Council of Europe
European Commission

Conseil de l'Europe
Commission européenne

Strasbourg, 20 June 2011

CDL-AD(2011)018
Or. Engl.

Opinion No. 622 / 2011

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT CONSTITUTIONAL LAW ON THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF KYRGYZSTAN

Adopted by the Venice Commission
at its 87th Plenary Session
(Venice, 17-18 June 2011)

on the basis of comments by

Mr Gagik HARUTYUNYAN (Member, Armenia)
Mr Konstantin VARDZELASHVILI (Substitute Member, Georgia)

I. Introduction

1. By a letter of 5 April 2011, Ms Galina Skripkina, Chairperson of the Committee on Constitutional Legislation, State Structure, Legality and Local Self-Governance of the Parliament of Kyrgyzstan *(Jogorku Kenesh)* made a request for an opinion on the following three draft Laws:

1. "the draft Constitutional Law on the Constitutional Chamber of the Supreme Court" (hereinafter the "draft Law", subject to the present opinion);
2. "the draft Constitutional Law on the introduction of changes to the Constitutional Law on the Status of Judges" of Kyrgyzstan (subject of Opinion 623/2011);
3. "the draft Law on the Council for the Selection of Judges" (subject of Opinion 624/2011).

2. As part of a judicial reform package, the Parliament of Kyrgyzstan has also prepared two other draft Laws (on Judicial Self-Government and on the Supreme Court and Local Courts), which were, however, not submitted to the Venice Commission for opinion due to the very short deadlines and the heavy workload of the Venice Commission in preparing the first three opinions.

3. Messrs Gagik Harutyunyan and Konstantin Vardzelashvili were invited to act as rapporteurs for the present opinion. Their (preliminary) comments appear in documents CDL(2011)035 and 045 respectively.

4. A delegation of the Venice Commission composed of Messrs Vardzelashvili (rapporteur for the present opinion), Mr Esanu (rapporteur for the Opinion on the draft Law on the Council on the Selection of Judges) and Mr Gstöhl (rapporteur for the Opinion on the draft constitutional Law on the Status of Judges) accompanied by Mr Schnutz Dürr from the Secretariat, visited Bishkek on 27-29 April 2011.

5. The delegation participated in a joint meeting of the committees for constitutional and judicial matters of Parliament on 27 April, a plenary session of Parliament on 28 April at which the package of laws was originally supposed to be adopted and a round table on the judicial reform package on 29 April 2011. The meetings and the round table were organised by the EU-UNDP Parliament Project. These meetings were very productive and have resulted in a number of proposals for amendments and changes to the draft Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan. The Venice Commission is grateful for the efficient assistance provided by the Project.

6. On 12 May 2011, all five laws of the judicial reform package were adopted by Parliament. The present opinion nonetheless refers to the draft Laws as they were submitted for opinion, but refers to the results of discussions and areas of agreement reached during the meeting of the Joint Committees when appropriate.

7. Following an exchange of views on the draft opinion with a joint delegation from the Kyrgyz authorities and the EU-UNDP Parliament Project, headed by Ms Skripkina, the present opinion was adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

II. General Remarks

8. The Opinion of the Venice Commission on the draft Constitution of the Kyrgyz Republic expressed the fear that the possibility of an early dismissal of a judge by a vote of two-thirds in the Parliament of the Republic could undermine the powers of the judiciary in the long term.[1] In this respect, the draft Constitutional Law "On the Constitutional Chamber of the Supreme Court"

[1] CDL-AD(2010)015, Opinion on the draft Constitution of the Kyrgyz Republic (8 June 2010), para. 56.

does not provide any specific safeguards. However, Article 26 of the draft Law "on Introduction of Changes to the Constitutional Law 'on the Status of Judges'" contains a detailed list of conditions, grounds and procedures for the dismissal of the judge. It seems that overall the issue has been addressed by the Kyrgyz authorities.

III. Specific Comments

9. Article 1 of the draft Law defines the Constitutional Chamber as "a judicial body which independently performs constitutional oversight". This article underlines the independence of the Chamber, however, it fails to indicate its status of a supreme judicial organ exercising constitutional control. Thus it would be advisable to bring the wording of this article in line with the spirit and content of the Constitution of the Kyrgyz Republic, under which the power of constitutional control is granted to the Chamber.

