



Office for Democratic Institutions and Human Rights

**KYRGYZ REPUBLIC
CONSTITUTIONAL REFERENDUM
2 February 2003**

POLITICAL ASSESSMENT REPORT



Warsaw
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Kyrgyz Republic
Constitutional Referendum
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OSCE/ODIHR Political Assessment Report

I. EXECUTIVE SUMMARY

On 10 January 2003, the OSCE Centre in Bishkek received a letter from the Chairman of the Central Election Commission (CEC) of the Kyrgyz Republic informing that a constitutional referendum was planned for the end of January/beginning of February 2003 and inviting the OSCE to observe. On 13 January, the referendum was announced for 2 February.

The ODIHR declined the invitation to observe on the grounds that there was insufficient time for a proper observation of the entire process. Further, the ODIHR considered that the period of time between the announcement of the referendum and the date of the poll was too short to enable adequate consideration of the final version of amendments by interested parties and the general public. It also noted that comments on the proposed amendments by the Council of Europe's Venice Commission, had not been taken into account.

While the process of constitutional change was initiated in late summer 2002 amid heightened political tension, the opportunity to consider such change was largely welcomed. Further, the composition of the Constitutional Council, which was convened by the President to reconsider elements of the Constitution, was broad based and included pro-governmental and opposition figures, heads of the Supreme and Constitutional Courts and representatives of civil society. While there was disagreement within the Constitutional Council over its final proposals, its work was characterised by a large degree of compromise and consensus.

However, the unforeseen establishment in early 2003 of an "experts group" to finalise the proposed amendments broke the good will engendered through the formation and deliberation of the Constitutional Council. The experts group significantly amended the proposals put forward by the Constitutional Council, changing the balance of powers between president and parliament in favour of the president, and presented a completed document to the Constitutional Council that was not open to further discussion.

The implications of the amendments for political and civil activity remain unclear. The authorities state that they represent a strengthening of democracy and a number of the amendments - such as the rationalisation of the judicial system - were widely supported. However, both international and local experts expressed concern about the process of developing the proposals and a number of issues contained in the final version of the amendments put forward for the referendum, including:

- the provision of more substantial powers to the president in relation to the parliament;
- the impact of changes to the electoral system on political party development and participation;
- and
- the expansion of the definition of human rights and freedoms to include a number of provisions which might be used to limit rather than expand human rights in the country.

There was no substantial campaign in advance of the referendum. The authorities conducted a series of “workshops” to explain the proposed amendments (though at the time the final version of proposed amendments had not been produced), opposition elements responded in different ways, some calling for a boycott, others criticising the amendments.

The ODIHR did not observe voting, counting or the tabulation of results, so no conclusions can be drawn as to whether the referendum was in line with international standards. However, reports from other international and domestic groups, notably with regard to the scale of interference in and control of the process by State and local administration officials and the lack of adherence to proper procedures in the conduct of the vote, reflected some of the negative trends identified by the ODIHR Election Observation Missions for the parliamentary and presidential elections in 2000.

II. INTRODUCTION

On 10 January 2003, the OSCE Centre in Bishkek received a letter from the Chairman of the CEC informing that a constitutional referendum was planned for the end of January/beginning of February 2003 and inviting the OSCE to observe. On 13 January, the President of the Kyrgyz Republic issued a decree calling for the referendum to be held on 2 February. A subsequent Note Verbale from the Ministry of Foreign Affairs on 16 January invited ODIHR to observe.

However, due to the lack of time to organise in accordance with ODIHR methodology the invitation to observe was declined. Further, the ODIHR considered that since the version of amendments submitted for the referendum was only published on 13 January (subsequently altered on 23 January), insufficient time had been provided for proper consideration of the proposed amendments by interested parties and the general public. In addition, comments already offered by the Council of Europe’s Venice Commission had not been taken into account.

The ODIHR therefore urged the postponement of the referendum to allow more time for consideration of the proposed amendments. This was declined by the Kyrgyz authorities on the grounds that since discussion of the amendments had been underway since the establishment of the Constitutional Council in September 2002, no additional time was required.

