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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PRELIMINARY COMMENTS
ON THE INTRODUCTION
OF CHANGES TO THE CONSTITUTIONAL LAW
“ON THE STATUS OF JUDGES”
OF KYRGYZSTAN

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.*

1. The present draft constitutional law is only part of a package of laws, ruling the reform of the judiciary in a modern law and efficient way. The present draft constitutional law is to be **considered as very positive** and might constitute an essential step to guarantee the independence and impartiality of the judiciary. In any case, this draft has to be read together with the other drafts of the reform package, in order to understand correctly the reform.

2. The draft Constitutional law of the Kyrgyz Republic “on Introduction of Changes to the Constitutional Law of the Kyrgyz Republic on the Status of Judges of the Kyrgyz Republic” is divided in 8 Chapters, where the first chapter, the General Provisions, deal with the general principles of administration of Justice, the enumeration of courts like in article 93 of the constitution, an **interdiction** of the legislator to **interfere** with the judges and especially the **binding nature** of all juridical acts. These general principles do correspond to the European standards in force in most of the European nations and especially the norms on the **independence** of judges and courts. The fact to **publicly** administer justice is a very important aspect and is highly welcome as well as the **binding** nature of judicial acts. The Venice Commission in CDL-AD(2010)004, note 67 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.” The ruling on the binding nature of judicial acts is welcome and does correspond to the standards.

3. Generally a high degree of qualification and ethical is required from the judges. A classification system (**art. 10**) of 6 **qualification grades**, depending on the position, the work records and other circumstances provided for to increase the incomes (and the pension) by an additional payment according to the grade, have been introduced to increase the salary by a scale. Those grades, however, have no influence on the status of the judge itself. They are awarded by the President of the Republic upon presentment of the Council of judges.

4. Besides the usual obligations to strictly observe the Constitution and the laws, as well as to observe the oath and the Code of Honor of judges, observe the secrecy of deliberation of judges, observe the working procedures established in the courts and, last but not least, to **declare his assets and incomes** in accordance with the legislation.

5. A series of interdictions, amongst which the interdiction to accept gifts, additional functions and the interdiction to be member of a political party, tend to **reinforce** the **impartiality** of judges. Especially the provisions on the **declaration of assets and incomes** as well as the interdiction to profess a political opinion by speech or membership in a political party are a **highly appreciated** instruments to insure an **independent** and **impartial** Justice. Generally it may be noted that the very high standards set for the qualification of Judges and the severe rules of behavior are part of the criteria set out by the Venice Commission¹ to ensure a high level of reputation of the Judges. Also the rules on incompatibility are welcome and advisable (see note 62 of the opinion CDL-AD(2010)004) in order to prevent judges to put themselves into a position where their independence or impartiality may be questioned.

GUARANTEES OF JUDICIAL INDEPENDENCE – CHAPTER 2

Independence (Art. 11)

6. The **roots** for the **independence** of judicial, this **very crucial** point for good administration of justice, are laid in the Constitution in article 94, where the constitutional guarantee of independence is accompanied by guarantees on the **prohibition** of **interference** and provisions of **immunity** for judges. The Draft Constitutional Law retakes these provisions and specifies them. The very high level of legislation, in which the independence of Judges and courts is rooted (i.e. Constitution and Constitutional law) does perfectly **correspond** to the European **standards**² strongly supported by the Venice Commission³.

¹ CDL-AD(2010)004, specifically notes 7 and 27

² Consultative Council of European Judges (CCJE), opinion Nr. 1 (at 16¹), quoted in CDL-AD(2010)004

Prohibition of Interference (art 12)

7. The **prohibition** of interference in the activity of judges is **guaranteed** and accompanied by **sanctions** according to the relevant legislation. The draft law further foresees that no one shall have the right to solicit **reports** on concrete cases, except for cases where the liability of a judge is pursued according to the present draft constitutional law. A judge is **not obliged** to give **explanations** on the merits of cases or to present the cases to **whatsoever** person other than in circumstances and in accordance with the procedures in the procedural law.

