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(VENICE COMMISSION)

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

JOINT OPINION

ON

THE DRAFT ELECTORAL LAW
OF THE KYRGYZ REPUBLIC

Adopted by the Council for Democratic Elections
at its 48th meeting
(Venice, 12 June 2014)
and by the Venice Commission
at its 99th Plenary Session
(Venice, 13-14 June 2014)

on the basis of comments by

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I. INTRODUCTION

1. In March 2014 the authorities of the Kyrgyz Republic asked 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 Elections in the Kyrgyz Republic" (hereinafter "the draft law", CDL-REF(2014)014), giving particular consideration to the draft law's compatibility with international standards and OSCE commitments in three areas: (1) establishment of electoral districts under the proportional representation system, (2) preference voting, and (3) quotas for women and persons belonging to national minorities on lists of candidates. As these three areas have been specifically identified in the request for this joint opinion, they are addressed under the discussion on the electoral system for the distribution of parliamentary mandates. The OSCE/ODIHR and the Venice Commission decided to provide a joint legal opinion on the draft Code.

2. The draft law regulates the following elections: presidential, parliamentary, city councils, *aiyl* councils, and executives (mayors and heads) of local self-government bodies. The draft law also regulates the Central Election Commission (CEC), which is currently regulated by a separate Law "On Election Commissions on Conduct of Elections and Referendums of the Kyrgyz Republic".

3. Prior opinions of the OSCE/ODIHR and joint opinions of the Venice Commission and the OSCE/ODIHR,¹ as well as election reports from previous OSCE/ODIHR and PACE election observation missions in the Kyrgyz Republic, provide good background for understanding the historical development of the election legislation in the Kyrgyz Republic.² The draft law incorporates some previous recommendations of the OSCE/ODIHR and the Venice Commission, but there remain numerous and significant areas in the draft law that require improvement.

4. This opinion should also be read in conjunction with the following documents:

- 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;
- International and regional documents which are relevant to the Kyrgyz Republic, including the International Covenant on Civil and Political Rights (ICCPR), Article 25.

¹ 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 Venice Commission at its 87th session (Venice, 17-18 June 2011, CDL-AD(2011)025) (herein "the 2011 joint opinion"); 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>.

² The OSCE/ODIHR Final Report on the Kyrgyz Republic presidential election 30 October 2011 (Warsaw, 10 January 2012); the OSCE/ODIHR Final Report on the Kyrgyz Republic parliamentary elections 10 October 2010 (Warsaw, 20 December 2010); all OSCE/ODIHR election observation mission reports can be found at: <http://www.osce.org/odihr/elections/kyrgyzstan>; Parliamentary Assembly of the Council of Europe, Doc. 12797, 24 November 2011, Observation of the presidential election in the Kyrgyz Republic (30 October 2011), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=12983&lang=EN>.

5. As noted above, this opinion takes into consideration standards and principles recognised by international and regional documents, that are relevant to the Kyrgyz Republic. This includes the documents of 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.³ 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”.⁴

6. This opinion has been prepared on the basis of comments by Messrs. Aivars Endzins, Nicolae Esanu and Jessie Pilgrim.

7. This joint opinion is based on an English translation of the draft law translated by IFES (International Foundation for Electoral Systems) and provided by the OSCE Center in Bishkek in the Kyrgyz Republic. The accuracy of the translation, as well as of the numbering of articles, clauses, and sub-clauses cannot be guaranteed. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation. The draft law reviewed consists of 118 articles.

8. The conduct of genuinely democratic elections depends not only on comprehensive and sound election legislation but on commensurate political will to implement legislation in good faith. The electoral legislation in the Kyrgyz Republic has been amended several times. However, further improvements are required in many important areas where the legislation and its implementation fall short of OSCE commitments and other international standards.

9. This joint opinion does not comment on the legislative processes, which resulted in the draft law. However, it is an established principle that legislation regulating fundamental rights such as the right to genuine elections should be adopted openly, following public debate, and with broad support in order to ensure confidence and trust in electoral outcomes. Broad political consensus and acceptance of the election legislation enhances public confidence in electoral processes.

10. This joint 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.

11. This opinion was adopted by the Council for Democratic Elections at its 48th meeting (Venice, 12 June 2014) and by the Venice Commission at its 99th session (Venice, 13-14 June 2014).

II. EXECUTIVE SUMMARY

³ The United Nations Human Rights Committee has adopted on 12 July 1996 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 interpretative statements of the provisions of the International Covenant on Civil and Political Rights (ICCPR).

⁴ Paragraphs 5(20) and 5(21) of the OSCE 1990 Copenhagen Document. See also paragraph 12 of the 1983 OSCE Madrid Document; paragraphs 10 and 11 of the 1992 OSCE Prague Document; and the Human Dimension section of the 1990 OSCE Charter of Paris.

12. While some amendments to the draft law mark progress, major concerns remain, including significant limitations to certain civil and political rights. Remaining areas in the draft law that should be addressed include:

- Articles 56, 60, 86, and 90 violate the principle of equal suffrage and the parliamentary election system established by these articles does not facilitate the representation of women and persons belonging to national minorities; in particular, the rules on allocation of seats to candidates inside a list should be revised and the double threshold should be reconsidered;
- Numerous articles in the draft law that unreasonably restrict the right to vote and candidacy rights and are contrary to international standards and OSCE commitments; in particular, the combination of restrictive provisions applying to presidential candidates strongly limit the passive electoral right;
- Unreasonable and excessive control of an elected deputy's mandate, resulting in *de facto* imperative mandate;
- Increased electoral deposits and continuing to require both supporting signatures and electoral deposits for some candidacies;
- Limitations on the rights to freedom of expression and association that are contrary to international standards and OSCE commitments;
- Lack of effective provisions to ensure equitable media access and coverage;
- Lack of effective provisions for transparency and accountability in campaign finance;
- The process for filing and adjudicating complaints and appeals to protect suffrage rights.

13. Some previous recommendations of the OSCE/ODIHR and the Venice Commission have been considered and adopted in the draft law. Improvements include:

- Enhanced provisions concerning the permanent status of members of the Central Election Commission (CEC) during their term of office and the members' rights to payment of salary during their term;
- Requiring the updating of the voter lists to commence no later than 20 days after the determination of the results of the last election;
- Expanding the responsibility for updating voter lists to include system administrators of the CEC and chairpersons of territorial election commissions.

14. In this joint opinion, the Venice Commission and the OSCE/ODIHR have made additional recommendations to the authorities of the Kyrgyz Republic in support of their efforts to improve election-related legislation and bring it more closely in line with OSCE commitments and international standards. However, it must be emphasised 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 LAW

A. Electoral system for the distribution of parliamentary mandates

15. Article 70 of the Constitution establishes the number of parliamentary seats at 120. Members of parliament are elected for a five-year term through a proportional party list system. The same article also provides that "as a result of elections a political party may not be granted more than 65 deputy mandates in the Parliament." This provision was adopted in June 2010. The Venice Commission and the OSCE/ODIHR have previously noted that such a provision

should be transitory, as it does not respect the principle of equality of votes.⁵ The limitation on the number of mandates a party is allocated should be based on the will of the voters expressed through voting and the actual election results. The acceptability of Article 70 diminishes with the passage of time.

16. Article 84 of the draft law establishes nine electoral constituencies for parliamentary elections. There is a constituency for each oblast and Bishkek and Osh cities. Article 85 provides that the allocation of parliamentary mandates among these nine electoral constituencies is based proportionally on the total number of voters in the constituency in relation to the total number of voters on the list of voters. Article 85 specifically references Article 38, which regulates compilation of the list of registered voters by the CEC. Article 85 requires the CEC determination of the number of mandates for each electoral constituency to be made 15 days before the announcement of elections. Article 83 provides that the announcement of regular elections by the president should occur no earlier than 75 days and no later than 60 days before voting day. Thus, the announcement of the number of mandates to be filled in each constituency should be made by the CEC between 75 and 90 days before the elections.

17. Previous reports of the OSCE/ODIHR state that the number of registered voters in the 2010 parliamentary elections was 3,036,703 and 3,032,681 in the 2011 presidential election. Based on Article 85 and the number of registered voters noted in 2010 and 2011, each electoral constituency will receive a mandate for about 25,000 registered voters (first electoral quotient). Undistributed mandates, remaining after distribution based on electoral quotients, are distributed among the electoral constituencies based on highest remainders. The formula for pre-election distribution of the number of mandates in each electoral district is acceptable. However, there are concerns when it comes to the distribution of mandates to candidates after the election results are determined. These concerns are compounded with the introduction of open list voting where a voter can express preferences or dislike for particular candidates on a list of candidates.

