



Office for Democratic Institutions and Human Rights

KYRGYZ REPUBLIC

**REVIEW OF DRAFT AMENDMENTS
TO THE ELECTION CODE**



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KYRGYZ REPUBLIC

REVIEW OF DRAFT AMENDMENTS TO THE ELECTION CODE¹

24 September 2001

I. EXECUTIVE SUMMARY

The draft amendments, prepared by the Central Election Commission (CEC), include a number of positive changes, many of which are in line with OSCE/ODIHR recommendations prepared after the 2000 parliamentary and presidential elections in the Kyrgyz Republic. However, a number of problematic aspects of the Code have not been adequately addressed.

Some of the positive draft amendments are:

- Deletion of Article 92, which unfairly restricted the registration of parties, and its replacement with more acceptable requirements for political parties wishing to compete in elections;
- A period of one month from the date of publication of the final results for the submission of appeals, rather than one month from the date of the election;
- Prohibition of opinion polls only in the five days prior to election date, rather than from the time of registration of candidates;
- Explicit statement that result protocols must be completed in ink, which should reduce cases of illegal tampering of protocols;
- Requirement for authorities to issue a written opinion for refusing a request by candidates/political parties to use public premises for a campaign meeting;
- Further explicit prohibition on local officials to be present during election commission sessions and in polling stations; and
- Clarification and rationalisation of repeat voting procedures to ensure that, if one of two candidates in a second round run-off withdraws, he/she must be replaced by the next-placed candidate.

However, some of the draft amendments raise concerns, including:

- Addition of an article prohibiting the financing of elections “in any form” by foreign States, enterprises, organisations, citizens, and international organisations. This could be used to justify the exclusion of domestic monitoring organisations which receive foreign financial and/or technical support. This draft amendment might also limit the possibility for the election administration to receive necessary and justified foreign assistance.
- Continued intrusive regulation of election bloc formation. The authorities should not seek to intrude the internal workings of a political party or bloc, unless such regulation is proportionate and necessary.

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

- The draft amendments relating to candidate registration do not provide the necessary and reasonable safeguards recommended by OSCE/ODIHR. The Code would still allow for the de-registration of candidates up to the day before election. In addition, the Code would not ensure lesser sanctions than de-registration if a candidate's sole infringement is not serious or substantial, for example, an administrative shortcoming in registration documents;
- The new procedures for determining candidates for heads of local self-government appear to be undemocratic and in violation of OSCE Commitments. They limit the number of candidates allowed to appear on the ballot to five and effectively allow the local Kenesh to determine the identity of the five.

Some articles requiring amendments have not been addressed at all, including:

- The draft amendments do not require the local Kenesh to include nominated representatives of political parties and groups of voters on election commissions. Instead, the draft amendments would only oblige them to “take account of suggestions” made by such stakeholders. This is inadequate to ensure plurality, transparency and confidence in the election administration.
- The draft does not address the procedures for identifying the Chairman and membership of the CEC. In its report on the presidential election, OSCE/ODIHR recommended that the full membership should reflect the range of election stakeholders participating in the election, and that the procedures for nominating the Chairman should be more pluralistic and not the sole prerogative of the President of the Republic.
- The Code would still provide for the start date for election campaigning to be from the moment of registration. As stated by OSCE/ODIHR in its previous recommendations, this does not ensure equality of opportunity for election participants as registration can be on a rolling basis, thus potentially providing some participants with more campaign time than others.

The above comments are offered to further improve and strengthen the legislative base for elections in the Kyrgyz Republic. However, the key to improving the quality of elections remains the fair implementation of the Code, and an undertaking by the authorities not to interfere in the electoral process. Without such a political commitment, even the best Code can be subverted.

II. INTRODUCTION

The OSCE/ODIHR deployed Election Observation Missions (EOM) for the Kyrgyz Parliamentary elections of February/March 2000 and for the Presidential election of October 2000. In the final reports of the two EOMs, a series of recommendations suggested changes to the election procedures and legislation. In addition, OSCE/ODIHR conducted an analysis of the Election Code of the Kyrgyz Republic in May 2000. This offered an in-depth assessment of the Code and a further series of recommendations aimed at strengthening the Code. Through these assessments of the Code and the electoral and political processes in the Kyrgyz Republic, the OSCE/ODIHR has gained an insight into the strengths and weaknesses of the legislative base of elections in the country.

