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(VENICE COMMISSION)

COMMENTS

**ON THE CONSTITUTIONAL SITUATION
IN THE KYRGYZ REPUBLIC**

by

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Introduction

The speaker of the Kyrgyz Parliament Mr Marat Sultanov asked the Venice Commission in a letter dated 15 October 2007 to comment on the constitutional developments that took place in the Kyrgyz Republic and to provide an analysis of the Constitutional Court's decision of 14 September 2007 as well as of the documents that were to be adopted by referendum on 21 October 2007, i.e. the Law on the new redaction of the Constitution and the new electoral code.

Preliminary remarks:

It is understood that the focus of the analysis should be laid on the decision of the Constitutional Court that triggered the whole reform. The newly adopted Constitution cannot be analysed as a whole, but only in respect of the principle of the separation of power and the checks and balances provided for within the system. Only the way of adoption, but not the contents of the Electoral Code will not be commented upon.

1) The Decision of the Constitutional Court of 14 September 2007-12-02

On the 14 of September 2007 the Constitutional Court adopted a decision on the constitutionality of the law on the amendment of the regulation of the Jogorku Kenesh adopted on 8 November 2006. By this amendment new rules for the adoption of changes of the Constitution of the Kyrgyz Republic are fixed.

The Constitutional Court considers these rules to be unconstitutional. It argues that the procedure for amendments and supplements to the Constitution of the Kyrgyz Republic are contained in Article 96 of the Constitution of 2003. According to Article 96 para 3 of the Constitution of 2003 proposals on introducing amendments and supplements to the Constitution of the Kyrgyz Republic shall be considered by the Legislative Assembly and Assembly of People's Representatives, taking into account the ruling of the Constitutional Court of the Kyrgyz Republic, no earlier than three months and no later than six months from the day of submission of the proposal to the Legislative Assembly and Assembly of the People's Representatives. According to the new law neither a ruling of the Constitutional Court is required nor have special time frames to be observed. The Constitutional Court holds that the new law contradicts the procedure set out in the Constitution and therefore violates Article 1 para. 3 and 5, Article 7, Article 12, Article 22 para. 2, Article 58 and Article 96 of the Constitution of 2003. The main argument is that the Jogorku Kenesh has overstepped its competences fixed in Article 58 of the Constitution of 2003 and that it cannot change a law adopted by referendum.

The Jogorku Kenesh on the other hand claims that the Constitutional Court has overstepped its competences by declaring an act unconstitutional on the basis of a the Constitution of 2003 that was no longer in force at the time when the decision was adopted. In a postanovlenie dated 18 September 2007 the Jogorku Kenesh stresses that the Constitutional Court's decision is illegal and expresses its mistrust in the Constitutional Court.

The legal question is therefore if the Constitutional Court could still argue in September 2007 on the basis of the Constitution of 2003 although it had lost its force on 9 November 2006 with the entry into force of the new Constitution that was abrogated and replaced by the new Constitution of 15 January 2007.

Generally, Constitutional Courts are bound by the texts of the Constitution valid at the moment when they take a decision. Former versions of the Constitution are irrelevant. This may be not stated explicitly, but it is the underlying idea of constitutional provisions granting constitutional courts the right to protect the constitution.

Thus the Constitutional Court would not be bound by the Constitution of 15 January 2007 or by the Constitution of 9 September 2006 only if both Constitutions were invalid. Only in this case the Constitution of 2003 could still be applied. They could be invalid if they were not passed on the basis of the procedure foreseen in the Constitution of 2003. As a matter of fact, they were passed on the basis of the procedure foreseen in the amended law on the Regulation of the Jogorku Kenesh. This law seemed to be valid at the time the new constitutions were enacted. But it could have lost its legal force retroactively on the basis of the decision of the Constitutional Court of 8 September 2007. This seems to be the idea underlying the Constitutional Court's decision.

But there are two problems.

First the wording of the Constitution of 2003 seems to make it clear that decisions of the Constitutional Court declaring a law unconstitutional do not have a retroactive effect. Thus it is stipulated in Article 82 para. 4 of the Constitution of 2003: "If the Constitutional Court declares laws or other acts unconstitutional, such laws or acts shall no longer be in effect on the territory of the Kyrgyz Republic; such a finding shall also annul normative and other acts which are based on the act declared unconstitutional." The wording "no longer" seems to exclude retroaction.

The second problem is that even if the Constitutional Court's decisions were accorded retroactive effect, this effect would be triggered by the Constitutional Court's decision, but could not precede it. That means that the Constitutional Court would still have to apply the Constitution valid at the time the decision is taken and could not rely on the former Constitution.

It has to be seen that this interpretation limits the role of the Constitutional Court as it cannot react to a breach of the provisions on constitutional amendments in the case of the adoption of a new Constitution. As soon as a new Constitution is in force the Constitutional Court is bound by it.

Another result might only be achieved if a new Constitution elaborated on the basis of a breach of procedural requirements would be deemed invalid *per se* (even before the Constitutional Court's decision; in this case the Court is seen only to *confirm* and not to establish the invalidity of unconstitutional laws). That is the solution of the German Grundgesetz. There might be doubts as to whether the Kyrgyz Constitution of 2003 envisages such a possibility. Furthermore it has to be stressed that such an interpretation would have important consequences. All the actions based first on the Constitution of 9 November 2006 and then on the Constitution of 15 January 2007 would be without a legal basis. That would also apply to the election to some of the constitutional judges taking part in the relevant decision.

In this context it is interesting to note that the new Constitution adopted by referendum on 21 October 2007 contains a provision on the abrogation of the Constitution of 9 November 2006, of the Constitution of 15 January 2007 as well as of the law of the Jogorku Kenesh of 8 November 2006 (Part II Paragraph 2 of the Constitution of October 2007). Such a provision would not make sense if these legal acts had been abrogated by the decision of the Constitutional Court retroactively or had never been valid.

The Constitution of the Kyrgyz Republic enacted by Referendum

The process of amending the Constitution has been going on for quite some time. It started with the "tulip revolution" in 2005. Since then many different proposals have been discussed. The Constitution enacted by referendum on 21 October 2007 is the third within one year.

The Constitution of October 2007 contains six chapters, a chapter on the general constitutional principles (Chapter I), a chapter on human rights (Chapter II), a chapter on the President (Chapter III), a chapter on the legislative power in the Kyrgyz Republic (Chapter IV), a chapter on the executive power in the Kyrgyz Republic (Chapter V), a chapter on the central organs of power in the Kyrgyz Republic including the prokuratura, the national bank, the central election commission, the audition chamber, and the ombudsman (Chapter VI), a chapter on the judicial power in the Kyrgyz Republic (Chapter VII), a chapter on local State administration (Chapter VIII), and a chapter on amendments to the Constitution (Chapter IX). Part II of the Constitution contains transitory provisions.

Provisions on human rights

The provisions on human rights do not seem in the focus of the present constitutional debate. Therefore they have not been analysed thoroughly.

It is to be welcomed that the death penalty is abolished. Although there is no explicit provision on this point, this can be induced from the guarantee of the right to life that does not allow for any exceptions.

Article 18 contains a general clause on potential limitations of human rights. The preconditions enumerated are generally in line with the provisions of the European Convention on Human Rights. It might be stressed that the words "on the basis of a law" ("zakonami") should be interpreted as excluding limitations based on ukazy of the President or postanovlenija of the Government. The safeguard that limitations must not touch upon the core of the rights is to be welcomed.

It is interesting to note that outside the section on human rights there is a provision prohibiting any limitations of the freedom of the press. It is not quite clear how this provision has to be interpreted in relation to Article 14 para. 6 that also grants the freedom of the press, but can be limited on the basis of Article 18.

Provisions on the Judicial System

The independence of the judges is laid down in Article 83 of the Constitution and secured by various provisions, among other things by granting immunity and material guarantees. It is to be welcomed that judges are nominated for life-time after a five years probation period.

The regulations on the judicial system are much less detailed in the present Constitution than they were in former Constitutions. The procedure for a revocation from office is only regulated in respect to judges of the High Court and the Constitutional Court, not for local judges. It is not clear what the preconditions for the dismissal of judges are. Furthermore the Constitution refers to a system of "rotation" without explaining what is meant by that. Contrary to former versions of the Constitution there are no detailed regulations on the composition and functioning of the National Council of the Judiciary although it plays a very important role (cf. the general provision of Article 84 para 5 of the Constitution).

On the basis of these regulations the safeguards for the independence of the judiciary might be seen to be somewhat weak.

The competence of the President to nominate the presidents and vice-presidents of the Constitutional Court and the High Court (Article 83 para 5) might be seen as an unnecessary interference of the executive branch into the domaine réservé of the judicial branch.

