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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS**

**ON**

**THE DRAFT LAW**

**ON**

**“THE COUNCIL ON SELECTION OF JUDGES OF  
THE KYRGYZ REPUBLIC”**

**by**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

## I. Introduction

1. On 5 April 2011 the Chairperson of Constitutional Committee of the Kyrgyz Parliament, Ms. Skripkina, requested the Venice Commission to provide an opinion on the draft Law on the Council for the selection of judges of Kyrgyzstan.

2. The draft law is one of the five drafts<sup>1</sup> that have been prepared pursuant to relevant provisions of the Constitution of the Kyrgyz Republic dealing with the judiciary. As concerns this particular piece of legislation, according to Article 95(8) of the Constitution, “the organisation and procedure of the Council on selection of judges, its powers and rules of formation shall be defined by the law”.

3. Thus, it is to be welcomed that the establishment of this new independent institution within the judiciary is foreseen in the Constitution (although the Constitution does not explicitly refer to the independence and autonomy of the Council). Article 95(4) of the Constitution provides that “[s]election of candidates for the position of local court judges, submissions for their nomination and transfer (rotation)” shall be done by the Council on selection of judges...”. Further, the Constitution envisages the composition of the Council, providing that “[t]he Council on selection of judges is composed of judges and representatives of the civil society. The Council of Judges, the parliamentary majority and the parliamentary opposition correspondingly shall elect one third of the Council on selection of judges” (Article 95(7)).

4. As it is seen from its title, the main task of the Council is to *select* candidates, by means of interview, for vacant positions of judges of: 1) the Supreme Court, 2) the Constitutional Chamber of the Supreme Court, and 3) local courts, and to submit relevant recommendations to the President of the country. Apart from this institution, the Constitution establishes another independent body – Council of Judges – which is endowed with some others powers that are normally attributed to judicial councils, relating, in particular, to the career progress, termination of office of judges, and disciplinary measures against them.

5. It should be borne in mind that certain issues concerning the activities of the Council for the selection of judges (in particular, the procedure for judicial appointments to local courts; the procedure for submitting documents for a competition to fill a vacant position of a local court judge; the procedure for conducting interviews with candidates to judges by members of the Council) are set forth in the Draft Constitutional Law on Introduction of Changes and Amendments to the Constitutional Law on the Status of Judges. As this draft constitutional law has also been presented to the Venice Commission for an opinion, I shall restrict my comments to the present draft law only.

## II. Specific comments on the draft law

### Article 2 (“Legal foundation of activity”)

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<sup>1</sup> The other four drafts are as follows: 1) Draft Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic; 2) Draft Law on the Supreme Court of the Kyrgyz Republic and Local Courts; 3) Draft Constitutional Law on Introduction of Changes and Amendments to the Constitutional Law on the Status of Judges; and 4) Draft Law on Introduction of Changes and Amendments to the Law on Bodies of Self-Regulation.

6. The article enumerates the legislation that should govern the activities of the Council for the selection of judges. This enumeration is not exhaustive (the article ends with the expression “*other normative legal acts of the Kyrgyz Republic*”) and is therefore superfluous. It is recommended that the article be deleted or the reference to other laws be omitted to ensure that the list is exhaustive.

#### **Article 4 (“Composition of the Council and its terms of office”)**

7. As noted above, the composition of the Council is envisaged in the Constitution. Article 4 of the draft law reproduces the above-mentioned constitutional provision, by adding two elements: firstly, that the number of members of the Council shall be twenty four, and secondly, that “the full membership of the Council shall be approved” by Parliament (see Article 5(4)).

8. I wish to stress at the outset that this composition has a number of obvious positive elements.

9. First, the Council is only composed of judges and representatives of the civil society. The presence in the Council of members of the executive power as well as any other persons employed in the civil service is definitely excluded.

10. Second, it is to be welcomed that representatives of the civil society are included in the composition of the Council. The Venice Commission has made it clear that “the best safeguard against corporatism is the presence of civil society representatives (whether or not legal specialists)” in a judicial council<sup>2</sup>.

11. Third, the parliamentary opposition is directly involved in the formation of the Council; one third of the composition of the Council (i.e. 8 members) is elected by the parliamentary opposition faction.

12. Fourth, judge members of the Council are elected by the Council of Judges which is a constitutionally established body of judicial self-regulation<sup>3</sup>.

13. Nevertheless, this provision gives rise to certain critical remarks.

14. The number of judges in the entire composition of the Council (only 8 out of the 24 members) does not seem to be adequate. With the current composition, the Council would clearly fall short of European standards requiring substantial judicial representation within such institutions. The Venice Commission has stressed that “[i]n all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges”<sup>4</sup>.

15. It is not clear from the draft law whether judge members of the Council would adequately represent the whole judiciary, that is to say, all judicial instances in the country, including first level courts. It is necessary to ensure a balanced representation – among the judge members of the Council – of all levels of the judiciary.