Authorities must note that: “Interference in the process by State authorities undermined the independence and integrity of courts, election administration and state media ... recommendations [for changes] will serve to strengthen the legislative, political and administrative processes, but without a concurrent political will on behalf of authorities to cease such interference in the future, any changes will have a negligible impact on the process.”²

Despite a number of weaknesses in the legislative framework for elections in the Kyrgyz Republic, with political will the Election Code could have provided for reasonably acceptable elections. However, during the parliamentary and presidential elections, the OSCE/ODIHR concluded that such political will was absent. Thus, the extent to which any new amendments to the Code can have a positive impact will ultimately be determined by the intent of those implementing the Code, those organising the elections, and those in charge of various State institutions.

These comments must be read in conjunction with previous analysis and recommendations offered by OSCE/ODIHR regarding the Electoral Code.

III. ANALYSIS OF DRAFT AMENDMENTS TO THE ELECTORAL CODE

A. Procedures for Establishing the Election Commissions

According to the proposed amendment to Article 11.6, Precinct Election Commissions (PEC) would be established by superior election commissions 30 calendar days prior to the election rather than 40 days. This would provide 10 more days for the nomination of PEC members, a positive change as political parties and non-governmental organisations (NGOs) complained in the past that there was insufficient time to identify and nominate PEC members.

However, no amendments are proposed to Article 11.7 which states that nominations are made by local Kenesh with “regard to suggestions made by political parties, public associations, voters’ meetings...”. ODIHR, in its final reports on both elections in 2000, urged a change to this article, formalising the obligation on local Kenesh to take account at least of nominations made by parties participating in that locality, thereby ensuring more pluralistic, representative and thus more transparent, election administrative bodies. Moreover, the Kenesh should be required to ensure, as far as practicable, multi-party representation within the PEC, or to ensure that the PEC includes at least one representative of each party participating at a given locality.

B. Status of an Election Commission Member

Article 16.3, which addresses the release or dismissal of an election commission member, would be extended to provide for the release of a person from their duties if the nominating or electing body finds that the said person is “systematically failing to fulfil [their] duties”.

² OSCE/ODIHR Final Report on Parliamentary Elections in the Kyrgyz Republic, Warsaw, 10 April 2000.

Based on the experience of the parliamentary elections, notably with the violations by some election commission members in Talas Constituency #44, it is welcomed that superior election commissions will now be in a position to dismiss such individuals for misconduct.

However, the failure of superior commissions to acknowledge overt violations of the election laws during previous elections suggests that the will to implement the law in this regard is as important as the inclusion of such explicit requirements. Further, there is still no articulated penalty for such violations by election commission members, as recommended by OSCE/ODIHR in its final report on the parliamentary elections. The Code should establish clear administrative and criminal responsibility for those who commit violations of its provisions and violate citizens' rights.

C. Transparency in the Activity of Election Commissions

Article 17.4 addresses the issue of persons authorised to be present at meetings of election commissions. This article would be supplemented to specify that "each candidate, political party, election bloc shall have the right to be present in the electoral area". The draft amendment limits such presence to "not more than one representative".

This limitation is reasonable given the reality of the condition of many of the premises in which election commissions are based in the Kyrgyz Republic. However, in recognition of the practical problems facing parties and NGOs, it would be prudent to re-formulate the amendment by adding "not more than one representative at one time". This would preclude the imposition of a strict registration of a single identified person for each polling place or election commission and instead allow stakeholders to be more flexible in allocating people to electoral areas.

A second draft amendment to the article would make explicit that the "presence in the electoral areas of officials from the governmental authorities and local self-government shall not be permitted, except for workers of legal protective bodies providing safeguard of public order in the course of voting". This is in accordance with the OSCE/ODIHR recommendations in the final report on the presidential election.

