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THE GOOD, THE BAD AND THE UNCERTAIN: COMMENTARY ON KYRGYZSTAN ELECTION LAWS OF 2011



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International Foundation for Electoral Systems

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Introduction

With an October presidential election growing closer, new election laws were passed in Kyrgyzstan this past June. These revisions represent a positive breakthrough, addressing problems that previously resulted in disenfranchised voters -- like migrants being unable to vote where they live -- and skewed results due to errors in the voter list and multiple voting.

However, as written, the legislation also presents challenges for election administrators. The new laws remain tied up in details that will make administration difficult, whether because the instructions are too rigid or because the provision is vague. For instance, while the procedure for inking is dictated down to the precise finger, processes for complaints adjudication and out-of-country voting remain unclear. The Central Election Commission (CEC) will be challenged to quickly and thoroughly update its regulations and procedures to meet stipulations of the laws.

Just as pressing is the need to communicate these changes to poll-workers, observers, candidates and voters to ensure that the fierce competition leading up to Election Day filters as smoothly as possible into a fair, peaceful process and credible results.

Nonetheless, the new legislation is a significant improvement. Previous electoral codes and earlier drafts produced during the work of the parliamentary working group on election law reform, which convened during the first quarter of the year, had flaws which have been dealt with effectively in the new law.

This report makes general comments on the two new laws, the *Constitutional Law on Presidential and Jogorku Kenesh Elections* and the *Law on Election Commissions*, and then goes through the legislation chapter by chapter.

What is new in the Election Laws of 2011?

1. Elimination of Additional Voter Lists – Citizens not included in the master voter list will not be entitled to vote.
2. The provision for an Electoral Address– This is a special procedure allowing a voter to vote at the place of his/her residence irrespective of the location of his/her permanent registration, provided that the voter complies with the established rules.
3. Observers are permitted to take photos, make audio and video recordings and document the entire process of voting and vote counting. Previously the Election Code allowed recording and photography *only* during the process of vote counting.
4. Three-level system of election commissions – Oblast election commissions (OECs) are removed from the system of commissions and their functions are distributed between territorial (rayon and administrative cities) and central election commissions (TECs and CECs).
5. Visible marking – Upon receiving a ballot, a voter's thumb is marked with a special, visible composition.
6. Authority for settling election disputes is better defined – Two authorities, the general prosecutor and election commissions, are given specific roles in dealing with the

- submission of election-related complaints. Previously, the Election Code did not contain clear instructions on which authority handled various issues.
7. Vote thresholds are determined from the number of voters who voted, i.e. voter turnout, rather than calculated against the total number of registered voters as previously required.
 8. Vote thresholds have been changed – the national threshold parties/candidates must reach has increased from 5 percent to 7 percent and the regional (oblast) thresholds from 0.5 percent to 0.7 percent.
 9. Requirement to place voter registration data on the CEC official website – The voter lists submitted by territorial election commissions will be consolidated by the Central Election Commission (with a breakdown by oblast) no later than 40 calendar days before the election. The list of names will be published on the CEC official website without mentioning the citizen's place of permanent or actual residence or year of birth.
 10. Registered candidates filling public, political, administrative, state and municipal positions or working in mass media will suspend their duties between the time of registration to when the election outcome is determined. This will be required of all candidates except the president and deputies of the Jogorku Kenesh.
 11. Voting outside the polling station is held one day before voting day. Previously, voters could vote outside the premises of polling stations on the same day as the election.
 12. The deadline for the CEC to score the election results and officially publish the results for presidential and Jogorku Kenesh elections has been mandated: the CEC will officially announce the results of elections within 20 days of the election.
 13. The number of CEC members has changed along with the procedure to appoint a chairperson: the number of CEC members was reduced to 12 and the chairperson will be elected from among the commission members.

General Observations

The new election laws include some notable positive changes. The provision for an election address, for instance, remedies the problem of internal and external migrants being unable to vote where they live. Given the known problems with the voter list, basing vote threshold on the number of total votes rather than registered voters was a common sense revision. Reducing the number of election commissions and members of the CEC should improve efficiency of operations. Increasing observers' access on Election Day will enhance transparency.

Yet, while there are improvements, the laws as written have flaws that could make administration difficult, whether because the instructions are too rigid or because the provision is unclear. *The* major task for the CEC in the coming months will be to work out regulations and procedures that meet the stipulations in the law and to inform the public of these procedures.