16. In the light of the above, reference should be made to Paragraph 1.3 of the European Charter on the Statute of Judges, which states that the judicial council should be an “authority

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<sup>2</sup> CDL-AD(2002)021 Supplementary Opinion on the Revision of the Constitution of Romania (adopted by the Venice Commission at its 52<sup>nd</sup> Plenary Session (Venice, 18-19 October 2002), Para. 21-22.

<sup>3</sup> See CDL-AD(2008)040, Opinion on the Constitutional Law on Bodies of Judicial Self-Regulation of Kyrgyzstan (adopted by the Venice Commission at its 77<sup>th</sup> Plenary Session (Venice, 12-13 December 2008)).

<sup>4</sup> CDL-AD(2010)004, Report on the Independence of the Judicial System. Part : The Independence of Judges (adopted by the Venice Commission at its 82<sup>nd</sup> Plenary Session (Venice, 12-13 March 2010)), Para. 32.

independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”.

17. Article 4(2) envisages that the term of office of the Council shall be three years since the approval thereof by the Jogorku Kenesh (Parliament). According to Article 4(4), the same person may not be elected for more than two consecutive terms. As can be seen from these provisions, the terms of office of all the members of the Council are likely to end simultaneously, and thus the composition of the Council would change entirely. This could result in a lack of continuity in the Council's work. It is therefore recommended that initial engagements for the first members of the Council be staggered; accordingly, terms of office for these members might be for less than three years.

18. Taking into consideration the amount of work to be performed by the Council, the drafters could re-consider the number of its members which seems to be too high.

#### **Article 5 (“Formation of the Council”)**

19. The article provides that representatives of the civil society shall be elected members of the Council by the parliamentary majority and the parliamentary opposition of the Jogorku Kenesh at separately held faction meetings. The candidates from the parliamentary majority and the candidates from the parliamentary opposition who win the largest number of votes of the members of the parliamentary majority and the parliamentary opposition respectively shall be deemed elected members of the Council.

20. In the last sentence above, it would be advisable to add the word “present” after the word “opposition”.

21. The article further states that the full membership of the Council shall be approved by the Jogorku Kenesh. During the process of approval all candidates proposed by the Council of Judges, the parliamentary majority and the parliamentary opposition of the Jogorku Kenesh shall be included in a single list. All the candidates shall be voted for simultaneously. The membership of the Council is deemed approved in case entire membership is voted for by the majority of those present but not less than fifty votes of deputies.

22. Apparently, the procedure of final approval by Parliament is introduced with a view to providing democratic legitimacy to the Council. However, it is not clear, what happens, if Parliament rejects the entire list because of one or several candidates.

23. Article 5(6) of the draft law is aimed at ensuring the gender balance in the composition of the Council and is therefore to be welcomed. Since this provision is addressed to the three components (the Council of Judges, the parliamentary majority and the parliamentary opposition), rather than to Parliament, it could be advisable to place it after the first paragraph of the article.

#### **Article 6 (“Requirements towards the candidates for membership in the Council”)**

24. The article provides for certain requirements to be met by candidates to the Council membership. In particular, a judge candidate is required to have the work record of at least ten years, whereas for candidates from the civil society it is sufficient to have five years' experience. This imbalance, in my view, can hardly be justified; moreover, it should be taken into account that according to the Kyrgyz legislation, in order to become a judge of a local court, a person is to have a higher legal education and no less than five years of experience in the legal profession. In this respect, the practical experience requirement formulated with respect to

non-judge candidates should be increased<sup>5</sup>.

### **Article 7 (“Termination and suspension of powers of a member of the Council”)**

25. Article 7(1) provides for a long list of cases when the powers of a member of the Council are terminated. Some of these grounds appear to be inappropriate. Thus, items 4 and 5 envisage that the membership shall be terminated in cases of: “termination of a criminal case on non-rehabilitating grounds” and “entry into force of a judgment of conviction pronounced by a court in respect of such person”. In my view, these provisions should be revised, because not all criminal cases or convictions would necessarily justify the dismissal of a member from the Council. One solution here would be to refer only to serious crimes.

26. Further, the grounds provided for in item 10 of the article (“three consecutive cases of non-attendance of the sittings of the Council without good reason”) and item 11 (“failure to make an announcement of recuse in cases envisaged in the present Law”) seem to be too strict to automatically give rise to the termination of the Council membership.

27. Article 7(2) provides for the suspension of the membership “by the decision of the Council in case of institution of criminal proceedings (as an accused person) or institution of administrative proceedings in an action at law”. As concerns cases of institution of criminal proceedings, here again, the element of seriousness of the criminal offence concerned could be inserted. As far as the latter case is concerned, in my view, it should be deleted. If an administrative sanction is not foreseen as a ground for the termination of the powers of a Council member, why should the mere fact of institution of administrative proceedings that may or may not result in the imposition of such a sanction, give rise to the suspension of the membership?

