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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS
ON THE LAW AMENDING AND SUPPLEMENTING THE LAW ON
“CONSTITUTIONAL PROCEEDINGS IN KYRGYZSTAN”

AND

ON THE LAW AMENDING AND SUPPLEMENTING THE LAW ON
“THE CONSTITUTIONAL COURT OF KYRGYZSTAN”

by

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The proposed amendments to the laws on the Constitutional Court and the constitutional proceedings are not aimed to be a comprehensive revision but only partial adjustments. The two pieces of legislation are closely connected, and often repeat the same provisions literally. Taking note of this, the main elements of the amendments are as follows:

1. Election of the judges, including the appointment of the president and deputy president of the Constitutional Court.
2. Regulation of the status of judges in a separate law.
3. Competences of the Constitutional Court.
4. Exemption of judicial decisions from the Court's power of review.
5. Obligation of present an annual report on the state of constitutionality.
6. The procedure of presenting the budget.
7. The redefinition of the quorum.
8. Use of official language.
9. List of authorities authorised to apply to the Constitutional Court.

1. Election of the judges, including the appointment of the president and deputy president of the Constitutional Court

Article 1.2 regulates the election of the president and deputy president of the Constitutional Court. According the new procedure the President of Kyrgyzstan appoints them from among the judges of the Court with the agreement of the *Jogorku Kenesh* (parliament) of Kyrgyzstan for a term of five years. It is not clear what the "agreement" of the parliament means exactly: probably a vote on the proposal of the Head of State. This procedure should be specified and also the majority required at the vote. Otherwise the fact that the president of the Court is not elected by the body itself but by a political actor, is widely excepted.

Article 1.3 rewords the regulation on the election of the judges. The regulation is exactly the same as presently: constitutional judges are elected by the *Jogorku Kenesh* with a majority vote of all representatives for a fifteen years term on the proposal of the Head of State.

The present regulation contains an otherwise redundant provision stating that in the event of accelerated withdrawal of a justice, the replacement should be made by the same procedure.

2. Regulation of the status of judges in a separate law

Article 4 deletes the whole of Chapter III on the status of justices of the Constitutional Court. This Chapter regulated, *inter alia*, the independence, the inviolability, the suspension of constitutional justices, the termination of their offices, and their labour law status.

It becomes obvious from Article 1.2 of the draft Law Amending and supplementing the Law "On constitutional proceedings in Kyrgyzstan" that a separate law is to be adopted "On the status of judges", and the deleted provisions are going to be regulated there. This piece of legislation is not known for the author of the present opinion. Earlier the Venice Commission has observed actually in the case of Kyrgyzstan that the dismissal of judges should be spelt out in the Constitution.¹

3. Competences of the Constitutional Court

Article 5 of the draft Law on the Constitutional Court, and Article 4 of the draft Law on constitutional proceedings defines the competences of the Court by amending Article 13 and Article 11 of the respective laws. The competences of the Court are limited to the following five cases:

- constitutional review of acts and other regulatory acts,

¹ CDL-AD(2007)045 *Opinion on the Constitutional Situation in the Kyrgyz Republic. Para 54.*

- official interpretations of the norms of the Constitution,
- review of the constitutionality of presidential elections,
- removal from office of the President of the Republic,
- decide on constitutional amendments.

Only the last competence may raise certain doubts because one might argue that the all laws are subject to review by the Constitutional Court, except constitutional amendments. An earlier opinion of the Venice Commission on the constitutional situation in Kyrgyzstan has underlined that "Constitutional courts are the institutions with the authority of providing a final interpretation of the Constitution."²

The following competences would be deleted according the draft:

- removal of judges of the Constitutional and the Supreme Court,
- consent to initiate criminal proceedings against a judge of a local court,
- declare the unconstitutionality of decisions of local government bodies,
- decide on constitutionality of the legal practice affecting the constitutional rights of citizens.

The review of criminal proceedings against judges of a local court or of local government regulation are not proper competences of a Constitutional Court (even if there are examples for the latter), so their removal is to be welcomed. The procedure concerning "legal practice" is vague and confusing, so it is better to delete it. As regards the competence of removing the justices of the Constitutional Court, it would be good to know how the Law on the status of judges would regulate the question, and what guarantees are included in it.