The new laws suffer mainly from an excess of words and a high level of procedural detail. A long law may look impressive, but can easily lack transparency. It also makes it difficult to become familiar with the law. As a result, those who are well versed in it are a very few people in the commissions or are major party election specialists. The public remains confused, which is a big problem for an election law. Further, the length and the complexity of the provisions will result in different interpretations and therefore disputes.

This type of drafting causes several types of challenge for a commission:

1. The excess of wording indicates a lack of clear, simple thought about the purpose of the provision. Many of the provisions could be expressed more clearly with half the words.
2. There is a great deal of repetition. For example, in the law on election commissions, all three levels of commission and members have very similar powers in their respective jurisdictions, yet all are spelled out explicitly. These could be generalized which would save five or six pages.
3. If an unforeseen problem arises, the CEC has little room to make adjustments to ensure a free, fair and efficient election without amending the law. Thus, small procedure issues arise that were not anticipated in the law. They tend to arise just before or during the election period. This is of course too late to get the law amended.
4. Generally, it is better to leave procedural and management detail to the CEC rather than spelling out every detail. The CEC is given the power to issue regulations, but the rigidity of the law removes the potential to adapt to unforeseen circumstances. It reads as a lack of trust in the CEC coupled with a tendency towards a perceived need for excessive control by the government and the legislature.

Beyond the extraneous detail, definitions used throughout the laws are not well thought out and are frequently long winded. Terms are defined and then never used. Short forms are used and not defined. The “hereinafter referred to...” format is used, but this is a difficult and old fashioned drafting technique. These factors also make the text difficult to read and understand.

Constitutional Law on Presidential and Jogorku Kenesh Elections

Chapter I General provisions; citizens’ electoral rights

Article 2.2 seems to guarantee all Kyrgyz who are out of country the right to vote in an embassy. It is not limited to places where the CEC is able to arrange this or where there are more than one or two living. There is no discretion.

Article 10 deals with international observers, who appear to have only slightly different powers from local observers under Article 9. It is normal practice to give both types of observers the same powers. However, in this law, different wording is used. This is unnecessary repetition if they are supposed to be the same and unclear if they are supposed to be different.

Chapter II Election Commissions and Constituency

Article 12 deals with Election Commissions and repeats some of the Election Commission Law. This is a bad idea as it seems either unnecessary or restrictive – do only these specific provisions apply? Surely the entire Election Commission Law applies.

Chapter III Voter Register

Article 14.9 envisages complaints to the CEC or to a court. This mixed jurisdiction is not a good system, and has caused great confusion in the past.

Article 14.11 requires placing the lists of voters on the official CEC website without referencing a voter's place of permanent or actual residence and the year of birth. It is not clear how voters can be identified in those cases where, within the same oblast, citizens have the same last names, first names and patronymics. In this situation it will be necessary to create additional instruments so citizens can determine whether there are duplications or separate identities listed (for instance, a hotline or online information tool).

Article 15.4, the provision for the electoral address, allows a person living inside or outside the country, who is omitted from the voter register, to apply up to 10 days before polling to be put on the list. This should cover some defects in the lists. However, implementation of this provision will be difficult. It requires a person to present their regular passport (foreign travel passport) but the regular passport of a KR citizen does not contain the address of their permanent residence or registration (*propiska*). This will make it impossible to identify the address of permanent registration of a KR citizen and place a mark in the list at the place of his/her permanent registration to note that he/she will vote at the newly assigned electoral address location.

Since Article 15.6 states that only citizens included on the voter list shall be entitled to vote. Additional steps need to be taken to improve the voters list (such as door-to-door enumeration) as well as to inform the public of the need to check the list prior to Election Day.

Chapter IV Representatives of the candidate and political party

Article 18.1 allows party or candidate representatives to participate in election commission discussions, which may be going too far, as this could disrupt meetings. This should only be a right to raise questions and concerns as permitted by the chair.

Article 19 deals with financial agents, called "authorized agents." Article 20 creates "agents," a third category of representative. This system of representation seems very confusing and can impede the commissions.

Chapter V Information in support of elections

This chapter on campaigning seems generally effective. However, it is necessary to pay close attention to create equal conditions for public and private media.

The campaigning offences in Article 28 are drafted rather loosely and it may be difficult to get convictions.

Chapter VI Voting organization and procedure

In Article 30.9 the limit of 0.1 percent of ballots printed over registered votes is too few to allow for the normal number of spoiled ballots.

