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COMMENTS ON THE DRAFT CONSTITUTION OF THE REPUBLIC OF KYRGYZSTAN

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REMARKS ON THE DRAFT CONSTITUTION OF KYRGHYZSTAN

A. Editorial remarks

1. This opinion has been prepared primarily on the basis of the English translation but taking into account the Russian text. This is to be underlined because the English version might cause confusion in some exceptional cases.

2. The remarks focus on questions raising doubts or being otherwise of particular importance. Other provisions are not commented on.

B. Substantial remarks

1. GENERAL REMARKS

1. The Constitution of Kyrghyzstan is envisaged as a permanent basic law.It is not conceptualized as a temporary act.

2. The Constitution is based on the principle of the division of powers, with a strong presidency. It does not seem,
however, that the position of the President contradicts the principles of the democratic Government. The Constitution contains interesting solutions which correspond closely with the modern constitutions of the world. Let us refer as the matter of example to the direct applicability of international norms in the domestic legal order, the individual constitutional complaint, the judicial control of norms. The frequent reference to the traditional solutions of the country in organizing the State structure constitutes a particular value of the draft Constitution under discussion.

3. The Constitution is a rather flexible act. The conditions for its amendments are not particularly rigid (art. 102 and 103). It must be underlined that the Constitution adopts two particularly interesting regulations, i.e. i) the proposals for amending the Constitution must be commented by the Constitutional Chamber of the Supreme Court prior to the debate in the Parliament, ii) the wording of amendments may not be changed in the course of the debate in the Parliament - this regulation seems to be doubtful because it forces the Parliament to limit the discussion to what was proposed to it by subjects enjoying the right of the legislative initiatives. On the other hand, the fact that the 1/3 of deputies have the right to submit the draft amendment

makes the mentioned limitation a little less rigid. It is remarkable that the Government does not have the right to propose the Constitutional amendments. Only the President of the State enjoys this rights what is one of the examples illustrating the dominating position of the President within the Executive.

II. PRINCIPLES OF THE STATE'S ORDER

chapter I and II

1. "The Republic shall be [...] a legal secular state." - art. 1. The connection between "legal" and "secular" seems to be a little artificial. But, perhaps that is a particular domestically relevant reason for this kind of regulation.

2. It is not certain if the para 6 of art. 2 is necessary in the light of the provisions of the further chapters.

3. Art. 3 describes the territory of the Republic as "inviolable and indivisible". Is not there any contradiction with the competence of the Parliament "to change the boundaries of the Republic"? - art. 59 (5).

4. It seems that it would be sufficient if the State guarantees the equal protection of different forms of property. It is not necessary for the State to guarantee the diversity of property - art. 4 (3).

5. Art. 7 (2) seems to be misleading. It is difficult to interpret this provision which speaking upon the State powers does not mention the President whose competence goes far beyond the representative functions. Should the President not be identified as the element of the Executive? The fact that he is Head of the State does not reduce his role as the Head of the Executive which results from the subsequent regulations.

6. One can, certainly, understand a particular, historical, sensitivity of the drafters towards the role of political parties. But, to say that political parties may "participate in the life of the State only in the forms provided by the Constitution" (art. 8/3/) is definitely to restrictive and contradicts the principle: "everything is allowed what is not prohibited by law". Moreover, the Constitution itself refers exclusively to the right of the parties to nominate the candidates for the elections. The activities of the parties not related directly to the appointment of candidates have not been mentioned at all.

7. Art. 10 dealing with the state of emergency and martial law does not contain any provisions concerning the influence of the imposition of such a state on the rights and freedoms of the individual. Proper guarantees in this regard would be recommended. A clear provision concerning the prolongation of the term of the representative organs seems also to be more preferable than the indirect language that the elections cannot be held under such circumstances.

8. Not having the sufficient knowledge on the traditional solutions it is difficult to make final evaluation on the relationship between art. 11(1) and art. 11(3-5). One can consider which role should play the "purposive financial funds" and if it is not better to have all the incomes and expenditures of the State included into the State budget.

9. It is to be underlined that the Russian text in the case of art. 12 speaks about the direct application of international law in the domestic legal order what does not result necessarily from the English version.

III. CITIZENSHIP, RIGHTS AND FREEDOMS OF AN INDIVIDUAL AND OF CITIZENS

chapter II

1. Art. 13 second sentence (citizen`s duties) suits better the chapter concerning rights and duties of the citizens.

2. Art. 14 para 2 - one can find the dependence of the rights of aliens jointly on "terms and procedure provided by Law, international treaties and agreements" a little misleading. Perhaps it would be better to proclaim the rights and freedoms of aliens in accordance with the international human rights standards, or/and to say that the aliens enjoy, in accordance with international law, the same rights as citizens with the exceptions established by law (e.g. in regard to political rights).

3. Despite the non-discrimination clause (art. 15 /3/) and art. 5 (2) concerning the instruction of languages the Constitution does not establish the protection of minorities. Additionally, the language of the art. 15 (5) seems to be rather restrictive. This seems to be an important deficiency of the Constitution.

4. In connection with point 3 - one can wonder whether the differentiation between "Kyrghyz and citizens of all nationalities in the Republic" (art. 16) in this particular context is particularly well founded. Perhaps - in order to avoid possible misunderstandings - it would be better to speak about simply all citizens or the whole population.

5. Taking into account the particular place of the Universal Declaration on Human Rights (1948) it would be advisable to refer in art. 17 (1) *expressis verbis* to this act.

6. The formulation of the list of rights and freedoms in art. 17 (2) is very vague. It is difficult to speak about a regulation of constitutional rights in that case. It is rather a list of them. This formula might give the rise for concern particularly if taking into account the very general content of art. 17 (3) which deals with the limits of rights and freedoms and leaves a large leeway-way to the state authorities. Both regulations

could require more specific regulation. Moreover, the general limits of rights are subject to regulation also by art. 18 (2). In the light of this provision it would be probably possible to drop the last sentence of the art. 17 (2).

7. One can wonder if the integration of the regulation of the guarantees of the right to property would not contribute to the clarity of the regulation. Now, art. 4, art. 17 (2) and art. 20 deal with this right. Should not the Constitution itself speak about the possibility of expropriation and right to compensation in this case?

