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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

KYRGYZSTAN

**URGENT AMICUS CURIAE BRIEF
RELATING TO THE POSTPONEMENT OF ELECTIONS
MOTIVATED BY CONSTITUTIONAL REFORM**

**Endorsed by the Venice Commission
at its 125th online Plenary Session
(10-11 December 2020)**

on the basis of comments by

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I. Introduction

1. By letter of 4 November 2020, the President of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, Mr Karybek Duisheev, requested an urgent *amicus curiae* brief from the Venice Commission on comparative law with respect to postponement of parliamentary elections motivated by constitutional reform.
2. Mr Richard Barrett, Ms Marta Cartabia and Ms Hanna Suchocka acted as rapporteurs for this *amicus curiae* brief.
3. This urgent *amicus curiae* brief was drafted on the basis of their comments. It was authorised by the Enlarged Bureau on 6 November 2020 and was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 17 November 2020. It was endorsed by the Venice Commission at its 125th Plenary Session on 11-12 December 2020.

II. Request

4. This request for an *amicus curiae* brief relates to the case pending before the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on the constitutionality of the provisions of the Constitutional Law of the Kyrgyz Republic "On the suspension of certain provisions of the Constitutional Law of the Kyrgyz Republic "On Elections of the President of the Kyrgyz Republic and Deputies of the Jogorku Kenesh of the Kyrgyz Republic", adopted by the Jogorku Kenesh on 22 October 2020 (see para. 9 below; see also CDL-REF(2020)077). For this *amicus curiae* brief, the Constitutional Chamber has asked the Venice Commission four specific questions:

- 1) In the absence of explicit restrictions in the Constitution of the Kyrgyz Republic, from the point of view of generally accepted democratic principles, how much can the scope of the Parliament's powers be expanded between the expiration of its mandate and the first session of the newly elected Parliament? In particular, to what extent is it consistent with the generally accepted democratic principles to carry out constitutional reforms in the period between the cancelation of election results and the holding of repeated / new parliamentary elections?
- 2) To what extent is it consistent with democratic principles to suspend an election to the supreme legislative body in order to carry out a constitutional reform (in the period between the annulment of the election results and the holding of repeated / new elections)?
- 3) To what extent do the amendments of electoral legislation, entailing suspension of the electoral process, correspond to democratic principles and international standards?
- 4) How consistent is it with democratic principles that the outgoing parliament adopts amendments to legislation disregarding the established procedure for the adoption of laws?

5. The Venice Commission, in the very limited time available, will limit itself to the questions posed above and reply to them from a comparative constitutional law perspective. It has no intention to comment on the political situation/dispute in the Kyrgyz Republic which forms the background to the proceedings, advocate for a particular result in the proceedings or speculate on the correct interpretation of the Kyrgyz Constitution.

6. The purpose of this brief is to assist the Constitutional Chamber by providing a general overview of international democratic principles relevant to the questions raised by the Court. The Commission understands these principles to encapsulate the three grounding principles of the European constitutional heritage - democracy, human rights and the rule of law.

III. Background

7. Article 70 para 2 of the Constitution of the Kyrgyz Republic provides that the Parliament (Jogorku Kenesh) is elected for a five-year term. The powers of the previous Parliament, in accordance with Article 71 para 3 of the Constitution, shall cease from the day of the first sitting of the newly elected Parliament. The term of office (mandate) of the Parliament elected on 4 October 2015 ended in October 2020. The new elections were held on 4 October 2020. However, as a result of civil unrest following allegations of electoral fraud, the Central Commission for Elections and Referendums of the Kyrgyz Republic (CEC) cancelled the results of these elections on 6 October 2020.

8. On 21 October 2020, in accordance with Articles 38 and 63 of the Constitutional Law of the Kyrgyz Republic "On Elections of the President of the Kyrgyz Republic and Deputies of the Jogorku Kenesh of the Kyrgyz Republic" (CDL-REF(2020)077), the CEC decided to call repeat elections and set the election date at 20 December 2020.

9. 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 provided:

"Article 1.

In order to stabilize the socio-political, epidemiological and related economic situation in the country, increase the level of public confidence in the electoral process, due to the need to take into account the opinions of the broadest segments of society and the implementation of a constitutional reform that provides for amendments to the current Constitution of the Kyrgyz Republic, suspend Articles 38 and 63 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" dated July 2, 2011 No. 68.

Article 2.

In connection with the recognition of the elections of deputies of the Jogorku Kenesh of the Kyrgyz Republic held on October 4, 2020 as invalid, repeat elections or new elections of deputies of the Jogorku Kenesh shall be announced in accordance with the legislation of the Kyrgyz Republic, but no later than June 1, 2021.

Article 3.

1. This Constitutional Law shall enter into force from the date of its official publication and shall remain in force until the completion of the constitutional reform.

