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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

AND

**OSCE/OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**JOINT OPINION ON THE DRAFT LAW ON  
PRESIDENTIAL AND PARLIAMENTARY ELECTIONS,  
THE DRAFT LAW ON ELECTIONS TO LOCAL  
GOVERNMENTS AND THE DRAFT LAW ON THE  
FORMATION OF ELECTION COMMISSIONS  
OF THE KYRGYZ REPUBLIC**

**Adopted by the Council for Democratic Elections  
at its 37<sup>th</sup> meeting  
(Venice, 16 June 2011)  
and by the Venice Commission  
at its 87<sup>th</sup> Plenary Session  
(Venice, 17-18 June 2011)  
on the basis of comments by**

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## I. INTRODUCTION

1. In March 2011 the authorities of the Kyrgyz Republic requested the Venice Commission and the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) to provide an opinion on the draft Law on Presidential and Parliamentary Elections ("draft national elections law", CDL-REF(2011)017), the draft Law on Elections to Local Governments ("draft local elections law, CDL-REF(2011)022) and the draft Law on Election Commissions ("draft election commissions law", CDL-REF(2011)023) of the Kyrgyz Republic.
2. This opinion is based on the initial set of informal comments provided by OSCE/ODIHR and the Venice Commission in April 2011.<sup>1</sup> This joint opinion comments on the most recent versions of these three draft laws, which include amendments through March 2011. Representatives of the Venice Commission and OSCE/ODIHR participated in parliamentary hearing on these draft laws held on 3 May. OSCE/ODIHR and Venice Commission are aware that the national elections law and the election commissions' law were adopted by the parliament on 12 - 13 May. At the moment of finalising this joint opinion the texts of adopted laws were not published and are not reflected in this opinion. The two institutions intend to review the adopted laws once they are available.
3. Earlier opinions of OSCE/ODIHR<sup>2</sup> as well as numerous election reports from previous OSCE/ODIHR election observation missions in the Kyrgyz Republic<sup>3</sup> provide good background for understanding the historical development of the election legislation in the Kyrgyz Republic. The draft laws incorporate some previous recommendations of OSCE/ODIHR, but there remain numerous and significant areas in the draft laws that require improvement. These areas include calculation of the threshold for allocation of parliamentary seats, clarification of how ballots are marked and mandates distributed in local elections, candidacy rights, campaign rules, the participation of women in elections, the determination of election results, and complaint and appeals procedures.
4. This opinion should also be read in conjunction with the following documents:

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<sup>1</sup> The Venice Commission asked Mr. Aivars Endzins (Member, Latvia), Mr. Evgeny Tanchev (Member, Bulgaria) and Ms. Marina Stavniychuk (Member, Ukraine) to provide their comments on the draft laws. OSCE/ODIHR engaged Mr. Jessie Pilgrim, legal expert, and Ms. Tamara Otiashvili, legal expert for this review.

<sup>2</sup> Assessment of the Election Code of The Kyrgyz Republic (Warsaw, 7 July 2006); Review of Amendments to the Election Code of The Kyrgyz Republic Adopted 11 October 2001 (Warsaw, 15 February 2002); Analysis and Recommendations Concerning the Election Code of The Kyrgyz Republic (Warsaw, 26 May 2000); Assessment of the Pending Amendments to the Election Code of The Kyrgyz Republic (Warsaw, 5 November 2003); Assessment of the Election Code as Amended by the Legislative Assembly in the Second Reading on 25 December 2003 (Warsaw, 15 January 2004). All OSCE/ODIHR legal reviews of the Kyrgyz electoral legal framework can be found at: <http://www.osce.org/odihr/elections/kyrgyzstan>.

<sup>3</sup> OSCE/ODIHR Final Report on The Kyrgyz Republic Parliamentary Elections 10 October 2010 (Warsaw, 20 December 2010); OSCE/ODIHR Final Report on The Kyrgyz Republic Presidential Election 23 July 2009 (Warsaw, 22 October 2009); OSCE/ODIHR Final Report on The Kyrgyz Republic Pre-Term Parliamentary Elections 16 December 2007 (Warsaw, 24 April 2008); OSCE/ODIHR Final Report on The Kyrgyz Republic Presidential Election 10 July 2005 (Warsaw, 7 November 2005); OSCE/ODIHR Final Report on The Kyrgyz Republic Parliamentary Elections 27 February and 13 March 2005 (Warsaw, 20 May 2005); OSCE/ODIHR Final Report on The Kyrgyz Republic Presidential Elections 29 October 2000 (Warsaw, 16 January 2001); OSCE/ODIHR Final Report on The Kyrgyz Republic Parliamentary Elections 20 February and 12 March 2000 (Warsaw, 10 April 2000). All OSCE/ODIHR election observation mission reports can be found at: <http://www.osce.org/odihr/elections/kyrgyzstan>.

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990);
  - Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), CDL-AD (2002)023rev;
  - Previous assessments, opinions, and reviews of OSCE/ODIHR noted herein; and
  - Final reports of OSCE/ODIHR election observation missions noted herein.
5. This opinion takes into consideration standards and principles recognized by the United Nations Human Rights Committee and the case-law of the European Court of Human Rights. The Kyrgyz Republic has ratified both the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>4</sup> Although the Kyrgyz Republic is not a member of the Council of Europe, the Kyrgyz Republic has been a member of the Venice Commission since 1 January 2004. Additionally, as noted by numerous OSCE documents, participating States commit to consider acceding to global or regional human rights instruments, “such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights”.<sup>5</sup>
6. This opinion does not take into consideration other laws, which have provisions that may relate to elections. Notably, this opinion does not include a review of the Civil Procedure Code.
7. The conduct of genuinely democratic elections depends not only on comprehensive and sound election legislation but on commensurate political will to implement it in accordance with the letter and spirit of the law. The electoral legislation in the Kyrgyz Republic has been amended several times. Many of these changes were initiated by comments of OSCE/ODIHR. However, further improvements are required in many important areas where the legislation and its implementation fall short of international standards and OSCE commitments. It is also to be noted that the authors of the current reform of the electoral legislation, which is mainly the Election Code adopted in 1999, decided to adopt separate laws instead of a new Election Code.
8. This opinion does not comment on the legislative processes, which resulted in the drafts of the election laws. However, it is an established principle that legislation regulating fundamental rights such as the right to genuinely free elections should be adopted openly, following public debate, and with broad support in order to ensure confidence and trust in electoral outcomes. A broad public consultation process encourages public trust and confidence in electoral outcomes, which has been lacking in elections in the Kyrgyz Republic. There should be broad political consent and acceptance of the election legislation in order to further enhance

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<sup>4</sup> The United Nations Human Rights Committee has adopted on 12 July 1996 a General Comment (General Comment 25) interpreting the principles for democratic elections and public service set forth in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). General Comments of the United Nations Human Rights Committee are interpretive statements of the provisions of the International Covenant on Civil and Political Rights (ICCPR).

<sup>5</sup> Paragraphs 5.20 and 5.21 of the Copenhagen Document. See also Madrid Document 1983, Principles, paragraph 12; Paragraphs 10 and 11 of Prague Document 1992; and Human Dimension section of Charter of Paris 1990.

public confidence in electoral outcomes in future elections, especially, when the reform is conducted in the electoral year.

9. This opinion 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.
10. This opinion was adopted by the Council for Democratic Elections at its 37<sup>th</sup> meeting (Venice, 16 June 2011) and by the Venice Commission at its 87<sup>th</sup> session (Venice, 17-18 June 2011).

## II. EXECUTIVE SUMMARY

11. While a number of amendments to the draft laws mark progress, some concerns remain, including significant limitations to certain civil and political rights. Areas in which further improvement is required include the following:

- Limitations on voting rights that are contrary to OSCE commitments, numerous recommendations of OSCE/ODIHR and the Venice Commission in the electoral field, good practices, notably the Code of Good Practice in Electoral Matters<sup>6</sup> and other international standards;
- Limitations on the right to be a candidate that are contrary to OSCE commitments, numerous recommendations of OSCE/ODIHR and the Venice Commission in the electoral field, good practices and other international standards;
- Lack of clarity in an election system for local government elections that does not seem implementable based on the actual written text of the law, particularly the part regarding the allocation of mandates;
- Certain provisions regulating the formation of election commissions at various levels could benefit from clearer delineation;
- Limitations on the rights to freedom of expression, and association that are contrary to OSCE commitments, recommendations and opinions of the OSCE/ODIHR and Venice Commission and other international standards;
- The process for filing and adjudicating complaints and appeals to protect suffrage rights; and
- A number of contradictions and unnecessary repetitions.

