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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE INTRODUCTION OF CHANGES TO THE CONSTITUTIONAL LAW "ON THE STATUS OF JUDGES"

OF KYRGYZSTAN

Adopted by the Venice Commission
at its 87th Plenary Session
(Venice, 17-18 June 2011)

on the basis of comments by

Mr Harry GSTÖHL (Member, Liechtenstein)
Mr James HAMILTON (Substitute Member, Ireland)

I. INTRODUCTION

1. By a letter of 5 April 2011, Ms Galina Skripkina, Chairperson of the Committee on constitutional legislation, state structure, legality and local self governance of the Parliament of Kyrgyzstan *(Jogorku Kenesh)*, made a request for an opinion on the following three draft laws:

1. "the draft Constitutional Law on the Constitutional Chamber of the Supreme Court" (subject of Opinion 622/2011);
2. "on the introduction of changes to the Constitutional Law on the Status of Judges" of Kyrgyzstan (hereinafter, the "draft Law", subject of the present Opinion);
3. "the draft Law on the Council for the Selection of Judges" (subject of Opinion 624/2011).

2. As part of a judicial reform package, the Parliament of Kyrgyzstan has also prepared two other draft laws (on Judicial Self-Government and on the Supreme Court and Local Courts), which were, however, not submitted to the Venice Commission for opinion due to the very short deadlines and the heavy workload of the Venice Commission, which is preparing opinions on the first three draft laws.

3. Messrs Harry Gstöhl and James Hamilton were invited by the Venice Commission to act as rapporteurs for the present opinion. Their preliminary comments appear in documents CDL(2011)033 and CDL(2011)034 respectively.

4. A delegation of the Venice Commission composed of Messrs Vardzelashvili (rapporteur for the Opinion on the draft Constitutional Law on the Constitutional Chamber of the Supreme Court), Mr Esanu (rapporteur for the Opinion on the draft Law on the Council for the Selection of Judges) and Mr Gstöhl (rapporteur for this opinion) accompanied by Mr Schnutz Dürr from the Secretariat, visited Bishkek on 27-29 April 2011.

5. The delegation participated in a joint meeting of the Committees for Constitutional and Judicial Matters of Parliament on 27 April 2011, a plenary session of Parliament on 28 April 2011 at which the package of laws was originally supposed to be adopted and a round table on the judicial reform package on 29 April 2011. The meetings and the round table were organised by the EU-UNDP Parliament Project. The Venice Commission is grateful for the efficient assistance provided by the Project.

6. On 12 May 2011, all five laws of the judicial reform package were adopted by Parliament. The present opinion nonetheless refers to the draft laws as they were submitted for opinion, but refers to the results of discussions and areas of agreement reached during the meeting of the joint committees.

7. Following an exchange of views on the draft opinion with a joint delegation from the Kyrgyz authorities and the EU-UNDP Parliament Project, headed by Ms Skripkina, the present opinion was prepared within the framework of the Joint Programme of the Council of Europe and the European Union "EU-Central Asia Rule of Law Initiative". It was adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

II. GENERAL PROVISIONS

A. General comment

8. The draft Law is part of a package of laws reforming the judiciary in a modern and efficient manner. It is a positive step forward and an essential one to guarantee the independence of the judiciary. However, this draft Law should be read together with the other laws of the reform package in order to understand its place in the reform process.

B. Principles of the administration of justice (Article 3)

9. The general provisions are set out in Chapter 1 of the draft Law and state that judicial power is to be administered only by courts represented by judges. Article 3 sets out a number of general principles including the administration of justice free of charge in cases envisaged in the draft Law, the autonomy of courts and the independence of judges, equality of all before the law and courts, responsibility of judges, openness and public examination of cases by all courts, the binding nature of judicial acts and the participation of citizens in the administration of justice.