2. The Government of the Kyrgyz Republic and the Central Commission for Elections and Referendums of the Kyrgyz Republic shall:

- bring its regulatory legal acts in compliance with this Law;*
- take the necessary measures arising from this Constitutional Law".¹*

10. The provisions of this new Law were challenged before the Constitutional Chamber of the Supreme Court as contrary to the Constitution. According to the applicants, the contested Constitutional Law was enacted with serious violations of the procedure for enactment of laws, provided for by the laws of the Kyrgyz Republic "On the Rules of Procedure of Jogorku Kenesh of the Kyrgyz Republic" and "On Normative Legal Acts of the Kyrgyz Republic" since amendments to a constitutional law were adopted in three readings on the day the bill was submitted to the Jogorku Kenesh and without public discussion. By decision of 2 November 2020

¹ Translation provided by the Constitutional Chamber of the Kyrgyz Republic

the Chamber accepted the request (see CDL-REF (2020)076). The decision is expected by 20 November 2020.

IV. Analysis

A. The scope of the Parliament's powers between the expiration of its mandate and the first session of the newly elected Parliament and, in particular, the intention to carry out constitutional reforms in the period between the cancelation of election results and the holding of repeated / new parliamentary elections.

11. This first question encompasses two issues: - a) how much can the scope of the Parliament's powers be expanded between the expiration of its mandate and the first session of the newly elected Parliament? And b) - to what extent is it consistent with generally accepted democratic principles to carry out constitutional reforms in the period between the annulment of election results and the holding of repeated elections?

12. It is a core feature of contemporary democracy that the legislature is renewed in periodic elections. As indicated by the Venice Commission in its 2019 Opinion on the scope of the powers of the president to set the dates of the elections Albania:

'The principle of democracy requires that the elections have to be held periodically – including on local (municipal) level. This stems from Article 25(b) of the International Covenant on Civil and Political Rights and Article 3 of the First Protocol to the European Convention on Human Rights and has been identified as one of the principles underlying Europe's electoral heritage in the Code of Good Practice in Electoral Matters. Without periodic elections at the local level, local self-government would lack the required legitimacy.

Periodic elections are thus both a requirement of the principle of democracy and a fundamental right. Any restriction of the right to take part in periodic elections has to be provided for in the law, have a legitimate aim and be proportionate'.²

13. The Constitution of the Kyrgyz Republic provides that the state is democratic, and the people of Kyrgyzstan are the sole source of state power. International treaties such as the International Covenant on Civil and Political Rights (ICCPR), to which the Kyrgyz Republic is a party, and the general principles of international law are part of the legal system of the country.

14. The Constitution of the Kyrgyz Republic follows a model where the mandate of the legislature ends after five years but the institution continues until the new legislature meets. The scheme required that elections be held in October 2020 to elect a new convocation of parliament and when that convocation meets, the out-going convocation loses its authority. More specifically, according to Article 70, para 2 of the Constitution, deputies are elected for "a five year term", and according to Article 71, para 4 "the powers of the deputies of the Jogorku Kenesh shall commence from the day of taking the oath by them". In light of these provisions, the mandate given by voters to the Jogorku Kenesh lasts for 5 years, and the term lapses starting with the oath of the deputies of the newly elected legislature. However, the scheduled elections failed and the Central Electoral Commission called repeat elections for a date which was later abandoned following the adoption of amendments to the electoral legislation from the out-going convocation of parliament.

² Venice Commission, CDL-AD(2019)019, Opinion on the scope of the powers of the president to set the dates of the elections in Albania, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)019-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)019-e) .

1. *The scope of the Parliament's powers between the expiration of its mandate and the first session of the newly elected Parliament*

15. The first question raised is about the scope of the powers of the out-going Parliament when its five-year mandate has ended but the lack of new elections has delayed the meeting of the new Parliament. Can it legislate or exercise other powers during that period? The Constitution of Kyrgyzstan does not explicitly deal with the extent of the continuing authority of the outgoing Parliament during that period, although Art 71 para. 3 (“3. The powers of the previous Jogorku Kenesh shall cease from the day of the first sitting of the newly convened Jogorku Kenesh.”) may imply that its powers continue until the new convocation meets. In some constitutional systems the outgoing legislature will be recognised as having some continuing role as a caretaker with restricted capacity.

16. In this respect it may be argued that the 5-year term set out in Articles 70 and 71 means that the office of deputies and the mandate of the Parliaments begins with the oath of the deputies and ends 5 years later. Then begins a period, when the old Parliament is still in office, in order to make sure that the Kyrgyz Republic is never deprived of a Parliament able to exercise its powers in case of necessity. The purpose of Article 71, para 3 is to prevent all form of institutional vacuum.

17. The Constitution does not provide for a fixed date for the elections after the end of the parliamentary term of five years (which begins with the oath of the deputies) and therefore allows some discretionary power to the authority in charge of determining the date. According to Article 64 of the Constitution, the President is vested with the authority of calling the elections. This is in line with the practice of many other states. In fact, according to the Venice Commission's Report on choosing the date of an election,³ there is no common practice to have the exact date of elections stipulated in the constitution or in the electoral law and the competent authorities have in many countries at least some discretion to decide on that issue. Therefore, it is neither against democratic standards nor against the voters' fundamental rights if the elections take place sometime after the term of office of the deputies has ended. Generally speaking, an average time interval is established to call for new elections and the average time interval to organise them is a period between 30 and 70/80 days.