12. Some previous OSCE/ODIHR recommendations in the electoral field have been considered and adopted in the draft law. Improvements include:

- Reducing the number of signatures required in support of a presidential candidate for registration purposes;
- Strengthening of provisions for transparency of election processes;
- Elimination of provisions for voting with absentee certificates;
- Requiring the inking of voters' fingers; and
- Permitting observers to become familiar with the *GAS Shailoo* automated information system and its software.

13. In the framework of this joint opinion,<sup>7</sup> the Venice Commission and OSCE/ODIHR are pleased to offer recommendations for consideration by the authorities of the Kyrgyz Republic in support of their efforts to improve election-related legislation

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<sup>6</sup> See doc. CDL-AD (2002) 023 rev.

<sup>7</sup> This joint opinion might be subject to changes and additions after it is discussed at the plenary session of the Venice Commission in June 2011 upon receipt of the adopted texts of the laws.

and bring it more closely in line with OSCE commitments and international standards. However, it must be emphasized that, in addition to further amendments to the legislative framework, full and effective implementation of the law is necessary in order to ensure conduct of elections in line with international standards.

### III. DISCUSSION OF THE DRAFT NATIONAL ELECTIONS LAW AND THE DRAFT ELECTION COMMISSIONS LAW

#### A. ELECTORAL SYSTEM FOR PARLIAMENT

14. Article 70 of the Constitution adopted in June 2010 establishes the number of parliamentary seats at 120. Members of parliament are elected for a five-year term through a proportional party list system within a single nation-wide constituency. Article 70 also provides that *“as a result of elections a political party may not be granted more than 65 deputy mandates in the Parliament.”*

15. The Venice Commission has previously stated concerning the electoral system for parliament:

*“The prohibition of a single party from having more than 65 out of 120 deputies should avoid the domination of one political party. Such a restriction on the size of the majority seems to be new. The problem is that it might violate the principle of the equality of votes. The votes for a party, which has already reached the relevant quota, can be lost. But, these restrictions might be justified as measures necessary to build a pluralistic party system. Specific legislation should explain how the remaining votes are distributed.”<sup>8</sup>*

16. This system is problematic as it does not ensure respect for the principle of equality of votes. The free expression of the will of the people is a fundamental principle for democratic elections as is the principle of equal suffrage. Equal suffrage is required by paragraph 7.9 of the 1990 OSCE Copenhagen Document and Article 25 of the International Covenant on Civil and Political Rights. Although this restriction could undermine the free expression of the will of the people and paragraph 7.9 of the Copenhagen Document, it can be seen as a transitory measure to build a pluralistic parliament.

17. The Venice Commission has also noted that specific legislation should explain how mandates are allocated under this system where a political party loses its votes because it received more votes than needed for 65 seats. The draft national elections law fails to establish a procedure for implementation of this constitutional provision. Article 65 of the draft law only states the formula for determining the electoral quotient to secure a mandate. Article 65 does not provide a process for the distribution of mandates where a political party reaches the limit of 65 mandates. **The Venice Commission and OSCE/ODIHR recommend** that Article 65 be amended to address the distribution of mandates where a political party reaches the limit of 65 mandates.

18. Article 66(2) of the draft national elections law limits distribution of parliamentary mandates to political parties that receive more than 5 per cent of the vote nationwide and at least 0.5 per cent of the vote in each of the seven oblasts and

<sup>8</sup>

Opinion on the Draft Constitution of the Kyrgyz Republic (version published on 21 May 2010), adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010), CDL-AD(2010)015, paragraph 40.

Bishkek and Osh cities. Both thresholds are calculated against the number of voters who participated in elections. This is a positive development compared with previous practice when the threshold was calculated against the number of registered voters. Further, as noted in previous OSCE/ODIHR reports, the double threshold requirement compromises the objectives of a proportional representation system.<sup>9</sup> **The Venice Commission and OSCE/ODIHR recommend** that the second threshold requirement of 0.5 per cent of the vote in each of the seven oblasts and Bishkek and Osh cities be reconsidered and that thresholds for the allocation of parliamentary seats be calculated based on the number of valid votes cast, rather than against the number of voters who participated in elections, in line with international practice.

## B. LIMITATION ON ELECTORAL RIGHTS

19. Article 3 of the draft national elections law sets forth the right of suffrage for citizens of the Kyrgyz Republic. Article 3(4) abrogates the passive right of suffrage of a citizen whose “conviction has not been dropped or redeemed pursuant the procedures established by the law”. Under this provision, 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 “dropped” or “redeemed”.
20. Article 3(3) denies the voting rights of citizens “kept in places of confinement”. Further, Article 14(5) requires the compilation of “data on voters temporarily confined to hospitals, investigation cells, and temporary containment cells”. Thus, it would appear that Article 3(3) is intended to apply to a citizen who has been convicted of a crime and is “kept in a place of confinement”.
21. The denial of suffrage, due to a conviction for *any* crime, is a questionable exercise of state power. 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.<sup>10</sup> In *Hirst v. United Kingdom (No. 2)*,<sup>11</sup> 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”. The blanket prohibition in Article 3 would appear to be contrary to the principles stated in the *Hirst* case.
22. The *Hirst* case was relied on recently by the European Court of Human Rights in the case of *Frodl v. Austria*, (Application no. 20201/04, decided 4 October 2010).<sup>12</sup>

<sup>9</sup> As noted in OSCE/ODIHR Final Report for the 2007 Parliamentary elections “a party might receive more than five per cent of the vote nationwide, but if it missed the 0.5 per cent in only one region, it would not gain parliamentary representation, thus compromising the objective of proportional representation.” See [www.osce.org/documents/odihr/2010/07/45515\\_en.pdf](http://www.osce.org/documents/odihr/2010/07/45515_en.pdf).

<sup>10</sup> See, e.g., Paragraph 24 of the 1990 OSCE Copenhagen Document which provides that “participating States will ensure that the exercise of all the human rights and fundamental freedoms will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law”. See also, Paragraph 1.1(d.iv) of Council of Europe, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines for Elections, (2002), page 8.

<sup>11</sup> *Hirst v. United Kingdom*, no. 74025/01 (6 October 2005), available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>12</sup> *Frodl v. Austria*, no. 20201/04 (October 2010), paragraph 25, available at [www.echr.coe.int](http://www.echr.coe.int).

23. Under the Hirst case, besides ruling out automatic and blanket restrictions, it is essential that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions.<sup>13</sup>
24. The essential purpose of these criteria is to establish disenfranchisement as an exception even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary, taking the above elements into account. The principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned (*ibid*, § 71).<sup>14</sup>
25. **The Venice Commission and OSCE/ODIHR recommend** that Article 3 of the draft national elections law be amended so that denial of suffrage rights 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 and only where a judge has made a specific determination that the circumstances of the individual case require forfeiture of voting rights. The forfeiture should be for an established period of time, likewise proportionate, and restoration of political rights should occur automatically after the expiration of this period of time. 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.

### C. CANDIDACY RIGHTS

26. 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 be elected at genuine, periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (3) have access, on general terms of equality, to public service in his or her country.<sup>15</sup> The draft national elections law does not fully satisfy this fundamental principle, as it contains provisions that prevent citizens who should have the opportunity to participate in representative government from exercising their right to be a candidate for public office.

### D. LIMITATIONS ON CANDIDACY RIGHTS

27. OSCE/ODIHR noted in its previous assessments that provisions as contained in Articles 21, 28, and 46 of the draft national elections law permit the cancellation of registration of a candidate for a variety of reasons; in many instances, the reasons for cancellation are disproportionate and the grounds are too wide.<sup>16</sup> A variety of campaign violations can be the basis for cancellation of registration.<sup>17</sup> Although wrongful acts should be punished, cancellation of registration is

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<sup>13</sup> *Id.*, paragraph 34.

<sup>14</sup> *Id.*, paragraph 35.

<sup>15</sup> See, e.g., Article 25 of the International Covenant on Civil and Political Rights.

<sup>16</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>17</sup> Article 21(2)(3) prohibits the “use of telephone” “that belong to government bodies” for the purpose of campaigning. Thus, making telephone calls on a government telephone could be the basis for cancellation of candidate registration.



disproportionate. In addition to possible abuse by authorities, these provisions could be potentially misused to “cancel” electoral opponents.

