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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE DRAFT CONSTITUTION
OF THE KYRGYZ REPUBLIC
(version published on 21 May 2010)**

**Adopted by the Venice Commission
at its 83rd Plenary Session
(Venice, 4 June 2010)**

On the basis of comments by

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1. Introduction

1. In a letter dated 23 April 2010, the Acting Vice Chairman of the Provisional Government of the Kyrgyz Republic, Mr Omurbek Tekebaev, asked the Venice Commission to assist the Provisional Government of the Kyrgyz Republic in its efforts to draft a new Constitution of the Kyrgyz Republic.

2. The new Constitution of Kyrgyzstan, that is to be adopted by referendum in June 2010, is based on the text of the last Constitution of Kyrgyzstan adopted on 21 October 2007. Many parts – especially the first section explaining the basic principles of the constitutional order and the second section on human rights – have remained largely unchanged. Other parts, especially those concerning the distribution of power between the President, the Government and Parliament have been reworked fundamentally.

3. The Venice Commission has accompanied the process of constitutional change in Kyrgyzstan since 2002. The last Constitution obtained the Venice Commission's comments in its "Opinion on the Constitutional Situation in the Kyrgyz Republic" adopted at its 73rd Plenary Session (Venice 14-15 December 2007). The comments concerning the unchanged parts of the Constitution are still valid today. The present Opinion will therefore focus on the new draft provisions in the Constitution of 21 May 2010, as published in the mass media after its approval by the Constitutional Assembly and the Provisional Government (on 19 May), but takes into account the previous opinions of the Venice Commission.

4. On the invitation of the Provisional Government, a delegation of the Venice Commission composed of Ms A. Nussberger and Messrs A. Endzins, N. Esanu and A. Fogelklou visited Bishkek and met with the representatives of the Provisional Government, members of the Working Group on the drafting of the Constitution¹ and the Constitutional Council². The following draft Opinion was prepared on the basis of the draft Constitution of 12 May 2010, transmitted to the delegation by the Working Group on the drafting of the Constitution (hereinafter, the "Working group").

5. The rapporteurs received the final version of the draft on 21 May 2010.

6. *This opinion was adopted at the 83rd Plenary Session of the Venice Commission (Venice, 4 June 2010).*

2. General observations

7. The 2007 Constitution kept the semi-presidential system, but has in reality centralised political power with the Presidency. At the same time, the 2007 Constitution contains a number of other provisions aimed at reinforcing the rule of law, guaranteeing human rights and freedoms and the constitutional structure as a whole. These amendments in general and many of the specific provisions are positive and have been preserved in the present constitutional draft.

8. The draft of 12 May 2010 presented to the experts of the Venice Commission was a step towards improving the system of the separation of powers. It took into account a number of important recommendations made by the Venice Commission in 2007.

¹ A group of national experts in charge of the drafting process.

² Constitutional Council is composed of 75 representatives of the authorities, political parties, civil society and independent experts.

9. The Working Group introduced a number of improvements to the draft of 21 May 2010 based on the preliminary comments made by the Venice Commission, which were transmitted to the drafters during the rapporteurs' visit to Bishkek on 12 – 14 May 2010. However, there seem to be some issues in the draft of 21 May that might need further clarification and/or amendments. The following opinion will focus on the provisions of the new draft and make several recommendations as well as provide comments.

3. Section I: Fundamental principles of the constitutional order

10. **Article 1** sets out the basic principles of a modern democratic state based on the rule of law. Generally, the comments contained in the Opinion of 2007 were followed.

11. New **Article 2** provides the basis for the organisation of referendums. Whereas in the last Constitution the only rule fixed was that the procedure for holding a referendum shall be established by constitutional law, the new version is more explicit. It prescribes that the questions which can be brought before a referendum have to be enumerated in a constitutional law. The regular legislative process should not be side stepped by having recourse to a referendum.

