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**(VENICE COMMISSION)**

# COMMENTS

# ON THE DRAFT LAW

# ON THE COUNCIL ON SELECTION OF JUDGES OF

# KYRGYZSTAN

# by


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## I. General remarks

1. The guiding principles of the rule of law require the guarantee of an independent judicial system. This includes a true balance of power between the legislature, the executive and the judiciary, which can ensure an independent position of the judiciary. Independence of the judiciary is a precondition for confidence in and authority and success of the administration of justice.

2. It is widely recognised that the procedures for the appointment of judges are central to the judicial independence, especially in the countries without strong democratic tradition.

3. Even if Kyrgyzstan is not a member of the Council of Europe and the European Convention on Human Rights is not applicable there, the Convention and the case-law of the European Court of Human Rights (hereinafter, "ECtHR") give an overview of standards and practices, which is relevant also for non-member states like Kyrgyzstan from a comparative persepective. According to the ECtHR, in order to establish whether a tribunal can be considered "independent", regard must be had, among other things, to "the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence"[1]

4. The Committee of Ministers of the Council of Europe expressly stated that "The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers" and "However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorized to make recommendations or express opinions which the relevant appointing authority follows in practice".[2]

5. In the par. 32 of the Report on the Independence of the judicial system. Part I: The independence of judges, adopted by the Commission at its 82nd plenary session on 12-13 March 2010 Venice Commission stated "…it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that **an independent judicial council have decisive influence on decisions on** the appointment and career of judges".
6. It is to regret that Kyrgyz authorities not followed these recommendations when drafting the new Constitution. Different bodies will have competences to take decisions on the appointment and career of judges. Thus art. 64 of the Constitution provides that the judges will be appointed on the proposal of the Council on selection of Judges (hereinafter, "Council") and the same article provide that dismissal will be made on the basis of the proposal of the Council of Judges. This constitutional

[1] See, among many other authorities, ECtHR, *Findlay v. United Kingdom*, judgment of 25 February 1997, *Rep.*, 1997-I, p. 281, § 73; ECtHR, *Salov v. Ukraine*, judgment of 6 September 2005, *ECHR*, 2005-VIII, §§ 80-82.

[2] See Recommendation No. R (2010)12 from 17 November, 2010 on judges: independence, efficiency an responsibilities, p. 46 and 47.

provision makes it impossible to have one body competent to take decisions on appointment and career of judges, without amending the Constitution.

7. But even if due to constitutional provisions it is impossible to have a single body which will take decisions on all aspects of the career of the judges (including appointment, disciplinary procedures and removal of the judges from the office) it is necessary to ensure that the bodies which will take decisions on some aspects of the career of the judges (in this case the Council competent for appointment and transfer) are organized and act in accordance with principles recommended for the High Council of Justice. If interpreted in good faith, in most of the cases, the Constitution can not serve as excuse for not following the recommendations.

8. The Constitution also designates the President and the *Parliament* as authorities competent to appoint (elect) judges. As a point of departure this is not problematic. Appointment of judges by the executive (President, Government) is acceptable. Even election by Parliament is not *per se* incompatible with Article 6 ECHR or the idea of rule of law, either.[3] However, special precautions are needed to guarantee that in such appointment or election procedures the merit of the person is decisive, not political or the like considerations.[4] The law should fix as accurately as possible all the procedural steps to be followed in order to select judges. Excellence and proficiency of new judges are the best guarantees for their independence and for a better service to the citizens. In order to achieve these goals I think that the system of the competitive examination should be regarded as the best one.

9. And in case of the future amendments of the Constitution it will be more reasonable to revise the whole system of self-government of the judiciary and to consider establishing a truly independent High Council of Justice, pluralistically composed, with a substantial part if not the majority of the members being judges elected by their peers, as the single organ of self-government. There could be sub-committees for specialised functions if necessary.