28. Article 46(6) expressly permits cancellation of candidate registration if a candidate is involved in *any* violation of “pre-election campaign rules”. This automatically incorporates provisions contained in Articles 22 through 28 into Article 46 since many “pre-election” campaign rules are stated in Articles 22 through 28. Thus, the grounds for cancellation of candidate registration are numerous and broad. Particularly, the draft allows revoking a candidate’s registration in the event election fraud is committed by his or her representatives or close relatives.
29. Moreover, regrettably, the draft still preserves the possibility of deregistering a candidate after his/her election, which also in theory implies, that a candidate with the majority of votes could be subject to deregistration in the event of any “violations.” This runs contrary to Paragraph 7.9 of the 1990 OSCE Copenhagen Document, which states that “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.”
30. 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 vital that, in a democracy, the right to choose belongs to the people. Voters are best suited to judge the intellectual capacity, honesty, integrity, and general persona presented by candidates. Articles 21, 28, and 46 severely limit the rights of voters as well as the rights of candidates. **The Venice Commission and OSCE/ODIHR recommend** 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 or age) or to severe violations of the election legislation, and that Articles 21, 28, and 46 be accordingly amended.
31. Article 21(10) of the draft national elections law provides that candidate immunity from arrest cannot be lifted “without preliminary consent of the Central Election Commission except for cases of being caught in action”. First, there is no exception to the legal presumption of innocence based on “being caught in action”. The presumption of innocence applies regardless of the quantum of proof of wrongdoing. Secondly, the election administration should not be involved in making judicial determinations, in the nature of preliminary criminal convictions, which result in the lifting of candidate immunity. **The Venice Commission and OSCE/ODIHR recommend** that the CEC be removed from Article 21(5) as the body responsible for determining whether immunity of a candidate should be lifted, and that this should be the responsibility of a court.

#### **E. PRESIDENTIAL CANDIDACY RIGHTS**

32. The term of the president has been extended to six years. The draft law stipulates that the president cannot be elected for two consecutive terms twice (Article 48.2). This contradicts the 2010 Constitution, which stipulates that “One and the same person may not be elected President twice” (art. 61.2). **The Venice Commission and OSCE/ODIHR therefore recommend** that this provision be brought in conformity with the Constitution.

33. Article 48(3) requires that a candidate for President must be a citizen between the ages of 35 and 70, a resident of the Kyrgyz Republic for 15 years prior to his/her nomination, and “know the state language”. This residency requirement seems excessive.

34. The UN Human Rights Committee has stated that:

*“Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as...residence or descent.”*<sup>18</sup>

35. The Venice Commission Code of Good Practice in Electoral Matters states: “a length of residence requirement may be imposed on nationals solely for local or regional elections.”<sup>19</sup> While residency is generally accepted as a valid restriction to candidacy rights, the 15-years residency requirement for presidential candidates would appear excessive. **The Venice Commission and OSCE/ODIHR recommend** that consideration be given to amend the 15-year residency requirement for a presidential candidate.

36. Article 51 requires a candidate to have a “level of proficiency” of the state language, which the article states is “determined based on his/her ability to read, write, express his/her thoughts in the state language”. Article 51 further requires the candidate to “present his/her pre-election program in a written form in the volume not more than three pages”; “read a printed text in the volume not more than three pages”; and “make an oral presentation within not more than 15 minutes presenting the main provisions of his/her election program”. Article 51 is of concern because language proficiency is determined subjectively based on the opinions of an ad hoc “language commission” appointed by the CEC. Thus, Article 51 does not state clear and objective criteria for determining proficiency, but instead allows for a subjective “proficiency” decision by an ad hoc commission. Further, application of the article will exclude the candidacy of a citizen who has a visual or vocal impairment and would discriminate against such a person.<sup>20</sup>

#### **F. COLLECTION OF SIGNATURES FOR PRESIDENTIAL CANDIDACY**

37. Article 49 of the draft national elections law requires that a candidate for President collect no less than 30,000 signatures of voters in support of his/her candidacy in order to be registered. This would lower the number of signatures required from 50,000, which is the current requirement. International good practice establishes that the number of signatures to be collected in support of candidacy should not exceed one per cent of the number of registered voters in the respective constituency.<sup>21</sup> This change is a positive development and should be included in the final version of the law.

38. Article 52(8) states “either all or part of the submitted signatures selected randomly (through casting a lot) for checking are subject to checking”. This provision is not consistent with international good practice.<sup>22</sup> Extrapolation of the percentage of invalid signatures in a sample to the total number of signatures

<sup>18</sup> UN Human Rights Committee General Comment 25, para. 15.

<sup>19</sup> Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.1.c.

<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> Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.3 ii.

<sup>22</sup> Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.3 iv.

collected does not provide an accurate reconciliation of collected signatures. OSCE/ODIHR noted in its election observation mission report on the 2009 presidential elections:

“Like the Oblast Election Commissions (OECs), the Central Election Commission (CEC) extrapolated the percentage of invalid signatures to the total amount. This double extrapolation is unreasonable and led directly to the denial of registration for Mr. Aitikeev. Initially, the OECs found 8,435 of Mr. Aitikeev’s 74,081 submitted signatures invalid (11.4 per cent). The CEC further verified 5,109 of the remaining 65,646 signatures (8 per cent) and found 1,405 (27.5 per cent) invalid; they consequently invalidated an additional 18,025 signatures. This left Mr. Aitikeev with only 47,521 valid signatures, 2,479 short of the required 50,000 (figures provided by CEC)”.

The method of ‘random’ verification used by the CEC treats potential candidates differently and is not statistically valid. Firstly, the sample size of three per cent may be too small compared with the overall number of collected signatures, which varied greatly for several candidates. Secondly, the sample size and the choice of regions in which to undertake verification were not consistent for all nominees. This is important, especially considering that the more localised the sample (i.e. fewer regions), the higher the chances of invalid signatures being found and extrapolated.<sup>23</sup>

39. 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 Venice Commission and OSCE/ODIHR recommend** that the procedure for verification of support signatures be revised, taking into consideration international good practice and the benefits of requiring a uniform procedure for all election commissions that can be evaluated objectively by candidates and observers.
40. Article 52(9) states that “signature lists are considered invalid if the requirements established by this article are not observed”. This is a very broad provision, which would require a signature list to be invalidated should a voter sign the list more than once. It is questionable whether one invalid signature should have the effect of invalidating hundreds or thousands of valid signatures. **The Venice Commission and OSCE/ODIHR recommend** that this provision be amended so that it is more narrowly tailored to address the specific irregularity that has been noted in regard to the signature list.

#### **G. ELECTORAL DEPOSITS FOR PRESIDENTIAL CANDIDATES**

41. Article 53(4) of the draft law requires that a candidate for President pay an electoral deposit (pledge) “in the amount of thousand times of the established by the legislation calculated index”. 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 Venice Commission and OSCE/ODIHR recommend** that the combined requirement of signatures and an electoral deposit be removed from the draft law, and that registration

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<sup>23</sup> OSCE/ODIHR Final Report on the Kyrgyz Republic Presidential Election 23 July 2009 (Warsaw, 22 October 2009), at page 11.

requirements may be met through either the collection of signatures or payment of an electoral deposit.

42. The deposit is reimbursed if the candidate obtains a number of votes not less than 15 per cent of the number of voters who participated in the election. 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>24</sup> Fifteen percent is a rather high threshold for reimbursement of the electoral deposit. **The Venice Commission and OSCE/ODIHR recommend** that Article 53(3) be amended to lower significantly the threshold for reimbursement of the candidate's deposit.
43. The amount of the electoral deposit for a presidential candidate is "in the amount of thousand times of the established by the legislation calculated index". This is interpreted to mean 1,000 times the minimum monthly wage. This could prevent the candidacy of many individuals due to their economic or social standing. It also creates the perception that 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>25</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 Venice Commission and OSCE/ODIHR recommend** that the amount of the electoral deposit 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.

#### H. PARLIAMENTARY CANDIDACY RIGHTS

44. Under Article 60(2) of the draft national elections law, parliamentary elections are limited to candidates nominated by a political party. This prevents individuals from standing for office as independent candidates, which is not in line with the 1990 OSCE Copenhagen Document. Paragraph 7.5 of the 1990 OSCE Copenhagen Document states: "*[The participating States will] respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination*". See also General Comment 25 (1996) of the UN Human Rights Committee to Article 25 of the International Covenant on Civil and Political Rights. Point 17 states that the "*right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties.*" **The Venice Commission and OSCE/ODIHR recommend** that law be amended to provide for the candidacy of independent candidates in elections.

#### I. CHANGE IN LIST ORDER OF CANDIDATES

45. Article 60(6) of the draft national elections law provides:

*"After submitting of a list of candidates to the CEC the sequence of candidates in it can be changed upon a decision of a political party only from the moment of*

<sup>24</sup> Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, 1.3(9).

<sup>25</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). See also OSCE/ODIHR Handbook for Monitoring Women's Participation in Elections at <http://www.osce.org/odihr/elections/35151>.

*determination of elections results till the day of registration of candidates as deputies with regard to requirements of item 3 of this article in the event a political party notified the Central Election Commission about a possible change of the sequence of candidates' placement in the list."*

46. Article 65(4) of the draft law provides:

*"... In the event of a preliminary notification of a political party about the flexibility of the submitted lists of candidates the sequence of placement of candidates in it can be changed upon a decision of a political party from the moment of determination of the election results till the day of candidates' registration as deputies with regard to the requirements of item 3 article 61 of this Law."*

47. These provisions allow political parties to determine, after the election day, which party members are to be allocated parliamentary mandates, regardless of their order on the candidates list. However, voters should know in advance which candidates or party representatives would enter parliament following an election and depending on the number of votes received. **The Venice Commission and OSCE/ODIHR therefore recommend** that the law be amended to oblige political parties and coalitions to determine and announce the order of candidates on their list before the elections, rather than allowing them to choose after election day which candidates will be awarded mandates.