12. The Venice Commission delegation welcomed the decision of the Working Group not to include the provision on election commissions, which existed in the draft of 26 April. Issues relating to the administration of elections should be included in a specific electoral law and a law on political parties.

13. **Article 3** defines the principles on which State power is based. The introduction of the principle of openness is a positive development.

14. **Article 4**, paragraph 4.2 provides that those who are part of the military, the law enforcement organs as well as judges cannot be members of political parties. This limitation could be problematic. The authors of the draft seem not to make any distinctions between servicemen, prosecutors and other people working in these bodies as supporting staff or under specific contracts. This problem could be solved by, for example, introducing a list of officials who cannot be members of political parties. Otherwise, this provision seems to be disproportionate and unnecessary in a democratic society.

15. The draft in its **Article 12** establishes a rather unusual regulation of the issues of property. There are several problems in the text. The regulation on expropriation makes a difference between various forms that necessitate different levels of protection. The regulation is not only unclear, but also inadequate, as it does not live up to international standards requiring a balancing of private and public interests as well as prompt and adequate compensation. Para. 4 provides protection for the property of Kyrgyz citizens and Kyrgyz legal persons as well as for Kyrgyz State property abroad. It is not clear how such a guarantee is going to be implemented.

4. Section II: Fundamental rights

16. The Venice Commission welcomes the provision of Article 6, which provides that International treaties on human rights have a direct effect. But, it is not clear whether these treaties have a higher hierarchical status than Kyrgyz laws. Furthermore, the effect of other treaties on the Kyrgyz legal system in cases of conflict remains unclear. It would be advisable to point out that international treaties ratified by the Kyrgyz Republic have precedence over Kyrgyz laws. It would also be helpful to accept as a general rule that all norms have to be interpreted in the light of international human rights treaties ratified by Kyrgyzstan.

17. The section on human rights and freedoms deserves praise for its far-reaching promises. In relation to the 2007 version, this version is edited more clearly, since the various rights are set out in different articles instead of being paragraphs or sub-paragraphs in one in two simple articles. This part of the Constitution includes a catalogue of guarantees the protection of human rights, which seems to fully correspond to international standards.

18. There are also some positive substantial changes in comparison to the 2007 Constitution in the area of limitation of human rights. Firstly, the provision on proportionality has a much better formulation (**Article 20 para. 2, last sentence**). Secondly, the rights and corresponding prohibitions, which must *not* be limited, have been clearly enumerated. (**Article 20 para. 4**). Thirdly, it is clearly prohibited to issue “*nodzakonnnye normativnaya akty*” concerning human rights and freedoms (**Article 20 para 2, second part**). It should, however, be pointed out that *only* the Constitution and the laws passed by Parliament may limit human rights. /**Cf Article 20 para. 2, first sentence**).

19. However, a separate Chapter on „rights and obligations of citizens“ is quite unusual, even if the provisions in Articles 50 – 59 do not seem to present any problems.

20. Since the Venice Commission did not receive any specific request from the authorities of Kyrgyzstan, Chapter II was not examined in detail by the rapporteurs of the Venice Commission.

5. Section III: The President of the Republic of Kyrgyzstan

21. Chapter III is subdivided into two sections. The first section deals with the election of the President, the second section with the President’s competences. The role of the President is defined in the preamble to Chapter III (**Article 60**).

- General definition of the role of the President

22. The version of the respective Article in the 2007 Constitution has been sharply criticized by the Venice Commission. In the new version, important changes have been inserted.

23. **Article 60 para. 1** contains, as stated in the 2007 opinion, “the usual definition of the role of the President in presidential and semi-presidential systems” (President as “head of State”; President as “highest official”). It has to be stressed that the President is not considered as being a part of the executive, since the Government is defined as the “highest organ of executive power” (Article 83 para. 2). He or she thus stands above or at least outside the traditional trilateral system described by the concept of the “separation of powers”.