18. Article 90(2) of the draft law limits distribution of parliamentary mandates to political parties that receive more than 5 per cent of the vote in the Kyrgyz Republic and at least 0.5 per cent of the vote in each of the seven oblasts and Bishkek and Osh cities. Both thresholds are calculated against the number of voters who participated in the elections. This double threshold existed under the previous version of the law and the OSCE/ODIHR and the Venice Commission noted the double threshold requirement compromised the objectives of a proportional representation system.⁶ The Venice Commission and the OSCE/ODIHR previously recommended that the regional threshold requirement of 0.5 per cent of the vote in each of the seven oblasts and Bishkek and Osh cities be reconsidered since the proportional representation system was based on a single nationwide constituency. As the proportional representation system is now based on nine geographically established constituencies, the rationale for a nationwide threshold of 5 per cent is questionable. Moreover, the double threshold reduces considerably the chances of minorities to be represented in the parliament as it is quite difficult to suppose that they will be able to achieve not only the nationwide threshold of 5 per cent but also the second threshold of 0.5 per cent in every constituency. *The Venice Commission and the OSCE/ODIHR recommend that the 5 per cent nationwide threshold be removed from the law if mandates are to be distributed based on a regional proportional representation system using election results in nine separate geographical constituencies.*

⁵ See 2011 Joint Opinion, paragraphs 14-16 (“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”).

⁶ See 2011 joint opinion, paragraph 18.

19. The OSCE/ODIHR and the Venice Commission previously recommended that the legal 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 practices. This recommendation remains unaddressed.

20. Article 90 of the draft law provides that the CEC determines the election results and the number of mandates won by a political party in each electoral constituency. As noted above, a political party receives mandates only if it received at least 5 per cent of the votes in the Kyrgyz Republic and 0.5 per cent of the votes in each electoral constituency. Article 90(3) then states:

“Distribution of deputies’ mandates among the candidates on political parties’ list of candidates in constituencies shall be carried out after specification of list of candidates by leading body of political party in case of delegating such powers by leading body.

In a priority order, a leader and two candidates are to be included into the candidates’ list of three constituencies, where political party received relative majority of votes, at the suggestion of the leading body of political party.

Further lining up of candidates in the list is being carried out taking into account voters’ opinion in regard of the sequence of candidates in the list and their rating.

Assigned candidates of every list of candidates, obtained more than 10 per cent of votes from total amount of votes cast for party list in electoral constituency, shall line up in a sequence of number of received votes. If two or more candidates obtain equal number of votes, then they shall line up in a sequence established by leading body of political party.

Following lining up of candidates in the list obtained less than 10 per cent of votes shall be established by leading body of political party taking into account requirements of part 3 article 86 of hereof present Constitutional Law.”

21. The above text establishes several rules for distribution of mandates to candidates. These rules are problematic and will be discussed in below paragraphs on the rules for distribution.

22. First, Article 90(3) provides that a political party leader and two candidates, based on the Article 86 requirement that each list of candidates contain the names of the leader of the political party and “two candidates especially singled out by a superior body” of the political party, must be distributed mandates in the three constituencies where the political party “received relative majority of votes”. This means that, regardless of voters’ preferences expressed in open list voting, three handpicked persons of the political party are guaranteed a mandate even though they “are not indicated in the sequence of candidates’ list” (see Article 86(3) on nomination of candidates). This special treatment for these three candidates is problematic and violates the fundamental principle of equality and of non-discrimination. Additionally, it is possible under these allocation rules to circumvent the will of voters in an electoral constituency by giving a mandate to a person who did not receive a single open list preference vote over a candidate who received preference votes in the open list voting. If open list voting is to be allowed, then it should apply to all candidates on the list without giving special treatment to three candidates. *The Venice Commission and OSCE/ODIHR recommend that Articles 86 and 90 be amended to delete the special treatment given to these three candidates if open list preference voting is to be used.*

23. After distribution of the three special mandates to the political party leader and two other candidates, mandates are then distributed to candidates who “obtained more than 10 per cent of votes from total amount of votes cast for party list in electoral constituency [...] in a sequence of number of received votes.” This provision in Article 90 has to be considered with Article 56, which regulates the marking of the ballot, and Article 60, which regulates the counting of ballots. In the English translation of these articles, it appears the voter has four voting options: (1) a

positive “+” vote for a preferred candidate on the list; (2) a negative “cross out” vote against a candidate on the list; (3) “against all”, which would be a vote against all parties and candidates, or (4) for a political party without changing the order on the list through a “+” or “cross out”. Article 60(21) provides that the “net” positive preferences for a candidate are calculated after deducting the candidate’s negative “cross outs”. Thus, the sequence of mandate distribution among open list candidates is not based solely on positive preferences of voters but also includes negative expressions of dislike for a particular candidate. It seems that several preference votes and/or crossing-outs are possible, but the text, or at least its translation, is unclear whether preference votes and crossing-outs may be combined. *The Venice Commission and OSCE/ODIHR recommend clarifying whether they may be combined.*

24. Allowing “vote against all” is not the best solution, especially in countries which are in the period of fundamental transition from totalitarian to democratic societies. The goal of the elections is to ensure the election of the representative bodies and not to test the credibility of the political parties or candidates. The vote is intended at electing authorities and not at preventing their election.

25. After the distribution of mandates to the three “favoured candidates” and open list candidates receiving 10 per cent of “net” positive preferences, political party leaders then distribute the remaining mandates under the requirements of Article 86(3), which reflects the following principles: (1) candidates of the less represented gender shall be given a mandate so that this group has at least 30 per cent of the mandates in the electoral constituency; (2) at least 15 per cent of the candidates receiving a mandate, based on the total number of mandates in all constituencies, are 35 years of age or younger; (3) at least 15 per cent of the candidates receiving a mandate, based on the total number of mandates in all constituencies, “have various ethnicity”.

26. A problem with the mandate allocation rules is that the measures to facilitate the representation of women and persons belonging to national minorities are secondary and may never be implemented. It is possible that, after the three special mandates (leader and two favoured candidates) and open list mandates are allocated, there may be few mandates remaining to allocate to women and persons belonging to national minorities. The distribution of mandates to parties in the 2010 parliamentary elections was 28, 26, 25, 23, and 18. Thus, it is a possible scenario for a political party to win 20 mandates overall. After allocation of the three special mandates, there would be no mandates remaining for women, persons belonging to national minorities, and youth if two candidates in each electoral constituency crossed the 10 per cent open list threshold, as the remaining 17 mandates would be distributed under the open list preference voting rules. Open list preference voting, combined with the use of nine separate electoral constituencies, will not enhance the election of persons belonging to national minorities and is not an effective measure for enhancing the participation of women. The goals stated in Article 86, regulating registration of candidate lists, is hindered by reserving three special mandates for the political party apparatus and *possibly* open list voting. *The Venice Commission and OSCE/ODIHR recommend* that Articles 56, 60, 86, and 90 be revised as the parliamentary electoral system established by these articles violates the principle of equal suffrage by giving special treatment to three chosen members of a political party⁷ and the system does not facilitate the representation of women and persons belonging to national minorities.

27. As noted above, no political party received more than 28 mandates in the 2010 parliamentary elections. However, the possibility does exist that a political party could obtain a number of votes that supported the allocation of more than 65 mandates to the political party.

⁷ On special treatment, see [Joint Opinion on the Electoral Code of the Republic of Albania by the Venice Commission and the OSCE/ODIHR adopted by the Venice Commission at its 78th plenary session \(Venice, 13-14 March 2009\)](#), CDL-AD(2009)005, par. 18-19.

