



## COMMENT OF THE NATIONAL DEMOCRATIC INSTITUTE ON THE PROPOSED KYRGYZ ELECTION CODE

November 27, 2003

The National Democratic Institute for International Affairs (NDI) has been asked by the Speaker of the Jogorku Kenesh (Parliament) to comment on the draft Kyrgyz Election Code and proposed amendments to the Code that are currently under consideration in Jogorku Kenesh (the “Proposed Amended Election Code”). NDI has offered a number of commentaries on the Kyrgyz election law over the years, beginning in June 1998, and has offered recommendations for improving the legal framework for elections in those commentaries and in NDI’s international election delegation statements.

The Institute would like to draw attention to the “Assessment of Pending Amendments to the Election Code” offered on November 5, 2003, by the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR). NDI and OSCE/ODIHR organized a roundtable on November 19 with representatives of the Parliament and the presidential administration to discuss the substantial number of improvements required in the legal framework set forth in the Proposed Amended Election Code, if Kyrgyz law is to meet international standards, including OSCE commitments. The Institute also conducted separate consultations with political, governmental and civic leaders on this and other matters related to creating the environment necessary for democratic elections.

*NDI concurs with the November 5 Assessment offered by OSCE/ODIHR. Noting the substantial number of improvements that are required for the Proposed Amended Election Code to meet international standards and commitments, NDI recommends that the Parliament continue discussion of the draft with the participation of Kyrgyz citizens, including non-governmental organizations, and, as appropriate, in light of comments offered by international organizations.*

Beyond developing a legal framework for elections that meets the minimum requirements of international standards, in countries like Kyrgyzstan that lack a tradition of democratic political processes and that have a troubled electoral history, much must be done – beyond the letter of the law – in order to win the confidence of the public in those who would seek the authority of citizens to govern in their name and in their interests. For elections to be democratic, citizens must be able to learn sufficiently about the political competitors so that they can make an informed choice when casting their ballots; they must be free from intimidation and political retribution for making a free choice when voting; citizens must be provided a real opportunity to vote based on universal and equal suffrage, and their votes must be accurately counted and respected.

Electoral law – and electoral practice – must also respect the right of citizens to stand for office as members of political parties and as individuals. The electoral process must also provide a genuine opportunity for those standing for office to qualify for the ballot without discrimination or unnecessary restrictions; it must provide a real opportunity for the political competitors (candidates, political parties and blocs) to reach the public in order to seek their support and to organize electoral campaigns on a fair basis (on a “level playing field”), and the competitors must be able to organize effectively to defend the support they win and the overall integrity of the process.

Electoral administration, state authorities at all levels and all state institutions, including the state controlled mass media, must maintain strict political neutrality and election authorities must have resources to conduct elections independently and effectively. Citizens too have to be provided an effective opportunity to participate in the election process through civic and voter education and election monitoring by civic organizations and the news media.

Each of these factors requires transparency in all of the processes surrounding elections and a demonstrated commitment to implementing and enforcing the law.

It is in this context that NDI offers the following additional highlights based on the OSCE/ODIHR assessment, international standards and comparative practices for establishing democratic election codes.

- **The Proposed Amended Election Code should be modified to guarantee respect for the right to stand for office.** As presently drafted the Proposed Amended Election Code violates the right to stand for elected office free of unwarranted restrictions in the following ways: 1) Article 3 denies candidacy to persons convicted of any crime whose previous conviction has not been expunged or cancelled, while international standards prevent such denials except for convictions of serious crimes and only then permit penalties in proportion to the crime; 2) Article 61 requires that candidates possess and demonstrate a “good command” of the state language, which goes beyond constitutional provisions concerning candidacy and offends constitutional and international anti-discrimination standards; it also provides a basis for arbitrary exclusions from candidacy based on subjective judgments and a lack of clear criteria for determining how to meet the requirement; and 3) Article 63 violates international anti-discrimination standards because it limits candidate registration to those who can pay a fee out of personal funds, which discriminates on the basis of property status and prevents political parties and citizens from supporting the candidacy of those who do not have financial means.
- **The Proposed Amended Election Code should be modified to ensure the rights of parties and electoral blocs to choose candidates, for registered candidates to seek election and for those elected to serve in office.** (1) Article 25 paragraph 3 and Article 72 paragraph 4 require that decisions of parties to enter electoral blocs and the nomination of party candidates for each specific election district must take place at party congresses (conferences). Such meetings are difficult to organize and expensive, and there are a number of other ways to make such decisions that have proven effective in democratic practice. The provisions therefore appear to be overly restrictive. (2) Article 28 paragraph 7, Article 36 paragraph 8 and Article 56 paragraph 1 permit the cancellation of a registered candidacy on several grounds that are disproportionate to the violations cited. Cancellation of a candidacy is an extreme penalty that should be reserved only for those who commit fraud in their nomination application by having represented that they were qualified for candidacy when they were not. (3) Provisions, such as Article 36 paragraph 8, that permit cancellation of candidate registration after an election also are contrary to international standards. Once elected, a person should be allowed to take office unless the individual committed fraud in the nomination application. If a candidate committed or was otherwise responsible for fraud in the election then immunities that apply to an officeholder may be denied, and the person may be removed from office as a result of judicial action with due process of law, and/or parliamentary procedures that afford equivalent due process. (4) This same standard should be applied to the provisions of Article 12 paragraph 15, which allows oblast, Bishkek city and Osh city election commissions to terminate early the mandate or force the withdrawal of local elected officials who exercise simultaneously powers of other offices that are incompatible with the elected office. (5) A well defined prohibition against holding certain incompatible offices simultaneously is well established internationally, but the law should provide that either a person must leave the office held when standing for election or when elected, or the law should provide that elected officeholders must resign if they take an incompatible post after they assume elected office.

