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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AND

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

JOINT OPINION

ON

DRAFT AMENDMENTS AND ADDENDA TO THE LAW "ON ELECTIONS TO THE OLIY MAJLIS OF THE REPUBLIC OF UZBEKISTAN" AND "ON ELECTIONS TO THE REGIONAL, DISTRICT AND CITY COUNCILS (KENGESH) OF PEOPLE'S DEPUTIES OF UZBEKISTAN"

Adopted by the Venice Commission
at its 93rd Plenary Session
(Venice, 14-15 December 2012)

on the basis of comments by
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I. Introduction

1. On 16 August 2012 the Deputy Speaker of Oliy Majlis of the Republic of Uzbekistan requested the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) to provide an opinion on draft amendments and addenda to the laws of Uzbekistan "On elections to the Oliy Majlis of the Republic of Uzbekistan" (Election Law) and "On elections to the regional, district and city Councils (Kengash) of People's Deputies" (Law on Local Elections). On 28 September 2012 the same request was received by the Venice Commission. The Venice Commission and the OSCE/ODIHR decided to provide a joint legal opinion on the draft amendments and addenda.

2. The draft amendments were prepared by the group of deputies of the Oliy Majlis of the Republic of Uzbekistan in connection with "Concept of Further Deepening Democratic Reforms and Establishing the Civil Society in the Country" presented by the President in November 2010.

3. These comments are based on an unofficial English translation of the draft amendments to the laws (and of the Election Law itself), as provided to the Venice Commission by the authorities of Uzbekistan on 28 September. The comments included in this joint legal opinion cannot guarantee the accuracy of the translation reviewed, including the numbering of articles, clauses and sub-clauses. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation. Earlier assessments of the legal framework by the OSCE/ODIHR [1] as well as election reports from previous OSCE/ODIHR Limited Election Observation and Assessment Missions provide a good background for understanding the amendments.

4. This joint opinion should also be read in conjunction with the following documents:

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990);
- Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002) CDL-AD (2002) 023 rev.;
- General Comment No 25 (1996) of the UN Human Rights Committee to Article 25 of the International Covenant on Civil and Political Rights (ICCPR);[2]
- General Comment No 34 (2011) of the UN Human Rights Committee to Article 19 of the ICCPR;
- 2005 OSCE/ODIHR Assessment of the 2004 Election Law;
- Final report of the OSCE/ODIHR Election Assessment Mission to the 2009 parliamentary elections in the Republic of Uzbekistan.

5. This joint opinion is provided with the aim of assisting the authorities in the Republic of Uzbekistan, political parties, and civil society in their efforts to bring the legal framework for elections further in line with OSCE commitments and other international standards for democratic elections. The comments are limited to the amendments proposed to the Election

[1] See the 2005 OSCE/ODIHR Assessment of the Law on Elections of the *Oliy Majlis*. All OSCE/ODIHR reports and assessments on Uzbekistan are available at: http://www.osce.org/odihr/elections/uzbekistan.
[2] Uzbekistan acceded to the ICCPR and its Optional Protocol 1 on 28 September 1995.

Law and to the Law on Local Elections and relevant provisions of these laws, but do not provide a full review of both laws.

6. This opinion was adopted by the Venice Commission at its 93rd Plenary Session (14-15 December 2012, Venice)

II. Key OSCE/ODIHR Recommendations which Remain to be Addressed

7. While the 2012 draft amendments incorporate certain recommendations previously made by the OSCE/ODIHR, many of them remain unaddressed. Continuing concerns include the following:

8. Given that the 100 members of the upper chamber of parliament are indirectly elected or appointed by the President, the provision that 15 seats in the lower chamber are reserved for representatives of the Ecological Movement of Uzbekistan (EMU) is not in line with paragraph 7.2 of the 1990 OSCE Copenhagen Document, which provides that all seats in at least one chamber of the national legislature should be freely contested in a popular vote. It would seem also to contradict Articles 58 and 117 of the Constitution (equality between public associations and equal suffrage).

9. The lack of the possibility for citizens to form initiative groups to nominate independent candidates (which was abolished by the 2008 amendments to the Election Law) is contrary to paragraph 7.5 of the Copenhagen Document, which provides that citizens should have the right to seek political or public office, individually or as representatives of political parties or organisations, without discrimination.

10. The right to freedom of association, including the right to form a political party, remain subject to very broad limitations.

11. Certain parts of the electoral process, including procedures of mobile voting on election day, as well as the rules concerning the nomination and election of representatives of the EMU, are insufficiently regulated and detailed by the legal framework.

