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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OPINION**

**ON THE DRAFT LAWS  
AMENDING AND SUPPLEMENTING**

- (1) THE LAW ON CONSTITUTIONAL PROCEEDINGS  
AND  
(2) THE LAW ON THE CONSTITUTIONAL COURT  
OF KYRGYZSTAN**

**Adopted by the Venice Commission  
at its 76<sup>th</sup> Plenary Session  
(Venice, 17-18 October 2008)**

**on the basis of comments by**

**Mr Harry GSTÖHL (Member, Liechtenstein)  
Mr Peter PACZOLAY (Member, Hungary)**

1. By letter dated 6 May 2008, the Chair of the Constitutional Court of Kyrgyzstan, Ms Svetlana Sydykova, requested an opinion on: (1) the draft Law amending and supplementing the Law on constitutional proceedings in Kyrgyzstan; (2) the draft Law amending and supplementing the Law on the Constitutional Court; (3) the Law on the Status of Judges; (4) the Law on Court Juries; (5) the Law on Bodies of Judicial Self-government and (6) the Law amending and supplementing the Law on the Supreme Court and local courts. Laws (1) and (2) are dealt with in this opinion and laws (3) to (6) will be dealt with in a separate opinion (Opinion 480).

2. The present opinion was drawn up on the basis of comments by Messrs Gstöhl and Paczolay, who were invited by the Venice Commission to act as rapporteurs. Their comments figure in documents CDL(2008)068 and 070 respectively.

3. A conference on the topic "Supremacy of law and the independence of the judiciary – guarantees for the stability of democratic institutions" was organised in Bishkek, Kyrgyzstan on 27-28 May 2008 together with the Constitutional Court. The purpose of the conference was to allow the rapporteurs to discuss and obtain information on the current judicial reform in Kyrgyzstan, in the context of the request for an opinion on the six draft laws/amendments mentioned above.

4. This opinion was adopted at the 76th Plenary Session of the Venice Commission (Venice, 17-18 October 2008).

## GENERAL REMARKS

5. The amendments were drafted as a result of the entering into force of a new Kyrgyz Constitution (CDL(2008)017). The Venice Commission has already given an Opinion on this Constitution (Opinion on the Constitutional Situation in the Kyrgyz Republic, document CDL-AD(2007)045) and a number of issues discussed in that Opinion also arise in relation to the amendments, which are the subject of the present opinion. The Venice Commission will, therefore, make recommendations with respect to these amendments, even if their implementation may engender the need for amendments to be made to the Constitution itself.

6. Both laws are closely linked together and often literally repeat the same provisions. The main amendments concern the following areas:

- I. Election of judges, including the appointment of the president and deputy president of the Constitutional Court;
- II. Regulation of the status of judges in a separate law;
- III. Competence of the Constitutional Court;
- IV. Exemption of judicial decisions from the Court's power of review;
- V. Obligation of presenting an annual report on the state of constitutionality;
- VI. Procedure for presenting the budget;
- VII. Redefinition of the quorum;
- VIII. Use of official language;
- IX. List of authorities authorised to apply to the Constitutional Court.

### ***I. Election of judges, including the appointment of the president and deputy president of the Constitutional Court***

7. Article 4 of the Law on the Constitutional Court as to be amended (*hereinafter the "Draft CC"*) deals with the president and deputy president's election to the Constitutional Court. The rewording of Article 4 of the *Draft CC* on the composition of the Constitutional Court seems to

have been made in order to comply with the new Constitution (Article 83.5). The new procedure provides that the President of Kyrgyzstan appoints the president and deputy president of the Constitutional Court for a term of five years from among the Constitutional Court's judges, with the agreement of the *Jogorku Kenesh* (hereinafter "Parliament").

8. It is not clear what is meant by "agreement" (or consent as set out in the Constitution) of Parliament, but it may mean a vote on the proposal of the head of state. This procedure should be further detailed and should indicate whether a qualified majority vote is required. The fact that the Constitutional Court's president is elected by a political actor and not the Court itself is a widely accepted phenomenon. Nevertheless, **the election of the President by the Court itself is, of course, preferable from the perspective of the independence of the court** but this would require an amendment to the Constitution.

9. Article 5 of the *Draft CC* on the election of judges to the Constitutional Court has been reworded as follows: "*Candidates for election to the post of judge of the Constitutional Court of the Kyrgyz Republic shall be submitted to the Jogorku Kenesh of the Kyrgyz Republic by the President of the Kyrgyz Republic*". In its Opinion on the Constitutional Situation in the Kyrgyz Republic (CDL-AD(2007)045, paragraph 83), the Venice Commission already criticised the strong role of the President of the Republic in the appointment of judges to the Constitutional Court. Given that this competence of the President is based on the Constitution (Article 83.5), the Law could at least provide for non-binding but public proposals for candidates by the Council of Judges.

