



**Office for Democratic Institutions and Human Rights**

**KYRGYZ REPUBLIC**

**ASSESSMENT OF THE ELECTION CODE**



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## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION AND CONTEXT .....</b>	<b>1</b>
<b>II.</b>	<b>EXECUTIVE SUMMARY.....</b>	<b>2</b>
<b>III.</b>	<b>DISCUSSION OF THE AMENDED ELECTION CODE .....</b>	<b>3</b>
A.	CANDIDACY RIGHTS .....	3
1.	<i>Article 3 Limitation on Candidacy Rights .....</i>	<i>4</i>
2.	<i>Articles 28, 36, and 56 Limitations on Candidacy Rights .....</i>	<i>5</i>
3.	<i>Article 58, 61 and Article 62 Limitation on Presidential Candidacy Rights .....</i>	<i>6</i>
4.	<i>Article 65(4) Limitation on Political Rights as a Condition of Candidacy.....</i>	<i>7</i>
5.	<i>Collection of Signatures for Presidential Candidacy .....</i>	<i>8</i>
6.	<i>Residency Requirement for Parliamentary Candidacy.....</i>	<i>8</i>
7.	<i>Correction of Defects in Candidate Registration Documents.....</i>	<i>9</i>
8.	<i>Electoral Deposits .....</i>	<i>9</i>
9.	<i>Over-Regulation of Political Parties/Electoral Blocs .....</i>	<i>10</i>
10.	<i>Prohibition on Candidacy in Repeat Elections.....</i>	<i>10</i>
B.	ELECTION COMMISSIONS.....	11
C.	ELECTION RULES.....	12
1.	<i>Formation of Electoral Constituencies.....</i>	<i>12</i>
2.	<i>Voter Lists.....</i>	<i>13</i>
3.	<i>Election Campaign Provisions .....</i>	<i>14</i>
4.	<i>Financing of Elections.....</i>	<i>16</i>
5.	<i>Media Provisions.....</i>	<i>17</i>
6.	<i>Early Voting.....</i>	<i>18</i>
7.	<i>Mobile Voting .....</i>	<i>18</i>
8.	<i>Voting Procedures .....</i>	<i>18</i>
9.	<i>Determination of Election Results .....</i>	<i>20</i>
10.	<i>Invalidation of Election Results and Failed Elections.....</i>	<i>22</i>
D.	TRANSPARENCY .....	22
E.	LEGAL PROTECTIONS .....	24
1.	<i>Impossibility to Challenge Potential Fraud Discovered After Signing of Protocols.....</i>	<i>24</i>
2.	<i>Lack of a Uniform and Consistent Process for Legal Protections.....</i>	<i>24</i>
<b>IV.</b>	<b>CONCLUDING REMARKS.....</b>	<b>25</b>

# KYRGYZ REPUBLIC

## ASSESSMENT OF THE ELECTION CODE

7 July 2006

### I. INTRODUCTION AND CONTEXT

This assessment reviews and comments on the Election Code (herein “the Code”) of the Kyrgyz Republic, as amended by the Jogorku Kenesh (Parliament) through 27 January 2006.<sup>1</sup>

The assessment is a result of a long standing dialogue and cooperation between the authorities and civil society of the Kyrgyz Republic and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR). The OSCE/ODIHR commented in November 2003 and January 2004 on proposed amendments to the Code proffered by both executive and legislative branches of government.<sup>2</sup> The OSCE/ODIHR has also provided comments and recommendations on the legislative framework for elections within its reports related to the Parliamentary Election and Early Presidential Election held in 2005,<sup>3</sup> as well as Recommendations for the Early Presidential Election<sup>4</sup> specially developed by the OSCE/ODIHR to assist authorities before the 2005 Early Presidential Election.

This assessment is provided with the goal of assisting the authorities in the Kyrgyz Republic, political parties, and civil society 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 improvements in the law can have a positive impact will ultimately be determined by the degree to which state institutions, officials and citizens implement and uphold the Code.<sup>5</sup>

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<sup>1</sup> The OSCE/ODIHR engaged Mr. Jessie Pilgrim and Mr. Tigran Karapetyan, legal experts, for this review.

<sup>2</sup> See Assessment of Pending Amendments to the Election Code, Kyrgyz Republic (5 November 2003); Assessment of the Election Code as Amended by the Legislative Assembly in the Second Reading on 25 December 2003, Kyrgyz Republic (15 January 2004). The 15 January 2004 assessment was sent to the Kyrgyz authorities but not published on the ODIHR website. This assessment supersedes both the previous OSCE/ODIHR assessments of proposed amendments. However, earlier assessments and comments in previous election observation reports should be considered as they provide good markers for measuring the improvement of election legislation in the Kyrgyz Republic.

<sup>3</sup> See OSCE/ODIHR Final Report on the Parliamentary Elections in the Kyrgyz Republic on 27 February and 13 March 2005 (20 May 2005) and OSCE/ODIHR Final Report on Presidential Election in the Kyrgyz Republic on 10 July 2005 (7 November 2005) at [www.osce.org/odihr-elections/14475.html](http://www.osce.org/odihr-elections/14475.html)

<sup>4</sup> See OSCE/ODIHR Interim Recommendations for the Early Presidential Election in the Kyrgyz Republic (12 April 2005).

<sup>5</sup> See Assessment of the Election Code as Amended by the Legislative Assembly in the Second Reading on 25 December 2003, (15 January 2004); Assessment of Pending Amendments to the Election Code, Kyrgyz Republic (5 November 2003); 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).

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This assessment is based on an unofficial English translation of the Code.<sup>6</sup> Thus, it 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.<sup>7</sup>

## II. EXECUTIVE SUMMARY

The Election Code of the Kyrgyz Republic has been amended on several occasions since previous OSCE/ODIHR assessments. While a number of amendments to the Election Code mark progress, some concerns remain, including limitations to certain civil and political rights. Moreover, some amendments do not address prior concerns but compound them. As a result, the Code requires improvement to bring it in line with OSCE commitments set forth in the 1990 Copenhagen Document and with other international standards for democratic elections.

Improvements in the Election Code since the previous OSCE/ODIHR assessment, some of which implement previous recommendations, include the following:

- Reduction of some financial obstacles for candidate registration for Presidential elections;
- Revision of residency requirements to extend candidacy rights;
- Allowing dual office holders to decide which office must be relinquished;
- Extension of the period for public scrutiny of voter lists;
- Reduction of the number of state and municipal employees that can constitute the membership of an election commission;
- Establishing that the chairpersons of Oblast, Bishkek City, and Osh City election commissions serve as full-time officials;
- Establishment of a uniform start date for campaigning for all candidates;
- Strengthening of provisions for maintaining order in a polling station;
- Provisions for transparent ballot boxes and the marking of voters' fingers as measures to increase public confidence;
- Clarification of the grounds which permit voting by mobile ballot box;
- Permitting observers to become familiar with the Shailoo automated information system and its software.

