

Comments on the draft law on Citizenship of the Kyrgyz Republic (CDL(1993)038)

Preliminary remarks

At the 15th meeting of the European Commission for Democracy through Law in Warsaw the observer on the Commission for Kyrgyzstan, Mr Kosakov, asked the Commission to give an opinion on the draft law on citizenship of the Kyrgyz Republic.

The opinion prepared by Prof. Z. Kedzia, alternate member of the Commission on behalf of Poland, appears under I, the opinion prepared by Mr F. Zilverentant from the Dutch Ministry of Justice, member of the Council of Europe's Committee of Experts on multiple nationality, appears under II and the opinion prepared by Mr R. Sch?rfer from the Swiss "Office f?d?ral de la Police", appears under III.

I

Opinion by Prof. Z. Kedzia

1. The Law on Citizenship of the Kyrgyz Republic is to be interpreted in the light of the Constitution which regulates this question extensively (**art. 13**). According to the Constitution (para 1): "The belonging of a citizen to the Republic of Kirghizstan and his status shall be determined as citizenship." The draft Law on Citizenship defines the citizenship (**Preamble**) as follows: "Citizenship of the Kyrgyz Republic shall determine permanent; ^[1] political and legal relations ^[2] between a physical person and the Kyrgyz Republic which are reflected in their mutual rights and duties". The Constitution allows a "double citizenship" only in the case binding international treaties establish such a possibility. It prohibits the deprivation of citizenship and the waive of the right to change the citizenship. Finally, it provides for an obligation of the State to protect citizens abroad.

2. The main principles of the draft Law on citizenship are:

- i) Every one in the Kyrgyz Republic has the right to citizenship (**Preamble**) - the Russian version is stronger than the English one which uses the phrase "shall have".
- ii) No one may be deprived of his/her citizenship or the right to change the citizenship (**Preamble**).
- ii) Citizens are equal irrespectively of the source of citizenship (**art. 5**).

It seems that the first two principles follow the language of **art. 15** of the Universal Declaration on Human Rights. But such a formulation, well-founded in international law, may cause some difficulties in interpretation of domestic law. Following questions might be raised: - who is "every one" and "which citizenship". Perhaps it would be better to say: "Every one who fulfills the conditions laid down in the present Law has the right to the Kyrgyz citizenship." Such a wording would also correspond with **art. 22 - 24** as well as with **art. 27 ' 2** which says: "Citizenship of the Kyrgyz Republic granted on the basis of false information or documents shall be invalidated since the moment of its acquirement."

Taking into account the rules of procedure contained in the last part of the statute one might arrive at the conclusion that the proclamation of the right to change the citizenship in a form typical to a freedom, i.e. without any reference to the possible limitations, might be misleading. In the light of **art. 13** of the Constitution and of the **Preamble** to the Law, an individual has the right to a free change of citizenship and cannot be deprived of his/her citizenship. The specific provisions of the Law limit, however, the freedom of an individual in this regard significantly. So, perhaps it would be better to refer to the admissible statutory limits.

3. The Citizenship of the Kyrgyz Republic is acquired: by birth, by naturalization, by virtue of international treaties ^[3], on other grounds envisaged by the present Law. The dominating rule is *ius sanguinis* (**art. 13 and 14** of the Law). The principle of *ius soli* plays an auxiliary role (**art. 15, 18**).

4. It is worth of emphasizing that the individual subjective right to citizenship constitutes the fundament of the Law under discussion. This is a perspective adopted by international law, both international and regional. Moreover, the concept of the Law assumes a desired stability and protection of the citizenship, which is required *inter alia* by the International Convention on the Reduction of Statelessness (some specific comments in this regard are made later on).

5. Generally, the Law under discussion regulates various questions of citizenship in a detailed way. This observation relates not only to the material (substantial) but also to procedural law (e.g. the precisely regulated procedure before the organs of Executive and the established right to appeal to the Supreme Court against the decisions passed). The establishment of time limits for the decision-making seems to be an important guarantee of the position of an individual as well. The maximum one-year-term (**art. 37**) should be probably acceptable in the case of citizenship which requires a complicated procedure.

2. SPECIFIC REMARKS

1. **Art. 3** which provides a general superiority of international treaties over the discussed Law might have raised some doubts (citizenship is one of the constitutive elements of constitutional law) but in the light of the constitutional provisions on citizenship and **art. 62 (12)** of the Constitution on the competence of the Parliament to ratify and denounce international treaties these doubts should disappear.

