



Office for Democratic Institutions and Human Rights

KYRGYZ REPUBLIC

ASSESSMENT OF PENDING AMENDMENTS TO THE ELECTION CODE



Warsaw
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I. INTRODUCTION

This assessment reviews and comments on pending amendments to the Election Code (hereafter “the Code”) of the Kyrgyz Republic.² The assessment is based on an unofficial English translation of the pending amendments, as reflected in a comparative table consisting of 93 articles provided to the OSCE Centre in Bishkek by the Ministry of Foreign Affairs and the Central Election Commission (CEC) of the Kyrgyz Republic in July 2003.³

The OSCE/ODIHR has previously commented on the legal framework for elections in the Kyrgyz Republic.⁴ This assessment should be viewed as complementary to earlier comments and recommendations.

This assessment is provided with the goal of assisting the authorities in the Kyrgyz Republic in their efforts to develop a sound legal framework for democratic elections. However, as previously stated by the OSCE/ODIHR, the extent to which any amendments can have a positive impact will ultimately be determined by the degree to which state institutions and officials implement and uphold the Code.⁵

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

¹ The OSCE/ODIHR engaged Jessie Pilgrim, legal expert, and Mark Stevens, election expert, for this review.

² Although the pending amendments have not been formally adopted by the Jogorku Kenesh, for the purpose of this assessment the current law and pending amendments will be referred to collectively as “the amended Election Code.”

³ The comparative table provided includes competing proposals in some articles. Competing proposals will be discussed to the extent necessary.

⁴ See Review of Amendments to the Election Code, Kyrgyz Republic (15 February 2002); Review of Draft Amendments to the Election Code, Kyrgyz Republic (24 September 2001); Analysis and Recommendations Concerning the Election Code of the Kyrgyz Republic (26 May 2000); Final Report on Presidential Elections in the Kyrgyz Republic, 29 October 2000 (16 January 2001); Final Report on Parliamentary Elections in the Kyrgyz Republic, 20 February and 12 March 2000 (10 April 2000).

⁵ See Review of Amendments to the Election Code, Kyrgyz Republic (15 February 2002); Final Report on Parliamentary Elections in the Kyrgyz Republic, 20 February and 12 March 2000 (10 April 2000).

Some of the amendments to the Code mark progress. However, the Code significantly limits some civil and political rights. As a result, the current text of the amended Election Code requires improvement to bring it in line with OSCE commitments set forth in the 1990 OSCE Copenhagen Document and other international standards for democratic elections. Notably, the amended Election Code:

- Contains limitations on the right to be a candidate that are contrary to OSCE commitments and other international standards;
- Permits premature termination of an elected candidate's mandate, contrary to Paragraph 7.9 of the OSCE 1990 Copenhagen Document and other international standards;
- Creates procedures for candidate registration that can be used to prevent legitimate candidates from participating in elections;
- Fails to ensure multi-party or pluralistic representation on the CEC and other election commissions;
- Does not provide completely satisfactory procedures for voting, counting of ballots, tabulation of results, and determination of winning candidates;
- Does not provide for full and complete transparency and observation of all aspects of the election process;
- Contains limitations on the rights to free speech, expression, and association that are contrary to OSCE commitments and other international standards; and
- Does not provide a satisfactory process for filing complaints and appeals to protect suffrage rights.

Recommendations are made in this assessment with the objective of correcting shortcomings in the Code. However, it must be emphasized that in addition to bringing the election legislation of the Kyrgyz Republic more closely in line with OSCE commitments, there must be a commensurate commitment on the part of state institutions and officials to fully and effectively implement the Code in order for there to be democratic elections in the Kyrgyz Republic.

III. DISCUSSION OF THE AMENDED ELECTION CODE

Discussion of the amended Election Code is presented under five general topics and not in the numerical order in which articles appear in the Code.⁶ The five topics are: Candidacy Rights, Election Commissions, Election Rules, Transparency, and Legal Protections.⁷ This thematic approach facilitates evaluation on the degree to which the

⁶ The amended Election Code regulates elections of the President, members of the Jogorku Kenesh, deputies of local keneshes, and heads of local self-government.

⁷ 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

amended Election Code is in line with OSCE commitments and other international standards for democratic elections.

A. 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.⁸ The amended Election Code does not satisfy this fundamental principle, as it contains several provisions that prevent citizens who should have the opportunity to participate in representative government, from exercising their right to be a candidate for public office.⁹ The Code creates a punitive system for punishing candidates; and the system created is subject to abuse by those who control election commissions. This permits usurpation of the will of voters as it grants significant power to election commissions to determine who can be a candidate, who can remain a candidate, and which candidates can stay in office after elected. These impermissible limitations on candidacy rights are considered in the order in which they appear in the amended Election Code.

1. Article 3 Limitation on Candidacy Rights

Article 3 of the amended Election Code sets forth the right of suffrage for citizens of the Kyrgyz Republic. Paragraph (4) of Article 3 abrogates the passive right of suffrage of a citizen whose “previous conviction has not been expunged or cancelled according to the procedure established by law”. Under this paragraph, 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. The principle of proportionality in the restriction of civil and political rights is expressly recognized in Articles 17 and 18 of the Constitution of the Kyrgyz Republic. The paragraph (4) of Article 3 abrogation of the passive right of suffrage is not consistent with international standards and would appear to be contrary to the Constitution of the Kyrgyz Republic.¹⁰

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.

⁸ See, e.g., Article 25 of the International Covenant on Civil and Political Rights. This right is also stated in Article 23 of the Constitution of the Kyrgyz Republic. An unofficial English translation of the Constitution of the Kyrgyz Republic, as amended by the referendum of 2 February 2003, is the version of the constitution referenced in this assessment.

⁹ The OSCE/ODIHR has previously expressed concerns about cancellation of candidate registration. See Review of Amendments to the Election Code, Kyrgyz Republic (15 February 2002); Final Report on Parliamentary Elections in the Kyrgyz Republic, 20 February and 12 March 2000 (10 April 2000).

¹⁰ Articles 17 and 18 of the Constitution, though, appear to conflict with paragraph (2) of Article 56 of the Constitution, which states: “No person with criminal record may be elected a deputy of the Jogorku Kenesh of the Kyrgyz Republic unless such record shall have been expunged and

The OSCE/ODIHR recommends that Article 3 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.¹¹ 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.¹² 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.