In order to comply fully with OSCE commitments and other international standards, and as detailed in this assessment, the Election Code should be further amended to

- Eliminate undue limitations on the rights to free speech, expression, and association;
- Remove disproportionate limitations on the right to be a candidate;

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<sup>6</sup> Although this assessment is based on an English translation of the Code, the OSCE/ODIHR has also considered a Russian language version in instances in which further clarity was required.

<sup>7</sup> The assessment is available also in Kyrgyz and Russian languages. However, the English version remains the only official document

- Improve provisions for transparency and observation of all aspects of the election process;
- Improve the process for filing and adjudicating complaints and appeals to protect suffrage rights more adequately;
- Remove the possibility for indefinite delay of the determination of election results and indefinite “suspension” of a candidate’s registration while a criminal case is pending against the candidate;
- Improve multi-party representation and inclusiveness in the composition of election commissions;
- Improve election rules, including provisions regulating the media and voting procedures;
- Improve provisions for invalidation of election results to ensure consistent and fair decisions regarding invalidation.

In the framework of this assessment, the OSCE/ODIHR is pleased to offer recommendations for consideration by the authorities of the Kyrgyz Republic in support of their efforts to improve election-related legislation and bring it more closely in line with OSCE commitments. However, it must be emphasized that, in addition to further amendments to the legislative framework, full and effective implementation of the Code is necessary in order to ensure conduct of elections in line with OSCE commitments.

### **III. DISCUSSION OF THE AMENDED ELECTION CODE**

Discussion of the Election Code is presented under five general topics and not in the numerical order in which articles appear in the Code.<sup>8</sup> The five topics are: Candidacy Rights, Election Commissions, Election Rules, Transparency, and Legal Protections.<sup>9</sup> This thematic approach facilitates evaluation of the degree to which the 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

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<sup>8</sup> The Code regulates elections of the President, members of the Jogorku Kenesh, deputies of local keneshes, and heads of local self-government.

<sup>9</sup> The Candidacy Rights topic discusses provisions of the law that define the conditions under which citizens can 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 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.

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.<sup>10</sup> The Code does not satisfy this fundamental principle in the following key areas as outlined below, as some provisions can prevent citizens who should have the opportunity to participate in representative government from exercising their right to be a candidate for public office.<sup>11</sup>

## 1. Article 3 Limitation on Candidacy Rights

Article 3 of the 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, where the conviction has not been expunged or cancelled.<sup>12</sup> The denial of suffrage, due to a conviction for *any* crime, is a disproportionate sanction which is contrary to Paragraph 24 of the 1990 Copenhagen Document.<sup>13</sup> The denial of suffrage 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 OSCE/ODIHR recommends** that Article 3 be amended so that denial of suffrage 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. The forfeiture should be for an established period of time, likewise proportionate, and restoration of political rights should occur automatically after the

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<sup>10</sup> 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.

<sup>11</sup> The OSCE/ODIHR has previously expressed concerns about cancellation of candidate registration. See Assessment of the Election Code as Amended by the Legislative Assembly in the Second Reading on 25 December 2003, Kyrgyz Republic (15 January 2004); Assessment of Pending Amendments to the Election Code, Kyrgyz Republic (5 November 2003); 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 the parliamentary elections in the Kyrgyz Republic on 27 February and 13 March 2005 (20 May 2005).

<sup>12</sup> The term “expungement” is generally understood in most legal systems to mean the removal of information of a criminal conviction from court records after the expiration of a period of time. The period of time required to pass for expungement is not necessarily related to the period of time for which the person was sentenced or incarcerated. Thus, it is possible that a person has served a sentence for a criminal conviction and is a productive member of society, but the time period for expungement has not expired.

<sup>13</sup> See also, e.g., Paragraph 1.1(d.iv) of Council of Europe, Venice Commission, *Code of Good Practice in Electoral Matters, Guidelines for Elections*, (2002), page 8 and *Hirst v. United Kingdom (No. 2)* (Application no. 74025/01, 6 October 2005), wherein the Grand Chamber of the European Court of Human Rights held that a blanket restriction on the voting rights of prisoners, “irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances”, was a violation of Article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court also observed that Article 3 of Protocol 1 “guarantees individual rights, including the right to vote and to stand for election”.

expiration of this period of time.<sup>14</sup> 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

The OSCE/ODIHR noted in its previous assessments that Articles 28, 36, and 56 of the Code permit the cancellation of registration of a candidate for a variety of reasons and that the sanction of cancellation of registration is disproportionate, in light of the conduct in these articles that can be a basis for cancellation.<sup>15</sup> As an example, a single telephone call by a candidate on a government telephone for campaign purposes can be the basis for cancellation of registration.<sup>16</sup> Although wrongful acts should be sanctioned, cancellation of registration in such cases would be disproportionate. These provisions could lead to abuse, such as efforts to “cancel” an election opponent as part of the quest for electoral victory.

Article 56(1)(c) expressly permits cancellation of candidate registration if a candidate is involved in *any* violation of a “pre-election” campaign provision. This automatically incorporates provisions contained in Articles 28 and 36 into Article 56 since many “pre-election” campaign provisions are stated in Articles 28 and 36. Paragraph (9) of Article 36 further incorporates Articles 30 through 35 of the Code and “other rules of pre-election campaigning”. Paragraph (9) also establishes the right to seek “law-enforcement” assistance to “suppress ‘illegal’ campaigning activity” and cancellation of candidate registration. Thus, the grounds for cancellation of candidate registration are numerous and broad.

The grounds for cancellation of candidate registration are not only broad, but may be applied to a candidate who received the most votes, and in fact, has been chosen by voters to assume elected office. The OSCE/ODIHR has previously expressed concern about post-election cancellation of candidate registration.<sup>17</sup> This concern remains as paragraph (1) of Article 56 of the Code specifically identifies where cancellation of candidate registration is limited to “five (5) days preceding the election day.” Other legal grounds for candidate cancellation, not specifically identified in paragraph (1) of Article 56, would appear to permit cancellation of the registration of an elected candidate. In fact, paragraph (4) of Article 56 expressly recognizes this possibility, as it requires the delay of the determination of election results and “suspension” of the winning candidate’s registration pending a verdict in a criminal case against him/her. Although the obligation to delay and “suspend” is on the respective election

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<sup>14</sup> The law should specifically list those crimes that are so serious as to require the forfeiture of suffrage rights.

