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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**KYRGYZSTAN**

**JOINT OPINION**

**ON THE DRAFT CONSTITUTION OF THE KYRGYZ REPUBLIC**

**adopted by the Venice Commission at its 126th Plenary Session**  
**(online, 19-20 March 2021)**

**on the basis of comments by**

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## I. Introduction

1. On 9 December 2020 the Ombudsman of the Kyrgyz Republic, Mr Tokon Mamytov, requested the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) to prepare an opinion on the constitutional reform in the Kyrgyz Republic. On 10 December ODIHR invited the Venice Commission to prepare a joint opinion. On 16 February 2021, the Ombudsman of the Kyrgyz Republic sent a letter to the OSCE/ODIHR and to the Venice Commission confirming its request for an opinion on the draft Law “On the Constitution of the Kyrgyz Republic” (hereinafter “the Draft Constitution”, CDL-REF(2021)017). The Venice Commission and the OSCE/ODIHR agreed to prepare the Opinion jointly.

2. Mr Paolo Carozza (Member, United States of America), Ms Angelika Nussberger (Member, Germany), Mr Qerim Qerimi (Member, Kosovo<sup>1</sup>) and Ms Hanna Suchocka (Honorary President of the Commission) were appointed as rapporteurs for the Venice Commission. Ms Marta Achler, Ms Slavica Banić, Mr Gábor Halmai, and Mr Martin Scheinin were appointed as legal experts for the OSCE/ODIHR.

3. During the past years, the OSCE/ODIHR and the Venice Commission have already supported constitutional reform efforts in the Kyrgyz Republic<sup>2</sup> and prepared a number of legal reviews on different Kyrgyz legislation, including on political parties, the judiciary and certain courts, including the Supreme Court and its Constitutional Chamber.<sup>3</sup>

4. On 4 March 2021, a joint delegation composed of Mr Paolo Carozza, Ms Angelika Nussberger, Mr Qerim Qerimi and Ms Hanna Suchocka on behalf of the Venice Commission, and of Ms Marta Achler and Ms Slavica Banić, on behalf of the OSCE/ODIHR, accompanied by Mr Serguei Kouznetsov from the Secretariat of the Venice Commission, and Mr Konstantine Vardzelashvili and Ms Anne-Lise Chatelain from the OSCE/ODIHR, participated in a series of videoconference meetings with the Ombudsman of the Kyrgyz Republic and representatives of non-governmental organisations (NGOs) and other stakeholders. On 26 February 2021 the Director of ODIHR sent a letter to Mr Talant Mamytov, Speaker of Parliament (Jogorku Kenesh) of the Kyrgyz Republic inviting the authorities to have an exchange of views with the rapporteurs of the Venice Commission and legal experts of the OSCE/ODIHR on the Draft Constitution. However, no official reply was received and no meetings with the representatives of the authorities could be organised. This Joint Opinion takes into account the information obtained during the meetings.

<sup>1</sup> [OSCE disclaimer: “Any reference to Kosovo, whether to the territory, its institutions, or population, is to be understood in full compliance with United Nations Security Council Resolution 1244”]

<sup>2</sup> OSCE/ODIHR and Venice Commission, [Joint Opinion on the Draft Law on Introduction of Changes and Amendments to the Constitution of the Kyrgyz Republic](#), CDL-AD(2016)025, 19 October 2016 (hereinafter “2016 Joint Opinion”); OSCE/ODIHR and Venice Commission, [Joint Opinion on the Draft Law on Introduction of Changes and Amendments to the Constitution of the Kyrgyz Republic](#), CDL-AD(2015)014, 22 June 2015 (hereinafter “2015 Joint Opinion”); Venice Commission, [Opinion on the Draft Constitution of the Kyrgyz Republic](#), CDL-AD(2010)015, 8 June 2010; Venice Commission, [Opinion on the Constitutional situation in the Kyrgyz Republic](#), CDL-AD(2007)045, 17 December 2007; OSCE/ODIHR, [Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic](#), 19 October 2005; Venice Commission, [Interim Opinion on Constitutional Reform in the Kyrgyz Republic](#), CDL-AD(2005)022-e, 24 October 2005, available at; Venice Commission, [Opinion on the Draft Amendments to the Constitution of Kyrgyzstan](#), CDL-AD(2002)33, 18 December 2002.

<sup>3</sup> See e.g., Venice Commission, [Urgent amicus curiae brief relating to the postponement of elections motivated by constitutional reform](#), CDL-AD(2020)040, 11 December 2020; OSCE/ODIHR, [Urgent Opinion on the Draft Law on Political Parties of the Kyrgyz Republic](#) (13 June 2020); 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, CDL-AD(2014)018; 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; 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; 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; Venice Commission, [Opinion on the Constitutional Law on bodies of Judicial self-regulation of Kyrgyzstan](#), CDL-AD(2008)040, 16 December 2008; Venice Commission, [Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan](#), CDL-AD(2008)039, 16 December 2008; Venice Commission, [Opinion on the Constitutional Law on Court Juries of Kyrgyzstan](#), CDL-AD(2008)038, 16 December 2008; 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.

5. The present Joint Opinion was examined by the Sub-Commission on Democratic institutions at its 71st on-line meeting on 18 March 2021. Following an exchange of views with Mr Tokon Mamytov, the Joint Opinion was adopted by the Venice Commission at its 126th online Plenary Session on 19 March 2021.

## II. Scope of the Joint Opinion

6. The scope of this Joint Opinion covers only the Draft Constitution submitted for review.<sup>4</sup> However, it does not constitute a full and comprehensive review of the entire constitutional framework of the Kyrgyz Republic.

7. The Joint Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on main areas that require amendments or improvements than on the positive aspects of the Draft Constitution. 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 legal opinions published by the OSCE/ODIHR and/or the Venice Commission.

8. 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,<sup>5</sup> the Joint Opinion also takes account of the potentially different impact of the Draft Constitution in this respect.

9. This Joint Opinion is based on an unofficial English translation of the Draft Constitution. Errors from translation may result.

10. In view of the above, the OSCE/ODIHR and the Venice Commission would like to note that this Joint Opinion will not cover all aspects of the Draft Constitution, and that the Joint Opinion thus does not prevent them from formulating additional written or oral recommendations or comments on the constitutional reform in the Kyrgyz Republic in future.

11. In view of the below described deficiencies in the process of preparation and adoption of the Draft Constitution to date, and until such time as this is duly rectified, the OSCE/ODIHR and the Venice Commission would like to state that the issuance and adoption of this Joint Opinion, which reviews the Draft Constitution, does not amount to an endorsement of the process of constitutional reform undertaken in the Kyrgyz Republic nor should it be understood to legitimise the same.

## III. Executive Summary

12. The Joint Opinion notes the positive changes in the Draft Constitution, such as giving human rights and freedoms a prominent place in the overall framework of the Draft Constitution and re-establishing the Constitutional Court in line with earlier recommendations of the OSCE/ODIHR and the Venice Commission. However, the Joint Opinion also finds that many provisions regulating the institutional framework and separation of powers, defining the powers and competencies of the President, the Parliament (the Jogorku Kenesh) and the

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<sup>4</sup> The Ombudsman requested OSCE/ODIHR and Venice Commission the review of the Draft Constitution for compliance with the Human Dimension commitments and international standards which include not only issues related to Human Rights but also to the functioning of democratic institutions, the current opinion also covers such issues as separation of powers, rule of law and independence of the judiciary.

<sup>5</sup> See [OSCE Action Plan for the Promotion of Gender Equality](#), adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32, which refers to commitments to mainstream a gender perspective into OSCE activities; and Council of Europe, [Gender Equality Strategy 2018-2023](#), which includes as its sixth strategic objective the achievement of gender mainstreaming in all policies and measures.

Judiciary, as well as some provisions dealing with human rights and freedoms are not in line with international standards and OSCE commitments.

13. Furthermore, the foreseen timeline and procedures leading to the adoption of the constitutional amendments raise serious concerns due to the lack of respect for the principles of rule of law and legality, and the absence of meaningful and inclusive public consultations and debate in parliament. The OSCE/ODIHR and the Venice Commission have always been of a view that constitutional amendments should be adopted through an effective, thorough, and inclusive process, facilitating the consensus of all key stakeholders.

14. The proposed Draft Constitution aim at introducing a presidential model of governance and move away from the parliamentary model to which the Kyrgyz Republic has been progressing from 2010 to date.

15. Throughout the OSCE region countries have adopted different systems of government. While in Europe the parliamentary system is the predominant choice, there are also countries in the OSCE region that have opted for a semi-presidential or presidential system. For this reason, the OSCE/ODIHR and the Venice Commission do not recommend any specific government model. Nonetheless, whichever model is chosen, participatory democratic governance, the rule of law, fundamental rights and freedoms must be preserved, and separation of powers must be maintained with checks and balances among different institutions.<sup>6</sup>

16. As such, one of the fundamental concerns with the current Draft Constitution is the overly prominent role and prerogatives of the President over the executive and the other branches of powers, with a weakened role of the Parliament and potential encroachments on judicial independence. This creates a real risk of undermining the separation of powers and the rule of law in the Kyrgyz Republic. It is therefore advised for the drafters to re-consider the overall institutional set-up, and significantly revise the relevant provisions of the Draft Constitution.

17. In light of the above, OSCE/ODIHR and the Venice Commission make the following key recommendations for improvement of the Draft Law:

- A. to ensure that the constitutional reform process allows for informed, inclusive and meaningful discussions within and outside the Parliament, with the participation of all relevant stakeholders, including non-parliamentary political parties, civil society, and the wider public, guaranteeing adequate time for proper discussions, at all levels, of the proposed Draft Constitution;
- B. to review the powers given to the President in order to ensure the separation of powers, including by completely reconsidering the powers of the President to single-handedly appoint and dismiss almost the entire administration of the state and/or key office-holders (including Cabinet of Ministers, Prosecutor General, Ombudsman for Children's rights, etc.) as well as his/her role in the selection and dismissal of judges of the highest (Supreme, Constitutional) and lower level courts; also removing the President's powers to dissolve local councils (keneshes), only permitting suspension of the local authorities and requiring the President to consult the Constitutional Court beforehand, while specifying the circumstances in which such decision may be taken; and restricting the President's power to initiate laws and referendums;
- C. to provide stronger oversight capacities to the Jogorku Kenesh, including through committees, to both initiate and review draft laws and ensure an appropriate budget to support this important function of checks over the powers of the President and the executive;
- D. to include in the text of the Constitution the main features of the electoral system envisioned for the election of the Jogorku Kenesh while considering that changes to

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<sup>6</sup> See e.g., Venice Commission, [Opinion on the Amendments to the Constitution](#), CDL-AD(2017)010, para. 14.

fundamental aspects of the electoral system should not take effect less than one year prior to an election and to remove the system of “recall” of deputies of the Jogorku Kenesh from the Draft Constitution;

- E. to re-consider the need for granting new prerogatives to the People’s Kurultai (proposing dismissal of the Cabinet members, appointing 1/3<sup>rd</sup> of the Judicial Council, etc.), and further clarify as appropriate its status, composition, and functions to ensure that it is not used to side-line the Jogorku Kenesh or duplicate its powers or the powers of other states bodies;
- F. to reinforce the independence of the judiciary from the legislative and executive branches of power, including the President, by specifying in the Draft Constitution that judge members of the Judicial Council are chosen by the judiciary and should ensure the representation of the judiciary at all levels; explicitly stipulating the principles of irremovability and security of tenure; reconsidering entirely the probationary period of five years for judges; reconsidering the provisions on transfer of judges and strengthening the decision-making powers of the Judicial Council regarding the appointment, promotion, transfer and disciplinary procedure for all judges, except for the Constitutional Court judges;
- G. to clarify the place of the Prosecutor General in the proposed constitutional order, also spelling out his or her competences, while removing the power of “supervision of exact and uniform implementation of laws”;
- H. to define the overall competencies and provide guarantees of institutional independence of the Ombudsman, including the functional immunity of the Ombudsman and his or her staff, during and after their term of office, from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities;
- I. to reconsider the selection and dismissal procedures for the members of the Central Commission for Elections and Referenda to ensure that it qualifies as an “independent impartial body” which is “in charge of applying electoral law”; and
- J. to revise the provisions pertaining to human rights and fundamental freedoms, avoiding vague wording and language in the formulation of the rights of individuals and the obligations of the State; clearly state which rights and freedoms are non-derogable and absolute rights and remain applicable regardless of the circumstances, even in a state of emergency as well as revise the provisions referring to mass media, freedom of expression and access to information in line with international standards.

#### **IV. Analysis and Recommendations**

##### **A. Background**

18. The 4 October 2020 parliamentary elections were followed by widespread claims of fraud and large-scale protests and on 6 October 2020 the Central Commission for Elections and Referenda (CEC) voided the voting results. The then-President, who could have served until 2023, decided to resign on 15 October. Former member of parliament Mr Sadyr Japarov subsequently served as acting Prime Minister and acting President until he resigned on 14 November 2020 (to be able to stand as a candidate in the early presidential election of 10 January 2021).

19. On 21 October 2020, the CEC decided to call repeat parliamentary elections and set the election date at 20 December 2020. A day later, on 22 October 2020, the Parliament passed in three readings the Constitutional Law “On the suspension of certain norms of the Constitutional Law of the Kyrgyz Republic ‘On Elections of President of the Kyrgyz Republic and Deputies of Jogorku Kenesh of the Kyrgyz Republic’”, which postponed the elections of the new Parliament until June 2021 to allow for constitutional reform, thereby also expanding the mandate of the current deputies until the new elections.

20. On 17 November 2020, following the request by the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, the Venice Commission published an urgent *amicus curiae* brief concluding that during a period of *prorogatio*, i.e. of diminished powers, the Parliament should only be allowed to carry out some ordinary functions, and not to approve extraordinary measures, including constitutional reforms and emphasising that any suspension of the elections should be for the shortest time possible.<sup>7</sup> However, on 2 December 2020, the Constitutional Chamber ruled that the Parliament acted constitutionally when postponing the elections for the sake of the constitutional reform arguing that it was an exceptional necessity in the period of instability.

21. During this period, a group of parliamentarians proposed a new draft constitution, which was published for public discussion by the Jogorku Kenesh on 17 November 2020. The proposal, however, sparked widespread criticism and the planned constitutional referendum was replaced by a referendum on the system of government, inviting voters to choose between either a presidential or a parliamentary form of government. The referendum took place on 10 January 2021, on the same day as the early presidential election, and resulted in a large majority of voters favouring a presidential system.

22. On 9 February 2021, a revised draft law “on the Constitution of the Kyrgyz Republic” was published for public discussion by the Jogorku Kenesh, which is the subject of this Joint Opinion.

23. The revised draft law contains eight Articles. Article 1 of the draft law contains the Draft Constitution commencing with the Preamble and Articles 1-116, whereas Articles 2-8 deal with the manner in which the new provisions would come into force and the transitory provisions concerning the status quo of the present office holders (including the President). For the purposes of clarity, unless otherwise indicated, all references to articles in this Opinion are to the provisions of the Draft Constitution, found in Article 1 of the draft law “On the Constitution of Kyrgyzstan”.

## **B. The procedure for amending the current Constitution**

24. The Draft Constitution under review was prepared after the referendum of 10 January 2021 and represents a substantially revised version of the previous draft constitution published for public discussion on 17 November 2020. This revised draft, which was prepared by the Constitutional Council, a body established on 20 November 2020 by order of the then acting President, was published for public discussion on 9 February and was open for comments until 9 March 2021. Despite the period of *prorogatio*<sup>8</sup> of the Jogorku Kenesh, deputies were also at some point supposed to submit their proposals to amend the proposed draft to the Constitutional Council for review, which should then be submitted to the Jogorku Kenesh along with a draft law on holding a referendum. On 2 March 2021, the draft law on holding a referendum on 11 April 2021 was submitted to the Jogorku Kenesh and was adopted in first reading on 3 March 2021.<sup>9</sup> The draft of this law is not publicly available.

25. At the same time, it was reported that the Draft Constitution was in fact appended to the draft law on the referendum, and on 11 March 2021 reportedly both draft law on the referendum and the Draft Constitution were adopted together in the second and third reading.

26. The entire process raises several concerns and presents serious shortcomings. First, the legitimacy of the Constitutional Council, a body not contemplated in the current Constitution and established by the executive, may be questioned, all the more in light of Article 114 of the current Constitution, which assigns to the Jogorku Kenesh a leading role when revising the Constitution. Second, as mentioned above, during the period of *prorogatio*, the Jogorku Kenesh should only be allowed to carry out some ordinary functions, and not to approve

<sup>7</sup> *Op. cit.* footnote 3, paras. 68 and 70 (2020 Venice Commission’s Urgent Amicus Curiae Brief).

<sup>8</sup> *Op. cit.* footnote 3 (2020 Venice Commission’s Urgent Amicus Curiae Brief).

