Strasbourg / Warsaw 19 October 2016 **CDL-AD(2016)025**

Venice Commission Opinion No. 863 /2016 Or. Engl.
ODIHR Opinion No. CONST-KG/ 294/2016

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

KYRGYZ REPUBLIC

JOINT OPINION

ON THE DRAFT LAW "ON INTRODUCTION OF AMENDMENTS AND CHANGES TO THE CONSTITUTION"

Endorsed by the Venice Commission
at its 108th Plenary Session
(Venice, 14-15 October 2016)

on the basis of comments by

Mr Aivars ENDZIŅŠ (Member, Latvia)
Mr Nicolae ESANU (Member, Moldova)
Mr Gagik HARUTYUNYAN (Member, Armenia)
Ms Taliya KHABRIEVA (Member, Russian Federation)
OSCE/ODIHR Experts

Table of Contents

I. Introduction

1. On 15 August 2016, Mr. Shykmamatov, Acting Chairperson of the Committee on Constitutional Legislation, State Structures and Regulations of the *Jogorku Kenesh* (Parliament) of the Kyrgyz Republic, sent a letter in which he requested the OSCE/ODIHR, in co-operation with the Venice Commission, to review draft amendments to the Constitution of the Kyrgyz Republic (hereinafter the "Draft Amendments") proposed in the Draft Law "On Introduction of Amendments and Changes to the Constitution of the Kyrgyz Republic" (hereinafter "the Draft Law", CDL-REF(2016)051). The OSCE/ODIHR received this letter on 16 August 2016.

2. By letter of 18 August 2016, the OSCE/ODIHR invited the Venice Commission to prepare a joint opinion on the Draft Amendments to assess their compliance with international human rights and rule of law standards and OSCE commitments. In view of the urgency of the matter, as the period for public consultations on the Draft Amendments was scheduled to end on 29 August 2016, the OSCE/ODIHR and the Venice Commission agreed to prepare a Preliminary Joint Opinion on the compliance of the Draft Amendments with international human rights standards and OSCE commitments.

3. On 23 August 2016, the OSCE/ODIHR Director responded to the letter received from the Acting Chairperson of the Committee on Constitutional Legislation, State Structures and Regulations, confirming the readiness of the OSCE/ODIHR to review the Draft Amendments jointly with the Venice Commission.

4. Mr Endziņš, Mr Esanu, Mr Harutyunyan and Ms Khabrieva were appointed as rapporteurs for the Venice Commission.

5. In 2015, the OSCE/ODIHR and the Venice Commission had already reviewed and issued a Joint Opinion on previous Draft Amendments to the Constitution of the Kyrgyz Republic (hereinafter "2015 Joint Opinion").[1] Before that, notably in 2010, the OSCE/ODIHR and the Venice Commission had also supported constitutional reform efforts in the Kyrgyz Republic and prepared a number of legal reviews on different Kyrgyz legislation, mostly pertaining to the judiciary and certain courts, including the Supreme Court and its Constitutional Chamber.[2]

---

[1] OSCE/ODIHR and Venice Commission, *Joint Opinion on the Draft Law on Introduction of Changes and Amendments to the Constitution of the Kyrgyz Republic*, 22 June 2015, available at http://www.legislationline.org/documents/id/19831.

[2] See e.g., OSCE/ODIHR and Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, available at http://www.legislationline.org/documents/id/19099; Venice Commission, *Opinion on the Draft Constitutional Law on Introducing Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic*, CDL-AD(2014)020, 16 June 2014, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)020-e; Venice Commission, *Opinion on the Draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan*, CDL-AD(2011)018-e, 20 June 2011, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)018-e; Venice Commission, *Opinion on the Draft Constitution of the Kyrgyz Republic*, CDL-AD(2010)015, 8 June 2010, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)015-e; Venice Commission, *Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan*, CDL-AD(2008)041, 16 December 2008, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)041-e; Venice Commission, *Opinion on the Constitutional Law on bodies of Judicial self-regulation of Kyrgyzstan,* CDL-AD(2008)040, 16 December 2008, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)040-e; Venice Commission, *Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan*, adopted by the Venice Commission at its 77th Plenary Session, CDL-AD(2008)039, 16 December 2008, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)039-e; Venice Commission, *Opinion on the Constitutional Law on Court Juries of Kyrgyzstan*, CDL-AD(2008)038, 16 December 2008, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)038-e; Venice Commission, *Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan*, CDL-AD(2008)029, 24 October 2008, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)029-e; Venice Commission, *Opinion on the Constitutional situation in the Kyrgyz Republic,* CDL-AD(2007)045, 17 December 2007, available at

6. Due to the short time available, it was not possible to organise a visit to the Kyrgyz Republic. The present Preliminary Joint Opinion was prepared on the basis of contributions from the Venice Commission's rapporteurs and OSCE/ODIHR experts; it was sent to the Kyrgyz authorities as a preliminary joint opinion and made public on 30 August 2016. The Venice Commission endorsed this opinion by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016)

II. Scope of the Preliminary Joint Opinion

7. The scope of this Preliminary Joint Opinion covers only the Draft Amendments, submitted for review. Thus limited, the Preliminary Joint Opinion does not constitute a full and comprehensive review of the entire constitutional framework of the Kyrgyz Republic.

8. The Preliminary Joint Opinion identifies key issues and provides indications of areas of concern. The ensuing recommendations are based on relevant international human rights and rule of law standards and OSCE commitments, Council of Europe and UN standards, as well as good practices from other OSCE participating States and Council of Europe member states. Where appropriate, they also refer to the relevant recommendations made in previous OSCE/ODIHR and Venice Commission opinions and reports.

9. Moreover, in accordance with the commitments of the OSCE and the Council of Europe to mainstream a gender perspective into all policies, measures and activities,[3] the Preliminary Joint Opinion also analyses the potentially different impact of the Draft Amendments on women and men and ensure that a gender equality perspective is integrated as part of the legal analysis.

10. This Preliminary Joint Opinion is based on an unofficial English translation of the Draft Amendments. Errors from translation may result.

11. In view of the above, this Preliminary Joint Opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation of the Kyrgyz Republic that the OSCE/ODIHR and/or the Venice Commission may make in the future.

III. Background

12. The 2010 Constitution of the Kyrgyz Republic was drafted and adopted by referendum in June 2010. At the time, the Venice Commission and the OSCE/ODIHR had supported the process of amending the 2007 Constitution, and on 8 June 2010, the Venice Commission issued an Opinion on the Draft Constitution.[4] This opinion noted the new Constitution's shift towards a parliamentary system, and welcomed the introduction of a more balanced distribution of power, a stronger legislature, and an improved section on human rights. At the same time, the 2010 opinion recommended introducing additional measures to ensure the

---

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)045-e; OSCE/ODIHR, *Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic*, 19 October 2005, available at http://www.legislationline.org/documents/id/1963; Venice Commission, *Interim Opinion on Constitutional Reform in the Kyrgyz Republic*, CDL-AD(2005)022-e, 24 October 2005, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)022-e; Venice Commission, *Opinion on the Draft Amendments to the Constitution of Kyrgyzstan*, CDL-AD (2002)33, 18 December 2002, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)033-e.

[3] See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at http://www.osce.org/mc/23295?download=true, which refers to commitments to mainstream a gender perspective into OSCE activities; and the Council of Europe's Gender Equality Strategy 2014-2017, available at http://www.coe.int/en/web/genderequality/gender-equality-strategy, which includes the realisation of gender mainstreaming in all policies and measures as one of five strategic objectives.

[4] *Op. cit.* footnote 2 (2010 Venice Commission's Opinion on the Draft Constitution of the Kyrgyz Republic).

independence of the judiciary, clearer rules on the formation of Government and on limits to the President's powers to issue decrees and orders, as well as a limitation of the strong role of the prosecution service. Moreover, the 2010 opinion urged the Kyrgyz authorities to reconsider the abolition of the Constitutional Court as a separate court.

13. In its 2011 Opinion on the draft Constitutional Law on the Constitutional Chamber of the Supreme Court,[5] the Venice Commission welcomed that "in functional terms, the draft Constitutional Law conceives constitutional justice as a separate, self-contained system of adjudication, irrespective of the fact that, in institutional terms, constitutional control is exercised by the Constitutional Chamber of the Supreme Court".

14. In 2014, the Venice Commission adopted an opinion on amendments and additions made to the Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic.[6] These amendments were meant to improve the work of the Chamber, but some of its provisions were criticised, particularly the introduction of a problematic procedure that gave the Constitutional Chamber the possibility of providing explanations on its previous decisions.[7]

15. In their 2015 Joint Opinion,[8] OSCE/ODIHR and the Venice Commission noted that a number of the amendments seriously affected the institutional status and role of the Constitutional Chamber as a judicial oversight body that reviews the constitutionality of laws, drafts laws and treaties; the amendments were also considered concerning as to the separation of powers and the independence of the judiciary. It was thus welcomed that these amendments were abandoned later on, although some of the Draft Amendments that are the subject of this Preliminary Joint Opinion raise similar concerns in substance (particularly as regards the role of the Constitutional Chamber, the independence of the judiciary, and the role of the prosecution service - see sub-sections 4.1 to 4.3. and 4.6. *infra*).

IV. Executive Summary

16. The Draft Amendments propose changes to constitutional provisions on the status of international human rights treaties and their position in the hierarchy of norms, the separation of powers, the dismissal of members of Cabinet, the manner of appointing/dismissing heads of local state administration, the independence of the judiciary and of judges as well as the roles of the Supreme Court, and of the Constitutional Chamber, among others.

17. In general, while accepting that it may be justifiable to clarify certain parts of the 2010 Constitution, the OSCE/ODIHR and the Venice Commission note that the proposed amendments to the Constitution would negatively impact the balance of powers by strengthening the powers of the executive, while weakening both the parliament and, to a greater extent, the judiciary. In particular, although the Constitutional Chamber is retained as such, the Draft Amendments would seriously affect its institutional status and role as an effective organ of judicial constitutional review. Overall, some of the proposed amendments raise concerns with regard to key democratic principles, in particular the rule of law, the separation of powers and the independence of the judiciary, and have the potential to encroach on certain human rights and fundamental freedoms.

---

[5] *Op. cit.* footnote 2 (2011 Venice Commission's Opinion on the Draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan).
[6] *Op. cit.* footnote 2 (2014 Venice Commission's Opinion on the Draft Constitutional Amendments pertaining to the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic).
[7] ibid. pars 42-48 (2014 Venice Commission's Opinion on the Draft Constitutional Amendments pertaining to the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic).
[8] *Op. cit.* footnote 1 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

18. In order to further improve the compliance of the Draft Constitution with international human rights standards and OSCE commitments and recalling the concerns raised in their 2015 Joint Opinion, the OSCE/ODIHR and the Venice Commission make the following key recommendations:

A. to ensure that the 'highest values' introduced in Article 1 par 1 cannot be used to restrict human rights and fundamental freedoms; [pars 38 and 100]

B. to abandon the changes to the procedure before the Constitutional Chamber in Article 97 and retain the current wording of this provision; [par 64]

C. to delete the amended Article 96 par 2 specifying the mandatory nature of the Supreme Court's "explanations", while retaining the current wording of Article 96 par 3 which states that decisions of the Supreme Court shall be final and not subject to appeal; [par 68 and 70]

D. to reconsider the introduction of mandatory waivers of judges' privacy rights in Article 94 par 8-1 of the Constitution; [par 81]

E. to retain the current wording of Article 41 par 2 guaranteeing access to effective remedies in cases of violations of human rights and fundamental freedoms; [par 109]

F. to clearly circumscribe grounds for the deprivation of citizenship in the new Article 50 par 2, and include relevant safeguards; [par 111] and

G. to delete Article 2 pars 6 and 9 of the Draft Law. [par 113 and 116]

As already recommended in the 2015 Joint Opinion, the constitutional procedure for amendments should be followed, as set out in Article 114 of the Constitution. The initiative for a referendum does not only require adoption by a two-thirds majority, but should also only take place following at least three readings with two months' intervals in between. In case of doubt, the Constitutional Chamber may need to decide whether this is the procedure to follow.[9]

Additional Recommendations, highlighted in bold, are also included in the text of the Preliminary Joint Opinion.

19. The OSCE/ODIHR and the Venice Commission remain at the disposal of the Kyrgyz authorities for any further assistance that they may require.

