendment to Article 24 requires completion of voters lists no later than 10 days before an election. **OSCE/ODIHR recommends** that this amendment be considered with the existing language in Article 25 that provides that voter’s lists are submitted for public inspection 15 days before Election Day.

A second amendment to Article 24 prohibits adding names to the voters lists on Election Day. This is a positive amendment. However, **OSCE/ODIHR**

²² The OSCE/ODIHR has previously noted that replacement of election commission members between the first and second rounds of elections has been a problem. *See* Final Report on Elections to the Parliament, Republic of Tajikistan, 27 February 2000 (17 May 2000), pages 22 and 27.

²³ *See* European Commission for Democracy Through Law (Venice Commission) “Code of Good Practice in Electoral Matters, Strasbourg 2002

recommends that Article 25 also be amended as it permits a voter to complain on Election Day about omission from the list and allows the election commission to make immediate correction. **OSCE/ODIHR recommends** that Article 42 should be similarly amended as it currently provides that “those voters that have not been included into the list of voters by any reason shall be included to the supplementary list of voters upon presentation [of] documents of identity”. As written, Articles 25 and 42 are inconsistent with the amendment to Article 24. This requires correction.

B. ELECTION CAMPAIGN PROVISIONS

Article 36 allows for the withdrawal of a candidate nomination *at any time*. **OSCE/ODIHR recommends** that Article 36 be amended to include a deadline for withdrawal, which should be before the printing of ballots.

Article 58 establishes legal liability for “persons who humiliate the honour and dignity of the candidate by publication and spreading of false information in press or by other means, or insulting the members of the electoral commission”. This limitation on free expression and 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.²⁴ However, in the context of a political campaign, or where a person is exercising the right to express political opinions (such as criticism of an election commission), 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.²⁵ **OSCE/ODIHR recommends** that Article 58 be reformulated in order to comply with international norms that protect the right of free speech and political expression. This concern is also applicable to similar provisions in Article 39 that prohibit “misuse of the freedom of media” and the publishing of “information discrediting honour, dignity and business reputation of candidates”. **OSCE/ODIHR recommends** that the provisions be reformulated in order to comply with international norms that protect the right of free speech and political expression.

C. EQUAL ACCESS PROVISIONS

Articles 37 and 39 contain provisions that require candidates and political parties to have access to media and other state resources on “equal” terms and conditions. However, both articles fail to provide sufficient details on how this is accomplished. The only specific detail provided is the requirement in Article 39 that candidates and political parties have the right to “talk on the Radio and Television once for free of charge”.

²⁴ See, e.g., Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁵ 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).

OSCE/ODIHR recommends that Articles 37 and 39 be amended to state the formula that is to be applied in order to accomplish the goal of “equal” access to media and state resources. This formula or schedule for equal access should be clearly stated, understandable, and capable of objective application. Additionally, concerning the allocation of media time, the formula 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. The timing of these access slots should also be fair, balanced and non-discriminatory. **OSCE/ODIHR recommends** that Articles 37 and 39 be accordingly amended. **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.²⁶

The law does not appear to distinguish between state and privately owned media. The law also fails to regulate paid political advertisements. **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 the lowest commercial rate 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 must refrain from campaigning for or against any party or candidate and must be completely impartial in the news coverage and treatment of candidates and political parties. **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 amended Election Law does not adequately address the issue of financing of political campaigns. The amended Article 9 provides that the CCER shall allocate a sum for financing political campaigns. Amended Article 9 also provides that every registered candidate and political party has the right to spend five times this amount from their own funds. Finally, amended Article 9 prohibits the use of state property and finances which are not otherwise allowed by law.²⁷

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”.

²⁶ One free spot “on Radio and Television” is likely insufficient.

²⁷ These two amendments are positive amendments that address previously stated concerns of the OSCE/ODIHR.

Campaign financing by the government must be on the “basis of equal treatment before the law”. Unfortunately, amended Article 9 merely states that the every registered candidate and political party will receive a sum allocated by the CCER. This provision offers no other guidance. **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 fundamental principle behind funding parties is to create equal opportunity so that *all* parties 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, based on the number of constituencies (electoral units) in which the party or candidate stands for election. The minimum amount should be enough to enable *all* political parties and registered candidates to compete effectively in the elections.

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. **OSCE/ODIHR recommends** that the amended Election Law include these requirements. Campaign finance regulation will never be 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 44 of the amended Election Law allows “voting ahead of schedule”. A note at the end of all amendments states that this is “a disputable point”. Early (absentee) voting can vastly increase the opportunity for electoral fraud. It places a greater burden on election administration and can significantly hinder observation efforts. In order to observe early voting, observers are required to deploy to every district election commission for several days before Election Day. The burden placed on observer organizations and candidate representatives is substantial. **OSCE/ODIHR recommends** that, in light of past problems with electoral fraud arising from voting outside of a regular polling station, and because it can severely hinder observation efforts, the early voting process should be deleted from the law as an additional confidence building measure.

