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(VENICE COMMISSION)

DRAFT AMENDMENTS TO THE CONSTITUTION OF THE KYRGYZ REPUBLIC

Comments by

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1. The following comments concern the draft amendments to the Constitution of the Kyrgyz Republic (CDL (2002) 144) which have been submitted to a nationwide discussion by the decree 17 October 2002 of the President of the Republic (CDL 2002) 143). I have limited my comments to the provisions "opened" by the draft amendments. As there are only few proposals concerning the provisions on human rights and freedoms (Chapter Two, Section Two) or on rights and duties of a citizen (Chapter Two, Section Three), these provisions will, with one exception (see below 15.), be bypassed.

2. According to the Constitution, both the President and the Parliament (the Jogorku Kenesh) are "entitled to act on behalf of the people of the Kyrgyz Republic" (Art. 1, par. 4.) represent the will of the people. As regards the organization of state power, the Constitution has clearly adopted a presidential system. Thus already according to the general provision in Art. 7, par. 7., the state power is based on the principle of the supremacy of the people, and "such power shall be represented and ensured by the nationally elected head of the state – the President of the Kyrgyz Republic". The emphasis on the position of the President is manifest both in the provisions concerning the relations between the President and the Government, as well as those between the President and the Jogorku Kenesh and between the Jogorku Kenesh and the Government.

A presidential system in itself is, also in light of European standards, a legitimate political choice. However, a certain minimum position should be reserved to the Parliament, particularly with regard to lawmaking and the control of the executive power. The system should also be clear and consistent so that unnecessary conflicts between constitutional organs can be avoided.

3. One of the main purposes of the proposed amendments is to strengthen the position of the Jogorku Kenesh. Thus certain decisions which now fall under the exclusive competence of the President would also require the consent of the Parliament. These would include the decisions on the structure and the composition of the Government, judicial and diplomatic appointments as well as the appointment of the Chairmen of Central Electoral Commission and the Auditing Chamber.

As a general assessment, these amendments can be considered welcome steps in enhancing the role of the Parliament in the constitutional system. In political respect, the most significant amendments concern the formation of the government. These amendments must be appraised within the whole constitutional architecture determining the relations between the main constitutional organs, i.e. the Jogorku Kenesh, the President and the Government.

4. Already according to the present Constitution (Art. 46, par. 1.1)), the President appoints the Prime Minister with the consent of the Jogorku Kenesh. According to the proposed amendment (Art. 46, par. 1.3); cf. Art. 58, par. 1. 8)), other members of the Government are appointed by the President on the advice of the Prime Minister and with the consent of the Jogorku Kenesh. This provides for a balanced procedure in a mainly presidential system.

The President would also have the power to dismiss the Prime Minister and the Government, but only with the consent of the Jogorku Kenesh (Art. 46, par. 1. 4); cf. Art. 58, par. 1. 9)). The dismissal of an individual member of the Government can take place either on the President's own initiative or on the basis of a censure voted by the Jogorku Kenesh. It is obvious that the dismissal of the Prime Minister automatically also means the dismissal of the whole Government. Thus, the resignation of the Prime Minister entails, according to the draft Art. 70, par. 5, even the resignation of the Government.

5. The Jogorku Kenesh would also have the power to cast votes of non-confidence (Art. 58, par. 1.11)). This power in itself is a welcome balancing factor in the mutual relations between Jogorku Kenesh, the Government and the President. However, there are some ambiguities in the relevant provisions.

In addition to a vote of non-confidence, the proposed amendments also provide for a procedure concerning individual members of the Government, called "censure". A censure differs from a vote of non-confidence in two ways. First, it requires only a single majority, whereas a vote of non-confidence in an individual member of the Government requires a two-thirds majority. Secondly, a decision by the Jogorku Kenesh on a censure does not bind the President, whereas a vote of non-confidence does have such an effect. (Art. 72, par. 3).

The procedure of a "censure" cannot be used with regard to the Prime Minister. The vote of non-confidence in the Prime Minister only requires a single majority. On the other hand, it is not binding on the President. However, according to Art. 71, par. 5, the President may refuse to dismiss the Prime Minister only once. If (s)he disagrees with a second vote of non-confidence, (s)he must choose between the dismissal or the dissolution of the Jogorku Kenesh.

All in all, the provisions on the vote of non-confidence and the censure are rather complicated. They express the purpose of securing the final say of the President in situations of political conflict.

6. The exact wording in the proposed provisions concerning the joint powers of the President and the Jogorku Kenesh varies, at least in the English version. In order to avoid unnecessary problems of interpretation, a consistent terminology should be adopted.

7. An important element in the mutual relations of the main constitutional organs consists of the power of the President to dissolve the Jogorku Kenesh. According to the proposed Art. 63, par. 2, the President would have this power 1) if such a decision has been voted for in a referendum, 2) if the Jogorku Kenesh has three times refused to accept the appointment of a Prime Minister and 3) "in the event of another crisis caused by an insurmountable disagreement between the Jogorku Kenesh and other branches of the state power". The last-mentioned provision gives the President excessive powers with regard to the Jogorku Kenesh. It must be noted that in addition to the provisions in Art. 63, par. 2., Art. 71 par. 5 regulates the dissolution of the Parliament in case the president twice disagrees with the Parliament on the dismissal of the Prime Minister (and the Government)-

After dissolving the Jogorku Kenesh The President would also decide the election day so that the new Jogorku Kenesh shall convene for its first session with six months after the dissolution (Art. 63, par. 5.). This time limit should be radically shortened.

