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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

JOINT OPINION ON THE DRAFT LAW ON POLITICAL PARTIES OF THE KYRGYZ REPUBLIC

by the Venice Commission and the OSCE/ODIHR

Adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009)

on the basis of comments by

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I. INTRODUCTION

1. By letter dated, 7 May, 2009 addressed to the Deputy Head of the OSCE Centre in Bishkek the Deputy Chairperson of the Committee on Ethics and Regulations of the Jogorku Kenesh of the Kyrgyz Republic, requested the review of the Draft Law on Political Parties of the Kyrgyz Republic (hereinafter referred to as "the Draft Law" CDL (2009) 099), by both the OSCE/ODIHR and the Venice Commission for Democracy Through Law of the Council of Europe (hereinafter, "Venice Commission").

2. This Opinion has been drafted as a response to the abovementioned request. This Opinion is based on an unofficial translation of the Draft Law into the English language, provided by the OSCE Centre in Bishkek. It should be noted that inconsistencies may transpire as a result of the translation.

3. The Opinion was prepared by Messrs Daniel Smilov and Jessie Pilgrim (OSCE ODIHR Experts) and Mr. Evgeni Tanchev, Member (Venice Commission).

4. The present opinion was adopted by the Venice Commission during its 80th Plenary Session in October 2009.

II. SCOPE OF REVIEW

5. The scope of the Opinion includes the Draft Law and reviews it largely in isolation from the rest of the Kyrgyz legislation on issues such as taxes, elections, NGOs, and accounting standards.

6. Further to the above, although the present Opinion has attempted to take into account the Constitution of Kyrgyzstan and the legislation regulating the registration of public associations, a comprehensive review of other legislation would enhance understanding the overall impact of the proposed Draft Law on the legal framework for political parties.

7. This Opinion on the Draft Law on political parties in Kyrgyzstan aims to analyse the provisions of the proposed piece of legislation in view of their potential impact, possibilities for misinterpretation or misapplication, and consistency with OSCE commitments and international principles ensuring freedom of association. This analysis also considers the model suggested by the Draft Law with the practices of party regulation in established democracies.[1]

8. This Opinion is without prejudice to any recommendations that the OSCE/ ODIHR and the Venice Commission may wish to make on the Draft Law in the future.

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[1] The position of the Venice Commission with respect to standards in the field of political parties can be found in a number of specific country-related opinions., notably: CDL-AD(2009)006**.** Opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009); CDL-AD(2008)034 Opinion on the Draft Amendments to the Law on political parties of Bulgaria adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008); CDL-AD(2008)002 Opinion on the Law on the financing of political parties of Bosnia and Herzegovina adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008); CDL-AD(2007)025 Comments on the Draft Law on political parties of Moldova endorsed by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007); CDL-AD(2006)031 Comments on the Draft Law on the financing of political parties of Croatia adopted by the Venice Commission at its 68th Plenary Session (Venice, 13-14 October 2006); CDL-AD(2004)025 Opinion on the Law on political parties of the Republic of Azerbaijan adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004).

III. EXECUTIVE SUMMARY

9. The Draft Law generally follows democratic standards and accepted practices as outlined in a number of international documents.[2] Nevertheless, the ultimate test of the compliance of this law with the relevant international standards will be its practical implementation In particular, the draft should be strengthened in some areas to fully respect the right of association as some of the text unreasonably limits this right. Reformulation of some of the provisions would also be beneficial in order to provide clarification, fine-tuning, and streamlining, especially of the enforcement procedures. There are some political choices suggested by the Draft Law, which might prove questionable and are thus worth re-considering. Further, some of the ambiguities and indeterminacies contained in the Draft Law may need to be addressed in other areas and not only in political party regulation. Therefore, some recommendations for the improvement of the Draft Law might be formulated as follows:

A. The definition of political parties in the Draft Law may be supplemented to stress the specific role of political parties when compared with other associations.

