



Strasbourg, 7 December 2007

CDL(2007)128*

Opinion no. 457/2007

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON THE CONSTITUTIONAL SITUATION
IN THE KYRGYZ REPUBLIC**

based on comments by

Ms A. NUSSBERGER (Substitute member, Germany)
Mr E. TANCHEV (Substitute member, Bulgaria)
Mr A. FOGELKLOU (Expert, Sweden)

**This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION | 3 |
| II. | BACKGROUND OF THE REQUEST | 3 |
| III. | THE DECISION OF THE CONSTITUTIONAL COURT | 4 |
| IV. | THE NEW CONSTITUTION | 4 |
| V. | THE NEW ELECTORAL CODE | 10 |
| VI. | CONCLUSIONS | 10 |

I. INTRODUCTION

1. The Speaker of the Parliament (Jogorku Kenesh) of the Kyrgyz Republic, Mr Marat Sultanov, asked the Venice Commission in a letter dated 15 October 2007 to comment on the recent constitutional developments that took place in the Kyrgyz Republic and to provide an analysis of the decision of the Constitutional Court of 14 September 2007 as well as of the documents that were to be adopted by referendum on 21 October 2007, i.e. the Law on the new redaction of the Constitution and the new electoral code.

2. Ms Nussberger (Germany), Mr Tanchev (Bulgaria) and Mr Fogelklou (Sweden) were appointed as rapporteurs. *The present Opinion is based on their comments and was adopted by the Commission at its ...* The funding for this activity was provided by the European Commission in the framework of the Joint Programme on constitutional assistance for Kazakhstan and Kyrgyzstan.

3. The present Opinion focuses on the text of the new version of the Constitution. The contents of the Electoral Code, which has not been translated into an official language, is not analysed. In accordance with its usual practice, the Commission also refrains from taking a position on the decision of the Constitutional Court.

II. BACKGROUND OF THE REQUEST

4. Following the March 2005 tulip revolution and the overthrow of the authoritarian regime of former President Akaev, the Kyrgyz Republic has undergone a period of political and constitutional instability. One of the consequences of the revolution was the wish to adopt a new, more democratic and liberal Constitution replacing the Constitution originally adopted in 1993 which had been amended several times during the Akaev years giving to it a more authoritarian character. Since this Constitution was last amended in 2003 it is usually referred to as the 2003 Constitution.

5. A draft new Constitution was prepared by a broadly based constitutional council with the participation of civil society. This draft was the object of a Venice Commission opinion (CDL(2005)022) and received a mainly favourable assessment, with the exception of the chapter on the judiciary which provided clearly insufficient guarantees for judicial independence.

6. Several further drafts were prepared and Venice Commission experts provided additional comments (CDL(2006)066). On 8 November 2006 the Jogorku Kenesh adopted a law amending its rules of procedure in respect to constitutional amendments. The next day it adopted a new version of the Constitution providing for a mainly parliamentary system of government. Only a few weeks later, on 30 December 2006, this decision was to a certain extent reversed by the adoption of a different version of the Constitution which, compared to the 9 November text, substantially strengthened presidential powers. Following its promulgation by the President, this new version entered into force, or was supposed to have entered into force, on 15 January 2007.

7. The constitutionality of the procedure chosen for the adoption of both new versions of the Constitution was contested by some members of parliament. On 14 September 2007 the Constitutional Court decided that the procedure for the adoption of both new versions of the Constitution had been unconstitutional and annulled both versions of the Constitution. This decision was contested by the Jogorku Kenesh, which claimed that the Court had clearly exceeded its powers.

8. On 19 September 2007 President Bakiev issued a decree submitting a new version of the Constitution as well as a draft Electoral Code for adoption by referendum. The referendum

took place on 21 October 2007. According to the Central Election Commission, more than 50% of eligible voters took part in the referendum and both the draft Constitution and the Electoral Code were approved. A Spot Report of the OSCE (No. 11/07) noted that according to local observers there had been cases of ballot stuffing and abuse of administrative resources.

III. THE DECISION OF THE CONSTITUTIONAL COURT

9. It cannot be the task of the Venice Commission to review decisions by national constitutional courts which are the institutions with the authority to provide a final interpretation of the Constitution. The Commission therefore refrains from taking a position on the justification of this decision of the Court which was strongly contested by the Jogorku Kenesh. Nevertheless, some clarifying remarks seem appropriate.

