



**NATIONAL  
DEMOCRATIC  
INSTITUTE**  
FOR INTERNATIONAL AFFAIRS

2030 M Street, NW, Fifth Floor  
Washington, DC 20036-3306  
(202) 728-5500  
fax: (202) 728-5520  
email: [contactndi@ndi.org](mailto:contactndi@ndi.org)  
[www.ndi.org](http://www.ndi.org)

**NDI COMMENTARY ON THE CONSTITUTIONAL LAW  
OF THE REPUBLIC OF KAZAKHSTAN**  
"On Elections in The Republic of Kazakhstan"  
*October 10, 2001*

**Background**

At the request of civic and political leaders in Kazakhstan, the National Democratic Institute for International Affairs (NDI) convened an international advisory group of constitutional and election law experts to review the Constitutional Law of the Republic of Kazakhstan on Elections in the Republic of Kazakhstan ("Law on Elections"), which is expected to be considered by the Parliament of Kazakhstan during the fall of 2001. NDI's advisory group assessed the Law on Elections in light of internationally established criteria for genuine democratic elections and the need to secure public trust in Kazakhstan's electoral process.

NDI's international election law advisory group included the following experts: Professor Amnon Rubinstein, Member of the Knesset, Israel's Parliament; Dr. Rafael López Pintor, Professor of Political Science from the Autonomous University of Madrid, Spain; Tara R. Gingerich, with the U.S. law firm of Steptoe & Johnson; Ann Colville Murphy, NDI Special Counsel on Electoral Programs; and Patrick Merloe, NDI Senior Associate and Director of Programs on Election and Political Processes. Each member of the group from outside NDI contributed his or her time freely and in an individual capacity. NDI staff, knowledgeable about Kazakhstan's political situation and about its election processes, also contributed to this review.

NDI is a nongovernmental organization working to strengthen and expand democracy worldwide. As part of its mandate, NDI conducts election programs that focus on constitutional and law reform efforts, international election observation, and election monitoring by domestic nongovernmental organizations (NGOs) and political parties. The Institute has provided election law commentaries in more than 20 countries around the globe. Having re-opened its office in Almaty in May 1999, the Institute has assisted Kazakhstan civic organizations through grants from the U.S. Agency for International Development (USAID), and has been a regular participant in the current Round Table on Elections series, organized under the auspices of the Organization for Security and Cooperation in Europe (OSCE) in collaboration with the Central Election Commission (CEC) and the Government of Kazakhstan. The Institute is pleased to review Kazakhstan's Law on Elections and to offer the following comments.



## Introduction

The key issue for the parliament to address regarding the Law on Elections, in the view of NDI's international election law advisory group, is enhancing the citizenry's level of confidence in election processes. To be effective and sustainable, a legal framework for democratic elections must be based on the trust of the people and agreed upon through a broad political dialogue. Following Kazakhstan's 1999 presidential and parliamentary elections, numerous citizens and domestic observers, as well as international observers, expressed the opinion that the country's elections processes were flawed. As exhibited by proposals presented at the Round Table on Elections series, a clear consensus continues to exist that the central problem with the Law on Elections is the lack of transparency in the election process and openness to political pluralism.<sup>1</sup> The primary aim of election legislation reform in Kazakhstan, therefore, should be to enhance public confidence by making the Law on Elections as inclusive, transparent and equitable as possible.

An example of a topic on which broad public discussion should be conducted is the question of whether a majoritarian, proportional or mixed electoral system should be created in Kazakhstan. NDI does not take a position on this question, but urges the government to solicit wide public input in an attempt to reach a nationwide consensus on such fundamental issues relating to the electoral system. The comments put forth by groups aligned with government, as well as by opposition NGOs, concerning the country's type of electoral system suggest that a variety of views exist about whether and how the current system could be improved.

The Round Table on Elections series received a plethora of recommendations from a wide spectrum of political groupings and domestic NGOs. It is NDI's understanding that the full election reform process which had been agreed to as part of the OSCE's efforts has not been followed. NDI has supported and participated in the OSCE's efforts and finds it unfortunate that this process is being ignored.

Because the Round Table on Elections series has shown that a wide consensus on numerous issues for reform has already emerged in Kazakhstan and that reform proposals are well-focused and clearly stated, NDI's commentary on the Law on Elections highlights a few of the target issues that warrant emphasis. In particular, NDI will comment on a number of themes that are insufficiently addressed in the Law on Elections, including the formation and composition of election commissions, the accreditation of election observers, and procedures for filing a complaint. NDI acknowledges that some of these deficiencies have been corrected by the Central Election Commission through subsequent resolutions, instructions, and recommendations.<sup>2</sup> Nonetheless, by highlighting areas of concern in the Law on Elections,

---

<sup>1</sup> See the OSCE's Office for Democratic Institutions and Human Rights' "Review of the Consolidated Table of Political Party Proposals" for the Republic of Kazakhstan Third Round Table on Elections, May 28, 2001.

