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

**COMMENTS**

**ON THE CONSTITUTIONAL SITUATION  
IN THE KYRGYZ REPUBLIC**

**by**

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*\*This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

## Background

The political and constitutional crisis in Kyrgyzstan which became evident in March 2005 has so far not been solved. A fragile stability was achieved in summer 2005 which rested on a mutual understanding between leading political and constitutional actors.

The compromise was only temporary. Political and constitutional conflicts continued through out 2006 and 2007. The President of the Republic, Kumanbek Bakiev, has tried to create a new order by having a new edition (*redaktisia*) or version of the 1993 Constitution adopted through a referendum (in the following this edition of the 1993 Constitution will sometimes simply be called the Constitution).

The new Presidential edition or version of the 1993 Constitution could be seen as response to the recent changes of the Constitution in November 2006 and in December 2006 which had been declared unconstitutional by the Constitutional Court on 14 September this year. The situation was close to a constitutional and legislative chaos. On 19 September 2007 Bakiev ordered that a referendum on a draft Constitution should be conducted on 21 October.

According to the Kyrgyz Central Electoral Commission the referendum was valid with more than 50% who voted for the draft Constitution and then draft Election Code. But observers have noted serious violations in conduction the referendum according to OCSE Spot Report No. 11/07.

## Introduction

In this conclusion the concrete content of the new version will be analysed. A former opinion of the Venice commission on the 2005 reform will form the background for the analysis whereas the 8 November and 30 December versions will not be brought into the foreground.

The Venice Commission does not take stand whether a state should be parliamentary, semi-presidential or presidential. It sees its task to defend the principles of democracy, the separation of powers, fundamental freedoms and liberties, and the rule of law. It does not necessarily say by which governmental forms these goals are to be achieved.

A difficult problem is whether a Constitution should be seen as a instrument of change or should it rather reflect given social conditions and mentalities? It should obviously be both.

Given the authoritarian tradition of Kyrgyzstan and her attempts to deepen democracy and the rule of law, the elements of change are important.

If the text of the Constitution, however, too much deviates from the actual mentalities in a country it could partly lose its normative force. It could become a symbolic framework and not an operative document.

The present version maintains formally the semi-presidential system but has centralised political power to the Presidency. One the same time the position of political parties has been strengthened. This has the disadvantage that possibilities for political participation by citizens will be constrained since they cannot be elected to the parliament as independent candidates.

The (new) Constitution contains a number of other provisions aimed at reinforcing or maintaining the rule of law, and guarantees for human rights and freedoms. Many of these provisions are positive and deserve support. Also the judicial system has been strengthened.

## **Chapter 1 – The Foundations of the Constitutional System (*Stroi*)**

That the Constitution in some respects is a step back could be seen in the amendment to Art. 7, dealing with fundamental principles of the state. The first principle provides now that (only) the President represents the people. His person embodies the Kyrgyz people. This is in contrast to Article 4 which mentions the President and the Parliament as elected representatives of the people. Also the November and December versions give such designation to the President.

The second state principle proclaims the principle of separation of powers but adds that they have to be co-ordinated and be based on mutual interaction (*vzyaimodeistvie*). The intention is to be supported but the concrete textual formulation is not altogether satisfying. Of course, there must be interaction and co-ordination between executive and legislative powers but given that the judicial decision-making process should be based on the independence of the judges and of the courts, the provision should be slightly reformulated.

There is a problem with the regulation of referendum. According to Art. 1.5 laws and other issues of supreme nation-wide importance may be submitted to nation-wide referendum. This was a change from before 2005 where Amendments and supplements to the Constitution were mentioned in the same provision.. This more restrictive approach was in line with the aims of the constitutional reform in 2005, since referendums may be more easily manipulated by those in possession of “administrative resources”. Also, the present Constitution was taken by a referendum in which it is not to be excluded that administrative resources were used.

The provision that political parties and political activities within the state apparatus should be prohibited is to be appreciated. Also the exception that officials may devote time for political activities when it is conducted not in connection with their service to the state deserves support. It reflects the intended growing importance for political parties in the present Constitution.

The provision that expropriation of private property should be compensated in advance and in full deserves support (Art. 4.3). Worth noticing is the differentiation between the state language and the official language (Russian) (Art. 5). It is an appropriate solution which takes into account both the interests of the Russian community and the interaction with the external world while preserving and maintaining a Kyrgyz identity. It also protects linguistic minorities.

A remnant from the Soviet legislative style is Article 4.5. Is it necessary one could ask but such question ignores the fact that constitutions should legitimise existing social conditions.

The provision that parties may not be founded on religious grounds (8.5, fourth paragraph) could be seen as problematic since it constrains the possibility for religious interests to be represented in legislative assemblies but is perhaps unavoidable in the present political situation. It does not correspond to European standards.

Although the incorporation of international law into the Kyrgyz legal system is to be appreciated, the provision (Art.12.3.) does not say which consequences this incorporation may lead to in cases of conflict between international and domestic law. Should international law prevail over internal legislation (with the exception of the Constitution) or should the most recent norm (international or domestic) take precedence? Or should even domestic legislation (formal statutes) prevail over treaties. The last alternative is hardly probable?

