



Strasbourg / Warsaw, 3 June 2015

Venice Commission Opinion no. 809 / 2015
ODIHR Opinion-Nr.: CONST-KYRG/269/2015

CDL(2015)022 *
Or. Engl.

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT JOINT OPINION

ON THE DRAFT LAW
“ON INTRODUCTION OF CHANGES AND AMENDMENTS
TO THE CONSTITUTION”

OF THE KYRGYZ REPUBLIC

on the basis of comments by

Ms Oyku Didem AYDIN (Substitute Member, Turkey)
Mr Aivars ENDZINS (Member, Latvia)
Mr Harry GSTÖHL (Member, Liechtenstein)
Mr Il-Wong KANG (Member, Republic of Korea)
Mr Konstantine VARDZELASHVILI (Substitute Member, Georgia)
Mr Felix UHLMANN (Expert for OSCE/ODIHR, Switzerland)
Ms Timea DRINOCZI (Expert for OSCE/ODIHR, Hungary)

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I. Introduction

1. By letter of 13 May 2015, Ms Natalia Nikitenko, Chairperson of the Committee on human rights, constitutional legislation and state structure of the *Jogorku Kenesh* (Parliament) of the Kyrgyz Republic, sent a letter to the OSCE Centre in Bishkek requesting assistance from the OSCE in reviewing draft amendments to the Constitution of the Kyrgyz Republic (CDL-REF(2015)020 - hereinafter the "draft Amendments"). This letter was forwarded to OSCE/ODIHR by official letter of the Head of the OSCE Centre in Bishkek on 14 May 2015. OSCE/ODIHR thereupon engaged Ms Drinoczi and Mr Uhlmann as experts, to assist with the preparation of the opinion.
2. On 14 May 2015, OSCE/ODIHR proposed to the Venice Commission the preparation of a joint opinion on the draft Amendments. Ms Aydin and Messrs Endzins, Gstöhl, Kang and Vardzelashvili were appointed as rapporteurs for the Venice Commission.
3. On 22 May 2015, the OSCE/ODIHR Director responded to the letter received from the OSCE Centre in Bishkek by confirming the readiness of OSCE/ODIHR to review the draft Amendments jointly with the Venice Commission.
4. *The present joint opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Scope of the Opinion

5. The scope of this Joint Opinion covers only the draft Amendments, submitted for review. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire constitutional framework of the Kyrgyz Republic.
6. The Joint Opinion raises key issues and provides indications of areas of concern. In the interests of concision, the Joint Opinion focuses more on problematic areas rather than on the positive aspects of the draft Amendments. The ensuing recommendations are based on relevant international human rights and rule of law standards and OSCE commitments, Council of Europe and UN standards, as well as good practices from other OSCE participating States and Council of Europe member states. Where appropriate, they also refer to the relevant recommendations made in previous OSCE/ODIHR and Venice Commission opinions and reports.
7. This Joint Opinion is based on unofficial English translations of the draft Amendments provided courtesy of the UNDP Office in the Kyrgyz Republic. Errors from translation may result.
8. In view of the above, this Joint Opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation that the OSCE/ODIHR and/or the Venice Commission may make in the future.

III. Background

9. The 2010 Constitution of the Kyrgyz Republic was drafted, and adopted by referendum in June 2010. At the time, the Venice Commission and OSCE/ODIHR had supported the process of amending the 2007 Constitution, and on 8 June 2010, the Venice Commission issued an Opinion on the draft Constitution¹. This opinion noted the new

¹ CDL-AD(2010)015 Opinion on the Draft Constitution of the Kyrgyz Republic (version published on 21 May 2010).

Constitution's shift towards a parliamentary system, and welcomed that it introduced a more balanced representation of power, a stronger legislature, and an improved section on human rights. At the same time, the 2010 opinion recommended introducing additional measures to ensure the independence of the judiciary, clearer rules on the formation of Government and on limits to the President's powers to issue decrees and orders, and a limitation of the strong role of the prosecution service. Moreover, the 2010 opinion urged the Kyrgyz authorities to reconsider the abolition of the Constitutional Court as a separate court.

10. In 2011, the Venice Commission issued an opinion on the draft constitutional Law on the Constitutional Chamber of the Supreme Court.² This opinion welcomed that "in functional terms, the draft Constitutional Law conceives constitutional justice a separate, self-contained system of adjudication, irrespective of the fact that, in institutional terms, constitutional control is exercised by the Constitutional Chamber of the Supreme Court."

11. Recently, five factions in the *Jogorku Kenesh* (Parliament) of the Kyrgyz Republic submitted to the *Jogorku Kenesh* draft legislation for consideration – this included a draft Law on "Carrying out a Referendum in the Frame of the Law on "Introducing Changes and Amendments to the Constitution of the Kyrgyz Republic", and a draft Law on "Introducing Changes and Amendments to the Constitution of the Kyrgyz Republic".

12. The draft Law on Introducing Changes and Amendments to the Constitution (hereinafter "the draft Amendments") proposes changes to constitutional provisions regulating the immunity of deputies of the *Jogorku Kenesh*, suspension/loss of their mandates, the dismissal of members of Cabinet, the authority of the Prime Minister to appoint/dismiss heads of local state administration, and the rights of the local *Keneshes* in this respect, as well as the roles of the Supreme Court, and of its Constitutional Chamber. They likewise propose changes to the majority of deputies required to adopt changes to the Constitution.