B. The prohibition of "establishment of political parties along the features of... national, ethnic belonging of citizens" and "religion" should be clarified in order to avoid over-restrictive interpretations and to respect freedom of association. It is commendable that the normative framework and the practices of interpretation of such restrictive provisions in Kyrgyzstan take into account the case-law of the European Court of Human Rights on this topic, which provides generally a fair balance between legitimate security concerns of the state and the right to freedom of association. It is particularly important for the Draft Law not to be read as to prohibiting parties whose members, sympathisers or leaders happen to be from a particular ethnic groups or religious denomination, or which simply include the name of a specific religion in their official name, or which aim at achieving social and constitutional changes, which are democratic in character and are pursued by legal and democratic means.[3]

C. The prohibition of political parties based on *professional* affiliation might be reconsidered as highly unusual in contemporary democracies and as raising an issue of compatibility with freedom of association. Article 6 of the Draft Law also appears to be too restrictive by introducing formal requirements not only for joining but also leaving a political party.

D. Similarly to the above, the ban of political parties "based on religion" may lend itself to misinterpretation and is recommended to be reconsidered to ensure that it does not prohibit all parties whose members, sympathisers or leaders happen to be from a particular religious denomination.

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[2] For the general recommendations of the Venice Commission also see: CDL-AD(2009)002 Code of good practice in the field of political parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008); CDL-AD(2006)025 Report on the participation of political parties in elections adopted by the Council for Democratic Elections at its 16th meeting (Venice, 16 March 2006) and the Venice Commission at its 67th Plenary Session (Venice, 9-10 June 2006); CDL-AD(2004)007rev Guidelines and Explanatory Report on Legislation on Political Parties: some specific issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004); CDL-INF(2000)001 Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st Plenary Session (Venice, 10 - 11 December 1999).

[3] See on this point the ECHR case law on the topic of political parties dissolution in Turkey: *United Communist Party of Turkey v Turkey* (30 January 1998), *Socialist Party v Turkey* (25 May 1998) and *Freedom and Democracy Party (Özdep) v. Turkey* (8 December 1999). See also CDL-AD(2009)006. Opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009).

E. The provision on the ban of activity of international political parties and their representative offices, although legitimate, should not exclude the possibility of co-operation of domestic political parties with foreign parties which could be beneficial to the development of the political party system in Kyrgyzstan.

F. There should be clearer requirements for establishment of political parties based on democratic principles. A separate provision of the Draft Law is recommended to be elaborated, bearing in mind however that the Draft Law should not seek to overly intervene in the internal organisation of the party.[4]

G. A clarification of the requirement of "fixed membership" is recommended.

H. The provision of the Draft Law which concerns the charter of the party and political parties' programmes should be of a formal nature only and not entail a substantive assessment of party ideology. The only requirement imposed on a party programme and charter should be that it meets legal and constitutional requirements.

I. The Draft Law should establish a positive obligation for the Ministry of Justice to process the application for registration of a party within a reasonable time. The Draft Law should clearly provide that in case of a failure to process the application by the Ministry of Justice, redress may be sought by the party in a court of law.

J. The provision that "the Ministry of Justice is entitled to require explanations from the political parties' leading bodies on the issues, connected to violation of political party charter and legislation" should be narrowed down, in order to exclude possibilities for excessive interference of the Ministry with the affairs of political parties.[5] The concept of re-registration first mentioned by Article 11, might also be problematic in light of international standards.

K. For the purposes of the strengthening of the party system, the Draft Law could grant some specific privileges to political parties compared to other public associations: for example, state aid for the carrying out of their essential activities (either in-kind or financial). The option is especially recommendable as it supports the development of a stable political party system.

L. The power of the Ministry to issue warnings "in case a political party undertakes actions, *extending beyond the limits of the goals and tasks determined in the charter*, or not complying with the acting legislation" should be narrowed in order to prevent the Ministry from assessing too intrusively the substance of the goals and tasks of the political party.

M. The Draft Law should make it clear that suspension of a political party may not be initiated and imposed for relatively minor violations of legislation. The provision that grants special protection from suspension to parliamentary parties is contrary to principles that require non-discrimination and equal treatment before the law. This provision is recommended to be reformulated to respect these principles. The provision in the Draft Law that provides for suspension of a political party for failure to participate in two elections should be reformulated to recognize that a political party can play a role not

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[4] CDL-AD(2009)002 Code of good practice in the field of political parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008)

[5] CDL-AD(2009)006. Opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009).

only in elections but also in the formation of public policy and conduct of public affairs.[6] This provision should be improved to state that a political party may legitimately exist even if it does not present candidates in elections.[7]

N. The provision in the Draft Law which states "stopping activity of political party stops activities of its deputy fraction" should be reformulated to ensure that retention of the elected deputy's mandate is not conditioned upon the continuation of the political party.

