

NDI COMMENTARY ON PROPOSED CHANGES TO THE LEGAL FRAMEWORK FOR ELECTIONS IN THE KYRGYZ REPUBLIC

June 29, 1998

At the request of deputies in both chambers of the Jogorku Kenesh (Parliament), the National Democratic Institute for International Affairs (NDI or the Institute) has prepared the following comments on the draft "Code of the Kyrgyz Republic on the Basic Guarantees of Election Rights of Citizens, Elections and Referenda" (Draft Election Law or Draft Law) put forth by the Kyrgyz Central Election Commission (CEC), and amendments to the Constitution of the Kyrgyz Republic proposed by Deputy Tekebaev, Chairman of the Legislative Assembly's Committee for State Structure and Law (Proposed Constitutional Amendments or Amendments).

NDI is a nonprofit, nongovernmental organization that works to support democratic institutions and processes worldwide. As part of its mandate, NDI has conducted more than 50 programs to strengthen election processes over the past year. These programs have included international election assessments and observer delegations, support to citizen organizations conducting nonpartisan election monitoring and to political parties organizing election-day pollwatchers and support for election law reform activities in developing democracies around the world. The Institute has offered commentaries in 1998 on proposed changes to election laws in Armenia, Azerbaijan, Bosnia and Hercegovina, the Former Yugoslav Republic of Macedonia, Serbia-Montenegro and the Slovak Republic, among other countries.

NDI formed a Kyrgyz Election Law Advisory Group to review the Draft Election Law and the Proposed Constitutional Amendments. The Advisory Group is chaired by Patrick Merloe, NDI Senior Associate and Director of NDI Programs on Election and Political Processes. The Advisory Group also includes: Professor Richard Boswell (United States), University of California at San Francisco, Hastings College of the Law; François Froment-Meurice (France), Conseiller d'Etat and former Member of the French National Assembly and the European Parliament; Matthew Frumin and Kendall Millard (United States), international election law experts with the Washington, DC, law firm of Arnold & Porter; and Karen Gainer (Canada), international election law expert and NDI field representative in Croatia. Each member of the Advisory Group participated as a volunteer in his or her individual capacity. The Institute is grateful to all members of the Group for contributing their time and expertise. Their efforts demonstrate the international community's interest in supporting the democratic process in Kyrgyzstan.

NDI analyzed the Draft Election Law, the Proposed Constitutional Amendments, and the Constitution of the Kyrgyz Republic. The Institute also reviewed comments provided by members of the Advisory Group and incorporated them into its analysis. The comments

presented below focus on legal provisions pertaining to elections to the Jogorku Kenesh. They are based on international standards for "free and fair" elections and accepted international practices noted during NDI's electoral activities in more than 60 countries. NDI's comments are offered in the spirit of international cooperation and in the hope that they will be of assistance to those in Kyrgyzstan who are working to advance the democratic process by improving the nation's electoral system.

COMMENTARY

In many important respects, the legal framework for elections in the Kyrgyz Republic, including the provisions contained in the Constitution, the Draft Election Law, and the Proposed Constitutional Amendments, meets international standards for election and political processes. The legal provisions call for: elections to be free and to be held on the basis of universal, equal and direct suffrage and by secret ballot (Constitution, Article 1); the organization and participation of political parties in elections and state affairs (Constitution, Article 8); and the recognition and protection of a broad range of human rights and fundamental freedoms, including those contained in international instruments ratified by Kyrgyzstan (Constitution, Articles 13 through 41). Article 12 of the Constitution explicitly provides that the Constitution has supreme legal force and direct application and that all laws are to be adopted on the basis of it. This basic framework establishes an important foundation for approaching other aspects of the electoral system.

Section I of this commentary analyzes proposals contained in both the Draft Election Law and the Proposed Constitutional Amendments to change the structure and method of electing the Jogorku Kenesh. Sections II - VI examine the specific provisions contained in the Draft Election Law governing electoral competition. NDI's experience shows that elections are most successful when the political and election processes are fully transparent, political contestants (parties, blocs of parties, and candidates) have an opportunity to participate directly in electoral bodies and in forming the electoral framework, civic groups are allowed to monitor all aspects of the electoral process, and appropriate time periods and requirements are provided for candidate qualification, campaigning, voter education and preparation of election administration. In these respects, there are several areas in which the Draft Election Law could be improved or refined.

I. MAJOR CHANGES TO THE ELECTORAL SYSTEM

The legal framework for an election sets the rules for those competing for political power; therefore, broad participation, public input and political consensus beyond a simple legislative majority, are required to encourage political stability and a sound democratic process. International experience demonstrates that this is particularly true when major structural changes to the electoral system are proposed, as is the case with both the Draft Election Law and the Proposed Constitutional Amendments.

The Draft Election Law would increase the number of seats in the Legislative Assembly of the Jogorku Kenesh (parliament's upper house) from 35 to 63, and it would replace the present majoritarian system of single-mandate districts with a mixed majoritarian/proportional system of

48 single-mandate seats and 15 proportional seats drawn nationally from party candidate lists. (Draft Law, Articles 67 and 69.)