IV. Executive Summary

A. Key Recommendations

13. In general, while recognizing the desire of the drafters to clarify certain parts of the 2010 Constitution, OSCE/ODIHR and the Venice Commission note that the majority of the proposed amendments to the Constitution would appear to raise concerns with regard to key democratic principles, in particular the separation of powers and the independence of the judiciary. For this reason, OSCE/ODIHR and the Venice Commission make the following key recommendations:

- A. The immunity for members of Parliament should be retained as it is in the current Constitution or replaced with a system whereby – upon request by a parliamentary minority – the Constitutional Chamber would decide on whether immunity can be lifted.
- B. Political parties and/or factions should not have the power to decide on the termination of the mandate of a Member of Parliament.
- C. Article 97 of the Constitution on the Constitutional Chamber, as well as other provisions making reference to its contents, should be retained in order to keep the Chamber as a judicial power ensuring effective constitutional oversight in the Kyrgyz Republic.

² CDL-AD(2011)018 Opinion on the Draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan.

- D. In order to guarantee internal independence of judges, the proposed provisions on "judicial oversight" and on "mandatory explanations" by the Supreme Court should be removed (draft Article 96 pars 2 and 3).
- E. The terms of office of chairpersons, their deputies and judges of local courts, the judges of the Supreme Court and the judges of the Constitutional Chamber should not be affected by amendments to the Constitution (transitional provision).

In any case, the constitutional procedure for amendments should be followed, as set out in Article 114 of the Constitution. The initiative for a referendum does not only require adoption by a two-thirds majority - there is no doubt about that requirement – but should arguably also only take place following at least three readings with two months' intervals between them. In case of doubt, the Constitutional Chamber may need to decide whether this is procedure to follow.

B. Additional Recommendations

14. OSCE/ODIHR and the Venice Commission make the following additional recommendations:

- F. Requiring future constitutional amendments to be adopted by a three-fourths' majority, rather than a two-thirds majority of the deputies of the *Jogorku Kenesh* would lead to a situation where it may become very difficult to amend the Constitution in future. To retain some flexibility in the system, it is recommended to delete this amendment from the draft Amendments.
- G. Rather than allowing only the Prime Minister to "suspend" his/her parliamentary mandate while in office, all members of Government – and not only the Prime Minister - should be permitted to have their parliamentary mandate suspended. At the same time, rules for a replacement of "suspended" members of Parliament should be foreseen; if these are not in place, then all members of the Government should be obliged to give up their mandates as members of Parliament while in office.
- H. The provisions on the dismissal of the heads of local public administrations should be redrafted to include grounds for dismissal. In order to be coherent, a declaration of no confidence by local *Keneshes* should lead to the dismissal of a head of local public administration.
- I. The procedure for appointing the Chairperson of the Supreme Court and his / her deputies should not involve the *Jogorku Kenesh* (draft Article 94 par 7).
- J. To enhance clarity and transparency, the procedure for dismissing members of Government should be set out in the Constitution and not be left to a separate constitutional law. The replacement of members of the Government should be subject to approval by the *Jogorku Kenesh*.
- K. Finally, the language used in the draft Amendments relates mostly to "he" or to "him". Unless this is a translation issue, it is recommended to use more gender neutral language throughout the draft Amendments, and to refer to both genders, to demonstrate that the people concerned may be both male and female.

15. The Venice Commission and OSCE/ODIHR remain at the disposal of the Kyrgyz authorities for any further assistance they may need.

V. Analysis and Recommendations

A. Procedure for amending the Constitution

16. At the outset, when reviewing the draft Amendments, the first question that arose was which procedure should be used to amend the 2010 Constitution, and the Law on the Enactment of the Constitution, which was passed at the same time as the Constitution.

17. Paragraph 1 of Article 114 allows the amendment of the (whole) Constitution by referendum called by the *Jogorku Kenesh*. However, paragraph 1 does not specify the procedure to follow for the referendum.

18. According to Article 4 of the Law on the Enactment of the Constitution of 2010, paragraph 2 of Article 114 will enter into force only in 2020. Even if it is not yet in force, this paragraph is nonetheless important in order to understand the entire Article 114. Paragraph 2 stipulates that changes to sections III to VIII of the Constitution may be adopted by the *Jogorku Kenesh* upon the proposal of the majority of the total number of deputies or at the initiative of not less than 300 000 voters. Paragraph 2 thus provides for a simplified method of amendment to the institutional sections of the Constitution by the *Jogorku Kenesh* alone, without a referendum.

19. Paragraph 3 provides the procedure for constitutional amendments but it does not specify whether the same or different procedures apply for amendments by referendum (according to paragraph 1) and by adoption through the *Jogorku Kenesh* (according to paragraph 2, as of 2020).

20. Paragraph 3 contains three sentences. The first sentence stipulates that the *Jogorku Kenesh* shall adopt the amending law within 6 months. The second sentence provides that the amending law has to be passed by a two-thirds majority following at least three readings with two months' intervals between them. Finally, the third sentence sets out that the amending law can be submitted to a referendum by a two-thirds majority of the *Jogorku Kenesh*.

21. The first two sentences could provide elements of the procedure both for (a) amendment by referendum according to paragraph 1 and (b) amendment of Sections III to VIII of the Constitution by the *Jogorku Kenesh* according to paragraph 2, which will enter into force only in 2020. The fact that these two sentences are already in force since 2010 is an argument for their application also to the amendments by referendum according to paragraph 1. Otherwise, these two sentences should enter into force in 2020, together with paragraph 2.

22. As a consequence, the initiative for the referendum would not only have to be adopted by a two thirds majority but also following at least three readings with two months' intervals between them. However, this interpretation is not apparent, and the Constitutional Chamber may need to decide on this issue.