<sup>9</sup> See <<http://kenesh.kg/ky/news/show/111116/kirgiz-respublikasinin-konstitutsiyasinin-dolbooru-boyuncha-referendumdu-2021-zhildin-11-aprelinde-belgilo-sunushtaluuda>>.

extraordinary measures, including constitutional reforms.<sup>10</sup> Third, the entire process of discussion and adoption of the Draft Constitution by the Jogorku Kenesh may not take place or be done in only a few days/weeks. This timeline does not allow for thorough consideration of the proposed draft and for public comments and would result in a hastily finalised Draft Constitution. Further, if such a procedure is followed, this will mean that the proposed constitutional amendments will not be subject to three readings by the Jogorku Kenesh at two months' intervals in between before being put to referendum, which is not in line with Article 114(3) of the current Constitution. While the current Constitution only refers to amendments to the Constitution and not to the adoption of a new Constitution, it is generally acknowledged that in light of the principle of "constitutional continuity", and even if not contemplated by an existing Constitution, new constitutions should be adopted following the prescribed amendment procedures in force, to ensure the stability, legality and legitimacy of the new system.<sup>11</sup>

27. The timeline currently foreseen does not allow for a meaningful discussion in the Parliament, nor for facilitation of consensus among the key stakeholders by Jogorku Kenesh. Furthermore, the process will not offer sufficient time for proper voter education on the proposed amendments to allow voters to make an informed choice when voting at the referendum, contrary to international recommendations and good practice.<sup>12</sup>

28. In addition, the matters being decided by a referendum should never be too vague, and the draft legislation adopted in this manner should not leave important matters to future laws.<sup>13</sup> In this context, it should be noted that it is normal for constitutions to leave some matters to constitutional (organic) laws, while others are worthy of securing at the constitutional level. This will be noted in the Opinion as appropriate.

29. 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. Although drafted as an amendment to the Constitution, the Draft Constitution is rather a near complete replacement of the current Constitution; the title is thus misleading. The lack of transparency has been further undermined, as the bill on referendum has not been made public, even after its adoption in the first reading. Furthermore, civil society and the public have had difficulties in obtaining the text of the Draft Constitution (reportedly updated since its publication on 9 February).

30. The international standards relevant to this issue are those applying to democratic law-making. In particular, OSCE participating States have committed to ensure that legislation will be "adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability" (1990 OSCE Copenhagen Document, para. 5.8).<sup>14</sup> It is also worth recalling that OSCE commitments require legislation to be adopted "as the result of an open process reflecting the will of the people, either directly or through their elected representatives" (Moscow Document of 1991, para. 18.1).

31. The Venice Commission's Rule of Law Checklist which contains standards and benchmarks concerning the quality of the procedures by which laws are made, also emphasises that the public should have access to draft legislation and a meaningful opportunity to provide input during the

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<sup>10</sup> *Op. cit.* footnote 3, paras. 68 and 70 (2020 Venice Commission's Urgent Amicus Curiae Brief).

<sup>11</sup> See e.g., Venice Commission, Report on Constitutional Amendment, CDL-AD(2010)001-e, especially paras. 68 and 124.

<sup>12</sup> See e.g., Venice Commission, [Code of Good Practice on Referendums](#), CDL-AD(2007)008rev-cor, point I.3.1.d and paras. 13-14 of the Explanatory Memorandum, which emphasize that "[v]oters must be able to acquaint themselves, sufficiently in advance, with both the text put to the vote and, above all, a detailed explanation".

<sup>13</sup> See *op. cit.* footnote 2, para. 28 (2015 Joint Opinion).

<sup>14</sup> Available at <<http://www.osce.org/fr/odhr/elections/14304>><http://www.osce.org/fr/odhr/elections/14304>>.

law-making process.<sup>15</sup> The process for making law must be “transparent, accountable, inclusive and democratic”. Where appropriate, impact assessments should be made before legislation is adopted.<sup>16</sup>

32. For consultations on draft legislation to be meaningful and effective, they should provide sufficient time to stakeholders to prepare and submit recommendations on draft legislation, while the State should set up an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions, providing for clear justifications for including or not including certain comments/proposals.<sup>17</sup> Notably, 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 ensuring that the text is adopted by society as a whole, and reflects the will of the people and support of the public.<sup>18</sup> These consultations should involve political institutions, non-governmental organisations and civil society, academia, the media and the wider public,<sup>19</sup> offer equal opportunities for women and men to participate, and should involve proactively reaching out to persons or groups that would otherwise be marginalised, such as national minorities.<sup>20</sup> Therefore, it is essential **to ensure that the constitutional reform process allows for informed and meaningful discussions with the participation of all relevant stakeholders, including non-parliamentary political parties, civil society, and the wider public; there should be time for proper discussions, at all levels, of the proposed amendments.**

## C. Preamble and Basics of the Constitutional Order

### 1. General Comments

33. From the outset it should be noted that the text of the Draft Constitution is difficult to read since various matters that are related to one another are treated separately (for example, the President and the executive power are separate; human rights protections are fragmented into various places); and there is a great deal of duplication, which invites inconsistency in application. Some of these inconsistencies appear already in the preamble.

34. The Preamble and the first Section on the Basics of the Constitutional Order bring together the key features that characterise the Kyrgyz Republic and establish general constitutional principles, which overall reflect the practice of many OSCE participating States

<sup>15</sup> See Venice Commission, CDL-AD(2016)007, Part II.A.5.

<sup>16</sup> *ibid.* Benchmarks A.5, A.5.iv, A.5.v.

<sup>17</sup> See e.g., [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; , the [Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE](#) (1991), para. 18.1 , 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, para. 18; 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; 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, para. 19.

<sup>18</sup> 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), para. 18.1 , 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, para. 18; 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.

<sup>19</sup> See 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, para. 19.

<sup>20</sup> 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.

and Council of Europe Member States. It is as such positive that the dimension of constitutional and human rights is present not only in the extensive fundamental rights Section II (Articles 23-65) but also elsewhere in the Constitution. In particular, Article 2 (2) on the foundational principles of the Constitution, which is new in comparison to the current Constitution, refers to the protection of human and civil rights and freedoms, thus formally giving them a prominent place in the overall framework of the Constitution.

35. At the same time, compared to the current Constitution, a number of important changes are being introduced, which demonstrates a worrisome shift in the key values and aims of the Constitution.

36. The Preamble and certain provisions of the new Chapter on the spiritual and cultural foundation of society under Section I signal an increased emphasis on traditions and customs (Preamble and Article 21(1)), national and moral values (Article 10(4)), patriotism (Article 20(3)), potentially at the expense of human rights and fundamental freedoms. Certain references to morals, ethical values and the “public conscience of the people” (Article 10(4)) as potential grounds for restricting activities and human rights and fundamental freedoms are also concerning due to the likely wide and inherently subjective interpretation of such terms.<sup>21</sup> Moreover, a new chapter on spiritual and cultural foundations of society in Section I is brought before the Section II on human rights and fundamental freedoms, **which tends to suggest a shift of priorities and a dilution of the weight and value given to human rights and fundamental freedoms.**

37. There are also instances of **significant overlap between fundamental rights provisions** under Section II and general constitutional provisions of Section I,<sup>22</sup> which may give rise to difficult issues of interpretation as to which provisions should prevail (see Sub-Section E *infra*).<sup>23</sup>

## 2. Hierarchy of Norms and Status of International Human Rights Norms

38. Article 6 of the Draft Constitution mirrors Article 6 of the current Constitution on the hierarchy of norms and status of international treaties. Article 6(3) of the Draft Constitution is commendable in recognising and constitutionally anchoring the legally binding force in the domestic legal order of international treaties in force in the Kyrgyz Republic. One remarkable feature of the Article 6(3) of the Draft Constitution is the inclusion of “generally recognised principles and norms of international law” in the provision, suggesting that not only treaties but also human rights norms of customary international law and, as a sub-category of them, *jus cogens* norms are an inherent part of the domestic legal order. The separate affirmation in Article 61(1) of the justiciability before domestic courts of “rights and freedoms provided for by the Constitution, laws, international treaties to which the Kyrgyz Republic is a party, and generally recognised principles and norms of international law”, is also welcome.

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<sup>21</sup> 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.

<sup>22</sup> For instance, the following provisions respectively in Section I and Section II: Article 8 together with political parties also mentions trade unions and public associations v. Article 36 on freedom of association; Article 9 on the separation of religion and state v. Article 34 on freedom of conscience and religion; Article 10 on mass media v. Article 33 on freedom of expression, also linked to Article 63(1), which states that “[l]aws restricting freedom of speech, press and media shall be prohibited”; Article 15 on the protection of private property and Article 16 on land ownership v. Article 40 on the right to property; Article 17 on conditions of economic activity vs. Article 41 on freedom of economic activity; Article 19 on welfare, social protection and multiple dimensions of economic and social rights v. actual fundamental rights provisions on economic and social rights in Articles 42-45; Article 20 on the protection of the family and of children v. Articles 26 and 27 on right to private and family life and rights of the child; Article 21 on culture v. Article 48 on several cultural rights; and Article 22 on education v. Article 46 on the right to education.

<sup>23</sup> For instance, whether one or the other clause in the Constitution represents *lex specialis* which due to its greater specificity would have primacy over another, more generic, clause, or whether inferences *a contrario* can be drawn from the absence of a norm or phrase in one provision, in contrast to its presence in another (if something is explicitly mentioned in clause A as protected, the fact that it is not mentioned in clause B may be taken as meaning that it cannot be protected by it).

39. 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. Moreover, the hierarchy of norms between the Constitution, international treaties, laws and other types of secondary legislation is rather unclear from the wording of Article 6. To avoid any ambiguity, the drafters may consider reinstating the priority of international human rights treaties over domestic law, as well as clarifying their hierarchical relationship with the Constitution.<sup>24</sup>

40. In any case, whatever the conditions and modalities for implementing norms of international law in a country, a State remains bound by international law and cannot invoke the provisions of its internal law as justification for its failure to perform a treaty that it has ratified (Article 27 of the Vienna Convention on the Law of Treaties).<sup>25</sup> Accordingly, Article 102(1) of the Draft Constitution, which provides that “[t]he court may not apply a normative legal act that contradicts the Constitution” should not be understood as diminishing the full applicability in international law of a specific treaty ratified by the Kyrgyz Republic, even if the court were to conclude through a domestic interpretation that it would contradict the Constitution.

### **3. Separation of Powers**

41. Article 1 enumerates the general principles defining the constitutional system of the Kyrgyz Republic (independent, sovereign, democratic, unitary, governed by the rule of law, secular, and social). As the State is defined as “unitary” there is no vertical separation of powers potentially compensating an inherent lack of checks and balances in the horizontal separation of powers system.

42. Another important feature of the Draft Constitution is that a number of important issues are to be regulated by constitutional laws, notably on composition and powers of the Cabinet of Ministers; the electoral system; parliamentary immunities; the composition and competences of the People’s Kurultai; the composition and procedure for the appointment and term of office of judges of the Constitutional Court; and overall competencies, guarantees of institutional independence, term of office and grounds for dismissal of the Ombudsman.

43. According to Article 1 para. 5 both the President and the Jogorku Kenesh are allowed to speak on behalf of the people of the Kyrgyz Republic while according to Article 66 para. 5 it is only the President who represents the Kyrgyz Republic in domestic and international relations. There might be a problem in interpreting what it means on the one hand “to speak on behalf of the people” (“выступать от имени народа”) and on the other hand “to represent the Kyrgyz Republic in domestic relations” („представлять ... во внутренних отношениях“). **This provision needs clarification.**

44. Article 2 provides for both direct and indirect democracy (elections, referenda on the one hand and representation by the State bodies and organs of local self-government on the other hand). Article 4, however, only focuses on the supremacy of the power of the people is “represented and ensured” by “a popularly elected President and the Jogorku Kenesh” and does not stipulate the role of direct democracy. On the other hand, the idea of direct democracy is again taken up in Article 37 para. 2 which stipulates the citizens’ right to participate in the management of public and state affairs both directly and through their representatives. **This issue should be further clarified by making the stipulation for direct and indirect democracy consistent throughout.**

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<sup>24</sup> Paras. 41-42 (2016 Joint Opinion); and para. 16 (2010 Venice Commission’s Opinion on the Draft Constitution of the Kyrgyz Republic). See also e.g., Venice Commission, [Report on the implementation of international human rights treaties in domestic law and the role of courts](#), CDL-AD(2014)036-e, paras. 25-28.

<sup>25</sup> Vienna Convention on the Law of Treaties, 23 May 1969, entered into force on 27 January 1980. The Kyrgyz Republic acceded to the Vienna Convention on 11 May 1999.

45. It would appear that Article 4 limits the principle of separation of powers to the division of competencies and functions (“разделения полномочий и функций”) between different State institutions. State functions (government, legislation, judicial decision-making) can be distributed in various ways between the different State bodies. The Kyrgyz model defines the President as the “head of the executive power” (Article 66 (1)) and stipulates that “the executive power ... is exercised by the President (Article 89 (1)). While the legislative power is vested in the Jogorku Kenesh (Article 76 (1), the President also exercises legislative powers as he can initiate both referenda (Article 70 (2) (1)) and laws (Article 70 (3)(1)) and is allowed to adopt decrees and orders that are binding on the entire territory of the Kyrgyz Republic (Article 71). The President may also encroach on judicial powers by his or her involvement in the nomination process (Article 70 (4)). This means that while the executive power is not shared, but fully within the hands of the President, the legislative and judicial functions are not exclusively concentrated on the Parliament and the judges. This suggests from the outset an imbalance between the different branches of power. **It would be advisable to replace the current wording “coordinated functioning and interaction” of state powers with clear provisions referring to the classic principles of “separation of powers” and of “checks and balances”.**

46. In addition to the State bodies found in constitutions worldwide, the Kyrgyz Constitution introduces with the People’s Kurultai a “public-representative assembly” (“общественно - представительное собрание” – better translated as an Assembly representing the society) (Article 7). It has deliberative and supervisory functions and can make recommendations in areas of social development (Article 7). Thus, it must be seen as an additional element in the separation of powers model. It has the right of legislative initiative (Article 85), is represented in the Judicial Council (Article 96 (7)) and may make proposals to dismiss members of the Cabinet of Ministers and heads of executive bodies (Article 70 (4)). **Provisions on this new body lack clarity and should be reconsidered.**

## **D. Institutional Arrangements**

### **1. General Comments**

47. The first democratic Constitution of Kyrgyzstan was adopted in 1993 but amended several times during the presidency of Askar Akaev giving it a more and more authoritarian character.<sup>26</sup> After the “Tulip Revolution” in 2005 there was an intense debate on the adoption of a new Constitution. The main controversial question was the separation of powers model, especially the system of checks and balances. Since then, the question of the distribution of powers has been answered in many different ways; the debate on amending the Constitution or adopting a new one was a mirror of the on-going political controversies. The 2007 Constitution kept the semi-presidential system, but, in the view of the Venice Commission, in reality centralised political powers with the Presidency again.<sup>27</sup>

48. In 2010 some parts of the 2007 Constitution, especially those concerning the distribution of power between the President, the Government and Parliament were reworked fundamentally in order to pass from a (semi)presidential system to a parliamentary system. This was explicitly welcomed by the Venice Commission. The Commission recommended, however, clearer rules on the formation of the Government and on the limits to the President’s powers to issue decrees and orders. Suggested changes in 2015 once again concerned the separation of powers, i.e. the immunity of the deputies of the Jogorku Kenesh, the suspension/loss of their mandates, the dismissal of members of Cabinet, the authority of the Prime Minister to appoint/dismiss the heads of local state administration, and the rights of local keneshes in this respect, as well as the roles of the Supreme Court and of its Constitutional Chamber. In addition, the rules on the amendment of the Constitution were changed. The Venice Commission considered that the proposed

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<sup>26</sup> CDL-AD (2007)045, para. 4.

<sup>27</sup> CDI-AD (2010)015, para. 7.

changes raised concerns regarding the separation of powers. While these draft amendments were abandoned later, new proposals for amending the Constitution made in 2016 were considered by the Venice Commission to raise similar concerns. They were seen to 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. Several amendments examined by the OSCE/ODIHR and the Venice Commission were abandoned by the drafters in the final text submitted to the national referendum on 11 December 2016.

49. The Draft Constitution now presented for review constitutes a significant departure from the direction in which the Constitution of the Kyrgyz Republic has been amended since 2007, that is, towards a parliamentary model. As already mentioned in the introduction, much work has been done since 2007, and earlier, *inter alia* with the assistance of the OSCE/ODIHR and the Venice Commission, to strengthen the separation of powers in the Kyrgyz Republic, in the framework of the parliamentary model of government. The system proposed by the Draft Constitution makes a clear return to a strong presidential model, warranting careful consideration and analysis to ensure that the principles of separation of powers, rule of law, democracy and fundamental rights and freedoms are respected.

## **2. President**

50. Article 66 (together with subsequent provisions) establishes a presidential system and the President's powers are overwhelmingly broad. They are spelled out in Section III, Chapter I of the Draft Constitution but also appear in a number of provisions of other chapters. The strongest available check on the power of the President is found in Article 67(2), which states that "the same person cannot be elected President for more than two terms". This provision is an essential one, as it is one of the few which keeps presidential powers in check, provided that it is not later amended, should the Draft Constitution indeed be adopted in this form.

51. The powers of the President are limited by Article 73 which provides the reasons and procedure for removal from office. The process of removal is complex, as it involves "two-thirds vote of the total number of deputies of the Jogorku Kenesh as initiated by at least half of the total number of deputies on a motion made by at least half of the total number of deputies on the basis of the conclusion of a special commission formed by the Jogorku Kenesh, which shall be sent to the Prosecutor General and the Constitutional Court" (Article 73(3)). This must be then confirmed by the Prosecutor General, the Constitutional Court and again go to the 2/3 majority vote in parliament. It is therefore recommended that further features of keeping the President's power in check are entrenched in the Constitution, in particular, in the carrying out of his/her mandate through the terms of office and not only in the form of an election once every five years, limited to two terms and a difficult removal procedure. The process for removal should be more realistic, so as to provide an important check on presidential power in the extreme cases. Proposals on how this may be achieved follow in the paragraphs below.