18. The Constitution provides that after the elections “the Jogorku Kenesh shall assemble for its first session not later than 15 days after the results of elections are defined” (Article 71, para 1). The challenged constitutional law establishes that new elections should be called by 1 June 2021, which is up to 8 months after the end of the mandate of the outgoing legislature: such a delay is longer than the average and should be supported by special justifications and extraordinary circumstances.

19. During the period of time that begins when the 5-year term expires and ends when the first session of the new Parliament takes place, the incumbent Parliament continues to exercise some competences and powers. This is essential for the principle of the continuity of the State action. The functions of the State shall be assured at all time, without breaks and interruptions.

20. However, when the mandate of the Parliament ends, its political legitimacy is diminished. Therefore in many countries it is a common constitutional custom that after the dissolution of the Parliament or after the end of its mandate, the incumbent Parliament is only allowed to

³ CDL-AD(2007)037, Report on choosing the date of an election.
[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)037-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)037-e)

take urgent and necessary measures or to conduct everyday business and to discharge formal duties. After the end of the mandate, Parliamentary powers are limited.

21. Such continuing capacity is based on a theory of necessity that in default of any other authority the outgoing legislature can provide for such legal steps as are essential and proportionate to facilitate the elections to put in place the new legislature, and perhaps a capacity limited to maintenance of government. With no intention to be prescriptive, it seems relevant considerations might be the political sensitivity of the action, the permanence/ability of the new parliament to effectively repeal the action, the impact on human rights, the political mandate for the action (i.e. was it part of the manifesto), and the necessity of the action.

22. It may be of assistance to recall that the rule of law does not generally permit the unaccountable exercise of legal powers and this extends to legislative powers. Thus, it may be of assistance to consider whether, as a matter of law, the legislature continues to be properly accountable to the electorate and/or other checks and balances in the constitutional order in the interregnum before meeting of the new legislature. Assuming that legislative powers continue to vest in the legislature at the relevant time, is that limited by the principles of democracy, human rights and the rule of law? Democracy is rooted in the proposition that political sovereignty originates with citizens. Democratic governance derives its legitimacy from the consent of the electorate. In that context, legitimacy in governance is fundamental to the rule of law – legitimacy as much as individual rights is a defence against the abusive exercise of legal powers. Of course, legitimacy through consent does not mean that every action is approved by the electorate, in modern democracies consent is mediated through representatives, elected by means of regular, periodic, free and fair elections, based on universal suffrage and a secret ballot. Put simply, governance derives its legitimacy in a democracy from inferring the consent of the electorate through the decisions of representatives elected by regular elections.

23. A theoretical distinction can be useful: one should always distinguish “extension” and “*prorogatio*” – a word derived from ancient Roman law *prorogatio imperii* - of Parliament’s powers: during an extension of the term the Parliament maintains its full capacity and powers; whereas during the *prorogatio*, necessary to prevent interruptions in the parliamentary function, the incumbent Parliament has a diminished capacity. The idea comes from the Roman experience when the praetor or consul were occasionally held over, but in a different position as a sort of “deputy praetor or deputy consul”, in a way subordinate to the main official.

24. Therefore, during the *prorogatio* that takes place after the legal term of the legislature has expired, the Parliament is only allowed to carry out some ordinary functions, whereas it is not allowed to approve extraordinary measures, including constitutional reforms.

25. So in the present case in Kyrgyzstan there are two problematic issues: one is an issue of time - how long can the incumbent parliament stay in office after the end of the term? The other one is an issue of powers - what can the Parliament do during the *prorogatio* period? Under both aspects, the constitutional law approved by the Kyrgyz Parliament on October 22 does not reflect the spirit of genuine democratic principles, although it does not openly violate any explicit constitutional provision: in the first place, the postponement of the elections of the new Parliament until June 2021, gives the Parliament in office 6 to 8 more months of power, which is a long period of time, much longer than the usual few weeks necessary to carry out the electoral activities; secondly, the Parliament in office, during the period of *prorogatio*, i.e. of diminished powers, has suspended a constitutional law and changed the rules of the democratic game.

26. Viewed in light of these propositions, the principles of democracy and the rule of law require that the Constitutional Chamber consider whether the legislative decision, even if *ex prima facie* lawful, has the quality of legitimacy from consent in the interregnum between the end of the mandate and the new legislature taking office. It must be that the legitimacy of

legislative decisions is lessened in this period. Whether the expiry of parliamentary mandate occurs through operation of law or through a political decision is not particularly relevant. The effect is the same – elections have been scheduled to elect the representatives through which legitimacy can be inferred. Until those elections have completed, it is more difficult to properly infer consent.