2. Articles 28, 36, and 56 Limitations on Candidacy Rights

Paragraph (7) of Article 28, paragraph (8) of Article 36, and paragraph (1) of Article 56 permit the cancellation of registration of a candidate for a variety of reasons. The sanction of cancellation of registration is disproportionate, in light of the conduct in these paragraphs that can be a basis for cancellation.¹³

Although the wrongful acts listed in Articles 28, 36, and 56 should be punished, the punishment of cancellation of registration is disproportionate. In addition to potential abuse by election commissions, these provisions could 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”.¹⁴ **The OSCE/ODIHR recommends** that the possibility to cancel a candidate’s registration be limited to the situation where the candidate does

canceled in such manner as law may provide.” A “criminal record” could include a record of unjustified, unproven allegations, and a person with a “criminal record” could even be found innocent during the course of judicial proceedings. Thus, there must be a translation error in Article 56 and it is likely that the phrase “conviction of a serious crime” is intended instead of “criminal record”. Interestingly, the Constitution does not contain a similar “criminal record” prohibition for candidates for the Presidency.

¹¹ Further, the law should specifically list those crimes that are considered to be so serious that forfeiture of a fundamental human right – suffrage – is required.

¹² Paragraph (4) of Article 3 indicates that restoration of suffrage rights is not automatic. The relevant legal provision for expunging or cancelling a conviction should be considered when evaluating paragraph (4) of Article 3.

¹³ As an example, a single telephone call on a government telephone can be a basis for cancellation of registration. Although wrongful acts should be punished, cancellation of registration is disproportionate. It would be more appropriate to authorize the imposition of a monetary fine and/or imprisonment based on consideration of several factors, which could include: (a) the threat that the violation presents to the conduct and administration of future elections, (b) whether the violator profited from the violation, either monetarily or through the allocation of a mandate for the violator or the violator’s political party or coalition, (c) the duration and pervasiveness of the conduct giving rise to the violation, (d) whether and to what degree there was an effort to conceal the violation, (e) the attitude and conduct of the violator upon discovery of the violation, (f) whether government authorities or public officials or resources were involved in the violation, (g) the number of times the violation occurred, (h) the number of other persons involved in the violation, and (i) the potential harm to free, fair, democratic, and transparent elections in the future.

¹⁴ In addition to general concerns previously expressed on the cancellation of registration issue, the OSCE/ODIHR has noted that cancellation on the grounds of “abuse of freedom of mass media” is certainly subject to abuse. *See* Review of Amendments to the Election Code, Kyrgyz Republic (15 February 2002).

not possess the legal requirements for candidacy, and that Articles 28, 36, and 56 be accordingly amended.

3. Article 61 Limitation on Candidacy Rights

Article 61 requires a candidate to have a “good command” of the state language, which the article defines as “the ability to read, write, express thoughts/ideas and make public speeches in the state language”.¹⁵ Article 61 further requires the candidate to “write up his/her election program pledges on not less than three pages”; “read a printed text on not less than three pages”; and “make an oral presentation for 20 minutes stating the main provisions of his/her election program pledges”.

The Constitution of the Kyrgyz Republic does not require that the President be a skillful orator and author. Thus, it is not clear why a candidate must be able to write his/her election program pledges on not less than three pages or make an oral presentation for 20 minutes.¹⁶ Further, Article 61 does not provide clear and objective criteria on how it is determined whether a candidate has successfully “passed” these requirements. Is a numerical score given to each candidate on these tests? What about a candidate who scores 100% when writing his or her election program and on reading printed text, but has a lower score on the oral presentation? What about a candidate who has a lower score on the oral presentation due to a physical speech impediment? Is a blind or visually impaired candidate required to read three pages of *printed text*?

As noted in the previous paragraph, the Constitution of the Kyrgyz Republic does not require that the President be a skillful orator and author, much less a skillful orator and author “in the state language”. In fact, Article 5(3) of the Constitution expressly states that “rights and freedoms of citizens shall not be abridged on account of ignorance of the state or official languages.” Further, this constitutional article provides that “the Russian language shall be used in the Kyrgyz Republic as an official language.” Thus, the requirement in Article 61 presents constitutional concerns as well.

Article 61 is problematic. First, the article does not state clear and objective criteria on how a candidate is “scored” *and* determined to have “passed”. Second, by its very language the article excludes the candidacy of certain citizens, such as those with physical impairments. Third, the article presents concerns under international

¹⁵ Article 61 expands the text of Article 43 of the Constitution, which requires “command of the state language”.

¹⁶ The only pledge required by the Constitution in order to be sworn in is: “I, ..., while entering the office of President of the Kyrgyz Republic, do swear before my people and the sacred Motherland of Ala-Too: that I will rigorously observe and protect the Constitution of the Kyrgyz Republic; guard the sovereignty and independence of the Kyrgyz State; respect and guarantee rights and freedoms of all citizens of the Kyrgyz Republic; faithfully and diligently execute the high duties of the President of the Kyrgyz Republic entrusted to me by the confidence of all the People!” Candidates for the Jogorku Kenesh have a shorter pledge: “I, ..., while entering the office of Deputy of the Jogorku Kenesh of the Kyrgyz Republic, do swear allegiance to the Kyrgyz Republic and vow: that I will observe the Constitution and laws of the Kyrgyz Republic, execute my duties in the interests of the people, protect the sovereignty and independence of the Kyrgyz State.” See Articles 45 and 55 of the Constitution of the Kyrgyz Republic.

standards and domestic constitutional provisions that prohibit discrimination.¹⁷ **The OSCE/ODIHR recommends** that Article 61 be amended to address *all* of these concerns. It may be that the only satisfactory solution that respects the principle of non-discrimination is the removal of Article 61 from the amended Election Code.