52. In opting for the presidential model, Article 66 (1) of the Draft Constitution places the President as not only the Head of State, but also the "highest official" and "head of executive power of the Kyrgyz Republic". Article 66 (2) provides that the President "ensures the unity of the people and the state power". This is repeated once more in Article 66 (4) - he "provides unity of state power, coordination and interaction of governmental bodies". While similar descriptions are found in other constitutions as well,<sup>28</sup> it is obvious that there is a certain tension with the idea of separation of powers. Such a characterisation might be read as an interpretation of the position of the President above the other powers and not as an integral part of the executive power. This reading is reinforced by the structure of the Constitution defining the executive branch in Chapter III, while dedicating a separate chapter to the President.

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<sup>28</sup> For example, Article 5 of the French Constitution, Article 80 of the Russian Constitution

53. According to Article 70(1) the President “determines the structure and composition” of the Cabinet of Ministers (albeit, according to paragraph 1 point 2, with “consent of the parliament” for some appointments), appoints and dismisses the heads of other executive authorities and heads of local state administration, forms the Presidential Administration, forms the Security Council, appoints and dismisses the Secretary of State and appoints and dismisses the Ombudsman for Children’s Rights (Article 70 of the Draft Constitution). It should be mentioned, however, that the Draft Constitution does not specify the functions or powers of these public bodies. For the most part, this is a re-instatement of the powers of the President from the Constitution of the Kyrgyz Republic of 2007. These broad powers of the President raised concerns then, in the same way as they do now.<sup>29</sup> **The power of the President to single-handedly appoint and dismiss almost the entire administration of the State may lead to the lack of accountability, undermine healthy democratic political processes, is prone to abuse, and thus is recommended to be significantly revised in the Draft Constitution.**

54. Furthermore, the kind of “consent” of the Parliament which the President must receive for appointment of the Chairperson of the Cabinet of Ministers, his/her deputies, and other members of the Cabinet of Ministers, stipulated in Article 70(1)(2), needs further elaboration. This is also repeated in Article 80(1)(6), in Chapter II on the Legislative Power of the Kyrgyz Republic. **The Draft Constitution should clearly specify that “consent” means a vote and by what majority.**

55. Another issue of concern relates to Article 66(3) of the Draft Constitution which states that the President is the “guarantor of the Constitution, human and civil rights and freedoms”. While it is true that some constitutions of countries in Central and Eastern Europe or Central Asia contain *similar* provisions, **this function has to be exercised by courts through constitutional or judicial review.** As noted by ODIHR<sup>30</sup> and the Venice Commission previous opinions – **“the judiciary is considered to be the guarantor of human rights and freedoms and the constitutional order as a whole.”**<sup>31</sup> **Calling the President a “guarantor” may place him or her beyond the constitutional order and constitute an interference with the independence of the judiciary, whose task it is to secure rights and freedoms.** This provision was rightly excluded from the current Constitution as it risks blurring competences of the President and other state bodies. **It is recommended to remove this provision.**

56. Article 70(4) and Article 95(7) and (8) give the President a strong role both in the appointment of judges and in their dismissal. Further, the same provisions also give the President powers related to the internal organisation of the highest courts in that the President has a role in the selection and dismissal of the Presidents and Vice Presidents of the Constitutional Court and the Supreme Court (discussed in detail in the section below on the Judiciary). In combination, these features are extraordinary even in comparison to other presidential constitutional systems.

57. According to Article 85(2) (Chapter II on the “Legislative Power of the Kyrgyz Republic”) of the Draft Constitution, the President is given legislative initiative powers. Article 86 further stipulates that any bills that the President (or his/her Chairperson of the Cabinet of Ministers) initiates that he/she deems urgent, skip the line and must be considered by the parliament in extraordinary order (Article 86(2)). Crucially, Article 116 allows the President to initiate constitutional amendments. This is in addition to the power of the President to initiate a referendum (Article 70(2)(1)), which is a tool of direct democracy capable of shaping the legal order on a wide palette of issues.

58. The Venice Commission has previously said that “[t]he principle of separation of power shapes primarily the regulation of legislative initiative. It implies the division of the institutions of

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<sup>29</sup> CDL-AD(2007)045, Opinion on the Constitutional situation in the Kyrgyz Republic adopted by the Commission at its 73rd Plenary Session (Venice, 14-15 December 2007)

<sup>30</sup> OSCE/ODIHR, [Comments on the Draft Constitution of Turkmenistan](#) (2016), para. 59.

<sup>31</sup> *Op. cit.* footnote 2, para. 24 (2010 Venice Commission’s Opinion on the Draft Constitution of the Kyrgyz Republic).

government into three branches: legislative, executive and judicial. The legislature makes the laws; the executive puts the laws into operation; and the judiciary interprets the laws. Power thus divided should prevent absolutism and dictatorship where all branches are concentrated in a single authority.”<sup>32</sup> **It is therefore recommended to consider curbing the powers of the president to initiate constitutional amendments and other laws.**

59. In this respect, it is true that many constitutions do not feature a purist approach where only the legislature holds law-making initiative powers. In the OSCE and the Council of Europe space, constitutions also grant the executive, or even the President, the right to legislative initiative, which is a political reality even of parliamentary systems. Giving legislative initiative powers to a Head of State and retaining proper separation of powers is only possible where there is a strong executive (Government) separate of the President, strong parliamentary oversight of bills, and rules securing a truly independent judiciary. In the case of the Draft Constitution under review, when the powers of the President are taken together with his/her exclusive executive powers, legislative initiative powers, overreach into the judiciary (discussed below) as well as a weakened role for the parliament (discussed below) **the principle of separation of powers is not achieved. Therefore, it is advised to re-consider the overall institutional setting, significantly revising relevant provisions of the Draft Constitution.**

60. According to Article 70(1)(7), the President “shall form the Presidential Administration”. Article 89 further states that the “the Chairman of the Cabinet of Ministers is the head of the Presidential Administration”. This may result in the creation of separate but *de facto* overlapping bodies, with redundant or even duplicating structures. The risk of an overlap is further increased by the fact that the Draft Constitution does not define the powers and functions of these officials. **It is thus recommended to clearly separate the position of the Chairman of the Cabinet of Ministers and of the Head of the Presidential Administration, as well as to ensure that there are no overlaps between these bodies.**

61. Finally, the President’s power to declare a state of emergency (Article 70 (9) is entirely unchecked since it requires no prior approval or subsequent ratification by the Jogorku Kenesh (only a notification), nor has it any other limitations specified, such as being temporary or established by law. The Venice Commission has recommended in its documents on emergency situations that any emergency measures are “subject to the triple, general conditions of necessity, proportionality and temporariness.”<sup>33</sup> **This and other related provisions of the Draft Constitution on states of emergency should be revised.**

### **3. The Executive (Cabinet of Ministers)**

62. Chapter III on “the Executive Branch of the Kyrgyz Republic” opens with Article 89, which in paragraph 1 states that “the executive power in Kyrgyzstan is exercised by the President”. The President “directs the activities of the executive branch, gives instructions to the Cabinet of Ministers and its subordinate bodies, supervises execution of its instructions, cancels acts of the Cabinet of Ministers and its subordinate bodies, temporarily dismisses members of the Cabinet of Ministers on the basis of constitutional law” (Article 89(3)). The President also presides over all the meetings of the Cabinet of Ministers.

63. As described above, the Chairman of the Cabinet of Ministers is simultaneously the Head of the Presidential Administration, accountable directly to the President, which appears to be an extremely unusual arrangement. The position is given a rather “managerial” role (Article 90(2)) and this **responsibility of overseeing the implementation of the decisions of the President,**

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<sup>32</sup> Venice Commission, [Report on Legislative Initiative](#), CDL-AD(2008)035, para. 11.

<sup>33</sup> See, among others, CDL-AD(2020)014, Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections - taken note of by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd plenary session.

as illustrated by Article 91, would diminish the role of the Cabinet and its Chair to implementing, rather than shaping or influencing policy and decision making. The Draft Constitution is also largely silent about the powers and functions of the Chairman of the Cabinet of Ministers.

64. Further, according to Article 70 (1)(4) of the Draft Constitution, the President shall again, “on his/her own initiative” or “as proposed by the Jogorku Kenesh or the People’s Kurultai, dismiss members of the Cabinet of Ministers and heads of executive bodies within the framework of the law.” This means that the Jogorku Kenesh or the People’s Kurultai (discussed below) may propose the dismissal of the members of Cabinet or the heads of executive bodies “within the framework of the law”. However, in both cases **neither the grounds (reasons and criteria) of the proposed dismissal, nor the procedure thereof, are defined by the Draft Constitution. This makes the Cabinet unstable and the position of its members fragile. Furthermore, the role of the People’s Kurultai in this process and the need for its intervention is completely unclear. The Draft Constitution should necessarily define the procedure of appointment as well as procedure and grounds for the dismissal of the Cabinet and of its members.**

#### **4. Jogorku Kenesh**

65. In general, the role and structure of the Jogorku Kenesh is revised in a number of ways. The first significant change from the current Constitution in the Draft Constitution is a reduction in the number of members of Jogorku Kenesh from 120 to 90.

66. Chapter II on the “Legislative Power of the Kyrgyz Republic”, while keeping legislative initiative powers also with the parliament, has not only reduced its capacity in the numerical sense but also in the organisational sense, with provisions which are featured in the current Constitution, on parliamentary committees, completely absent from the text of the Draft Constitution. **While the establishment of such committees may be left to the Rules of Procedure of the Parliament, the absence of a constitutional basis for establishing these committees *prima facie* curtails the oversight capacity of the parliament over the executive and it is recommended that they be restored, including with appropriate budgeting for their work.**

67. The Draft Constitution retains the possibility for deputies to form factions and deputy groups, but the provision seems merely symbolic, given the change of the manner in which deputies will be elected and the lack of power to influence the forming of the government. It is noted in particular that, while according to Article 80(1)(6) of the Draft Constitution the Jogorku Kenesh shall give its “consent”, presumably by vote, to the appointment of the Chairperson of the Cabinet, the deputies and members of the Cabinet of Ministers, the Draft Constitution does not provide for a solution as to what may happen if such consent is not given. The establishment of a process which would foresee the absence of consent is fundamental in ensuring checks and balances between the branches of power.

68. Furthermore, the Draft Constitution would make the formation and composition of the future Jogorku Kenesh unregulated, by abolishing the current system of proportional representation without indicating the new electoral system. **It is generally considered as good practice to settle such major questions directly in the Constitution instead of leaving them to constitutional legislation. Indeed, experience has shown that, otherwise, this may engender - precisely because they are set out only in norms of legislative level - a permanent temptation for the majority in place to change them as they see fit. Furthermore, such far reaching constitutional reform will have an impact on the electoral legislation - the ODIHR and the Venice Commission emphasise that in accordance with good practice in the field of elections, changes to fundamental aspects of the election**

**system should not take effect less than one year prior to an election.**<sup>34</sup>

69. The Draft Constitution also proposes a radical change to the mandate of the members of the parliament. While the current Constitution prohibits the imperative mandate and recall of parliamentarians,<sup>35</sup> Article 76(3) of the Draft Constitution deletes this provision and introduces the system of recall. The said article states that “a deputy of the Jogorku Kenesh may be recalled in the manner and cases provided for by constitutional law.” The exact formula for the recall is not known and perhaps has not been worked out at the moment; however, the revocation and recall of elected representatives appear at odds with the principle of representation.<sup>36</sup> Recall is closely connected with the system of the imperative mandate which is a relic of systems where the actor who administered the mandate was not the electors but the party.<sup>37</sup> As mentioned in previous opinions on the issue in the Kyrgyz Republic,<sup>38</sup> it serves to “weaken the independence of deputies from the faction and the party”. Furthermore, the OSCE/ODIHR - Venice Commission Guidelines on Political Party Regulation<sup>39</sup> state that there should be no imperative mandate imposed on deputies because, “according to a generally accepted democratic principle, the parliamentary mandate belongs to an individual MP, because he/she receives it from voters via universal suffrage and not from a political party”.<sup>40</sup> **The institution of recall of elected representatives raises concern, and should be removed from the Draft Constitution.**

70. Article 78 of the Draft Constitution provides deputies with immunity. Any regulation of immunity of a parliamentarian must strike a fair balance between protection from persecution and the prevention of possible abuse. Generally, as also outlined in the Venice Commission’s 2014 Report on the Scope and Lifting of Parliamentary Immunities, there are two categories of parliamentary immunity, namely ‘non-liability’ and ‘inviolability’. While non-liability of parliamentarians usually involves immunity from prosecution for opinions, remarks and the outcomes of votes, inviolability provides special legal protection for parliamentarians accused of breaking the law, without the consent of the Parliament.<sup>41</sup> **In particular, it is recommended that the Draft Constitution explicitly states that the immunity granted to MPs is only “functional” or “non-liability” and that, in terms of temporary duration of the mandate, this kind of immunity should extend beyond the MPs’ mandate, in order for them not to be limited in their voting or exercise of freedom of expression, by fear of persecution or repercussions of lawsuits against them following departure from office.**

71. Finally, Article 80 (1)(3) of the Draft Constitution gives Jogorku Kenesh the power to “provide official interpretation of the laws”. The Parliament can adopt legislation that further develops provisions existing in other pieces of legislation; **however, the interpretation of the existing laws normally should belong to the judiciary. It is recommended to reconsider this provision.**

## **5. The People’s Kurultai**

72. Chapter I of the Draft Constitution includes a specific provision on *People’s Kurultai* or a public-representative assembly (Article 7) as one of the fundamental elements of the

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<sup>34</sup> Venice Commission, [Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report](#), CDL-AD(2002)023 rev2-cor, part II.2.d and Explanatory. Report, paras. 63-65.

<sup>35</sup> Article 73(1) of the current Constitution.

<sup>36</sup> Venice Commission, Report on the recall of mayors and local elected representatives, CDL-AD(2019)011, §§ 17-18; Para 7.9 of the Copenhagen Document (1990) states:

*“ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.”*

<sup>37</sup> Venice Commission, [Report on the Imperative Mandate and Similar Practices](#), CDL-AD(2009)027, para. 10.

<sup>38</sup> *Op.cit* fn 1., 2015 Joint Opinion, para 52

<sup>39</sup> OSCE/ODIHR Venice Commission Guidelines on Political Party Regulation 2<sup>nd</sup> Edition, paras 131-132, CDL-AD(2020)032, citing also the case of ECtHR, Paunović and Milivojević v. Serbia, no. 41683/06, 24 May 2016, para. 63.

<sup>40</sup> *ibid.* para. 131.

<sup>41</sup> Venice Commission, [Report on the Scope and Lifting of Parliamentary Immunities](#), CDL-AD(2014)011.

constitutional order and as a “deliberative, supervisory assembly, making recommendations on areas of social development”. The People’s Kurultai has key prerogatives including (as mentioned above) the ability to propose the dismissal of members of the Cabinet of Ministers and heads of executive bodies (Article 70(4)), the right of legislative initiative (Article 85(6)) and the power to appoint one third of representatives in the Judicial Council (Article 96(7)). The Draft Constitution otherwise does not detail the composition or competences, besides stating that the organisation and procedures for the activities of the *People’s Kurultai* will be defined by constitutional law (Article 7(3)).

73. The rationale for introducing a new body, with such broad prerogatives and with no accountability, is neither clear, nor justified. The fact that the People’s Kurultai is not regulated under Section III among the other public institutions may suggest a pre-eminent role within the proposed new institutional arrangements contemplated by the Draft Constitution. Also, its status vis-à-vis the Jogorku Kenesh, as “the highest representative body”, is rather unclear. Of note, Article 52(2) of the Constitution currently in force already provides that citizens shall have the right to hold people’s kurultais [assemblies], which has much more limited rights, although it is entitled to make recommendations on the issues of state and public importance. **Given the important prerogatives it has beyond its advisory role on social development subject matters, it is recommended to considerably re-assess the need to introduce such a body, or further clarify as appropriate its status, composition, functions and powers, preferably in Chapter II of the Draft Constitution, crucially ensuring that it is not used in order to sideline the Jogorku Kenesh or duplicate its powers or the powers of other state bodies.**

## 6. Judiciary

74. The judiciary is addressed by Chapter IV of the Draft Constitution in Articles 94-104, primarily, with references to the judiciary also to be found in other sections, where powers of appointment, dismissal and selection are given to the President (Article 70(4) points 1-6), the Jogorku Kenesh (Article 80(3) points 1-4) and the People’s Kurultai (within Chapter IV, that is, Article 95(7)). The provisions are mainly of a general nature. They mention that further elaboration shall be regulated by constitutional and other laws, however, in an inconsistent manner.

75. The declaratory provisions of Chapter IV on the Judiciary in the Draft Constitution are welcome and in line with the principle of the independence of the judiciary, notably the declaration that “Justice in the Kyrgyz Republic is administered only by the Courts” (Article 94(1)) and that “judges are independent and subject only to the Constitution and law” (Article 95(1)). These provisions further buttress the recommendation made above in relation to the President, to remove from Article 66(3) the wording “the President is the guarantor of the Constitution, human and civil rights and freedoms”. This is the function of the Courts and such wording risks blurring respective competences and infringing the constitutional principle of the independent position of the judiciary.<sup>42</sup> It could be suggested that the drafters could add in Chapter IV a specific indication that the courts shall constitute a separate power and shall be independent of the other branches of power.