10. The binding nature of judicial acts and the participation of citizens in the administration of justice are very important and highly welcomed steps. In its Report on the independence of the judicial system - Part I: The independence of judges, the Venice Commission underlined:

> *"the principle that judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal*."[1]

11. Article 3.2 provides that citizens of Kyrgyzstan shall be entitled to judicial protection free of charge in the circumstances provided for in the law as well as in any case where they submit proof to the court that they do not have sufficient means to conduct their case in court. It is not clear whether this provision means that in some cases a fee is payable by litigants for the services of the court. The draft Law itself is silent as to what the circumstances are where the right to judicial protection free of charge arises and presumably this is to be found in separate legislation. The reference to proof that a litigant does not have sufficient means to conduct a case in court would seem to suggest that some sort of legal aid provision is made in such cases.

12. In some respects, this draft Law appears to be something of a framework law in that it refers in places to circumstances which are to be provided for by law, but which are not specified in this particular draft Law. Another example relates to Article 3.6, which says that the examination of cases in all courts shall be conducted in an open manner, except for cases which are subject to examination in a closed session in circumstances provided for "in the law", but these circumstances are not in fact provided in the draft Law. Article 3.7 covers the right of participation of citizens in the administration of justice in cases provided for "in the law", but again without specifying what these cases are. In any event, it seems clear that a full understanding of these provisions will require the consideration of other legal texts.

[1] See paragraph 67, Report on European standards as regards the independence of the judicial system - Part I: The independence of judges (CDL-AD(2011)004), http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.asp.

C. Status of a judge (Article 4)

13. The first paragraph of this Article states that:

> *"the status of a judge shall be defined by enhanced requirements towards its acquisition and termination, establishment of high standards in respect of the personality of the holder, qualification and conduct, increased responsibility for improper exercise of the judicial powers, material social benefits as well as other guarantees corresponding to the high status"*

14. Unfortunately, it is not clear what any of this means in practice as, again, it seems that these various "enhanced requirements", "high standards", "increased responsibility" must be defined elsewhere than in this draft Law.

D. Requirements towards a judge in accordance with his or her status (Article 5-1)

15. This Article sets out the requirements of a judge in accordance with his or her status. Judges are required to strictly comply with the Constitution and laws and to observe their oath of office. They are to observe the requirements of the Code of Honour of judges. The Venice Commission has not received a copy of this Code of Honour and therefore has not seen its contents. Judges are obliged to confront any attempts at unlawful intervention in activities related to the administration of justice. They are to observe secrecy of deliberations. An important provision requires them to declare assets and incomes in accordance with the legislation of the State. This could be an important safeguard, given that there is a history of judicial corruption in Kyrgyzstan.

16. Article 5-1.2 sets out a number of prohibitions applying to serving judges. These are of some importance because, as later provisions make clear, breach of them can result in dismissal of a judge from office. Judges may not act as legal representative for persons. They are not to make public statements about cases which are before the courts other than through the court processes. They are not to disclose information for purposes not related to their judicial function. They are prohibited from receiving gifts. They are not to accept honorary and special degrees, awards and other decorations of foreign countries, political parties or other organisations. They are not to travel on business outside the State at the expense of private persons and legal entities except for purposes specified in the law. They are prohibited from participating in other activities such as being members of managing bodies, councils of trustees or supervisory boards, again with certain exceptions. They may not participate in strikes and rallies nor may they engage in entrepreneurial activity or engage in other paid work except teaching scientific and creative activity to the extent that it does not impede their judicial duties. These rules are to be welcomed[2] in order to prevent judges from putting themselves in a position where their independence or impartiality may be questioned.

17. Judges are prohibited from being members of political parties or from speaking in support of or against any political party. This question of judges participating in political life is one which has been discussed by the Venice Commission[3] on a number of occasions and although this tends to reinforce the impartiality of judges, there is certainly a view among many judges in western democracies that judges should have such a right. It may be that in the current state of development of Kyrgyzstan, the prohibition of judges being members of political parties or engaging in the political activity of a party is not only justified, but necessary.

E. Fundamental rights of a judge (Article 5-2)

[2] Ibid, paragraph 62.
[3] Ibid, in particular paragraphs 7 and 27.

18. Article 5-2 confers fundamental rights on judges, including the right of judges to transfer to another court, to offer themselves for election as president or deputy president of a court or as a representative in the bodies of judicial self-regulation and the Council for the Selection of Judges, to improve his or her qualification, to resign from office.