In line with recent experience during local elections and referenda, the ODIHR sent two election experts to Kyrgyzstan to support the OSCE Centre in Bishkek to conduct a political assessment of the process. Mr. Mark Stevens, who was Head of the ODIHR Election Observation Missions for both the 2000 parliamentary and presidential elections arrived in Bishkek on 28 January and was joined by Mr. Graham Elson, who was Deputy Head of the ODIHR Election Observation Mission for the 2000 presidential election, on 31 January. Both experts remained in Kyrgyzstan until 7 February.

During the assessment, the experts met with representatives of the CEC, Ministry of Foreign Affairs, embassies of OSCE participating States, parliament officials, judicial authorities, the experts group, political parties, civil society and international organisations. The ODIHR wishes to thank the OSCE Centre in Bishkek for the excellent support and co-operation provided during the political assessment.

III. BACKGROUND

A. INITIATION OF CONSTITUTIONAL REFORM AND ESTABLISHMENT OF CONSTITUTIONAL COUNCIL

The current Constitution of the Kyrgyz Republic was adopted on 5 May 1993. It was subsequently amended in 1996, 1998 and 2001. The latest process of constitutional change was initiated by a Presidential decree of 26 August 2002, which called for the establishment of a Constitutional Council to reconsider elements of the Constitution. This was widely welcomed, though was viewed by some as a “tactical concession” to the opposition and to divert political attention from the continuing fallout from the Aksy killings in March 2002, in which six people had died.

The Constitutional Council originally had 40 members, later expanded to 45, which included both opposition and pro-government political figures, judges (including the Heads of the Supreme and Constitutional Courts) and civil society leaders. It was chaired by President Akaev and had a mandate to consider changes to the Constitution, including to key issues such as the powers of the President, government and judiciary as well as provisions for local self-government. The Council met for the first time on 4 September 2002, on eleven other occasions and published a final report on 2 October 2002.

The aim of the Constitutional Council was to produce a final set of proposals for changes to the Constitution, which would be subject to public debate prior to a referendum. According to participants in its meetings, the Council sought to do this through consensus and compromise, and though opinions differed on the final proposals, with individual members criticising various amendments, the process was inclusive.

On 17 October the President issued a decree “On the Nationwide Discussion of Amendments to the Constitution”. This required the government to arrange for national and local newspapers to publish the draft amendments and the original constitutional text as well as to hold public meetings to explain the proposals, and local authorities to help citizens in their communities understand the “purpose and goals” of the constitutional reform process. For some weeks prior to this the public had been able to submit suggestions for changes, and reportedly some 11,000 did so. The Constitutional Council was supposed to take these into account, but according to sources on the Council, they did not have the administrative capacity to fully consider all the proposals.

Some of the main proposed amendments put forward by the Council dealt with the balance of powers between the President and parliament. Under the amendments the Presidential system of government would continue, but there would be a shift of powers from the President to the proposed unicameral parliament and the Higher Arbitration Court would be unified with the Supreme Court.

B. ESTABLISHMENT OF THE EXPERTS GROUP AND FINAL PROPOSALS FOR CONSTITUTIONAL AMENDMENTS

On 2 January 2003, the President issued a further decree “On Completion of the Nationwide Discussion on Amendments to the Constitution”. This concluded that since some of the many

suggestions made by the public during the consultation process differed from the Constitutional Council proposals, an “experts group” should be established to prepare a new package of draft amendments by 13 January which would take full account of the public suggestions and the original proposals of the Constitutional Council.

The establishment of such a group had not been foreseen. Members of the Constitutional Council were concerned about its purpose and hoped it would just “fine tune” their proposals and return them for consideration. However, in the end, the final proposals of the experts group were presented to the Constitutional Council as a completed document that was not open to discussion. This undermined the good will and optimism engendered by the consensual approach of the Constitutional Council and was viewed by some members as a betrayal of their trust in engaging in the process. This view became stronger when it became clear that the proposals put forward by the experts group differed on some points quite substantially from those put forward by the Constitutional Council.