<sup>15</sup> Assessment of the Election Code as Amended by the Legislative Assembly in the Second Reading on 25 December 2003, Kyrgyz Republic (15 January 2004), at page 4; Assessment of Pending Amendments to the Election Code, Kyrgyz Republic (5 November 2003), at page 4.

<sup>16</sup> Paragraph (2) of Article 28 prohibits the “use of telephone” “of government institutions” for the advantage of a candidate. Thus, a single telephone call on a government telephone could be the basis for cancellation.

<sup>17</sup> See Assessment of the Election Code as Amended by the Legislative Assembly in the Second Reading on 25 December 2003, Kyrgyz Republic (15 January 2004), at page 7; Assessment of Pending Amendments to the Election Code, Kyrgyz Republic (5 November 2003), at page 7.

commission, the commission's obligation is based on the failure of the court to render a verdict. Arguably, the power to "suspend" candidacy might rest with anyone who has the ability to bring about the filing of a criminal proceeding against a candidate. This is not clear due to the provision in paragraph (5) of Article 28, which appears to limit the ability of authorities to institute criminal proceedings or arrest a registered candidate. However, this limitation would not appear to apply to cases that were pending prior to registration, and a court could proceed on a pending case under Article 56.

The possibility to "suspend" or subsequently cancel the registration of a candidate who received the number of votes necessary to win the election, based on a pre-election campaign violation (Article 56(1)(c) or registration irregularity (Article 56(1)(e)), 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 Article 56 is a "legal provision", it is not a legal provision that is in conformity with democratic parliamentary and constitutional procedures.<sup>18</sup>

A basic principle embodied in OSCE commitments is that voters should have the opportunity to choose in genuinely democratic elections, from among the citizenry, those persons who are to govern. Inherent in this principle is the possibility that the voters may not choose the best candidates for governance. However, it is fundamental tenet of the democratic electoral process that the right to choose belongs to the people. Voters are best suited to protect and advance their own interests, and are therefore able to judge the intellectual capacity, honesty, integrity, and general persona presented by candidates. Articles 28, 36, and 56 severely limit the rights of voters as well as the rights of candidates. **The OSCE/ODIHR recommends** that the possibility to cancel a candidate's registration should be limited to the situation where the candidate does not possess the legal requirements for candidacy (citizenship, age, residency), and that Articles 28, 36, and 56 be accordingly amended.

### **3. Article 58, 61 and Article 62 Limitation on Presidential Candidacy Rights**

Article 58 (3) requires that a candidate for President must be a resident of the Kyrgyz Republic for 15 years prior to his/her nomination. However, this article does not specify how this durational requirement is calculated. The method of calculation should be clearly indicated – whether these 15 years are calculated consecutively (*i.e.* the 15 years continuously immediately prior to nomination) or cumulatively (*i.e.* an aggregate total of 15 years within the candidate's lifetime up to the date of nomination). This provision should also be amended to state what types of physical presence within the borders of the Kyrgyz Republic constitute "residency" and under what circumstances "residency" continues for periods of temporary absence from the

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<sup>18</sup> See, *cf.*, *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).

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Kyrgyz Republic. **The OSCE/ODIHR recommends** that the 15-year residency requirement for a Presidential candidate be clarified in the Code.

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”.<sup>19</sup> Article 61 further requires the candidate to “write up his/her election program pledges on not more than three pages”; “read a printed text on not more than three pages”; and “make an oral presentation for no more than 15 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, much less a skillful orator and author “in the state language”. Article 5(4) 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.” This constitutional article also provides that “the Russian language shall be used in the Kyrgyz Republic as an official language.” Thus, the requirements in Article 61 present constitutional concerns.

Furthermore, Article 61 does not state clear and objective criteria for determining proficiency, but instead allows for a subjective “proficiency” decision by a “Linguistic Commission” approved by parliament. Here, application of the article will exclude the candidacy of a citizen who has a visual or vocal impairment and discriminates against such a person.<sup>20</sup> **The OSCE/ODIHR recommends** that Article 61 be amended to address these concerns.

#### 4. Article 65(4) Limitation on Political Rights as a Condition of Candidacy

An amendment establishing Article 65(4) requires a candidate for President to sign an agreement that limits the rights of free speech, assembly, and association “after announcement of voting results and legitimacy of presidential elections by the Constitutional Court” (sic). The text of this limitation is broad and applies indefinitely to any post-results “act or support” of “any activity destabilizing the situation in the country”. This limitation could be applied to impose legal liability on a losing candidate who voices the view in a public gathering that the votes were not counted honestly.<sup>21</sup> The term “destabilizing” is vague and subject to a wide range of interpretive opinions. Further, the text does not satisfy the commitment in Paragraph 24 of the Copenhagen Document which makes clear that any restriction on a right or freedom in an OSCE state must be strictly necessary in a democratic society and narrowly tailored to meet that necessity. **The OSCE/ODIHR recommends** that Article 65(4) either be deleted from the law or revised to meet the strict requirements of Paragraph 24 of the Copenhagen Document.

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<sup>19</sup> Article 61 expands the text of Article 43 of the Constitution, which requires “command of the state language”.

<sup>20</sup> International standards prohibit wrongful discrimination. 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.

<sup>21</sup> Article 65(4) only applies to “non-elected” candidates. An elected candidate retains the full rights of free speech, assembly, and association.

## 5. Collection of Signatures for Presidential Candidacy

Article 62 requires that a candidate for President collect no less than 50,000 signatures of voters in support of his/her candidacy in order to be registered. The number of signatures required may be excessive should the number of registered voters be less than 5,000,000. International best practice establishes that the number of signatures to be collected in support of candidate should not exceed one per cent of the number of registered voters in the respective constituency.<sup>22</sup> The Article 62 signature requirement also presents a problem in case of early election of the President, where the timelines for all election processes, including signature collection, are shortened by one quarter. **The OSCE/ODIHR recommends** that Article 62 of the Code be reconsidered in light of international best practice and should require signatures for candidate support in a number not to exceed one per cent of the total number of registered voters.

Article 62 (10) regulates the verification of signatures in support of candidacy to be conducted solely on the basis of a sample of the signatures. This provision is not consistent with international best practice.<sup>23</sup> Extrapolation of the percentage of invalid signatures in a sample to the total number of signatures collected does not provide an accurate reconciliation of collected signatures. The validity of all signatures should be checked up until the point that it is established that there are sufficient valid signatures or that there are no more signatures to check. **The OSCE/ODIHR recommends** that the procedure for verification of support signatures be revised, taking into consideration international best practice and the benefits of requiring a uniform procedure for all election commissions that can be evaluated objectively by candidates and observers.

