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(VENICE COMMISSION)

COMMENTS

ON

THE DRAFT CONSTITUTIONAL LAW

ON

"THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF THE KYRGYZ REPUBLIC"

by

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Comments
on the draft Constitutional Law of the Kyrgyz Republic "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic"

Concerning the draft Constitutional law submitted (hereinafter Draft law) and bearing in mind the time available, our views are as follows:

I. Main positive points:

1. It is a most positive point that, **in functional terms**, constitutional justice is conceived as a separate self-sufficient system of jurisprudence, irrespective of the fact that, in institutional terms, judicial constitutional supervision is exercised *de jure* by the Constitutional Chamber of the Supreme Court. In essece, the placing of the institutional ruling on a formal footing flows from the Constitution of the Kyrgyz Republic, on which the Venice Commission has expressed its unequivocal view in conclusion CDL-AD(2010)015 of 8 June 2010.

2. The Draft law affords the Constitutional Chamber broad scope for exercising constitutional justice in both abstract and tangible forms.

3. Also of merit is the broad introduction of the institution of individual complaints, through the provision that all physical individuals and legal entities shall be entitled to lodge an application with the Constitutional Court (article 22).

4. Sufficient attention has been devoted to guaranteeing the independence of constitutional justice, the legal competence of the Constitutional Chamber and the well-foundedness and enforceability of the rulings made.

5. Provision for dissenting opinions of judges is also a positive point.

II. Proposals concerning Section I:

We believe that the Draft law also contains certain shortcomings which might substantially influence the effectiveness of the entire system of constitutional justice in the Kyrgyz Republic. In particular, these relate to the following:

6. The statutory description of the Constitutional Chamber given by article 1 of the Draft law has theoretical significance and does not reflect the juridical substance of that organ. This is because of the implication that it is not only the Constitutional Chamber that can exercise constitutional supervision. The key factor arising from the Constitutional law status of this organ is that it is the Constitutional Chamber which exercises constitutional justice in the country, and this article should be reworded as follows: "The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic (hereinafter the Constitutional Chamber) is the independent supreme judicial organ exercising constitutional justice".

7. The provision enshrined in article 3 paragraph 3 of the Draft law that a judge of the Constitutional Chamber may be dismissed or bear liability not only under constitutional laws but also **under other normative regulatory acts** is highly questionable, and this may adversely affect the independence of judges; for that reason it is proposed that the words "and other normative regulatory acts" be deleted.

8. Regarding the words **"other normative regulatory acts"** set out in article 4 paragraph 1 sub-paragraph 1 of the Draft law, it must be clearly defined precisely to which acts this relates. Otherwise, the main mission of this judicial organ would lose its meaning given the great diversity of such acts.

9. Under article 4 paragraph 1 sub-paragraph 2 of the Draft law, the Constitutional Chamber shall "hand down conclusions on the constitutionality of international treaties to which the Kyrgyz Republic is a party and which have not entered into force". We consider that, from the international law viewpoint, certain theoretical contradictions are implicit in this wording, as a State is deemed to be a party to a treaty following the completion of the domestic procedures required for its entry into force. Consequently, we think it more advisable to use the term

"contracting State". According to article 2 of the 1969 Vienna Convention on the Law of treaties, to which the Kyrgyz Republic is also a party, ""*contracting State"* means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force".

In addition, use of the term "constitutionality" here is not entirely advisable, as it refers to compliance with the Constitution as the basic law of the State and is applicable to acts of national legislation; where international treaties which have not yet become part of domestic legislation are concerned, it would be more acceptable to use the term "concordance with the Constitution".

Furthermore, the text of this article does not make it clear whether the procedure of prior constitutional supervision extends to all international agreements or only treaties making provision for their ratification.

We also feel it appropriate to point out that the very idea of prior constitutional supervision of international treaties is implicit in the need to examine them prior to ratification or the completion of other domestic procedures necessary for their entry into force; otherwise this constitutional supervision as such would entirely lose its meaning and effectiveness.

It is necessary to clearly define the procedural characteristics of the examination of applications brought to establish the concordance of international treaties with the country's constitution.

10. Under article 4 paragraph 2 sub-paragraph 3 of the Draft law, the Constitutional Chamber shall "conduct an annual analysis of the state of constitutional legality in the republic". We believe it expedient to establish in what form the findings of that analysis are to be presented.

11. The mechanism for satisfying the requirements set out in article 5 paragraph 2 of the Draft law must be firmly established in this law; otherwise people will simply opt for their own preferred approaches to settling the question of gender representation.