4. Article 63 Limitation on Candidacy Rights

Paragraph (3) of Article 63 limits registration of candidacy for President to a person who can pay an election fee “out of his/her personal funds in the amount of one thousand minimum monthly salaries established by law”. Paragraph (3) of Article 63 discriminates on the basis of social or property status as it precludes candidates who do not have sufficient personal wealth to pay the fee.¹⁸ It is clearly discriminatory as it precludes a candidate from relying on the support of a political party or individual citizens for payment of the fee. Requiring a person to pay 83 years of minimum wages from personal funds, in order to be a candidate, is clearly unacceptable.¹⁹ Additionally, the provision is also likely to have a discriminatory impact on women as women are often economically disadvantaged in comparison with the general population.²⁰ There is no legitimate basis for requiring such a high registration fee to be paid from personal funds. Even a citizen who is economically less fortunate has the right to participate in government, including the right to be a candidate for President.²¹ The fact that the fee is refundable, after the elections to candidates crossing the 15% threshold of votes, does not address the problem.²² The fee should

¹⁷ See Paragraph 7.3 of the OSCE 1990 Copenhagen Document; Articles 2 and 21 of the Universal Declaration of Human Rights; Articles 25 and 26 of the International Covenant on Civil and Political Rights; Articles 1(6), 5, and 15(3) of the Constitution of the Kyrgyz Republic.

¹⁸ Article 15(3) of the Constitution of the Kyrgyz Republic provides that no one may be subjected to any sort of discrimination or abridgment of rights and freedoms because of origin, gender, race, ethnicity, language, faith, political or religious beliefs, or any other conditions or circumstances of a personal or social character. Article 3 of the amended Election Code provides “Any citizen of the Kyrgyz Republic may elect and be elected irrespective of his/her origin, sex, race, ethnicity, official and property status, faith, political and religious beliefs, and other circumstances.” It is a universal human rights principle that a person, who has the right of suffrage, be allowed to exercise his/her suffrage right without distinction of any kind, such as race, colour, gender, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, disability, or other status. 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. See also Paragraphs 7.3 and 7.5 of the OSCE 1990 Copenhagen Document.

¹⁹ Most citizens will never have the opportunity to be a candidate under such a requirement. Assuming a citizen becomes gainfully employed at 18 years of age, and that the age limit for candidacy remains at 65 years of age (Article 43 of the Constitution), then it is necessary to earn 83 years of minimum wages in 47 years. Of course, a higher wage earner or wealthy citizen does not face this obstacle.

²⁰ See Consolidated Summary and Chair’s Conclusions, OSCE Human Dimension Seminar, Participation of Women in Public and Economic Life, 13-15 May 2003 (Warsaw).

²¹ This concern is also applicable to Article 73, which requires an election registration fee for a candidate for deputy of the Jogorku Kenesh to pay 25 years of wages from personal funds, and Articles 83 and 90, which have similar requirements for candidates for local keneshes and heads of local self-government.

²² This percentage has been raised from 10 to 15. Interestingly, the candidate who finished second in the 2000 Presidential election received 13.85% of the vote, with the next five finishers receiving percentages of less than 6%. The OSCE/ODIHR has previously stated that the 10% requirement is too high. Increasing this requirement to 15% is certainly not an improvement in

be lowered to a reasonable amount so that the right to be a candidate is not limited to a select group of wealthy citizens. Further, the source of payment of the fee should not be limited to personal funds. Political parties have the right to support candidates and individual citizens have the right to support independent candidates as well as political party candidates. **The OSCE/ODIHR recommends** that Paragraph (3) of Article 63 be accordingly amended to address these concerns.

5. Article 64 Limitation on Candidacy Rights of Independent Candidates

Article 64 regulates creation of campaign funds for candidates in Presidential elections. Article 64 permits campaign funds for candidates to come from three separate sources. However, the source in paragraph (2)(b) is limited to a candidate nominated by a political party or election bloc. Thus, this article discriminates against independent candidates as it prohibits independent candidates from receiving funds from political parties or election blocs.²³ Paragraph 7.5 of the OSCE 1990 Copenhagen Document provides that citizens have the right “to seek political or public office, individually or as representatives of political parties or organisations, without discrimination”. Further, a political party should have the right to provide financial support to an independent candidate in an election where the political party has not nominated its own candidate. A small political party may not have sufficient strength to nominate a candidate for a Presidential election. However, it should have the right to support a candidate, financially and otherwise. **The OSCE/ODIHR recommends** that the limiting phrase “that nominated him/her” be reformulated so that an independent candidate can receive financial support from political parties. However, the article should clearly state that the total amount of contributions from political parties cannot exceed the amount stated in the paragraph.

6. Post-election Cancellation of Candidate Registration

Some provisions in the amended Election Code permit post-election cancellation of candidate registration. As an example, paragraph (8) of Article 36, in contrast to paragraph (1) of Article 56, permits post-election cancellation of candidate registration, which would include cancellation of the registration of an elected candidate. Such a provision is contrary to the commitment formulated in Paragraph 7.9 of the 1990 OSCE Copenhagen Document: “candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures”. Although paragraph (8) of Article 36 is a legal provision, it is not a legal provision that is in conformity with democratic parliamentary and constitutional procedures.²⁴ Democratic principles require that the will of the

the law. This concern is also applicable to Articles 73, 83, and 90, which have a similar 15% requirement.

²³ Articles 74, 84, and 92 have similar provisions and should be accordingly amended.

²⁴ *See, e.g.*, Articles 51 and 56 of the Constitution of the Kyrgyz Republic; *See also Sadak and Others v. Turkey*, Application Nos. 25144/94, 26149/95, 26154/95, 27100/95 and 27101/95, European Court of Human Rights (11 June 2002) (post-election forfeiture of a mandate is incompatible with the very essence of the right to stand for election and to hold parliamentary office, and infringes the unfettered discretion of the electorate to exercise free and universal suffrage).

electorate be duly respected. This provision allows losing candidates, or government authorities, to press for post-election cancellation of the winner's registration. **The OSCE/ODIHR recommends** that paragraph (8) of Article 36 be amended to allow post-election cancellation only where the elected candidate does not meet requirements for candidacy under the Constitution.

7. Over-Regulation of Political Parties/Election Blocs as Limitation on Candidacy

Paragraph (3) of Article 25 states: "The decision to join an election bloc shall be taken at a congress (conference) of the political party." Paragraph (4) of Article 72 states: "Nomination of candidates for single-electoral districts by political parties shall be carried out at their congresses (conferences) with identification of the district where each candidate shall run." These provisions fail to consider previous recommendations of the OSCE/ODIHR calling for more liberal provisions for the formation of election blocs and nomination of candidates.

