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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT CONSTITUTIONAL LAW ON INTRODUCING AMENDMENTS AND ADDITIONS TO THE CONSTITUTIONAL LAW ON THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF THE KYRGYZ REPUBLIC

on the basis of comments by

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Mr Ciril RIBIČIČ (Member, Slovenia)
Mr Konstantine VARDZELASHVILI (Substitute member, Georgia)

*This document has been classified restricted on 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.

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I. Introduction

1. By letter of 28 April 2014, the Chairperson of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, Mr. Mukambet Kasymaliev, requested an opinion on the draft constitutional law "On introducing amendments and additions to the constitutional law 'On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic'" (CDL-REF(2014)017, hereinafter "the Draft Law").

2. The Venice Commission has invited Mr Gagik G. Harutyunyan, Mr Ciril Ribičič and Mr Konstantine Vardzelashvili to act as rapporteurs for this opinion.

3. On 20 May, a delegation of the Venice Commission composed of Mr Ribičič, accompanied by Mr Schnutz Dürr, Ms Anna Jasiak and Ms Svetlana Anisimova from the Secretariat visited Bishkek and had meetings with (in chronological order) Mr T. Tumanov and Ms N. Nikitenko (members of Parliament), members of the Council of Judges and its chairperson, Mr J. Abdrakhmanov, the Presidential Administration and its Head, Mr D. Narymbaev, the judges of the Constitutional Chamber and its president, Mr. M. Kasymaliev, as well as with NGOs.

4. This opinion is based on the comments written by Messrs. Harutyunyan, Ribičič and Vardzelashvili and takes into account the information obtained during the above-mentioned visit.

5. This opinion was adopted by the Venice Commission at its … Plenary Session (Venice, …).

II. Preliminary remarks

6. According to Article 97 of the Constitution of the Kyrgyz Republic, the Constitutional Chamber is a body which shall independently perform constitutional oversight. It is the highest judicial body and it has an authority to 1) declare laws and other regulatory legal acts unconstitutional in the event that they contradict the Constitution; 2) conclude on the constitutionality of international treaties not entered into force and to which the Kyrgyz Republic is a party; and 3) conclude on the draft law on changes to the present Constitution.

7. In 2010, the Venice Commission adopted an opinion on the Draft Constitution of the Kyrgyz Republic, which provided for the establishment of the Constitutional Chamber of the Supreme Court[1]. In 2011, the Venice Commission provided an Opinion on the Draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan[2]. The Law entered into force on 13 June 2011. However, the Chamber was unable to start its work until summer 2013, because there were two unfilled vacancies. A 2013 amendment to the law on the Constitutional Chamber reduced the quorum and allowed overcoming this problem.

III. Specific comments

8. The Draft Law provides for various amendments concerning the procedure before the Constitutional Chamber and its competences. According to the explanatory memorandum, its aim is to optimise the work of the Constitutional Chamber and to fill gaps in the current constitutional law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic. The Venice Commission supports all proposals that enhance the efficiency of the work of the

[1] Opinion on the Draft Constitution of the Kyrgyz Republic (version published on 21 May 2010) adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010), CDL-AD(2010)015.
[2] CDL-AD(2011)018.

Constitutional Chamber as the guarantee of the supremacy of the Constitution, protection of human rights and constitutional democracy. In this opinion, the Venice Commission makes recommendations on the following topics: *actio popularis*, evidence, scope of appeals, appeal against inadmissibility, urgent decisions, withdrawal of a petition, representation, experts/specialists, *amicus curiae* briefs, recusal, repeated applications, contempt of court, separate opinions, explanations of decisions, the self-executing nature of decisions and publication of judgments.

A. *Actio popularis*

9. According to **part 1, para 1 of Article 20** which is currently in force a private person or a legal entity are entitled to appeal to the Constitutional Chamber in case they believe that the laws or other normative regulatory acts violate *their* rights and freedoms recognized in the Constitution". The Draft Law (the English version of it) proposes to delete the word "*his*" in this legal provision. However, there is no word *"his"* in the English text of the law, which seems to be an editorial or translation error. In this regard, Russian texts of the law and the Draft Law are more coherent as they contain the word "his" ("*его*" in Russian) followed by "rights and freedoms".