8. Both Russian and English version contain the rather unfortunate formulation of art. 21: "grant political asylum [...] in case of human rights violation".

9. The Section 3 is entitled "The Rights and Freedoms of a citizen". The title does not mention citizen's duties laid down in this section. One can have problems with the interpretation of this regulation for the following reasons:
- a number of the rights mentioned in this section do constitute human rights and not only citizen`s rights; their limitation only to citizens seems to be deprived of justification (see e.g. art. 39 - 40, but not solely these provisions),
- some rights which can be limited principally to citizens should be granted also to aliens-residents in the country (some of the mentioned social rights),
- generally: should not the Section 2 and 3 be merged?

10. The provisions of the 3 Section constitute a mixture of subjective rights, objectives of the State policy and moral principles (e.g. art. 27/2/). One can doubt if care should not be taken in order to separate provisions of different kind. In any case, however, the Constitution should avoid the situation in which the form of subjective rights is given to provisions containing the description of the principles or objectives of the State policy. Otherwise the Constitution might promise to much.

11. If the partition between Section 2 and 3 should be maintained the provisions concerning the legal protection (art. 39-42) should be laid down in the Section 2. They must define the position of an individual and not only of the citizen.

IV. STATE`S POWERS

chapters III - VI

1. General remarks

1. The form of Government assumes a strong presidency which consequently influences the competencies and functions of other powers and organs.

2. A certain inconsistency seems to exist as far as the law-making competency is concerned. Despite the laws issued by the Parliament both the President (art. 49) and the Government (art. 76) are entitled to enact binding norms. Unfortunately, the

Constitution does not determine the substantive scope of this competence nor the rank of the rules enacted by the President and the Government. Perhaps, these doubts arise because of the rather fragmentaric regulation. If so, it would be required to introduce some necessary supplements into the existing provisions.

3. It seems that the competencies of the President and of the Parliament might be formulated in a more consolidated form. On the other hand, the competencies of the Government and its position are regulated in a very general form if compared with the President and the Parliament.

2. The President

1. The quorum necessary for the election of the President -1/2 of all the electors of the Republic (art. 45/2/3) seems to be a very high requirement and under circumstances can prevent the election of the President. It would be advisable to reduce this requirement at least in the second ballot.

2. It seems that if all the terms mentioned in art. 45 and art. 46 will be kept and particularly if the President will be elected in the first ballot an overlapping of the term of the former President and the beginning of the term of the newly elected President is probable.

3. There is a certain inconsistency between art. 47 (4) point 4 and 5. On the one hand the President conducts international negotiations, signs international treaties and submit them to the Parliament for ratification. On the other he can protest to the Supreme Court the international treaty ratified by the Parliament. Should it mean that after the submission to the Parliament for ratification the treaty might be changed by the Parliament which in order to do it needs additional negotiations with the party/ies to the treaty?

4. Which are the reasons of art. 50? It is difficult to evaluate this solution without this explanation.

5. Art. 51 (2) deals (most probably) with the first elected President under the Constitution to be adopted. If so, it would be necessary to spell it clearly out and perhaps to shift this rule to the final provisions.

6. It seems that some details of the impeachment procedure (art. 54) should be established by the Constitution itself. Involvement of the Court would also be required in the case referred to by art. 53(2).

3. The Uluk Kenesh

1. In art. 57 (3) The sentence "Provisional Commissions shall examine the validity of measures [...] " seems to be unclear.

2. The rule of art. 57 (4) is very restrictive. Why a e.g. teacher or professor, businessman or farmer should not be entitled to hold the post of a deputy?

3. Art. 61 (2 and 3) might be regulated in the parliamentary rules of procedure.

4. The regulation of the referendum should be, perhaps, regulated in a more precise way (art. 70). Taking into account the place of the regulation one can expect the referendum to execute law-making functions. Considering the art. 47 (5) by virtue of which the President might dissolve the Parliament in result of referendum one can assume that the referendum might deal with both legislative and organizational matters. If so or if this interpretation is wrong the Constitution itself should contain a more exhaustive regulation of this crucial question.

4. The administration of justice

1. Art. 82 (right to defence) should necessariiy speak about the individuals generally instead of citizens.

2. Art. 84 (2) in the present form and content remains in a certain contradiction with the art. 80 (6) - the establishment of generally understood precedence.

3. An original solution contains the Constitution concerning the Constitutional Chamber of the Supreme Court. One can wonder if the special set of competencies as well as a particular way of election of the members of this chamber does not, finally, speaks in favour of a separate Constitutional Court. Under the present conditions the overlapping of functions between the various bodies of the Supreme Court which in fact do possess different character seems to be unavoidable. That is why the proposal of the division of the constitutional court and Supreme Court attracts our attention. The establishment of the constitutional complaint and control of norms (art. 89) by the Constitutional Chamber requires a little more precise regulation.

4. There is no clear reference to the administrative courts. Should the control over the legality of the acts of administration be executed by the ordinary courts?

5. Unlike in many other countries, the Constitution does not establish the institution of ombudsman. It would be advisably to reconsider this question.

Geneva. February 1993

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2 mars 1993 (rév.)

Observations concernant la situation juridique de l'individu en général et les droits et libertés de l'individu et du citoyen en particulier dans le Projet de Constitution de la République de Kyrghyzstan (Bishkek 1993)

I. Introduction

1. Le Parlement de la République de Kyrghyzstan a adopté un texte de Projet de Constitution au mois de décembre 1992 (ci-après le "Projet") et l'a soumis au débat public. Invité à prendre part à cette discussion et venant d'un pays lointain, européen, occidental, je me suis approché avec beaucoup d'hésitations et, en même temps, avec un intérêt particulier à la tâche de présenter quelques observations concernant une partie du Projet. Finalement, j'ai essayé, avec une très grande admiration, d'apprendre autant que possible de la Kirghizie, de son histoire et ses longues traditions, de sa culture, de sa situation et mission de relais entre de différents peuples, de sa tolérance, des beautés du pays, de son ascèse matérielle actuelle.

