



Strasbourg, 1 December 2008

CDL(2008)130*
Engl. only

Opinion no. 480 / 2008

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON THE DRAFT AMENDMENTS TO
THE CONSTITUTIONAL LAW ON THE SUPREME COURT
OF KYRGYZSTAN**

**on the basis of comments by
Ms Angelika NUSSBERGER (Substitute Member, Germany)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. By letter dated 6 May 2008, the Chair of the Constitutional Court of Kyrgyzstan, Ms Svetlana Sydykova, requested an opinion on: (1) the draft Law amending and supplementing the Law on constitutional proceedings in Kyrgyzstan (CDL(2008)064); (2) the draft Law amending and supplementing the Law on the Constitutional Court (CDL(2008)065); (3) the Law on the Status of Judges (CDL(2008)099); (4) the Law on Court Juries (CDL(2008)069); (5) the Law on Bodies of Judicial Self-regulation (CDL(2008)098) and (6) the Law amending and supplementing the Law on the Supreme Court and local courts (CDL(2008)097). The latter is dealt with in this opinion. Laws (3) to (5) are dealt with in separate opinions and laws (1) and (2) were dealt with in Opinion 481 (CDL-AD(2008)029).

2. The present opinion was drawn up on the basis of comments by Ms Nussberger (CDL(2008)100), who was invited by the Venice Commission to act as a rapporteur.

3. A conference on the topic "Supremacy of law and the independence of the judiciary – guarantees for the stability of democratic institutions" was organised in Bishkek, Kyrgyzstan on 27-28 May 2008 together with the Constitutional Court (CDL-JU(2008)022 synopsis). The purpose of the conference was to inform the Venice Commission about the current judicial reform in Kyrgyzstan, in the context of the request for an opinion on the six draft laws/amendments mentioned above.

4. This opinion was adopted at the ... Plenary Session of the Venice Commission (Venice, ...).

GENERAL REMARKS

5. The aim of the draft Law on amending and supplementing the Law "on the Supreme Court of the Kyrgyz Republic and local courts" is to bring the Law "on the Supreme Court of the Kyrgyz Republic and local courts", adopted on 18 July 2003, in conformity with the new Constitution of Kyrgyzstan, adopted by referendum on 21 October 2007.

6. This Opinion is based on two documents: (1) a comparative table (English translation) and (2) 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.

7. Article 86 of the Constitution deals with the Supreme Court in the following manner: "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. 2. The Plenum of the Supreme Court shall give explanations on questions of court practice. 3. The acts of the Supreme Court adopted in the exercise of supervision shall be final and not subject to appeal."

8. The amendments introduced by the draft Law concern, in particular, 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 courts' staff etc.).

9. The main change introduced by the Constitution is the creation of a National Council for the Judiciary. As a result, the Supreme Court has lost a number of competences, especially with respect to disciplinary proceedings.

10. The results brought on by these changes in the Constitution cannot be properly assessed because it is unclear how the new National Council for the Judiciary is going to work. This

Opinion will therefore focus on issues that are regulated in a comprehensive manner by this draft Law.

LAW ON THE SUPREME COURT

I. Responsibility for the execution of judgments

11. The draft Law contains a regulation, Article 9.2, on the “...*inappropriate supervision on the part of a judge of the Kyrgyz Republic of the execution of their judicial acts...*”. The English version of the draft Law is not entirely clear, but the wording seems to provide for a liability of the judge in this context.

12. It is important to underline that, as a rule in European practice, **it is not the judge’s task to supervise the execution of judgments**. There are specialised bodies which deal with this. The judge will not have the means nor the time to ensure that judgments are implemented in practice. **It therefore seems to be inappropriate to establish the judge’s liability in this context. This could even be used to undermine the judges’ independence.**

II. Powers of the President of the court

13. The President of the Supreme Court and the presidents of local courts have extraordinarily vast powers. Some of the amendments aim to reduce the scope of these powers, for instance, the competence to initiate disciplinary proceedings is transferred to the National Judicial Council, **which is welcomed**. In the light of this change, it is important to underline that the Venice Commission strongly recommends that an appeal to an independent court be available against any disciplinary decisions rendered by the National Council of the Judiciary¹. Nevertheless, some of the remaining competences are open to criticism.

14. The competence that raises the most concern is the **power of the president of the court** (both Supreme Court and local courts) **to allocate cases to judges** (Articles 20.3, 31.3, 32.3 and 36.2). This power **can easily be abused**, for instance, by not allocating politically sensitive cases to certain undesirable judges. It may also be used as an instrument of pressure, as particular judges may purposely be overloaded with low-profile cases.