The draft law fails to establish a procedure for mandate allocation, should such a situation occur. Article 65(4)(2) provides that the “order of mandates’ distribution in case political parties pretend for more than 65 deputy mandates as a result of elections shall be established by the Central Election Commission”. Such an important issue should not be dealt with by CEC decisions. Should the limit of 65 seats for the first party be maintained, *the OSCE/ODIHR and the Venice Commission recommend that the draft law be amended to explicitly outline the procedure for the distribution of mandates where a political party reaches the limit of 65 mandates.*

28. The previous version of the law allowed political parties to change the order of candidates in the list after election day. The OSCE/ODIHR and the Venice Commission previously recommended that this possibility be removed from the law. The draft law does not contain a specific provision allowing for a political party to change the order of candidates on a list after the elections. However, the rules on “favoured candidates” as well as the possibility for political party leaders to partly decide about who will be elected after the elections – even if some criteria, such as representation of women, young and minorities are provided for in the law – is a *de facto* changing of the order of candidates regardless of the results of the open list voting and is not in line with international standards.⁸ *The Venice Commission and the OSCE/ODIHR recommend revising the draft in order not to allow the party leadership to change the allocation of seats after the elections and to clarify the criteria for allocation of seats.*

29. Article 86(2) of the draft law limits the right to nominate candidates for parliamentary elections to political parties. The OSCE/ODIHR and the Venice Commission previously recommended that the law be amended to provide for independent candidates. This recommendation has not been addressed and Article 86(2) 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: “[T]he participating States will] respect the right of citizens to seek political or public office, individually or as representatives of political parties or organisations, without discrimination”. General Comment 25 (1996) of the UN Human Rights Committee to Article 25 of the International Covenant on Civil and Political Rights also states, in Paragraph 17 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 again recommend that the law be amended to provide for the candidacy of independent candidates in parliamentary elections.*

30. According to Article 91(5), “If no candidates remain on the list of a political party, the mandate shall remain vacant until the next election to the Parliament (Jogorku Kenesh).” This provision is questionable as it does not provide citizens with full representation, although a logical choice of a duly-elected representative is known. Thus, the mandate could be allocated to the list of another party based on the results of the elections.

B. Forfeiture of mandate

31. The Venice Commission and the OSCE/ODIHR previously expressed concern as to provisions in the 2010 Constitution and election law that unjustifiably required the forfeiture of a deputy’s parliamentary mandate. Such provisions still remain in the 2010 Constitution and draft election law. Although the 2010 Constitution explicitly provides that parliamentary deputies are

⁸ See [Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections, and Electoral Administration in the Republic of Serbia by the Venice Commission and OSCE/ODIHR -adopted by the Venice Commission at its 66th Plenary Session \(Venice, 17-18 March 2006\)](#), CDL-AD(2006)013, par. 43 and other relevant documents.

not bound by an imperative mandate,⁹ 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.¹⁰ *The OSCE/ODIHR and the Venice Commission reiterate the recommendation that all legal provisions that require forfeiture of a parliamentary mandate due to a deputy's disassociation with a faction be removed from the legal framework.*¹¹

32. It should be noted that Article 91 of the draft law has also made procedural changes in regard to the issue of mandate forfeiture. Under the current law, a deputy "shall be understood under early retirement" upon the occurrence of certain disqualifying events. Under Article 91(3) of the draft law, the political party can make changes with the deputy's mandate in four possible situations and, under Article 91(4), the deputy is "understood under early retirement" in nine possible situations. Both Articles 91(3) and 91(4) are of concern.

33. Article 91(3)(4) of the draft law allows post-election changes in candidate list order where there is "lack of communication between candidate and party." This is a very broad phrase and could be interpreted to allow mandate forfeiture if an elected deputy fails to return a party leader's telephone call, for instance. This phrase could be interpreted in numerous ways and "lack of communication" is not a justifiable basis for requiring the forfeiture of a mandate of a deputy elected through the will of voters expressed in elections. *The OSCE/ODIHR and the Venice Commission recommend that Article 91(3)(4) be deleted from the law.*

34. Article 91(4)(8) provides for "early retirement of a deputy" upon obtaining citizenship of another state. The issue of dual citizenship has recently received attention from the European Court of Human Rights. Considering the recent evolution of the case law of the European Court of Human Rights, the forfeiture of a mandate upon the acquisition of a second citizenship may be deemed contrary to human rights principles.¹² *The Venice Commission and the OSCE/ODIHR recommend Article 91(4)(8) be reassessed in light of emerging developments concerning restrictions on suffrage rights due to holding dual citizenship.*

35. Article 91(6) requires all mandates of a faction be forfeited and redistributed to other political parties if the "leading body of party or faction take a decision to dissolve faction". Deputies in a faction should not forfeit their mandates simply because party leaders want to dissolve the faction. Deputies in the faction have been elected to parliament based on the expression of the will of voters in elections. Regardless of their motivations, leaders of a party or faction should not be able to undermine the will of voters after the elections by deciding to dissolve the faction. *The Venice Commission and the OSCE/ODIHR recommend that Article 91(6) be deleted from the draft law.*

36. According to Article 92(1), the powers of a deputy may be suspended by a decision of the leading body of a political party, with the subsequent approval of the supreme governing body of the political party in case of repeated violation (at least twice) of party regulations or the loss of connection with political party or faction; offence, discrediting the status of deputy and member of the party; personal statement, as well as in connection with not entering a faction or entering other deputy units without consent of faction. The numerous possibilities in the draft

⁹ 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 or forfeit their mandate for changing.

¹⁰ According to Article 70(3) of the Constitution, deputies unite in factions, which may form a majority faction or an opposition faction.

¹¹ The 2011 joint opinion contains an extensive discussion on "floor crossing" and how courts have been critical of restrictions on "floor crossing" due to the fundamental human right to free association and the rights to hold political views as well as change one's political views. See 2011 joint opinion, paragraphs 49-50. 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), CDL-AD(2009)027.

¹² See European Court of Human Rights' *Judgment Tănase v. Moldova*, 27 April 2010.

law for forfeiture of a parliamentary mandate appear to contradict the constitutional provision lifting the imperative mandate and reintroduce 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 the OSCE/ODIHR again recommend* deleting all legal provisions that require forfeiture of a parliamentary mandate for “floor crossing”, “lack of communication”, or due to termination of political party or faction activity.¹³

C. Limitation on suffrage rights

37. Article 4 of the draft law sets forth the right of suffrage for citizens of the Kyrgyz Republic. Article 4(4) abrogates the passive right of suffrage of a citizen whose “conviction has not been expunged 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 expunged. Further, Article 4(3) denies the voting rights of citizens “kept in places of confinement”, without regard to the reason (nature of the crime) for confinement.¹⁴

38. The OSCE/ODIHR and the Venice Commission previously recommended¹⁵ that these provisions be amended so that denial of (active and/or passive) 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.¹⁶ The blanket restriction on the right to vote for “citizens adjudicated by court as legally incapable” appears problematic.¹⁷

39. The text of Article 4(3) does not list the other circumstances that should be defined as discriminatory in terms of suffrage rights. As Article 16(2) of the Constitution and international standards refer to such “other circumstances”, Article 4(3) could be reconsidered.

D. Limitations on candidacy rights

40. The 2011 joint opinion expressed concern over the possibility to cancel a candidate’s registration for a wide range of violations of the law, ranging from minor violations to more

¹³ 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). On the issue of imperative mandate and similar practices, see the [Report on the Imperative Mandate and Similar Practices adopted by the Council for Democratic Elections at its 28th meeting \(Venice, 14 March 2009\) and by the Venice Commission at its 79th Plenary Session \(Venice, 12-13 June 2009\)](#), CDL-AD(2009)027.

¹⁴ See the 2011 joint opinion, paragraphs 21-25, for an extensive discussion as to why a blanket denial of suffrage rights for conviction of any crime is incompatible with fundamental human rights. See also *Frodl v. Austria*, (Application No. 20201/04, 4 October 2010), at paragraph 25; *Hirst v. United Kingdom (No. 2)* (Application No. 74025/01, 6 October 2005); 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”; Paragraph I.1.1(d.iv) of Council of Europe, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines for Elections.

¹⁵ CDL-AD(2011)025, par. 19-25.

¹⁶ Code of Good Practice in Electoral Matters, I.1.1.d.v; *Hirst v. United Kingdom*, No. 74025/01 (6 October 2005), available at www.echr.coe.int; *Scoppola v. Italy (No. 3)* no. 126/05 (22 May 2012) does not go so far and states that “the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied”.

¹⁷ *Alajos Kiss v. Hungary*, No. 38832/06 (20 May 2010).

serious violations.¹⁸ Although there is some improvement in the text of the draft law, concern remains due to broad and vague language found in articles of the draft law. Article 53(8) allows for cancellation of candidate registration “in the event of breach of the requirements specified herein” and for “violations of the abovementioned requirements”. It is not clear whether these phrases are intended to refer to all requirements of the draft law or just the requirements of Article 53. Further, Article 70(2) allows cancellation of candidate registration for violations of Articles 46, 77, 87, 102, and 108, and for “direct involvement of the candidate and his/her representatives in violation of election campaign rules”. Similar provisions apply to lists of candidates according to Article 70(3). As the OSCE/ODIHR and the Venice Commission previously noted, such provisions 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. A variety of campaign violations can be the basis for cancellation of registration.¹⁹ Revocation of candidate’s registration can be accepted as a sanction only in the last resort, and only if other sanctions cannot be considered proportional to the gravity of the violation committed by the candidate. In this connection, the possibility of revocation of candidate’s registration for any, even minor, violation of the election campaign rules cannot be considered in accordance with international standards. The provision of Article 70(3)(5), which provides for a possibility of revocation of the list of candidates if the violation of the campaign rules was committed by the leadership, or officials of an executive body or representatives of a political party, is even more problematic. These provisions could in particular be misused to “cancel” electoral opponents.