10. The general length of the term of office for judges, which was fifteen years, has been dropped and not replaced. The regulation of the term of office of judges is not clearly set out in the draft *Law on the status of judges* either, but is written in the Constitution: judges of the Constitutional and Supreme Court shall have tenure and keep their offices until they retire at the age of 70 (Article 83.5 of the Constitution).

11. This Article also provides that for the election of a judge, a majority of the total number of the People's Representatives in Parliament is required. A higher **qualified majority**, e.g. two thirds, might be **better to ensure the opposition's participation in the election of judges**.

12. In the light of past problems encountered in other countries, it might be useful to **introduce a provision stating that judges who are going to retire should stay in office until their successor takes office**.

## ***II. Regulation of the status of judges in a separate law***

13. The *Draft CC* deletes all of Chapter III on the status of judges of the Constitutional Court. This Chapter regulated, *inter alia*, the independence, the inviolability, the suspension of constitutional judges, the termination of their offices and their labour law status.

14. It seems that these amendments intend to assimilate judges of the Constitutional Court to those of ordinary courts. Such an assimilation does not take into account the special position of a Constitutional Court, which has a specific constitutional task, notably the annulment of laws and normative acts. By its very nature, this task may create conflicts between the Constitutional Court and political powers. While the basic requirements for judicial independence are the same for both ordinary and constitutional court judges, the latter must be protected from any attempt of political influence due to their position, which is particularly exposed to criticism and pressure from other state powers. **Therefore, constitutional court judges are in need of special guarantees for their independence, as set out in the current Chapter III, which should not be deleted.**

## ***III. Competence of the Constitutional Court***

15. Article 13 of the *Draft CC* and Article 11 of the Law on Constitutional Proceedings as to be amended (hereinafter *Draft Proceedings*) set out the competence of the Constitutional Court. The result is that the Constitutional Court's competence is limited to the following five cases, which are in line with Article 85 of the Constitution:

- a) constitutional review of acts and other regulatory acts;
- b) official interpretations of the norms of the Constitution;
- c) review of the constitutionality of presidential elections;
- d) removal from office of the President of the Republic;
- e) decisions on constitutional amendments.

16. It is important that there is a clear understanding of who has standing with respect to which competencies. In this respect, the Law on Constitutional Proceedings (Articles 11 and 14) is unclear. It seems that any authority or person with standing could bring a case under all five of the above competencies. For instance, it could even be understood that a "*local kenesh*" has the right to file a motion to remove the President of the Kyrgyz Republic. **The Law should specify who has standing for the various procedures before the Constitutional Court.**

17. In line with Article 85 of the Constitution, Article 11.2 *Draft Proceedings* introduces a new competence for the Court to provide an **official interpretation of the norms of the Constitution**. It is important to underline here the difference between what are known as abstract review proceedings and an official interpretation of the Constitution. Whereas abstract review proceedings concern the constitutionality of a given law without involving reference to an individual act applying this law, an official interpretation of a norm of the Constitution does not relate to any law. In such a case, the Constitutional Court gives an authoritative interpretation of the Constitution without reference to any specific law.

18. Although such a competence also exists in other new democracies (e.g. Azerbaijan, Belarus, Moldova, Ukraine), it has the notable drawback that the Court is obliged to provide such an interpretation of a constitutional provision without reference to any law implementing this provision. Constitutional courts usually provide decisions on conflicts and have the benefit of hearing both sides before rendering their judgments. The danger of providing such a competence is that in reality a conflict exists, but one party prefers to request an interpretation of the Constitution rather than bring the conflict (often a conflict of competence) openly to Court. The Commission understands the fact that in new democracies the existence of such a competence of a constitutional review body may enable maintaining constitutional stability. Nonetheless, in such cases, the Court is forced to render a judgment without having had the benefit of hearing both sides. Furthermore, it may happen that in the light of the binding interpretation of a constitutional provision, a law based on this provision is unconstitutional. As the Court was only asked to interpret the Constitution, this – obviously unconstitutional – law remains in force. **The Venice Commission therefore does not recommend the introduction of such a competence.** The Commission is aware that a review of this competence would require an amendment to Article 85.3.2 of the Constitution.

