

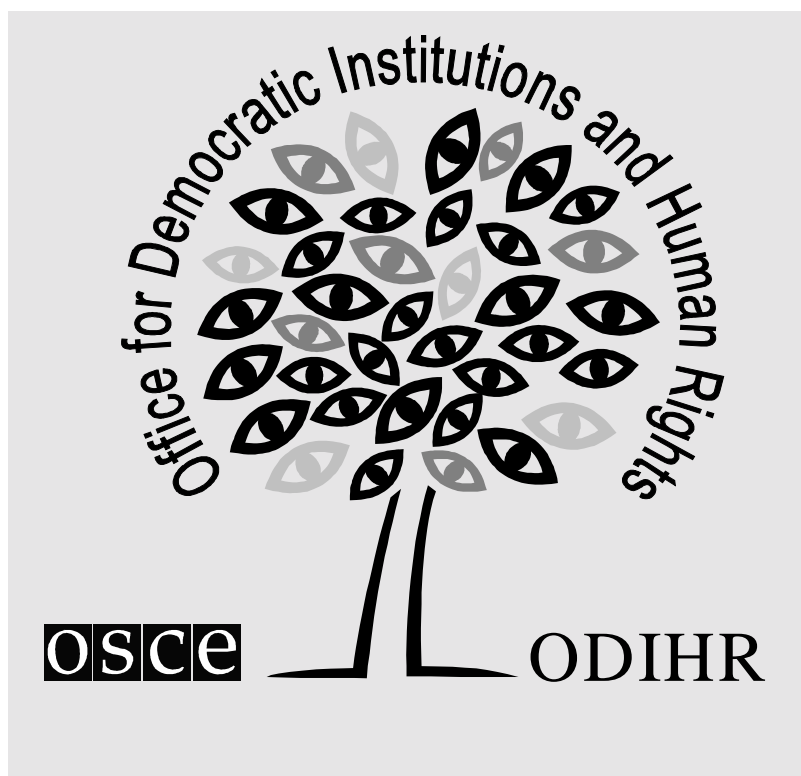


Office for Democratic Institutions and Human Rights

KYRGYZ REPUBLIC

REVIEW OF AMENDMENTS TO THE ELECTION CODE

Adopted 11 October 2001



Warsaw
15 February 2002

TABLE OF CONTENTS

<u>I.</u>	<u>EXECUTIVE SUMMARY</u>	1
<u>II.</u>	<u>INTRODUCTION</u>	2
<u>III.</u>	<u>ANALYSIS OF DRAFT AMENDMENTS TO THE ELECTORAL CODE</u>	3
<u>A.</u>	<u>PROCEDURES FOR ESTABLISHING THE ELECTION COMMISSIONS</u>	3
<u>B.</u>	<u>STATUS OF AN ELECTION COMMISSION MEMBER</u>	4
<u>C.</u>	<u>TRANSPARENCY IN THE ACTIVITY OF ELECTION COMMISSIONS</u>	4
<u>D.</u>	<u>ORGANISATION OF AN ELECTION COMMISSION'S ACTIVITY</u>	4
<u>E.</u>	<u>ELECTION BLOCS</u>	5
<u>F.</u>	<u>CAMPAIGN TIMEFRAME</u>	5
<u>G.</u>	<u>CAMPAIGNING BY MEANS OF MASS EVENTS</u>	5
<u>I.</u>	<u>THE PROTOCOL OF A PRECINCT ELECTION COMMISSION ON VOTING RESULTS</u>	6
<u>J.</u>	<u>PROCEDURES FOR DETERMINING RESULTS OF ELECTIONS</u>	6
<u>K.</u>	<u>FINANCING OF PREPARATION AND CONDUCT OF ELECTIONS</u>	6
<u>L.</u>	<u>ELECTION FUNDS</u>	7
<u>M.</u>	<u>DEADLINE FOR APPEALS</u>	7
<u>N.</u>	<u>JUDICIAL APPEALS PROCEDURE</u>	7
<u>O.</u>	<u>GROUND FOR THE CANCELLATION OF A CANDIDATE'S REGISTRATION</u>	7
<u>P.</u>	<u>SIGNATURES IN SUPPORT OF A PRESIDENTIAL CANDIDATE</u>	8
<u>Q.</u>	<u>PROCEDURES FOR THE NOMINATION OF CANDIDATES FOR LEGISLATIVE ASSEMBLY</u>	8
<u>R.</u>	<u>REGISTRATION OF CANDIDATES FOR LEGISLATIVE ASSEMBLY</u>	8
<u>S.</u>	<u>TABULATION AND PUBLICATION OF THE ELECTION RESULTS</u>	9
<u>T.</u>	<u>CONSTITUENCIES</u>	9
<u>U.</u>	<u>ORGANISATION OF THE ELECTION OF THE HEADS OF THE SELF-GOVERNMENT</u>	9