F. Irreproachability of conduct of judges (Article 6)

19. Under this Article, a judge is to hold his or her position for as long as his or her conduct is irreproachable. Irreproachable conduct is defined by reference to the fundamental requirements of the judge, as set out in Article 5-1, and the finding of a violation of these duties must be confirmed or recognised by the Council of Judges.

G. Judicial qualification grades (articles 8-10)

20. In general, a high degree of qualification and ethics is required from judges. A classification system of six qualification grades has been introduced. These grades are based on seniority and affect the salary payable to judges. Qualification grades are awarded by the President on proposal by the Council of Judges. Advancement through the grades depends on the position held, the years of service as a judge, the quality of the judge's administration of justice and irreproachable conduct. It seems that a judge can normally expect to advance through this process to a higher grade every three years.

21. However, by Article 8, advancement is conditional on the quality of the administration of justice. There is nothing in the draft Law to indicate how this is to be assessed, although by implication it seems to be a function of the Council of Judges. The Law "On bodies of judicial self-regulation" is silent on the issue. It is not clear whether the President is simply required to give formal effect to the recommendation of the Council of Judges or whether he or she has a discretion in relation to the matter. Again, it may be that this draft Law is intended merely as a framework, but in order to assess it, it would be necessary to have more information as to how exactly an assessment of the quality of administration of the judges is to be carried out and by whom.

III. GUARANTEES OF JUDICIAL INDEPENDENCE

A. Independence of judges (Article 11)

22. The basis for the independence of the judiciary, which is crucial for the good administration of justice, is found in Article 94 of the Constitution. In that Article, the constitutional guarantee of the independence of judges is accompanied by the prohibition of interference in the administration of justice and immunity of judges. The draft Law takes up and develops these provisions. Having the independence of judges guaranteed at such a high level (in the Constitution and in constitutional laws) is welcomed and very much in line with European standards[4] and supported by the Venice Commission[5].

B. Inadmissibility of interference in the activity of judges (Article 12)

23. This Article provides that any interference in the activity of judges related to the administration of justice is to be prohibited. Persons guilty of influencing a judge are to be liable

[4] See paragraph 16, Opinion No. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges, http://www.venice.coe.int/site/main/texts/JD_docs/CCJE_Opinion_1_E.htm.

[5] See paragraph 22, Report on European standards as regards the independence of the judicial system - Part I: The independence of judges (CDL-AD(2010)004), http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.asp.

in accordance "with the law". Again, presumably this latter law, which sets out how this is to be achieved, is to be found elsewhere.

24. The principle of judicial independence seems to cover both external and internal influence. It seems that the undue influence of higher ranking judges is also covered by this provision, which is in line with the Venice Commission's recommendations[6].

25. The Article also foresees that no one has the right to solicit reports on concrete cases, except in cases where the liability of a judge is being reviewed under this draft Law. Judges are not obliged to provide explanations on the merits of a case that they have dealt with or have been assigned and are not obliged to present cases to anyone other than in circumstances foreseen by the procedural law.

C. Irremovability of judges (Article 13)

26. Under this Article, judges of all courts are irremovable, removal from office or termination or suspension from office or limitation of powers may only be made in accordance with the Constitution and this draft Law. This draft Law also governs the transfer of local judges by rotation to other local courts in other regions of Kyrgyzstan.

D. Immunity of judges (Article 14)

27. This Article deals with the immunity of judges who cannot be detained and arrested or subject to search of premises or their person unless they are caught at the scene of a crime.

28. Article 14.2 provides that a judge may not incur criminal and administrative liability at law for unlawful actions committed in performance of his or her judicial powers except in accordance with procedures envisaged in this draft Law.

29. Functional immunity[7] is what European standards tend to favour, and that is what seems to be the immunity intended in this draft Law. Independent of the wording of Article 14, Article 95.6 of the Constitution stipulates that:

> *"Administrative and criminal action against judges of all courts of the Kyrgyz Republic may be brought in a judicial proceeding upon the consent of the Council of Judges in accordance with the procedures envisaged in the constitutional law."*

and Article 30 of this draft Law foresees the possibility of introducing administrative or ordinary criminal proceedings against a judge, if the Council of Judges agrees with it. In the Venice Commission's view, an agreement must be refused if the proceedings concern a fact related to the function of the judge. The immunity of judges is therefore indeed more of a functional one.