V. Analysis and Recommendations

1. The Procedure for Amending the Constitution

20. As already stated in the 2015 Joint Opinion, the first question also with regard to the new Draft Amendments concerns the procedure and modalities that should be used to amend the 2010 Constitution.

21. Article 114 par 1 of the current Constitution provides that "[t]he law on introducing changes to the present Constitution may be adopted by referendum called by the Jogorku Kenesh". Article 114 par 2 further states that any changes to sections III to VIII of the Constitution (i.e., Articles 60 to 113 which detail the respective roles and powers of the executive, legislative and judicial branches, other state authorities and local self-government) may be adopted by the *Jogorku Kenesh* upon the proposal of the majority of all deputies, or of no less than 300,000 voters. Article 114 par 2 thus provides for a simplified

[9] *Op. cit.* footnote 1, par 13 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

method of amendment to the institutional sections of the Constitution by the *Jogorku Kenesh* alone, without a referendum. At the same time, pursuant to Article 4 of the Law on the Enactment of the Constitution of 2010, Article 114 par 2 will enter into force *only in 2020*. However, even if not yet in force, this paragraph is nonetheless important in order to understand the entire Article 114.

22. The Draft Amendments concern both, changes to sections III to VIII, as well as, to provisions in other sections. The procedure for constitutional amendments provided by Article 114 par 1 should thus in any case apply here, all the more since some of the Draft Amendments concern fundamental human rights and freedoms.

23. Article 114 par 3 of the Constitution stipulates the procedure for adopting constitutional amendments i.e., that the *Jogorku Kenesh* shall adopt the amending law within 6 months (first sentence), the amending law shall be passed by a two-thirds majority following at least three readings with two months' intervals in between (second sentence) and the amending law shall be submitted to a referendum by a two-thirds majority of the *Jogorku Kenesh* (third sentence). At the same time, it is not clear whether these procedures apply equally to amendments under Article 114 par 1 and to those submitted and adopted according to Article 114 par 2 (applicable as of 2020).

24. In the 2015 Joint Opinion, the OSCE/ODIHR and the Venice Commission concluded that *a priori*, the initiative for the referendum mentioned in Article 114 par 1 would be subject to the procedure of Article 114 par 3 (meaning that it should not only be adopted by a two-thirds majority but also following at least three readings with two months' intervals between each reading). At the same time, the Joint Opinion stressed that since this question remained somewhat unclear, the Constitutional Chamber may need to decide on this issue.[10]

25. Such an interpretation would be in line with good practices and earlier comments made by the OSCE/ODIHR and the Venice Commission, which have warned against holding constitutional referenda without a prior qualified majority vote in Parliament. Indeed, the failure to hold a parliamentary debate prior to a referendum could expose this instrument of direct democracy to polemics, misleading information and abuse of democracy if not carefully managed in accordance with generally accepted democratic rules.[11] As highlighted by the OSCE/ODIHR and the Venice Commission in the past, "provisions outlining the power to amend the Constitution […] may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself".[12] In any case, the competent state authorities must direct their efforts towards ensuring inclusive discussions on the intended amendments, and provide a necessary period for reflection as well as adequate time for the preparation of a referendum (where applicable).[13]

---

[10] *Op. cit.* footnote 1, pars 20-22 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

[11] ibid. par 25 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic). See also Venice Commission, *Report on Constitutional Amendment*, CDL-AD(2010)001, 19 January 2010, par 241, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e; and *Opinion on three Draft Constitutional Laws amending Two Constitutional Laws amending the Constitution of Georgia*, CDL-AD(2013)029, 15 October 2013, par 31, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)029-e.

[12] *Op. cit.* footnote 1, par 23 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

[13] ibid. par 24 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

26. Generally, the matters being decided by a referendum should never be too imprecise or too vague, and the draft legislation adopted in this manner should not leave important matters to future laws.[14] In this context, it is noted that the Draft Amendments leave certain key questions unresolved, such as the early dismissal of judges (Article 64 par 3 (2), conditions and procedures for protecting personal information of judges (Article 94 par 8-1) and governing their disciplinary proceedings (Article 95). In all of these cases, the amendments state that more detailed provisions will be set out in legislation. As the contents of such legislation have not even been drafted yet, this means that citizens will not have a clear idea of the changes that they are expected to decide on in a referendum. Asking citizens to engage in such a "blind vote" would dilute the very purpose of popular referenda, and should be avoided.

27. Finally, the process of amending the Constitution should be marked by the highest levels of transparency and inclusiveness – in particular in cases where draft amendments, such as the current ones, propose extensive changes to key aspects of the Constitution, such as the roles of the highest court and the Constitutional Chamber, the functioning of the state institutions and the independence of the judiciary. In this context, it should be borne in mind that the Constitution itself, in its Article 52, specifically states that citizens shall have the right to "participate in the discussion and adoption of laws of republican and local significance". Transparency, openness and inclusiveness, as well as adequate timeframes and conditions allowing for a variety of views and proper wide and substantive debates of controversial issues are key requirements of a democratic constitution-making process and help ensure that the text is adopted by society as a whole, and reflects the will of the people.[15] Notably, these should involve political institutions, non-governmental organisations and citizens' associations, academia, the media and the wider public;[16] this includes proactively reaching out to persons or groups that would otherwise be marginalized, such as national minorities.[17] It is thus recommended **to ensure, in this and further attempts to amend the Constitution, that all relevant stakeholders, including non-parliamentary political parties, civil society, and the wider public, are aware of the proposed changes, and are included in various platforms of discussion on this topic; there should also be time for proper discussions, at all levels, on the proposed amendments**. This will ensure that, once draft amendments are presented to the *Jogorku Kenesh* for adoption, they enjoy the widest support of the public.[18]

---

[14] ibid. par 28 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

[15] See, in relation to the adoption of legislation, the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), par 18.1, available at http://www.osce.org/fr/odihr/elections/14310, which provides that "legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives". See also e.g., Venice Commission, *Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary*, CDL-AD(2011)001, 28 March 2011, par 18, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)001-e; and Venice Commission, *Compilation of Venice Commission Opinions concerning Constitutional Provisions for Amending the Constitution*, CDL-PI(2015)023, 22 December 2015, Section C on pages 5-7, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)023-e.

[16] ibid. par 19 (2011 Venice Commission's Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary).

[17] See OSCE High Commissioner on National Minorities (HCNM), *Ljubljana Guidelines on Integration of Diverse Societies* (2012), Principle 2 on page 9 and Principle 23 on page 32, available at http://www.osce.org/hcnm/96883?download=true.

[18] For more specific recommendations on enhancing public consultation in the legislative process, see OSCE/ODIHR, *Assessment of the Legislative Process in the Kyrgyz Republic*, December 2015, pars 63-72, available at http://www.legislationline.org/documents/id/19881; and *Preliminary Assessment of the Legislative Process in the Kyrgyz Republic*, April 2014, in particular pars 44-48, available at http://www.legislationline.org/documents/id/19084. See also *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, available at http://www.osce.org/odihr/183991.

2. Constitutional "Highest Values"

28. The proposed amendment to Article 1 of the Constitution would introduce a reference to a set of "highest values". These include "pursuit of happiness", "love for the motherland", "honour and dignity", "unity of the people of the Kyrgyz Republic", "peace and accord in the country", "preservation and development of language and national culture", "careful attitude to history", "morality", "family, childhood, fatherhood, motherhood", "combination of traditions and progress". It is common for constitutions, either in their preambles or in the texts, to contain references to fundamental principles and values for the state concerned and its population, which generally also have a unifying function.[19] However, the Venice Commission has considered that "a Constitution should avoid defining or establishing once and for all values of which there are different justifiable conceptions in society. Such values, as well as their legislative implications, should be left to ethical debates within society and ordinary democratic procedures, respecting at the same time the country's human rights and other international commitments."[20]

29. In this context, it is worth noting that Article 16 par 2, which used to refer to human rights and fundamental freedoms as being of "superior value", now states that human rights are part of these "highest values". This may serve to undermine the significance and status of such rights and freedoms in the Kyrgyz Republic's legal order (see also pars 40-42 *infra*).

30. Moreover, the terms used may be problematic if and when such constitutional values are given legal significance, which seems to be implied by the new Article 1 par 3, which states that "highest values create the basis of laws and other normative regulatory acts […] and are the essence and content of the work of [state/public authorities and officials]". Thus, this may potentially have an influence on the interpretation of the Constitution and/or serve as a legal basis when reviewing a law or other legal act for its compliance with the Constitution; this could potentially lead to the refusal to adopt such legal texts or invalidate them.[21] Moreover, alleged violations of these values could be invoked by all state/public authorities at all levels, as additional grounds for restricting the exercise of international human rights and freedoms (see also pars 31-36 *infra*).

31. This is also of particular concern since a number of the terms or concepts referred to in the proposed amendments to Article 1 of the Constitution are overly broad or potentially ambiguous and/or lack precision, which is essential for a legal text.[22] They may lead to various and potentially diverging interpretations. In particular, the reference to "love for the motherland", "honour and dignity", "unity of the people of the Kyrgyz Republic" or "peace and accord in the country", should not be used as a tool to limit, for instance, the right to freedom of expression, which is protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[23] The UN Human Rights Committee has stressed that Article 19 of

---

[19] See e.g., the Preambles of the Constitution of the Republic of Albania (as last amended in 2015), of the Constitution of the Republic of Armenia (as last amended in 2015), of the Constitution of the Republic of Bulgaria (as last amended in 2007), of the Constitution of the Republic of Estonia (as last amended in 2011); of the Constitution of France (as last amended in 2008) and its Article 1; of the Preamble to the Fundamental Law of Hungary (2011, as amended in 2013); Preamble and Articles 1 and 2 of the Constitution of Ireland (1937, as amended in 2015); Preamble and Article 1 of the Constitution of the Republic of Kazakhstan (1995, as amended in 2011); Preamble of the Constitution of the Republic of Moldova (1994, as amended in 2006); Preamble of the Constitution of the Republic of Poland (1997, as amended in 2009); all are available at http://www.legislationline.org/documents/section/constitutions and the CODICES database of the Venice Commission www.CODICES.CoE.int. See also Venice Commission, *Opinion on the New Constitution of Hungary*, CDL-AD(2011)016, 20 June 2011, par 31, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e.

[20] See e.g., ibid. par 38 (2011 Venice Commission's Opinion on the New Constitution of Hungary*).*

[21] See e.g., ibid. par 34 (2011 Venice Commission's Opinion on the New Constitution of Hungary).

[22] See e.g., ibid. par 34 (2011 Venice Commission's Opinion on the New Constitution of Hungary).

[23] UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Kyrgyz Republic acceded to the ICCPR on 7 October 1994.

the ICCPR also protects "deeply offensive" speech,[24] other public expressions that may be said to humiliate "national honor and dignity",[25] and opinions that are critical of state institutions.[26]

32. As far as the term "careful attitude to history" is concerned, while it is not necessarily unusual or illegitimate to use legal tools to officially assess a certain period of history, it is important that such provisions are not used to impose a particular view of history on the persons living in a state or to forestall public debate; they should also not prevent freedom of expression, including free media, academic research and free artistic creation.[27]

33. The potential for undue restrictions to the freedom of expression and opinion on these grounds is exacerbated by the newly introduced paragraph 4 of Article 1, which states that "[n]o ideology can be aimed at undermining the highest values of the Kyrgyz Republic". The actual meaning of this provision needs to be ascertained, in particular how the expression of ideas perceived as being in contradiction to these "highest values" would be evaluated and treated. In that context, the UN Special Rapporteur on the situation of human rights defenders has noted with concern the worrying trends of branding as a security concern any opinion perceived to differ from state ideology, and using this as a justification to unduly restrict the right to freedom of opinion and expression.[28] In principle, restrictions to freedom of opinion and expression are only permissible in cases where statements are considered to constitute incitement to violence or hatred.[29] It is thus recommended to remove the new paragraph 4 of Article 1, or at a minimum, to clarify that only an ideology paired with incitement to violence or hatred is prohibited.

34. Further, the reference to "morality" as one of the "highest values" of the Kyrgyz Republic should not be used as a ground for limiting the exercise of human rights and fundamental freedoms, as the concept is vague and subject to a potentially wide and changing interpretation of the term "morals".[30]

35. Overall, it is not uncommon to see references to tradition, culture and/or language in preambles of constitutions since such elements generally play a particular role in building and preserving a state identity and nationhood.[31] However, the reference to "preservation and development of language and national culture" in the proposed Article 1 should not be interpreted as excluding or limiting constitutional guarantees for the protection of the rights of national minorities. In this regard, reference is made to Article 27 of the ICCPR, according to

---

[24] See UN Human Rights Committee (UN HRC), *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, 12 September 2011, par 11, available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

[25] ibid. par 38 (UN HRC General Comment No. 34 (2011)).