KYRGYZ REPUBLIC

REVIEW OF AMENDMENTS TO THE ELECTION CODE ADOPTED 11 OCTOBER 2001¹

15 February 2002

I. EXECUTIVE SUMMARY

The OSCE/ODIHR underscores from the outset that, despite weaknesses in the Election Code of the Kyrgyz Republic, with political will the Code could have provided for reasonably acceptable elections. However, during the 2000 parliamentary and presidential elections, the OSCE/ODIHR concluded that such political will was absent. Thus, the extent to which any new amendments to the Code can have a positive impact will ultimately be determined by the intent of those implementing the Code, those organizing the elections, and those in charge of the various State institutions.

Nonetheless, the amendments to the Code include a number of positive and welcome changes, consistent with OSCE/ODIHR recommendations prepared after the 2000 parliamentary and presidential elections in the Kyrgyz Republic. Some of these changes reflect concerns expressed by the OSCE/ODIHR about the draft amendments to the Code prepared by the CEC. However, other concerns highlighted by OSCE/ODIHR have not been addressed and some positive proposals of the CEC have not been implemented.

The positive amendments include the following:

- A period of one month from the date of publication of the final results for the submission of appeals, rather than one month from the date of the election.
- An explicit requirement that result protocols must be completed in ink, which should reduce cases of illegal tampering of protocols.
- Requirement for authorities to issue a written opinion for refusing a request by candidates/political parties to use public premises for a campaign meeting.
- An explicit prohibition on state and local government officials from being present during election commission sessions and in polling stations.

However other amendments raise concerns:

- The amendments relating to candidate registration still fail to provide the necessary and reasonable safeguards recommended by OSCE/ODIHR. The Code would still allow for the de-registration of candidates up to the day before election. In addition, the Code continues not to envisage lesser sanctions than de-registration if a candidate's sole infringement is not serious or substantial, for example, an administrative shortcoming in registration documents.

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

- The addition of wording prohibiting the financing of elections “in any form” by foreign States, enterprises, organisations, citizens, and international organisations. While subsequent clarification by the CEC in a Resolution appears to indicate that this does not exclude the financing of domestic monitoring organisations or the election administration, the Code should either be amended to reflect this clarification in a satisfactory manner or the wording should be removed.

Some provisions of the Code, which should have been addressed:

- An excessively restrictive rule remains whereby parties are prohibited from participating in parliamentary elections if they have not been registered for at least one year. An attempt by the CEC to reduce this period to six months failed to win parliamentary approval.
- The amendments do not address the procedures for identifying the Chairman and membership of the CEC. In its report on the presidential election, OSCE/ODIHR recommended that the full membership should reflect the range of election stakeholders, and that the procedures for nominating the Chairman should be more pluralistic and not the sole prerogative of the President of the Republic.
- No amendments have been introduced to ensure pluralistic representation on territorial and precinct election commissions. Thus the right for political parties, candidates and NGOs to nominate representatives on election commissions to create a more pluralistic electoral administration has still not been formalised.
- The Code still provides for election campaigning to begin from the moment of registration of candidates. As stated by OSCE/ODIHR in previous recommendations, this does not ensure equality of opportunity for election participants as registration can be on a rolling basis, thus potentially providing some participants with more campaign time than others.
- The Code continues to prohibit opinion polls from the registration of candidates or candidate lists, rather than the more reasonable five-day pre-election ban proposed by the CEC.
- There is a need for greater transparency regarding the tabulation and publication of election results.

