



Environmental Implications of the 2010 Constitution of the Kyrgyz Republic

Michelle Lim*

Introduction

On 7 April 2010, the Bakiyev Government of the Kyrgyz Republic¹ was overthrown in a civil uprising. Following this, the subsequent interim government introduced the draft of a new Constitution. This draft Constitution significantly reduced the powers of the President. On 27 June 2010, this draft was approved by 90 per cent of voters in a referendum.

The *Report of the Venice Commission (2010)*² has analysed the merits of the political restructure. Hence, this Country Report will focus primarily on the particular provisions of the 2010 *Kyrgyz Constitution* (the *2010 Constitution*) that concern the natural environment ('the environment'). Other constitutional changes that may potentially have an impact on the environment will also be considered.

* Australian Centre for Agriculture and Law, School of Law, University of New England, NSW 2351 Australia. Email: michelle.lim11@gmail.com.

¹ The official name of this Central Asian nation is the 'Kyrgyz Republic'. The country is however widely known as 'Kyrgyzstan'. Both names are used interchangeably in this report.

² Venice Commission (European Commission for Democracy Through Law) (2010) 'Opinion on the Draft Constitution of the Kyrgyz Republic' (version published on 21 May 2010), Adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010) CDL-AD (2010) 015.

Since declaring independence from the former Soviet Union in 1991, the Kyrgyz Republic has experienced numerous instances of constitutional change. Therefore, the scope of this report is limited to a comparison of the *2010 Constitution* with its immediate predecessor: the *2007 Constitution*. The report consists of 3 parts. Part 1 sets out the constitutional developments and political context within the Kyrgyz Republic leading up to the adoption of the *2010 Constitution*. Part 2 presents critical analysis of the constitutional changes brought about by the introduction of the *2010 Constitution* and their implications for environmental law in Kyrgyzstan. The political situation is also analysed in a reflection on what will be required to achieve positive environmental outcomes in the country. Finally, Part 3 puts forward three potential research agendas for consideration by IUCN Academy on Environmental Law (the IUCN Academy).

Recent Constitutional Developments in the Kyrgyz Republic and the Political Context Leading up to the Introduction and Adoption of the *2010 Constitution*

General Background

In 1991, the Kyrgyz Republic gained independence following the collapse of the Soviet Union. In the two decades that followed, Kyrgyzstan underwent a significant period of transition from a planned to market economy. During this time, the Kyrgyz Republic took concrete steps for economic reform. At the same time, a relatively stable political situation developed within the country. These factors, in combination with the country's geographic location and position as an anti-terrorism ally in the region, resulted in the Kyrgyz Republic emerging as a preferred destination for donors and investors. This year has however been a tumultuous one for the country. Recent events have undermined both the political and economic stability of the nation. The political situation that led to the adoption of the 2010 Constitution is charted below.

Political Background to the Adoption of the 2010 Constitution

President Kurmanbek Bakiyev was ousted from power on 7 April 2010 following violent protests in which 78 people were killed and 1600 injured.³ These events mirror the lead up to Bakiyev's rise to power in March 2005. In 2005, Bakiyev's predecessor Askar Akayev was similarly overthrown in a civil uprising. This overthrow followed numerous protests, which stemmed from independent and opposition candidates being barred from standing in Presidential elections. Kurmanbek Bakiyev took over as the acting president after President Akayev fled to Russia. In July 2005, Bakiyev achieved a landslide victory in presidential polls and was inaugurated in August of that year.⁴

In elections held on 23 July 2009, President Bakiyev was returned for a second term. The Organization for Security and Co-operation in Europe (OSCE) was an observer at these elections. The elections were assessed by the OSCE as having 'failed to meet key OSCE commitments for democratic elections'.⁵

The events in the Kyrgyz Capital on 7 April 2010 created for many, not least Bakiyev himself, a real sense of déjà-vu. On this day, rioters stormed government offices protesting against the rising prices for basic necessities and accusing Bakiyev of failing to curb corruption.⁶ Fleeing from Bishkek to the south of the country the President initially refused to resign. Bakiyev has since been granted refuge abroad, in Belarus.⁷

The newly formed interim government led by Roza Otunbayeva introduced the 'Return to Democracy' program. The objective of this program was to create a

³ R. Demytrie, 'Kyrgyzstan Holds Funeral Ceremonies for Protest Victims' *BBC News* (Kyrgyzstan, 10 April 2010) available at <http://news.bbc.co.uk/2/hi/asia-pacific/8612812.stm>.

