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(VENICE COMMISSION)

COMMENTS

**ON THE LAW ON COURT JURIES
OF THE KYRGYZ REPUBLIC**

by
Ms Angelika NUSSBERGER
(Substitute Member, Germany)

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Introduction

The Constitutional Court of the Kyrgyz Republic has asked the Venice Commission to adopt an opinion on the law “On court juries in the Kyrgyz Republic”. This law is part of a series of laws reforming the judicial system of the Kyrgyz Republic as a consequence of the constitutional changes in this field.

Preliminary remarks

The opinion is based on an English version of the new law. It seems that the Venice Commission has been given one draft out of various drafts currently debated in Kyrgyzstan. An analysis (in Russian) prepared for the OSCE refers to another draft.

Comments on the new law

According to the explanatory memorandum to the draft law the main aims of the new law are to “bridge the gap between the judicial system, courts and society” and to put an end to corruption. The perception that a jury system can enhance fair trial and lead to higher acquittal rates can be based on historical evidence. Nevertheless, caution is necessary. Jury systems by themselves are not a guarantee for the independence and fairness of justice. It all depends not only on the legal framework, but also on the practical application of the rules.¹

1) Participation in the dispensing of justice – right or duty?

The constitutional basis for the new law is Article 15 and Article 82 of the Constitution.

Article 15 para. 6

Everyone shall have the right to have their case examined by a court with the participation of jurors in cases stipulated by law.

Article 82

1. Judicial authority in the Kyrgyz Republic shall be exercised solely by a court.

In the cases and under the procedures provided for by law, citizens of the Kyrgyz Republic shall be entitled to participate in the administration of justice.

2. Judicial authority shall be exercised by means of constitutional, civil, criminal, administrative and other forms of legal proceedings.

3. The judicial system of the Kyrgyz Republic shall be established by the Constitution and laws and shall consist of the Constitutional Court, the Supreme Court and local courts. Specialised courts may be established by constitutional law.

¹ The report of the OECE meticulously analyses the forms in which jury systems can be misused.

The creation of extraordinary courts shall not be permitted.

4. The organisation and operating procedure of the courts shall be defined by law.

Article 82 explicitly grants an *entitlement to participate in the administration of justice*. The wording reminds of other participation rights such as the right to participate in the government of the State (e.g. Article 23 of the Kyrgyz Constitution). This approach differs from other European Constitutions which fix only the *right of the accused* to be judged by a jury in cases of especially serious crimes (cf. Article 22 of the Russian Constitution), not a citizen right to participate in the adjudication of cases. Accordingly, taking part in jury trials is conceived not a right, but as a duty.

The new Kyrgyz law mirrors the constitutional provisions and explicitly states that the citizens are “entitled, in circumstances provided for in law, to participate in the dispensing of justice.” (Article 1 para. 1). At the same time the law explains that the participation in the exercise of justice is a “civil duty” (Article 1 para. 3).

In this context it might just be mentioned that it is not entirely clear what it means to be entitled to participate in the dispensing of justice. In Article 7 para. 3 it is explained that candidates for jury service are chosen by “means of random selection” (Article 7 para. 3). Therefore the entitlement mentioned in Article 1 has to be understood as a right to take part in the random selection process. It is not clear by which procedure these rights can be realised if they are denied by the administration; there is no judicial remedy.

It is also not clear how the civil duty mentioned in Article 1 para. 3 can be enforced in case the candidate chosen declined to take part in a process.

2) Definition of the legal basis

According to Article 2 there is a *numerus clausus* of legal acts determining the status of jurors, whereas Article 3 mentions “other legal and regulatory acts” and is thus open for regulations in various laws. This seems to be contradictory.

3) Number and status of jurors

Article 4 is the basic prescription explaining that jurors take part in the adjudication of “criminal cases regarding particularly serious crimes”. They can be involved at the “request of a party admissible under the procedure established by the Code of Criminal Procedure”. Apparently this includes the accused person, the procuror as well as the victim.

The number of jurors is set at 12. This seems to have been controversial; the presidential administration wanted to have only 7 or 9 jurors. 12 jurors are better because a larger number of jurors helps to base the decision on a broader consensus.

Article 4 para. 3 mentions that “any influence on that process by persons with an interest in the outcome of the case” shall be precluded. This wording is very vague. In order to become operational it is recommended to clearly define what is meant by “interest in the outcome of the case” and to set up a procedure for excluding those having a specific interest. (This might have been done in the Code of Criminal Procedure; but this document is not available for the present analysis).

4) Prerequisites for being a juror

According to its heading Article 5 regulates the “requirements imposed on jurors”. In fact, it explains who is excluded from being a juror. The age limit is set at 25 years. This might be criticised with a view to age discrimination, but similar age limits not uncommon in European practice concerning both judges and jurors.

In addition to excluding certain persons from the lists of candidates for jury service, some persons can be excluded from the examination of a given criminal case (Article 5 para. 3). According to Article 5 para. 3 No. 2 persons not speaking the language in which the proceedings will take place can be excluded. This provision can only be judged on the basis of the provisions on the languages used in criminal procedure. There is a danger that such a provision can lead to the exclusion of minorities.

5) Selection mechanism

The procedure for identifying and selecting candidates is explained in some detail in Articles 6 et seq. of the law. It is mainly based on a cooperation between the President of the Supreme Court and the regional administration in order to identify candidates. The basic idea is to have a random selection among those registered as voters. It might be advisable to explain the process of “random selection” in order to exclude misuse and corruption.

It is noticeable that all citizens have the right to submit written notification concerning unfounded inclusion and exclusion of candidates. It is difficult to imagine if this procedure will work in practice and if it is possible for the administration to check the written notifications within 5 days only (Article 7 para. 11).

Article 8 fixes the obligation of officials and leaders of organisations to submit information concerning the compiling of the list. It is not clear in which context such additional information is necessary in so far as the selection process is based on the lists of the registered voters only. Which organisations are meant here?

Article 9 is especially important as it regulates who can be excluded from the list of candidates by the administration. It excludes a wide range of professionals such as judges, prosecutors, military servicemen etc. This is to be highly welcomed.

6) Material compensation and guarantees

Article 12 regulates the material compensation for the jurors. This seems to be acceptable so that the jurors do not have financial disadvantages because of their work.

The regulations on independence and immunity of jurors are very short also in comparison to earlier versions of the draft. The guarantees of independence and immunity of judges on the basis of the law “On the status of judges of the Kyrgyz Republic” is extended to jurors and members of their family. An assessment of this provision is not possible as the regulations referred to are unknown. It might just be mentioned that it seems to be strange that immunity also applies to the members of the family.

Article 13 para. 2 establishes that persons hampering a juror in the fulfilment of his or her function shall bear liability. This provision is extremely vague. It is recommended to explain concretely what is meant by “hampering the fulfilment of the duty”.

Summary

The new law has to be read together with several other laws that are not yet available. Therefore the comments can only be preliminary. Whereas the overall conception of including jurors in criminal trials on the most serious crimes seems to be a promising approach to enhance fair trial, some details of the new regulation remain rather vague. This applies especially to the exclusion of persons having an "interest" in the outcome of the process, to the guarantees of independence and immunity and to the procedure of "random selection".