10. It is indeed highly unusual, if not unprecedented, that a Constitutional Court declares the full text of an acting constitution to be unconstitutional. As a general rule, constitutional courts have to take their decisions on the basis of the Constitution valid at the moment of their decision. Former versions of the Constitution are irrelevant. This means that the Court could take this decision only if the text of the Constitution adopted on 30 December 2006, and which was supposed to have entered into force on 15 January 2007, was invalid *ab initio*. There might be doubts as to whether the 2003 Kyrgyz Constitution envisaged such a possibility. Furthermore, it has to be stressed that such an interpretation would have important consequences. All the actions based first on the Constitution of 9 November 2006 and then on the Constitution of 15 January 2007 would be without a legal basis. That would also apply to any election of constitutional judges taking part in the relevant decision.

11. In this context it is interesting to note that the new Constitution adopted by referendum on 21 October 2007 contains a provision on the abrogation of the Constitution of 9 November 2006, of the Constitution of 15 January 2007 as well as of the law of the Jogorku Kenesh of 8 November 2006 (Part II Paragraph 2 of the Constitution of October 2007). Such a provision would not be necessary if these legal acts had been abrogated by the decision of the Constitutional Court retroactively or had never been valid.

IV. THE NEW CONSTITUTION

1. General comments

12. The main focus of the constitutional debate in Kyrgyzstan was on the distribution of powers between president, parliament and government and the major differences between the various texts concerned this issue. The subsequent comments will therefore also focus on this question. Since the Constitution was already adopted, the Commission has refrained from a detailed article by article analysis and the present Opinion addresses only some major issues.

13. In general, while there are some advances in the text as regards human rights and the independence of the judiciary, the excessive concentration of powers in the hands of the President and the lack of checks and balances give rise to serious concerns.

2. Chapter I on fundamental principles of the constitutional order

General Comments

14. Generally the provisions in this Chapter are welcome and in line with international standards.

Article 1

15. The constitutional definition of the Kyrgyz state in Art. 1 is welcome since it contains all democratic characteristics of a modern democratic unitary nation state – a state founded on the rule of law (closer to the German concept of the *Rechtsstaat* than to the Anglo-Saxon rule of law), a democratic, secular and social state. Paragraph 3 as well as the Preamble contain the classical statement that the Kyrgyz people are the sole source of state power in Kyrgyzstan.

Article 2

16. The wording and the goal of Art. 2, especially its first paragraph (“The state and its organs shall serve the whole of society, and not one particular part of it.”) and the explicit prohibition in the second paragraph. (“No separate group of people, association or individual shall have the right to usurp power in the State”) have to be welcomed since they are a constitutional safeguard against totalitarianism, authoritarianism or one man rule. This provision has been borrowed and transplanted from the 1789 Declaration of Rights of Man and Citizen which is still an acting part of the of 1958 Constitution of the Fifth French Republic.

Article 4

17. It is welcome that the new text, in particular Art. 4.3, provides stronger protection for private property.

Article 5

18. Article 5 providing for the Kyrgyz language as the state language and the Russian language as a further official language appears an appropriate solution although the distinction will have to be clarified by legislation. It takes into account both the interests of the Russian community and the interaction with the external world while preserving and maintaining a Kyrgyz identity. It also protects linguistic minorities.

Article 7

19. Article 7 provides for the principles on which the state authority is based. Compared to the 2005 draft the new wording of the first principle is a step back since it is now (only) the President who represents the people and not the President and the parliament. This special position of the President may pave the way for one man rule and seems difficult to reconcile with the provisions of Article 2.

20. The second state principle proclaims the principle of separation of powers but adds that these have to be co-ordinated and be based on mutual interaction (*vzyaimodeistvie*). The intention is to be supported but the concrete wording is not altogether satisfactory. Of course, there must be interaction and co-ordination between executive and legislative powers but, given that the judicial decision-making process should be based on the independence of the judges and of the courts, the provision should be slightly reformulated.

Article 8

21. Article 8.1 establishes a secular state and religious pluralism without a state or otherwise privileged denomination.

22. The subsequent paragraphs provide for political pluralism and a multi-party system. In practice, special attention will have to be paid to full respect for these principles when decisions are made on the registration and legality of political parties.