41. 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. 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. *The OSCE/ODIHR and the Venice Commission recommend that Articles 53 and 70 be amended accordingly.*

42. The request for a certificate from the place of work or study as a mandatory document for registration of candidates for presidency (Article 77(1)(1)) and parliament (Article 87(1)(2)) may unduly limit candidate nomination. First, it does not take into consideration people who are not formally employed or are not students, such as, for example, retired people. Secondly, this requirement could be misused by postponing the delivery of such certificates until after the candidate registration deadline. *The OSCE/ODIHR and the Venice Commission recommend reconsidering this requirement.*

E. Presidential candidacy rights

43. The OSCE/ODIHR and the Venice Commission previously expressed concerns about the requirements for being a candidate for president. The draft law not only fails to address previous recommendations, but introduces additional restrictions on the right to be a candidate for president.

44. Article 74(3) of the draft law establishes the following requirements for a candidate for president:

¹⁸ See the 2011 joint opinion, paragraphs 27-31.

¹⁹ Article 46(3)(3) prohibits the “use of telephone” of state institutions for the purpose of campaigning. Thus, making telephone calls on a government telephone could be the basis for cancellation of candidate registration.

Any citizen of the Kyrgyz Republic, who does not have citizenship of a foreign state, is not younger than 35 years old and not older than 70 years old, has higher education and working in total no less than 7 years as a head in state and municipal bodies, speaks the state language and has been living in the Kyrgyz Republic for at least 15 years in aggregate, may be elected as President of the Kyrgyz Republic.

45. The above requirements, albeit partly provided for in the Constitution (Article 62), are too restrictive and incompatible with international standards.

46. The Venice Commission and the OSCE/ODIHR have previously commented on the requirement for residency of 15 years. 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.”²⁰ 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.²¹

47. The residency requirement of 15 years is excessive. *The Venice Commission and the OSCE/ODIHR again recommend the residency requirement be removed.*

48. Article 75 of the draft law requires a candidate to have a “higher education”. Paragraph 15 of General Comment No. 25 specifically identifies educational requirements for candidates as problematic: “Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education [...]”. *The OSCE/ODIHR and the Venice Commission recommend that the requirement for a “higher education” be deleted from Article 75.*

49. Article 75 of the draft law requires a candidate to have worked “no less than 7 years as a head in state and municipal bodies”. The requirement of 7 years work as an executive (head or mayor) in a state or local government, which excludes the vast majority of citizens from the right to be elected, including members of legislative branches of government, is unreasonable and discriminatory and contrary to international standards. Moreover, it hardly can be considered as being in conformity with Article 62 of the Constitution of the Kyrgyz Republic, which does not provide for such a condition. *The OSCE/ODIHR and the Venice Commission recommend that the requirement for 7 years of executive branch experience be deleted from the draft law.*

50. The limitation on the candidacy of a person over 70 years of age raises a question of compatibility with international standards and OSCE commitments for non-discrimination, particularly Paragraph 7.5 of the 1990 OSCE Copenhagen Document. *The OSCE/ODIHR and the Venice Commission recommend that this age limitation be removed from the draft law.*

51. Article 75 requires a candidate to have a “level of state language proficiency”, which the article states is “determined based on his/her ability to read, write, express his/her thoughts in the state language”. Article 75 further requires the candidate to make an oral presentation of his/her pre-election programme in 15 minutes or less and “read a printed text in the volume not more than three pages”. Article 75 is of concern because language proficiency is determined subjectively based on the opinions of a “language commission” appointed by the CEC. Thus, Article 75 does not state clear and objective criteria for determining proficiency, but instead allows for a subjective “proficiency” decision by an *ad hoc* commission. Finally, application of the article will exclude the candidacy of a citizen who has a visual or vocal impairment and

²⁰ Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.1.c.

²¹ UN Human Rights Committee General Comment 25, par. 15.

would discriminate against such a person.²² The Kyrgyz Republic, although it has not ratified it, has signed the United Nations Convention on the Rights of Persons with Disabilities. Requiring a person with a visual or vocal impairment to meet the requirements of Article 75 in order to be a candidate would violate the general obligations under Article 4 of Convention on the Rights of Persons with Disabilities. *The OSCE/ODIHR and the Venice Commission recommend Article 75 to be amended to provide for objective criteria for determining state language proficiency²³ and to accommodate persons with disabilities by providing alternative means of assessment.*

F. Collection of signatures for presidential candidacy

52. Article 76 of the draft law requires that a candidate for president collect no less than 30,000 and not more than 50,000 signatures of voters in support of his/her candidacy in order to be registered. The number of signatures was reduced in 2011 to 30,000 from 50,000, addressing a previous recommendation of the OSCE/ODIHR and the Venice Commission. 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.²⁴ The number of 30,000 is consistent with international good practice in light of the number of registered voters.

53. Article 76(8) states “either all or part of the submitted signatures selected randomly (through casting a lot) may be checked”. This provision is not consistent with international good practice²⁵ and the Venice Commission and OSCE/ODIHR have previously recommended that the procedure for verification of signatures be revised. Extrapolation of the percentage of invalid signatures in a sample to the total number of signatures collected does not provide an accurate reconciliation of collected signatures and may result in an unjustified denial of registration.²⁶

54. 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.²⁷ The OSCE/ODIHR and the Venice Commission previously recommended 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. This recommendation remains unaddressed.

55. Article 76(9) of the draft law states that “signature lists shall be 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 not admissible that one invalid signature should have the effect of invalidating hundreds or thousands of valid signatures. Every clearly valid signature should be taken into consideration.

²² 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.

²³ See UN HRC, *Ignatane v. Latvia*, 25 July 2001, No. 884/1999, CCPR/C/72/D/884/1999, in which limitations to the right to stand for office, based on language requirements, were ruled a violation of Article 25 ICCPR because they were not based on objective criteria and were not applied in a procedurally objective manner. See also the judgment of the European Court of Human Rights of 9 April 2002 in *Podkolzina v. Latvia*, No. 46726/99.

²⁴ Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.3 ii.

²⁵ Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.3 iv.

²⁶ The 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)”. See OSCE/ODIHR Final Report on the Kyrgyz Republic presidential election 23 July 2009 (Warsaw, 22 October 2009).

²⁷ Cf. Code of Good Practice in Electoral Matters, I.1.3.iv.

The OSCE/ODIHR and the Venice Commission previously recommended 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. This recommendation remains unaddressed.

G. Electoral deposits for presidential candidates

56. Article 77(4) of the draft law requires that a candidate for president pay an electoral deposit “in a five thousand-fold amount of the calculated index established by the legislation”. This is an increase from the current legal requirement of “a thousand-fold”, which was already considered as excessive in the 2011 joint opinion and limiting the right to be elected to wealthy people.²⁸ Further, it is questionable whether both the collection of signatures and the requirement of an electoral deposit are necessary to ensure that spurious candidates do not waste electoral resources. The requirement of both signatures and electoral deposits is excessive and may prevent legitimate candidacies. The OSCE/ODIHR and the Venice Commission previously recommended that the combined requirement of signatures and an electoral deposit be removed from the law, and that registration requirements may be met through either the collection of signatures or payment of an electoral deposit. This recommendation not only remains unaddressed, but the amount of the electoral deposit has been increased.

57. As noted above, the amount of the electoral deposit for a presidential candidate has been increased from a thousand-fold to “a five thousand-fold amount of the calculated index established by the legislation”. This is interpreted to mean 5,000 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.²⁹ 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 the OSCE/ODIHR previously recommended that the amount of the electoral deposit be carefully considered. The draft law, instead of lowering the amount of the electoral deposit, increases the amount of the electoral deposit while still retaining a requirement for 30,000 supporting signatures of voters. *The OSCE/ODIHR and the Venice Commission recommend* that the amount of the electoral deposit be lowered and that the combined requirement of signatures and an electoral deposit be removed from the law, and that registration requirements may be met through either the collection of signatures or payment of an electoral deposit.

