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PRELIMINARY COMMENTS
ON THREE DRAFTS
FOR A REVISED CONSTITUTION
OF THE KYRGYZ REPUBLIC

by

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Introduction

These preliminary comments were prepared by Ms Angelika Nussberger (Germany) and Mr Anders Fogelklou (Sweden) on behalf of the Venice Commission following a request for comments from the Presidential Administration of the Kyrgyz Republic through the OSCE Centre Bishkek.

The comments were prepared under great time pressure and have to be regarded as preliminary. A more thorough scientific analysis of the texts would be desirable. However, these preliminary comments should already be useful to the Kyrgyz authorities when deciding on the further steps to be taken with respect to constitutional reform.

I) Comments on common provisions in all three drafts

1) Human rights and freedoms

It is clearly set out that the death penalty is abolished. That mirrors the European standard and is to be welcomed. It is a clear step in the right direction compared to Art. 18 of the present Constitution.

The sections of the draft constitution dealing with human rights have not been thoroughly analysed. In general, all three drafts are however a clear step forward with respect to the existing Constitution. Still some provisions are worth commenting upon.

In the light of internationally accepted human rights and freedoms the following provisions might cause problems:

- General prohibition of political parties on the basis of religion (Art. 8 No. 5)
- General prohibition of political aims of religious communities (Art. 8 No. 5)
- Prohibition of all activities of foreign political parties, civil and religious organisations and their representatives and departments to pursue political aims (Art. 8 No. 5)

The notion "political aims" ("političeskie celi") is very broad and can easily be misused. Under the European Convention on Human Rights (Art 11) restrictions of the freedom of assembly and association are only possible if they are "necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." The provisions in the draft constitutions go much further. If interpreted in a broad sense, they might render the work of foreign non-governmental organisations in Kyrgyzstan impossible.

- Prohibition of any restriction of the freedom of expression and the freedom of press (Art. 37 No. 5 Mixed Constitution, Art. 36 No. 5 Parliamentary Constitution)

The exclusion of any sort of restriction of the freedom of expression and the freedom of press goes very far and is probably not realistic as certain restrictions are necessary for the safeguard of national security and for the protection of the rights and reputation of other persons.

In the drafts of the new Constitution there is a new section on an ombudsman for the control of the observance of human rights and freedoms. This is a new institution in Kyrgyzstan that can play a positive role in society.

2) Judiciary system and prokuratura

The regulation on the prokuratura is new and gives a constitutional basis to the "nadzor"-system. The detailed rules are delegated to the legislator. The nadzor-system might endanger the independence of the judiciary and the right to a fair trial (see the jurisprudence of the European Court on Human Rights). The regulation in the Constitution is too vague to predict how the system will function. In the June draft it was also vague, but still more concrete than now.

The independence of the judges is laid down in all the new drafts of the Constitution (Art. 56 Mixed Constitution, Art. 56 Presidential Constitution, Art. 52 Parliamentary Constitution). In general, all three drafts constitute clearly a step forward with respect to the present Constitution. Nevertheless, having regard to the details of the regulations, there remain some threats to the independence of judges.

- Thus judges stay only in office "as long as their behaviour is irreproachable ("poka ich povedenie budet bezuprečnym"). They can be dismissed before the end of their term

"only on grounds that are laid down in a constitutional law as well as in the case of a violation of the ethical codex".

- That means that the legislator is free to determine the reasons for dismissing a judge. Contrary to the draft of June 2005 the reasons for dismissing a judge are not defined in the Constitution. The notion "irreproachable" is very broad. It is not clear what might be reproached to the judge and lead to the end of his or her term. Although the procedure of dismissal is defined (High Court judges can be dismissed before the end of their term only by a two-thirds majority vote of the Parliament on the basis of a proposition of the National Council of the Judiciary; lower court judges can be dismissed on the basis of such a proposition by the President), the safeguards against dismissal are too weak to guarantee the independence of the judiciary. Especially it might be very easy to find a violation of the ethical code. Still, it is better than in the June draft, where – according to the wording of the provision – a dismissal by the President together with a two-thirds majority of the Parliament was possible without giving any reason.