10. According to the explanatory note, this amendment is purely editorial in nature. However, it should be noted that this amendment may lead to establishing *actio popularis* access to the Constitutional Chamber and causes confusion between the subjects of abstract and concrete review. Deleting the word "their" (or "his") in front of the words "rights and freedoms" would enable any person to apply to the Chamber for any alleged violation of the Constitution, irrespective whether such violation has a direct impact on the applicant or not. It is not clear if this was the intention of the drafters. The Venice Commission has already made such observations in 2011 and recommends also now that the proposed amendment is reconsidered. The right to appeal should be limited to those persons whose rights have been affected. Otherwise the Chamber might be seriously overburdened with appeals by individuals who complain about any legal act they come to know of.[3]

B. Evidence

11. The Draft Law proposes to supplement **Article 25** with part 3, which reads as follows: "*Requirements to a petition, indicated in para 6 of part 3 of the present article, are presented when the rights and freedoms of the petitioning party were violated by the disputed act*." Para 6 of part 3 stipulates that a petition to the Chamber should contain "*circumstances, on which the party bases its petition as well as evidence confirming the facts presented by such party*". Thus, the provision seems to suggest that the requirement to present facts proving the violation applies in case if petitioner claims the violation of his/her rights. However, the amendment 3 of Article 25 read together with the amendment to Article 20 para 1 (deleting the word his/her) would relieve the party from the obligation imposed by para 6 of the part 3 in case if they choose to submit an *actio popularis* claim.

12. Moreover, as the Venice Commission stated in the previous opinion on the Draft Law on the Constitutional Chamber,[4] it should be taken into account that in constitutional proceedings taking physical evidence is rather an exception. Constitutional review is mainly focused on the legal arguments rather than facts, which only rarely may be relevant for the Chamber as evidence supporting the legal argument. Therefore, the parties should not be obliged to but rather be given a possibility to submit evidence.

[3] Opinion on the Draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan, CDL-AD(2011)018 para 27.
[4] Para 34.

C. Scope of appeal by public bodies

13. It should also be noted that the explanatory note contains no explanation of the reasons for the deletion of **para 2 of Article 20**. The deleted paragraph stipulated that the Jogorku Kenesh, a faction (political group) of the Jogorku Kenesh, the President, the Government; the Prime Minister, bodies of local self-governance, the Prosecutor General, the *Akyikatchy* (the Ombudsman) may submit presentments only to the extent of their competences. The Venice Commission recommends to clarify whether the intention of the drafter is to provide all the above listed bodies/public officials with unlimited possibility to apply to the Chamber. Will these entities be equally allowed to challenge the law that may be limiting constitutional rights as well as the laws infringing competences of other constitutional bodies?

D. Appeal against inadmissibility

14. Amendments to **part 5 of Article 28** provide that an appeal against an inadmissibility decision can be taken without a hearing. According to the explanatory note, these are appropriate amendments reasoned by the fact that the law does not specify matters dealing with the necessity of participation of parties in appeal proceedings.

15. Appeals may be beneficial for establishing a common approach with regard to the admissibility criteria. However, it is also true that such appeals could lead to an overburdening of the Chamber. The explanatory note contains no information on the number of appeals, if and to what extent the Chamber was burdened by the appeals against inadmissibility decisions and whether this was the real reason for the amendment.

16. One – radical – alternative would be to remove the appeal as such. This may become necessary in the future when the number of petitions and appeals will be much higher and might paralyse the operation of the Chamber. As another alternative, in order to avoid overburdening of the Chamber with appeals, it could be provided that the petition may be declared inadmissible only with unanimous vote of the Panel of judges and providing a requirement to transfer the case to the Chamber if the judges disagree on the issue.

17. In its Opinion on the Draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan, the Venice Commission stated that "[*i*]*t would be reasonable to provide the Panel with the right to transfer the case to the Chamber if it finds that the admissibility decision deals with complicated and/or important issues of law. The Panel decision should be final in order to ensure compliance with the requirements of the Constitution as well as to avoid overburdening the Chamber*."[5]

E. Urgent decisions

18. According to the proposed additions to **Article 29**, some of the petitions that "*may be recognised as urgent by the definition of the Constitutional Chambe*r", should be considered "*within a period not exceeding two months*."

