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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

INTERIM OPINION ON CONSTITUTIONAL REFORM IN THE KYRGYZ REPUBLIC[1]

adopted by the Commission at its 64th plenary session (Venice, 21-22 October 2005)

on the basis of comments by

Mr Kestutis LAPINSKAS (Member, Lithuania)
Mr Anders FOGELKLOU (Expert, Sweden)

[1] On the draft amendments to the Constitution, approved by the Constitutional Council on 9 June 2005.

I. Introduction

1. In a letter dated 17 June 2005 the Toraga (Speaker) of the Jogorku Kenesh (Parliament) of the Kyrgyz Republic asked the Venice Commission to assist the Constitutional Council of the Kyrgyz Republic in its efforts to revise the Constitution of the Kyrgyz Republic.

2. The present interim Opinion, based on comments by Mr Lapinskas (Lithuania) and Mr Fogelklou (Sweden), was adopted by the Commission at its 64th plenary session in Venice on 22 October 2005. It addresses the text of the law on introducing amendments and additions to the Constitution of the Kyrgyz Republic as adopted by the Constitutional Council on 9 June 2005. The constitutional reform process in the Kyrgyz Republic is continuing and the Commission is aware that the draft under consideration is not final. It remains at the disposal of the Kyrgyz authorities to assist them to further develop the text.

3. The reporting members of the Commission were provided with the comments by OSCE/ODIHR on the draft amendments. They agree with and support these comments which go in the same direction as the present Opinion. The Commission greatly acknowledges the financial support from the European Commission for its assistance to Kyrgyzstan.

II. General comments

4. The political and constitutional crisis of spring 2005 in Kyrgyzstan revealed a clear need for constitutional reform in that country. The draft amendments to the Constitution concentrate mainly on finding a balance of powers between the main branches of state power, since the essential cause of the political crisis was a lack of balance between central state institutions. That lack of balance had arisen through earlier constitutional reforms, which had excessively strengthened the powers of the President to the detriment of Parliament and the Government. The amendments would move the country from a de facto presidential regime to a semi-presidential regime. At the same time they contain a number of other provisions aimed at reinforcing the rule of law, guarantees for human rights and freedoms and the constitutional structure as a whole. The amendments as a whole and many of the specific provisions are positive and deserve support. If adopted, they would definitely improve the constitutional situation in the country and ensure a better balance of powers between the state organs.

5. Nevertheless further improvements of the text are desirable and, having regard to the fact that the constitutional reform process is still on-going, should also be possible. The present Opinion therefore contains detailed comments and proposals which should contribute to further improving the text. While the main emphasis is on the provisions to be amended, some other related provisions of the present Constitution are also commented upon.

III. Comments article by article

Chapter 1 – The Kyrgyz Republic

6. The present Constitution of the Kyrgyz Republic already enshrines, in particular in its **Article 7**, the principle of division of powers into the legislative, executive and judicial branches and no major changes are required in this respect. The general tendency of the reform is reflected in the amendment to Art. 7.1 providing that not only the President but also the Jogorku Kenesh represent the people.

7. Another amendment in this Chapter concerns **Art. 1.5** on referendums. According to the new wording, laws and other issues of supreme nation-wide importance may be submitted to nation-wide referendum, whereas under the old wording the catalogue was broader (amendments and

supplements to the Constitution, laws and other important matters). This more restrictive approach is in line with the aims of the constitutional reform, since referendums may be more easily manipulated by those in possession of "administrative resources". Referendums also have other drawbacks, in particular the limited possibilities of broad and comprehensive discussion of the issues involved and the impossibility of amending and improving the respective legislation during this process. They may also be used to put the people against the elected representatives of the people, i.e. parliament. Consideration could therefore be given to toning down this provision even further, e.g. "Supremely important matters of state significance and, by decision of the Jogorku Kenesh of the Kyrgyz Republic, also laws, may be submitted to a referendum (nation-wide voting)."

8. The amendment to **Art. 8.3** on the activity of foreign religious organisations may be explained as a reaction to the problem of religious fundamentalism. Nevertheless, the amendment may lead to undue interference of the State in the affairs of religious communities and should be reconsidered.