Article 63(3) of the Code requires that a candidate for President pay an electoral deposit in “the amount of 1000 minimum monthly salaries established by law”. It is questionable whether *both* the collection of signatures and the requirement of an electoral deposit are justified. Either requiring a reasonable number of signatures *or* a reasonable amount of an electoral deposit is acceptable to ensure that spurious candidates do not waste electoral resources. The requirement of *both* signatures and electoral deposits goes too far and may prevent legitimate candidacies. **The OSCE/ODIHR recommends** that the combined requirement of signatures and an electoral deposit be removed from the Code.

## 6. Residency Requirement for Parliamentary Candidacy

Article 56(1) of the Constitution provides that, in order to be nominated as a candidate for Parliament, a person must have “been a permanent resident within the Kyrgyz Republic during five last years prior to his nomination”. Article 69(1) of the Election Code provides that the legal status of “permanent resident” is not lost for “interruptions of up to six months” if a person is abroad for “business, scientific or job travels as well as other activities”. In a welcome amendment to Article 69 that adopts

<sup>22</sup> Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Venice Commission, Council of Europe, October 2002, [http://venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.asp](http://venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp)

<sup>23</sup> Ibid.

a previous OSCE/ODIHR recommendation and broadens Article 69, the law now preserves the permanent resident legal status of “diplomats, commercial representatives and other persons who work in the service of the President ... Jogorku Kenesh ... and Government of the Kyrgyz Republic”.

## 7. Correction of Defects in Candidate Registration Documents

The 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. Although Article 27 (5) provides for submission of missing documents before the end of the registration period, 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 27, 63, 73, 84, and 91 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, even if it means that the corrected documents will be submitted past the end of the registration period, 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 such a provision could slightly delay the start of 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.<sup>24</sup>

## 8. Electoral Deposits

Several articles in the Code require that a candidate pay an electoral deposit when submitting the candidate’s registration documents for any election. The deposit is reimbursed if the candidate obtains a number of votes not less than 15 per cent of the number of registered voters (in the case of presidential candidates, 15 per cent of the number of *votes cast*). It is generally accepted that the amount of an electoral deposit and the number of votes required for reimbursement of the deposit should not be excessive.<sup>25</sup> Fifteen percent is rather high for the threshold for reimbursement of the deposit. **The OSCE/ODIHR recommends** that Articles 63(3), 73(2), 84(2), 91(2) of the Code be amended to lower significantly the threshold for reimbursement of the candidate’s deposit. Furthermore, the percentage should be calculated in regard to the number of valid votes.

The amount of the electoral deposit should also be carefully considered in each of these articles. The amount of the electoral deposit for a Presidential candidate is “the amount of 1000 minimum monthly salaries established by law”. This is equivalent to 83 years of the minimum legal salary. This could prevent the candidacy of many individuals due to their economic or social standing. It also creates the perception that

<sup>24</sup> The amendment to paragraph (5) of Article 27, which allows for the submission of “missing” documents before the registration deadline, does not completely address this concern.

<sup>25</sup> Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Venice Commission, Council of Europe, October 2002.

the law only permits the wealthy to participate as candidates in elections. The right to participate in government, including the right to be a candidate for President, should be broad, inclusive, and not limited to a few members of society. In addition, a high electoral deposit may have a discriminatory impact on women, as women are often economically disadvantaged in comparison with men.<sup>26</sup> The fact that the deposit is refundable, after the elections to candidates who receive a certain percentage of votes, does not remedy the problem. **The OSCE/ODIHR recommends** that all articles in the Code that require electoral deposits be carefully considered. Although the amount of an electoral deposit should be sufficient to discourage spurious candidates, the deposit requirement should not result in the denial of suffrage rights.

## 9. Over-Regulation of Political Parties/Electoral Blocs

Paragraph (3) of Article 25 states: “The decision to join an electoral 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. 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 and grant parties the freedom to decide on the procedures for joining coalitions and for nomination of candidates in accordance with their charter.

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 83 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. A political party or bloc should have the discretion to invite guests to its events by its own choice and any intrusion in such events is unacceptable as an interference with the right of association. **The OSCE/ODIHR recommends** that these three provisions be deleted from the Code.

## 10. Prohibition on Candidacy in Repeat Elections

Article 46(3) requires a repeat election if (1) the number of voters who participated in the election is less than the percentage required by the Code in order for the election to be valid, or (2) “when the number of votes cast in favour of the candidate (candidates) who won the majority of the votes in comparison with the other candidate (other candidates) is less than the number of votes cast against all candidates.” Article 46(3) also provides that “former candidates may not be nominated to contest for repeated elections.” There is no legitimate basis for this

<sup>26</sup> See “Consolidated Summary and Chair’s Conclusions, OSCE Human Dimension Seminar, Participation of Women in Public and Economic Life,” 13-15 May 2003. Available at [www.osce.org/documents/odihr/2003/07/518\\_en.pdf](http://www.osce.org/documents/odihr/2003/07/518_en.pdf)

prohibition on candidacy in repeat elections.<sup>27</sup> **The OSCE/ODIHR recommends** this Article 46 prohibition be deleted from the law.

## **B. ELECTION COMMISSIONS**

The OSCE/ODIHR has previously expressed concern that election commissions were not sufficiently pluralistic, subject to the control of government authorities, and did not always act independently.<sup>28</sup> An amendment to Article 11 partially addresses these concerns by creating the possibility for political parties to propose, in total, up to 1/3 of the members of an election commission. This amendment, although an improvement in the Code, does not ensure sufficient pluralism or impartiality of election commissions or that commissions will be more independent of government authorities. **The OSCE/ODIHR recommends** that the legislature further amend the legal provisions regulating the appointment of election commissions. The Code and all legislation regulating the Central Election Commission (CEC) should be amended to substantially guarantee the representation of political parties on election commissions in a transparent and inclusive manner. In addition, the Code should specify that no more than one third of the members should come from any one institution.

**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.<sup>29</sup> At a minimum, the amendment should provide for (1) written notice to the commission member of the proposed grounds for removal, (2) the opportunity to present evidence and arguments to rebut the written grounds alleged, and (3) 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 represents an improvement, as it has the potential to increase the professionalism and stability of electoral administration as well as facilitate election preparations.

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

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<sup>27</sup> The prohibition appears to be premised on the concept that a “weak” candidate, as shown by the failure to win in the earlier election, forfeits the passive suffrage right. Such a disregard of the basic human right to suffrage runs counter to universal principles and OSCE commitments.

<sup>28</sup> See Assessment of the Election Code as Amended by the Legislative Assembly in the Second Reading on 25 December 2003, Kyrgyz Republic (15 January 2004), at page 11; Assessment of Pending Amendments to the Election Code, Kyrgyz Republic (5 November 2003), at page 11; 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).