10. When analyzing this draft and other pieces of legislation concerning judiciary it is necessary to take into consideration:

- The United Nations Basic Principles on the Independence of the Judiciary (29 November 1985);[5]
- The Recommendation No. R (2010) 12 of the Committee of Ministers of the Council of Europe from 17 November 2010 on judges: independence, efficiency and responsabilities;[6]
- The European Charter on the Statute for Judges (1998);[7]

[3] See, *e.g.*, ECtHR, *Ninn-Hansen v. Denmark*, no. 28972/95, decision of 18 May 1999, *ECHR*, 1999-V.

[4] The influence of politics in the appointment of judges is not unknown in other countries either, but the international trend clear go in the direction of such influence decreasing. See L. Heuschling, "Why Should Judges be Independent?", in *Constitutionalism and the Role of Parliaments* (K.S. Ziegler, D. Baranger and A.W. Bradley, eds.), Oxford, 2007, (199), 218 ("The interference of politicians in the appointment of judges has not entirely vanished, but its impact has been progressively diminished").

[5] The United Nations Basic Principles on the Independence of the Judiciary. URL: http://www.abanet.org/rol/docs/judicial_reform_un_principles_independence_judiciary_english.pdf [State: 23.09.2009]

[6] URL: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1707137&Site=COE

[7] European Charter on the statute for judges. Activities for the development and consolidation of democratic stability. European Charter on the statute for judges and Explanatory Memorandum. Strasbourg, 8 - 10 july 1998. URL:http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf [State: 05.01.2007].

- The Judges' Charter in Europe of the International Association of Judges 1997 (I.A.J./U.I.M.);
- The Universal Charter of the Judge of the International Association of Judges (1998);[8]
- The Opinions ("Avis") of the Consultative Council of European Judges;[9]
- The Bangalore Principles of Judicial Conduct 2002 ;"[10]
- The Report on Judicial Appointments, adopted by the Venice Commission at its 70th plenary session on 16-17 March 2007 (CDL-AD(2007)028)
- The Report on the Independence of the judicial system. Part I: The independence of judges, adopted by the Venice Commission at its 82nd plenary session on 12-13 March 2010 (CDL-AD(2010)004).

## II. Comments article by article

### Art. 1

11. Par. 3 provides that the Council "…shall perform its activity on the principles of independence, openness, collegiality, good faith and legality". Not this or other drafts proposed for analyze by Kyrgyz authorities include the obligation of the Council to adopt the decision impartially and based on the objective criteria clear defined in advance by the law or by an independent body. It is recommended to include such provisions in paragraph 3 and to develop them in the next articles.

### Art. 2

12. It is difficult to find any practical reasons for the regulation which just state the obvious fact that the Council act on the bases of the Constitution and any other relevant normative act.

### Art. 3

13. In this article are repeated the Constitutional provisions concerning the competence of the Council to organize the contest for selecting the candidates for appointment as judges of courts of all levels and to propose the selected candidates to President for appointment (transfer) or for submission of the proposal for appointment (transfer) to the Parliament. It seems that the Council will not be involved in any mode in the process concerning career of the judges, including removal of judges from the office. This option do not seem to be the best if to take in consideration that, for example, removal of judges also will be linked with assessment if the judges still have or note the qualities for being a judge. And it is difficult to understand the reasons for not involving the body which is supposed to know better than any other bodies if the person deserve to be (in the situation of removal – to remain) the judge. As the Kyrgyz Constitution does not regulate specially the competence of the Council it seems possible to provide for Council at least consultative role in the process of removal of judges from the office.

14. The provisions concerning the right of the Council to ask for necessary information or documents and to invite for explanations any official or private persons are formulated in so broad terms that can suggest that the Council can act as an investigative agency. These provisions are not clear as they do not set out what information is sought here. What kind of information can be collected and received?

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[8] "Statut du juge en Europe/Judges' Charter in Europe". In: Euroiustitia, Volume 1, 1997. 5. "The Universal Charter of the Judge/Statut universel du juge/Estatuto universal del juez". International Association of Judges. Roma, 1999. URL: http://www.iaj-uim.org/ [State: 05.01.2007].