O. The Draft Law should offer a much more elaborate mechanism of enforcement, including fines for relatively minor violations, and warnings, suspension and dissolution only for very serious violations. Suspension and dissolution is therefore recommended to be limited only to instances of serious violations (mentioned in Article 3) and the procedural requirements of Article 5 of the Draft Law.[8]

P. The Kyrgyz legislator may also consider introducing provisions on special grounds and procedures for declaring a party unconstitutional and refer this to the jurisdiction of the Constitutional Court.

Q. Generally, it is not advisable for political parties to own firms and companies, since this leads to patronage and (possibly) corruption. Such ownership should be limited to publishing houses and other business activity essential to their activities.

R. The Draft Law should provide for the publication of the annual party financial reports in the State Gazette or on the website of the Ministry of Justice.[9]

S. In the financial reports, on the expenditure side, it would be useful if the Draft Law required the parties to disclose separately their expenses on public relations and media advertising. On the income side, it will be useful for the Draft Law to distinguish between financial and in-kind donations.

IV. ANALYSIS AND RECOMMENDATIONS

10. One of the purposes of legislation on political parties is to stress their central importance for the functioning of democracy. Therefore, it is common for a political party law to underline the special role of political parties in the "formation of the will of the people".[10] In contrast, the Draft Law does not appear to facilitate this special role of political parties when compared to

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6 CDL-AD(2004)007rev Guidelines on legislation on political parties: some specific issues (H.-H. Vogel, K. Tuori): « Any interference of public authorities with the activities of political parties, such as, for example, denial of registration, loss of the status of a political party if a given party has not succeeded to obtain representation in the legislative bodies (where applied), should be motivated, and legislation should provide for an opportunity for the party to challenge such decision or action in a court of law ».

7 There are some States where parties which do not participate in elections can lose their status as parties. For example, in Finland, a party that fails to win a single seat in two consecutive parliamentary elections is stricken from the register but may apply again. Another example is Canada, where parties which do not present candidates in at least 50 constituencies are struck off the register, but this obviously does not prevent members of these organisations from standing on an individual basis. It should be underlined that requirements for registration of parties in both countries are not restrictive.

8 See also CDL-INF(2000)001 Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st Plenary Session (Venice, 10 - 11 December 1999).

9 CDL(2008)148 Conference on "International Standards of Financing of political parties and Election Campaigns" (Okan Intercontinental Hotel, Astana, Kazakhstan, 1 December 2008): Reports. CDL-AD(2008)002 Opinion on the Law on the Financing of political parties of Bosnia and Herzegovina adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March2008)

10 Political parties play a primordial role in a democratic state and are a form of association essential to the proper functioning of democracy (United Communist Party-judgment, § 25).

other associations. It may be considered to include in the Draft Law; the definition proposed by the Code of Good Practices in the field of Political Parties of the Venice Commission[11].

11. Further, the definition of a political party in the Draft Law specifies that it is supposed to "carry out the political will of a specific part of the society". This is a plausible (pluralist) vision of party competition, but the Draft Law does not need to restrict itself to this limited view. It is possible that there could be political parties, which claim to represent the interests of society as a whole in and not just one limited view. Indeed, in many contemporary democracies this has become the dominant form of party representation.

12. Some parts of Article 3 are ambiguous and problematic. Firstly, the ban of "establishment of political parties along the features of professional, racial, national, ethnic belonging of citizens" is overbroad and problematic. It is worth noting that this legal provision goes beyond the restrictive provisions on the formation of political parties embedded in the Constitution of Kyrgyzstan (Article 8). Such a provision should be coupled with with other criteria such as the discriminatory or closed character of membership, or formations which are para-military or those that resort to force in carrying forward its policies.