<sup>29</sup> Paragraph (3) of Article 16 regulates replacement of a member of an election commission. The amendments in paragraphs (10) and (11) of Article 11, which address the issue of replacement of an entire commission, do not address this concern.

municipal employees, and employees of municipal bodies, may not comprise more than one-third of the total number of election commission members”. Although this constitutes improvement, this number should be more strictly limited. Further, the number of individuals, who are employed by the *same* institution, should also be strictly limited from serving on the *same* election commission. **The OSCE/ODIHR recommends** that Article 11 be amended accordingly.

The 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. A commendable effort of the legislature to address such concern is made in Article 1(4) of the Law on Central Commission for Elections and Referenda, which requires the CEC to be located in a separate administrative building. **The OSCE/ODIHR recommends** that the Code also be amended to require, where possible, that all election commissions be located in buildings where there are no other state or local-government authorities.

The rights and responsibilities of precinct election commission (PEC) members appointed by candidates should also be clarified. Although paragraph (8) of Article 11 extends to such a member a “consultative vote”, paragraph (11) of Article 16 might be construed to limit that right. In order to prevent unnecessary confrontation or confusion concerning the status of a candidate appointed member, **the OSCE/ODIHR recommends** that the Code expressly state the rights and responsibilities of a candidate appointed election commission member.

The Presidential election in 2005 was an early election due to the premature termination of the President’s term. Under Article 58 of the Code, such an election requires a reduction in the timeframes for election events by one-fourth. However, no other guidance is provided on the calculation of deadlines in an early election. This omission can, as it did in the 2005 Presidential election, create significant problems in election administration and hinder efficient election processes. **The OSCE/ODIHR recommends** amending the Code to include a standard method of calculating time periods in the electoral calendar where shortened timeframes must be applied.

## C. ELECTION RULES

### 1. Formation of Electoral Constituencies

It is best practice for electoral constituencies to be reviewed at least every ten years. This allows for constituencies to be periodically adjusted as necessary to reflect population changes within constituencies. Article 19 of the Code, however, allows for constituencies to be changed much more frequently – in fact, before every election. Frequent changes in election constituencies should be avoided, especially immediately prior to an election, in order to maintain public confidence in the impartiality of constituency delimitation and limit even the semblance of electoral

manipulation.<sup>30</sup> Further, the fundamental rationale for single member constituencies – making deputies accountable to their electorate and creating a “link between the deputy and voters” – is undermined when deputies know that they will acquire new voters with new constituencies before each election. **The OSCE/ODIHR recommends** that language be included in Article 19 to prevent the re-establishment of constituencies too close to an election and to avoid re-districting for each election, except where necessary due to exigent circumstances such as displacement of a substantial number of voters in constituencies.

For local elections, Article 82 of the Code provides that Oblast and Bishkek and Osh city keneshes can have up to 20 multi-member constituencies. Rayon and city level keneshes can have up to 10 multi-member constituencies. Town and village level keneshes can have up to seven multi-member constituencies. Article 86 provides that candidates are elected in these multi-member constituencies under a majoritarian election system. A majoritarian election system in a multi-mandate electoral constituency (Articles 82 and 86) could have adverse consequences on the ability of minorities to elect candidates.

## 2. Voter 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 supplementary lists. Reports of observers indicate that the quality of the voter lists remains an issue. Some voters may have been disenfranchised and others registered more than once as a result of inaccuracies in the voter lists. This situation undermines the basic principle of universal and equal suffrage. The current registration process requires increased commitment, capacity and coordination by the institutions involved in the compilation of the voter lists. Nevertheless, the Code can serve as a legal basis for accurate voter lists if implemented in good faith and with a significant and timely commitment of resources.

Although the Code can serve as a legal basis for creating accurate voter lists, it could still be improved in this area. Paragraphs (2) and (3) of Article 22 allow for amendment of the voter lists or inclusion in a supplementary voter list on election day of an elector who has been erroneously omitted. While such a provision is used in some countries, it can be subject to abuse. As Article 22(1) provides sufficient time for review and amendment of the voter lists, election day additions should not be necessary and, considering problems noted in past elections, should be avoided.<sup>31</sup> **The OSCE/ODIHR recommends** that Article 22 be accordingly amended. Should the Code retain the possibility of registration of voters by PECs on election day, it is **recommended** that this possibility be permitted upon presentation of a court decision allowing the voter’s inclusion and the decision should be attached to the voter list.

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<sup>30</sup> Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Venice Commission, Council of Europe, October 2002

<sup>31</sup> *See also*, Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Venice Commission, Council of Europe, October 2002.

### 3. Election Campaign Provisions

Addressing previous OSCE/ODIHR recommendations, the Code provides for a common start of the campaign of all candidates, immediately after the end of the registration.<sup>32</sup>

Paragraph (2) of Article 30 defines permissible activities during an election campaign. By defining permissible activities, it might be implied that other legitimate activities, that are not specifically included in Article 30, are not permissible. This is problematic as election campaign activities are almost invariably a manifestation of the individual's rights to freedom of expression and/or association, which are rights applicable throughout the year, regardless of whether elections are being conducted. **The OSCE/ODIHR recommends** that paragraph (2) of Article 30 be amended to state that Article 30 is not a limitation on the rights of freedom of expression, speech, assembly, or association at any time.

Paragraph (2) of Article 30 provides: "The conduct of jubilees and other festive events that are of public and state significance during the conduct of election campaign shall be prohibited." It is not clear what would be considered a "festive event" or how "of public and state significance" is defined. **The OSCE/ODIHR recommends** that this text be clarified or a reference to the relevant legislation regulating "jubilees and other festive events of public and state significance" be included so that it is clear as to what conduct is prohibited and in order to ensure that the text does not limit the rights of freedom of association, assembly and movement.

Article 30(2) states that "Citizens of the Kyrgyz Republic, candidates, political parties, election blocs shall have the right to conduct campaigning". This provision could be interpreted or applied to limit the speech and associational rights of non-citizens during the period of the pre-election campaign. The rights of freedom of expression and association, according to international human rights principles, belong to all persons within the jurisdiction of a state. Even if non-citizens (stateless and alien residents) do not have the right to vote, they do have the right to freely express their opinion, associate and participate in political discussions. Article 30(2) could be applied to limit the fundamental rights of non-citizens residing in the Kyrgyz Republic.<sup>33</sup> Similar limiting text is found in Article 30(1). **The OSCE/ODIHR recommends** that Article 30 of the law be clarified.