The amended Election Code imposes an excessive degree of regulation and represents a limitation on the rights and freedoms usually enjoyed by political parties and election blocs. This is a concern as, in past elections, the CEC has decided to de-register a whole electoral bloc because the congress at which its list of candidates was selected was deemed to be invalid by a court. This over-regulation of political parties and election blocs acts as a limitation on candidacy rights. **The OSCE/ODIHR recommends** that Articles 25 and 72 be amended to delete this over-regulation. However, if these provisions remain in the Code, it should be ensured that failure to fully comply with the provisions results in the need for a party/bloc to hold a new congress and choose a new set of candidates, rather than the complete de-registration of the party or bloc.

Paragraph (1) of Article 60 and paragraph (4) of Article 72 empower the CEC and the Ministry of Justice to be present at a party congress for the nomination of candidates by a political party (or election bloc). Paragraph (3) of Article 82 empowers the district election commission and Ministry of Justice to be present at a party congress for the nomination of candidates by a political party in local elections. There is no legitimate basis for these provisions. In addition to the observation above that such congresses should not be obligatory, provisions for the intrusion of the CEC, Ministry of Justice, and district election commission in the internal meetings of a political party (or election bloc) are a further infringement of the right of political parties to conduct their legitimate political affairs outside of the scrutiny of the authorities. **The OSCE/ODIHR recommends** that these three provisions be deleted from the Code.

8. Early Termination of Authority of Deputies of Local Keneshes

An amendment to paragraph (15) of Article 12 empowers the Oblast, Bishkek city, and Osh city election commissions to "adopt resolutions on early termination or withdrawal of the authorities from deputies of local keneshes and elected heads of local self-government in cases of their simultaneous exercise of powers that are incompatible with their office of a local kenesh deputy or head of local self-government." This provision appears to address the problem of one individual holding two incompatible positions at one time. Although a prohibition on "dual

office holding” is acceptable, the decision on which office is to be surrendered should be made by the office holder and not by an election commission. **The OSCE/ODIHR recommends** that this provision be further amended to provide that the election commission adopts a decision informing the individual of the “incompatibility” and that the individual shall be obliged to inform the election commission within 48 hours of which office the individual wishes to relinquish.

9. Correction of Defects in Candidate Registration Documents

The amended Election Code provides that, within ten days (or five depending on the election) of receipt of candidate registration documents, the respective election commission shall register the candidate or issue a motivated decision on the refusal to register. The Code makes no provision for the possibility of a candidate to correct a defect in documents. Candidates should not be denied registration based on a defect in documents where the defect can be corrected in a timely manner. **The OSCE/ODIHR recommends** that Articles 63, 73, 83, and 90 of the Code be amended to provide that in cases where the respective 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 motivated decision on the refusal to register. Although this would delay the campaign for the candidate concerned, 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.

10. Formation of Electoral Constituencies

Articles 19 and 20 present competing proposals for the formation of electoral constituencies. Both proposals require improvement in several areas.

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. The timeframes given in the competing draft proposals both allow establishment of constituencies relatively shortly before an election. **The OSCE/ODIHR recommends** that the Code provide that all constituencies must be established and published at least six months before an election.²⁵

The Code does not state at what time intervals constituencies are examined and re-established. Generally, most countries examine and re-establish constituencies every ten years. This allows for constituencies to be periodically adjusted as necessary, in order to reflect population changes within constituencies. The amended Election

²⁵ One proposal requires that the CEC develop a plan and submit it to the legislature “no later than 190 days to the date of expiration of the constitutional term of office of the present convocation of the Jogorku Kenesh” (sic). However, there is no deadline for approval of the plan and publication of the plan in mass media can be delayed until “not later than 120 days before the expiry of the constitutional term of office of the present convocation of the Jogorku Kenesh”.

Code, however, allows for constituencies to be changed much more frequently – in fact, before every election. Frequent changes in election constituencies should be avoided. Electoral manipulation through the drawing of constituencies becomes a more distinct possibility when constituencies are changed frequently. Further, the fundamental rationale for single member constituencies – making deputies accountable to their electorate and creating a link between the deputy and voters – is completely undermined when deputies know that they will acquire new voters with new constituencies. There is not sufficient language in either proposal to prevent the changing of constituencies between elections. **The OSCE/ODIHR recommends** that language be included in the proposal that is ultimately accepted to prevent the re-establishment of constituencies between elections.

Both proposals base the formation of constituencies on the number of registered voters. Representative democracy is based on the principle that all citizens, even those who are not registered to vote, are entitled to representation in parliament. Each deputy in parliament should represent approximately the same number of citizens. Thus, each electoral constituency should have approximately the same number of citizens, regardless of the number of citizens in the constituency that are registered to vote. **The OSCE/ODIHR recommends** that the Code provide that, if sufficient and reliable population data is available, the basis of formation of constituencies is the number of citizens instead of the number of registered voters.

One proposal establishes a permissible deviation of 10% from the average constituency population. The competing proposal establishes a permissible deviation of 5%. A permissible deviation of 5% is preferable to 10%. This is especially true as both proposals allow an additional 5% deviation for “remote and difficult access places” and permit consideration of existing administrative-territorial divisions of the country.

The amended Election Code is not clear as to how many multi-member constituencies, and the number of deputies to be elected in a multi-member constituency, are established for elections of local keneshes (legislative assemblies). Article 8 defines a multi-member constituency as “an electoral district, in which several deputies (MPs) are elected whereby the electorate vote for each one of them as an individual person” (sic). Article 81 provides that Oblast and Bishkek city level keneshes can have up to 20 multi-member constituencies.²⁶ Rayon and city level keneshes can have up to 10 multi-member constituencies. Town and ayil (village) level keneshes can have up to seven multi-member constituencies. However, the Code does not provide any details on the number of multi-member constituencies, other than indicating parameters in vague terms through the “up to” phrasing. Nor does the Code provide any details on the number of members in a constituency other than that constituencies should be “established with approximate equality of the number of voters per each member” (Article 81). **The OSCE/ODIHR recommends** that the Code be amended to provide sufficient detail so that voters, political parties, and candidates understand the electoral system for elections of local keneshes.²⁷

²⁶ There are two Article 81s in the draft table provided for review. This reference is to the second Article 81 on page 115 of the draft table.

