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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

ON THE DRAFT AMENDMENTS TO THE CONSTITUTION OF KYRGYZSTAN

adopted by the Venice Commission
at its 53rd Plenary Session
(Venice, 13-14 December 2002)

on the basis of comments by

Ms Hanna SUCHOCKA (Member, Poland)
Mr Kaarlo TUORI (Member, Finland)

Introduction

1. By a letter which was received by the Secretariat of the Commission on 6 December 2002, Ms Cholpon Baekova, Chair of the Constitutional Court of Kyrgyzstan, reiterated the request of the President of Kyrgyzstan made at a meeting with the Secretary of the Commission on 22 November 2002, for an opinion on the proposed amendments to the Kyrgyz Constitution (draft amendments CDL (2002) 144 and "Grounds of Major Provisions of the Draft Law of the Kyrgyz Republic on Amendments to the Constitution of the Kyrgyz Republic of 17 October 2002 - hereinafter referred to as "Grounds" – CDL (2002) 142).

2. The amendments in question have been submitted to nation-wide public debate, which is scheduled to be completed on 2 January 2003. The Kyrgyz Constitutional Commission will then examine all the proposals and opinions concerning the constitutional amendments, including the opinion of the Venice Commission, and will draft a final text to be submitted to a referendum.

3. The Venice Commission invited Ms H. Suchocka and Mr K. Tuori to act as rapporteurs on this issue. The present opinion, based on their comments (CDL (2002) 160 and 159 respectively), was adopted by the Commission at its 53rd Plenary session (Venice, 13-14 December 2002).

1. General comments

4. The Kyrgyz Constitution has clearly adopted a presidential system. Thus, already according to the general provision in Art. 7 § 7, the state power is based on the principle of the supremacy of the people, and "such power shall be represented and ensured by the nationally elected head of the state – the President of the Kyrgyz Republic". According to the Constitution, both the President and the Parliament (the Jogorku Kenesh) are "entitled to act on behalf of the people of the Kyrgyz Republic" (Art. 1 § 4) to represent the will of the people. The emphasis on the position of the President is manifest in the provisions concerning both the relations between the President and the Government, those between the President and the Jogorku Kenesh and those between the Jogorku Kenesh and the Government. It also appears from the internal structure of the Constitution itself, as the chapter devoted to the President is inserted just before the chapter devoted to the Parliament.

5. The choice for a presidential system cannot be criticized in itself as long as the principle of the separation of powers is maintained by attributing to Parliament a strong position as a legislator and in controlling the executive. The system needs also be clear and consistent so that unnecessary conflicts between constitutional organs can be avoided.

6. The Commission will examine and appraise the proposed amendments to the Kyrgyz Constitution within the whole constitutional architecture determining the relations between the main constitutional organs, i.e. the Jogorku Kenesh, the President and the Government.

2. The relations between the President and the Jogorku Kenesh

i. Joint competencies

7. In application of the proposed amendments, the President would exercise many of the competencies awarded to him/her, including notably the decisions on the structure and the composition of the Government, judicial and diplomatic appointments as well as the appointment of the Chairmen of Central Electoral Commission and the Auditing Chamber, only with the consent of the Jogorku Kenesh. In this area, therefore, the President's powers would be limited by Parliament and he would need to obtain the latter's consent for every personal proposition.

8. In the Commission's view, this constitutes a positive development. However, there could be many situations in which this mechanism would risk blocking the decision-making process. Political parties, and especially parliamentary fractions, could end up playing a key role. The chosen solution may be a favorable one from the point of view of searching for a consensus and concluding political compromises, but it may prove difficult in a new democracy. In a context of weakness of the party system (generally, a characteristic feature of new democracies), where parties are often set up from elections to elections, this method of appointment might lead to blocking decisions, and even to resorting to a certain type of political blackmail. As a consequence, this may mean that extemporaneous arrangements within parliament have a greater impact on specific personal decisions than a clear and coherent political vision. Accordingly, the Commission considers that appropriate mechanisms should be foreseen in order to prevent these appointments from becoming the object of political bargaining.

9. Further, certain adverse consequences, especially in the area of parliamentarian blackmail, may be caused by the proposal for the joint competency of the President and the Jogorku Kenesh to decide on the structure of the government, i.e. determine how many ministries and state committees there should be, how they will be called, and what their terms of reference in the system of state governance will be.

10. As regards the joint power of the President and the Parliament to form the whole judicial corps, and in particular the election of all judges of local courts (district, city, regional, military and arbitrage) upon the approval of each nominee by the Jogorku Kenesh, the Commission is of the view that this politicizes the process of nominating judges too strongly. At any rate, given that they are appointed for seven years only, according to Article 80 § 2 *in fine*, the Commission is of the view that the appropriate constitutional law should set out objective criteria for their reappointment, in order safeguard their independence.