9. Similarly, the amendment to **Art. 9.4** banning activities directed at disturbing the peaceful communal life of the people or igniting religious strife appears problematic and open to abuse. In particular the term "religious strife" may be interpreted as including non-violent religious disagreement and discussion and should be replaced by "inter-religious violence". Also, as suggested in the opinion by OSCE/ ODIHR, as an additional condition it should be required that the activities present a direct threat to the peaceful common life.

10. The amendment to **Art. 11** introducing the right of citizens to information on financial support to state authority bodies seems a welcome reaction to previous practices.

11. An amendment to **Art. 12** introduces the concept of "constitutional laws" having higher legal force than ordinary laws. The provision seems, however, not sufficiently precise and may lead to disputes about its interpretation which will have to be resolved by the Constitutional Court. If one wishes to introduce this concept, the Constitution should clearly spell out in which areas such laws are to be adopted. A number of further issues arise, e.g. does the jurisdiction of the Constitutional Court to review the constitutionality of laws by virtue of Art. 82.3 cover constitutional laws? It may be more useful to include other principles such as "laws or other legal acts that contradict the Constitution shall not be valid" and "only officially promulgated laws and other legal acts shall have effect" in this Article instead of introducing new concepts which complicate the legal order.

Chapter 2 - Citizens

12. The draft amendments contain a number of welcome provisions aimed at ensuring a better protection of human rights. **Art. 15.2** of the existing Constitution already enshrines the principle of innate human rights. This is very positive, only the description of human rights as "absolute" should be reviewed, since other articles refer to restrictions and limitations of human rights.

13. The amendments to Art. **16.3** introducing the principle that only courts may arrest and detain persons and that detained persons have to be immediately brought before a court are welcome, as is the amendment to Art. **16.5** introducing the right to judicial defence if the right to secrecy of correspondence is violated. Art. 18.3 again deals with arrest and detention in similar terms. Adjustments should be made to avoid duplication.

14. **Art. 16.7** regroups the protection of a large number of rights in one section with seven sub-points. From a technical point of view it would be preferable not to have rights of a different

nature such as freedom of movement and freedom of religion in the same provision. Nevertheless, the amended text is generally in line with international standards.

15. The Constitutional Council deserves to be congratulated for the amendment to **Art. 18.4** abolishing the death penalty. This is in line with the common European standard and the increasing international tendency. The second sentence of Art. 16.2 should be adjusted accordingly, deleting the word "arbitrarily".

16. By contrast, the unchanged **Art. 21.2** of the Constitution linking the exercise of human rights and freedoms with the duties of the citizens is a legacy of the Soviet system incompatible with the principles of rule of law set forth elsewhere in the Kyrgyz Constitution. The provision is unclear and contradictory. If a person violates his or her duties he or she may be sentenced to prison but he or she is not thereby deprived of other rights such as the right not to be tortured. This provision has to be repealed.

Another problematic unchanged provision of the Constitution is **Art. 41** making the publication of respective normative acts a precondition for the use of human rights. This provision should be repealed. Instead a provision on the mandatory publication of all laws could be introduced in Chapter 1 (cf. para. 10 above).

17. The Section on the rights and duties of citizens, in line with several other post-communist constitutions, gives fairly far-reaching constitutional protection to social rights. There is a danger that those constitutional promises will not be fulfilled. The result could be that the normative force of the Constitution is weakened. On the other hand, a comprehensive protection of social rights could be interpreted as at least primarily addressed to the legislative power and aimed at increasing the legitimacy of the Constitution.

Chapter 3 - The President of the Kyrgyz Republic

18. The amendments to this Chapter reduce the dominant role of the President and reflect the move from a (non formal) presidential system to a more formal semi-presidential system. The changes in the description of the role of the President in **Art. 42** point in that direction**.** In particular, the provision that the President "defines the fundamental directions of internal and external policy of the state" is deleted. However, some problems remain in this Article. According to its Section 2, the President is the guarantor of the observation of the Constitution and of rights and freedoms of the person and citizen. Defence of rights and freedoms is however the task of the judiciary and there is a risk of infringing the constitutional principle of the independent position of the judiciary. Under Section 3, the President ensures the unity and continuity of state power and the responsibility of state bodies before the nation. These provisions seem hard to reconcile with the principle of division of powers.