H. Participation of women in elections

58. The OSCE/ODIHR noted in its election report on the 2010 parliamentary elections: “women do not feature prominently in politics and are under-represented in decision-making positions”.³⁰ As a result, previous recommendations of the OSCE/ODIHR have included: (1) considering the extension of gender distribution requirements on candidate lists so that they apply to the final candidate lists; (2) requiring political parties to replace any withdrawn candidate with a member of the same gender; (3) positioning women higher on candidate lists; (4) political parties voluntarily providing female candidates opportunities which are equal to those of their male colleagues, such as addressing the public at rallies and being featured in party campaign

²⁸ CDL-AD(2011)025, par. 43.

²⁹ 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. See also OSCE/ODIHR Handbook for Monitoring Women’s Participation in Elections at <http://www.osce.org/odihr/elections/35151>.

³⁰ OSCE/ODIHR Final Report on the Kyrgyz Republic parliamentary elections 10 October 2010 (Warsaw, 20 December 2010), page 16.

materials and advertisements; and (5) political parties voluntarily providing for leadership advancement of female party members. As noted in the discussion on the electoral system for parliamentary elections, the draft law, which presents no new provisions that will result in strengthening the participation of women in elections, will not facilitate the effective participation of women in elections.

I. Participation of national minorities

59. The OSCE/ODIHR noted in its election report on the 2011 presidential election that national minority issues and inter-ethnic relations did not feature prominently in the election campaign. However, it was noted there were some areas where national minorities had a significant population and they were underrepresented in Territorial Election Commissions (TECs).³¹ The OSCE/ODIHR has previously made the following recommendations in regard to the participation of national minorities in elections: (1) representation of national minorities in the election administration should be ensured, especially in areas compactly populated by national minorities; and (2) voter information and election material should be made available in minority languages, especially in the areas populated by those minorities. The draft law does not address these recommendations.

J. Election commissions

60. Election administration is currently regulated by a separate Law “On Election Commissions to Conduct Elections and Referenda in the Kyrgyz Republic”. The draft law repeals this law and incorporates the majority of its provisions as Articles 13-34. As noted by the OSCE/ODIHR in its election observation reports, the problems observed in the election administration have resulted primarily due to implementation failures and not the law itself. Most of the recommendations of the OSCE/ODIHR and the Venice Commission have been for increased transparency, training, and good faith implementation of existing legal provisions. However, there are areas of the draft law that should be improved.

61. Article 13 of the draft law provides that elections are administered by the CEC, TECs, which are determined by the CEC for the territory covered by Bishkek and Osh cities and the rayons, and precinct election commissions (PECs). In the 2011 presidential election, the CEC established 58 TECs and 2,318 PECs were established by the TECs.³²

62. Article 18 of the draft law provides that the CEC is formed for a period of six years and consists of 12 members. The President of the Kyrgyz Republic, parliamentary majority and parliamentary opposition each “recommend” to the parliament one-third of the nominees for membership in the CEC. Should a nominee be rejected, then the nominating entity “shall be entitled to nominate the same or a different candidate”. As a rejected candidate can be nominated again, it appears that the right to nominate is equivalent to the right to appoint the member as the nominating entity can keep submitting the candidate’s name to parliament until the candidate is approved. Moreover, the parliament has to justify the rejection of a candidate, which could be difficult to implement in practice, since it is a collegial body in which the decisions are adopted by the majority of votes. *The OSCE/ODIHR and the Venice Commission recommend the revision and clarification of the procedures.*

63. The six years term is an increase in the term of CEC members from five years. This change aligns the formation of the CEC to correspond with the term of the presidency instead of the five

³¹ OSCE/ODIHR Final Report on the Kyrgyz Republic presidential election 23 July 2009 (Warsaw, 22 October 2009), at page 14.

³² OSCE/ODIHR Final Report on the Kyrgyz Republic presidential election 23 July 2009 (Warsaw, 22 October 2009), at page 6.

years term of the parliament. It is not clear whether the additional one year in the term of membership would apply to the current CEC. This should be clarified.

64. The Venice Commission and the OSCE/ODIHR already recommended that at least some members of CEC have a legal background.³³ Article 23(4)(5) determines that candidates for the post of Chairperson and Deputy Chairperson of the CEC shall have a law degree, election experience as a candidate or member of an election commission. The order of performance of the authorities of the Chairperson of the CEC is defined by drawing lots. The law is silent of possibility that not enough members of the CEC might have the above-mentioned qualifications.

65. Article 28(3)(4)(7) provides that the rejection of the annual progress report of the Chairperson of the CEC shall imply termination of his/her powers. This provision is peculiar since the annual progress report must reflect the activity of the CEC and not of its chairperson as the commission is a collegial body sharing responsibility with the chairperson. The Chairperson should not be revoked on this ground.

66. The dissolution of the TECs and PECs must be a solution of last resort adopted only in extraordinary circumstances and for serious violations. Article 33 is too broad in this respect. In particular, the provision of Article 33(1)(3) that the TECs and PECs can be dissolved for any "violation of requirements of this Constitutional Law" is not in conformity with the principle of proportionality.

67. As noted by the OSCE/ODIHR in its election observation mission report on the 2011 presidential election, the current law requires that no more than 70 per cent of the CEC members may be of the same gender, which resulted in four female members.³⁴ This requirement is not found in the draft law. This is a negative change in the legal framework regulating the formation of the CEC. *The Venice Commission and the OSCE/ODIHR recommend that the law provides a mechanism for ensuring that women are represented in the election administration, including in senior decision-making roles.*

68. The provision of Article 22(5) that the protocols on the election and referenda results shall be signed by all members of the CEC attending the meeting is also questionable; the norm should be clarified in order not to be interpreted in the sense that the refusal of some members to sign will invalidate the protocol.

69. It should be noted that Article 25 of the draft law is an improvement compared with the previous text concerning the permanent status of members of the CEC and the members' right to payment of salary during their term of office. This addresses previous recommendations of the OSCE/ODIHR and the Venice Commission that the law ensures that members are paid for their service on the CEC, do not suffer any negative consequences as a result of their membership, and that it is clear 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. The text of Article 25 is an improvement addressing previous recommendations.

70. Article 22(8) of the draft law, similar to existing legal provisions, requires CEC decisions to be published on the CEC website within 24 hours of adoption. However, the minutes reflecting CEC discussion of the issues prior to the decision, although required to be signed by members, do not have to be published on the CEC website. The OSCE/ODIHR has previously

³³ See the 2011 joint opinion, par. 53.

³⁴ OSCE/ODIHR Final Report on the Kyrgyz Republic presidential election 23 July 2009 (Warsaw, 22 October 2009), page 6.

recommended that the minutes of CEC meetings also be published on the CEC website as a means to enhance transparency. This recommendation remains unaddressed.

71. The competencies of the CEC to “consider and approve territorial borders, covered by the territorial election commission” to “approve borders of the electoral districts” and to “determine a number of mandates for electoral districts”, included in Article 19(1) envisage fundamental elements of the election law. According to the Code of Good Practice in Electoral Matters, such issues “should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law”.³⁵ As well, the unduly short time period of 5 days provided for in Article 36(6) should also be reconsidered.

72. Article 37(5) determines that at the presidential and parliamentary elections polling stations for the citizens of the Kyrgyz Republic staying in the territories of foreign countries, shall be established by the CEC on recommendation of the Ministry of Finance of the Kyrgyz Republic. A recommendation of the Ministry of Foreign Affairs would be more appropriate.

73. Article 87(9) of the draft law retains the provision that the CEC’s decision denying “registration of the candidates’ list may be appealed to the superior election commission or the court”. The Venice Commission and the OSCE/ODIHR previously recommended that this provision be clarified, as there is no election commission superior to the CEC. This recommendation remains unaddressed.

74. The OSCE/ODIHR and the Venice Commission previously expressed concern that the appointment process for the election administration did not ensure a broad and equitable representation of all election stakeholders. The most recent election report of the OSCE/ODIHR on the 2011 presidential election noted that election commissions at all levels were more pluralistic than in past elections. This is positive, particularly since interests holding political power in executive and legislative branches of government control much of the appointment process. The appointment process for the election administration in future elections should be observed carefully and assessed whether this positive trend is likely to be maintained even without changes in the legal provisions regulating appointment.

K. Voter lists

75. The OSCE/ODIHR has previously commented in election observation reports 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 law provides an adequate legal basis, in practice, the registration process is insufficient due to a 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. Many of the recommendations of the OSCE/ODIHR relate to the procedural regulations issued by the CEC for updating voter lists and training of election commission members. However, some changes have been introduced in the draft law, some of which are positive and some negative.