19. If, as is the case in Kyrgyzstan, such a competence exists on the constitutional level and if a constitutional change is not likely to occur in the short term, the exercise of this competence requires the Court to use restraint in order not to allow consideration of the issue of official interpretation of the Constitution instead of a pending or possible dispute on competence or a dispute on the constitutionality of a norm. It is obvious that such a competence might only be used in a limited number of cases. The Commission is therefore of the opinion that possible grounds and a procedure to exercise such a competence, in case it remains intact, are subject to detailed regulation in the *Law on the Constitutional Court of Kyrgyzstan* and/or in the *Law on Constitutional Proceedings*. In particular, and in the absence of a competence on the settlement of disputes of conflicts of competence in Kyrgyzstan, **the Court should be obliged by the Law**

to invite the various state powers (Parliament, President; Government, Judiciary including prosecution if applicable) to submit their arguments as to the interpretation of the constitutional provision. In this way, the Court would benefit from a *quasi* adversarial procedure, even in the framework of a purely abstract procedure.

20. According to the *Draft CC*, the following competences will be deleted from Article 11 of the *Law on Constitutional Proceedings*:

- removal of judges of the Constitutional and the Supreme Court (Article 11.4);
- consent to the initiation of criminal proceedings against a judge of a local court (Article 11.5);
- declaring the unconstitutionality of decisions of local government bodies (Article 11.7);
- deciding the constitutionality of the legal practice affecting constitutional rights of citizens (Article 11.8).

21. Again, these changes are made following the requirements of Article 85 of the Constitution. Nonetheless the “lost” competencies of the Court merit comment. Removing the task of deciding the “*constitutionality of the legal practice affecting the constitutional rights of citizens*” is a very critical point in the amendments. Although the present formulation of this competence appears to be somewhat vague, it nevertheless provides an important guarantee for the protection of human rights.

22. Article 14.8 of the current *Law on Constitutional Proceedings* (Article 14.10 of the *Draft Proceedings*) **allows individual citizens and legal entities to appeal to the Constitutional Court** on “*questions directly affecting their constitutional rights if these do not lie within the competence of other courts*”. This right should, of course, **not be limited to citizens, but be extended to any individual, including foreigners and stateless people**, who are under the jurisdiction of Kyrgyzstan.

23. This type of individual complaint is limited to cases that do “*not lie within the competence of other courts*”. Individuals therefore seem to have standing only as concerns the control of normative rather than individual acts. However, human rights violations often are the result of unconstitutional individual acts based on constitutional normative acts. No such individual complaint to the Constitutional Court is available. **The Venice Commission therefore recommends the introduction of individual complaint proceedings also against individual acts.** Again, Article 85 of the Constitution would need to be amended.

#### ***IV. Exemption of judicial decisions from the Court’s power of review***

24. Article 14 paragraph 4 of the current *Law on the Constitutional Court* provides that court decisions based on unconstitutional normative acts (laws) “*shall not be subject to execution*”. The current *Law on the Constitutional Court* remains vague on whether acts, which have already been executed, keep their legal force.

25. The amendments (Article 14 para. 4 in point 6 of *Draft CC*) provide that judicial acts based on unconstitutional norms shall be reviewed by the court in every specific case upon complaints of citizens whose rights and freedoms have been affected. The *Draft CC* therefore refers to a special complaints procedure that takes place in front of ordinary courts instead of the automatic *ex lege* exclusion of the execution of such decisions.

26. Article 14 paragraph 3 *Draft CC* provides for a clarification of the *ex tunc* effect by stating that judgments by the ordinary courts, which have final force, can be reopened by an ordinary court upon receipt of a complaint. A rigid application of an *ex tunc* effect could potentially have serious implications for society and could result in a heavy burden on the state budget if numerous cases have to be reopened, which date back to the distant past. The current

legislation does not provide for an attenuation of this effect by the Constitutional Court, as is the case for example in Portugal where the Court itself can limit the effects of its *ex tunc* judgments. **Limiting the effects of a decision of the Constitutional Court to future cases and cases, which have not yet been decision in final instance has an advantage from the viewpoint of legal certainty.**

27. That said, **it should be ensured that at least the complainant**, especially an individual complaint, **benefit from winning a case before the Constitutional Court**. If his/her case is already settled by a final decision, it should be reopened even if final judgments in other similar cases remain in force. This is necessary in order to provide an incentive for an individual to bring a case in the first place – the so-called “*premium for the catcher*” (of the unconstitutionality).