12. Questions regarding the legal status, formation and functions of the Council on selection of judges (article 7 paragraph 2 of the Draft law) and the requirements to be satisfied by the members of the Council must be regulated by this law. Non-selected candidates must be granted the possibility of appealing against the Council's decision.

13. The list of entities entitled to challenge the constitutionality of international treaties to which the Kyrgyz Republic is a party and which have not entered into force (article 24 of the Draft law) is highly debatable on the grounds that it is the Head of State and the Government, and not the parliamentary deputies, who are accountable for the framing and implementation of state foreign policy. It is proposed that this list of entities be discussed with a view to its adjustment.

14. We feel that paragraphs 3 and 4 of article 7 of the Draft law are not matters for regulation by a constitutional law.

III. Proposals concerning Section II:

15. Generally speaking, this section needs a more in-depth reworking since, in our opinion, the specific characteristics of constitutional justice are not fully taken into account and the individual procedural provisions are more appropriate to general court judges.

16. Paragraph 1 of article 13 of the Draft law states that the Constitutional Chamber is independent and shall be subject to the Constitution and **laws**. We believe that, since the Constitutional Chamber of the Supreme Court examines matters of constitutionality, stipulating that it is subject to laws is not expedient.

17. Under article 14 paragraph 2 of the Draft law a judge may not be removed from participation in a sitting of the Constitutional Chamber except in the event of their dismissal from office under the procedure established by constitutional law or the **granting of their application for self-disqualification**. We would point out that in the context of the general provisions of the Law, it is not clear who would grant such an application or what would be the consequences of a situation where, for example, applications were made by 5 judges at once. Generally, the institution of self-disqualification in constitutional justice is dubious and unwarranted.

18. Paragraph 4 of article 18 stating that the inclusion of a new judge in the sitting shall result in the reopening of case proceedings since the commencement of the trial is debatable and unwarranted in practice.

19. Article 21 paragraph 3 stipulates that the Constitutional Chamber shall deliver its acts only on matters dealt with in the application and solely in respect of the part of a normative regulatory act whose constitutionality is challenged. It should be pointed out that there may be cases where the need arises to also examine other provisions of an act which are systemically interlinked with the provision in question. This circumstance must be catered for accordingly.

20. Article 22 states that a private individual or a legal entity shall also be entitled to apply to the Constitutional Court where they believe that laws or other legal or regulatory acts violate rights and freedoms recognised in the Constitution. No detail or clarification is given as to whether abstract or specific conformity-checking is envisaged here. There is no provision distinguishing the characteristics of the different forms of conformity-checking, which is of fundamental importance for constitutional justice.

21. There is a technical error in article 23, which mentions article 23 instead of article 22.

22. In international practice there is no justification for a situation where any deputy may apply to an organ of constitutional justice for an abstract check on conformity. In European countries such a prerogative generally requires one-fifth of the Parliament. This comment also applies to articles 24 and 25 of the Draft law.

23. Under paragraphs 8 and 9 of article 27 it is stated that the application must set out "concrete grounds for the examination of the application as envisaged in the present constitutional law" and the "opinion of the applicant in respect of the issue raised by them as well as its legal substantiation with reference to the relevant norms of the Constitution". Looking at the provisions set out in the second paragraph of article 26 of the Draft law, we consider that the content of these paragraphs is identical to all intents and purposes. In our view, paragraphs 6 and 9 are sufficient.

24. In constitutional law practice, there is strong emphasis on the collegial nature of the rulings made. We think it wrong that a judge working on their own, in accordance with article 30 of the Draft law, verifies the application and the attached documents and, within five days, hands down a decision confirming the admissibility of the application for proceedings and preparation of the case for a sitting of the Constitutional Chamber or a decision rejecting the application for proceedings with the return of the material to the applicant or rejects the application for proceedings. The stipulation that the ruling of inadmissibility or admissibility may be appealed against by the parties in the Constitutional Chamber does not salvage the situation. In constitutional law practice, these questions are resolved either in plenary sittings or by separate teams of judges with no fewer than three members. Furthermore, if they do not arrive at a unanimous decision, the final decision is taken by a full complement of judges. Our experience shows that such mechanisms are fully justified.

25. Article 30 paragraph 4 provides that "the repeal or invalidation of the act whose constitutionality is challenged shall result in the rejection of the application for proceedings in the Constitutional Chamber". We believe that this norm is expedient only where the act in question was not applied prior to its repeal or invalidation and if there are no effects of its application. In other cases, repeal or invalidation cannot be considered as an absolute ground for deeming an application inadmissible.

26. In constitutional court practice there can be no justification for the time limits for examining cases provided for in article 31 of the Draft law. There is usually provision for different time limits, taking account of the specific features of differing forms and topics of constitutional supervision. Where laws are concerned, 5 to 6 months, dating from the declaration of admissibility, appears to be the optimum period for handing down a ruling on a case.