In a meeting with the Assessment Team the experts group reported that its aim had been to provide for more effective State institutions, notably through reform of parliament, parliamentary procedures and the judicial system. The group also reported that it had been guided by the proposals of the Constitutional Council and the more than 11,000 suggestions from the public.

Concerns raised by various members of the Constitutional Council to the Assessment Team about the expert group’s proposals of 13 January focused on:

- the provision of more substantial powers to the President in relation to the parliament, notably an absolute right of veto of legislation;
- alteration of the electoral system to the detriment of political parties;
- reduction of the right of citizens to appeal to the Constitutional Court;
- an ambiguous prohibition on the “pursuance of political goals”, by foreign non-governmental organizations which could preclude involvement with domestic monitoring or human rights groups;
- inclusion of libel provisions in the Constitution; and
- weakening of the protection from arbitrary removal from parliament enjoyed by MPs and the establishment of parliamentary procedures normally left to the prerogative of parliament.

In short, government figures reported that the final set of proposals reflected the spirit of the Constitutional Council proposals, while opponents to the experts group version reported that it did not reflect the earlier version of the proposed amendments and reduced the freedoms and protections in the original Constitution.

On 13 January the President issued a further decree setting the date of the referendum on the basis of the experts group proposals. However, as a result of criticism from both national and international bodies, and after some technical errors had been corrected, some final alterations to the proposals were made on 23 January. Most significantly these reinstated the explicit provision for “freedom of the press” and removed the absolute right of veto afforded to the President over legislation promulgated by the parliament.

C. POLITICAL REACTIONS AND CONCLUSIONS ON THE PROCEDURES FOR ESTABLISHING AMENDMENTS

Consideration of constitutional change took place against a backdrop of increased political tension, notably in the south of the country as a result of the Aksy killings, which included:

- demonstrations by and in favour of the families of the victims of the shootings;
- counter-demonstrations in favour of the militiamen charged with the killings;
- fiercely contested by-elections involving serious irregularities and court cases;
- dismissal of some State and governmental officials;
- calls for the resignation of the President; and
- court proceedings against a private newspaper, *Moya Stolitsa*, which was accused of “anti-Kyrgyz orientation” on the basis of questioning a government initiative to announce 2003 as the “2,200th anniversary of Kyrgyz statehood”.

In the early stages of the process the opposition called for the referendum to be held without delay, in November/December as originally indicated. However, after the involvement of the experts group, there were calls for either a postponement or a boycott.

The opposition established a “Public Headquarters on Amendments to the Constitution” which monitored the process. There was no concerted “no” campaign.

The restricted timeframe (21 days) between the publication of the initial final proposals and the date of the referendum (the proposals were only finalised nine days prior to the referendum date) had a number of negative consequences:

- there was insufficient time for proper consideration of the constitutional changes and their implications for government and political life;
- there was insufficient time to find consensus between the government and political and civic activists which appeared to be emerging during the deliberations of the Constitutional Council; and
- the general public was not provided with sufficient information about what they were voting on in the referendum. For example, posters produced by the CEC to inform voters about the referendum did not even include the final amendments of 23 January.

IV. LEGAL FRAMEWORK AND ADMINISTRATIVE STRUCTURE

A. LEGAL FRAMEWORK

The conduct of the referendum was based on the Law on Referendum (1991); Constitution (1993, amended 1996, 1998, 2001); Election Code (1998, amended 2001). A new Law on Referendum was discussed in the Legislative Assembly, but not adopted. This led some to argue that the referendum was illegal as it should have been held under the new law and not the Soviet-era law. However, as previous referenda had been held under the 1991 law and the new law had not been adopted, use of the existing law was reasonable.

B. ADMINISTRATIVE STRUCTURE

The Election Code defined the administrative structure for the election: CEC; Oblast Election Commissions/Bishkek City Election Commission; Rayon Election Commissions; and Precinct (polling station) Election Commissions.

The method for determining the composition of election commissions (Article 11.7 of the Election Code) remained unchanged from previous elections, during which the ODIHR raised concerns that the commissions were dominated by State or local government employees. The lack of a mechanism for ensuring a balance of political party membership remains a concern.