19. The amendment to Art. **43.2** prohibiting the re-election of the President and making it clear that constitutional reform does not provide a pretext for the possibility of re-election of a President is obviously a reaction to and justified by the recent experience in the country.

20. The unchanged **Art. 44.4** of the Constitution provides that a presidential election is valid only if 50% of registered voters participate. This seems too high, especially for the second round, and the term of office of the incumbent is thereby indirectly prolonged, since under Art. 45.4 his or her powers end only when the newly elected President takes the oath of office.

21. The amendments redraft **Art. 46.1**[2] of the Constitution comprehensively. The Government will become more autonomous vis-à-vis the President. The proposal for the structure of the government submitted to the Jogorku Kenesh by the President will now originate from the Prime Minister and heads of administrative departments will no longer be appointed and dismissed by the President. The number of institutions outside the control of the government and the parliament is reduced. The Security Council will continue to be established and chaired by the President, however, its status will now be determined by law. This is a step in the right direction, it would be advisable to go further and define the composition of the Security Council in the Constitution and delete the word "establish" in the new Art. 46.1.5. Similarly the power of the President to establish government security services and the National Guard seems questionable, although it will now be qualified by a reference "in accordance with the procedures established by law". The President of the Republic is a civilian official, so the link between him and militarised structures is mainly formal – by historical tradition he is the commanding officer of the armed forces. Moreover, considerable powers in the defence sphere are conferred on the government and the Ministry of Defence. In real terms, the armed forces are commanded by serving military professionals. The "establishment" by the President of any militarised structures, particularly ones subordinate to him, is not a characteristic attribute of a head of state in a democratic country.

22. **Art. 46.5.2** gives the President a right to veto acts passed by Parliament. This is a partial or suspensive veto, signifying a refusal by the President, with grounds provided, to sign an act passed by Parliament and the return of it to Parliament for re-consideration. The right of veto is thus always linked to the right of an official to sign (ratify) and promulgate acts passed by Parliament. In the case in point, this is an exclusive right of the President and the newly introduced words in Art. 46.5.2 "or at the request of the Prime Minister" are redundant. The corresponding right of the Prime Minister is enshrined in Article 73.4; on the same grounds, it is recommended that Art. 73.4 be removed.

23. Attention should be given to **Art. 46.5.4**, where it is stipulated that the President "shall have a right to suspend or annul the effect of normative legal acts of the government of the Kyrgyz Republic and other bodies of executive power". Under the Constitution, the right to monitor whether normative legal acts are constitutional or legal is assigned to the Constitutional Court. This is in line with the principles of a state based on the rule of law and the division of state power. Major interference in the activities of specific state bodies in the execution of the powers conferred upon them by law (and, moreover, by the Constitution) on the part of other state bodies, apart from bodies of judicial power in the execution of justice by them, is incompatible with the principle of division of state power and with the principle of legality. It is therefore proposed that Art. 46.5.4 be deleted.

24. **Art. 46.6.1** states that the President « has the right to convoke an extraordinary session of the Jogorku Kenesh of Kyrgyzstan and to determine the issues subject to consideration." Such a provision can only be interpreted as a direct interference in the constitutional competences of another branch of state power. On the other hand, one cannot dismiss the possibility that the President's submissions could be useful for the country. Thus, a possible wording of Art. 46.6.1 could be as follows: "(1)if necessary, has the right to convoke an extraordinary session of the Jogorku Kenesh of Kyrgyzstan and to suggest the questions which are to be decided by the Jogorku Kenesh of Kyrgyzstan".

25. A particularly positive amendment concerns **Art. 47.1,** establishing that the decrees and orders of the President have to be issued on the basis of and in order to execute the Constitution

[2] The provisions in Art. 46.2 on the role of the President in appointing and dismissing judges are examined below in the framework of the discussion on Chapter 6 of the Constitution on Courts and Justice.

and the laws. This amendment safeguards the role of the Jogorku Kenesh as the legislative power. The amendment could be made more precise by defining the terms "decrees" and "orders" and making it clear in which areas the President may adopt such texts.