27. We feel that article 32 requires substantial amendment to free it of procedural principles typifying general courts. This primarily relates to the judge's duties of: providing assistance in obtaining evidence for submission to the Constitutional Chamber; questioning the parties; deciding whether to combine inter-related claims from different people in a single set of

proceedings or to separate out claims outside the court's competence which are included in one application; ensuring the participation of the necessary individuals.

28. Article 42 provides for termination of the proceedings in the event of the applicant waiving their claims. Generally speaking, in constitutional law practice the withdrawal of an applicant is not always a ground for terminating examination of the case. The withdrawal of an application at the origin of the case examined may be refused if the judicial authority exercising constitutional supervision finds that examination of the case relating to the subject of the application is in the interest of society or the State, with the exception of circumstances provided for in law where withdrawal of the application results in termination of the examination of the case.

29. Paragraph 2 of article 50 states that a judge of the Constitutional Chamber who voted for a judgment or conclusion on the merits of a case examined by the Constitutional Chamber but who was in the minority when voting on some other matter or on motivation of the adopted act shall have the right to submit their dissenting opinion in writing. It must be pointed out that contemporary academic thinking tends to take the line that acts of constitutional judicial authorities consist not only of conclusions but also of other sections, including the motivation behind the decision, which is of decisive importance in this category of justice. Consequently, when paragraph 1 of this article provides for the expression of "disagreement with an act of the Constitutional Chamber", this implies that the judge disagrees with **both the conclusions section and the motivation section of the decision**. This must be set out separately. In addition, it follows from the above that the motivation section of a decision presents the content of the constitutional norm and is no less important for developing constitutionalism in the country than the conclusions section. Accordingly, it is also expedient in all cases to publish a dissenting opinion on the latter together with the decision. Therefore, we think it advisable to draw these provisions together and provide for a single stipulation governing the issue.

30. Under article 53 paragraph 3 if the Constitutional Chamber rules that laws or other normative regulatory acts or provisions thereof are unconstitutional, they are to be repealed on the territory of the Kyrgyz Republic, and the same applies to other normative regulatory acts based on the laws, other normative regulatory acts or provisions thereof deemed unconstitutional except for judicial acts. We would point out here that under article 21 of the Draft law the Constitutional Chamber passes rulings on the matter raised in the application and only in respect of the part of the normative regulatory act whose constitutionality is called into question. This means that an act of the Constitutional Chamber does not relate to other parts of the challenged act or other acts. Accordingly, the wording of the Draft law may result in legal uncertainty, since it will not be clear exactly which acts are based on the laws or other normative regulatory acts in question or through which procedure they are to be repealed, and there will be no clear definition of how the given norm is applied in practice.

31. Article 54 paragraph 3 provides that failure to execute, improper execution or obstruction of the execution of judicial acts of the Constitutional Chamber **as well as interference with the activity of the Constitutional Chamber shall incur liability established by law**. Since the provision marked in bold here already appears in article 13, it is pointless to repeat it.

32. Under article 55 paragraph 1, if, during the proceedings, the Constitutional Chamber finds violations of law, it shall be entitled to hand down a special ruling and send that ruling to the relevant state authorities, local self-government bodies, legal entities and/or officials thereof, who are under obligation to give notification of the measures taken within one month of receiving a copy of the special ruling. We believe that this provision is not expedient in the general context of the Draft law. Article 53 of the Draft law states that acts of the Constitutional Chamber and, therefore, its special rulings shall be binding for all state authorities, local self-government bodies, officials thereof, public associations, legal entities and physical individuals and subject to execution throughout the territory of the republic. Consequently, this does not exclude situations in which the Constitutional Chamber finds violations of the law (in its opinion) and formalises **universally binding requirements** regarding matters not within its competence, which distorts both the essence of constitutional justice and the principle of separation of the powers.

33. The Draft law does not provide for the effective and widely practised constitutional justice institution of the written examination of cases.

34. We believe that the Draft law should include an entire section on the examination and resolution of separate cases in the Constitutional Chamber. A good example can be found in chapter 10 of the Law on the Constitutional Court of the Republic of Armenia, which was very highly rated by the Venice Commission in its opinion CDL-AD(2006)017 of 22 July 2006.

General conclusion

The draft Constitutional Law of the Kyrgyz Republic "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" for the most part makes requisite provision for the independent functioning of the Constitutional Chamber as an autonomous mechanism of judicial constitutional supervision. However, the procedural principles of constitutional justice in the Draft law require substantial reworking, taking account of the proposals in the present set of conclusions.

7 April 2011