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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

KYRGYZSTAN

JOINT OPINION ON THE AMENDMENTS TO SOME LEGISLATIVE ACTS RELATED TO SANCTIONS FOR VIOLATION OF ELECTORAL LEGISLATION

Adopted by the Venice Commission on 20 March 2020 by a written procedure replacing the 122nd plenary session

on the basis of comments by

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I. Introduction

1. By letter of 25 December 2019, Ms Aida Kasymalieva, Deputy Chairperson of Jogorku Kenesh of the Kyrgyz Republic (hereinafter parliament), requested an Opinion of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) on the draft law on amendments to some legislative acts related to sanctions for violation of electoral legislation (CDL-REF(2020)016). By letter of 30 January 2020, ODIHR and the Venice Commission confirmed the readiness to provide a joint legal opinion on the draft law.

2. Messrs Nicolae Esanu and Pere Vilanova Trias were appointed as rapporteurs for the Venice Commission, and Mr Vasil Vashchanka as the expert for ODIHR.

3. A delegation composed of Messrs Kakha Inaishvili and Vasil Vashchanka on behalf of ODIHR and Messrs Nicolae Esanu and Serguei Kouznetsov on behalf of the Venice Commission, visited Bishkek on 11-12 February 2020. The delegation met with the Ministry of Foreign Affairs, the parliamentary committee on the rule of law and combating crime and corruption, the Central Commission for Elections and Referenda, the Prosecutor General's Office, the Supreme Court, inter-disciplinary working groups on reforms of the electoral legislation and on the judiciary and civil society representatives. Regrettably, the delegation was not able to meet with the parliamentary committee on constitutional law, state-building, judicial and legal issues. This Joint Opinion takes into account the information obtained during the above-mentioned visit.

4. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Kyrgyzstan. It was adopted by the Venice Commission on 20 March 2020 through a written procedure which replaced the 122nd session of the Venice Commission, due to the COVID-19 disease and following consultation of the Council for Democratic Elections.

II. Background and Scope of the Joint Opinion

5. The draft law includes amendments to the Criminal Code, Code on Minor Offences, Code on Infractions, and Code of Administrative Procedure with respect to electoral offences.[1] The draft law is part of legislative proposals envisaged by the Strategy for improving the electoral legislation of the Kyrgyz Republic in 2018-2020. This Strategy was developed by a working group under the President of the Kyrgyz Republic and adopted by the National Council for Sustainable Development of the Kyrgyz Republic in August 2018. The ODIHR and Venice Commission delegation takes note of the active role of the Central Commission for Elections and Referenda in developing the Strategy and its implementation.

6. The draft law submitted for review follows extensive amendments to the Constitutional Law on Elections of the President of the Kyrgyz Republic and Deputies of Jogorku Kenesh of the Kyrgyz Republic ("Election Law") as well as the Law on Election of Deputies of Local Keneshes ("Local Election Law") adopted in August 2019. These amendments have not been subject to a review by ODIHR and the Venice Commission.

7. The scope of this Joint Opinion covers only the draft law submitted for opinion. It does not constitute a comprehensive review of electoral legislation of the Kyrgyz Republic. Provisions of other legislative acts are commented upon only to the extent they relate to the draft law.

[1] The new Criminal Code and Code on Minor Offences were adopted in 2017 and entered into force from January 2019, replacing the 1997 Criminal Code. Offences included in the Criminal Code carry the heaviest penalties and entail retention of a criminal record for a certain time after a sentence is served. The new Code on Infractions, also in force since January 2019, replaces the 1998 Code on Administrative Responsibility.

8. The review is based on relevant Council of Europe and other international obligations and standards, OSCE commitments and international good practice. This Joint Opinion is provided with the aim of assisting the authorities of the Kyrgyz Republic, political parties and civil society in their efforts to bring the legal framework for elections further in line with OSCE commitments, Council of Europe's and other international standards for democratic elections.

9. The present opinion is based on an unofficial English translation of the draft law commissioned by ODIHR. Errors from translation may result.

10. ODIHR and the Venice Commission remain at the disposal of the authorities of the Kyrgyz Republic for any further assistance that they may request.

