OPINION ON THE CALCULATION OF TIME LIMITS IN THE CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN

Based on an unofficial English translation of the relevant laws provided by the OSCE Office in Astana
OSCE/ODIHR Opinion on the Calculation of Time Limits in the Constitution of the Republic of Kazakhstan

I. INTRODUCTION
1. On 6 March 2012, the Head of the Constitutional Council of the Republic of Kazakhstan addressed the Head of the OSCE Centre in Astana with a request for legal expertise on two questions related to the calculation of time limits in the Constitution of Kazakhstan. The request from the Constitutional Council followed an earlier demand of the Prime Minister of Kazakhstan for official interpretation of the Constitution in accordance with Article 72 par 1(4) of the Constitution.¹

2. As per established procedure, the OSCE Centre in Astana forwarded the request and translations of the Constitution and other relevant legislation to the OSCE/ODIHR. The current Opinion is provided in response to the above request.

II. SCOPE OF REVIEW
3. The scope of the Opinion is limited to the following questions, posed by the Constitutional Council:

- Do the rules for the calculation of time limits in the civil code, civil procedure code, criminal code, criminal procedure code, and other fields of legislation also apply to the terms or time limits set in the Constitution, or are there other rules applicable to constitutional terms?

- When does the time period set by Article 16 par 2 of the Constitution² referring to permissible the arrest begin (from the moment of de facto arrest or detention of a person, or from the moment of drafting the arrest protocol etc.)? Are there any OSCE recommendations on this and what is the practice of European States?

4. The Opinion covers only the above-mentioned questions. Thus limited, the Opinion does not constitute a full and comprehensive review of all available legislation pertaining to the setting of time limits in the Republic of Kazakhstan.

5. The Constitutional Council’s request was sent to the OSCE Centre in Astana on 6 March 2012, with a deadline for reply on 16 March 2012. There has thus been a limited amount of time available for the preparation of this Opinion, and consequently it has been narrowed down to focus on the most substantial issues.

6. The ensuing recommendations are based on international and domestic legal provisions, as found in the Constitution of Kazakhstan and in international

¹ Article 72 par 1(4) of the Constitution states as follows “1. The Constitutional Council by appeal of the President of the Republic of Kazakhstan, the chairperson of the Senate, the Chairperson of Majilis, not less than one-fifth of the total number of deputies of Parliament, the Prime Minister shall:

   …

4) officially interpret the standards of the Constitution”.

² Article 16 par 2 of the Constitution states as follows “Arrest and detention shall be allowed only in cases stipulated by law and with the sanction of a court with right of appeal of an arrested person. Without the sanction of a court, a person may be detained for a period no more than seventy-two hours.”
agreements and commitments ratified and entered into by the Republic of Kazakhstan.  

7. The Opinion is based on an unofficial translation of the Constitution and relevant legislation, which has been attached to this document as Annex 1. Errors from translation may result. 

8. This Opinion is without prejudice to any written or oral recommendations and comments to this or other related legal provisions that the OSCE/ODIHR may make in the future.

III. ANALYSIS AND RECOMMENDATIONS

1. Relationship Between Constitutional Provisions on the Calculation of Time Limits and Corresponding Provisions in Ordinary Laws

9. The first question posed by the Constitutional Council is very general and is understood by OSCE/ODIHR, as referring to time limits set out in the Constitution of Kazakhstan and their relation to time limits provided in other laws such as civil and criminal legislation. The request briefly mentions a number of articles of the Constitution. Time has not allowed lengthy analysis of individual provisions, and so in the interest of concision, the following response will only refer to general principles on the relationship between constitutional provisions and other legal norms.

10. Article 4 par 2 of the Constitution of Kazakhstan prescribes that the Constitution “shall have the highest judicial force and direct effect in the entire territory of the Republic”. This establishes the Constitution as the highest legal norm in the Republic of Kazakhstan. As regards international treaties ratified by Kazakhstan, these shall, according to Article 4 par 3 of the Constitution, have priority over domestic laws and be implemented directly, unless the application of such treaty requires the promulgation of a law.