26. In view of the fact that some of the President's powers overlap with functions carried out by government offices (for example by the Ministries of Foreign Affairs, Internal Affairs, Defence and Justice), discussion is needed as to whether countersigning should be introduced for the issue of Presidential decrees on certain subjects. This would enable responsibility for the issue of such acts to be transferred from the President to the corresponding authorities

27. **Art. 51** on the impeachment of the President is amended but the procedure remains extremely cumbersome and difficult, time-limits are short, and the majority required for impeachment remains very high. In practice impeachment will remain nearly impossible.

28. According to the amendment to **Art. 52,** the Speaker and no longer the Prime Minister will replace the President if he or she is unable to carry out his or her duties. This is another step towards a more parliamentary system of government.

29. Under the amendment to **Art. 53,** former Presidents may be brought to court following a decision by the Jogorku Kenesh. This is a step towards more accountability but one may wonder why a former President should enjoy immunity at all.

Chapter 4 – The Jogorku Kenesh of the Kyrgyz Republic

30. **Art. 54.1** is amended, calling the Jogorku Kenesh the supreme representative body instead of the representative body. This is welcome and corresponds to the redefinition of the role of the President in Art. 42.

31. **Art. 54.2** is amended to replace the majoritarian system of parliamentary elections by a mixed system**.** This does not meet with objections. However, it is surprising to find in the same section an additional sentence that the functioning of the Jogorku Kenesh should be regulated by constitutional law. By contrast, the proposed Article 58.1.35 establishes that the Jogorku Kenesh adopt its rules of procedure. The question consequently arises of why two legal enactments are needed to determine the legal status and matters relating to the activities of Parliament; what relation do they have to each other; and so on. It should be observed that the constitutional status of Parliament as the supreme representative body in the country requires that it should be recognised as having a right to the independent determination of its own internal structure, the procedure by which it as a whole and its structural sub-divisions function, the procedure by which individual questions are discussed and resolved, including legislative procedures, etc. This is generally determined by parliamentary rules (or statute) with the effect of law, but in contrast to other laws, this one, having been passed by Parliament, is ratified and promulgated by the Chairman of Parliament. This is considered to be an additional guarantee of its autonomy and independence from executive power.

32. **Art. 57** of the Constitution as amended stipulates the right of enquiry of a deputy and establishes that addressees must provide an answer to an enquiry within a maximum of fifteen days. One might ask whether this is a long enough time to prepare and deliver a proper answer to a deputy's enquiry.

33. There are a number of amendments to **Art. 58**[3] of the Constitution enumerating the powers of the Jogorku Kenesh.

a) The first of these amendments deletes the words "the Constitution and" in Art. 58.1.3 "official interpretation of the Constitution and the laws adopted by the Jogorku Kenesh." This is a welcome but not sufficient amendment, since the whole sub-section should be deleted. The interpretation of laws following their adoption is the prerogative not of the legislative power, but the right and duty of the executive, and in the end, the judicial power. Furthermore, many legal provisions, and especially the procedure for their application, are governed and made specific by subordinate legislation. It is not possible to implement a law without interpreting the content and sense of specific norms. The monitoring of the lawfulness of this implementation of legal norms is the task of the courts. The legislator, however, always retains a right to introduce amendments, or even to repeal existing laws. The power referred to in sub-section 1.3 is therefore superfluous.

b) The amendment to Art. 58.1.10 of the Constitution extends the possibility of a vote of no confidence in the Government, adopted by a two-third majority of all Deputies, to the Prime Minister and individual ministers (cf. also Art. 72.4). This does not seem a good idea. It is a threat to the stability and coherence of the government if parliament has the possibility to remove individual ministers from the government. In a parliamentary system, the prime minister is responsible before parliament for the activity of the government as a whole; a vote of no confidence is therefore directed against the prime minister; its success leads to the resignation of the government as a whole. By contrast, the requirement of a vote of two-thirds of the members of parliament for such a motion to be successful puts too much of a premium on stability and is not in line with practice in other democratic countries. A vote of no confidence is usually expressed by an absolute majority of votes, i.e. by more than half of the votes of the total number of deputies in parliament. This is primarily due to the fact that not only the draft state budget, but also many other bills are prepared by the government, and their passage depends directly on the authority of the government and the trust in which it is held by parliament. In other words, there should be not just mutual understanding between parliament and the government, but also mutual trust and a government having only the support of between one third and one half of the members of parliament will not be able to govern effectively. If one wishes to enhance government stability, the constructive vote of no confidence as in the German Constitution, providing that parliament may express its lack of confidence in the prime minister only when at the same time electing a new prime minister, is preferable.