24. **Article 60 para. 2** defines the President as the “symbol of the unity of the people and state power”, but omits the characterisation as “the guarantor of the Constitution of the Kyrgyz Republic and of human and civil rights and freedoms”. While it is true that other constitutions of Central and Eastern European countries contain similar provisions, the change is welcome. As a rule, the judiciary is considered to be the guarantor of human rights and freedoms and the constitutional order as a whole. Calling the President a “guarantor” might be easily misunderstood as placing him or her beyond the constitutional order. The authors of the draft have rightly seen that the defence of rights and freedoms is the task of the judiciary and, by deleting this phrase, the risk of blurring competences and of infringing the constitutional principle of the independent position of the judiciary has been diminished.

- Election of the President

25. Whereas the 2007 Constitution stated that the same person could not be elected for more than two consecutive terms, the new version (**Article 61 para. 2**) states that it is not even possible to be elected President twice. This provision is very restrictive in comparison to worldwide practice.³ Yet, this provision is welcome. As it provides for an obligatory change after a six-year period, it tries to avoid the establishment of authoritarian structures. If a President has no chance of being re-elected immediately, there will not be an incentive to build up a strong power base and to crush the opposition. As experience has shown in Kyrgyzstan, the abuse of presidential power is a very serious problem. The new wording of **Article 61 para. 2** can be a useful remedy if it is strictly observed and not changed during the first presidential term.

26. The number of the signatures that have to be collected in order to run for President has been reduced from 50 000 to 30 000. This is welcome as it allows for more competition. **Article 63 para. 3** provides that the President cannot be a member or act on behalf of any political party while in office. This is a positive provision.

- Competences of the President

27. **Article 64** contains essential changes. The clear aim of the reform is to limit presidential powers, to involve more state organs in the decision-making process and in making key appointments. It might be useful to recall the comments on the 2007 version of the Constitution in order to understand why all these changes are seen as very helpful in building a truly democratic State:

“The list of powers of the President in these Articles and other Articles of the Constitution seems inspired by the wish of the drafters of the Constitution to provide the President with all powers which may be found in European, US, Latin American or Russian constitutionalism. ... The President thus is in full control of the administration in general and the power structures in particular, he or she dominates the executive and has decisive influence on appointments to judicial and other independent positions. If ever there is resistance against his or her wishes, the President can call a referendum without the involvement of the other state organs.” (CDL-AD(2007)045, paras. 39, 41)

28. The changes in the list of competences are essential:

1) Appointments within the executive

....

- The President can appoint and dismiss the Prosecutor General with the consent of or based on the initiative of one-third of the members of Parliament, but only in the cases fixed by law (**Article 64 para. 4.1**). The system of appointment of the above-mentioned officials has been clarified in comparison to the April version of the Constitution. In order to guarantee the independence of the institution, it is particularly important to clearly set out the legal basis in a law on the Procuratura.
- The President can suggest a candidate for the post of the Chairperson of the National Bank who is then elected by Parliament.
- The President still has extensive powers. He or she has the right to appoint the members of the Government in charge of State Agencies dealing with issues of defence and security and their deputies. These powers seem to exceed the powers given to a President in the proposed system of separation powers. He or she still can determine the structure of the

³ Cf. Angelika Nußberger, Setting Limits and Setting Limits aside – The Constitutional Framework of Presidential Power in Post-Communist Countries, in: Liber Amicorum Antonio La Pergola, Strasbourg, The Hague 2008, S. 206-228.

presidential administration and form and preside over the Security Council. Furthermore, he or she is chief commander of the army and appoints and dismisses the highest military officials. Yet, the following organs can no longer be appointed by the President:

- Heads of administrative departments
- Heads of local state administrations
- Secretary of State
- State organs directly subordinate and accountable to the President

The President can no longer determine the terms for the remuneration of state and municipal civil servants.