11. When analyzing the correlation between a constitutional provision and a provision of ordinary law, it should therefore be borne in mind that the Constitution is at the top of the hierarchy of laws in Kazakhstan. Thus, in the case of contradictions.

---


4 Article 16 par 2 (detention), Article 44 par 2 (powers of the President in relation to the Parliament), Article 51 par 3 (extraordinary elections of Parliament), Article 54 par 2(2) (Parliament voting rules), and Article 73 par 3 (appeal of elections to the Constitutional Council).
between the Constitution and other laws, constitutional provisions will always prevail in accordance with the above principle of the hierarchy of laws.

12. Having said that, it should be noted that conceivably, the Constitution may provide more general regulation, whilst a specific law will provide more detailed provisions. In this case, the more specific rules found in the ordinary law will usually be applied. However, also in such cases, the ordinary law may not be in contradiction with the rules of the Constitution. Where the Constitution provides the basic legal framework, the realization of the provisions contained therein may not be distorted through legislation that changes their original meaning. When ordinary laws provide more detailed provisions on matters regulated in constitutional provisions, the former must always be analyzed in each individual case in order to ensure that they do not conflict with the Constitution.

13. Consequently, as with all other constitutional provisions, the time limits stated in the Constitution will generally prevail over corresponding rules in ordinary laws. However, a specific law could provide more detailed guidance on how a constitutional time limit should be applied in practice, provided that the law does not conflict with the nature and purpose of the constitutional provision.

2. Calculating the Time Limit in Article 16 par 2 of the Constitution

14. Article 16 par 2 of the Constitution states that upon arrest, a person may only be detained for 72 hours without a court decision. The Constitutional Council’s question relates to whether this 72-hour period should be calculated from the point of de facto arrest or detention or from another point in time, such as the drafting of the arrest or detention protocol. In ordinary law, a rule corresponding to Article 16 par 2 can be found in Article 136 of the Criminal Procedure Code of Kazakhstan. This provision connects the beginning of the 72-hours time limit to “the moment of detention”.

15. Article 9 par 3 of the International Covenant on Civil and Political Rights (hereinafter “the ICCPR”) states that “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”. This right is also guaranteed in a corresponding OSCE Commitment, namely the 1990 Copenhagen Document. In the European context, Article 5 par 3 of the European Convention on Human Rights (hereinafter “the ECHR”), guarantees a similar protection to anyone arrested or detained.

16. The right to be brought before a judge “promptly” after one’s arrest or detention must be read against the background of the general right to liberty of all persons

---

5 Criminal Procedural Code of Kazakhstan (Law No. 206 of 14th December 1997).
6 ICCPR, Article 9 par 3.
7 Copenhagen Document, par. 5.15.
9 ECHR, Article 5 par 3.
as guaranteed in both the ICCPR and the ECHR. Consequently, the loss of liberty is the important factor triggering the right to be brought before a judge. Identifying the moment of the actual loss of liberty is therefore crucial in this context.

17. The deprivation of liberty has clearly taken place when any person is being kept against his/her will in a police or detention/prison cell, but there are many other forms of confinement that may also amount to a loss of liberty according to relevant international human rights instruments. In most circumstances, this will include cases where a law enforcement officer stops a person in the street and either by physical restraint or by words or conduct makes it clear that a person is not free to leave, or is obliged to follow a police officer to a different location. Furthermore, the same applies in situations where a person enters a police station voluntarily but is thereafter required to stay. The decisive factor leading to a loss of liberty is the existence of compulsion, meaning that a person is required to stay at a certain location against his/her will.

18. According to the ECHR, the actual loss of liberty is the crucial point at which the clock starts ticking with regard to the permissible time period before a person is “promptly” brought before a judge. Any limitation period should therefore be evaluated starting from the actual point of deprivation of liberty, rather than from the moment that any subsequent formal steps are taken by the authorities in order to formalize the arrest or detention. Any protocol drafted on an arrest or detention should refer to the actual point in time from which the apprehended person was no longer free to leave, whether this was from the moment when he or she was stopped in the street or when he or she was no longer able to freely leave a police station.

19. The same interpretation appears to apply for the ICCPR, as the point in time that a person was actually taken into custody appears to be used as the benchmark for assessing whether this person was brought “promptly” before a judge.