II. INTRODUCTION

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

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

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

These comments should be read in conjunction with previous analysis and recommendations offered by OSCE/ODIHR regarding the Electoral Code. In particular, reference should be made to the OSCE/ODIHR comments on the proposed amendments to the Code drafted by the Central Electoral Commission.³

III. ANALYSIS OF DRAFT AMENDMENTS TO THE ELECTORAL CODE

A. Procedures for Establishing the Election Commissions

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

However no amendments have been introduced to ensure pluralistic representation on territorial or precinct election commissions. The ODIHR reports on the 2000 parliamentary and presidential elections raised concerns about the composition of such commissions. According to the CEC’s own figures, 50% of oblast electoral commission members, 57% of rayon electoral commission members, and 50.26% of PEC members were on state or local government payrolls.⁴ This raises obvious concerns about the level of autonomy that electoral commissions can realistically expect to enjoy.

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

³ Review of Draft Amendments to the Election Code, 24 September 2001.

⁴ OSCE/ODIHR Final Report on Presidential Election in the Kyrgyz Republic, Warsaw, 10 April 2000.

An amendment to Article 11.6 which provides that no more than one third of the composition of a PEC may be drawn from a single “labour collective” (workplace) is a step in the right direction, but only applies to the composition of PECs. Moreover, depending on the definition of “labour collective”, it may still be possible to bring in a large majority of PEC members from different state and local government bodies. It is unfortunate that more stringent limits on enlisting members of electoral commissions from state and local government bodies were not imposed.

B. Status of an Election Commission Member

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

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

However, the failure of superior commissions to acknowledge overt violations of the election laws during previous elections suggests that the will to implement the law in this regard is as important as the inclusion of such explicit requirements. Article 57 of the Code sets out various matters, including many forms of misconduct by members of electoral commissions, which will attract administrative and criminal penalties. It is therefore essential that these provisions are matched by corresponding provisions in the Criminal and Administrative Violations Codes and that these provisions are rigorously applied in practice. If the CEC monitors and publishes the number of such proven violations and publishes data on administrative and criminal sanctions applied in relation to each election, this may well enhance public confidence that the Code and the rights it seeks to protect are being taken seriously.

C. Transparency in the Activity of Election Commissions

A proposed amendment to Article 17.4 limited candidates and parties to having no more than one representative or observer on the voting premises. This amendment has been clarified to specify that there should be no more than one such person present at any one time, which accords with a suggestion made in the ODIHR review of the draft amendments. Similarly, Article 17.4 now also makes clear that officials from state and local government bodies may not be present at polling stations, something which had been a concern from previous elections. Unfortunately, the amendment does not make clear the obvious exception, that such persons must be permitted to attend a polling station in order to cast their own votes.

D. Organisation of an Election Commission’s Activity

Articles 18.13 and 18.14 of the Code have been substantially supplemented to require State-owned electronic media to provide “free of charge, the Central Election

Commission ... with not less than 15 minutes of airtime a week in their channels for the purpose of clarification of the electoral legislation ... informing voters of the terms and the order of carrying out necessary election actions, of the course of the election, and for replies to voters' questions". A parallel obligation on State-owned print media provides the CEC with free space for the same purpose.

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

E. Election Blocs

A proposed amendment to Article 25.3, which would have set out detailed rules on the internal procedures for the formation of election blocs and nomination of candidates, has not been approved by parliament. This seems entirely appropriate. Political parties should be free to establish their own mechanism for selecting candidates and forming blocs.