10. Article 3 of the draft Law stipulates that the "status, guarantees of independence, procedure of liability, dismissal and discharge of the judges of the Constitutional Chamber shall be defined in the constitutional laws, other laws as well as other normative regulatory acts. "Other normative regulatory acts" can be not only constitutional and ordinary laws but also bye-laws. Even theoretically opening the possibility to dismiss or discharge a judge on the basis of the procedures defined under a bye-law could seriously undermine the independence of the judiciary. For that reason it is proposed that the words "and other normative regulatory acts" be deleted.

11. According to Article 4 of the draft Law, the Constitutional Chamber has a competence to provide conclusions on draft Laws on changes to the Constitution (in the English text this competence is referred as pronouncement… on changes to the Constitution). In principle a "pronouncement" can be made either on the basis of substantial review of constitutional amendments, by checking them against the fundamental principles enshrined in the Constitution and/or by checking compliance of the procedure on introducing changes/amendments with the requirements of the Constitution and/or constitutional law.

12. However, the draft Law does not clarify which part of the Constitution is taken as a standard for the assessment. Without such standards (basic principles or similar), the Court seems to be left with the control if the amendment procedure is followed and/or avoid internal contradictions in the Constitution.

13. The Venice Commission has earlier pointed out that there is no generally accepted standard in comparative constitutional law regarding the participation of constitutional courts in the constitutional amendment process[2]. In practice; it is rare for Constitutional Courts to undertake this function. Therefore, it is absolutely necessary to clearly define the role of the Constitutional Chamber in this regard, especially in relation to changes of the political system of the country.

14. According to Article 4.1.2 of the draft Law, the Constitutional Chamber shall "make its pronouncement on constitutionality of international agreements to which the Kyrgyz Republic is a party and which have not entered into force". It would be advisable not to use the term "constitutionality" hear but rather refer to the term "concordance with the Constitution" and to refer to "signatory state" in line with the Vienna Convention. Apart from that it should be clarified that the Chamber has an authority to make pronouncement only with regard to those treaties that have not yet entered in to the force.

15. Article 4.2.3 of the draft Law provides that the Chamber shall "conduct an annual analysis of the status of the constitutional legality in the Republic". In its earlier opinion, the Venice

[2] CDL-AD(2010)001, Report on Constitutional Amendment, para. 227 seq.

Commission mentioned that "Courts usually speak through their judgments rather than through reports...".[3] It should be avoided that the Chamber is obliged to report to the executive and that it identifies potentially unconstitutional legislation on its own initiative. However, if the Chamber will only be authorised to publish an annual report analysing the judgements given and their execution, this could serve the important function of informing the public and thus contribute to increased transparency.

16. According to Article 5 of the draft Law "the composition of the Constitutional Chamber shall be formed in view of the representation of no more than 70 percent of persons of the same gender". While the policies aimed to ensure a gender balance in public institutions should be strongly welcomed and all efforts in this direction praised, a strict legal provision setting a quota for judges of the same gender should be treated with caution, as this may lead to practical difficulties and may not always work for the benefit of the Chamber.

17. During the working meetings and the round table organised with the support of the EU Project, it was pointed out that this provision could only be effective if the Council for the Selection of Judges were obliged to take the gender balance into account when identifying candidates. Therefore, the Law on the Council for the Selection of Judges may contain some recommendations / guidance requesting the Council to take the gender balance into account during the selection process, without, however, indicating an obligatory percentage of persons of the same gender.

18. Articles 6 and 7 of the draft Law duplicate the grounds and procedures for the selection of the Chamber's judges. It is advisable that these issues be regulated by a single law. This idea seems to have been accepted in the discussions in Bishkek.

19. Article 7 of the draft Law is quite ambiguous. It provides a judge of the Constitutional Chamber with the possibility to apply for a vacant position of in the Chamber after termination of his/her term. Taking into account that the law provides for permanent appointments of the judges until retirement at 70 years of age, the purpose of this article is not clear.

20. Article 7 also stipulates that applicants who are willing to be nominated for the vacant position at the Constitutional Chamber are required to submit a medical health certificate. The purpose of gathering health related information about the applicants is not clear. It does not seem to affect the selection procedure. In any case, if the applicant has disabilities or other types of health related problems this information should be irrelevant for the selection procedure, unless they make the candidate unfit for work as a judge (e.g. mental disabilities).

21. According to Article 14 a judge may be removed from the participation in the hearing in case of his or her dismissal or recusal. The draft Law does not provide the parties with the possibility to demand the recusal of the judge. This possibility should be granted to parties if parties identify grounds for recusal defined by the law.

