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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT CONSTITUTIONAL LAW

ON THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT

OF KYRGYZSTAN

by

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I. General Comments

1. According to the draft law the Constitutional Chamber enjoys the necessary degree of independence and autonomy, has wide enough competences and jurisdiction to function as effective organ of judicial constitutional review. The judges of the Chamber elect the Chairperson, deputy chairs and secretary, which is an example of the autonomy that Chamber enjoys according to the draft law. Article 56 guarantees financial independence of the Chamber from other branches of power by authorizing it to draft the budget. The law further stipulates that the budget (expenses) of the Chamber may not be reduced in comparison to the previous fiscal year. Such previsions are indeed welcomed. Article 54 stipulates special and detailed provisions regarding the execution of the decisions of the Chamber by the Government, the President and the Parliament.

2. It was indicated in resent Opinion of the Venice Commission on the draft Constitution of the Kyrgyz Republic, the possibility of an early dismissal of a judge by a vote of two-thirds in the Parliament of the Republic could undermine the powers of the judiciary in the long term. In this respect the Draft Constitutional Law of the Kyrgyz Republic "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" does not provide any specific safeguards. However, Article 26 of the draft law On introduction of changes to the Constitutional Law of the Kyrgyz Republic "On the status of judges of the Kyrgyz Republic" contains detailed list of conditions, grounds and procedures for the dismissal of the judge. It seems that in overall the issue has been addressed by the Kyrgyz authorities.

3. The Draft Constitutional Law of the Kyrgyz Republic "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" and draft law On introduction of changes to the Constitutional Law of the Kyrgyz Republic "On the status of judges of the Kyrgyz Republic" duplicates the grounds and procedures of selection of the Chamber judges. It is advisable that these issues are regulated by a single law.

4. During April 27-29 Venice Commission experts visited Bishkek and had a possibility to meet with the Members of the Parliament from ruling as well as opposition parties and coalitions, members of the Committee on constitutional legislation, state structure, legality and local self-governance and Committee on judicial and legal issues. Venice Commission experts also had a possibility to participate in the round table organized by the European Commission and the UNDP dedicated to the draft laws that had been submitted to the Venice Commission for the comments. During the visit Venice Commission held working meetings and exchange of opinions with the experts contracted by the UNDP working on the draft law.

5. It should be mentioned with satisfaction that these meetings and discussion were extremely productive and have resulted in number of draft amendments and changes to the draft law on Constitutional Chamber of the Supreme Court of the Kyrgyz Republic. Most of the comments and opinions on this draft have been shared by the dafters of the law and UNDP expert. The working document which entails revised provisions of the draft law has been submitted to the Venice Commission. It is acknowledged with the satisfaction that some if not most of the comments and recommendations found in this document have already been taken into account. Kyrgyz experts working on the draft law took a good note of the comments and address the concerns / issue raised by the Commission experts. However, taking into account that this is an informal document as well as in order to avoid possible duplications and inconsistencies, the current preliminary opinion is focused on the draft law, which was originally submitted to the Venice Commission.

II. Specific Comments

1. Article 1 of the draft law defines the Constitutional Chamber as "a judicial body which independently performs constitutional oversight". This article underlines the independence of the Chamber, however, it fails to indicate its status of a supreme judicial organ exercising constitutional control. Thus it would be advisable to bring the wording of this article in line with the spirit and content of the Constitution of the Kyrgyz Republic, under which the power of the constitutional control is granted to the Chamber.

2. Article 3 of the draft law stipulates that the "status, guarantees of independence, procedure of liability, dismissal and discharge of the judges of the Constitutional Chamber shall be defined in the constitutional laws, other laws as well as other normative regulatory acts. "Other normative regulatory acts" are not only constitutional and ordinary laws but also by-laws. Providing even theoretical possibility to dismiss or charge the judge on the basis and in accordance with the procedures defined under the by-law would highly undermines the independence of the judiciary. For that reason it is proposed that the words "and other normative regulatory acts" be deleted.

3. According to the draft law (Article 4) Constitutional Chamber has a competence to provide conclusions on draft laws on changes to the Constitution (in English text this competence is referred as pronouncement… on changes to the Constitution). However, the draft law does not clarify what part of the Constitution is taken as a base for the assessment. Will the amendments be assessed against the chapter on fundamental rights and freedoms and/or any other section of the Constitution? Does it entail the formal aspects: checking the procedural aspects of adoption, promulgation, etc.? It is also unclear from the draft if the Chamber has any role in case if amendments are proposed to the political and/or economic system of the country.