Enforcement of such provisions is not an appropriate responsibility of election commissions.

- **The Proposed Amended Election Code should be modified to respect and promote freedom of political expression, including the right or seek, receive and impart information, as well as the freedom of association and the right to participate in governmental and public affairs – all necessary for electoral campaigning.** The OSCE/ODIHR assessment provides considerable detail on appropriate recommendations concerning campaign related provisions. As presently drafted the Proposed Amended Election Code would, among other things, inappropriately: prevent citizen groups from election campaigning (Article 30 paragraph 1); limit possible campaign activities (Article 30 paragraph 2); prohibit publication in the mass media of public opinion results and other research material in connection with the elections (Article 31 paragraph 3); limit the right to issue printed campaign materials (Article 35 paragraph 1); and prohibit political speech in a vague and overly broad manner (Article 36 paragraphs 2 and 6). The Proposed Amended Election Code must be amended in all of the campaign related areas noted by the OSCE to comply with international standards.
- **The Proposed Amended Election Code should be modified to ensure that election commissions are politically impartial and independent of government, and it should state explicitly that all government officials and institutions must be politically neutral in the use of official offices and government resources.** There are several methods for composing election commissions that have proven in international practice to ensure the impartiality and independence of election commissions. Past Kyrgyz elections have shown this to be a particularly troublesome area, and as presently drafted the Proposed Amended Election Code does not provide assurance that international standards will be met in this regard. If a party-representative approach is taken for composing election commissions, the Proposed Amended Election Code should be amended to guarantee and broaden substantially the representation of opposition political parties on election commissions, including membership on the Central Election Commission. In countries, like Kyrgyzstan, where the public and political competitors have little trust in the ability of electoral authorities to act impartially, composing election commissions with a pluralistic balance of political party representatives and ensuring independence from governmental influence is necessary. The election code also should prohibit partisan political activity by any government employee while acting in an official role and prohibit the use of any state resource for partisan political advantage.
- **The Proposed Amended Election Code should be modified to provide proper provisions for voting, counting of ballots, tabulation of results, and determination of election results, and it should be amended to provide full transparency.** Provisions regulating voting (including early and mobile voting), and rules for posting of election protocols at the precinct level, should be brought into line with the corresponding recommendations set for the in the OSCE/ODIHR assessment’s recommendations.
- **The Proposed Amended Election Code should be modified to provide for election monitoring and observation of all stages of the election process.** International election observation and domestic nonpartisan election monitoring have become internationally accepted components of democratic election processes and a key to the transparency required to establish public confidence in the democratic character of elections. As a participating state in the OSCE, Kyrgyzstan has an international commitment to enable such monitoring of all stages of the election process, although the Proposed Amended Election Code does not meet that commitment. The recommendations of the

OSCE/ODIHR assessment should be incorporated into the Code in this respect. NDI would like to emphasize that the prohibition restricting Kyrgyz organizations that receive foreign funding from observing elections (Article 50) violates international standards for freedom of association and paragraphs 8, 10.4, 24 and 26 of the OSCE's Copenhagen Document. Sovereignty belongs to the people of a country, and the authority to govern derives from their will expressed in genuine elections. Citizens have a right to participate in governmental affairs, as recognized in the Universal Declaration of Human Rights (Article 21), and in the Constitution of the Kyrgyz Republic (Article 23), and therefore have the right to monitor election processes.

- **The Proposed Amended Election Code should be modified to provide for publication of voter lists and for an effective way for citizens to review them and seek corrections in a timely and effective manner.** An accurate voter list is vital for conducting free and fair elections and protecting the right of citizens to political participation. Inaccurate voter lists have contributed to past election abuses in Kyrgyzstan, particularly by adding people to supplemental lists on election day without adequate safeguards against illegal voting. The Proposed Amended Election Code should allow a sufficient timeframe for the publication and correction of voter lists. If sufficient time were allowed for consideration and amendment of the voter lists before the elections, amendment of voter lists on election day would not be necessary and provisions allowing this could be eliminated. The voter registration process then would require adequate safeguards to prevent disenfranchisement of eligible voters through omission of their names on the voter lists. In addition, the voter registration process, like other stages of the election process, should be opened to the scrutiny of political parties, domestic election monitoring organizations and international observers.
- **The Proposed Amended Election Code should be modified to provide effective remedies through complaints and appeals procedures.** Articles 54 and 55 do not provide a means for voters, political contestants or other citizens to seek and receive effective redress for violations of the election-related rights or procedures provided in the Code, nor are such means adequately provided in other parts of the Code. The OSCE/ODIHR recommendations in this respect should be implemented. These issues are relevant to all election processes, including among others registration of candidates and qualification for the ballot, delimitation of election districts, registration of voters, voting, counting and tabulation of election results and determining who has been elected to office. In all instances the Code must provide due legal process and guarantee equal protection of the law to all without discrimination on improper bases, including political opinion. When election results are disputed, the courts play a crucial role in determining the electoral outcome. Thus, consistent and uniform rules must ensure fair and expeditious resolution of the election disputes in courts.

NDI offers these recommendations in the spirit of international cooperation and in the hope that the Jogorku Kenesh and others involved in the legislative drafting process will continue their discussion of the election code, secure public participation in the discussion process and give careful consideration to the recommendations of international organizations. Adoption of an election code that meets international standards is crucial for demonstrating the Kyrgyz government's commitment to democratic development.