30. However, it is difficult to conceive what sort of unlawful actions might properly be committed by a judge in the performance of his or her judicial powers, and if such unlawful acts are not properly committed, it is not clear why a judge should have immunity for them. The Venice Commission would like to invite the Kyrgyz authorities in this respect, to provide further clarity on what functional immunity covers in their view. As a general rule, the Venice Commission has, on many occasions, been critical of over-extensive immunities conferred on judges. While it is necessary to ensure that a judge is not subjected to intimidatory or harassing behaviour while performing his or her judicial functions or during the course of court proceedings, it is difficult to imagine why a judge should not be subject to the law. Placing excessive obstacles in

[6] Ibid, paragraphs 56 and 60.
[7] Ibid, paragraph 60.

the way of a proper investigation of crimes alleged to have been committed by judges is likely to encourage judicial corruption.

31. The problem with immunity is its degree of protection. It is obvious that judges need to be protected against pressures and abuses from other state powers and immunity is a means to avoid pressure from undue, untrue and abusive prosecution. However, even judges should not be above the law. Hence, an equilibrium between the two requirements needs to be found, taking into account the specific circumstances at the time and in the country.

IV. APPOINTMENT OF JUDGES

32. Chapter 3 sets out the requirements relating to the appointment of judges of the Supreme Court and of the Constitutional Chamber. Again, these provisions seem, for the most part, to be framework provisions and there is little detail on how the actual appointment is to be made.

A. Requirements towards the judges of the Supreme Court and the Constitutional Chamber and their election procedure (Article 15)

33. Appointment to the Supreme Court or Constitutional Chamber is confined to citizens between the ages of 40 and 70 years who have higher legal education and at least 10 years' experience in a legal profession, of which five years as a judge for the Supreme Court and 15 years' experience in a legal profession for the Constitutional Chamber. They are to be elected by Parliament upon the proposal of the President based itself on a proposal of the Council for the Selection of Judges.

34. According to the draft Law on the Council for the Selection of Judges, this body is elected as to one-third by the Council of Judges, one-third by the parliamentary majority and one-third by the opposition. This appears to be a commendable attempt to reduce political influence in the appointment system – or at least to ensure a degree of consensus. The draft Law provides that a competition is to be conducted by means of interview. The procedure is set out in Article 17 of the Law "On the Council for the Selection of Judges of the Kyrgyz Republic". A rapporteur is appointed and reports to the Council on the candidate and on the information on his or her personal file after which the candidate can give explanations. This is presumably the "interview" that is referred to. Following this procedure, the Council for the Selection of Judges takes an open vote and recommends candidates to the President.

35. It is not clear whether the President has a discretion to propose a candidate to Parliament. The latter has a discretion to reject candidates proposed (Article 15.7).

36. Article 15.5 requires applicants for vacancies among the judges to provide a number of documents including a copy of their passport, their diploma of higher legal education, copies of their service record and work record, and a medial certificate. The requirement for a recent medical health certificate is justified in order to ensure that a candidate is in sufficient good health to carry out his or her duties. However, it should be made clear that the content of such a certificate should not be detailed, but rather limited to a statement (evaluation) that – according to medical opinion – the candidate is in sufficient good health (or not) to fulfil the duties of a judge at the Supreme Court or similar duties. Under these circumstances and in respect to non-discrimination of disabled persons, such a requirement is fully acceptable.

37. The involvement of both the President and Parliament in the process without any clear criteria being established for appointment would seem to make politicisation of appointments inevitable despite the involvement of the judges and the opposition in the Council for the Selection of Judges. In the event that Parliament does not elect a candidate for the position of judge, the President is required to present a new candidate on the basis of a new competitive selection.