The draft amendment is welcome, as the unauthorised presence of such persons was a serious problem in previous elections. However, it may be expedient to clarify that the officials identified in this amendment may attend polling stations in order to vote, but should then leave immediately and that law-enforcement personnel should only enter to restore public order when requested by, or on behalf of, the chairman of the PEC and should leave the polling station as soon as order has been restored.

D. Organisation of an Election Commission's Activity

According to draft amendments, Articles 18.13 and 18.14 would be substantially supplemented to require State-owned electronic media to provide "free of charge, the Central Election Commission ... with not less than 15 minutes of airtime a week in their channels for the purpose of clarification of the electoral legislation ... informing voters of the terms and the order of carrying out necessary election actions, of the

course of the election, and for replies to voters' questions". A parallel obligation on State-owned print media would provide the CEC with free space for the same purpose.

The draft amendment is positive, as it provides the CEC with an opportunity to explain to voters, and even participants, many aspects of the process, thus increasing familiarity and transparency. However, such a provision should not be misused by the CEC, which issued a number of partisan press notices during the presidential election against some opposition candidates and one domestic monitoring organisation.

E. Election Blocs

The draft amendment of Article 25.3 would make an already overly-regulatory article even more demanding, and fail to take account of the OSCE/ODIHR recommendation calling for more liberal provisions for the formation of election blocs and nomination of candidates.

The original article stated that, "The decision to enter an election bloc shall be taken at a congress (conference) of a political party". An election law should not regulate the manner in which political parties decide whether or not to form an election bloc. The only legal requirement should be the manner in which the bloc is registered as a participant in the election. Likewise, parties/blocs should be free to establish their own mechanism for selecting candidates.

The draft amendment, rather than liberalising this aspect of the Code, continues to overly regulate, stipulating that "the decision on entering an electoral bloc shall be adopted at a congress (conference) of each of the political parties with an indication of the names of those political parties with which it is proposed to create an electoral bloc."

Further, the draft amendment to Article 27.1, stipulates that, for the registration of candidates (lists of candidates), a protocol must be submitted with "a decision on nominating a candidate (list of candidates) taken by the congress (conference) of a political party, the election bloc, the assembly (conference) of a regional branch of the political party, or a gathering of voters".

This draft amendment is not clear. If it is meant to state that the regional branches of the political parties comprising the election bloc must each hold a congress and thereby give their formal support to the candidate list of the party or election bloc, then this again imposes an excessive degree of regulation and represents a limitation on the rights and freedoms usually enjoyed by political parties and election blocs.

F. Campaign Timeframe

The draft amendment to Article 31.3 is welcome and in accordance with the OSCE/ODIHR recommendation on the parliamentary elections. The draft amendment that: "Within five calendar days prior to the voting day, and on the voting day, publication (promulgation) in the mass media of the results of public opinion surveys shall not be permitted", would be far more reasonable than the existing

article, which prohibits such surveys from the day of registration of candidates and also includes a wide-ranging prohibition on forecasts about the election. However, OSCE/ODIHR had recommended that a uniform start date for the campaign be set, rather than allowing the campaign to start from the time of registration which may vary. No consideration of this recommendation is included in the draft amendments to the Code.

G. Campaigning by Means of Mass Events

The draft amendment to Article 34.2 is welcome that, in the case of a “refusal to a candidate, political party, election bloc to provide a room for meetings with voters, bodies of the state power and of the local self-government shall be obliged to issue a motivated refusal”. It should serve to strengthen the transparency of the electoral process and ensure a more fair election campaign, as State and local government representatives would be less able to obstruct the activities of candidates.

H. “Misuse” of the Freedom of Expression

The draft amendment to Article 36.2 causes some concern, as the purpose of the change is not clear. Given the environment in the Kyrgyz Republic, it could be misused to limit and even intimidate the activities of some candidates. The draft amendment prohibits the “misuse of freedom of speech” and “misuse of freedom of the mass media”. The authorities may interpret “misuse” in a subjective and restrictive manner. During the presidential election, the CEC unfairly condemned opposition candidates for their speeches.