23. In any case, the legitimacy of the referendum needs to be examined as well. Provisions outlining the power to amend the Constitution are not a legal technicality but they may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself. Equally important, a wide acceptance of these amendments needs to be ensured.

24. Therefore, the competent state authorities must direct their efforts to ensuring inclusive discussions on the intended amendments, and provide a necessary period for reflection as well as adequate time for the preparation of a referendum (where applicable).

25. In general, the Venice Commission warns against constitutional referenda without a prior qualified majority vote in Parliament. The fact that no debate can take place during the referendum procedure exposes this instrument of direct democracy to polemics, misleading information and abuse of democracy if not carefully managed in accordance with generally accepted democratic rules. Especially the lack of a proper debate at the moment of the vote on the one hand, and the fact that the submitted questions can potentially be very complex and difficult to understand for the majority of voters on the other, require the relevant authorities to establish clear and strict criteria for such processes. Such criteria are necessary in order to ensure that the voter understands the question submitted for referendum, and to give the voter a real chance to decide which parts of a question or draft law he/she wants to adopt and which he/she wants to reject.

26. Even if “the national parliament is the most appropriate arena for constitutional amendment, in line with a modern idea of democracy” (...) “it is to be stressed that the use of referendums should comply with the national constitutional system as a whole. As a main rule, a referendum on constitutional amendment should not be held unless the constitution explicitly provides for this”.³

27. The executive should also never take recourse to a referendum in order to circumvent parliamentary amendment procedures⁴.

28. Finally, the matters that are being decided by a referendum should never be too imprecise or too vague, and the draft legislation adopted in this manner should not leave important matters to future laws. In this context, it is noted that the draft Amendments do leave key questions, such as the procedures for dismissing members of Government and chairpersons of the Supreme Court, as well as the powers of the Constitutional Chamber to future laws. As the contents of such legislation have not even been drafted yet, this means that citizens will not have a very clear idea of which changes they are supporting in a referendum. Asking citizens to engage in such a ‘blind vote’ would dilute the very purpose of popular referenda, and should be avoided.

B. Changes to the procedure for future amendments to the Constitution

29. Article 12 of the draft Amendments seeks to amend Article 114 itself. The respective amendments concern par 4 of this provision, and aim to change the required majority for amending the Constitution from a two-thirds majority to a three-fourths majority.

30. In this context, it is noted that already a two-thirds majority is a difficult hurdle that would appear to prevent frequent amendments to the Constitution. Raising the bar for such amendments further would lead to a situation where it may become very difficult to amend the Constitution in future. To retain the flexibility of the system, it is recommended to delete this amendment from the draft Law.

31. In its Report on Constitutional Amendment, the Venice Commission expressed its concern with regard to excessively rigid procedures and warned against the difficulty of engaging in constitutional reform in such cases.⁵ In other cases, the Commission has been

³ Report of the Venice Commission on Referendum CDL-AD(2010)001, Nr. 183 and Nr. 185

⁴ CDL-AD(2010)001, par 68.

⁵ CDL-AD(2007)004, Opinion on the Constitution of Serbia, §§ 99-100

confronted with the opposite challenge, where amendments, or attempted amendments to the constitution happen on a too frequent basis, which may also negatively affect constitutional and political stability.⁶ The Commission has thus stressed that a constitution cannot “be amended in conjunction with every change in the political situation in the country or after a formation of a new parliamentary majority”.⁷

32. As for the process of amending the Constitution, it is noted that this process should be marked by the highest levels of transparency and inclusiveness – in particular in cases where draft amendments, such as the current ones, propose extensive changes to key aspects of the Constitution, such as the roles of the highest court and its constitutional chamber, the immunity and loss of mandate of deputies, and the process of appointing/dismissing heads of local administration. In this context, it should be borne in mind that the Constitution itself, in its Article 52, specifically states that citizens shall have the right to participate in the discussion and adoption of laws of republican and local significance, which surely applies in the current case.

33. It is thus recommended to ensure, in this and further attempts to amend the Constitution, that all relevant stakeholders, including civil society, and the wider public, are aware of the proposed changes, and are included in various platforms of discussion on this topic, so that, once draft amendments are presented to the *Jogorku Kenesh* for adoption, they are also representative of the will of the people.⁸

C. Immunity of deputies of the *Jogorku Kenesh*

34. According to the current reading of the Constitution (Article 72 par 1), a deputy of the *Jogorku Kenesh* may not be prosecuted for opinions expressed in the course of his/her activities as a deputy, or for the outcome of voting in the *Jogorku Kenesh*. Criminal proceedings may be initiated following the consent of the majority of the total number of deputies of the *Jogorku Kenesh*, except in cases involving grave offences. At the time, the 2010 opinion of the Venice Commission welcomed the fact that this provision foresaw a limited immunity for deputies; however, the explanatory memorandum to the draft Amendments states that in practice “corporate solidarity and unwillingness to betray the colleagues dominate over the collegiate responsibility towards the electorate and the society”.

35. Generally, as also outlined in the Venice Commission’s 2014 Report on the Scope and Lifting of Parliamentary Immunities⁹, there are two categories of parliamentary immunity, namely ‘non-liability’ and ‘inviolability’. While non-liability of parliamentarians usually involves immunity from prosecution for opinions, remarks and the outcomes of votes, inviolability

⁶ AD(2005)025, Final Opinion on Constitutional Reform in the Republic of Armenia, where the Venice Commission welcomed the lowering from 1/3 to 1/4 of the minimum number of registered voters for validating a constitutional referendum, § 42.