38. Article 15.9 sets out a number of matters which will disqualify a person from being a judge at the Supreme Court and at the Constitutional Chamber. This concerns persons having previous criminal convictions (including those removed from the record), having been dismissed from their position as judge for disciplinary reasons or having been dismissed from law enforcement agencies or having had their licence to practice as a defence lawyer revoked or having the citizenship of a foreign country. This last provision bars dual nationals from becoming judges.

B. Procedure of election and dismissal of the president and deputy presidents of the Supreme Court (Article 16)

39. This Article provides that the judges of the Supreme Court are to elect from among themselves, the president and deputy presidents of the Supreme Court with a limit of two consecutive terms for these provisions.

V. ELECTION OF JUDGES OF LOCAL COURTS

40. Chapter 4 contains provisions for the election of judges of local courts corresponding to those for the Supreme Court and the Constitutional Chamber.

A. Requirements towards judges of local courts (Article 17)

41. The age limit under this Article is between 30 and 65 and the requirement is for higher legal education and at least five years' experience. There are similar exclusions and there is a long list of the type of work experience which would qualify one to be appointed to a local court. It appears to include most forms of state legal work. It does not, however, appear to include private lawyers, members of the bar or of legal firms, which is to be deplored.

B. Competition to fill a vacant position of a local court judge (Article 18)

42. Again, appointment is made following a recommendation from the Council for the Selection of Judges which carries out an interview. There are similar provisions in relation to the documentation that is to be provided. In relation to local courts, following a recommendation from the Council for the Selection of Judges, the judges are appointed by the President. Parliament is not involved in this process.

43. The other steps of the selection mode by the Council for the Selection of Judges are the same than for the Judges of the Supreme Court and the Constitutional Chamber.

C. Interview (Article 21)

44. The interview may determine the intellectual capacities of candidates, the personal qualities, the ability to correctly understand and impartially consider the case, the communicative skills and their efficient application and, upon request of members of the Council for the Selection of Judges, a candidate may have to provide an income statement and other information which confirms the irreproachability of the candidate's conduct. However, the additional documents must only be produced by those candidates for whom the Council for the Selection of Judges has requested such information and it is not clear under which criteria a candidate will be asked to produce these documents. It would be useful to explain either that the documents need to be produced by all candidates or to state under which conditions additional information may be required from a specific candidate.

45. The examination requirement on the one hand and the interview on the other seem – *per se* – to be appropriate to filter out the candidates according to capacity and ethical requirements.

However, the final recommendation of the Council for the Selection of Judges is then attached to the file of a candidate and not returned to the candidate. A possibility to make an appeal against the decision is not foreseen in this draft Law. This might constitute an undue limitation of candidates' rights and should be changed.

D. Procedure of appointing the candidates for positions of local court judges and assigning them to local courts for the execution of powers of local court judges (Article 22)

46. This Article foresees that judges of local courts shall be appointed by the President from among persons who have passed the competitive selection and were proposed by the Council for the Selection of Judges. On the basis of the outcome of the interview, a proposal for appointing a candidate to a position of a local court judge shall be submitted to the President. The President shall have the right to return the documents of a candidate to the Council for the Selection of Judges with a reasoned decision. If the Council for the Selection of Judges fails to find facts which prevent the appointment of a candidate to the position of a local judge, then the Council for the Selection of Judges shall again submit to the President the proposal of the same candidate who shall be subject to mandatory appointment within 10 days. The exam seems to be seen as only one of other pre-conditions to participate in the interviews (see Article 21).

47. This Article therefore clearly envisages the possibility that the President will reject candidates who have been recommended by the Council for the Selection of Judges. He or she must give a motivated decision for rejection. No criteria are established for rejection and therefore it is not only possible, but likely that the process will be politicised. Such criteria should be provided.

E. Grounds and procedure of transfer (rotation) of a local court judge (Article 23)

48. This Article deals with the delicate subject of the transfer of a local court judge from one court to another. This can be done for four reasons: (1) at the request of the judge concerned, or (2) because of reorganisation of the court or (3) changes to the structure of staffing numbers, or (4) for the purpose of protecting judges.