III. Executive Summary

11. The draft law includes amendments to the Criminal Code, Code on Minor Offences, Code on Infractions, and Code of Administrative Procedure with respect to electoral offences.[2] The draft law was developed with active participation of the Central Commission for Elections and Referenda and received input from academics, practitioners, state officials and civil society organisations. The inclusiveness of the drafting process is welcome and the Venice Commission and ODIHR encourage authorities to ensure that all legislation, notably on elections, is elaborated in a similarly inclusive manner. It also reminds that importance of political commitment to fully implement the electoral legislation in good faith.

12. The draft law addresses several issues noted in ODIHR and the Parliamentary Assembly of the Council of Europe (PACE) election observation reports and the corresponding recommendations.[3] In particular, it establishes responsibility for the abuse of administrative resources, introduces changes to the legal framework to counter vote-buying, and clarifies the deadlines for lodging appeals against violations of electoral rights. The following recommendations are made in relation to the draft law:

A. To exclude from the draft law Article 42^2 to the Code on Infractions, which introduces sanctions for voters for providing knowingly false information to an election commission regarding change of an electoral address;
B. To amend draft Article 87^1 to the Code on Minor Offences to include officials within the meaning of electoral legislation among the subjects of responsibility for the abuse of administrative resources;
C. To reconsider draft Article 87^2 to the Code on Minor Offences, relating to provision by a candidate to an elected office of deliberately false information; If this offence is retained, consideration should be given to its inclusion in the Code on Infractions;
D. To give due consideration to minimising and even abolishing limitations on holding public offices for citizens with dual nationalities;
E. If draft Article 87^3 to the Code on Minor Offences is retained, it should state more clearly that any person who reports vote-buying to the law enforcement bodies or co-operates in the investigation or prosecution of vote-buying shall not be held responsible for vote-selling.

[2] Classifications of sanctions appear in annexes to the Code on Minor Offences and the Criminal Code. For different categories of sanctions, please see CDL-REF(2020)016-e Amendments to some legislative acts related to sanctions for violation of electoral legislation.
[3] See for example the ODIHR report on the presidential election, 15 October 2017 and the PACE report on the observation of the presidential election in Kyrgyzstan (15 October 2017)

IV. Analysis and Recommendations

A. The process of development of the draft law

13. During the visit to Bishkek on 11-12 February 2020, the delegation of ODIHR and the Venice Commission experts was informed that the draft law was developed by a working group for improving electoral legislation under the President of the Kyrgyz Republic, with active participation of the Central Commission for Elections and Referenda. The draft law received input from another working group – on the judicial reforms, as well as from academics, state officials and civil society organisations. This inclusiveness of the drafting process is welcome.

14. At the parliament, the delegation was also informed of the intention to hold parliamentary hearings on the draft law. This intention is also welcome and follows a long-standing ODIHR and the Venice Commission's position that electoral legislation should be adopted through a public and inclusive process facilitating consensus of the key stakeholders.[4]

B. Amendments to the Code on Infractions

15. The draft law introduces two new articles to the Code on Infractions. Article 42^1 introduces sanctions for natural and legal persons who fail to provide information or materials to an election commission within the time limits established by law, as well as for "non-compliance with decisions and requests of an election commission made within its authority, necessary for the preparation and conduct of elections". Article 42^2 introduces sanctions for voters for providing knowingly false information to an election commission regarding change of an electoral address.

16. Draft Article 42^1 evidently pursues the aim of ensuring compliance with the lawful requests made by election commissions. Some of the interlocutors met by the delegation of ODIHR and the Venice Commission in Bishkek pointed out that this separate article may be redundant in light of the existing more general sanction for non-compliance or inadequate compliance with a lawful decision, order, resolution or request made by an authorised body (Article 293 of the Code of Infractions). While this may be correct, the presence of a specific sanction may be of deterrent value as far as it does not detract from the principle of legal certainty. It should also be noted that draft Article 42^1 contains a more dissuasive sanction – a 3rd category fine, as opposed to a 2nd category fine in Article 293.[5]