76. A fundamental positive change to the structure of the judicial system is the (re-) establishment of the Constitutional Court. Article 94(3) of the Draft Constitution states that the judicial system, as established by the Constitution and laws, consists of the Constitutional Court, the Supreme Court and local courts. The abolition of the Constitutional Court was criticised in previous Venice Commission’s opinions<sup>43</sup> and therefore its re-instatement is welcome (see further below).

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<sup>42</sup> See *op. cit.* footnote 2, para. 24 (2010 Venice Commission’s Opinion on the Draft Constitution), where the Venice Commission welcomed the deletion of the President’s characterisation as “the guarantor of the Constitution and of human and civil rights and freedoms”.

<sup>43</sup> *ibid.* para. 59 (2010 Venice Commission’s Opinion on the Draft Constitution). See also *op. cit.* footnote 2, para. 9 (2015 Joint Opinion).

77. In assessing the structure of the judiciary and its institutions, but most importantly the independence of the judiciary proposed by the Draft Constitution, the context of the whole constitutional order behind the amendments must be borne in mind. This means, the respective roles of the President and of the parliament and the status of the People's Kurultai, all have some part in the appointment and selection of the Judicial Council and judges to the various courts, as well as their dismissal.

78. Article 70(4) points 1-6 of the Draft Constitution authorises the President either to appoint judges (of "local courts") upon the nomination of the Judicial Council or to submit judicial candidacies (of the Constitutional and the Supreme Courts) to the Jogorku Kenesh for appointment, also upon the nomination of the Judicial Council. The practical result of the proposed set-up appears to be that the President will have a pivotal role in the appointments of judges (all the way down to the local level). Furthermore, in addition to appointing the Presidents of the Supreme Court and of the re-established Constitutional Court, the President will also be appointing Vice-Presidents of the Supreme and Constitutional Courts, upon nomination by the Presidents of these courts (Articles 70 (4) and 95(7)).

79. It should be recalled that the institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are envisaged in many international documents, including the UN Human Rights Committee's General Comment no. 32 on Article 14 of the ICCPR,<sup>44</sup> the UN Basic Principles on the Independence of the Judiciary,<sup>45</sup> and in key documents of the OSCE<sup>46</sup> and of the Venice Commission.<sup>47</sup>

80. The institutional arrangements presented in the Draft Constitution are assessed against these international norms and supporting documents. That is, Article 96(7) lays down the composition of the Judicial Council as follows: "At least 2/3 of the Judicial Council (of note related to translation: Article 96(7) the Russian version of the Draft Constitution refers to Judicial Council (Совет по делам правосудия), while in other parts of the Draft "Council of Judges" is mentioned – see Article 103 (2)) shall be judges, and one third shall be representatives of the President, the Jogorku Kenesh, the People's Kurultai and the legal community". The composition of the Judicial Council is approved by the Jogorku Kenesh in a manner prescribed by the constitutional law (Article 80(3)(4)). **In this respect it should be noted that as described under the section on the People's Kurultai, its participation in the selection of judges to the Judicial Council requires scrutiny due to the nature of the People's Kurultai itself, the composition and manner of election thereto. The approval of the composition of the Judicial Council by Jogorku Kenesh should also be reconsidered.**

81. It is unclear how these 2/3 of the members of the Judicial Council who are judges are nominated to their positions at the Judicial Council. Article 96(8) leaves the formation of the Council for Justice to be determined by a constitutional law and the Explanatory Note does not provide any further information in this respect. The manner in which judges are appointed to such a judicial council, and particularly the nature of the appointing authorities, is relevant in terms of judicial self-governance,<sup>48</sup> and for determining whether judicial councils are themselves

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<sup>44</sup> CCPR, [General Comment no. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial](#), 23 August 2007.

<sup>45</sup> [UN Basic Principles on the Independence of the Judiciary \(1985\)](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>46</sup> Especially, OSCE, [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE](#), 1990; OSCE, [Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE](#) 1991; OSCE/ODIHR, [Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010) were 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.

<sup>47</sup> Especially, Venice Commission, [Report on Judicial Appointments](#) (2007), CDL-AD(2007)028-e; and [Report on the Independence of the Judicial System – Part I: The Independence of Judges](#) (2010), CDL-AD(2010)004.

<sup>48</sup> See e.g., for the purpose of comparison, ECtHR, [Oleksandr Volkov v. Ukraine](#) (Application No. 21722/11, judgment of 25 May 2013), paras. 109 to 117, particularly para. 112.

independent and impartial,<sup>49</sup> i.e., free from interference from the executive and legislative branches.

82. In this respect, the bodies appointing the judge members of a judicial council should not be from the executive and legislative branches as this may mean that political considerations may prevail when appointing/electing the said members. This, combined with the judicial appointment process falling completely under the control of the political authorities puts into question the independence of this body.<sup>50</sup> The Draft Constitution provides for three other judicial bodies; the Congress of Judges and the Assembly of Judges (Article 103 (2)). Recommendations pertaining to the selection of members of judicial councils or other similar bodies developed under the auspices of the OSCE and the Council of Europe expressly advise for judge members of judicial councils to be chosen by the judiciary.<sup>51</sup> **It is therefore recommended to specify in the Draft Constitution that judge members of the Judicial Council are chosen by the judiciary and should ensure the representation of the judiciary at all levels.**

83. The Judicial Council is a body composed in 2/3 of judges *prima facie* (with the above-mentioned caveat on who will be the authority appointing the Judicial Council). However, in practice it is threatened by lack of decision-making powers, independence and is potentially exposed to a large degree of politicisation. The Judicial Council only “nominates” and “recommends” appointments and dismissals, and it is not clear what may occur should the President or the Jogorku Kenesh reject the nomination. The only substantial competence at the constitutional level is the power of the Council to give its consent on the temporary removal of the judges (Article 96(4)).

84. As to the President’s powers in relation to judicial appointments, a distinction needs to be made between parliamentary systems where the president has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it.<sup>52</sup> The President’s refusal to appoint a candidate should be based on procedural grounds only and must be reasoned, while also proposing as an option the possibility for the selection body to overrule a presidential veto by a qualified majority vote.<sup>53</sup> Instead, the Draft Constitution does not seem to provide limitations as to the powers of the President to reject candidates nominated by the Judicial Council nor to detail the conditions in which the President can reject the proposed candidate, which is especially problematic from the viewpoint of judicial independence.

85. The current approach offered by the Draft Constitution introduces a high degree of politicisation in the judicial appointment procedure and raises serious concerns of potential undue

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<sup>49</sup> See [Bangalore Principles of Judicial Conduct](#) (2002), endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006, Preamble, which states that the Bangalore Principles “presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards which are themselves independent and impartial”.

<sup>50</sup> See e.g., ODIHR, [Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#) (2017), para. 39; Venice Commission, [Opinion on the Constitution of Serbia](#), adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007), para. 70; and [Preliminary Opinion on the Proposed Constitutional Amendments regarding the Judiciary of Ukraine](#), CDL-PI(2015)016-e, 24 July 2015, paras. 36-37.

<sup>51</sup> See e.g., op. cit. footnote 46, para. 7 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that “[w]here a Judicial Council is established, its judge members shall be elected by their peers”; and Venice Commission, [Report on Judicial Appointments](#) (2007), CDL-AD(2007)028-e, para. 25; and [Report on the Independence of the Judicial System – Part I: The Independence of Judges](#) (2010), CDL-AD(2010)004, para. 50, which both state that “[a] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself”. The Consultative Council of European Judges (CCJE) has expressly stated that it “does not advocate [for] systems that involve political authorities such as the Parliament or the executive at any stage of the selection process [of judge members of Judicial Councils]”; see CCJE, [Opinion no. 10 on the Council for the Judiciary at the Service of Society](#) (2007), para. 31.

<sup>52</sup> Venice Commission, report on judicial appointments, CDL-AD(2007)028, para.14

<sup>53</sup> Op. cit. footnote 46, para. 23 (2010 ODIHR [Kyiv Recommendations](#)).

influence on judicial independence and impartiality. **It is therefore recommended to reconsider presidential prerogatives in this realm, and ensure that s/he is bound by the proposals made by the Judicial Council, and that refusal by the President to appoint a candidate should be limited to procedural grounds only, while requiring that s/he should provide reasons for the rejection.**

86. In the matter of individual judges, both the present Constitution and the Draft Constitution contain the term “irreproachability” (Article 96 (2)) as a pre-requisite to “hold office and retain the powers” of a judge. Where this criterion is not met, the judge may be dismissed. In the 2016 Joint Opinion, the OSCE/ODIHR and the Venice Commission expressed the view that early dismissal should always be based on clear and objective criteria as well as open and transparent procedures.<sup>54</sup> Unless grounds for early dismissal are clearly and strictly defined in other legislation, the provisions at issue may jeopardise the judges’ security of tenure, and the independence of the judiciary in general.<sup>55</sup> **While specific rules on appointment and security of tenure of judges are often to be found in legislation, rather than at the constitutional level, it is strongly recommended that the Draft Constitution reinforces the main tenets of the independence of the judiciary from the legislative and executive branches of power by explicitly stipulating the principles of irremovability and security of tenure of judges.**

87. By the same token, the lack of precision of Article 96(3), which allows a judge to be removed “in other cases not involving violations of the irreproachability requirement”, is so broad and vague that it may open the gateway to arbitrary interpretation and abuse **and is recommended to be removed from the Draft Constitution.**

88. Furthermore, the Draft Constitution introduces what appears to be “probationary periods” of 5 years for local judges (Article 95(8)). The OSCE/ODIHR and the Venice Commission have repeatedly stated that probationary appointments of judges may violate judicial independence, as judges may feel under pressure to decide in a certain way during this period, to ensure that they are appointed for life afterwards.<sup>56</sup> Generally, a short, non-extendable, probationary period may be employed, provided that life appointment or fixed tenure is automatically granted afterwards, except for probationary judges who were dismissed as a consequence of disciplinary measures.<sup>57</sup> The Venice Commission has previously stated that if probationary appointments are considered indispensable, factors that could challenge the impartiality of judges should be excluded.<sup>58</sup> Among the most important excluding factors is that the decision on renewal of position may only be taken by an independent authority. **The probationary period of five years should be reconsidered entirely, or considerably shortened, while ensuring that only an independent body can take decisions in this respect; the provision of the Draft Constitution should be revised accordingly.**

89. As long as the position of judges in the appointment and dismissal procedure is burdened by the involvement of political actors, regardless of the safeguards that are put in place against

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<sup>54</sup> *Op. cit.* footnote 2, para. 55 (2016 Joint Opinion).

<sup>55</sup> *ibid.* para. 55 (2016 Joint Opinion). See e.g., for the purpose of comparison, Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies; UN Human Rights Committee, General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial, 23 August 2007, para. 19, which states that States should “take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws, and establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them”

<sup>56</sup> See e.g., OSCE/ODIHR, [Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova](#), 13 June 2014, para. 37; [Joint Opinion by the Venice Commission and the DG I on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine](#), CDL-AD(2015)007, para. 37; [Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine](#), CDL-AD(2013)014, paras. 16-18.

<sup>57</sup> See e.g., [Report of the UN Special Rapporteur on the independence of judges and lawyers](#), A/HRC/11/41, 24 March 2009, para. 56.

<sup>58</sup> Para. 37 (2010 Venice Commission’s Report on the Independence of the Judicial System Part I).

arbitrary decision-making processes, the judiciary constantly stands on the “verge” of the political arena with a tendency to satisfy the needs of politics against the needs of citizens. This weakens the principle of separation of powers with their coordinated functioning and interaction as it stands in Article 4 of the Draft Constitution as well as the trust of the public in the judicial system.

90. In that regard, it is **strongly recommended to reconsider the provisions on the appointment and dismissal procedures to ensure that the Judicial Council is given decision-making powers on the appointment, promotion and discipline for all judges, except for the Constitutional Court judges; it is therefore recommended reducing to a minimum the role of the executive (i.e. of the President) and legislative branch.**

91. Furthermore, the transfer (rotation) of local court judges foreseen in Article 96(6) may also potentially impact the irremovability of judges. While there is a general rule that transfer to another court may not be allowed without consent of a judge, exceptions are permitted in the case of the conduct of disciplinary measures, reorganisation of the court system or in the case of a temporary assignment to reinforce a neighbouring court.<sup>59</sup> However, the proposed Article 96(6) is problematic as it involves a two tiered decision-making approach with one tier being the decision of the President of the Supreme Court (chosen by the President of the Republic) who proposes the transfer, and the second tier being the execution of such proposal by the President of the Republic him/herself, who implements this transfer. The involvement of the President of the Supreme Court in decisions of transfer raises questions of the “internal independence” of judges, who should remain without threat of undue pressure from their superiors. **In this case, it is highly recommended that the decision of transfer of judges be given to an independent judicial body,**

92. There are several concerns about the Supreme Court. The first one relates to the appointment procedure of judges, covered above. The second one relates to the appointment of the President of the Supreme Court by the President of the Republic with the approval of the Jogorku Kenesh (by at least half of the total number of deputies) for a period of five years, while the vice-president is appointed by the President of the Republic on the basis of the proposal of the President of the Supreme Court, also for five years. The third concern relates to the powers of the President of the Supreme Court to appoint the presidents of the local courts as well as to propose the transfer of local court judges. Last but not least, the fourth concern relates to the power of the Plenum of the Supreme Court to give explanations on issues of judicial practice which have binding force. Regarding the last point, the powers given under Article 98(3) stating that the Plenum of the Supreme Court will “give explanations on issues of judicial practice, which shall be binding for all courts and judges of the Kyrgyz Republic” in fact foresees the binding force of the explanations on issues of judicial practice which will threaten the internal judicial independence of the courts in handing down their decisions. This power of the Supreme Court was strongly criticised in the 2015 Joint Opinion and the provided arguments are still valid.<sup>60</sup> The issuing by high courts of directives, explanations, or resolutions shall be discouraged, but as long as they exist, they must not be binding on lower court judges. Otherwise, they represent infringements of the individual independence of judges.”<sup>61</sup> **It is recommended to remove this provision and allow the uniformity of interpretation of the law to be developed through the means of consistent adjudication or, alternatively, modify it in ways that permit the adoption by the Supreme Court of legal opinions or guidelines that contribute to the consistent application of laws (and/or legal certainty), however without granting them binding force.**

<sup>59</sup> See e.g., [European Charter on the Statute for Judges](#) (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23]; and Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, para. 52.

<sup>60</sup> Par 71, CDL-AD(2015)014, Joint Opinion on the draft law “on introduction of changes and amendments to the Constitution” of the Kyrgyz Republic, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015)

<sup>61</sup> Par 35, [2010 ODIHR Kyiv Recommendations](#)

93. Regarding the appointment of the President and Vice-Presidents of the Supreme Court, Article 70(4)(5) provides that the President of the Republic appoints the President of the Supreme Court, as nominated by the Judicial Council, as well as its vice-presidents as nominated by the President of the Supreme Court from among the judges of the Supreme Court (Article 70(4)(6)). Generally, the procedures for the appointment of presidents of courts should follow the same process as those for the selection and appointment of judges, providing that such processes respect judicial independence.<sup>62</sup> At the same time, having the judges of a particular court elect the court chairperson is usually considered a good practice,<sup>63</sup> in line with the requirements of the principle of internal independence of the judiciary.<sup>64</sup> A thorough analysis on the issue of the election of the President of the Supreme Court and vice-presidents was undertaken in the 2015 Joint Opinion.<sup>65</sup> In that Joint Opinion, while it was not denied that the executive or legislative powers may be involved in the process of selection of the President of the Supreme Court, it was simultaneously acknowledged that such solution is not appropriate. Article 94(7) of the current Constitution provides that the judges of the Supreme Court shall elect from among them the Chairperson of the Supreme Court and her/his deputies. **In light of the foregoing, it is recommended to retain this modality for the Supreme Court as well as for the Constitutional Court, which is in line with good practice at the international level.**

94. Lastly, Article 85(5) of the Draft Constitution gives legislative initiative powers to the Supreme Court in matters of its jurisdiction. A strict interpretation of the principle of separation of powers means that judicial power interprets laws and does not initiate them.<sup>66</sup> The Venice Commission has previously stated that “giving to the Supreme Court the right of legislative initiative on issues within its jurisdiction raises concerns with respect to its compatibility with the principle of the independence of the judiciary. The Supreme Court has the task of interpreting legislation following its adoption and should not be involved in the political process of adopting legislation.”<sup>67</sup> The OSCE/ODIHR has also commented that while international standards or instruments do not prohibit the involvement of judges in law-drafting *per se*,<sup>68</sup> if the highest courts participate in the drafting of laws, this may also raise doubts as to their objective impartiality when they are called upon to interpret and apply that law in a given case before them.<sup>69</sup> At the same time, legislative initiative *sensu stricto* should not be confused with the possibility of the courts to comment or provide views in an ongoing process of drafting laws by the legislative or executive which concern them, or indeed any laws which would concern the legal system as a whole.<sup>70</sup> **The Draft Constitution should reflect such principles.**

95. As already mentioned above, Article 97 sees the welcomed return of the institution of the Constitutional Court in the Kyrgyz Republic. The competences are evidently much larger than those of the current Constitutional Chamber. Particularly, it is welcomed that the Draft Constitution provides the possibility of individuals to challenge the constitutionality of laws and by-laws (Article 97(3)) in the case of violation of human rights and accordingly enabling a review of judgments made, based on subsequently abolished laws or provisions. Nevertheless, in the case of the latter, it will be of high importance to establish within constitutional law the procedure

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<sup>62</sup> See e.g., *op. cit.* footnote 46, para. 16 (2010 ODIHR [Kyiv Recommendations](#)); and ODIHR, [Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland](#) (as of 26 September 2017) (13 November 2017), para. 103.