27. The question asked is even narrower, asking rather whether such powers as may continue can be expanded upon. If the caretaker has some continuing powers can it use those powers to extend the powers themselves? In principle the answer must be in the negative. Any caretaker powers held between the end of mandate and the meeting of the new convocation are limited and cannot include power to expand the role of the outgoing Parliament itself.

2. *The issue of undertaking a programme of constitutional reform by continuing legislature*

28. The first question also relates to whether it is consistent with accepted democratic principles for such a continuing legislature to undertake a programme of constitutional reform. The process of initiating and producing constitutional reform requires extensive analysis and public discussion inside and outside the legislature. In many constitutional traditions the process of constitutional reform requires a specific mandate for a constitutional assembly or requires special elections before the adoption of the changes. That process is beyond the scope of a continuing caretaker authority. Such a continuing authority with limited capacity cannot use that capacity to turn itself into a constitutional assembly.

29. A substantial respect of the democratic will and therefore of the basic democratic principles would suggest postponing all constitutional changes and to defer them to the new Parliament. In the meanwhile, the incumbent Parliament should refrain from approving any amendment to the constitution during the interval between the end of the legal mandate and the first session of the new Parliament.

30. A different scenario takes place when a state of emergency or war is formally declared in all the country: in those cases, many Constitutions envisage the possibility of a proper extension of the Parliament in office and to postpone the elections (this is not the case for the constitution of the Kyrgyz Republic). Several constitutions also limit the possibility of adopting constitutional amendments or legislation during states of emergency (this is the case for Kyrgyzstan: see Article 80 of the Constitution).

31. In Kyrgyzstan, an official state of emergency was only in force in part of the country between 25 March and 15 April due to Covid-19, and was imposed again only *after* the October elections, to be terminated on 15 October 2020.

32. It is true that one of the justifications for the postponement of the elections is “to stabilize the socio-political, epidemiological and related economic situation in the country” (See Article 1 of Law of 22 October 2020, para. 9 above). This suggests that there is an – undeclared – situation of emergency in the Kyrgyz Republic. The Venice Commission recalls that it has previously underlined, in the context of states of emergency, that “[i]f the elections are postponed, the legitimacy of the parliament is to some extent limited. Thus, the parliament should abstain from adopting amendments to the constitution, organic laws or other important reforms under political debate which are not necessary to return to the normal situation.”⁴

33. A difference should also be made between a general constitutional reform and specific, technical amendments which may appear as essential in order to proceed with the elections

⁴ Venice Commission, Respect for democracy, human rights and the rule of law during states of emergency: reflections, CDL-AD(2020)014, para.119.

(or to return to normalcy). The latter might be justifiable even in a context of prorogatio. What is envisaged in the Kyrgyz Republic, however, is a very generic “constitutional reform that provides for amendments to the current Constitution of the Kyrgyz Republic” (see Article 1 of the law of 22 October 2020, para. 9 above).

34. The Venice Commission finally recalls that constitutional amendment must be carried out in compliance with the relevant procedure as set out in the Constitution. As the Venice Commission has had the opportunity of stressing before in the context of the Kyrgyz Republic, “[p]rovisions outlining the power to amend the Constitution are not a legal technicality but they may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself. Equally important, a wide acceptance of these amendments needs to be ensured.”⁵ Article 114 of the Constitution of the Kyrgyz Republic sets out the procedure for amending the constitution and provides for a time-frame for the amendment.⁶ Such time-frame must be respected. The need to organise repeat elections may not justify disregarding the constitutional procedure.

35. The Commission considers that an act to expand the powers of Parliament and/or to carry out constitutional reforms must be viewed with careful scrutiny. Such an action has the possibility of altering the balance of power in the country, and thereby impacting on the rule of law.

B. Suspension of an election to the supreme legislative body in order to carry out a constitutional reform.

36. The second question asked by the Constitutional Chamber is whether it is consistent with democratic principles to suspend the electoral process for the formation of the supreme legislative body in order to carry out constitutional reform before those elections. With respect to the actual aim of the suspension, it has been already been stressed that an outgoing parliament in prorogatio would in principle lack the democratic legitimacy to carry out constitutional amendment; the actual justification for the suspension might rather have been the massive refusal by the Kyrgyz population of the rigged results of the parliamentary elections.

37. Circumstances may arise which require the temporary suspension of an election: this indeed is contemplated by Article 7 para 3 of the Constitutional Law ‘On Elections of the President of the Kyrgyz Republic and Deputies of the Jogorku Kenesh of the Kyrgyz Republic’ when a formal emergency situation exists. However, the motivation for the suspension must

⁵ Venice Commission, CDL-AD(2015)014, Joint Opinion on the Draft Law “On Introduction of changes and Amendments to the Constitution” of the Kyrgyz Republic, para. 23.