19. The Constitutional Chamber should indeed have a freedom in prioritising certain cases and expediting the review of those cases that may be deemed urgent for variety of reasons. However, in order to avoid at least an appearance of arbitrariness of this decision, the Venice Commission recommends clarifying the procedure and criteria on which a case may be recognised as urgent. Should it be for the Panel to suggest that case should be heard in an expeditious manner?

[5] Opinion on the Draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan CDL-AD(2011)018 para 40.

20. However, the Venice Commission notes that according to part 1 of Article 29, the Chamber must render the decision on the case in "*five months since the day of its acceptance for proceedings*". This means that the law already defines an upper time limit and does not preclude the Chamber from deciding the case earlier.

F. Withdrawal of a petition

21. According to part 1 of the proposed **Article 30-1** "[p]etitions accepted for proceedings may be revoked by the petitioning party prior to its consideration at a session of the Constitutional Chamber." In other words, even after the Panel declares the petition admissible, it may be terminated if the author of the petition revokes it.

22. It cannot be excluded that the submitted petition is revoked as a result of a threat or other form of illegal influence or pressure (this will happen rarely though). The law should provide that the proceedings will be terminated only when the Constitutional Chamber is satisfied that this was not the reason to revoke the petition. The law may provide that in very exceptional circumstances if there is a compelling public interest, the Constitutional Chamber has discretion to continue considering the case.

23. The new provision seems to overlap with para 1 of part 1 of Article 41 according to which proceedings on a case may be terminated if "….*the applicant waives his/her claims or a party voluntarily waives the matter prior to the Constitutional Chamber makes its judgment on the merits*". This provision implies that the case must be terminated at any stage before the judgment is delivered (announced). Thus, the Chamber seems to be obliged to terminate the case (if applicant waives the claim) even after the oral hearing and when the decision is drafted and ready to be announced. This requirement may open a possibility for manipulation and therefore it is recommended to change it. The Chamber may be provided with discretionary power to terminate the proceedings, however, as a rule this should not be done after the oral hearing or even at a later stage.

24. Apart from this, it is not clear what is the difference between a situation in which the "applicant waives his/her claims" or a situation in which a "party voluntarily waives the matter prior to the Constitutional Chamber makes its judgment on the merits", as provided for in this para 1 of part 1 of Article 41.

25. The role of the Reporting Judge in this process should be evaluated separately. According to the proposed addition "*the reporting judge makes a decision on the return of a petition and its abandonment*". It seems to be excessive to grant a power to a single judge to change the decision of the Panel. Once, the Panel transfers petition to the Chamber, decisions on the termination of the proceeding should be made by the Chamber. Apart from that this power of the reporting judge seems to be in conflict with para 1 of part 1 of Article 41 of the Law empowering the Constitutional Chamber to terminate the proceedings in a case if the petitioner waives the claim.

G. Representation

26. The proposed new wording of **part 2 of Article 32** guarantees the right of parties to conduct their affairs personally or through their representatives. This is welcome. However, the new wording seems to eliminate requirements that representatives should be lawyers and thus providing for a possibility for the party to appoint non-lawyers as representatives. The Venice Commission advises to clarify the purpose of this provision. In addition, the Commission recommends that legal aid should be available also for proceedings before the Constitutional Chamber.

H. Experts / specialists

27. It is not clear what the purpose of **Article 34-1** is. Although Article 34 and supplementing Article 34-1 in English versions of the text refer to the "expert", in the Russian versions of the law and the Draft Law two different types of professionals are identified: experts and specialists.

28. According to the Draft Law a specialist is a person who is not involved in the case, and is called upon by the reporting judge or the Constitutional Chamber for consultations on matters concerning the case that is being reviewed. A specialist may be a person with special knowledge in specific areas of the law. Conversely, an expert is a person who has special knowledge on matters relating to the case under consideration. The matters, on which the experts should provide their opinion, shall be defined by the reporting judge or the Constitutional Chamber.

29. The major difference between the definition provided by the Articles 34 and 34-1 is that the specialist is defined as a person who is not involved (or has no interest) in the case. However, it is also obvious that the Draft Law fails to establish clear distinction between "the expert" and "the specialist", the definition provided for the expert may cover various areas of special knowledge including the field of law. Such a definition may in practice lead to confusion and is not necessary in practice. The Venice Commission recommends reconsidering the introduction of Article 34-1. In any event, an expert or a specialist should be called upon only by the Constitutional Chamber and not by the reporting judge. This is also provided in the current Article 34.