2) Appointments outside the executive

- As there no longer is a Constitutional Court, no appointments are made in this field;
- no competence to give consent for criminal prosecution or administrative proceedings against local court judges;
- The President can no longer appoint one half, but only one-third of the members of the Election Commission; he or she can no longer appoint the chairman and has not right to dismiss those who have been appointed.

3) Powers in the field of foreign policy

- The power to direct foreign policy has been abolished.
- The power to conduct negotiations and sign international treaties has to be exercised in accordance with the Prime Minister.

29. The powers of the President in conferring State awards and granting pardon have not been changed.

4) Powers of the President in the legislative process

- The President is no longer entitled to submit draft laws to the *Jogorku Kenesh*
- The President is no longer entitled to suspend the action of legal and regulatory acts of the Government and other executive authorities
- The President is no longer entitled to call a referendum on his own initiative, but only on the initiative of 300 000 voters and the majority of the deputies (cumulative conditions)
- The right of the President to issue decrees and orders has not been changed (former Article 47, now Article 65). This wording is potentially dangerous - it is not specifically mentioned that the decrees must not contradict the Constitution and the laws or replace laws. It might be wise to complete the Article in the sense that no decree may reduce the scope of human rights.
- The President keeps the right to return legislation (veto) to the *Jogorku Kenesh* (Article 64 para. 2). **Article 81 para.3** provides that the Parliament can overrule the presidential veto on legislation by a 2/3 majority vote.

5) Powers of the President in the case of emergencies and in the case of war

30. The President still has the right of immediate reaction in the case of emergencies and war. But in all those cases it is necessary "to provide prompt notification to the *Jogorku Kenesh*", which has the right to confirm or to abrogate the decrees of the President (Article 74).

31. All these changes are very positive, as they considerably reduce the excessive powers the President had under the 2007 Constitution. The scope of powers now assigned to the President is still large enough for securing stability in the country, especially in view of the possibilities of immediate reaction to emergency situations.

6) Immunity and protection of the President

32. The provisions on the immunity, support, service and protection of the President have been abrogated. This is to be welcomed as it seems to have been understood as a status “*legibus-absolute*”. It is clear that the international rules on the immunity of Heads of State apply to the President.

7) Termination of the powers of the President

33. There are three reasons for the termination of the powers of the President: resignation, dismissal and inability to exercise his/her duties.

34. The procedure for dismissal of the President has been changed. Whereas according to the 2007 Constitution it was necessary to accuse the President of having committed “high treason or another particularly serious crime” (**Article 51 para.1**), it is now sufficient to have committed a “crime” (**Article 67 para. 2**). On the basis of the 2007 Constitution not only the *Jogorku Kenesh* and the general prosecutor had to support the accusation, but also the Constitutional Court; this precondition is no longer necessary. The two-thirds majority of the deputies for the decision to bring a charge against the President is replaced by a simple majority; for the initiative a vote of one-third of the deputies instead of the majority is sufficient. The vote on the dismissal has to be taken by two-thirds of the deputies and no longer by three-quarters. The – short - time-frame of three months is upheld.

35. Thus, it is now clearly easier to impeach the President. Taking into account that the President can be elected only for one term, the potential for the usurpation of power has been largely reduced.

6. Section IV: The legislature of the Kyrgyz Republic

1. Composition the Jogorku Kenesh and status of the deputies

36. The general description of the role of the *Jogorku Kenesh* as “the highest representative body exercising legislative power and supervisory functions within the limits of its competence” has been upheld (**Article 70 para. 1**).

37. The number of the deputies is to be increased from 90 to 120. There is no “ideal” number of deputies. Generally, it depends on the size of the country and the need for an equal representation of the different parts of the population and regions.