49. In reality, it seems that the provision allowing for transfer to be compulsory in the event of reorganisation of the court or changes to the structure or staffing numbers effectively means that a judge can be compulsory transferred at any time. It is not clear from the draft Law who is to make proposals relating to reorganisation of the court or changes to the structure or staffing number of judges. At the meetings in Bishkek, it was pointed out that such a reorganisation can only be carried out through a law. If this is so, this seems to be a sufficient guarantee against transfers in individual cases. However, if a reorganisation could also be carried out through other means, e.g. through an executive decree, this could be a powerful method of ensuring compliance by a judge with the executive power's will.

50. The draft Law provides that in the event of a reorganisation of a local court, the Council of Judges is to hear the opinion of judges concerning their transfer and to make a decision on transfer taking into account all of the circumstances. However, it is not clear that the Council of Judges has any power to prevent a reorganisation going ahead or to stop a change to the structure or staffing number. A similar situation arises where a decision is made to transfer judges for the purpose of their protection, the Council for the Selection of Judges makes a decision.

51. The possibility of an appeal of the decision would be welcomed. Applications to transfer from one local court to another are limited to once every five years. This provision together with the lack of an appeal is an example of how the method of rotation could be misused to punish judges or put them under undue pressure.

VI. GROUNDS AND PROCEDURES FOR SUSPENSION OF POWERS, DISMISSAL FROM OFFICE AND TERMINATION OF POWERS OF A JUDGE

A. Dismissal of a judge from office (Article 25)

52. Article 25.1 provides that a judge shall be dismissed from office in the event that the Council of Judges gives its consent to the institution of criminal proceedings as an accused person or administrative proceedings at law. Article 25.2 says that Parliament may dismiss a judge of the Supreme Court or the Constitutional Chamber in the event that it gives to the Prosecutor General its consent to institute criminal proceedings. It also provides that the President may dismiss a local court judge in the event that consent is given to the Prosecutor General to institute criminal proceedings against him or her. In each case the Council of Judges makes a proposal to Parliament or to the President, as appropriate. There seems to be some overlap between these provisions as Article 25.1 appears to apply to all judges.

53. It seems somewhat harsh that the mere institution of proceedings should lead to dismissal from office rather than merely suspension pending a decision on the criminal charges, unless Article 25.3 is meant to refer only to suspension rather than dismissal. The English translation of the draft Law seems indeed to be incorrect in this case, as was pointed out at the meetings in Bishkek.

54. Article 25.4 goes on to say that a judge dismissed from office shall be restored in case circumstances constituting the grounds for a decision of dismissal cease to exist. This means, presumably, that the judge is restored to office in the event of being acquitted of the criminal charge. Article 25.1 refers not only to criminal proceedings, but also to administrative proceedings. It is not clear whether this means that a judge could be dismissed for some relatively minor infringement of the law, as there is no information as to what type of administrative proceedings are envisaged.

55. The consequences of the dismissal/suspension are the suspension of the payment of salary and other types of material and social benefits to which the judge is entitled. A judge suspended from office shall be restored to his or her position by the body which elected or appointed him or her, if the grounds for the dismissal cease to exist. The salary and other types of material and social benefits are then paid back in full.

56. It should, in the view of the Venice Commission, be taken into consideration that the suspension of salary, besides the fact that it also affects the family of the judge, may seriously hinder the right to a legitimate defence by taking away all of his or her financial means and might therefore seriously affect the human rights of the judge who, until a final condemnation is made, is deemed to be innocent. The Venice Commission recommends that the salary and other allowances not be suspended until a final decision has been rendered, in order not to violate human rights.

B. Grounds and procedures for dismissal of a judge from office (Article 26)

57. The reasons why a judge is dismissed are set out in Article 26 and include voluntary dismissal from office, the entry into legal force of a guilty verdict by a court in respect of a judge, and, e.g. the membership of a judge in political parties and their statements in support of a political party. Being registered as a candidate for the office of President of the Republic or for the office of a deputy in a local parliament are also grounds for dismissal.