Articles 31-33 provide pages of fine procedural detail that should certainly not be in a constitutional law but in a procedure issued by the CEC. The CEC has no power to adapt or change any of this to deal with special or unforeseen circumstances that may arise. Specifically, Article 31.3 specifies that a voter's left-hand thumb shall be marked with a special composition. Using this exact description for the marking procedure removes the possibility of using other modern or more effective techniques in the future and raises the concern of how to mark a voter who lacks a left-hand thumb.

Chapter VII Determining election results

Power is given to the CEC to directly address the protocol and its procedures and to determine the validity or invalidity of an election.

Article 38 allows for repeat elections if the election was "acknowledged as a failure." It specifically references official error or inaction as a reason for repeat elections, not mentioning the possibility of substantial fraud or violations. However, the phrase "acknowledged as a failure" seems to serve as a catch-all for any number of justifications for repeat elections.

Chapter VIII Election Financing

Article 40 repeats parts of the Election Commission Law, which should not be necessary.

The chapter provides for party funds and requires banks to report to the CEC but there seems to be no provision for publication.

Chapter IX Guarantee of freedom of elections

This section repeats the redundant requirement that everyone must obey the law.

According to Articles 43 and 44, complaints must be assessed within two days and determined within another three days. This is a very tight time frame that will reduce the effectiveness of the Election Dispute Resolution process.

The lack of an independent complaints body may call into question the independence of the CEC and its possible bias in defending its actions. The ability to appeal to the court of jurisdiction and Supreme Court following a decision on a complaint to the CEC is potentially burdensome for expediency.

Complaint deadlines are not expressed precisely enough to be certain exactly when they expire.

Chapter X Presidential Elections

This chapter is very detailed but the procedures seem effective.

Article 53.9 allows a candidate to withdraw up to three days before polling day. Such a late withdrawal is difficult for voters and for administration.

Chapter XI Jogorku Kenesh Elections

Article 60.3 requires a party list to have at least 120 candidates. This seems a high threshold. It often results in candidates with no real experience or interest being included.

In Article 62.2, on political finance, it should be made clearer that the contribution limits listed are in aggregate, not per contribution.

The mandate calculation and seat allocation stipulated in Article 64 seems clear enough. According to Article 64.2, political parties that exceed the threshold of 0.7 percent of the votes in each oblast, and the cities of Bishkek and Osh, will receive mandates in parliament. However, if in the future the Kyrgyz Republic abolishes the administrative and territorial unit of oblast, it is unclear how the thresholds of 0.7 percent of votes will be calculated.

Under 64.4, it is a closed-list system, as was the practice in the past.

Law on Election Commissions

Chapter 1 General Provisions

This section includes unnecessary provisions, such as stating that the CEC is bound by the Constitution and the laws. It is unnecessary to make superfluous statements like this. A provision in a law is supposed to make a difference from what would happen if it were not there and this case only lengthens the law unnecessarily.

Every law should state near the beginning what or who it applies to. In this case, that it applies to the structure to administer specific listed elections. This is generally referred to as the “scope” of the law. This is dealt with by stating repetitively that the CEC has to administer the listed elections. It will not actually cause a problem, but it shows the poor organization of the law.

Article 3.1 lists certain principles of operation. It is not certain how they will be interpreted and applied. In many cases the later details specify things that are to ensure “publicity” and “openness.” Are those details a full expression of what is needed to meet the principles, or are there other things the CEC must do? The requirement for legality may mean that every act of the CEC must be justifiable by a specific law. This leaves little room for common sense in cases not dealt with in the law at all. This is a recurring theme dating perhaps from the historical authoritarian Soviet style where everything is forbidden or compulsory.

The requirement for “collegiality” is hard to interpret. Does it mean consensus, consultation, friendliness? This Article may give rise to insincere legal challenges.

The responsibility for non-fulfillment under Article 3.5 should be tied to an offence and penalty and should refer to a specific provision by its Article.

Chapter II CEC

Article 4.3 requires a “separate building” for the CEC which is an unusually rigid requirement, meaning that they cannot share even if it would be convenient or economical. One presumes they meant to say that it must not be located within a government building – to demonstrate independence.

Article 5.1 states that the CEC is “formed for five years.” One assumes this really means the Commissioners are appointed for five years. The five year period is not a good choice, because it means that Commissioners are appointed after an election. Sitting Commissioners, who stand to be renamed or replaced by political parties, could thus be judged on the political outcome rather than the quality of the election. A longer period of perhaps eight years, with phased replacement (half after four years, then half after eight) would create greater independence.