4. In principle the "pronouncement" can be made either on the basis of substantial review of constitutional amendments, by checking them against the fundamental principles enshrined in the Constitution and/or by checking compliance of the procedure on introducing changes/amendments with the requirements of the Constitution and/or constitutional law.

5. Venice Commission has earlier pointed out that there is no generally accepted standard in comparative constitutional law regarding the participation of constitutional courts in the constitutional amendment process . In practice it is extremely rare for the Constitutional Courts to undertake this function. Therefore, it is absolutely necessary to define clearly the role of the Constitutional Chamber of the Kyrgyz Republic in this regard, especially in relation to changes of the political system of the country.

6. According to the Article 4 para 1, sub-paragraph 2 of the Draft law, the Constitutional Chamber shall " make its pronouncement on constitutionality of international agreements to which the Kyrgyz Republic is a party and which have not entered into force". It would be advisable not to use of the term "constitutionality" hear but rather refer to the term "concordance with the Constitution". Apart from that it should be clarified that the Chamber has an authority to make pronouncement only with regard to those treaties that have not yet entered in to the force. Current wording suggests that in principle Chamber may invalidate agreements to which the Kyrgyz Republic is a party, which may include agreements which are already in force.

7. Article 4 para 2 (sub-para 3) of the draft law provides that Chamber shall "conduct an annual analysis of the status of the constitutional legality in the republic". In its earlier opinion

the Venice Commission mentioned that "Courts usually speak through their judgments rather than through reports...". However, in case if the Chamber will be authorised to publicize (rather than obliged to report to the executive) an annual report analysing the judgements and their execution, this would serve important function of informing public and thus contributing to increased transparency.

8. According to the Article 5 of the draft law "the composition of the Constitutional Chamber shall be formed in view of the representation of no more than 70 percent of persons of the same gender". While the policies aimed to ensure the gender balance at the public institutions should be strongly welcomed and all efforts in this direction praised, strict legal provision setting the number or percentage of the representatives of the same gender should be treated with caution, as these may lead to practical difficulties and may not always work for the benefit of the court.

9. Furthermore, during the working meetings as well as round table organized with the support of the UNDP, it has been mentioned that this provision could only be effective if Council on Selection of Judges is also obliged to take the gender issue into account while identifying the candidates. Therefore, it is recommended to include in the law on Council on Election of Judges recommendations / guidance that will encourage the Council to take the gender issue into account during the selection process, however, without indicating concrete percentage of representatives of the same gander.

10. Article 7 of the draft has quite an ambiguous content. It provides the judge of the Constitutional Chamber with the possibility to apply for the vacant position of the same Chamber after expiration of his/her term. Taking to account that the law provides with the life-time appointments of the judges but until the 70 years of age, the purpose of this article is not clear.

11. Article 7 also stipulates that applicants willing to be nominated for the vacant position of the Constitutional Chamber are required to submit medical health certificate. The purpose of gathering health related information about the applicants is not clear, it does not seem to affect the selection procedure. In any case if applicant has disabilities or other type of health related problems this information should be irrelevant for the selection procedure. Most probably certificate is requested to demonstrate that the candidate is mentally fit.

12. According to the Article 14 the Judge may be removed from the participation in the hearing in case if his recusal and/or dismissal. At the same time, Art 8 of the draft law provides that "a meeting of judges of the Constitutional Chamber shall be deemed eligible in the event that no less than two thirds of the total number of judges of the Constitutional Chamber are attending".

13. In order to avoid the situation when the hearings may be postponed indefinitely due to the lack of quorum, it is recommended to release the judge from the obligation to recues him/herself if recusal may lead to the lack of quorum. However, in such cases the judge must publicly announce about the existence of the grounds for recusal.

14. In order to ensure that the Chamber continues functioning in all circumstances and avoiding the risk of Chamber being paralyzed as a result of the lack of quorum, it would be desirable to apply the similar rule with regard to the retirement obligation.

15. Article 14 also states that "judge may not be removed from participation" in case if "his/her announcement of recuse is honored". In is not clear from the draft who and on what

grounds may honor or disapprove the announcement of self-recusal. As it was mentioned above, theoretically such announcement may not be honored by the Chamber in case if self-recusal would result in a lack of quorum. However, it is also questionable to oblige the judge to participate in the hearing against his/her will if judge perceives it as impossible to take part in hearing due to the conflict of interests.