17. The aim of draft Article 42^2 is less clear. It mirrors Article 15.3, paragraph 5 of the Election Law (as amended in August 2019), which provides for responsibility for the submission of knowingly false information about an electoral address of a voter, but it remains unclear what would constitute such "knowingly false information". The electoral address is an instrument that allows voters to apply to vote at a place other than their registered place of residence (Article 15.3 of the Election Law). Such voters are taken off voter lists at their place of residence and included on voter lists at the requested electoral address. If a voter provides a false (non-existent) electoral address, s/he would presumably not be able to vote. If a voter provides a real address but does not actually intend to vote at the requested location or has another ulterior motive to change the voting location, it is questionable that such behaviour can be penalised as long as the law entitles voters to change their voting address with few or no

[4] Paragraph 5.8 of the 1990 OSCE Copenhagen Document provides that "legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability." See also, among many others, Joint Opinions of the Venice Commission and ODIHR on the draft electoral law of the Kyrgyz Republic, CDL-AD(2014)019 and on the draft law amending the electoral legislation of Moldova, CDL-AD(2014)003.

[5] The Code on Infractions provides for eight categories of fines, with the 1st category being the lightest. These fines are imposed by the competent administrative authority, in this case – election commissions. The fine of 2nd category currently amounts to 3,000 Kyrgyz *Som* (KGS) for natural persons and KGS 13,000 for legal persons. The 3rd category fine is KGS 5,500 for natural persons and KGS 17,000 for legal persons. 1 Euro is approximately KGS 75.

restrictions. It may be inferred that the draft Article 42^2 seeks to prevent suspicious "surges" in changes of voting addresses that may work to the benefit of particular contestants, especially in local elections. If that is the case, other ways that do not risk penalising voters for exercising their legal entitlement should be explored.

18. In addition, ODIHR and the Venice Commission take note of the view expressed by some interlocutors that Article 42^2 is redundant in light of the more general Article 294 of the Code on Infractions, which penalises non-provision, untimely provision, or provision of false information, data or report to an authorised body. This article establishes the same penalty as the draft Article 42^2 – a fine of 2nd category. **ODIHR and the Venice Commission recommend to exclude the draft Article 42^2 of the Code on Infractions from the draft law.**

C. Amendments to the Code on Minor Offences

19. The draft law introduces three amendments to the Code on Minor Offences: Article 87^1 that penalises the abuse of administrative resources; Article 87^2 that penalises provision by a candidate to an elected office of knowingly false information; and Article 87^3 that introduces a sanction for accepting a reward in return for one's vote.

1. Abuse of administrative resources

20. Draft Article 87^1 introduces a sanction for abuse of administrative resources by candidates, heads and founders of state media and online media, and organisations with a share of state (municipal) participation over 30 per cent. This offence is punishable by a fine of 2nd category.[6] The same offence committed by heads of state and municipal organisations is punishable by a fine of 3rd category and a ban of 2nd category on holding certain offices.[7] The draft law appears to contain an error since 2nd category is the highest category of fines that can be imposed under the Code on Minor Offences. [8] Nevertheless, these penalties appear to be sufficiently dissuasive.

21. The draft article does not give a definition of abuse of administrative resources. This concept is developed in the new Article 21^1 of the Election Law introduced by the August 2019 amendments. Article 21^1.1 of the Election Law defines abuse of administrative resources as:

> "*unlawful use of human, financial, material, media, institutional resources by candidates, officials, heads of state and municipal organizations, members and founders of media and online editions during elections, obtained as a result of their control over civil state and municipal employees or employees of state, municipal enterprises, institutions, enterprises with the share of state (municipal) participation over 30 per cent, over finances and their distribution, which may be transformed into political and other forms of support of particular candidates, political parties, undermining the equality of candidates*."

22. This broad definition is supplemented by particular types of abuse of administrative resources in Article 21^1.2 of the Election Law, which lists involving subordinates in activities supporting candidates; use of premises that are not available to other candidates on the same terms; use of state (municipal) means of communications and transport; advantageous access to media for the purpose of support signature collection and campaigning; campaigning at public events organised by state or local authorities; publication of reports on activities and

[6] The Code on Minor Offences provides for heavier fines compared to the Code on Infractions. The fine of 2nd category is currently between KGS 60,000 and 80,000.
[7] The 2nd category ban lasts from one to two years.
[8] See paragraph 2.2 of the Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, document CDL-AD (2016) 004.

distribution of greetings and other materials that are not paid from the corresponding electoral fund. Further, Article 21[1].3 prohibits holders of state and municipal offices and heads of state (municipal) enterprises and institutions from using the advantages of their positions as candidates or in support of candidates. Similar provisions were introduced in the Local Election Law (Article 17[1]).