[26] See UN HRC, *Concluding Observations on Kyrgyzstan*, 23 April 2014, par 24, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/KGZ/CO/2&Lang=En.

[27] See e.g., OSCE/ODIHR and Venice Commission, *Joint Interim Opinion on the Law of Ukraine on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of their Symbols*, 21 December 2015, par 89, available at http://www.legislationline.org/documents/id/19884. See also, for further guidance on this point, *Perinçek v. Switzerland,* European Court of Human Rights (ECtHR) judgment of 15 October 2015 (Application no. 27510/08), available at http://hudoc.echr.coe.int/eng?i=001-158216#{"itemid":["001-158216"]}.

[28] UN Special Rapporteur on the situation of human rights defenders, *2011 Report*, A/HRC/19/55, par 52, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-55_en.pdf.

[29] See also UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation* (10 December 2008), page 3, available at http://www.osce.org/fom/99558?download=true, which states that "[r]estrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, *hostility or violence".* See also *OSCE/ODIHR, Manual on Countering Terrorism and Protecting Human Rights*, 2007, pages 218 to 239, available at http://www.osce.org/odihr/29103?download=true.

[30] See e.g., Venice Commission, *Opinion on the issue of the prohibition of so-called "Propaganda of homosexuality in the light of recent legislation in some Council of Europe Member States*, CDL-AD(2013)022, 18 June 2013, pages 14-15, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)022-e.

[31] See, for instance, *op. cit.* footnote 19, par 32 (2011 Venice Commission's Opinion on the New Constitution of Hungary).

which "persons belonging to [ethnic, religious or linguistic] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Article 10 par 3 of the Constitution similarly lays down the right of the representatives of all ethnicities forming the population of Kyrgyzstan "to preserve their native language" as well as to create "conditions for [their] learning and development". To ensure that the wording of the amended Article 1 is not used to unduly restrict national minority rights, it is recommended to include a specific reference to the right of persons belonging to national minorities to enjoy and develop their cultural, linguistic or religious identity.[32]

36. The reference to "childhood, fatherhood, motherhood" in the amended Article 1 should be reconsidered, and ideally even removed, to avoid a potential perpetuation of possible gender stereotypes including limiting women's roles to being wives and mothers.[33] This is all the more important given the March 2015 Concluding Observations of the Committee on the Elimination of Discrimination against Women on Kyrgyzstan, which noted with concern "the persistence [of] deep-rooted patriarchal attitudes and stereotypes concerning the roles and responsibilities of women and men in the family and society".[34]

37. Finally, the newly introduced paragraph 3 of Article 1 provides that citizens and legal entities contribute to the protection and promotion of these "highest values". The purpose and consequences of this provision are unclear. Under no conditions should these provisions provide grounds for undue limitations to human rights and fundamental freedoms.

38. In sum, while proclaiming fundamental values for the respective state and people in a constitution is not uncommon, notably in the preamble, these should, mainly due to their broad application and often vague wording, **never be used as a basis for restricting human rights and fundamental freedoms** (see also par 100 *infra*). It is thus recommended **to reconsider any wording in the current Draft Amendments that could imply such restrictive use**.

3. Hierarchy of Norms and Compliance with International Human Rights Standards

39. The Draft Amendments aim at deleting Article 6 par 3, second sentence, pertaining to the priority of international human rights treaties over other international treaties and their direct effect.

40. Removing the reference to the priority of international *human rights* treaties over other international treaties would mean that human rights treaties would no longer be recognized internally as having precedence over other treaties in case of contradiction. Although the state will remain bound by its international human rights treaty obligations by virtue of the principle of *pacta sunt servanda*, this has the potential to weaken the status of such treaties in the national legal order. In addition, the legal status of international human rights treaties in the domestic legal order is definitely one of the decisive factors affecting their implementation in domestic law.[35]

---

[32] OSCE/ODIHR, Venice Commission, OSCE Mission to Georgia and HCNM, *Joint Opinion on the Draft Amendments to the Constitution of the Republic of Georgia*, 9 February 2005, par 86, available at http://www.legislationline.org/documents/id/1945.

[33] UNDP, *"Drafting Gender-Aware Legislation: How to Promote and Protect Gender Equality in Central and Eastern Europe and in the Commonwealth of Independent States"*, page 8, available at http://iknowpolitics.org/sites/default/files/drafting20gender-aware20legislation.pdf.

[34] Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Concluding Observations on Kyrgyzstan*, 11 March 2015, pars 15-16, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKGZ%2fCO%2f4&Lang=en.

[35] See Venice Commission, *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts*, CDL-AD(2014)036, 8 December 2014, par 111 (and par 27), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e.

41. In any case, whatever the conditions and modalities for implementing norms of international law in a country, a State remains bound by international law. Indeed, pursuant to Article 27 of the Vienna Convention on the Law of Treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Consequently, it should also be borne in mind that the reference to the "highest values" listed in the new Article 1 of the Constitution cannot be invoked to justify non-compliance with provisions of a treaty ratified by the Kyrgyz Republic.

42. In addition to removing the priority of human rights treaties, the Draft Amendments aim to delete the reference to the "direct effect"[36] of international human rights treaties in Kyrgyzstan, currently set out in Article 6 par 3. Instead, the new Article 6 par 3 second sentence provides that "[t]he procedure and modalities of [the] application of international treaties and universally recognized principles and norms of international law shall be defined in the law". So far, the Kyrgyz Constitution has reflected a traditionally monist approach whereby international treaties are considered part of the domestic legal order, without any need for their transposition by means of national legal instruments. The draft amendments would appear to point to a dualist approach whereby international treaties do not apply directly within the domestic legal order but need to be transformed into national law by means of a statute or other source of national law.[37] At the same time, this may somewhat contradict the provision of Article 6 par 3 first sentence (which will remain unchanged), which states that international treaties and universally recognized principles and norms of international law "shall be the constituent part of the legal system of the Kyrgyz Republic". In this context, it is worth noting that in a number of constitutions, it is common practice to declare that ratified international treaties constitute part of the national legal order.[38] However, to avoid any ambiguity, it is generally advisable to explicitly stipulate that international treaties shall prevail over domestic non-constitutional law, as well as to clarify their hierarchical relationship with the Constitution.[39] In light of the above, the drafters should, therefore, **reconsider deleting Article 6 par 3, second sentence, pertaining to the priority of international human rights treaties over other international treaties and their direct effect**.

43. It is worth noting that Article 16 par 1 second sentence currently defines the "meaning and content of the activity of the *legislative* [emphasis added]*,* executive power and self-governance bodies" through the lens of human rights and freedoms whereas the new provision no longer refers to the legislative power, while still covering the executive power and self-governance bodies. It is unclear why the reference to the legislative power is now omitted, since **human rights and fundamental freedoms should be binding on all three state powers**.

[36] i.e., the legal mechanism which enables a domestic body (especially a court) to apply an international rule directly; see ibid. par 29 (2014 Venice Commission's Report on the Implementation of International Human Rights).

[37] ibid. pars 18-24 (2014 Venice Commission's Report on the Implementation of International Human Rights Treaties).

[38] See e.g., Article 6 par 4 of the Constitution of the Republic of Armenia; Article 10 of the Constitution of the Czech Republic; Article 138 of the Constitution of the Republic of Lithuania; Article 15 par 4 of the Constitution of the Russian Federation. For constitutions of OSCE participating States that are also Council of Europe member states, see also ibid. par 20 (2014 Venice Commission's Report on the Implementation of International Human Rights Treaties).

[39] See e.g., ibid. pars 25-28 (2014 Venice Commission's Report on the Implementation of International Human Rights Treaties).

4. The Institutional Framework and Balance of Powers under the Amended Constitution

4.1. The Status and Role of the Constitutional Chamber

44. The jurisdiction of the Constitutional Chamber is currently set out in Article 97 of the Constitution. Under this provision, the Constitutional Chamber is responsible for performing constitutional oversight, which, according to Article 97 par 6 shall involve reviewing the constitutionality of laws, international treaties, and draft laws. If these are found to be unconstitutional, then the Constitutional Chamber has the power to declare these instruments unconstitutional, and thus to repeal them (Article 97 pars 6 and 9). Paragraph 7 of Article 97 also foresees the possibility of individual constitutional complaints, which everyone may initiate in case he/she believes that certain laws or other regulatory acts violate the rights and freedoms recognised in the Constitution.

45. Although the abolition of the Constitutional Court by the 2010 Constitution had been criticised by the Venice Commission at the time,[40] the Venice Commission also acknowledged that the establishment of the Constitutional Chamber constitutes a separate, self-contained system of adjudication which "enjoys the necessary degree of independence and autonomy" and has a "wide enough jurisdiction to function as an effective organ of judicial constitutional review".[41]

46. The current Draft Amendments foresee a complete restructuring of the judicial constitutional review mechanism and of its modalities. First, according to the new wording of Article 93 par 3, the Constitutional Chamber appears to be no longer part of the Supreme Court. As such, this provision draws a clear distinction between the Supreme Court and local courts on the one hand, and the Constitutional Chamber in charge of exercising constitutional control on the other. While the latter appears to remain a separate body meant to exercise some form of constitutional control (see comments on amended Article 97 in Sub-Section 4.1. *infra*), the status of this new Constitutional Chamber is not specified in the Draft Amendments.

47. Further, the new Article 93 par 4 simply states that "[t]he organization and procedures of courts shall be defined by the legislation", which would *a fortiori* also apply to the organization of and procedures governing the Constitutional Chamber. In this context, it is noted that a majority of countries have established separate constitutional jurisdictions for constitutional reviews. Constitutional justice is generally considered to be a key component of a constitutional democracy.[42] The Venice Commission has noted that while there is no general requirement to establish a constitutional court,[43] the establishment of such an organ as a separate institution is generally recommended and has often proved to be a motor in implementing the rule of law in a given country.[44]

48. Where such courts exist, the respective constitution generally establishes their overall jurisdiction, the parties entitled to appeal to such courts, as well as the constitutional principles on which the activity of the constitutional court shall be based; more concrete

---

[40] *Op. cit.* footnote 2, par 69 (2010 Venice Commission's Opinion on the Draft Constitution of the Kyrgyz Republic).
[41] *Op. cit.* footnote 2, pars 58-59 (2011 Venice Commission's Opinion on the draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan).
[42] See e.g., OSCE/ODIHR, *Opinion on Constitutional Reform Proposals submitted on 22 May 2008 by the Constitutional Commission on Improvement of the Constitution of Turkmenistan*, 23 June 2008, par 53, available at http://www.legislationline.org/documents/id/15352; and Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, CDL-PI(2015)002, 1 July 2015, page 5, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)002-e.
[43] See Venice Commission, *Opinion on the Constitution of Finland*, CDL-AD(2008)010, 7 April 2008, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)010-e.
[44] *Op. cit.* footnote 1, pars 81 and 84 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic). See also *op. cit.* footnote 2, par 59 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic).

norms on procedural matters are then set out in laws and rules of procedure, with the latter usually being drafted by the constitutional court itself.[45] At the same time, the institutional independence of such body should generally be guaranteed in the constitution.[46] The fact that "[t]he organization and procedures" of the Constitutional Chamber would be defined by ordinary legislation (new Article 93 par 4) would jeopardize the institutional status of the Constitutional Chamber, which, as the main body responsible for interpreting the Constitution, should be fully independent from the executive and the legislative branches. It is noted however that certain aspects regarding the composition of the Constitutional Chamber and its role are still laid down in the revised Article 97, which would support the view that it retains a special status within the Kyrgyz judicial system.

49. As regards the appointment of Constitutional Chamber judges, Article 74 par 4 (1) as amended specifies that this shall be done by the *Jogorku Kenesh* following a "submission" of possible candidates by the President; Article 97 par 2, which remains unchanged, sets out the eligibility requirements for becoming a judge of the Constitutional Chamber. At the same time, these provisions do not refer to the involvement of self-governing bodies, which may imply that the President has potentially a quite wide discretion in this respect, save for the need to comply with Article 97 par 2.

50. Specialised constitutional courts often have rules of composition, which differ from those of ordinary courts. Typically, judges of constitutional courts are elected by a qualified majority in parliament or the executive, the legislative and judicial powers each appoint one-third of the composition of such courts. In such systems, a balance in the composition of the court is sought.[47]

51. The fact that the Constitution of the Kyrgyz Republic does not establish a specialised constitutional court but rather a Constitutional Chamber of the Supreme Court has important repercussions on the appointment of the judges of the Chamber. Article 97 par 11 of the Constitution in force provides that the composition of the Chamber shall be defined in a constitutional law. Article 5 par 2 of the Constitutional Law on the Constitutional Chamber of the Supreme Court in turn provides that the judges of the Constitutional Chamber shall be elected pursuant to the procedure envisaged in the Constitutional Law on the Status of Judges. As a consequence, the judges of the Constitutional Chamber are appointed in the same manner as ordinary judges and following the same principles.

52. In principle, all decisions concerning the appointment and the professional career of judges, which should include the appointment to the highest posts within the judiciary, should be based on merit, following pre-determined objective criteria set out in law, and open and transparent procedures.[48] The involvement and decisive influence in appointment procedures and promotion of ordinary judges, including constitutional judges in the Kyrgyz Republic, of independent judicial councils or similar independent self-regulation bodies is generally considered to be an appropriate method to guarantee judicial independence.[49] As

---

[45] See e.g., Venice Commission, *Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan*, CDL-AD(2004)023, pars 5-6, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)023-e.

[46] *Op. cit.* footnote 42, Section 4.8 (2015 Venice Commission Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice).

[47] Venice Commission, *Report on the composition of constitutional courts - Science and Technique of Democracy No. 20 (1997)*, CDL-STD(1997)020, page 21, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e.

[48] OSCE/ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, pars 21-23, available at http://www.osce.org/odihr/KyivRec?download=true. See also Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010),* CDL-AD(2010)004, pars 23-32, available at http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx.

[49] See e.g., ibid. pars 23-32 (2010 Venice Commission's Report on the Independence of the Judicial System Part I – The Independence of Judges); and Venice Commission, *Report on Judicial Appointments*, CDL-AD(2007)028, 22 June 2007, pars 48-49, available at http://www.venice.coe.int/webforms/documents/CDL-AD(2007)028.aspx.

recommended in OSCE/ODIHR's Kyiv Recommendations (2010),[50] in cases where the final appointment of a judge lies with the president, his/her discretion to appoint should be limited to those candidates nominated by an independent selection body; any refusal to appoint such a candidate should be based on procedural grounds only and would need to be reasoned. Another possible option is to give the selection body the power to overrule a presidential veto by a qualified majority vote.[51] The proposed system of appointment of judges of the Constitutional Chamber which gives a wide discretion to the President is highly problematic from the viewpoint of the separation of powers and for ensuring effective checks and balances. Similar comments apply with regard to the appointment of Supreme Court judges (see Sub-Section 4.2. *infra*). It is strongly recommended **to amend the procedures for appointing Supreme Court and Constitutional Chamber judges to ensure greater openness and transparency, which may include a greater role for the Council of Judges**.

53. As far as dismissals are concerned, the new Article 64 par 3 (2) provides that the President "shall submit to the Jogorku Kenesh the judges to be dismissed from the membership in the Supreme Court and the Constitutional Chamber upon proposal of the disciplinary commission with the Council of Judges or the Council of Judges in cases envisaged in this Constitution and the constitutional law". Additionally, the amended Article 95 par 2 states that when judges of the Constitutional Chamber violate "the requirement of irreproachability [of the conduct of judges]", they may be subject to early dismissal upon submission of the President followed by a vote of the majority of the total number of deputies of the *Jogorku Kenesh*.

54. In the past, the Venice Commission has expressed its strong concern that the possibility of an early dismissal could undermine the powers of the judiciary in the long term.[52] The current Draft Amendment lowers **the number of votes required for adopting a decision on such judges' early dismissal from two-thirds to the majority of the total number of deputies. This makes it easier to dismiss the judges of the Supreme Court and the Constitutional Chamber and may therefore negatively affect the independence of the judiciary**.

55. While the current Article 97 par 5 does not mention the circumstances for the early dismissal of judges, this is now specified in the new Article 95 pars 2 and 3. This is generally welcome. At the same time, Article 95 par 2 refers to the violation of "the requirement of irreproachability" as a ground for dismissal. While the term "irreproachability" is defined in the Constitutional Law on the Status of Judges of the Kyrgyz Republic as the absence of a violation of a number of requirements and prohibitions applying to serving judges listed in the Constitutional Law, some of these are rather vaguely framed (see also par 74 *infra*).[53] In general, the OSCE/ODIHR and the Venice Commission reiterate that early dismissal should always be based on clear and objective criteria as well as open and transparent procedures.[54] Hence, **unless grounds for early dismissal are clearly and strictly defined in other legislation, the respective provisions may jeopardize judges' security of tenure, and the independence of the judiciary in general**.

56. While the Constitutional Chamber is retained as such, the draft amendments to Article 97 appear to considerably weaken its institutional role as an effective organ of judicial constitutional review by essentially turning it into a mere advisory body. This would also appear to be the intent of the legal drafters, as the Explanatory Statement to the Draft Amendments states that the Constitutional Chamber should be a "body secondary to the

[50] *Op. cit.* footnote 48, par 23 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).
[51] ibid. pars 21-23 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).
[52] *Op. cit.* footnote 2, par 56 (2010 Venice Commission's Opinion on the Draft Constitution of the Kyrgyz Republic).
[53] *Op. cit.* footnote 2, pars 21-32 (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).
[54] ibid. Part IV Sub-Section 2 on Definitions of Disciplinary Offences (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).

President and the *Jogorku Kenesh* which cannot and should not have more powers than the people or their representatives". While there are various models of constitutional review across the OSCE and the Council of Europe regions, such review should, as a general rule, take place outside the legislative and executive branches of power.[55] Moreover, democratic systems are built on the separation of three equal branches of power, including, next to the executive and the legislative, also the judiciary, with the two latter exercising special oversight functions. Turning the Constitutional Chamber into a body that is secondary to the executive and legislative powers would thus constitute a worrying development, all the more given the importance of a constitutional court for the overall functioning of democratic institutions, the protection of human rights and the rule of law in a country.[56]

57. This weakened position of the Constitutional Chamber is also reflected in the new paragraphs 8 to 10 of Article 97, which grant the President and the *Jogorku Kenesh* key roles in constitutional review proceedings. In particular, the new procedure foresees that any decision taken by the Constitutional Chamber on the unconstitutionality of a law shall primarily constitute a "preliminary conclusion", which is to be sent to the President and to the *Jogorku Kenesh* for their consideration within a three-month period.

58. Article 97 par 9 sets out three possibilities of how the Constitutional Chamber may reach a decision following its preliminary conclusion, each requiring the votes of the full composition of judges:

(a) If the President and the *Jogorku Kenesh* agree with the Chamber's conclusion or do not reply within the three month consideration period, the Constitutional Chamber shall adopt the decision on the unconstitutionality of a law, or part of a law, by the majority of at least one half of the votes.

(b) If either the President or the *Jogorku Kenesh* disagrees with all or parts of the conclusion, a two-thirds majority is necessary to reach a decision.

(c) If the President and the *Jogorku Kenesh* both disagree with all or parts of the conclusion, the Chamber requires a three-fourths majority to uphold its preliminary conclusion.

59. If in any of the above cases the required majority of judges' votes is not achieved, the preliminary conclusion on the unconstitutionality of a law "shall lose its force".

60. First, the reference to the "full composition of judges" is understood as referring to an attendance quorum, thereby requiring the presence of all the judges of the Constitutional Chamber for the vote to be valid. This carries the risk of hindering the decision-making capacities of the Constitutional Chamber and rendering it ineffective, thereby making it impossible for this body to carry out its key task of ensuring the constitutionality of legislation.[57]

---

[55] See e.g., Venice Commission, *Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine*, CDL-AD(2013)014, 15 June 2013, par 13, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)014-e; and *Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan*, CDL-AD(2014)017, 16 June 2014, par 12, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)017-e. See also the *Report on « Constitutional Review Design and Functions: Implications for the Separation of Powers »*, by Mr. Evgeni Tanchev (Member of the Venice Commission, Bulgaria), as part of the Conference on Relations of the Constitutional Court with Other Public Authorities, organized by the Venice Commission in co-operation with the Constitutional Court of the Republic of Moldova, 28 September 2015, CDL-JU(2015)021, page 2, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2015)021-e.

[56] *Op. cit.* footnote 1, pars 81 and 84 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic). See also *op. cit.* footnote 2, par 59 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic).

[57] See e.g., Venice Commission, *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland,* CDL-AD(2016)001, 11 March 2016, par 71, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e.

61. Second, introducing such ”bargaining” requirements and creating such a high voting threshold to overcome dissenting opinions of the President and the *Jogorku Kenesh* (especially in the cases (b) and (c) mentioned above), would render the Constitutional Chamber's constitutional oversight functions – as laid down in Article 97 par 1 - *de facto* ineffective. The Chamber would no longer adopt decisions that are immediately binding and final, but would essentially be obliged to adopt two decisions – one preliminary conclusion, and one final decision, following extensive consultations with the President and the *Jogorku Kenesh*. In order to be able to adopt final decisions, in practice, the Constitutional Chamber would need to build a broad consensus internally, which might result in decisions that would often constitute compromise solutions, and not necessarily clear and well-formulated reflections on the constitutionality of a given law. Moreover, in order not to be completely paralyzed, the Constitutional Chamber would also be forced to seek a consensus with the President and the *Jogorku Kenesh* - both organs that should normally be under the oversight of the Chamber. This would seriously compromise the neutrality of the Chamber's decisions and subject them to the whims/views of the parliamentary majority, or the President in office at a particular time.

62. Furthermore, the notification of a preliminary conclusion would not appear to be necessary to obtain the opinions of the President and the *Jogorku Kenesh* on the respective cases at hand because both of them may express their views during the general proceedings before the Chamber. As a consequence, the additional exchange of views introduced by the Draft Amendments would not relate to new legal arguments but, on the other hand, would threaten to politicize the proceedings before the Chamber. Furthermore, the period of three months given to the President and the *Jogorku Kenesh* for review will significantly delay proceedings before the Chamber and could prevent it from taking actions in urgent proceedings.

63. In sum, the new provisions on appointment and dismissal of judges and on constitutional adjudication itself provide the legislative and executive branches with overwhelming leverage over the Constitutional Chamber, and thus severely undermine the principle of the separation of powers proclaimed in Article 3 par 2 of the Constitution. The Draft Amendments also contradict Article 94 par 1 of the Constitution which provides that “[j]udges shall be independent and subordinate only to the Constitution and laws”.

64. In light of the above, it is clear that the Draft Amendments would not allow the Constitutional Chamber to enjoy the “necessary degree of independence and autonomy” or enable it “to function as an effective organ of judicial constitutional review”, as concluded by the Venice Commission in its 2011 opinion[58] It is therefore **strongly recommended to abandon such amendments and to rather retain the current wording of Article 97 of the Constitution**.

4.2. The Supreme Court

65. Under the current Constitution (Article 96), the Supreme Court is the highest body of judicial power in all areas of law, and has the power to “revise court rulings of local courts upon appeals of the participants in the judicial process” (par 1); its rulings “shall be final and not subject to appeal” (par 3). The Plenum of the Supreme Court consisting of the Chairperson and collegiums shall also “give explanations on issues of court practice” (par 2).

66. The proposed revised Article 96 par 2 states that the Supreme Court's explanations on issues of court practice, which are also mentioned in the current version of the Constitution, “shall be mandatory for all courts and judges of the Kyrgyz Republic”. As already highlighted in the 2015 Joint Opinion, this amendment calls into question the general independence of the courts as well as individual judges' independence. In addition, this provision also

[58] *Op. cit.* footnote 2, pars 58-59 (2011 Venice Commission's Opinion on the draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan).

contradicts Article 94 par 3 which provides that any interference with the administration of justice shall be prohibited and lead to individual liability in accordance with the law.

67. Notably, OSCE/ODIHR's 2010 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia explicitly state that "the issuing by high courts of directives, explanations, or resolutions shall be discouraged", but that, as long as they exist, they shall not be binding on lower court judges.[59] Uniformity of interpretation of law should rather be encouraged through studies of judicial practice that have no binding force.[60] In its 2010 Report on the Independence of the Judicial System; Part I: The Independence of Judges, the Venice Commission likewise found the adoption of such binding guidelines reflective of a strict hierarchical order within the judiciary, which it considered to be problematic from the point of view of judicial independence.[61]

68. Hence, while a supreme judicial body such as the Supreme Court generally plays a key role in a country, by, among others, providing legal certainty, foreseeability, and uniformity in the interpretation and application of laws,[62] it should not supervise lower courts nor issue guidelines, directives, explanations, or resolutions that would be binding on judges.[63] **Article 96 par 2, as amended, allowing the Supreme Court to give mandatory "explanations" should, therefore, be deleted**.

69. At the same time, this does not mean that judges at lower instances may simply ignore the judgments of the Supreme Court. By way of appeal, the Supreme Court will ensure that its interpretation of the law prevails. However, lower court judges should have the possibility to distinguish their cases at hand from previous cases and they should be in a position to present new arguments, which then will be tested at the appeals stage.

70. Finally, it is noted that the **current wording of Article 96 par 3**, stating that Supreme Court decisions shall be final and not subject to appeal, has not been retained in the Draft Amendments. **This provision, which reflects the status of the Supreme Court as the highest appeals court in the country, should be kept**.

4.3. The Status of Judges and Their Independence

71. Pursuant to the new Article 95 par 6, the transfer and rotation of judges of local courts shall be undertaken by the President upon submission of the Council of Judges in accordance with the procedures and cases laid down in the constitutional law. It is not clear to what extent the decision of the Council of Judges is binding on the President and it is not possible to rule out a situation where the President would not follow the submission of the Council of Judges, thereby undermining the authority and the independence of this self-regulatory body. It would, therefore, be advisable **to omit the involvement of the President in such internal matters of the judiciary**.

72. Pursuant to the new Article 64 par 3, the President may, "based on the proposal of the disciplinary commission with the Council of Judges, or the Council of Judges", submit to the *Jogorku Kenesh* the names of judges who shall be dismissed. Local judges may be dismissed by the President directly, also based on proposals of the disciplinary commission or the Council (Article 64 par 3 (4)).

---

[59] *Op. cit.* footnote 48, par 35 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).
[60] ibid. par 35 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).
[61] *Op. cit.* footnote 48, par 70 (2010 Venice Commission's Report on the Independence of the Judicial System Part I – The Independence of Judges).
[62] See e.g., Venice Commission, *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, CDL-AD(2012)014, 18 June 2012, pars 64-65, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)014-e.
[63] *Op. cit.* footnote 48, par 35 (ODIHR Kyiv Recommendations on Judicial Independence (2010)); and *op. cit.* footnote 48, pars 70-71 (2010 Venice Commission Report on the Independence of the Judicial System Part I – The Independence of Judges).

73. As stated in the 2014 Joint OSCE/ODIHR-Venice Commission Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic (hereinafter "2014 Joint Opinion"), **the competences of the President and the *Jogorku Kenesh* pertaining to the dismissal of judges should be omitted from the Constitution**, as this raises questions with regard to guarantees for the independence of judges.[64]

74. The reworded Article 95 par 3 introduces the possibility for early dismissal of judges where certain causes of termination are established: death, reaching the retirement age or loss of citizenship (see also comments on loss of citizenship in par 111 *infra*). At the same time, the new provision also refers to cases involving a judge's "transfer to another position" as well as "other cases not related to the violation of irreproachability requirement". Such open-ended and vague formulations could potentially be abused to remove individual judges (see par 55 *supra*). The Draft Amendments have also lowered the threshold for early dismissal from two- thirds of the votes of the total number of deputies of the *Jogorku Kenesh* to the majority of the deputies present (with a required quorum of 50 votes), which means that the dismissal of judges on such grounds is also greatly facilitated. **To ensure that the early dismissal of judges is only permissible in cases specifically set out in law, it is recommended to list all possible grounds for such early dismissal in the Constitution, and to remove the reference to 'other cases' currently set out in the revised Article 95 par 3**.

75. The new Article 95 par 9 outlines the composition of the disciplinary commission (namely, the President, the *Jogorku Kenesh* and the Council of Judges shall each appoint one-third of the members), while specifying that the disciplinary commission is part of the Council of Judges. Yet, the current draft amendment to Article 102 par 2 removes the consideration of disciplinary issues from the competence of the Council of Judges, which presumably aims to ensure that the disciplinary commission has a semi-autonomous status, and is not unduly influenced by the Council of Judges. At the same time, the proposed amendments foresee a greater role of the President and of the *Jogorku Kenesh* in disciplinary matters of the judiciary. As a consequence, this would lead to a situation where jointly, the presidential and *Jogorku Kenesh* appointees would always be in majority for assessing disciplinary matters concerning judges, which raises concerns as to the independence of the judiciary and the separation of powers.

76. Indeed, any kind of control by the executive branch or other external actors over Judicial Councils or bodies entrusted with discipline is to be avoided.[65] As noted in the 2014 Joint Opinion, the composition of a disciplinary body is key to guaranteeing its independence and impartiality.[66] In that context, a composition comprising civil society representatives, thus ensuring community involvement in disciplinary proceedings, was noted by the OSCE/ODIHR and the Venice Commission as a particularly welcome development.[67] The **rules pertaining to the composition of the disciplinary commission should be amended to ensure that the legislative and/or executive branches do not have decisive influence over such body, while ensuring an adequate representation of civil society/community and a generally gender balanced composition**.

77. The proposed amendments to Article 95 par 6 (now included in a new Article 95 par 4) would allow a judge's suspension from office, which is not mentioned in the current Constitution, as well as the initiation of administrative and criminal actions against a judge upon consent of the disciplinary commission. As mentioned in pars 75-76 *supra*, the

[64] *Op. cit.* footnote 2, Recommendation C(2) and par 104 (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).
[65] *Op. cit.* footnote 48, par 9 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).
[66] *Op. cit.* footnote 2, pars 11, 76 and 88-89 (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).
[67] ibid. par 76 (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).

composition of the disciplinary commission is concerning in terms of the potential influence that the executive and legislative branches may have on such a body, thus jeopardizing its independence and impartiality. A "procedural immunity", in other words a special legal protection/procedural safeguard for judges accused of breaking the law, typically directed against arrest, detention and prosecution,[68] would help ensure that judges can properly exercise their functions without their independence being compromised through fear of prosecution or other judicial actions by an aggrieved party, including state authorities.[69]

78. In a number of countries, such "inviolability" or "procedural immunity" exists to protect judges from potentially frivolous or false accusations, vexatious or manifestly ill-founded complaints that could exert pressure on them.[70] Should the drafters opt for this type of wider immunity, the scope of such immunity should be strictly circumscribed. In any case, the procedure for lifting the immunity should include procedural safeguards to protect judicial independence and the requisite decision should be taken by an independent judicial body or other independent entity, while ensuring that conditions and mechanisms for lifting such immunity do not put judges beyond the reach of the law.[71] One way to achieve this would be to ensure that the disciplinary commission is composed of a wide variety of stakeholders that would ensure its independence and neutrality (see par 76 *supra*).

79. The new Article 94 par 8-1 provides that persons running for the position of judge are obliged to state in writing, that they waive their rights to privacy while they are in office; any failure to do so would result in their ineligibility (see also comments on Article 2 par 9 of the Draft Law on Transitional Provisions which addresses the issue of the temporal applicability of this new requirement, in par 116 *infra*). Although reference is made to possible limits that would be determined in constitutional law, such a general, and obligatory waiver of the right to privacy appears hardly justifiable under international standards. Article 17 of the ICCPR states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" and that "[e]veryone has the right to the protection of the law against such interference or attacks". Hence the right to privacy is guaranteed to every individual, including judges. Moreover, interferences, even if provided for by law, should be in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the particular circumstances.[72] Any legislation providing for such interferences must also clearly and strictly set out the conditions and circumstances for their application and provide adequate substantive and procedural safeguards against abuse.[73]

---

[68] Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities*, CDL-AD(2014)011, 14 May 2014, par 11, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e.

[69] *Op. cit.* footnote 2, par 37 (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).

[70] Venice Commission, *Amicus Curiae Brief on the Immunity of Judges for the Constitutional Court of Moldova*, CDL-AD(2013)008, 11 March 2013, pars 23-27 and 52, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)008-e.

[71] See e.g., *op. cit.* footnote 2, pars 54-62 (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).

[72] See UN HRC, *General Comment No. 16 on Article 17 of the ICCPR on the Right to Privacy (1998),* par 4, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6624&Lang=en.

[73] This should include a list of clear grounds for ordering the measures of monitoring/surveillance (specifying the nature of offences which may give rise to surveillance and provide a definition of the categories of people liable to have their communications monitored, and in which circumstances); the definition of the scope and clear limit on the duration of such monitoring/surveillance; the identification of the authorities competent to permit, carry out and supervise the surveillance measures; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; a detailed list of the circumstances in which data obtained may or must be erased or the records destroyed; some form of oversight of the surveillance measures undertaken by an external body or official, or public reporting mechanism of some type, which should be independent; access to adequate remedies in case of abuse; etc. - see e.g., OSCE/ODIHR, *Opinion on the Draft Law of Ukraine on Combating Cybercrime*, 22 August 2014, pars 44-48, available at http://www.legislationline.org/documents/id/19323; and *Opinion on the Draft Criminal Procedure*

80. It is worth noting that pursuant to Article 20 par 2 of the Constitution, human rights may be limited "for the purpose of protecting national security, public order, health and moral of the population as well as rights and freedoms of other persons". First, it is worth highlighting that the wording of the provisions that concern permissible limitations to the enjoyment of fundamental freedoms in the ICCPR vary slightly for the rights to freedom of movement, freedom of religion or belief, freedom of expression, and freedoms of peaceful assembly and of association, while some rights are non-derogable under any circumstances. **It is thus recommended to reflect these differences by introducing parallel language in the Constitution, as appropriate**.[74] Further, the Draft Amendments add that "[s]uch limitations can be also introduced in view of specific modalities of military or other civil services". It is not clear however whether judges are considered part of the "civil service" within the meaning of Article 20 par 2 of the Constitution.

81. A blanket obligation on judges to waive their right to privacy in general, which also constitutes an additional eligibility requirement to become and remain a judge, appears to constitute an undue restriction of judges' right to privacy. Also, the legitimate aim being pursued is not clear and would appear to expand unduly the permissible aims set out in Article 20 par 2 (which reflect those generally stipulated in the ICCPR). Finally, while the Venice Commission has acknowledged that restrictions to judges' rights to privacy may be justified to combat corruption in order to conduct surveillance measures in respect to financial operations of holders of judicial offices, it has also noted that such restrictions should be accompanied by adequate and effective procedural guarantees to protect these persons from abuse.[75] It is thus recommended **to reconsider the introduction of the new Article 94 par 8-1 into the Constitution to avoid undue violations of judges' basic human rights**.

4.4. The Executive Branch

82. The revised Article 68 par 2 of the Constitution states that officials exercising the powers of the President in case of early termination of his/her mandate and pending the organization of early presidential elections (Article 68 par 1) may not run for the office of president in such elections. This constitutes a restriction of the right of any person to stand for election, as guaranteed by Article 25 (b) of the ICCPR. Any restrictions on the right to stand for election must be justifiable based on objective and reasonable criteria[76] to be laid down by law. As such criteria are not apparent in this case, **the drafters are encouraged to delete this limitation from Article 68 par 2 of the Constitution**.

Code of the Kyrgyz Republic, 19 June 2015, sub-section 7.4., available at http://www.legislationline.org/documents/id/19834. See also UN HRC, *Concluding Comments on the Russian Federation* (1995) UN doc. CCPR/C/79/Add. 54; and *Concluding Comments on Poland* (1999), UN doc. CCPR/C/79/Add. 110, where it considered that wire-tapping and surveillance, whether electronic or otherwise, must be prohibited if there is no independent monitoring (judicial supervision) of such practices. It may be helpful to note that the ECtHR has held that the mere existence of legislation allowing surreptitious state activity (i.e. various forms of state control or surveillance) may involve "for all those to whom the legislation could be applied, a menace of surveillance" which may amount to an interference with the right to privacy; see *Klass and Others v. Germany,* ECtHR Judgment of 6 September 1978 (Application no. 5029/71), par 41, available at http://hudoc.echr.coe.int/eng?i=001-57510.

[74] See e.g., *op. cit.* footnote 2, par 75 (2005 OSCE/ODIHR Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic).

[75] See e.g., Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania*, CDL-AD(2016)009, 14 March 2016, par 51, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)009-e.

[76] See UN HRC, *General Comment No. 25 on Article 25 of the ICCPR*, 27 August 1996, par 15, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en. See also OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 5 June - 29 July 1990), hereinafter "OSCE Copenhagen Document (1990)", par 24, available at http://www.osce.org/fr/odihr/elections/14304.

83. While the current Article 80 par 3 states that laws triggering increased expenditures using the state budget may only be passed after the Government has determined the source of funding,[77] the Draft Amendments go further by stating that such bills may only be adopted by the *Jogorku Kenesh* following the *Government's consent*. This amendment enhances the Government's oversight role in such cases, presumably to ensure responsible budgeting in the context of legislative initiatives, including draft laws proposed by MPs, for example.[78] At the same time, while it is understandable that the drafters may want to ensure that only those laws are passed that can also be funded, the respective provisions should not result in undue interferences of the Government in the work of the *Jogorku Kenesh*. While it is not uncommon to find similar provisions aimed at preventing financially unrealistic legislative proposals in constitutions from the OSCE and Council of Europe regions,[79] other types of safeguards that would limit the risk of governments' interference could also be considered (e.g., requiring a higher qualified majority to adopt a bill,[80] introducing a requirement to append to the amendment financial calculations which demonstrate the sources of revenue necessary to cover the expenditure,[81] or providing for the possibility for the parliament to overcome the lack of the government's consent by a qualified majority vote).[82] To pre-empt potentially extensive governmental interference in the work of the *Jogorku Kenesh*, the **legal drafters may consider introducing some of these alternative safeguards *in lieu* of the provision contemplated in the new Article 80 par 3**. In any case, a proper financial impact assessment of any draft law should always be conducted at an early stage of the law-making process.[83]

84. Under the revised Article 81 par 2, the President is obliged to sign laws on budget and taxes, "except where the Prime Minister requests laws to be returned without signing". In this context, it is noted that in principle, laws shall only be promulgated by a head of state. At this stage, once a law is adopted by parliament, the executive should no longer have any influence as to whether a law acquires legal effect through promulgation. It is thus **recommended to delete the proposed change from the Draft Amendments**.

85. The three amendments pertaining to procedures in cases of no confidence in the government (Articles 85 par 4, 86 par 1 and 87 par 1) could potentially lead to political crises. A resolution on no confidence would now require a two-thirds majority of the total number of deputies of the *Jogorku Kenesh* to pass (Article 85 par 4), as opposed to a simple majority in the current Constitution. This could result in a situation where the government remains in power but is no longer supported by the majority in parliament, which could also have a serious impact on the ability of the government to carry out its responsibilities and to pass the laws needed to implement its policies.[84] The qualified majority requirement is also

[77] This principle is also reflected in Article 26 par 1 of the Law of the Kyrgyz Republic on Normative Legal Acts of 10 April 2009 and Article 31 par 4 of the Law of the Kyrgyz Republic on the Government of the Kyrgyz Republic of 18 June 2012.
[78] *Op. cit.* footnote 18, par 28 (2014 OSCE/ODIHR's Preliminary Assessment of the Legislative Process in the Kyrgyz Republic).
[79] See e.g., Article 93 par 5 of the Constitution of Georgia; Article 113 of the Basic Law of the Federal Republic of Germany; Article 61 par 6 of the Constitution of the Republic of Kazakhstan. Certain constitutions even provide for a complete ban of such proposals, see e.g., Article 40 of the Constitution of the Republic of France, which states that "Private Members' Bills and amendments introduced by Members of Parliament shall not be admissible where their enactment would result in either a diminution of public revenue or the creation or increase of any public expenditure"; and Article 167 of the Constitution of the Portuguese Republic.
[80] See e.g., Venice Commission, *Preliminary Opinion on the draft amendments to Chapters 1 to 7 and 10 of the Constitution of the Republic of Armenia*, CDL-PI(2015)015rev-e, 10 September 2015, par 102, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2015)015rev-e.
[81] See e.g., Article 116 of the Constitution of the Republic of Estonia.
[82] See e.g., Article 62 par 2 of the Constitution of the Principality of Andorra.
[83] *Op. cit.* footnote 18, pars 16 and 50-53 (2015 OSCE/ODIHR's Assessment of the Legislative Process in the Kyrgyz Republic).
[84] *Op. cit.* footnote 2, pars 69-70 (2005 OSCE/ODIHR Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic)

not in line with the practice in other democratic countries.[85] As previously recommended by the OSCE/ODIHR and the Venice Commission,[86] **the simple majority requirement in Article 85 par 4 should be retained**.

86. This should also be considered in light of the amendment to Article 87 par 1, which provides that the loss of the status of the parliamentary majority by a coalition of factions shall automatically cause the resignation of the Government. Such an amendment would exclude the possibility for the government to continue as a so-called minority government, i.e., a government which is not supported by a majority in parliament but also not opposed. In this case, it would also not be possible for a government to be supported by a majority different from the majority which expressed its confidence in the government when it was formed. It is thus recommended to **delete the proposed change to Article 87 par 1 from the Draft Amendments**.

87. The amendment to Article 86 par 1 aims at lifting the prime minister's restriction to ask the *Jogorku Kenesh* for a vote of confidence more than once per year. Such change could increase the risk of political instability and may, in crisis situations, further aggravate a tense situation in the country. In light of the above-mentioned comments on Article 85 par 4, it is thus recommended **to delete the proposed change from the new Article 86 par 1.**

88. The new paragraph 5 of Article 87 introduces the possibility for the Prime Minister to reshuffle his/her government and specifies the procedure for dismissal of ministers and the appointment of candidates to the vacant position, which includes the requirement that new members of the Government should be approved by the *Jogorku Kenesh*. Such draft amendments are overall in line with the recommendations made in the 2015 Joint Opinion.[87] At the same time, under this new provision, the Prime Minister may propose the dismissal of all members of Government except for those heading state agencies in charge of defence and national security. The reason for this distinction is not clear, especially as the Prime Minister bears full responsibility for the Government's performance under Article 89 of the Constitution. Therefore, he/she would appear to have unfettered discretion to propose the dismissal of any member of Government to the President.[88] It is thus recommended to **reconsider the above-mentioned limitation**.

89. Under the revised Article 89 par 7, the Prime Minister shall now appoint and dismiss the heads of local public administrations without co-ordinating this with *local keneshes.* The reference to having such actions conducted in accordance with "procedures of law" has also been removed. In this respect, the OSCE/ODIHR and the Venice Commission refer to their legal analysis pertaining to similar amendments, contained in the 2015 Joint Opinion.[89] Local public administrative bodies are local branches of the central state, as opposed to local self-governance bodies, which are headed by *local keneshes*. While there is thus no obligation for the Prime Minister to consult with *local keneshes* when appointing the heads of local public administration, these types of consultations constitute a good practice that could help avoid friction between central and local representatives, especially in areas with significant

[85] See e.g., Article 115 of the Constitution of the Republic of Armenia; Article 89 of the Constitution of the Republic of Bulgaria; Article 116 of the Constitution of the Republic of Croatia; Article 97 of the Constitution of the Republic of Estonia; Article 49 of the Constitution of the Republic of France; all are available at http://www.legislationline.org/documents/section/constitutions and the CODICES database of the Venice Commission www.CODICES.CoE.int. See also op. cit. footnote 2, par 33 (b) (2005 Venice Commission's Interim Opinion on Constitutional Reform in the Kyrgyz Republic).

[86] *Op. cit.* footnote 2, Recommendation (n) and par 70 (2005 OSCE/ODIHR Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic); and ibid. par 33 (2005 Venice Commission's Interim Opinion on Constitutional Reform in the Kyrgyz Republic).

[87] *Op. cit.* footnote 1, pars 59-60 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

[88] ibid. par 58 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

[89] ibid. pars 61-68 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

minority populations.[90] The removal of the reference to "procedures of law" is also of concern here, as it could suggest that the Prime Minister would have full discretion to appoint local public administrative officials without having to follow specific procedures and criteria. It is, therefore, recommended to reconsider the current amendments. Rather, as recommended in the 2015 Joint Opinion, **the drafters, when amending these provisions of the Constitution, should consider incorporating mechanisms that would enhance transparency and reduce the potential for conflict between delegated state administration operating in local communities and local self-governance bodies**.

4.5. The Legislative Branch

90. The amended Article 70 par 3 stipulates that "[t]he decision on withdrawal from the coalition of the parliamentary majority shall be made by a faction by at least two thirds of votes of the total number of faction members". This new provision *de facto* increases the difficulty for a faction to withdraw from the coalition of the parliamentary majority. The underlying rationale could be the maintenance of a stable governing majority.[91] This should not be an issue *per se* in light of the fact that the deputies remain free to vote for or against the position of the fraction/party or coalition of the majority, in line with Article 73 par 1 of the Constitution.

91. The amended Article 70 par 3 further provides that "[t]he decision of the faction shall be in the form of resolution of the faction and shall be signed by each faction member who voted for the withdrawal". In practical terms, this formal procedural requirement may render it more difficult for a faction to withdraw from the majority/coalition; it may also effectively put pressure on the deputies from the faction seeking withdrawal from the coalition, and induce them to vote against the withdrawal, thereby *de facto* weakening the independence of deputies from their faction. While this would not necessarily imply an imperative mandate *per se* (which is also forbidden by Article 73 par 1 of the Constitution), it would nevertheless come close to a "party-administered model" in the form of a party whip.[92] The legal drafters should therefore **analyse the potential impact of such an amendment, and see whether this is in fact required given the national context**.

92. On a side note, it is worth noting that the other paragraphs of Article 70 of the Constitution remain unchanged. In this context, in its 2015 Parliamentary Election Observation Mission Final Report on the Kyrgyz Republic, the OSCE/ODIHR recommended to amend the Kyrgyz legal framework to allow independent candidates to stand in parliamentary elections.[93] While this does not necessarily refer to or require an amendment to the Kyrgyz Constitution, it may nevertheless be advisable **to clarify this point also here, and to specifically mention in Article 70 of the Constitution the right for independent candidates to run for parliamentary elections, regardless of their political affiliation or lack thereof.**[94]

---

[90] The OSCE HCNM *Lund Recommendations on the Effective Participation of National Minorities in Public Life* (1999) provide that when creating institutions and procedures, especially those which might affect national minorities, "[g]overnmental authorities and minorities should pursue an inclusive, transparent, and accountable process of consultation in order to maintain a climate of confidence". See http://www.osce.org/hcnm/32240?download=true, pages 7-8.

[91] See e.g., *op. cit.* footnote 2, pars 41-42 (2010 Venice Commission's Opinion on the Draft Constitution of the Kyrgyz Republic); and *Draft Opinion on Three Draft Laws Proposing Amendments to the Constitution of Ukraine*, CDL (2003) 93, 8 December 2003, par 62, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2003)093-e.

[92] See Venice Commission, *Report on the Imperative Mandate and Similar Practices*, CDL-AD(2009)027, of 16 June 2009, par 39, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)027-e.

[93] See OSCE/ODIHR, *Kyrgyz Republic - Parliamentary Elections Election Observation Mission Final Report*, 4 October 2015, Priority Recommendation no. 5 and pages 2 and 12, available at http://www.osce.org/odihr/elections/kyrgyzstan/219186?download=true.

[94] OSCE/ODIHR-Venice Commission, *Guidelines on Political Party Regulation (2011)*, par 130, available at http://www.osce.org/odihr/77812.

93. The amended paragraph 2 of Article 72 introduces certain incompatibilities between the parliamentary mandate and posts such as those "in the civil and municipal service", "entrepreneurial activity" or "member[ship] of the governing body or supervisory council of a commercial organizations". Deputies may, however, continue to exercise "scientific, teaching or other creative activities" – as is already the case. Generally, the primary purpose of incompatibility provisions is to ensure the separation of powers, enhance transparency and guarantee that parliamentarians' public or private occupations do not influence their role as representatives of the nation to avoid or limit conflicts of interest.[95]

94. Constitutional practice is quite diverse when it comes to this latter issue, often combining rules on incompatibility of functions with some form of obligation to disclose all sources of income, employment and/or assets.[96] On the other hand, private occupations are in principle compatible with parliamentary mandates. They are also viewed as a means for preventing such a mandate from becoming a fully-fledged profession and for enabling different professional groups to be represented in parliament; however, certain countries have also in certain cases introduced incompatibilities with private functions to prevent collusion between public and business interests.[97] This new provision is, therefore, not at odds with constitutional or other provisions found in other countries. At the same time, **the legal consequences of infringements of incompatibility rules, including a possible termination of mandate, could be usefully specified in the Constitution**.[98]

95. According to the amendment to Article 72 par 3, if a deputy is appointed to the position of Prime Minister or Vice Prime Minister, his/her mandate and right to vote at the plenary sessions of the *Jogorku Kenesh* shall be retained.