76. The OSCE/ODIHR has previously recommended that the law should provide for a regular update of voter lists. Article 38(4) of the draft law states that the compilation of the voter lists “shall start no later than 20 days after determination of the election results”. This change is a positive change, as it requires that updating of the lists be an ongoing process between elections. The OSCE/ODIHR also recommended that election commission system administrators be involved in the early updating of voter lists. This recommendation is

³⁵ Code of Good Practice in Electoral Matters, II.2.b.

addressed by Article 38(4), which places responsibility for updating the voter lists with system administrators of the CEC and chairpersons of TECs. The draft law retains current legal provisions that require government bodies, both national and local, to assist the CEC and other election commissions by providing data and information on citizens.

77. The revised text in Article 38(8) raises a question as to a voter appealing a removal from the voter list. The existing Article 14(9) creates avenues for appeal to the CEC or court should a voter's name be removed from the list. The revised text in Article 38(8) of the draft law inserts the phrase "within the procedure specified in Para 5 (sic) of this Article", which is the procedure related to creating a list of voters temporarily staying in hospitals and detention centers. *The OSCE/ODIHR and the Venice Commission recommend* this text to be checked as the reference to paragraph 5 would eliminate appeals for other situations where a voter has been removed from a voter list.

78. Article 38(9) maintains the current requirement that the voter list be placed on the website of the CEC. The requirements for public posting are expanded, as the voter list must be updated when new information on voters is obtained. Additionally, the current legal provision does not require posting of voter lists on the CEC website until 40 days before election day. However, the phrase "without indicating data on permanent and actual residency, date of birth of voters" has been removed from the law. *The Venice Commission and the OSCE/ODIHR recommend* that consideration be given to amending Article 38 to protect private information of the voter.

79. The OSCE/ODIHR previously recommended that the practice of printing a second copy of preliminary voter lists for PECs should be reinstated. Although there are some changes in text in Article 39 of the draft law, it retains the substance of current Article 15 of the law which provides for only one copy of voter lists to be delivered to the PECs. This recommendation remains unaddressed.

80. Article 40(4) reintroduces the possibility to be included on the voter list on election day in the polling station. This is a negative development, which is not in line with good practice.³⁶ A person claiming to be a voter who was omitted from the list can submit an application to the PEC Chairperson, who then informs the TEC. The TEC Chairperson makes a decision after conferring with the system administrator, two TEC members, representatives of political parties and candidates, and observers. A ballot is given to the voter if the decision is favourable to the voter. The OSCE/ODIHR and the Venice Commission have been critical of this provision in prior versions of the election law due to the observation of frequent and serious legal violations observed in polling stations on election day. *The Venice Commission and the OSCE/ODIHR recommend the possibility for election day registration in the polling station be deleted from the law.*

L. Election campaign provisions (2.5)

81. Article 47(9 and 10) of the draft law, similar to existing provisions, 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 47(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 OSCE/ODIHR and the Venice Commission previously recommended that Article 47(9 and 10) should be amended to state that the article is not a limitation on the rights of freedom of expression, assembly, or association. This recommendation has not been addressed.

³⁶ Code of Good Practice in Electoral Matters, I.1.2.iv.

82. Additional language in Article 47(9) of the draft law introduces the following text: "Election commissions shall organise the meetings of all candidates simultaneously". There are two concerns with this new text. First, it requires election commissions to be involved in the "organisation" of the meetings of candidates with voters. This goes beyond making sure that public facilities are available for candidates to meet with voters on a non-discriminatory basis. The election administration should not be involved in organising the substantive political content of a candidate meeting with voters. Secondly, the new language is subject to different interpretations in the English translation. The text can be interpreted to mean that the candidate meetings are to occur "simultaneously". *The OSCE/ODIHR and the Venice Commission recommend that Article 47(9) be clarified and the article be clear as to the involvement of the election administration in "organising" candidate meetings with voters.*

83. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for genuine democratic elections. Article 49 and other articles of the draft include some provisions which are in line with the goal to ensure freedom of expression during electoral debates. However, the blanket prohibition to comment on speeches of candidates, leaders or representatives of political parties (Article 49(5)) is an unjustified limitation of the freedom of expression and is also contrary to the logic of electoral debates. The goal of the electoral debates is exactly the fight of ideas and concepts, during which the candidates try to convince voters to accept their ideas and to reject the ideas promoted by other contenders.

84. Article 52(1) prohibits the preparation of campaign materials outside the Kyrgyz Republic. This appears as an excessive restriction of freedom of expression. Article 52(1) also requires that "copies of printed materials and other campaigning materials must be submitted to the relevant election commission which had registered the candidate or list of candidates". The Venice Commission and the OSCE/ODIHR previously expressed concern over a similar provision as it could be interpreted as requiring the approval of election commissions prior to the distribution of campaign materials. The Venice Commission and the OSCE/ODIHR recommended that this provision be revised to respect the right to freedom of expression through campaigning without prior submission of campaign materials to election commissions. This recommendation remains unaddressed. Moreover, the provision in the same paragraph according to which "candidates and political parties shall have the right to freely issue and disseminate printed, audio-visual and other campaigning materials" should not be understood as preventing other people from doing the same.

85. A violation of the requirement to identify the source of print campaign material indicated in Article 52(2) may lead to deregistration of a candidate under Article 53(8). The Venice Commission and the OSCE/ODIHR previously recommended that Article 53(8) be amended, as deregistration is an unreasonable sanction for violation of Article 52(2). This recommendation remains unaddressed.

86. Several articles in the draft law retain existing provisions intended to protect the "honour, dignity, and business reputation" of candidates and political parties. These include provisions found in Articles 47(16), 53(5), and 53(6). The protections place liabilities with candidates, candidate representatives, political party representatives, mass media, and "other individuals".

87. Article 53(2) prohibits "abuse of mass media freedom" by giving a number of examples, which includes "use of photo and video materials with the images of politicians and statesmen of other countries and other forms of abuse of mass media freedom". Article 53(5) also retains the current 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.³⁷ The OSCE/ODIHR and the Venice Commission previously recommended that these provisions be amended to comply with international standards. The recommendation remains unaddressed.

88. Article 53(3) forbids "to bribe" voters "from the moment of calling the elections". It is assumed that relevant criminal legislation prohibits bribery of voters in provisions for the protection of electoral rights and integrity of elections. Relevant criminal provisions should be checked to ensure that bribery of voters is always a crime even if it occurs before the calling of elections or after the determination of election results.

M. Campaign Financing

89. Previous recommendations of the OSCE/ODIHR and the Venice Commission have emphasised the need for transparency in campaign finance and effective mechanisms for monitoring legal compliance through audits. The draft law makes no improvement in these areas. Nor does the draft law provide effective dissuasive sanctions for failure to comply with campaign finance regulations. As a result, previous recommendations for increased transparency and accountability for campaign finance remain unaddressed.

90. As under existing law, the draft law requires candidates and parties participating in elections to submit reports to the CEC on their funds and expenditures 10 days after the elections (Article 65(19)). OSCE/ODIHR election observation mission reports have noted that the CEC, by its regulations, has required an additional report 10 days before election day.³⁸ *The OSCE/ODIHR and the Venice Commission recommend that the requirement of an additional report prior to election day be included in the draft law.*

91. The draft law 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. *The OSCE/ODIHR and the Venice Commission recommend that the draft law be revised to provide specific details on the information that must be included on campaign finance reports and that all reports must be publicly available for scrutiny, including on the website of the CEC.*

92. Article 65(20) of the draft law retains the current provision that "the balance of non-spent funds on a special account shall be 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 the OSCE/ODIHR previously recommended* that this provision 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. *The recommendation remains unaddressed.*

³⁷ See, e.g., *Oberschlick v. Austria*, Case No. 6/1990/197/257, European Court of Human Rights (23 May 1991); *Lopes Gomes Da Silva v. Portugal*, Application No. 37698/97 European Court of Human Rights (28 September 2000); *Bowman v. The United Kingdom*, Case No. 141/1996/760/961, European Court of Human Rights (19 February 1998); *Incal v. Turkey*, Application No. 41/1997/825/1031, European Court of Human Rights (9 June 1998).

³⁸ See OSCE/ODIHR Final Report on the Kyrgyz Republic parliamentary elections 10 October 2010 (Warsaw, 20 December 2010), page 13.