11. Further, the Commission notes that pursuant to the amended Article 81 §§ 1 and 3, local courts' judges may be discharged from office "on other grounds envisaged in the constitutional law", according to a procedure to be set out in the relevant law. The Commission wishes to underline that it is essential that this constitutional law should provide detailed and precise grounds for termination of office and a detailed procedure to be followed, including the possibility for the judges whose mandate is terminated to seek review of this decision by an independent body. In this respect, the Commission refers to the principles contained in Articles 5 and 7 of the European Charter on the Statute for judges.

12. As a minor remark, the Commission wishes to stress that the exact wording in the proposed provisions concerning the joint powers of the President and the Jogorku Kenesh

varies, at least in the English version. In order to avoid unnecessary problems of interpretation, a consistent terminology should be adopted.

ii. Dissolution of the Jogorku Kenesh

13. An important element in the mutual relations of the main constitutional organs consists in the power of the President to dissolve the Jogorku Kenesh. According to the proposed Art. 63 § 2, the President would have this power 1) if such a decision has been voted for in a referendum, 2) if the Jogorku Kenesh has three times refused to accept the appointment of a Prime Minister and 3) "in the event of another crisis caused by an insurmountable disagreement between the Jogorku Kenesh and other branches of the state power".

14. In the Commission's opinion, the first and third provision gives the President excessive powers with regard to the Jogorku Kenesh.

15. It must be noted that, in addition to the provisions in Art. 63 § 2, Art. 71 § 5 regulates the dissolution of the Parliament in case the president twice disagrees with the Parliament on the dismissal of the Prime Minister (and the Government).

16. After dissolving the Jogorku Kenesh, the President would also decide the election day so that the new Jogorku Kenesh shall convene for its first session with six months after the dissolution (Art. 63 § 5.). This time-limit should, in the Commission's view, be radically shortened.

iii. The President's law-making power

17. According to the proposed Art. 47 § 1, the President "may issue decrees and orders, which shall not contradict the Constitution and laws". As the Constitution does not include any provision of matters reserved for parliamentary legislation, the conclusion seems to be that the norm-giving powers of the President cover all the areas where the Parliament has not *de facto* exercised its legislative powers.

18. In addition, Art. 68 § 1 allows for the delegation of the legislative powers of the Jogorku Kenesh to the President for a period up to one year. The wording of the provision implies that the Parliament could even relinquish all its legislative powers. Finally, according to Art. 68 § 2, legislative powers devolve on the President in the case of the dissolution of the Jogorku Kenesh.

19. In this respect, the Commission recalls that the ability for the executive power to issue legal acts with the power of a statute is permissible (albeit not without doctrinal reservations) in a system in which parliament works at sessions. In this case, at the time when it is not in session, the executive power may discharge legislative functions to a very limited degree – i.e. in a very limited scope and under strictly defined conditions.

20. Insofar as this ability would be awarded to the President for the duration of parliament's disbandment, the Commission finds the President's powers rather understandable. The Commission, however, wishes to underline the absence of specific limitations to these powers in the Constitution, which provides instead for a very general shift of competencies from the Legislator to the Executive. Indeed, very general terms ("delegate legislative power") are used. The period for which law-making powers may be turned over to the president, i.e. for a full year, also appears to be too long.

21. In the absence of a clear framework or of explicit, appropriate limitations, therefore, and for a very long period of time, the President may assume all legislative authority, including that of amending the Constitution. In the Commission's opinion, this is not acceptable in a democratic constitutional state.

3. The relations between the President and the Government

22. Already according to the present Constitution (Art. 46 § 1.1), the President appoints the Prime Minister with the consent of the Jogorku Kenesh. According to the proposed amendment (Art. 46 § 1.3; see also Art. 58 § 1. 8), other members of the Government are appointed by the President upon proposal by the Prime Minister and with the consent of the Jogorku Kenesh. This provides for a balanced procedure in a mainly presidential system.

23. The President would also have the power to dismiss the Prime Minister and the Government, but only with the consent of the Jogorku Kenesh (Art. 46 § 1. 4; see also Art. 58, § 1. 9). The dismissal of an individual member of the Government can take place either on the President's own initiative or on the basis of a censure voted by the Jogorku Kenesh. It is obvious that the dismissal of the Prime Minister automatically also means the dismissal of the whole Government. Consequently, the resignation of the Prime Minister entails, according to the draft Art. 70 § 5 the resignation of the whole Government.

4. The relations between the Jogorku Kenesh and the Government

24. The Jogorku Kenesh would also have the power to cast votes of non-confidence (Art. 58, § 1.11). This power in itself is a welcome balancing factor in the mutual relations between the Jogorku Kenesh, the Government and the President. However, there are some ambiguities in the relevant provisions.