⁷ See e.g. CDL-INF(2001)015, Opinion on the Amendments of 9 November 2000 and 28 March 2001 of the Constitution of Croatia, item 4 and conclusions, where the Venice Commission regretted that the Constitution had been amended twice in a very short space of time (5 months) and warned that the suppression of the second chamber should not make future constitutional revisions too easy and weaken stability; CDL-AD(2007)047, Opinion on the Constitution of Montenegro, § 126; CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine, § 105.

⁸ For more specific recommendations on enhancing public consultation in the legislative process, see OSCE/ODIHR’s Preliminary Assessment of the Legislative Process in the Kyrgyz Republic of April 2014, in particular pars 44-48.

⁹ Report on the Scope and Lifting of Parliamentary Immunities, CDL-AD (2014)011, of 14 May 2014.

provides special legal protection for parliamentarians accused of breaking the law, without the consent of the Parliament.¹⁰

36. Under Article 1 of the draft Amendments as set out in document CDL-REF(2015)020 Article 72 par 1 of the Constitution retains the non-liability principle. At the same time, the requirement of consent of the *Jogorku Kenesh* in order for criminal proceedings to be initiated against a deputy (in cases not involving grave offences) has been removed; instead, the *Jogorku Kenesh* is informed *after* such proceedings have been initiated, and may then review whether the prosecution is linked to the political activity of the deputy (in this case it is considered “political persecution”), at the initiative of no less than one-third of the number of deputies. A decision on the presence or absence of political persecution shall then be taken within two months from the day when the initiative of the deputies was launched. If such decision is taken, and the *Jogorku Kenesh* decides by a two-thirds majority that there is a case of political persecution, then the prosecution shall be terminated, or suspended until the end of the term of the *Jogorku Kenesh* of relevant convocation.

37. If there is no initiative to assess whether there is a case of “political persecution” or if this assessment is not completed within the required two months’ period, then political persecution shall be deemed absent, and criminal prosecution may proceed. The entire procedure of assessment of political persecution shall not apply in cases of grave crimes.

38. However, the latest version of the draft Amendments¹¹ (not yet included in CDL-REF(2015)020) would appear to revert to the requirement of consent of a majority of the total number of deputies of the *Jogorku Kenesh* before criminal proceedings can be instituted. The only amendment to the current wording of Article 71 par 1 seems to be the removal of the requirement of consent of the *Jogorku Kenesh* for crimes related to obtaining a parliamentary mandate.

39. A regulation on immunity for deputies must strike a fair balance between the protection of the deputies and the prevention of possible abuse. However, the proposed amendments as set out in document CDL-REF(2015)020 appear to focus more on preventing abuse, than on protecting deputies from possible politically-motivated prosecution. The meanings of the terms “an offence linked to political activity”, and “political persecution” are quite unclear, and may be open to different, and arbitrary interpretation. For the same reason, “political persecution” may also be difficult to prove in practice.

40. Moreover, while it is conceivably possible that one-third of the deputies could join together to initiate the process of examining a case, it is uncertain whether in practice two-thirds of the *Jogorku Kenesh* would ever come to the conclusion that criminal proceedings against a deputy are arbitrary and “political persecution” in the above sense. This would essentially require the majority in the *Jogorku Kenesh* to declare that the executive, in other words the Government (made up of members of the same majority party or parties) conducted arbitrary or “political” procedures against a deputy. Even if such decision would be taken in some cases involving deputies from majority factions, it is doubtful whether such a large majority would ever come together to prevent possible political persecutions of members belonging to minority parties.

41. Overall, it is questionable whether the evaluation of an ongoing criminal investigation, which may only be initiated if one-third of the *Jogorku Kenesh* supports this, would

¹⁰ Ibid, pars 10 and 11.

¹¹ Russian version available at the site of the *Jogorku Kenesh* at http://www.kenesh.kg/RU/Articles/30107-Na_obshhestvennoe_obsuzhdenie_22_maya_2015_goda_vynositsya_proekt_Zakona_Kyrgyzskoj_Respubliki_O_vnesenii_izmenenij_v_Konstituciyu_Kyrgyzskoj_Respubliki.aspx.

effectively protect the deputies of the *Jogorku Kenesh*, and thereby the *Jogorku Kenesh* as such, in the same way as the system that is currently in place. In this regard, it is important to return to the original purpose of parliamentary immunity, which is to fulfil the democratic function of protecting parliament as an institution, and in particular the parliamentary opposition, from undue pressure or harassment from the executive, the courts or from other political opponents.¹²

42. In addition, whatever the outcome after the two months' period may be (a decision confirming or rejecting the possibility of political persecution), the pressure on the individual deputy during this period is enormous. Moreover, it may be presumed that political persecution would normally hide under the guise of ordinary suspicions voiced towards a deputy, which means that also for this reason, it would – in practice – be almost impossible to demonstrate in the *Jogorku Kenesh* that a persecution is based on purely political reasons.

43. The deletion of this amendment in the latest version of the draft Amendments (which for the most part retains the current system) is thus welcome, as the diminution of parliamentary immunity, and the protection from arbitrary prosecutions that it involves, could prevent deputies from engaging in the active fulfilment of their democratic mandate.

44. At the same time, a good alternative for future consideration could be to introduce a system similar to the Italian model involving the judiciary. Under this system, prosecutors and ordinary judges would be obliged to inform Parliament about the arrest of, and the institution of criminal proceedings against a Member of Parliament. A minority of the members of Parliament (maybe one-third of its members) would then be entitled to complain against the arrest of and prosecution against one of its members to the Constitutional Chamber within a given deadline. The measures taken against the member of Parliament would remain suspended until the Chamber decides on the matter.