⁴ R. Demytrie, 'Kyrgyzstan Timeline' *BBC News* (Kyrgyzstan 14 October 2010) available at http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1296570.stm.

⁵ Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, *Kyrgyz Republic Presidential Election* (2009), at 3.

⁶ R. Demytrie, 'Clashes Escalate in Kyrgyz Crisis' *BBC News* (Bishkek, 7 April 2010) available at <http://news.bbc.co.uk/2/hi/8607324.stm>.

⁷ R. Demytrie, 'Kyrgyzstan Holds Funeral Ceremonies for Protest Victims' *BBC News* (Kyrgyzstan, 10 April 2010) available at <http://news.bbc.co.uk/2/hi/asia-pacific/8612812.stm>.

peaceful transition of the Kyrgyz Republic into a democratic state.⁸ A review of the *2007 Constitution* was identified to be crucial to achieve this transition.⁹ As a result, the draft *2010 Constitution* was produced and a constitutional referendum was scheduled for 27 June 2010.

From 10 June 2010, violent clashes between ethnic Kyrgyz and Uzbeks broke out in the south of the country. At least 200 people were killed, however the interim government has said that the figure is closer to 2000. Further, the United Nations has reported the displacement of 400,000 people as a result of the violence.¹⁰

The referendum on 27 June 2010, took place as scheduled despite widespread concerns of the impact the security situation would have on voter turn-out and consequently the legitimacy of the vote. The OSCE noted shortcomings in the referendum process but concluded that the Kyrgyz authorities had succeeded in creating the necessary conditions for the peaceful conduct of a constitutional referendum.¹¹ With the approval more than 90 per cent of voters (from a 72 per cent voter turn-out) the *2010 Constitution* was adopted.¹² Having considered the events leading up to the adoption of the *2010 Constitution*, the significant developments contained within its text are considered below.

Constitutional Developments

The *2010 Constitution* is based on its 2007 predecessor. Whilst the articles have been rearranged and renumbered the substantive components of many provisions remain largely unchanged. The parts that have been significantly overhauled concern the powers of the President. The constitutional developments in three areas: the political restructure; provisions relating to the environment; and the greater emphasis on international human rights treaties, are highlighted below. The merits of these developments are evaluated later in this report.

⁸ Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights), *Kyrgyz Republic Constitutional Referendum - OSCE/ODIHR Limited Referendum Observation Mission Report* (2010), at 3.

⁹ *Ibid.*

¹⁰ R. Demytrie, 'Q&A: Kyrgyzstan's Ethnic Violence' *BBC News* (Kyrgyzstan, 24 June 2010) available at <http://www.bbc.co.uk/news/10313948>.

¹¹ *Supra* note 8.

¹² *Supra* note 8.

Political restructuring

The *2010 Constitution* significantly reduces the powers of the President and redistributes these powers to the *Jogorku Kenesh* (Parliament). The President remains the head of state (article 60(1), *2010 Constitution*; article 42(1), *2007 Constitution*) but is no longer the 'highest' official of the Kyrgyz Republic (cf. article 42(1), *2007 Constitution*).

The *2007 Constitution* enabled the President to define domestic and foreign policy (article 42(3)) and submit draft laws to the Parliament (article 46(5)(1)). These Presidential powers are now vested with the Parliament. Articles 74 and 76(3) of the *2010 Constitution* state the various functions of the Parliament and vest with it the power to draft and adopt laws. The President does however retain the role of representing the Kyrgyz Republic within the country and in international relations (article 64(6)(1), *2010 Constitution*; article 42(3), *2007 Constitution*).