16. It should also be noted that the draft law does not provide the parties with the possibility to demand the recusal of the judge. This possibility should be granted to parties in case if parties identify the grounds for recusal defined by the law.

17. Article 18, para 4, stipulates that: "Entering of a new judge in the sitting shall result in the resumption of proceedings on the case since the commencement of the trial". It is advisable to clarify that the newly elected judges should join in the hearing only in exceptional cases, such as when it is required to maintain the quorum.

18. Article 22 provides with the possibility of an individual appeals to the Chamber. This should be welcomed as it provides an important mechanism for protection of rights and freedoms guaranteed by the Constitution. However, this article theoretically provides with actio popularis, when everyone may bring an appeal to the Chamber questioning the constitutionality of any legal act in relation to the rights and freedoms guaranteed by the Constitution. It is not clear if this was an intention of the drafters. In nay case it should be recommended to revisit this provision limiting the right to appeal only those persons whose rights have been affected.

19. Article 22 of the draft law lists persons and entities having right to appeal to the Chamber, however, it does not clarify on what grounds they can appeal. His would mean that all subjects listed in the subparagraphs 2-10 of the part 1 of this article have a right to question the constitutionality of the legal act against any provision of the Constitution. Similar remarks were made with relation to the draft laws amending and supplementing the Law on Constitutional Proceedings and the Law on the Constitutional Court of Kyrgyzstan. At that time the Venice Commission stated that it is "important that there is a clear understanding of who has standing with respect to which competencies.... It seems that any authority or person with standing could bring a case under all five of the above competencies. The Law should specify who has standing for the various procedures before the Constitutional Court." Current law obviously bears the signs of the similar problem.

20. Article 23 contains an error. The article states that"…the right to submit a petition on declaring laws and other normative regulatory acts unconstitutional shall be assigned to entities listed in part 1 article 23 of the present constitutional law". It is an obvious misprint and should read Article 22 instead of Article 23. However, it is not entirely clear what was of the drafter's intention. Part 1 of Article 22 lists all "subjects for appeal" - everyone who is eligible to apply to Chamber. In this case Article 23 simply repeats the content of the previous article.

21. In this respect it should also be noted that Article 4 and Article 20 of the draft law listing the competences of the Chamber, does not specifically mentions jurisdiction over the disputes over competences between the branches of power. However, by listing organs such as Jogorku Kenesh, local keneshes, the Government, etc., as separate entities having the right to appeal to Chamber, may invite us to conclude that the Chamber may also be addressed with such an issue. It would be desirable to clarify this issue.

22. It should also be noted that Article 22 grants a single deputy of the Parliament the right to appeal to the Chamber, this may result in high number of petitions overloading the Chamber. It is advisable to revise this provision. In most of the European countries such a right

s granted to the factions of the Parliament and/or certain percentage of the MPes. This comment also applies to articles 24 and 25 of the Draft law.

23. Article 22 differentiates between the presentments, motions and requests. According to the draft the request (or petitions) could be submitted by the judges of the lower court, while "…agencies and officials listed in paragraphs 2-6 and 8-10 of the part one of this article shall submit to the Constitutional Chamber their presentment. The draft law proceeds further by stating that "other persons and agencies shall submit motions". It is not clear to what other agencies the draft is referring to and if there is any substantial difference between the presentments and motions.

24. Article 25 provides that only Jogorku Kenesh, a deputy (deputies) of the Jogorku Kenesh and the Government have a right "….to submit a petition on giving the pronouncement on the draft law on changes to the Constitution…" thus making thing even less clear. According to the part 2 of the Article 22 Jogorku Kenesh, a deputy (deputies) of the Jogorku Kenesh and the Government shall submit presentments.

25. According to the Article 27, para 6, requests from the petitioner to submit "circumstances, on which the party bases its petition as well as evidence confirming the facts presented by such party" It should be mentioned that the constitutional proceedings do not usually consider physical evidences. The constitutional review is mainly focused on the legal arguments rather than facts, which may be brought to the attention of the Chamber as evidence supporting the legal argument. Therefore, the parties should not be obliged to but rather given a possibility to submit the evidences.

