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(VENICE COMMISSION)

KYRGYZSTAN

OPINION

ON AMENDMENTS TO THE LAW ON REGULATORY LEGAL ACTS

Adopted by the Venice Commission
at its 139th Plenary Session
(Venice, 21-22 June 2024)

on the basis of comments by

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I. Introduction

1. By letter of 27 February 2024, Mr A. Baetov, Minister of Justice of the Kyrgyz Republic requested an opinion of the Venice Commission on the draft law "On amendments to the Law of the Kyrgyz Republic on Regulatory Legal Acts" (hereinafter "the draft amendments"). On 30 April 2024, Mr Baetov submitted a renewed request with updated draft amendments (CDL-REF(2024)024-e and CDL-REF(2024)025).

2. Mr Rafael Bustos Gisbert, Mr Vladimir Vardanyan and Mr Tomáš Langášek acted as rapporteurs for this opinion.

3. On 27 May 2024, a delegation of the Commission composed of Mr Bustos, Mr Vardanyan and Mr Langášek, accompanied by Mr Vahe Demirtshyan and Ms Anna Kacmarikova from the Secretariat had online meetings with the Deputy Minister of Justice Ms Zarema Askarova, as well as with the representatives of civil society organisations. The Commission is grateful to the authorities of the Kyrgyz Republic for the organisation of the online meetings.

4. This opinion was prepared in reliance on the English translation of the draft Law "On amendments to the Law of the Kyrgyz Republic on Regulatory Legal Acts". The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 27 May 2024. It was adopted by the Venice Commission at its 139th Plenary Session (Venice, 21-22 June 2024).

II. Background

A. National Legal Framework

6. On 11 April 2021, the Kyrgyz Republic adopted a new Constitution[1] (hereinafter referred to as "the Constitution") through a national referendum, which established a presidential model of governance. According to Article 6 of the Constitution:

> "1. This Constitution shall have supreme legal force and direct effect in the Kyrgyz Republic.
> 2. Constitutional laws, laws and other normative legal acts shall be adopted on the basis of the Constitution.
> 3. The generally recognised principles and norms of international law, as well as international treaties that entered into force in accordance with the legislation of the Kyrgyz Republic, are an integral part of the legal system of the Kyrgyz Republic. The procedure and conditions for the application of international treaties and generally recognised principles and norms of international law shall be determined by law.
> 4. The official publication of laws and other normative legal acts is a prerequisite for their entry into force.
> 5. A law or another normative legal act that establishes new obligations or aggravates liability shall have no retroactive effect."

7. According to Article 23 (3) and (4) of the Constitution, the adoption of by-laws restricting human and civil rights and freedoms shall be prohibited. The law may not impose restrictions on human rights and freedoms for other purposes and to a greater extent than those provided for in the Constitution. According to Article 37(4) of the Constitution, citizens of the Kyrgyz Republic have the right to participate in the discussion and adoption of laws and decisions of the national and local importance. According to Article 62 (1) of the Constitution, the state guarantees the publication of laws and other normative legal acts concerning human rights, freedoms and obligations, which is a prerequisite for their application.

[1] CDL-REF(2021)017

8. The practice of adopting laws on regulatory or normative legal acts is prevalent among most of the former Soviet countries. It is important to note that there are no deeply entrenched traditions in the procedural regulation of the law-making process in this region, as the relevant legislation was developed post-independence. The current Law "On Regulatory Legal Acts of the Kyrgyz Republic"[2] (hereinafter referred to as "the Law") was adopted in 2009[3] and has since undergone approximately thirteen amendments. The preceding law, also titled "On Regulatory Legal Acts of the Kyrgyz Republic," was enacted in 1996, drawing significantly from the 1995 Model Law on Regulatory Legal Acts adopted by the Inter-Parliamentary Assembly of the Commonwealth of Independent States (CIS).[4]

9. The Law defines the principles of normative legal acts, establishes the concepts and types of normative legal acts, their correlation with each other, the procedure for their preparation, adoption, publication, as well as the rules of their validity, interpretation, and resolution of conflicts. According to Article 4 of the Law, in the legal structure of the Kyrgyz Republic, normative legal acts are categorised on the basis of their authority and functional scope. The hierarchy of these legal acts is presented below in descending order, commencing with those possessing the highest legal power.

10. At the pinnacle of this hierarchy is the Constitution, which possesses supreme legal force and direct effect. It enshrines the fundamental principles and norms essential for the legal regulation of the most crucial social relations, thereby establishing a foundational legal basis for the enactment of subsequent laws and other normative legal acts.

11. Beneath the Constitution are constitutional laws, which are normative legal acts adopted by the Jogorku Kenesh (the highest representative body exercising legislative power) of the Kyrgyz Republic. These are enacted following the procedures established by the Constitution and address issues specified therein.

12. Codes form the next category of normative legal acts, providing systematic regulation over homogeneous social relations, followed by ordinary laws, which are also enacted by the Jogorku Kenesh and regulate significant social relations within particular sectors.

13. The President of the Kyrgyz Republic issues Presidential Decrees, which are normative legal acts that must comply with the overarching legal stipulations. Similarly, the Jogorku Kenesh adopts resolutions on matters within its constitutional and statutory jurisdiction.

14. The Cabinet of Ministers of the Kyrgyz Republic adopts resolutions based on and in pursuit of higher legal force normative acts, adhering to the legal requirements specified. These resolutions govern various administrative and governmental functions.

15. The National Bank of the Kyrgyz Republic and the Central Commission for Elections and Referendums each issue resolutions within their respective competencies, based on higher authority normative legal acts and in compliance with specified legal requirements.