2. In spite of the equality of Kyrgyz citizens irrespectively of the origin of the citizenship, **art. 5** lays down the general principle of equality of citizens. While the second para which speaks about the equality before the law seems to be well founded, the next para might be source of misinterpretations (equality in all spheres of life and not equality before law).

3. The Law repeats in **art. 6** the constitutional principle concerning the "single" citizenship of the Kyrgyz citizens. The English version does not refer to the international treaties which could be the basis for a "double" citizenship. But the Russian version states additionally: "In the interest of the Republic and in exceptional cases the citizens of foreign states could also become (be?) citizens of the Kyrgyz Republic by virtue of the President's decision". One can wonder in which relation remains this provision with the Constitutional provision which accepts the double citizenship only in the case the binding international treaties establish such a possibility. Does **art. 6** establish only a procedure for the situations the Constitution speaks about (an international treaty provides for "double" citizenship) or can the President act by virtue of the statutory provision only? If the answer to the second question is to be affirmative would it not mean that this provision is inconsistent to the Constitution? Moreover, the Constitution speaks about the "double" citizenship when the foreigner acquire the Kyrgyz citizenship and when the Kyrgyz citizen acquire the foreign citizenship without loosing the prior one. The text of the Law suggests that only those persons who previously were foreign citizens can become also the Kyrgyz citizens but not conversely. Again, one can wonder which is the reason for this solution.

4. One can have some doubts whether the obligation of the Kyrgyz citizens to register in the consular office of the Kyrgyz Republic while staying

temporarily or permanently abroad (**art. 7**) is necessary. Would it not be better to leave the decision on maintaining contacts with the consulate with the individuals themselves? This obligations of administrative character seems to be superfluous and in the light of **art. 27 ' 1 point 2** dangerous from the point of view of human rights (see: point 12).

Little confusing is '**1 of this article**'. It reads: "Residence of a citizen of the Kyrgyz Republic outside its territory shall not lead by itself (underlined by Z.K.) to the loss of citizenship of the Kyrgyz Republic". It seems to accept under circumstances the loss of the citizenship. It would be inconsistent to the clear and unconditional prohibition laid down by the Constitution (**art. 13**) and by the **Preamble** to the Law^[4].

5. **Art. 8** of the English version is not translated properly and can lead to a misinterpretation. Instead of saying "shall not lead to the change of citizenship" the Russian version states "does not cause the change of citizenship". '**2** of this article are formulated rather vague. Doubts arise whether marriage with a foreigner or change of the citizenship cannot be a ground of the change of citizenship of another spouse at all or does not lead to the change of citizenship *eo ipso*.

Moreover, the Law under discussion ignores the idea of "a specially privileged naturalization procedures" for foreign wives and other concepts related thereto as provided for by the International Convention on the Nationality of Married Women. In the context of **art. 8** one can wonder if the Law under discussion is not contrary to the mentioned Convention.

6. The Law (**art. 10**) accepts the extradition of Kyrgyz citizens based on the international agreements ("*miedzunarodnyje soglaszenia*" - the English version speaks about "intergovernmental agreements" what is probably not correct). But, the Russian version itself differentiates between an international treaty - *miedzunarodnyje dogovory* (e.g. in **art. 3**) and an international agreement - *miedzunarodnyje soglaszenia*. This difference is of paramount relevance because **art. 62 (12)** of the Constitution establishing the competence to ratify and denounce international treaties does not mention "international agreements". If the English version faithfully reflects the intention of the drafters it would mean that the possibility of the extradition might be established by an intergovernmental agreement without Parliament being involved in the procedure. This would mean an excessive power of the Executive in regard to the status of a citizen. It does not seem that this is in fact the intention of the drafters. But to avoid the danger of misinterpretation it would be purposeful to replace in **art. 10** the notion "*miedzunarodnyje soglaszenia*" (international agreements) by "*miedzunarodnyje dogovory*" (international treaties).

