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COMMENTS

**ON THE CONSTITUTIONAL SITUATION
IN THE KYRGYZ REPUBLIC**

by

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Preliminary Remarks

Since for now the text of the Constitution – the Presidential version has been enacted and for the present next amendment or revision is out of sight I will limit my review on the text of the constitution and knowledge in the field from my previous experience in Central Asia and Kyrgyzstan and the compliance of constitutional principles and provisions to the European standards of constitution drafting especially in the areas of principles, institutions and human rights. I will not go in detail on wording and some of the unclear problems and controversies the text might invite not speaking of sense that has been unintended by the founding fathers and mothers of the Kyrgyz constitution, or side effects of some of the constitutional provisions. Moreover that I will be analyzing the version of the text in Russian and I will not be in a position to compare it to Kyrgyz wording which according to the constitution itself is declared to be the official language, but unfortunately is beyond my knowledge. It seems as well that any comparison to the other previous two drafts has no whatever value since they are already historical artifacts in the relatively short saga of Kyrgyz constitutionalism.

However, evaluating constitution as a scripture might be misleading since it is the living constitution that makes sense to real governmental process and human rights commitment. It is the evaluation of living constitution to the European standards of constitution drafting and the ECHR that really matters.

Democratic values and principles are prerequisites to the constitutional drafting and are transposed and shape the constitutional provisions on the governmental structure.

My review will start from the constitutional principles since they are the cornerstone of constitutional design and will go to institutions and system of fundamental human rights.

Principles of the Acting Kyrgyz Written Constitution

Like other contemporary nation state constitutions the Kyrgyz one proclaims system of democratic constitutional principles with the most important being – popular sovereignty, separation of powers, political pluralism and the rule of law.

Well balanced governmental structure built on blending and interacting and not on conflicting constitutional principles is of vital importance to the viable constitutional democracy in Central Asia and especially in Kyrgyzstan since there is no political experience and no tradition of limited, democratic and responsible government before and during the Soviet period. Authoritarian political culture, elements of legal nihilism and fetishism do not disappear over night or within one or two decades of independent post communist constitutionalism. (To illustrate my point I will bring an example from my past experience in Kyrgyzstan. By the end of the 90ies of the XX century an amendment to the Civil procedure Code was enacted providing filing of the complaints in the elections but there were no complaints filed. One of the Supreme Court judges' reaction was symptomatic of the feelings and stereotypes of majority of the population – she stated that though legally possible it would be morally reproachable to file complaint against the state by the candidates standing in election.)

Constitutional design should be especially careful against reemerging authoritarianism since by the constitutional entrenchment ancient regime deficiencies might be easily modified and brought to new life to be enforced as legal or constitutional phenomena but no modern constitution might bestow legitimacy to authoritarianism.

The constitutional definition of the Kyrgyz state in the art. 1 should be welcomed since it contains all democratic characteristics of modern democratic unitary nation state – state

founded on the rule of law (closer to the German concept of the *rechtstaat* principle rather to the Anglo-Saxon rule of law), democratic, secular and social state.

Popular Sovereignty

In the preamble and in art.1 par.3 the classical statement that the Kyrgyz people is the sole source of governmental power in Kyrgyzstan. Further par.4 of art. 1 provides that people exercise their sovereignty directly by voting in the referendums and in the elections or through the state organs and the institutions of local self government on the basis of the Constitution and the laws (standing for parliamentary statutes). This constitutional language conforms to the European concept of people sovereignty (actually this is the understanding to be found in the German Grundgesetz of 1949) and it marks clear departure from the Soviet type of proclaiming of popular sovereignty to be exercised directly by the people or only through the Supreme representative assemblies (this was the formula but the real sovereign was the one party blended to the state power its central committee and General Secretary).

However, looking at art. 7 .1 wording (stated as the first principle of governmental power “supremacy of the people, represented and secured by the popularly elected head of state – President of the Kyrgyz republic”) and the definition of the status of the President in art. 42 it is obvious that the President has a special supreme position to exercise popular sovereignty from all the organs. This special position of the President in carrying the principle of popular sovereignty and the supremacy of the people does not correspond to any of contemporary European standards on the form of government (if we can speak of certain standards in this area or any soft law at all since the basic reaction might be that it’s a matter of national sovereignty and the form of government is a product of sovereign decision of the nation united in a nation state). However this pattern of governmental form bears some resemblance to the 19 century dominating doctrine of the state hierarchy and governmental organs in the second Reich or German empire after Bismarck – only the head of state is the primary organ through which the people exercise their power while other organs like the parliament being elected by the people are secondary repositories of people sovereignty. What is more interesting, besides the opportunity of paving the way to one man rule, is the obvious contradiction of the thesis that the President is granted with the power to represent and secure supremacy of the people to the provision of art. 2. The wording and the goal of art.2 especially par.1 (“The state and its organs serve the interests of the whole society and not a part of it.”) and explicit prohibition of art 2. (“No part of people, association or a single person shall usurp state power’ have to be welcomed since they are a constitutional safeguard against totalitarianism, authoritarianism or one man rule. This provision has been borrowed and transplanted from the 1789 Declaration of Rights of man and Citizen which is still an acting part of the of 1958 Constitution of the Fifth French republic.