13. Further elaboration is needed on the proposed ban. Firstly, the prohibition of political parties based on *professional* affiliation is unusual and inconsistent with democratic pluralism. This prohibition is also inconsistent with freedom of association, which may be restricted only in very limited circumstances where the restriction is necessary in a democratic society. On its face, this article appears to prohibit workers parties,[12] business parties, and any other party formed around a common goal that derives from one's chosen profession or means of livelihood. Such a ban is contrary to the principles of freedom of association and equal treatment before the law. This provision should be reconsidered. Secondly, the ban on political parties based on *national and ethnic* grounds is also potentially overbroad and inconsistent with freedom of association. In order for such a provision to be accepted as a reasonable restriction on freedom of association, which is strictly necessary in a democratic society, it should be established that the activities or aims of the political party constitute a real threat to the state and its institutions. It is difficult to accept that all political parties based on nationality or ethnicity should, as a matter of pure legal text without regard to any existing facts, be considered as a threat to the state. Although it may be acceptable, as expressed by the European Court of Human Rights, to ban a political party that has "an attitude which fails to respect" the state constitutional order, evidence of this attitude should be based on facts and not a blanket presumption applicable to all nationalities and ethnicities. For such prohibitions to be acceptable, they must be interpreted and applied very narrowly by judges and officials. In contrast, if the provisions are read broadly – for example, as a ban of parties, whose membership or leadership is predominantly from a certain ethnic (minority) group – the bans may be construed as undemocratic. The opportunity for various interpretations, which the formulation of the provision allows, creates possibilities for abuse. The possibility of developing of constitutionally sound practices is not excluded, but it is not guaranteed either. Therefore, it is advisable that this provision is reconsidered and clarified in order to avoid the creation of pockets of administrative and judicial discretion, and possibilities for abuse.[13]

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[11] Paragraph 11 CDL-AD(2009) 021

[12] See the above cited *United Communist Party of Turkey v Turkey* (30 January 1998): « *in the absence of any concrete evidence to show that in choosing to call itself "communist", the TBKP had opted for a policy that represented a real threat to Turkish society or the Turkish State, the Court cannot accept that the submission based on the party's name may, by itself, entail the party's dissolution* ».

[13] CDL-AD(2006)025 Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st Plenary Session (Venice, 10 - 11 December 1999**);** CDL-AD(2009)006**.** Opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009).

14. Further, the ban of political parties "based on religion", although constitutionally required in Kyrgyzstan (Article 8), creates the same possibilities for misinterpretation as the provisions discussed above. In all circumstances, this ban should be read again very narrowly, to prohibit the formation of political parties whose militant religious character poses a serious and immediate danger to the constitutional order. It is commendable that the normative framework and the practices of interpretation of such restrictive ("militant democracy") provisions in Kyrgyzstan take into account the case-law of the European Court of Human Rights on this topic, which provides generally a fair balance between legitimate security concerns of the state and the right to freedom of association. It is particularly important that this provision of the Draft Law is not read as to prohibit all parties whose members, sympathisers or leaders happen to be from a particular religious denomination, or which simply include the name of a specific religion in its official name, or which aim to achieve social and constitutional changes, which are democratic in character and are pursued by legal and democratic means. As the provision stands at the moment, it does not guarantee that such dangerous and excessively restrictive interpretations will be avoided in the future.[14]

15. Finally, the last paragraph of Article 3 – the ban on activity of international political parties and their representative offices – is of course a legitimate sovereign choice of every country. Nevertheless, it appears to be over-inclusive and might rule out certain forms of international cooperation, which could be beneficial for the development of the political party system in Kyrgyzstan. First, if the ban targets foreign political parties trying to compete in elections in Kyrgyzstan or in public debates, this is a legitimate aim. If, however, it bans cooperation between domestic political parties and foreign political parties for the purposes of training of activists, elaboration of programmes and platforms, seminars, conferences, and participation in regional programmes, the provision may be considered as too restrictive.

16. It is commendable that Article 4 of the Draft Law includes the principle of equal opportunities regarding the members of political parties. In general, the provision includes the most important principles, which parties should observe. The Council of Europe's European Commission for Democracy Through Law (Venice Commission) has offered a more parsimonious and structured description of these principles as being[15]:

"a. Rule of law

17. Political parties must comply with the values expressed by international rules on the exercise of civil and political rights (UN Covenant and the ECHR). Parties must respect the Constitution and the law. However, nothing can prevent them from seeking to change both the Constitution and the legislation through lawful means.

b. Democracy

18. Parties are an integral part of a democracy, and their activities should ensure its good functioning. Hence, a commitment to internal democratic functioning reinforces this general function. Although few European states regulate this requirement in detail, several countries require the party's internal structure and operation to be democratic.http://www.venice.coe.int/docs/2009/CDL-AD(2009)002-e.asp - _ftn5 This positive experience could be shared between different Council of Europe Member States.