### **Article 8 (“Election and term of office of the Chairman of the Council”)**

28. Election of the Chairperson of the Council by the members themselves is a positive solution. The article provides that candidates for the post of Chairperson shall be nominated by the Council members. The Chairperson is elected for a period of one year. However, it is not clear whether he or she may be re-elected.

29. The voting procedure described in the article (particularly, in paragraphs 2-5) seems to be unnecessarily detailed. The same holds true for Article 18, paragraphs 2-5. Such technical rules could be envisaged in the internal rules of procedure.

### **Article 19 (“Proposals of the Council on presentment and appointment to the position of a judge”)**

30. Article 19(2) provides that the President may refuse to appoint a candidate nominated by the Council, and that this refusal shall be reasoned. The Council is entitled to re-examine its decision and re-submit the same candidature to the President. However, the President may still reject the candidature, if there are “reasonable grounds” for that. Otherwise, the person concerned “shall be subject to appointment within thirty days”.

31. Several points can be raised here. First, the draft should indicate that a presidential veto referred to in this article may be based on procedural grounds only<sup>6</sup>. Second, the provision

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<sup>5</sup> In one of its Opinions the Venice Commission stated as follows: “It is vital that the members of the Council have sufficient practical experience to carry out their work”. See CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, Para. 51.

<sup>6</sup> See, in this regard, Joint Opinion on the Draft law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights

envisaging a second presidential veto should be deleted. This provision could certainly undermine the authority and independent status of the Council. Moreover, the provision, as it stands, runs counter to Draft Constitutional Law on Introduction of Changes and Amendments to the Constitutional Law on the Status of Judges, Article 22(2) of which clearly states the if Council decides to re-submit to the President the proposal on the same candidate, the person concerned “shall be subject to mandatory appointment within ten days”. Third, it is advisable to provide that the Council is entitled to overrule a presidential veto by a qualified majority vote.

### **Articles 9-15 (Procedural rules)**

32. Many organisational and procedural rules that are contained in these articles as well as elsewhere in the draft law might be easily set out in the internal rules of procedure. Above all, this is important for safeguarding the Council's independence so that the institution itself decides on its procedural rules. In this respect, a number of provisions of the draft law, specifically, Articles 8-14 and 18 should be substantially revised.

33. The draft law contains a number of repetitive provisions (see, e.g., Articles 12(1) and 14(2); 10(2), item 3 and 15(4); 7(1), item 11 and 15(5)).

### **Articles 13 and 16 (Publicity in the work of the Council)**

34. It is a positive element that the draft law guarantees public access to the deliberations of the Council (Article 13(2)). The draft provides that vacancy notes shall be publicly announced (Article 16(2)), and a list of all candidates applying for a judicial position shall be publicly available (Article 16(7)). In this respect, it would be advisable to consider providing for the publication of decisions of the Council

### **Article 18 (Decisions of the Council)**

35. Article 18(12) states that decisions of the Council shall not be subject to appeal. In my view, this provision should be revised. The law should provide for judicial review of the Council's decisions relating to appointments and transfers of judges.

## **III. Conclusions**

36. The draft Law on the Council for the Selection of Judges of Kyrgyzstan merits a generally positive assessment. However, several aspects the draft law do not comply with international and European standards. In this respect, the following key recommendations can be made:

- the composition of the Council should be reconsidered to ensure that a substantial part or a majority of the members are judges;
- the draft law should ensure a balanced representation – among the judge members of the Council – of all levels of the judiciary;
- in order to ensure continuity in the Council's work, the draft law should envisage that initial engagements for the first members of the Council are staggered; accordingly, terms of office for these members might be for less than three years;
- Article 5 should clarify that candidates within the parliamentary factions are elected to the Council by a majority of the members present and not of all the members of the factions;
- Article 5 should clarify, what are the consequences, if Parliament rejects the entire list

- because of one or several candidates;
- the practical experience requirement formulated with respect to non-judge candidates should be increased;
- in items 4 and 5 of Article 7(1) and Article 7(2), reference should be made only to serious criminal offences, taking into account that not all criminal cases or convictions would necessarily justify the dismissal of a member from the Council;
- items 10 and 11 of Article (7(1) should be deleted or revised to ensure that they do not automatically give rise to the termination of the Council membership;
- the provision of Article 7(2) providing for the suspension of the Council membership based on the fact of institution of administrative proceedings should be deleted;
- Articles 8-14 and 18 should be substantially revised, taking into account that organisational and procedural rules that are contained in these articles as well as elsewhere in the draft law might be set forth in the internal rules of procedure;
- the draft law should provide that a presidential veto in relation to the Council's recommendations may be based on procedural grounds only, and to delete the provision envisaging a second presidential veto;
- the drafters should consider providing for the publication of decisions of the Council;
- the law should provide for judicial review of decisions of the Council relating to appointments and transfers of judges.