²⁷ Most electoral systems that rely on multi-member constituencies use either the Single Transferable Vote, Block Vote, or party lists with some form of proportional voting. Article 85

B. ELECTION COMMISSIONS

The OSCE/ODIHR has previously expressed concern that election commissions are not pluralistic, subject to the control of government authorities, and do not act independently.²⁸ Although the amendments to the Election Code make some changes in the formation of election commissions, they do not adequately address previous OSCE/ODIHR concerns about formation of election commissions.

Although Article 11 of the amended Election Code allows for “consideration of the proposals of political parties, public associations, constituents’ meetings”, and provides for candidates to have “consultative” members, it does not place any obligation on government bodies to establish independent or pluralistic election commissions, or to appoint the nominees proposed by political parties or citizens. In effect, this allows opposition proposals and views to be ignored in the formation, activities, and decision making of election commissions.

Once again, **the OSCE/ODIHR recommends** that the legislature further amend the articles regulating the appointment of election commissions. The Code should be amended to substantially broaden and guarantee the representation of political parties on election commissions, including the CEC.

The OSCE/ODIHR also recommends that the provision for replacement of election commission members be amended to prevent removal of a member for political reasons.²⁹ At a minimum, the amendment should provide for (1) written notice to the 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.

An amendment to paragraph (3) of Article 11 provides that the chairpersons of Oblast, Bishkek City and Osh City election commissions shall be full-time officials. This is in addition to the Chairperson of the CEC. This amendment will hopefully increase the professionalism of electoral administration as well as facilitating preparations for the elections.

Paragraph (7) of Article 11 has also been amended concerning the membership of election commissions. The OSCE/ODIHR has commented during previous elections that precinct and district election commissions have been dominated by local state officials and that this was detrimental to at least the perception of impartiality of these

provides for a type of plurality system: “the candidates (in accordance with the number of seats) who won the largest number of votes cast in the election in the corresponding electoral district shall be deemed elected”. However, Article 85 does not state how unfilled seats are allocated when one, two, or a few candidates collectively receive all the votes and there are remaining seats to be filled.

²⁸ See Review of Amendments to the Election Code, Kyrgyz Republic (15 February 2002); Final Report on Parliamentary Elections in the Kyrgyz Republic, 20 February and 12 March 2000 (10 April 2000); Final Report on Presidential Elections in the Kyrgyz Republic, 29 October 2000 (16 January 2001).

²⁹ Paragraph (3) of Article 16 regulates replacement of a member of an election commission.

commissions. This amendment provides that that “Civil and municipal servants shall not comprise more than one-third of the total number of election commission members”. It can be argued that in the absence of substantial confidence in the election process that such persons should not be members of election commissions at all because they are beholden to the state authorities.

The amended Election Code does not address the issue of where an election commission office may be located. The location of an election commission inside a governmental institution building can be explained as a logistical issue connected with the supplying of sufficient support for election administration. However, the location of an election commission on the premises of a governmental institution can raise concern. Thus, **the OSCE/ODIHR recommends** that the Code be amended to require, in the first instance and where possible, that the CEC and all other election commissions be located in non-governmental buildings. **The OSCE/ODIHR also recommends** that the proposed amendment adding paragraph (5) to Article 37, which requires authorities to ensure adequate utilities and communications for election commissions, be further amended to state that this cannot be the sole basis for locating an election commission and that first consideration must be given to locating an election commission in non-government premises that facilitate observation.

C. ELECTION RULES

1. Voters Lists

The OSCE/ODIHR has previously commented that inaccuracies in the voter lists have constituted a problem in prior elections and led to a large number of voters being included in additional lists. As the practice of adding voters to lists shortly before an election creates the opportunity for electoral fraud, **the OSCE/ODIHR recommends** that a voter requesting to be added to a list due to a move to a new place of residence should be required to produce a certificate of de-registration from the previous place of residence.

Paragraph (1) of Article 22 states that lists of voters at precinct stations shall be presented for general familiarizing and additional updating not later than 15 calendar days prior to election day. This may not be sufficient time for public scrutiny, appeals, decisions and revisions. **The OSCE/ODIHR recommends** that the legislature consider whether this time is sufficient and amend the Code to provide for additional time if this would improve the quality of the voter lists.

Paragraph (2) of Article 22 allows for amendment of the voter lists on election day. While such a provision is used in some countries, it is subject to abuse. If sufficient time is allowed for consideration and amendment of the voter lists, as recommended above, then election day addition should not be necessary and, considering problems noted in past elections, should be avoided. **The OSCE/ODIHR recommends** that Article 22 be accordingly amended.

2. Election Campaign Provisions

Paragraph (1) of Article 30 limits the State guarantee of “free conduct of pre-election campaigning” to specifically identified groups “that have nominated candidates”. As all citizens, as well as other groups, have the right to free expression, association and speech, which encompasses the right to promote and support candidates and political parties, regardless of whether the citizen or group has nominated a candidate, paragraph (1) of Article 30 impermissibly limits the rights of citizens and other groups. This limitation is contrary to OSCE commitments, other international standards, and domestic constitutional law.³⁰ **The OSCE/ODIHR recommends** that the limiting phrase “that have nominated candidates” be deleted from Article 30.

Paragraph (2) of Article 30 defines permissible activities during an election campaign. By defining “permissible activities”, it is implied that other legitimate activities, that are not specifically included in paragraph (2), are not permissible. **The OSCE/ODIHR recommends** that paragraph (2) of Article 30 be amended to state that it is not to be applied, interpreted, or construed as a limitation on other legitimate means of political campaigning.

Paragraph (7) of Article 30 states “Pre-election campaigning shall be prohibited in foreign mass media disseminated on the territory of the Kyrgyz”. There is no legitimate basis for such a limitation. This provision violates the principle that a citizen has the right to receive and impart information regardless of frontiers.³¹ OSCE participating states recognize that citizens have the right “to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts.”³² OSCE participating states also commit themselves “to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.”³³ **The OSCE/ODIHR recommends** that this prohibition be deleted from the Code.

Paragraph (8) of Article 30 provides that if a mass media official is a candidate, then his or her TV station or newspaper is not permitted to cover the candidate’s activities. This is contradictory to the principle of offering equal conditions for all candidates. It is also a limitation on the freedom of speech and expression afforded to private media. **The OSCE/ODIHR recommends** that this provision be reformulated to ensure equal treatment of all candidates and respect for private media’s right to free speech and expression.