#### **J. FORFEITURE OF MANDATE**

48. In a positive step, and addressing previous OSCE/ODIHR recommendations, the new Constitution explicitly provides that parliamentary deputies are not bound by an imperative mandate.<sup>26</sup> However, Article 73(3)(1) of the Constitution still retains the concept that the mandate of an elected deputy is terminated ahead of term if the deputy ceases to be a member of a faction.<sup>27</sup> This is also stated in Article 67(3)(11) of the draft national elections law, which provides that a deputy loses his or her mandate upon the "*deputy's exit from the faction from which he/she was elected*".

49. Termination of a mandate for leaving one's original faction in parliament is a practice that has been used in recent years in several countries. Leaving one's faction is commonly known as "floor crossing". Courts in these countries, particularly in South Africa and Malawi, have written extensive opinions concerning the legitimacy of prohibitions on "floor crossing" due to the right of freedom of association. In fact, these opinions reference Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the principle that a restriction of Article 11 must be strictly necessary in a democratic society and proportionate. Applying such an analysis, courts have ruled that absolute bans on "floor crossing", which are an absolute ban on freedom of association, are contrary to the right of freedom of association. Such an analysis leaves open the possibility for limited bans, which allow windows (timeframes) for changing political affiliations in a legislative institution as opposed to outright bans. An analogous analysis would be how the European Court of Human Rights has treated restrictions on voting rights of persons convicted of crimes, *i.e.*, general absolute restrictions are unacceptable and text must be narrowly crafted for specific conduct. The provisions in Article 66(3) of

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<sup>26</sup> Article 73(1) of the Constitution prohibits the imperative mandate, but fails to give a definition of the term. The term imperative mandate means that deputies are bound to remain members of the parliamentary faction or bloc to which they were elected throughout their term in office.

<sup>27</sup> According to Article 70(3) of the Constitution, deputies unite in factions, which may form a majority faction or an opposition faction.

the draft law are absolute restrictions. As absolute restrictions, they are contrary to Article 11 of the European Convention as well as other international instruments that recognize the right to freedom of association.<sup>28</sup>

50. This possibility in the draft national elections law also seems to contradict the constitutional provision lifting the imperative mandate and reintroduces a disproportionate level of party or faction control over deputies elected by popular vote. This, in turn, contradicts paragraph 7.9 of the 1990 OSCE Copenhagen Document. Paragraph 7.9 of the 1990 OSCE Copenhagen Document provides that “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”. **The Venice Commission and OSCE/ODIHR recommend** that Article 66(3) be amended to delete provisions that require forfeiture of a parliamentary mandate for “floor crossing” or due to termination of political party activity.<sup>29</sup>

## K. ELECTION COMMISSIONS

51. Article 12 of the draft national elections law provides that elections are administered by the Central Election Commission for Elections and Referenda (CEC), territorial election commissions, Bishkek and Osh election commissions, *rayon* election commissions (TECs), and precinct election commissions (PECs). Article 12 also provides that a separate law on election commissions regulates the procedures and activities of election commissions.
52. The separate law regulating the election administration is the draft law on formation of election commissions in the Kyrgyz Republic (“draft election commissions law”). Article 2 of the draft election commissions law provides that the system of election commissions comprises the CEC, TECs, and PECs. The definition for a TEC in Article 1 of the draft election commissions law states that it includes Bishkek and Osh city election commissions and *rayon* election commissions.
53. Article 6 of the draft election commissions law provides that the CEC is formed for a period of five years and consists of twelve members. The President of the Kyrgyz Republic, parliamentary majority and parliamentary opposition each propose “for consideration” one-third of the nominees for membership in the CEC. The phrase “for consideration” suggests that the nominees may be rejected by the parliament. However, there are no provisions in the draft election commissions law on how replacement nominees are to be named in the event the parliament rejects original nominees. Thus, it appears that the “nominations” are really automatic appointments which the parliament must accept. **The Venice Commission and OSCE/ODIHR recommend** that the draft law be clarified as to whether appointments of members to the CEC are automatic. If appointments are not automatic, then the draft CEC law should state how replacement nominations are to be made. The drafters could also consider introducing a requirement that there should be at least some members with a legal background.

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<sup>28</sup> See also Report on the Imperative Mandate and Similar Practices adopted by the Council for Democratic Elections at its 28th meeting (CDL-AD(2009)027 Venice, 14 March 2009) and by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).

<sup>29</sup> See *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 due to dissolution of a political party 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).

54. Each entity that nominates to the CEC should propose nominees of both gender in equal numbers. However, Article 6 does not state how many nominees a nominating entity may propose. Thus, the practical effect of the fifty per cent requirement cannot be determined. If there are no limitations on the number of nominees, then the fifty percent requirement for gender balance may not facilitate the balanced gender representation at the CEC. **The Venice Commission and OSCE/ODIHR recommend** that the draft law clearly state whether there is any limit on the number of nominees that may be submitted by a nominating entity.
55. It would seem that paragraph 5 of Article 13 is a repetition of paragraph 6 of Article 6 of the law. Article 13 (7) of the draft election commissions law provides that, with the exception of the Chairperson and Deputy Chairperson, members of the CEC “fulfil their authorities on a voluntary basis while staying in-service of their main jobs.” This provision should be clarified to ensure that members are paid for their service on the CEC and do not suffer any negative consequences as a result of their membership. It should also be clearly stated in the law that the duties of the CEC members are permanent duties that must be fulfilled by the members during the term of appointment. The administration and oversight of elections requires that the CEC members devote full efforts to their positions and that membership not be viewed as a part-time or voluntary position.
56. OSCE/ODIHR has previously expressed concern about the lack of transparency in the election administration, particularly at the CEC level when complaints were considered and decided. Article 4(1), Article 17(1), Article 18(7), and Article 19 of the draft election commissions law state significant legal requirements for transparency. However, these provisions are not self-enforcing and the CEC must exhibit good faith efforts in order to ensure that transparency is observed by the election administration in future elections.
57. Article 61(9) of the draft national elections law provides that the CEC’s decision on “registration refusal of the candidates’ list can be appealed at the superior election commission or court”. **The Venice Commission and OSCE/ODIHR recommend** that this provision be clarified, as there is no election commission superior to the CEC.
58. Article 8 of the draft election commissions law provides that the TECs are appointed by the CEC. Article 20 provides that TECs, as well as PECs, are appointed for two year terms. Two-thirds of the members are political party representatives and one-third consists of representatives of local self-government authorities. There is a limit in Article 20(1) of 70 per cent of the members from one nominating entity being from the same gender. Article 20(2) limits each political party to one member on a TEC or PEC.
59. Article 20(5) of the draft CEC law states that the CEC forms the TECs “through drawing lot with members not less than eleven from the reserve of respective territorial election commission”. Article 1 defines the TEC or PEC “reserve” as “potential candidates to be nominated as members of respective election commission”. Articles 20(6) and 20(8) establish a similar lottery procedure for PECs, which are to have no less than seven members, except for PECs with 501 to 1200 voters (nine members) and PECs with 1201 to 2000 voters (eleven members). This article appears to address the concern previously expressed by OSCE/ODIHR that the legal framework fails to establish the precise number of members for a PEC.<sup>30</sup>

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<sup>30</sup> OSCE/ODIHR Final Report on the Kyrgyz Republic Presidential Elections 29 October 2000 (Warsaw 16 January 2001), page 7.

60. Under Article 20(9), the heads of state authorities and local self-government, state, and municipal institutions and enterprises are not eligible to hold the position of either chairperson or secretary of the TEC or PEC. This is a positive provision.

61. The OSCE/ODIHR has previously recommended that:

*“The composition of election commissions at all levels should be revised so as to ensure broader and equitable representation of election stakeholders and to avoid the domination by one party interest. This would increase confidence in the process.”*<sup>31</sup>

This recommendation is not implemented by the draft law, as the CEC is appointed by a limited group of political party interests holding political power in the executive and legislative branches. Political parties participating in elections, unless they already have mandates in parliament, are excluded from the appointment process. **The Venice Commission and OSCE/ODIHR recommend** that the appointment process for the election administration ensure broader and equitable representation of all election stakeholders.