45. If the current system is retained, and to prevent the abuse of immunity by individual deputies, consideration may also be given to introducing additional safeguards, such as those mentioned in the 2014 Venice Commission Report on the Scope and Lifting of Parliamentary Immunities. These include clear and impartial procedures for lifting immunity, specifying that immunity does not apply to preliminary investigations, for cases where a deputy is caught *in flagrante delicto*, or for minor or administrative offences (e.g. traffic violations).¹³

46. Another safeguard mentioned in the 2014 Venice Commission report is the temporal nature of immunity; this is included in the amended Article 72 par 1, since the suspension of persecution may last only until the expiration of the term of the *Jogorku Kenesh*. This raises the question of whether a deputy may retain his/her immunity in cases where he/she has left the *Jogorku Kenesh* prior to the expiration of its term. To avoid possible abuse of immunity, it may be preferable to specify that in case a deputy leaves the *Jogorku Kenesh* before the end of tenure, his/her immunity ends with his/her mandate. Finally, it is assumed that the expiration of immunity shall not apply to the non-liability for opinions expressed, and voting results from a deputy's tenure, which should always be protected, even once a deputy's mandate has expired.

¹² Ibid, par 185.

¹³ Ibid, par 187.

D. Incompatibility and loss of mandate of deputies

47. Article 73 outlines the mandate of deputies of the *Jogorku Kenesh*, which shall end simultaneously with the termination of activity of the relevant convocation of the *Jogorku Kenesh* (par 2). In its paragraph 3, Article 73 outlines those cases that shall lead to the early termination of a deputy's mandate.

48. Under sub-paragraph 1 of this provision, the mandate of a deputy shall end following the deputy's resignation, or his/her disaffiliation with a political faction (which thus makes it impossible for a deputy to change factions and still retain his/her mandate). Article 2 of the draft Amendments proposes changes to this provision, by stating, in a new sub-paragraph 1, that loss of mandate shall take place where a faction decides to exclude a deputy, based on a respective proposal of the "governing body" of the relevant political party. It seems that the latest version of the draft Amendments refers to a party congress rather than the governing body. Even if this seems more democratic, it does not affect in essence the arguments developed below.

49. A new sub-paragraph 2 still foresees the loss of mandate based on a written statement of resignation signed by the respective deputy, but also due to the deputy's renunciation of his/her nationality, or acquisition of another nationality (presumably this refers to citizenship).

50. The new sub-paragraph 1 under Article 73 paragraph 3 raises serious constitutional concerns, as it would permit a faction, based on the decision of a political party, to terminate the mandate of a deputy.

51. In previous opinions, the Venice Commission has declared such practices to be incompatible with the principle of a deputy's free and independent mandate, and has argued that this "would put [a] parliamentary bloc or group in some ways above the electorate which, in return, is unable to revoke individually a parliamentary mandate conferred through election"¹⁴. While it should always be possible for a party or faction to expel a deputy (following specific criteria that are spelled out in law), this should not lead to the loss of his/her mandate, since, while such groups or factions may play important roles in parliaments, they do not have the same status as that of deputies elected by the people.

52. The new sub-paragraph 1 of paragraph 3 thus seems to provide political parties, and their factions, with quite extensive powers vis-à-vis their deputies, who would at any time be faced with the prospect of losing their mandates should they disagree with party lines, or otherwise displease their party or their faction. While this would not necessarily imply an imperative mandate *per se* (which is also forbidden by Article 73 par 1 of the Constitution), it would nevertheless come close to a "party-administered model".¹⁵ The proposed amendments would weaken the independence of deputies from the faction and the party and would be a setback for the democratic parliamentary system adopted in the Kyrgyz Republic in 2010. Given the dangerous repercussions that the revised version of Article 73 par 3 (1) would have for deputies of the *Jogorku Kenesh*, and their free mandate, this provision should be deleted.

¹⁴ Consolidated Opinion on the Ukraine Constitutional Reform Project CDL-INF(2001)011, of 11 July 2001, II b).

¹⁵ See the Venice Commission's Report on the Imperative Mandate and Similar Practices, CDL-AD(2009)027, of 16 June 2009, par 39.

E. Suspension of the parliamentary mandate of the Prime Minister

53. The proposed amendment to Article 72 par 3 states that if a deputy is appointed to the position of Prime Minister, his/her competencies as a deputy shall only be temporarily suspended, until the termination of his/her responsibilities as Prime Minister.

54. The proposed amendment may be intended to articulate the practice in many parliamentary systems, which is that members of the executive remove themselves from the day-to-day work of the legislature. This practice is often intended to strengthen the ability of the legislature to hold the executive to account. However, as drafted here, the proposed new Article 72 par 3 remains unclear, as do the effects of such suspension of mandate.

55. Furthermore, it would also not seem logical to provide for such a suspension only for the Prime Minister. If it were introduced, then all ministers should have their parliamentary mandate suspended while in office.

56. At the same time, the suspension of the parliamentary mandate of the Prime Minister – and much more so of all members of Government – would deprive the majority of valuable votes in Parliament, which could then result in a distortion of the relative forces of political parties in Parliament. Rules for replacing “suspended” members of the *Jogorku Kenesh* should therefore be foreseen, or the members of the Government should be obliged to give up their mandates as Members of Parliament while in office.

F. Dismissal of members of Government

57. Currently there is no provision permitting a Prime Minister to reshuffle his or her government. The proposed amendment to Article 87 of the Constitution requires a constitutional law to set out the circumstances in which the Prime Minister may dismiss a minister and thus reshuffle the Government.

58. It is a usual practice for a Prime Minister to be able to dismiss his/her ministers. Indeed, this power might be assumed to exist even if it is not expressly set out in the Constitution. There are habitually also no specific limits to circumstances in which members of the Government may lose their positions. As the Prime Minister bears full responsibility for running the Government under Article 89, it would not be uncommon for him or her to have unfettered discretion to propose the dismissal of members of Government to the President.