The special position of the President to represent and secure the peoples supremacy has other implications with the most important being his power to call referendum and his location in the context of the separation of powers principle.

By using his power to call referendum under the art. 46, par.6.2 the president might rely on the plebiscitary effect of direct democracy in order to reinforce his power and built a one man rule on constitutional grounds. (I remember in the 90ies Akaev used this power to put several questions to be decided directly by the Kyrgyz electorate with the most important being stripping of the members of Jogorku Kenesh and the judges from the immunity provided by 1993 Constitution and abolishing the constitutional ban against second reelection or serving more than two consecutive terms introduced in the most constitutions during the perestroika period in Central Asia.) The special position of the President to people supremacy in the state government affects the principle of separation of powers.

The Principle of Separation of Powers

The principle of separation of powers has been proclaimed in the art.7, 2 after the statement that the President is the repository of people supremacy in government.

Kyrgyz constitution has declared the classical triad of constituted horizontal separation of powers in a unitary state. This means that in the enumeration of the power branches there is no mentioning of the primary separation between constituent and constituted powers. Jogorku Kenesh blends constituent power to the legislative power, though in the both of them there is a special place reserved for the President entitled both to initiate the constitutional and legislative processes since he is vested with the power to introduce draft laws and to veto the laws and constitutional amendments adopted by the parliament. Concrete dimensions of the separation of powers will be reviewed when the powers and formation of institutions will be treated.

Into most of the complications of the constitutional design in the context of the separation of powers stem from the political will of the mothers and fathers of the constitution to entrench Presidential supremacy and to equip the institution of the President with all available armour in the European, US, Latin American and Russian constitutionalism. However by establishing super presidentialism one man authoritarian rule is to reemerge on formal constitutional grounds and separation of powers in built checks and balances might become useless.

Other Constitutional Principles

In general the other constitutional principles are in conformity to the European standards of democratic constitutionalism and should be welcomed though there are grounds for improvement in future amendments to this Constitution or to a constitutional revision in the future.

This relates to:

1. the principles of economic constitution in art. 4 protection of different forms and especially of private property. Limitative enumeration of the objects reserved to national (state) property.
2. establishing coexistence between Kyrgyz and Russian language in art.5 in contrast to the practice of providing for only one national language to be in a special position and the administration to be purged from the employees that are not in command of it. (Though there should be some clarification between the official and state language.)
3. establishing a secular state and religious pluralism without a state or privileged denomination (art.8)
4. principle of political pluralism and multiparty system. (Though besides the provision of the art. 8 special attention should be paid to the established complex electoral barrier in the coming general parliamentary elections - 0,5% in every electoral region, and 5% within the whole country, which will certainly reduce the number of the parties and parliamentary relevant parties as well. Special care in enforcing the criteria for legality of the parties by the judiciary should be paid.)
5. the peaceful clause in the provision of art.9 should be praised and pointed as an example to other constitution makers
6. the rule of law proclaimed in art.12 is a merit of Kyrgyz Constitution and especially the position of the international law treaties as a part of the domestic legal order is to

receive a positive evaluation as well. (Though regarding the international treaties some clarification is needed – probably it has been done in the parliamentary law on the international treaties for it is obvious that the Kyrgyz constitution leaves this problem open to legislative law making and its good to remember that no Constitution in the world is to attempt to codify all the most important legal norms. However, it would have been much better if the Kyrgyz Constitution would have been clearer if the place of the international treaties in the hierarchy of the national legal order have been clarified in the constitutional text. There is some ambiguity as well concerning ratification of the international treaties - some of them are to be ratified by Jogoku Kenesh and others by the President – it would have been better if the Constitution defined which should be subject to parliamentary and which should belong to the realm of the presidential ratification

7. equality and non-discrimination have been proclaimed (except to being close to the classic Greek “isonomia”) the constitutional provisions should receive positive evaluation on the stipulation providing the broadest possible definition for non discrimination grounds – in art.13.1 stating that nobody should be discriminated on any personal or social grounds.