16. Lastly, representative bodies of local self-government adopt resolutions that address local issues, have binding legal force within their territories, and conform to normative legal acts of higher force.

B. International legal standards of law-making

17. As mentioned by the Venice Commission, there exists no obligatory international standard tailored specifically to the area of law-making. However, several significant international standards bear direct relevance. The diverse approaches adopted by various States are shaped

[2] It is necessary to unify the English terminology used in the draft amendments to avoid ambiguities and discrepancies. Two different terms, "regulatory" and "normative," are used in the English translation to refer to the same word, "нормативный," in the official Russian text. Therefore, in the context of the draft amendments, the terms "normative" and "regulatory" should be considered identical.

[3] CDL-REF(2024)025

[4] https://iacis.ru/public/upload/files/1/24.pdf

by their unique legal traditions and the constitutional identities rooted in their histories. These national approaches typically evolve from longstanding constitutional customs, which over centuries have been partially or wholly codified through formal legislation and often enshrined within the Constitution itself. In the absence of specific standards, this diversity in traditions and practices is admissible as long as it does not go against more general standards, deriving, for example, from the three main principles expressed in the Preamble to the Statute of the Council of Europe – democracy, human rights and the rule of law.[5]

18. The following international principles of law-making are pertinent to the national system of regulatory legal acts and should be duly considered during the drafting of legislation in this domain.

19. *Transparency as a principle of democratic law-making:* The Venice Commission Rule of Law Checklist contains standards and benchmarks concerning the quality of the procedures by which laws are made. The law-making process must be "transparent, accountable, inclusive and democratic". To satisfy this requirement, the public should have access to draft legislation, and should have a meaningful opportunity to provide input. Where appropriate, impact assessments should be made before legislation is adopted.[6]

20. Additionally, the significance of public debate in the law-making process has been underscored by the European Court of Human Rights (ECtHR). While the ECtHR has not addressed the legislative processes in detail, it has nevertheless considered pluralism and freedom of political debate to be the foundation of any democracy.[7] As appears from its case-law, in order to determine the proportionality of a general legislative measure, the ECtHR may examine the quality of the parliamentary assessment of the necessity of the measure,[8] as well as the scope and seriousness of the debate during the relevant law-making process.[9]

21. *The principle of legality:* This principle requires that supremacy of the law is recognised. Amongst other things, this means that conformity of the legislation with the Constitution must be ensured, and the action of the executive branch must conform with the Constitution and other laws. The duty to implement the law, in respect of the principle of the hierarchy of legal norms, is one of the cornerstones of the principle of legality.[10] It is also to be noted that an ambiguous and complex system of laws impenetrable for outsiders could be an obstacle to such implementation. The conformity to this duty cannot however be evaluated *in abstracto*. If the authorities are able to navigate through the legal system, and if these laws are clear for individuals, it is difficult to say that the system is not appropriate, or it should be changed.[11]

22. *The principle of the separation of powers*: The principle of legality, which also requires that discretion of the executive cannot be unlimited, is closely related to the principle of the separation of powers, which underpins the Rule of Law requirement that applies to the law-making powers of the executive: that where law-making power is delegated to the executive by the legislature, the supremacy of the legislature over the executive must still be ensured. This means that general and abstract rules should be included in an Act of Parliament, or a regulation based on that Act, save for limited exceptions provided for in the Constitution, and when legislative power is delegated by Parliament to the executive, the objectives, contents, and scope of the delegation of power should be explicitly defined in a legislative act.[12]

23. As regards the implementation of laws, it is the task of the executive and judicial branches of government. The power of the executive to adopt normative acts is limited to legislative delegation as defined above and implementation of (formal) laws. It is more generally competent for adopting decisions (legal acts of an individual and concrete nature). Usually the executive

[5] Venice Commission, CDL-AD(2019)025-e, on the draft law on legal acts of Kosovo, para. 6.
[6] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, Benchmarks A.5.
[7] ECtHR, Tănase v. Moldova [GC], no. 7/08, 27 April 2010, para. 154, with further references.
[8] ECtHR, Animal Defenders International v. the United Kingdom [GC], no. 48876/08, 22 April 2013, para. 108.
[9] ECtHR, Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, 6 October 2005, para. 79.
[10] CDL-AD(2016)007, II.A.7.
[11] Venice Commission, CDL-AD(2019)025-e, on the draft law on legal acts of Kosovo, para 11.
[12] Venice Commission, CDL-AD(2020)034, opinion on the Draft Law on the Government of Kosovo, paras 21-27.

(through its administrative institutions and bodies) acts for the future (pro futuro, ex nunc), while the judiciary decides on the legality of the previous behaviour of the state and of individuals, it implements laws with retrospective effect (ex tunc). Since the executive has usually the largest structure of institutions and bodies, its internal administration also needs rules. These internal rules look formally like normative acts (of a general and abstract character); however, their addressees are only the state institutions, and they have no direct effect on individuals.[13]

24. *The principle of legal certainty* implies that laws must be accessible: they should be published before entering into force, and easily available, e.g. in an official bulletin.[14] Also, the effects of laws must be foreseeable: laws should be written in an intelligible manner and formulated with sufficient precision and clarity to enable people and legal entities to regulate their conduct in conformity with the law's requirements.[15] Foreseeability also requires that new legislation should clearly state whether, and which, previous legislation is repealed or amended, and amendments should be incorporated in a consolidated, publicly accessible version of the law.[16] The Venice Commission has also recommended providing explanatory memorandums to draft legislation. It should be remembered that law-making is not only an act of political will, but also a rational exercise. No meaningful public debate is possible if the reasons for a policy are not put forward.[17]

C. Typology of legal acts

25. The Venice Commission has described the typology of legal acts in its earlier opinion on the draft law on legal acts of Kosovo.[18]

26. Legal acts can be normative (general and abstract) or special (individual and concrete). Normative (general) acts can be either external (binding all individuals, legal persons and institutions) or internal (binding only state institutions such as the legislature, the executive or the judiciary including the Constitutional Courts).