8. The **Principle of independence** as guaranteed in these texts seem to **concern all persons** whatsoever and should – under this formulation – **comprise** all persons outside and **inside of the judicial** system and the undue influence of higher ranking judges should be also covered by this protection, which is **perfectly in line with the recommendations of the Venice Commission**⁴.

Irremovability of judges (art 13)

9. The protection of the judges by irremovability in the draft law is of very high standard. Judges of all courts are irremovable; removal from office or termination or suspension from office or limitation of powers shall be only in accordance to the Constitution and the present draft constitutional law. The transfer of local judges by rotation to other local courts in other regions of the republic is ruled by the present draft constitutional law.

Immunity of judges (art. 14)

10. The judges are protected by **immunity** and they are specifically protected against **arrest**. This immunity suffers exceptions, in the first line, only when a judge is caught on the facts.

11. The problem of the immunity is the degree of protection. It is obvious that the judges need to be protected against pressures and abuses from the other powers of the state and the immunity is a probate instrument to avoid pressures from undue, untrue and abusive prosecution. However, even judges should not be over the law and therefore an equilibrium between the two requirements, taking into consideration the specificities of the moment and the country, may give more weight to the one or the other direction. The European standards are more into the direction of a functional immunity.

12. It seems that, independent of the wording in article 14, the protection given to the judges in the context of the draft constitutional law is **in fact** the protection similar as given by the European standards. The Constitution of the Kyrgyz Republic in Article 95, point 6 quotes 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 the present draft constitutional law also foresees the possibility to **introduce** administrative or ordinary criminal proceedings against a judge, if the Council of judges agrees to it. An agreement **has to be refused** if the proceeding concerns a fact related to the **function** of the Judge. The immunity of the judges is therefore more a functional one.⁵

ELECTING JUDGES – CHAPTER 3 and 4
Supreme Court and Constitutional Chamber

³ CDL-AD(2010)004, point 22 with quotations

⁴ CDL-AD(2010)004 note 56

⁵ CDL-AD(2010)004 note 60

13. The requirements to become a judge at the Supreme Court and the Constitutional Chamber is an age limit of 40 to the minimum and 70 to the maximum, a higher legal education and a work record of 10 years, of which 5 years as a Judge for the Supreme Court and a working record of 15 years (of which 10 as a judge) for the Constitutional Chamber. To become a Judge (at all levels), one must be of Kyrgyz nationality and may not have (additionally) a foreign nationality, which excludes double nationals from the possibility to become a judge.

14. Persons having suffered condemnations (including those already removed from the records) or have been dismissed once from the position of a judge for disciplinary reasons or having been impeached to act as law enforcement officer or as defense lawyer are also excluded.

15. The **election** of judges of the Supreme Court and the Constitutional Chamber is made by the Jogorku Kenesh upon **presentment** of the President based on the **proposal** of the Council on selection of judges. The term ends at the **limit of age**.

16. The **selection** of a judge for a vacant position is made by the **Council on selection of judges** after a competition following a procedure. The necessity to submit a recent medical **health certificate** may be justified in order to be sure that a candidate is sufficiently in health to fulfill his duties. However, it should be made clear, that the **content of such a certificate** should not be detailed but rather be **limited itself to a statement** (evaluation) that – under medical consideration – the person candidate is in **sufficient** good health (or not) to **fulfill** the function as a judge at the Supreme Court or the like. Under these circumstances and in respect to non-discrimination of disabled persons, such a requirement is fully acceptable.

17. The rest of the documents required are of general nature and of the kind to enable the council of selection to verify the conditions and the aptitude of a candidate. Acting judges are free to submit their candidature, which is expressly foreseen.