62. Articles 21(13) and 21(15) allow TECs to attend political party meetings to nominate candidates and requires TECs to organize meetings of candidates and political parties with voters. The involvement of election commissions in candidate nomination meetings and meetings with voters should be reconsidered. The election administration has substantial responsibility for preparing and administering elections. Involvement in internal nomination procedures of political parties or organizing meetings with voters detracts from the ability of election management bodies to prepare and conduct elections. **The Venice Commission and OSCE/ODIHR recommend** that consideration be given to removing these two provisions from Article 21.

63. Article 23 (5) could be re-worded providing that “the same person cannot be a member of more than one commission”.

64. The draft laws do 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. OSCE/ODIHR has previously recommended that consideration could be given to locating TECs outside local self-government administration buildings as a safeguard against possible interference by local administrations. Article 4(3) of the draft election commission’s law, however, requires that state authorities and local self-government provide premises to election commissions. Thus, this recommendation remains unaddressed.

## L. VOTER LISTS

65. 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. While the draft national elections law provides an adequate legal basis, in practice, the registration process is insufficient due to a

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<sup>31</sup> *Id.*, page 24.



lack of commitment, capacity and coordination by the institutions involved in the compilation of the voter lists. 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. Nevertheless, the draft law can serve as a legal basis for accurate voter lists if implemented in good faith and with a significant and timely commitment of resources.

66. Under Article 14(3) of the draft national elections law, primary responsibility for the preparation of voter lists belongs to the Central Election Commission. Government bodies, both national and local, are required to assist the CEC and other election commissions by providing data and information on citizens. Article 14(9) creates avenues for appeal to a higher election commission or court should a voter's name be removed from the list.
67. Article 16 contains two very short sentences stating that the "record of voters is made via a unified system" and "the Law shall regulate the use and formation of the unified system." It would appear that a separate law is intended to regulate the collection and use of data on citizens for purposes of establishing the "unified system". No opinion is expressed herein concerning the collection, maintenance, dissemination, or subsequent destruction of personal data on citizens contained in the "unified system". However, **the Venice Commission and OSCE/ODIHR recommend** that such data be collected and maintained in a manner that is consistent with recognized principles for the protection of personal data of citizens.<sup>32</sup>
68. Article 15 introduces the concept of the so-called "electoral address", allowing voters to vote where they find themselves on election day regardless of their registered (permanent or/and temporary) residence. This new provision seems to enjoy broad support because it has the potential to enfranchise such voters, mainly in the urban areas, who have found employment away from their registered permanent residence and have not registered temporary residence in line with the law due to heavy bureaucratic procedures. Within 40 days but not later than 10 days before election day, voters can apply to vote in the location where they anticipated being on election day, the "election address". The "electoral addresses" are to be collected by the polling station commissions, which then are transferred to the TECs. The applications are forwarded to territorial election commissions, who have seven days to decide. The final voter list must be established no later than three days prior to election day and submitted to the precinct electoral commissions.
69. Such innovation has the potential to further deepen existing problems with voter registration, also noted in OSCE/ODIHR election observation reports, as it introduces a new principle determining the place where the voter is entitled to cast his or her vote. This is particularly so if the new system is to be in place for the presidential election anticipated in autumn of 2011, as such deep changes require significant time to be properly implemented and understood by voters. In addition, despite its new responsibility, the CEC will have to rely on information of other institutions about voters' names and other personal data. Further to that, the possibility that voters can vote where they find themselves on election day may have an impact on the performance of an election system based on electoral districts which do not span the territory of the entire state, for instance in case if

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See, e.g., Convention 108 of the Council of Europe for the Protection of Individuals With Regard to Automatic Processing of Personal Data and The Explanatory Report (28 January 1981), which provides detailed discussion as to what safeguards should be in place. See at: <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>.

electoral address is applicable for local elections. **OSCE/ODIHR and Venice Commission recommend** that due consideration be given to this innovation and all the aspects considered before its implementation.

70. On a positive note, the draft national elections law removes the possibility for a person to be added to the voter list on election day. This change incorporates a previous recommendation of OSCE/ODIHR that addition to the voter list on election day be deleted from the legal framework. As noted above, the final voter list must be established no later than three days prior to election day.<sup>33</sup>

#### **M. ELECTION CAMPAIGN PROVISIONS**

71. Article 21(2) of the draft national elections law states that candidates “acting for agencies with state share of more than 30 per cent (or agencies with more than 30 per cent of State involvement) cannot take advantage of their official position”. This provision arbitrarily approves the abuse of position provided the percentage of state involvement in 30 per cent or less. It is not clear whether there are available data that would explain why 30 per cent is a rational choice for this provision. It would be relevant to know how many persons are within the categories just below and above this 30 per cent. Without additional information as to why this 30 per cent was included in the draft law, it would appear to be an arbitrary percentage that allows a certain level of misconduct. **The Venice Commission and OSCE/ODIHR recommend** that Article 21(2) be assessed to determine its practical implementation and revised to the extent necessary to achieve the public policy goal of preventing the abuse of official position no matter what percentage the state share is.
72. Article 22(9 and 10) of the draft national elections law 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 22(9 and 10), 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 Venice Commission and OSCE/ODIHR recommend** that Article 22(9 and 10) be amended to state that the article is not a limitation on the rights of freedom of expression, assembly, or association.
73. Article 22(15) of the draft national elections law prohibits certain groups from campaigning, thereby introducing unreasonable restrictions on individual citizens. Members of charitable and religious organizations, rather than the organizations themselves, for example, are not allowed to campaign. It would appear that this is intended to prevent undue influence by religious and charitable organizations and to prevent improper influence through charitable donations. However, this may be overly restrictive. Although this might seem like a logical provision, this provision violates the principles of freedom of religion and non-discrimination. Every person has the right to the exercise of free speech through campaigning. **The Venice Commission and OSCE/ODIHR recommend** that Article 22(15) be amended to conform to international standards and domestic law protecting freedom of religion and the right to non-discrimination in the exercise of freedom of speech through campaigning.
74. Article 22(15) prevents foreigners and stateless persons from participating in election campaigns. This prohibition is not in accordance with international standards. The rights of freedom of expression and association, according to

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See also Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.2.iv.

Articles 10 and 11 of the European Convention of Human Rights, belong to all persons within the jurisdiction of a member 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 debates during election campaigns. Such a clause limits fundamental rights of non-citizens residing in the Kyrgyz Republic and conflicts with the basic human rights protected by the regional and global international conventions recognized in OSCE commitments.<sup>34</sup> **The Venice Commission and OSCE/ODIHR recommend** that this prohibition is reconsidered.

75. Article 22(16) prohibits campaigning “via foreign mass media, which is disseminated in 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>35</sup> OSCE participating States also commit themselves “to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.”<sup>36</sup> **The Venice Commission and OSCE/ODIHR recommend** that these prohibitions be deleted from the draft law.
76. Article 27(1) also requires that “copies of printed and other campaigning materials should be submitted to the Central Election Commission”. There appears to be no legitimate reason to establish the Central Election Commission as an archive for copies of campaign material. If this provision is intended to require prior approval of campaign materials by the Central Election Commission, then it would represent excessive control over campaigning and would be disproportionate. **The Venice Commission and OSCE/ODIHR recommend** that Article 27(1) be revised to respect the right to freedom of expression through campaigning and to remove the burden placed on the CEC to be a campaign material archive.
77. Article 27(1) limits the right to issue printed campaign materials to “candidates and political parties”. All persons in the Kyrgyz Republic have the rights to freedom of expression, and association, which can be considered as encompassing the right to issue printed campaign materials. Article 27(1) limits these rights, contrary to international standards.<sup>37</sup> **The Venice Commission and OSCE/ODIHR recommend** that the limitations in Article 27(1) be reconsidered.
78. A violation of the requirement to identify the source of print campaign material indicated in Article 27(2) may lead to deregistration of a candidate under Article 28(9). **The Venice Commission and OSCE/ODIHR recommend** that Article 28(9) be amended, as deregistration is not an acceptable sanction for violation of Article 27(2) and should be deleted from Article 28(9). Article 28(9) should specify a proportionate sanction for failing to meet the requirements of Article 27(2). An example of such a proportionate sanction would be requiring removal of material that fails to meet the requirements of Article 27(2) until the material is corrected to include all necessary information.

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<sup>34</sup> See Paragraph 5.21 of the OSCE 1990 Copenhagen Document; and the Human Dimension section of the Charter of Paris of 1990.

<sup>35</sup> Paragraph 26.1 of the OSCE 1991 Moscow Document.

<sup>36</sup> Paragraph 26 of the OSCE 1999 Istanbul Document.

<sup>37</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; Paragraph 9.1 of the 1990 OSCE Copenhagen Document.