<sup>63</sup> *ibid.* para. 16 (2010 ODIHR [Kyiv Recommendations](#));

<sup>64</sup> See Venice Commission and DGI, [Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia](#), CDLAD(2014)031, 14 October 2014, para. 84.

<sup>65</sup> *Op. cit.* footnote 2, paras. 75 and 78 (2015 Joint Opinion).

<sup>66</sup> See Venice Commission, [Report on Legislative Initiative](#), CDL-AD(2008)035, para. 59.

<sup>67</sup> See e.g., Venice Commission, [Interim Opinion on the Constitutional Reform in the Kyrgyz Republic](#), CDL-AD(2005)022, para. 37.

<sup>68</sup> See OSCE/ODIHR, [Comments on the Draft Constitution of Turkmenistan](#), 21 July 2016, para. 52.

<sup>69</sup> See Venice Commission, [Opinion on the Constitution of Finland](#), CDL-AD(2008)010, para. 110; and European Court of Human Rights in the case of [Procola v. Luxembourg](#) (Application no. 14570/89, judgment of 28 September 1995), para. 41.

<sup>70</sup> For instance, the Act on the Supreme Court of Poland (2017, last amended 2021), states in Article 1 para. 4, that the Supreme Court administers justice by “giving opinions on bills and other normative acts, on the basis of which are adjudicated and operated by courts, as well as other bills in the field of how they affect cases falling within the competence of the Supreme Court” Dz. U. 2018 poz. 5.

for the review of decisions based on such abolished laws. Article 97(6) outlines the citizen's complaint procedure stipulating that the decision on whether the court will review a matter is made on a case-by-case basis, therefore raising issues of legal certainty for citizens. **It is therefore recommended to replace the wording "case by case basis" with a process which would be clear for individuals and ensure legal certainty as well as equality before the law, ensuring that their case be dealt with in accordance with the same procedures.**

96. At the same time, Article 97 of the Draft Constitution remains rather general and the composition and procedure for the formation of the Constitutional Court are to be determined by constitutional law (Article 97(7)). While the fact that such rules are determined by constitutional law is in line with an earlier recommendation made by the OSCE/ODIHR and the Venice Commission,<sup>71</sup> **it is important that the composition, term of office, re-election, incompatibility provisions, be included in the Constitution as they constitute key guarantees of the independence of this institution.** The regulation concerning the appointment and dismissal of Constitutional Court judges and President/Vice-Presidents are overall the same as for the Supreme Court. It is generally acknowledged that given the special role of a constitutional court,<sup>72</sup> rules different than those applicable to common judges should generally apply. The aim is to find a balance between providing institutional guarantees for the independence, credibility and efficiency of constitutional judicial review, and involving different state organs and political forces into the selection process so that the constitutional court judges are seen as being more than the instrument of one or the other political force.<sup>73</sup> Ultimately, the selection procedure should ensure the recruitment of a competent, experienced, gender balanced and diverse body of constitutional court judges, reflecting the composition of society, which can enhance a constitutional court's legitimacy for striking down legislation adopted by parliament as the representative of the people<sup>74</sup> and more generally trigger greater public trust in the impartiality of the Court.<sup>75</sup> Moreover, the legitimacy of a constitutional court and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of different social values and sensibilities,<sup>76</sup> which may be facilitated by ensuring diversity in its composition. It is therefore recommended to introduce a provision specifying that **gender and diversity considerations should be taken into account throughout the nomination (and election) process.**<sup>77</sup> This would uphold and reaffirm the constitutional principles enshrined in Articles 13 (representation of all ethnic groups) and 24 (equality between women and men) of the Draft Constitution.

97. Article 70(4) read together with Article 80(3) provide that upon nomination of the Judicial Council the President of the Republic proposes the candidates to the Jogorku Kenesh, which elects them by at least half of the total number of deputies. **It would be advisable for the Draft Constitution to ensure the inclusion of a broad political spectrum in this procedure and**

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<sup>71</sup> Op. cit. footnote 2, para. 48 (2016 Joint Opinion).

<sup>72</sup> See OSCE, [Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area](#) (2008), para. 4.

<sup>73</sup> See e.g., Venice Commission, [Opinion on the Proposal to Amend the Constitution of the Republic of Moldova \(introduction of the individual complaint to the constitutional court\)](#), CDL-AD(2004)043, paras. 18-19; and [Opinion on Act CL I of 2011 on the Constitutional Court of Hungary](#), CDL-AD(2012)009, para. 8, noting that "while the 'parliament-only' model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors".

<sup>74</sup> See e.g., Venice Commission, [Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina](#), CDL-AD(2005)039, para. 3.

<sup>75</sup> See e.g., Venice Commission, [Opinion on the Law on the High Constitutional Court of the Palestinian National Authority](#), CDL-AD(2009)014, para. 48.

<sup>76</sup> See e.g., Venice Commission, [Rule of Law Checklist](#), CDL-AD(2016)007, 18 March 2016, para. 112; and [The Composition of Constitutional Courts - Science and Technique of Democracy](#), no. 20 (1997), CDL-STD(1997)020, page 21.

<sup>77</sup> See e.g., Article 10 of the Law on the Constitutional Court of Montenegro (2015), which states that "[i]n nominating the candidates, proposers [i.e., President of Montenegro and responsible working body of the Parliament of Montenegro] shall take into account the proportionate representation of members of minorities and other minority ethnic communities, as well as a balanced gender representation". See also [OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life](#), 2 December 2009, which specifically calls on OSCE participating States to "consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies";

**provide for a vote by a qualified majority, with a suitable anti-deadlock mechanism.**<sup>78</sup> As to their terms of office, a generally acceptable model is a **fixed non-renewable mandate, for a longer period of time**<sup>79</sup> and it is recommended to supplement Article 97 in this respect. As to the dismissal of Constitutional Court judges, Article 70(4)(2) provides that upon nomination by the Judicial Council, the President submits to the Jogorku Kenesh the names of the Constitutional Court judges (and Supreme Court judges) for dismissal, which may occur by reason of lack of “irreproachability” (Article 96(2)). As mentioned above, this vague and broad ground for dismissal raises serious concerns and could potentially be abused in order to remove individual Constitutional Court judges. Indeed, as stated by the Venice Commission, “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”.<sup>80</sup> **It is recommended to review the modalities for the dismissal of Constitutional Court judges to limit the potential influence of political considerations or abuse by the President and/or the Jogorku Kenesh, for instance by considering other modalities such as the decision of at least two-thirds of the total number of judges of the Constitutional Court itself.**<sup>81</sup> It is also important to provide a mechanism in case of a failure to replace a Constitutional Court judge when the mandate is over to ensure institutional stability (for example the extension of the mandate of the outgoing judge pending the nomination of his/her successor).

## 7. Court of Elders

98. Article 115 of the Draft Constitution refers to the role of *aksakals*’ courts or courts of elders. Article 59 of the current Constitution only refers to the citizens’ right to establish such courts, and provides that the competences, procedures and activities of the courts are to be further defined by law. Article 115 of the Draft Constitution already provides an initial framework regarding their competences, financing from the local budget and appeal process against their decisions. In particular, such courts should “hear cases with a view to reconciling the parties and rendering fair decisions that are not contrary to the law”.

99. While acknowledging the notable reconciliation feature of *aksakals*’ courts and their traditional value and importance in the cultural heritage, their parallel functioning with common courts may be problematic on several fronts. First, the UN Human Rights Committee in its 2014 Concluding Observations on the Kyrgyz Republic, recognised that such courts do not fully comply with fair trial guarantees and non-discrimination principles, and noted that decisions of the courts of elders in family matters may adversely affect women.<sup>82</sup> Second, such mechanisms promote reconciliation, which often happens at the expense of victims’ protection, particularly given the inability of such courts to issue protection orders, provide support and assistance to victims or order the detention of the abuser.<sup>83</sup> **For this reason, the reconciliation procedure before the court of elders should only apply in cases which do not fall under the scope of criminal legislation<sup>84</sup> or risk discrimination, by adjudicating on issues such as domestic violence.** It is also important that women’s participation in the courts of elders be promoted.<sup>85</sup> In light of the foregoing, **the parallel functioning of such courts should not be to the detriment of the right**

<sup>78</sup> See e.g., Venice Commission, [Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice](#), CDL-PI(2020)004, Section 4.3.1.

<sup>79</sup> See e.g., [Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia](#), CDL-AD(2009)042, para. 14.

<sup>80</sup> See *op. cit.* footnote 2, para. 55 (2016 Joint Opinion). See also 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, CDL-AD(2014)018, Section IV.2.

<sup>81</sup> 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, paras. 28-29; and [Opinion on the Draft Law on the Constitutional Court of Ukraine](#), CDL-AD(2016)034, para.26.

<sup>82</sup> See CCPR, [Concluding observations on the second periodic report of Kyrgyzstan](#) (2014), CCPR/C/KGZ/CO/2, para. 19.

<sup>83</sup> See UN Special Rapporteur on Violence Against Women, its Causes and Consequences, [2010 Report](#), A/HRC/14/22/Add.2, 28 May 2010, para. 83.

<sup>84</sup> See OSCE/ODIHR, [Opinion on the Draft Law of the Kyrgyz Republic on Safeguarding and Protection from Domestic Violence](#) (28 October 2014), para. 44.

<sup>85</sup> *Op. cit.* footnote 83, para. 92 (2010 Report of the UN Special Rapporteur on VAW on the Kyrgyz Republic). See also OSCE, [Compilation of Good Practices “Bringing Security Home: Combating Violence against Women in the OSCE Region”](#), page 85.

**to a fair trial and the principle of non-discrimination. Access to common courts should be guaranteed in all cases.**

## **8. Prosecution**

100. Article 70(5)(1) states that the President shall appoint the Prosecutor General with the “consent of the Jogorku Kenesh”. As in other provisions, the nature of the “consent” is not specified in the Draft Constitution, that is, whether the appointment will be confirmed by simple or qualified majority vote. On the contrary, the dismissal of the Prosecutor General by the President requires the consent of “half of the total number of deputies of the *Jogorku Kenesh*”. On the motion of the Prosecutor General elect, the President then appoints his or her deputies.

101. Article 105 of Chapter V on “the Public Authorities of the Kyrgyz Republic with Special Status” of the Draft Constitution defines the role of the prosecutor’s office as follows: it “supervises the exact and uniform implementation of laws and other normative acts” and “conducts criminal prosecution, participates in court proceedings, supervises the execution of court decisions and exercises other powers stipulated by constitutional law.”

102. At first it is acknowledged that many models of appointment exist in Europe and beyond, for the appointment of a Prosecutor General. In some countries, the prosecution is attached to the executive and - as it is the case under this Draft Constitution, the executive or the president appoints the prosecutors, with the approval of the parliament (Article 70). In other countries, the prosecution is completely separate from the executive, which is useful when - as it is provided by the Draft Constitution, the Prosecutor General may be tasked with highly political cases such as criminal prosecution of members of government, parliament or even the President (Article 73(3) of the Draft Constitution). **This role should be clarified.**<sup>86</sup>

103. As proposed in previous opinions and recommendations of the OSCE/ODIHR<sup>87</sup> and Venice Commission<sup>88</sup> on the matter, **consideration may be given to creating a commission of appointment comprised of persons who would be respected by the public (professional non-political experts) and trusted by the Government or a Prosecution Council.**

104. It is also recommended that the Draft Constitution stipulates general rules on eligibility criteria and incompatibilities, the rules pertaining to functional immunity (as opposed to general immunity)<sup>89</sup> and accountability, as well as the duration and termination of the mandate. **A Prosecutor General should be appointed for a relatively long period without the possibility of renewal at the end of that period.**

105. Furthermore, as concerns the main duties of the Prosecutor’s office, it is recommended to remove the reference and indeed competence to “supervision of exact and uniform implementation of laws.” The main role of the Prosecutor is to conduct criminal proceedings and not general supervision. As previously stated by OSCE/ODIHR, “[s]uch a ‘supervisory’ model of the role and powers of the prosecution service is rather prevalent among the post-

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<sup>86</sup> The drafters might find it useful to refer to the Council of Europe’s standards concerning Prosecutors office such as : Recommendation CM/Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system; - Recommendation CM/Rec(2012)11 of the Committee of Ministers to member states on the role of public prosecutors outside the criminal justice system; - The Opinion No. 3(2008) of the Consultative Council of European Prosecutors on ‘The Role of Prosecution Services Outside the Criminal Law Field’ - The Opinion No.12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No.4 (2009) of the Consultative Council of European Prosecutors (CCPE) on “Judges and prosecutors in a democratic society” (‘the Bordeaux Declaration’); - Opinion No. 9(2014) of the Consultative Council of European Prosecutors (‘the Rome Charter’); - CDL-AD(2010)040 Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, adopted by the Venice Commission at its 85th plenary session;

<sup>87</sup> OSCE/ODIHR, [Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic](#), 18 October 2013.

<sup>88</sup> See Venice Commission, [Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service](#) (adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), para. 48.

<sup>89</sup> OSCE/ODIHR, [Comments on the Draft Constitution of Turkmenistan](#) (2016), para. 114.

Soviet states and is in fact reminiscent of the old Soviet ‘prokuratura’ model.”<sup>90</sup> This is particularly concerning when combined with the new power of the Prosecutor General to **initiate laws** in accordance with Article 85 (7) of the Draft Constitution. **The power of the Prosecutor General to initiate laws together with the role of supervision designated to the Prosecutor should be removed from the Draft Constitution.**

## 9. Ombudsman<sup>91</sup>

106. According to the Draft Constitution the Ombudsman for Children’s Rights is appointed by the President (Article 70 (1)(10)), meanwhile the Ombudsman for Human Rights is elected and dismissed by the Jogorku Kenesh. Article 80 (3) (8)-(9) gives the parliament this power, as well as the power to elect and dismiss the Ombudsman’s deputies on his/her recommendation. It is positive that the role and appointment of the Ombudsman is stipulated at a constitutional level.<sup>92</sup>

107. The Ombudsman presents an annual report on his/her work to the parliament (Article 80(5)(2) and Article 109 states that “parliamentary control over the observance of human and civil rights and freedoms in the Kyrgyz Republic shall be exercised by the Ombudsman”. Article 110 of the Draft Constitution provides that “[t]he organization and operating procedures of the state bodies [which includes the Ombudsman] mentioned in this section, as well as the guarantees of their independence shall be determined by constitutional law”. At the same time, **it is recommended that at least the overall competencies, guarantees of institutional independence, term of office and grounds for dismissal of the Ombudsman, should be specified in at the constitutional level<sup>93</sup> as well as the requisite majority required to elect or dismiss him or her to or from office.** Also, crucially, as the Ombudsman is a body of oversight over state action or omission - **the immunity of the Ombudsman and his or her staff from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities during and after their term of office<sup>94</sup> should be explicitly provided for.**

## 10. Central Election Commission

108. The Draft Constitution submitted for review has changed the manner of appointment of the members of the Central Commission for Elections and Referenda (“CEC”) of the Kyrgyz Republic. The current Constitution in force stipulates that 1/3 of CEC members are chosen by the President, 1/3 are chosen by the ruling majority in Parliament, and 1/3 are chosen by the parliamentary opposition. The Draft Constitution however, stipulates in Article 70(5)(3) that the President shall “propose to the Jogorku Kenesh for elections and dismissal half of the members of the Central Commission for Elections and Referenda”. Article 80(3)(6) states that the parliament shall “elect members of the Central Elections and Referenda Commission; one half as nominated by the President and the other half of their own initiative”, making the *proposal* suggested in Article 70(5)(3) one that cannot be refused. Such unconditional acceptance must be reconsidered as it further encroaches on the principle of separation of powers between the executive and the legislative branches. The removal of the participation of the parliamentary opposition (if one is eventually formed) should also be reconsidered.

<sup>90</sup> See, among others, OSCE/ODIHR, [Opinion on the Key Legal Acts Regulating the Prosecution Service in the Kyrgyz Republic](#), 18 October 2013, para. 13

<sup>91</sup> For the purpose of this Opinion, the term “ombudsman” will be used as this is the qualification used by the institution. While acknowledging that the Scandinavian term “Ombudsman” is considered to be gender-neutral in origin, the term “ombudsperson” is generally preferred, in line with increasing international practice, to ensure the use of gender-sensitive language (see e.g., <[https://www.unescwa.org/sites/www.unescwa.org/files/page\\_attachments/1400199\\_0.pdf](https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf)>).

<sup>92</sup> See Venice Commission, [Venice Principles on the Protection and Promotion of the Ombudsman Institution](#), CDL-AD(2019)005, adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 2.

<sup>93</sup> See Venice Commission, CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution (“The Venice Principles”), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), item 2.

<sup>94</sup> OSCE/ODIHR, [Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland](#) (16 February 2016), para. 43.