15. The Venice Commission therefore recommends that the **allocation of cases be carried out on the basis of abstract criteria laid down in advance, for instance proceed in alphabetical order of the claimants’ names. This is important as it forms a part of a fair trial.**

III. Powers of the plenum of the Supreme Court

16. The power of the Plenum of the Supreme Court to hand down clarifications on questions concerning judicial practice was retained in Article 15. Similar regulations are applied in other legal systems, such as in the Russian judicial system.

17. In the case of Kyrgyzstan, it seems that these “clarifications” are handed down by the Plenum on its own initiative (Article 15.2.1). **Depending on the way this quasi-legislative power is exercised, it might be at odds with the principle of the separation of powers.**

18. From this perspective, we should welcome the deletion of the provision according to which the “clarifications” are binding on lower courts. However, it is unlikely that this will lead to a major change in practice.

¹ See paragraph 25 of the Report on Judicial Appointments (CDL-AD(2007)028).

19. The manner in which the Supreme Court votes has not been changed. This might raise doubts as to the independence of the judiciary. According to Article 15.5, as a rule, decisions are adopted by open ballot. Article 15.7 provides that **the Minister of Justice and the Prosecutor General may be invited to participate in the meetings of the Plenum. In practice, the voting of judges might be influenced by the presence of the high representatives of the executive – this does not serve judicial autonomy and this provision should be deleted.**

20. Furthermore, the wording of Article 15.10, according to which the plenum “*shall consider other matters of organisation and activity of courts*” is very vague. The competence of the plenum might be unduly increased on the basis of this provision.

IV. Establishment of the number of judges at local courts

21. Draft Article 25 provides that the President of the Republic shall have the power to establish the number of judges of the local courts in accordance with the workload norms of judges and the number of local court staff.

22. This provision raises concern insofar as the risk of abuse cannot be excluded. Thus, the number of judges can be reduced in order to get rid of undesirable judges or to weaken the judiciary as a whole. Reference to the workload norms does not seem to be a mechanism to prevent such abuse.

23. According to the unamended version of the Law, the President can exercise this power only on the basis of a proposal of the President of the Supreme Court (see Article 27.2 with respect to the *oblast* courts and Article 34.2 with respect to the *rayon* courts). **The risk of abuse might be reduced if this right were transferred to the National Council of the Judiciary.** It should be made clear that the independence of the judges must not be jeopardised in this context.

V. Other issues

24. Most of the changes relate to management issues (the creation of the office of the First Vice-President of the Supreme Court, rules on the court administration and staff). It should be ensured that the staff does not interfere with the tasks of the judiciary. The adjudication of cases must be exclusively in the hands of independent judges.

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

CONCLUSION

26. Some of the amendments have the potential of improving the proficiency of the administration of justice. The compatibility of most of the amendments with the principle of the rule of law will depend on their implementation. The judges' liability for the non-execution of judgments as well as the competences of the presidents of courts to assign cases to specific judges, raise concern in view of the principle of the rule of law.

27. The Venice Commission therefore recommends the following:

- Article 9.2 seems to provide a liability of the judge in the context of the supervision of the implementation of judgments. This provision should be revised as it should not be the judge's task to supervise the execution of judgments – there should be a specialised body set up to deal with this;

- Articles 20.3, 31.3, 32.3 and 36.2 the powers of the president of the court (both Supreme Court and local courts) to allocate cases to judges should be revised, as this may give rise to abuses and be used as an instrument of pressure against judges. The Venice Commission recommends that the allocation of cases be carried out on the basis of abstract criteria laid down in advance, for instance proceed in alphabetical order of the claimants' names;
- Article 15.7 provides that the Minister of Justice and the Prosecutor General may be invited to participate in the meetings of the plenum of the Supreme Court. This provision should be reconsidered, as the presence of such high representatives of the executive could affect the voting of the judges;
- Article 15.10 concerning the plenum of the Supreme Court, should be reworded as it might unduly increase its competence;
- Article 25 according to which the President of the Republic has the power to establish the number of judges of the local courts should be revised, as it could allow abuses that could weaken the judiciary as a whole. This power should be transferred to the National Council of the Judiciary to reduce the risk of abuse.

28. The Venice Commission remains at the disposal of the Kyrgyz authorities for any further assistance.

*
* *
*