93. Article 65(13) of the draft law 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". The Venice Commission and OSCE/ODIHR have previously expressed concern that this provision prohibits persons who do not have financial resources from contributing their time or labour in support of a candidate. 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 OSCE/ODIHR and the Venice Commission previously recommended* that the law 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. *This recommendation remains unaddressed.*

94. Article 65(6) of the draft law retains the current provision that limits on campaign funds and contributions are calculated "based on a salary index established by the Kyrgyz Republic on the day of calling of the election". 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 the OSCE/ODIHR previously recommended* that this provision be clarified. *The recommendation is not addressed.*

95. Article 70(2) of the draft law is of concern as it retains the current provision for cancellation of a candidate's registration based on a campaign finance violation in excess of 0.5 per cent of a campaign limit. 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 OSCE/ODIHR and the Venice Commission previously recommended* that this cancellation provision be deleted from the law and replaced by a proportionate sanction, such as a fine bearing some relation to the amount of the overspending. *The recommendation is not addressed.*

N. Media provisions

96. Previous opinions of the OSCE/ODIHR and the Venice Commission have noted the need for improvement in legal provisions regulating media in elections. Previous recommendations, including those made in OSCE election observation mission reports, have focused on the need for the law: (1) to provide for equitable coverage of contestants in news and current affairs programs, (2) respect the right of media to exercise independent editorial coverage of campaign events, (3) state clear guidance to the oversight bodies responsible for implementation of the law, including consideration of establishing a single independent regulatory body responsible for ensuring compliance with power to conduct systematic media monitoring, (4) removing the requirement for special accreditation for media outlets to cover the electoral campaign, (5) to provide greater clarity on the difference between news coverage ("informing") and "campaigning"; (6) specify that media should not be held responsible for "unlawful" statements made by candidates; and (7) require all advertisements, both free and paid airtime, to clearly identify whether the advertisement is free or paid and who is responsible for the content.

97. The draft law makes no significant changes in text to address the above recommendations. Articles 47-53 of the draft law retain the basic text of existing legal provisions regulating media during elections. Although these articles generally provide for free and paid broadcast time and print space to candidates, based on equal conditions, none of the specific previous recommendations for improvement of these articles has been addressed.

O. Mobile voting

98. The provisions for mobile voting in Article 58 of the draft law retain the current legal provisions, which are very broad. The Venice Commission and OSCE/ODIHR previously recommended that mobile voting be limited to situations where a voter cannot attend regular voting due to health or disability reasons. The current legal text is unchanged in the draft law and this recommendation remains unaddressed.

99. Article 58(4) requires at least two members of the PEC, who are chosen by lot, to administer mobile voting. The Venice Commission and OSCE/ODIHR previously recommended the law specifically provide that the PEC members who administer mobile voting should be representative of the various entities eligible to nominate commission members and not representatives of the same nominating entity. This recommendation remains unaddressed.³⁹

P. Voting procedures (1.3.2.2)

100. Article 55(7) of the draft law requires envelopes and ballots be printed in the state and official languages. The OSCE/ODIHR and the Venice Commission previously recommended that consideration be given to amending the law to provide that election materials must also be printed in minority languages in areas where there are a sufficient number of persons belonging to national minorities. This would facilitate the participation of national minorities in the elections and meet international standards and OSCE commitments.⁴⁰ The law remains unchanged in this regard.

101. Article 57 provides for an early voting process for a period of 3-9 days prior to the voting day. In order to prevent possible abuse and fraud, the law should specify concrete days and hours when early voting can take place and provide for observers and candidate representatives to follow the early voting process.

102. The draft law introduces the use of envelopes in voting. Marked ballots are put inside envelopes prior to being placed in the ballot box. Although intended as a security measure against fraud, the use of envelopes can complicate determining ballot validity and establishing the results in the polling station. Careful and thorough observation of polling and counting in the next elections will assist in evaluating whether the use of envelopes improves or hinders election processes in the Kyrgyz Republic, should envelopes be used.

103. Article 56(7) retains the current provision 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. The Venice Commission and OSCE/ODIHR previously recommended this provision be amended to address concern that it would be used to allow persons to vote without proper identification. The lack of identification documents in the polling station does not appear to be a significant problem noted by the OSCE/ODIHR in its last two election observation reports. However, the necessity of an identification document for every voter should be a general requirement in all precincts.

104. The OSCE/ODIHR and the Venice Commission previously recommended that candidate withdrawals be limited by setting the deadline for withdrawal of candidates immediately before the CEC takes the decision on the format of the ballot. This recommendation remains unaddressed.

³⁹ See 2011 joint opinion, par. 93-94.

⁴⁰ General Comment No. 25 of the UN Human Rights Committee recommends that "information and materials about voting should be available in minority languages". See *also* paragraph 32.5 of the 1990 OSCE Copenhagen Document, which states that "persons belonging to national minorities have the right [...] to disseminate, have access to and exchange information in their mother tongue."

Q. Determination of election results (1.3.2.3)

105. Article 60(28) of the draft law retains the requirement 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.” The OSCE/ODIHR and the Venice Commission previously recommended this provision be amended to provide that the protocol shall also be posted, in addition to the selected “place”, at the premises of the PEC (polling station). *The OSCE/ODIHR and the Venice Commission made a similar recommendation for a provision governing posting of the protocol by TECs (Article 61(6) of the draft law). This recommendation is unaddressed.*

106. Article 60(9) retains the current provision that requires all ballots in a mobile ballot box be invalidated if the number of ballots and envelopes 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. A better practice may be to note any discrepancy in the number of mobile ballots in the protocol, thereby preserving an evidentiary basis for later consideration should there be the mathematical possibility that an extra ballot in the mobile box could have affected the determination of the winner in the constituency. *The OSCE/ODIHR and the Venice Commission previously recommended revising the requirement that an entire ballot box be invalidated on the basis of one more ballot/envelope than applications for ballots. This recommendation remains unaddressed.*

107. Article 61 of the draft law regulates the procedure for determining the election results by territorial election commissions. Although Article 61 states that the information in the protocols of the TEC shall include the information stated on the protocols of the PEC, there is no explicit requirement that the information in the TEC protocol be broken down by precinct level, which is an important element in increasing transparency. *The Venice Commission and OSCE/ODIHR previously recommended this provision be amended to clearly state that the summary table required by the law provides all information broken down to the precinct level. The same recommendation was made for the provision, which regulates the content of the CEC protocol, to ensure that the “summary table containing summary data of the lower ranking election commissions’ protocols” is broken down by each precinct and territorial election commission. These recommendations remain unaddressed.*

108. Article 62(3)(1) of the draft law retains the provision stating that nominated candidates “cannot be candidates for elective posts” in repeat elections held because “elections failed” due to more votes against all candidates than in favour of any candidate. As previously noted by the OSCE/ODIHR and the Venice Commission, this provision is an unreasonable limitation on candidacy and is contrary to the principle of universal and equal suffrage. *The OSCE/ODIHR and the Venice Commission recommend this provision be amended to allow “losing” candidates to compete in repeat elections.*

109. Article 63 of the draft law regulates the publication of election results. *The OSCE/ODIHR and the Venice Commission have previously recommended that this legal provision be amended so that it is clear that the law requires the publication of all detailed results broken down to the precinct and territorial election commission levels. This recommendation remains unaddressed.* Moreover, Article 63(4) provides for the publication of the list of voters who took part in the voting, which is not in line with good practice.⁴¹

110. Although the draft law, like the current legal provisions, provides that votes should be counted and summarised 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

⁴¹ Code of Good Practice in Electoral Matters, I.4.c.

imposes a deadline for summarising final results of presidential elections, however there is no such deadline for parliamentary elections. *The OSCE/ODIHR and the Venice Commission recommend the imposition of deadlines on the counting and summarisation of results to avoid delays in the process.*

111. Articles 81, 89 and 100 provide for repeated elections. Article 81(2), 89(3) and 100(3) provide that in case of repeated elections persons or political parties, whose actions have led to declaring elections invalid, cannot compete again. These rules appear disproportionate, in particular when sanctioning a political party for the action of some of its members. Moreover, it is not provided who should make the final decision, the CEC or courts.

R. Transparency/observation

112. The draft law provides for observation of election processes. Broad provisions allowing for observation and transparency are found in Articles 9 through 12 of the draft law. This is a positive feature of the draft law, which has incorporated previous recommendations for transparency.

113. Article 10(4)(6) provides that the observers have the right to be present at the voting premises at any time “of the polling day”. It should be made clear that, should the commission continue its activity (in particular counting) on the next day, the observers will be allowed to be present. Moreover, the rule according to which “observers may not [...] create any obstacles to the work of the election commission” (Article 10(5)(6)) should not be interpreted restrictively by the election administration.