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[14] CDL-AD(2006)025 Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st Plenary Session (Venice, 10 - 11 December 1999).

[15] CDL-AD(2009)002 Code of good practice in the field of political parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008).

c. Non-discrimination

19. Political parties should not act against the values of the ECHR and the principle of equality. Parties must not discriminate against individuals on the basis of any ground prohibited by the ECHR.

d. Transparency and openness

20. The parties should offer access to their programmatic and ideological documents and discussions, to decision-making procedures and to party accounts in order to enhance transparency and to be consistent with sound principles of good governance."

21. The Draft Law goes beyond these requirements and includes additional principles such as "collegiality" and "humanism", which are understood as elements of internal democracy enshrined in the Constitution. If considered in the context of the values mentioned above, these two definitions should not present a problem.

22. The term "Glasnost", should be interpreted as a full equivalent of transparency, in line with the European Constitutional heritage. Especially in recent years, the principle of transparency is intimately related to anticorruption activities. Since party financing is an important area of potential corrupt activities, it is important to stress transparency in particular.

23. The procedure of establishing of political parties laid down in Article 5 of the Draft Law follows the main principles of contemporary democracy and is not unduly restrictive except for limitations related to geography and the number of members required for a political party. Concerning the number of members required, it should be noted that since the Draft Law grants no significant "special privileges" to political parties, there appears to be no justification for the number of required members. Further, as the trend is for "local control" and decentralization of government services (consider the European Charter on Local Self-Government), it does not seem absolutely necessary for the law to require such a rigid, hierarchical structure in order to form a political party. Another potentially burdensome requirement is the requirement for regional branches and *offices*. Generally, it is better if the requirements focus on membership and the register of members, rather than on offices and party infrastructure, which could be expensive and serve as an impediment to party formation.

24. The requirement for "fixed membership" is unclear. Is this a requirement for registering of members and keeping registers? If so, the provision could be superfluous. Alternatively, does this provision require that the membership of a political party cannot be less that 1,800 at any point in time? The Draft Law would benefit from clarification on this point.

25. The second clause of Article 7 suggests that the internal affairs of political parties should be organised in a democratic way. This would be better placed in a separate provision of the Draft Law. Also, the Draft Law should provide guidance by elaborating precisely the minimum democratic conditions that a party needs to follow. For example, should every member have the same voice in the election of the leadership (one person one vote)? How often should the elections for leadership be held and what is the maximum length between elections? Which positions must be elected? The best place for such clarifications is in Article 8, which regulates the charter (relating to the political parties' programme) of the political party.[16]

[16] CDL-AD(2009)002 Code of good practice in the field of political parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008).

26. It is important that the requirements of Article 9 of the Draft Law are not turned into demanding substantive standards for the assessment of the coherence and political quality of the programmes of political parties. These should be rather formal requirements, which do not bind the political party to a specific substantive ideology, sets of principles, or required party activities. It would be extremely problematic if an administrative or judicial body examined the rationality and coherence of the political programme, goals and principles of the party, and passed judgements on whether the party has fulfilled them. Such evaluations should be left to the public and voters.

27. Further to the above, if the programme is militantly antidemocratic, the authorities will be authorised to take certain actions. However, it should be clear from the language of the Draft Law that, as long as the party programme is in conformity to constitutional and legal standards, it could have any content, no matter how superficial, incoherent or otherwise problematic it is or appears to be to magistrates and administrative officials.

28. Article 11 is of key importance for the Draft Law. It provides for a procedure of registration of a party by the Kyrgyz Ministry of Justice. Generally, there are two main models of party registration: registration by a court, or registration by an administrative body. Both of these have advantages and disadvantages. In both cases judicial control and the right to appeal decisions are necessary. The Kyrgyz Draft Law overall meets the basic requirements of party registration. A potential ambiguity is presented by the two month period within which the Ministry needs to register the party or issue a reasoned refusal. The Draft Law should establish a positive obligation for the Ministry of Justice to process the application for registration of a party within a reasonable time. The Draft Law should clearly provide that in case of a failure to process the application by the Ministry of the Justice, redress may be sought by the party in a court of law Furthermore, the Draft Law should specifically state the Court responsible for appeals of the refusal of the Ministry of Justice and provide for reasonable time for the court decision to be handed down and foresee whether there is a possibility of further appeal

29. Further, the party is obligated to report to the Ministry (within one month) concerning various events, including the decline of membership below the minimal required number. There is certain vagueness in this provision, which might lead to potential abuses. At what specific time does the obligation to report arise? Is there any grace period during which the party can supplement its membership with new members before being required to report the decline in membership?