Institutions

- The President

The system of the election of the President is within the scope of the established patterns of presidential direct elections in Europe and in the Americas.

Some of the requirements of the candidates should receive positive reaction. This is particularly relevant to the minimum and maximum age limitations which are set respectively at 35 and 65 years (art. 44, par.1). The constitution also limits presidential continuity in power to two consecutive terms of five years in office and while in office the President should freeze his activity within a political party. However, the Constitution also requires the candidate to be fluent in Kyrgyz language and to have lived at least 15 years in Kyrgyzstan though not continuously.

The Constitution provides for Presidential Supremacy:

- as it was already mentioned before with a special presumption that he represents and secures the people supremacy in government;
- by defining the role and position of the institution within the governmental structure;
- by providing immense and innumerable powers within the realm of Kyrgyz state .

Starting with the definition of the status of the President within the governmental structure provided in art. 42 we have to admit that par.1 stating that the President is a head of state and supreme official and par.2 that he is a symbol of peoples unity and state power, guarantee of the Constitution and citizens rights and liberties (wording obviously influenced by the 1958 Fifth French Republic constitution) are within the scope of prerequisites of defining presidential or semi-presidential governmental systems.

The text of par.3 of art. 42 extends the presidential supremacy beyond all limits and blends it with presidential arbitrage. The president determines fundamentals of external and internal state politics, represents Kyrgyzstan abroad and within the country, takes measures to preserve sovereignty and territorial integrity, guarantees unity and continuity of state power and takes care for concerted functioning and interaction between the state organs and their responsibility to people. *It is a broad power indeed and it is packed in linguistic overbreadth. It seems that geopolitical implications and Kyrgyz borders are the only limitation of this absolute power which*

if Kyrgyzstan was world number 1 country in power might have extended within the whole world or some other planets as well.

The powers of the President can be counted with difficulty and their impact goes beyond imagination. (Most of them are concentrated in art. 46, having six paragraphs with each one of them containing from 4 to 10 powers. There are also powers of the President which have been provided in other chapters of the constitution regulating Parliament, Judiciary, amendment of the Constitution, etc.)

The President is not repository of any one of the three branches but he has decisive package and voice in all branches of power making him an active and decisive participant in all the branches of power. Some of the most striking Presidential powers deserve mentioning. Besides the appointing powers in the areas of Executive and the Judiciary which he performs alone or in cooperation with the parliament and besides the power of Commander in Chief the President is equipped with a personal army (for according to art.42,1.8 he forms National Guard and the Service and State Bodyguard service providing that they are under his personal command"). The President is to determine the conditions for the salaries of the civil servants in the Central and in Municipal administration (art. 46.1.10). In the area of constituent and legislative power the President has a stake at the initial and at the conclusive part of the drafting (adoption) process of the constitutional amendments or the statutes adopted by Jogorku Kenesh. The President is vested with the power to initiate legislation (art. 46.5.1) and the power to sanction and promulgate constitutional amendments or statutes of the Parliament. Procedure and majorities for overriding the presidential veto are provided in the text of art. 66. According to the par.3 veto on ordinary legislation (which the parliament adopts with simple majority of the MPs) is to be overridden with majority more than two thirds or 61 of the 90 mp corpus of Jogorku Kenesh at least. The President however has been vested with the controlling package of stoppage power in the area of constituent power which usually classic and cotemporary constitutions concentrate in special assemblies or in parliaments acting under the special requirements, procedures and supermajorities. According to art.66, par 3 when the presidential veto will concern constitutional statutes, laws on interpreting the constitutional statutes, laws amending or supplementing the provisions of the Constitution, law on amending state borders which are voted with two thirds qualified majority, the veto might be overridden with majority of three fourths of all the MPs corpus at least.

Though the Constitution is silent in determining the nature of the Presidential acts decrees the constitutional practice demonstrates that they might be both individual concerning concrete addressees and normative by establishing rules and regulating performance of institutions or human rights (see the presidential decree for introducing the local electoral barrier of 0,5% in general parliamentary elections introduced by a presidential decree in the Electoral code). Besides that the President is also vested with the power to stop the action of governmental normative acts of the Council of Ministers or any other organ of the executive branch (art.46.5.4).

In this way with his position in the area of constituent and the three constituted branches of power (legislative, executive and judiciary) the President can act as a referee and as a player in the "game" of constitutional government.

- Jogorku Kenesh

Some of the constitutional provisions concerning Jogorku Kenesh are to be welcomed:

- art. 55.4 establishing continuity of parliamentary representation;
- art. 56.2 regulating incompatibilities;
- art. 57.2 providing for m p s attending and political party discipline.
- art.62.1 setting the rule that the term of each session is firmly established to begin on the first working day of September and end the last working day of June next year.