20. In the legal practice of OSCE participating states, it is clear that the moment of actual arrest or actual loss of liberty is the moment from which to measure the time of detention. In Poland, any person should be released within 48 hours from the moment of detention, if he or she has not been brought before the authority of

---

10 ICCPR, Article 9 par 1 and ECHR, Article 5 par 1.
12 De Wilde, Ooms and Versyp v. Belgium, application no. 2832/66, 2835/66 and 2899/66, ECtHR judgment of 18 June 1971, par 65; Storck v. Germany, application no. 61603/00, ECtHR judgment of 16 September 2005, par 74.
OSCE/ODIHR Opinion on the Calculation of Time Limits in the Constitution of the Republic of Kazakhstan

The time of detention is calculated from the moment of the actual deprivation of liberty. In Moldova, police custody or police arrest is a deprivation of liberty that may last for a maximum of 72 hours before the person is to be brought before a judge for a detention hearing. The term of 72 hours begins to flow from the moment when the person is de facto deprived of his/her liberty and thus includes both the moment when the respective individual was brought to the police station and the time during which the police protocol was drawn up. Also in other OSCE participating states, such as Georgia, Germany or Sweden, the time of de facto deprivation of liberty is the relevant starting point for calculating time spent in detention.

21. The practice of OSCE participating states, as well as regional and international legal instruments thus all point to the moment of actual deprivation of liberty as the starting point when calculating the maximum permissible period of detention before a person shall be brought before a judge. In order to ensure the compliance of the Constitution of the Republic of Kazakhstan with international and domestic human rights standards in practice, it is therefore recommended to calculate the 72-hour time limit mentioned in Article 16 par 2 from the moment of de facto deprivation of liberty, as described above, of the apprehended person.

[END OF TEXT]

Annex 1

Excerpts of

CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN

Article 4

1. The provisions of the Constitution, the laws corresponding to it, other regulatory legal acts, international treaty and other commitments of the Republic as well as regulatory resolutions of Constitutional Council and the Supreme Court of the Republic shall be the functioning law in the Republic of Kazakhstan.
2. The Constitution shall have the highest juridical force and direct effect on the entire territory of the Republic.
3. International treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases when the application of an international treaty shall require the promulgation of a law.
4. All laws, international treaties of which the Republic is a party shall be published. Official publication of regulatory legal acts dealing with the rights, freedoms and responsibilities of citizens shall be a necessary condition for their application.

Article 16

1. Everyone shall have the right to personal freedom.
2. Arrest and detention shall be allowed only in cases stipulated by law and with the sanction of a court with right of appeal of an arrested person. Without the sanction of a court, a person may be detained for a period no more than seventy-two hours.
3. Every person detained, arrested and accused of committing a crime shall have the right to the assistance of a defense lawyer (defender) from the moment of detention, arrest or accusation.

…

Excerpts of

CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF KAZAKHSTAN

Article 136 The Reasons for Releasing a Person Detained under Suspicion of Commission of a Crime

1. A person detained because of a suspicion in commission of a crime shall be subject to release pursuant to the resolution of the inquest officer, detective or procurator, if:
   1) the suspicion of commission of a crime was not confirmed;
   2) there are no reasons to apply to a person detained a measure of suppression in the form of detention;
3) the detention was performed in violation of requirements of Article 134 of this Code.
2. A measure of suppression in the form of detention must be selected within seventy-two hours from the moment of detention in respect of a suspect, in accordance with the procedure provided for by this Code or he shall be subject to release.
3. When during seventy-two hours from the moment of detention no resolution from an inquest officer or detective as being received by the chief of the place of detention of a detainee, sanctioned by the procurator on application to a given detainee of detention as a measure of suppression, the chief of the place of maintenance of the detainee shall immediately release him by his resolution and he shall notify of that the person, who handles the case or the procurator.
4. In the case of a failure to implement the requirements of the third part of this Article, the chief of the administration of the place of maintenance of a detainee shall be held responsible in accordance with the law.
5. In the case of the release of a detainee, the latter shall be given a document, which says by whom he was detained, the reasons, the place and the time of detention, the reasons and the time of release.