I. *Amicus curiae* briefs

30. According to **part 1 of Article 35** currently in force, private persons as well as entities "*have the right to present their written explanations, arguments and considerations on certain issues of law, reviewed by the Constitutional Chamber in a concrete case*". This provision effectively introduced *amicus curiae* briefs. Unfortunately the new wording seems to limit such a possibility. It stipulates that individuals and relevant organisations may submit amicus curiae briefs only "*at the request of the reporting judge*" or the Chamber.

31. The explanatory note is silent on the reasons for this amendment. It should also be mentioned that according to part 2 of para 2 of the same article *"[t]he reporting judge shall have the right to apply to the subjects listed in part one of this article at his/her own initiative.*" Thus, the new provision in part duplicates the existing legal norm but at the same time denies without any justification the right of the interested persons to submit the amicus brief to the Chamber.

32. The Venice Commission recommends retaining the right of all interested individuals and organisations to submit *amicus curiae* briefs while also allowing the Panel and/or Chamber to request an amicus brief from any organisation or individual if and when it deems it necessary.

J. Internal sessions

33. The new **Article 36-1** and the proposed amendments to **part 2 of Article 39** introduce internal sessions. This seems to be related to the new possibility to decide on the postponement of ordinary sessions in a closed meeting, without the parties. Such a procedural simplification is reasonable.

K. Recusal

34. The redrafted **part 2 of Article 36** defines the procedure for considering motions of the parties requesting recusal of a judge. If such motion is made the Chamber "…*shall make a reasoned decision after hearing the opinions of persons involved in the case, and also hear out the judge, to whom the recuse is issued*". This provision does not seem to limit the right of the judge to announce self-recusal. However, concerns have been expressed that if under pressure from other state powers or the media, judges could use the recusals to avoid delivering judgements. Such 'political' recusals can considerably weaken the authority of the Court and must be avoided. It is an obligation of the authorities to protect the judges from external pressure and intimidation. They are obliged to act swiftly and effectively in order to prevent as well as respond to the reports of intimidation and thus avoid abnormal situation when judges are forced to recuse themselves due to external pressure. It should also be noted that critical opinions expressed in media may not, by itself, be considered as intimidating and by no means should be considered as ground for the recusal. In order to avoid such recusals, the conditions for recusal have to be defined narrowly and should be strictly limited. The fact that a judge participated in adoption of the law in Parliament should not be a valid reason for a recusal as this could easily lead to a *non liquet* because the number of remaining judges drops below the quorum. There should be no hearing on the recusal if the judge him- or herself accepts the recusal and withdraws from the case.

L. Repeated applications

35. **Article 41** defines the grounds for the termination of the case and is supplemented by para 3-1 which establishes that the case should be terminated "[*i]f there is a decision of the Constitutional Chamber on the subject of appeal*".

36. This provision equally applies to the proceedings before the Panel and the Chamber. In other words if the judges of the Panel (at the stage of admissibility) or the Chamber (during the consideration of the case) realise that a matter raised by the applicant is similar to the one that has already been decided, they have to terminate proceedings.

37. The Venice Commission recommends revising this provision as it unnecessarily limits the power of the Chamber to decide on the constitutional issues when they (re)appear in the law. The mere fact of the existence of the decision should not be enough for terminating the case or even for adopting inadmissibility decision.

38. For instance, if the Chamber upholds constitutionality of the legal act, future petitions that may demand evaluation of constitutionality of the same legal act should indeed be declared as inadmissible, unless there are new circumstances, e.g. a consistent different interpretation given to the contested legal provision by the ordinary courts. However, if the petitioner questions constitutionality of the norm, which is re-adopted despite the earlier finding of unconstitutionality, the Panel and/or the Chamber should not be precluded from considering the case. The Constitutional Chamber should be provided with effective mechanisms to ensure the binding nature of its decisions and offering a solution when legislator fails to follow the ruling of the Chamber.

M. Contempt of court

39. According to the amendments to **part 1 of Article 45**, the Chamber can, in cases of contempt of court, bring the perpetrators to administrative responsibility instead of imposing fines which is the current regulation. This is welcome if it simplifies the proceedings before the Chamber. In addition, the perpetrators will benefit from a right to appeal, which they do not have under the current provision. At the same time, the Venice Commission

recommends that the law clarifies what "*bring them to administrative responsibility*" precisely means and that concrete means of responsibility be prescribed by the law.

