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(VENICE COMMISSION)

COMMENTS

ON THE LAW ON AMENDING AND SUPPLEMENTING THE LAW ON THE SUPREME COURT AND LOCAL COURTS OF KYRGYZSTAN

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Introduction

1. The following comments are submitted to the Venice Commission in response to a request from the Constitutional Court of Kyrgyzstan for providing an opinion on a draft *Law on Amending and Supplementing the Law on the Supreme Court of the Kyrgyz Republic and Local Courts*, i.e. the Law No. 153 of 18 July 2003 as subsequently amended (by amending laws of 10 July 2004, 7 July 2006, 7 May 2007, 1 June 2007 and 25 June 2007).

General Remarks

2. The said draft Law (hereinafter the "Draft Law") was initially presented to the Commission by way of a comparative table (in English) setting the respective original Articles against the altered text cf. CDL(2008)97, together with a text in Russian of the original Law as then standing. In the meantime, the Draft Law has been adopted and published as Law No. 134 of 23 June 2008, and the Commission has been furnished with an English translation of the comprehensive Law including the amendments thus effected (Law No. 153 of 18 July 2008, CDL(2008)xx).

3. The Draft Law forming a part of a series of laws relating to the judicial system of the Kyrgyz Republic, primarily aims at bringing the above basic Law on the Supreme Court and local courts into line with the Constitution of the Kyrgyz Republic as now amended under the new wording adopted by referendum on 21 October 2007. The constitutional provision to which the Law mainly relates is Article 82.3, according to which the judicial system of the Kyrgyz Republic shall be established by the Constitution and by laws and shall consist of the Constitutional Court, the Supreme Court and local courts. It is added that specialised courts may be established by law, while the creation of extraordinary courts shall not be permitted.

4. The other laws most directly connected with the Draft Law are, firstly, the *Law on the Status of Judges of the Kyrgyz Republic*, which has been adopted in line with Article 83(7) of the Constitution and, replaces earlier legislation on this subject. This law contains extensive provisions aiming at supporting the independence and integrity of the judiciary and lays down the procedures for election or appointment of judges of the Republic, their tenure and potential transfer or rotation and the conditions under which they may be retired or removed from office. The law also contains provisions on the immunity of judges and their disciplinary liability, and for protection of their social status.

5. Secondly, there is the *Law on Bodies of Judicial Self-Regulation*, No. 35 of 18 March 2008, which has been adopted pursuant to Article 91 of the Constitution. According to this Law and that Article, these bodies are a Congress of Judges, which is convened at three-year intervals and has a policy-making function for the judicial branch of power, and a Council of Judges of 15 members elected by the judicial community (in the Congress) for a term of three years. The Council is to serve the objective of protecting and representing the rights and lawful interests of the judges of the Republic and has several important functions concerning the judiciary in general, such as to supervise the preparation and implementation of the budget of the courts, to organise the training of judges and court staff, and to examine questions of disciplinary proceedings of judges.

6. Thirdly, there is or will be a law on the *National Council for the Judiciary*. The establishment of this body is provided for in paragraphs 5 and 6 of Article 84 of the

Constitution of October 2007, according to which it is to be formed from among representatives of the legislative, executive and judicial power and public associations, with organisation and powers as defined by law.

7. The status of the Supreme Court as the highest general court in the land is dealt with in Article 86 of the Constitution, in three paragraphs. [quote] – In the comprehensive 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).

8. 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 National Council for the Judiciary. The structure and activity of the local courts are mainly dealt with in Section III of the comprehensive Law (Articles 25-36), which provides for the formation of these courts by the President consistently with the said Article of the Constitution. As referred to below, the Draft law has now augmented Article 25 by 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.

9. 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 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).

10. The amendments introduced by the Draft law are relatively limited in scope and mainly concern the regulation or adjustment of specific matters. These include the creation of the office of a First Vice-President of the Supreme Court (Deputy President, Article 20-1), a responsibility for supervision of the execution of judicial acts (Article 9.2), a qualification on the power of the Supreme Court Plenum to hand down clarifications of questions of judicial practice (Article 15.2.1), a provision concerning the number of local court judges (cf. above), and the management and appointment of court staff (e.g. Articles 31, 36, 38, 39).

11. As favourably noted in the Venice Commission Opinion CDL-AD(2007)45, a major change introduced by the Constitution of October 2007 was the creation of a National Council for the Judiciary. This change is reflected in the Draft Law, by which certain important competences are transferred from the Supreme Court (and Oblast Courts) to the National Council, especially with respect to disciplinary proceedings. At this point, however,

the results following from this change in the Constitution cannot be fully assessed, as the organisation and functions of the National Council have not yet been clarified through legislation.

Responsibility for the execution of judgments

13. Article 9.2 of the comprehensive Law contains a provision (applicable to all courts) to the effect that failure to execute or implement a judicial act, improper execution of such acts and also interference with the activities of courts shall incur liability as established by law. The provision mirrors Article 89.2 of the Constitution, which appears to have essentially the same wording. The Draft Law adds to this provision by inserting (before "and also") a reference to "*… inappropriate supervision on the part of judges … of the execution of their acts*" as being subject to such liability. – The inference seems to be that the actual liability will fall to be determined by another law (such as the penal code and/or codes of legal procedure).

14. Under the principles of separation of powers and judicial independence as generally regarded in European practice, the execution or enforcement of court judgments is not a task for the judges themselves, but for enforcement bodies which are distanced from the courts. The imposition of a duty on judges to supervise the execution or observance of their judgments will tend to be at odds with these principles, and the comments in the report of Ms Nussberger on this matter are therefore to be supported.