F. Campaign Timeframe

Article 31.3 prohibits the publication of opinion polls from the registration of candidates or lists of candidates. The ODIHR review of the parliamentary elections had suggested that this was an onerous and excessive restriction. A proposal in the CEC's draft amendments, that opinion polls would only be banned from five days before the election, was therefore welcome. Unfortunately, this is one of the CEC proposals which parliament has not seen fit to incorporate into the Code.

The ODIHR had also recommended a uniform start date for the campaign be set, rather than allowing the campaign to start from the time of registration which may vary. This recommendation was not reflected in either the draft or the adopted amendments to the Code.

G. Campaigning by Means of Mass Events

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

H. "Misuse" of the Freedom of Expression

The CEC proposals included an amendment to Article 36.2 which caused some concern; this prohibited the "misuse of freedom of speech" and "misuse of freedom of

the mass media”. The concern was that this was an ill-defined prohibition which was clearly open to subjective interpretation. That proposal has not been approved by parliament in the actual amendments to the Code.

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

Article 43.3 has been revised so that the voting results are recorded only in ink. This is a welcome addition and should serve to strengthen the electoral process. In the past, protocols have been filled out in pencil, allowing changes to be made at a later stage. This amendment is in accordance with the OSCE/ODIHR recommendation in its final report on the presidential election. A further improvement should include an explicit requirement that the polling station protocol is completed by PEC members in the premises of the polling station.

J. Procedures for Determining Results of Elections

An amendment to Article 46.3 invalidates the election in a particular constituency if the number of votes “against all” is greater than the number of votes for the candidate with the highest number of votes. This rule is of questionable value. Moreover “against all” votes should not violate the principle of equality among all voters. If voters in a constituency wish to vote in this way, their voice should still count. However, if the rule is to be preserved, it should at least not apply to a repeat election. Otherwise, if the voters continue to be unimpressed by all the candidates available, the election may prove to be invalid indefinitely.

K. Financing of Preparation and Conduct of Elections

The CEC had proposed to amend Article 50.1 in the following form: “Financing of elections in any form by foreign states, enterprises, organisations, citizens, international organisations shall not be permitted”. The ODIHR review of the CEC draft amendments suggested that the scope of this prohibition was unclear. It might prohibit support from UNDP for the Shailoo Electronic System or the IFES/USAID-funded training of election officials. But more likely, the amendment could be used to justify the exclusion of domestic observer groups funded by foreign organisations. During the presidential election, the chairman of the CEC repeatedly asserted that one of the NGO groups observing the election should be denied accreditation because it received financial support from a foreign organisation, the US-based National Democratic Institute for International Affairs (NDI). Such support is a common practice in transitional democracies.

The amendment proposed by the CEC was approved by parliament, restricted only to the extent that it does not apply to foreign intervention for educational programmes. Subsequently the CEC issued a clarifying Resolution stating that the Article “prohibited financing of elections, i.e. financing of election commissions, candidates, political parties, their blocs (authorised representatives, trusted persons, candidate’s observers, political party, election bloc)” but permitted “financing of programmes on improvement of election system, including improvement of the election legislation, informational educational, scientific programs, technical preparation of elections,

monitoring of election process, upgrading of citizens' election culture". It is therefore recommended that the Code is amended to include this clarification or that the amendment is removed from the Code altogether.

L. Election Funds

The CEC proposals included an amendment whereby legal entities would be prohibited from offering work, services or goods, directly or indirectly, free of charge or at unreasonably low prices "at the request of candidates, political parties, election blocs" (Article 51.10). The ODIHR review of the CEC proposals noted that this left open the possibility that goods and services would be offered free or at very low cost on a "voluntary" basis, which would subvert the purpose of the prohibition. It is therefore reassuring to find that such a qualification of the prohibition on offering free goods and services has not been incorporated into the actual amendments to the Code.