Between more of than thirty powers that were attributed to Jogorku Kenesh in the art it is very strange to find the provision of art.58.1.13 stipulating that the parliament is to hold a hearing of presidential messages and statements. It seems also that there is not so much sense in establishing enumeration of 33 powers of the parliament in par.1 and 2 of the art.58 and then in par.3 to provide that Jogorku Kenesh is fulfilling other competences established by the Constitution and parliamentary statutes.

The differentiation between the position of Jogorku Kenesh as constituent authority (institution adoption new constitution or constitutional amendments) and legislative body should be improved if and when the time to revise the constitution will come.

Jogorku Kenesh has been empowered with a provision of self terminating its own legislature by a decision with majority of two thirds of the mps.

In relation to the formation of government the parliament has some powers creating thus an impression not of a parliamentarian system of government but something between the clear presidentialism and the traditional double dependence of government known as orleanist cabinet formation and responsibility – the cabinet using the support both of the head of state and the parliament.

- Council of Ministers

The Council of Ministers has been defined as the executive branch of power in Kyrgyz republic.

It is interesting to notice that the cabinet investiture procedure ha been borrowed from Balkan constitutionalism and a device which I would name Balkan roulette has been transplanted to Kyrgyz constitution. The meaning of this system of formation of government is to facilitate cabinet formation, to avoid transformation of ministerial crisis into parliamentary one, to improve the chances of survival of parliament, to stimulate the serving of a whole parliamentary term of the legislature without frequent recourse to new general parliamentary election and in general to contribute to political stability . The so called Balkan roulette *mutatis mutandis* is to be found in 1975 Greek Constitution adopted after the fall of the military junta established by *coup d'état* in 1968, in 1982 Turkish Constitution drafted in a similar situation when civil government replaced the military regime and 1991 Constitution of Bulgaria which marked the transition from communist rule to parliamentary democracy. According to art.70 if the party or the prime minister designated by the party that has won more than 50% are unable to form a Cabinet the President delegates the mandate to another party represented in Jogorku Kenesh to form a Cabinet. If this attempt at government formation is unsuccessful as well the President delegates the mandate to form Council of Ministers to a coalition representing parliamentary majority. The President is bound by the Constitution to make a third attempt to form a government supported by a parliamentary ad hoc coalition. If this third attempt is unsuccessful the President forms a government (with a mandate until new cabinet is formed after the new parliamentary elections are held and the new parliament has begun its business), dissolves the Parliament and schedules new elections. Compared to the Greek, Turkish and Bulgarian versions of the Balkan roulette in cabinet investiture Kyrgyz President has more discretionary power to determine to whom to delegate the mandate to form the Cabinet after the first attempt which is always reserved for the party or coalition that has won the elections and has more than 50% of the parliamentary seats. The position of the Cabinet formed by the President when he is dissolving the Parliament for the Parliament has been unable to form Council of Ministers is not like in Greece, Turkey and Bulgaria a caretaker government.

According to the provision of art. 71, par.1 the Cabinet is responsible to the both the President and the Parliament.

A procedure for non-confidence vote taking has been established in the Kyrgyz constitution but it is strange that after receiving a negative vote by the parliamentary majority the government instead of handling resignation might stay in power if the President does not accept its resignation. If however within three months the same government receives a second non confidence vote the President either accepts its resignation or dissolves the parliament and schedules elections. The President might also refuse to accept a resignation of a minister that has received a resolution of no confidence from the parliament.

Enumeration of Cabinet powers in art.73, par.1 should be more accurate for after having listed ten of the Cabinet powers point 11 is vested with other powers in the Constitution, parliamentary statutes and the presidential decrees.

According to the constitution might address the cabinet in person during the Council of ministers meeting and bring to their attention the issues of country and international politics of Kyrgyz state.

- Judiciary and the Constitutional Court

The Constitutional Court is within the judiciary and is provided with the abstract, posterior, concentrated and specialized judicial review on the compliance of the parliamentary laws to the Constitution.

The system of appointment election by the parliament on proposal by the President for serving within the age limitation of 70 is to be welcomed since it secures the independence of the constitutional judges.

The Constitution is silent on the issue who can seize the court but as far as I remember the cases might be brought by the institutions only.

Though the Constitution provides that other issues and status of the judges should be regulated in a special constitutional law to be passed by Jogorku Kenesh I think that the constitution might develop the regulation of the Constitutional Court in more concrete provisions when next amendments of the Constitution will be scheduled for consideration in the parliament.