15. It may be that this requirement for judicial supervision of the implementation of judgements 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 on the part of 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 comprehensive 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 therefor and the conditions under which such infringement was possible. However, the problem with supervision of 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.

Powers of the Presidents of the Courts

16. As above noted, the establishment of a National Council for the Judiciary may be expected to be of high importance for the judicial system of Kyrgyzstan. The transfer of the competence to institute disciplinary proceedings against a judge from the President of the Supreme Court (cf. the prior Article 20.5/20.6) and Presidents of Oblast Courts and Rayon Courts (prior Articles 31.9 and 36.8) to the National Council is an appropriate consequence of this development, and the comments by Ms Nussberger regarding this matter are to be supported.

17. The comments regarding the power of Presidents of the Supreme Courts and the local courts to allocate cases among judges and panels also are to be supported (while it is to be noted that allocation of cases and formation of panel composition also is a responsibility of bench presidents, cf. Articles 21.2 and 32.3, though subject to instruction by the court President). While clarity as to the ultimate responsibility for case allocation is important, the principle of allocation according to objective criteria is no less important and represents an essential feature of judicial independence.

18. In this connection, it is to be noted that according to Article 15.7 of the comprehensive Law, the Plenum of the Supreme Court has the authority to adopt Rules of the Supreme Court on matters relating to the internal activities of the Court. It may be that these Rules as currently in force deal with the issue of case allocation in general terms, but this has not been explained. And even if they do, a statement of the need for objective criteria will be a desirable feature of the Law itself.

19. It may further be noted that according to Articles 15.6 and 18.5 of the comprehensive Law, the Plenum of the Supreme Court had a power to create specialised teams for specialised cases within the benches of the Court. These provisions have been deleted in the adoption of the Draft Law, which is to positive effect.

Powers of the Plenum of the Supreme Court

20. The Plenum of the Supreme Court comprises the entire body of justices of the court, and to that extent has the character of a general meeting. It is convened by the President as necessary and not less than twice a year, and can adopt resolutions with 2/3 of the judges present (Article 15.3 and 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, cf. 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).

21. The Plenum traditionally has had the power to "*examine material concerning the analysis and generalisation of judicial practice and hand down clarifications of questions of judicial practice*", as now provided in Article 15.2.1. As pointed out in the report by Ms Nussberger, this power might be at odds with the principle of 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 may 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.

22. Under the unamended 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 may obviously be asked whether it will lead to a major change in practice. However, it is to be noted that the

emergence of a National Council for the Judiciary may tend to reduce the scope and weight of this function of the Plenum.

24. According to Article 15.7 of the Law, the Minister of Justice and the Prosecutor General may be invited to participate in meetings of the Plenum, as also local court judges and other individuals. While this feature may serve to enhance the importance of the Plenum as a forum of discussion, it also raises the issue that according to the Law, the manner of voting in the Plenum generally is by open ballot or show of hands (which is a natural point of departure for such assembly), except for purposes of election. As pointed out by Ms Nussberger, the method involves the practical risk that the voting of the judges might be influenced by the presence of these high representatives of the executive. While it may not follow that an outright deletion of this provision should be considered, it is at least to be recommended that the scope for secret voting in the Plenum be widened to meet this risk.

25. According to Article 15.2.9, the list of functions of the Plenum ends with the proviso that the assembly may also "*consider other matters of organisation and activity of courts*". While this proviso may be seen as rather wide and imprecise, it is of a conventional nature. Among other things, it is to be noted that the Plenum is a forum where all judges of the Court presumably can have a voice. Accordingly, a clause of this kind does seem justified, but its wording could be reconsidered.

Establishment of the number of judges at local courts

26. As amended by the Draft law, Article 25 provides that the number of judges of local courts shall be established by the President of the Republic, "*in accordance with the workload norms of judges and the number of local court staff*". In consequence, the corresponding provisions of Article 30.2 on Oblast Courts (referring to proposals by the President of the Supreme Court) and Article 34.2 on Rayon Courts (referring also to population size) have been deleted.

27. This power of the President of the Republic presumably is to be seen in the light of Article 86.3 of the Kyrgyz Constitution, according to which the judges of the lower courts are to be appointed by the President at the proposal of the National Council for the Judiciary. While the National Council is not mentioned in the Law, the reason may be that it is still in the process of formation. Accordingly, the present text of Article 25 is perhaps to be regarded as a temporary provision, although it has not been specifically so explained.

28. The new text is positive in the sense that it carries the policy inference that the number of local judges should be reasonably commensurate with the workload of the courts, although the reference to court staff perhaps carries a converse budgetary inference. On the other hand, as pointed out by Ms Nussberger, the provision as now standing carries a certain risk of abuse and to judicial independence. Accordingly, it is to be expected that the power will be exercised so as to give the National Council the weight in the matter which is envisaged by the Constitution, and a transfer to the Council of the power to determine the number should perhaps be considered.

29. In any case, from the point of view of judicial independence, the ultimate aim of the Kyrgyz legislative power should be to have the number of local court judges spelled out in

the Law itself as far as possible, leaving mainly the nomination of the judges to the President and the National Council.

Other Issues

30. 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 or apparatus. Some of these provisions are not immediately clear form the text of the Law itself. Thus Articles 31.4 on Oblast Courts and 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*".

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.

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The above comments are presented for purposes of potential consideration in connection with the extant draft Opinion before the Commission, which has my support in general terms.