⁶ Article 114 1. The law on introducing changes to the present Constitution may be adopted by referendum called by the Jogorku Kenesh. 2. Changes to the provisions of sections three, four, five, six, seven and eight of the present Constitution may be adopted by the Jogorku Kenesh upon proposal of the majority of the total number of deputies or at the initiative of not less than 300 000 voters. 3. The Jogorku Kenesh shall adopt the law on introduction of changes to the present Constitution not later than 6 months after it was submitted for consideration of the Jogorku Kenesh. The law on introduction of changes to the present Constitution shall be passed by the majority of not less than two thirds of the total number of deputies of the Jogorku Kenesh after conducting not less than three readings with 2 months’ time interval between them. At the initiative of not less than two thirds of the total number of the deputies of the Jogorku Kenesh the law on introduction of changes to the present Constitution may be submitted to the referendum. 4. Adoption of the law introducing changes to the present Constitution shall be prohibited during a state of emergency or state of martial law. 5. The adopted law on introducing changes to the present Constitution shall be submitted to the President for signature.

be the narrow focus of the emergency or special crisis. A motivation to carry out constitutional reform will generally go beyond that.

38. The suspension of an election impacts on the civil and political rights of the electorate and has the potential to undermine democracy. Thus, the suspension of an election, for any purposes, is limited by the principles of proportionality and necessity. The need to carry out constitutional reform may well be necessary, but its suggested necessity should, in this context, be interpreted as necessary to ensure full and free elections where the will of the people can be properly discerned. Further, even if the constitutional reform and suspension is necessary, any suspension of the elections should be for the smallest time possible. Underlying the above is the fundamental premise that any action should not and should not be seen as undermining the electoral process. Constitutional reform, however, entails constitutionally imposed timeframes which are generally long in order to enable a thorough discussion and reaching a broad agreement of the political forces and within the society.

39. In the light of democratic principles and the rule of law it should be strongly pointed out that constitutionalism implies that the fundamental rules for the effective exercise of state power and the protection of individual human rights should be stable and predictable, and not change in the course of the electoral process.

40. As it has been pointed out by the Venice Commission in the case of the constitutional reform in Romania: *'The underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities.'*⁷

41. The Constitution should be created as an expression of the broadest possible social consensus. It is to be a cross-party instrument in the sense that subsequent changes between majority and the opposition should not affect readiness to observe the constitution loyally.⁸

42. A procedure that violates democratic standards, in the process of enactment of the Constitutional Law itself suspending the elections, gives rise to fears that constitutional reform will be carried out in the same way. One may have an impression that the suspension of an election motivated by a need of a constitutional reform is a purely instrumental perception of the Constitution and cannot be considered in line with democratic standards.

C. Amendments of electoral legislation adopted by a continuing legislature, entailing suspension of the electoral process

43. The issue here is to what extent the amendment of electoral legislation entailing suspension of the electoral process corresponds to democratic principles and international standards. This depends on the timing of the amendment and the motivation for the suspension. Democratic principles and international standards require stability of electoral law⁹ and structures in order that electoral stakeholders can plan accordingly. Therefore, an unexpected suspension during the election process itself will be problematical.

44. Any suspension of the electoral process entails a limitation of the basic fundamental political rights of citizens, that imply periodical elections, a principle that is protected by article 25(b) of the International Covenant on Civil and Political Rights and by Article 3 of the First Protocol to the European Convention on Human Rights and has been identified as one of the principles

⁷ CDL-AD(2014)010. Opinion on the Draft Law on the Review of the Constitution of Romania. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)010-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)010-e)

⁸ CDL-AD(2010)001. Report on constitutional amendment.

⁹ Code of Good Practice in Electoral Matters, II.2b.

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e)

underlying Europe's electoral heritage in the Code of Good Practice in Electoral Matters¹⁰. As has been pointed out by the Venice Commission «*Periodic elections are thus both a requirement of the principle of democracy and a fundamental right. Any restriction of the right to take part in periodic elections has to be provided for in the law, have a legitimate aim and be proportionate*».¹¹

45. Assuming the suspension of the electoral process is necessary to ensure the efficacy and fairness of that process and is also proportionate, the new election should be held without delay. As the Commission has commented in its Report on choosing the date of an election:

*'As it is of the utmost importance that the political parties have enough time to prepare the elections and that the new Parliament is elected without undue delay, it can be useful to determine a minimum and a maximum period between the decision on the date of the elections and the elections themselves. It therefore seems to be good practice that the written or unwritten constitutional law contains these safeguards to avoid abuses.'*¹²

46. The Venice Commission has also pointed out in its opinion on Albania the condition necessary for the postponement of elections:

'Typically, postponement of the elections is subject to clear conditions: the situations of emergency requiring such a measure are provided for in detail (war, threats to national integrity, natural disasters and so on) by the Constitution or by statute, and the measure of postponing the election can only be undertaken by the President in circumstances that demonstrate the existence of one of these situations.

Norway is currently in the process of revising its 2002 Election Act inter alia to introduce an emergency clause in the event of natural disasters, terrorist attacks, or other extraordinary events interrupting the election (pandemics, or a major break-down in communications for example due to a cyber-attack or due to a break-down in the energy supply) and which require the election to be postponed or extended. It seems that there are only a few countries that have such emergency clauses in their election laws, but in view of the risk of cyber-attacks or massive disinformation campaigns in elections, it may be prudent to have one.'