27. The top-level external normative act is the Constitution, that should regulate the types of other external normative acts, including primary and secondary legislation.

28. The highest level primary external normative acts are statutes, products of legislation by the highest democratically elected body, the parliament. Statutes may not contradict the Constitution.

29. The Constitution generally provides for the possibility of the executive power to adopt normative acts under certain conditions:

- The Constitution may (under strict limits) delegate power to create primary external normative acts without need of delegation through statutes to the executive. Primary legislation by the executive should not be called "statute", to distinguish it from statutes adopted by the Parliament, but, for example "decree". Primary decrees may not contradict the Constitution and statutes.

- In conformity with the Constitution, the statutes may delegate to the executive the power to create secondary external normative acts if the objectives, contents, and scope of the delegation of powers are explicitly defined in a legislative act. The addressee of this delegation is usually (but not necessarily) the highest institution of the executive (cabinet or council of ministers, often called 'Government' and/or head of state).

- The executive may also adopt normative acts (which are also secondary decrees) to implement the statutes.

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[13] Ibid, paras 17, 18.
[14] CDL-AD(2016)007, II.B.1.i and ii.
[15] CDL-AD(2016)007, II.B.3.i and § 58. See in particular ECtHR *The Sunday Times v. The United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 49.
[16] CDL-AD(2016)007, II.B.3.ii.
[17] Venice Commission, CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, para 17.
[18] Venice Commission, CDL-AD(2019)025-e, on the draft law on legal acts of Kosovo, paras 23-31.

30. Legislation by the executive should be clearly differentiated from the statutes of parliament. Decrees may not contradict the Constitution and statutes in general, and the statute (possibly the primary decree) that delegates the power, in particular. The denomination of the different types of external normative acts should only depend on their legal nature and not on their content (material, procedural, or institutional norms, etc.) or on whether they are new pieces of legislation or amendments to existing law.

31. In the case of internal normative acts there are less clear rules, since they are addressed only to State bodies. They may not contradict external normative acts, and they may not have a direct effect on individuals. Moreover, internal normative acts may usually not be referred directly to a court. However, they may have an indirect effect on individuals, when used by the administration to interpret external normative acts (e.g. in the fields of taxes and social security), and then be also indirectly challenged before the courts.

D. Scope of the opinion

32. According to the explanatory note, the draft amendments were developed "to eliminate existing contradictions and problems in the law enforcement practice of rule-making activities of state bodies and local governments and are aimed at improving the quality of adopted regulatory legal acts."[19]

33. The proposed draft amendments pertain to the types of legal acts, and the planning of legislative work by the Cabinet of Ministers. They also address the functioning of the unified portal for public discussion of draft legal acts, the establishment of expedited decision-making processes, the legal regulation of social relations in a pilot mode and other issues. Additionally, they include some modifications of an editorial and clarificatory nature.

34. The analysis will focus on these issues, assessing them in light of international standards of law-making. The Commission will evaluate the compatibility of the proposed amendments with principles of democratic governance, transparency, and public participation, as well as their adherence to the rule of law and the protection of human rights and fundamental freedoms. The fact that this opinion does not explicitly address other aspects of the draft amendments should not be interpreted as an endorsement by the Venice Commission or as an indication that these aspects will not be raised in the future. Similarly, this opinion will refrain from providing extensive commentary on sections of the draft amendments that do not give rise to special concerns at the present moment.

III. Analysis

A. Types of normative legal acts

35. In the draft amendments, several changes are introduced in Article 4 of the Law to clarify and enhance the legal terminology and coherence. Specifically, in the second paragraph, regarding the legal force of the Constitution, the words "having supreme legal force" are replaced with "having supreme legal force, direct effect." This amendment reflects the provisions of Article 6 of the Constitution, which stipulates that the Constitution has direct effect. The inclusion of the concept of the direct effect of the Constitution is considered positive and aligns with the fundamental principles of constitutional law.

36. Regarding the legal force of the Resolutions of the Jogorku Kenesh, the draft law stipulates that these resolutions are adopted "on issues referred to its jurisdiction by the Constitution and laws".

37. This amendment aims to prevent situations where the Resolutions of the Jogorku Kenesh (Parliament Resolutions) contradict Laws (Statutes), which hold higher legal force, thereby aligning with the principle of legality which includes the respect to the principle of hierarchy of

[19] CDL-REF(2024)024-e

legal norms. However, it is essential to compare the draft amendments with Article 6 of the Law, which establishes the hierarchy of normative legal acts and distinguishes between various types, including constitutional laws, codes, and regular laws. Therefore, it is crucial that apart from the laws, constitutional laws and codes are also explicitly mentioned in the draft amendments to avoid any controversies during the application of the current regulations.

38. Additionally, it remains unclear whether the Resolutions of the Jogorku Kenesh could overrule Presidential Decrees, which possess higher legal force within the hierarchy of regulatory legal acts. The Venice Commission underlines that clarity about the hierarchy of norms, or which legal acts prevail in the event of a conflict or inconsistency between them, is also an important aspect of the Rule of Law. It helps to ensure that the executive, or other State branch, is not left with a discretion which has not been expressly conferred on it but is the result of legal ambiguity.[20] During the online meetings, it was noted that the Resolutions of Jokorgu Kenesh and Presidential Decrees, in principle, should not be contradictory. However, to avoid any potential conflicts, it is advisable to explicitly address this issue in the text of the Law.