I. The Protocol of a Precinct Election Commission on Voting Results

The draft amendment to Article 43.3, that: “Records of the results of voting shall only be made in ink” is a welcome addition and should serve to strengthen the electoral process. In the past, protocols have been filled out in pencil, allowing changes to be made at a later stage. This amendment is in accordance with the OSCE/ODIHR recommendation in its final report on the presidential election.

J. Procedures for Determining Results of Elections

The draft amendment to Article 46.3, which invalidates the election in a particular constituency if the number of votes “against all” is greater than the number of votes for the candidate with the highest number of votes, is of questionable value. This rule is part of the Soviet legacy. If voters in a constituency wish to vote in this way, their voice should still count. However, if the rule is to be preserved, it should at least not apply to a repeat election.

K. Financing of Preparation and Conduct of Elections

Article 50.1 is amended with the sentence: “Financing of elections in any form by foreign states, enterprises, organisations, citizens, international organisations shall not be permitted”.

The intention of this draft amendment is not clear. It may prohibit support from UNDP for the Shailoo Electronic System or the IFES/USAID-funded training of election officials. But more likely, the amendment could be used to justify the exclusion of domestic observer groups funded by foreign organisations. During the presidential election, the chairman of the CEC repeatedly asserted that one of the NGO groups observing the election should be denied accreditation because it received financial support from a foreign organisation, the US-based National Democratic Institute for International Affairs (NDI). Such support is a common practice in transitional democracies.

This draft amendment should be clarified to ensure that it does not prevent the authorities receiving necessary support for the holding of elections and that it is not intended to prevent NGO groups from receiving financial support from international organisations to organise domestic observation of elections.

L. Election Funds

The draft amendment to Article 51.10 could cause problems. The amendment prohibits “Legal entities, their subsidiaries, representation offices” from providing “*at the request of candidates, political parties, election blocs*, works, services, sale of goods, directly or indirectly related to elections, either free of charge or at unreasonably low prices”.

The inclusion of the qualifying clause “at the request of candidates” etc., opens the possibility for the provision of such services or goods on a voluntary basis. It would be hard to prove whether the act was truly voluntary and made without the request of the candidate.

Further, during the parliamentary elections, the CEC tried to assert that the invitation for candidates to appear on TV talk shows during the elections, be considered a free gift and therefore should not be allowed. Eventually, the CEC did not enforce this position. The OSCE/ODIHR urges to make it explicit that such an invitation should not be prohibited.

M. Deadline for Appeals

The draft amendment to Articles 54.5 and 55.13 to set the time limit for appeals as one month from the publication of the results rather than one month from the day of the election is in line with OSCE/ODIHR recommendation. This positive amendment will provide a more fair and reasonable opportunity for citizens and stakeholders to seek legal redress for alleged violations.

N. Judicial Appeals Procedure

Under the existing Article 55.3, where a complaint is filed with a court and an electoral commission, and the court accepts the complaint for consideration, the electoral commission suspends its consideration of the complaint until the court has ruled on the issue. However, under the draft amendments, this rule is replaced with the following: “A court shall adopt a complaint for consideration only after the complaint has been considered by the Central Electoral Commission”. Under this

proposal, a complaint cannot be considered by any court unless the complainant has first taken the complaint up to the CEC, whether or not he/she wishes to pursue the complaint through the electoral commissions. In practice such a rule would seriously undermine the important principle set out in Article 55.1, that the unlawful actions of an electoral commission are appealable to a court. The process of pursuing a complaint to the CEC would almost invariably entail considerable delay. Citizens should have direct access to a court for the prompt and effective protection of their electoral rights.

O. Grounds for the Cancellation of a Candidate's Registration

The de-registration of candidates during the 2000 parliamentary elections was one of the main concerns of the EOM. Election authorities unfairly acted against the interests of a number of candidates. As a result, the EOM made a series of recommendations in its final report for the amendment of the Code in this area. Unfortunately these recommendations have not been taken into account in the draft amendments.