M. Deadline for Appeals

Articles 54.5 and 55.13 have been amended to set the time limit for appeals as one month from the publication of the results rather than one month from the day of the election. This accords with an OSCE/ODIHR recommendation. This positive amendment will provide a more fair and reasonable opportunity for citizens and stakeholders to seek legal redress for alleged violations. However, in view of Articles 48.3 and 48.4, concerning the "official" publication of results, it now appears that appeals can be lodged as late as three months after election day, which may disrupt the activities of the newly elected body.

N. Judicial Appeals Procedure

Under the existing Article 55.3, where a complaint is filed with both a court and an electoral commission, if the court accepts the complaint for consideration the electoral commission suspends its consideration of the complaint until the court has ruled on the issue. One of the draft amendments to the Code stipulated that "A court shall adopt a complaint for consideration only after the complaint has been considered by the Central Electoral Commission". In practice such a rule would have seriously undermined the important principle set out in Article 55.1, that the unlawful actions of an electoral commission are appealable to a court. The process of pursuing a complaint to the CEC would almost invariably entail considerable delay. Citizens should have direct access to a court for the prompt and effective protection of their electoral rights. It is therefore to be welcomed that this proposal was not adopted by parliament.

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

The de-registration of candidates during the 2000 parliamentary elections was one of the main concerns of the EOM. Election authorities unfairly acted against the interests of a number of candidates. As a result, the EOM made a series of recommendations in its final report for the amendment of the Code in this area.

Unfortunately these recommendations have not been taken into account in the amendments.

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

The only amendment to Article 56.1 has been to set a deadline for the cancellation of candidate registration not later than on the day preceding the voting day. This is not an effective response to the concerns outlined above. These de-registration provisions were misused by the authorities and candidates during the 2000 parliamentary elections to the detriment of the credibility of the electoral process. Further amendments, in line with OSCE/ODIHR recommendations, should be considered.

P. Signatures in Support of a Presidential Candidate

The proposed amendments to the Code included a number of bureaucratic and cumbersome rules on the collection of signatures for presidential candidates (Article 62). Fortunately these have not found their way into the actual amendments approved by parliament.

Q. Procedures for the Nomination of Candidates for Legislative Assembly

One of the main criticisms during the parliamentary elections was the unreasonable requirements for the registration of political parties contained in Article 92 of the Code: political parties had to be registered for at least one year if they wished to participate in the parliamentary elections. This was an excessively restrictive rule. Moreover, the OSCE/ODIHR suggested that all parties officially registered under the Political Parties Law (June 1999) should be recognised for the purpose of competing in the election; Article 92 of the Code permitted parties to participate if they had been registered under the Law on Public Associations. Although these rules are now found in Article 72.1 rather than Article 92, they are otherwise unchanged. A CEC proposal to reduce the qualifying period to six months was rejected by parliament. It is strongly recommended that they are again reconsidered.

R. Registration of Candidates for Legislative Assembly

A draft amendment to Article 73.4 brought the period for consideration of candidate nominations by Territorial Election Commissions into line with the period provided for CEC consideration of Lists of Candidates. Both bodies would be provided with a 10 day period for review of documents. This was in line with an OSCE/ODIHR

recommendation that the authorities require more time for full consideration of the documents to ensure a proper and final registration of a candidate. Unfortunately, this proposal was not included in the amendments.

S. Tabulation and Publication of the Election Results

Article 48.4 still fails to require, in an unambiguous manner, a timely and consolidated publication of the election results listing all polling stations nationwide. Additionally, in Article 48.1, there is no clear obligation for election commissions to provide interested parties with protocols in a timely manner should a request be submitted.

T. Constituencies

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

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

One of the proposals contained in the draft amendments to the Code was to introduce short-listing of candidates for the post of head of the local self-government by the local Kenesh. Such short-listing would have operated wherever there were more than five candidates. The proposal, which was of questionable justification, and open to easy abuse, was not adopted as one of the amendments to the Code.