96. In some countries, such a combination of ministerial and parliamentary functions is considered to violate the principle of separation of powers,[99] as this may create a conflict of interest which *de facto* prevents such parliamentarians from exercising their parliamentary oversight functions over the executive. On the other hand, in some parliamentary regimes, which are based on close collaboration between the legislative and the executive, the combination of ministerial and parliamentary duties is even encouraged.[100] At the same time, in many parliamentary systems, members of the executive remove themselves from the day-to-day work of the legislative in order to strengthen the ability of the legislative to hold the executive to account.[101] In that case, it is often considered helpful to have them replaced by members of the same party. Indeed, and as noted in the 2015 Joint Opinion, the suspension of the parliamentary mandate of the Prime Minister and other members of Government would deprive the majority of valuable votes in this Parliament with a total of 120 seats, which could result in a distortion of the relative forces of political parties in Parliament. **It may be useful for the respective legal drafters and stakeholders to debate this point in detail, and reiterate the positive and negative sides of all options in order to find a**

---

[95] See OSCE/ODIHR, *Background Study: Professional and Ethical Standards for Parliamentarians* (2012), page 43-46, available at http://www.osce.org/odihr/98924?download=true. See also Venice Commission, *Report on Democracy, Limitation of Mandates and Incompatibility of Political Function*s, CDL-AD(2012)027rev, 31 January 2013, par 76, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)027rev-e.

[96] ibid. pages 43-46 (2012 OSCE/ODIHR Background Study on Professional and Ethical Standards for Parliamentarians); and par 120 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

[97] ibid. page 46 (2012 OSCE/ODIHR Background Study on Professional and Ethical Standards for Parliamentarians); and par 81 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

[98] ibid. pars 92-97 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

[99] For instance in Andorra, Bulgaria, Portugal, Spain, Switzerland, Turkey, Ukraine, etc. See ibid. par 77 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

[100] ibid. pars 79-80 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

[101] *Op. cit.* footnote 1, pars 54-56 (2015 Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

good solution that is most beneficial for the smooth and independent functioning of the *Jogorku Kenesh*.

97. Finally, Article 72 par 3 does not specify whether deputies exercising ministerial functions can retain their parliamentary mandate, as it only refers to the Prime Minister or Vice Prime Minister and not to other ministers as well. This should ideally **be clarified**.

4.6. The Prosecution Service

98. The revised Article 104 par 1 retains the quite extensive supervisory powers of the Office of the Prosecutor. Such a "supervisory" prosecution model is in fact reminiscent of the old Soviet *prokuratura* model.[102] At the same time, over the last decades, many post-communist democracies have sought to deprive their prosecution services of extensive powers in the area of general supervision, by transferring such prerogatives to other bodies, including national human rights institutions (such as an Ombudsperson).[103] The rationale for such reforms was to abolish what was considered to be an over-powerful and largely unaccountable prosecution service.[104] Maintaining the prosecution service as it is in the Constitution could mean retaining a system where vast powers are vested in only one institution, which may pose a serious threat to the separation of powers and to the rights and freedoms of individuals.[105] The maintenance of such wide prosecutorial supervisory powers has been repeatedly criticized by international and regional organizations, among them OSCE/ODIHR and the Venice Commission. In numerous opinions on this topic,[106] including specifically on the legal framework regulating the prosecution service in the Kyrgyz Republic,[107] the OSCE/ODIHR and the Venice Commission have recommended, for the above-mentioned reasons, that the supervisory role of prosecutors be abandoned and that their competences be restricted to the criminal sphere.[108] The drafters should therefore **consider reforming their prosecution service by removing its general supervisory powers and confining its powers to the criminal field**.

---

[102] See e.g., OSCE/ODIHR, *Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic*, 18 October 2013, par 13, available at http://www.legislationline.org/documents/id/18547.

[103] ibid. par 13 (2013 OSCE/ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic). See also OSCE/ODIHR, Venice Commission and DGI, *Joint Opinion on the Draft Law on the Prosecution Service of Moldova*, 23 March 2015, par 42, available at http://www.legislationline.org/documents/id/19747.

[104] See e.g., ibid. par 13 (2013 OSCE/ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic).

[105] See e.g., *op. cit.* footnote 103, par 42 (2015 OSCE/ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova).

[106] See, for instance, ibid. (2015 OSCE/ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova); *op. cit.* footnote 102 (2013 OSCE/ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic); Venice Commission, *Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine*, CDL-AD-(2012)019, 15 October 2012, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)019-e; and Venice Commission, *Opinion on the Federal Law on the Prokuratura (prosecutor's office) of the Russian Federation*, CDL-AD(2005)014, 13 June 2005, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)014-e.

[107] ibid. pars 13-15 and 26-27 (2013 OSCE/ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic); and *op. cit.* footnote 2, par 60 (2010 Venice Commission's Opinion on the Draft Constitution of the Kyrgyz Republic).

[108] Such wide powers are understood as reflecting a non-democratic past and are thus not compatible with European standards and Council of Europe values. See e.g., Venice Commission, *Compilation of Venice Commission Opinions and Reports Concerning Prosecutors*, CDL-PI(2015)009, 30 June 2015, page 14, http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)009-e. See also *op. cit.* footnote 103, pars 39-44 (2015 OSCE/ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova); Venice Commission, *Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service* (Study N° 494 / 2008, adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), par 73, available at http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf. See also *op. cit.* footnote 102, par 15 (2013 OSCE/ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic). See also Resolution 1896 (2012) of the Parliamentary Assembly of the Council of Europe on "the honouring of obligations and commitments by the Russian Federation", pars 25.4-25.5, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19116&lang=en.

99. Additionally, whereas the prosecution service previously only oversaw the implementation of laws by executive powers and local self-government bodies, the new Article 104 par 1 expands this supervision to "other state institutions listed in the constitutional law". If "other state institutions" under this provision would be interpreted to include judicial institutions, this amendment would hardly be in compliance with the democratic principle of separation of powers, under which an independent judiciary oversees the executive, and not vice-versa. For this reason, and due to related concerns set out above, **the inclusion of such provision in the new Article 104 par 1 should be re-considered**.

5. Constitutional Amendments Pertaining to Specific Human Rights and Fundamental Freedoms

100. Pursuant to Article 16 par 1, "special measures" (that do not constitute discrimination) will now be allowed not only to further equal opportunities, but also to "ensure the highest values of the Kyrgyz Republic" as mentioned in the amended Article 1 of the Constitution. This means that special measures could be imposed to advance these values, which include "love for the motherland", "honor and dignity", "state sovereignty", "unity of the people", but also "motherhood" and "fatherhood". Generally, international standards do not object to the adoption of "special measures" in specific areas and under limited circumstances if they are not considered discriminatory.[109] While the potential practical consequences of this amendment are not clear, the vague formulation of a number of the values mentioned in Article 1 of the Constitution (see pars 28-38 *supra*) could allow the Government to take a variety of measures, including potentially arbitrary ones, to pursue such values. It is, therefore, recommended **to remove the reference to "highest values" from the amended Article 16 par 1.**

101. The new Article 20 par 2 extends the possibility of limiting human rights "in view of specific modalities of military or other civil service". This wording is likewise unclear and quite vague. This provision could arguably be interpreted as allowing limitations of human rights and fundamental freedoms in the armed forces, of civil servants or other persons engaged in the administration of the state. Article 22 par 2 of the ICCPR expressly recognizes the possibility of restricting the exercise of the right to freedom of association of members of the armed forces and of the police. Such restrictions may be justified where forming or joining an association would conflict with the public duties and/or jeopardize the political neutrality of the public officials concerned.[110] At the same time, every restriction must respect the principle of proportionality and blanket bans are generally considered to be

[109] This involves, for instance, the achievement of women's *de jure* and *de facto* equality with men in the enjoyment of their human rights and fundamental freedoms; securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups' or individuals' equal enjoyment or exercise of human rights and fundamental freedoms; or special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms; see Article 4 of the UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), adopted by UN General Assembly Resolution 34/180 on 18 December 1979; the Kyrgyz Republic acceded to CEDAW on 10 February 1997; Articles 1 par 4 and 2 par 2 of the UN International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965; the Kyrgyz Republic acceded to CERD on 5 September 1997; and *op. cit.* footnote 76, par 31 (OSCE Copenhagen Document (1990)). See also *General Recommendation No. 25 of the CEDAW Committee on temporary special measures* (1997), available at http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf; and *General Recommendation No. 32 of the CERD Committee on the meaning and scope of special measures in the CERD*, 24 September 2009, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f32&Lang=en. See also e.g., special measures foreseen in the OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area (Annex to Decision No. 3/03, available at http://www.osce.org/odihr/17554).

[110] See e.g., OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Association (2015)*, par 144, available at http://www.osce.org/odihr/132371?download=true.

unjustifiable.[111] More generally, it is worth highlighting that military personnel shall be able to enjoy and exercise their human rights and fundamental freedoms, although some – limited – restrictions may be applied taking into consideration the requirements of the service/military needs. As a general rule, such limitations must be provided by law, be non-discriminatory and necessary in a democratic society and proportionate to the legitimate aim that they pursue.[112] Similar strict requirements should apply to justify any human rights restrictions imposed on civil servants and persons engaged in the administration of the state. Given that Article 20 par 2 already contains a general provision pertaining to restrictions of human rights, including in the interests of national security, the need for this new sentence is not clear. It is thus recommended **to delete it from the amended Article 20 par 2**.

102. The new Article 26 par 7 addresses the expiration of time limits for specific crimes, stating that periods of limitation in criminal cases "shall only be applied by court". It further provides that, regardless of the expiration of time limits, all criminal cases shall be investigated and then referred to courts.

103. Statutes of limitation generally aim at barring public prosecution after the passage of a stated period of time. Criminal statutes of limitation generally serve several purposes. They ensure the efficiency of the administration of criminal justice but also protect accused persons from having to defend themselves against charges dating back a considerable time, for which it would be difficult to gather exculpatory evidence.[113]

104. The proposed amendment to Article 26 par 7 raises a number of questions, including why crimes that fall under statutes of limitation should even be investigated, let alone taken to court. Dealing with cases that *a priori* fall under statutes of limitation runs the risk of overburdening law enforcement services in charge of investigating criminal cases, as well as courts in charge of adjudicating such cases.

105. In this context, it is generally important to strike a balance between ensuring that criminal offences do not go unpunished and guaranteeing the efficient administration of criminal justice systems with the proper use of resources. One compromise solution could be to supress statutes of limitation for criminal offences that are considered to be particularly grave, e.g. genocide, crimes against humanity and war crimes,[114] torture[115] or enforced disappearance.[116]

---

[111] See ibid. pars 145-146 (2015 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association).

[112] See OSCE, *Code of Conduct on Politico-Military Aspects of Security* (1994), available at http://www.osce.org/documents/sg/1994/12/702_en.pdf. See also OSCE, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (2008), available at http://www.osce.org/odihr/31393.

[113] See e.g., Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Georgia on the Retroactivity of Statutes of Limitation and the Retroactive Prevention of the Application of a Conditional Sentence*, CDL-AD(2009)012, 16 March 2009, par 15, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)012-e. See also University of Pennsylvania Law Review, *Note on the Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution,* Vol. 102, No. 5 (Mar., 1954), pages 632-635, available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7793&context=penn_law_review.

[114] On 8 December 1998, the Kyrgyz Republic has signed the Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998. Article 29 of the Rome Statute states that "the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".

[115] The UN Committee against Torture (UNCAT) considers that no statute of limitations should apply to the crime of torture; see UNCAT, *Concluding observations on Kyrgyzstan*, 20 December 2013, par 10, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fKGZ%2fCO%2f2&Lang=en.