C. ELECTORAL SYSTEM

Article 34 of the 1991 Law on Referendum determines that for the referendum to be valid, 50%+1 of the registered electorate must participate. Adoption of the proposals requires the positive support of 50%+1 of the registered electorate. This means that if, for example, the voter turnout is 85%, some 58.1% of those participating would have to vote “yes” for the proposals to be adopted.

D. REFERENDUM QUESTIONS

Voters were presented with two separate ballots containing the following questions:

- 1 Should the Law of the Kyrgyz Republic “On a New Version of the Constitution of the Kyrgyz Republic” be adopted?
- 2 Should Askar Akaev remain President of the Kyrgyz Republic until December 2005 (to the end of his constitutional term) in order to implement the approved constitutional amendments?

The first question raised the issue of whether the changes to the Constitution proposed by the referendum would result in a new Constitution or an amended Constitution. The Chairman of the CEC stated categorically that they would not result in a new Constitution, only a new version. However, the Head of the Constitutional Court, who was also a member of the Constitutional Council, reported to the Assessment Team that the changes were so substantive that they would effectively amount to a new Constitution. While international practice shows that Constitutions can be fundamentally altered over many years without being considered a new Constitution, the issue has implications as to whether President Akaev will be able to stand for a further term. The Constitutional Court ruled that he was able to stand in 2000 only because his first term, under the old Soviet-era Constitution, did not count as part of the two-term limitation. However, under the existing Constitution, his second mandate would end in 2005 and he would not be able to stand again. Given that the President’s mandate does not legally expire until 2005, inclusion of the second question led to speculation that the President was seeking a stronger mandate in light of opposition calls for his resignation in the wake of the Aksy incident.

There was no substantial campaign around either of the issues. Government officials stressed that the changes would consolidate democracy in the country. Opposition elements did not organize a “no” campaign, but responded in different ways, some calling for a boycott, others criticising the amendments.

E. VOTER REGISTRATION

In the run-up to voting day, the CEC was unable to provide a final figure for the total number of registered voters in the country. This was of concern given the importance of this figure for the calculation of the result and the need for full transparency .

On 27 January, the Chairman of the CEC informed a meeting of international organizations that the provisional number of registered voters was some 2,533,000, but this could change due to the lack of accurate data. At a briefing for the international community on 1 February, he repeated this figure, adding that the final figure would only be available once the protocols had been received from the lower-level commissions as a result of the vote tabulation. In a press conference on the evening of 2 February, the Chairman announced that the total number of voters was 2,776,000. When the final results were issued on 6 February, the registered electorate was reported to be 2,465,684.

The Chairman of the CEC explained that the lists were in poor order, particularly with regard to migrant voters within and outside the country. In addition, on the day of the election, voters not on the list but able to prove their local residency through a *Propiska* stamp in their passport, were able to vote by being added to an additional list. Past experience shows that this procedure is open to abuse.

V. VOTING, COUNTING AND RESULTS

Under each of the two questions, voters were presented with two options, a “yes” and a “no”. As the process was regulated by the 1991 Soviet-era Law, voters were instructed to cross out the answer with which they disagreed. This form of “negative voting” is against the practice adopted during local, parliamentary and presidential elections, but is consistent with previous referenda in the country.

The CEC reported positively on the process, stating that only 17 official complaints were received, mostly of a minor nature. On 6 February it announced the final results, reporting that 86.68% of the registered voters participated (meaning the referendum was valid), 76.61% of the registered voters supported the first question and 78.74% supported the second question (meaning both were adopted). Only 9.23% opposed the first question and 7.07% opposed the second question. In response to the results, President Akaev stated: “I think we will strengthen democracy in our country. [By adopting the changes to the Constitution] we will create good conditions in order to protect human rights and the freedom of the people.”

The ODIHR can draw no conclusions on the conduct of voting, counting and tabulation as it did not observe on election day. However, reports from a delegation from the National Democratic Institute

for International Affairs (NDI), the domestic monitoring group “Coalition for Democracy and Civil Society” and other groups generally reflect the negative election day trends observed by the ODIHR during the 2000 parliamentary elections and in particular the 2000 presidential election.