109. International standards stipulate that, in principle, the administration of democratic elections requires that election administration commissions/bodies are independent and impartial<sup>95</sup> and this should be guaranteed by the Constitution. As stated in previous OSCE/ODIHR opinions,<sup>96</sup> election management bodies make and implement key decisions regarding organisation of elections and while the selection and appointment of their members differs greatly across the OSCE and Council of Europe region, laws should be guided by the ultimate need to ensure that such bodies are able to carry out their duties in an independent and impartial manner,<sup>97</sup> ensuring the proper administration of the entire electoral process.<sup>98</sup>

110. The Code of Good Practice in Electoral Matters<sup>99</sup> highlights that one of the most important procedural guarantees is to ensure that the Central Elections Committee must be permanent in nature and elections should be “organised by and impartial body”.<sup>100</sup> The Code of Good Practice in Electoral Matters further states that “the bodies appointing members of electoral commissions must not be free to dismiss them at will”.<sup>101</sup>

111. The Draft Constitution offers a model that does not reflect these recommendations. The proposed model assumes broader involvement of the President in formation of the CEC detracting from the current balanced approach. Half of the members of the CEC is appointed by the President and the other half is chosen by the Jogorku Kenesh whose powers are severely diminished by the proposed provisions of the Draft Constitution. In addition, when the parliamentary majority is from the same political force as the President, the proposed model may compound the President’s influence over the composition of the CEC. This may potentially negatively affect the public perception of the CEC, undermine its independence and impartiality and put at risk public confidence in the outcome of the elections administered by such institution. The possibility for the President to dismiss half of the CEC members may also make the members of the CEC vulnerable to political pressure putting the independence of individual members at higher risk.

112. While the presidential form of government proposed by this Draft Constitution may re-distribute certain powers from the parliament to the president, this should not be the case with the formation of independent institutions, such as the CEC, Ombudsperson and others. **The selection and dismissal process for the members of the CEC must be reconsidered in the corresponding provision of the Draft Constitution establishing that an “independent impartial body” is “in charge of applying electoral law”. The principle of independence and impartiality of the CEC should be expressly stipulated in the Constitution.**

### **11. Local Self-Government**

113. At the local level, the Constitution foresees local self-governance, as regulated in Section IV of the Draft Constitution. Article 111(1) stresses that this involves “real opportunity for local communities to independently decide issues of local significance in their own interests and under their own responsibility”. Local self-governance shall be implemented by local communities either directly, or through local self-governance bodies (Article 111(3)). According to Article 112(1), the system of local self-governance bodies involves representative bodies and executive bodies.

<sup>95</sup> See CCPR, [General Comment no. 25 on Article 25 of the ICCPR](#), 27 August 1996, para. 20, which provides that: “An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant”.

<sup>96</sup> OSCE/ODIHR, [Comments on the Draft Constitution of Turkmenistan](#) (2016), para. 129.

<sup>97</sup> See also Venice Commission, [Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report](#), CDL-AD(2002)023 Section II Point 3.1, a.

<sup>98</sup> See OSCE, [OSCE Existing Commitments for Democratic Elections in OSCE participating States](#) (2003), Section 4.

<sup>99</sup> Venice Commission, [Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report](#), CDL-AD(2002)023.

<sup>100</sup> *ibid.* Section II Point 3.1, a. (2002 Venice Commission’s Code of Good Practice in Electoral Matters).

<sup>101</sup> *ibid.*

Under paragraph 2 of this provision, executive bodies of local self-governance are accountable to the representative bodies in their activity. It is welcome that the principle of independence is clearly stated (Article 111(1) and (5)), as well as the principle that the transfer of competence must be accompanied by corresponding financial resources (Article 114(2)). In addition, **it is also recommended to specifically introduce in Section IV of the Draft Constitution the principle of subsidiarity meaning that each level of organisation must receive as many powers as it is capable of exercising satisfactorily.**<sup>102</sup>

114. Section IV of the Draft Constitution does not elaborate on the attribution and respective competences between the central and local self-government representatives, which may potentially lead to conflicts of attribution and other controversies, which should ideally be determined by the Constitutional Court.<sup>103</sup> **It is recommended to spell out at the constitutional level the “own competences” of local self-government bodies, or, at a minimum, state that this should be determined by a constitutional law.**<sup>104</sup> This would avoid legislators potentially taking away powers from local self-governments.

115. Article 113(1) of the Draft Constitution provides that “[d]eputies of local councils (*keneshes*) shall be elected by citizens residing in the respective administrative-territorial unit in the manner prescribed by law with equal opportunities”. However, nothing is said as to the type of electoral system that will be applied. It is generally considered as a good practice to settle such major questions directly in the Constitution instead of leaving them to constitutional legislation.<sup>105</sup> **The legal drafters should consider specifying the type of electoral system for the election of members of local *keneshes* in the Draft Constitution itself.**

116. Article 70(2)(3) of the Draft Constitution provides that the President, in cases and according to the manner prescribed by law, can dissolve local councils (*keneshes*) as well as appoint early elections to local councils. The use of this power may endanger the principle of local self-government. It would be preferable to limit the President’s power to the possibility of suspending - as opposed to terminating - the powers of the self-government bodies<sup>106</sup> or, at a minimum, to introduce additional safeguards, such as a requirement that the President consult the Constitutional Court or other independent body before taking the decision.<sup>107</sup> Moreover, nothing is said as to the conditions/circumstances in which such dissolution may be decided, e.g., when the self-government body oversteps their constitutional and legal competences and poses a threat to the sovereignty, territorial integrity and security of the state.<sup>108</sup> **It is recommended to reconsider such prerogative or to add safeguards to limit the potential discretionary use of such power, for instance by requiring a decision of the Constitutional Court beforehand and specifying the circumstances in which such decision may be taken.**

117. It is noted that compared to the current Constitution, local *keneshes* no longer have the power to “[i]mpose local taxes and dues as well as decide on preferences on them” (see Article 112(3)(3) of the current Constitution). Such amendment is questionable as it is important to secure that at least part of the total funds of local self-governance bodies derive from “own

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<sup>102</sup> See e.g., Venice Commission, [Opinion on the Draft Revision of the Constitution of Romania](#), CDL-AD(2003)004, para. 7.

<sup>103</sup> See e.g., Venice Commission, [Opinion on the Draft Constitutional Law on changes and amendments to the Constitution of Georgia \(Chapter VII - Local Self-Government\)](#), CDL-AD(2010)008, paras. 19, 30-31 and 50; and [Opinion on the Draft Revision of the Constitution of Romania](#) (Unfinished texts by the Committee for the revision of the Constitution), CDL-AD(2003)004, para. 7.

<sup>104</sup> *ibid.* paras. 31-34 (2010 Opinion on Draft Amendments to the Constitution of Georgia).

<sup>105</sup> See e.g., Venice Commission, [Opinion on the Final Draft Constitution of the Republic of Tunisia](#), CDL-AD(2013)032, para. 198.

<sup>106</sup> See e.g., Venice Commission, [Opinion on the Amendments to the Constitution of Ukraine regarding the Territorial Structure and Local Administration as proposed by the Working Group of the Constitutional Commission in June 2015](#), CDL-AD(2015)028, para. 24.

<sup>107</sup> See e.g., Venice Commission, [Interim Opinion on Constitutional Reforms in the Republic of Armenia](#), CDL-AD(2004)044, para. 27.

<sup>108</sup> See e.g., Venice Commission, [Opinion on the Amendments to the Constitution of Ukraine regarding the Territorial Structure and Local Administration as proposed by the Working Group of the Constitutional Commission in June 2015](#), CDL-AD(2015)028, para. 24.

income” i.e. local taxes and charges whose rate they can determine.<sup>109</sup> This is essential to contribute to the financial autonomy of local self-governance bodies. **It is recommended to reconsider such deletion.**

118. Of note, at the local level, there are also “local public administrations”, which exercise executive power on the territory of the respective administrative-territorial unit (Article 93 of the Draft Constitution). Under Article 70(1)(6), the President shall appoint and dismiss “heads of local public administrations”, without any reference to the involvement of local self-governance bodies in such appointments/dismissals *per se*. A similar provision conferring this prerogative to the Prime Minister without involving local self-governance bodies was criticised by ODIHR and the Venice Commission in their 2015 Joint Opinion as constituting a means to asserting central control over certain matters that fall under subnational control in other jurisdictions, instead of pursuing increased local autonomy.<sup>110</sup> This provision is also problematic as it fails to set out the conditions and criteria for such cases, thus leaving wide discretionary powers to the President in this respect, which may ultimately make it more difficult to manage tensions between the local state administrations and the central government.<sup>111</sup> **As recommended in the 2015 Joint Opinion, the legal drafters 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.**<sup>112</sup>

## E. Human Rights and Fundamental Freedoms

### 1. General Comments

119. The catalogue of human rights and fundamental freedoms in Section II of the Draft Constitution is rather comprehensive. Attention has been given to providing a constitutional basis for the determination of the temporal and geographical-jurisdictional basis for constitutional rights protection (Article 24), as well as to the right to citizenship (Article 51) and the question of to what extent constitutional rights also extend to non-citizens (Article 52). Some rights beyond those derived from international human rights treaties are also included, such as the right to a healthy environment (Article 49).

120. At the same time, the principle of interdependence and indivisibility of all human rights may suffer from an artificial division of Section II into multiple Chapters, as well as from the inclusion of provisions of relevance for human rights in other Sections of the Constitution. **A reconsideration of these structural features is advised in order not to undermine the rights that the Draft Constitution wishes to entrench in the text.**

121. While defining the constitutional rights and obligations it is important to avoid vague formulations as much as possible. In this respect, Article 53(1), which defines “observance of the rules and norms of social behavior, respectful attitude to the interests of society” as a duty of every person, appears problematic. “Rules and norms of social behavior” or “attitude to the interests of society” are vague concepts, which may evolve and change with time. It is therefore recommended to reconsider Article 53, in order to exclude vague or overbroad language that risks disproportionately limiting the application of human right and freedoms.

122. Section II of the Draft Constitution starts with some general provisions in Article 23. In particular, paragraph 1 seems to suggest that all human rights and freedoms defined and protected by the Draft Constitution should be “recognised as absolute”. Such definition is

<sup>109</sup> See e.g., Venice Commission, [Opinion on the Draft Amendments to the Constitution of Republika Srpska](#), CDL-AD(2008)016, para. 11; and [Opinion on the Constitution of Serbia](#), CDL-AD(2007)004, para. 13.

<sup>110</sup> See *op. cit.* footnote 2, paras. 64-65 (2015 Joint Opinion);

<sup>111</sup> *ibid.* para. 66 (2015 Joint Opinion).

<sup>112</sup> See similar recommendation made in *ibid.* para. 68 (2015 Joint Opinion).

inaccurate and may be confusing as well as contradicting to other paragraphs of this article in the Draft Constitution, which allow restrictions to the exercise of qualified fundamental rights on legitimate grounds.

123. It should also be noted that Article 20(4) and (5) of the current Constitution, which provides a list of non-derogable and absolute rights that cannot be restricted under any circumstances, would be deleted in the Draft Constitution. Beyond the non-derogable rights listed in Article 4(2) of the ICCPR<sup>113</sup>, some other rights have been recognised as not being subject to derogation during a state of emergency, including the right to an effective remedy (Article 2 of the ICCPR) since it is inherent to the exercise of other (non-derogable) human rights<sup>114</sup>, the fundamental principles of a fair trial,<sup>115</sup> the fundamental guarantees against *arbitrary* detention<sup>116</sup> and the principle of *non-refoulement*, which is absolute and non-derogable<sup>117</sup>. Absolute rights include the rights to be free from torture and other cruel, inhuman or degrading treatment or punishment, from slavery and servitude, the prohibition of genocide, war crimes and crimes against humanity, the prohibition against the retrospective operation of criminal laws, and the broader requirement of legality in the field of criminal law, the prohibition of arbitrary deprivation of liberty and the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention,<sup>118</sup> and the principle of *non-refoulement*.<sup>119</sup> Additionally, the right of persons of marriageable age to marry, and the right of minorities to enjoy their own culture, profess their own religion, or use their own language have also been considered to be non-derogable rights.<sup>120</sup> **It is recommended that non-derogable and absolute rights are expressly stated in the Draft Constitution, and are applicable regardless of the circumstances, even in a state of emergency, “emergency situation” or under martial law.**

124. Paragraph 2 of the same article provides an exhaustive list of permissible grounds for restrictions, which are deemed to be equally legitimate with respect to all rights and freedoms defined by the Draft Constitution. In general, careful consideration should be given to limitation clauses, as they may define the scope of a protected right, as well as should serve as a safeguard against potential abuse. Though there are examples of national constitutions that include a general provision on restrictions, it is important to bear in mind that certain rights may not be restricted on the grounds defined in Article 23. This provision lacks sufficient guidance as to the application of fundamental rights under respective articles of the Draft Constitution, or acknowledgment of the differences between them. Since several of the (new) human rights provisions ask for positive actions of the government (several rights “shall be ensured by law”),

<sup>113</sup> See *op. cit.* footnote 33 (2015 Joint Opinion)

<sup>114</sup> See UN Human Rights Committee (CCPR), [General Comment no. 29 on Article 4 of the ICCPR](#), paras. 14-15.

<sup>115</sup> CCPR, General Comment no. 29, para. 16; and General Comment no. 32 (2007), para. 6. These would include the right to be tried by an independent and impartial tribunal (CCPR General Comment no. 32 (2007), para. 19); the presumption of innocence (CCPR General Comment no. 32 (2007), para. 6); the right to access to a lawyer; and the right of arrested or detained persons to be brought promptly before an (independent and impartial) judicial authority to decide without delay on the lawfulness of detention and order release if unlawful/right to *habeas corpus* (CCPR General Comment no. 29, para. 16; and [General comment no. 35, Article 9 \(Liberty and security of person\)](#), para. 67).

<sup>116</sup> CCPR, [General comment no. 35, Article 9 \(Liberty and security of person\)](#), paras. 66-67, which includes the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention.

<sup>117</sup> See UN General Assembly, [Resolution A/RES/51/75](#), 12 February 1997, para. 3. See also UN High Commissioner for Refugees (UNHCR), [Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol](#), 26 January 2007, paras. 12 and 20.

<sup>118</sup> See Working Group on Arbitrary Detention, [Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies](#) (8 May 2020), para. 5; [Report of the Working Group on Arbitrary Detention to the UN Human Rights Council](#), A/HRC/22/44, 24 December 2012, paras. 42-51; [General Comment no. 35](#) on Article 9 of the ICCPR (Liberty and security of person), para. 67.

<sup>119</sup> See Article 4 of the 1984 Convention against Torture and Cruel, Inhumane or Degrading Treatment and Punishment (CAT), which contains an absolute prohibition of refoulement for individuals in danger of being subjected to torture. See also CCPR, [General Comment no. 20 on Article 7 of the ICCPR](#), 10 March 1992, para. 9; and ECtHR case-law which incorporates this absolute principle of non-refoulement into Article 3 of the ECHR, see e.g., [Soering v. United Kingdom](#) (Application no. 14038/88, judgment of 7 July 1989), para. 88; and [Chahal v. United Kingdom](#) [GC] (Application no. 22414/93, judgment of 15 November 1996), paras. 80-1.

<sup>120</sup> CCPR, [General Comment no. 24](#) (1994), para. 8. CCPR, furthermore, General Comment no. 29 (2001) para 11 states “the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2” [of the ICCPR]

there may arise problems especially in drawing the line between restricting and / or ensuring a right.

125. Furthermore, human rights treaties specify separately for each right the scope of permissible limitations and in particular enumerate the legitimate aims that justify a necessary and proportionate restriction with respect to each right, and they do not allow to pursue aims not specified in the said human rights treaties.<sup>121</sup> If a general list of permissible grounds is preserved in Article 23, **it is advisable to specify an additional requirement that any restriction must be compatible with internationally recognised permissible limitations under human rights instruments binding upon the Kyrgyz Republic.**

126. Article 23(2) introduces the proportionality principle (“restrictions imposed must be proportionate to the stated goals”), which is a positive addition, even if it would be more clear to require proportionality between the restriction and the actual benefit towards the stated goal that is obtained through it. However, it also suggests justifying restrictions on vaguely formulated grounds of “taking into account the specifics of the military or other state services”. While certain rights may indeed be specifically restricted for military or public servants, it would be wrong to use this as a universal standard defining the proportionality of restrictions. The drafters should therefore be encouraged to abandon this sentence. The final sentence in paragraph 2, “The restrictions imposed must be proportionate to the stated goals”, is a correct one, but which ought to be supplemented by the following: “and is necessary in a democratic society”. Finally, it is suggested to clarify the meaning of paras 5 and 6, which provide that “no restrictions shall be placed on the human rights and freedoms established by the Constitution” and that “the constitutionally established guarantees against prohibition are not subject to any limitation”.

127. A number of provisions of the Draft Constitution continue to grant certain rights exclusively to “citizens” instead of “everyone” or “all individuals”, such as the right to freely depart from the Kyrgyz Republic (Article 31(2)), the right to strike (Article 42(4)), the protection of property (Article 15(4)). Moreover, Article 56(1) of the Draft Constitution provides that “[t]he state shall ensure the rights and freedoms of citizens”, and not of everyone, and Article 91(1)(3) states that the Cabinet of Ministers shall implement measures to ensure the “rights and freedoms of citizens”. Further, Article 97(6) specifically refers to “complaints of *citizens* whose rights and freedoms have been affected”. In this context it is noted, as also specified in Article 25 of the ICCPR, that certain rights may apply only to citizens, e.g., the right to take part in the conduct of public affairs, to vote and to be elected, and to access public services. These points are reflected in Articles 2 and 37 of the Draft Constitution. On the other hand, guarantees of fundamental rights and freedoms should apply to everyone under the jurisdiction of a state, and not just to citizens.<sup>122</sup> Thus, while acknowledging the intention of the drafters to extend the enjoyment of the same rights and freedoms to foreign nationals and stateless persons (see Article 52(1) of the Draft Constitution), **it is recommended to refrain from referring exclusively to “citizens” in the above-mentioned provisions<sup>123</sup> to avoid any ambiguity and make it clear that such guarantees of fundamental rights and**

<sup>121</sup> See ODIHR, [Guidelines on the Protection of Human Rights Defenders](#) (2014), para. 56. See also CCPR, [General Comment no. 34 on Article 19 of the ICCPR](#), UN Doc. CCPR/C/GC/34, 12 September 2011, para. 22.

