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(VENICE COMMISSION)

DRAFT AMENDMENTS TO THE CONSTITUTION OF THE KYRGYZ REPUBLIC

Comments by

Ms Hanna SUCHOCKA (Member, Poland)

T
he essential novelty in this document is the proposal of a unicameral parliament to supercede the bicameral parliament. Kyrgyzstan is not the first state to make this type of change. A bicameral parliament was introduced in some states in the initial phase of transformation. This was recognized as one of the symptoms of democratization, and in any case as a severance of ties with the former system. For the communist system did not accept the concept of a bicameral parliament. It was believed that there was a reason for a bicameral parliament to exist only in states with a complex nationality structure where a multi-cameral parliament would constitute a guarantee that the various nationalities are represented in parliament. In practice then bicameral parliaments existed only in those states that embraced a federal structure. Other states, i.e. single chamber states, notwithstanding the political system tradition of these states, had only unicameral parliaments. That is why the severance of this principle was treated as a kind of symbol of severing ties with the previous political system. The opposite situation took place with respect to the previous one, namely bicameral parliaments were also created in states that never had such a parliamentary tradition in their histories. For this reason practical assessments were made after the parliament functioned for some time in this form, and once the existence of the second chamber was acknowledged as not being expedient, the unicameral parliament system was reinstated. This is in fact exemplified by Kyrgyzstan and is portrayed in the document entitled the "Grounds of Major Provisions of the Draft Law of the Kyrgyz Republic on Amendments to the Constitution of the Kyrgyz Republic of 17 October 2002 (cited further as Grounds). The majority of the Constitutional Assembly members consider such a structure to be more expedient in the current situation and for the future of Kyrgyzstan. In truth, the document does not include the more profound argumentation that led to this assessment. Nevertheless, one should not criticize this solution. The introduction of a unicameral parliament to supercede a bicameral parliament does not pose a threat to democracy. The democratic European standards in this area are flexible and that is why I do not have any reservations concerning this proposal. The assessment was made from the point of view of this institution's expediency and utility in the structure of the state; the disbandment of the second chamber should not cause any adverse effects on the course of the democratization processes, nor should it adversely affect the making of law.

Reservations or doubts do appear, however, with respect to the mutual relations among the powers, especially between the president and the parliament. As an aside, one may add that the problem frequently encountered by new democracies is to strike the right balance between the individual powers. In many states, especially the ones established after the collapse of the Soviet Union one may observe a certain trend towards encroaching upon the boundaries resulting from the separation of powers: this sometimes entails excessive strengthening of presidential power and it sometimes entails excessive omnipotence on the part of the parliament. It is extraordinarily difficult to create a system of checks and balances. One may have the impression that this draft legislation is attempting to effect a new distribution of the centers of gravity between the powers and to create new principles for their cooperation. The reflection comes to mind that the current draft places much greater emphasis on the cooperation of the powers than on the separation of powers. The attached justification also seems to testify to this aim. The justification attached to the "Grounds…" states that "a certain portion of the powers of the President of the Kyrgyz Republic will be under the joint jurisdiction of the President and the Zhogorku Kenesh". This structure most assuredly aims to curtail presidential power in comparison with his current scope of powers. Moreover, it revisits one concept that is, on the whole, rejected in contemporary political

systems, i.e. the dual accountability of the government to the president and the parliament, as this may in practice elicit a number of tensions.

This draft, notwithstanding these general remarks, leads to questions on the detailed solutions concerning the relations between the president and the parliament. The arrangement of the constitution itself may suggest that emphasis is being placed on presidential power. The internal structure of the constitution may testify to this, as the chapter devoted to the president in the constitution is inserted just before the chapter devoted to the parliament. This is a very formal argument but as we know the internal structure of a constitution is not devoid of meaning. One must assume, however, that this internal structure follows from the previous concept when the constitutional solutions aimed mostly at stronger presidential power. Under the current concept, the president may exercise many of the competencies awarded to him only with the consent of the parliament. For example, article 46 1.1) stipulates that the "President shall appoint the Prime Minister with the consent of the Jogorku Kenesh". In turn, article 46 1.3) specifies that the "President shall appoint the members of the government with the consent of the Jogorku Kenesh". Similarly, the president's full scope of competencies set forth in article 46.2 is exercised jointly with the parliament. In this area the president's power is limited by the parliament, at least in terms of how the constitution is worded, and he must obtain the parliament's consent for every personal proposition. In many situations this may entirely block decision-making. Political parties and especially parliamentary fractions will play a key role under such a solution. This may be a favorable solution from the point of view of searching for a consensus and concluding political compromises, but this is frequently extraordinarily difficult in a new democracy. On the other hand, however, especially when coupled with the weakness of the party system, the extemporaneous establishment of parties from elections to elections, which are generally features of new democracies, this may lead to a blockage of making certain personal decisions, and even to resorting to a certain type of political blackmail. As a consequence, this may mean that extemporaneous arrangements within the parliament will have a greater impact on specific personal decisions than a clear and coherent political vision. In this context one should therefore positively evaluate the solutions proposed in article 71.4, which discipline the parliament in a material way, for the president may independently nominate the prime minister and disband the parliament if the president's candidate for prime minister is not approved three times.