39. The Venice Commission thus recommends that, the draft amendments explicitly mention that constitutional laws and codes alongside other statutory legislation have higher legal force than the Resolutions of the Jogorku Kenesh. Furthermore, the draft amendments should provide clear guidance on the hierarchy between Resolutions of the Jogorku Kenesh and Presidential Decrees to prevent conflicts and ensure adherence to the principle of legality.

B. Planning of the legislative activity

40. The amendments to Article 18 of the Law address the planning processes for the legislative work of the Cabinet of Ministers. Traditionally, the Cabinet of Ministers approves a Plan of Legislative Work at the beginning of each calendar year. However, to improve communication with the Jogorku Kenesh (Parliament) regarding planned legislative initiatives and to prevent duplication in the initiation of bills by various legislative entities, it is now proposed that this plan be aligned with the sessional periods of the Jogorku Kenesh's activities. Furthermore, the draft amendments allow the preparation of regulatory legal acts outside the legislative work plan.

41. The Venice Commission underlines that the legislative planning is a fundamental pillar for the effective functioning of Parliament. It serves as a tool to prevent the duplication of bill initiation by various entities. Moreover, rather than reacting to specific short-term problems and thereby unnecessarily rushing the legislative process (leading to uneven results in terms of quality of legislation), more long-term planning of key legislative initiatives results in qualitatively better, more sustainable legislation.[21] In light of this, the proposal aiming to ensure better coordination and efficiency in the legislative process appears sensible.

42. However, this issue must be examined through the lens of the principle of separation of powers and the independence of the legislature. The Venice Commission reminds that the legislature should have independent competence and authority to wield the power of legislation.[22] Governmental legislative planning should be a tool binding on the Government as a legislative initiator, but not on Parliament, it shall strengthen the role of parliamentary bodies. Parliament shall have a key role in deciding not only the content of the law[23] but also in the planning of the legislative process. This approach ensures greater independence for the legislator and respects the law-making rights of both the ruling majority and the opposition.

43. The planning of legislative activity is intended to focus on the legislative agenda of Parliament; hence, its bodies should have a more significant voice in the process. Moreover, although paragraph 3 of the amended Article 18 clarifies that other normative acts can be developed outside the plan of the legislative activity, however, it should be explicitly stated that it will not

[20] Venice Commission, CDL-AD(2019)025-e, on the draft law on legal acts of Kosovo, para 77.
[21] See, OSCE/ODHIR, Assessment of the Legislative Process in Bosnia and Herzegovina, para 430.
[22] Venice Commission, CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, para 19.
[23] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, Benchmarks A.5.

exclude other proposals, particularly those from Parliament itself. Hence, it is crucial that the plan of the legislative activity not concentrate the legislative initiative within the executive.

44. Additionally, it is advisable to include provisions on initiatives of Parliament that may interfere with or relate to projects covered by the plan, ensuring that the government does not have the opportunity to block such initiatives, except maybe in cases related to spheres which are under exclusive competence of executive.

45. The Venice Commission thus recommends that the Law guarantee the key role of Parliament in the planning of legislative activity. The legislative plan should not exclude other legislative proposals not covered by the plan, particularly those from Parliament itself, and should safeguard that parliamentary initiatives related to draft laws covered by the plan are not, in principle, subject to government rejection. This will ensure that legislative planning enhances rather than constrains parliamentary initiative.

C. Analysis of the regulatory impact

46. The draft amendments foresee a new Article 19 (1) of the Law, according to which draft regulatory legal acts aimed at regulating business activities, with the exception of cases of regulating business activities in circumstances of force majeure and temporary regulatory legal acts for a period of less than one year, as well as aimed at achieving and maintaining price stability, implementing monetary policy, ensuring efficiency, security and reliability of the banking and payment systems are subject to a regulatory impact analysis in accordance with the methodology approved by the Cabinet of Ministers.

47. The impact assessment made before adopting legislation (e.g. on the human rights and budgetary impact of laws)[24] is an important component of the law making procedures. Moreover, in order to have laws and policies that adequately address the problem at hand and also work in practice, it is important to start out by assessing the impact of such laws and policies. Regulatory impact assessment (RIA) is both a tool and a process designed to help inform political decision makers and the public on whether and how to regulate to achieve public policy goals.[25]

48. The Regulatory Impact Analysis should encompass as many aspects as possible, including human rights, budgetary impact, gender equality, and environmental considerations if regulations have an impact on these issues. This comprehensive approach is crucial for understanding the goals of the law, the methods to achieve them, and their positive and negative impacts. In this regard, it is commendable that the Law (Article 20) includes provisions for various types of "legal and other scientific expertise" of draft legal acts.

49. The Venice Commission acknowledges that providing such extensive impact analysis may not always be possible or necessary in all cases, particularly in cases of force majeure. However, it remains unclear why from regulatory impact analysis are exempted temporary regulatory legal acts with a validity period of less than one year. This exemption is particularly concerning as it may involve the adoption of laws or regulatory acts that may directly affect human rights and freedoms. Similar concerns apply to acts aimed at achieving and maintaining price stability, implementing monetary policy, and ensuring the efficiency, security, and reliability of the banking and payment systems, as in financial and monetary matters, the economic impact of legal measures is of paramount importance. The online meetings reaffirmed the position that at least in these exceptions, a specific justification for why an impact assessment is not necessary or possible could help ensure compliance with the general principle of conducting an impact assessment for each legislative project.