4. Exemption of judicial decisions from the Court's power of review

The review of ordinary judicial decisions is exempted from the Constitutional Court's competence even under the present regulation. The draft makes some points more explicit on this issue. It articulates that all legal provision declared unconstitutional, are null and void, with the exception of judicial acts. Article 14.4 of the present law states that court decisions based on unconstitutional normative acts "shall not be subject to execution". The draft says that judicial acts based on unconstitutional norms shall be reviewed by the court in every specific case upon complaints of citizens whose rights and freedoms have been affected. Thus the draft refers to a special complaint procedure that takes place before the ordinary court instead of the automatic, *ex lege* exclusion of execution of such decisions. However, the amendment is acceptable insofar as it enforces legal security by making more unambiguous the relation of the Constitutional Court to ordinary courts. As a general rule, the relation of a constitutional court to "ordinary" high courts has to be determined in clear terms.³

5. Obligation of present an annual report on the state of constitutionality

The present practice in Kyrgyzstan is that under Article 15 of the Law on the Constitutional Court the president of the Court annually forwards messages reflecting the state of affairs concerning constitutionality to the President of the Republic, to *Jogorku Kenesh*, and to the Government of Kyrgyzstan. Article 7 of the draft makes this obligation more precise – instead of forwarding messages, the President has to present an annual report on the state of constitutionality. But, the addressee of this report is only parliament. Under Article 9 of the draft Law on constitutional proceedings, the Constitutional Court prepares the annual report on the state of constitutionality.

² CDL-AD(2007)045 *Opinion on the Constitutional Situation in the Kyrgyz Republic.*

³ CDL-AD(2004)024 *Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.*

This is more suitable with the Rule of Law practice, as it does not link the court to the executive branch.

6. The procedure of presenting the budget

As regards the financing of the Constitutional Court, the present Law determines that the activities of the Constitutional Court shall be financed by the national budget – which should be obvious. The draft would amend Article 18.2 that presently states that pro forma expenses of the Constitutional Court shall be determined at the session of *Jogorku Kenesh* upon submission by the president of the Constitutional Court. According to the draft the budget would be submitted by the president of the Constitutional Court to the Council of Judges, and the president is obliged to inform the same Council on the implementation of the budget. The Council of Judges is a new institution established by the constitutional reform, regulated by Article 84 of the Constitution.⁴ Most probably the Council of Judges submits the budget of all courts to the Government and to parliament. Under a new provision in the draft, the President of the Constitutional Court is entitled to participate in sittings of the Government and the *Jogorku Kenesh* where the budget of the courts of Kyrgyzstan is discussed.

7. The redefinition of the quorum

Article 3 of the presently valid Law on constitutional proceedings defines the *quorum* necessary for Constitutional Court decisions.

Presently the regulation of the quorum is twofold. The examination of cases, rendering of conclusions, adoption of the Rules of court and motions for the suspension of a judge's powers requires of no less than seven judges of the Constitutional Court.

Sessions of the Constitutional Court of Kyrgyzstan Republic on other matters are valid if over half of the court's registered judges participate (at least five).

Article 2 of the draft law on constitutional proceedings unifies the quorum for all procedures: a session of the Constitutional Court is valid if no less than two thirds of its members are present (that is six judges).

The uniformity of the quorum makes the procedure of the Constitutional Court more consistent.

8. Use of official language

Article 3 of the draft Law on constitutional proceedings instead of the term 'state language' used by the presently valid Law introduces the terms of 'an official language', and the 'language of the proceedings'. This leads indirectly to the conclusion a more permissive regulation is to be implemented by Kyrgyzstan regarding the use of languages in official proceedings, and this is to be welcomed as it enlarges the respect by state authorities to linguistic rights.

9. List of authorities authorised to apply to the Constitutional Court

Article 6 of the draft Law on constitutional proceedings enlarges the list of authorities authorised to apply to the Constitutional Court with the Ombudsman (*Akiykatchy*) and the Central Electoral Commission.

As the Venice Commission has earlier pointed out, quite a number of countries allow the ombudsman to challenge a legislative act before the Constitutional Court (e.g. Albania, Armenia, Georgia, Estonia, Moldova, Poland, Portugal, Romania, Russia, Spain). Thus, the

⁴ This development was welcomed by the Venice Commission: CDL-AD(2007)045 *Opinion on the Constitutional Situation in the Kyrgyz Republic*.

power to challenge laws before the Constitutional Court is not alien from the institution of the ombudsman.

Consequently, the Commission recognised as desirable that the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms.⁵

As for the Central Electoral Commission, issues that affect fundamental rights may occur before it, thus there is no problem if the highest electoral body has the possibility to ask the Constitutional Court for constitutional review.

Therefore to extend the possibility of applying to the Constitutional Court in Kyrgyzstan Republic is to be welcomed.

Conclusions

The rather limited amendments regarding the competences and procedures of the Constitutional Court are in accordance with European standards. They are capable of improving the functioning of the Constitutional Court.

However, for a better understanding of the amendments, the knowledge and the evaluation of the new law 'On the Status of Judges' would be desirable.

⁵ *CDL-AD(2007)020 Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan.*
Similarly: *CDL-AD(2003)006 Opinion on the Draft Law on the Human Rights defender of Armenia* and
CDL-AD(2004)041 Joint Opinion on the Draft Law on the ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe.