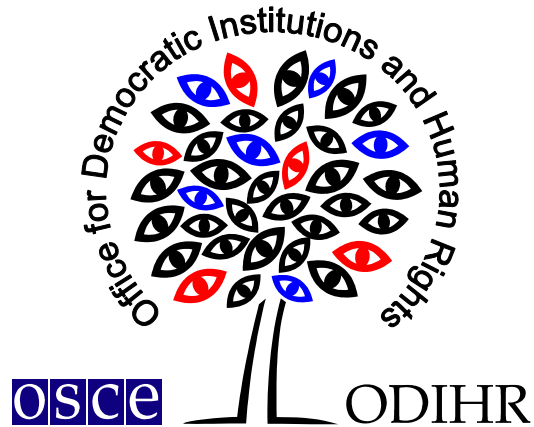


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## OPINION

### ON THE DRAFT AMENDMENTS TO THE CONSTITUTION OF THE KYRGYZ REPUBLIC

*As approved by the Constitutional Conference on 9 June 2005*

*This opinion has been prepared on the basis of opinions by Marek Zubik (Deputy Head, Department of Preliminary Control of Applications and Constitutional Complaints, Constitutional Tribunal of Republic of Poland) and Alexander N. Domrin (Senior Associate, Institute of Legislation and Comparative Law, Moscow, Russian Federation; Visiting Professor, University of Iowa College of Law, United States of America). The sections of the opinion pertaining to the freedom of religion or belief have been prepared on the basis of the opinion provided by the OSCE/ODIHR's Panel of Experts on Freedom of Religion or Belief.*

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## **1. INTRODUCTION**

1. *This Opinion has been prepared in the framework of tripartite cooperation between the Government of the Kyrgyz Republic, the European Commission for Democracy through Law (hereafter the Venice Commission) and the OSCE/ODIHR, in order to assist the Kyrgyz authorities in the constitutional reform process.*
2. *The amendments were drafted by the Constitutional Conference and approved on 9 June 2005 by the same body. The Constitutional Conference is an ad hoc body composed of MPs, representatives of the executive, judges and civil society representatives, set up in accordance with the Resolution of the Jogorku Kenesh (Parliament) of the Kyrgyz Republic of 25 April 2005 with the main task of developing draft amendments and additions to the Constitution for their further submission to public debate. The 114-member Constitutional Conference is chaired by the Speaker of the Jogorku Kenesh and includes a working group (28 people) which is the core unit responsible for the preparation of draft amendments.*
3. *This Opinion has been prepared on the basis of the Russian and English translations of the draft amendments.*
4. *The text of the Opinion of the Venice Commission on the proposed amendments has been communicated to the OSCE ODIHR, which hereby expresses its full support for the recommendations and conclusions contained in that Opinion.*

## **2. SCOPE OF REVIEW**

5. This Opinion intends to (a) assess the compliance of the draft constitutional amendments (hereinafter referred to as the “Draft”) with international law as well as with international best practices and the European constitutional heritage; and (b) propose recommendations considering the relevant international standards.
6. The understanding that there is a great degree of flexibility with regard to the level of specificity of constitutional provisions is fundamental to this analysis and is reflected throughout.
7. This Opinion does not purport to provide a comprehensive review nor does it attempt to assess the Constitution beyond the provisions affected by the proposed amendments. However, considering that some of the draft amendments have implications beyond the Articles affected by the changes proposed, it was deemed

necessary to include comments on other provisions not directly affected by the draft amendments. Still, such instances are very limited and specifically mentioned in the text of the Opinion.

8. Absence of comment on a specific provision cannot be interpreted to imply that the provision in question is consistent with the view of OSCE ODIHR.
9. The OSCE ODIHR would like to mention that the opinion provided herein is without prejudice to any further opinions or recommendations that the OSCE ODIHR may wish to make on the issues under consideration.

### **3. EXECUTIVE SUMMARY**

10. The OSCE/ODIHR welcomes the proposed amendments to the Constitution of the Kyrgyz Republic as drafted by the Constitutional Conference and finalized in June 2005. Amongst others, the positive elements are the shift towards a better balance of power among the three branches of government, in particular, the emphasis placed on reinforcing the role of the Jogorku Kenesh (the parliament of the Kyrgyz Republic) and on securing a strengthened position of the government within the executive. The express prohibition of the death penalty is also welcomed. However, a number of concerns still remain. The most significant of these being the implications of the proposed amendments for freedom of religion or belief and insufficient guarantees of judicial independence.

11. The following constitutes a full list of recommendations:

- a) It is recommended that issues such as the body competent to call a referendum and the effects of referenda be expressly regulated at constitutional level. Concerning the question of convening a referendum on matters other than constitutional reform, it is important that the legislative powers of the Jogorku Kenesh not be impeded or prejudiced. One suggestion would be to submit the legislation to a referendum only with the prior consent of the Jogorku Kenesh. [see para 15]
- b) In general, it is recommended to review the provisions that concern permissible limitations on the enjoyment of fundamental freedoms. Since the limitation clauses in the ICCPR vary slightly for freedom of religion, freedom of expression, and freedom of association, it is recommended that those differences be reflected by the introduction of parallel language in the Constitution. [see para 16]

- c) The list of sources for exceptions to the principle of equal treatment provided for by Article 22 needs to be reconsidered in order to prevent its arbitrary application. For the purposes of consistency, it is proposed that the principle of equal rights and equal treatment, as well as the permissible exceptions thereto, be set forth in one article. [see paras 23-25]
- d) It is recommended that the proposed amendment to Article 8(3) concerning freedom of religion or belief be removed from the text of the draft. It is also recommended for the drafter to consider supplementing the relevant provisions in Article 16(7), which guarantees freedom of religion and belief in the Kyrgyz Republic, with a limitation clause that would make it clear that manifestations of religion may be limited only under the conditions permitted in Article 18(3) of the ICCPR. Also, for the sake of consistency, the possibility of moving the prohibition against “*religious cults which are degrading to the human dignity and contradict the principles of humanity*” from Article 8(3) (secular state) to Article 16(7) (human rights and freedoms, including freedom of religion and belief) may be considered. [see para 31]
- e) It is recommended that the proposed amendment to Article 9(4) be revised to read “*[a]ctions that pose an imminent danger to the peaceful communal life of the people, and propaganda and other conduct directly and imminently aimed at fomenting inter-ethnic or religious violence are prohibited.*” [see para 34]
- f) Similar changes narrowing the scope of the current religious hate speech clause of Article 8(3) should be considered. It is recommended that this provision be moved so that it becomes part of Article 16(7). Furthermore, it should be interpreted with due respect for religious freedom. It is vital that hate speech provisions not be used as an excuse for censoring non-violent religious disagreement naturally arising out of religious diversity and freedom to express such disagreement in peaceful ways. [see para 34]
- g) It is recommended that the draft provide that claims on the violation of religious freedom can be overridden only under specifically listed circumstances in accordance with international law. [see para 39]
- h) It is recommended that the amendment to Article 43(3) be reformulated so as not to unduly restrict candidacy rights. [see para 43]

- i) Although the proposed amendments to Article 66(4) are welcome overall, it is obvious that a refusal by the President to sign the law would automatically cause a conflict with the Jogorku Kenesh. Should such a situation occur, the Constitution should indicate the state body authorized to confirm the expiry of the constitutional terms fixed in Articles 66(2) and 66(3). The role of the “mediator or arbitrator” may be carried out by the Toraga (Speaker) of the Jogorku Kenesh. [see para 60]
- j) It is recommended that Article 51(3) be revised to ensure that rulings of the Constitutional Court on charges against the President are binding. [see para 61]
- k) It is recommended that the draft amendments to Article 58(10) which allow the Jogorku Kenesh to cast a vote of no confidence regarding an individual member of the Government be deleted, as, in practice, this may lead to unnecessary conflicts and, as a result, decreased efficiency. Instead it is recommended that the Government be held accountable to the Jogorku Kenesh as a collective body. [see para 63]
- l) It is recommended that Article 58(1)(3) be revised in order to ensure that the competence to interpret the this law,officially lies within the jurisdiction of the Constitutional Court as an independent judicial body. [see para 64]
- m) In light of the proposed amendments to Article 70(3) it remains unclear whether the first sentence of Article 71(2) creates a nexus between the election of the new President and a nomination for the post of the Prime Minister. The draft is recommended to be revised to clarify this issue. [see para 66]
- n) The two-thirds majority required for a successful vote of no confidence is deemed too excessive. It is therefore recommended to reconsider this requirement [see para 70].
- o) It is recommended that the legislature is not unreasonably restricted in its powers to initiate a vote of no confidence. It is also recommended to clarify the formulation of Article 72(3) concerning the situation of two votes of no confidence being cast within a period of three months [see para 71];

- p) It is recommended that the proposed amendment to Article 73(2) of the Constitution be reconsidered, as the new wording of this provision might constitute a potential source of conflict between the Government and the Jogorku Kenesh. [see para 72]
- q) It is recommended that Article 80 be amended to provide for lifetime tenure of judges. [see para 74]
- r) It is recommended that Article 64 be revised to divest the Supreme Court of its right of legislative initiative. [see para 75]
- s) The draft amendments to Article 82(1)(6) do not empower the Constitutional Court to assess the legality of the procedure of amendments and supplements to the Constitution, and therefore, need to be reconsidered. Furthermore, the proposed exclusion from Article 82(3) of the Constitutional Court's competence to hand down a decision on the constitutionality of the activities of political parties, non-governmental and religious organizations is not recommended. [see paras 76-77]
- t) The proposed amendments to Article 58(1)(12-14) transfer competence to elect judges to the Jogorku Kenesh. However, it is strongly recommended that the power to dismiss judges does not lie within this competence of the Jogorku Kenesh, as it will impede the independence of the judiciary. [see para 80]
- u) It is recommended that the scope of the powers conferred upon the Prosecutor's Office be reduced and specifically defined. The principles that need to be regulated on a constitutional level should provide the basis for comprehensive reform of the Prosecutors' office anchored in the principles of the rule of law and the separation of powers. Finally, it is recommended that the powers of the Prosecutor General as well as the structure and organization of bodies subordinate to him be regulated at the level of constitutional laws. [see para 82]
- v) It is recommended that the provisions of Article 95(1) defining the procedure of elections to local keneshes be reconsidered. [see para 84]
- w) It is also recommended to consider defining the scope of responsibility of local self-government stipulated in Article 95(5), as well as any possible sanctions which can be imposed if a body of the local self-government fails to fulfill its duties resulting from this constitutional provision.

However, these issues may also be dealt with at the level of specific legislation concerning local self-government. [see para 85]

12. The following recommendations do not concern provisions specifically affected by the proposed amendments, but are comments upon other provisions which would need to be considered in light of the implications of the proposed amendments:

- a) Although Article 44(4) which provides that “[t]he election of the President of the Kyrgyz Republic is considered valid if more than fifty per cent of all voters in the republic shall have taken part in the elections” is not subject to amendment, it is still recommended to consider amending it in order to exclude the possibility of a series of failed elections and an incentive for electoral malfeasance. [see para 57]
- b) It is recommended that the draft address the potential interpretative problems in relation to Article 73(5) of the existing Constitution. According to this article, the organization and procedure of the activities of the Government shall be defined by the constitutional law. Although the Prime Minister may decide upon the structure of the Government without any restraint (amendment to Article 70(2)), at the same time he/she is substantially constrained by the provisions of the constitutional law (Article 73(5) of the existing Constitution). [see para 67]

## **4. ANALYSIS AND RECOMMENDATIONS**

### ***4.1 General principles***

#### **4.1.1 Referendum and the procedure of constitutional amendment**

13. If the amendments to the Constitution are adopted, subsequent “*amendments and supplements to the Constitution of the Kyrgyz Republic*” cannot be “*submitted to referendum (nation-wide voting)*.”<sup>1</sup> Only “*the laws... and other issues of great nation-wide importance*” can be decided at a referendum. As far as constitutional reform is concerned, these amendments have to be read in conjunction with proposed new Article 96 (Chapter 8).
14. There is no unanimity among scholars and experts of constitutional and comparative law regarding the question whether constitutional amendments should necessarily be adopted by referendum. This matter ought to be left to the discretion of national authorities. The question is generally decided after due consideration of a number of parameters stemming from both the constitutional framework and the political realities.
15. Nevertheless, it is recommended for Article 1(5), which provides for the instances where a referendum shall be used, to provide also for the body competent to call a referendum and the effects of referendums. Concerning the question of convening a referendum on matters other than constitutional reform, it is important that legislative powers of the Jogorku Kenesh not be impeded or prejudiced. In this regard, one suggestion would be for legislation to be submitted to a referendum only with the prior consent of the Jogorku Kenesh.

### ***4.2 Human rights and freedoms***

16. In general, it is recommended to review the provisions that concern permissible limitations on the enjoyment of fundamental freedoms. Since the limitation clauses in the ICCPR vary slightly for freedom of religion, freedom of expression, and freedom of association, it is recommended that those differences be reflected by introducing parallel language in the Constitution.

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<sup>1</sup> Draft amendments, Article 1(5).

#### **4.2.1 Liberty and security of person**

17. The proposed amendments to Article 16(3) introduce very important elements ensuring the liberty and security of person by providing that “*nobody can be arrested and detained otherwise than on motivated decision by the Court and only on the grounds and according to procedure, fixed by the law... Every detained person must be immediately delivered to the court to solve the legality of his/her detainment.*” This fully corresponds to the international (in particular, the International Covenant on Civil and Political Rights<sup>2</sup>) and European human rights standards.

18. It should be noted, however, that the new wording of this article is repeated later in the first sentence of Article 18(3) of the current Constitution. For the sake of consistency, it is recommended not to repeat the same provision elsewhere in the text.

#### **4.2.2 Prohibition of arbitrary or unlawful interference with one’s privacy, family, home or correspondence**

19. The draft amendments go beyond simple confirmation of the protection of a person’s right to “*secrecy of correspondence, telephonic and telegraphic, postal and other communications*”, by also establishing everyone’s “*right to judicial defense in case of this right violation,*”<sup>3</sup> which is a welcomed development.

20. In addition, the draft amendment proclaims that “*every person has the right to inviolability of the home. Nobody has the right to enter the home against the will of persons residing in it.*” It also establishes that “*the search may be conducted only by the Court decision. In exceptional cases, stipulated by the law, the state authorities’ representatives are permitted to enter the home against the will of people, residing in it, with the purpose to conduct rescuing or operative-investigational actions. The legality and substantiation of such actions may be appealed in juridical procedure.*”<sup>4</sup>

#### **4.2.3 Prohibition of death penalty**

21. The proposed amendment to Article 18, which prohibits the death penalty in the Kyrgyz Republic, is welcome.

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<sup>2</sup> Acceded to by Kyrgyzstan on 7 October 1994. Full text of the document available at <http://www.ohchr.org/english/law/ccpr.htm> (last visited on 10 October 2005).

<sup>3</sup> Draft amendments, Article 16(5).

<sup>4</sup> *Id.*, Article 16(6).

#### **4.2.4 Equality before the law and the prohibition of discrimination**

22. According to Article 22, the law concerning the rights and duties of citizens should be applied equally to all citizens and not bestow on anyone advantages and privileges. The catalogue of exceptions to this general principle includes those envisaged by the Constitution and “*by laws for the social protection of citizens,*”<sup>5</sup> as well as, according to the draft amendments, by the “*laws on provision of equal rights for men and women.*”
23. Not only do the proposed amendments to Article 22(1) raise some important issues, but closer examination of the article as a whole reveals that it could be redundant and may as well be deleted from the text. The provisions of Article 15(3) already enshrine the principle of equality before the law and a general prohibition against discrimination. It is unclear what may be the specific purpose of Article 22(1) since it seems to duplicate the constitutional guarantee of equality before the law while providing for an inventory of lawful exceptions to this principle. For the purposes of consistency, the principle of equal rights and equal treatment, as well as the permissible exceptions thereto, should be set forth in one article.
24. As far as the exceptions themselves are concerned, the general lack of clarity regarding the purpose of Article 22(1) in turn also renders their specific purpose unclear. It may, however, be assumed that the exceptions included in the amendment shall be treated as exceptions from the general principle of equal treatment and non-discrimination (for instance, such as to establish the case for affirmative action). Should this be the case, the arbitrary selection of issues essentially limited to gender equality would be unacceptable.

#### **4.2.5 Freedom of religion or belief**

##### ***4.2.5.1 State interference with freedom of religion or belief***

25. The draft amendments to Article 8(3)<sup>6</sup> which, if adopted, would specifically require “*coordination with the proper state authorities*” as a prerequisite for a foreign

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<sup>5</sup> Current Constitution, Article 22(1).

<sup>6</sup>Draft amendments, Article 8(3) (“*Religion, all faiths, shall be separated from the State. Extension and propaganda of religions and cults humiliating the dignity of individual and contradicting the humanity principles are prohibited. The activity of foreign religious organizations at the territory of the Kyrgyz Republic as well as appointment of the leaders of religious organizations in the Kyrgyz Republic by foreign religious centers are to be carried out on coordination with the proper state authorities of Kyrgyz Republic according to the procedure fixed by law.*”)

religious organization's operation in the country, merit particular consideration as potentially encroaching on freedom of religion or belief.

26. The proposed amendment would amount to undue interference with religious autonomy thus violating the rights of both religious groups and of their individual members by limiting the legitimate range of religious activities. The amendment would be in violation of principle 16(d) of the OSCE Vienna Concluding Document,<sup>7</sup> which provides that participating States will “*respect the right of religious communities to ... select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State.*”<sup>8</sup>
27. Only in the case of specific religions that may voluntarily accept “state coordination” for example, coordination with a state church in countries that permit such arrangements—are the constraints involved in “coordination” permissible. Otherwise, the proposed amendment would allow unacceptable intervention by the State in matters of appointment of religious leaders. Requiring “*coordination with the proper state authorities,*” whether under the Constitution itself or under a “*procedure fixed by law,*” is clearly inconsistent with Kyrgyzstan’s OSCE commitments.
28. Furthermore, when autonomy rights of a religious group to carry out its distinctive activities conflict with other public policies, only the limitations permitted by Article 18(3) of the International Covenant on Civil and Political Rights should be allowed. The limitations on freedom of religion or belief that would be authorized by the proposed amendment go far beyond the narrow range of State actions that are permitted under Article 18(3) which provides that “[*f*]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” The interpretation of Article 18(3) by the U.N. Human Rights Committee is of relevance here as the Human Rights Committee specifically emphasizes that “[*l*]imitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated” and warns against the imposition of restrictions “*for discriminatory purposes*”.<sup>9</sup>

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<sup>7</sup> Concluding Document of the Vienna meeting 1986 of representatives of the participating States of the Conference on Security, and Co-operation in Europe. Full text of the document is available at [http://www.osce.org/documents/mcs/1986/11/4224\\_en.pdf](http://www.osce.org/documents/mcs/1986/11/4224_en.pdf).

<sup>8</sup> Emphasis added.

<sup>9</sup> U.N. Human Rights Committee General Comment No. 22 (48), adopted by the U.N. Human Rights Committee on 20 July 1993. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc HRI/GEN/1/Rev.1 at 35 (1994) (“*paragraph 3 of article 18 is to be strictly interpreted: restrictions are not*

29. Furthermore, the proposed amendment has implications for the principle of non-discrimination as it concerns movement across national borders. International law recognizes the State's authority to impose regulations concerning the entry of foreigners into the country. However, if a State creates purely religion-based criteria for exclusion, this may be inconsistent with the required religious neutrality of the State. The proposed amendment could operate to exclude individuals or groups solely because of religious considerations, as opposed to neutral and non-discriminatory criteria.
30. The above recommendations by no means lead to the conclusion that foreign religious organizations should enjoy a "safe haven" in Kyrgyzstan and cannot be called to account for manifestly illegal behavior. However, the Constitution already contains sufficient safeguards applicable to everyone irrespective of nationality; therefore the additional constraints devised specifically to prevent illegal acts by foreign religious groups appear to be both redundant and discriminatory.
31. It is therefore recommended that the proposed amendment in Article 8(3) be removed from the text of the amendments. It is also recommended to consider supplementing the relevant provisions in Article 16(7), which guarantee freedom of religion and belief in the Kyrgyz Republic, with a limitation clause stating that manifestations of religion may be limited only under the conditions permitted in Article 18(3) of the ICCPR. Consideration should also be given to moving the prohibition against "*religious cults which are degrading to the human dignity and contradict the principles of humanity*" from Article 8(3) (secular state) to Article 16(7) (human rights and freedoms, including freedom of religion and belief).

#### ***4.2.5.2 Freedom of religion or belief and freedom of expression***

32. Another potential concern arises with regard to Article 9(4) of the Draft, which provides that:

*The Kyrgyz Republic strives toward universal and just peace, mutually beneficial cooperation, resolution of global and regional problems by peaceful means, and shall observe the universally recognized principles of international law. Activities directed at disturbing the peaceful communal life of the people, propagandizing and igniting interethnic or religious strife shall not be allowed.*

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*allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner").*

33. Experience has shown that there is a substantial risk that well-intended but vague prohibitions on “hate speech” lead to situations in which public officials abuse their discretion by restricting the rights of political opponents or of religious minorities. The term “*religious strife*” is particularly problematic; it includes not only physical violence that violates individual rights, but religious disagreement and debate, which is protected. The proposed amendment in Article 9(4) is problematic in this respect.
34. It is recommended that the proposed amendment be revised to read: “*[a]ctions that pose an imminent danger to the peaceful communal life of the people, and propaganda and other conduct directly and imminently aimed at fomenting inter-ethnic or religious violence are prohibited.*” Similar changes narrowing the scope of the current religious hate speech clause of Article 8(3) should be considered. It is recommended that this provision be moved so that it becomes part of Article 16(7), and also for it to be interpreted with due respect for religious freedom. It is vital that hate speech provisions not be used as an excuse for censoring non-violent religious disagreement naturally arising from religious diversity and freedom to express such disagreement in peaceful ways.

#### 4.2.5.3 Freedom of religion or belief: General issues

35. The proposed amendment to Article 16(7) replaces the current version with “*[e]very person in the Kyrgyz Republic is entitled to ... freedom of belief, spiritual and religious freedom*” the currently existing provision that “*[e]veryone is guaranteed freedom of conscience, religion, religious or atheistic activities. Everyone is free to manifest any religion, or to manifest no religion, choose, have and propagate religious or atheistic beliefs.*”
36. The wording in the proposed provision is apparently intended to reflect the phrase in Article 18(1) of the ICCPR, which ensures that “*[e]veryone shall have the right to freedom of thought, conscience and religion.*” However, the proposed wording here is rather vague and even ambiguous.
37. A state committed to neutrality can appropriately remove the provision of the existing Constitution because of its arguable bias in favor of non-religious belief (i.e., the current language makes an inappropriate emphasis on the propagation of atheistic beliefs), while Kyrgyzstan’s international commitments oblige it to remain neutral by protecting freedom of religion or belief, including atheistic or agnostic beliefs. At the same time, as noted in connection with the analysis of Article 8(3) above, it would be helpful if there were a provision stating that claims on the violation of religious freedom can be overridden only in the case of a very narrow range of circumstances.

38. Arguably, Article 12(3) of the existing Constitution solves this problem by making the limitation clause of Article 18(3) of the ICCPR directly effective as part of Kyrgyz legislation. Similarly, Article 15(4) provides that “[h]uman rights and freedoms are valid in the Kyrgyz Republic . . . [and] determine the meaning, content and application of laws .” Article 15(4) goes on to state that the obligation to observe human rights is binding on all branches of government. Implicitly, the recognized limitations on these rights presumably apply. However, all of this is a rather elliptical way to ensure that limitations on freedom of religion or belief are not allowed to expand beyond their permitted scope under international law.
39. It is therefore recommended for the draft to provide that claims on the violation of religious freedom can be overridden only under specifically listed circumstances in accordance with international law.

#### **4.2.6 Social protection**

40. Both Articles 27 and 34 declare State responsibility to provide financial support to public and private healthcare. Article 27 as amended would guarantee social security on retirement, in case of illness and disability or loss of breadwinner and in any other cases provided for by law. It must be stressed that the effective implementation of these constitutional provisions would be contingent on the national budgetary capacity.

#### **4.2.7 The state language and the right to political participation**

41. The draft amendments to Article 5(2) seem to make an effort to remove the current anomaly when an “official” language (Russian) is different than the “state” language,<sup>10</sup> however, they stop short of remedying the problem as the only proposed change is the use of the “official” language “together with” the “state” language. It is unclear what this amendment may entail in practice, and what the intent behind the amendment may be.
42. Although the requirement in Article 43(3) that the President “has command of the state language” exists already in the Constitution as it stands now, it should nevertheless be commented upon since the proposed amendments to Article 5(2) may have been intended as a solution – albeit a partial one – to address the concerns arising out of this requirement.

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<sup>10</sup> Draft amendments, Article 5(2).

43. While not necessarily problematic in and of itself, the constitutional requirement that the President “*has command of the state language*” is used as the basis for a provision in the Election Code which requires conducting a language test for candidates seeking registration to run for the presidency. The ODIHR has previously expressed concern<sup>11</sup> with the use of the language test since it can serve to limit the possibilities for political participation by national minorities. In the Kyrgyz context, it has been used in the past to limit the possibilities for participation by opposition candidates.<sup>12</sup> It is therefore recommended that the amendment to Article 43(3) be reformulated so as not to unduly restrict candidacy rights.

#### ***4.3 The balance of powers: Relations between the constitutional bodies of the State***

44. Overall, the proposed amendments to the Constitution are welcome as they intend to clarify the mutual relations between the constitutional State bodies and to help avoid future conflicts. Having in mind the previous revision of the Constitution in the year 2003, and referring to the opinion on the draft amendments to that text adopted by the Venice Commission,<sup>13</sup> the new proposal presents another step forward in building a democratic constitutional state.

45. At the same time, it must be noted that some changes seem to give additional powers to the Jogorku Kenesh (Parliament) without in fact changing the current model of a presidential system. This raises concerns as to consistency and viability of the chosen model. However, the practical implementation of the amendments will provide the best test for this.

##### **4.3.1 Separation of powers**

46. As a general assessment, most amendments relating to central constitutional bodies of the State seem to express and emphasize the principle of the separation of powers mentioned in Article 7 of the Constitution. Thus, a proposed amendment to Article 7(1) which says that not only “*the nationally elected President*” of the country, but the “*Jogorku Kenesh (Parliament) of the Kyrgyz Republic*” “*represent and ensure... the supremacy of the power of the people*” of Kyrgyzstan, is definitely one

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<sup>11</sup> OSCE ODIHR, Kyrgyz Republic: Assessment of the Election Code as Amended by the Legislative Assembly in the Second Reading on 25 December 2003. Full text of the Assessment is available at [http://www1.osce.org/documents/html/pdfhtml/4382\\_en.pdf.html](http://www1.osce.org/documents/html/pdfhtml/4382_en.pdf.html).

<sup>12</sup> OSCE ODIHR, Kyrgyz Republic Presidential Elections, 29 October 2000: OSCE ODIHR Final Report (16 January 2001). Full text of the document is available at [http://www.osce.org/documents/html/pdfhtml/1383\\_en.pdf.html](http://www.osce.org/documents/html/pdfhtml/1383_en.pdf.html).

<sup>13</sup> Opinion No 229/2002, adopted by the Venice Commission at its 53rd Plenary Session (13-14 December 2002). Full text of the document is available at [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)033-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)033-e.asp) (last visited on 10 October 2005).

of the most advanced innovations, strengthening the legislative branch of government and making the separation of powers in the country more balanced. Article 7(1) is just the first norm in a whole set of new constitution provisions that puts Jogorku Kenesh (Parliament) on an equal footing with the Chief Executive.

47. It is noted that the new wording of this article does not mention the interaction between the legislative, executive and judicial branches as the element of execution of State power. It clearly expresses the element of separation. Obviously, this general principle may be affected by the other, more specific constitutional provisions concerning the role of each of the branches of power.

#### **4.3.4 The position of the president**

48. Draft amendments to Article 43 contain a very interesting innovation aimed at removing a loophole that could be used by a President (not only in Kyrgyzstan) to extend his or her stay in office beyond two consecutive terms: “[i]ntroduction of amendments and additions to this Constitution do not serve as the base for repeated election or for prolongation of powers of the active President of the Kyrgyz Republic.” Well-intended as it is, the proposed amendment still does not offer a viable solution since a subsequent amendment to the Constitution may well remove this particular provision. There seems to be no other remedy to this problem than an overall reinforcement of the balance and separation of powers.
49. The proposed amendments raise the upper age limit for a President from 65 to 70 years.<sup>14</sup> A citizen can run for President’s office if he/she has resided in the republic at least 15 years, in the aggregate, rather than uninterruptedly, which is positive in that the residency requirement will result in inclusiveness in the realization of passive voting rights.
50. As far as the powers of the President are concerned, the draft amendments to Article 46 do not introduce any significant changes in comparison with the existing Constitution. The President remains responsible for the appointment of the Prime Minister and submission of the Government,<sup>15</sup> nomination of the candidates for the

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<sup>14</sup> Draft amendments, Article 43(3).

<sup>15</sup> *Id.*, Article 46(1)(1-4) (“1) submit the structure of the Government of the Kyrgyz Republic, as proposed by the Prime Minister of the Kyrgyz Republic, to the Jogorku Kenesh of the Kyrgyz Republic for approval; 2) appoint and dismiss the Prime Minister of the Kyrgyz Republic with the consent of the Jogorku Kenesh of the Kyrgyz Republic; 3) appoint in consultation with the Prime Minister of the Kyrgyz Republic and with the consent of the Jogorku Kenesh of the Kyrgyz Republic, the members of the Government of the Kyrgyz Republic, and relieve them of their offices on his/her own initiative or in consultation with the Prime Minister of the Kyrgyz Republic and with the consent of the Jogorku Kenesh of the Kyrgyz Republic;

positions of the judges of the Supreme Court<sup>16</sup> as well as the Chair and judges of the Constitutional Court,<sup>17</sup> appointment and dismissal of the Chair, Deputy Chairs and Board Members of the National Bank.<sup>18</sup> Even though the draft amendments deprive the President of the power to direct the foreign policy of the Kyrgyz Republic, he/she would still possess wide competencies relating to the foreign affairs of the state.<sup>19</sup> Furthermore, other amendments intended to enhance the position of the Prime Minister and the Jogorku Kenesh (see details in the subsections on *The role of the Government* and *The role of the parliament*) do not undermine the general character of the presidential system, characteristic to the Kyrgyz Republic. Draft amendments to Article 46 also make further attempts to limit the presidential powers and redistribute them between other branches of government, in a more equal manner. For instance, if adopted, the amendments would allow the President to appoint and dismiss one-third of the Kyrgyz Republic Central Election and Referendum Commission or one-third of the Kyrgyz Republic Account Chamber and not one-half.<sup>20</sup>

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4) accept requests by the Government of the Kyrgyz Republic, the Prime Minister of the Kyrgyz Republic or an individual member of the Government to resign.”)

<sup>16</sup> *Id.*, Article 46(2)(2) (“nominates to Jogorku Kenesh of the Kyrgyz Republic the candidatures to the positions of the judges of the Kyrgyz Republic Supreme Court.”).

<sup>17</sup> *Id.*, Article 46(2)(1) (“presents to the Jogorku Kenesh of the Kyrgyz Republic candidates for election to the offices of Chairman of the Constitutional Court of the Kyrgyz Republic, his deputy, and judges of the Constitutional Court of the Kyrgyz Republic.”)

<sup>18</sup> *Id.*, Article 46(2)(5-6) (“5) appoints and dismisses with the consent of Jogorku Kenesh the Chairman of the National Bank of the Kyrgyz Republic,

6) appoints and dismisses with the consent of Jogorku Kenesh the Deputy Chairs and Board Members of the Kyrgyz Republic National bank.”)

<sup>19</sup> *Id.*, Article 46(3) (“The President of the Kyrgyz Republic: 1) conducts negotiations and signs international treaties of the Kyrgyz Republic; 2) signs instruments of ratification; 3) appoints after consultations with the respective committee of the Jogorku Kenesh of the Kyrgyz Republic and recalls diplomatic representatives of the Kyrgyz Republic in foreign states and international organizations; accepts the credentials and letters of recall of the heads of diplomatic missions of foreign states and representatives of international organizations accredited to the President of the Kyrgyz Republic; 4) decides questions of acceptance and forfeiture of citizenship in the Kyrgyz Republic and of granting political asylum.”)

<sup>20</sup> *Id.*, Article 46(6)(6, 8) (“6. The President of the Kyrgyz Republic: 1) has the right to call early meeting of the Jogorku Kenesh of the Kyrgyz Republic and to determine issues subject to consideration; 2) designates referendum on his own initiative, or decides to call referendum upon the initiative of no less than 300,000 voters or a majority of the total number of deputies of the Jogorku Kenesh of the Kyrgyz Republic; 3) calls elections to the Jogorku Kenesh of the Kyrgyz Republic, carries out early dissolution of the Jogorku Kenesh of the Kyrgyz Republic under the circumstances set forth in this Constitution; 4) calls elections to local Keneshes and carries out their early dissolution under the circumstances set forth in the law of the Kyrgyz Republic; 5) appoints and dismisses, with the consent of the Jogorku Kenesh of the Kyrgyz Republic, the Chairperson of the Central Election and Referendum Commission of the Kyrgyz Republic; 6) appoints and dismisses one-third of members of the Central Election and Referendum Commission of the Kyrgyz Republic; 7) appoints and dismisses, with the consent of the Jogorku Kenesh of the Kyrgyz Republic, the Chairperson of the Auditing Chamber of the Kyrgyz Republic; 8) appoints and dismisses one-third of auditors of the Auditing Chamber of the Kyrgyz Republic.

51. The amendments also limit the decree-making powers of the President.<sup>21</sup> If the current Constitution of Kyrgyzstan simply states that the “[p]resident of the Kyrgyz Republic issues decrees and orders”, the amendments establish that the President can exercise this power only “on the base of and with sanctions” of the Kyrgyz Constitution and its laws.
52. The amendments discussed in paragraphs 49-51 are welcome.
53. The draft amendment to Article 51 contains an extremely important norm streamlining regulations of the impeachment process and making it a working mechanism by removing the following “draconian” provision: “A negative ruling by the Constitutional Court of the Kyrgyz Republic on a charge made by the Jogorku Kenesh of the Kyrgyz Republic shall result in the dissolution of the Jogorku Kenesh of the Kyrgyz Republic.” The current norm (quoted) is an anomaly which conflicts with established constitutional standards on the impeachment procedure. The attempt to remove it is a welcome step.
54. Another welcome idea is the proposal to reduce the number of votes in the Jogorku Kenesh necessary for the impeachment of the President from “four-fifths” to “three-quarters.” In light of international practice, it could be further reduced to two-thirds. Nevertheless, “three-quarters” is certainly welcome step.
55. The proposed amendments to Article 49(2) certainly deserve mention. If passed, these amendments would require the Kyrgyz Republic to provide “support, service and protection” (at the “state expense”) to the President of the country only, and not to his/her family members. Similarly, proposed amendments to Article 53(4) stipulate that “financial support, services and security support” is to be provided to an ex-President, but not members of his/her family.
56. Unlike the current version of the Constitution, guaranteeing immunity to an ex-President,<sup>22</sup> the draft amendments authorize the Jogorku Kenesh to lift such immunity.<sup>23</sup>

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[...] 8. The President of the Kyrgyz Republic declares universal or partial mobilization; announces a state of war in the event of aggression or direct threat of aggression to the Kyrgyz Republic, promptly submits the issue for consideration of the Jogorku Kenesh of the Kyrgyz Republic; declares a state of war in the interests of the defense of the country and the safety of its citizens, and promptly submits the issue for consideration of the Jogorku Kenesh of the Kyrgyz Republic.”)

<sup>21</sup> *Id.*, Article 47(1) (“The President of the Kyrgyz Republic issues decrees and orders in the verges of his powers on the base of and to execute the Kyrgyz Republic Constitution and the laws of the Kyrgyz Republic.”)

<sup>22</sup> Extant Constitution, Article 53 (“2. Ex-President of the Kyrgyz Republic shall enjoy immunity. He cannot be subjected to criminal or administrative prosecution for all acts or non-actions related to his

57. Finally, although Article 44(4), which provides that “[t]he election of the President of the Kyrgyz Republic is considered valid if more than fifty per cent of all voters in the republic shall have taken part in the elections”, is not subject to amendment, it is still recommended to consider amending it. This constitutional provision gives rise to a similar provision in the Election Code. Since the entire election must be repeated in case of failure to meet the minimum turnout requirement, the 50 percent turnout requirement creates the possibility for a series of failed elections. In addition, the provision is conducive to electoral malfeasance, either to artificially depress or raise turnout.

#### **4.3.2 The role of the parliament**

58. Another positive aspect of the proposed amendments is the general intention to enhance the role of Jogorku Kenesh in the constitutional system. This conclusion results from the proposed new wording of Article 7(1) as well as the other constitutional provisions. The proposed Article 47(1) restricts the President’s law-making powers allowing him to issue decrees and orders only “*in verges of his powers on the base of and to execute the Constitution and the laws of the Kyrgyz Republic.*” It clearly prevents the President from assuming all legislative authority. In addition, the proposed amendments to Article 68<sup>24</sup> exclude the possibility to delegate the legislative powers of the Jogorku Kenesh to the President.
59. The position of the Jogorku Kenesh in the legislative process has been strengthened also by the proposed amendments to Article 66(2-3).<sup>25</sup> Eventual objections of the President to the law presented for his signature may be reconsidered by the Jogorku Kenesh without any additional terms. The proposed wording of Article 66(3)

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*tenure as President of the Kyrgyz Republic, as well as detained, arrested, subjected to search, examination or personal inspection. 3. Immunity of the ex-President of the Kyrgyz Republic shall extend to all of his personal and official residences and offices, to his means of transportation and to his communications, his archives and any other property, documents, baggage and correspondence.”)*

<sup>23</sup> Draft amendments, Article 53 (“2. *Ex-President may not be detained or arrested, subjected to search or personal inspection except when detained in the act of perpetrating a crime. He may be subjected to criminal and administrative prosecution only provided there is the consent of the Jogorku Kenesh of the Kyrgyz Republic.*”)

*3. Financial support, service and security support of an ex-President of the Kyrgyz Republic shall be made according to the procedures established by law.”)*

<sup>24</sup> *Id.*, Article 68 (“*The Jogorku Kenesh of the Kyrgyz Republic is not entitled to delegate its powers to other state authorities or officials.*”)

<sup>25</sup> *Id.*, Article 66(2-3) (“2. *The President of the Kyrgyz Republic, no later than one month after receiving the law, shall sign it or return it with his objections to the Jogorku Kenesh of the Kyrgyz Republic for reconsideration. 3. If upon reconsideration the law is approved in the earlier adopted version by majority vote of no less than two-thirds of the total number of deputies, then the law is to be signed by the President of the Kyrgyz Republic within one month after its receipt.*”)

expresses also the intention to give the last word in the legislative process to the Jogorku Kenesh, which is welcome.

60. The new provision of Article 66(4)<sup>26</sup> is also welcomed (see also the amendment to Article 59<sup>27</sup>). However, it is quite obvious that the President's refusal to sign the law will automatically cause a conflict with the Jogorku Kenesh. Should such a situation occur, the Constitution should indicate the state body authorized to confirm the expiry of the constitutional terms fixed in Articles 66(2) and 66(3). The role of the "mediator or arbitrator" may be carried out by the Toraga (Speaker) of the Jogorku Kenesh.
61. The position of the Jogorku Kenesh has been strengthened in the procedure of the impeachment. According to the proposed Article 51(3),<sup>28</sup> the Jogorku Kenesh has the right to make the final decision on the President's dismissal from office. A potential negative ruling of the Constitutional Court on charges made by the Jogorku Kenesh will not result in its dissolution. Furthermore, even if the Constitutional Court rules that the President is guilty; its ruling would not be binding for the Jogorku Kenesh. According to the proposed amendment, the Jogorku Kenesh may choose not to approve the Constitutional Court decision within the constitutional two month period. This ultimately means that the political body (Jogorku Kenesh) may verify the judicial decision of the Constitutional Court. It is recommended that a ruling of the Constitutional Court on charges against the President should be binding on the Jogorku Kenesh.
62. As already noted above in the subsection *The position of the president*, the proposed Article 52(1) introduces a better separation of competencies between Toraga (Speaker) of the Jogorku Kenesh and the Prime Minister in case of President's inability to fulfill his duties.
63. The amended Article 58<sup>29</sup> enumerates the powers of the Jogorku Kenesh. Although probably proposed with an intention to improve the balance of powers, the

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<sup>26</sup> *Id.*, Article 66(4) ("If the President of the Kyrgyz Republic does not sign a law within the terms fixed by points 3 and 4 thereof, then this law is deemed as signed and subject to publication.")

<sup>27</sup> Removing the words "A law cannot come into force and be published until its signing by the President of the Kyrgyz Republic."

<sup>28</sup> Draft amendments, Article 51(3) ("With regard for conclusion by the Kyrgyz Republic Constitutional Court on accusation, brought by the Kyrgyz Republic Jogorku Kenesh against the President of the Kyrgyz Republic for his impeachment, the decision of the Jogorku Kenesh of the Kyrgyz Republic is to be taken by the majority of at least three quarters of votes from the total number of the Kyrgyz Republic Jogorku Kenesh's deputies, not later than in 2-month period from the date of accusation brought by the Jogorku Kenesh of the Kyrgyz Republic. If the decision of the Jogorku Kenesh is not approved within the said period of time, the accusation shall be deemed to be rejected.")

<sup>29</sup> *Id.*, Article 58 ("1. The work of the Jogorku Kenesh of the Kyrgyz Republic includes:

- 1) introduction of amendments and supplements to the Constitution of the Kyrgyz Republic in the procedure established by the Constitution;
- 2) adoption of laws of the Kyrgyz Republic;
- 3) official interpretation of the laws passed by Jogorku Kenesh;
- 4) alteration of the borders of the Kyrgyz Republic;
- 5) approval of the republican budget and the report on its implementation, nation-wide programs for social and economic development submitted by the Government of the Kyrgyz Republic;
- 6) deciding matters of administrative and territorial structure of the Kyrgyz Republic;
- 7) appointment of elections for Presidency of the Kyrgyz Republic;
- 8) approval of the structure of the Government of the Kyrgyz Republic recommended by the President of the Kyrgyz Republic;
- 9) giving consent to the appointment of the Prime Minister of the Kyrgyz Republic, members of the Government of the Kyrgyz Republic;
- 10) giving a no confidence vote to the Prime Minister of the Kyrgyz Republic, to individual members of the Government of the Kyrgyz Republic by a majority of at least two thirds of votes of all deputies or to the Government of the Kyrgyz Republic at large;
- 11) election and dismissal, upon nomination by the President of the Kyrgyz Republic, of the Chairman of the Constitutional Court of the Kyrgyz Republic, his deputy, and judges of the Constitutional Court of the Kyrgyz Republic;
- 12) election and dismissal of local courts' judges by recommendation of the President of Kyrgyz Republic;
- 13) giving the consent to appointment and dismissal of local courts' judges
- 14) giving the consent to appointment and dismissal of local courts' chairmen and deputy chairmen;
- 15) giving consent to appointment of the General Prosecutor of the Kyrgyz Republic;
- 16) giving consent to appointment of the Chairperson of the National Bank of the Kyrgyz Republic;
- 17) giving consent to appointment of Deputy Chairpersons of the National Bank of the Kyrgyz Republic and Board members of the National Bank of the Kyrgyz Republic;
- 18) election of one-half of the members of the Central Electoral and Referendum Commission;
- 19) election and recall of 1/3 members of the Central Electoral and Referendum Commission of the Kyrgyz Republic by proposal of the Kyrgyz Republic Jogorku Kenesh deputies and 1/3 membership by proposal of public organizations.
- 20) giving the consent to appointment and relieve of the chairman of the Kyrgyz Republic Auditing Chamber;
- 21) election and recall of 1/3 auditors staff of the Kyrgyz Republic Auditing Chamber by proposal of the Kyrgyz Republic Jogorku Kenesh deputies and 1/3 of staff by proposal of public organizations.
- 22) election and dismissal of the Ombudsman (Akyikatchi) of the Kyrgyz Republic and his deputies;
- 23) giving consent to subjecting the Ombudsman (Akyikatchi) of the Kyrgyz Republic and his deputies to criminal and administrative prosecution in accordance with judicial procedures;
- 24) ratification and denunciation of international treaties;
- 25) introduction of states of emergency, authorization or annulment of decrees of the President of the Kyrgyz Republic concerning this issue;
- 26) deciding matters of war and peace; introducing the state of war; and authorization or annulment of decrees of the President of the Kyrgyz Republic about these issues;
- 27) deciding matters about the possibility of using the Armed Forces of the Kyrgyz Republic beyond its borders when necessary to fulfill international treaty obligations in support of peace and security;
- 28) establishing of military ranks, diplomatic ranks, class categories and other special titles of the Kyrgyz Republic;
- 29) establishment of state awards and honorary titles of the Kyrgyz Republic;
- 30) issuing acts of amnesty;
- 31) hearing addresses and statements by the President of the Kyrgyz Republic, speeches of the leaders and other representatives of foreign countries, international organizations;
- 32) hearing annual reports of the Constitutional court of the Kyrgyz Republic on the status of the constitutional legality in the country, of the Ombudsman (Akyikatchi) of the Kyrgyz Republic - on the state of affairs in the country in the field of human and civil rights and freedoms;

amendment allowing the Jogorku Kenesh to cast a vote of no confidence regarding an individual member of the Government may actually lead to unnecessary conflicts and result in decreased efficiency. It is recommended that the Government be held accountable to the Jogorku Kenesh as a collective body.

64. A major concern arises with regard to the amended Article 58(1)(3) of the Constitution. Although the Jogorku Kenesh has lost its competence to interpret the Constitution, it is still empowered to make an official interpretation of adopted laws. Imprecise wording of this provision may suggest that this interpretation shall be binding upon other entities, including the courts. It raises an issue of the relation between this power of the Jogorku Kenesh and tasks of the Constitutional Court resulting from Article 82(3) of the Constitution. It is recommended that Article 58(1)(3) be revised to ensure that the competence to officially interpret current law lies within the jurisdiction of the Constitutional Court as an independent judicial body.
65. An important amendment is proposed with regard to Article 65(5).<sup>30</sup> It clearly widens the scope of draft laws which may be submitted to the Jogorku Kenesh based solely on a prior proposal from the Government.
66. According to the proposed amendments to Articles 70(2) and 70(3)<sup>31</sup> the composition of the Government will now emanate from the elected Jogorku Kenesh. Unlike the current Constitution, the entry into office of a newly elected

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33) *hearing annual reports of the Prime Minister of the Kyrgyz Republic, General Prosecutor of the Kyrgyz Republic, Chair of the National Bank of the Kyrgyz Republic, Chair of the Accounting Chamber of the Kyrgyz Republic;*

34) *dismissal of the President of the Kyrgyz Republic from office.*

*Hearing of annual reports of bodies and officials specified in this point shall be conducted with account of the rules established in this Constitution and laws of the Kyrgyz Republic on autonomy and independence of the respective bodies and their officials.*

35) *adoption of the rules of procedure of Jogorku Kenesh*

*2. The Jogorku Kenesh of the Kyrgyz Republic takes resolutions on issues indicated in Subparagraphs 2-22 and 31-33 p. 1 thereof, and also on issues related to control over the laws observation.*

*3. Laws and resolutions of the Jogorku Kenesh of the Kyrgyz Republic shall be adopted by majority of votes of the deputy corps of the Jogorku Kenesh of the Kyrgyz Republic unless this Constitution provides for other procedure of their adoption.”)*

<sup>30</sup>*Id.*, Article 65(5) (“*The draft laws budgeting increase of expenses, covered on account of the state budget or decrease of its revenues, on abolition of taxes, exemption from their payment, on amendment of financial liabilities of the state may be submitted to the Kyrgyz Republic Jogorku Kenesh at availability of the conclusion by the Kyrgyz Republic Government.*”)

<sup>31</sup> *Id.*, Article 70 (“*2. The activity of the Cabinet of the Kyrgyz Republic is headed by the Prime Minister of the Kyrgyz Republic. The structure of the Kyrgyz Republic Government shall be approved by the law.*

*3. The election of new composition of the Kyrgyz Republic Jogorku Kenesh, entails the resignation of the Kyrgyz Republic Government pursuant to the procedure and in terms fixed by the Kyrgyz Republic legislation.”)*

President will not result in the resignation of the Government. According to Article 71(2) or the existing Constitution, a nomination of a candidate for the Prime Minister is submitted to the Jogorku Kenesh no later than two weeks after entry into office of the newly elected President. However, serious concerns arise with regard to Article 71(2) of the Constitution. In the light of the proposed amendments to Article 70(3) it remains unclear whether the first sentence of Article 71(2) creates a nexus between the election of the new President and a nomination for the post of the Prime Minister.

#### **4.3.3 The role of the government**

67. Under the proposed amendments, the Constitution will not specify the obligatory structure of the Government thereby giving the Prime Minister more flexibility in this matter. However, in light of these changes some interpretative problems may arise in relation to Article 73(4) of the existing Constitution.<sup>32</sup> According to this article, the organization and procedure of the activities of the Government shall be defined by constitutional law. Although the Prime Minister may decide upon the structure of the Government without any restraint (amendment to Article 70(2)), at the same time he/she is substantially constrained by the provisions of the constitutional law (Article 73(4) of the existing Constitution).
68. Overall, the amendments relating to the position of the Government seem intent on introducing elements which are more characteristic of a parliamentary model. A tendency to strengthen the position of the Government in relation to the President is clearly seen. This intention may be seen in the proposed amendment to the Article 72(1) which excludes the possibility for the President to preside at the sitting of the Government. According to this article, the Government in its activities shall be responsible not only to the President, but also to the Jogorku Kenesh.
69. Additionally, the Jogorku Kenesh may decide to call the Government to account by using the procedure of the vote of no confidence. Pursuant to Article 72(3), the Jogorku Kenesh may cast such a vote following the consideration of an annual report. However, at this stage, the President is not bound by the vote and the Government may continue in power. It is only if another vote of no confidence is cast within three months after the first vote that, according to the proposed amendments, the government would be required to resign if the vote is successful. This stands in contrast to the current Constitution, which stipulates that the President may alternatively opt for dissolving the Jogorku Kenesh. A successful

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<sup>32</sup> Current Constitution, Article 73(4) (“*Organization and procedure of the activities of the Cabinet of the Kyrgyz Republic is defined by the constitutional law.*”)

vote of no confidence requires a qualified majority of two-thirds of the deputies. Moreover, the number of times a vote of no confidence may be attempted is limited. Taken together these two features (limits on the timing of votes of no confidence and qualified majority requirement) distinguish the Kyrgyz system from parliamentary systems.

70. The qualified majority requirement makes it possible for a government to continue in power without the support of two-thirds of the deputies in the Jogorku Kenesh. This could have a serious impact on the ability of the government to carry out its responsibilities under e.g. Article 73(3) (taxing and budget; health policy, culture, welfare, education, etc). As a result of this requirement, the government would not be able to fulfill its responsibilities by passing the laws needed to implement its policies. It is therefore recommended that this rule be made less stringent.
71. Moreover, the requirement that a vote of no confidence may only be cast when the government presents its annual report to the Jogorku Kenesh seems to be in conflict with the provision, which states that the Government must resign only after a successful vote of no confidence has taken place within three months after the first such vote. It is recommended that the formulation of the relevant paragraphs of this provision be revised so as to dissipate any possible misunderstanding. Furthermore, it is to be noted that, in principle, the legislature should not be unreasonably restricted in its power to initiate a vote of no confidence.
72. Finally, it is recommended that the proposed amendment to Article 73(2) of the Constitution be reconsidered, as the new wording of this provision may become a potential source of conflict between the Government and the Jogorku Kenesh. On the basis of this article the Jogorku Kenesh will be able to require the Government to ensure enforcement of such legal acts (resolutions) which have a lower legal status compared to binding laws. It clearly contradicts the general principle of the separation between the legislative and executive powers of the state.

#### **4.4 Judiciary**

73. Although the amendments proposed to the provisions concerning the organization of the judiciary in the Kyrgyz Republic seem generally intended to strengthen the independence of courts and judges, there are a number of serious concerns which remain.
74. One issue that calls for particular attention is the tenure of judges. The independence of the judiciary is put into question as long as a judge remains elected or appointed for only a specified period of time. Proposed amendments to Articles

80(5) and 80(6)<sup>33</sup> only extend the tenures for the judges, which does not offer a real solution. The full independence of the judges should be guaranteed by their appointment for an indefinite period. While the relevant international standards such as the United Nations Basic Principles on the Independence of the Judiciary<sup>34</sup> and the Council of Europe Recommendation R(94)12 on the Independence, Efficiency and Role of Judges<sup>35</sup> do not explicitly require that the judicial tenure be for a lifetime, but rather provide that “[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists,”<sup>36</sup> this provision should be understood as the principle of absolute security of tenure for judges, meaning that “a permanently appointed judge cannot be removed from office without valid reasons before he reaches the mandatory retirement age,”<sup>37</sup> with the only exceptions being applicable to “cases where either judges have to be re-elected after a certain period or some judges undergo a period of “probation” when they first take up their duties.”<sup>38</sup>

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<sup>33</sup> Draft amendments, Article 80 (“The citizen of the Kyrgyz Republic under the age of 70, having higher juridical education and at least 10-year working experience can be the judge of the Kyrgyz Republic Constitutional Court.

*The citizen of the Kyrgyz Republic under the age of 70, having higher juridical education and at least 5-year working experience can be the judge of the Kyrgyz Republic Supreme Court.*

*The judges of constitutional court of the Kyrgyz Republic and Supreme Court of the Kyrgyz Republic are to be elected for the term of 15 years by the Kyrgyz Republic Jogorku Kenesh by presentation of the Kyrgyz Republic President.*

*The Chairman of the Kyrgyz Republic Supreme Court and his deputies are to be elected for 5 years from judges of the Kyrgyz Republic Supreme Court by the plenum of the Supreme Court of the Kyrgyz Republic.*

*6. A citizen of the Kyrgyz Republic not younger than 25 years of age and not older than 65 years of age who holds a law degree and has worked for at least five years in the legal profession may become a judge of a local court.*

*Judges of local courts shall be appointed by the President of the Kyrgyz Republic with the consent of the Jogorku Kenesh of the Kyrgyz Republic first for a term of 5 years and next for a term of 15 years.*

*Chairpersons of local courts of the Kyrgyz Republic and their deputies shall be appointed by the President of the Kyrgyz Republic with the consent of the Jogorku Kenesh of the Kyrgyz Republic from among judges of local courts for a term of five years; chairpersons of local courts of the Kyrgyz Republic and their deputies shall be dismissed by the President of the Kyrgyz Republic with the consent of the Jogorku Kenesh of the Kyrgyz Republic.”).*

<sup>34</sup> United Nations Basic Principles on the Independence of the Judiciary. Full text of the document is available at [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm) (last visited on 10 October 2005).

<sup>35</sup> Council of Europe Recommendation R(94)12 on the Independence, Efficiency and Role of Judges. Full text of the document is available at [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Legal\\_professionals/Judges/Instruments\\_and\\_documents/Rec\\_94\\_12E%20+%20explanatory%20memorandum.pdf](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Legal_professionals/Judges/Instruments_and_documents/Rec_94_12E%20+%20explanatory%20memorandum.pdf) (last visited on 10 October 2005).

<sup>36</sup> *Id.*, Principle I(3).

<sup>37</sup> Explanatory memorandum to the Council of Europe Recommendation R(94)12 on the Independence, Efficiency and Role of Judges. Full text of the document is available at [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Legal\\_professionals/Judges/Instruments\\_and\\_documents/Rec\\_94\\_12E%20+%20explanatory%20memorandum.pdf](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Legal_professionals/Judges/Instruments_and_documents/Rec_94_12E%20+%20explanatory%20memorandum.pdf) (last visited on 10 October 2005).

<sup>38</sup> *Id.*

75. In addition, the independence of the judiciary may be seriously endangered as a result of the proposed addition of the right to legislative initiative to the powers of the Supreme Court by Article 64 of the Constitution. The Supreme Court as one of the main bodies composing the judiciary in the Kyrgyz Republic should not be involved in the political processes which take place while negotiating enforcement of specific legislation in the Jogorku Kenesh (Parliament). Therefore, the addition giving legislative initiative to the Supreme Court is recommended to be removed.
76. Furthermore, with regard to amendments to Article 82(3)<sup>39</sup> enumerating the powers of the Constitutional Court, it must be stressed that the Constitutional Court as the highest judiciary body in the Kyrgyz Republic should have an opportunity to assess the legality of the procedure of amendments and supplements to the Constitution. The draft amendments to Article 82(1)(6) do not provide for this kind of power of the Constitutional Court.
77. Furthermore, the exclusion of competence to hand down a decision on the constitutionality of the activities of political parties, non-governmental and religious organizations<sup>40</sup> is not recommended as it is clearly one of the elements intended to protect the Constitution in a democratic state. The Venice Commission Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures<sup>41</sup> explicitly require that “[t]he prohibition or dissolution of a political party should be decided by the Constitutional court or other appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial.” The same reasoning should apply to various civil society organizations such as NGOs because of civil society’s central role as an indispensable element and indeed one of the pillars of democracy.
78. At the same time, the added possibility to issue decisions on the constitutionality of implementation of laws affecting “*constitutional rights of citizens*” is considered a

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<sup>39</sup> Draft amendments, Article 82(3) (“*The Constitutional Court: 1) declares laws and other normative legal acts unconstitutional if they contradict the Constitution of the Kyrgyz Republic; 2) decides disputes concerning the effect, use and interpretation of the Constitution of the Kyrgyz Republic; 3) determines the validity of elections of the President of the Kyrgyz Republic; 4) issues a determination concerning the removal from office of the President of the Kyrgyz Republic as well as judges of the Constitutional Court, the Supreme Court of the Kyrgyz Republic; 5) gives its consent to the criminal prosecution of judges of local courts; 6) annuls the decisions of bodies of local self-governance which contradict the Constitution of the Kyrgyz Republic; 7) takes decision on constitutionality of the law implementation affecting constitutional results of citizens.*”)

<sup>40</sup> Compare with Article 82(3)(8) of the existing Constitution.

<sup>41</sup> Venice Commission, Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures (adopted at the 41st plenary session of the Venice Commission, 10-11 December 1999). Full text of the document is available at [http://www.venice.coe.int/docs/2000/CDL-INF\(2000\)001-e.asp](http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp) (last visited on 10 October 2005).

positive development. It may give rise to the specific form of complaints concerning constitutional infringements as an essential means for the defense of freedom and rights.

79. Articles 83<sup>42</sup> and 84<sup>43</sup> of the Draft are obviously intended to create the proper conditions for the activity of the courts and guarantee their independence. An important provision in this regard is contained in the proposed amendments to Article 84, which states that the courts manage the funds allotted from the national budget, independently.
80. Some final concerns with regard to the judiciary refer to the procedure of dismissal of judges of the local courts as well as the chairs and deputy chairs of the local courts. The proposed amendments to Article 58(1)(11-14)<sup>44</sup> transfer the election of judges within the competence to the Jogorku Kenesh. However, it is strongly recommended that the dismissal of judges does not come within the competence of the Jogorku Kenesh as it may impede the independence of the judiciary.

#### ***4.5 The Office of the Prosecutor***

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<sup>42</sup> Draft amendments, Article 83 (“1. *The Supreme Court of the Kyrgyz Republic is the highest body of judicial power in the sphere of civil, criminal and administrative legal proceedings, as well as other cases provided by law.* 2. *The panels of judges and their compositions are to be formed under the Kyrgyz Republic Supreme Court, the powers of which are determined by laws.* 3. *The Supreme Court of the Kyrgyz Republic supervises the judicial activity of local courts in the form of revision of judicial acts related to claims of the parties of legal proceedings.* 4. *Plenum of the Supreme Court of the Kyrgyz Republic consisting of all judges of the Supreme Court has the right to give clarifications on the issues of court practice which will be binding for all lower courts.*”)

<sup>43</sup> *Id.*, Article 84 (“*The state ensures financial support and proper conditions for operation of courts and judicial activities. Financial support of courts shall be from the funds of the republican budget and must secure the possibility of full and independent administration of justice in compliance with law. The Court manages the funds allotted from republican budget independently.*”)

<sup>44</sup> *Id.*, Article 58 (“11) *election and dismissal, upon nomination by the President of the Kyrgyz Republic, of the Chairman of the Constitutional Court of the Kyrgyz Republic, his deputy, and judges of the Constitutional Court of the Kyrgyz Republic;* 12) *election and dismissal of Supreme Court judges by recommendation of the President of Kyrgyz Republic;* 13) *giving the consent to appointment and dismissal of local courts’ judges;* 14) *giving the consent to appointment and dismissal of local courts’ chairmen and deputy chairmen.*”)

81. The proposed amendments to Article 78<sup>45</sup> do obviously not purport to introduce the basis for a comprehensive reform of the Office of the Prosecutor (*Prokuratura*) in the Republic of Kyrgyzstan. These provisions would seemingly leave unchanged a system where public prosecution bodies are part of the executive and exercise a wide range of powers out of which prevails a broad and general “supervisory” function crossing over all branches of government. The introduction of an appointment procedure in paragraph 2 of this Article rather strengthens this perception. Similarly, the proposed amendments that make the Prosecutor General responsible both to the President and to the Jogorku Kenesh seem to retain the legacy of the past.
82. While there is a lack of universally recognized standards in respect of Office of the Prosecutor, a number of guiding principles have emerged over time.<sup>46</sup> The common denominator is the emphasis placed on the respect of all elements that form the bed rock of the rule of law. These include, the principle of the separation of powers, the principle of legal certainty and the principle of ‘equality of arms’. It is therefore recommended that these principles that would need to be regulated on constitutional level constitute the basis for comprehensive reform of the Office of the Prosecutor based on the above-mentioned key parameters. Finally, it is recommended that the powers of the Prosecutor General as well as the structure and organization of bodies subordinate to him be regulated at the level of constitutional laws.

#### **4.6 Local self-government**

83. The proposed amendments to Article 92 strengthen the independence of local self-government in terms of both actual and financial independence. While the inclusion of provisions stating that “[t]he deputy of a local kenesh is to be elected for 5-year term and cannot be persecuted for expression of own opinion and voting at local Kenesh,”<sup>47</sup> “local keneshes act independently from local state

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<sup>45</sup> *Id.*, Article 78 (“1. The bodies of public prosecutor’s office carry out supervision over strict uniform observation of the Kyrgyz Republic laws, take part in court proceedings on defense of human rights and liberties, legal interests of state and individual, execute criminal prosecution in cases and due to procedure stipulated by the law.

2. The bodies of public prosecutor’s body of the Kyrgyz Republic form the integrate system, led by the General prosecutor of the Kyrgyz Republic appointed by the President of the Kyrgyz Republic on consent of the Kyrgyz Republic Jogorku Kenesh for the term of 7 years.

3. The Kyrgyz Republic General Prosecutor is responsible to the President of the Kyrgyz Republic and the Jogorku Kenesh of the Kyrgyz Republic.

4. The legislation determines powers, structure and order of functioning of the Kyrgyz Republic Prosecutor’s Office bodies.”)

<sup>46</sup> For a detailed presentation of European standards relating to the Prosecutor’s office, see Venice Commission Opinion No. 340/2005 on the “Federal Law on the *Prokuratura* (Prosecution’s Office) of the Russian Federation” adopted at its 63<sup>rd</sup> plenary session (Venice, 10-11 June 2005), CDL-AD(2005)014.

<sup>47</sup> Draft amendments, Article 95(1).

*administration,”<sup>48</sup> and “local keneshes and other bodies of self-government are responsible to the state for observation and fulfillment of laws and to local community – for results of own activities”<sup>49</sup> reinforces the actual independence of local self-government, the proposed amendments to Article 92 strengthen the financial and economic basis for its independence by providing that “[t]he municipal property and other movable and immovable property of local communities, tax and non-tax sources of local budget incomes, revenues from use and management of municipal property, credit and other resources formed in order fixed by the law constitute financial and economic basis of local self-government.”*

84. However, the proposed amendments to Article 95(1) providing for the procedure of the elections to the local keneshes may raise certain concerns. According to the Draft, a half of all deputies to a local kenesh will be elected in unified electoral area on the basis of proportional electoral system while another half will be elected using the majority system. This solution cannot be automatically subjected to criticism especially in light of those amendments which relate to the election of the Jogorku Kenesh. However, the electoral system should always be adapted to the specifics of the territorial division of the state. As practice has shown, the proportional electoral system would be at a risk of malfunctioning if introduced in relation to small units of local self-government.
85. It is also recommended to define the forms of responsibility of local self-government in Article 95(5), as well as any possible sanctions which can be imposed if a body of local self-government fails to fulfil its duties resulting from this constitutional provision. However, these issues may also be dealt with at the level of more specific legislation concerning local self-government.

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<sup>48</sup> *Id.*, Article 95(3).

<sup>49</sup> *Id.*, Article 95(5).