40. In addition, **part 4 of Article 45** should be deleted, since part 1 of Article 45 doesn't speak anymore of fines.

N. Separate opinions

41. There might be a misunderstanding due to the English translation of **Article 49**. This Article uses the term "*dissenting opinion*", while both dissenting and concurring opinions are meant. It would be therefore better to replace the words "*dissenting opinion*" by "*separate opinion*".

O. Explanations of decisions

42. The Draft Law proposes to supplement the law with **Article 50-1** which establishes the procedure of the "*explanation of decision*" by the Chamber "*at the request of bodies and persons entitled to appeal to the Constitutional Chamber, other bodies and persons, to whom it is directed*".

43. As the Venice Commission already stated, *"[i]t is (…) unusual to create a new constitutional procedure in order to explain judgments rendered by the Constitutional Court. The reasoning of the Constitutional Court's judgment itself has to explain the ruling, and this should not be the task of another, additional, judgment. While it is true that such a procedure exists in a number of countries, it seems that in new democracies, where legal culture is not yet settled, such a provision could even be used to pressure a constitutional court into changing a previous judgment in substance."*[6]

44. Moreover, the *"[j]udgments should be straightforward to understand and should not need further explanation. Nonetheless, it may indeed happen that the Constitutional Court, in its judgment, was not able to solve the constitutional problem or it may even have created a new problem. In such cases, a new judgment in a new procedure should be delivered, but not as an explanation of the former ruling*."[7]

45. Particularly in the context of the Kyrgyz Republic, the instrument of explanation of the judgments should be avoided. During the visit to Bishkek the Venice Commission has learned that some politicians do not see this instrument as a purely neutral means for the Constitutional Court to help the executive bodies to implement the judgments in a correct way, by providing an explanation *without changing the judgments' substance*. As appears from the information the Venice Commission obtained, even if the Article 50-1 were narrowed down to provide explicitly that the substance of the decision cannot be changed, the instrument of explanation could in the current Kyrgyz context be used to put pressure on the Constitutional Chamber to change the judgments which are unpopular with the Parliament, the Government or the public opinion. Pressure to adopt "explanations" can seriously undermine the authority of the Constitutional Chamber and harm the peoples' trust in the independence of the Constitutional Chamber.

46. To avoid the need of explanation after the pronouncement of its judgments, the Constitutional Chamber should firstly have the opportunity to receive all the necessary information in order to prepare well its decisions. A proper instrument for this purpose are the *amicus curiae* briefs which have a basis in the current law. As the Venice Commission

[6] Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, CDL-AD(2007)036 para 24.
[7] *Ibid*., para 25.

stated above (paras 30-32), the draft law therefore shouldn't limit the possibility of providing the Constitutional Chamber with the *amicus curiae*.

47. Article 47, para 11 establishes the requirement that the judgment shall be pronounced in open sitting immediately after it is signed. For extremely complicated matters, the same paragraph also allows postponement of the drafting of the reasoning part to the judgment for a period of up to ten days. This provision seems to suggest that the Chamber must in all cases pronounce the judgment (which generally covers both "reasoning" and "operative" parts) immediately after it is signed. But in exceptional circumstances it also allows judges to sign and formally pronounce the operative part without having the text of the reasoning part of the judgment. The delegation was also informed about the current practice according to which the judgments of the Constitutional Chamber have to be pronounced right after the hearing. This provision as well as the practice should be revised.[8]

48. The Constitutional Chamber should be given sufficient time for drafting judgements; it should also be able to take into account all the information obtained during the hearing. Otherwise, this may lead to a situation when judgements are prepared in advance, before the hearings take place, thus turning the hearings into purely formal procedure, without substantial effect on the judgements. The strict and unreasonable time limit for drafting of the judgements may also compromise their quality and credibility. The judgments of the Constitutional Chamber risk being unclear and ambiguous. The alternative of announcing the decisions immediately after the hearing, without declaratory part of the judgment been drafted, can lead to misinterpretation of the decision and misunderstanding even between the judges themselves. All the above mentioned could be a reason why the Chamber may find itself in a need for issuing explanations in addition to the judgment itself.