La Charte de Paris du 21 XI 1990 de la Conférence sur la sécurité et la coopération en Europe (CSCE), à laquelle adhère le Kyrghyzstan, parle dans sa première partie de l'engagement à édifier, consolider et raffermir la démocratie comme seul système de gouvernement: que le gouvernement démocratique repose sur la volonté du peuple, exprimée à intervalles réguliers par des élections libres - que la démocratie est fondée sur le respect de la personne humaine et que les droits de l'homme et les libertés fondamentales sont inhérents à tous les êtres humains, inaliénables et garantis par la loi - que la démocratie est fondée sur l'Etat de droit et que les pouvoirs publics se conforment à la loi (nul n'est au-dessus de la loi) et à l'exercice impartial de la justice - que la démocratie est le meilleur garant de la tolérance envers les groupes de la société et de l'égalité des chances pour chacun - que l'identité ethnique, culturelle, linguistique et religieuse des minorités nationales sera protégée - que chacun jouisse de recours effectifs contre toute violation de ses droits.

Face à un choix entre un Etat qui tend vers l'absolutisme et un Etat qui respecte, défend, protège la personne humaine (et les cellules naturelles de famille etc.), la soutient et encourage dans son épanouissement, le Projet a opté pour la seconde forme - comme elle est p.ex. reflétée dans la Charte de Paris mentionnée -, mais accorde aussi au Président une grande autorité. Déjà les premiers paragraphes (par. ou §) et articles (art.) du Projet marquent la mesure. Les Etats européens occidentaux, par exemple, ont mis des siècles de tragédies pour dégager la société civile de l'Etat absolu (alinéa 5 du préambule, art. 1 § 1, aussi art. 8 §§ 1 et 2 du Projet), ou de reconnaître à la personne la liberté de conscience (ce sanctuaire de l'être humain et de responsabilité dont parle le grand philosophe romain Sénèque) etc. (voir art. 17 du Projet). D'autre part il est mis du poids sur la souveraineté non limitée de l'Etat unitaire (art. 1 §§ 1-2). Visant l'ensemble du Peuple dont le premier alinéa du préambule fait mention, étant guidé par les préceptes des ancêtres "to live in unity, peace, concord", des mots pleins de signification, on peut se demander si le terme de "tolerance" que je crois pouvoir déceler particulièrement de la tradition du Kyrghyzstan ne pourrait s'y ajouter: "to live in unity, peace, concord, tolerance" (voir aussi Charte de Paris).

Si les remarques suivantes soulèvent un nombre de questions - dont quelques-unes sont, certes, dues à la traduction anglaise du Projet et ne se posent pas dans la version originale de langue kyrghyzse - ceci se fait dans une sorte de dialogue et dans le désir de clarifier certains points - tout vu par les yeux d'un constitutionnaliste occidental.

II. Considérations sur la situation juridique de l'individu en général (démocratie, Etat de droit, effets du droit international public dans l'ordre juridique interne, Etat d'exception)

Démocratie

2. D'après l'art. 1 du Projet, la souveraineté non limitée de la République réside dans le peuple qui est la seule source de tout pouvoir de l'Etat. Le pouvoir est exercé, sur base de la Constitu-

tion et des lois, directement par le peuple et par les organes de l'Etat.

Le transfert du pouvoir du peuple aux autres organes de l'Etat s'effectue par le biais d'élections démocratiques, périodiques, au suffrage universel, secret, direct et égal (art. 1 § 6; 45 §§ 2-3; 56). Le peuple possède un droit d'initiative relative à des dispositions légales (art. 66) ou constitutionnelles (art. 102 § 1) et de referendum législatif (art. 70), et il décide éventuellement sur d'autres "issues of State life" (art. 1 § 5; 47 § 5 point 2; 59 alinéa 1 point 23).

Quelques aspects de l'Etat de droit

3. La Constitution est la loi suprême (art. 12 §§ 1-2; 89 § 1 point 2; 90). Le pouvoir est exercé sur la base de la Constitution et des lois (art. 1 § 4). Se laisse-t-il en déduire que tout acte du pouvoir public présuppose l'existence d'une base légale ou d'une autre norme constitutionnellement admise ou d'une disposition constitutionnelle directement applicable (réserve de la loi) et est subordonné à la loi (primauté de la loi)? Une telle garantie, connue comme principe de la légalité, serait un élément de premier ordre de l'Etat de droit, guidant toute activité du pouvoir public et protégeant l'individu contre toute autre ingérence (illégale ou sans base légale) de la part de l'Etat.

Le principe de la légalité garantit non seulement la légitimité démocratique (législation par le législateur démocratiquement élu), mais aussi l'égalité des individus devant la loi, et empêche tout acte (ingérences et prestations) qui ne repose pas sur la loi - et ceci non seulement quant aux droits et libertés de l'homme, mais aussi dans le domaine de toute la vie publique et de la société. L'exemple le plus significatif et ancien du principe de la légalité concerne le secteur pénal et en est la règle de "nulla poena sine lege" qui ne se trouve pas suffisamment explicitée dans le Projet.

La publication d'une loi (ou autre norme) devrait être une précondition de la validité, et non seulement de l'entrée en vigueur (art. 69) de la loi. La publication de la loi est une des préconditions de sa validité, de son entrée en vigueur et, finalement, de son applicabilité et de son application, ceci

nullement seul dans le domaine concernant les individus et citoyens, mais aussi (contrairement à l'art. 42) concernant tout autre destinataire (pouvoirs publics, leur organisation et procédures etc.).

Le contrôle des normes par la Chambre constitutionnelle de la Cour suprême assure et fait exécuter l'ordre hiérarchique des normes, la Constitution en étant la loi suprême (Art. 89 § 1 point 2; 90). Vu sous cet angle, la phraséologie usée dans les arts. 43 § 2 et 46 § 3, conférant au Président de la République la tâche de "garantir" (non seulement de "respecter") la Constitution et les droits et libertés des citoyens peut prêter à de malentendus..

4. Le pouvoir public est subdivisé en pouvoirs législatif, exécutif et judiciaire et, dans la dimension verticale, en Etat central ("unitary", art. 1 § 1) et pouvoirs locaux (voir art. 7 du Projet).