And further,

*'In the European constitutional law tradition, it is possible to postpone elections in limited circumstances. This has previously happened for municipal elections and wherever there is a legal basis for it, for in-stance in Azerbaijan, Bosnia and Herzegovina, Canada, Estonia, Poland, the Russian Federation, Switzerland and Ukraine. Such a decision has to be taken by a competent body. This competent body has to be identified in the law or the postponement process should be directly provided for in the law. The competent body to postpone the elections is not necessarily the institution competent to set the date of elections. As far as the Venice Commission is aware, with the exception of a state of emergency, there appear to be no countries where the elections can be cancelled without providing a new date for them.'*¹³

¹⁰ Idem, par 57.

¹¹ CDL-AD(2019)019. Albania, Opinion on the scope of the powers of the president to set the dates of the elections par. 75. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)019-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)019-e)

¹² CDL-AD(2007)037. Report on choosing the date of an election.

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)037-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)037-e)

¹³ CDL-AD(2019)019. Albania, Opinion on the scope of the powers of the president to set the dates of the elections, par 14. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)019-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)019-e)

47. To sum up, elections that take place shortly after the term has ended would not be problematic if this is based on a consensus of main stakeholders and if an appropriate legal basis for the postponement either already exists or is created ad hoc.

48. Thus, the Commission considers that the suspension of the electoral process is limited by the principles of necessity and strict proportionality. The assessment of the “legitimate purpose” and of the “proportionality” of the restriction of voters’ rights can only be conducted in a contextual manner, having in mind the factual situation of the country.

49. In the case of cancelled elections in Kyrgyzstan in 2020, the impact of the challenged constitutional law on the rights of voters could be more severe than in cases of simple postponement: not only have the elections been postponed, but the electoral procedure under way has also been suspended and the date postponed. *Suspension* and *postponement* are connected, but still separate from conceptual point of view. Suspension may require a stricter scrutiny, since it entails an abrupt interruption of an ongoing democratic procedure, with an electoral campaign already in act and with voters’ expectations of renovation of the composition of the Parliament already elicited.

50. The constitutional law adopted on 22 October declares that the decision of suspending articles 38 and 63 of the Constitutional Law on election is meant «*to stabilize the socio-political, epidemiological and related economic situation in the country, increase the level of public confidence in the electoral process, due to the need to take into account the opinions of the broadest segments of society and the implementation of a constitutional reform that provides for amendments to the current Constitution of the Kyrgyz Republic*». To this purpose the elections have been suspended for a period of maximum eight months.

51. As a general principle, according to the aforementioned document of the Venice Commission «The legitimate aim of maintaining the constitutional order may justify the postponement of elections in exceptional situations, such as a state of war or natural catastrophes. When a severe crisis affects a country, elections might indeed exacerbate political conflicts and it may be necessary to seek a solution to the crisis. In very exceptional conditions, it can be the duty of the authorities to postpone elections with a view to reducing tensions and giving voters the possibility of expressing their will in a safe and well-ordered context».¹⁴

52. Assuming that there might have been such a danger, the question is therefore if such a decision as a state of emergency, or war, has been taken according to the national constitution and therefore whether the restrictions of voters’ rights are founded on a legitimate ground. However, as has been reported by the decision of the Constitutional Chamber of the Supreme Court, when the challenged constitutional law was passed, the Republic of Kyrgyzstan was not in a state of emergency, emergency situation or force majeure circumstances. Therefore, the Constitutional Chamber will have to determine whether the restrictions of the political rights of citizens are proportionate to a legitimate aim.

D. Amendments to legislation disregarding the established procedure for the adoption of laws.

53. Disregarding law and the established procedure for the enactment of laws is itself damaging to the rule of law as it undermines the expectation of transparency and accessibility in the law-making process. The Venice Commission’s Rule of Law Checklist suggests in respect of law-making procedures that the right of citizens to participate in public affairs requires that the public has access to draft laws and an opportunity to provide input.¹⁵

¹⁴ Idem, par 54.

¹⁵ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, p. 15.
[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e) .

54. The law-making procedure, being a common value in the European legal culture, is of great importance for a democratic state governed by the rule of law. In the Venice Commission's Report on the rule of law,¹⁶ legality, including a transparent, accountable and democratic process for enacting laws is mentioned as one of the elements of the definition of the rule of law. This means that, in a truly democratic state based on the rule of law, it is mandatory to ensure that, at all stages of any reform process, all interested parties be involved either directly or through appropriate consultation in the legislative process.