In an earlier version from 2005 there was a provision that the state budget should be made public, in this version the formulation is weaker (Art. 14.3, seventh paragraph).

## **Chapter 2 – Freedoms and Rights of Men and Citizens**

### Part 1: Human freedom and rights.

This part deserves strong praise in several aspects but gives also rise to some slight doubts. Some formulations are extremely far-reaching: human rights are “absolute and non-alienable” (Art. 13.1). They appear as declarations of individualist natural law thinking in a patriarchal and collectivist political culture. Do such formulations have a impact on the actual functioning of the legal and political system? Would they even function as ideals.

All provisions in this part should be appreciated. They concern everybody and not only citizens. Only a few comments should be added.

The anti-discriminatory provision Article 13 should be supported. The last formulation that “other circumstance of personal and social character” should not be ground for discrimination is to me not clear since the law-giver sometimes must differentiate, for example between children and adults. But it could have its aim that, for example, a court should not for reasons of friendship or family connections sentence a person more leniently than it otherwise would have done.

Art. 14.1. provides that nobody could be deprived of his life which I interpret that the death penalty is prohibited, but that should perhaps be stated more precisely. Otherwise the provision of course deserves support. Also to be noted is that the Constitution gives everybody the right to get compensation from the state of damage caused by illegal actions from the side of (state) officials Art. 14.3., 9<sup>th</sup> paragraph. From an editorial point of view and in line with international documents it would be an advantage that the various rights and freedoms could each be given a specific article. Now, for example, the freedom of the expression is regulated under point 6., Article 14.

It is to be noted that Constitution also keeps high European standards in the sphere of the rule of law. Article 15 enumerates in detail basic rule of law principles, for example, the principle that only the courts and not the prosecutor should have the power to arrest individuals who are suspected or accused of having committed crimes (Art. 15.1.) Article 15 with all its detailed points and sub-points reflects a clear progression from earlier situation. In particular, the provision that everybody is guaranteed judicial defence of his/her rights is to be supported.

Also the limitations of human rights (Art. 18) are fairly well expressed since it provides that the essence of a given right is not to be infringed on.

The rights of citizens is regulated in part 2 of Chapter 2. This part also comprises a catalogue of social rights of which it could be said that these social guarantees in a very poor country easily could be seen as decorative. It is to be noted that Article 21.5 guarantees judicial protection of all rights and freedom for all citizens. Art 23.2. also recognises traditional communities.

## **Chapter 3 – The President of Kyrgyz Republic**

This Constitution is formally a semi-presidential constitution but is in reality a presidential Constitution with few checks and balances. This should give rise to concern from the side of the Venice Commission. If one wants to break an authoritarian tradition it could be seen that the powers given to the President are too wide. On the other hand, it could be seen as a concession to a patriarchal political culture. From another perspective it could possibly be seen as more effective in combating corruption than say a parliamentary government but it is not certain that it will have such an effect.

The experiences from the region point to extended periods for the Presidency or the abolishment of the prohibition of being re-elected more than once. It is a clear advantage that

such situation does not concern Kyrgyzstan. Given the strong powers attached to the Presidential office in the present Constitution, it is worth noticing that the tenure of five years could only be renewed once (Art. 42). However, in the new version point 3 has been excluded in contrast to the earlier which says that changes of the Constitution may not concern a prolongation of the periods under which a President may be elected or re-elected.

The President's power seems to be excessive leading to a situation in which the principle of the separation of powers is weakly reflected in the Constitution Accordingly, Article 42. 2 provides that the President should be "the symbol of the unity between the people and state power" and be the "guarantor the Constitution" with its protection of human rights. He should determine "the main direction of the internal and external policy of the country" and co-ordinate all state organs (Art. 42.3.). The President's "honour" and "dignity" shall be protected by law (Art. 49). It is important that such a law does not unnecessarily limits the freedom of expression in relation to the President and his concrete policies.

The State Security Service and National Guard function under his command (Art. 46.8).

He has a Presidential administration and chairs the Security Council. He may also lead cabinet meetings. The President has discretionary power to dismiss the Prime Minister and the Government ( Art. 46.2) According to Article 46. 10, the President has the prerogative to appoint the heads and lead the power ministries (defense, security, internal affairs and foreign policy).

The President could also at his discretion decide on organizing referenda. Since referenda easily could be used to change the constitution on the condition that 50% of the members of the Parliament have given their consent to organize a referendum, the present Constitution could then lead to a situation which is similar before the reforms in 2005 (Given that 43.3. has been excluded).

An impeachment of the President is difficult to achieve. The alleged crime must be treason or other "especially severe crimes". Within three months after an accusation against the President has been made by two thirds of the Parliament on the initiative of the absolute majority in the Parliament, the Parliament must with three fourths majority decide to impeach the President (Art. 51). The procedure seems to be too short and would not possibly lead to an impeachment.