38. The deputies will be elected for five years on the basis of the proportional system. Concerning the electoral system in Kyrgyzstan, several experimental approaches have already been tried out: elections had been held on the basis of a mixed system and on the basis of a majoritarian system. The problem is the lack of a stable party system in which the parties are rooted in certain traditions and world views as it has grown in democracies such as the British or the French system. The decision to introduce a proportional system might help to strengthen the representation of a plurality of political views in Parliament. Yet, it all depends on the relevant forces in civil society to build up parties with identifiably different profiles. The warning issued in the 2007 Opinion might be recalled:

“Since the party system is very weakly developed, there is a risk 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 may not be grounded in the concrete political experience of the people. Moreover, there is no room for independent candidates.” (CDL-AD (2007)045, para. 45).

39. In view of the later developments, this comment proved to be very much to the point. But, it has to be noted that the 2007 Constitution established a strong Presidential system leaving almost no possibility for the Parliament to act. It might be hoped that the formation of political parties will be promoted by giving considerable powers to Parliament.

40. The prohibition of a single party from having more than 65 out of 120 deputies should avoid the domination of one political party. Such a restriction on the size of the majority seems to be new. The problem is that it might violate the principle of the equality of votes. The votes for a party, which has already reached the relevant quota, can be lost. But, these restrictions might be justified as measures necessary to build a pluralistic party system. Specific legislation should explain how the remaining votes are distributed. Previous versions of the draft included provisions on electoral threshold. The final version provides that the issue of electoral threshold will be regulated through a constitutional law.

41. Article 70 para. 3 introduces the concepts of “fraction” and of “Parliamentary majority” that were absent in the previous version of the Constitution. The deputies have to form fractions. The fraction or coalition of fractions reuniting more than half of the deputies are considered to be the “parliamentary majority”. The formation of a coalition has to be officially declared.

42. These regulations aim at forming a stable representation of the parties within Parliament. As deputies lose their mandates when they leave a fraction or a party (**Article 73 para. 1**) their “freedom” is clearly restricted. Nevertheless, they are free to vote for or against the position of the fraction/party. Furthermore, in contrast to the 2007 Constitution, they can no longer be expelled from the party. Thus, the regulation proposed might be considered as balanced in view of the potential misuses of political mandates. Yet, some questions remain. Is it possible to form new coalitions in the five-year period? Is it possible for deputies to refrain from adhering to any fraction? It is advisable to solve these questions explicitly on the basis of the Constitution.

43. In the parliaments of post-communist States, the misuse of immunity regulations constituted a widespread problem, because the status of a parliamentarian could be attractive to those who wanted to escape criminal prosecution. Therefore, the concept of a very restricted immunity in the new version of the Kyrgyz Constitution is very welcome. Contrary to the former Constitution, there is no general guarantee that the deputies “shall enjoy immunity” (former Article 56 para 1). It is only the prohibition of prosecution for “opinions expressed in the course of their activities as a deputy or for the outcome of voting in the Jogorku Kenesh” that is upheld (**Article 72**). There no longer is any protection against arrest and searches. The consent of the majority of the *Jogorku Kenesh* remains a precondition for judicial proceedings against deputies except for “particularly serious crimes”. If this does not correspond to a certain category of crimes in the Criminal Code, this notion should be clarified.

44. The rest of the regulations on the composition of the *Jogorky Kenesh* and the status of the deputies has not undergone any significant changes. It might be mentioned that the regulation of the incompatibility of business activities with the status of a deputy is particularly relevant and does not seem to have been implemented in practice.

45. The Constitution still provides the *Jogorku Kenesh* with the right to self-dissolution (Article 78). It is not recommended that this right be guaranteed without any preconditions, as it might contribute to instability in the country.