55. The function as constitutional legislator is always subject to special procedures and requirements. The most common features are a time between the initiative and the first reading, the requirement of multiple readings, and special voting requirements. The Venice Commission and ODIHR have on numerous occasions pointed out practices not in line with democratic standards, as concerns the legislative procedure and identified the recurrent problems as follows:

1. speedy (rushed) procedure for making law, including constitutional amendments;
2. lack of transparency in the legislative process.
3. shortening of the minimum working time on different stages of legislative process and between readings in Parliament;
4. lack of public consultations;
5. no genuine dialogue has been possible between the majority and the opposition or the civil society during the debate and final adoption of the Constitution or law.¹⁷

56. The issues were addressed in previous Venice Commission opinions¹⁸ in which the Venice Commission expressed its concern over the lack of transparency of the process of the adoption of the new Constitution and the inadequate consultation of the society because of a speedy procedure to make these amendments.

57. Relevant examples can also be found in national case law of Constitutional courts. A K9/11 case of the Polish Constitutional Tribunal could be of particular interest since it deals with the issue of speedy procedure for adoption of electoral legislation. In its ruling from July 2011 the Tribunal decided that the legislator could not proceed with electoral laws under the urgent procedure (Article 123 of the Constitution). Thus, it expressed its conviction that changes to the electoral law must not be made hastily but must be preceded by a thorough parliamentary debate.¹⁹

58. Another relevant example may be a recent decision taken from the Italian Constitutional Court case law: the complaint regarded the parliamentary procedure of the approval of the annual budgetary law, that was boiled down to a discussion of a few hours in one of the two Chambers of Parliament. In that case, the Constitutional Court was operating a balancing between the aforementioned different principles starting from this reasoning:

"4.1.– It must be stated at the outset that the procedural contrivances objected to by the applicants lead this Court to draw attention to the need that the role of Parliament under the Constitution within the law-making procedure be respected not only nominally, but also in substantive terms. Article 70 vests legislative powers in the two Houses whilst Article 72 of the Constitution provides specifically that each bill must be examined both

¹⁶ CDL-AD (2011)003rev; CDL-AD(2016)007.

¹⁷ CDL-AD (2019)015- Parameter on the relationship between the Parliamentary majority and the opposition in a democracy. A checklist; see also report on Romania (CDL-AD (2012)026).

¹⁸ CDL-AD(2011)001 on three legal questions arising in the process of drafting the new Constitution; CDL-AD(2011)016 on the new Constitution of Hungary; CDL-AD(2013)012 on the fourth amendment to the fundamental law of Hungary. CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal in Poland.

¹⁹ Ruling of the Constitutional Tribunal in Poland from 20 July 2011, K 9/11.

during committee stage and before the chamber of the house, requiring that votes be held first article by article and then on the final text. These principles are intended to enable all political forces, from both the majority and the opposition, as well as the individual members of Parliament, to cooperate in an informed manner in the formulation of the text, in particular during the committee stage, through discussions and the proposal of alternative texts and amendments. The procedural stages set out by Article 72 of the Constitution concern some of the essential parts to the legislative procedure which the Constitution requires must always be respected in order to guarantee the role of Parliament as a forum for debate and discussion between the various political forces as well as for approving individual legislative acts, and in order to guarantee the legal order as a whole, which is premised on the prerequisite that all representatives be afforded broad scope to contribute to the formation of the will of Parliament.”²⁰

59. All parliamentary procedures are designed to balance two opposite principles: on the one hand the principle of an expeditious and effective exercise of legislative power; and on the other hand, the principle of open discussion, deliberation and participation of all political forces. Moreover, at the constitutional level, all procedures are meant to strike a proper balance between rigidity and flexibility.²¹

60. The challenged constitutional law of the Kyrgyz Republic in its Article 1 declares to pursue the purpose of socio-political stabilisation in the country. To this purpose, the substantive respect of constitutional procedures and rules and the adequate involvement of public and political debate is of fundamental importance, notably if the constitutional law on elections is amended.

61. The current Rules of procedure of the Jogorku Kenesh provide for two terms: a timeframe of 10 days – to slow down the procedure for permitting a veritable parliamentary and public debate; and a time limit of 30 days, to make sure that the procedure gets to an end in a reasonable time. The Venice Commission has highlighted that when in a parliamentary procedure a deadline is envisaged in between multiple readings, the aim is to give the majority the time to cool down and reconsider the decision and to provide a more thorough decision making process and a wider public debate²². Therefore, the respect of 10 days’ timeframe responds to the rationale of making room for an inclusive political debate and a rich democratic participation.

62. In any case, the Parliament is not permitted to disregard and infringe the procedures established by the Constitution and by the legislation in force. Even in those countries where the autonomy of the Parliament is held in high respect and the judicial review of the internal acts of the Parliament is very limited – according to the *interna corporis* doctrine – Parliament is still bound to respect what we might call the “due law-making process” or manner and form requirements established by the Constitution.

63. In light of these principles, that apply to all parliamentary democracies, the parliamentary procedures must always be respected not only nominally, but in substantive terms, in order to protect the role of Parliament as a forum of public debate, political participation and discussion.

64. In the case under discussion three parliamentary deliberations were taken in one hour. Therefore, the formal respect of the three readings seems not to be enough to respect the substantive role of the Parliament, at the detriment of the basic principles of parliamentary democracy.

²⁰ Italian Constitutional Court decision n. 17 of 2019 .