25. In addition to a vote of non-confidence, the proposed amendments also provide for a procedure concerning individual members of the Government, called "censure". A censure differs from a vote of non-confidence in two ways. First, it requires only a single majority, whereas a vote of non-confidence in an individual member of the Government requires a two-thirds majority. Secondly, a decision by the Jogorku Kenesh on a censure does not bind the President, whereas a vote of non-confidence does have such an effect. (Art. 72 § 3). Indeed, a decision on censure may lead to a vote of non-confidence, if Parliament so decides with a two thirds majority six month after the vote of censure but no later than one year after this vote.

26. The procedure of a "censure" cannot be used with regard to the Prime Minister. The vote of non-confidence in the Prime Minister only requires a single majority. On the other hand, it is not binding on the President. However, according to Art. 71 § 5, the President may refuse to dismiss the Prime Minister only once. If (s)he disagrees with a second vote of non-confidence, (s)he must choose between the dismissal or the dissolution of the Jogorku Kenesh.

27. All in all, the provisions on the vote of non-confidence and the censure are rather complicated. They express the purpose of securing the final say of the President in situations of political conflict and should be reconsidered.

5. The relations between the Jogorku Kenesh and the Judiciary

28. Under the proposed Article 58 § 1.3, the Jogorku Kenesh is empowered to "make official interpretations of the Constitution and of the laws adopted by the Jogorku Kenesh". While the wording of this provision is perhaps imprecise, it suggests that this interpretation is binding upon other entities. This raises the questions of whether it is binding upon courts as well, and what is the relation between this power of the parliament and the task envisaged for the Constitutional Court (Article 82 § 3 of the Constitution). In the Commission's opinion, it should be up to the Constitutional Court to hand down official interpretations.

29. Under Article 64, the Supreme Court of the Kyrgyz Republic has a right of legislative initiative. The Commission finds that the Supreme Court should not be directly involved in the negotiating efforts to force specific draft legislation through the parliament because this could draw the Supreme Court into the political arena and may thus endanger its independence.

6. Other proposed amendments

i. The transformation of Parliament into a unicameral one

30. One of the proposed amendments to the Constitution of Kyrgyzstan is the substitution of the currently existing bicameral parliament for a unicameral one. Kyrgyzstan is not the first State to make this type of change. A bicameral parliament was introduced in some States in the initial phase of their transition, as one of the initial steps to democratization, and in any case as a severance of ties with the former system. Indeed, the communist system did not accept the concept of a bicameral parliament. It was believed that there was a reason for a bicameral parliament to exist only in States with a complex nationality structure where a multicameral parliament would constitute a guarantee that the various nationalities would be represented in parliament. In practice, therefore, bicameral parliaments existed only in those states that embraced a federal structure. That is why the challenge of this principle was treated as a kind of symbol of severing ties with the previous political system.

31. In Kyrgyzstan, a practical assessment has recently been made, after Parliament had functioned for some time in this form; as indicated in the explanatory memorandum ("Grounds" - CDL (2002) 142), the existence of the second chamber has been assessed as not being effective, which has prompted the proposal to return to a unicameral parliament. The majority of the Constitutional Assembly members consider such a structure to be more expedient in the current situation and for the future of Kyrgyzstan.

32. In the Commission's opinion, this decision is not *per se* open to criticism. The introduction of a unicameral parliament to supersede a bicameral parliament does not pose a threat to democracy. Indeed, the European standards on democracy in this area are rather flexible. To the extent that the disbandment of the second chamber was motivated by the need to enhance the parliament's effectiveness and utility in the structure of the state, it should not adversely affect the course of the democratization processes, nor the law-making processes. Indeed, in a relatively small country as Kyrgyzstan, this may be a rational choice.

ii. Security Services and Armed Forces

33. According to the proposed §§ 1.7 and 1.8 in Art.46, the President would have the power to constitute and abolish the National Security Service and to constitute and head the Security Council of the Kyrgyz Republic and other co-ordinating bodies. In addition to that, the President would have the power to form state security services and the National Guard subordinate to him (Article 46 § 1.9). The relations between the National Security Service and the Security Council are not entirely comprehensible.

34. The President also is the Commander-in-Chief of the Armed Forces.

35. The Commission considers that such large, exclusive and uncontrolled powers over armed forces and security services are not appropriate in a democratic constitutional system.

iii. Hierarchy of laws

36. The hierarchical system of legal norms should be as clear as possible and also guarantee the primacy of parliamentary legislation. The Kyrgyz Constitution provides for the possibility of enacting constitutional laws (Art. 65 § 5). However, the Constitution does not contain a list of the issues to be regulated through such laws.

