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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION ON
THE DRAFT AMENDMENTS TO
THE CONSTITUTIONAL LAW ON THE SUPREME COURT
AND LOCAL COURTS
OF KYRGYZSTAN

Adopted by the Venice Commission
at its 77th Plenary Session
(Venice, 12-13 December 2008)

on the basis of comments by

Ms Angelika NUSSBERGER (Substitute Member, Germany)
Mr Hjörtur TORFASON (Member, Iceland)

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) and Mr Torfason (CDL(2008)147), who were invited by the Venice Commission to act as rapporteurs.

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 77th Plenary Session of the Venice Commission (Venice, 12-13 December 2008).

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). An English translation of the Law as amended has subsequently been furnished.

7. 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.).

8. 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."

9. In the Law, the organisation and activity of the Supreme Court are mainly dealt with in Section II (Articles 12-24). As provided in Article 13, the Court is composed of 35 justices, i.e. a President, a first Deputy Vice-President, 2 other Vice-Presidents and 31 judges. The Court is to operate with three benches of judges, i.e. (1) a bench for criminal cases and administrative infringements, (2) a bench for civil cases and (3) a bench for administrative and economic cases. The membership of the benches is established by the Plenum of the Court (i.e. the entire body of justices), and they are to be headed by the respective Vice-

Presidents of the Court (Article 17). For the hearing of individual cases, the benches normally will sit in panels of three judges (Article 13.3).

10. The system of local courts of Kyrgyzstan is not directly set out in the Constitution, which mainly provides (in Article 83.6) that the judges of these courts are to be appointed by the President of the Republic at the proposal of the Judicial Council. The structure and activity of the local courts are mainly dealt with in Section III of the former Law (Articles 25-36), which provides for the formation of these courts by the President consistently with the said Article of the Constitution. The draft Law has now increased the size of Article 25 by adding the provision that the number of local court judges shall be established by the President in accordance with the workload norms for the judges and the number of court staff.

11. According to the Law, the local courts shall be (1) Oblast (province) Courts and courts equated thereto (i.e. the Bishkek Municipal Court and the Military Court of the Republic), and Rayon Courts and courts equated thereto (i.e. courts for districts or a town or city, municipal courts and courts of military garrisons). The Oblast Courts are to operate with benches similar to those of the Supreme Court (Article 27) and will sit in panels of three judges and usually act as courts of second instance (Article 30.6 and Article 30.7). In the Rayon Courts, which are exclusively courts of first instance (Article 35.1), cases normally will be heard by a single judge or, where procedural laws so provide, by a judge with the participation of not less than 2 judicial assessors (Article 35.3).

12. As favourably noted by the Venice Commission in its Opinion (CDL(2007)045) on the Constitutional situation in the Kyrgyz Republic, the main change introduced by the Constitution of 2007 is the creation of a National Judicial Council (see Article 84.5 and 84.6 of the Constitution). As a result, the Supreme Court has lost a number of competences, especially with respect to disciplinary proceedings.

13. The results brought on by these changes in the Constitution cannot be properly assessed because it is unclear how the new Judicial Council 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 AND LOCAL COURTS

I. Responsibility for the execution of judgments

14. The draft Law contains a regulation, Article 9.2, which seems to mirror Article 89.2 of the Constitution, but adds a reference to “...*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. The inference seems to be that the actual liability will be determined by another law (such as the penal code and/or codes of legal procedure).

15. 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.**

16. It may be that this requirement for judicial supervision of the implementation of judgments is not primarily intended to refer to conventional enforcement by bodies such as a sheriff or chief of police, but rather to the manner in which the results of judgments are in

fact received or treated by the authorities in the public sector whose area of jurisdiction is affected. In other words, the requirement perhaps is to be considered in the light of provisions such as Article 19.1 of the former Law, which states that simultaneously with the rendering of a decision on a case, the Supreme Court shall, where necessary and through a special ruling, draw the attention of governmental authorities (state or local) or legal entities or officials to legal infringements found in the case, the causes therefore and the conditions under which such infringement was possible. However, the problem with supervising the implementation will be similar even on this basis. Moreover, the concept of a special ruling as under Article 19 also raises the issue that a court should in principle speak only through its judgments (which should be self-sustaining as far as possible), and it is to be hoped that these rulings can be handled by the Court in the light of that principle.