[116] See Article 13 par 6 of the UN Declaration on the Protection of All Persons from Enforced Disappearance, UN General Assembly Resolution 47/133, 18 December 1992, available at http://www.un.org/documents/ga/res/47/a47r133.htm. See also e.g., Inter-American Court of Human Rights, case of *Heliodoro Portugal* v. *Panama*, judgment of 12 August 2008, Ser. C No. 186, par 206, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf, where the Inter-American Court of Human Rights has specified that, for domestic legislation on enforced disappearance to meet international standards, not only the punishment of the offence shall be subjected to a statute of limitations; the criminal proceedings should

106. It is also unclear whether following this new provision, courts would be able to render a guilty verdict even in cases where the statute of limitation has elapsed. In this context, it may be useful to refer to Article 315 of the Criminal Procedure Code, which states that "a court shall render the guilty verdict without assignment of punishment in the instances when by the moment of rendering [the judgment] the statute of limitations for criminal liability for such crime has expired." As recently concluded by the OSCE/ODIHR,[117] while such a provision is rather unusual (though not entirely exceptional, as similar rules may be found in other countries),[118] it is nonetheless considered to be in line with general rules on the presumption of innocence.[119] However, the legal consequences of such a guilty verdict remain unclear. If such a verdict has only a symbolic value and no other legal consequences are attached to it that could potentially worsen the legal situation of the defendant, then the proposed amendment is not *prima facie* problematic, although the guilty verdict by itself would already worsen the defendant's situation.

107. Finally, it is debatable whether such a procedural matter should be regulated at the constitutional level at all, or whether it would perhaps not be advisable to address such matters in criminal legislation. **In light of these and other concerns mentioned above, it is recommended to delete this provision.**

108. The new Article 36 par 5 provides that "a family is created upon voluntary union of a man and a woman who reached the age of consent and entry into marriage […, which] shall be registered by the state". This could imply that only the union of a man and a woman would be recognized by the state/public authorities as a "family". Such a provision may *de facto* limit access to certain state/public benefits which are dependent upon "family status"/official marriage (e.g., certain social security benefits, economic protection benefits, access to social housing, child and health benefits).[120] This would also indirectly discriminate against unmarried couples, those in a *de facto* relationship or same-sex partners. In principle, any difference in treatment on the basis of marital or family status must be justified on reasonable and objective criteria, and be proportionate.[121] As regards same-sex partners, they would be subject to intersecting forms of discrimination[122] on the basis of both, their sexual orientation and their family status. While same-sex marriages are debated in many OSCE participating States and the practice varies greatly across the OSCE and the Council of Europe regions,[123] the new provision could be problematic under the right to freedom from

---

also not fall under a statute of limitations until the fate and whereabouts of the disappeared person have been established.

[117] See e.g., *op cit.* footnote 73, par 48 (2015 ODIHR's Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic).

[118] See e.g., OSCE/ODIHR, *Opinion on the Draft Criminal Procedure Code of the Republic of Armenia*, 23 April 2013, par 13, available at http://www.legislationline.org/download/action/download/id/4407/file/228_CRIM_ARM_23%20April%202013_en.pdf.

[119] ibid. par 13 (2013 OSCE/ODIHR Opinion on the Draft Criminal Procedure Code of Armenia). See also *Adolf v. Austria*, ECtHR Judgment of 26 March 1982 (Application no. 8269/78), pars 35-41, available at http://hudoc.echr.coe.int/eng?i=001-57417.

[120] See e.g., *op. cit.* footnote 34, pars 35-36 (2015 CEDAW Committee's Concluding Observations on Kyrgyzstan), which for instance specifically refers to the denial of economic protection upon the dissolution of "unrecognized" marriages.

[121] See UN Committee on Economic Social and Cultural Rights (CESCR), *General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights*, 2 July 2009, par 31, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en.

[122] Meaning that the combination of discrimination on the basis of several grounds produces new and unforeseen effects inadequately addressed through measures aimed at addressing only one such ground; see e.g., European Parliament's Directorate General for Internal Policies, *Study on Discrimination Generated by the Intersection of Gender and Disability* (2013), pages 9 and 34-35, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493006/IPOL-FEMM_ET(2013)493006_EN.pdf; see also *op. cit.* footnote 94, par 59 (2011 OSCE/ODIHR-Venice Commission Guidelines on Political Party Regulation).

[123] As of November 2013, at the Council of Europe level, although there is no consensus, a trend is currently emerging with regard to the introduction of new systems of registered partnerships as well as forms of legal recognition of same-sex relationships: nine countries (Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden) recognise same-sex marriage. Seventeen member States (Andorra,

discrimination based on one's sexual orientation.[124] It is thus recommended **to retain the current wording of Article 36 par 5, while at the same time ensuring, as recommended by UN human rights monitoring bodies, that legislative measures necessary to protect the rights especially of women upon dissolution of unregistered marriages are also guaranteed**.[125]

109. The last sentence of the new Article 41 par 2 has been deleted. It previously stated that in cases where international human rights bodies confirm violations of human rights and freedoms, the Kyrgyz Republic shall take measures to restore such rights/freedoms and compensate for damage. While this obligation merely reflects the general obligations set out in international treaties ratified by and binding for the Kyrgyz Republic, the deletion would still appear to be a significant step back and weaken the status of international treaties in Kyrgyzstan, similar to the newly introduced Article 6 par 3 (see pars 40-42 *supra*).[126] The drafters should, therefore, **retain the current wording of Article 41 par 2**.

110. In contrast to the current wording of Article 50, the new Article 50 par 2 now permits the deprivation of citizenship and denial of the right to change one's citizenship in cases and following procedures set out in law. Under international law, States have broad discretion in the granting and withdrawal of citizenship[127] as it is generally recognized that it is up to each state to determine who its nationals are[128] (see also par 74 *supra* on loss of citizenship of judges). At the same time, the Universal Declaration of Human Rights of 10 December 1948 lays down in its Article 15 that "[e]veryone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".

111. The proposed changes would be worrying if they would *de facto* allow persons to become stateless, as this may have a direct impact on their enjoyment of other human rights and fundamental freedoms. In principle, a loss of nationality/citizenship is only permissible in cases of conduct seriously prejudicial to the vital interests of a state, and would always need to be proportionate to the seriousness of the crime, while respecting the principles of non-discrimination and fair trial (as far as respective procedures are concerned).[129] Hence, while not necessarily contradicting international standards, **the new Article 50 par 2 should be strictly circumscribed by adequate substantive and procedural safeguards, and comply with the above-mentioned principles. In particular, the Constitution should explicitly provide the grounds for the deprivation of citizenship**.

Austria, Belgium, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Slovenia, Spain, Switzerland and the United Kingdom) authorise some form of civil partnership for same-sex couples. Denmark, Norway and Sweden recognise the right to same-sex marriage without at the same time providing for the possibility of entering into a civil partnership. Lithuania and Greece are the only Council of Europe countries which provide for a form of registered partnership designed solely for different-sex couples as an alternative to marriage (which is available only to different-sex couples); see e.g., *Vallianatos and others v. Greece,* ECtHR Judgment of 7 November 2013 (Application no. 29381/09), pars 25-26, available at http://hudoc.echr.coe.int/eng?i=001-128294.

[124] See *op. cit.* footnote 121, par 32 (CESCR's General Comment No. 20 (2009)).

[125] This is all the more the case given that the UN HRC specifically welcomed this provision in its 2014 Concluding Observations on the Kyrgyz Republic. See also e.g., *op. cit.* footnote 34, pars 35-36 (2015 CEDAW Committee's Concluding Observations on Kyrgyzstan).

[126] See *op. cit.* footnote 26, par 6 (2014 UN HRC's Concluding Observations on Kyrgyzstan).

[127] See e.g., UN Refugee Agency, *Guidelines on Statelessness No. 1: The Definition of "Stateless Person" in Article 1 (1) of the 1954 Convention relating to the Status of Stateless Persons*, 20 February 2012, par 48, available at http://www.refworld.org/pdfid/4f4371b82.pdf.

[128] See e.g., Article 3 of the European Convention on Nationality: "1. Each State shall determine under its own law who are its nationals. 2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality".

[129] Venice Commission, *Opinion on the Draft Constitutional Law on « Protection of the Nation » of France*, CDL-AD(2016)006, 14 March 2016, pars 47 and 75-98, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)006-e.

6. Transitional Provisions

112. While the above amendments focus on the changes proposed in Article 1 of the Draft Amendments, Article 2 of the Draft Law deals with the entry into force of the amendments, and transitional matters.

113. Article 2 par 6 of the Draft Law refers to the non-applicability of time limits "in respect of persons who committed crimes *in officio* in preparation to the development and exploration of the 'Kumtor' gold deposit, as well as crimes against the interests of the service at non - governmental enterprises and organizations engaged in the development of the 'Kumtor' deposit. Such persons shall be brought to criminal liability irrespective of time of commitment of criminal offences except for persons in respect of whom there are judicial acts on application of time limits which entered into legal force". It is unclear why such a provision specifically addressing an individual legal affair or individual legal cases is included in the Draft Law aimed at amending the Constitution, and particularly in its transitional provisions. Legislative competence implies the adoption of laws of a general nature, that are applicable to all, rather than to specific individual situations/cases; a focus on individual legal cases could also give the impression that the legislator may wish to directly interfere in specific cases, which would contradict the principle of the separation of powers. Generally, new legislation should not have retroactive effect if it in any way places individuals in a situation that is worse than under the previous legislation. Moreover, Article 2 par 6 of the Draft Law also conflicts with the new Article 26 par 7 of the Constitution which provides that decisions regarding the applicability of statutes of limitations should be exclusively taken by the court. It is therefore **recommended to delete Article 2 par 6 of the Draft Law**.

114. Article 2 par 9 of the Draft Law provides that "Chairpersons, deputy Chairpersons of the Supreme Court, the Constitutional Chamber of the Supreme Court as well as local courts, elected or appointed in accordance with the provisions of the law adopted for the implementation of the Constitution of the Kyrgyz Republic dated June 27, 2010 shall retain their powers until expiration of the term of their election or appointment or until other circumstances envisaged in the law which result in their dismissal provided they *within one month's period* comply with the requirements of part [sic] 8-1 of article 94 of the Constitution of the Kyrgyz Republic in the version of this law". This amendment raises particularly serious concerns, as it opens the door to the dismissal of judges who refuse to waive their rights to privacy as required under Article 94 par 8-1 within one month of the entry into force of the Amended Constitution (see par 79 *supra*). This could potentially affect a significant number, and maybe even the majority of judges. Whatever the reason for introducing such a waiver of privacy rights (for instance to remedy widespread instances of corruption or widely spread incompetence among the judiciary), provisions that could lead to the dismissal of a significant number of judges at the same time are not in line with international and regional human rights and rule of law standards; this would also potentially jeopardize the continued and smooth administration of justice.[130]

115. Further, it appears that such dismissals would be automatic, without due consideration of each individual case. General Comment No. 32 of the UN Human Rights Committee on Article 14 of the ICCPR emphasizes the importance for states to ensure that "[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law".[131]

---

[130] See e.g., Venice Commission, *Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as Approved by the Constitutional Commission on 4 September 2015*, CDL-AD(2015)027, 26 October 2015, pars 36-38, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)027-e.

[131] See UN HRC, *General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, par 20, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en.

Moreover, a judge should in principle be entitled to appeal the decisions relating to his/her early dismissal.[132]

116. In light of the above, the respective legal drafters are strongly urged to remove Article 2 par 9 of the Draft Law. **At a minimum, this requirement should not be retroactive, and should only be applicable to judges elected or appointed after the entry into force of the Amended Constitution**. The OSCE/ODIHR and the Venice Commission also reiterate the recommendations made in their 2014 Joint Opinion pertaining to the quality of proceedings that may lead to the early dismissal of judges in the Kyrgyz Republic.[133]

7. Gender Neutral Drafting

117. It is noted positively that overall, the Draft Amendments uses gender neutral drafting. However, on some occurrences, certain provisions still use only the male gender. This is not in line with general international practice, which requires legislation to be drafted in a gender neutral manner. It is recommended to review the respective provisions and avoid the use of the male gender (such as reference to "он"/he or "его/ему"/his)[134] by **replacing relevant wording with, as appropriate, the plural or other gender-neutral formulation**.[135]

[132] See e.g., *op. cit.* footnote 2, pars 112-113 (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).
[133] ibid. Section 6 (pars 89-118) (2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).
[134] See e.g., new Article 1 par 1 (1) referring to "его"/his; and new Article 24 par 2 referring to "он"/he.
[135] For further reference, see e.g., the UN Economic and Social Commission for Western Asia (ESCWA), *Guidelines on Gender-Sensitive Language*, developed by Nouhad Hayek, available at https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf. This could mean replacing, as appropriate, "он"/he by "он или она"/"he or she" or "его/ему"/his by "его или её"/"ему или ей"/"his or her", or "своего/своему" when suitable, or other gender neutral formulations.