The Coalition deployed 3,400 observers to monitor the voting and counting procedures. In its preliminary statement the group drew attention to the mobilisation of the State apparatus to secure a high turnout and positive endorsement of the proposed changes. The group also pointed to the role of the Rayon-level administration in controlling the process. Reports from other organisations also highlighted that the events on 2 February, were not being controlled by higher level electoral authorities, but rather by government and lower-level state administrative bodies. The Coalition also cast doubt on the official turnout figures, claiming that reporting of voter turnout figures during the day from Rayons was inflated and later had to be reduced.

VI. CONSTITUTIONAL AMENDMENTS

The idea of constitutional change, and in particular a number of the key changes such as the consolidation and rationalisation of the judicial system, received widespread support. However, concern was raised by international experts, civil society representatives and political activists in the country about a number of the other changes. Significantly, in response to the proposals of the Constitutional Council, the Council of Europe’s Venice Commission issued an “Opinion on the Draft Amendments to the Constitution of Kyrgyzstan” on 18 December 2002. Some of these comments were superseded by the changes to the draft proposals put forward by the experts group in January 2003.

A. BALANCE OF POWERS

The right of absolute veto over parliamentary legislation, present in the experts group proposal, was dropped by Presidential decree on 23 January. However, the Venice Commission expressed concern that Article 63.2, “gave the President excessive powers with regard to the Jogorku Kenesh”.

- Article 63.2 states: “The Jogorku Kenesh of the Kyrgyz Republic may be dissolved early by the President of the Kyrgyz Republic:
 - if so decided by a referendum;
 - in the event of three [subsequent] refusals by the [parliament] to accept a nominee to the office of Prime Minister;
 - or in the event of another crisis caused by an insurmountable disagreement between the [parliament] and other branches of the state power.”

Further, as the Commission also points out, Article 71.4 gives the President additional powers by stating that “After the [parliament] may have thrice (three times) rejected candidates for the office of prime minister, the President shall appoint the Prime Minister and shall dissolve the [parliament].

The Venice Commission also expressed concern about a lack of limitations under certain conditions on the President’s decree issuing powers. Article 47.1 states that “The President...may issue decrees and orders”, Article 68 states that “The [parliament] may delegate its legislative powers to the President for a period of up to one year” following the dissolution of the parliament. The Commission considered that though such provision might exist, the President’s right to discharge

legislative powers should only be undertaken “to a very limited degree” and “under strictly defined conditions”. However, such restrictions and conditions are absent from the Constitution.

B. PARLIAMENTARY PROCEDURES

Article 56.9 states: “A deputy of the Jogorku Kenesh may be divested of his powers for systematic absences without due cause at meetings of the parliament...if such decision shall be taken by a majority of the Assembly”. Some concern was expressed to the Assessment Team that this weakens the status of an MP and could be used to unfairly remove an MP from parliament.

C. HUMAN RIGHTS

At the time of the Venice Commission’s report, the provisions on human rights and freedoms and the rights and duties of citizens had not been amended. However, in the final proposals that were adopted, a number of substantial changes were made in this area, some of which raised concerns.

Article 8.4 now states: “The following activities shall not be permitted in the Kyrgyz Republic...Activities of foreign political parties, non-governmental and religious organisations, including their representative offices and branches, which pursue political goals....”. Some interlocutors expressed concern that this could be used to curtail the legitimate activities of international non-governmental organizations in support of civil society groups.

A series of additions were also made to Article 16, leading to claims by opposition figures and civil society groups that various paragraphs in the new Article were ambiguous, open to abuse, and could be used to prosecute legitimate discourse. For example, Article 16.9 states: “No propaganda or advocacy that constitutes incitement to social...hatred or hostility shall be permitted” Article 16.12: “Insulting one’s ethnic (national) dignity shall be prosecuted in accordance with law”. Article 16.21: “In realising his rights and freedoms, a person may not violate the rights and freedoms of others”.