La séparation des pouvoirs est la condition institutionnelle de la modération de l'Etat, afin "que le pouvoir arrête le pouvoir" (Montesquieu, De l'esprit des lois). Sous cet angle l'art. 59 dernier alinéa du Projet se présente, si je le lis correctement, comme une échappatoire de l'ordre constitutionnel et permet d'absorber tous pouvoirs et de les concentrer dans les mains du Parlement. Ainsi la réinstallation de l'Etat absolu devient constitutionnellement possible. L'art. 59 dernier alinéa renferme un risque permanent pour l'Etat de droit et démocratique et, finalement, pour l'individu et le citoyen.

Afin de faire respecter la paix constitutionnelle il est conseillé de confier explicitement à la Chambre constitutionnelle de la Cour suprême la compétence de décider en cas de conflits de compétence entre les différents pouvoirs. Il semble que l'art. 89 § 1 point 1 contient implicitement une telle compétence, mais il est essentiel d'être clair sur cette question de grande portée (quel est, dans ce contexte, le sens de l'art. 43 § 2 in fine?).

Au Président, au Gouvernement et aux Ministères etc. sont attribuées, directement par la Constitution, des compétences législatives (art. 49, 76, 77 § 2) qui ne se distinguent pas toujours facilement de celles du Uluk Kenesh.

5. Un élément indispensable de l'Etat de droit est l'indépendance du pouvoir judiciaire vis-à-vis des autres pouvoirs (art. 80), son

impartialité et l'inamovibilité des juges (art. 47 § 2 point 6; 59 alinéa 1 point 24; 80 §§ 4-5; 89 § 1 point 6; 92).

L'indépendance du pouvoir judiciaire est une chose, sa compétence de juger sur toute affaire civile, pénale ou administrative en est une autre. Le droit d'accès à un tribunal de l'individu représente le "couronnement" de l'Etat de droit. Sans la protection judiciaire, devant un juge indépendant et impartial, dans une procédure équitable et en règle publique qui se termine, dans un délai raisonnable, par une décision motivée et publiée, le simple "droit" n'est pas effectif - comme l'exprime la règle juridique latine: "Ubi ius, ibi remedium", ou anglaise: "No right without remedy". Ceci est essentiel, non seulement pour les droits de caractère civil et des litiges entre particuliers, mais surtout dans le domaine pénal et administratif où le particulier concerné se trouve en face de l'Etat comme partie adverse.

Sur ce point je renvoie aux art. 86, 95 et 96 du Projet. Il y a des tribunaux pour les affaires civiles et pénales et des tribunaux pour des affaires économiques, de travail et sociales. Il n'existe pas de protection judiciaire générale dans le secteur administratif où l'exécutif jouit d'un pouvoir énorme - sous réserve de la protection judiciaire prévue en cas de violation (aussi de la part des autorités administratives) d'un droit ou d'une liberté constitutionnel. Cependant, ce dernier droit à la protection judiciaire est réservé aux citoyens du Kyrghyzstan (art. 89 § 1 point 3). Une question finale dans ce contexte: Est-il exacte que le citoyen qui ne trouve pas de tribunal inférieur dans le domaine de droit administratif et qui prétend d'être victime d'une violation de ses droits et libertés constitutionnels doit s'adresser directement à la Chambre constitutionnelle de la Cour suprême en vertu de l'art. 89 § 1 point 3?

6. Un descendant du droit à l'égalité et à la non-discrimination, ennemies à l'arbitraire à l'excès et au détournement du pouvoir, est le principe de la proportionnalité. La loi abstraite et générale est fréquemment un instrument trop grossier pour guider le pouvoir public en cas d'ingérence dans les droits et libertés des particuliers. Il faut que l'application concrète de la loi soit accompagnée et conduite par le principe de la proportionnalité qui, elle-même, restreint l'ingérence au nécessaire. Pour les pouvoirs exécutif et judiciaire le principe comprend des éléments de caractère normatif et d'appréciation de fait. L'ingérence dans un droit ou dans une liberté doit être légale, dans son moyen, ainsi

que dans son objet et but. Sur le plan de considérations de fait, le moyen choisi de l'ingérence doit être apte à atteindre le but visé et doit être, parmi les moyens aptes, le moyen le plus atténué. En d'autres termes: le moyen légal doit être "proportionné" au but légal visé. Aussi, dans l'ordre purement normatif de la législation, le principe de la proportionnalité doit être un principe directeur pour le législateur simple, afin qu'une loi (admise par la Constitution en principe pour de certains buts) ne restreigne pas arbitrairement ou excessivement, mais seulement dans la mesure du nécessaire un droit ou une liberté constitutionnel. La disposition de l'article 18 § 2 répond en bonne partie, mais non pas suffisamment à cette dernière exigence. Il faut donner au principe de la proportionnalité qui guide tous les pouvoirs, y-inclus le législateur, dans tous les domaines le rang de norme constitutionnelle. Le principe devrait figurer dans une constitution moderne. Dans des anciennes constitutions, où le principe n'est pas explicitement retenu, il fait régulièrement part d'une jurisprudence bien établie, p.ex. dans les pays du Conseil de l'Europe.

7. En règle générale, la loi prévoit qu'en cas de litige entre particuliers un dommage provoqué par l'un d'eux doit être réparé par celui-ci. Qu'en est-il en cas de préjudices causés par l'Etat? Souvent un préjudice porté à quelqu'un ne se laisse pas réparer par un jugement favorable ou une constatation finale de violation de droit. En cas de dommage matériel ou moral causé sans droit par l'autorité publique et non réparable autrement l'Etat de droit devrait accorder une satisfaction équitable - ceci non seulement dans le cas de l'art. 19 § 3 du Projet.

Effets du droit international public dans l'ordre juridique interne

8. Le respect du droit international public (art. 9 § 4) et son incorporation, par le biais de la ratification (art. 12 § 3 et 17 § 1; aussi art. 14 § 2 et 17 § 2 dernier alinéa et 18 § 2), renforcent l'Etat de droit et les droits et libertés constitutionnels. Une question relative au rang du droit international en matière de droit de l'homme et de libertés fondamentales, incorporé dans l'ordre interne par une ratification d'un traité (art. 12 § 3 combiné avec l'art. 17 § 1), se pose: Est-ce que les normes de tels traités jouissent du rang de normes constitutionnelles qui lient aussi le législateur simple, et, dans

l'affirmative, est-ce que de telles normes s'ajouent à la Constitution et élargissent la protection judiciaire constitutionnelle, prévue à l'art. 89 § 1 points 1-3?