18. The selection of the candidates (competition) is conducted by **interviews** by the Council of selection which, on one hand gives a lot of **power of appreciation** to the council. Therefore much attention should be paid to the **composition** of the council of selection of judges, which is ruled in a separate law, separately examined by the Venice Commission. The fact that there is a competition on the basis of **only an interview**, might lack of **objective** criteria and could raise **critics**, specifically if no **possibility of appeal** exists.

19. The Council of selection **submits** within 10 days to the **President** the names of candidates for election to the position of a judge of the Supreme Court and the Constitutional Chamber and the president makes a **presentment** to the **Jogorku Kenesh** who shall decide upon the nomination **within 2 weeks**. **Failing** to be nominated by the Jogorku Kenesh, a **new** selection process has to be made and the procedure is repeated. The draft constitutional law does not say how many times the procedure has to be repeated if no election is made by the Jogorku Kenesh and this fact might well lead to a crisis in extreme situations. Given the fact that for the nomination procedure of local court judges, the analogue problem has been resolved by a limitation to 2 repetitions, the problem has been **consciously** left open. Avoiding the possible conflictual situation might have been preferable.

Local Courts

20. Local court Judges have to match lower requirements: The age limit is 30 years as minimum and 65 years as maximum. Besides a higher legal education a minimum of 5 years experience in the legal profession is needed. A qualification exam has to be passed by a candidate (who is not yet a judge or has been a judge before more than 10 years). The **qualification exam** as a general supplementary and more **objective** requirement is a **welcome** condition in order to ensure a high qualification of judges and **impartiality in selection**. The impeachments to become a judge of a local court are the same than for the Supreme Court and the Constitutional Chamber.

21. The other steps of the selection mode by the council of selection is the same than for the Judges of the Supreme court and the Constitutional Chamber; and 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, a candidate will have to provide an income statement and other information which confirms irreproachability of the candidate's conduct. However, the additional documents must be only produced by those candidates for which the council has asked for and it is not clear at all under which criteria a candidate will be asked to produce these documents. **It is advisable to precise either that the documents are required for all candidates or to state, under which conditions a supplement of documentation may be required from a specific candidate.**

22. The procedure of the examination requirement on one hand and the interview on the other hand seems – *per se* – to be appropriate to filter the candidates according to capacity and ethical requirements. However, the final recommendation of the council is then attached to the file of a candidate and not returned to the candidate. A possibility to make a **appeal** against the decision is **not foreseen** in this draft law. This **might** constitute an **undue limitation** in the rights of candidates.

23. Article 22 of the law foresees that the 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 on selection of judges. On the basis of the outcome of the interview, a **presentment** 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 with a motivated decision. In the event the Council fails to find facts which **prevent** the appointment of a candidate to the position of a local judge, then the Council shall **again** submit to the President the proposal on the same candidate who shall be subject to mandatory appointment within ten days. The **exam** seems to be seen as **only one** out of other pre-conditions to participate at the interviews (art. 21).

24. The most delicate subject of the transfers of a local court judge from one local court to another is ruled by article 23 and is possible under 4 reasons:

- on the own will of a judge;
- in the event of reorganization of the court or changes to the structure or staffing number of judges;
- for the purpose of state protection of judges on circumstances beyond the control of the judge and the state;
- in the event of participation of a local court judge in the competitive selection of candidates to a vacant position of a judge of another local court and presentment of his candidacy to the President by the council on selection of judges.

In this very last case it is to presume that the candidate **knows** for which location (vacancy) he is competing; if **not**, this would present a problem.

25. The rotation (transfer) is effected by the council on selection of judges. The **rule** is that the council **shall honor** to find a mutual consent with the judges in respect of transfer. As already said, also here a **possibility of appeal** would **bring more guarantee**. Applications to transfer from one local court to another are limited to once every 5 years. Together with the lack of appeal possibilities, this rule is only one example how the method of rotation could be misused to punish judges or put undue pressure upon them.