- The right to immunity is guaranteed only in a restricted form, i.e. only "in connection with fulfilling the duties of a judge" (v svjazi s otpravleniem pravosudija). There is no constitutional guarantee against other illegal encroachments upon the freedom of a judge. In earlier drafts of the new Constitution the right to immunity was broader.

- The Constitution previews a system of rotation of the judges that has to be fixed by law (Art. 54 .5). It is not explained what is meant by that. Generally it should be seen as a prerequisite for judicial independence to guarantee personal stability to the judges.

The new regulations on the National Council of the Judiciary are to be welcomed. The Council is composed of 16 people, 4 deputies of Parliament, 4 judges, 4 lawyers and law professors, the Minister of Justice and 3 representatives of human rights organisations. This body makes propositions for the nomination of judges. This system seems to be preferable to the procedures laid down in the earlier drafts of the Constitution. – It may be noted that the Constitution establishing a presidential system is not unequivocal at that point as the right to make propositions is only mentioned in the section on the judicial system (Art. 58), but not in the section on the powers of the President (Art. 36).

The new regulations on the terms of the judges' appointments are to be welcomed as well. Now the judges have to be nominated first for a period of 3 years and then up to the age limit of 65 years. This regulation is helpful for securing the independence of the judges.

It is deplorable that the Constitutional Court has been abolished in all the new drafts despite repeated public statements in favour of maintaining this important institution made inter alia by

President Bakiev. There remains only a constitutional chamber of the High Court with restricted competences. The constitutional chamber cannot annul unconstitutional laws, but only "decide on the question of their compatibility with the Constitution". If a law is declared to be unconstitutional the application is suspended (dejstvie … priostanavlivaetsja) and the law is sent to Parliament. It is the Parliament's task to make the law compatible with the Constitution (privedenie v sootvetsvie s Konstitutciej).

Compared to the Constitutional Court as it is established in the present Constitution the Constitutional Chamber has lost the following competences:

- Decision of disputes concerning the effect, use and interpretation of the Constitution. By contrast, the power of interpreting the Constitution is given, in accordance with the Soviet tradition, to parliament. This is not in line with a modern system of separation of powers.
- Determination of the validity of the elections
- Ruling on an impeachment against the President
- Consent to the criminal prosecution of local judges
- Annulment of unconstitutional decisions of the bodies of the local self-government

On the other side the Constitutional Chamber also gets new competences:

- Decision on the question of the compatibility of not ratified international treaties and new laws (before their enactment) with the Constitution
- Decision on constitutional complaints of the citizens

The last competence is different from what was foreseen in the June draft. There the Constitutional Court was given the competence to rule on the constitutionality of the law-enforcement practice that affects constitutional rights of citizens. It was not clear if the citizens themselves could directly go to the Constitutional Court. Now the citizens have been given this right. But not the constitutionality of the application, but only the constitutionality of the law itself is examined.

Despite the progress made in some points, the abolishment of the Constitutional Court does not seem to be a step in the right direction

II) Comments on the draft of the Constitution establishing a presidential system

The power the President gets from the people is almost unrestricted. The proclamation of the principle of the separation of powers is not unequivocal. Although it is explicitly fixed in Article 3.1, there are other provisions that suggest a concentration of State power in the hands of the President. Thus the President is the "guarantor of the unity of the people, of State power and of the inviolability of the Constitution" (garant edinstva naroda i gosudarstvennoj vlasti, nerušimosti Konstitucii) (Art. 33). Furthermore the President is called upon to "secure the unity and continuity of State power" (obespečivaet edinstvo i preemstvennost' gosudarstvennoj vlasti).

The President completely dominates the executive:

- The President is elected directly by the people
- The President is the only central organ of executive power. There is no Government (cf. Chapter 3 of the Constitution: Executive Power, Sub-Chapter 1: President; there is not sub-chapter 2 on the Government, instead there is only a vice-president and ministers directly reporting to the President)
- The President defines the fundamental directions of external and internal policy of the State (Art. 33)
- He alone – without any co-operation of other State bodies – appoints and dismisses the vice-president, the ministers and all the other heads of organs of the executive power. He can also define their competences; everybody has to report to him. Furthermore he founds and dismisses State organs, although this competence has to be executed "in compliance with the law" (Art. 36).
- He has the power to make proposals for the election of the mayors and can dismiss them with the consent of the Parliament (Art. 36)
- He can even determine the system of paying the civil servants (opredeljaet edinuju sistemu oplaty truda gosudarstvennych služaščich) (Art. 36)
- With the consent of the Parliament he appoints and dismisses people 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, ombudsman)
- He can determine the budget which has to be confirmed by the Parliament. Laws on financial matters can be introduced into the Parliament only with the consent of the President (Art. 52.3)
- He can suspend or change all decisions ("rešenija") of the executive State organs (Art. 36.5)
- He is commander of the Army
- His competences concerning the introduction of the state of emergency, mobilization and the declaration of the state of war go very far, as the Parliament is only involved subsequently. The President can act in urgent cases, but has to inform the Parliament without any delay (Art. 36.8), the Parliament can confirm or modify the ukazy of the President (Art. 47.1). Generally all measures for the protection of sovereignty and territorial integrity fall into the competence of the President (Art. 33).

The President has a decisive influence on the exercise of legislative power and can take over the functions of the legislative power completely

- The President can fix the elections for Parliament and for the local self-governement bodies (Art. 36.6)
- The President can initiate a referendum (Art. 36.6)

- He has a right to veto all parliamentary laws without giving any reason. There is no possibility for the Parliament to overrule the veto with a qualified majority (Art. 36.5); Parliament has to adopt a new law based on the critical statements (vozraženija) of the President.
- He can introduce draft laws into Parliament (Art. 36.5). He can determine that the priority treatment of draft laws in case of urgency.
- The right of the President to issue decrees and regulations (ukazy i pasporjaženija) is unlimited as to the material scope of regulations. But it is laid down that the acts of the President have to be in conformity with the Constitution and the laws.
- In the case of self-dissolution of the Parliament the President takes over all the competences with the exclusion of questions of personal policy ("kadrovye voprosy") (Art. 50.3); in this case the President's ukazy have the force of law.

The only provisions that might limit a misuse of presidential power is the prohibition of re-election after two terms of five years (Art. 34.2) and the regulation on removal from office in case of corruption or commission of a grievous crime (introduction of the procedure by absolute majority in Parliament on the basis of an expertise by a special commission, dismissal of the President with a two-thirds vote) (Art. 41). The three months time limit provided for this procedure seems excessively short.

Without going into further details it is evident that there is practically no balance of power between the three branches of power. There are not enough mechanisms to prevent a misuse of presidential power. The impossibility for parliament to override a presidential veto even with a qualified majority and the unlimited scope of presidential decrees seems incompatible with the normal functioning of a democratic presidential system. The adoption of this version of the Constitution would constitute a step back from the ideal of a democratic order in Kyrgyzstan.

III) Comments on the draft of the Constitution establishing a mixed system

In the mixed system the position of the President is weaker than in the draft of a presidential system, but still very strong in comparison to other democratic systems in Europe.

The position of the President as head of the executive power is only slightly modified in comparison to the presidential system:

- The President is directly elected by the people
- The President does no longer guarantee the "unity of the State power", but is considered as a "symbol" (Art. 43) But the President is still called upon to secure the "unity and continuity of State power".
- The powers of the executive are divided between the President and the Government (Chapter 4 of the Constitution has two sections: one on the Government and one on the President). The powers of the Government are quite restricted in comparison to those of the President.
- The President doesn't have the right to dismiss Parliament.
- The structure of the Government is determined by the President, but confirmed by the Parliament in form of a law. The Parliament also adopts a constitutional law on the Government defining the activities, competences and the composition.
- The Parliament is involved in forming the Government by giving its subsequent consent. As the consequences of a denial of consent are not regulated, it is not clear if this is an effective mechanism of balance of power (Art. 40).
- The Parliament can pass a vote of no confidence against each member of Government. The consequences are not regulated, though. The President is not obliged to dismiss the member of Government concerned (Art. 34.7).
- The President still has the dominating position within the executive. The following competences are worth mentioning

    - He is the head of the Government (Art 39.3)

    - He forms and governs the Security Council (Art. 46.5)

    - He determines the foreign policy (Art. 46.3)

    - He can suspend and modify normative legal acts of the Government and other bodies of the executive (Art. 46.5)

    - He has the same powers to determine a state of emergency or a state of war as in the Constitution establishing a presidential system. It is strange, though, that in this case it is not clearly regulated that the Parliament can modify and confirm the relevant ukazy of the President (Art. 34.1.20 and 34.1.21of the Mixed Draft in comparison to Art. 47 of the Presidential Draft).