Etat d'exception

9. L'état d'exception (et ses conditions) est réglé dans les art. 10, 47 §§ 6-7, 59 alinéa 1 points 15, 19 et 20 et art. 68 § 3. Est-il correct de conclure que l'ordre constitutionnel et aucun des droits et libertés constitutionnels ne subissent de restrictions en cas d'état d'exception? Est-ce réaliste? S'il y a des doutes sur cette question il est recommandable de connaître non seulement les organes, ayant la compétence à décider, et les procédures à suivre, mais aussi le noyau dur des droits et libertés constitutionnels à respecter même en cas d'état d'exception.

III. Observations concernant les droits et libertés de l'individu et des citoyens (sections 2 et 3 du Projet)

Droits et libertés de l'individu d'une part et du citoyen de l'autre part

10. Evidemment, l'aspect quantitatif du nombre des articles concernant l'individu (art. 15 - 21, 42, 82 §§ 2-3, 83) et des articles concernant le citoyen (art. 22 - 41, 82 § 1 et 89 § 1 point 3) ne doit pas jouer un rôle. Le gros des droits et libertés se trouve concentré à l'art. 17 qui est relatif à tous les individus. Aussi faut-il prendre en considération que l'art. 14 § 2 étend les droits et libertés des citoyens sur la base et selon la loi et les accords et traités internationaux à tous les individus; cependant, de tels droits et libertés (art. 14 § 2) sont subordonnés à la volonté du législateur simple et ne sont, par conséquent, pas de véritables droits constitutionnels, ou sont, plus précisément, des droits constitutionnels conditionnés par l'absence de législation simple ou de conclusion de traités.

11. La Constitution appelle à une application directe (art. 12 § 1), en particulier dans les domaines des droits et libertés constitutionnels (art. 12 § 1 combiné avec l'art. 15 § 4). Mais les droits et libertés sont en même temps libellés d'une façon très condensée et vague (voir p.ex. l'art. 17). Ceci est d'autant plus surprenant que la partie relative à l'organisation de l'Etat (art. 43 ss) use une phraséologie très détaillée, même minutieuse.

Pour une constitution moderne qui ne profite pas d'une longue jurisprudence (comme p.ex. celle des Etats-Unis) il est essentiel pour l'individu et le citoyen, afin qu'ils puissent, surtout dans la sphère des droits et libertés constitutionnels, orienter et déterminer leur conduite d'après les dispositions de la Constitution. Ceci est également important pour le juge, afin qu'il ne devienne pas, par le biais de l'application (interprétation) de la Constitution, le quasi-législateur constitutionnel. Finalement, il est décisif pour l'exécutif, mais aussi pour le législateur simple, de réduire le champ de diverses interprétations et de controverses autant que possible. Une comparaison du libellé serré de l'art. 17 avec des normes internationales correspondantes, p.ex. celles du Pacte international relatif aux droits civils et politiques (1966) ou de la Convention européene de sauvegarde des Droits de l'Homme et des Libertés fondamentales (1950), le démontre. Une phraséologie plus explicite, précise et claire est souhaitable.

12. A la verité, il faut prendre en considération les dispositions constitutionnelles qui renvoient aux traités internationaux ayant trait aux droits de l'homme (Art. 17 § 1 avec l'article 12 § 3, art. 17 § 2 dernier alinéa et 18 § 2). De tels traités et normes peuvent, évidemment, combler d'éventuelles lacunes constitutionnelles. Mais tel ne serait pas la meilleure forme. Souvent il n'est pas facile, ni pour l'individu, ni même pour le juge, de connaître les normes respectives de traités. Si l'individu ou le citoyen prend en main la Constitution, il doit, en particulier en matière de ses droits et libertés, dans la mesure du possible y trouver énoncés les textes élémentaires afin de pouvoir orienter et régler sa conduite.

13. Ce qui complique la tâche de déceler les véritables droits subjectifs de l'individu et du citoyen, directement applicables par les tribunaux et exécutoires, est le fait que le texte des sections 2 et 3 du Projet use, sur la même échelle, le terme "droit" aussi pour une catégorie de droits sociaux ou autres qui sont dif-

ficilement à appliquer par le juge (voir p.ex. les art. 30, 34, 35, 36) et dépendent grandement des fonds publics de l'Etat. Si le juge applique directement de telles normes dans un cas concret (ce qui vaut pour tous les cas pareils), le juge se substitue au législateur et dispose des fonds de l'Etat. Par contre, si dans les sections 2 et 3 se trouvent réunis des "droits" qui ne sont pas de véritables droits, cela affaiblit le poids, le contenu, les contours et la qualité de tous les droits. Il serait souhaitable de séparer les droits subjectifs et directement applicables et exécutoires des obligations, certes, très importantes de l'Etat envers les individus et citoyens.

14.. **Quelques remarques spécifiques concernant le catalogue des droits et libertés des sections 2 et 3 du Projet (abstraction faite du renvoi au droit international)**

- Art. 15: Il est très précieux de mentionner le droit à la dignité de la personne humaine (§ 1). - Le mot "absolute" (§§ 1-2) peut prêter à des malentendus. Surtout, quand il s'agit de libertés de l'individu, celles-ci peuvent se heurter à celles du voisin (comme indiqué en l'art. 13 § 1 pour les citoyens). - Le terme "basic" (§ 2) n'est pas clair. Quels droits et libertés (voir titre de la section 2) sont "basic"? - Les droits et libertés appartiennent à la personne "from birth" (§ 2). Selon les instruments internationaux il convient d'user le terme (inherent), qui laisse, au moins, ouverte la question de l'existence de droits avant la date de la naissance. - Le membre de phrase "are equal before law and court" (§ 3) devrait être complété par les mots "and other state bodies (organs)". - L'insertion du mot "direct" (au § 4: "shall have direct force") serait souhaitable. - Au même par. (§ 4) se trouvent les mots "and shall be provided by justice". Est-ce que c'est une obligation de créer des tribunaux? Dans le secteur de droit administratif il manquent des tribunaux en général, et devant la Chambre constitutionnelle de la Cour suprême sont admises seulement des requêtes de citoyens (voir observations supra II 5 alinéa 3).