59. The current proposal does not, however, explicitly increase the powers of the Prime Minister to recommend such dismissal. If the power to recommend dismissal is to be limited to specific circumstances, perhaps to ensure broad representation in Government or to avoid the concentration of power in one person, one would expect to find these circumstances spelled out in the Constitution and not in another, hitherto unspecified law. Permitting this important detail to be set out in a constitutional law renders the situation quite unclear, and means that the Constitution would lack an important detail pertaining to the framework for Government. It also means that voters approving such amendment in a referendum would have no idea what its implications might be. This matter should therefore be settled in the Constitution, and the draft Amendments should be changed accordingly.

60. In addition, to ensure adequate checks and balances, as well as consistency with Article 84 of the Constitution, consideration may be given to introducing a requirement that new members of the Government should be approved by the *Jogorku Kenesh*.

G. Dismissal of Local Heads of Government Administration

61. Under Article 3 of the Constitution, the state power is based on the supremacy of popular power, represented by the *Jogorku Kenesh* and the President, the separation of powers, and the separation of functions and powers of state authorities and local self-governance bodies.

62. At the local level, the Constitution foresees local self-governance, as regulated in Section VIII of the Constitution. Article 110 par 1 stresses that this involves “the real possibility for local communities to independently resolve the matters of local significance in their own interests, and under their responsibility”. Local self-governance shall be implemented by local communities either directly, or through local self-governance bodies (Article 110 par 3). According to Article 111 par 1, the system of local self-governance bodies involves local *keneshes* (representative bodies of local self-governance) and *ayil okmotus* and mayors’ offices (executive bodies of local self-governance). Under par 2 of this provision, executive bodies of local self-governance are accountable to the local *keneshes* in their activity.

63. At the same time, Articles 89, 91 and 92 of the Constitution speak of “local public administrations”. These appear to be local arms of the central state, responsible for fulfilling the delegated responsibilities of the central government in villages and cities on behalf of the central government. The “heads of executive local self-government bodies” referred to in Article 112(2), on the other hand, are local executive bodies fulfilling the responsibilities of the local authorities (devolved functions).

64. Under Article 89 par 7 of the Constitution, the Prime Minister, upon proposals of local *keneshes* in accordance with the relevant legislation, shall appoint and dismiss “heads of local public administrations”. The proposed revisions to Article 89 par 7 remove the requirement of the prior proposal of such appointments and dismissals by the local *keneshes*, and thus their involvement in such appointments/dismissals *per se*.

65. This would mean that, rather than moving to increased local autonomy, the draft Amendments attempt to assert central control over certain matters that fall under subnational control in other jurisdictions. However, the proposed amendment to Article 89 would be acceptable if coupled with adequate mechanisms to avoid conflicts between local self-governments and the delegated administration of the central state at local levels.

66. At the same time, the amendments to Article 89 par 7 also remove the separate requirement that appointments and dismissals are to be done in accordance with “the procedures of the law”. This would appear to be incompatible with the notion of a constitutional state because it leaves the appointment of administrative positions to the sole discretion of the Prime Minister, without setting out any criteria for such cases. Such wide discretion would not appear to be necessary, or appropriate to achieve the goal set out in the explanatory memoranda to the draft Amendments, which is the strengthening of the executive by ensuring quality professional staff. This wide discretionary role of the Prime Minister may also make it more difficult to manage tensions between the local state administrations and the central government.

67. It appears that the proposed addition to Article 112 par 3 item 1 of the right of a local *Kenesh* to adopt a vote of no confidence in “the head of local public administration” is to make up for the removal of their right approve these officials. The new provision appears to be incomplete, as it does not specify the consequences of such declarations of no confidence. The *Kenesh* may thus adopt a vote of no confidence but has no mechanism for enforcing that decision. The procedure invites direct conflict between the Prime Minister and local *Keneshes* and offers no mechanism for resolving such conflict.

68. To sum up the above, it would be expedient for the law drafters, when amending these provisions of the Constitution, to incorporate mechanisms that would enhance transparency, and reduce the potential for conflict between delegated state administration operating in local communities, and local self-governance bodies. The current draft Amendments do not contain such safeguards, and would need to be revised in order to be clearer, and more coherent.

H. The role of the Supreme Court

69. Under the current Constitution (Article 96), the Supreme Court is the highest body of judicial power in all areas of law, and has the power to “revise court rulings of local courts upon appeals of the participants in the judicial process”; its rulings are final and not subject to appeal. The Plenum of the Supreme Court (Chairperson and collegiums) shall also give explanations on issues of court practice.

70. The draft amendments enhance the role of the Supreme Court under Article 96 by adding, in its par 2, that the Supreme Court shall also “perform judicial oversight over the activity of all courts and judges of the Kyrgyz Republic in accordance with the procedures established by law.” It is not clear what this kind of “judicial oversight” would imply, and how it would relate to the general principle that all judges shall be independent and subordinate only to the Constitution and laws, as stipulated in Article 94 of the Constitution. To avoid potential interference with the courts’ and the judges’ general independence, it is recommended to delete this draft amendment.