F. MOBILE VOTING

The OSCE/ODIHR has previously recommended that the procedures for mobile voting be improved to prevent fraud during mobile voting and increase transparency of the mobile voting process. Although the amendment to Article 42 is an improvement, it is not a sufficient improvement to address the problems that have been noted with mobile voting in past elections. **OSCE/ODIHR recommends** that Article 42 be further 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 must 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 submitted by the voter, and acted upon by the polling station committee, within a deadline established by law. This deadline should not be one or a few days before Election Day, but should be sufficiently in advance of Election Day to permit observers to plan in advance 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 small number of extra ballots to allow for voters who may spoil their ballot paper.
- The number of persons who have used the mobile box should be recorded in 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.

The amendment to Article 42 does not adequately insulate the mobile voting process from election fraud or provide the necessary level of transparency. The above recommendations should be incorporated in Article 42.

G. VOTING PROCEDURES

An amendment to Article 40 prohibits armed personnel in the polling station “except for extraordinary situations”. **OSCE/ODIHR recommends** that Article 40 be further revised to provide that the precinct election commission determines when there is an “extraordinary situation” and, in such a situation, seek assistance from security forces, which should leave the polling station premises immediately after situation has been properly addressed.

Another amendment to Article 40 prohibits representatives of state authorities, except for the purpose of voting, from being in the polling station. **OSCE/ODIHR recommends** that this prohibition be expanded to also include any unauthorized person.

H. BALLOT SECURITY

An amendment to Article 41 requires that ballots should have “several protective levels”. However, the amendment does not provide any further details on how this is to be accomplished. **OSCE/ODIHR recommends** that Article 41 be amended to 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.

I. DETERMINATION OF ELECTION RESULTS

Articles 45 through 53 of the law regulate counting of votes and completion of protocols at the precinct election commission. As noted previously by the OSCE/ODIHR, these articles should be amended to provide more explicit details on the counting procedure and manner of completion of protocols. **OSCE/ODIHR recommends** that these articles be amended to provide for the following:

- Polling station commission members should announce how each ballot is marked so as to facilitate the observation of the count.
- The signature of voters on the voter list must be counted before opening the ballot box. The simultaneous count of multiple votes must be prohibited.
- The total number of ballots found in the ballot box should be systematically checked against the number of ballots issued to a polling station and recorded in the protocol. In addition, the total number of ballots contained in the mobile box should be counted separately and checked against the list of voters who had asked for the mobile box.
- Protocols should be publicly posted at the polling station, district election commission, and CCER for public review for an established period of time after completion of the election. The amendment to Article 46 requires that the protocols must be “displayed for electors”, but does not require public posting for any established period of time. Publication in local, regional, and national newspapers should also be required to enhance confidence in the process.
- A majority of election commission members should be present during the tabulation of results and remain in session until the completion of the reporting process. The location where the election commission tabulates the results should be publicly announced and proper arrangements for observer access and conduct of their duties made well in advance.

Article 46 regulates the procedure for determining the election results by superior election commissions. **OSCE/ODIHR recommends** that Article 46 be amended to clearly state that all results must provide the results of mobile voting and early voting, and that all results information is broken down to the precinct level so that all results can be traced from the lowest level of voting through the tabulations at each level of election commission, including the CCER, and for every form of voting. This degree of detail is necessary to enable observers to track results and locate specifically where potential fraud has occurred if the numbers are unlawfully changed during the tabulation processes.

Article 55 provides for the publication of election results. Although Article 55 has been amended, this article requires further amendment. **OSCE/ODIHR recommends** that the article be amended to require that publication of results must be in the form of tables with all relevant details, 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 fraud.²⁸

Article 54 regulates the invalidity of results for elections in single member constituencies for the Assembly of Representatives. This article has two problems.

First, Article 54 permits the invalidation of results for a violation of law, regardless of whether the violation affected the determination of the winning candidate. Invalidation should occur *only* where a legal violation could have affected the determination of the winning candidate. As currently written in the English text, a winning candidate can be deprived of a mandate based on an inconsequential, minor violation of law that did not affect the results. This is not appropriate and presents the real potential for abuse. **OSCE/ODIHR recommends** that Article 54 be amended and that invalidation should occur *only* where a legal violation could have affected the determination of the winning candidate.

Secondly, the last part of Article 54 states in the English text that the CCER can exclude the results as “invalid” in some polling stations and still determine the results of the election. This should not be permitted. Repeat polling should take place in those polling stations where the results have been declared “invalid”, unless it can be established with a mathematical certainty that all of the votes in the polling station could not have affected the determination of the winner in a single member constituency or the allocation of a single mandate in the national constituency for candidate lists. **OSCE/ODIHR recommends** that Article 54 be accordingly amended to address this problem.

The amendment creating the new Article 35-1 presents a problem, which may be one of translation. The article states: “In the electoral districts, where on the day of election is registered only one candidate, election should not be conducted” (sic). As written, this would prevent voting in the district for the candidate lists for the national constituency. **OSCE/ODIHR recommends** that the article be revised so that it is clear that the elections for the candidate lists for the national constituency are still conducted in the district.

VII. TRANSPARENCY

There are several amendments to Article 8 of the amended Election Law that are intended to increase transparency. However, these amendments should be further improved and in some instances require clarification.