[9] URL:****http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/textes/Avis_en.as [State: 22.12.2007].

[10] URL: **** http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/textes/DocsRef_en.as [State: 04.01.2007].

What kind of procedure regulates the collection of this kind of information? What is the state of knowledge of the candidate about this information? Does the candidate have the right to contest this information? Without further clarification, these provisions are not in line with applicable standards and go against the transparency of the process of selection of judges.

15. It my opinion the process of competitive selection of judges can not be transformed in investigation of documents or facts. The Council must deal with the documents and information presented by the candidates (it is to be mentioned that the list of the documents and the required information must be established in advance and must be the same for all candidates which are in sensitive similar conditions) and result of the tests for checking the capacities of the candidates In case of any doubts concerning the accuracy or veracity of facts or documents an investigation must be conducted by the specialized bodies.

16. It is to be mentioned also that the Draft Law does not include any provision that the request for documents and information and the examination of them must be done respecting the rules concerning personal data protection.

**Art. 4**

17. The three years limit of mandate of the Council rise concerns about its independence and impartiality since at relative short period of time the Parliament will have possibility strongly influence the process of selecting the judges, especially taking into consideration that the draft gives Parliament the possibility to appoint absolute majority of the members of the Council.

18. It is quite unusual to provide the limit for reappointment, like in par. 4, of the members of bodies dealing with selection of judges. This limit is usually established for the Heads of States. I can suppose that this rule has the goal to ensure the independence and impartiality of the members. But it is common understanding that this goal can be better achieved establishing that the persons can hold a position only once but on longer term. For ex. judges of ECtHR are currently appointed for one nine years term instead of two six years terms in the past.

**Art. 5**

19. In accordance with art. 95 par. 7 of the Kyrgyz Constitution “The Council of Judges, the parliamentary majority and the parliamentary opposition correspondingly shall elect one third of the composition of the Council on selection of judges”. And without amending Constitution it is not possible to meet the recommendation that the important part if not majority of the body dealing with selection of the judges to be elected by their peers. But it is still possible to meet the recommendation that the majority of the Council to be judges. The Constitution provide in the art. 95 par. 7 that “The Council on selection of judges is composed of judges and representatives of the civil society” without establishing the number of judges and representatives of the civil society. In this situation I recommend to examine the possibility to amend par. 1 of article 5 and to provide that the majority and the opposition must propose for Council also judges. If this will not be considered against Constitution.

20. The provisions of the Draft Law concerning the election of the members of the Council on selection of judges raise serious concerns about very strong political control on the process of appointment and transfer of the judges as they permit that the majority of the Council can be formed by the persons strongly politically committed. Article 6 does not provide even that the members of the Council can not be members of political parties. It is difficult to believe that in Kyrgyz Republic

members of the civil society can not be members of political parties. If the draft will remain as it is currently this can lead to the appointment (transfer) of all judges on political criteria. Even under current constitutional provisions it is still possible to diminish political influence in the process of the formation of the Council. For this it is necessary to include in the Draft Law the objective criteria for process of selection of candidates and for persons which will be designated.

21. It is not the best the solution from par. 2 which gave to the Council of Judges the competence to decide all the questions related to the election of the members of the Council from among the judges. Of course the procedure of election can be approved by the congress of judges but the principles must be provided in this Draft Law. For example, in order to be in line with the standards it is necessary to provide that the Council of Judges must elect the judges in the Council respecting the proportion between all levels of judiciary (courts).

22. Par. 3 establishes that the members of the Council which must be proposed by the majority and the opposition are elected separately at the meeting of the fractions. But this mechanism can be used only in the cases when the majority and the opposition are composed by one fraction. It is necessary to have solutions also for cases, and this much probably will be the rule, when the majority or the opposition consist from more that one fraction.
23. It is to be welcomed the provision in par. 6 which provide for the gender balance in the Council. But it can remain just a declaration because the draft does not provide a mechanism for its implementation.