<sup>122</sup> See e.g., Venice Commission, [Opinion on the Draft Law on the Review of the Constitution of Romania](#), CDL-AD(2014)010, 24 March 2014, para. 49; and [Opinion on the Constitution of Bulgaria](#), CDL-AD(2008)009, 31 March 2008, paras. 55-57.

<sup>123</sup> Particularly Article 31(2) (freedom to leave any country, including one’s own, guaranteed to everyone under Article 12(2) of the ICCPR), Article 42(4) (right to strike, guaranteed by Article 8 of the International Covenant on Economic, Social and Cultural Rights, noting that the Covenant’s rights have been recognized as applying to everyone, including non-nationals – see Committee on Economic, Social and Cultural Rights, [General Comment no. 20 on Non-discrimination in economic, social and cultural rights](#) (2009), para. 30), Article 15(4) (right to private property, stated in Article 17 of the Universal Declaration of Human Rights as applying to everyone), Article 56(1), Article 91(1)(3) and Article 97(6) (State’s duty to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR and right to an effective remedy and to seek redress in courts, which is granted to any person under Article 2 of the ICCPR).

**freedoms apply to everyone, and not just to citizens.**<sup>124</sup>

128. Chapter 5 of Section II specifically deals with citizen's rights and obligations, though certain provisions included therein go beyond the rights and obligations applicable solely to citizens. Establishing a link between the exercise of the rights afforded under the Draft Constitution and the fulfillment of duties/obligations may suggest that human rights are conceived as "privileges" rather than "rights", which is fundamentally opposed to the nature and essence of human rights.<sup>125</sup> The whole idea behind human rights law is to balance the overwhelming power that the states has over the individual by creating the obligation on the State to "respect, protect and fulfill"<sup>126</sup> fundamental human rights and freedoms. Furthermore, certain guarantees and obligations defined under this section clearly apply to everyone (see Article 53, which provides for an obligation to exercise rights and freedoms without violating the rights and freedoms of others, as well as right of everyone to carry out actions, except for those prohibited by the Constitution and laws). It is therefore crucial to remove the reference to citizen's obligations which would suggest any kind of distortion of this clear-cut legal principle.

### **3. Right to Liberty and Security of Persons**

129. Article 59 of the Draft Constitution reflects some of the fundamental safeguards required under Article 9 of the ICCPR,<sup>127</sup> which is welcome. That being said, the provision securing immediate access to a lawyer and a doctor upon arrest does not clearly affirm that they must be persons of one's own choice. Also, Article 59 (4) guarantees the right to be brought promptly before a court and within 48 hours, however, it should also specify what is the timeframe for the court to rule on detention. It must also be highlighted that international bodies recommend that **in cases of juveniles, access to a judge should be guaranteed within 24 hours maximum.**<sup>128</sup> **It may also be helpful to differentiate more clearly in Article 59 between arrest by the police and detention as ordered or authorised by a court.**

130. Moreover, the provision concerning the (continuous) review of the legality of detention in accordance with the rules and periodicity established by law provided by Article 24(4) last paragraph of the current Constitution has been removed completely. This would prevent a detained person from lodging, after the initial automatic review by a judicial authority within 48 hours, an appeal to have the lawfulness of the detention over time reviewed again by a court, as guaranteed by Article 9(4) of the ICCPR<sup>129</sup>. **This key safeguard should be reintroduced under Article 59 of the Draft Constitution.**

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<sup>124</sup> See e.g., OSCE/ODIHR, [Comments on the Draft Constitution of Turkmenistan](#) (2016), para. 132. See also e.g., Venice Commission, [Opinion on the Draft Law on the Review of the Constitution of Romania](#), CDL-AD(2014)010, 24 March 2014, para. 49; [Opinion on the Constitution of Bulgaria](#), CDL-AD(2008)009, 31 March 2008, paras. 55-57.

<sup>125</sup> See e.g., OSCE/ODIHR, [Comments on the Draft Constitution of Turkmenistan](#) (2016), para. 135.

<sup>126</sup> H Shue, 'The Interdependence of Duties' in P Alston and K Tomasevski (eds) *The Right to Food*, Dordrecht, Martinus Nijhoff, 1984 pgs 84-85 as cited in E Cooke, A Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* Bloomsbury Publishing, 2004, pg 224 and subsequently, Asbjørn Eide, Report on the Right to Adequate Food as a Human Right, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987

<sup>127</sup> Including the right to be promptly brought before a court to decide on the legality and validity of their detention, to be informed without delay of the reasons for the detention and related rights, as well as from the moment of detention the opportunity to defend themselves and to have qualified legal assistance from a lawyer, and the right to a medical examination and the assistance of a doctor.

<sup>128</sup> See UN Committee on the Rights of the Child, [General Comment no.10 on "Children's rights in Juvenile Justice"](#) (2007), CRC/C/GC/10, para. 83; and UN Human Rights Committee, [General Comment no. 35 on Article 9 of the ICCPR](#) (2014), CCPR/C/GC/35, para. 33.

<sup>129</sup> *ibid.* (2014 CCPR [General Comment no. 35 on Article 9 of the ICCPR](#)), para. 30, which states that "[Article 9] paragraph 4 entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. It enshrines the principle of *habeas corpus*. Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination." See also CCPR, *Gavrilin v. Belarus* (Communication no. 1342/2005), para. 7.4; *Ahani v. Canada* (Communication no. 1051/2002), para. 10.2; and *A. v. New Zealand* (Communication no. 754/1997), para. 7.3, available at <<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC35-Article9LibertyandSecurityofperson.aspx>>.

#### 4. Fair Trial Guarantees

131. There is no comprehensive provision on the right to a fair trial in the Draft Constitution. Several aspects are scattered across different Sections of the Draft Constitution, e.g., Article 24(2) which mentions the principle of equality before courts, Articles 57-58 though they primarily refer to elements of fair trial in *criminal* cases, Article 60 which refers to the non-retroactivity of more severe criminal legislation and the principle of *nullum crimen, nulla poena sine lege*<sup>130</sup> (though not necessarily as comprehensively as in Article 15 of the ICCPR or Article 7 of ECHR), Article 61 on judicial protection of rights and freedoms and the right to receive qualified legal assistance, Article 100 which includes reference to open hearings and the principle of adversarial proceedings, and Article 104 on legal assistance.

132. **It is advisable to try to consolidate such provisions under Section II in a comprehensive general clause on fair trial rights in criminal and civil cases, reflecting all elements pertaining to fair trial guarantees embedded in Articles 14 and 15 of the ICCPR (Articles 6 and 7 of ECHR may also serve as a useful guidance).** Moreover, some key fair trial guarantees appear to be missing and **could be added, including e.g., the right to be tried within a reasonable time,<sup>131</sup> and the right to a public, reasoned and timely judgment.<sup>132</sup>**

#### 5. Freedoms of Peaceful Assembly and of Association

133. The separation between freedom of association (Article 36) and freedom of peaceful assembly (Article 39), by placing the latter but not the former in Chapter III in political rights, may not be fully justified and should be reconsidered. Indeed, the separation of civil and political rights is no longer strictly used.

134. Article 39 guarantees everyone the right to freedom of peaceful assembly. With a view to ensuring a peaceful assembly, paragraph 2 of the same article provides everyone with “the right to submit a notification to national or local authorities”. If it is well understood that the article serves only to entrench the principle that notification may be given (but never authorisation, and what is more, when there is no notification, organisers are in any case free to exercise their right to peaceful assembly and will not be held liable in any way) then it is fully in line with international law and welcomed. It is not necessary under international human rights law for domestic legislation to require advance notification of an assembly, but prior notice can enable the state to better ensure the peaceful nature of an assembly and to put in place arrangements to facilitate the event, or to protect public order, public safety and the rights and freedoms of others.<sup>133</sup> Further details should be dealt with in a specialised law, **while at the constitutional level it is recommended to guarantee the right to freedom of peaceful assembly without prior authorization and also defining the exhaustive list of permissible limitations.** However, compared to Article 34 of the current Constitution, Article 39 no longer states that “[p]rohibition and limitation on conduct of a peaceful assembly shall not be allowed; the same applies to refusal to duly ensure it due to the failure to submit notice on conduct of free assembly, non-compliance with the form of notice, its contents and submission deadlines”. It is unclear why such protective provision, which also emphasizes the authorities’ duty to facilitate and protect freedom of peaceful assembly irrespective of notification, was removed. **It is recommended to reconsider such deletion.**

135. Although the Draft Constitution establishes the right of everyone to freedom of

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<sup>130</sup> I.e., a person cannot face criminal punishment if his/her behaviour did not constitute a criminal offence at the time when such act was committed.

<sup>131</sup> Article 14(1) and (3)(c) of the ICCPR.

<sup>132</sup> Article 14(1) of the ICCPR; and CSCE/OSCE, [Concluding Document of the Third Follow-up Meeting](#), Vienna, 4 November 1986 to 19 January 1989, para. 13.9.

<sup>133</sup> OSCE/ODIHR-Venice Commission, [Guidelines on Freedom of Peaceful Assembly](#) (3<sup>rd</sup> edition, 2019), para. 25.

association (Article 36), it does not specifically mention the right to establish political parties or trade unions. Article 8, however, provides generally that “political parties, trade unions and other public associations may be established ... for the implementation and protection of the rights, freedoms and interests of man and citizen”.

136. Pursuant to Article 8(3)(3) of the Draft Constitution, the “creation of political parties on a religious and ethnic basis, the pursuit of political goals by religious associations” is prohibited. In principle, equality requires that parties representing national minorities should be permitted.<sup>134</sup> States may prohibit the establishment or registration of a political party based exclusively on ethnic affiliation and advocating the promotion of that particular ethnic majority, when it would be perilous in the prevailing political context to foster electoral competition between political parties based on ethnic or religious affiliation. However, a blanket ban on the establishment of political parties with religious or ethnic attributes would, as a rule, be disproportionate.<sup>135</sup> Such a restriction would only be permissible if it were strictly necessary in a democratic society, which would require a party “whose militant religious character poses a serious and immediate danger to the constitutional order”.<sup>136</sup> As to the pursuit of political goals by religious organisations, this provision may not only interfere with freedom of expression protected by Article 19 of the ICCPR by restricting religiously inspired political arguments, but may also limit the expression of members of religious or belief organisations in political debate, which is protected under Article 25 of the ICCPR, as well as being a possible violation of ICCPR’s Article 18(1) guarantee of freedom of religion and belief.<sup>137</sup> **It is therefore recommended to remove or to revise Article 8(3)(3) of the Draft Constitution.**<sup>138</sup>

137. Article 8(4) of the Draft Constitution provides that “public associations shall ensure transparency of their financial and economic activities”. First, it is worth emphasising that the aim of ‘enhancing transparency’ of civil society would by itself not appear to be a legitimate aim according to international human rights instruments.<sup>139</sup> The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association specifically warned against the misuse of transparency as a pretext for “extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment”.<sup>140</sup> Accordingly, **it is recommended to remove the reference to transparency of public associations’ financial and economic activities and allow for legislation to set the standards for reporting and accountability obligations of associations, in accordance with international law and good practice.**

### **5. Freedom of Expression and Access to Information**

138. As mentioned above, freedom of expression, including access to information of public interest, and freedom of the media are addressed in several provisions under Section I and Section II. There are issues of potential inconsistency between Article 10 (4) and (5) that allow for restrictions on freedom of expression and Article 23 (2) which includes the general human rights limitation clause, and Article 33 and Article 63 (1) which seem to suggest absolute

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<sup>134</sup> Venice Commission, [Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report](#), CDL-AD(2002)023, Point I.2.4 (equality and national minorities).

<sup>135</sup> OSCE/ODIHR- Venice Commission, [Guidelines on Political Party Regulation](#) (2<sup>nd</sup> edition, 2020), CDL-AD(2020)032, para. 134.

<sup>136</sup> Ibid para. 57 (June 2020 ODIHR Urgent Opinion); and para. 14 (2009 Joint Opinion).

<sup>137</sup> See OSCE/ODIHR-Venice Commission, [Joint Opinion on the Draft Law of Uzbekistan “on Freedom of Conscience and Religious Organizations”](#) (12 October 2020), CDL-AD(2020)002, para. 35.

<sup>138</sup> Op. cit. footnote 3, para. 57 (2020 ODIHR [Urgent Opinion on Draft Law on Political Parties of the Kyrgyz Republic](#)). See also OSCE/ODIHR-Venice Commission, [Joint Guidelines on Political Party Regulation](#) (2<sup>nd</sup> edition, 2020), para. 134.

<sup>139</sup> See e.g., OSCE/ODIHR-Venice Commission, [Joint Opinion on Draft Law No. 140/2017 of Romania on Amending Governmental Ordinance No. 26/2000 on Associations and Foundations](#) (16 March 2018), CDL-AD(2018)004, para. 64. See also OSCE/ODIHR-Venice Commission, [Joint Guidelines on Freedom of Association](#) (2015), para. 224, which states that “[t]he need for transparency in the internal functioning of associations is not specifically established in international and regional treaties owing to the right of associations to be free from interference of the state in their internal affairs. However, openness and transparency are fundamental for establishing accountability and public trust. The state shall not require but shall encourage and facilitate associations to be accountable and transparent”.

<sup>140</sup> UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, [Report to the UN Human Rights Council of 24 April 2013](#) (Funding of associations and holding of peaceful assemblies), para. 38.

protection of these freedoms. The prohibition of criminal liability for defamation or humiliation under Article 29 of the Draft Constitution, which is a welcome addition in comparison with the current Constitution, is also a freedom of expression issue. **It would be advisable to address all such issues under a comprehensive provision in order to find a coherent formulation on the right to freedom of expression, including access to information and freedom of the media.**

139. There are also significant potential inconsistency and confusion regarding the notions used in several provisions of the Draft Constitution, especially with regard to the terms “mass media” and “press”. According to Article 10, “mass media” are “free” and “guaranteed the right to receive information”, while Article 63 speaks about “freedom of speech, press and mass media”. It is unclear as to why this new provision is introduced in this part of the text and is separate from the right to which it essentially belongs, which is the right to freedom of thought and opinion, freedom of expression, of speech and of the press, which is recognised in Article 32 of the Draft Constitution. At the same time, the Law of the Kyrgyz Republic “On the Mass Media” defines “mass media” in its Article 1 as “newspapers, magazine, supplements, almanacs, books..., audiovisual recordings”, etc.<sup>141</sup>, in other words, material carriers of information. Moreover, the Draft Constitution speaks of the “freedom of the press” exclusively as an “individual right”, and not as an institutional one, belonging for instance to the editorial offices of the mass media outlets. **It is recommended to review the terminology used in this respect to ensure consistency and clarity.**

140. Article 10 of the Draft Constitution, which deals with mass media, provides in its paragraph 4 that “[i]n order to protect the younger generation, activities that contradict moral and ethical values and public conscience of the people of the Kyrgyz Republic may be restricted by law”. The right to freedom of expression may be limited for the reasons exhaustively listed under international law (Article 19 ICCPR), that is “(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals” and must pass the test of necessity, proportionality and legality. In that respect, terms such as “moral and ethical values” and “public conscience” are broad and vague and are not legally defined concepts at the international level.<sup>142</sup> Therefore, **the vague reference in Article 10(4) of the Draft Constitution to the protection of the younger generation, or to contradiction with “moral and ethical values and public conscience of the people of the Kyrgyz Republic” as a potential ground for limiting freedom of expression and of the media (and potentially other freedoms) appears unduly broad and vague to comply with the principle of legal certainty and should be removed entirely.**<sup>143</sup>

141. It is important to note that the “same rights offline are protected online” including the right to freedom of expression.<sup>144</sup> In this context, consideration should also be given to ensuring that

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<sup>141</sup> See <<http://minjust.gov.kg/ru/content/38>>.

<sup>142</sup> See OSCE Representative on Freedom of the Media, [Legal Commentary to the Draft Information Security Concept of the Kyrgyz Republic for 2019 – 2023](#), 21 June 2019, page 4, recommending to abstain from using, in the legal context, categories that have no international legal recognition and are not satisfactorily described in legal theory, such as “group and public consciousness”, “popular culture”, “moral values”.

<sup>143</sup> For the purpose of comparison, 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-e, paras. 31 and 80, where wording such as “information which is able to cause damage to moral and spiritual development or to the health of minors” or “protection of minors” was considered to be too vague to fulfil the requirement of being “prescribed by law”; as opposed to more precise reference to “the demonstration of nudity or sexually explicit or provocative behaviour or material” (para. 58) or prohibitions limited to sexually explicit content or obscenities (para. 80). See also SUN Human Rights Committee, [Fedotova v. Russian Federation](#), Communication no. 1932/2010, UN doc. CCCPR/C/106/D/1932/2010 (30 November 2012). para. 10.8, where the Committee duly distinguished “actions aimed at involving minors in any particular sexual activity” from “giving expression to [one’s] sexual identity” and “seeking understanding for it.”