12. The legal framework continues to lack detailed and proportionate sanctions for electoral violations. This leaves a vacuum, which may result in diverging interpretations by relevant authorities and lead to unequal implementation of the law.

III. The 2012 Draft Amendments

13. The 2012 draft amendments to the election laws relate to:

a. observer access to the election of the EMU representatives;

b. voting and voter registration in penitentiary facilities;

c. election campaign regulations;

d. early voting;

e. prohibition to publish opinion polls forecasts of election results and other research related to the on-going elections up to 3 days prior to election-day.

14. The draft amendments will be discussed under these five general topics:

a. Observer access to the election of the EMU representatives;

b. Voting and voter registration in penitentiary facilities;

c. Election campaign regulations;

d. Early voting;

e. Prohibition to publish opinion polls, forecasts of election results and other research related to the ongoing elections up to three days prior to election day.

Observer access to the election of the EMU representatives

15. The draft amendment to Article 6 of the Election Law establishes that observers are allowed to be present during the election of the EMU representatives to the Oliy Majilis. This is generally a positive development, since the presence of observers can enhance the transparency of the electoral process and contribute to public confidence.

16. A legal provision for observation of this stage of the electoral process by domestic non-partisan observers is, however, still lacking in the Election Law of Uzbekistan.[3] This is not in line with Paragraph 8 of the 1990 OSCE Copenhagen Document where OSCE participating States commit themselves to invite and admit observers to the process.[4] As previously recommended by OSCE/ODIHR, a legal provision allowing for access of domestic non-partisan observers to all stages of electoral process could further increase transparency and accountability.

17. Likewise, the Election Law still does not guarantee the right of observers to attend the meetings of the Central Election Commission (although it mentions district and precinct election commissions). An explicit legal provision to this effect could further increase transparency and contribute to public confidence in the work of the election administration.

Voting and voter registration in penitentiary facilities

18. The draft amendments also concern voting procedures for persons in penitentiary facilities and introduce the following provisions to both laws:

- Establishment of electoral precincts in penitentiary facilities (addition to Article 8 of the Election Law and Article 8 of the Law on Local Elections);

- Allowing the precinct election commissions in penitentiary facilities to declare voting closed when all persons in the voter list have voted (addition to Article 38 of the Election Law and Article 35 of the Law on Local Elections);

- Compilation of voter lists in penitentiary facilities (addition to Article 32 of the Law on Elections and Article 29 of the Law on Local Elections);

[3] Art. 6 of the Election Law merely refers to "one observer from each of the political parties that nominate candidates, representatives of mass media, observers from other countries, international organiziatons and movements" and does not mention domestic non-partisan observers.

[4] See also Istanbul Declaration, Charter of European Security, p.27: "Non-governmental organizations (NGOs) can perform a vital role in the promotion of human rights, democracy and the rule of law. They are an integral component of a strong civil society. We pledge ourselves to enhance the ability of NGOs to make their full contribution to the further development of civil society and respect for human rights and fundamental freedoms."

- Presentation of voter lists for inspection by voters in penitentiary facilities (addition to Article 33 of the Election Law and Article 30 of the Law on Local Elections).

19. These additions are welcome as they help to enfranchise a number of eligible voters. It appears, however, that these provisions only extend to persons in pre-trial detention, as voting rights of convicted prisoners continue to be curtailed.

20. Specifically, Article 117 of the Constitution of the Republic of Uzbekistan denies voting rights to prisoners. Articles 2 of the Election Law and of the Law on Local Elections reiterate this prohibition by stating that "*citizens … held in penitentiary facilities serving court sentences … shall not participate in elections*." Such general and unconditional denial of prisoners' suffrage rights is not in line with OSCE commitments, other international standards for democratic elections, as well as international good practice, according to which the denial of suffrage should only occur where a person has been convicted of committing a crime of such a serious nature that forfeiture of political rights is proportionate to the crime committed.[5]

21. Since this limitation of voting rights is based on a provision of the Constitution of the Republic of Uzbekistan, a solution is possible only by revising the corresponding provision of the Constitution.

Election campaign regulations

22. The draft amendments to Article 27 of the Election Law (and to Article 25 of the Law on Local Elections) provide for more detailed regulation of the election campaign. The amended articles of both laws establish that campaigning shall start on the day of registration of candidates by the CEC, that campaigning is not allowed on election day or on the day before voting. Such a 24-hours silence period before election day is foreseen in many election laws and aims to reduce the influence of campaign propaganda on voters' choices. Below discussion of specific campaign-related draft amendments to the Election Law applies *mutatis mutandis* to the draft amendments to the Law on Local Elections.