**Art. 6**

24. The interdiction for persons which are on the state or municipal service to be elected in the Council is to be welcomed. But it is necessary to check if this condition covers all the persons which hold the official positions. For example, are in accordance with national law members of the Parliament considered persons which are on the state or municipal service? And it is questionable the interdiction for the persons below 30 years to be elected in the Council. In accordance with article 70 of the Kyrgyz Constitution the member of the Parliament can be the person "…who has reached 21 years of age as of the election day…" and it is difficult to understand the reasons for not to follow the same rule.

25. Even stronger are doubts concerning the condition of 10 years experience for the judges. This provision will make very difficult to elect the best candidates from all level of judiciary, especially from the first level courts.

**Art. 7**

26. In the situation when the Draft Law do not regulate at all the notion "good reasons" (par. 1 point 10) which is one of the ground for the termination of the mandate of the member of the Council this provision can be misused. Will be the holiday a "good reason", for example?

**Art. 10**

27. The member of the Council has a right to sign the decision of the Council (par. 1 point 6). Does this mean that every decision of the Council which is not signed by all the members is not binding? In any case it is difficult to argue the necessity that the decisions to be signed by other members that the Chairperson and secretary of the Council.

28. If in other texts is not provided expressly what mean “closes relatives” it is necessary to regulate this in the current draft (this comments is pertinent for other norms of the draft which include this provision). Specially taking in consideration that this provision can lead to the termination of the mandate.

**Art. 11**

29. In accordance with par. 1 the Secretary of the Council is the “…responsible employee of the competent body”. It is questionable if this solution is acceptable from the point of view of the necessity to ensure the independence of the Council, specially taking in consideration that in art. 21 Draft Law provide that the members will act on pro-bono basis. In this case all the administrative tasks of the Council in fact will be dependent from the executive power which can influence the procedure of selection of judges, for example, by manipulating the materials which will be made accessible or hidden from the members of the Council.

**Art. 13**

30. From par. 2 results that if one of the candidates which was properly informed about the time and place of the meeting is not present the selection process will continue without him, even in cases when he (she) is not present for the reason which can be excused, and he (she) will be excluded from the process. But what mean “properly informed” in this case? Will be applied in this case the procedural rules or other rules? And what will be the solution if the person can prove that he (she) was not “properly informed”.

**Art. 16**

31. It is dangerous to permit to Chairperson alone to decide to return the documents which “… are incomplete or which do not meet the requirements of the constitutional law …”. Not in all cases will be easy to establish if the documents respect all requirements and if they are incomplete. And it is doubtful if even smallest differences or a very short disregard of the deadline must be punished so severe. Besides, it is not clear which are the reasons not to decide this problem in the plenary of the Council and to give the possibility to the candidates to explain the reasons. This can create possibility for manipulation or can lead to disqualification on formal and not very important grounds, of the strong candidates.

32. The express provision that the letter signed by chairperson must state the reasons for return it is to be welcomed. But in the absence of the mechanism of judicial control of this reasons make it useless. So, it is recommended to provide expressly the right to appeal to courts.

**Art. 17**

33. Par. 5 provide that “Based on the outcomes of the competitive selection the Council shall have an open vote on each candidate and make the decision to propose candidates for the position of a judge of the Supreme Court, the Constitutional Chamber and a local court”. In my opinion this norm includes two opposed regulations. First part provides that the selection of the candidates must be made “Based on the outcome of the competitive selection…” but in the second part it is established that the Council “…shall have an open vote on each candidate”. So, in the first part the rule seems to provide that the candidates are selected based on the objective criteria, in the result of the competitive selection. If the norm to be interpreted in this way (only in this case it makes sense to include it in the Draft Law, otherwise we will have just an presentation of all candidates but not a “competitive selection”) it is unnecessary and impossible to have an voting process, because the

selected candidates will be established on the result of competitive selection on the bases of the points (marks) which they will receive. Excluding the situation when the vote is held for formal approval of the result of the selection. But the second part of the rule seem to provide that after the competitive selection the Council will have an open vote on each candidate and for position of a judge will be proposed the candidate which will receive the majority of votes of the members of the Council (see article 18 par. 1 of the Draft Law). In this situation the result of the competitive selection are useless because the Law do not provide that the members of the Council are obligated to vote for the candidate which has the best position after the competitive selection.

