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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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1. The advice of the Venice Commission is sought in relation to a draft 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".

2. Chapter 1 of the draft law sets out general provisions to the effect that the 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 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.

3. Article 3.2 provides that citizens of the Kyrgyz Republic 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 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.

4. In some respects this 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 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 present law. Similarly, Article 3.7 talks about 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.

5. Article 4 deals with the status of a judge. The first paragraph 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". 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 the present text.

6. Article 5-1 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 writer does not have any information as to the contents of the code of honour which presumably can be found elsewhere. 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 the Kyrgyz Republic.

7. 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 organizations. 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.

8. 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 on a number of occasions and there is certainly a view among many judges in western democracies that judges should have such a right. In the opinion of the present writer in the current state of development of the Kyrgyz Republic the prohibition on judges being members of political parties or engaging in party political activity is not only justified but necessary.

9. Article 5-2 goes on to confer 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 on selection of judges, to improve his or her qualification, to resign from office. According to Article 6 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 recognized by the Council of judges.

10. Articles 8 -10 deal with judicial qualification grades. These grades are based on seniority and affect the salary payable to judges. Qualification grades are awarded by the President upon the proposal of 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. However, by Article 8 advancement is conditional on the quality of the administration of justice. There is nothing in the text 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 has a discretion in relation to the matter. Again, it may be that this 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.

11. Article 12 provides that any interference in the activity of judges related to the administration of judges is to be prohibited. Persons guilty of influencing a judge are to be liable in accordance with the law. Again, presumably this latter law which sets out how this is to be achieved is to be found elsewhere.

12. Article 14 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. 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 the present constitutional law. 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. 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 as is any other citizen. Placing obstacles in the way of proper investigation of crimes alleged to have been committed by judges is likely to encourage judicial corruption.

13. Chapter 3 sets out the requirements relating to the appointment of judges of the Supreme Court and of the Constitutional Chamber. Again, these provision seem for the most part to be framework provisions and there is little detail on how the actual appointment is to be made. 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. They are to be elected by parliament upon the proposal of the President based itself on a proposal of the Council of Judges on selection of judges. According to the draft law on the Council on selection of judges in the Kyrgyz Republic 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 law provides that a competition is to be conducted by means of interview. There is no provision for written examination. The procedure is set out in Article 17 of the law "On the Council on 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. Presumably this is the "interview" that is referred to. Following this procedure the Council takes an open vote and recommends candidates to the President.

14. It is not clear whether the President has a discretion whether to propose a candidate to the parliament. The parliament has a discretion to reject candidates proposed but no criteria for the exercise of this discretion are set out (Article 14.7). 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 provision goes on to say "the application may be accompanied by other documents (references and recommendations) concerning the personality of the applicant". This seems to the writer to encourage the possibility of political involvement in the selection process. Indeed, the involvement of both the President and the Parliament in the process without any clear criteria being established for appointment would seem to make politicization of appointments inevitable despite the involvement of the judges and the opposition in the Council on selection of judges. In the event that the 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. The law provides that there are a number of matters which will disqualify a person from being a judge of the Supreme Court or the Constitutional Court, including having criminal convictions, having been earlier dismissed from the position of a judge or from the law enforcement agencies or being a foreign citizen.

15. Article 16 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.

16. Chapter 4 contains provisions for the election of judges of local courts corresponding to those for the Supreme Court and the Constitutional Chamber. Here the age limit 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. Again, appointment is made following a

recommendation from the Council on 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 on selection of judges the judges are appointed by the President. The parliament is not involved in this process. Article 22 clearly envisages the possibility that the President will reject candidates who have been recommended by the Council for the selection of judges. He 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 politicized.

17. Article 23 deals with the transfer of judges from one local court to another. This can be at the request of the judge concerned, or because of reorganization of the court or changes to the structure of staffing numbers, or for the purpose of protection of judges. In reality, it seems to the writer that the provision allowing for transfer to be compulsory in the event of reorganization 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 text who is to make proposals relating to reorganization of the court or changes to the structure or staffing number of judges. If, as I assume, this is a function of some member of the executive this could be a powerful method to ensure compliance by a judge with the will of the executive power. The law provides that in the event of reorganization 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 has any power to prevent a reorganization going ahead or to stop a change to the structure or staffing number. Similarly, where a decision is made to transfer judges for the purpose of their protection the Council on the selection of judges makes a decision.

18. Chapter 5 deals with the grounds and procedures for suspension of powers, dismissal from office and termination of the powers of a judge. Article 25(1) provides that a judge of the Kyrgyz Republic 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. Paragraph 2 says that the 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. In each case the Council of Judges makes a proposal to the parliament or to the President as appropriate. There seems to be some overlap between these provisions as paragraph 1 appears to apply to all judges.

19. 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 25.1-3 is meant to refer only to suspension rather than dismissal. However, paragraph 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. Presumably this means 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 to the writer 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.

20. Article 26 deals with the grounds and procedures for dismissal of a judge from office. As one would expect they include the entry into legal force of a guilty verdict by a court in respect of a judge. However, paragraph 2(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). In the writer’s opinion this should be specifically stated as if it is not so confined then it could be interpreted in a very wide manner.

21. 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. In the English text this provision is somewhat obscure, but the writer assumes 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.

22. 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 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 law are covered. 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.

23. Article 29 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. 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 I have not seen these I cannot comment further.

24. Article 30 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.

25. Article 31 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 the writer to present a serious problem in a case where there is suspicion that a judge may have committed an offence which can only verified by carrying out a search. Until the search is carried out the evidence does not exist. On what basis would the prosecutor institute proceedings in advance of obtaining this evidence?

26. 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.

Conclusion

27. The draft law seems to leave open the possibility of a very politicized appointment method despite the commendable inclusion of the parliamentary opposition in the Council of selection of judges. No detailed criteria for the appointment of judges is

made. 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 on the selection of judges has made a recommendation, the President has a discretion whether to accept the recommendation but no criteria are established to give guidance as to whether he should do so or not. In the case of judges of the Supreme Court and the Constitutional Chamber the appointment is subject to a further power of veto by the parliament. Again, no criteria are established for the exercise of these powers. The open ended provision allowing for the furnishing of documents other than the specified ones on application for the position leaves open the possibility of political support and interference.

28. The draft gives too great an immunity to judges and the provisions relating to searches of judges are too restrictive.

29. Otherwise the provisions appear to be generally appropriate. However, as indicated above 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.