P. Self-executing nature of decisions

49. The suggested amendment to **Article 52** contains a controversial formulation. It stipulates that when a law is found fully or partially unconstitutional or if the decision of the Constitutional Chamber entails a need to eliminate a gap in legal regulation, the Government of the Kyrgyz Republic not later than within 4 months of a publication of the decision by the Constitutional Chamber introduces a draft of a constitutional law or a law ensuing from the indicated decision to the Jogorku Kenesh.

50. The Venice Commission stresses that it is important to make sure that the decisions of the Constitutional Chamber are self-executing, that the laws declared as unconstitutional loose the force from the moment of publication of the decision. There should be no need for the Parliament to formally repeal the law that was already declared as unconstitutional by the Chamber in order for it to lose its effect. The existence of such a requirement would undermine the effectiveness of the constitutional control. The proposed introduction of "a constitutional law" in order to remedy a decision finding a provision unconstitutional should be in any case avoided. This could be interpreted as a way to overcome the decision of the Chamber by simply re-adopting the ordinary legal provision found unconstitutional as a constitutional provision. This is unacceptable as appears from para 2 of part 1 of current Article 51 on a similar situation, which states that [t]he legal force of a judgment on

[8] In its 2012 opinion on Romania, the Venice Commission recommended "announcing a judgement only when its full text is available for public release. In order to properly implement a judgement of a constitutional court for other state powers the sentence but also the arguments leading to that sentence are essential." (Opinion on the compatibility with constitutional principles and the rule of law of actions taken by the government and the Parliament of Romania in respect of other state institutions and on the government emergency ordinance on amendment to the Law no. 47/1992 regarding the organisation and functioning of the Constitutional Court and on the government emergency ordinance on amending and completing the law no. 3/2000 regarding the organisation of a referendum of Romania, CDL-AD(2012)026 para 66).

unconstitutionality of a normative legal act or part thereof shall not be superseded by a repeated adoption of the same normative legal act or part thereof with the same content.

51. At the same time the legislation should empower the Chamber to postpone the effect of its decisions if the decision of the Chamber would create a gap which might jeopardise constitutional rights. In such a case it is indeed necessary to impose time limits for the Parliament for its action to fill the "legal gap". The law should also regulate the procedure to be followed in cases when the Parliament fails to react.

Q. Publication

52. As far as the publication of the decisions of the Constitutional Chamber is concerned (reworded **Article 52**), the Venice Commission finds a clear regulation essential. All decisions should be published in the official journal (the state gazette where all legislation is published), and not in several "official publications of state bodies". The publication in the official journal should be the first publication, which marks the entry into force of the decision. The second official publication in the Bulleting of the Chamber will intervene later and should not have this constitutive effect. Nowadays, all decisions of the Chamber should also be published on the Internet in order to maximize their accessibility and this should be provided for in the law.

IV. Additional recommendations

53. The Venice Commission suggests using the occasion of the present amendments to take up recommendations already made in the previous opinion.

54. According to **Article 4.1.2** of the Law, the Constitutional Chamber shall make its pronouncement on the constitutionality of international agreements which have not entered into force for the Kyrgyz Republic. It is advisable not to use the term "constitutionality" but rather refer to the term "concordance with the Constitution". Apart from that it should be clarified that the Chamber has an authority to make a pronouncement only with regard to those treaties that have been signed but *not yet been ratified* rather than not yet entered into force. A multilateral treaty may already have entered into force but what matters is whether it has been ratified by Kyrgyzstan. The provision could then read: "*The Constitutional Chamber shall….make its pronouncement on the concordance with the Constitution of international treaties and which have been signed but not yet been ratified by the Kyrgyz Republic*".

55. According to **part 4 of Article 28** of the current law, the "*cancelation or lapse of an act, the constitutionality of which is being contested, shall result in the refusal to accept the petition for proceeding in the Constitutional Chamber*." Article 41, part 1, para 3 stipulates that the cancelation or lapse of an act the constitutionality of which has been contested will also result in the termination of the proceedings after the case has been admitted.

56. The Venice Commission recommended in 2011 that the Chamber should be provided with discretion to consider an appeal even if the challenged act is no longer in force due to exceptional circumstances (in case of a strong public interest). This provision should also be examined in the light of current Article 51, part 4, which provides persons with the possibility to request the review of the judicial acts based on provisions of laws or other normative regulatory acts, which were declared unconstitutional. Consequently, if the Chamber refuses to accept an appeal against a normative act no longer in force, the individuals remain without the possibility to request the review of individual acts which were based on the (allegedly) unconstitutional normative act.