#### **V. *Obligation of presenting an annual report on the state of constitutionality***

28. Under Article 15.3 of the current *Law on the Constitutional Court*, the practice in Kyrgyzstan is for the president of the Constitutional Court to annually forward information on the state of affairs with respect to constitutionality to the President of Kyrgyzstan, Parliament and Government.

29. Article 15.3 of the *Draft CC* (point 7) limits this obligation by setting out that the President of the Constitutional Court must present an annual report on the state of constitutionality, but now it only needs to be addressed to Parliament.

30. This change is also reflected in draft Article 24 paragraph 5 of the *Law on Constitutional Proceedings*, which provides that the Constitutional Court prepare an annual report on the state of constitutionality and presents it to Parliament.

31. Courts usually speak through their judgments rather than through reports, but the limitation imposed by this obligation to send a report to Parliament only, is more in line with the principle of the rule of law. In this way, it at least will not link the Constitutional Court to the executive branch.

#### **VI. *Procedure for presenting the budget***

32. As regards the financing of the Constitutional Court, Article 18 of the present *Law on the Constitutional Court* sets out that the activities of the Constitutional Court are financed by the national budget. The president of the Constitutional Court directly submits the budget to Parliament.

33. According to the *Draft CC*, the budget would be submitted by the president of the Constitutional Court to the Council of Judges. The president of the Constitutional Court would be entitled to participate in sittings of Government and Parliament where the budget of the courts of Kyrgyzstan is discussed. After adoption, the President of the Constitutional Court would then be obliged to inform this Council on the implementation of the budget.

34. The Council of Judges is a new institution regulated by Article 84 of the Constitution. This development was welcomed by the Venice Commission: *CDL-AD(2007)045 Opinion on the Constitutional Situation in the Kyrgyz Republic*.

35. However, the same reasoning as set out above in relation to the suppression of Chapter III of the present *Law on the Constitutional Court* applies to the procedure of presenting the budget of the Court. The amendments seek to assimilate the Constitutional Court to ordinary courts, which are governed by the Council of Judges. As a special constitutional body, **the Constitutional Court should be entitled to present its own budget directly to Parliament**

**without the intervention of the Council of Judges or Government. The budget of the Constitutional Court should not be a part of the general budget of the judiciary.**

36. The participation of the President of the Constitutional Court in these procedures suffices to guarantee the independence of the Court, the Council of Judges still has the final word as to the budgetary proposal.

#### **VII. Redefinition of the quorum**

37. Article 3 of the current *Law on constitutional proceedings* defines the necessary quorum needed for the Constitutional Court to render a decision. Under this provision, the regulation of the quorum is twofold:

- (1) examination of cases, drawing up conclusions, adopting the rules of the court and motions for the suspension of a judge's powers requires no less than seven judges of the Constitutional Court;
- (2) sessions of the Constitutional Court of Kyrgyzstan on other matters are valid if over half of the court's registered judges participate (at least five).

38. Article 3 of the *Draft Proceedings* unifies the quorum for all procedures: a session of the Constitutional Court is valid if no less than two thirds of its members are present (i.e. six judges). **The uniformity of the quorum makes the procedure of the Constitutional Court more consistent.**

#### **VIII. Use of official language**

39. Article 6 of the *Draft Proceedings* introduces the terms of "an official language" and the "language of the proceedings" to replace the term "state language" used by the presently valid law. This is to be **welcomed as it enlarges the respect by state authorities of linguistic rights, allowing constitutional proceedings to take place in another language than the state language.**

#### **IX. List of authorities authorised to apply to the Constitutional Court**

40. The amendments to Article 14.8 of the *Draft Proceedings* enlarges the list of **authorities allowed to apply to the Constitutional Court, by adding the Ombudsman (Akiykatchy) and the Central Electoral Commission.** In a previous opinion, the Venice Commission had identified a number of countries that allow the Ombudsman to challenge a legislative act in front of the Constitutional Court, notably Albania, Armenia, Georgia, Estonia, Moldova, Poland, Portugal, Romania, Russia and Spain. The Venice Commission has recognised the usefulness for the mandate of the Ombudsman or Human Rights Defender to include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms.<sup>1</sup>

41. The list also includes the Central Electoral Commission. Since issues that affect fundamental rights may be brought before this body, it is a welcomed step to give the highest electoral body the possibility to ask the Constitutional Court for constitutional review.

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<sup>1</sup> CDL-AD(2007)020 *Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan.* Similarly: CDL-AD(2003)006 *Opinion on the Draft Law on the Human Rights defender of Armenia* and CDL-AD(2004)041 *Joint Opinion on the Draft Law on the ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe.*

42. The **extension of this list is therefore welcome**.

43. As pointed out above, it should be made clear who has standing in which proceedings. As the draft Law stands, the Electoral Commission or even local authorities could request the impeachment of the President of the Republic. This is probably not intended by the drafters.

**X. Recommendations relating to provisions that have not been amended in the Law on constitutional proceedings**

44. According to Articles 7 and 8 of the current *Law on constitutional proceedings* it seems that each judge has to hear each piece of evidence in person. This is uncommon for constitutional courts. The strong insistence on this principle would be appropriate for criminal cases rather than for constitutional ones. Constitutional proceedings do not usually require taking physical evidence and many constitutional courts deal with their cases in the form of written proceedings only. The exceptions to this may be the impeachment cases, which can be dealt with in a similar manner to criminal proceedings. In other cases, **the Constitutional Court should have a wider choice in dealing with cases in written proceedings**. This may be important in order to avoid an overburdening of the court with individual complaints.

45. Article 18 of the current *Law on constitutional proceedings* on **state levies and costs for bringing a case** to the Constitutional Court seem quite rigid. As a guarantee for the protection of human rights, access to the Constitutional Court should be simplified. If there are fees for bringing a case, they **should be relatively low and even then the Court should be able to make exceptions for people who do not have the means to bring a claim, which is not manifestly unfounded**.

46. A number of provisions, such as Article 20 of the *Draft Proceedings*, on the exact elements of the minutes, are very detailed and should be regulated by the rules of procedure. This is important not only from a practical point of view, but also as a guarantee for the procedural autonomy of the Court, which would otherwise have to seek an amendment to its Law for each minor change in its procedure.

47. The review of judgments of the Constitutional Court (Article 28 of the *Draft Proceedings*) is a very delicate subject. The very existence of such a provision can be used to exert pressure on the Court to make such a review when the judgment displeases other state powers. Article 28.1 seems to allow for the review of a judgment when the constitutional norm or the law serving as the basis for the judgment have changed, which seems unnecessary as in such a situation, the previous judgment would simply remain without object.

## **CONCLUSION**

48. The amendments on the competences and procedures of the Constitutional Court are capable of improving the functioning of the Constitutional Court. Nevertheless, the following recommendations should be taken into account:

- The *Draft Law on the Constitutional Court* deletes Chapter III of the current Law dealing with the status of judges in this Court. The Venice Commission recommends that this Chapter not be deleted, as constitutional court judges are in need of special guarantees for their independence, and this is provided for by Chapter III and they cannot be assimilated to ordinary judges.
- Article 4 of the *Draft CC*, the election procedure of the president and vice-president of the Constitutional Court should be further detailed to clarify what is meant by “*agreement*” by Parliament – the procedure should also indicate that qualified majority vote is required.



- Article 5 of the *Draft CC*, with respect to the election of a judge, a vote of the majority of the total number of the People's Representatives in Parliament is required - here a higher qualified majority would be welcomed as this would ensure the participation of the opposition in such an election.
- It would also be useful to introduce a provision that judges who are going to retire should remain in office until their successor takes office.
- Article 13 of the *Draft CC* and Article 11 of the *Draft Proceedings* define the competence of the Constitutional Court. Item b) on "*official interpretations of the norms of the Constitution*" introduces a new competence for the Court to provide an official interpretation of the norms of the Constitution, which is not recommended by the Venice Commission.
- The Law should specify who has standing for the various procedures before the Constitutional Court.
- Article 14.8 (which will be Article 14.10) of the *Draft Proceedings* the right of individual citizens and legal entities to appeal to the Constitutional Court on "*questions directly affecting their constitutional rights if these do not lie within the competence of other courts*" should be extended to include foreigners and stateless people who come within the jurisdiction of Kyrgyzstan.
- Article 7 and 8 of the current *Law on constitutional proceedings* should be amended to give the Constitutional Court a wider choice in dealing with cases in a written procedure in order to avoid it being overburdened with individual complaints.
- The introduction of an individual complaint against individual acts is recommended.
- Article 18 paragraph 2 of the *Draft CC*, the Constitutional Court should be entitled to present its own budget, which should not be a part of the general budget for the judiciary.
- Article 18 of the current *Law on constitutional proceedings* on state levies and costs for bringing a case to the Constitutional Court should be revised to simplify access to the Constitutional Court.
- In general, the current *Law on constitutional proceedings* has a number of very detailed provisions that should be included in separate rules of procedure.

49. The Venice Commission remains at the disposal of the Kyrgyz authorities for any further assistance.