#### **Chapter 4 – Legislative Power of the Kyrgyz Republic**

All the members of the Parliament must be elected on party lists. (Art. 54.2.)

The members of the Parliament must be controlled by their parties according to the President. Since the party system is very weakly developed, it would mean that the constitutional reform contributes to a rather artificial system in which political parties are founded from above. They may be controlled by business interests but also by the executive and are not grounded in the concrete political experiences of the people.

Only parties with more than 5% of votes and with more than 0, 5 % in each district may be represented in the Parliament, according to the Law on Elections. The danger is that independent political activities may be stifled by these strict regulations.

President Bakiev has justified the exclusion of independent candidates that the latter easily buy votes. But it is not clear that the prohibition of independent candidates would lead to less corruption than a system with exclusive party list candidates. The control by the parties on members of the Parliament seems to be a stronger reason.

A remnant of the Soviet past is that the Parliament shall interpret laws (Art. 58.3). Since this is also the function of the Constitutional Court, such power of the Parliament should be abolished.

Only the Parliament may release deputies from parliamentary immunity in relation to a criminal or administrative process but the immunity does not concern "especially grave crimes" (Art.58.3) This exception to parliamentary immunity causes surprise since it is in relation to allegations of serious crimes that parliamentary immunity is important. This exclusion was not found in earlier versions of the Constitution. Obviously, the constitutional legislator does not believe that the Parliament may take impartial or objective decisions in relation to members who may have committed grave crimes.

## **Chapter 5 – Executive Power**

This chapter deals with governmental power and the formation and dismissal of the Prime Minister and his Government.

The Government is responsible both to the President and the Parliament but it seems to me that the President has the upper hand. He is the leading figure in the nomination process and controls also the way the Parliament may want to express non-confidence to the Government.

An absolute majority of the parliament may vote for non-confidence and the President may at his discretion agree or not with that decision (Art. 71, 4,6.). If the Parliament within three months takes a new decision to express non-confidence, the President may dismiss the Government or dissolve the Parliament (Art. 71.7.).

The President also controls the nomination process. According to Article 69 the deputies from the party with more the 50% of the votes in the Parliament proposes to the President a candidacy for the post as Prime Minister. If this alternative for various grounds, such as the absence of a party with more than 50% of the votes in the Parliament does not take place, the President gives according to Article 70 deputies of another party to present a candidate leading a coalition government. If this does not take place the President proposes deputies from still another party to present a candidate for Prime Minister, forming a coalition government. The procedure could be repeated for the third time with a third party. If this does not take place then the President dissolves the Parliament, announces new elections and forms a temporary government.

It is hard to judge whether this procedure is appropriate it depends very much how the party system will develop in Kyrgyzstan.

## **Chapter 7 – Judicial power**

In several aspects the chapter on judicial power is satisfying. The election of judges of the Constitutional Court and the Supreme Court by a qualified majority in the Parliament on proposal from the President corresponds to European standards. To withdraw the immunity of these judges is only possible with the consent of the Parliament.

The nomination of district judges by the President based on the proposal from the National Council of the Judiciary also deserves support. Likewise only the President could take away their immunity. The composition of National Council of Judges is only partly regulated in the Constitution but its establishment should be seen as a step forward.

However, the way judges from the Constitutional and Supreme Court are *dismissed* is not completely satisfying. The procedure that the President with the consent of two thirds of the

members of the Parliament corresponds to the ideal of the rule of law but it would be desirable if the *grounds* for dismissal would be mentioned in the Constitution which is not the case (Art. 84). One possible ground would be that the judge's behaviour is not irreproachable (*bezuprechny*) which it should be according to Article 83.

Such strict condition is suitable for the nomination of a high court judge but it is doubtful whether it is appropriate for such radical measure as the dismissal a high court judge.

### **Chapter 9 – Order for adopting a Constitution**

The adoption of a (new) Constitution or changes or amendments to the present Constitution are regulated in Chapter 9, which according to Art. 98 provides that the present version of the Constitution or a new Constitution may be taken by referendum ordered by the President with the consent of more than 50% of the members of the Parliament. The procedure for adopting the new version of the 1993 Constitution is also regulated by the same version

Changes of chapters 3- 8 of the present Constitution may be taken by two thirds of the Parliament if the Constitutional Court has given a conclusion on the constitutionality of the proposed changes. It is not clear whether the Court's conclusion is mandatory but I interpret the text that this is the intention. The provision should be more clearly formulated.

It should be stated more clearly that the basis for the control by the Court is, I suppose chapters 1 – 2 and 9. Otherwise the control by the Constitutional Court will appear as undemocratic. The Court should not be legislator and prohibit changes without clear constitutional support.

### **General conclusion**

It is clear that this Constitution gives too much power to the Presidency without having established clear checks and balances. The Constitutional Court seems to have gained importance and could be seen as such controlling institution but this is not sufficient. The space for democratic development is constrained.

The protection of human rights and the rule of law is satisfactorily regulated.