71. The draft amendment to Article 96 par 3 stipulates that explanations on issues of judicial practice shall be mandatory for all courts and judges. This proposed measure again calls into question the general independence of the courts and judges. Notably, OSCE/ODIHR’s 2010 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia explicitly state that “the issuing by high courts of directives, explanations, or resolutions shall be discouraged”, but that, as long as they exist, they shall not be binding on lower court judges. Otherwise, they would represent infringements of the individual independence of judges. Uniformity of interpretation of law shall be encouraged through studies of judicial practice that also have no binding force.¹⁶

72. In its 2010 Report on the Independence of the Judicial System; Part I: The Independence of Judges, the Venice Commission also found the adoption of guidelines by higher courts that shall be binding on lower courts to be problematic from the point of view of judicial independence.¹⁷ Every judge has the same right to judge. A strict hierarchical order within the judiciary would entail the risk that judges behave like civil servants who are subject to orders from their superiors. The Venice Commission thus came to the conclusion that while supreme courts may have the authority to set aside or modify judgments of lower courts, they should not supervise them.¹⁸

73. Based on the above considerations, Article 96 par 3, as amended by Article 7 of the draft Amendments, allowing the Supreme Court to give mandatory “explanations” should be deleted.

¹⁶ OSCE/ODIHR’s 2010 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, par 35.

¹⁷ Report on the Independence of the Judicial System; Part 1: The Independence of Judges, CDL-AD(2010)004, of 16 March 2010, par 70.

¹⁸ *Ibid*, par 71.

74. At the same time, it is noted that the current wording of Article 96 par 3, according to which the Supreme Court's decisions shall be final and not subject to appeal, has not been retained. While this may be an oversight, it is recommended to specify in Article 7 of the draft Amendments that this provision shall be kept.

I. Election of the Chairperson of the Supreme Court and his/ her deputies

75. The election of the Chairperson of the Supreme Court, and of his/her deputy is currently regulated under Article 94, which states that the members of the Supreme Court shall elect their Chairperson from among themselves, for a term of three years. Article 6 of the draft Amendments now change this procedure under Article 94, by specifying that the Chairperson and deputy chairpersons of the Supreme Court shall be elected from among the judges of the Supreme Court by the *Jogorku Kenesh*, upon presentation of the President.

76. It is not completely unusual to grant the executive a role (or even the right to take decisions) in the appointment of court leadership. However, in many cases these practices are outdated (United Kingdom) or inherited (former colonies). Lessons from the past have led new constitutional orders to introduce more balanced mechanisms for the appointment of all judges and judicial leadership. While the appointment of constitutional judges requires specific democratic legitimacy to ensure that it also reflects the "majority will" as expressed by representative institutions, this is not true for Supreme Court judges in countries where there is a specialised Constitutional Court (or Chamber as in the Kyrgyz Republic).

77. The manner of electing judges of the Supreme Court is not specifically outlined in the Constitution. According to Article 3 par 2 of the Law on the Selection of Judges, the *Jogorku Kenesh* appoints these judges upon recommendation of the Council for the Selection of Judges¹⁹. This procedure should be specified in a future amendment to the Constitution. Under Article 95 par 2 of the Constitution, the *Jogorku Kenesh* may, upon request of the Council of Judges (different from the Council for the Selection of Judges), also dismiss them.

78. Given this involvement of the *Jogorku Kenesh* in the appointment and dismissal of Supreme Court judges, it is not apparent why it would, in addition, be necessary for it to also select the Chairperson and deputy chairpersons of the Court. The current procedure, whereby this is left up to the members of the Supreme Court, would appear to be the more reasonable manner of selecting the Chairperson/deputies, since the other members of the Court will be more familiar with the requirements of the post, and the qualifications needed to fill this post. This is also confirmed by paragraph 16 of the OSCE/ODIHR 2010 Kyiv Recommendations, which considers the election of a court chairperson by the judges of the particular court to be a good option. In case of executive appointment, the Kyiv Recommendations specify that this should happen upon recommendation of an advisory body (such as a Judicial Council or Qualification Commission), which the executive body may only reject by reasoned decision.

79. The new procedure introduced by Article 7 of the draft Amendments would allow the *Jogorku Kenesh* and the President to interfere with the internal workings of the Supreme Court without any involvement of members of the judiciary. This would raise concerns with regard to the independence of the judiciary under Article 94, and the separation of powers under Article 3 of the Constitution. Based on the above considerations, it would appear preferable to leave the procedure for appointing Chairperson/deputies of the Supreme Court

¹⁹ see also CDL-AD(2011)019, Opinion on the draft law on the Council for the Selection of Judges of Kyrgyzstan adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

as it is, and to not further involve the *Jogorku Kenesh* in these matters. An alternative could be to involve the Council of Judges in this procedure.

J. The role of the Constitutional Chamber

80. The jurisdiction of the Constitutional Chamber is set out in Article 97 of the Constitution. Under this provision, the Constitutional Chamber is responsible for performing constitutional oversight, which, according to Article 97 par 4 shall involve reviewing the constitutionality of laws, international treaties, and draft laws. If these are found to be unconstitutional, then the Constitutional Chamber has the power to declare these instruments unconstitutional, and thus to repeal them (pars 6 and 9). Paragraph 7 of Article 97 also foresees the possibility of individual constitutional complaints, which everyone may initiate in case he/she believes that certain laws or other regulatory acts violate the rights and freedoms recognised in the Constitution.