In turn, I believe that certain adverse consequences, especially in the area of parliamentarian blackmail may be caused by the proposal for the joint competency of the president and the parliament, namely "jointly deciding on the structure of the government, i.e. determining how many ministries and state committees there should be, how they will be called, and what their terms of reference in the system of state governance will be".

Let me reiterate that one cannot, of course, claim that these solutions do not comply with democratic standards. One may, however, have reasonable doubts as to whether this will bolster the position of marginal parties which do not belong to the governing coalition in the parliament and as such they may play the role of tipping the scale when making decisions on the government's specific internal structure.

At the same time, however, in light of such an explicit trend towards curtailing presidential power, doubts must arise as to his role towards the special services. In this area the president has a number of independent powers mentioned in article 46.7, 8, 9. "The President shall constitute and abolish the National Security Service" and he "shall constitute and head the Security Council of the Kyrgyz Republic and other coordinating bodies". The relations

between the National Security Service (article 46.7) and the Security Council of the Kyrgyz Republic (article 46.8) are not entirely comprehensible. There are questions about whether this method of defining the president's powers towards the special services might not harbor certain elements that in practice could shift the balance between the parliament and the president as outlined in the draft.

In addition to the foregoing remarks, analysis of this draft leads one to the general conclusion that the constitutional idea itself too frequently permits one power to encroach upon competencies reserved for another power and this is done without explicit constitutional limitations. This must precipitate concerns about the operation of the entire system based on the principle of the separation of powers mentioned in article 7 of the constitution.

One may cite several examples here:

1. Article 58 1.3) grants the right to Jogorku Kenesh "to make official interpretations of the Constitution and of the laws adopted by the Jogorku Kenesh". Perhaps this wording is not entirely precise but the statement that it makes the official interpretation means that this interpretation is binding upon other entities. And the question must be posed upon whom, upon courts, too? And what is the relation between this power of the parliament and the task envisaged for the Constitutional Tribunal? Will there be a collision here? Essentially, if a state has a constitutional tribunal, this body should be the one to hand down official interpretations. One may have the impression that this provision is reminiscent of the previous system which did not envisage the existence of a constitutional tribunal.

2. Article 64 also grants the right of legislative initiative to the Supreme Court of the Kyrgyz Republic. According to me, this should not be. This type of initiative should rather be assumed by the president; it should not directly entangle the Supreme Court in the negotiating efforts to force specific draft legislation through the parliament.

3. Article 68 permits the possibility that the "Jogorku Kenesh may delegate its legislative powers to the President of the Kyrgyz Republic for a period of up to one year". The ability for the executive authority to issue legal acts with the power of a statute is permissible (albeit not without doctrinal reservations) in a system in which the parliament works at sessions. In this case, at the time when the parliament is not in session, the executive power may discharge legislative functions to a very limited degree – but one must emphasize that this may be done in a very limited scope and under strictly defined conditions. The proposal in the draft calls for this right to be awarded to the president for the duration of the parliament's disbandment. This may therefore be understandable in some way. The absence, however, of specific limitations set forth in the constitution must give rise to reservations because this allows one to conclude that there is a very clear shift of competencies between the executive and legislative powers. A very general term "delegate legislative power" is used here. This is a very far-reaching solution. The period for which the legislative power may be turned over to the president, i.e. for a full year elicits my reservations. This is a very long period and one may have grave doubts as to whether this fits within democratic standards. Second, the constitution does not envisage a framework or any limitations for the president's legislative power. As a result of the absence of the appropriate limitations he may assume all legislative authority, including amendments to the constitution. The minimum pre-requisite for granting this right must

be a substantially more precise definition of the conditions for using this right and this definition must be included in the constitution itself.

4. Article 78 presents a very imprecise structure of the prosecution's office. It refers the entire regulation to a statute. This may elicit certain doubts, albeit not of a fundamental nature. Material reservations, however, arise in connection with the specification of the tasks of the prosecution's office. In this case, we are once again dealing with a return to a regulation known from the previous period when the prosecution's office was a type of an oversight body, not with respect to bodies conducting investigations but to other state bodies. It played the role of the supreme body of control of law and order. This function of the prosecution's office must be changed in a state under the rule of law. This role of the prosecution's office is assumed by the administrative court and the constitutional tribunal. That is why the wording of article 78, as it stands in the current draft, should be changed.

5. I am also very critical of the proposal for the "forming of the whole judicial corps" to be a joint power of the president and the parliament. In particular, very strong reservations are raised by the concept that "all judges of courts (district, city, regional, military and arbitrage) will be elected upon the approval of each nominee by the Zhogorku Kenesh. This politicizes the process of nominating judges too strongly.

In conclusion, I have the impression that this draft is another attempt to find the best form of political system for the Kyrgyz Republic. One should also assume that this is not the final structure. One may, however, have reasonable concerns that many of the specific solutions included in the current draft are too strongly rooted in solutions known from the previous period. Moreover, a number of the proposals I have mentioned may in practice introduce a certain amount of competency-related chaos instead of precisely separating the competencies among the individual bodies, and this would be harmful to the formation of democratic attitudes in the society.

Hanna Suchocka