Further, an extension of Article 16.14 such that it now states: Citizens of the Kyrgyz Republic have the right to freedom of peaceful assembly....prior to notification of executive bodies or bodies of local self-government” raised concerns as to its effects on the legitimate right of people for peaceful assembly.

In addition, the deletion of Article 82.8 from the Constitution, has resulted in a change to the rights of citizens to approach the Constitutional Court. Article 82.8 had stated that the mandate of the Constitutional Court included “rendering a decision concerning the constitutionality of practices concerning the application of laws which affect the constitutional rights of citizens”. According to the Head of the Constitutional Court, over 60% of the cases heard were from citizens protesting that their rights had been infringed and in over 95% of cases the court heard in favour of the plaintiff.

D. ELECTORAL SYSTEM

Article 54.2 now states: “The Jogorku Kenesh shall consist of 75 deputies elected for the term of five years from single member constituencies”. This represents a major change from a bi-cameral parliament to a unicameral one, with a decrease in the total number of MPs, from 105 (60 in the Legislative Assembly and 45 in the People’s Representative Assembly) to 75. In the previous

system, there was a provision for election to the Legislative Assembly for 45 single mandate constituencies and 15 seats elected from national party lists. This system stimulated and supported the development of political parties. However, the Minister for Foreign Affairs informed the Assessment Team that the previous system was an “experiment”, which had failed.

VII. RECOMMENDATIONS

The ODIHR stands ready to work with the authorities and civil society in the Kyrgyz Republic to address the following recommendations. These should be considered in conjunction with recommendations contained in ODIHR reports on previous elections in the Kyrgyz Republic.

1. In light of the problems experienced during the referendum and ODIHR’s opinion that further time should have been provided to consider the changes, the new law on referenda should be finalised and include a minimum time between the setting of a date and the holding of a referendum, providing ample time for such consideration by all concerned.
2. The new law on referenda should include a provision that equal support be provided to both the “yes” and “no” campaigns, in terms of funding, access to media etc.
3. The new law on referenda should require that a voter makes a positive vote for their choice as opposed to a negative mark against, in line with practice at parliamentary and presidential elections.
4. The CEC and local authorities should make serious efforts to improve the quality of voter lists. Among other benefits, this would mean that local commissions could ensure that Russian speakers received voter education materials in Russian rather than solely in Kyrgyz.
5. The use of dual language ballot papers should be considered.
6. Most significantly, the State and local government administration must stop interfering in the electoral process and the impartiality and independence of election commissions must be ensured through a balance of political membership. Until such systemic weaknesses are addressed, the credibility of the electoral process in the Kyrgyz Republic will remain in question.

ABOUT THE OSCE ODIHR

The Office for Democratic Institutions and Human Rights (ODIHR) is the OSCE's main institution to assist participating States "to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and (...) to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society" (1992 Helsinki Document).

The ODIHR, based in Warsaw, Poland, was created in 1990 as the Office for Free Elections under the Charter of Paris. In 1992, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today it employs over 80 staff.

The ODIHR is the lead agency in Europe in the field of **election** observation. It co-ordinates and organizes the deployment of thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, the ODIHR helps participating States to improve their electoral framework.

The Office's **democratization** activities include the following six thematic areas: rule of law, civil society, freedom of movement, gender equality, trafficking in human beings and freedom of religion. The ODIHR implements more than 100 targeted assistance programs, seeking both to facilitate and enhance State compliance with OSCE commitments and to develop democratic structures.

The ODIHR **monitors** participating States' compliance with OSCE human dimension commitments. It also organizes several meetings every year to review the implementation of OSCE human dimension commitments by participating States.

The ODIHR provides advice to participating States on their policies on **Roma and Sinti**. It promotes capacity-building and networking among Roma and Sinti communities, and encourages the participation of Roma and Sinti representatives in policy-making bodies. The Office also acts as a clearing-house for the exchange of information on Roma and Sinti issues among national and international actors.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR [website](#), which also contains a comprehensive library of reports and other documents, including all previous election reports and election law analyses published by the ODIHR.