An amendment in Article 8 provides that the Chairman of the CCER registers local and international observer organizations. It is not clear why this is the responsibility of the Chairman. **OSCE/ODIHR recommends** that this provision be amended and that the responsibility be that of the CCER as a legal body.

²⁸ The same information for early voting should be included if the early voting process is retained in the law.

Accreditation of an observer organization can be delayed until one week before the election. This is too late in the election processes. Effective observation of the election process in its entirety encompasses a greater period of time than the one week before an election. It is for this reason that the OSCE/ODIHR usually deploys long term observer teams several weeks before an election to observe campaign activities, media coverage, and election commission preparation for elections. Local observer organizations should have the same rights and opportunity for long term observation. **OSCE/ODIHR recommends** that the law be amended to provide that an application for accreditation can be submitted as early as 45 days before an election. This time frame is not too early as district election commissions must be formed no later than 90 days before Election Day and precinct election commissions must be formed no later than 60 days before Election Day. Accreditation must come much earlier than the law currently provides.

OSCE/ODIHR also recommends that Article 8 be amended to provide that an accredited observer organization will provide, no later than two days before deployment, a list of the organization's observers. Further, for organizations engaged in long term observation, the law should require that the organization notify the appropriate election commission of any additions or deletions of observer names within 48 hours of the change.

The amended Article 8 also makes a distinction in the rights of domestic observers and foreign observers. There should be no distinction between the rights of domestic and international observers. Transparency requires that both types of observers be permitted to observe all election processes. **OSCE/ODIHR recommends** that the law is amended to clearly state that all observers have the right to inspect documents, attend meetings, and observe election activities at all levels, and to obtain copies of protocols and tabulations of results at all levels, *during the entirety of the election processes*.

The requirement in amended Article 8 that international observers must make "their conclusions on documented and checkable facts" violates principles protecting the right to free speech and expression.²⁹ Further, any legal provision that hinders legitimate observation and reporting is questionable. This is especially applicable to any provision that attempts to obstruct observers or prevent them from reporting or releasing information that has been obtained by observation efforts. **OSCE/ODIHR recommends** that Article 8 be amended to conform to international standards and the Constitution of Tajikistan.

Article 41 of the law does not define who can observe the printing of ballot papers or be present when the ballot papers are delivered to respective election commissions. Both the printing and delivery of ballots should be open to the same level of transparency as other parts of the election process. Accordingly, **OSCE/ODIHR recommends** that the law be amended to explicitly allow the printing and delivery of

²⁹ See Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 30 of the Constitution of Tajikistan.

ballot papers to election commissions to be open to observers and representatives of the media.

Article 47 allows for a recount of votes. **OSCE/ODIHR recommends** that this article be amended to state that the respective election commission shall give timely notice to observers of the recount. It is preferable for the article to state a specific minimum number of hours sufficient to allow for any necessary travel to observe the recount.

VIII. LEGAL PROTECTIONS

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

Article 20 provides some legal protections for challenging the decision of an election commission. Article 20 also includes a right to appeal decisions of the CCER to the Supreme Court.

One problem with Article 20 is that it allows for a complaint to be lodged with a “higher election commission or to the court”. This provision creates the possibility of inconsistency in decisions. As uniformity and consistency in decisions is important, **OSCE/ODIHR recommends** that challenges to decisions be filed in only one forum designated by the law – either a court or higher election commission.³⁰ 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.

OSCE/ODIHR recommends that Article 20 be amended to state a clear, understandable, *singular* hierarchical complaint process that defines the roles of each level of election commission and each level of courts. It is important that this process be uniform. This process should also identify which bodies act as fact finding bodies of first instance and which bodies act as appellate review bodies. Finally, at minimum, the law should provide the following for voters, candidates, and political parties:

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

³⁰ Article 10, which provides that a request to cancel a decision of an election commission can be considered by “the higher election commission or by the court”, should also be considered.

- The right to appeal to an appellate court if a remedy is denied³¹

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.

B. DEADLINE FOR COMPLAINTS AND APPEALS

Article 20 provides that the deadline for challenging a decision of an election commission or appealing to the Supreme Court is ten days. This period is too long within the context of election disputes, which should be lodged and decided expeditiously. **OSCE/ODIHR recommends** that, absent unique local factors, this period be no more than five days.

IX. CONCLUSION

The current text of the amended Election Law requires improvement to establish the necessary framework for democratic elections in line with OSCE commitments. There are also technical drafting concerns with the law that have been noted in this assessment.³² All of these concerns should be addressed in order to create a sound legal framework for democratic elections.

This assessment is provided by the OSCE/ODIHR with the goal of assisting the authorities in Tajikistan in their endeavors to improve the legal framework for elections, meet OSCE commitments and international standards, and develop the best practices for the administration of democratic elections. The OSCE/ODIHR stands ready to assist the authorities in their efforts.

³¹ 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.

³² There are instances in the law where the drafters have not made changes in some articles that are required for consistency with proposed amendments. The drafters should carefully review the law for such occurrences and ensure that all articles of the law are consistent with the proposals ultimately adopted.