26. The Presidents and deputy presidents of local courts are elected at the meeting of judges of the relevant local court for a period of three years. A consecutive re-election at the same court is not possible.

GROUNDS AND PROCEDURES FOR SUSPENSION OF POWERS, DISMISSAL FROM OFFICE AND TERMINATION OF POWERS OF A JUDGE – CHAPTER 5

27. The dismissal of a judge (i.e. suspension of exercising the duties) better defined as **suspension**, is automatic in the event that the council of judges gives its consent to institution of criminal proceedings or administrative proceedings against a judge and – in the case of judges of the Supreme Court and the Constitutional Chamber – if the Jogorku Kenesh, upon proposal of the Council of judges suspends a judge if it gives the authorization to proceed against a judge. In the case of a local court judge the President – upon proposal of the Council of judges – may suspend a judge if a proceeding is authorized against him. It has been clarified that the technical term used in connection with article **25** is in reality a suspension of the exercise; the terminology could be misleading.

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

29. It should, in the view of the Venice Commission, be taken into consideration that **the cut** of salary, besides **touching** also the **family** of the Judge, may **seriously hinder the right to a legitimate defense** by taking away all financial means and might therefore seriously **affect the human rights** of a person who, until definitive condemnation, is **deemed to be innocent**. It is recommended **not to cut** the salary and other allowances until there is a definitive decision, in order not to violate human rights.

30. The reasons why a judge is dismissed are enumerated in Article **26** and comprise the **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 judges in political parties and their statements in support of whatsoever political party. The fact to be registered as a candidature to the office as President of the Republic or to the office of a deputy in a local kenesh are also grounds for dismissal.

31. Judges of the Supreme Court and the Constitutional Chamber have to be dismissed by at least 2/3 of the deputies of the Jogorku Kenesh upon presentment 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 upon proposal of the Council of Judges.

32. The decision on early dismissal of a judge of the Kyrgyz Republic from office shall **not be subject to appeal**. This latter prescription is very criticable. Every decision should be submitted to the possibility to be appealed. In fact, some grounds of dismissal are objectively clear, but others need to be interpreted in order to check, whether there is or not a violation 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) is **not subject to appeal** may violate the right to a **fair trial**.

33. The powers of a judge shall be terminated upon reaching of the age limit and are subject to early termination (art. 27) through loss or withdrawal from citizenship of the Kyrgyz Republic or acquisition of the citizenship of another country; in case of total or partial loss of legal capacity declared by court verdict, death or death declaration or declaration of missing of a judge. So far these prescriptions do not raise comments.

34. The resignation of a judge, i.e. the voluntary retirement from office at any age, does not affect his rank as a judge and his personal immunity. This prescription does underline the high social status of judges and is welcome, even if the rules on immunity might be matter of discussion.

Disciplinary Proceedings (art. 29)

35. Disciplinary proceedings are brought to the disciplinary commission of the Council of Judges who acts upon complaints of private persons or juridical entities, state agencies, local self-governance bodies, officials thereof, presidents of relevant courts of the Kyrgyz Republic **accusing** a judge of disciplinary misdeed and upon special rulings pronounced by courts of higher instances in respect of judges of courts of lower instances.

36. The procedure before the disciplinary commission of the Council of judges is understandable. There is the possibility of an appeal, if the commission refuses to initiate a disciplinary proceeding but no possibility for the implicated judge to challenge the decision to open a procedure; he will have to undergo the whole investigation procedure and the disciplinary process; also in this context a possibility to appeal the decision to proceed would be welcome.

37. The possible sanctions after a disciplinary procedure are – in very insignificant cases – the **warning**, followed by the possibility of an **admonition** or **censure** and, as last measure, the **early dismissal** of a judge from his position. Admonition and censure may be cancelled not earlier than six months after they were applied.