81. In its opinion of 2011, the Venice Commission welcomed the intention of the Kyrgyz authorities to establish the Constitutional Chamber as a separate, self-contained system of adjudication, irrespective of the fact that, in institutional terms, constitutional control is exercised by the Constitutional Chamber of the Supreme Court. The Commission also welcomed the introduction of individual access for natural and legal persons to the Constitutional Chamber.²⁰

82. At the same time, it should be mentioned that the abolition of the Constitutional Court by the new Constitution of 2010 had been strongly criticised by the Venice Commission in its 2010 Opinion on the draft Constitution of the Kyrgyz Republic. Currently, however, pursuant to the Constitution and Constitutional Law, the Constitutional Chamber “enjoys the necessary degree of independence and autonomy and has a wide enough jurisdiction to function as an effective organ of judicial constitutional review.”²¹

83. The draft Amendments foresee the deletion of the entire Article 97, which would essentially mean that the role of the Chamber, currently a judiciary oversight body to review the constitutionality of laws, draft laws and treaties, and annul them if they are unconstitutional, would no longer be set out in detail in the Constitution. Article 93 par 2, stating that judicial power shall be exercised by means of “constitutional, civil, criminal, administrative and other forms of legal proceedings” would also be amended to exclude the word “constitutional”, which may indicate that the Chamber shall no longer exercise judicial functions, as in the past.

84. This would be a worrying development, given the importance of a constitutional court for the overall functioning of democratic institutions, the protection of human rights and the rule of law in a country. While the Constitutional Chamber is retained as such, the draft amendments appear to essentially turn it into an advisory body, which may only respond to inquiries by local courts on the constitutionality of laws or other regulatory acts (Article 101 par 2). The Constitutional Chamber would, according to a new Article 104-1, be an “other state authority” under Section VII of the Constitution, on par with the Prosecutor-General, the National Bank, the Central Election Commission, and the Ombudsman.

85. Under the new Article 104-1, this new Constitutional Chamber would still maintain “control” over the constitutionality of laws, and other normative and legal acts, but would no longer exercise effective constitutional oversight. The competencies, organisation and

²⁰ CDL-AD(2011)018.

²¹ CDL-AD(2011)018, par 58.

procedure of the Chamber, as well as the consequences of incompatibilities between the Constitution and other laws are to be prescribed in a constitutional law.

86. The proposed changes are thus an enormous step back from a system of true constitutional supervision and would also abolish the right for every individual to challenge the constitutionality of a law or another regulatory act in cases where he/she believes that these acts violate rights and freedoms recognised in the Constitution

87. It is particularly regrettable that the draft Amendments would remove Article 97 of the Constitution without indicating, or giving a detailed constitutional framework for the contents of the separate constitutional law. During the referendum, the voters would thus be asked to give their blind approval to the transformation of the Constitutional Chamber into a non-judicial body, without knowing in detail what this would mean in terms of revised mandate and procedures.

88. In this context, it should be borne in mind that any constitution is a living instrument, which requires constant interpretation in light of changing circumstances – such interpretation should be done by the judiciary, and in this context, a constitutional court. It is important that this be a strong and independent court, which will help retain the people's trust in the Constitution. In new democracies the establishment of an independent Constitutional Court has proved to be a motor in implementing the rule of law²².

89. In a system of specialised constitutional control, it is likewise essential that the highest court responsible for constitutional matters has the final power to interpret the Constitution, to avoid arbitrary and varying interpretations, and to order the annulment, or to revoke itself any legislation that is not compliant with the Constitution. These powers should also be explicitly outlined in the Constitution, and not in a constitutional law, as proposed by the new Article 104-1, par 2. In this context, it is also important for the Constitution to specify that any person may initiate a complaint with this Constitution, and ask for its interpretation.

90. As the Venice Commission has pointed out in its previous opinions, “access to judicial review must be open to all interested persons, that is to all persons potentially exposed to the danger of unlawful violations of their rights, and, on the other hand, the decisions of the competent judicial authorities must be capable of producing effects which comply with the principle of the certainty of law.”²³

91. Dismantling the Constitutional Chamber, and stripping it of its independent oversight powers would deprive the Kyrgyz Republic of a higher corrective instance capable of identifying and removing violations of the Constitution. This would upset the current balance of powers between the executive, legislative and judiciary. If there is no higher body competent to interpret the highest legal act of the country, and to ensure that all other legal acts are in conformity with it, then this opens the door for a multitude of possibly arbitrary interpretations of the Constitution by different powers and bodies. In this way, the Constitution itself, which currently has “supreme legal force” and forms the basis for the adoption of all other laws, would be weakened and would lose its current standing as a strong and firm basis of law, on which the remainder of the legal system rests. For this reason, the law makers of the Kyrgyz Republic are strongly urged to retain Article 97, and the overall strong and effective powers of the Constitutional Chamber.

92. Thus, the abolition of an independent Constitutional Chamber with the effective competence of judicial review would result in a severe regression in the rule of law in the Kyrgyz Republic. Should there indeed be a lack of “confidence in justice”, as suggested by

²² CDL-AD(2010)015.

²³ CDL-AD(2010)015.

the Memorandum of the drafters of the Amendments (p. 2), then a more appropriate manner of addressing this problem would be to improve the selection and training of judges, rather than the abolishment of constitutional control.

K. Transitional provision

93. While the above amendments focused on the changes proposed in Article 1 of the draft Amendments, Article 2 deals with entry into force of the amendments, and transitional matters.

94. In its paragraph 5, this provision provides that chairpersons, their deputies and judges of local courts, the judges of the Supreme Court and the judges of the Constitutional Chamber shall retain their powers “until the emergence of any other circumstances resulting in their dismissal in accordance with the constitutional law”. This amendment raises serious concerns, as it opens the door to the dismissal of such judges via a future constitutional law. This provision should be removed because it not only, due to its vague wording, raises potentially serious concerns with regard to the principle of the independence of the judiciary, but also submits an issue central to the rule of law and the separation of powers to a ‘blind vote’ during a possible referendum, since the contents of such law will only be clear after the referendum. It would be preferable if, even after adoption of the amendments, those judges in power would retain their positions until their mandates end.

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