79. Article 26(2) implies that candidates/parties wishing to organize a campaign event in places/venues belonging to state or municipal government, first need to receive a permission from the authorities. Whether such an event takes place depends on the response from authorities. **The Venice Commission and OSCE/ODIHR recommend** that this provision be amended so that it is worded as a “notification” rather than “permission”.<sup>38</sup> Moreover, the current provision contradicts the 2010 Constitution, which stipulates that “*prohibition and limitation on conduct of a peaceful assembly shall not be allowed; the same applies to refusal to duly ensure it failing to submit notice on conduct of free assembly, non-compliance with the form of notice, its contents and submission deadlines.*”<sup>39</sup>
80. Several articles in the draft national elections law appear intended to protect the “honour, dignity, and business reputation” of candidates and political parties. These include provisions found in Articles 22(16), 28(5), and 28(6). The protections place liabilities with candidates, candidate representatives, political party representatives, mass media, and “other individuals”. Article 28(5) also establishes the right to reply or refute defamatory material “on demand” by the offended candidate or political party. These limitations on political opinions 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>40</sup> **The Venice Commission and OSCE/ODIHR recommend** that these provisions be amended to comply with international standards.

## N. FINANCING OF ELECTIONS

81. Article 41(6) of the draft national elections law provides that limits on campaign funds and contributions are calculated “based on a salary index established by the Kyrgyz Republic on the day of appointment of elections”. It is not clear from this text which agency or body in the Kyrgyz Republic establishes this index. Nor is it clear whether this refers to an existing salary index or requires the establishment of a new salary index on the day of calling the elections. **The Venice Commission and OSCE/ODIHR recommend** that Article 41(6) be clarified.
82. Article 41(10) of the draft national elections law states:

*“Citizens and legal entities can provide financial (material) support to the activity promoting election of a candidate, list of candidates only through election funds. It is prohibited for legal entities, their branches, representation officers and also individuals to provide free of charge execution or execution for unjustifiably reduced fees of work, deliver services, and sell goods directly or indirectly connected with elections.”*

<sup>38</sup> Article 21 of the ICCPR recognizes the right of peaceful assembly. It is further enforced by paragraph 9.2 of the 1990 Copenhagen Document: “Everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards.”

<sup>39</sup> Article 34.2 of the 2010 Constitution of Kyrgyz Republic.

<sup>40</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).

83. The above provision prohibits a person from donating his or her services in support of a candidate's campaign, as "financial (material) support" can only be given "through election funds". This provision is problematic as it prohibits persons who do not have financial resources from contributing their time or labour in support of a candidate. This provision limits political involvement through campaign support to persons who cannot make financial donations to election funds. Regulation of in-kind contributions is possible through strict reporting requirements. However, in-kind contributions should not be prohibited simply because they are not traceable through the election fund. **The Venice Commission and OSCE/ODIHR recommend** that Article 41 be amended to allow for the contribution of in-kind services to a political campaign, subject to strict reporting requirements and the same contribution limits that apply to monetary donations.
84. Article 46(1) is of concern as it provides additional grounds for cancellation of a candidate's registration. Under this provision, 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 Venice Commission and OSCE/ODIHR recommend** that this cancellation provision be deleted from Article 46(1) and replaced by a proportionate sanction, such as a fine proportional to the amount of the overspending.
85. Article 41(17) states that "remaining unspent funds of a special account are returned to a candidate, political party". This article does not specify any limitation on how a candidate or political party is to use these returned funds. Allowing a candidate to retain unspent campaign funds for personal use could have a corrupting effect. In fact, allowing candidates to use unspent campaign funds for personal use could be seen as a form of bribery. **The Venice Commission and OSCE/ODIHR recommend** that Article 41(17) be amended to prohibit the use of unspent campaign funds for the personal benefit of candidates. Unspent campaign funds could be returned to donors on a proportionate basis, given to charities, or required to be used for some other legitimate public purpose.
86. Article 41(12) stipulates that banks and other institutions should on a weekly basis, upon the CEC's request, provide information on income and expenditure of the special account of the candidate, political party. The CEC should post this information on its official webpage upon receipt. This is a welcome development to provide transparency of campaign financing.
87. Article 42 of the draft national elections law provides for the formation of a *control-revision group* at the CEC to oversee expenses in connection with the election budget and a candidate's or party's campaign funds. This is a welcome step. Work of this group can be beneficial for monitoring election-related expenses and bringing deviations to the attention of the respective bodies, including the electorate. Candidates and parties participating in elections are obliged to submit reports to the CEC on their funds and expenditures (Article 41(16)). The draft law however does not specify that these reports are made publicly available. Further, the draft provides no specific regulations on what information should be included in the financial reports. In order to provide timely and relevant campaign finance information to the public, **the Venice Commission and OSCE/ODIHR recommend** that the law should require full disclosure, before and after elections, of sources and amounts of financial contributions and the types and amounts of campaign expenditures. Since the CEC receives these reports this information can also be published on the CEC website.

## O. MEDIA PROVISIONS

88. Articles 22-28 of the draft national elections law 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 fixed amounts of time and space to candidates, 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 “joint discussions, round tables and other similar campaigning”.
89. OSCE/ODIHR noted in its election observation mission report for the 2010 parliamentary elections that the media had a difficult time in implementing legal provisions requiring media to provide equality of treatment to candidates. It was observed that media refrained from editorial coverage of the campaign in news programs out of concern that any such coverage would be a violation of provisions requiring equal treatment.<sup>41</sup> This problem should be addressed through a legal text that provides more detailed guidance on the difference between “informing” and “campaigning” in relation to media coverage of the election campaign. **The Venice Commission and OSCE/ODIHR recommend** that the law provide greater clarity on the difference between news coverage and “campaigning”.
90. Further, to also address the reluctance of media to provide news coverage and inform voters, the draft law should clearly 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. All advertisements, both free and paid airtime, should also clearly identify whether the advertisement is free or paid and who is responsible for the content. **The Venice Commission and OSCE/ODIHR recommend** that these changes be incorporated in the draft law. These amendments would improve the regulatory framework for media during elections.

## P. EARLY VOTING (1.3.2.2.3)

91. Article 32 of the draft national elections law provides for an early voting process for a period of “9 to 1 days prior to the voting day.” Such a substantial opportunity for early voting is difficult to regulate in a transparent manner and could significantly increase the opportunity for electoral fraud.<sup>42</sup> Early voting, in addition to placing a greater burden on election administration, also significantly hinders observation efforts. The burden placed on observer organisations and candidate representatives is substantial. **The Venice Commission and OSCE/ODIHR therefore recommend** that Article 32 be amended to reduce the number of days, as well as hours, for early voting and to provide necessary safeguards against potential fraud. This will provide observers and candidate representatives with a reasonable opportunity to observe the early voting process. In addition, the precinct election commission members who administer early voting should be representative of the various entities eligible to nominate commission members.
92. Article 32(4) could endanger the secrecy of the vote for early voters as the voter is required to sign the envelope that contains the marked ballot. Thus, it is possible to link the voter’s identify with the voter’s marked ballot. **The Venice**

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<sup>41</sup> OSCE/ODIHR Final Report on the Kyrgyz Republic Parliamentary Elections 10 October 2010 (Warsaw, 20 December 2010), page 14.

<sup>42</sup> Prior OSCE/ODIHR reports have noted that electoral fraud is much more prevalent with early voting and mobile voting than with regular voting in a polling station on election day.

**Commission and OSCE/ODIHR recommend** that consideration be given to introducing a system ensuring the secrecy of the vote.

#### R. MOBILE VOTING

93. The provisions for mobile voting in Article 33 of the draft national elections law are also very broad. Mobile voting is permitted due to health reasons, disability, detention, remote and inaccessible location due to cattle grazing, and “in exceptional cases” to military who are in service on election day. The phrase “exceptional cases” grants an election commission wide discretion in deciding who may vote by mobile ballot box. The OSCE/ODIHR has previously recommended that mobile voting be available only to a voter who cannot attend regular voting due to health or disability reasons. The proposed Article 33 extends the possibility for mobile voting instead of restricting the use of mobile voting. **The Venice Commission and OSCE/ODIHR recommend** that the phrase “and in exceptional cases” be deleted from Article 33(1).
94. Article 33(4) also provides that the mobile voting is administered by precinct election commission members, but does not state how many members of the commission attend the mobile voting. Article 33(4) should be amended to state the number of members of the precinct election commission who administer mobile voting. In addition, the precinct election commission members who administer mobile voting should be representative of the various entities eligible to nominate commission members.