Additions to environmental provisions

Neither the *2007 Constitution* nor the *2010 Constitution* has defined the term 'environment'. Nevertheless the changes within the *2010 Constitution* that have the greatest impact on the natural environment are identified by the author as the provisions concerning: land and resource ownership (article 4, *2007 Constitution*; article 12, *2010 Constitution*); and rights and duties regarding the environment (article 35, *2007 Constitution*; article 48, *2010 Constitution*).

Article 4(5) of the *2007 Constitution* vests ownership of land and its underlying resources, forests, flora, fauna and natural resources with the Kyrgyz Republic. This article also attributes special State protection to these resources. Article 4(5) also states that land and other natural resources may be in 'private, municipal or other forms of property'. This provision is largely reproduced in article 12(5) of the *2010 Constitution*. The *2010 Constitution* contains an additional statement that pastures may not be in private ownership.

Article 35 of the *2007 Constitution* states that 'citizens of the Kyrgyz Republic' have the right to a healthy and safe environment. It also states that 'citizens' are entitled to compensation for damage caused to the health or property that results from the use

of nature. Article 48 is the corresponding provision in the *2010 Constitution*. The new provision now grants 'everyone' the right to a healthy environment and compensation for its damage. Furthermore, an additional sub-paragraph (article 48 (3)) imposes a duty on 'everyone' to care for the environment, flora and fauna.

Greater emphasis on international human rights treaties

The *2007 Constitution* contains a range of provisions reinforcing the rule of law and providing human rights guarantees. Many of these provisions are retained in the *2010 Constitution*. The *2010 Constitution* now also provides, in article 6, that international human rights treaties have direct effect. Article 17 of the *2010 Constitution* states further that rights and freedoms shall not be interpreted as a derogation of other 'universally recognized human and civic rights and freedoms'. As with environmental rights, other rights under the former Section II are no longer granted solely to citizens of the Kyrgyz Republic but to 'everyone'. 'Everyone' is not however defined in the *2010 Constitution*.

Critical Consideration of the 2010 Kyrgyz Constitution

A critical analysis of the constitutional changes and their implications for the environment and environmental law in the Kyrgyz Republic is presented below.

Political Restructuring

The most important changes in the *2010 Constitution* concern the distribution of further powers to Parliament and the corresponding reduction of presidential powers. These developments potentially provide enhanced conditions for democratic governance and stability within the Kyrgyz Republic. It is foreseeable that the improved socio-political environment created by these developments would also have positive flow-on effects for the effective management of the natural environment. The amendments concerning the redistribution of power should therefore be welcomed.

Analysis of the Environmental Provisions

The additions to the *2010 Constitution* are acknowledged. While these are positive developments, the environmental provisions of the *2010 Constitution* still suffer from the same shortcomings of their predecessor. Like the *2007 Constitution*, the 2010 environmental provisions contain only broad aspirational statements. Further, neither the term 'environment' nor the means of enforcing environmental rights have been defined. Specific issues concerning the environmental provisions of the *2010 Constitution* are discussed in further detail below.

Article 48(3) of the *2010 Constitution* now includes, in addition to the right to a healthy environment, a duty to care for the environment. While this addition is an improvement on the *2007 Constitution*, the attribution of the duty to 'everyone' is far too vague. It is therefore unclear how article 48 will be enforced if 'everyone' has such broad rights *and* duties.

Article 12(5) of the *2010 Constitution* now explicitly states that pastures may not be in private ownership. This reflects developments that have occurred in Kyrgyz legislation since 2007. In January 2009, the Kyrgyz Republic's *Law on Pastures* came into force. Article 3(1) of the *Law on Pastures* also states that pastures are publicly owned. Agriculture and pasture use are important economic activities in the Kyrgyz Republic. They also have great cultural significance. The move to acknowledge pasture ownership within the *2010 Constitution* is to be commended. This is because doing so provides a greater degree of certainty for the management of this type of land use, which is of significant importance to many within the Kyrgyz Republic.