7. **Art. 15 - 22** regulate very precisely the citizenship of a child in the case of collision of various presumptions. These regulation does not give rise to doubts generally. Both rights of the spouses and the autonomous standing of the child after fourteen seem to suit the requirements of the protection of rights of the minor. There can be some doubts related to **art. 15 ' 5** which makes the citizenship of the child under fourteen^[5] dependent on the nationality of the father - Kyrgyz citizen when the mother is a stateless person. A converse dependency is not provided. Perhaps, such a regulation might be justified by tradition and culture but it is contrary to the prohibition of discrimination based on gender. One can also wonder if the absence of the right of a person which has acquired his/her nationality by the solution of the aforementioned collision to a free option after reaching the age of maturity would not be advisable? Now, only the consent of the children between 14 and 16 for the change of their citizenship is required.

8. Unclear seems **art. 23**. Should the phrase "following all the indicated requirements" indicate actually that a foreigner might acquire the Kyrgyz nationality only in the case that all of the mentioned requirements are fulfilled jointly? It would mean that: i) the acquirement of the citizenship can happen only by virtue of an international treaty, ii) the other requirements are to be respected by the international treaty. If it is so **art. 23** is formulated properly. But, it seems that the intention of the drafters was different. Otherwise, it would be advisable to say clearly that the international treaties concerning the requirement of the Kyrgyz citizenship shall be based on the following rules - and here the **rules 1-3 under ' 2** should be mentioned. It would, however, exclude the possibilities of acquiring nationality, which are familiar to many legal orders (e.g. the residence in the country for a specified number of years).

There is also an inconsistency between the **art. 23 ' 2 point 2** (residence in the Republic during the last 5 years) and the competence of the President to grant the citizenship to aliens residing outside the territory of the Republic - **art. 29 point 2**. Unless, the relationship between these norms is governed by the principle: *lex specialis derogat generalis*. This explanation would be, however, doubtful since it is difficult to interpret which of the norms should be the general and which the specific one.

9. In **art. 24 point 4** concerning the denial of citizenship a general clause is used "as well as on other grounds envisaged in the present Law". The analysis of the text does not help in finding these other grounds. Since it is an article concerning the legal status of an individual and for the sake of the legal stability it would be definitely better when the list of the grounds for the denial of citizenship would have been formulated exhaustive and precisely.

10. The translation of the title of **art. 25** is not correct (the Russian text uses different notions for the discontinuation of citizenship in **art. 25 and 27**). It seems that it would be better to speak about "cessation" instead of "loss" in this context. Consequently, in the first line of this article the word "shall cease" should replace "shall be lost".

11. In **art. 25 point 3** concerning the loss of citizenship a general clause is used "as well as on other grounds envisaged in the present Law". The analysis of the text does not help in finding these other grounds. Since it is an article concerning the legal status of an individual and for the sake of the legal safety it would be probably better when the list of the grounds for the loss of citizenship would have been formulated exhaustive and precisely.

12. **Art. 27** seems to be inconsistent to **art. 13** of the Constitution and to '**3** of the preamble which prohibit deprivation of citizenship generally without any conditionality. In particular, however, **point 2** gives rise to concern. The duty of citizens to register while staying abroad in the consular offices is somehow peculiar and limits the freedom of movement as laid down by the universal and regional international treaties (see: point: 4). The refusal to comply with this duty as the reason for the deprivation of citizenship is to be evaluated as inconsistent to international law (non-compliance with the norm inconsistent to fundamental human rights cannot be the reason for deprivation of citizenship).

13. It is difficult to establish why by virtue of **art. 34** the applications concerning the citizenship should be submitted by the applicant personally (during a visit to the competent body) and only in the case of "a good reason" they can be sent by mail or be delivered by a third person. In the context of this provision, the **first para of art. 33** is not understandable. It states that "Claims for grant of citizenship [...], resumption of citizenship or renunciation shall be considered on the basis of an application in writing". Should it mean simply that an application made orally will not be accepted, or that the decision is to be taken by competent body without any hearing as a rule? It is unclear and opens way to different interpretations. Therefore some amendments would be desirable. *Inter alia* the access of the applicant to the competent bodies (including the presentation of the applicant's interests) should be guaranteed. On the other hand, the obligation of the applicant to submit the application personally could be removed. Taking into account that the Law on citizenship lays down a "self-contained regime" the necessary improvements of the procedure seem to be particularly important.

14. **Art. 39 ' 2** dealing with the documents on a permission for residence to aliens seems to suit better a law on aliens than this particular Law on citizenship.