#### S. VOTING PROCEDURES

95. The draft national elections law does not state how many voters should be assigned to a polling station. Article 11(2) of the draft local elections law provides that the number of voters in a polling station should not exceed 1,500. **The Venice Commission and OSCE/ODIHR recommend** that a similar limit on the number of voters for a polling station be included in the draft national elections law.
96. Article 30 of the draft national elections law regulates the text of the ballot paper. Article 30 requires that the ballot be printed in the state and official languages. The OSCE/ODIHR noted in its election observation mission report for the 2010 parliamentary elections that 30 per cent of the ballots were printed in Russian.<sup>43</sup> The OSCE/ODIHR also noted that Uzbeks constitute nearly 15 per cent of the population.<sup>44</sup> In order to achieve a more inclusive environment for national minorities during the election, **the Venice Commission and OSCE/ODIHR recommend** that consideration be given to amending Article 30 to provide that ballots are also printed in the Uzbek language in areas where this is relevant. This would facilitate the participation of this significant national minority in the elections.<sup>45</sup>
97. Article 30(10) of the draft national elections law provides that precinct election commissions shall cross out on the ballots the names of candidates and lists 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. In the case of withdrawal, voters should be informed through

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<sup>43</sup> OSCE/ODIHR Final Report on the Kyrgyz Republic Parliamentary Elections 10 October 2010 (Warsaw, 20 December 2010), page 18.

<sup>44</sup> *Id.*, at page 17.

<sup>45</sup> General Comment No 25 of the UN Human Rights Committee recommends that “information and materials about voting should be available in minority languages”.

information provided by the Central Election Commission in news and by the posting of informational material in polling stations. **The Venice Commission and OSCE/ODIHR recommend** that Article 30(10) be accordingly amended. Moreover, withdrawal of candidates should not be possible at least a few days before elections, in order to ensure clarity and to avoid pressure on candidates.

98. Article 1 of the draft national elections law defines “election documents” as including “absentee ballots”. However, it appears that provisions for absentee ballots are not included in the draft national elections law. Previous recommendations of the OSCE/ODIHR and comments in election observation mission reports have noted problems with absentee voting. It is a positive development that absentee voting has been removed from the law. **The Venice Commission and OSCE/ODIHR recommend** that the definition of elections documents in Article 1 be revised to reflect this change in the law.
99. Article 31(7) provides that, in polling stations with less than 500 registered voters, a voter is not required to provide documented proof of personal identification if the voter’s identity and residence can be established by two members of the precinct election commission and approved by the chairperson. It is not possible to ascertain from the review of the draft national elections law the number of total voters who might be able to vote without identification documents. Polling station turnout from past elections should be reviewed in order to determine the potential total number of voters who may be able to vote without identification documents. Secondly, it is of concern that the final decision on whether a person may vote without identification documents belongs to the precinct election commission chairperson. It would be more appropriate for a decision on the fundamental issue of who can cast a ballot without identification documents be made by a vote of the commission. **The Venice Commission and OSCE/ODIHR recommend** that consideration be given to amending Article 31 to address these concerns while keeping the need for identification as a general requirement.

## T. DETERMINATION OF ELECTION RESULTS

100. Article 35(21) provides that an enlarged copy of the precinct (polling station) protocol “shall be posted for public inspection in the place designated by the precinct election commission.” However, there is no requirement that the “place” be at the premises of the precinct election commission (polling station), which is the logical place for a voter or an observer to look for the protocol. **The Venice Commission and OSCE/ODIHR recommend** that Article 35(21) be amended to provide that the protocol shall also be posted, in addition to the selected “place”, at the premises of the precinct election commission (polling station). **The Venice Commission and OSCE/ODIHR recommend** that a similar amendment be made in Article 36(6) for the posting of a territorial election commission protocol.
101. Article 35(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. Two practical considerations should be noted on this issue. First, the possibility should not exist to invalidate all mobile ballots by simply dropping



an extra ballot in the mobile box. Secondly, if it is logically sound to have a legal presumption of fraud based on one extra ballot in the mobile ballot box, then it is logically sound to have a presumption of fraud based on one extra ballot in a regular ballot box. **The Venice Commission and OSCE/ODIHR recommend** that consideration be given to amending Article 35(6) to address these concerns.

102. Article 36 regulates the procedure for determining the election results by territorial election commissions. Although Article 36 states that the information in the protocols of the territorial election commissions shall include the information stated on the protocols of the PEC, there is no explicit requirement that the Article 36 protocol information be broken down by precinct level. This degree of detail is necessary for territorial election commission protocols to enable citizens and observers to track results and locate specifically where mistakes or potential fraud has occurred in case the numbers are unlawfully changed during the tabulation processes. **The Venice Commission and OSCE/ODIHR recommend** that Article 36 be amended to clearly state that the summary table required by Article 36 provide all information broken down to the precinct level. 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. Accordingly, Article 37, which regulates the content of the CEC protocol, should be amended as well to ensure that the “summary table on summary data of the protocols of the subordinate election commissions” is broken down by each precinct and territorial election commission.
103. Article 36(8) allows for a recount of votes, based on a decision of the Central Election Commission. Although this article allows observers to attend the recount, the article does not require that observers be notified of the recount. **The Venice Commission and OSCE/ODIHR recommend** that this article be amended to expressly 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 Venice Commission and OSCE/ODIHR recommend** that Article 36(8) 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.
104. Article 37(3) provides that if no candidate, or list of candidates, in an election received more votes than “the number of votes cast against all candidates”, or “all lists of candidate”, then a repeat election<sup>46</sup> is conducted. However, “repeat elections are conducted for which previous candidates (and list candidates) cannot be nominated.” This is problematic. The apparent rationale for this provision is that the “losing” candidates and lists do not have enough support to be placed on the ballot for the repeat election. This rationale, carried to its logical extension, would bar all losing candidates, and lists of political parties, from ever competing in subsequent elections. The possibility to vote against all candidates or all lists is in itself questionable and does not solve any particular problem. Article 37(3) is not a reasonable limitation on candidacy and is contrary to the principle of universal and equal suffrage. **The Venice Commission and OSCE/ODIHR recommend** that Article 37(3) be amended to allow “losing” candidates and political party lists to compete in repeat elections.

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<sup>46</sup> The phrases “repeat voting” and “repeat elections” are used to describe both second round run-off elections and new elections held due to invalidity of voting results. This is confusing and creates uncertainty in the legal provisions applicable to both types of elections. For the purposes of this assessment, “repeat voting” is assumed to describe a second round run-off in the originally scheduled election. “Repeat election” is assumed to be a new election held due to invalidity of the first elections.

105. Article 37(4) provides a text on the procedure for the territorial election commission to declare the results of voting at a polling station to be invalid. However, Article 37 regulates the determination of results by the Central Election Commission. It may be more appropriate for the text of Article 37(4) to be placed in Article 36.
106. Article 39 regulates the publication of election results. A remarkable level of transparency is achieved when the CEC, as it has done in some past elections, makes preliminary results of all levels of election commission available on its website when they become available. This is a positive practice. Article 39 should be clarified so that it is clear that the phrases “volume of data” and “data contained in protocols” require the publication of all detailed results broken down to the precinct and territorial election commission levels. **The Venice Commission and OSCE/ODIHR recommend** that the draft law be amended to require the publication of preliminary results by polling station on the CEC website as they become available.
107. Although the draft provides that votes should be counted and summarized immediately after the end of voting, consideration should be given to set a clear deadline when the voting results should be delivered. This would prevent delays in the process, especially given the timeframe for seeking legal redress. Similarly, the draft imposes a deadline for summarizing final results of presidential elections, however there is no such deadline for parliamentary elections. **The Venice Commission and OSCE/ODIHR recommend** that such deadline is imposed to avoid delays in the process.

#### **U. TRANSPARENCY**

108. The draft national elections law provides for observation of election processes. Comprehensive provisions for transparency are found in Articles 8 through 11 of the draft law. This is a positive feature of the draft law, which has incorporated previous ODIHR recommendations for transparency.
109. The draft national elections law lifts the previously imposed prohibition on international observers to “express opinion on election legislation, on preparation and conduct of elections” before the end of voting. However, this change is blurred by a provision stipulating that “holding press conferences, and talking to media is prohibited until the end of voting” (Article 10(4)(2)). Article 10(4)(2) of the draft national elections law limits public expression of opinions by international observers until “after completion of voting.” This restriction reduces the transparency of the work of international observers by preventing them from sharing their findings with the host country during the course of elections through interim reports and news conferences. Interim reports of election observation missions are routinely published on the internet, which could be considered a component of mass media. This provision hinders legitimate reporting of an observer’s findings, conclusions, and recommendations for improvement of electoral processes. This provision is also a questionable limitation on the right to freedom of expression.<sup>47</sup> Legal provisions regulating observers should facilitate observation efforts rather than hinder. Legal provisions should certainly not be designed to or result in censoring observers, as observers provide important functions in enhancing transparency and for improvement of electoral processes. This is a problematic provision. **The Venice Commission and OSCE/ODIHR recommend** that Article 10(4)(2) be revised.

<sup>47</sup>

See Paragraph 9.1 of the OSCE 1990 Copenhagen Document.