37. The Government also has the competence to issue, "within its powers", resolutions and ordinances. The position of these resolutions and ordinances within the legal order of Kyrgyzstan remains unclear.

iv. Proclamation of the state of emergency and state of war

38. The Constitution, in its proposed amended form, contains provisions on the proclamation of a state of emergency or a state of war, as well as on the imposition of martial law (Art. 10; Art. 46 §§ 7-8; Art. 58 §§ 21-22). These provisions seem to secure in an adequate way the position of the Jogorku Kenesh. However, the legal effects of the proclamation of a state of emergency or a state of war or the imposition of martial law are not regulated in a comprehensive way.

v. Jogorku Kenesh's vote of non-confidence in the Procurator-General

39. The Jogorku Kenesh would also be empowered with voting non-confidence in the Procurator-General (Art. 58 § 19). Considering that the latter is a legal official, it may be inappropriate to make her or him politically responsible to the Parliament.

vi. Appointment and Dismissal of the Ombudsman

40. The Jogorku Kenesh would have the power not only to appoint, but also to dismiss the Ombudsman. With regard to the independence required by the exercise of this office, the dismissal of the Ombudsman by Parliament should be possible only with a qualified majority and following a procedure regulated by law.

vii. Strengthening of local self-administration

41. According to the Grounds (CDL (2002) 142), the strengthening of local self-administration is included in the aims of the reform. According to the proposed amendment in Art. 1 § 4, bodies of local self-administration would be added to the provision regulating the ways in which popular sovereignty is exercised. The provision would state that "the people of Kyrgyzstan shall exercise their power, on the basis of this Constitution and the laws of the Kyrgyz Republic, directly and through a system of state bodies and bodies of local self-administration". However, the constitutional guarantees for local self-administration remain rather weak. Thus, no general principle that local administration would be based on self-government is stated in Chapter Seven of the Constitution. Chapter Five of the Constitution also includes a specific Section on local state administration, where it is, according to the draft amendment, stated that "in respective administrative territories, the executive power shall be exercised by the local state administration" (Art. 76 of the Constitution). Considering the absence of a general principle of local self-government, Article 76 seems to imply that the starting-point in the organization of local administration would not be self-government but administration through state organs.

42. The Commission further notes that, according to the amended Constitution, the President would also have powers which endanger the principle of local self-government. Thus, the President could suspend or annul not only acts of the Government and other executive bodies, but also acts of bodies of local self-administration (Art. 46 § 4. 4). Already the Constitution in force gives the President the power to dissolve local assemblies (Art. 46 § 6. 6). This power covers only cases provided for by the law, but the Constitution does not in any way limit the powers of the legislature to regulate the reasons for dissolution.

viii. Human Rights

43. The provisions on human rights and freedoms or the rights and duties of the citizens have not been amended in the draft proposals. However, a new wording for the first sentence in Art. 19 § 3 has been proposed: "No person shall be arrested, detained, or held in custody unless when on court decision." The requirement of an explicit provision in law, as well as a list of legitimate reasons for restricting personal liberty, should be added.

44. An examination of the constitutional provisions in light of the European Convention on Human Rights would give reason to more extensive comments, beginning with the provisions on the death penalty (Art. 4). However, as the Commission has been requested to examine only the provisions "opened" by the present redrafting of the Constitution, it has not carried out such an examination in this context**.** It is however prepared to do so upon request.

ix. Division of powers

45. According to the new Article 96 § 2, the President would have an absolute veto power over amendments to Articles 7, 46 and 58 of the Constitution, which regulate the general division of powers as well as the respective powers of the Jogorku Kenesh and the President. This would further enhance the central position of the President within the constitutional structure. Furthermore, it remains unclear whether the provision in question would concern only cases when the Constitution is amended by Parliament (Art. 97) or even when it is amended through a referendum.

x. Reduction of the term of office of Constitutional Court judges

46. The Commission would recommend the introduction of a transitory regime for judges of the Constitutional Court, whose mandate would be reduced from fifteen to ten years (under the amended Article 80 § 2 of the Constitution).

7. Conclusions

47. The proposed amendments to the Constitution represent an attempt to find the best form of political system for Kyrgyzstan. As a general assessment, these amendments can be considered welcome steps in enhancing the role of Parliament in the constitutional system. Indeed, to a certain extent, the Parliament's position within the power relations between the main constitutional organs would be strengthened. The presidential traits in the Constitution, however, remain very strong. In the light of European standards for a democratic constitutional state, they can even be deemed excessive.

48. The Commission also observes that the proposed Constitution allows too frequently, and without explicit limitations, one power to encroach upon competencies reserved for another power. This raises concerns in the light of the principle of the separation of powers mentioned in Article 7 of the Constitution. Indeed, a number of the proposed changes risk introducing a certain amount of competency-related uncertainty instead of precisely separating the competencies among the individual bodies.