II. Powers of the President of the courts

17. 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 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 Judicial Council¹. Nevertheless, some of the remaining competences are open to criticism.

18. 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.

19. The Venice Commission therefore recommends that safeguards against any abuse be introduced. It would be helpful if abstract criteria for the redistribution of cases were laid down by the law. This may be done by proceeding in alphabetical order of the claimants' names or on the basis of a computerised system. The specialisation of the judges may also be taken into account. It is important that the criteria for the redistribution of cases be transparent.

III. Powers of the plenum of the Supreme Court

20. The Plenum of the Supreme Court comprises the entire body of court judges, and to that extent has the character of a general meeting. It is convened by the President of the Court as necessary and not less than twice a year, and can adopt resolutions with 2/3 of the judges present (Article 15.3 and Article 15.5). Its functions include the election of presidents of the benches of judges from among the vice-presidents of the Court and the establishment by election of the membership of the respective benches, in each case by secret ballot (Article 15.3, see also Article 17 on the benches). The Plenum also has the power to adopt Rules of the Supreme Court on matters relating to the internal activity of the Court (Article 15.7).

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

21. 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.

22. In the case of Kyrgyzstan, it seems that these “clarifications” are handed down by the Plenum on its own initiative (Article 15.2.1). It is understood that these ‘clarifications’ are non-binding and present the analysis of the former case-law. This power may be at odds with the principle of the separation of powers, depending on the way in which it is exercised. The power (and the function under Article 15.2.2 concerning the application of laws by local courts) also tend to increase the hierarchy in the judicial system and affect the necessary independence of the lower courts, who should be addressed by the Supreme Court through its judicial decisions. Under the former Law, these clarifications were to be binding on the lower courts and they could only be adopted with the full Plenary in session (Article 15.2.1 and 15.2.6). The provision for this binding effect has now been deleted by the draft Law and resolutions on the matter will be subject to the ordinary quorum.

23. While this amendment is significant and is to be welcomed, it remains to be seen whether it will lead to a major change in practice.

24. The manner of voting in the Plenum of 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 reconsidered.**

25. Furthermore, the wording of Article 15.10, according to which the plenum “*shall consider other matters of organisation and activity of courts*” is quite 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 level

26. Draft Article 25 provides that the number of judges of the local courts shall be established by the President of the Republic. This provision presumably is to be seen in the light of Article 86.3 of the Constitution, according to which the judges of the lower courts are to be appointed by the President at the proposal of the Judicial Council. Ms Sydykova, the Chair of the Constitutional Court of Kyrgyzstan informed the Venice Commission that no reduction in the number of judges is to be made. For future purposes, however, from the point of view of judicial independence and integrity, it should be an aim to have the number of local judges spelled out in the Law itself as far as reasonably possible.

V. Other issues

27. 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.

28. The draft Law includes certain amendments with respect to the management and financing of the courts and the rules concerning the administrative and other court staff. Some of these provisions are not immediately clear from the text of the Law itself. Thus Article 31.4 on Oblast Courts and Article 36.4 on Rayon Courts provide that the Court President shall implement the overall management of the Court staff and “*submit proposals*

to the head of the state authority responsible for providing the organisational, material and technical and other support for the activity of local courts and ensuring the execution of judicial acts".

29. In general, however, power with respect to staff of the courts of each instance is largely vested in the Court Presidents, and the provisions of the Law in support of the budgetary independence of the judiciary appear to remain in place.

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

CONCLUSION

31. 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.

32. 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;
- It should be an aim to have the number of judges at local courts established within the Law itself as far as reasonably possible.

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