**W. COMPLAINTS AND APPEALS (2.4)**

110. Prior OSCE/ODIHR election observation mission reports have noted issues with the adjudication of election complaints and appeals arising from four consistently problematic areas: (1) inconsistencies or conflicts in jurisdiction, deadlines, and procedures established by the Civil Procedure Code and election legislation; (2) CEC informality and disregard of legal provisions requiring consideration of complaints and issuance of motivated written decisions; (3) failure of the CEC to adequately consider complaints, thereby potentially failing to provide an effective remedy to complainants; and (4) the consideration of complaints by working groups of the CEC instead of the full CEC, which undermines the credibility and transparency of the adjudication process.<sup>48</sup> The CEC's failure to adequately address complaints is of particular concern as the right to receive an effective remedy is provided for in Paragraph 5.10 of the 1990 OSCE Copenhagen Document and Paragraph 18.2 of the 1991 OSCE Moscow Document. An effective remedy is also required by Article 2 of the International Covenant on Civil and Political Rights and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Changes should be made in the legal framework, as discussed below, to address these concerns.
111. Articles 44 and 45 of the draft national elections law fail to establish a uniform and consistent process for protecting suffrage rights. Articles 44 and 45 create the option of filing a complaint with either an election commission or a court, which creates the possibility for a party to file a complaint in a "favourable" forum as opposed to legally pre-established forum. This possibility – to file in different forums – could also lead to inconsistency in decisions. As uniformity and consistency in decisions is important, **The Venice Commission and OSCE/ODIHR recommend** that challenges to decisions be filed in only one forum designated by the law – either a court or higher election commission. If the forum designated by the law 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.<sup>49</sup>
112. Articles 44 and 45 should be amended to state a clear complaint process that defines the roles of each level of election commission and each level of court. 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 Venice Commission and OSCE/ODIHR recommend** that Articles 44 and 45 be amended to:
- Require that all hearings and proceedings on election disputes be open to the public, observers, and the media.
  - 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.

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<sup>48</sup> OSCE/ODIHR Final Report on The Kyrgyz Republic Parliamentary Elections 10 October 2010 (Warsaw, 20 December 2010), at page 18; OSCE/ODIHR Final Report on The Kyrgyz Republic Presidential Election 23 July 2009 (Warsaw, 22 October 2009), at pages 16-17.

<sup>49</sup> Code of good practice in electoral matters, CDL-AD(2002)023rev, II.3.3 a and c.

- Require that decisions on complaints and appeals be written and provide an explanation of the supporting law and facts.

#### IV. DISCUSSION OF THE DRAFT LOCAL ELECTION LAW

##### ELECTORAL SYSTEMS FOR LOCAL ELECTIONS

113. Article 47 of the draft law on local elections establishes two separate electoral systems for local elections. Under Article 47(1), in local “administrative-territorial units with a population of five thousand and above, local elections are held under the proportional representation system”. Article 47(2) provides, for local “administrative-territorial units with a population of up to five thousand, local elections are held by the majority system”.
114. The draft law is unclear as to what is intended by “majority system”. Article 47(2) specifically uses the phrase “majority system”. However, Article 60(1), which specifically references Article 47(2), uses the phrase “multi-member constituencies”. It might be assumed that some form of “first past the post” or plurality voting occurs where there are multiple candidates in a single electoral constituency and that multiple mandates are allocated based on the highest number of votes obtained by the candidates. However, this assumption may not be sound as Article 60(1) states that the “number of multi-member constituencies and the number of mandates in each of them are determined by the relevant election commissions in accordance with requirements provided for in legislation.” Without review of the other pertinent legislation, it is also not possible to assess the consequences that such a system will have on minorities and women in local elections.
115. The draft law does not indicate how many mandates are allocated under either system. As a result, it is not possible to assess the appropriateness of the mathematical threshold required to secure a mandate.
116. Article 47(3) of the draft law states:
- If election under proportional system will be declared invalid or void in accordance with this Law and a new election will be declared invalid or void, the election of the administrative-territorial units, referred to in paragraph 1 of this Article shall be held by the majority system.
117. The above provision would appear to be premised on the belief that a “majority system” election is either less subject to invalidity or easier to administer. Regardless of the purported rationale for this provision, it is of concern that the election system would be changed so quickly and arbitrarily. It is of concern that there might not be sufficient time for voters, candidates, and political parties to become familiar with the new election system before the election was held.
118. Article 49(2) grants the right to nominate candidates for local *keneshes* (councils) to registered political parties, “groups of voters”, and “citizens through self-nomination (with the election of multi-member constituencies)”. This suggests that independent candidates cannot stand for election in administrative-territorial units with a population of 5,000 and above.
119. Article 49(6) states that “political parties have no right to nominate candidates individuals who are members of other political parties and who are not members of that political party (non-party).” Thus, in order to be a candidate in local

government elections in an administrative-territorial unit of more than 5,000, a person must be a member of a nominating political party or seek nomination from a “group of voters”. This is problematic as Article 49(6) does not allow for independent candidates.

120. The electoral system for local elections does not provide for the candidacy of independent candidates. Although the electoral system is a proportional representation system, such a system does not require the exclusion of independent candidates and it is possible for an allocation formula to provide for independent candidates as well as political parties. Thus, there is no justification for excluding individual independent candidates. Paragraph 7.5 of the OSCE Copenhagen Document recognizes the right of citizens to seek political office, individually or as representatives of political parties or organizations, without discrimination. Further, as noted by the United Nations Human Rights Committee:

*“Persons who are otherwise eligible to stand for election should not be excluded ... by reason of political affiliation.”<sup>50</sup>*

*The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties.”<sup>51</sup>*

121. **The Venice Commission and OSCE/ODIHR strongly recommend** that the draft law be revised to allow independent candidates to stand in local government elections.

122. Article 30 of the draft local elections law states:

4. In the elections of deputies of a local *kenesh* by majoritarian system three election ballots shall be produced in which additionally the surnames, first names and patronymics of candidates should be indicated:

- 1) Female;
- 2) Male;
- 3) Male and female (mixed group).

Each voter shall receive three of the above indicated ballots for voting.

5. In the elections of deputies of a local *kenesh* under the proportional system the names of political parties, groups of voters shall be indicated additionally in the ballots in the sequence established by lot.

6. In the elections of heads of the executive bodies of local governments, last name, first name and patronymic of the candidate shall be indicated in addition, in the sequence established by lot.

7. An empty box is included on the right side of the data of political parties, candidates, groups of voters indicated in parts 4 - 6 of this article. At the end of the candidates' list, a line reading “against all candidates” (“against all lists of candidates”) should be printed, with an empty square field located to the right of it.

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<sup>50</sup> See General Comment 25, Paragraph 15 of the United Nations Human Rights Committee.

<sup>51</sup> See General Comment 25, Paragraph 17.

123. Based on the above text in Article 30, it would appear that each voter receives a “female ballot”, “male ballot”, and “male and female (mixed group ballot)”. Article 65 provides that “the candidate is considered as elected (in accordance with the number of mandates), receiving the greatest number of votes”. However, as Article 60(1) states that the “number of multi-member constituencies and the number of mandates in each of them determined by the relevant election commissions in accordance with requirements provided for in legislation”, and no other article describes how mandates are to be allocated, it is impossible to assess how Article 65 is applied to a real election. Are there three separate allocations (female, male, and male/female) in each multi-member constituency, or are there female multi-mandate constituencies, male multi-mandate constituencies, and male/female multi-mandate constituencies? Can one “relevant election commission” choose the former while another commission chooses the latter? Thus, it is impossible to assess the electoral system and the merits of the “female ballot”, “male ballot”, and “male and female (mixed group ballot)”. **The Venice Commission and OSCE/ODIHR recommend** that the draft law be revised to provide an electoral system for local elections that can be reviewed and assessed on the written text and to clarify how the winners (female, male, male/female) are determined in local elections. In addition, the draft local elections law should be revised to ensure representation of women and men in local governments.
124. The draft local elections law contains many provisions for candidate eligibility, registration, campaigning, media, voting, and complaints and appeals that are similar to those stated in the draft national elections law for the same election processes. Recommendations made concerning the draft national elections law are also applicable to the draft local elections law, where there is a similar legal text.

## V. CONCLUSION

125. The text of the draft laws requires improvement in order to respect OSCE commitments and other international standards for democratic elections. There are also technical drafting concerns with the draft laws that have been noted in this opinion. All of these concerns should be addressed in order to create a sound legal framework for democratic elections.
126. This joint opinion is provided by the Venice Commission and OSCE/ODIHR with the goal of assisting the authorities in the Kyrgyz Republic in their stated objective to improve the legal framework for elections, meet OSCE commitments and other international standards, and develop good practices for the administration of democratic elections. OSCE/ODIHR and the Venice Commission stand ready to assist the authorities in their efforts and hopes that there will also be a commensurate commitment on the part of the authorities to fully and effectively implement the election legislation in future elections.