Paragraph (7) of Article 30 states "Pre-election campaigning shall be prohibited in foreign mass media disseminated on the territory of the Kyrgyz Republic". There is no legitimate basis for such a limitation. 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."<sup>34</sup> OSCE participating States also commit

<sup>32</sup> Final Report on Presidential Elections in the Kyrgyz Republic, 29 October 2000 (16 January 2001).

<sup>33</sup> See Paragraph 5.21 of the OSCE 1990 Copenhagen Document; Paragraphs 10 and 11 of the OSCE 1992 Prague Document; and the Human Dimension section of the Charter of Paris of 1990.

<sup>34</sup> Paragraph 26.1 of the OSCE 1991 Moscow Document.

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.”<sup>35</sup> **The OSCE/ODIHR recommends** that this prohibition be deleted from the Code.

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 candidates’ registration”. This prohibition 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, especially analytical programs, as well as publication of exit poll results. It is also unclear as to when such prohibition is discontinued and whether publication of such information is allowed after election day. **The OSCE/ODIHR recommends** that the reference to “other research materials” be deleted and that any prohibition on the publication of the results of public opinion polls be limited to a more reasonable period.

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, as well as proportionate sanctions for failing to meet this requirement. An example of a proportionate sanction would be removing such unidentified advertisement from broadcasts until the proper required identification is included in the advertisement.

Paragraph (1) of Article 35 limits the right to issue printed campaign materials to “candidates, political parties, election blocs”. As persons in the Kyrgyz Republic have the rights to free expression, association, and speech, which encompass the right to issue printed campaign materials, paragraph (1) limits these rights. This limitation is contrary to international standards.<sup>36</sup> **The OSCE/ODIHR recommends** that paragraph (1) be amended to include all persons in the Kyrgyz Republic. 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 could represent a form of censorship.<sup>37</sup> **The OSCE/ODIHR recommends** that the second sentence of paragraph (1) of Article 35 be deleted from the Code.

A violation of the requirement to identify print campaign material indicated in Article 35(2) may lead to deregistration of a candidate under Article 36(9). **The OSCE/ODIHR recommends** that Article 35 be amended, as deregistration is a

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<sup>35</sup> Paragraph 26 of the OSCE 1999 Istanbul Document.

<sup>36</sup> 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.

<sup>37</sup> *Ibid.* See also, Council of Europe, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines for Elections, (2002), Section II, 1.

disproportionate sanction for violation of the provision and should be deleted from Article 35. Article 35 should specify a proportionate sanction for failing to meet the requirements of Article 35(2). An example of such a proportionate sanction would be requiring removal of material that fails to meet the requirements of Article 35(2) until the material is corrected to include all necessary information.

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 political opinions could prevent a robust and vigorous campaign, which is critical to election campaigning in a democracy. In the context of a political campaign, in 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.<sup>38</sup> **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.

#### 4. Financing of Elections

An amendment to Article 50 partially addressed a previously expressed OSCE/ODIHR concern that the prohibition on foreign funding would prevent legitimate observation activities and support of domestic observer groups. Nevertheless, Article 50 could be further improved to ensure respect of 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.” **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,

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<sup>38</sup> 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).

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)(a) of Article 56 is of concern as it provides additional grounds for cancellation of a candidate's registration. Under this paragraph, some violations of the procedures for campaign financing (*e.g.*, overspending of 0.5 per cent of the limit for the candidate's election related expenses) can result in the cancellation of candidacy. **The OSCE/ODIHR recommends** that this cancellation provision be deleted from paragraph (1) of Article 56 and replaced by a proportionate sanction, such as a fine proportional to the amount of the overspending.

An amendment to Article 64 removes the limit on campaign expenditures made from the candidate's election fund. Although candidates must be able to spend sufficient amounts of money in order to convey their political messages to voters, the removal of the limit could result in a situation where wealthy candidates may have an unfair advantage over other candidates. Removal of any limit on expenditure could also harm public confidence in elections as it may create the perception that election results can be "bought" by the expenditure of large sums of money in a campaign. **The OSCE/ODIHR recommends** that careful consideration be given to this issue and that Article 64 be amended to establish a reasonable limit on campaign expenditures that allows all candidates to compete effectively and convey political messages, while at the same time preserving public confidence in elections.

## 5. Media Provisions

Provisions in Articles 30 through 36 of the Election Code, with the Law on Mass Media (1992) Law on Professional Activities of the Journalists (1997), and Law on Administrative Penalties (1998), regulate media during elections. Also relevant is Article 16 of the Constitution, which guarantees the freedom of expression and speech, freedom to receive, transform and distribute information, and prohibits censorship. Article 7 of the Law on Professional Activities of Journalists requires journalists to provide objective information.

Articles 30–36 of the Election Code govern the conduct of electronic and print media during a pre-election campaign, *inter alia* providing for free and paid broadcast time and print space to candidates, based on equal conditions. The state media are obliged to allocate to candidates fixed amounts of time and space, free of charge, from the start of the official campaign. At the same time, at least one-third of allocated time must be devoted to televised debates.

The media provisions in Articles 30 through 36 should be clarified and strengthened. **The OSCE/ODIHR recommends** that these articles in the Election Code be amended to:

- clarify the difference between 'informing' and 'campaigning' in relation to media coverage of the election campaign;

- specify that media should not be held responsible for "unlawful" statements made by candidates (responsibility for the content of the free and paid advertisements should be on the contestants); and
- require that all free and paid airtime be clearly identifiable.

These amendments would improve the regulatory framework for media during elections.

## 6. Early Voting

Article 41 of the Code provides for an early voting process for Kyrgyz citizens who can prove that they will be abroad on election day. Such voting can only take place at higher level election commissions, for a period of “9 to 1 days before the election day.” This provision is an attempt to ensure, within a limited scope, the franchise of voters who will be abroad on election day. However, in recognition of the greater burden early voting procedures place on election administrators, observers and candidate representatives, the **OSCE/ODIHR recommends** that Article 41 be amended to enhance the transparency of the process by requiring that the territorial election commission fill in a protocol that details the number of votes cast each day per precinct and that a protocol be filled by the precinct election commission when the ballots are transferred. Article 41 should also be amended to specify that the early voting process is open to observers.

## 7. 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 “health 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 or disability 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 be amended to state that all procedures for identifying a voter, issuing a ballot, and for observation are applicable to the mobile voting procedure. In addition, the precinct election commission members who administer mobile voting should be from different political parties.