**Art. 18**

34. In accordance with par. 1 “Decisions of the Council shall be made by open vote by the majority of the total number of the members of the Council with the use of individual ballot papers”. For me it is not clear the necessity to have “…individual ballot papers…” if the decisions are adopted by open vote. The number of the members of the Council in any case will be not so large in order to provoke the problems for the accurate establishment of the result of the vote if vote will be without ballot papers.

35. Besides, from the interpretation of this part of the norm in conection with other provision of the draft it seems that it establish only the rules for adopting the decisions on the selection of the candidates. But the Council inevitably will have to decide in a lot of cases on different procedural maters. And it is necessary to regulate the procedure for adopting decisions in those cases and for sure it can not include the ballot papers.

36. And taking in consideration the comments on article 17 (concerning the proposal that candidates are to be selected on the bases of the objective appreciation of their abilities and not on the bases of the subjective votes of the members) I propose to examine the possibility to provide that the majority will be counted from the number of present members.

37. Par. 6 of the article once again stress, that will be nominated for appointment the candidate which receive the majority of votes without any conection with the result of the competitive selection. It is necessary once again to mention expressly in the draft Law that the selections of the candidates must be made on the bases of the objective criteria established in advance. The draft includes an important number of the provision which can ensure a rather transparent process. But the transparence will be useless if the result will depend fully from the votes of the members which will vote on the bases of their free appreciations not on the bases of the objective criteria. And the par. 7 confirm the interpretation that the authors of the draft see the process of selection of the candidates as an electoral competition in which the winner is the person which game the sympathy of the electors and not as an competition based on the objective criteria which will ensure the appointment of the person which most correspond to the established criteria.

38. Par. 9 provides that “The decision shall be signed by the chairperson and the members of the Council who attended the meeting”. I doubt the utility of the provision that the decisions of the Council must be signed by all the members which attended the meeting. And if this provision to be kept in the Draft Law it is necessary to provide solutions for the cases when same members will refuse or will be unable to sign in order to prevent the lockout by members which will not agree with the opinion of the majority.

39. The decisions of the Council will affect not only the judiciary but also the rights of the candidates. And in cases when the candidates consider that the process of the selection was not in conformity with the law it is necessary to respect the right of these persons to have access to mechanisms of control of legality of the process of adoption of decision which affect their rights. In this connection I do not consider the best, solution adopted by authors in par. 12, which establish that “The decisions of the Council are not subject to appeal”.

**Art. 19**

40. The provision from part. 2, that in the cases when the President rejects the candidate proposed by the Council he (she) must adopt a motivated decision is a step in right direction. But it is not enough. It is necessary to provide expressly that the President can reject the candidate proposed by the Council only in cases when the selections procedure was conducted with serious violence of the law. In a large number of the opinions adopted by the Venice Commission it was recommended that the discretionary power of the President be curbed by limiting him or her to verify whether the procedure for selection and appointment had been followed by the body responsible for selection of candidates. The President should in other words act only as a “notary. And in cases when after the reexamination, the Council proposes the same candidate, the President must follow the recommendation and appoint the proposed candidate.

41. The legality of the Council decisions must be checked not by the President but by the court, which is a body much more appropriated for this task. The same apply, mutatis mutandis, for the cases when the judges are appointed by the Parliament.

**Art. 21**

42. In accordance with Constitution of Kyrgyz Republic the Council must have a key role in the process of the appointment and transfer of the judges. But it is doubtful that such a huge task can be fulfilled by the body, if all its members act on pro-bono basis. In order to diminish the dependence of the Council from the quality of acts performed by the secretariat composed by public servants it is necessary to ensure that at least part of the members of the Council can act on permanent basis.