2. Competences of the Jogorku Kenesh

46. The changes of the chapter on the competences of the *Jogorku Kenesh* are complementary to the changes of the powers of the President and clearly show that the newly established system is a parliamentary one. Whereas in the 2007 Constitution it was the President who had the right “to define the fundamental thrusts of state domestic and foreign policy” (former Article 42 para. 3), now this task is conferred on the Government and the Parliament (**Article 74 para. 3.2**) which “confirms the general programmes of development of the Kyrgyz Republic introduced by the Government.” The *Jogorku Kenesh* has to be heard in all important decisions on personal appointments. It has to give its consent to the structure and composition of the Government (**Article 74 para. 3.1**) and to decide on the vote of confidence or no-confidence in the Government (**Article 74 para. 3.3 ad 3.4**). Yet, this right does not include expressing a vote of no-confidence on individual members of the Government as provided under the 2007 Constitution. As already stated above, the *Jogorku Kenesh* also has the power to confirm or abrogate the decrees of the President in case of emergencies and war.

47. The regulations on the status of the *Toraga* of the *Jogorku Kenesh* are similar to the ones in the 2007 Constitution. Deputies of the *Toraga* are elected amongst the representatives of the opposition (**Article 75 para. 1**).

48. Concerning the work of the *Jogorku Kenesh*, it must be pointed out that there are special tasks reserved for the parliamentarian minority, such as the chairmanship of the committee dealing with the budget and of the committee on the legal order (Article 77). This seems to be a good mechanism of inner-parliamentarian control.

7. Section V: The Executive Power

49. The rules on the formation of Government have been changed in a surprising way. Under the 2007 Constitution, the parliamentarian majority had the right to propose a candidate and in the case of failure, this right could be passed on to other parties. Now if the majority in the *Jogorku Kenesh* does not succeed in forming a Government, this right is given to the other parties in the parliament. If they fail to get support for their proposal, the President has to form the Government. If his or her proposal is not supported, than he or she has to call for early elections. The proposed system seems to be very complex and might not guarantee stability.

50. Contrary to the 2007 Constitution, the Government is no longer responsible to both the President and the *Jogorku Kenesh*, but only to the latter. It is therefore reasonable to expect the Government to be supported by the majority of the *Jogorku Kenesh*. In this context, the repeated vote of no-confidence of the *Jogorku Kenesh* forces the President to call for new elections.

51. Article 89 of the draft lists the Prime Minister’s powers. It is clear from the list that he or she is a head of the executive in Kyrgyzstan.

8. Section VI: The Judiciary

52. **Article 93** establishes the main principles of the operation of the judiciary, which meet the requirements used in democratic States. However, some of the “Soviet” characteristics of the judicial system, such as the right of the Supreme Court to give explanations on questions of judicial practice (**Article 96 para. 2**) have been upheld; it is not clear if the system of “nadzor” is understood in a wide or narrow sense.

53. According to the **Article 94 para. 7**, the President of the Supreme Court can not be re-elected for a second term. In para. 8, the same rule applies to the presidents of other courts. This is an experimental approach. Its effect has to be closely observed in practice

54. Article 94, in its para. 9, establishes the 5-year probationary period for judges, which could undermine their independence. In this respect the Venice Commission has already pointed out, in its Report on the Independence of the Judicial System Part I: The Independence of Judges adopted at its 82nd Plenary Session (Venice, 12-13 March 2010)⁴ “the Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence”.

55. In this connection, it would also be justified to raise the issue of the role of different State bodies in ensuring the independence of the judiciary. The report on the Independence of the Judicial System Part I underlines that: “it is the Venice Commission’s view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers”⁵.

56. **Article 95** gives Parliament the power to dismiss judges by a vote of two-thirds of MPs. This can lead to decisions which are politically motivated. Such a system could undermine the powers of the judiciary in the long term.

57. The most important change in the judicial system, however, is the abolition of the Constitutional Court as an institution. The general description of the judicial functions is not changed, although: “Judicial authority shall be exercised by means of constitutional, civil, criminal, administrative and other forms of proceedings” (**former Article 82, para. 2, Article 93 para. 2**).

58. The function of constitutional control is transferred to the Constitutional Chamber of the Supreme Court. **Article 97** seems to give quite an important degree of autonomy to the Constitutional Chamber. The Chamber keeps most powers previously exercised by the Constitutional Court of the Republic of Kyrgyzstan.