23. In Article 8.5, the provision that political party organisations and political activities within the state apparatus are prohibited is welcome, including the phrase clarifying that officials may devote time for political activities when these are conducted not in connection with their service to the state. The provision reflects the intended growing importance of political parties under the present Constitution.

24. The provision that parties may not be founded on religious grounds (8.5, fourth paragraph) is more problematic since it constrains the possibility for religious interests to be represented in legislative assemblies. The provision is perhaps unavoidable in the present political situation but does not correspond to standards in Europe.

Article 9

25. This Article, reflecting the peaceful nature of the Kyrgyz state, could be an example to other constitution makers.

Article 12

26. This Article reflects fundamental principles of the rule of law and merits a positive assessment. As regards international law, an additional clarification as to the position of international treaties in the hierarchy of norms would be desirable.

3. Chapter II on human and civil rights and freedoms

General comments

27. With the exception of the issue of the abolition of the death penalty, human rights issues have not been in the focus of the recent constitutional debate. The Commission therefore refrains from commenting this chapter in detail. Nevertheless, it has to be underlined that on the whole it deserves a positive assessment.

Article 13

28. The first paragraph contains a sweeping statement that human rights are “absolute and inalienable”. This reflects individualistic natural law thinking in a society with a very different tradition. It remains to be seen what will be the effects of such statements.

29. The anti-discriminatory provisions in Article 13 are welcome. The last formulation that “other circumstance of personal and social character” should not be ground for discrimination is not clear since the law-giver sometimes must differentiate, for example between children and adults. But it could have as its aim that, for example, a court should not for reasons of friendship or family connections sentence a person more leniently than it otherwise would have done.

Article 14

30. Article 14.1 guarantees the right to life and states that no one may be deprived of life. The Commission congratulates the Kyrgyz authorities for thus abolishing the death penalty. An explicit statement on the abolition of this penalty would have been welcome.

31. Otherwise Article 14 contains a comprehensive catalogue of fundamental rights. From an editorial point of view and in line with international documents, it would be preferable to give to the various rights and freedoms each time a specific article. The 9th sub-paragraph of Article 14.3, providing for the right to get compensation from the state for any damage caused by illegal acts of state or local authorities and officials deserves special praise.

Article 15

32. This article reflects high standards in the sphere of the rule of law. It enumerates in detail basic rule of law principles, for example, the principle that only the courts and not the prosecutor should have the power to arrest individuals who are suspected or accused of having committed crimes (Art. 15.1.) Article 15 with all its detailed points and sub-points reflects clear progress with respect to the 2003 Constitution. In particular, the provision that everybody is guaranteed judicial defence of his/her rights is to be supported.

Article 18

33. The provision on restrictions of human rights is fairly well drafted. In particular, it provides that the essence of a right may not be infringed. The Commission underlines that the words “on the basis of a law” (“zakonami”) should be interpreted as excluding limitations based on ukazy of the President or postanovlenija of the Government. It would have been desirable to reflect the principle of proportionality.

Section II on rights of citizens

34. The rights of citizens are regulated in this section which comprises a broad catalogue of social rights. Such guarantees could appear as purely programmatic in a very poor country but it is to be noted that Article 21.5 guarantees judicial protection of all rights and freedom for all citizens.

4. Chapter III – The President of the Kyrgyz Republic

General comments

35. Formally the Constitution establishes a semi-presidential system but in reality the powers of the President are almost unrestricted and there are few checks and balances. The powers given to the President are too wide, especially for a country wishing to break with an authoritarian tradition. While the principle of the separation of powers appears explicitly in Article 7, other provisions suggest a concentration of State power in the hands of the President. The President is both a main player and an arbiter between the other state powers.

Article 42

36. The first two paragraphs of this Article are fully in line with the usual definition of the role of the President in presidential or semi-presidential systems. By contrast, the third paragraph establishes a presidential supremacy beyond reasonable limits. The President defines the main directions of internal and foreign state policy, represents the Kyrgyz Republic inside the country and in international relations, undertakes measures to protect the sovereignty and territorial integrity of the Kyrgyz Republic, ensures the unity and continuity of state authority, the concerted functioning and interaction of state bodies, and their responsibility to the people.

Article 43

37. The only effective check on presidential powers is Article 43.2 providing that the President may be re-elected only once. Contrary to the draft Constitution examined by the Commission in 2005, this paragraph no longer contains the provision that amendments to the Constitution may not be the basis for prolonging the President’s term of office.