50. In view of the above, the Venice Commission recommends including in the Law the carrying out of regulatory impact analysis also for temporary regulatory legal acts with a validity period of less than one year, as well as for legal acts aimed at achieving and maintaining price stability,

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[24] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, Benchmarks A.5.
[25] See, OSCE/ODHIR, Assessment of the Legislative Process in Bosnia and Herzegovina, para 149.

implementing monetary policy, and ensuring the efficiency, security, and reliability of the banking and payment systems, except in rare and objectively justified cases.

D. Public discussions

1. Organisation of public discussions

51. According to the amended Article 22 of the Law, "(1) Draft normative legal acts that directly affect the rights, freedoms, obligations of citizens and legal entities, introducing new regulation of public relations, as well as draft normative legal acts regulating business activities, are subject to public discussion. Public discussion is carried out by posting the project on the Unified Portal of public discussion of draft regulatory legal acts (hereinafter referred to as the Unified Portal). Organiser of the public discussion ensures consideration of received comments and proposals.
The procedure for placement and completion of the procedure of the public discussion of draft regulatory legal acts on the Unified Portal is determined by the Cabinet of Ministers.
(2) The requirements of Part 1 of this article do not apply to draft normative legal acts arising from the decision of the Constitutional Court, providing for amendments of an editorial and technical nature, regulating public relations in the field of defence and national security, protection of state secrets, military-technical cooperation, having temporary nature, with a validity period of less than one year, and also aimed at achieving and maintaining price stability, implementing monetary policy, ensuring the efficiency, security and reliability of the banking and payment systems.
(3) Financing of the costs of organising and conducting a public discussion is carried out at the expense of the entity preparing the draft regulatory legal act, and other sources not prohibited by the legislation of the Kyrgyz Republic".

52. The Venice Commission has consistently underlined that transparency is a pivotal principle of democratic law-making. The principle of transparency requires, among other things, that the public should have access to draft legislation, at least when it is submitted to Parliament. The public should also have a meaningful opportunity to provide input.[26] This includes the opportunity to participate in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves.[27] The Commission reiterates that the adoption of acts of Parliament regulating essential aspects of the legal order without genuine consultations with the opposition, experts, or civil society representatives falls short of the standards of democratic law-making.[28] An open and transparent consultation and preparation process for such amendments increases confidence and trust in the adopted legislation and the State institutions. Parliament should address the recommendations and outcomes of such consultations when drafting the legislation.[29] Furthermore, the Venice Commission emphasises that an inclusive law-making process is not solely a procedural exercise. Meaningful consultations with both the opposition and the civil society as well as with other stakeholders, are crucial.[30]

53. The Venice Commission further underlines that the provisions for creating the Unified Portal for Public Discussion are a significant asset for facilitating public discussions and improving proposed draft legislation. The Commission observed that currently, public discussions are conducted on the websites of various rule-making entities, each with different options and capabilities, often lacking feedback mechanisms, commenting options, or submission facilities for proposals. The creation of the Unified Portal may eliminate these complications and make the public discussion process more transparent, democratic, inclusive, and efficient. Hence, these

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[26] Venice Commission, CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, para 74.
[27] UN Human Rights Committee, General Comment No. 25 (1996), Article 25 (Participation in Public Affairs and the Right to Vote), para 8.
[28] Venice Commission, CDL-AD(2022)010 , Georgia - Opinion on the December 2021 amendments to the organic Law on Common Courts, para 79.
[29] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.A.5.iii-iv; see also 1990 OSCE Copenhagen Document, par 5.8 of the which commits participating States to ensure that "legislation (is) adopted at the end of a public procedure".
[30] Venice Commission, CDL-AD(2023)044, Georgia - Opinion on the Law on the Special Investigation Service and on the provisions of the Law on Personal Data Protection concerning the Personal Data Protection Service, para 29.

changes should be considered positive in the context of enhancing the transparency of law-making.

54. However, adjustments are needed to make the draft law more consistent with the principles of democratic law-making. First, it is not clear why public discussions should be held only for legal acts "introducing new regulation of public relations". The meaning of this term is ambiguous and requires clarification. It would also be appropriate to expand the scope of public discussion items to include regulatory legal acts concerning environmental issues. Although the delegation of the Venice Commission was informed during online meetings that, according to legislation on environmental expertise, such laws are subject to compulsory expertise, it would be preferable to explicitly stipulate in this Law the need for public discussions on environmental issues. This consideration is important given that this Law is the primary legal act regulating the lawmaking process. This recommendation also is interconnected with the international obligations of the Kyrgyz Republic, particularly those arising from its accession to the UN Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention).[31]

55. Secondly, since the amended draft Article 22 of the Law is less detailed compared to the existing regulation, it is important to clarify which accompanying documents should be posted to the Unified Portal for Public Discussion. If it is not feasible to maintain the requirements of paragraphs 2 and 3 of the current regulation,[32] it is desirable, from a transparency perspective, to specify in the draft amendments the necessary information that should be posted on the Unified Portal alongside the draft legal acts. This approach aligns with the Venice Commission Rule of Law Checklist, which requires that proposed legislation be adequately justified, notably through explanatory reports.[33] Moreover, in order to improve the regulation and ensure the efficiency of the procedure, it is recommended to include in the Law some guiding principles for the Cabinet of Ministers regarding the procedure of public discussions which should encompass transparency, complementary information documents, public accessibility of proposals and comments, user-friendly design, and follow-up of proposals at later stages.