59. Generally, the Venice Commission advocates the establishment of a Constitutional Court as a separate institution as this model has often proved to be a motor in implementing the rule of law in a given country. As the Venice Commission has pointed out in its previous opinions, access to judicial review must be open to all interested persons, that is to all persons potentially exposed to the danger of unlawful violations of their rights, and, on the other hand, the decisions of the competent judicial authorities must be capable of producing effects which comply with the principle of the certainty of law. It is true, as was pointed out by the Commission in its Opinion on the Constitution of Finland⁶, that there is no general requirement to have such a court. Nevertheless, it seems a step backwards if a country with a functioning Constitutional Court decides to abolish it. This decision should be reconsidered.

⁴ See document **CDL-AD(2010)004 p. 38**.

⁵ Idem., p. 32.

⁶ CDL-AD(2008)010 Opinion on the Constitution of Finland adopted by the Venice Commission at its 74th plenary session (Venice, 14-15 March 2008).

9. Section VII: Other State authorities

60. The Soviet institution of the *prokuratura* has not been changed. This institution keeps its power to “*oversee the proper and uniform implementation by state bodies and local authorities, legal persons and other normative legal acts within the limits prescribed by law*” as a main competence (**Article 104 para 1**). Although this does not seem to be a good solution, it is understandable that under the present conditions the focus of the reform is on the distribution of power between the President, Parliament and Government. Other reforms may be introduced later.

10. Section VIII: Local Administration

61. This part of the Constitution has not been analysed in detail.

11. Section IX: Modification of the Constitution

62. The Chapter on the Amendment of the Constitution has been modified in a far-reaching way. First, the role of the judiciary has been eliminated; second, the powers of the President in this process have been considerably diminished.

63. The abrogation of the President’s right to initiate a referendum on a modification of the Constitution (former Article 98 para. 2) is in line with the general changes of the constitutional system from a presidential to a parliamentary system.

12. Conclusions

64. The Venice Commission welcomes the effort of the Provisional Government and the Constitutional Assembly of Kyrgyzstan aimed at drafting a new Constitution that is fully in line with democratic standards.

65. The Constitutional draft deserves serious praise for its intention to introduce, for the first time, a form of a parliamentary regime in Central Asia. Even if this system may have certain disadvantages, the Kyrgyz experience has shown that a presidential regime can easily lead to authoritarianism. Although the party system is less developed, there still is a fairly strong civil society in Kyrgyzstan, which might be the basis for democratic development within a parliamentary system.

66. At the same time the Commission notes that the President keeps a number of important powers, in particular in respect of security sector, law enforcement and has extensive powers to veto legislation.

67. The examined draft text of the Constitution resolves a number of problems which existed in the Constitution adopted in 2007, notably:

- 1) it introduces a more balanced distribution of powers between the President, Parliament and the Executive;
- 2) it provides for an increased role of the legislative power;
- 3) it contains an improved version of the Section on human rights.

68. However, the Commission is of the opinion that a number of constitutional provisions could be further improved:

- 1) additional measures to ensure the independence of the judiciary should be introduced into the text;
- 2) the complex rules for the formation of the Government, which could lead to various, sometimes widely differing, interpretations should be revised;
- 3) the role of the *Procuratura* should be reconsidered;

4) the limits of the powers of the President to issue decrees and orders could be defined in a clearer way.

69. The Venice Commission considers that the abolition of the Constitutional Court as a separate institution is not a good solution. It hopes that this matter will be reconsidered and that the system of constitutional control chosen by Kyrgyzstan will nevertheless be exercised in such a way as to provide full protection of constitutional rights and freedoms and to contribute to the creation of a stable political and legal culture in the country.

70. The Commission reiterates its position that even a good Constitutional text cannot ensure stability and democratic development of society without there also being the relevant political will of different political forces, further legislation in line with democratic standards and a sound system of checks and balances that sets the basis for its implementation.