- Art. 17 ss: voir observations relatives à l'art. 17 supra III 11 et 12.

- Le droit à la vie (art. 17 § 2 premier tiret et art. 19), étant le droit le plus fondamental, mérite d'être énoncé plus strictement et d'exiger aussi "la protection par la loi". Il est essentiel que

le droit à la vie protège l'individu vis-à-vis des ingérences de la part le l'Etat, mais aussi que l'Etat soit obligé à protéger la vie par la loi à l'envers des ingérences des autes individus. Est-il correct que la peine de mort est abolie, étant donné, que les art. 18 § 2 et 19 § 1 usent les termes de "limitations" et non pas de "suppression" et, étant donné, que l'art. 18 § 1 interdit l'abolition ("abolish") d'un droit?

- La torture est interdite (art. 17 § 2 premier tiret, et art. 19 § 1 [se trouvant dans la traduction française]). Le mot "vexations" résulte possiblement de la traduction. Il est conseillé de se tenir à la terminologie des instruments internationaux: "Nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants."

- Est-ce que la disposition concernant des expériences médicales etc. (art. 19 § 2), prise isolément, ne renferme-t-elle pas des risques de différentes interprétations?

- L'esclavage, la servitude et le travail forcé ne figure pas expressément dans le catalogue.

- Il manque une énumération précise et detaillée de tous les cas et circonstances, où une privation de la liberté (voir art. 17 § 2 et 19) est admise, et un énoncé de toutes les procédures de protection devant le juge. Voir p.ex. l'art. 5 de la Convention européenne des Droits de l'Homme.

- La règle de "nulla poena sine lege" ne se trouve pas explicitement dans le Projet. La phraséologie usée à l'art. 19 § 3 n'est pas précise sur ce point.

- L'art. 4 § 2 permet l'attribution de parcelles de propriété foncière aux citoyens. Les articles 17 § 2 et 20 règlent le droit à la propriété privée pour tous les individus (non seulement pour citoyens: art. 4 § 4). Il manque le droit à compensation en cas d'expropriation.

- Le droit de grève est prévu pour les citoyens (art. 31).

- Le droit de mariage?

- Dans un Etat unitaire une protection spéciale pour les minorités peut être un bien précieux.

- Outre les droits et libertés substantiels, un droit de première classe est celui de l'accès à un tribunal indépendant et impartial etc. pour tout droit (non seulement les droits constitutionnels) et la garantie de justice et d'équité procédurale. Voir observations supra II 5. Les dispositions énoncées à travers le Projet n'offrent pas de droits suffisamment précis et complets (p.ex. art. 19 § 3; 39 [pour citoyens]; 82 [en partie pour citoyens]; 83). La présomption de l'innocence est réglée différemment pour les individus en général (art. 19 § 3) et les citoyens (art. 40).

- L'art. 18 permet de restreindre (§ 2) les droits et libertés et n'ont pas de les abolir (§ 1 arg. e contrario). Pour guider le législateur, les autres pouvoirs et l'individu, il est recommandable d'énumérer d'une façon explicite les droits devant résister à toute ingérence (p.ex. l'interdiction de la torture). Pour les autres droits et libertés le modèle allemand garantissant l'essence du droit contre toute restriction (Wesensgehaltsgarantie) mérite l'attention. - Concernant un autre aspect de l'art. 18, il est souhaitable de biffer les mots "be published which" au § 1.

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DRAFT CONSTITUTION OF THE KYRGHYZ REPUBLIC

(of February 1993)
Observations by Mr Giorgio Malinverni (Switzerland)

Art. 2:

In article 2, it would be better to specify that Power in the State cannot be taken by force or by illegal or illicit means. The text would be clearer and would better take into account the real signification of this article.

Art. 8:

Paragraph 5 appears to infringe the freedom of association of a considerable portion of the population. The persons concerned by this article also have the right to hold political views and to belong to political parties. In western countries, the theory of inherent limitations is in the process of disappearing.

Art. 10:

At the end of paragraph 1, it is difficult to imagine which motives other than those already mentioned could justify a state of emergency. If there should be any others, then they ought to be defined here and not by referring to other articles in the Constitution, for reasons of style.

Art. 12: para 3:

Only treaties can be ratified, and not other norms of International Law. This paragraph should therefore be drafted differently. It would also be appropriate to indicate here what ranking international treaties hold within the hierarchy of normative acts and also to underline the fact that they are superior to any conflicting internal legislation.

Art. 13: para 2:

This provision is hard to justify. The phenomenon of double nationality cannot be ignored and is becoming more and more wide-spread.

Art. 14: para 1:

It would be appropriate to indicate here that the rights and duties mentioned are provided for by this Constitution.

Para 2:

Foreigners and stateless persons cannot enjoy the same rights as nationals. In particular, they do not have the right to vote and to take part in elections. Furthermore, this paragraph appears to be in contradiction with articles 29 et seq., which reserve human rights for citizens of the Republic and would therefore seem to exclude foreigners and stateless persons from exercising these rights.

Art 15: para 3:

It would be advisable to specify that all persons are equal not only before law but also in law, in other words clearly stating that the principle of equality not only binds the authorities who apply the law but also those who legislate.

Para 5:

This provision does not really seem appropriate to a catalogue of rights and freedoms.

Art. 17: para 2:

The list of fundamental rights enumerated by this provision is too summary. It would be preferable to devote a special article to each right and to detail fully its substance.

- For example, the granting of a right to life does not deal with such basic questions as:

the death penalty, abortion, euthanasia.

These points should be settled at constitutional level (see, for example, art. 2 of the European Convention on Human Rights).

- The guarantee of personal freedom and security does not mention the conditions and the grounds which could justify limiting this freedom. In this case too the draft could draw inspiration from art. 5, para 1 ECHR.