- The draft does not provide for the position of Prime Minister. Without a Prime Minister the government will however not be able to have real authority independently from the President. A Prime Minister is a necessary feature of any mixed or semi-presidential system.

The influence of the President on the exercise of legislative power is still very strong:

- The President has a right of vetoing laws without giving any reasons. But the Parliament can overrule the veto with a 2/3 majority (Art. 38).
- Apart from that the regulation on the interaction between President and Parliament is quite similar to the presidential version of the Constitution (cf. right to initiate a referendum, fixation of elections, right to issue decrees and regulations without limitations of the substance matter). But in the case of a self-dissolution of the Parliament the competences are not transferred to the President (cf. Art. 35.3 and 35.4 of the Mixed Draft vs. Art. 50 Presidential Draft).

There are only a few mechanisms of control and limitation of the Presidential power:

- As in the presidential system the President cannot be elected for more than two terms of five years
- The procedure of removal from office is regulated in a slightly different way. The procedure can be started without reference to any specific reasons. It is enough to formulate an "accusation" (obvinenie) that has to be confirmed by a special Committee of the Parliament. Contrary to the presidential system a dismissal has to be based on a majority of votes of three-fourth of the members of Parliament.

In principle, a mixed or semi-presidential system may be regarded as well suited to the present stage of democratic development of the Kyrgyz Republic and this draft probably is the best of the three alternative drafts. Nevertheless, having regard in particular to the lack of the position of Prime Minister, the draft seems more presidential than mixed and should be thoroughly reviewed in this and other respects.

IV) Comments on the draft of the Constitution establishing a parliamentary system

In this draft power is concentrated with the Head of Government, whereas the competences of the President elected by Parliament are generally restricted to the traditional competences of a weak Head of State in a Parliamentary system. There are only two important exceptions: The President – and not the Head of State – is given the right to veto parliamentary laws. The veto can be overruled by a 2/3 majority, in the case of constitutional laws by a ¾ majority. Furthermore the President can issue decrees and regulation without any limitation as to the substance matter.

The Head of Government as well as the members of Government are elected by Parliament. The Head of Government has to be proposed by the strongest party (Art. 45.3). This is questionable since the decisive point is not which party is strongest within parliament on its own but which candidate is most likely to be able to build a coalition which comprises the majority of seats within parliament. The other members of Government are proposed by the Head of Government. If the Parliament does not succeed in forming a Government within four weeks, the President has to dissolve the Parliament (Art. 34.5). The Government is responsible in relation to the Parliament. A vote of no confidence can be directed only towards the Government and the Head of Government (Art. 33.1.8), seems to be possible only after the report of activities of the Government and is successful on the basis of a 2/3 majority (Art. 46.3).

It is highly questionable if this concept of a Parliamentary system would work under the present conditions in Kyrgyzstan as there is no stable party system. It might happen quite often that the four weeks period for forming a Government elapses without the formation of a new Government and Parliament has to be dissolved. That might lead to a very instable system.

V) Summary

It has to be welcomed that all three drafts contain important improvements with respect to the protection of human rights and the independence of the judiciary. Nevertheless some problems remain in these areas and the abolition of the Constitutional Court constitutes a step backwards.

As regards the separation and balance of powers, none of the three drafts seems satisfactory. The draft based on a presidential system provides for practically unlimited power of the President and would be a step back with respect to the democratic standards already achieved. The draft based on a parliamentary system does not seem functional. In the absence of a Prime Minister the draft establishing a mixed system seems more like a draft establishing a presidential system which is more balanced than in the first draft. The influence of the President on the legislative process also remains too strong. This draft would also have to be reviewed.

None of the three drafts should therefore be adopted without major amendments. In this respect it would be advisable to look again at the draft Constitution prepared in June 2005 within the Constitutional Council, which contained many positive elements, and the opinion

of the Venice Commission on this text. By combining the positive aspects of this draft with the positive aspects of the three drafts examined here, it should be possible to arrive at a text which substantially improves the constitutional situation in the Kyrgyz Republic.