While the clarification on pasture ownership is welcomed, neither the *2007 Constitution* nor *2010 Constitution* expressly state whether wildlife is owned by the Kyrgyz Republic. These constitutional texts refer to flora and fauna but make no distinction between wild and domesticated plants and animals. The Kyrgyz Republic's *Law on Animals* (1999) provides that wildlife is legally owned by the Government of Kyrgyzstan. This instrument subjects the protection and use of native wild species to governmental regulation. It would have been desirable that this statement was also included within the *2010 Constitution*.

To further assess the merits of the environmental provisions of the Kyrgyz's *2010 Constitution* a comparison is drawn with the *2010 Constitution of Kenya*. The *Kenyan Constitution* not only highlights how the framers of the *Kyrgyz 2010 Constitution* may have provided more substantive content within its text, but also how enforcement provisions could have been drafted.

As with the Kyrgyz Republic, a new *Kenyan Constitution* also came into force in 2010. The environmental provisions of the *Kenyan Constitution* are one of the most comprehensive of any in the world. From its preamble to its provision of environmental rights (article 42); its incorporation of specific associated obligations of the State (article 69); and provisions stating how environmental rights are to be enforced (article 70), the text consists of an impressive incorporation of contemporary international environmental law principles and concepts.

Questions remain regarding the capacity of both Kenya and Kyrgyzstan to enforce the provisions of their Constitutions. However, if assessed solely on the wording of the respective instruments, the *Kenyan Constitution* provides an excellent example of how the Kyrgyz Republic could have addressed, within its *2010 Constitution*, the shortcomings of its *2007 Constitution*.

Potential Implications of the Greater Emphasis on International Human Rights Treaties

As noted above, the *2010 Constitution* gives direct effect to international human rights treaties (article 6, *2010 Constitution*). Further, article 17 states that rights and freedoms under the *2010 Constitution* are not to be read in such a manner that would derogate from universally recognized human rights. By acknowledging both human rights treaties and universal human rights, the *2010 Constitution* would appear to incorporate into domestic law human rights from the international law sources of both treaty and custom.¹³

Furthermore, the recognition within the *2010 Constitution* of the universal rights of all persons (non-citizens included) is commendable. This is also congruent with

¹³ See further: *Statute of the International Court of Justice*, article 38(1).

international law principles concerning the treatment of foreign citizens¹⁴ and those contained within multilateral human rights treaties.¹⁵ There is however no clarification as to whether rights contained within the *2010 Constitution* have a hierarchical status. There is also no indication whether international human rights treaties take precedence over other treaties to which the Kyrgyz Republic is a signatory.¹⁶

The emphasis within the *2010 Constitution* on universal human rights and international human rights treaties could be important in the future management of the natural environment of Kyrgyzstan. This is because these provisions may enable developments that occur in the international sphere concerning environmental rights as fundamental human rights to impact or inform the development of environmental law in the Kyrgyz Republic.

Implementation and Enforcement

Commenting in the context of the *2010 Constitution*, the *Venice Commission (2010)* stressed that even a 'good Constitutional text' cannot ensure, in itself, 'the stability and democratic development of society'.¹⁷ The Commission further emphasised the need for associated political will, supporting legislation and the existence of a 'system of checks and balances'. In addition, in 2007 the Commission expressed the view that even though the *2007 Constitution* provided a 'broad catalogue of social rights', implementation and enforcement of these rights could prove 'purely programmatic' in an economically disadvantaged country such as Kyrgyzstan.¹⁸ Despite amendments to the text, the same concerns remain for the *2010 Constitution*.

¹⁴ See further: *Mavromattis Palestine Concessions Case (Greece v UK)* (Jurisdiction) [1924] PCIJ Rep Series A No 2, at 12.

¹⁵ See, for example: *International Covenant on Economic, Social and Cultural Rights* (December 16, 1966, entered into force 3 January 1976) 993 UNTS 3; and *International Covenant on Civil and Political Rights* (December 16, 1966, entered into force 23 March 1976) 999 UNTS 171.