Article 73.4 provides for a 10-day period for the respective election commission to consider the registration documents of candidates. The OSCE/ODIHR recommended that after consideration of these documents a candidate's registration should be considered final, and the status of the registration only reconsidered in the most serious and exceptional circumstances. The OSCE/ODIHR also stressed that the penalty for violations of the registration procedures should be proportionate, and that de-registration is not necessarily the suitable punishment for an administrative error. The OSCE/ODIHR also stressed that a candidate should not be de-registered between the two rounds of voting. None of these issues have been taken into account in the draft amendments.

The draft amendment of Article 56.1 providing for a deadline for the cancellation of the candidate registration not later than on the day preceding the voting day is inadequate. As indicated above, these provisions were misused by the authorities and candidates during the 2000 parliamentary elections to the detriment of the credibility of the electoral process. Further amendments, in line with OSCE/ODIHR recommendations, should be considered.

P. Signatures in Support of a Presidential Candidate

Under the draft amendment, new provisions detailing the collection of signatures for presidential candidates would be added to Article 62. These amendments are highly bureaucratic and may prove too cumbersome for candidates.

Q. Procedures for the Nomination of Candidates for Legislative Assembly

One of the main criticisms during the parliamentary elections was the unreasonable requirements for the registration of political parties contained in Article 92 of the Code. The OSCE/ODIHR proposed that this article be deleted and replaced with an amendment to Article 72.1. The draft amendment requires that a political party only has to be registered for six months prior to the day of election and contains no requirement for a party's charter to state intention to stand for election.

The OSCE/ODIHR also argued that all parties officially registered under the Political Parties Law (June 1999) should be recognised for the purpose of competing in the election. This has not been adopted in the draft amendments. Nonetheless, the draft amendment to Article 72 is an improvement on the previously unreasonable and restrictive Article 92.

R. Registration of Candidates for Legislative Assembly

The draft amendment to Article 73.4 brings the period for consideration of candidate nominations by Territorial Election Commissions into line with the period provided for CEC consideration of Lists of Candidates. Both bodies would be provided with a 10 day period for review of documents. This is in line with an OSCE/ODIHR recommendation that the authorities require more time for full consideration of the documents to ensure a proper and final registration of a candidate.

The draft amendment to Article 73.5 provides for only a 20 day period between the completion of the registration process and the day of the election. Previously it was 25 days. Given that candidates are not allowed to legally start their campaign until registration, and given that there is a 24 hour campaign silence period, this would provide just 19 days for the election campaign, which is fairly short and to the detriment of candidates unable to secure widespread TV coverage.

S. Summing Up of the Election Results

The draft amendment to Article 75.4, stating that, “In the case where in the electoral district there are only two candidates on the ballot paper, and the one receiving the largest number of votes of those who have participated in the election shall be deemed to be the winner”, would serve to clarify this aspect of the process. The implication is that if there are only two candidates competing, then it is not necessary to secure an absolute majority of registered voters in order to win in the first round. This is a reasonable amendment.

T. Repeat Voting

The draft amendment of Article 76, which addresses repeat voting, is welcomed, and is in line with the opinion of the OSCE/ODIHR recommendation after the parliamentary elections. Under the amendment, in the event of the withdrawal of one of the two candidates in a second round run-off, then the third placed candidate would, in all cases, replace the candidate who has withdrawn. This is confirmed by deleting the second paragraph of Article 76.3, which states: “In case there is one candidate left, voting shall not be conducted and a candidate shall be recognised to be elected”.

U. Constituencies

The draft amendment to Article 86.4 that: “Multi-mandate electoral districts shall be formed with an approximate equality in the number of voters per one mandate”, is welcomed. However, while the principle is in line with good practice, it would be helpful to clarify this further by adding a margin of acceptable difference, for example +/- 10%.

V. Organisation of the Election of the Heads of the Self-Government

Under the amended Article 95.3, in the event that more than five candidates for the post of head of the local self-government are put forward, then the names will be forwarded to the relevant local Kenesh for a vote. This vote will be used to determine the top five candidates, who will then be included on the ballot.

It is not clear why the number of candidates should be limited to five. More significantly, candidates put forward by groups of voters and political parties effectively can be eliminated by the local Kenesh. This provision could be easily abused, particularly as there is no mention of procedures regarding withdrawal following the “selection” of the chosen five by the Kenesh.