Art. 18: para 2:

This provision which is derived from paragraph 2 of articles 8 to 11 ECHR, is it not too general ? Is it sufficiently precise in order to be applied to all freedoms ? Does it take into account the particular nature of each freedom ?

Art. 19: para 1:

There may be other cases, other than the one mentioned here, which necessitate the limitation of personal freedom. For example, cases such as protective custody, confinement of the mentally sick and of those suffering from infections diseases, alcoholism, etc., should perhaps be considered.

Art. 20: para 2:

It would perhaps be preferable to provide that an expropriation order could also be issued by an administrative authority but that there would be a legal remedy before a court of law.

- It must be stipulated that expropriation can only be ordered on grounds of national interest (the construction of a road, a school, etc.)

- It must also be established that any form of expropriation should - at least in principle - give rise to compensation.

- Compensation should be allocated not only in the event of strict expropriation but also in the case where a serious limitation is imposed upon property.

Art. 24-26:

A question of style. These articles detail the duties which are referred to by article 14. It would therefore be preferable to link all these provisions, for instance, by placing article 14 immediately before article 24.

Art. 29 et seq.:

All the rights which are provided for in these articles are human rights, which should be accorded to everyone and not only to citizens. It would therefore be more appropriate to replace the word "citizen" by the word "person".

Art. 47: para 1: ch. 1:

Does the word "structure" refer to the composition?

Para 2: ch. 6:

Does it not seem excessive to vest so much power in the President so that he may "remove" the authorities and official persons established by this provision? Would it not be better to stipulate that he can only do this with the consent of other bodies, such as courts of law, etc. ?

Para 4: ch. 5:

If it is desirable to vest in the President the right to contest an international treaty before the Supreme Court, he should be able to do so before the treaty has been ratified and not afterwards. This could be established by granting him "treaty making power" which would permit him not to ratify a treaty which had been accepted by Parliament (see art. 59, ch. 15: this power should be devolved to the President).

Para 4: ch. 6:

This provision vests in the President powers which could appear to be excessive and which generally fall within the jurisdiction of the Constitution Court.

Art. 59:

Are there not too many details regarding the powers of the Parliament?

For example, ch. 16. Since the power to make laws has been vested in the Parliament, then these laws may concern very diverse domains. Is it therefore necessary to mention them in the Constitution ?

Art. 64:

A rather strange provision. The Parliament can declare its own dissolution. On what grounds? This provision does not state, in enough detail, the type of referendum which could lead to the dissolution of Parliament.

Art. 70:

The number of 300,000 electors required in order to propose a referendum is high when one considers that the total population of the country is estimated at approximately 5 million inhabitants.

- The article does not stipulate whether the referendum is legislative only or if it is also constitutional.

- It does not stipulate either whether the referendum will have suspensive or abrogative power.

It is necessary at least to make a reference to the relevant legislation.

Art. 76:

This provision raises an important problem concerning respect for the principle of the separation of powers.

The decrees and ordinances which can be adopted by the Government are legislative acts (in the material sense) and it would therefore be advisable to state whether the Government can adopt them independently of any other authority or only if a delegation of legislative power has been accorded by an act of Parliament.

Art. 77:

It is not stipulated whether the Government can be overthrown by a motion of censure instigated by Parliament. Is this anticipated ?

Art. 80:

The chapter on fundamental rights does not grant the right to a fair trial. Would it not be advisable to mention this right here?

Para 3:

Judges cannot be elected and appointed. It would therefore be better to replace the word "and" by "or" and define those who are elected and those who are appointed. Not only the independence of the judges should be guaranteed by the Constitution and by Law but also their impartiality.

Para 4:

The words "as well as" should be omitted. In reality, a court of law can only relieve a judge of his office on the grounds mentioned in this paragraph and not for other motives.

Para 6:

It might be appropriate to state that there are no special courts but, if necessary, to institute separate courts of law such as juvenile courts, military tribunals, etc.

Art. 82:

The rights of the defence should be defined more precisely, for example as in art. 6, para 3 ECHR.

- This article, which grants fundamental rights, should be placed in the relevant chapter and not here.

Art. 85:

It is not established whether the Procurator-General is attached to the judiciary or to the administrative authority.

Art. 86: para 1:

It might be helpful to specify the number of judges who compose the Supreme Court, as does art. 87, para 4 concerning the Constitutional Chamber.

- The verb "supervise" is not very suitable. The Supreme Court does not strictly speaking control the activities of the lower courts. It is generally considered to be the authority of appeal against decisions pronounced by the lower courts.

Para 2:

Would it not be advisable to establish, in addition, a chamber or a division of the Supreme Court which would be competent in dealing with affairs concerning administrative law (construction law, town and country planning, expropriation, etc.) ?

Art. 87:

It is contradictory to impose retirement at 65 years' old when it is possible to be elected up to the age of 70. The age limit for being elected should be 60.

Art. 89: para 2:

Can the Constitutional Chamber only invalidate laws and other normative legal acts or can it also invalidate decisions ?

Art. 91:

The same observation as before concerning the adjective "supervisory".

Art. 92:

There are several articles concerning the Constitutional Chamber but the Constitution does not mention anything about the powers and the competence of the other divisions of the Supreme Court. It would be advisable at least to establish that legislation will deal with these matters.

Art. 93:

This article does not state whether or not, after 10 years, judges will be eligible for reelection.

Art. 98:

Is it appropriate to state in the Constitution the number of subdivisions which comprise the country?

- Do these lower entities have a local parliament?

Art. 102:

The text submitted to the Constitutional Chamber for examination should not be the proposal made by the authorities mentioned in the first paragraph, but the text adopted by the Parliament after debate and after any possible modifications which may have been made to the original proposal. In short, it must be the final text decided upon by the Parliament.

Comments on the Draft Constitution of the Kyrghyz Republic

Ergun ÖZBUDUN

System of government: legislative-executive relations:

The draft Kyrghyz Constitution has adopted a strong version of French type semi-presidentialism which combines a popularly elected President of the Republic with significant constitutional powers with a government responsible to the legislature.