58. As one would expect, the grounds and procedures for dismissal of a judge from office include the entry into legal force of a guilty verdict by a court in respect of a judge. However, Article 26.9 includes, as a ground for dismissal, “engaging in activity incompatible with the

position of a judge". It is not clear whether this provision refers back to the various incompatibilities referred to in Article 5-1. This should be specifically stated, because if it is not so confined, then it could be interpreted in a very wide manner.

59. Judges of the Supreme Court and the Constitutional Chamber may only be dismissed by at least two-thirds of the deputies of Parliament on proposal of the President of the Republic made in accordance with the decision of the Council of Judges. A local court judge shall be subject to early dismissal from office by the President of the Republic on proposal of the Council of Judges.

60. Under Article 26.6, the decision on early dismissal of a judge from office shall not be subject to appeal. This latter provision may give rise to problems. Every decision should be appealable. In fact, some grounds of dismissal are objectively clear, but others need to be interpreted in order to check whether there is a violation or not of the duties of a judge (e.g. statements of political nature and the like) and the fact that the decisions (of the Council of Judges) are not subject to appeal may violate the right to a fair trial.

C. Grounds and procedure of termination of powers of a judge (Article 27)

61. Article 27.1 deals with resignation of a judge, which it defines as "a honorary retirement or honorary removal from office" and in such cases the resigned person retains the rank of a judge, the guarantees of personal immunity and affiliation to the judicial community. This provision underlines the high social status of judges and is welcomed, even if the rules on immunity might be a matter for discussion – are they really needed for retired judges? In the English version of the draft Law, this provision is somewhat obscure, but it is assumed that it refers to a judge who retires because he or she has reached the retirement age or decides voluntarily to retire early without being compelled to do so by reason of some misbehaviour.

VII. LIABILITY OF JUDGES

A. Disciplinary liability of judges (Article 28)

62. Article 28 deals with the disciplinary liability of judges. A disciplinary misdeed is defined as a deed or omission of a judge which does not correspond to the requirements towards irreproachable conduct as envisaged in Article 6.2 of the draft Law as well as involving activity incompatible with the position of a judge. This latter provision should expressly provide that only the activities deemed incompatible with the position of a judge by Article 5-1 of the draft Law are covered.

63. There is a time limit of one year for dealing with disciplinary sanctions. The sanctions can include admonishment or censure or early dismissal from his or her position. In the case of insignificant misdeeds, the Council of Judges may limit itself to a warning.

B. Procedure of instituting disciplinary proceedings against judges (Article 29)

64. This Article sets out the procedures which are to be applied. The disciplinary commission of the Council of Judges can initiate disciplinary proceedings in respect of a judge based on complaints, presentments and special rulings received. There are two months within which to carry out the investigation.

65. A refusal to initiate disciplinary proceedings may be appealed against in the Council of Judges. The procedure and timeframe for such appeal is to be defined in the regulation on the disciplinary commission. Internal investigation includes questioning and looking for explanation and other evidence from a judge, questioning and seeking explanations from the complainant, questioning of witnesses and examination of the case, as well as any other actions to collect

relevant information. A memorandum is drawn up on the basis of the internal investigation. The judge must be made familiar with the materials of the proceedings in advance. The Council of Judges then makes a decision either to terminate disciplinary proceedings due to the absence of a disciplinary misdeed or to impose one of the sanctions already referred to. There are obviously more detailed regulations dealing with the precise procedures which are to be followed and, as the Venice Commission has not seen them, these cannot be commented further.

C. Initiation of a criminal case against a judge and procedure of instituting criminal or administrative proceedings at law (Article 30)

66. This Article refers to the initiation of criminal cases against a judge. The decision to initiate such cases is made by the Prosecutor General who must obtain the consent of the Council of Judges. He or she submits a proposal to the Council of Judges, indicating the circumstances of the criminal case and the legal provision under which the judge is accused to initiate the proceedings.

67. In theory, it is possible for the prosecutors to instruct the case without the consent of the Council of Judges by simply not accusing the respective judge and leaving him or her – willingly – in the status of a suspect or witness. The status of a witness does not provide the person with the same guarantees as those of a suspect or accused. In addition – in particular - a witness has to tell the truth. A better protection of the independence of the judiciary would be if the Council of Judges were requested, at a very early stage of the investigation, to give its approval to proceed.