30. Furthermore, the concept of re-registration, first mentioned in Article 11 of the Draft Law is considered as potentially problematic.

31. Article 12 enumerates, though not exhaustively, the main rights of political parties necessary to carry out their essential activities. It might be useful to include expressly fund-raising among these main activities since politics involves money and parties should have an expressly stated right to raise funds.[17]

32. Further, the Draft Law does not grant the right to political parties to get some form of state support (either in-kind or financial) for the carrying out of their essential activities. In contemporary politics, such support is generally provided by the state. Most democracies provide for different forms of state support for the political parties, with the understanding that they play a key role in elections and in the formation of public policy. Many countries have had special campaigns and programmes to strengthen their political parties. Financial or in-kind subsidies are essential in these programmes. Kyrgyzstan's democracy would be

[17] CDL(2008)148 Conference on "International Standards of Financing of political parties and Election Campaigns" (Okan Intercontinental Hotel, Astana, Kazakhstan, 1 December 2008): Reports

likely to benefit from some special state support to the political parties, which aims to strengthen their resources in a fair and pluralistic way.[18] It is suggested that the level of state subsidy received should be dependent upon parties' participation in the last elections.

33. Of course, it could be that Kyrgyzstan has decided to grant state support through its electoral legislation (or other legislation, for that matter). It is important to note, however, that apart from electoral costs parties have routine costs of operation as well during non-election periods. A healthy party system contains political parties, which are active and functioning properly not only during elections, but throughout the whole electoral cycle. Therefore, if a political decision is taken to support the parties and strengthen the party system, the political party law should be the place to provide for various forms of state aid and support.

34. The second and the third clauses of Article 13 raise some questions and concerns. The second clause appears to be too broad ("...except for cases provided by law") and in fact invites the passage of legislation interfering with the activities of political parties. It should be clear that state intervention must be exceptional, and only for the limited purposes strictly required by constitutional requirements and the legislation regulating political parties. Opening the door to interferences provided by other legislation is problematic and undermines the regulation established by the Draft Law. Generally, interference should be possible only when the party fails to comply with its essential legal duties and when there is some immediate and serious danger for the constitutional order posed by the activities of the party.

35. The provision that "the Ministry of Justice is entitled to require explanations from the political parties' leading bodies on the issues, connected to violation of political party charter and legislation" is very broad and grants too much power to the administrative authority. For instance, it is said that the charter includes the "goals and tasks" of the political party. The current wording of the article suggest that the Ministry could require an explanation as to why the party is not addressing these goals and tasks or why the party is addressing them in a certain manner or way. The Ministry should not be in the position to pass political judgements on the goals and tasks of parties. Without sufficient guarantees against such interferences, it is recommended to reconsider this provision.

36. Further, the Ministry could seek explanations for any form of violation of Kyrgyz legislation by a political party. It is possible to imagine a situation in which a given party fails to pay the rent for its premises, or violates the labour legislation regarding some of its employees. Clearly, such violations should not be a ground for an administrative interference with the affairs of the party, which could ultimately lead to party suspension or closure. As it stands, the Draft Law does not exclude such possibilities for abuse. Thus, clarification and some fine-tuning of the discussed provision is recommended.

37. Article 14 of the Draft Law provides an opportunity to the Ministry of Justice to exercise oversight over the activities of political parties. In case a party violates existing legislation, the party could be officially warned by the Ministry – a step which might lead to the eventual suspension or the closure of the party. This procedure must take seriously into account the right of political parties to internal autonomy, which is an essential part of their freedom of association.