23. The introduction of legislative provisions aimed at countering abuse of administrative resources is a welcome development, which addresses a prior ODIHR recommendation.[9] The new provisions of the Election Law are rather comprehensive and capture the essence of abuse of administrative resources described by the Venice Commission:

> "*Administrative resources are human, financial, material, in natura and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations, access to public facilities as well as resources enjoyed in the form of prestige or public presence that stem from their position as elected or public officers and which may turn into political endorsements or other forms of support*."[10]

24. The emphasis in the above definition is on the resources available to incumbents and civil servants that stem from their position. In draft Article 87[1] to the Code on Minor Offences the sanction for abuse of administrative resources is envisaged for candidates, heads of state and municipal bodies, organisations, and media. At the same time, other holders of state and municipal offices, mentioned in Article 21[1] of the Election Law and Article 17[1] of the Local Election Law are not listed in the draft law.

25. **ODIHR and the Venice Commission recommend to amend the draft Article 87[1] of the Code on Minor Offences and include officials within the meaning of electoral legislation among the subjects of responsibility for the abuse of administrative resources.**

2. Provision of knowingly false information by a candidate

26. Draft Article 87[2] introduces sanctions for the provision by a candidate to an elected office of knowingly false information, documents, or concealment of information about citizenship of another country for the purposes of nomination, registration or election. This offence is punishable by a fine of 1st category; and if committed by state or municipal employees – by a fine of 2nd category together with a ban on holding certain offices of 2nd category.

27. The conduct penalised by draft Article 87[2] is certainly undesirable. However, it is doubtful that it should be punished under the Code on Minor Offences. A candidate who presents false information or conceals facts that result in ineligibility for elected office will already suffer negative consequences by losing his/her mandate according to electoral legislation. Spending additional public resources on an investigation in order to also sanction such conduct with a fine does not appear to serve a convincing purpose. If an additional sanction is warranted, for example, for preventive purposes, it could be imposed by an election commission under the Code on Infractions.

28. **ODIHR and the Venice Commission recommend that draft Article 87[2] to the Code on Minor Offences be reconsidered. If this offence is retained at all, consideration should be given to its inclusion in the Code on Infractions.**

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[9] Recommendation 1 of the final ODIHR report on the 2017 presidential election in Kyrgyz Republic.
[10] Venice Commission, Report on the misuse of administrative resources during electoral processes, CDL-AD(2013)033, para 12.

29. In relation to the citizenship of another state, ODIHR and Venice Commission note the prohibition for citizens of the Kyrgyz Republic who have another citizenship to hold state political and judicial offices, according to Article 52.2 of the Constitution. It should be pointed out, however, that this restriction diverges from the practice of Council of Europe member states. The European Convention on Nationality, ratified by 21 countries, provides in Article 17 that:

> "*Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party*".

30. In the case of *Tănase v. Moldova* the European Court of Human Rights (ECtHR) examined the prohibition for dual nationals to stand for parliament and found that:

> "*a review of practice across Council of Europe member States reveals a consensus that where multiple nationalities are permitted, the holding of more than one nationality should not be a ground for ineligibility to sit as [a member of parliament (MP)], even where the population is ethnically diverse and the number of MPs with multiple nationalities may be high*."[11]

31. In this judgment, the ECtHR rejected the arguments of the Moldovan government in support of the restriction of the right to stand for dual nationals and found this restriction to be in breach of Article 3 of Protocol 1 of the European Convention on Human Rights. It should also be recalled that OSCE participating States have committed themselves to respect the right of citizens to seek political or public office without discrimination.[12]

32. **ODIHR and the Venice Commission recommend that Kyrgyzstan's legislators give due consideration to minimising and eventually abolishing limitations on holding public offices for citizens with dual nationalities.**

3. Vote-selling

33. Draft Article 87^3 introduces a sanction for "accepting by a voter (referendum participant) for one's own benefit or that of a third person of money or material values for exercising the electoral right", i.e. for vote selling. In the course of the visit to Bishkek the delegation of ODIHR and the Venice Commission experts heard different views on this proposal. Some interlocutors supported this initiative, emphasising its potential deterrent effect. Others described the proposal as impractical and unnecessary.