<sup>144</sup> See Council of Europe, Appendix to Recommendation CM/Rec(2014)6, [A Guide to human rights for Internet users](#) (adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers’ Deputies), which states: “1. Freedom of expression and information: You have the right to seek, receive and impart information and ideas of your choice, without interference and regardless of frontiers. This means: 1. you have the freedom to express yourself online and to access information and the opinions and expressions of others. This includes political speech, views on religion, opinions and expressions that are

there are no unduly broad or vague restrictions on freedom of expression on social media and the internet in general, which is the communication of choice for many people, especially the youth.

142. Further, Article 10(3) of the Draft Constitution, which guarantees the freedom of the mass media states that “[i]nformation security in the Kyrgyz Republic is ensured by the state”. The so-called “[i]nformation security” is a controversial term in international law and generally refers to the protection of telecom infrastructure rather than content regulation. However, the origins of the concept of “information security” in the Draft Constitution can be traced back to the “Information Security Concept of the Kyrgyz Republic for 2019-2023”.<sup>145</sup> In its legal analysis of this Concept, the OSCE Representative on Freedom of the Media noted particular instances of vague and overbroad use of the term “information security” to adopt disproportionate measures, including legal ones, that restrict the right to freedom of expression and freedom of the media.<sup>146</sup> Moreover, Article 10(3) of the Draft Constitution would overlap with Article 23 (2) which already refers to “national security” as a legitimate ground for possible restrictions to human rights, including the right to freedom of expression, which would already encompass information threats to national security. In light of the foregoing, **it is recommended to withdraw the reference to “information security” in Article 10 (3).**

143. Article 10(5) of the Draft Constitution further states that “[a] list of activities to be restricted and information to be restricted in access and dissemination shall be established by law”, without qualifying potential grounds for restrictions or circumscribing the potential restrictions in line with international human rights standards.<sup>147</sup> In this field, it is important to have as the starting point the principle of maximum disclosure, the presumption of the public nature of meetings and key documents and broad definitions of the type of information that is accessible, among others,<sup>148</sup> and this should feature more prominently in the Draft Constitution. **It is therefore recommended to emphasize in Article 10(5) the principle of maximum disclosure of information of public interest.**

## 6. Other Comments

144. **Right to life** – Article 25 guarantees the right to life. In addition to a new provision added to the first paragraph, reading “Encroachment on personal life and health shall not be permitted”, the Draft Constitution introduces an entirely new paragraph providing that: “Everyone shall have the right to defend his life and health and the lives and health of others against unlawful encroachments, within the limits of necessary defense”. This is an unusual constitutional provision. With basis in natural law, it contains both a general self-evident description of fact and a somewhat problematic constitutional solution, especially when it refers to everyone’s right to defend “the lives and health of others against unlawful encroachments”. Indeed, this is the duty of the state or state authorities. Extending it to “everyone” might be controversial, from a practical point of view what actions can be judged to be taken by an individual in defense of the “life and health of others”. **This paragraph should be reconsidered altogether.**

145. **Freedom of religion and belief** - Article 34 on freedom of religion and belief is considerably more restrictive than the international standards of both the ECHR and the ICCPR. It makes no reference to the manifestation of beliefs in public or private and alone or

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favourably received or regarded as inoffensive, but also those that may offend, shock or disturb others. You should have due regard to the reputation or rights of others, including their right to privacy.

<sup>145</sup> See <http://cbd.minjust.gov.kg/act/view/ru-ru/13652>.

<sup>146</sup> See OSCE Representative on Freedom of the Media, [Legal Commentary to the Draft Information Security Concept of the Kyrgyz Republic for 2019 – 2023](#), 21 June 2019.

<sup>147</sup> See e.g., OSCE, *Decision of the Ministerial Council On Safety of Journalists*, 7 December 2018; CSCE/OSCE, [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen](#), 29 June 1990, para. 9.1.

<sup>148</sup> See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, [2010 Report](#), 20 April 2010, para. 32.

in community, in contrast to both the ICCPR (Article 18(1) guarantees “freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”) and the ECHR (Article 9 (1) has language almost identical to the ICCPR on this point). **Article 34 should be redrafted and expanded to conform to the applicable international standards of protection.**

146. Article 21: The affirmative state obligation to ensure inter-confessional harmony, while in the abstract a constructive goal, could invite excessive state interference in the internal practices and beliefs and governance of religious communities, threatening their freedom of religion and belief. This language is indicative of a broader theme throughout the Draft Constitution, which seems to see religious pluralism as a threat to harmony and order, rather than as a strength of liberal constitutional democracies. **The state should have no excuses for suppressing societal pluralism.**

147. **Right to Education** – Article 20(3) of the Draft Constitution provides that “[b]y creating conditions conducive to the full spiritual, moral, intellectual and physical development of children, the State fosters patriotism and citizenship”. According to Article 13(3) of the ICESCR, State Parties shall “respect the liberty of parents and, when applicable, legal guardians to [...] ensure the religious and moral education of their children in conformity with their own convictions”. Accordingly, Article 13(3) of the ICESCR permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression.<sup>149</sup> **Article 20(3) of the Draft Constitution could be supplemented to reflect such caveat and specify that this is without prejudice to the right of parents, subject to the evolving capacities of the child, to provide moral and religious education to their children in accordance with their own convictions.**

148. **Right to Property** – Article 15 of the Draft Constitution deals with the protection of the right to property, prohibits the arbitrary deprivation of property, states that the seizure of property against the will of the owner is allowed only by a court decision and refers to the “fair and prior security for compensation for the value of the property and the losses caused by the seizure of the property”. In essence it retains the existing solutions of Article 12 of the current Constitution, which were subject to critical remarks of the Venice Commissions 2010 opinion which indicated that “the regulation is not only unclear, but also inadequate, as it does not live up to international standards requiring a balancing of private and public interests as well as prompt and adequate compensation. Paragraph 4 provides protection for the property of Kyrgyz citizens and Kyrgyz legal persons as well as for Kyrgyz State property abroad. It is not clear how such a guarantee is going to be implemented”.<sup>150</sup> Article 45(2) of the Draft Constitution further provides that “[n]o one shall be arbitrarily deprived of their home”. It is noted that the UN human rights mechanisms have urged the Kyrgyz Republic to ensure full compliance of the national legislation with international obligations regarding evictions and resettlement only in case when these measures are justified, and set up effective legal safeguards against arbitrary land expropriation and forced evictions, while providing compensation and alternative housing and ensuring that house demolitions and forced evictions are used only as a last resort.<sup>151</sup> It is recommended to review the provisions pertaining to the right to property in the Draft Constitution and enhance the provisions on the protection of property rights and related safeguards in light of such recommendations.<sup>152</sup>

149. **Emergency situations** - Compared to Article 15 of the current Constitution, Article 12

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<sup>149</sup> See CESCR Committee, [General Comment no. 13 on Article 13 of the ICESCR on the right to education](#) (1999), E/C.12/1999/10, para. 28.

<sup>150</sup> CDL-AD(2010)015, para. 15.

<sup>151</sup> See CERD Committee, [Concluding observations on the Kyrgyz Republic](#) (2018), CERD/C/KGZ/CO/8-10, para. 24; and CESCR Committee, [Concluding observations on the Kyrgyz Republic](#) (2015), E/C.12/KGZ/CO/2-3, para. 19.

<sup>152</sup> See also footnote 2, para. 15 in the 2010 Venice Commission’s Opinion on the Draft Constitution of the Kyrgyz Republic.

of the Draft Constitution introduces a new regime of the “emergency situation” but it is not clear what does it entail or how can it be imposed. Articles 70 and 80 defining the powers of the President and the *Jogorku Kenesh*, make no mention of the “emergency situation”. Article 116(5) also specifies that a new Constitution and introduction of amendments and additions to the Constitution cannot be adopted during a state of emergency or martial law but there is no further provision that would restrict constitutional revisions in the new category of “emergency situations”, nor are the differences between such regimes are described, or under which circumstances they may be invoked. Article 12 is also silent on the issue of derogations from constitutional or human rights during a state of emergency and falls short of reflecting the criteria and safeguards of Article 4 of the ICCPR. As declaring a state of emergency entails a possibility for derogations from some fundamental rights,<sup>1</sup> **it is recommended to define differences between emergency regimes, the pre-conditions and the procedure for declaring a state of emergency or emergency situation, and defining fundamental rights that may or may not be subject to derogation.**

150. **Non-Refoulement** - The prohibition against *refoulement* in Article 52(2) of the Draft Constitution falls short of international standards as it is only applicable with respect to those who have been granted political asylum and with respect to formal extradition. It is recommended **to include a more general non-refoulement clause** protecting anyone against any form of removal to a country or area where there is a real risk of that person being subjected to torture or other cruel, inhuman or degrading treatment or punishment,<sup>153</sup> of violations to the rights to life.<sup>154</sup> Furthermore, current and evolving practice in international law also prohibits *refoulement* in cases of a risk to the integrity or freedom of the person, of flagrant violation with respect to arbitrary imprisonment,<sup>155</sup> enforced disappearance,<sup>156</sup> flagrant denial of justice,<sup>157</sup> serious forms of sexual and gender-based violence,<sup>158</sup> prolonged solitary confinement<sup>159</sup> or of other serious human rights violations.<sup>160</sup>

## F. The procedure for constitutional amendments and adoption of the new constitution

151. Article 116 of the Draft Constitution provides for the procedure of adoption or revision of the constitution, which significantly differs from the procedure currently in force. In particular, it appears to define the ways in which not only amendments can be done, but how an entirely new constitution may be adopted. According to para 1 of Article 116 (1), the Constitution may be

<sup>153</sup> See Convention Relating to the Status of Refugees (opened for signature on 28 July 1951, entered into force on 22 April 1954), 189 UNTS 150, Article 33; Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force on 26 June 1987), 1465 UNTS 85, Article 3; International Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force on 23 December 2010), 2716 UNTS 3, Article 16; Articles 2(1) and 7 of the ICCPR (see [CCPR, General Comment no. 20 \(1992\)](#), para. 9, which indicates that this obligation is reflected in Article 7 of the ICCPR, whilst [General Comment no. 31 \(2004\)](#), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 12, recognises the non-refoulement principle in Article 2 of the ICCPR). See also e.g., CCPR, [General Comment no. 36 \(2018\)](#), para. 31.

<sup>154</sup> See e.g., OHCHR, [Technical Note on the Principle of Non-Refoulement under International Human Rights Law](#) (2018), page 1; and CCPR, [General Comment no. 31 \(2004\)](#), para. 12.

<sup>155</sup> *ibid.* page 1 (2018 OHCHR Technical Note on Non-Refoulement).

<sup>156</sup> See e.g., for the purpose of comparison, ECtHR, [Othman \(Abu Qatada\) v. United Kingdom](#) (Application no. 8139/09, 17 January 2011) See Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly by Resolution A/RES/61/177 of 20 December 2006 (which entered into force on 23 December 2010).

<sup>157</sup> *Op. cit.* footnote page 1 (2018 OHCHR Technical Note on Non-Refoulement). See also, *op. cit.* footnote, paras. 258-262 (2021 ECtHR [Othman \(Abu Qatada\) v. United Kingdom](#)).

<sup>158</sup> *ibid.* page 1 (2018 OHCHR Technical Note on Non-Refoulement). See also e.g., UN CAT Committee, [Njamba and Balikosa v. Sweden](#), Communication no. 322/2007, 3 June 2010, para. 9.5; and CEDAW Committee, [General Recommendation no. 32 \(2014\)](#), para. 23.

<sup>159</sup> *ibid.* page 1 (2018 OHCHR Technical Note on Non-Refoulement). See also e.g., CCPR, [General Comment no. 20 \(1994\)](#), para. 6.

<sup>160</sup> See CCPR, [Kindler v. Canada](#), Communication no.470/1991, at para. 13.2: “If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant”; and [ARJ v. Australia](#), UN Doc. CCPR/C/60/D/692/1996, 11 August 1997, para. 6.9 referring to risk of any serious human rights violation triggering non-refoulement obligations.

adopted by referendum on the initiative of at least 300 000 voters, the President or two-thirds of the total number of deputies of the Jogorku Kenesh. In such case, the referendum should be called by the President. *Prima facie*, this provision provides for a procedure for adoption of an entirely new constitution, however, para 7 of the same article appears to introduce a qualification to this principle, by stating that a new version of the constitution may be adopted through “amendments and additions” and thus seems to stipulate that a new constitution may in fact only be adopted as amendments to the old, rather than an entirely new document. Thus, the procedure of adoption leaves room for interpretations, which could be problematic. **Any constitution adopted should be clear on the procedure of its amendment or, in fact, replacement.**

152. Furthermore, para 2 allows for the revision of Sections I (“basics of the constitutional order”), 2 (human rights, freedoms and duties) and 5 (procedure of adoption and revision of the constitution) by a referendum at the initiative of “at least 300 000 voters or the President or two-thirds of the total number of deputies of the Jogorku Kenesh”. In this case, a referendum should also be called by the President. According to para 3, the revision of the sections 3 (“Public authorities”) and 4 (“Local self-government”) may only be initiated by the President or two-thirds majority of the Jogorku Kenesh and should be adopted “no later than six months from the date the draft law is submitted to the Jogorku Kenesh”, by a majority of at least two-thirds and after at least three readings with a break of two months between the readings.

153. Finally, according to the para 4 of Article 116, the Constitutional Court of the Kyrgyz Republic shall issue an opinion for amendments and additions to the Constitution.

154. Article 116 of the Draft Constitution suffers from several deficiencies. First, it is vaguely worded. Second, it seems to allow for the adoption of a new Constitution and constitutional amendments by a referendum but without involvement of the legislature. Third, it fails to remedy deficiencies of Article 114 of the current Constitution, which have been an issue of controversy over differences in interpretations in the past.<sup>161</sup>

155. It should be noted that in most constitutions the amendment procedure is the same regardless of whether the amendment only relates to a single provision, or to large parts, or even the whole document. A number of constitutions, however, expressly provide for a special, reinforced procedure for a total revision of the constitution (Austria, Spain, Switzerland (both chambers are dissolved if the people demand the adoption of a new constitution) or for the adoption of a new constitution (e.g. Bulgaria, Montenegro, Slovakia, Spain and Russia).<sup>162</sup>

156. In general, in order to ensure “constitutional continuity”, it is considered good practice for a constitution to provide for a procedure for adopting an entirely new constitution – thus strengthening the stability, legality and legitimacy of the new system.<sup>163</sup>

157. In cases when the new Constitution is planned to be adopted or if there are amendments which comprehensively change the structure of a Constitution or affect its fundamentals, it may be appropriate to organise a referendum. However, as mentioned above, this should necessarily be preceded by a phase where parliament discusses and debates the new text, and subsequently adopts it with a reinforced majority. **The Draft Constitution should provide for meaningful parliamentary debates and for the adoption of the constitutional revision (whether partially or entirely replacing the existing constitutional norms), through a clearly defined timeframe and procedure of a qualified vote, by the Jogorku Kenesh.** Apart from that, it is necessary to ensure that the Draft Constitution is interpreted in a way that would not allow executive authorities to circumvent parliamentary amendment procedures by having recourse to

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<sup>161</sup> See *op. cit.* footnote 2, (2015 Joint Opinion); and (2016 Joint Opinion).

<sup>162</sup> See “Report of the Venice Commission on Referendum CDL-AD(2010), par 56

<sup>163</sup> See for eg., “Report of the Venice Commission on Referendum CDL-AD(2010), par 68

a referendum.<sup>164</sup>

158. The role assigned to the President by the Draft Constitution, allowing the office holder to initiate revisions to all sections of the Constitution (including those that regulate the powers of the President and other public authorities), as well as granting exclusive competence to call a referendum, is clearly problematic in terms of separation of powers and needs to be reconsidered. **It is therefore recommended to revise the Draft Constitution accordingly.**

159. As regards the involvement of the Constitutional Court in the amendment process, while it is envisaged in the constitutions of several states, it should be subject to certain conditions.<sup>165</sup> **The Constitution should clearly define the scope of such involvement (whether the court is reviewing procedural or substantive aspects of the reform), define the authorities responsible to request such a review, as well as the timeframe for it, and the consequences in case the Constitutional Court's vote is negative or lacking.**

160. It is noteworthy that Article 3 of the transitional provisions to the Draft Constitution prescribe that the President elected on 10 January 2021 on the basis of the former Constitution for six years is considered to be elected on the basis of the new Constitution for six years, although the mandate in the Draft Constitution is only for five years and the competences are very different due to the change from a parliamentary system to a presidential one. This raises a problem of democratic legitimacy. The voters did not know the rules to be applied to the new President. In addition, the regulation in Article 3 of the Transitory Provisions is to be understood as a sort of cherry-picking, choosing those regulations out of the two constitutions that enlarge the President's powers, on the one hand providing him with longer mandate, and on the other hand giving him broader scope of competences. The planned referendum cannot rectify this deficiency as only a yes-or-no-vote is possible blurring the adoption of a new constitution with the prolongation of the personal mandate of the President. **It is therefore recommended to reconsider this provision clarifying the issue of the mandate of the sitting President in a manner that ensures the democratic legitimacy of the President.**

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<sup>164</sup> 2015 joint opinion, para 27

<sup>165</sup> The Venice Commission Report on Referendum, CDL-AD(2010), para 58