38. Further to the above, the formulation of Article 14 raises some of the questions discussed in the previous sections. The Ministry, for instance, can issue a warning "in case a political party undertakes actions, *extending beyond the limits of the goals and tasks determined in the charter*, or not complying with the acting legislation". As drafted, the

[18] CDL(2008)148 Conference on "International Standards of Financing of political parties and Election Campaigns" (Okan Intercontinental Hotel, Astana, Kazakhstan, 1 December 2008): Reports

provision gives powers to the Ministry to assess the substance of the goals and tasks of the political party. For instance, if a party has as a goal to represent the interests of the rural population, but does not support increases for public subsidies to farmers, should it be warned for deviating from its goals and tasks? Or, if a party suddenly decides to campaign for a constitutional amendment that has not been mentioned among its concrete tasks and goals, is it to be considered as "going beyond" its goals? Because of these possibilities for abuse, it is necessary to describe in greater detail only serious violations which would justify interference by the Ministry of Justice in the activity of a political party.

39. Article 15 describes the procedure of "suspending" a political party by a court after two official warnings by the Ministry of Justice. Generally, it is a very positive practice if an independent judicial body is to decide on such a serious interference with freedom of association, such as suspension of political activities. There are some remaining ambiguities, however, which could potentially become a source of problems. Therefore, the Draft Law would benefit from indicating the appropriate Court for appealing such suspension.

40. Further to the above, it is not clear whether suspension could be initiated only after two official warnings concerning one and the same issue, or after two warnings on different violations. Presumably, the first should be the case, as the Ministry should not be satisfied with the measures undertaken by the party to address a specific problem after two warnings. Otherwise, it would be possible for suspension to be initiated after two separate warnings on different and potentially minor matters, which the party could be addressing at the time of suspension proceedings. Some clarification on this issue is advisable since the text lends itself to more than one interpretation.

41. More importantly, however, the concern is that suspension could be initiated and imposed for relatively minor violations of legislation. Indeed, it is expressly stated that political parties (with the exception of parliamentary parties) could be suspended for violations not included under Article 3 - the severe violations for which political parties are normally banned or suspended. Thus, the law actually provides that parliamentary parties enjoy a higher degree of protection from suspension than extra-parliamentary parties. This arrangement raises constitutional objections of discrimination and lack of equality. This arrangement is also contrary to OSCE Commitments and Venice Commission recommendations as well as international principles that require non-discrimination and equal treatment before the law. Additionally, this arrangement leaves political parties outside of parliament to the discretion of the Ministry of Justice and the courts. If these are demanding and pursue restrictive and punitive policies, they could easily find two violations of rules pertaining to parties (party funding, auditing, taxes, etc.) in order to initiate and obtain the suspension of a political party. Thus, the law does not provide sufficient guarantees for the fair and non-arbitrary application of party suspension procedures. It is possible, of course, that the courts and the Ministry of Justice develop fair practices even under provisions similar to those of the Draft Law, but, legally speaking, the possibilities for abuse would remain. This is an important issue that should be addressed in the law, including both the discriminatory nature of the law on its face and the potential for abuse in the subjective application of the law.

42. Article 16 describes the procedure of dissolution of political parties and the grounds for doing so. First of all, it is positive that the decision to dissolve a party is to be taken by a court. Further, the Draft Law postulates that a party which has failed to take part in more than two periodical (consecutive?) elections is automatically dissolved. Although this provision is similar to arrangements in other countries, there is no justification for requiring forfeiture of the freedom of association because a political party has not participated in elections. Freedom of association, as formulated in OSCE Commitments and in regional and international human rights instruments, is not conditioned upon the standing of candidates in elections or some other form of participation in elections. Nor should failure to stand

candidates or participate in elections be construed as a threat to the constitutional order or state institutions. As the European Court of Human Rights has observed, political parties play a role not only in elections but also in the formation of public policy and conduct of public affairs. Thus, Article 16 should be improved to reflect that a political party may legitimately exist even if it does not present candidates in elections.

43. Another potentially problematic element of Article16 of the Draft Law is the stated grounds for dissolution by a court. Firstly, it is only normal that political parties could be dissolved for violations of Article 3 (please also see comments to Article 3 on possibilities of abuse). However, the Draft Law provides for another possibility for dissolution on the ground of measures not being taken after the suspension of a political party. As mentioned in the previous comment, this provision opens opportunities for possible arbitrary closures especially of extra-parliamentary parties. Therefore, the unproblematic application of Article 16 would require revisions and reformulations of the article, as well as of Article 3 and Article 15, along the lines suggested in previous comments.