22. At the same time, Article 8 of the draft Law provides that "a meeting of judges of the Constitutional Chamber shall be deemed valid if no less than two thirds of the total number of judges of the Constitutional Chamber are attending". In order to avoid a situation where hearings would have to be postponed due to a lack of a quorum, it is recommended to release the judge from the obligation to recuse him or herself, if such a recusal would lead to a lack of a quorum. However, in such cases the judge should be obliged to announce the existence of the grounds for recusal at the hearing and such a statement should become part of the judgement.

[3] CDL-AD(2008)029, Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, para. 31.

23. It is clear that a situation where a judge has to sit in a case where there are grounds for recusal is far from ideal. The judge is effectively obliged to participate in proceedings even though the judge perceives this inappropriate due to a conflict of interests. Of course, this judge should not be the rapporteur judge. In practice, the judge should restrain him- or herself during the proceedings after having made such a declaration (or after the approval of recusal grounds raised by the parties). A choice has to be made between avoiding the possible bias of a judge and the continued functioning of the Constitutional Chamber. On balance, the latter value prevails. Constitutional Chamber judges are expected to be persons of high integrity and they should be able to make abstraction of their personal interests in deciding the constitutional issue before them.

24. Article 14 also states that a "judge may not be removed from participation" unless "his/her announcement of recus[al] is honored". In is not clear from the draft who and on what grounds may honour or disapprove the announcement of self-recusal. As it was mentioned above, such an announcement should not be approved by the Chamber if self-recusal would result in a lack of quorum.

25. In order to ensure that the Chamber continues functioning in all circumstances and avoiding the risk of the Chamber being paralysed as a result of the lack of a quorum, it would also be desirable to terminate the mandate of a judge due for retirement only when a new judge has entered into office.

26. Article 18.4 stipulates that: "Entering of a new judge in the sitting shall result in the resumption of proceedings on the case since the commencement of the trial". It is advisable to clarify that newly elected judges should join in the hearing only in exceptional cases, such as when it is required to maintain the quorum.

27. Article 22 provides the possibility of an individual appeal to the Chamber. This should be welcomed as it provides an important mechanism for protection of rights and freedoms guaranteed by the Constitution. However, this article theoretically provides an *actio popularis*, where everyone may bring an appeal to the Chamber questioning the constitutionality of any legal act in relation to the rights and freedoms guaranteed by the Constitution. It is not clear if this was the intention of the drafters. In any case it is recommended to review this provision, limiting the right to appeal only 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.

28. Article 22 of the draft Law lists persons and entities having a right to appeal to the Chamber, however, it does not clarify on what grounds they can appeal. This would mean that all subjects listed in the subparagraphs 2-10 of paragraph 1 of this article have a right to question the constitutionality of a legal act. Similar remarks were made with relation to the draft Laws amending and supplementing the Law on Constitutional Proceedings and the Law on the Constitutional Court of Kyrgyzstan. At that time, the Venice Commission stated that it is "important that there is a clear understanding of who has standing with respect to which competencies.... It seems that any authority or person with standing could bring a case under all five of the above competencies. The Law should specify who has standing for the various procedures before the Constitutional Court."[4] The present draft Law obviously bears the signs of a similar problem.

29. Article 23 contains an error. The article states that"…the right to submit a petition on declaring laws and other normative regulatory acts unconstitutional shall be assigned to entities listed in Article 23.1 of the present constitutional law". It is an obvious misprint and should read

[4] CDL-AD(2008)029, para. 43.

Article 22 instead of Article 23. However, it is not entirely clear what was the drafter's intention. Article 22.1 lists all "subjects for appeal" - everyone who is eligible to apply to Chamber. In this case Article 23 simply repeats the content of the previous article.

30. In this respect it should also be noted that Article 4 and Article 20 of the draft Law listing the competences of the Chamber, do not specifically mention jurisdiction over the disputes over competences between the branches of power. However, the list of organs such as the *Jogorku Kenesh*, local *keneshes*, the Government, etc., as separate entities having the right to appeal to the Chamber, invites to conclude that the Chamber may deal with such an issue. It would be desirable to clarify this issue.

31. It should also be noted that Article 22 grants a single member of Parliament the right to appeal to the Chamber. This may result in a high number of petitions, thus overloading the Chamber. It is advisable to revise this provision. In most of the European countries such a right is granted to the factions of the Parliament and/or a certain percentage of the members of Parliament. This comment also applies to articles 24 and 25 of the Draft law.