The regulations on the Constitutional Court are quite vague as well. Thus the procedures and competences of the Constitutional Court are enumerated, but the important question who can initiate those procedures remains unanswered.

Provisions on the competences of the main actors

The power the President gets from the people is almost unrestricted.

The proclamation of the principle of the separation of powers is explicitly fixed in Article 7. But there are other provisions that suggest a concentration of State power in the hands of the President. Thus the President is the “symbol of the unity of the people, of State power and of the inviolability of the Constitution” (simvol edinstva naroda i gosudarstvennoj vlasti, garant Konstitucii, svobod i prav človeka i graždanina) (Art. 42). Furthermore the President is called upon to “secure the unity and continuity of State power, the harmonious functioning and the interaction of the state organs and their responsibility before the people” (obespečivaet edinstvo i preemstvennost' gosudarstvennoj vlasti, soglasovannoe funkcionirovanie i vzaimodejstvie gosudarstvennyh organov , ich otvetstvennost' pered narodom, Article 42 of the Constitution).

The President dominates the executive (cf. Article 42 of the Constitution):

- He defines the fundamental directions of external and internal policy of the State
- He appoints the Prime Minister on the basis of a proposition by the strongest party in Parliament (detailed provisions in Article 46 para 1 in connection with 69 et seq.)
- He can dismiss the Prime Minister and the Government as well as the ministers without any special reason
- On the basis of a proposition of the Prime Minister he can appoint the heads of the administrative organs and other organs of the executive branch; he can dismiss them on his own initiative
- He can appoint and dismiss the heads of the local State administration
- He appoints the State Secretary and defines his status and competences and forms the Presidential Administration
- He builds up and presides over the Security Council and the Secret Service
- He builds up and structures all the State organs that are under his command and appoints and dismisses the leaders
- He can even determine the conditions of payments for the civil servants (opredeljaet ulsovija oplaty truda gosudarstvennyh i municipal'nyh služuščich)
- With the consent of the Parliament he appoints and dismisses persons to all the other key positions in the State (Procurator general, Chairperson of the National Bank, chairperson as well as half of the members of the Central Election Commission, Chairperson of the Auditing Chamber)
- He introduces all the candidates for the Constitutional Court that are then elected by Parliament
- He can suspend all the normative acts of the Government and other organs of executive power
- He can call the Jogurku Kenesh before the set time and decide on the questions it has to deal with
- He can call for a referendum on his own initiative and decide on a referendum initiated by 300 000 voters or by the majority of the deputies
- He is commander of the Army
- He can call for the introduction of the state of emergency, mobilization and the declaration of the state of war, if necessary even without the consent of the Parliament although the Parliament has to confirm the decision

The President has a decisive influence on the exertion of legislative power

- He has a right to veto all parliamentary laws without giving any reason. The Parliament can overrule the veto with a qualified majority
- He can introduce draft laws into Parliament. He can determine the priority treatment of draft laws in case of urgency.
- The President has the right to issue decrees and regulations

The only provisions that might limit a misuse of presidential power is the prohibition of re-election after two terms of five years (Article 43 para. 2 of the Constitution) and the regulation on the dismissal from the office on the basis of a charge of high treason or of another grievous crime supported by a ruling of the General Procurator and the Constitutional Court. The Jogurku Kenesh has to take a decision by two thirds of the deputies on the basis of a ruling of a special commission. The whole procedure has to come to an end within three months.

Contrary to former versions of the Constitution the present Constitution does not contain any detailed regulations on the elections of the President (procedure, confirmation etc.).

The system established is clearly a presidential system. The powers of the President are enlarged in comparison to the last version of the Constitution that already granted more powers to the President than former Constitutions. It is important to note that the President has now the power to determine the structure and the personal composition of State organs as well as their payment.

In comparison to other models of democracy in Europe the system established in Kyrgyzstan on the basis of the new Constitution seems to show quite a significant shift of power to the President. As this is not really counterbalanced by the competences given to the legislative and judicial branches, the newly established system might not be in conformity with the principle of separation of powers that the Constitution itself declares to be of fundamental importance.

The new Electoral Code

The new Electoral Code is very comprehensive and cannot be judged in its entirety. It might just be stressed that it is problematic to adopt an electoral code on the basis of a referendum. The citizens cannot be expected to study such a detailed law, especially if they have no other option but to accept or to reject it as a whole. Furthermore, it renders changes to the law unnecessarily complicated.