68. If the consent is refused by the Council of Judges, no repeated presentment by the Prosecutor General is possible.

D. Carrying out operational search and investigative actions in respect of a judge (Article 31)

69. This Article provides that the carrying out of search measures in respect of a judge can be permitted only after criminal proceedings have been instituted against the judge. This seems to present a problem in a case where there is suspicion that a judge may have committed an offence which can only be verified by carrying out a search. Until the search is carried out, the evidence does not exist. It is difficult to see on what basis the Prosecutor General would institute proceedings in advance of obtaining this evidence.

VIII. SOCIAL GUARANTEES OF THE STATUS OF JUDGES

70. The remaining provisions in Chapter 7 relate to such questions as salary, other benefits, official housing, annual paid leave, social protection measures, medical insurance, life insurance, and the physical protection of judges. The provisions in question seem appropriate.

71. The system of grades as foreseen by the draft Law in articles 4.4 and 8-10 is transparent, as far as can be judged from the outside, but it should not conceal some sort of bonus system. The application of this system of grades in individual cases will be the final proof whether the system is working correctly. The attribution of housing facilities and allocations are subject to a considerable amount of appreciation and discretion and are a source of possible abuse[8] which, in post-socialist countries, persist. The Venice Commission recommends the phasing out of such benefits and that these be replaced by an adequate level of financial remuneration[9].

[8] Ibid, paragraphs 46, 47 to 51.
[9] Ibid, paragraph 50.

72. State protection is provided to judges through a number of security measures (see Article 34). The protection covers a threat to the judge's life, health or property in connection with his or her official activity. The provision sets out that these measures should not prejudice the housing, labour, pension or other rights of the person protected. This is to be welcomed and shows the high level of consideration given to judges and to their work.

IX. CONCLUSION

73. The draft Law sets high standards for the qualification of judges and the fact that a high level of social consideration is given to judges, even after the termination of their services, constitutes an important element for the independence of the judiciary. The degree of protection of the independence of the judiciary provided in the Constitution and in the constitutional laws is a further indication of the intention of giving the judiciary an important role.

74. Nevertheless, the draft Law seems to leave open the possibility of a politicised appointment method, despite the commendable inclusion of the parliamentary opposition in the Council for the Selection of Judges. No detailed criteria for the appointment of judges are provided. Only very basic ones concerning age limit, length of employment and basic legal qualification are set out. There is no written examination, nor does there appear to be any provision for training before a judge is appointed to office. The only competitive element is an interview. After the Council for the Selection of Judges has made a recommendation, the President has discretion whether to accept the recommendation, but no criteria are established to give guidance as to whether he or she should do so or not.

75. As far as the first nomination term of judges of local courts is concerned, this first term is limited in time by the Constitution itself to five years. The term is longer than a normal probation period and should be reduced. Reference is made to the opinion by the Venice Commission on the then draft Constitution (now adopted)[10].

76. In the various proceedings before the different bodies such as the Council for the Selection of Judges and the Council of Judges a possibility should have a right to appeal.

77. As for the remuneration of judges, the system is in conformity with the standards of the Venice Commission. The allotment of housing, however, should be phased out and replaced with financial remuneration (increase of salary). The system of grades should not reveal itself to be a hidden bonus system.

78. Otherwise, the provisions appear to be generally appropriate. However, as indicated above (paragraphs 12-14, 21, 23 and 32), many of the provisions are very much framework ones and details remain to be filled in. For example, in relation to discipline, without seeing the detailed regulations it is difficult to establish whether or not the envisaged procedures are fair.

79. Furthermore, it should be noted that the present draft Law is only one part of the entire reorganisation of the judiciary and that it must be read together with the Constitution on the one hand, and the other laws ruling the different matters of the judiciary sector, on the other.

80. The Venice Commission remains at the disposal of the Kyrgyz authorities for any further assistance they may need on this issue.

[10] See paragraph 54, Opinion on the draft Constitution of the Kyrgyz Republic (CDL-AD(2010)015), http://www.venice.coe.int/docs/2010/CDL-AD(2010)015-e.asp