56. Thirdly, the Venice Commission underlines, that while it is understandable that certain regulatory legal acts should be exempt from mandatory public discussion - particularly those of a technical or editorial nature, or in some cases those related to defence or national security - the exemption of temporary regulatory legal acts with a validity period of less than one year appears unjustified. Such acts may directly impact the fundamental rights and freedoms of individuals or legal entities or address environmental issues, a compromise could be to exclude only those temporary acts that do not directly affect human rights.

57. Fourthly, while the Venice Commission acknowledges that the public discussion on draft normative legal acts arising from the decision of the Constitutional Court could be, in general, subject to specific conditions, it is however unclear why those acts should be exempt from public discussion at all. Constitutional courts act as "negative legislators", declaring certain norms

[31] Aarhus Convention, Article 3.
[32] "2. Public discussion of a draft normative legal act shall be ensured by the rule-making body by means of: ensuring access to the text of the draft normative legal act; acceptance, consideration and generalisation of proposals coming from participants of public discussion; preparation, based on the results of public discussion, of final information on the proposals received with justification of the reasons for their inclusion or non-inclusion in the draft normative legal act. The final information shall be reflected in the statement of justification to the draft normative legal act.
3.The subject of normative activity is obliged to make public information relevant to the subject of discussion, including: text of the draft normative legal act; justification of the necessity to adopt a normative legal act; list of persons and organisations that participated in the development, as well as with whom the draft normative legal act was previously agreed; financial and economic calculations, conclusions of expert examinations; Statistical data; information on monitoring and evaluation of legislation in the sphere of public relations that will be regulated by the developed draft normative legal act; forecast of possible social, economic, legal and other consequences of the prepared normative legal act; contact details of the entity that prepared the draft regulatory legal act (address, including electronic address, telephone numbers that receive fax messages), as well as the surname, name and contact details of the implementer responsible for receiving proposals and comments; other information necessary for substantiation of the draft normative legal act, except for information containing state or other secret protected by law".
[33] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, Benchmarks A.5.

unconstitutional, but they typically do not draft new provisions. Not all decisions of the Constitutional Court necessitate a definite normative response that cannot be questioned. Conversely, there are typically various options for amending an unconstitutional statute that can still be open to public debate. Hence, the mere fact that a legislative initiative stems from a Constitutional Court decision should not preclude it from being subject to public discussion and relying solely on the presumption of constitutionality for regulatory legal acts derived from the decisions of Constitutional Courts is inappropriate. In this light, the explanation provided by the authorities - that the decision of the Constitutional Court has direct effect, must be implemented within a three-month period, and that current regulations also foresee such a provision - does not seem convincing.

58. Similarly, regulations pertaining to public relations in the context of defence and national security, the protection of state secrets, and military-technical cooperation, among others, frequently attract significant public interest due to their profound impact on citizens' lives, rights, and duties. This interest may sometimes justify the necessity of subjecting such regulations to public scrutiny. Consequently, the complete exclusion of public debate in these areas contradicts the fundamental principles of law-making procedures and is therefore unjustified.

59. Lastly, the explanatory note fails to provide a substantive justification for exempting from public discussions the regulation of areas such as achieving and maintaining price stability, implementing monetary policy, and ensuring the efficiency, security, and reliability of banking and payment systems. The explanatory note merely asserts that these matters require immediate and prompt solutions, which does not constitute an adequate justification for excluding the public from the legislative process. Additionally, the online meetings did not offer a clear explanation to address this concern.

60. Consequently, the Venice Commission recommends clarifying in the draft amendments the term "introducing new regulation of public relations" and to specify which documents must accompany legal acts on the Unified Portal by foreseeing also clear guidelines and procedural principles for the Cabinet of Ministers. The Venice Commission also recommends that the authorities set limits to the exemption from public discussions of temporary acts, legal acts resulting from Constitutional Court decisions, or those related to the fields of defence and national security, as well as those regulating price stability, monetary policy, and banking efficiency. Such exemptions should be limited to exceptional and objectively justified cases only.

2. Period of the public discussions

61. According to the amended Article 23 of the Law, "(1) The period for public discussion of draft regulatory legal acts is no more than 20 calendar days. (2) In the case of organising additional events aimed at increasing the effectiveness of public discussion, including consultation and expert discussions with the possibility of participants submitting comments and suggestions to the draft regulatory legal act, including information in the media, on the official website of the government body (official persons) or in other ways about carrying out these additional events, the period for public discussion may be reduced to ten calendar days. (3) The calculation of the period for public discussion begins on the day following the day of publication of the draft normative legal act".

62. The current Law states that "The term of public discussion of draft normative legal acts shall be at least one month, except for draft normative legal acts aimed at regulating the rights of citizens and legal entities under force majeure circumstances".

63. The Venice Commission underlines that according to Article 25 ICCPR every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives. The right to participate in public affairs, provides that citizens also take part in the conduct of public affairs by exerting influence through public debate.[34] According

[34] UN Human Rights Committee, General Comment No. 25, para 8.

to Article 37(4) of the Constitution, citizens of the Kyrgyz Republic have the right to participate in the discussion and adoption of laws and decisions of the national and local importance.

64. Although the length of public discussion differs among States and no exact international standard has been developed in that regard, the reduction of the public consultation period should pursue a legitimate objective and be sufficiently justified. The explanatory note concerning the present amendment briefly stipulates that "these amendments were prepared for the purpose of prompt decision-making." This justification is vague and fails to explain why the previously stipulated duration of public discussions (at least one month) is no longer sufficient and how it obstructs prompt decision-making, making it necessary to reduce the public discussion period to a maximum of 20 calendar days (which may be reduced to ten calendar days in cases outlined above).