## 8. Voting Procedures

An amendment to paragraph (1) (13) of Article 10 requires the CEC to establish the model for the ballot boxes, which should be assembled from transparent materials. An amendment to paragraph (1) of Article 40 provides for procedures for the marking of voters’ fingers. Both amendments are welcome steps to increase transparency and public 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 high and places an undue administrative burden on the precinct election commissions. **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 20 provides that voting out-of-country will be conducted in precincts established by the heads of diplomatic missions and consular establishments of the Kyrgyz Republic. However, the Election Code provides no express rules or procedures regulating the process of out-of-country voting. **The OSCE/ODIHR recommends** that the rules and procedures for out-of-country voting be explicitly described in the Code.

Article 39 of the Election Code regulates the text of the ballot paper. In order to achieve a more inclusive environment for national minorities during the election, **the OSCE/ODIHR recommends** that Article 39 should be amended to provide that ballots are also printed in the Uzbek language in areas in which there are significant numbers of this minority. This would facilitate the participation of this significant national minority in the elections.

Article 39(10) provides that precinct electoral commissions shall cross out on the ballots the names of candidates who have withdrawn after the ballots have been printed. This is time consuming and creates significant possibility for errors and abuse. No marks should be made on the ballot except the voter's voting choice, which should be made by the voter. The law should clearly state a deadline for candidate withdrawal which will not delay the timely printing of ballots. **The OSCE/ODIHR recommends** that Article 39(10) be accordingly amended.

Article 40 regulates the voting procedure. Paragraph (4) of Article 40 should more clearly define the procedure to be followed for voters who were erroneously omitted in the voter lists and voters who are voting with absentee voting certificates. Although Paragraph (4) of Article 40 provides for inclusion of such voters in a supplementary voter list, it would be beneficial to expressly incorporate Article 22 requirements for voters list in the text of Article 40.

Article 44(5e) provides for determination of the number of voters who have voted in the polling station using an absentee voting certificate by counting the number of signatures in the supplementary voter list. The article also provides for checking the resulted number against the number of absentee voting certificates collected by the PEC. In order to ensure consistency and proper application of Article 44(5e), **the OSCE/ODIHR recommends** that Article 40(3) be amended to state explicitly that the absentee voting certificate is not only presented to the PEC, but is retained by the PEC and attached to the supplementary voter list.

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. The principle of universal and equal suffrage requires that the same general voting rules apply to all voters.<sup>39</sup> **The OSCE/ODIHR recommends** that this provision in Article 40 be deleted and that Article 40 include a general provision

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<sup>39</sup> See, e.g., 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.

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requiring that all procedures for identifying a voter and issuing a ballot are applicable for voting in “special” precincts (military, hospitals, remote areas).<sup>40</sup>

Paragraph (7) of Article 40 allows a voter to vote “against all candidates”. As a matter of principle, a voter should be encouraged to vote for a preferred candidate or party. The purpose of an election is to make a positive choice between multiple options. An election should not contain within itself the possibility for an endless series of failures to choose, which is the outcome if the “vote against all” option receives the most votes. **The OSCE/ODIHR recommends** that the possibility of voting against all candidates be deleted. Further, Article 44(12) should be amended to expressly state that ballot papers without any mark should be considered invalid.

## 9. Determination of Election Results

Article 43(1) permits the protocols on the polling station results to be completed on more than one page of paper, with the numbering of subsequent pages. This practice can facilitate possible manipulation of the protocols before their submission to a superior election commission. **The OSCE/ODIHR recommends** that the Code be amended to require that the protocols on results that are completed for all election commissions be on forms consisting of a single sheet of paper.

Article 44(22) provides that an enlarged copy of the precinct (polling station) protocol “shall be posted for general information in a spot, determined by the precinct election commission.” However, there is no requirement that the “spot” be at the premises of the precinct election commission (polling station), which is the logical place for an observer or voter to look for the protocol. **The OSCE/ODIHR recommends** that Article 44(22) be amended to provide that the protocol shall also be posted, in addition to the selected “spot”, at the premises of the precinct election commission (polling station). **The OSCE/ODIHR also recommends** that a similar amendment be made in paragraph (7) of Article 45 for the posting of a superior election commission protocol.

Article 44(6) 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 voter applications for use of the mobile ballot box. It is questionable whether the existence of one extra ballot is a sufficient justification for invalidating all mobile ballots. The better practice may be to note any discrepancy in the number of mobile ballots in the protocol, thereby preserving an evidentiary basis for later consideration should there be the mathematical possibility that an extra ballot in the mobile box could have affected the determination of the winner in the constituency. The possibility should not exist to invalidate all mobile ballots by simply dropping an extra ballot in the mobile box. **The OSCE/ODIHR recommends** that consideration be given to amending Article 44(6) to address these concerns.

Article 45 regulates the procedure for determining the election results by superior election commissions. Although Article 43(4) states that the information in the protocols of all superior election commissions shall include the information stated on

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

the protocols of the PEC, there is no requirement that the Article 45 protocol information be broken down by precinct level. This degree of detail is necessary for superior election commission protocols 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. **The OSCE/ODIHR recommends** that Article 45 be amended to clearly state that the summary table required by paragraph (3) of Article 45, provide all information broken down to: (1) the precincts on the territory of the district of the relevant DEC (Rayon or City Electoral Commission for Presidential elections) and (2) the districts on the territory of the relevant next level electoral commission. This will allow the opportunity to trace results from the lowest level of voting through the tabulations at each level of election commission, including the CEC.

Article 45(8) allows an election commission to reconstitute itself and issue a “repeat” protocol if it discovers a mistake in the original one, after the original protocol has been submitted to and accepted by the superior commission. This is an unusual provision and subject to abuse. The commission should tabulate the PEC results and complete the protocol and summary table accurately. Once the protocol has been signed and the first copy sent to a superior election commission, the commission’s work should be considered completed unless the superior election commission identifies an error and requires a recount. There should be no possibility for revising the results once the protocol has been submitted to the next level of election commission, at which stage observers and candidates’ representatives are likely to have left the commission’s premises. The same concerns apply to the next level commissions. **The OSCE/ODIHR recommends** that Paragraph (8) of Article 45 be deleted.

Paragraph (9) of Article 45 allows for a recount of votes, based on a decision of the relevant superior election commission. **The OSCE/ODIHR recommends** that this paragraph be amended to state that notice of 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. **The OSCE/ODIHR** also recommends that paragraph (9) of Article 45 be amended to require public posting of the recount protocol and that copies be provided to all observers who are present when the protocol is completed.

Article 48 regulates the publication of election results. A remarkable level of transparency is achieved when the CEC, as it did in 2005, makes preliminary results of all levels of election commission available on its website when they become available. This is a positive practice. **The OSCE/ODIHR recommends** that the Code be amended to require the publication of provisional results by polling station on the CEC website as they become available.