Paragraph (3) of Article 31 states: “It shall be prohibited to publish in mass media the results of public opinion polls, forecasts of election results, other research materials in connection with elections from the moment of registration of candidates”. This

³⁰ See Paragraph 26.1 of the OSCE 1991 Moscow Document; Paragraph 26 of the OSCE 1999 Istanbul Document; Article 19 of the Universal Declaration of Human Rights; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 16 of the Constitution of the Kyrgyz Republic.

³¹ See Article 19 of the Universal Declaration of Human Rights; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 16 and 36 of the Constitution of the Kyrgyz Republic.

³² Paragraph 26.1 of the OSCE 1991 Moscow Document.

³³ Paragraph 26 of the OSCE 1999 Istanbul Document.

presents two problems. First, such a period of prohibition on opinion polls is excessive. Second, the inclusion of a prohibition on “other research materials” is ambiguous and could constitute a restriction on normal media coverage of an election. **The OSCE/ODIHR recommends** that such references are deleted and replaced with the following text: “It shall be prohibited to publish in mass media the results of public opinion polls within seven days of the day of the election.”

Articles 30 and 32 permit the purchase of paid political advertisements. However, the Code does not require that these broadcasts be identified as paid political advertisements. **The OSCE/ODIHR recommends** that Articles 30 and 32 be amended to require proper identification of these advertisements as paid political advertisements.

Paragraph (1) of Article 35 limits the right to issue printed campaign materials to “candidates, political parties, election blocs”. As each citizen has the rights to free expression, association, and speech, which encompass the right to issue printed campaign materials, paragraph (1) impermissibly limits the rights of a citizen. This limitation is contrary to international standards and domestic constitutional law.³⁴ **The OSCE/ODIHR recommends** that paragraph (1) be amended to include all citizens. Further, paragraph (1) also requires submission of these materials to election commissions in order to ensure that the materials comply with the Code. This requirement for approval of printed campaign materials prior to their dissemination also violates international standards and domestic constitutional law.³⁵ **The OSCE/ODIHR recommends** that the second sentence of paragraph (1) of Article 35 be deleted from the Code.

Paragraph (2) of Article 36 prohibits many types of campaign material and speech, including campaign material or speech that “excites” or creates “animosity” on “social” issues. The current formulation of this paragraph is too broad. It is permissible to prohibit campaign materials and speech that are calculated to incite violence. However, as currently written, this paragraph could be interpreted to prohibit campaign speech and political discussion on important social problems and issues in the country. **The OSCE/ODIHR recommends** that this paragraph be reformulated so that it cannot be applied to limit legitimate political discourse during the campaign.

Paragraph (6) of Article 36 prohibits campaign materials “that can damage dignity, honour or business reputation of candidates”. Article 36 provides that a person who violates paragraph (6) is subject to prosecution. This limitation on free expression of speech and political opinions 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.³⁶ However, in the context of a political campaign in

³⁴ See Articles 19 and 20 of the Universal Declaration of Human Rights; Articles 19 and 22 of the International Covenant on Civil and Political Rights; Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 16 and 17 of the Constitution of the Kyrgyz Republic.

³⁵ *Id.*

³⁶ See, e.g., Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

which candidates make a conscious decision to enter the public sphere to compete for public office, 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 political expression and speech.³⁷ **The OSCE/ODIHR recommends** that paragraph (6) of Article 36 be amended to comply with international standards. **The OSCE/ODIHR also recommends** that paragraph (3) of Article 57 be amended for the same reasons.

3. Financing of Elections

An amendment to Article 50 partially addresses a previously expressed OSCE/ODIHR concern that the prohibition on foreign funding would prevent legitimate observation activities and support of domestic observer groups. Although the amendment partially addresses previous concerns, Article 50 requires further improvement as its current formulation is still contrary to Paragraph 10.4 of the OSCE 1990 Copenhagen Document, wherein participating OSCE States commit to allow domestic observer groups “to have unhindered access to and communication with similar bodies within and outside their countries and with international organizations, to engage in exchanges, contacts and co-operation with such groups and organizations and to solicit, receive and utilize for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law.” Clearly, the Article 50 limitation on “foreign funding” is contrary to the commitment to allow unhindered access to “voluntary financial contributions from national and international sources”. **The OSCE/ODIHR recommends** that paragraph (1) of Article 50 be amended to ensure that the prohibition on foreign funding cannot be applied to preclude international or domestic observer organisations from full engagement in observation activities, including the training of observers, deployment of personnel, compilation of data, fact finding, and subsequent analyses and reporting, and to ensure compliance with Paragraph 10.4 of the OSCE 1990 Copenhagen Document.

Paragraph (1) of Article 56 is of concern as it provides additional grounds for cancellation of a candidate's registration. Under this paragraph, any violation of the procedures for campaign financing (Articles 50 and 51) can result in the cancellation of candidacy. **The OSCE/ODIHR recommends** that this cancellation provision be deleted from paragraph (1) of Article 56.

4. Early Voting

Article 41 of the amended Election Code governs the early voting process. There are two competing proposals concerning Article 41. One proposal is to remove the early voting process from the Code. The other proposal is to increase the opportunities for early voting with the possibility, in some cases, of counting ballots and establishing results as early as three days before the election.

³⁷ 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).

The proposal to broaden the opportunities for early voting is problematic. First, by allowing early voting and the establishment of results before election day, the opportunity to improperly influence the election is created. Indeed, concern with improperly influencing the election has resulted in the absolute ban, in Article 31, on “forecasts of election results” during the entire pre-election campaign. Second, the broadening of early voting increases the opportunity for electoral fraud.³⁸ It places a greater burden on election administration and significantly hinders observation efforts. The burden placed on observer organizations and candidate representatives is substantial. Third, in light of the possibility of obtaining an outside voting certificate under Article 38, there simply is not sufficient justification for a broad early voting process. **The OSCE/ODIHR recommends** that, in light of Article 38 and past problems with electoral fraud that have been observed with voting outside of a regular polling station on election day, the early voting process should be deleted from the amended Election Code.