57. According to current **Article 30, part 1, para 9**, a reporting judge is obliged to take care of a timely delivery of copies of the case papers to all judges and the participants in the sitting, which should be not later than ten days prior to the sitting. The Venice Commission advises to add more details of the procedure of the Chamber to the Rules of Procedure adopted by the Chamber itself. This will allow for more flexibility and autonomy for the work of the Chamber.

58. As far as the powers of the reporting judge, as listed in Article 30, are concerned, the Venice Commission notes that some of them appear excessive. For instance, the reporting judge may "question relevant official and other persons" (para 4) and "*decide upon the combination within one legal proceeding the interlinked petitions of various persons or segregation of requests outside of the jurisdiction which are included in one petition*" (para 6). It would, however, be advisable to allow the Panel to decide on the issue of joining different petitions (or at least providing Panel with the possibility to approve or reject such a proposal) and it is necessary to define the procedure under para 4 in a more detailed manner. This procedure may imply sending the questions to the parties or officials requesting additional information or clarifications. It may also refer to the procedure of "questioning" and may be problematic if conducted outside the court room and if not regulated properly.

59. **Part 4 of current Article 51** provides individuals with a real and effective possibility to remedy the rights infringed as a result of the unconstitutional provisions. It gives them namely a right to request the review of the judicial acts based on provisions of laws or other normative regulatory acts, which were declared unconstitutional.

60. The Venice Commission earlier observed that the Constitution of the Kyrgyz Republic already guarantees the possibility to review court decisions and allows therefore the *ex tunc effect* of the Constitutional Chamber's rulings. However, in the light of the rule of law principle of legal certainty, an *ex tunc* effect of the Constitutional Chamber's decisions should be applied with great caution. The Commission therefore strongly advises to provide more detailed guidance/clarification with regard to the grounds and procedures leading to the reopening of the cases.

V. Conclusion

61. The Draft Law is meant to improve the work of the Constitutional Chamber and to fill the gaps in the constitutional law. Some of the proposed amendments like, for example, the introduction of internal sessions or the possibility for a party to represent him- or herself in the proceedings before the Constitutional Chamber, will definitely contribute to this purpose.

62. The most important issue seems to be the proposed procedure of the explanation of the Chamber's decisions, which should be avoided. It could be used to exert dangerous pressure on the Chamber to change a previous judgment in substance. This could seriously undermine the authority of the Chamber.

63. Furthermore the Venice Commission makes the following recommendations:

1. The right to appeal to the Constitutional Chamber should be limited to those persons whose rights have been affected. Otherwise the Chamber might become seriously overburdened (Article 20, part 1, para 1).
2. Given the abstract character of the constitutional review, which is mainly focused on legal arguments instead of facts, the parties should not be obliged to but rather be given a possibility to submit evidence (Article 25, part 3, para 6).

3. Instead of simplifying the existing procedure of appeal in admissibility cases, the appeal as such could be removed or an application could be referred from the Panel to the Chamber if the Panel judges disagree on admissibility (Article 28, part 5).
4. Even if the party revokes its petition, in exceptional circumstances there might be a compelling public interest to continue the case. The proceedings shouldn't be terminated as a result of revocation after the oral hearing or even at a later stage (Article 30-1 and Article 41, part 1, para 1).
5. Decisions on termination of cases should be taken by the Chamber and not by the reporting judge. Also when there is a decision of the Chamber on the subject of appeal or when the law which is subject to review is cancelled or lapses, the Chamber should have the possibility to proceed (Article 30-1).
6. The relation between experts and specialists who can be consulted in the proceedings should be clarified (Article 32, part 2).
7. The right to submit *amicus curiae* briefs by everyone who is interested should be retained (Article 35, part 1).
8. The law itself should prescribe concrete means of administrative responsibility in case of contempt of court rather than referring to other legislation (Article 45, part 1).
9. Decisions of the Constitutional Chamber should be published in the official gazette and not in several "official publications of state bodies" (Article 52).

64. The Venice Commission remains at the disposal of the Kyrgyz authorities for further assistance in this matter.