The President is elected by a majority of votes cast. If such majority is not obtained on the first ballot, a second ballot will be held between the two highest vote getters. Both the first and the second ballots will be considered valid only if more than fifty percent of all electors have taken part in it (Art.45). The draft constitution is silent on the question of what will happen if turnout does not reach fifty percent. Presumably, such requirement may be dropped for the second ballot.

As for the powers of the President, it is not clear what is meant by determining "the structure of the Government" (Art. 47, 1, 1). In the choice of the Prime Minister, how will the "consent" of the Uluk Kenesh be obtained: by simple or absolute majorrity, before or after the appointment of ministers? What will happen if the Uluk Kenesh does not approve the candidate of the President (Art.47, 1, 2)? When the President relieves (dismisses) members of the Government, does he need the consent of the Prime Minister (Art.47, 1,5)? Does the President have the power to dismiss a Government which still enjoys the confidence of the Uluk Kenesh? What is meant by the

"withdrawal of the powers of the Government before the expiry of its term of office"? Does it simply mean dismissal, or something else? If only certain powers are taken away from the Government, who will then exercise such powers? Since the Government is dependent upon the confidence of the Uluk Kenesh, presumably it cannot have a fixed term of office. Therefore, it is not clear what is meant by its "term of office" (Art. 47 has. 1,6).

Among the President's powers is mentioned withdrawal of citizenship of the Kyrghyz Republic (Art. 47; 3, 1). This seems to be contradictory to Art. 13/3.

With respect to the President's legislative veto (Art.47, 4,2) the two-thirds majority required to override it seems to be excessive.

Article 47, 4,6 seems to give the President wide discretionary powers in annulling or suspending the acts of the Government, etc., in case he thinks they are against the Constitution. It is preferable to give the president the right to refer the matter to the Supreme Court in such cases as in the case of laws and international treaties. The Supreme Court should be the sole arbiter of constitutionality.

The President may dissolve the Uluk Kenesh before the expiry of its term "according to the results of public referendum" (Art. 47, 5,3). However, nowhere details are given about such referendum: who initiates it, how is it conducted, is a special majority required? Further, can the President dissolve the Uluk Kenesh without a referendum? Finally, if the Kyrghyz wish to adopt a version of the French semi-presidential model, they may wish to give the president an unconditional power of dissolution, since the

most problematic aspect of this model of government is the possibility of deadlocks between the legislative and executive branches.

Article 49 (no.1) mentions presidential decrees. It is not clear whether such decrees are issued with or without the participation of the Government. If it is the latter, the President will have the power to regulate a very broad area alone.

With regard to the powers of the Uluk Kenesh, in the crucial matter of a vote of no-confidence in the Government, a two-thirds majority of the total number of deputies is required (Art.59,22). This would make a no-confidence vote very difficult in practice and it may lead to the undesirable consequence of a government running the country without the confidence of the Parliament.

Similarly, a two-thirds majority in the parliamentary approval of a state of emergency seems to be excessive. In both cases, an absolute majority should be sufficient (Art. 59,19).

On the other hand, to require parliamentary approval of the appointment of heads of diplomatic missions is rather unusual (Art. 59,12). Traditionally, this is an area best left to the discretion of the executive.

The last paragraph of Art.59 seems to give the Uluk Kenesh very broad and undefined powers. There is no need for such a blanket provision.

The Supervision Chamber of the Uluk Kenesh is charged with the duty of financial and economic supervision. The Kyrghyz authorities might wish to consider to set up an independent Court of Account, still responsible to the Uluk Kenesh, to perform this function as in many European

parliamentary systems (Art.62).

If the Uluk Kenesh comes to feel that the country's interests would best be served by anticipated elections,such a decision should not be made difficult to take by requiring a two-thirds majority (Art.64).

Article 68, by requiring "a majority of the total number of deputies," makes the adoption of any law excessively difficult.

Article 74 is rather vague on the relationship between the President and the Government. Does presidential control imply that no goverment act is valid unless approved by the President?

The Judiciary:

With regard to the election of the Supreme Court judges (Art.87) it is not clear whether the President presents one or several nominees to the Uluk Kenesh. If it is the former, what happens if the Uluk Kenesh does not approve the President's nominee?

Likevise, it is not clear who decides on the dismissal of the judges in situations mentioned in Article 80, no.4. The Kyrghyz authorities might wish to consider to set up a Supreme Council of Judiciary to decide on matters of discipline, promotions, transfers, and dismissal.

What is the nature of the opinion of the Constitutional Chamber of the Supreme Court in matters referred to in Art.89, no.s 6 and 7? Are they advisory or binding? If they are advisory, then it may be preferable not to involve the Court in highly political matters in an advisory capacity.

It is not clear who initiates the proceedings in actions of unconstitutionality (Art.89, no.1.2), or even whether such a possibility exists. Apparently the drafters of the Constitution have opted for a single judiciary (i.e. with no separate system of administrative courts). In this case, it may be worth considering to create a judicial board on "administrative cases" within the Supreme Court. This is recommendable particularly in view of the fact that in a post-communist society, the domain of administrative law is bound to be very large and many disputes have therefore an administrative character.

The draft constitution makes reference to constitutional complaints. No doubt, this is one of the most effective ways of protecting the constitutional rights of individuals. It should be born in mind, on the other hand, that this may lead to the flooding of the Constitutional Chamber with thousands of complaints. Therefore, alternative methods, such as an ombudsman's office, may very well be considered.

General Remarks

The draft constitutional of the Kyrghyz Republic is commendable in that it provides the basic framework for a democratic system. Particularly noteworthy are the provisions on the secular and ideologically neutral (important in a post-communist state) nature of the state (Art. 8), the renunciation of war and agression as an instrument of policy (Art.9), recognition of international treaties and other norms of international law as part of domestic law (Art.12, 18 no.2), the liberal, natural law conception of individual rights and liberties (Art.15),

recognition of private property (again important in a post-communist state, although some provision should be included in the Constitution on expropriation, Art.20), etc. Missing in the Constitution are provisions on the supervision of the conduct of elections and referenda, procedure for complaints, etc. In a well-functioning democracy such supervision should be left to judicial or at least semi-judicial authorities. The Kyrghyz authorities might wish to consider to set up such a body, the members of which are preferably chosen from among the supreme court judges.