26. Article 30 sets a five days time limit for deciding on admissibility of the case (acceptance of a petition for proceeding). The time limit seems to be too tight. Admissibility decisions frequently require thorough analysis of the challenged act(s), case law and constitutional provision(s). It may also raise complicated legal issues. The five day time-limit could turn out to be unrealistic in case of a heavy case flow.

27. It should also be noted that Article 30 refers only to petitions, which according to the Article 22 Part 2 is referred solely as a synonym of a request submitted by the judge ("2. Agencies and officials listed in paragraphs 2-6 and 8-10 of the part one of this article shall submit to the Constitutional Chamber their presentments, other persons and agencies shall submit motions and a judge (judges) shall submit requests (hereinafter referred to as the petitions"). In order to avoid misunderstanding and misinterpretation, the terminology used in the draft law needs to be reviewed carefully.

28. According to the Article 30, para 4, cancellation of an act, the constitutionality of which is being contested, shall result in the refusal to accept the petition. While Article 42 para 1, sub-para 3, stipulates that cancelation of an act shall also result in termination of constitutional proceedings with regard to the appeal, which has already been accepted for consideration by the Chamber.

27.1 It would be advisable to provide the Chamber with discretion in exceptional circumstances (such as in case of a high public interest) to consider an appeal. This provision should also be studded in the light of the Article 53, which provides persons with the possibility to request the review of the judicial acts based on provisions of laws or other normative regulatory acts, which were declared unconstitutional. Thus, in case if Chamber refuses to accept an appeal, the individuals remain without the possibility to remedy the infringed rights.

29. According to the Article 30 "5. The decision on refusal to accept the petition for proceeding or the receipt thereof may be subject to appeal by the parties to the Constitutional Chamber. The Constitutional Chamber shall adopt a separate resolution on this matter. According to the draft law the decision to reject the application is made by a single judge and in such circumstances it is not uncommon to have an appeal procedure. However, there might be a formal contradiction between the Articles 30 and 53. As far as the decisions to accept or refuse the claim should be regarded as a legal act of the Chamber, this provision may be in contradiction with the Article 53, which states that "The acts of the Constitutional Chamber shall be final and shall be not subject to appeal" as well as the Constitution of the Republic stating that decisions are final.

30. During the working meetings and discussions in Bishkek with the Kyrgyz experts working on the draft law, it was proposed to have a panel of three judges ruling on the admissibility. According to this amendment, the failure of the panel to reach consensus regarding the admissibility should result in transferring the case to the Chamber. It sound reasonable to have a panel of judges dealing with the admissibility issue and this would also solve the problem of contradiction between the articles of the law and Constitution. However, it seems to be over-complicated to insert the requirement of unanimous decision in order to accept or refuse the appeal.

31. Instead it would be reasonable to provide the Panel with the right to transfer of the case to the Camber if it finds that the admissibility decision is connected with the complicated and/or important issues of the law.

32. According to the Article 31 Constitutional Chamber must consider and decide on petition accepted for proceeding within the two months period. It is advised to provide the Chamber with more time for delivering the judgment on the merits. The speedy proceedings may not always be beneficial and may have negative implications for the work of the Chamber.

33. Article 32 regulate the time-limits for the delivery of copies of the case papers to all judges of the Constitutional Chamber and the participants in the sitting. In order to provide more flexibility and autonomy to the work of the Chamber, it is advisable if such details of the internal procedure of the Chamber are regulated by the Rules of Procedure adopted by the Chamber itself.

34. Article 32 requires substantial amendment as it establishes the procedures typical to general courts. There should be no duty on the part of the judge to provide assistance in obtaining evidence for submission to the Constitutional Chamber.

35. According to the same Article 32 he Chamber shall "ascertain the witnesses, experts and other persons, who should be invited and summoned to the sitting". This wording implies that the Chamber must identify the witnesses, experts, etc. It should be a right of the chamber but it sounds like an obligation.

36. Following the meetings and discussions with the Kyrgyz experts working on the draft law it has been agreed to recognize the right of any interested person to submit amicus curiae in relation to the constitutional appeal being considered by the Chamber. The purpose of amicus curiae brief is to invite representatives of the legal society as well as human rights groups to make their views known to the Chamber, giving possibility to provide analysis and expressing the views with regard to compliance of the challenged acts with Constitution. The drafters have also expressed readiness to stipulate specifically in the draft law that the Chamber shall also be allowed to request an expertise opinion from the persons and/or

institutions it deems necessary to approach. This approach from the experts should indeed be welcomed.