114. The CEC delayed accreditation of international observers in the 2011 presidential election until 30 days before election day.⁴² This limited the ability of international observers to completely observe the election processes. According to the Article 11 the responsibility for accreditation of international observers is with the CEC, but there is no deadline for acting on a request for accreditation. *The OSCE/ODIHR and the Venice Commission recommend that Article 11 of the draft law be amended to require the CEC to make a decision on observer accreditation within a reasonable time after receiving the request for accreditation.*

115. Article 11(1) provides that international observers shall be accredited only in the cases when they have received an invitation forwarded by the President, Jogorku Kenesh, Government and Central Election Commission. This should be considered as a technical formality, and not a limiting condition.

116. Article 11(2) of the draft law provides that the validity of the accreditation of an international observer expires on the day of official publication of election results. However, at times there are electoral activities, such as the adjudication of court cases related to electoral complaints, that may take place after the official publication of results. International observers often observe these activities and report on them in their election observation reports. *The OSCE/ODIHR and the Venice Commission recommend that Article 11(2) of the draft law be amended to provide that accreditation expires after the international observers have concluded all their observation activities.*

117. Article 11(4) could be interpreted as giving international observers fewer rights than to national observers. This should be reconsidered.⁴³

⁴² See OSCE/ODIHR Final Report on the Kyrgyz Republic presidential election 30 October 2011 (Warsaw, 10 January 2012), page 16; Parliamentary Assembly of the Council of Europe, Doc. 12797, 24 November 2011, Observation of the presidential election in the Kyrgyz Republic (30 October 2011), par. 20.

⁴³ Cf. [Guidelines on an internationally recognised status of election observers adopted by the Council for Democratic Elections at its 31st meeting \(Venice, 10 December 2009\) and by the Venice Commission at its 81st plenary session \(Venice, 11-12 December 2009\)](#), CDL-AD(2009)059, par. 10, according to which « Both international and domestic election observers should be granted the same freedoms and rights ».

118. Article 11(6) provides that the CEC can withdraw the accreditation of an international observer in the event of violation of legislation of the Kyrgyz Republic, without taking into consideration the seriousness of the violation. This goes against the principle of proportionality. *The Venice Commission and OSCE/ODIHR recommend reconsidering this provision in order to make it in conformity with the principle of proportionality.*

119. The right of the CEC to withdraw accreditation of mass media representatives (Article 12(4)) is formulated in similar terms, which also goes against the principle of proportionality. The right of appeal to a court should be given at any rate.

S. Complaints and appeals (2.4)

120. Electoral complaints procedures are in accordance with international standards only if the powers and responsibilities of the various bodies are clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.⁴⁴

121. The provisions of, *inter alia*, Article 68 par. 1, 4 and 5 (see also, e.g., Article 87(9)), which provide that decisions and (or) actions (inactions) of election commissions and their officials, which violate electoral rights of electoral process subjects, can be appealed in the superior election commission or in court, are clearly not in conformity with the mentioned standard. The quoted provisions not only create the possibility to choose between the superior election commission and the court but also the risk that the complaints will be submitted to both forums at the same time.

122. As noted in the 2011 joint opinion, prior OSCE/ODIHR election observation mission reports have noted issues with the adjudication of election complaints and appeals. These concerns were reiterated in the most recent OSCE/ODIHR election observation mission report on the 2011 presidential election.⁴⁵ The draft law does little to address previous recommendations as most of the previous articles remain in the draft law without significant change. Articles 67-71 of the draft law do not address the current problems which have resulted primarily from the CEC's lax and informal procedures for addressing complaints and appeals. This informality on the part of the CEC has been enabled by the failure of the draft law to provide clear and detailed provisions for the handling of electoral complaints and appeals. As a result of this informality in the handling of electoral complaints and appeals, the CEC has disregarded the few articles in the law regulating the consideration of complaints and appeals.⁴⁶ 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.

123. Minor changes are introduced in Articles 68(7) and 69(3) of the draft law. The first change requires a copy of an appeal be endorsed by the appropriate PEC, indicating the time of its receipt, and the copy be given to the applicant. A refusal to accept the appeal results in the drawing of an act to be filed with the superior election commission. The second change requires that a decision by an election commission shall be immediately provided to representatives of candidates and political parties. Although these are positive changes, they

⁴⁴ Code of Good Practice in Electoral Matters, II.3.3.c.

⁴⁵ *Id.*, pages 20-21, 23.

⁴⁶ See 2011 joint opinion, paragraph 110. See also 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.

do not address the substantive issues concerning the lack of uniform and consistent procedures in the law to ensure the proper adjudication of electoral complaints and appeals.

124. Article 67(4)(3) maintains the general supervision role by the prosecutor's service over the observance of electoral legislation. This is not in line with international standards and should be revised.⁴⁷

125. Deadlines of 2 or 3 days for submission of complaints and appeals, such as those provided in Article 68(7) and 69(3), appear unduly short.

126. Previous recommendations for the improvement of the processes for the adjudication of electoral complaints and appeals remain unaddressed. The OSCE/ODIHR and the Venice Commission recommend that Articles 67-71 of the draft law be amended to:

- Ensure clarity in the powers of the various complaints and appeals bodies;
- Establish realistic deadlines to allow for the adjudication of appeals between the closure of candidate registration and the start of the campaign period;
- 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, using standardised forms, 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; and
- Require that decisions on complaints and appeals be written and provide an explanation of the supporting law and facts.

T. Discussion of the systems for local elections

127. Articles 93 through 117 of the draft law address local government elections. These articles present similar concerns for local elections, as exist for parliamentary elections, in regard to limitations on candidacy, impact of the electoral system on women and persons belonging to national minorities, and forfeiture of mandates.

128. The amount of the deposit provided by Article 99 for the candidates to city or *aiyl* councils does not seem reasonable. According to the law, the deposit shall be returned only to a candidate or political party for which no less than 15 per cent of those who took part in the elections voted. It is significantly higher than the 5 per cent threshold for presidential and parliamentary elections. Moreover, it should be made clear that the threshold is calculated based on the number of valid votes cast. *The Venice Commission and OSCE/ODIHR recommend* to lower the threshold for reimbursement of the candidate's deposit and specify that the threshold is calculated based on the number of valid votes cast.

129. Article 96 of the draft law establishes two separate electoral systems for local council elections. Under Article 96, the election of deputies of "city councils shall be based on a proportional system and election of *aiyl* council deputies – on a majority system". Article 98 limits the right to nominate candidates for *aiyl* council elections to political parties. This is problematic as it precludes the candidacy of independent candidates. *The Venice Commission and OSCE/ODIHR recommend* that the draft law be revised to allow independent candidates to stand in local government elections, including *aiyl* council elections.

⁴⁷ See Report on European standards as regards the independence of the judicial system – Part II: The prosecution service, CDL-AD(2010)040, par. 82-83; Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe, par. 7.5.

130. Articles 102 and 106(4) give excessive powers to the party leadership in changing the order of the list and dismissing elected members of city councils. In this respect, the recommendations of the Venice Commission and the OSCE/ODIHR for the national elections apply to local elections as well.

131. The threshold for the allocation of seats should be based on the number of valid votes cast (Article 106(2)).

132. Although elections of executives (heads and mayors) of local governments are by indirect elections, candidacy requirements, like candidacy requirements for the president, are problematic as well.

133. As an example, Article 114 of the draft law requires a candidate for mayor to have a “higher education”, no criminal record, and “work experience in the state or municipal service for at least 5 years” or work experience in managerial positions in certain specified state or municipal institutions (see also Article 116). The total exclusion, for example, of persons from the private sector is discriminatory and therefore unacceptable and probably contrary to the Constitution. Article 52(1)(2) of the Constitution provides that citizens shall have the right to “be elected to state authorities and local self-governance bodies in accordance with the procedure established by the present Constitution and the law”. *The Venice Commission and OSCE/ODIHR recommend* that these restrictions to the right to be elected be removed.

IV. CONCLUSION

134. The text of the draft law requires improvement in order to respect OSCE commitments and other international standards for democratic elections. There are also technical drafting concerns with the draft law that have been noted in this joint opinion. All of these concerns should be addressed in order to create a sound legal framework for democratic elections.

135. *In particular, the following issues should be reconsidered:*

- *The provisions which unreasonably restrict the right to vote and candidacy rights, in particular for presidential elections;*
- *The rules enabling unreasonable and excessive control of an elected deputy's mandate, resulting in a de facto imperative mandate;*
- *The parliamentary electoral system, in particular the rules on allocation of seats to candidates inside a list and the double threshold;*
- *Limitations on the rights to freedom of expression and association that are contrary to international standards and OSCE commitments.*

136. This joint opinion is provided by the OSCE/ODIHR and the Venice Commission 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. The 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.