65. The Venice Commission further observes that although the proposed amendments introduce the possibility of a digital unified portal for public discussions, which was previously unavailable and may expedite the process, this alone is insufficient to enhance transparency. It is not enough to merely post a draft regulatory act for consideration; reasonable time-limits for commenting and submitting proposals must also be allocated. In this context, the maximum 20-calendar day period may be deemed insufficient, particularly given that no explanation was provided for this reduction. Moreover, significant projects should be allocated more time for public debate, while simpler or non-controversial projects may require less time, hence a more nuanced approach would be appropriate, allowing for the extension of deadlines when the importance or complexity of the project necessitates additional time for public consultation.

66. Furthermore, it is important to underline that the current regulations of the Law are based on the opposite logic, providing a minimum length for public discussions of at least one month. By contrast, the proposed draft establishes only a maximum period of twenty days, without clarifying the minimum period for public discussion. The absence of a defined minimum period for public discussion does not align with the principle of legal certainty, as it theoretically allows for the public discussion to range from one second to twenty days. This lack of legal clarity may undermine the entire public discussion process, rendering it non-transparent, non-inclusive, and undemocratic. This is compounded by the fact that during the online meetings the authorities assured that the twenty-day period could be extended if needed. However, it appears that no such provision is explicitly stipulated in the draft amendments to the Law.[35]

67. Moreover, it seems highly controversial and unclear why additional events aimed at enhancing the effectiveness of public discussions should impact the duration of the public discussion. The Venice Commission considers that while additional expert meetings, hearings, and media campaigns to disseminate information can indeed increase the transparency and inclusiveness of public discussions, thereby adding value to the legislative process, they should not serve as a justification for reducing the public discussion period to ten calendar days. This limitation may render public discussion of complex and voluminous regulations empty, useless, and impossible and may lead to abuses in the public discussion process.

68. It is also not clear who is responsible for deciding on the reduction of the public discussion period and what are the criteria for such decisions. Posting draft regulatory acts on the Unified Portal should not preclude other forms of public discussion. This limitation should also be evaluated from the perspective of the principle of independence of actors of legislative initiative, including the Jogorku Kenesh, who are entitled to hold hearings, and convene discussions and expert meetings regarding the relevant draft legislation. It should be borne in mind that the legislative branch must hold a supreme role in determining the content of laws and in freely and publicly debating them, not only within the parliament but also in other public forums.[36]

69. The Venice Commission thus recommends that the proposed amendments to Article 23 of the Law be revised retaining the current Law's provision of a minimum one-month period for

[35] The practice of different European states shows that the usual period for public discussion ranges from four to six weeks. This fact was also highlighted in the comments of several commercial entities made during the public discussion of the draft amendments.
[36] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, Benchmarks A.5.

public discussions except for duly justified urgent cases. Furthermore, it recommends removing the possibility of reducing the period of public discussions to ten days in case of organising additional events.

E. Temporary regulation of emerging social issues (pilot mode)

70. According to the amended Article 31.1 of the Law, "(1) In order to test the functioning of new social relations, the President or the Cabinet of Ministers has the right to introduce a pilot regulation project for a period of up to one year. The procedure for carrying out the pilot regulation project is determined by the President or the Cabinet of Ministers. (2) If the pilot regulation project is successfully implemented, the President or the Cabinet of Ministers may adopt the corresponding regulatory legal act or initiate changes to the regulatory legal acts. (3) Temporary regulation of new social relations in the field of provision of banking and payment services is regulated by the constitutional Law of the Kyrgyz Republic "On the National Bank of the Kyrgyz Republic".

71. The Venice Commission is mindful that this new provision establishes a framework for the temporary regulation of emerging social issues and that the primary objective of this provision is to facilitate the testing and implementation of innovative solutions that are not currently covered by existing legislation.

72. At the outset, the Venice Commission underlines that the approbation and piloting of such procedures may serve as a useful tool to ensure that new ideas are implemented more swiftly. This mechanism could potentially bridge the gap between innovation and existing regulatory frameworks, promoting a more dynamic adaptation of the law to new realities.

73. However, the Commission emphasises that such a tool cannot be applied without robust safeguards against potential abuse. It is imperative that measures are in place to prevent the misuse of the "sandbox" mode, ensuring that its application remains within the bounds of promoting genuine innovation and public interest. These safeguards are crucial to maintaining the integrity and trust in the regulatory framework.

74. The Venice Commission reiterates that democracy and the rule of law require that, in principle, all the important legislation be adopted by the legislature. The legislature should have independent competence and authority to wield the power of legislation. The legislature must have the right to discuss, amend and adopt or rescind proposals for legislation, as well as the right to initiate new legislation.[37] In most modern constitutional and democratic regimes, it is considered that Parliament’s "essential property" is its normative and organisational autonomy (as well as the resulting budgetary autonomy).[38] The legislature should be able to adopt and amend its own rules of procedures on an independent basis. It also should be free to schedule its sessions, to set its own pace and to determine how much time is needed to draft, review or amend proposed legislation.[39]

75. However, the above new provision does not specify whether Parliament has any role in initiating pilot regulations and there is no explanation provided as to why this procedure may not include Parliament. It is not excluded that the normative legal acts adopted in the pilot mode could raise serious human rights issues or other public relations that are typically regulated by parliamentary laws, potentially bypassing Parliament. The duration of one year may be sufficient to adopt problematic legal acts without parliamentary participation and allow the enactment of regulations that could have detrimental consequences, potentially creating legal and social issues that are difficult to rectify. The abovementioned concerns were made clear during the rapporteurs’ online meetings and need to be addressed.