44. Article 16 also states that "stopping activity of political party stops activities of its deputy fraction". Although this is subject to different interpretations, it would be problematic if this were interpreted to mean that an elected deputy must forfeit the parliamentary mandate based on the "stopping activity" of the deputy's political party. The case-law of the European Court of Human Rights and several national courts clearly establishes the principle that retention of the elected deputy's mandate is not conditioned upon the continuation of the political party. This is because the right to be elected is an individual human right.[19]

45. Article 17 of the Draft Law prohibits certain forms of funding of political parties by banning a number of possible sources of funding. These bans are compatible with normal democratic and constitutional principles. Probably there is an excessive emphasis on the bans on all forms of foreign donations, but this is a political choice. The Draft Law also contains two clearly anti-corruption measures: the ban on anonymous donations and the ban on recently established legal personalities to donate money.[20]

46. It is strongly recommended that the Draft Law introduces limits on private donations (or a prohibition of donations over a particular limit). Unless such limits exist in other regulations, the Kyrgyz model would allow for unlimited private (including corporate) donations. This is a practice, which is generally untypical of Europe and North America, and is increasingly rare in contemporary developed democracies.

47. Article 18 specifies the legitimate sources of funding of the political parties. All forms of state aid are excluded from the list. This is an exception to the general practice in a fledging-democracy, which needs to develop a strong and stable party system. The list of sources is non-exhaustive, which leaves the possibility for some forms of state aid to be introduced by means of other legislation (budget law, electoral laws, tax law). However, the absence of state aid in the Draft Law is an uncommon choice in a new democracy.

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[19] Article 3 of Protocol No. 1 seems at first sight different from the other provisions of the Convention and its Protocols which guarantee rights, as it is phrased in terms of the obligation of the High Contracting Parties to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the travaux préparatoires of Article 3 of the Protocol and the way the provision has been interpreted in the context of the Convention as a whole, the Court has established that Article 3 of Protocol No. 1 also implies individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51; *Case of Ždanoka v. Latvia*, 16 March 2006, § 102; *Yumak and Sadak v. Turkey*, 8 July 2008, § 108).

[20] CDL-AD(2006)014 Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006).

48. Articles 18 and 19 regulate the property of political parties and disbursement of their income. Generally, political parties are allowed to own movable properties as well as real estate. They are permitted set up companies for the purposes of pursuing their programmes (essentially publishing houses). Yet, the law does not exclude the possibility for parties to own companies. Indeed, one provision suggests that they can: *"The party members do not have entitlement to income and property of the enterprises and organisations established by political party, and are not responsible under their obligations."* The Draft Law is recommended to be more precise on this issue. Generally, it is not advisable for political parties to own networks of firms and companies, since this leads to patronage and (possibly) corruption, and distracts the party officials from their main activities. If parties rely on their own companies for financing, it would be better to discontinue the practice and to substitute it with forms of state aid to compensate for the initial financial shock.

49. Article 21 of the Draft Law provides for an annual reporting procedure to the Ministry of Justice. The positive elements of the procedure are, first, that the report must disclose the names of the party donors (individuals and legal personalities) and the amount of their donations. Secondly, the law provides for a public disclosure of the annual party reports through a media outlet ("…with a copy of corresponding printed mass-media outlet...").

50. Further to the above, it may be more beneficial for the Draft Law to provide for the publication of the annual reports of political parties in the State Gazette or on the website of the Ministry of Justice. This would make the comparison of different party reports easier and would provide for the possibility to track funding trends through the years.

51. The Draft Law attempts to break down the income and expenditure of political parties in categories of public interest. On the expenditure side, it will be useful if the law requires the parties to disclose separately their expenses on public relations and advertising. On the income side, it will be useful if the law distinguishes between financial and in-kind donations. A general weakness of the regulation is that it does not take explicitly into account possibilities for in-kind support for the political parties, which sometimes can be very substantial. Disclosure of such donations is also important.

52. It is a generally commendable practice that Article 23 of the Draft Law does not require re-registration of already existing parties upon its entering into force. Such provisions have elsewhere proven to be sources of administrative abuses against specific parties.