<sup>2</sup> NDI is aware, for example, that the 1999 "Collection of Resolutions, Instructions and Recommendations of the Central Election Commission of the Republic of Kazakhstan on Preparation and Conduct of Voting at the Polling Station" (hereinafter "Resolutions") includes provisions on the accreditation and function of international observers and domestic monitors; instructions on the compilation and posting of voting minutes, as well as the counting of votes and voters on lists; and resolutions on general appeal procedures for citizens. These improvements should be incorporated into the Law on Elections to add necessary legal force, clarity and detail.

NDI's commentary emphasizes the need to incorporate later decisions into the existing legislation in order to produce one complete, clear document.

## Comments

### I. Election Commissions

The formation and composition of the election commissions is barely addressed in the Law on Elections. This issue is crucial, considering that the CEC appears to have unlimited jurisdiction, not only with regard to administering the election, but also with regard to hearing appeals concerning exclusion from voters' lists (Article 26.4) and to other judicial and quasi-judicial powers. According to the current Law on Elections, members of the CEC are chosen and can be dismissed by the lower house of the Parliament (*Majilis*) "upon suggestion of the President of the Republic" (Article 11.2), and members of the other commissions are chosen by the CEC or other higher election commissions (Articles 13.3, 15.1, 17.1). However, the law fails to describe the process by which commissions are formed and approved. This presents a potentially significant problem. If, for example, the President were to appoint all of the members of the CEC, and then the CEC were to appoint the lower commissions, there would be no safeguard for the impartiality of the commissions.

The law also does not express any preference or requirement regarding the composition of the commissions concerning political party representatives or independent and non-governmental representatives. Participation of political parties and independent/neutral individuals on the election commissions would promote trust between the political parties and the government, enhance the transparency of the process and increase voter confidence in the independence and impartiality of these important institutions.

In addition, in the interest of transparency, the meetings of the election commissions should be open to the public or, at a minimum, to certain representatives of the candidates, parties, observers and the media. It is not clear from the law whether this is the case.

### II. Monitoring/Observers

There are a number of provisions in the law relating to observers that should be improved. First, it is crucial that observers, both domestic and international, be granted the express authority to observe *all* stages of the election process. However, the law does not authorize observers to witness the entire process. For example, there are no provisions for observing meetings of the election commissions, any vote re-counts and all aspects of the complaint process.

Second, the law should clearly set forth the process for accreditation of observers, as is included in the Resolutions. Moreover, a provision regarding the grounds for refusing accreditation is necessary. Accepted international election standards acknowledge that an invitation from governmental or electoral authorities should not be required. The government (or CEC) should accredit international observers from appropriate organizations in accordance with the OSCE's Copenhagen Document.

Third, the provision limiting the number of candidate representatives, journalists from each mass media, members of public associations, and international observers in each polling station to one (Article 42.5) is unnecessarily restrictive and not in the interest of an open election process that will generate confidence from the citizenry and international community. The standard methodology used by election observers is to deploy in teams of two to polling stations. This helps to minimize potential bias and provides greater security for observers. NDI acknowledges that these issues are addressed in the Resolutions, but notes that “observers from public association[s]” are still limited to one representative per polling station.

Finally, there is no discussion of domestic, nonpartisan observers in the Law on Elections, though the Resolutions contain provisions for “observers from public associations of the Republic.” Providing for election observers from Kazakhstani nongovernmental organizations will bring the framework for elections into conformity with accepted international practice (e.g., Paragraph 8 of the Copenhagen Document). The law should expressly provide that these domestic observers are permitted to monitor all stages of the election process and should set out any related requirements.

### **III. Candidate Qualification**

#### *A. Candidate Registration*

The Law on Elections disallows candidate registration on the grounds of administrative sanctions for faults or crimes committed one year earlier (Article 4). These bases are overly broad. It is generally accepted that persons convicted of serious crimes (felonies) may be disqualified from seeking elected office. Persons who may be charged or detained but not convicted are presumed innocent and may not be disqualified. Those who have been judged by a court to have committed lesser crimes, including administrative offenses, generally should not be disqualified from candidacy for public office.