In addition, the Draft Election Law would establish indirect election of Deputies to the Assembly of People's Representatives of the Jogorku Kenesh (parliament's lower house), by establishing multi-member constituencies for each of the country's six oblasts (provinces) and the city of Bishkek, with a total of 42 Deputies from the seven constituencies, each with six seats. (Draft Law, Articles 80 and 82.) Candidates for Deputy of the Assembly of People's Representatives would be nominated and elected by members of the Local Keneshes. (Draft Law, Articles 84 through 87.)

The Proposed Constitutional Amendments would also make major changes to Kyrgyzstan's electoral system. They would create a unicameral national legislature with 105 Deputies, 70 from single-mandate, majoritarian districts and 35 from a proportional system, which are to be determined on the basis of party lists. (Amendments, Article 65.) Deputies would be elected by citizens in direct and secret voting. (Amendments, Article 67.) The Proposed Constitutional Amendments would also restore many of the legislative powers lost by the Parliament as a result of the 1996 national referendum. (E.g., Amendments, Articles 57 through 63 and 69 through 74.)

NDI does not take positions on essentially political questions (such as whether a majoritarian, proportional or mixed system is best or whether a bicameral or unicameral legislature is preferable). The Institute does raise for consideration issues that illustrate relative strengths and weaknesses of such fundamental elements of electoral systems. NDI's experience demonstrates the importance of broad political discussion and the search for consensus in such matters. These factors are also crucial when addressing other fundamental questions, such as whether to introduce indirect representation for one of the chambers of parliament.

Introducing indirect representation, as proposed in the Draft Election Law, need not introduce a nondemocratic element into an election system. The Organization for Security and Cooperation in Europe's (OSCE) 1990 Copenhagen Document (Paragraph 7.2) requires that participating States, such as Kyrgyzstan, permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote, which implies that a second chamber could be indirectly elected. International human rights obligations concerning elections, such as those established by the OSCE and in Article 21 of the Universal Declaration of Human Rights, however, express a preference for direct election of representatives by the citizens of a country.

The Draft Law would introduce a system in which one chamber of the national legislature would be both nominated and selected by other elected officials. This would not seem fully consistent with Article 21 of the Universal Declaration, which states, in part that: "Everyone has the right to take part in the government of his [or her] country, directly or through freely chosen representatives." It should be noted that the Draft Law does not indicate the division of legislative powers between the two chambers. If the indirectly elected body is given lesser powers, concerns regarding the overall representativeness of the electoral system would be diminished.

The unicameral system provided for in the Proposed Constitutional Amendments would satisfy international norms for democratic representation. At the same time, establishing a unicameral system could tilt the balance of authority away from the executive toward the legislative branch. Bicameral systems inherently tend to provide checks and balances on the governmental structure and slow the passage of legislation. Any move to a unicameral system should therefore be carefully considered before adoption.

The major changes provided by the Draft Election Law and by the Proposed Constitutional Amendments would require amendments and/or supplements to the Constitution, which could be adopted by a two-thirds vote of each chamber of parliament or by a referendum called by the President of the Republic. (Constitution, Articles 96 and 97.) As noted above, broad participation, public input and political consensus beyond the mere legislative majority are needed to establish a sound basis for major changes to an electoral system. Open discussion and public education leading to the two-thirds majority vote in both chambers of the Jogorku Kenesh could provide that basis. If a referendum were to be called to enact major changes to the electoral system, adequate time should be provided for public education and political debate of the advantages and disadvantages of such changes before a vote takes place.

II. IMPARTIALITY OF ELECTION ADMINISTRATION AND PUBLIC CONFIDENCE

It is essential in any country that election administration be impartial towards all political contestants and be competent to administer the election process in an effective manner. These characteristics are essential from the national level down to the polling stations. It is equally important that election administration be perceived as impartial and competent by the political contestants and by the general public. If this is not the case, there will not be public confidence in the elections or in the resulting government.

The Draft Election Law provides that the Central Election Commission (CEC) be a permanent, independent body that heads a system of subordinate election commissions and is to be financed from the national budget. (Draft Law, Article 10.) The Draft Law also provides the CEC with broad authority in crucial electoral matters, including, among many others: establishing boundaries for single-mandate constituencies; establishing oblast and Bishkek city election commissions, which in turn establish subordinate election commissions; registering candidates; and participating in the establishment of a voter registration system; providing voter education; and determining election results to be filed with the Constitutional Court. (Draft Law, Article 11.)

The Draft Law, however, does not appear to provide adequately for impartiality of the CEC. It provides for one-third of the members of the CEC to be appointed by the President of the Republic, one-third by the Legislative Assembly, and one-third by the Assembly of People's Representatives. In addition, the Chairperson of the CEC, who would have a great deal of authority over election administration, would be appointed by the President. (Draft Law, Article 10.)