37. According to the Article 37 a "judge of the Constitutional Chamber should announce the self-recuse before the commencement of consideration of a case in the following instances: 1) in the event that the judge under his/her position participated in the adoption of the act which is the subject of proceedings; 2) in the event that the impartiality of a judge in adjudication may be questioned in view of his familial or otherwise personal relations to the parties in the proceedings." There might be other grounds for self-recusal as well.

38. According to the Article 42 the Constitutional Chamber shall terminate the proceedings on a case if applicant waives his/her claims. It should be mentioned that there are different viewpoints regarding the power of the Court to assess the constitutionality of the law in absence of the applicant actually challenging the infringement. There is no single model which is universally adopted by the countries. Therefore, it is indeed up to the state to make a choice between an adversarial system, where constitutional proceedings are allowed only in case if there are parties contesting at the court or more inquisitorial one, when the Courts are allowed to initiate constitutional review independently. It should be stressed that latter approach, when the Court's decision is made without examining the arguments of the parties as well as without any prove that the laws have ever been applied in an unconstitutional manner, have much higher probability of a mistake. This may also invite us to consider that this kind of abstract review may be less effective as it takes away the resources and time that should be dedicated to the individual concrete appeals.

It should be also specified that termination should be followed only in case if applicant waives the claim.

39. According to the Article 46, part 1 "In order to safeguard the dignity of the Constitutional Chamber and the participants in the sitting as well as to ensure due process of the constitutional legal proceedings, the Constitutional Chamber may remove the persons from the courtroom or impose a fine in the amount of up to five nominal fine rates for each case of violations, which are represented in the following: 1) proclamation of anti-constitutional statements and appeals irrespective of their wording;
This is a vague language which may lead to excessive restrictions and penalties. It is strongly advisable to remove or redefine it.

40. According to the Article 47, para 3, 3. the judgment of the Constitutional Chamber shall be signed by the chairperson and judges of the Constitutional Chamber. This provision fails to acknowledge the possibility of the dissenting and/or concurring judges to publicize their opinions. Without ensuring that dissenting opinions are published together with the decision of majority, it is not right to demand the dissenting judge to sign the decision he/she does not agree with.

41. Article 53 further states that "Judicial acts which are based on provisions of laws or other normative regulatory acts which were declared unconstitutional shall be revised by the court which adopted such acts in each concrete case based on the appeals of citizens whose rights and freedoms were affected. This step is aimed at increasing effectiveness of the constitutional review, provides individuals with real and effective possibility to remedy the rights infringed as a result of the unconstitutional provisions.

42. It should be mentioned that generally countries are extremely cautious and in rare cases introduce ex tunc effect of the Constitutional Court decisions with regard to the court

judgments already entered into force. However, there are number of countries, which in some extend provide such possibility.

43. Venice Commission has already expressed its opinion on this issue, when commenting on the similar provisions of the law regulating the authority and proceedings of the Constitutional Court of Kyrgyz Republic. It particular it has stated that a "...rigid application of an ex tunc effect could potentially have serious implications for society and could result in a heavy burden on the state budget if numerous cases have to be reopened, which date back to the distant past. The current legislation does not provide for an attenuation of this effect by the Constitutional Court, as is the case for example in Portugal where the Court itself can limit the effects of its ex tunc judgments. Limiting the effects of a decision of the Constitutional Court to future cases and cases, which have not yet been decision in final instance has an advantage from the viewpoint of legal certainty. Indeed the principle of legal certainty has been given the priority in the majority of states.

44. "However, it should be ensured that at least the complainant, especially an individual complaint, benefit from winning a case before the Constitutional Court. The choice between annulment and derogation also has effects on the individuals' readiness to file a complaint against a normative act. If the court invalidates the norm with prospective effect, the applicant's case will not be solved by the removal of the unconstitutional general norm. Therefore, to provide an incentive for individuals to complain against normative acts, some states envisage a retroactive effect of the decision applying uniquely to the applicant's case.

45. In case of Kyrgyz Republic, the possibility to revisit the court decisions is guaranteed by the Constitution. Thus the legislator has already made a decision in favor of giving ex tunc effect of the decisions of the Constitutional Chamber with regard to the court rulings, which indeed may have an extremely positive effect for the protection of constitutional rights and freedoms in Kyrgyz Republic. However, it would be strongly advisable to provide more detailed guidance / clarification with regard to the grounds and procedures leading to the reopening of the cases.