c) The amendments with respect to the composition of the Central Electoral Commission (now: one-third - instead of one half - appointed by the President, Art. 46.6.6, one-third - instead of one half - elected by the Jogorku Kenesh on its own proposal and one third elected by the Jogorku Kenesh on the proposal of public organisations, Art. 58.1.19) is a step in the right direction. It seems however insufficient to ensure a pluralistic composition of the Central Electoral Commission[4] and the provision on recall of these members by the bodies having appointed them should be deleted to enable the members of the Commission to exercise their functions independently and impartially.

d) Art. 58.1.23 requires the consent of the Jogorku Kenesh for legal proceedings against the Ombudsman. One may wonder whether an Ombudsman should enjoy immunity except for functional immunity for his official acts.

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[3] The provisions in Art. 58.1 on the role of the Jogorku Kenesh in appointing and dismissing judges are examined below in the framework of the discussion on Chapter 6 of the Constitution on Courts and Justice.

[4] Cf. Art. II.3.1 of the Code of Good Practice in Electoral Matters", CDL-AD(2002)23rev.

e) The attempt in Art. 58.2 to define the instances where the Jogorku Kenesh may adopt resolutions does not seem successful. On the one hand, it implies that laws are adopted by resolution, on the other, it seems incomplete and it would be preferable not to have such a list. Accordingly, Art. 59.1 providing that laws are to be adopted in areas not reserved to resolutions by this provision should be abrogated. It is unacceptable to define the possible scope of laws as the superior acts by reference to resolutions, which are subordinate acts.

f) Art. 58.3 establishes that laws and resolutions are to be passed by a majority of votes of the total number of members of parliament. Theoretically this is fine; but in practice (and particularly with the installation of a multi-party system and a strengthening of political opposition in Parliament), such regulation may become a serious delaying factor in the legislative process and in Parliament's activities as a whole. In many countries laws are passed in parliament by a simple majority of votes, i.e. more than half of the votes of the deputies of parliament present at the session is sufficient to pass a law. The requirement of an absolute majority of votes is usually set for the passage of constitutional laws.

34. The attempt made in **Art. 61.1** to limit the number of parliamentary committees is questionable since matters of its internal organisation should fall within the competence of the Jogorku Kenesh itself. Nevertheless the amendment is preferable to the original text which was even stricter.

35. In comparison with the current norm of **Art. 62.3** of the Constitution, whereby the quorum is at least two thirds of the total number of deputies, the draft envisages a significant reduction of the quorum. However, even the requirement of at least half of the total number of deputies is extremely high, and under certain circumstances it may reduce the functional efficiency of Parliament. This is exacerbated by the fact that in the second paragraph of Article 62.3 a new and higher quorum is envisaged for voting on bills – at least two thirds of the total number of deputies. The point should be made that it is unusual in parliamentary practice to set a double quorum for the functioning of parliament, and it would therefore be advisable to reject this.

36. With respect to **Art. 63.2** the possible reasons for an early dissolution of the Jogorku Kenesh by the President are rephrased. While it seems welcome that Parliament can no longer be dissolved as the result of a referendum, it is questionable to leave the definition of the situations in which Parliament may be dissolved to constitutional laws. Dissolution of Parliament is an extreme measure which should only be applied in instances defined by the Constitution itself. Article 63.2 should therefore be amended so as to list, clearly and precisely, all possible instances of early dissolution of Parliament. **Art. 63.5** should preferably stipulate shorter deadlines for the assembly of a newly-elected Parliament to hold its first session (for example, by stipulating 3 or 4 months instead of 6 months). Furthermore, to ensure continuity of the activities of legislative power, **Art. 63.4** should be supplemented by a provision with approximately the following content: "Prior to the assembly of a newly-elected Jogorku Kenesh to hold its first session, the functions of legislative power shall continue to be performed by the previously-elected Jogorku Kenesh of the Kyrgyz Republic".

