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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON AMENDING AND SUPPLEMENTING THE LAW ON THE SUPREME COURT AND LOCAL COURTS OF KYRGYZSTAN

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Introduction

The Kyrgyz Republic has asked the Venice Commission to adopt an opinion on the draft Law of the Kyrgyz Republic "Amending and supplementing the Law of the Kyrgyz Republic 'On the Supreme Court of the Kyrgyz Republic and local courts". This law aims at bringing the Law "On the Supreme Court of the Kyrgyz Republic and local courts" adopted on 18 July 2003 in conformity with the new Kyrgyz Constitution adopted by referendum on 21 October 2007.

Preliminary remarks

The opinion is based on two documents, a comparative table (in English) and a text of the law of 2003 containing the amendments of 10 July 2004, 7 July 2006, 7 May 2007, 1 June 2007 and 25 June 2007 (in Russian). There is no complete version of the draft law, neither in English nor in Russian.

The relevant article of the Kyrgyz Constitution dealing with the Supreme Court is the following:

> **Article 86**
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> 1. The Supreme Court shall be the highest body of judicial power in the sphere of civil, criminal and administrative and other legal proceedings within the jurisdiction of local courts and shall supervise the judicial activity of local courts by review of judicial acts on appeals lodged by participants in judicial proceedings under the procedure provided for by law.
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> 2. The Plenum of the Supreme Court shall give explanations on questions of court practice.
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> 3. The acts of the Supreme Court adopted in the exercise of supervision shall be final and not subject to appeal.

The changes in the draft law concern most of all specific regulations (e.g. responsibility of the execution of judicial acts, number of Vice-Presidents and judges, organisation of the sittings of the Plenum, organisation of the apparatus of the courts etc.).

The main change in the Constitution is the creation of a Judiciary Council. In this regard the Supreme Court looses some competences especially in disciplinary proceedings. The results of these changes cannot be properly assessed as it is not clear how the new Judicial Council will function.

Therefore the opinion on the draft law has to concentrate on those issues comprehensively regulated in the new law.

The following remarks can be made:

I) Responsibility for the execution of judgements.

The new version on the Law contains a regulation on the "inappropriate supervision on the part of a judge of the Kyrgyz Republic of the execution of their judicial acts" (Art. 9 para. 2). The English version of the new text is not entirely clear, but, according to the wording provided it seems to fix a liability of the judge in this context.

It should be noticed that, as a rule in European practice, it is not the judge's task to supervise the execution of judgments, but there are specialised bodies responsible for that. The judge will not have the means to make sure that the judgements are really implemented in practice. It

seems to be inappropriate to establish the judge's liability in this context. That might even be used as a means to undermine the judges' independence.

II. Powers of the President of the court

The President of the Supreme Court as well as the presidents of the local courts have extraordinarily vast powers. Some of the amendments aim at reducing their scope (e.g. the competence to initiate disciplinary proceedings is transferred to the Judicial Council), but nevertheless, some of the remaining competences are still subject to criticism.

This applies above all to the power of the president of the court (both the Supreme Court and the local courts) to allocate the cases to the judges. This power can be easily abused e.g. by not allocating politically sensitive cases to judges who are not opportune. It may also be used as an instrument of pressure, as particular judges may purposely be overloaded with minor-profile cases.

Therefore it is suggested that the allocation of cases should be effectuated on the basis of abstract criteria laid down in advance (e.g. in alphabetical order of the claimants). This is part of a fair trial.

III. Powers of the Plenum of the Supreme Court

1. The power of the plenum of the Supreme Court to hand down clarifications of questions concerning judicial practice has been maintained. Similar regulations are applied in other legal systems, such as the Russian judicial system.

In the case of Kyrgyzstan it seems that these "clarifications" are handed down by the plenum on its own initiative. Depending on the way this quasi-legislative power is exercised it might be at odds with the principle of separation of powers.

From this perspective, it should be welcomed that the provision according to which the "clarifications" are binding for lower courts has been deleted. But it is not to be expected that this will lead to a major change in practice.

2. The way of voting in the Supreme Court that had already been fixed in the last version of the law and that has not been changed might also raise doubts as to the independence of the judiciary. According to Article 15 para. 5, as a rule, rulings are adopted by open ballot. According to Article 15 para. 7 the Minister of Justice and the Prosecutor General may be invited to participate in the meetings of the plenum. In practice the voting of the judges might be influenced by the presence of the high representatives of the executive.

3. Furthermore it might be mentioned that the wording of Article 15 para 10, according to which the plenum "shall consider other matters of organisation and activity of courts" is very vague; the competences of the Plenum might be unduly enlarged on the basis of this provision.

IV. Establishment of the number of judges at local courts.

According to the new Article 25 the President of the Republic shall have power to establish the number of judges of the local courts in accordance with the workload norm of judges and the number of local court apparatus staff.

This provision raises concerns insofar as the risk of abuse cannot be excluded. Thus the number of judges can be reduced in order to get rid of unpleasant judges or to weaken the judiciary as a whole. The reference to the workload norms does not seem to be a mechanism preventing such abuse.

According to the last version of the law the President could exercise this power only on basis of a proposal of the President of the Supreme Court (see article 27 para 1 with regard to the oblast courts and article 34 para 2. with regard to the rayon courts). The risk of abuse might be reduced, if this right were transferred to the Judicial Council. It should be made clear that the independence of the judges must not be endangered in this context.

V. Other issues

Most of the changes are related to management issues (creation of the office of the First Vice-President of the Supreme Court, rules on the court administration and the apparatus). It should be secured that the apparatus does not interfere into the tasks of the judiciary. The adjudication of cases has to be excusively in the hands of independent judges.

Insofar as the aim of the changes is to improve the proficiency of the management they are to be welcomed.

VI. Conclusions

Some of the amendments certainly have potential to improve the proficiency of the administration of justice. The compatibility of most of the changes with the rule of law principle depends on their implementation in practice. The judges' liability for the non-execution of judgements as well as the competences of the Presidents of the courts to assign cases to specific judges raise concerns in view of the rule of law principle.