Article 56(4) permits the delay of determination of election results and suspension of a candidate’s registration pending a court verdict in a criminal case against the candidate. This amendment allows the indefinite delay of determination of election results. **The OSCE/ODIHR** recommends this provision be deleted from the Code.

It is also questionable whether tie votes for elections of deputies to local keneshes (Article 86.2) should be decided based on “who registered earlier than the others [as a candidate]”. This provision warrants further consideration.

## 10. Invalidation of Election Results and Failed Elections

Article 46 regulates void and invalid elections. The last sentence in Paragraph (4) of Article 46 provides for repeat voting to be conducted within two weeks in a precinct where “the announcement that the election results on the territory of the PEC are invalid will influence the election results in the entire constituency”. This text should be clarified. Undoubtedly the vote in each separate polling station does *influence* the results in the relevant constituency. However, it is possible that the results in a particular polling station, although *influencing* the overall constituency results, *may not affect the determination of the winning candidate* due to the margin of victory in the constituency. **The OSCE/ODIHR recommends** that Article 46 be amended to expressly state the circumstances that require repeat voting, using text that is more precise than “influence”.

Further, **the OSCE/ODIHR recommends** that Article 45(9) be clarified in order to *require* a recount of ballots if this will effectively establish the will of voters in a constituency. The current text “...the superior election commission shall have the right to take a decision on conducting a repeated counting of electors’ votes...” means that a recount is discretionary. Where the will of voters in the constituency can be determined through a recount of votes, a recount should be required first before there is invalidation. If the will of voters in the constituency cannot be determined after a recount of votes, then invalidation should be available as a legal remedy.

Article 44 of the Constitution and Articles 65(3)(first round) and 66(4)(second round) of the Election Code provide that at least 50 per cent of the registered voters must vote in order for a presidential election to be considered successful. In case of failure to meet the minimum turnout requirement in either round, Article 67 requires that the entire election must be repeated. The law thus creates the potential for a cycle of failed elections, and may be conducive to electoral malfeasance. **The OSCE/ODIHR recommends** that these requirements be removed from the Constitution and the Election Code.

## D. TRANSPARENCY

The 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 international observers in the list of persons who have the general right to attend meetings of election commissions, and paragraph (6) limits domestic and international observers’ observation of election day activities of election commissions to “when they [election commissions] 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 international observers are limited in their observation activities. Transparency of the *electoral processes* is a fundamental

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principle required by OSCE commitments and other international standards. Paragraph 8 of the OSCE 1990 Copenhagen Document recognizes the importance of the presence of observers, both international 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.

While the Election Code makes welcome provision for observation of election day activities in polling stations, paragraph (4) of Article 17 limits an observer organisation to one observer in a polling station. As observer organisations often deploy observers in teams of two persons in order to facilitate effective observation, **the OSCE/ODIHR recommends** that paragraph (4) of Article 17 be amended to remove this limitation.

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) of Article 17 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, minutes, and other documents 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. **The OSCE/ODIHR recommends** that the Code be amended to expressly include these rights for observers.

Article 39 of the Code does not specify who can observe the printing of ballots or be present when the ballots are delivered from the printing house. Further, Article 39 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 accredited observers and representatives of the media.<sup>41</sup>

In addition, **the OSCE/ODIHR recommends** that the following transparency measures be introduced in the Code:

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<sup>41</sup> Recognizing the potential for large numbers of people who may want to observe this stage of the electoral process, and certain security concerns, the CEC should establish an equitable basis upon which accredited observers and candidate representatives can have access to these procedures.

- Written minutes of all CEC sessions and meetings should be produced within 24 hours after their completion and made accessible to the public.
- An election commission member or any other person, who obstructs, hinders, or interferes with an observer engaged in legitimate observation, should be held strictly accountable under the law.
- All sessions and meetings of the CEC and its working groups and tasks groups should be public. The CEC should, no later than twenty-four (24) hours before a session, publicly post on its website and at the main entrance to its office a notice for each CEC session. The notice should include an agenda of all items and matters to be considered at the session.
- During the entire election time period and until final publication of the election results, the CEC should hold regular sessions at pre-scheduled times and hold additional sessions as necessary during this period.

These amendments would improve transparency and openness of election processes and strengthen public confidence in the results.

## **E. LEGAL PROTECTIONS**

### **1. Impossibility to Challenge Potential Fraud Discovered After Signing of Protocols**

Paragraph (6) of Article 46 makes it impossible to challenge fraudulent results where the fraud is discovered after the protocols have been signed. A legitimate complaint or appeal should not be barred simply because a person omits to enter a remark or is prevented from entering a remark in the protocol. This provision significantly reduces the possibility of fighting fraud in the election process and denies an effective remedy for violations of the law. **The OSCE/ODIHR recommends** that Article 46(6) be removed from the Code.

### **2. Lack of a Uniform and Consistent Process for Legal Protections**

Articles 54 and 55 of the Code do not establish a uniform and consistent process for protecting suffrage rights. Although Article 55(3) provides that an election commission must “suspend” its consideration of a complaint when a “similar complaint” has 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 for a party to file a complaint in a “favourable” forum as opposed to a more logical and fair forum. This possibility - to file in different forums - will also lead to inconsistency in decisions.<sup>42</sup> 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.

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<sup>42</sup> Paragraph (5) of Article 27 similarly allows a decision on refusal to register a candidate to “be appealed in the superior election commission or in court.”

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**The OSCE/ODIHR recommends** that Articles 54 and 55 be amended to state a clear complaint process that defines the roles of each level of election commission and each level of courts. This process should also identify which bodies act as fact finding bodies of first instance and which bodies act as appellate review bodies. Proceedings on complaints and appeals for violations of electoral rights, including within election administration and in the courts, should be transparent. Hearings and proceedings on complaints and appeals must be open to the public and observers. Decisions on complaints and appeals should be written and provide an explanation of the supporting law and facts. **The OSCE/ODIHR recommends** that Articles 54 and 55 be amended to require that all hearings and proceedings on election disputes be open to the public, observers, and the media. **The OSCE/ODIHR recommends** that Articles 54 and 55 be amended to establish simple and accessible procedural and evidentiary rules for the adjudication of election disputes so that citizens and electoral subjects can protect their rights without having to be knowledgeable of the various aspects and nuances of different laws. Further, **the OSCE/ODIHR recommends** that Articles 54 and 55 be amended to require that decisions on complaints and appeals be written and provide an explanation of the supporting law and facts.

#### **IV. CONCLUDING REMARKS**

The OSCE/ODIHR remains ready to continue its dialogue and cooperation with the authorities and civil society of the Kyrgyz Republic in support of their efforts to conduct elections in line with OSCE Commitments and other standards for democratic elections.