²¹ Report on Constitutional Amendment, p. 21. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)001-e)

²² Idem, p. 19.

V. Conclusion

65. The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic has put four questions to the Venice Commission. The Venice Commission notes as a general remark that in spite of the fact that a national practice in such fields as postponement of elections by the outgoing parliament is lacking, there are several benchmarks which have to be respected in order to ensure the respect of international principles and best democratic practices.

66. The Commission has reached the following conclusions:

- 1) In the absence of explicit restrictions in the Constitution of the Kyrgyz Republic, from the point of view of generally accepted democratic principles, how much can the scope of the Parliament's powers be expanded between the expiration of its mandate and the first session of the newly elected Parliament? In particular, to what extent is it consistent with the generally accepted democratic principles to carry out constitutional reforms in the period between the cancellation of election results and the holding of repeated / new parliamentary elections?

67. The postponement of parliamentary elections beyond the time limit determined by the constitutional duration of the mandate of the outgoing parliament, hence the prorogatio of the latter's powers, should be supported by special justifications and extraordinary circumstances. The constitutional law approved by the Kyrgyz Parliament on October 22 does not reflect genuine democratic principles, although it does not openly violate any explicit constitutional provision: in the first place, the postponement of the elections of the new Parliament until June 2021 gives the Parliament in office 6 to 8 more months of power, which is a long period of time, much longer than the usual few weeks necessary to carry out the electoral activities.

68. Secondly, during the period of prorogatio, i.e. of diminished powers, the Parliament is only allowed to carry out some ordinary functions, whereas it is not allowed to approve extraordinary measures, including constitutional reforms. The Parliament in office instead has suspended a constitutional law and changed the rules of the democratic game. The process of initiating and producing constitutional reform requires extensive analysis and public discussion inside and outside the legislature. In many constitutional traditions the process of constitutional reform requires a specific mandate for a constitutional assembly or requires special elections before the adoption of the changes. That process is beyond the scope of a continuing caretaker authority. The constitutional procedure and timeframe for constitutional amendment must at any rate be respected.

- 2) To what extent is it consistent with democratic principles to suspend an election to the supreme legislative body in order to carry out a constitutional reform (in the period between the annulment of the election results and the holding of repeat / new elections)?

69. The need to carry out constitutional reform should be interpreted as necessary to ensure full and free elections where the will of the people can be properly discerned. If needed, a constitutional reform aimed at solving the existing institutional problems may be adopted by the new legislature.

70. Any suspension of the elections should be for the smallest time possible. Constitutional reform, however, entails constitutionally imposed timeframes which are generally long in order to enable a thorough discussion and reaching a broad agreement of the political forces and within the society. Except for punctual and technical reform necessary to conduct the new election, any other constitutional reform cannot be initiated after the postponement of the regular elections.

71. A procedure that violates democratic standards in the process of enactment of the Constitutional Law itself suspending the elections, gives rise to fears that constitutional reform will be carried out in the same way. One may have an impression that suspension of election motivated by a need of a constitutional reform is a purely instrumental perception of the Constitution and cannot be considered to be in line with democratic standards.

- 3) To what extent do the amendments of electoral legislation, entailing suspension of the electoral process, correspond to democratic principles and international standards?

72. Any suspension of an election impacts on the civil and political rights of the electorate and has the potential to undermine democracy. The assessment of the “legitimate purpose” and of the “proportionality” of the restriction of voters’ rights can only be conducted in a contextual manner, having in mind the factual situation of the country. In the Kyrgyz Republic, not only have the elections been postponed: the electoral procedure under way has also been suspended. Suspension may require a stricter scrutiny, since it entails an abrupt interruption of an ongoing democratic procedure, with an electoral campaign already in act and with voters’ expectations of renovation of the composition of the Parliament already elicited.

73. The Commission considers that the suspension of the electoral process is limited by the principles of necessity and strict proportionality. An exceptional situation might indeed justify postponing the elections. However, when the challenged constitutional law was passed, the Republic of Kyrgyzstan was not in a state of emergency, emergency situation or force majeure circumstances. Therefore, the Constitutional Chamber will have to determine whether the restrictions of the political rights of citizens are sufficiently proportionate in the pursuit a legitimate aim.

- 4) How consistent is it with democratic principles that the outgoing parliament adopts amendments to legislation disregarding the established procedure for the adoption of laws?

74. The substantive respect of constitutional procedures and rules and the adequate involvement of public and political debate is of fundamental importance during the legislative process. The adoption of important changes to electoral legislation outside the procedures established by the Constitution and by the legislation in force undermines the principles of parliamentary democracy. Parliament is bound to respect what might be called the “due law-making process” or manner-and-form requirements established by the Constitution. In light of that principle, that apply to all parliamentary democracies, the parliamentary procedures must always be respected not only nominally, but in substantive terms, in order to protect the role of Parliament as a forum of public debate, political participation and discussion.

75. The Venice Commission remains at the disposal of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic for further assistance in this matter.