23. Draft Article 27^1 defines types, forms and methods of election campaigning as "*spreading information about the program and (or) election platform of a political party with a call to vote for its candidate for deputy; spreading information about candidates with a call to vote for him.*" It also details possible fora and forms of election campaigning as follows: "*Election campaign through television, radio and periodicals may be conducted in the following forms: public debates, discussions, press conferences, interviews, presentations, meeting with electorate, distribution of short video about the candidate for deputy, political party*." Somehow redundantly, Article 27^1 reiterates that the election campaign is conducted "*through mass media, as well as television, information-telecommunications network (including internet); through production and distribution of printed, graphical, audiovisual and other agitation materials; through conducting meetings with electorate*." It would be advisable to eliminate this redundancy in the formulation with a view to further increase clarity of this legal provision. In a welcome step, draft Article 27^1 concludes by stating that other types, forms, methods of election campaigning are permissible as long as they are not prohibited by the law.

24. Draft Article 27^2 provides, in Paragraph 1, for free and equal access of candidates and political parties to the state media. This is a welcome amendment that brings the law further in line with Paragraph 7.8 of the OSCE Copenhagen Document.

[5] See Paragraphs 7.3 and 24 of the 1990 OSCE Copenhagen Document, Paragraph 14 of the UN Human Rights Committee General Comment 25, and Paragraph I.1.1.d.iv. of the Council of Europe Venice Commission Code of Good Practice in Electoral Matters (CDL-Ad (2002a 023 rev); ECTHR Hirst. The United Kingdom (No.2) 6 October 2005

25. The second paragraph of draft Article 27[2] seems, however, to contradict paragraph 1 by providing that "*state media provides candidates for deputy, political parties with time for broadcasting or publishing for free or for charge"* (emphasis added). Legal clarity could be improved by redrafting these two paragraphs.

26. Paragraph 4 of draft Article 27[2] reiterates the concept of equality by stating that the terms of payment and other requirements must be equal for all candidates and political parties. This is a positive development as it helps ensure fairness of the electoral process, as provided for by Paragraph 7.7 of the 1990 OSCE Copenhagen Document.

27. Paragraph 5 of draft Article 27[2] mandates that "the information disseminated by the media, should be accurate, not violate the rights and lawful interests of candidates and political parties. Dissemination of false information and discrediting the honour and dignity of the candidates is prohibited." This provision is of concern for several reasons. Firstly, elements of this provision referring to "false information" or "discrediting the honour and dignity of the candidates" could be open to subjective interpretations. Secondly, application of these provisions risks to unreasonably restrict freedom of expression, which is of particular concern since constitutional safeguards of the right to freedom of expression are formulated in very general terms and allow possible restrictions by law.[6] Such broad restrictions of the freedom of expression may impede a robust and vigorous campaign that is critical to an electoral process and, thus, are not in line with international standards.[7]

28. Concerns relating to paragraph 5 of draft Article 27[2] are further increased by a lack of clear provision for proportionate sanctions in cases of violation. The applicable Article 65 of the Election Law merely provides that the one who violates any provision of the Election Law "shall be held responsible," which leaves an overly broad discretion to the authorities.

29. Draft Article 27[3] affirms, in a positive development, that political parties are given equal conditions for unhindered production and distribution of campaign materials.

30. Draft Article 27[4] regulates campaigning through meetings with voters. Positively, it mandates that political parties are given equal conditions and obliges public authorities to provide candidates and political parties with premises free-of-charge for meetings with voters.

31. As regards the organisation of campaign events, Paragraph 2 of draft Article 27[4] maintains that the role of the election administration is limited to co-ordination of the venues and providing information to voters. An amendment to this effect was introduced in 2008 and addressed the concerns raised previously by OSCE/ODIHR in its 2005 Assessment of the Election Law. Nonetheless, Paragraph 2 of draft Article 27[4] might benefit from further clarification, as the provision that candidates "*hold* meetings with voters by themselves" leaves room for interpretation. The previous Article 27 was clearer when stating that a "meeting of voters shall be *organised by* political parties themselves." A clear formulation with regards to the delineation of the role of political parties and the election administration in organising campaign events would help ensure unimpeded campaigning in line with Paragraph 7.7 of the 1990 OSCE Copenhagen Document.[8]

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[6] See Article 29 of the Constitution of the Republic of Uzbekistan: "Everyone shall be guaranteed freedom of thought, speech and convictions. Everyone shall have the right to seek obtain and disseminate any information, except that which is directed against the existing constitutional system and in some other instances specified by law."