Criminal or administrative cases against a judge (art. 30)

38. The decision to initiate a criminal case against a judge is with the **Prosecutor** General. In order to initiate the procedure against a judge as an accused person, the Prosecutor General has to **apply** to the Council of Judges in order to obtain the consent of the council to proceed against the judge as accused person. 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 – willingly – in the status of a suspect or witness; the status of a witness does not give the person the guarantees of a suspect or accused. And – in particular - a witness has to tell the truth . It might be a **better** protection of the **independence** of the judiciary, if the Council of Judges would have to be asked in a very early stage of the investigation for the approval to proceed.

39. If the consent is refused by the Council of judges, no repeated presentment by the General Prosecutor is possible. Operational search measures related to limiting his civil rights or the violation of his immunity as guaranteed by Constitution, the present draft constitutional law and other laws are permitted only after a criminal proceeding has been instituted against the judge.

SOCIAL GUARANTEES – CHAPTER 7

40. The provisions on salary, housing, pension, insurance, vacation etc. are fully **in line** with a law based remuneration system which takes into consideration the dignity of the judges. The system of **grades** as foreseen by the draft constitutional law is **transparent as far as it can be judged from outside** but it should not turn out to a hidden bonus system and the concrete application of the system of the grades in individual cases will finally be the bench mark of a functioning system. Of course the attribution of **housing** facilities and allocations have a considerable part of appreciation and discretion and are a source of possible abuses⁶ which, in post-socialist countries persist; however, the Venice Commission **recommends the phasing out** of such benefits and replacing them by an adequate level of financial remuneration⁷ .

State protection of judges

41. In case of **threat** personal protection, **protection** of the home and property of the judge is provided. Besides the issue of firearms, special facilities of individual protection and danger alert can be provided as well as temporary placement to a safe facility and other protective

⁶ See CDL-AD(2010)004 notes 46, 47 to 51.

⁷ See opinion CDL-AD(2010)004 note 50

measures which may be extended, in case of need, also to close relatives of the judge. However, the security measures must not prejudice the housing, labor, pension or other rights of the person protected. This concern about the protection of judges is very welcome and shows the high level of consideration towards the judges and the work they have to fulfill.

CONCLUSIONS

42. The high standards set on the **qualification** of judges and the high level of **social consideration** given to judges, even after termination of their service, is very positive and constitutes an important element of the independence of the judiciary. The degree of protection of the independence in the constitution and in constitutional laws is a further indicator of that will to give the judiciary a high profile.

43. The **appointment** and the professional career of the judges is highly based on the law and widely separated from the executive and the legislative power. The Council of judges and the council of election of judges are self-governing institutions which fulfill the requirement of **independence**. The rules of **incompatibility** for judges are clearly stated and present another element of judicial independence.

44. As far as the **first nomination** term of the judges of local courts is concerned, this first term is limited in time by the constitution itself to 5 years. The term is longer than a normal probation time and it is understandable. Reference is made to the opinion rendered by the Venice Commission concerning the then draft Constitution (now adopted)⁸.

45. In the **various proceedings** before the different bodies such as the Council of Selection of judges and the Council of Judges a possibility for **appeal** would be welcomed.

46. As for the **remuneration**, the system is **conforming** to the standards shared by the Venice Commission. The allotment of houses should be **phasing out** and be replaced by financial help (increase of salary). And the system of grades should **not reveal** itself to be a **hidden bonus system**.

47. As for the immunity it might be worth introducing a precision or indicating more precisely that a criminal investigation against a judge (even if only suspected or as a witness) **needs the approbation** of the Council of judges.

48. Other elements, such as the **prohibition** for judges to be member of a political party and to make statements in favor of a **political** party are, together with the binding nature of juridical acts, important factors which tend to underlining the independence and impartiality of the judiciary.

49. And **finally** it should be noted that the present draft constitutional law is only a single part of the whole reorganization of the judiciary and that it has to be read together with the constitution on one hand and with the other laws ruling the different matters of the judiciary sector on the other hand.

⁸ CDL-AD(2010)015, note 54