37. The proposed amendment to **Art. 64** giving to the Supreme Court the right of legislative initiative on issues within its jurisdiction raises concerns with respect to its compatibility with the principle of the independence of the judiciary. The Supreme Court has the task of interpreting legislation following its adoption and should not be involved in the political process of adopting legislation.

38. **Art. 65** sets out the main rules for the legislative process and the amendments proposed are not major ones. The amendment to Art. 65.5 no longer requires the consent of the Government

but only the availability of a conclusion by the Government for the adoption of laws increasing expenses or reducing revenue. This is a welcome but prudent strengthening of the position of Parliament which is however not reflected in the parallel provision of Art. 65.4 on the state budget. A possible solution would be to provide that amendments increasing expenditure are only possible if the source of funds to cover the proposed new expenditure is indicated. Art. 65.6 is redrafted but still contains a reference to the adoption of constitutional amendments. Since the Constitution contains a specific chapter relating to amending the Constitution, it is suggested that the reference here be deleted.

39. **Art. 66** governs the procedure following the adoption of a law by Parliament. References to promulgation in addition to signing should be added in the first three sections. The amendment to Section 2 enabling the Jogorku Kenesh to immediately adopt by a two-third majority a law vetoed by the President and no longer to have to wait for six months to do so seems reasonable and justified. Even following the amendments, the position of the President remains very strong: he has a – too long – period of one month for his signature and his veto can be overcome only by a two-third and not an absolute majority of the members of the Jogorku Kenesh.

40. Following the amendment to **Art. 68**, it will no longer be possible for the Jogorku Kenesh to delegate its legislative powers to the President for up to one year. This is a welcome amendment in line with the overall aim of the constitutional reform.

Chapter 5 – Executive power of the Kyrgyz Republic

41. The purpose of the first amendment to **Art. 70.1**, deleting the word "highest" in the sentence "the Government is the highest body of state executive power …" is hard to understand. The Government cannot be put on an equal footing with a Ministry or a local authority. One may also wonder why the general formal definition of the composition of the Government in **Art. 70.2** should be deleted.

42. The amendment to **Art. 70.3**, according to which the Government resigns following elections to the Jogorku Kenesh and no longer following presidential elections, is particularly important and reflects the switch from a Government mainly dependent on the President to a more parliamentary system. However, Art. 71.2 still mentions the nomination of a candidate for Prime Minister following presidential elections. Both provisions have to be harmonised.

43. According to **Art. 71**, the President remains the only authority that is able to propose a candidate for Prime Minister. There is no provision that he has to make the proposal following consultation of the political forces represented in Parliament but nothing prevents such a practice. The addition to Section 4, providing that the President may suggest the same candidate only once, slightly strengthens the position of the Jogorku Kenesh. Nevertheless, the President retains the stronger role since, if Parliament refuses his or her candidates three times, he or she can appoint a Prime Minister and dissolve the Jogorku Kenesh. Therefore the members of the Jogorku Kenesh are placed before a choice of either accepting a presidential candidate or risking their seats in Parliament. The appointment of a Prime Minister without election lacks legitimacy. In such a case the President should dissolve Parliament and ask the outgoing Government to remain in office in a caretaker capacity[5].

44. The amendment to Art. **72.1**, taking away from the President the right to chair sessions of the Government, establishes a clearer division of responsibilities between President and Government and is welcome. The Government will now be responsible to the President and the

[5] Cf. the Opinion of the Venice Commission on the Draft Amendments to the Constitution of Georgia, CDL-AD(2004)008, para. 29.

Jogorku Kenesh; it was previously responsible to the President and accountable to the Jogorku Kenesh.

45. The provisions on motions of no confidence in the Government in **Art. 72.3-6** are amended only slightly. As stated above at para. 32.b), the majority of two-thirds for a vote of no confidence is excessive. It is the more surprising that the President is not even bound by such a vote but can retain the Government. Now, only if the Jogorku Kenesh again expresses its lack of confidence in the Government within three months, under the proposed new Section 6 does the Government have to resign, while previously the President could alternatively dissolve the Jogorku Kenesh. It remains however unclear how the Jogorku Kenesh can vote for a second time within three months, since according to Section 3 such a vote can take place only in the framework of the consideration of the annual report by the Prime Minister. In countries with a system of parliamentary monitoring of the activities of the government, raising the question of a vote of no confidence is not limited to any particular times and is unencumbered by additional conditions; the initiative is usually taken by a group of deputies consisting of between one-fourth and one-third of the total number of deputies (this right is usually taken up by deputies from opposition fractions in the parliament); for a resolution to express a vote of no confidence to be passed, an absolute majority, i.e. half of the total number of deputies in the parliament, is usually sufficient. It should be stressed that a vote of no confidence is a parliamentary procedure, so the involvement of the head of state in this procedure is not appropriate.

46. **Art. 78** on the Public Prosecutor's Office appears in the Chapter on executive power and is completely rephrased, making it more precise and detailed. The amendment maintains and confirms at the constitutional level the Soviet system of Prokuratura including general supervision over the "strict and uniform observation" of the laws. The system should be reformed[6] as was done in many European countries and, in particular, enshrining the old system in the Constitution should be avoided.

Chapter 6 – Courts and Justice in the Kyrgyz Republic

47. The proposed amendments in this Chapter would improve the text. They do however not seem sufficient to really ensure the independence of the judiciary as one of the main values of the Constitution.

48. The amendments to **Art. 80.5** contain revised rules on the election and appointment of judges. Constitutional court judges will be elected for a period of 15 years by the Jogorku Kenesh upon the proposal of the President. The election of constitutional judges for a limited period of office corresponds to international practice. However, in this case their re-election should be excluded as is done in most countries. Otherwise there is a danger that judges, especially when nearing the end of their term, may be influenced in their decisions by their wish to be re-elected. The requirement of ten years' work experience before being able to become a constitutional court judge seems very low.

49. Judges of the Supreme Court are to be elected by the Jogorku Kenesh on the proposal of the President for a period of 15 years, judges of local courts rare to be appointed by the President with the consent of the Jogorku Kenesh for a period of 15 years following an initial period of 5 years. These provisions are clearly inadequate to safeguard judicial independence. In most countries, judges are appointed, possibly following a trial period, until the age of retirement or

[6] See the Opinion of the Venice Commission on the Federal Law on the Prokuratura of the Russian Federation, CDL-AD(2005)014. Art. 129 of the Russian Constitution on the Prosecutor's Office is in the Chapter of the Constitution on Justice and does not explicitly maintain the function of general supervision.

even for life. This is a main guarantee of their independence. Moreover, the setting up of a judicial council, to be involved as an independent body in the appointment process, might warrant consideration by the Kyrgyz authorities. With respect to the judges of the Supreme Court, the requirement of five years' work experience before being elected seems excessively low. Art. 80.5 and the corresponding provisions in Arts. 46 and 58 should therefore be further reviewed.

50. One new sentence in Art. 80.5 provides for the election of the President of the Supreme Court by the plenum of the court. This is a positive step. A corresponding provision on the election of the President of the Constitutional Court is however missing. He or she continues to be elected by the Jogorku Kenesh on the proposal of the President (Art. 58.1.11).

51. The rules on the dismissal of judges in **Art. 81** will remain unchanged according to the draft. Art. 81.1 establishes a list of reasons for the removal of judges from office. While the reasons listed explicitly (own request, health, criminal conviction) are unobjectionable, the reference to other reasons specified by law is problematic. It would appear that if the Constitution is going to define the grounds for releasing judges from their post, then this list of grounds must be exhaustive, precise and have the necessary degree of detail. The actual procedure for such release may be established by a law, but it is essential to define in the Constitution itself who is entitled to release judges from office and up to what level of judicial office he or she may do this. Even more problematic is Art. 81.2, allowing for the dismissal of constitutional and supreme court judges through a vote by a two-third majority of the Jogorku Kenesh upon the proposal of the President[7], as well as the provision in Art. 80.6 allowing the President to dismiss chairpersons of local courts and their deputies with the consent of the Jogorku Kenesh. No grounds seem to be required for such dismissals. These provisions seem incompatible with judicial independence and should be reviewed, together with the corresponding provisions in Arts. 46 and 58.

52. The proposed new **Art. 82.3.7** giving the Constitutional Court the possibility of taking decisions on the constitutionality of law implementation practice affecting citizens' rights is particularly positive, although a more precise wording defining the scope of this power more clearly would have been even better. However, this may be provided in the respective legislation.

53. The rephrased **Art. 83.3** stipulates that the Supreme Court shall supervise the judicial activities of local courts by way of reviewing judicial acts in response to complaints from participants in the judicial process. This wording would appear to be slightly less than correct in respect of local courts: there will be supervision of their activities; this could be taken both as an expression of mistrust and as a downgrading of the authority of local courts. But the principle of judicial independence requires recognition of the self-sufficiency, equality and equivalence of all courts in the exercise of justice. Consequently, the following wording for Article 83, point 3 would appear more appropriate: "3. The Supreme Court of the Kyrgyz Republic shall be the appeal instance in matters considered by courts of first instance".

54. The amendment to **Art. 84** introducing the principle of the independent management by the courts of their budgets is a positive step.

Chapter 8 – Procedure for amendments and supplements to the Constitution of the Kyrgyz Republic

[7] Art. 82.3.4 provides for a determination of the Constitutional Court on the dismissal of constitutional and supreme court judges. The scope of this provision is unclear.

55. The amendments propose adding in the heading of the Chapter the words **"**and constitutional laws of the Kyrgyz Republic". It would seem preferable to put the rules on constitutional laws, if such rules are to be introduced, into the Chapter on the legislative process and consequently to leave this heading unchanged.

56. The first amendment to **Art. 96** excludes the previous Section 1, which gave to the President the possibility of calling a referendum on constitutional amendments. Having regard to the previous abuse of this possibility in Kyrgyzstan and other post-Soviet states, this amendment deserves strong support. The new Section 1, previously Section 2, is unclear and should be redrafted as referring only to the right to introduce constitutional amendments.

57. A new requirement of holding two readings with an interval of one month is introduced into **Art. 97.1** for the adoption of constitutional amendments**.** The text does prompt a few questions though. Firstly, it is not obvious how one should understand the wording "two readings". Does this mean two rounds of voting? Or is it no more than two stages of discussion with at least a month between them? Secondly, what is meant by the interval of "at least one month" (particularly, in cases where this interval is only one month)? The idea probably arose out of an intention to make the procedure for passing amendments to the Constitution more complex, using what is known as the double vote mechanism to achieve this aim (two rounds of voting). If this is the case, what the text should specify is not "two readings", but two rounds of voting. Furthermore, the time interval between the rounds of voting should preferably be a little longer. If so, the text of Article 97, point 1 might read something like this: "1. Amendments and supplements to this Constitution shall be passed by the Jogorku Kenesh of the Kyrgyz Republic after two successive discussions and rounds of voting with an interval of at least three months between them, and shall be considered as passed if at each round of voting the bill is passed by a majority of at least two thirds of the total number of deputies of the Jogorku Kenesh of the Kyrgyz Republic".

IV. Conclusions

58. The Venice Commission welcomes the proposed constitutional amendments. They reflect the intention of the drafters to arrive at a better balance between the powers of the main state organs, strengthening both parliament and the government, and they strengthen the rule of law and human rights. Especially welcome are the introduction of the requirement of a judicial decision for arrests, the abrogation of the death penalty, the safeguarding of the legislative role of the Jogorku Kenesh and the possibility for the Constitutional Court to rule in cases of alleged violation of human rights through the implementation of laws.

59. The Venice Commission encourages the Kyrgyz authorities to consider amending also some other remnants of the former system, in particular, the link between human rights and duties, the interpretation of laws by Parliament and the Prokuratura. The guarantees of judicial independence should be further improved, especially with respect to the appointment and possible dismissal of judges.

60. Some of the proposed amendments could be further improved and concrete suggestions in this respect are made in the present Opinion. This does however in no way affect the general positive assessment of the text. By adopting the text, the Kyrgyz Republic would make an important step bringing it closer to European legal and constitutional standards and towards the consolidation of democracy and the rule of law.