Further, the provisions in the Law on Elections pertaining to repeat elections are of particular concern. Articles 64.1, 80.4, 96.4, 96.5, 100.3 and 124.4 each dictate that no candidate who participated in a primary election subsequently deemed invalid shall be allowed to stand for office in the resulting repeat election. These provisions arbitrarily bar candidates from exercising their right to seek public office even if they were in no way responsible for the primary election being declared invalid. Only in a situation where the number of voters who cast ballots marked “Against All Candidates” is greater than the total number of voters who cast ballots for specific candidates, could such a provision be useful. Otherwise, the public’s interest can be protected by disqualifying candidates from repeat elections if they are found responsible for wrongdoing in the primary elections.

#### *B. Signature Requirements*

Under Article 72.2 of the election law, an elector/voter is allowed to offer his/her signature to only one candidate running for election as deputy of the Senate. Voters should be able to sign more than one candidate list. This restriction may confuse the electors/voters into thinking that their signature commits them to vote for that candidate, which undermines the

precept that voting is to be freely conducted on election day and is to be by secret ballot. The restriction also creates a greater opportunity for coercion of voters, because candidate and party activists may threaten those who refuse to sign, claiming the refusal reveals the person is supporting a different candidate or party. This dynamic creates an incentive for individuals to sign all candidate lists, which generates many invalid signatures.

Article 56.8 states that if more than 2 percent of the signatures submitted in support of a candidate for President are ruled invalid, the candidate will be refused registration; in elections for Deputies to the Senate, the candidate will be refused registration if more than 1 percent of the signatures are ruled invalid (Article 72.7). This provision creates an unnecessary barrier to candidate qualification. Candidates should be allowed to submit as many signatures as they choose above the number required for qualification so that, after rulings have been made with regard to invalid signatures, the candidates can still retain the threshold number of valid signatures. The important point should be whether the candidate has submitted the required number of valid signatures, not the number of signatures that are ruled invalid. A focus on the number of signatures ruled invalid puts unreasonable pressure on those collecting signatures, because they have no reasonable means to determine on the spot whether a signature is valid or faulty. This basis for refusing candidate registration also invites deliberate efforts to "taint" a candidate's signature list by those opposing the candidate.

### C. *Candidate Withdrawal*

The law places a number of restrictions on a candidate's ability to withdraw from an election.

First, the law provides that candidates for President of the Republic, Deputies of the Senate, Deputies of the *Majilis*, and Deputies of the *Maslikhats* may not withdraw – and that public associations may not withdraw their support of a candidate – within seven days of the election (Articles 60, 74, 90 and 105) and that candidates for bodies of local self-administration may not withdraw within three days of the election (Article 119).

Such restrictions discourage the withdrawal of those candidates who determine that they do not have a realistic chance of being elected. Possible consequences include an unnecessarily crowded field of candidates and disincentive for newcomers to enter the campaign. It is generally accepted that, within a reasonable number of days from the election, candidate names will not be removed from the ballot, due to appropriate logistical requirements, but candidates nonetheless are allowed to withdraw from the election at any time.

Second, the law provides that if the withdrawal was not based on "compelling circumstances," the election commissions have the right to charge the candidate or public association a part of the costs allocated from the national budget for conducting the election campaign. (Paragraph 4 of Articles 60, 74, 90 and 105). This provision also inappropriately penalizes candidates who determine that their bid for office would not succeed even after a reasonable attempt to win support. Such candidates should be allowed to withdraw, based on a freely made decision.

Third, Articles 59.2, 73.2, and 88 provide that individual candidates and political parties putting forth party lists for the election of the President, Deputies of the Senate and Deputies of the *Majilis* who receive less than 7 percent of the vote will not receive a refund of their election deposit. While this is intended to provide a disincentive to frivolous candidates, the requirements for collecting signatures appears to be a sufficient safeguard against this possibility.

#### **IV. Campaign**

There does not appear to be a provision in the Law on Elections addressing the obligation of the media to engage in fair, balanced and accurate reporting during news broadcasts. Such a provision should be included. State-controlled media must provide politically neutral coverage to serve the public's interest rather than the interest of specific candidates or parties. International experience confirms that the election law or law on mass media should provide an expedited procedure for candidates to respond to unfair treatment in the media, expressly setting forth remedies, including the right of correction and right of reply.

#### **V. Campaign Financing**

The provision regarding candidates losing their election deposit if they do not capture at least 7 percent of the vote is discussed above.

The requirement in Article 34.9 that candidates and political parties give portions of their remaining non-state funds to the national budget following the election undermines the ability of political parties to function as long-term organizations with budgets. It also unnecessarily inhibits the freedoms of association and expression.