8. According to the proposed par. 1.7) in Art.46, the President would have the power to constitute and abolish the National Security Service. In addition to that, the President has the power to form state security services and the National Guard subordinate to him. The President also is the Commander-in-Chief of the Armed Forces. Such large exclusive and uncontrolled powers over armed forces and security services are not appropriate in a democratic constitutional system.

9. The hierarchical system of legal norms should be as clear as possible and also guarantee the primacy of parliamentary legislation. The Kyrgyz Constitution has adopted the hierarchical level of constitutional laws (Art. 65, par. 5). However, the Constitution does not contain a list of the issues to be regulated through such laws.

Another problem consists of the very large norm-giving powers of the President. According to the proposed Art. 47, par. 1, The President "may issue decrees and orders, which shall not contradict the Constitution and laws". As the Constitution does not include any provision of issues reserved for parliamentary legislation, the conclusion seems to be that the norm-giving powers of the President cover all the areas where the Parliament has not de facto exercised its legislative powers. In addition, Art. 68, par. 1. allows for the delegation of the legislative powers of the Jogorku Kenesh to the President for a period up to one year. The wording of the provision implies that the Parliament could even relinquish all its legislative powers. Finally, according to Art. 68, par. 2, the legislative powers devolve on the President in the case of the dissolution of the Jogorku Kenesh. All in all, the Constitution allows for such a concentration of legislative powers within the competence of the President which should not be possible in a democratic constitutional state.

10. In addition to the norm-giving powers of the Parliament and the President, the Government also has the competence to issue, "within its powers" resolutions and ordinances. The position of these resolutions and ordinances with the legal order of the Kyrgyz Republic remains unclear.

11. The Constitution, in its proposed amended form, contains provisions on the proclamation of a state of emergency or a state of war, as well as on the imposition of martial law (Art. 10; Art. 46, par. 7.-8.; Art. 58, par. 21-22). These provisions seem to secure in an adequate way the position of the Jogorku Kenesh. However, the legal effects of the proclamation of a state of emergency or a state of war or the imposition of martial law are not regulated in a comprehensive way..

12. According to the proposed amendments, the Jogorku Kenesh would be transformed into a uni-cameral body. In such a relative small country as the Kyrgyz Republic, this seems to be a rational choice.

13. In addition to the above-mentioned powers which the Jogorku Kenesh would exercise jointly with the president it would also receive the power to vote non-

confidence in the Procurator-General (Art. 58, par. 19). Considering that the Procurator-General is a legal official, it seems inappropriate to make her or him *politically* responsible to the Parliament. The Jogorku Kenesh would also have the power not only to appoint but even to dismiss the Ombudsman. An open authorization to dismiss the Ombudsman can also be considered problematic with regard to the independence required by the exercise of this office.

14. In the Explanatory Note for the Draft Amendments (CDL (2002) 142), the strengthening of local self-administration is included in the aims of the reform. According to the proposed amendment in Art. 1, par. 4., bodies of local self-administration would be added to the provision regulating the ways in which popular sovereignty is exercised. The provision would state that "the people of Kyrgyzstan shall exercise their power, on the basis of this Constitution and the laws of the Kyrgyz Republic, directly and through a system of state bodies and bodies of local self-administration". However, the constitutional guarantees for local self-administration remain rather weak. Thus, no general principle that local administration would be based on self-government is stated in Chapter Seven of the Constitution. Chapter Five of the Constitution also includes a specific Section on local state administration, where it is, according to the draft amendment, stated that "in respective administrative territories, the executive power shall be exercised by the local state administration" (Art. 76). Considering the absence of a general principle of local self-government, Art. 76 seems to imply that the starting-point in the organization of local administration would not be self-government but administration through state organs.

According to the amended Constitution, the President would also have powers which endanger the principle of local self-government. Thus, the President could suspend or annul not only acts of the Government and other executive bodies but also acts of bodies of local self-administration (Art. 46, 4. 4)). Already the Constitution in force gives the President the power to dissolve local keneseshes (Art. 46, 6. 6). This power covers only cases provided for by the law, but the Constitution does not in any way limit the powers of the legislature to regulate the reasons for dissolution.

15. As mentioned above, the provisions on human rights and freedoms or the rights and duties of the citizens have not, as a rule, been amended in the draft proposals. However, a new wording for the first sentence in Art. 19, par. 3., has been proposed: "No person shall be arrested, detained, or held in custody unless when on court decision." The requirement of an explicit provision in law, as well as a list of legitimate reasons for restricting personal liberty, should be added.

An examination of the constitutional provisions in light of the European Convention on Human Rights would give reason to more extensive comments, beginning with the provisions on death penalty (Art. 4). As I have understood my present task to be limited to the provisions "opened" by the present redrafting of the Constitution, I have not carried out such an examination in this context.

16. According to the new Art. 96, par. 2., the President would have an absolute veto power over amendments to Articles 7, 46 and 58, which regulate the general division of powers as well as the respective powers of the Jogorku Kenesh and the President. This would further enhance the central position of the President within the constitutional structure. Furthermore, it remains unclear where the provision in question would

concern only cases where the Constitution is amended through a referendum or even cases where the procedure regulated in Art. 97 is resorted to.

16. As a conclusion it can be stated that the draft amendments would, to some extent, enhance the position of the Parliament within the power relations between the main constitutional organs. However, the presidential traits in the Constitution remain very strong. In the light of European standards for a democratic constitutional state, they can even be deemed excessive.

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