15. The Law on citizenship does not recognize the right of the child, which by virtue of the decision of parents did or did not acquire the Kyrgyz citizenship, to make up its own option after reaching the age of maturity (compare also point II.7). It seems that recognizing the right of a child to citizenship as laid down by the International Covenant on Civil and Political Rights - **art. 24 ' 3** and confirmed by **art. 7 and 8** of the International Convention on the Rights of the Child as well as the subjective character of the right to citizenship as laid down by the Law under discussion, the mentioned right to one's own option is adequate (compare the concept adopted in **art. 1 ' 2 (a)** and in **art. 4** of the International Convention on the Reduction of Statelessness).

Opinion by Mr F. Zilverentant

Article 4 - Is a birth certificate a document certifying citizenship? Is in birth certificates in general (Kyrgyz birth certificates) citizenship stated? If yes, how about foreigners born in the Kyrgyz Republic?

Article 6 - This seems a denial of reality. There are always people with multiple citizenship. Does this article mean that the other citizenship has to be abandoned? If yes, how to act if it is impossible to abandon the other citizenship?

Or is meant that only Kyrgyz citizenship is to be taken into account? If that is the background of this article, then it should be formulated in that sense.

Article 15, last paragraph - Why the age of five years? Why not all minors? All these children are children of Kyrgyz fathers. Make Article 17 applicable.

Article 23, paragraph 2, point 1 - add : if possible;

Article 23, paragraph 2, point 3 - how is the interpretation of this provision? Are handicapped or old people (not able to work) not permitted to apply for naturalisation?

Article 23, paragraph 3, point 1 - What is Kyrgyz nationality versus Kyrgyz citizenship? Is meant : Kyrgyz origin or descent?

Article 26 - Is withdrawal possible even if the result is statelessness?

Article 27 - See the comment on Article 26. Has (point 2 of paragraph 1) to be registered every year? If yes, one has to realise that such registrations will be forgotten. And furthermore : yearly registration could possibly mean a lot of work for the authorities. Or is meant : registration within one year after settling abroad?

Article 30, paragraphs 2 and 3 - Are these subsections not a contradiction with Article 31, paragraphs 2 and 3, or is it the intention to do it double?

Article 32 - Ministry of Foreign Affairs has to be (I suppose) : Ministry of Internal Affairs.

III

Opinion by Mr R. Sch?rer

On the whole, the Kyrgyz citizenship law is quite a workable text.

My remarks concern the following points :

Article 15, paragraph 3

According to this paragraph, the citizenship of a child born abroad by parents permanently residing abroad one of whom is a Kyrgyz citizen shall be determined parents' consent in writing.

According to paragraph 27, item 2, Kyrgyz citizenship shall be lost if a person permanently residing abroad has not been registered at the consular office during the period of one year.

It follows from the comparison between these two articles that the moment of acquisition of Kyrgyz citizenship according to article 15, paragraph 3 is decisive for the loss of Kyrgyz citizenship according to article 27, paragraph 2. The text of article 15, paragraph 3, however, does not determine this point. Have the parents to give their written consent at the time of birth of their child or shortly thereafter? Can they give it at any time during the minority of the child? Can they give it even for a major child? Has the consent to be registered with a consular office of the Kyrgyz Republic in order to become effective? It seems to me that the text of this article should be clarified in order to answer these questions.

The same remark applies to the last sentence of paragraph 3 of article 15 and to article 20, paragraph 3.

Articles 26 and 27

These articles provide for the loss of Kyrgyz citizenship by renunciation (article 26) and automatically on the fulfilment of certain conditions (article 27). They raise a problem of human rights insofar as they may create statelessness when a person who holds only Kyrgyz citizenship loses this citizenship in compliance with these articles.

I thus strongly recommend that the loss of Kyrgyz citizenship according to both articles be made dependent on the complementary condition that the persons concerned by these provisions possess not only the Kyrgyz but at the same time a foreign citizenship.

[1] Perhaps the word "continuous" better reflects the Russian word "postojannyje".

[2] It seems that the notion "politiczesko-prawowyje otnoszenija" (Russian version) is not reflected properly by the notion "political and legal relations" (English version). While the last version implies that "citizenship" covers all the political as well as legal aspects of the relationship between an individual and the State, the Russian notion seems to cover only a specific part of this relationship, which has a political nature but is regulated by law.

[3] The Russian version uses the word "international" and not "intergovernmental".

[4] The translation of the phrase in the ' 2 : "at a diplomatic mission of consular office" is wrong; according to the Russian version it should read: "at a diplomatic mission or a consular office".

[5] Not five as it stands in the English version.