5. Mobile Voting

The provisions for “mobile voting” in Article 42 have been amended. A positive amendment in paragraph (1) replaces the phrase “or due to other reasons” with “or disability”. This amendment comports with a prior OSCE/ODIHR recommendation that mobile voting be available only to a voter that cannot attend regular voting due to health reasons. However, Article 42 should also provide that all other provisions for voting and transparency are applicable to mobile voting. **The OSCE/ODIHR recommends** that Article 42 state that all procedures for identifying a voter, issuing a ballot, and for observation are applicable to the mobile voting procedure. Further, the number of persons who have used the mobile ballot box must be recorded in the polling station protocol and successive protocols and tabulations by election commissions. In addition, the two or more precinct election commission members who administer mobile voting should be from different political parties.

6. Voting Procedures

An amendment to paragraph (12) of Article 10 requires that ballot boxes should be made of transparent materials. This is a welcome amendment to increase transparency and confidence in the process.

Paragraph (2) of Article 20 states that “Precincts (polling stations) shall be established ... with not more than 3,000 voters per precinct”. This number is very high and places a severe administrative burden on the precinct election commissions. In places where the required resources are available, **the OSCE/ODIHR recommends** that the number of voters allocated to a precinct be decreased to a more manageable number, such as between 1,000 and 1,500.

Paragraph (5) of Article 40 provides that, in polling stations with less than 500 registered voters, a voter is not required to provide documented proof of personal identification. This provision is not acceptable as it contravenes Copenhagen Commitment 7.3 that guarantees universal and equal suffrage rights to all citizens.

³⁸ Prior OSCE/ODIHR reports have noted that electoral fraud is much more prevalent with early voting and mobile voting than with regular voting in a polling station on election day.

The same voting rules must apply to all voters.³⁹ **The OSCE/ODIHR recommends** that this provision in Article 40 be deleted and that Article 40 include a general provision requiring that all procedures for identifying a voter and issuing a ballot are applicable for voting in “special” precincts (military, hospitals, remote areas, etc.).⁴⁰

There are two competing amendments in paragraph (7) of Article 40 concerning the manner of marking the ballot. One proposal provides that the voter places a mark in the square on the ballot related to the candidate whom the voter selects. The second proposal allows the voter to vote “against all candidates”. **The OSCE/ODIHR recommends** that the first proposal be adopted as it is much preferred over the second proposal.

Paragraph (11) of Article 40 provides that the chairperson of the precinct election commission is responsible for maintaining order in the polling station. **The OSCE/ODIHR recommends** that this paragraph be amended to provide that, in case of serious disorder, the chairperson may seek assistance from security forces, which should leave the polling station premises immediately after order has been restored.

7. Determination of Election Results

The procedure in paragraph (8) of Article 44 for counting ballots in mobile ballot boxes is of concern. The procedure requires that all ballots in a mobile ballot box be invalidated if the number of ballots in the mobile ballot box exceeds the number of written applications requesting to vote outside the premises. This provision treats voters unequally and discriminates against mobile voters because this invalidation requirement does not apply to regular ballot boxes. The same counting rules must apply to all voters.⁴¹ Further, the existence of one ballot too many is not a sufficient justification for invalidating all mobile ballots. The better practice is to count mobile ballots with regular ballots so that the same counting rules apply to each type of ballot. **The OSCE/ODIHR recommends** that Article 44 be amended to address these concerns. One hundred legitimate and valid mobile ballots should not be invalidated just because one extra ballot is found in the mobile ballot box.

Paragraph (21) of Article 44 provides that a copy of the precinct protocol “shall be posted for general information in the place, established by the precinct election commission.” **The OSCE/ODIHR recommends** that paragraph (21) be amended to provide that the protocol shall also be posted at the precinct election commission. **The OSCE/ODIHR also recommends** that a similar provision be included in paragraph (6) of Article 45 for the posting of an election commission protocol.

Paragraph (9) of Article 45 allows for a recount of votes. **The OSCE/ODIHR recommends** that this paragraph be amended to state that the notice to observers of

³⁹ See Paragraph 7.3 of the OSCE 1990 Copenhagen Document; Articles 2 and 21 of the Universal Declaration of Human Rights; Articles 25 and 26 of the International Covenant on Civil and Political Rights; Articles 1(6) and 15(3) of the Constitution of the Kyrgyz Republic.

⁴⁰ Similar provisions should be included in the corresponding articles for determination, announcement, and publication of results from special polling stations.

⁴¹ See Paragraph 7.3 of the OSCE 1990 Copenhagen Document; Articles 2 and 21 of the Universal Declaration of Human Rights; Articles 25 and 26 of the International Covenant on Civil and Political Rights; Articles 1(6) and 15(3) of the Constitution of the Kyrgyz Republic.

the recount shall be provided in a timely manner. It is preferable for the paragraph to state a specific minimum number of hours sufficient to allow for any necessary travel to observe the recount.

Article 45 regulates the procedure for determining the election results by superior election commissions. **The OSCE/ODIHR recommends** that Article 45 be amended to clearly state that all results, including the summary table required by paragraph (3), provide the results of mobile voting and early voting, and that all 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 CEC. This degree of detail is necessary to enable observers to track results and locate specifically where mistakes or potential fraud has occurred if the numbers are unlawfully changed during the tabulation processes.

Article 46 regulates invalidity of results. The grounds for invalidation are not clear in the English text and paragraphs (4), (7), and (8) appear to be contradictory. Sub-paragraphs (a) and (b) of paragraph (4) appear to state the single principle that invalidation should occur *only* where an electoral irregularity could have affected the determination of the winning candidate. Sub-paragraphs (c) and (d) of paragraph (4), and paragraphs (7) and (8), however, apply criteria that disregards this single principle and focuses on the electoral irregularity that was committed. **The OSCE/ODIHR recommends** that Article 46 be clarified and that invalidation should occur *only* where an electoral irregularity could have affected the determination of the winning candidate, regardless of the nature of the electoral irregularity. Further, any electoral irregularity, regardless of the nature of the irregularity, should be justification for invalidation if the irregularity could have affected the determination of the winning candidate.