[7] See Paragraph 9.1 of the 1990 OSCE Copenhagen Document, General Comment No 34 of the UN Human Rights Committee to Article 19 of the ICCPR affirms the crucial importance of the freedoms of opinion and expression for every free and democratic society and subjects possible restrictions to these freedoms to clear limitations, Paragraph 2, Paragraph 20, Paragraph 22.

[8] See also paragraph 7.3 in 'Existing Commitments for Democratic Elections in OSCE participating States': "The fair and free atmosphere needed for effective political campaigning requires the state to provide election contestants

Early voting

32. The draft amendments to Article 41 (paragraphs 5-10) of the Election Law (Article 38 of the Law on Local Elections) regulate early voting in a more detailed way and also introduce certain safeguards to protect the integrity of votes cast early. Specifically, it establishes that "early voting begins ten days before the election and ends on the day before the election." The CEC, which, in accordance with draft Article 41(10) of the Election Law, establishes the time for delivery of ballot papers for early voting to polling stations, will have to take these timelines into account. This would be particularly important since Article 36 of the Election Law (Article 33 of the Law on Local Elections) merely establishes that precinct election commissions receive ballot papers not later than three days before the elections.

33. Draft Article 41 (paragraph 7) adds clarity to the regulation of procedure for early voting and introduces certain safeguards to ensure the secrecy of the votes cast early (paragraphs 8 and 9). These specifications and safeguards are welcome and contribute to the integrity of early voting, in line with the recommendation of the 2009 OSCE/ODIHR EAM Final Report. Notwithstanding these clarifications, and although granting wide possibilities for early voting are in principle compatible with international standards on democratic elections,[9] corresponding provisions of both laws could be further developed in the draft law.

Prohibition to publish opinion polls forecasts of election results and other research related to the on-going elections up to three days prior to election-day

34. The draft amendments add a new Paragraph 2 to Article 65 of the Election Law (Article 49 of the Law on Local Elections) to prohibit the publication of "opinion polls, forecasts of election results and other research related to the on-going elections" less than three days prior to election day.

35. It is not uncommon to prohibit the publication of opinion polls shortly before election day. The broad prohibition of "other research related to the on-going elections", however, raises concerns as it allows for a wide margin of appreciation by the implementing authorities and might thus unduly restrict the freedom of expression. Moreover, although draft paragraph 2 contains a rule on the prohibition of opinion polls, it is incorporated in Article 65 of the Election Law (Article 49 of the Law on Local Elections) that deals with liability for violations of the law. It would be advisable to incorporate a new article into the law instead of adding a provision to the existing article detailing legal consequences for breaches of the election law as proposed by the draft amendments.

IV. Conclusions

36. The joint Venice Commission and OSCE/ODIHR comments on the draft amendments are offered to the authorities, political parties, and civil society of the Republic of Uzbekistan with the intention to support their stated objective to improve the legal framework for democratic elections and to bring it more closely in line with the OSCE commitments and other international standards for democratic elections.

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equal opportunity to convey their messages to the electorate. The government and all state bodies must provide equal access to public facilities…"

[9] See also paragraph 8.10 in 'Existing Commitments for Democratic Elections in OSCE Participating States': "*Special voting, e.g., voting conducted … in advance ... potentially gives greater effect to the right to vote. Special… voting procedures must, however, be carefully designed and carried out in order to preserve ballot secrecy and accountability, while safeguarding against fraud and undue influence*."

37. The draft amendments introduce certain improvements. Notably, the draft amendments provide for voting and voter registration in penitentiary facilities. They also regulate early voting in more detail and introduce certain safeguards to protect the integrity of votes cast early. Likewise, admission of international observers to the election of the EMU representatives is now provided for.

38. The Venice Commission and the OSCE/ODIHR welcome that the President has expressed his commitment to democratic reforms and they note his "Concept of Further Deepening of Democratic Reforms and Establishing the Civil Society in the Country", which was presented at the joint session of the Legislative Chamber and the Senate of the *Oliy Majlis* in November 2010.

39. However, as detailed in the introduction and throughout this joint opinion, numerous recommendations contained in previous OSCE/ODIHR reports and assessments remain unaddressed by the draft amendments. Additionally, some of the draft amendments are overly complex and could be improved by being stated in a more clear and concise manner so that they are easily understandable to all electoral stakeholders.

40. OSCE/ODIHR and the Venice Commission stand ready to assist the authorities of Uzbekistan in their efforts to create a legal framework for democratic elections in conformity with OSCE commitments and other international standards for democratic elections.