[37] Venice Commission, CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, paras 19 and 21.
[38] Venice Commission, CDL-AD(2017)026* , Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine, para 22.
[39] Venice Commission, CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, para 20.

76. The Commission finds that to enhance the role of Parliament, it is essential to ensure public debate and comprehensive impact assessment of such pilot mode projects. Parliament must clearly define the objectives of the pilot mode and maintain robust oversight powers over its operation to ensure transparency, accountability, and alignment with democratic principles and the rule of law.

77. Furthermore, during the online meetings, concerns were raised about the unclarity of the notion "new social relations". It was noted that every single amendment to the existing legislation could be considered as regulating new social relations. Moreover, from the content of the amended article, it is unclear what distinguishes the status of the legal acts adopted in pilot mode from those of normal legal acts. Furthermore, it remains uncertain what the legal force of the legal acts adopted through this procedure is. The absence of this crucial information undermines the legislative oversight and accountability that are fundamental to a democratic process.

78. Additionally, there is a lack of clarity and foreseeability regarding the procedure for adopting legal acts in the pilot mode. The exact powers of the President and the Cabinet of Ministers in this context are not clearly defined, leading to potential uncertainties. Hence it is not excluded that this "sandbox" mode provides an opportunity to implement regulatory acts that may not derive directly from laws or the Constitution but are based on procedures adopted by the executive (President or the Cabinet of Ministers). It is also not clear whether this kind of regulations may be subject to review by the Constitutional Court.

79. The Venice Commission further finds the legal areas that cannot be covered by pilot regulations should be explicitly listed. These should include, but should not be limited to, constitutional issues, matters regulated by constitutional legislation, issues typically governed by laws, matters concerning human rights and freedoms, and environmental issues, moreover, provisions for judicial or constitutional review to challenge the sandbox regulations should be established. The Commission consequently underlines that more detailed regulations are imperative, as this model resembles temporary delegated legislative authority, necessitating precise regulations.

80. Consequently, the Venice Commission recommends revising draft Article 31.1 of the Law about the legal regulation of public relations in pilot mode, clearly regulating the status and the legal force of the legal acts adopted in pilot mode, the procedure of their adoption, legal areas that cannot be covered by pilot regulations, also foreseeing a decisive role of Parliament in this process.

IV. Conclusion

81. By letter of 27 February 2024, Mr A. Baetov, Minister of Justice of the Kyrgyz Republic requested an opinion of the Venice Commission on the draft law "On Amendments to the Law of the Kyrgyz Republic on Regulatory Legal Acts". On 30 April 2024, Mr Baetov submitted the renewed request with the updated draft amendments.

82. The Venice Commission acknowledges that the draft amendments were developed to eliminate existing contradictions and problems in the law -making activities of state bodies and aim to improve the quality of adopted regulatory legal acts. It also underlines that the main changes foreseen by the draft amendments, which include clarifying the types of legal acts, planning of legislative work by the Cabinet of Ministers, the creation of a unified portal for public discussion, and the legal regulation of social relations in a pilot mode, are positive changes *per se* capable of improving the law-making process.

83. However, the Commission notes with concern that the draft amendments appear to facilitate a reduction of public discussions on draft laws. The limited timeframe for public discussions, the broad exemptions to public discussions and impact assessments—particularly concerning urgent bills—and the regulation of the pilot mode, contribute to a trend of diminishing public and parliamentary participation in the legislative process. This shift seems to excessively boost the position of the executive, notably the President and the Cabinet of Ministers, at the expense of popular and parliamentary engagement. Such an excessive reallocation of power in favour of the

executive branch may have significant implications for the separation of powers, potentially undermining the balance that is essential for a healthy democracy and the rule of law.

84. In the light of the above, the Venice Commission has the following recommendations:

- The draft amendments should explicitly mention that constitutional laws and codes alongside other laws have higher legal force than Resolutions of the Jogorku Kenesh; furthermore, the draft amendments should provide clear guidance on the hierarchy between Resolutions of the Jogorku Kenesh and Presidential Decrees.

- The law should guarantee the key role of Parliament in planning legislative activity. The legislative plan should not exclude other legislative proposals, particularly those from Parliament itself, and should safeguard that parliamentary initiatives related to draft laws covered by the legislative plan are not, in principle, subject to government rejection.

- The regulatory impact analysis should include temporary regulatory legal acts with a validity period of less than one year, as well as legal acts aimed at achieving and maintaining price stability, implementing monetary policy, and ensuring the efficiency, security, and reliability of the banking and payment systems, except in rare and objectively justified cases.

- The term "introducing new regulation of public relations" should be clarified and documents which must accompany legal acts on the Unified Portal of public discussion should be specified by stipulating also clear guidelines and procedural principles for the Cabinet of Ministers. The Venice Commission also recommends that the exemption from public discussions of temporary acts, legal acts resulting from Constitutional Court decisions, or those related to the fields of defence and national security, as well as those regulating price stability, monetary policy, and banking efficiency be limited to exceptional and objectively justified cases only.

- The proposed amendments to Article 23 of the Law should be revised and the current provision of a minimum one-month period for public discussion should be retained except for duly justified urgent cases. Furthermore, the Commission recommends removing the possibility of reducing the period of public discussions to ten days in case of organising additional events.

- The regulation of public relations in pilot mode should be revised, clearly regulating the status and the legal force of the legal acts adopted in pilot mode, the procedure of their adoption, areas that cannot be covered by pilot regulations, also foreseeing a decisive role of Parliament in this process.

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