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COMMENTS

ON THE DRAFT LAW ON THE STATUS OF JUDGES IN KYRGYZSTAN

by

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Introduction

The President of the Republic, Kumanbek Bakiev, changed the constitutional order in Kyrgyzstan by having a new version *(redaktisia*) of the 1993 Constitution adopted. On 19 September 2007 Bakiev ordered that a referendum on a draft Constitution should be conducted on 21 October. According to the Kyrgyz Central Electoral Commission the referendum was valid with more than 50% who voted for the draft Constitution. This version of the 1993 Constitution is consequently now in force

The present version of the 1993 Constitution maintains formally the semi-presidential system but has centralised political power to the Presidency. The principle of separation of powers is not fully implemented constitutionally. Checks and balances are to a large extent missing. For this reason a strengthening of the judiciary in the constitutional system is essential. Such strengthening is already foreseen in the Constitution.

The Constitution also contains a number of other provisions aimed at reinforcing or maintaining the rule of law, and guarantees for human rights and freedoms. Many of these provisions are positive and deserve support.

The problems that this draft Constitutional Law (in the following the draft or the draft law) should solve are several. Primarily, the draft law should implement the constitutional principle of independence of the judicial systems and of the judges personally. But it should also be instrumental in achieving a higher professional level and protect the judicial system from corruption. Complaints of incidences of judicial corruption are not rare in Kyrgyzstan.

General provisions

The draft in its style follows some of the conventions which are characteristic for post-Soviet legislation, For example Art. 2 (1), enumerating legislation which should govern the position of judges, ends with the expression “other laws and normative acts of the Kyrgyz Republic. The enumeration is not exhaustive and consequently basically superfluous.

The draft positively enumerates the normative principles which should govern judiciary which deserves praise. The draft also mentions the possibility of giving financial support to parties before the courts but the draft is vague how that should be regulated except in cases of mandatory remuneration to defence lawyers (Art.3. (2)). Article 4, proclaiming non-discrimination and the equality before the courts, gives a catalogue of several prohibited discrimination grounds and ends with the expression and “other…. grounds.” Perhaps this last expression should be omitted.

It is positive that the draft makes an attempt to define what the law means with the expression in Russian *(bezuprechnyi*) irreproachable (Art. 6 (1) by referring to several duties such as to act in conformity with the ethical codex for Kyrgyz judges and also mentions the possibilities of conflict of interests. Besides, judges also have to declare the assets and income “according to the legislation in Kyrgyz Republic” (which I am not familiar with). This explicit mentioning of possible effects of corrupt activities is noteworthy but, as in other cases, the problem is rather how this provision will be effectively implemented.

In line with other post-Soviet legislation on the judiciary judges are prohibited to be a member of political parties (Art. 6 (3). Of course, this provision is not in line with the UN Covenant on Civil and Political Rights but is still probably necessary in a state such as Kyrgyzstan where the party system is not developed. The parties are more similar to groupings around a specific persons and have distinctively a flavour of intertwinement between political ambitions and economic interests in informal networks.

The draft law opens the possibilities of a judicial career according to traditional pattern in continental and post-Soviet systems by dividing the professional level in six different classes (Art. 8). The National Council of Judges proposes advancement to a higher class to the President who takes the decision. The decision-making process in the Council is not spelled out in the draft law.

Guarantees of judicial independence

The normative regulations of judicial independence which comprises of six different guarantees deserves support. It is, for example, spelled out that no one has the right to interfere in the activities of the judiciary; judges cannot be removed from their offices other than in those cases which are regulated in the Constitution and in the present draft constitutional law. A judge enjoys strict immunity.

The regulation of the tenure of judges is however not clearly formulated in the Law but is written in the Constitution. Judges of the Constitutional and Supreme Court, shall have a tenure and keep their offices until pension age which is 70, according to the Constitution Art. (83 (5) 3rd par)

Article 13 (1) says that judges… "maintains their offices and keeps their prerogative within the framework of their constitutional limits." Local judges should be appointed first time for a period of five year but then they have tenure until pension age which 65 (Art. 83 (6) 2nd para.)
I interpret the draft and the Constitution that the judges after a test period cannot be removed against their will from their offices before pension age except through criminal persecution or other sanction. This is in line with the Constitutional regulation which says that judges of all courts shall occupy their posts and retain their prerogative as long as their conduct is irreproachable (Art. 84(1) Kyrgyz Constitution). Indirectly that is shown by the way you have been given a specific qualification class. The qualification is given for life and could only be lost if you are given a higher class (Art.9 (2)). In the cases of criminal verdict to a judge, as a supplementary punishment you may lose you qualification class. A qualification class is however not an office so the provision does not regulate the actual tenure of judges.

The law should more clearly regulate the tenure of judges.

Election of Justices of the Constitutional Court and the Supreme Court and appointments of the Presidents and their deputies

To be a judge of the Constitutional Court one should have absolved an education in law and at least ten years professional experience and not be older than 70 . This provision repeats the Constitutional regulation. The way judges of the Constitutional Court are elected in the draft law gives rise to concern. Since a constitutional court, at least potentially, has a large impact on the political process, it would be advisable to adopt a more strict nomination procedure in which a qualified majority in the Parliament and/or a more transparent procedure should be introduced. Since the present version of the Constitution gives the President vast symbolic, institutional and operational powers it could be argued that the Constitutional Court could not function as a counterbalancing force but the Constitution still has a progressive catalogue of human rights. The defence of human rights against repressive legislative measures could be seen as a primary task of the Constitutional Court.