32. Article 22 differentiates between presentments, motions and requests. According to the draft the request (or petitions) could be submitted by the judges of the lower courts, while "…agencies and officials listed in paragraphs 2-6 and 8-10 of the paragraph 1 of this article shall submit to the Constitutional Chamber their presentment." The draft Law continues by stating that "other persons and agencies shall submit motions". It is not clear to what other agencies the draft is referring to and if there is any substantial difference between presentments and motions. If this is note the case, the same term should be used.

33. Article 25 provides that only "the *Jogorku Kenesh*, a deputy (deputies) of the *Jogorku Kenesh* and the Government" have a right "… to submit a petition on giving the pronouncement on the draft Law on changes to the Constitution" thus making things even less clear. According to Article 22.2 the *Jogorku Kenesh*, a deputy (deputies) of the *Jogorku Kenesh* and the Government shall submit presentments.

34. According to Article 27.3.6 of the draft Law, requests from the petitioner to submit "circumstances, on which the party bases its petition as well as evidence confirming the facts presented by such party". It should be taken into account that in constitutional proceedings taking physical evidence is rather the exception. Constitutional review is mainly focused on the legal arguments rather than facts, which may be brought to the attention of the Chamber as evidence supporting the legal argument. Therefore, the parties should not be obliged to but rather be given a possibility to submit the evidence.

35. Article 30 sets a five days time limit for deciding on the admissibility of the case (acceptance of a petition for proceeding). The time limit seems to be too tight. Admissibility decisions frequently require thorough analysis of the challenged act(s), case law and constitutional provision(s) and can also raise complicated legal issues. The five day time-limit could turn out to be unrealistic in case of a heavy case flow.

36. It should also be noted that Article 30 refers only to petitions, which according to Article 22.2 are referred solely as a synonym of a request submitted by the judge ("2. Agencies and officials listed in paragraphs 2-6 and 8-10 of the part one of this article shall submit to the Constitutional Chamber their presentments, other persons and agencies shall submit motions and a judge (judges) shall submit requests (hereinafter referred to as the petitions"). In order to avoid misunderstanding and misinterpretation, the terminology used in the draft Law needs to be reviewed carefully.

37. According to Article 30.4, the cancellation of an act, the constitutionality of which is being contested, shall result in the refusal to accept the petition. While Article 42.1.3 stipulates that

the cancelation of an act shall also result in the termination of constitutional proceedings with regard to the appeal, which has already been accepted for consideration by the Chamber.

38. It would be advisable to provide the Chamber with discretion in exceptional circumstances (in case of a high public interest) to consider an appeal, even if the challenged act is no longer in force. This provision should also be examined in the light of Article 53, 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. Thus, 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.

39. According to Article 30.5, the "decision on refusal to accept the petition for proceeding or the receipt thereof may be subject to appeal by the parties to the Constitutional Chamber. The Constitutional Chamber shall adopt a separate resolution on this matter." According to the draft Law the decision to reject the application is made by a single judge and in such circumstances it is not uncommon to have an appeal procedure. Unless Article 53 was changed, there might be a formal contradiction between the Articles 30 and 53. As far as the decisions to accept or refuse the claim should be regarded as a legal act of the Chamber, this provision may be in contradiction with the Article 53, which states that "The acts of the Constitutional Chamber shall be final and shall be not subject to appeal" as well as the Constitution stating that decisions are final.

40. During the meetings and discussions in Bishkek with the Kyrgyz experts working on the draft Law, it was proposed to have a panel of three judges ruling on the admissibility. It sounds reasonable to have a panel of judges dealing with the admissibility issue and this would also solve the problem of contradiction between the articles of the law and the Constitution. It would be reasonable to provide the panel with the right to transfer the case to the Camber 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.

41. According to Article 31, the Constitutional Chamber must consider and decide on a petition accepted for proceeding within a two months period. It is recommended to provide the Chamber with more time for delivering the judgment on the merits. Speedy proceedings may not always be beneficial and may have negative implications for the work of the Chamber.

42. Article 32 regulates the time-limits for the delivery of copies of the case papers to all judges of the Constitutional Chamber and the participants in the sitting. In order to provide more flexibility and autonomy for the work of the Chamber, it is advisable that such details of the procedure of the Chamber be regulated in the Rules of Procedure adopted by the Chamber itself.

43. Article 32 requires substantial amendment as it establishes procedures typical for general courts. There should be no duty on the part of the judge to provide assistance in obtaining evidence for submission to the Constitutional Chamber.

44. According to the same Article 32 the Chamber shall "ascertain the witnesses, experts and other persons, who should be invited and summoned to the sitting". This wording implies that the Chamber must identify the witnesses, experts, etc. It should be a right of the Chamber but it is formulated like an obligation.

45. At the meetings and discussions in Bishkek, the Kyrgyz experts working on the draft Law agreed to recognise the right of interested persons to submit *amicus curiae* briefs in relation to the constitutional appeal being considered by the Chamber. The purpose of *amicus curiae*

briefs is to invite representatives of the legal community as well as human rights groups to make their views known to the Chamber, offering the possibility to provide legal analysis and expressing arguments with regard to the compliance of the challenged act with the Constitution.

46. The experts have also expressed readiness to stipulate in the draft Law that the Chamber should be allowed to actively request an expert opinion from persons and/or institutions, which it deems relevant for the case. Such an approach should be welcomed.

47. According to Article 37 a "judge of the Constitutional Chamber should announce his or self-recusal before the beginning of the consideration of a case only in the following instances: 1) in the event that the judge under his/her position participated in the adoption of the act which is the subject of proceedings; 2) in the event that the impartiality of a judge in adjudication may be questioned in view of his familial or otherwise personal relations to the parties in the proceedings." However, there might be other grounds for self-recusal, for example the publication of an article on the very tropic being dealt with by the Chamber.

48. According to Article 42, the Constitutional Chamber shall terminate the proceedings on a case if the applicant waives his/her claim. There are different viewpoints regarding the power of the Court to assess the constitutionality of a law in the absence of an applicant. There is no single model which is universally adopted by the countries. Therefore, it is indeed up to the state to make a choice between a purely adversarial system, where constitutional proceedings are allowed only in case if there are parties contesting before the court or a slightly more inquisitorial one, when the Court is allowed to continue a case after the withdrawal of the request if there is a sufficiently strong public interest.

49. It is true that in the latter case, the Court does not have the benefit of listening to the applicant's arguments and thus respond precisely to the problems identified by the applicant. Oral proceedings indeed allow the Court to examine the arguments of the parties profoundly and they are likely to reduce the probability of a mistake. It can also be argued that the continuation of cases in the public interest, after the withdrawal of the application take away resources and time that should be devoted to the individual concrete appeals. However, another point of view justifies continuation of proceedings if the Court believes that the issue brought up by the application are of a great significance for society.

50. According to Article 46.1 "In order to safeguard the dignity of the Constitutional Chamber and the participants in the sitting as well as to ensure due process of the constitutional legal proceedings, the Constitutional Chamber may remove the persons from the courtroom or impose a fine in the amount of up to five nominal fine rates for each case of violations, which are represented in the following: 1) proclamation of anti-constitutional statements and appeals irrespective of their wording. This is a vague language which may lead to excessive restrictions and penalties. It is strongly advisable to remove or redefine it.

51. Article 50 provides for dissenting opinions and this is welcomed. However, paragraph 2 provides that the dissenting opinion "may be published" in the Chamber's Bulletin. Dissenting opinions should always be published together with the judgement itself. Article 47.3 provides that "[t]he judgment of the Constitutional Chamber shall be signed by the chairperson and judges of the Constitutional Chamber". This provision fails to acknowledge the possibility of the dissenting and/or concurring judges to publicise their opinions. Without ensuring that dissenting opinions are always published together with the decision of majority, it is not appropriate to demand the dissenting judge to sign the decision he/she does not agree with.

52. Article 53 further states that "Judicial acts which are based on provisions of laws or other normative regulatory acts which were declared unconstitutional shall be revised by the court which adopted such acts in each concrete case based on the appeals of citizens whose rights and freedoms were affected". This step is aimed at increasing the effectiveness of constitutional

review, provides individuals with real and effective possibility to remedy the rights infringed as a result of the unconstitutional provisions.

53. It should be mentioned that generally countries are extremely cautious and only in rare cases introduce radical *ex tunc* effect of the Constitutional Court decisions with regard to court judgments already entered into force. However, there are number of countries, which to some extent provide such a possibility.[5]

54. The Venice Commission has already expressed its opinion on this issue, when commenting on the similar provisions of the law regulating the authority and proceedings of the Constitutional Court of Kyrgyz Republic. It particular it has stated that 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."[6] Indeed the principle of legal certainty has been given priority in the majority of states.