Article 44

38. The new Constitution contains far less detail on presidential elections than earlier versions of the Constitution.

Article 46 and 47

39. The list of powers of the President in these Articles and other Articles of the Constitution is impressive and seems inspired by the wish of the drafters of the Constitution to provide the President with all powers which may be found in European, US, Latin American or Russian constitutionalism.

40. The President clearly dominates the executive. The President
- defines the fundamental directions of external and internal policy of the State;
 - appoints the Prime Minister on the basis of a proposal by the strongest party in Parliament (detailed provisions in Article 46 para 1 in connection with 69 et seq.);

- can dismiss the Prime Minister and the Government as well as the ministers without any special reason ;
- On the basis of a proposal of the Prime Minister, can appoint the heads of the administrative organs and other organs of the executive branch and can dismiss them on his or her own initiative;
- can appoint and dismiss the heads of the local State administration;
- appoints the State Secretary and defines his or her status and competences and forms the Presidential Administration;
- builds up and presides over the Security Council and the Secret Service;
- builds up and structures all the State organs that are under his or her command and appoints and dismisses the leaders;
- can even determine the conditions of payments for the civil servants;
- with the consent of the Parliament, appoints and dismisses persons to all the other key positions in the State (Prosecutor General, Chairperson of the National Bank, chairperson as well as half of the members of the Central Election Commission, Chairperson of the Auditing Chamber);
- proposes all the candidates for the Constitutional Court that are then elected by Parliament;
- can suspend all the normative acts of the Government and other organs of executive power;
- can call the Jogurku Kenesh before the set time and decide on the questions it has to deal with;
- can call a referendum on his own initiative and decide on a referendum initiated by 300 000 voters or by the majority of the deputies;
- is commander of the Army;
- can call for the introduction of the state of emergency, mobilisation and the declaration of the state of war, if necessary even without the consent of the Parliament although the Parliament has to confirm the decision

41. The President thus is in full control of the administration in general and the power structures in particular, he or she dominates the executive and has decisive influence on appointments to judicial and other independent positions. If ever there is resistance against his or her wishes, the President can call a referendum without the involvement of the other state organs.

42. In addition, the President has a decisive influence on the exercise of legislative power. The President

- has a right to veto all parliamentary laws without giving any reason; the Parliament can overrule this veto only with a two-thirds majority of its members.
- can introduce draft laws into Parliament and determine the priority treatment of draft laws in cases of urgency;
- has the right to issue decrees and regulations.

Though the Constitution is silent in determining the nature of the Presidential decrees and regulations, constitutional practice demonstrates that these might be either individual acts concerning concrete addressees or normative acts establishing rules and regulating the performance of institutions and influencing human rights (the threshold of 0,5% required in all districts in order to be represented in parliament was introduced into the draft Electoral Code by presidential decree). Besides, the President is also vested with the power to suspend the effect of normative acts of the Government or any other organ of the executive branch (Art.46.5.4).

Article 51

43. An impeachment of the President is difficult to achieve. The alleged crime must be treason or other “especially severe crimes”. The allegation has to be supported by a conclusion from the Prosecutor General and a report from the Constitutional Court on the regularity of the

procedure. Within three months after an accusation against the President has been made by two thirds of the Parliament on the initiative of the absolute majority in Parliament, the Parliament must with three fourths majority decide to impeach the President. The timeframe for the procedure seems too short and it is highly unlikely to lead to an impeachment.

5. Chapter IV – The Legislative Branch of the Kyrgyz Republic

General comment

44. The position of the Jogorku Kenesh is not strong enough for it to function as an effective counterweight to the powers of the President.

Article 55

45. According to the second paragraph of this Article, all members of the Jogorku Kenesh are elected on the basis of party lists. The previous election was held on the basis of a majoritarian system and the 2005 draft Constitution provided for a mixed system. Since the party system is very weakly developed, there is a risk that the constitutional reform contributes to a rather artificial system in which political parties are founded from above. They may be controlled by business interests but also by the executive and may not be grounded in the concrete political experience of the people. Moreover, there is no room for independent candidates.

Article 58

46. The power of the Jogorku Kenesh to officially interpret laws (Art. 58.1.3) is a remnant of the Soviet system.

Article 66

47. As set forth above, a presidential veto against draft laws can be overruled only by a two-thirds majority. A presidential veto against constitutional amendments can be overruled only by a majority of three fourths of the total number of deputies. It is thus nearly impossible for the Jogorku Kenesh to adopt constitutional amendments reducing the powers of the President.

6. Chapter V – Executive authority in the Kyrgyz Republic

General comment

48. The Government is more dependent on the President than on the Jogorku Kenesh.

Article 69 and 70

49. The process of forming the government is similar to constitutional rules in countries such as Bulgaria, Greece and Turkey. According to Article 69 the deputies from the party with obtained more than 50% of the seats in the Jogorku Kenesh propose to the President a candidate for the post of Prime Minister. If this fails for any reason, such as the absence of a party with more than 50% of the seats, the President invites according to Article 70 deputies another party to present a candidate who would lead a coalition government. If this attempt is again unsuccessful, the President asks deputies from still another party to present a candidate for Prime Minister, forming a coalition government. The procedure could be repeated for the third time with a third party. If the election still fails, the President dissolves the Parliament, announces new elections and forms a temporary government which is, however, not limited to caretaker functions.

Article 71

50. According to the first paragraph the Government is responsible both to the President and the Jogorku Kenesh but the President seems to have the upper hand. The President can decide to disregard a vote of no confidence in the government, unless this vote is repeated

within three months. The President then remains free to either dismiss the Government or to call early elections to the Jogorku Kenesh. The President can also disregard a vote of no confidence in an individual minister unless it is repeated within six months.

7. Chapter VI – Central bodies of state authority in the Kyrgyz Republic

Article 77

51. This article maintains the Soviet *prokuratura* system.

8. Chapter VII – Judicial authority of the Kyrgyz Republic

General comments

52. This chapter of the Constitution contains some important improvements, in particular judges will now be appointed after an initial period until retirement and a Judicial Council is established. Judicial independence could, however, be further strengthened.

Article 83

53. According to this Article judges of the Supreme and Constitutional Court are elected by the Jogorku Kenesh on the proposal of the President until they reach retirement age. Judges of the local courts are appointed by the President on the proposal of the Judicial Council, the first time for five years, thereafter until retirement. If not fully satisfactory, these provisions are a significant improvement with respect to the 2003 Constitution under which judges had only limited terms of office. The role of the President nevertheless is problematic since he or she is not a neutral head of state as in a parliamentary system but holds most of the executive powers.

Article 84

54. It is welcome that Article 84 provides an important role for a Judicial Council, an institution not mentioned in the 2003 Constitution. Regrettably, there are no detailed rules as to the composition and functioning of this important institution. The grounds for the dismissal of judges should be spelt out in the Constitution.

Article 85

55. This article sets out the rules for the Constitutional Court. The article remains fairly vague, in particular it does not regulate the important issue of who may initiate proceedings. Constitutional complaints by individuals are not mentioned in this article.

V. THE NEW ELECTORAL CODE

56. The new Electoral Code is very comprehensive and cannot be evaluated in this context. It should be stressed that it is problematic to adopt an electoral code on the basis of a referendum. The citizens cannot be expected to study such a detailed law, especially if they have no other option but to accept or to reject it as a whole. Furthermore, it renders changes to the code unnecessarily difficult.

VI. CONCLUSIONS

57. The new Constitution was adopted by referendum in an extremely complex and unusual legal situation. The timeframe of one month between the publication of the draft Constitution and the date of the referendum was extremely short.

58. The new Constitution maintains some of the advances made in earlier texts and drafts and reflects in this respect also earlier discussions between the Venice Commission and the Kyrgyz authorities. This concerns in particular:

- The requirement that deprivation of liberty is authorised by a judge and not by a prosecutor;
- The abolition of the death penalty;
- The fact that judges will in the future mainly have terms of office until retirement;
- The setting up of the Judicial Council.

59. On the whole, the negative elements of the text prevail. The main thrust of the new version of the Constitution is to establish by all possible legal means the indisputable supremacy of the President with respect to all other state powers. This corresponds to an authoritarian tradition which Kyrgyzstan has tried to overcome. While the Constitution proclaims the principle of the separation of powers, the President clearly dominates and appears both as the main player and the arbiter of the political system. Few obstacles exist for the President having his tenure prolonged by changing the Constitution. Moreover, if there are no legal constraints on the powers of the President and few opportunities for an opposition to effectively make its views heard, the consequence might be that changes of power in the country will also in the future be based on revolutions and not on a peaceful and constitutional transfer of authority.