The President himself, "independently", chooses candidates for the Constitutional Court and presents his candidates to the Parliament Nothing is mentioned in the draft law how the process of selection of presidential nominees to the Constitutional Court should be regulated. The parliament then by a simple majority elects the candidate. According to the Constitution (Art. 59 (2)) laws and resolutions shall be taken by a majority of the votes of the total number of deputies in the Parliament, i.e. at least 46 votes of 90. If the Parliament refuses to approve of the candidate, the President could again propose the same candidate or another candidate.

This procedure leaves room for possible pressures to the Parliament. The general public and/or the association of judges are not involved in this procedure. The law is however in line with the present Constitution which prescribes that judges from the Constitutional Court are elected by the Parliament at the proposal of the President.

An election with a qualified majority should have already been regulated in the Constitution and since this is not the case, the only thing one could recommend is that the procedure for selecting candidates for the Constitutional Court should be made more transparent. A committee in the Parliament could for example be involved.

The nomination procedure for judges of the Supreme Court is clearly better regulated. Candidates are proposed by the President and should be elected by the Parliament. The candidates that he proposes are based on suggestions from the National Council of Judges. When a vacancy is open in the Supreme Court, the Council makes an announcement. All Kyrgyz judges could then apply for a judgeship in the Supreme Court. On the basis of these applications the National Council make a list of candidates and suggest candidates from the list to the President who then selects one candidate. The President then proposes this candidate to the Parliament. If the Parliament declines to approve of the suggested candidate, the President may again propose the same candidate or another (who I assume must be taken from the list prepared by the Council).

That the President could suggest for the second time the first candidate who did not get the necessary votes to be elected gives the President too much power in the election of Supreme Court Judges and leaves room for pressures.

The President also appoints the Chairmen and their deputies of the two highest Courts with the consent of the Parliament for a period of five years. One could argue that these Courts could elect their Chairmen independently, which, for example, is the case in the Russian Constitutional Court.

Appointment of local judges

The provision concerning qualifications, examinations and procedures for appointment of regular district courts judges fulfil European standards. The National Council for Judges and the Judicial Department of the Republic are responsible. The National Council selects candidates when vacancies have been announced.

Dismissal and suspension

Of special importance for the rule of law is the way judges will be dismissed or suspended from their positions. The law make a distinction between loss of prerogative of judges (*polnomochnost*) and suspension of judges *(otstranenie*). In the cases of loss prerogatives which comprise cases in which the candidate is involved in political activities which he is prohibited to do, the President shall take the decision. If the circumstance(s) which led to the loss (e.g. that the person is a member of a political party) have disappeared the judge regains his prerogative through a decision by the President. A more serious measure is suspension. A judge may be suspended if a criminal or administrative process with the judge as the suspect or defendant is underway. An opening of an investigation whether a dismissal shall take place is another ground for suspension.

A decision on suspension of a judge is taken by the President. His decision should be based on a proposal from the National Council of Judges .

Dismissal as the most serious sanction could take place on various legitimate grounds. The most obvious would be a sentence, or verdict by a court, in which a judge has been declared guilty of having committed a crime.

Judges of the highest courts are dismissed by two thirds of deputies of the Parliament on the proposal of the President. Judges of local courts are dismissed by the President. His decision should be based on a proposal from the National Council of Judges. Cases of dismissal on administrative grounds in which the behaviour of the judge has been regarded as not irreproachable has a special procedure Such form of dismissal must be confirmed by decisions from the Council of Judges and the National Council of Judges before the President or the Parliament takes the final decision.

The draft regulates in detail legal effects of administrative violations of judges, in relation to the present law and/or in connection with activities which are not compatible with being a judge. Legal effects could be various disciplinary measures or early (*dosrochnyi*) dismissal. In contrast to a (plain) dismissal in relation of judges of the two highest courts, no qualified majority of the Parliament is needed. The decision in the Parliament should anyway be based on a decision of the Council of Judges.

Conclusion

In the a constitutional situation where the Presidents enjoys too much power, a strengthening of judicial independence is highly desirable. The draft is for this reason needed. In several ways this draft is also worth praise. Its general principles are excellent. In particular the way judges – with the exception of Constitutional Court Judges- are elected or appointed should be supported from the Venice Commission. Also the regulations of dismissal fulfil European standards. However, the draft law could more clearly regulate the tenure of judges. The draft law does not regulate the procedures in National Council of Judges and how the decision-making process in the Council of Judges takes place.

However the problems in Kyrgyz law lay not so much in the legislative regulations but are related to how the law is interpreted in practice. Especially, the decision-making processes in the National Council for Judges and the (independent) Council of Judges must be analysed. Could judicial independence lead to more judicial corruption and could the National Council be a counter force controlling possible incidences of corruption.

The draft law should protect the judges financially and socially but such protection is dependent on sublegislation which regulates salaries and other means for protection.

The outcome is not evident but the draft law gives a fairly good ground for the development of judicial independence and integrity.