55. "However, it should be ensured that at least the complainant, especially in case of an individual complaint, benefit from winning a case before the Constitutional Court. The choice between annulment and derogation also has effects on the individuals' readiness to file a complaint against a normative act. If the court invalidates the norm with prospective effect, the applicant's case will not be solved by the removal of the unconstitutional general norm".[7] Therefore, in order to provide an incentive for individuals to complain against normative acts, some states envisage an *ex tunc* effect of the decision applying uniquely to the applicant's case.

56. The possibility to revisit the court decisions is guaranteed by the Constitution. Thus the Constitution has already made a decision in favour of giving *ex tunc* effect of the decisions of the Constitutional Chamber with regard to the court rulings, which indeed may have a positive effect for the protection of constitutional rights and freedoms in the Kyrgyz Republic. However, it would be strongly advisable to provide more detailed guidance / clarification with regard to the grounds and procedures leading to the reopening of the cases.

57. The Commission welcomes that Article 56 guarantees financial independence of the Chamber from other branches of power by authorising it to draft its budget. The law further stipulates that the budget of the Chamber cannot be reduced in comparison to the previous fiscal year. Such previsions are indeed welcomed. Article 54 contains detailed provisions regarding the execution of the decisions of the Chamber by the Government, the President and the Parliament.

[5] Albania, Czech Republic, Hungary, Italy, South Korea, Moldova, Portugal, Romania, Slovenia, Spain (as well as South Africa, Mexico and Uruguay) provide the possibility to reopen criminal case if this would lead to a more favourable penalty. In South Africa and Slovenia the court decision may be revisited if the statute on which the conviction was based has been declared unconstitutional. In Portugal, the Constitutional Court's decisions can have retroactive effect when the rule declared unconstitutional or illegal concerns criminal matters, disciplinary matters, or administrative offences, when its content is less favourable to the accused." CDL-AD(2010)039rev, Study 538/2009 on Individual Access to Constitutional Justice, para. 194.

[6] CDL-AD(2008)029, para. 26.

[7] CDL-AD(2010)039rev, para. 187.

IV. Conclusion

58. The Commission welcomes 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. This means that possible problems resulting from the abolition of the previous Constitutional Court by the new Constitution, which had been criticised in the Opinion on the draft Constitution of the Kyrgyz Republic, seem to have been averted.

59. According to the draft 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.

60. The introduction of individual access for natural and legal persons to the Constitutional Chamber is welcomed. The possibility for judges to express a dissenting opinion is a positive point as well. The judges of the Chamber can elect their Chairperson, deputy chairs and the secretary, which are examples of the autonomy that the Chamber enjoys according to the draft Law. The Commission also welcomes the financial independence of the Chamber from other branches of power by authorising it to draft its budget. The provision that the budget of the Chamber cannot be reduced in comparison to the previous fiscal year is positive as well.

61. Nonetheless, the Commission makes the following recommendations

1. The possible regulation by "other normative act[s]" of the dismissal or discharge of a judge should be excluded.
2. The criteria for the review of constitutional amendments should be specified.
3. The annual report of the Chamber should not identify on the Chamber's own initiative potentially unconstitutional legislation.
4. Parties should have the possibility to demand the recusal of a judge. Additional grounds for recusal should be added.
5. No recusal should be possible if this would result in a lack of a quorum of the Chamber.
6. Judges should retire from their office only when a new judge has entered into office.
7. The right of individuals to appeal to the Chamber should be limited only those persons whose rights have been affected.
8. In respect of each competence of the Chamber, the Law should clearly set out the specific procedures applying and in particular who has standing.
9. A single Member of Parliament should not have the right to appeal to the Chamber.
10. Constitutional review being mainly focused on the legal arguments rather than facts, parties should not be obliged to but rather be given a possibility to submit any evidence.
11. The time limits for admissibility and final decisions are too tight.
12. The Chamber should have discretion in exceptional circumstances in case of a strong public interest to consider an appeal, even if the challenged act is no longer in force.
13. A panel of three judges may rule on admissibility.
14. Details of the procedure of the Chamber should be regulated in the Rules of Procedure rather than in the Constitutional Law.
15. The Chamber should be able to accept *amicus curiae* briefs and be empowered to request expert opinions.
16. The wording of the provision providing for the punishment of the "proclamation of anti-constitutional statements" should be review.
17. Dissenting opinions should always be published together with the majority decision.
18. An *ex tunc* effect of the Chamber's decisions should be applied with great caution, providing it in exceptional circumstances only. It is absolutely necessary to provide the courts with clear guidance with regard to the *ex tunc* effect of the Chamber's decisions.

.

62. The Venice Commission remains at the disposal of the authorities of the Kyrgyz Republic for further assistance.