The President, majority party and opposition each nominate a list of four names (one-third of the CEC membership), out of which the Jogorku Kenesh elects Commissioners. The article suggests that CEC membership must be “not more than 70 percent of one gender,” which really means “not more than eight.” (It would be better to say “not more than eight.”) But it says not more than 70 percent of *nominees* shall be of one gender. This does not seem to apply to the proportion elected, which is really the normal principle. This wording creates a loophole that could be used to exclude women from the commission.

The continuity of power is generally well drafted. But it would be normal, because of the wording of Article 5.1, to also state that the existence of one or more vacancies does not impair the powers of the CEC. This is specified elsewhere in 16.2, which is confusing.

Article 7 lists the CEC’s authorities. However, what’s written is a confusing mixture of objectives, specific tasks for stages of the election, duties and powers. It also is long and detailed. Theoretically, if anything is missed it can be covered by catch-all provisions in 7.1 points 1 or 30. But so, too, could all the duties and powers be covered by 7.1 points 1 or 30. The order of provisions does not follow the order of events and seems random. There is also a great deal of unnecessary repetition between Article 7 (CEC “Authorities”) and Article 6 (CEC “Objectives”).

7.1 11, 12, 13, 14 are all financial administration and should be in a separate article.

7.1 26) seems to deal with complaints only against commissions, not outsiders, which might cause problems in dealing with complaints against third-party fraud. It is unclear whether 7.2 2), 3) and 4) relate to complaints or internal review.

Articles 10 and 11 regarding training and voter registration are oddly placed right in the middle of the institutional provisions for commissions.

Chapter III Members of commissions

It is unusual to state members’ authorities separately from the commission’s authorities other than the procedural powers to vote, obtain information, make proposals and call for a formal vote. The external powers of members, those related to actions outside meetings, should be

limited to carrying out the instructions of the Commission. Individual initiatives and actions by commissioners can often cause problems. One has to remember that they are partisan in origin.

For example, Article 13.1 seems to allow individual commissioners to oversee lower commissions. This should be only when asked to do so by the CEC, as under 13.2 which calls on members to train lower-level commissions; otherwise there can be chaos from conflicting instructions.

All commissions suffer at times from unauthorized actions and statements by individual commissioners. But the authorities in this chapter could make this situation worse than expected.

Chapter IV CEC decisions

Article 18.2 sets a two-thirds absolute majority approval for many basic decisions, and is not well defined. The provision includes a very extensive list of matters the CEC might decide upon, and covers decisions that must be taken quickly. This can lead to leverage or deadlock caused by a minority.

Article 18.7 and 8 are unclear on the time of commencement of decisions into effect.

Chapter V Territorial and Precinct Election Commissions

Article 19.9 specifies precinct commissions and sets numbers at a minimum – who sets the actual number of members is unclear. The law does not specify a cap for the number of voters that can be registered at a voting station, which could lead to overcrowding and potential conflict.

The hierarchy relationship of the CEC over TECs is unclear.

In Article 20 all powers should be limited to the territory, but only the first two are. In Article 21 all powers should be limited to the precinct. This is presumed, but not stated.

Chapter VI Final Provisions

Article 25 covers finances. This should not be included in “Final Provisions,” but rather a finance chapter. This is a technicality with no practical consequences.

Article 25.4 seems to be intended to prevent foreign funding for partisan activity, but does not say so and the exemptions are confusing, but allow international funding for advising on technical election administration. It might leave the opportunity for foreign funds to go to a party if they claim to use it for “information.” The standard should be foreign funding to parties and candidates for campaigning and other partisan action. That is all that need be said.

Article 25.6 covers members “business trips.” These and all other expenses should be approved by the CEC. This is unclear.

Conclusion

The new election laws contain several welcome changes, though in many areas the legislation comes up short. The complaints adjudication process remains convoluted. Retaining regional vote thresholds will continue to limit competition. Many provisions are ill-defined or overly detailed and will prove difficult to implement.

After a relatively successful parliamentary election in 2010, Kyrgyzstan is well-positioned to improve upon the effort in 2011 with the presidential election, which is expected to be hotly contested. Much work remains to be done in a short amount of time. A new CEC is in place, with many experienced members. This body must now develop regulations and procedures to accommodate the new laws and avoid some of the problems evident in 2010. Efforts must be made to improve the quality of the voters list in a short amount of time – a task that decision-makers chose to shelve in 2010. Moreover, given new rules, a major priority for the CEC must be education of lower-level commissions (especially poll workers) and voters.