34. In the experience of many countries in the OSCE region vote-buying disproportionately affects socially vulnerable groups. The threat of prosecution may have a chilling effect on the willingness of representatives of these groups to report attempts of vote-buying and co-operate with their investigation. This risk is not entirely eliminated by the reservation in the draft law that a person who voluntarily reports vote-buying shall be relieved from liability. It has also been argued that limited resources of the prosecution should be invested in combating offences that present a greater social threat.[13]

35. **If draft Article 87^3 to the Code on Minor Offences in retained in the draft law, ODIHR and the Venice Commission recommend stating more clearly that any person**

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[11] *See Tănase v. Moldova (application no. 7/08, 27 April 2010)*, para 172.
[12] See paragraph 7.5 of the 1990 OSCE Copenhagen Document.
[13] These considerations have, for example, led to the amendment of the Constitution of the State of Maryland (USA) in 1913, allowing the legislature to decriminalise vote-selling and punish only vote-buying.

who reports vote-buying to the law enforcement or co-operates in the investigation or prosecution of vote-buying shall not be held responsible for vote-selling.

D. Amendments to the Criminal Code

36. The draft law introduces two amendments to existing articles of the Criminal Code: Article 191.2 which penalises obstruction of the work of election commissions and Article 192 which deals with vote-buying.

37. Article 191.2 of the Criminal Code establishes responsibility for obstructing the work of election (referenda) commissions or their members. The proposed amendment adds to this provision "an intentional attempt to disrupt or falsify data of state information systems used in the electoral process". The sanction of the current article remains unchanged: community labour of IV category, or correctional labour of III category, or a fine of IV category.[14] The explanatory note accompanying the draft law explains that the amendment addresses the growing threat from cybercrime targeting information systems used in the electoral process. As such, this amendment could be a valuable tool for more effective law enforcement and prosecution.[15]

38. Article 192 of the Criminal Code criminalises vote-buying by a candidate for national or local office, as well as his/her spouse, close relatives, proxies or authorised representatives. ODIHR and the Venice Commission note with satisfaction that under the new Criminal Code in force since January 2019 the criminal offence of vote-buying is subject to public prosecution, which addresses a prior ODIHR recommendation.

39. The proposed amendment divides the current article into two parts. Draft Article 192.1 penalises vote-buying, defined as "handing over money, material values or assisting in obtaining any position or another benefit" in general, without specifying the subject of the offence. This offence would be punishable by a fine of IV category. Draft Article 192.2 establishes more severe sanctions if the same offence is committed by a candidate, his/her proxies or authorised representatives: a fine of V category or deprivation of liberty of I category.[16] A candidate's spouse and relatives are omitted from this new provision.

40. The proposed amendment is seen as an improvement on the current wording of Article 192 insofar as it allows for criminal prosecution for vote-buying offences when there is no evidence of links between the perpetrators and election contestants. The proposed sanctions appear to be sufficiently dissuasive.

E. Amendments to the Code of Administrative Procedure

41. The proposed amendment to Article 201.4 of the Code of Administrative Procedure changes the deadline for lodging appeals against violations of electoral rights from two to three days. The two-day deadline has in the past led to confusion among stakeholders in light of Article 201.6 of the same Code, which provides for a three-day deadline for lodging appeals against decisions of election commissions.[17] The elimination of this divergence by the draft amendment is therefore welcome.

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[14] Community labour of IV category is between 100 and 120 hours for juveniles, for adults – between 280 and 360 hours; correctional labour of III category is between six and nine months for juveniles, and between two to two and a half years for adults; a fine of IV category currently amounts to between KGS 80,000 and 100,000 for juveniles and between KGS 180,000 and 220,000 for adults.

[15] See also the Council of Europe's 2001 Budapest Convention on Cybercrime.

[16] A fine of V category is currently between KGS 100,000 and 120,000 for juveniles and between KGS 220,000 and 260,000 for adults. Deprivation of liberty of I category is for up to 1.5 years for juveniles and up to 2.5 years for adults.

[17] See the final ODIHR report on the 2017 presidential election in Kyrgyz Republic.