¹⁶ See further: *Venice Commission (2010)* (supra note 2), at 3.

¹⁷ *Ibid*, at 12.

¹⁸ Venice Commission (European Commission for Democracy Through Law) (2007), 'Opinion on the Constitutional Situation in the Kyrgyz Republic', Adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007) CDL-AD (2007) 045, at 7.

These statements of the Commission also ring true for the effective management of the natural environment. It is added here however that good governance and institutional capacity are also essential. The challenge is that garnering sufficient political will for environmental regulation and management is far more difficult when livelihood and security issues are so pressing. The concern is that for the Kyrgyz Republic, long-term sustainability and environmental issues will be, somewhat understandably, deemed to be of lesser importance.

While it is recognized that no Constitution can adequately address environmental issues in the absence of appropriate leadership and financial and institutional backing, a comprehensive constitutional instrument can provide the foundation upon which institutional, governance and enforcement capacity are subsequently built. Further, by the incorporation of environmental provisions within the *2010 Constitution*, drafters send a clear signal to legislators and policy makers that the environment is an issue of importance. This creates a positive framework within which other components of environmental management can be addressed.

New Research Agendas for the IUCN Academy

The discussion above identifies for the author three areas of further research for consideration by the IUCN Academy. These three areas are discussed below.

Constitutions and Environmental Outcomes

Through the analysis of the Kyrgyz *2010 Constitution* the author is reminded of the wide variability between the Constitutions of various jurisdictions. The comparison between the Kyrgyz and Kenyan Constitutions is just one example of the vast differences that exist in how Constitutions worldwide deal with the issue of the natural environment.

The first area for further research therefore calls for comparative constitutional studies across jurisdictions. This research would evaluate how environmental concerns are facilitated within respective constitutions. The research would reflect on the content and relative effectiveness of particular constitutions in achieving

environmental outcomes. The capacity of countries to implement constitutional ideals would be a further point for consideration.

Critical Evaluation of Environmental Rights and the Rights-Based Approach

The emphasis on international human rights treaties and norms within the Kyrgyz Constitution illustrates the potential importance of the human-environmental rights discourse. A second area of research therefore concerns the theme of this issue: 'New Directions in Earth Rights, Environmental Rights and Human Rights'. While potential synergies exist between the rights to life and livelihoods; environmental rights; and rights to a healthy environment, conflicts can and do occur. Further research is therefore recommended to address how best to incorporate human and environmental rights into existing and future constitutions.

Capacity Building

Building capacity for environmental law scholarship within countries such as the Kyrgyz Republic is essential for the facilitation of robust environmental law discourse within the country. It is expected that such a discourse would enable enhanced decision-making with regards to the environment and ultimately result in improved environmental outcomes.

The third research issue therefore concerns how the IUCN Academy promotes an inclusive global environmental law discourse. Particular issues include questions of how the Academy engages with countries that are not part of the IUCN membership and how the Academy supports the involvement of institutions within countries that do not have environmental law programmes.

These issues are of particular relevance for Kyrgyzstan and other former Soviet countries. Many of these countries are still developing the instruments and institutions to address contemporary challenges and changed circumstances. It is thus important that countries conducting legal reform have access to the wide range of environmental law materials and legal instruments that exist globally. The availability of (additional) resources in Russian would be a positive first step.

Conclusion

The Kyrgyz *2010 Constitution* is an improvement on its 2007 predecessor. The amendments that redistribute presidential powers are commended and have the potential to create a stable political environment within the country. If this potential is realised it could have positive flow-on effects for enhanced environmental and sustainability outcomes.

The environmental provisions of the Kyrgyz *2007 Constitution* and *2010 Constitution* are, however, too vague. Furthermore, the extent to which the additional emphasis on international human rights will have on the interpretation of environmental rights remains to be seen.

Recognizing that constitutional reform does not provide in itself, the solutions to environmental issues, it is recommended that addressing the inherent institutional and governance issues within the country should also be a priority. Capacity building and the development of environmental scholarship within the Kyrgyz Republic are also essential.