Article 48 provides for the publication of election results. **The OSCE/ODIHR recommends** that paragraph (4) of 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 CEC 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 be an indicator of electoral fraud.⁴²

Article 49 provides for the use of an automated information system (“Shailoo”) in elections. Paragraph (1) of the article provides that “all election commission members shall have the right to get familiarized with any information input and output in the automated information system.” This article should be expanded to specifically ensure that interested parties have the opportunity to verify the integrity and reliability of the system. **The OSCE/ODIHR recommends** that the Code provide that authorized representatives of candidates have the opportunity to verify the accuracy and soundness of hardware and software used for any automated information system. Whether manual, mechanical, or electronic processes are used, procedures for audit

⁴² The same information for early voting should be included if the early voting process is retained in the law.

and inspection to ensure accuracy and reliability must be in place. Further, **the OSCE/ODIHR recommends** that the paragraph (1) right of familiarization “with any information input and output” be expanded to include observers and representatives of candidates. **The OSCE/ODIHR also recommends** that Article 17 be amended to include this in the list of rights of observers and candidate representatives.

D. TRANSPARENCY

The amended Election Code provides for some observation of election processes. However, the Code should be improved in the area of transparency.

Paragraph (2) of Article 17 does not include domestic or foreign observers in the list of persons who have the general right to attend meetings of election commissions, and paragraph (6) limits domestic and foreign observers’ observation of election day activities of election commissions to “when they establish the results of voting, the election returns, compile corresponding protocols on the results of voting, and election results, as well as at a repeated count of votes”. As a result of this language, domestic and foreign observers are limited in their observation activities. Transparency of the *electoral processes* is a fundamental principle required by OSCE election related commitments and other international standards. Paragraph 8 of the OSCE 1990 Copenhagen Document recognizes the importance of the presence of observers, both foreign and domestic, to enhance the *electoral processes*. Observation should include the right to observe all electoral processes, including all activities, meetings, and decision making in election commissions, before, during, and after elections. **The OSCE/ODIHR recommends** that paragraphs (2) and (6) of Article 17 be accordingly amended.

Paragraph (4) of Article 17 limits an observer organisation to one observer in a polling station. This limitation is not appropriate where there is sufficient space for more than one observer from each organisation. Observer organisations often deploy observers in teams of two persons. **The OSCE/ODIHR recommends** that paragraph (4) include additional language that states the limitation is not applicable where there is sufficient space to accommodate a two person observer team.

The language in paragraph (7) of Article 17 implies that an observer will only be permitted to observe in one polling station or election commission. Effective observation requires that an observer be accredited and able to attend several polling stations and election commissions. **The OSCE/ODIHR recommends** that paragraph (7) be accordingly amended.

The Code should 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 process*. The Code should also establish an expedited process for observers to obtain corrective relief when an election commission denies the rights of an observer, including the right to be registered as an observer, or fails to consider an application for accreditation as an observer.

Article 39 of the amended Election Code does not define who can observe the printing of ballot papers and who can be present when the ballot papers are delivered from the printing house. Further, it limits observation of the destruction of defective ballots at the printing house to election commission members and candidate representatives. Both the printing and delivery processes, as well as the destruction of defective ballots, should be open to the same level of transparency as other parts of the election process. Accordingly, **the OSCE/ODIHR recommends** that the Code be amended to explicitly allow the printing process, delivery of ballot papers to election commissions, and destruction of defective ballots be open to observers and representatives of the media.

E. LEGAL PROTECTION

1. Lack of a Uniform and Consistent Process for Legal Protections

Articles 54 and 55 of the amended Election Code fail to establish a uniform and consistent process for protecting suffrage rights. Although paragraph (4) of Article 55 provides that an election commission must “suspend” its consideration of a complaint when the complaint has also been presented to a court, the possibility of filing a complaint with either an election commission (Article 54) or a court (Article 55) creates the possibility of “forum shopping” and inconsistency in decisions. As uniformity and consistency in decisions is important, **the OSCE/ODIHR recommends** that challenges to decisions be filed in only one forum designated by the Code – either a court or higher election commission. If the forum designated by the Code is an election commission, then the Code must provide that the right to appeal to a court is available after exhaustion of the administrative process.

The OSCE/ODIHR recommends that Articles 54 and 55 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 to prevent “forum shopping”. 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 Code 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; and
- the right to appeal to an appellate court if a remedy is denied.⁴³

⁴³ 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. Further, the comments and recommendations stated in the OSCE/ODIHR Review of the Election Legislation for Election Disputes, Appeals and Penalties, Republic of the Kyrgyz Republic (26 April 2001)

Article 55 and other provisions in the amended Electoral Code provide some of the protections noted above. However, not all required protections are provided in the Code. Further, it would be better to include all of these protections in a single article (or closely grouped articles) in the Code regulating complaints and appeals.

2. Deadline for Complaints and Appeals

Both Articles 54 and 55 have a deadline of 10 days for filing a complaint or appeal. This deadline is triggered by election day, regardless of whether the election results are known and regardless of whether it is possible to discover the electoral irregularity within the 10 days. **The OSCE/ODIHR recommends** that the Code be amended to provide an exception to this deadline where the election results are not known within 10 days or where the electoral irregularity could not have been discovered within 10 days. However, this recommendation should not be misconstrued as contradictory with OSCE/ODIHR recommendations for expeditious and prompt adjudication of election disputes. This recommendation is to ensure that suffrage rights and the integrity of the election results are not arbitrarily disregarded where an election has been stolen and the theft cannot be discovered for example until 11 days later.

IV. CONCLUSION

The current text of the amended Election Code requires improvement in order to respect OSCE commitments and other international standards. There are also technical drafting concerns with the Code that have been noted in this assessment.⁴⁴ 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 the Kyrgyz Republic in their stated objective to improve the legal framework for elections, meet OSCE commitments and other 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 and hopes that there will also be a commensurate commitment on the part of the authorities to fully and effectively implement the Code at future elections.

should be considered when the legislature considers additional amendments to the Election Code.

⁴⁴ There are also many instances in the law where the drafters have not made changes in some articles that are required for consistency with proposed amendments. As an example, Article 75 provides for establishing results for elections to the Legislative Assembly and People's Representatives Assembly. This article also provides for establishing results on political party lists for the single national constituency. There are numerous articles with similar technical mistakes. The drafters should carefully review the law for such occurrences and special care should be taken to ensure that all articles of the law are consistent with the proposals ultimately adopted.