The statement in Article 34.6 that "the procedure of spending of the election funds is determined by the Central Election Commission" is ambiguous. It is possible that this provision is meant to establish reporting requirements. For example, an appropriate requirement might provide that all funds received must be deposited into an account with notation of the source of funds, and all expenditures must be made from that account, also with appropriate notation. This could be combined with requirements to periodically disclose reports on that account. If, on the other hand, election authorities are to have power over how political contestants choose to spend funds, Article 34.6 would violate freedom of expression as well as freedom of association. This ambiguity, therefore, should be removed so that it is clear that political contestants are allowed to decide how to expend funds -- particularly non-state funds -- as long as the expenditures are for legal purposes. Disclosure reports on contributions and expenditures can sufficiently protect against abuses in these areas.

#### **VI. Voting**

The Law on Elections prohibits the presence of state officials in the polling stations. The Resolutions adequately define who is allowed to be present at the polling stations. They state that the chairperson of the precinct election commission is responsible for order inside the polling station and that officials of internal affairs are allowed to enter polling stations only upon the invitation of the chairperson. The Law on Elections should also expressly prohibit the presence of any unauthorized persons at voting stations, particularly considering the problems

that have occurred in this regard during previous elections. There does not appear to be a prohibition on the presence of law enforcement officials in the polling stations. International experience demonstrates that it is best to provide that the polling officials have responsibility for maintaining order inside the polling stations. The polling station president/chairman should have authority to request the police to enter the polling station to assist with the specific need to maintain order; otherwise police should not enter and should not act in a manner near polling stations that could influence the voters' choice at the ballot box.

## **VII. Counting of Votes**

Several proposals by NGOs and opposition groups in Kazakhstan have focused on the need for stricter control over the number of ballot papers distributed to polling stations and their handling by polling station officials. The number of ballot papers should be tracked carefully and recorded at each step of their distribution, at each step of their re-collection and throughout the consolidation of results in order to prevent fraud or the appearance thereof.

Two additional safeguards should be added with respect to the protocols ("voting minutes"): (1) a requirement that the protocol setting forth electoral results be posted at a visible location at the polling stations before the station closes and that it remain posted for two weeks. This will raise public confidence and allow verification if questions arise about the vote. The Resolutions provide for the protocols to be posted outside the polling station, but do not specify the required duration of such posting; and (2) a requirement that all candidate representatives and accredited observers receive copies of the protocols immediately upon their completion, or that polling station officials sign and place an official stamp on "observation protocols" provided by such persons, verifying that the vote counts on them correspond exactly with the counts on the official protocols.

NDI recognizes that the Resolutions include provisions requiring that the number of voters on the voters' list and the number of voters who received ballots should be established and entered on the protocol before the ballot box is opened. The number of ballots found in the ballot box is to be entered on the protocol and compared with the number of persons who voted. Any significant discrepancy between the number of persons who voted and the number of ballots in the ballot box indicates electoral irregularities that should be recorded in the protocol.

## **VIII. Complaint Mechanism**

Public confidence in the election process and election results depends significantly on an efficient and impartial system to peacefully resolve any election-related complaints. Several provisions in the election law allow citizens to appeal decisions of the election commissions to either higher commissions or courts. The law should further elaborate upon this complaint mechanism. There should be expedited procedures and provisions for effective remedies. The Resolutions address these issues to a certain extent. However, the law should set forth the process of filing complaints, the burden of proof, procedures regarding the submission of evidence and any other procedural requirements in a clear and comprehensive manner.

## Conclusion

In NDI's efforts to help assess and improve electoral processes throughout the world, the Institute has found that elections are most successful when: the process is fully transparent; an opportunity is provided for the political contestants to have direct participation in electoral bodies and in forming the electoral framework; civic groups are allowed to monitor all aspects of the electoral process; and appropriate rules and periods are established for candidate qualification, campaigning, voter education, and preparation of electoral administration. Moreover, once the legal framework for democratic elections is agreed upon and enacted through a broad political dialogue, the challenge of proper implementation becomes crucial. For this reason, the composition of the CEC, as well as all other election commissions, is vital.

Whether the election process elicits public confidence is the test of the authorities' effectiveness and intent. To this end, efforts toward negotiation and compromise should continue in order to reach consensus on outstanding issues. Such a consensus is necessary to represent the diversity of the electorate and to ensure that the elections are accepted as representative of the will of the people. The law is a crucial aspect of the elections, but it is ultimately the people of Kazakhstan who will judge the success of the elections.

NDI will continue to monitor the development of the electoral process in Kazakhstan and remains available to provide further information and more detailed consultations should they be appropriate.