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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW ON THE COUNCIL FOR THE SELECTION OF JUDGES OF KYRGYZSTAN

on the basis of comments by

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Mr Latif HÜSEYNOV (Member, Azerbaijan)

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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),* has made a request for an opinion on the following three draft Laws:

- "the draft Constitutional Law on the Constitutional Chamber of the Supreme Court" (subject of Opinion 622/2011);
- "the draft Constitutional Law on the introduction of changes to the Constitutional Law on the Status of Judges" (subject of Opinion 623/2011);
- "the draft Law on the Council for the Selection of Judges" (hereinafter the "draft Law", subject to the present opinion).

2. As part of a judicial reform package, the Parliament of Kyrgyzstan had 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 in preparing the first three opinions.

3. Messrs Nicolae Esanu and Latif Hüseynov were invited to act as rapporteurs for the present opinion. Their (preliminary) comments appear in documents CDL(2011)046 and 047 respectively.

4. A delegation of the Venice Commission composed of Mr Esanu (rapporteur for the present opinion), Mr Vardzelashvili (rapporteur for the Opinion on the draft Constitutional Law on the Constitutional Chamber of the Supreme Court) and Mr Gstöhl (rapporteur for the Opinion on the draft constitutional Law on the Status of Judges), accompanied by Mr Schnutz Dürr from the Secretariat, made a visit to 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, a plenary session of Parliament on 28 April at which the package of laws was originally supposed to be adopted in second reading 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. These events were very productive and have resulted in number of proposals for amendments and changes to the draft Law. 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 Law as it was submitted for opinion, but it points out the results of discussions and areas of agreement reached during the meeting of the Joint Committees when appropriate.

7. The present opinion was adopted by the Venice Commission at its … Plenary Session (Venice, …).

II. General remarks

8. The procedures for the appointment of judges are central to the judicial independence, especially in countries without strong democratic tradition.

9. Even if Kyrgyzstan is not a member of the Council of Europe and consequently the European Convention on Human Rights is not applicable there, the Convention and the case-law of the European Court of Human Rights provide standards, which are relevant also for non-member states like Kyrgyzstan from a comparative perspective.

10. According to the European Court of Human Rights, in order to establish whether a tribunal can be considered "independent", regard must be had, among other things, to "the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence"[1]

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

12. In its Report on the Independence of the Judicial System - Part I: The independence of Judges, the Venice Commission stated: "…it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges" (paragraph 32).

13. The new Kyrgyz Constitution does not provide for a single body in charge of appointment and career of judges but has charged separate bodies with this task. Article 64.3 of the Constitution provides that the judges shall be appointed on the proposal of the Council for the Selection of Judges (hereinafter, "Council") and same article provides judge shall be dismissed on the basis of a proposal by the Council of Judges, which is distinct from the Council for the Selection of Judges. Regrettably, this constitutional provision makes it impossible to establish a single body competent to take decisions on appointment and career of judges. A future constitutional revision could provide for a single body, possibly with sub-commissions for specialized functions (e.g. discipline).

14. When a Constitution provides for more than one body competent for all aspects of the career of the judges, provisions on each of these bodies should be examined in the light of the standards developed for single judicial councils.

15. The Constitution also designates the President and the Parliament as authorities competent to appoint (elect) judges. As a point of departure, this is not problematic. Appointment of judges by the executive (President, Government) is acceptable under certain conditions. Even election by Parliament is not *per se* incompatible with Article 6 ECHR or the idea of the rule of law.[3] However, special precautions are needed to guarantee that in such appointment procedures the merits of the candidate are decisive, not political or similar considerations.[4] The law should clearly determine the procedure for the selection of judges.

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

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

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

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

Excellence and proficiency of judges are the best guarantees for their independence and for a better service to the citizens. A system of competitive entry examination is appropriate for the selection of judges in countries where judges enter the judiciary right after their law studies (as opposed to the common law system of appointing experienced barristers as judges).

16. The draft Law is very detailed and a number of provisions would better fit into the rules of procedure adopted by the Council itself (Articles 9 to 15 and 18). Nonetheless, these provisions will be commented below. The draft Law also contains a number of repetitive provisions, e.g. Article 12.1 and 14.2; 10.2.3 and 15.4; 7.1.11 and 15.5.

III. Comments article by article

17. Article 1.3 provides that the Council "shall perform its activity on the principles of independence, openness, collegiality, good faith and legality". In addition, the Council should be obliged to adopt its decisions impartially and based on the objective criteria clear defined in advance by the law or by an independent body.

18. Article 3 repeats the Constitutional provisions on the competence of the Council to organise the competition for selecting candidate for appointment as judges of courts of all levels and to propose the selected candidates to the President for appointment (transfer) or for submission of the proposal for appointment (transfer) to Parliament. It seems that the Council will not be involved in the decisions concerning the further career of judges, including dismissal. However, as the body specialised in assessing the qualifications of a person for the position of a judge, the Council should also be involved in dismissal proceedings, at least in consultative capacity. This should be possible even under the Constitution in force.

19. The provisions concerning the powers of the Council to request necessary information or documents and to convoke any official or private person for explanations are too broad and would be appropriate rather for an investigative agency. These provisions are not clear as they do not set out what information should be provided. What kind of information can be collected and received? What kind of procedure regulates the collection of this kind of information? What is the state of knowledge of the candidate about this information? Does the candidate have the right to contest this information? These provisions should be clarified in order to bring them into conformity with applicable standards.

20. The process of competitive selection of judges cannot be transformed into an investigation of documents and facts. The Council should take its decisions on the basis of documentation provided by the candidates and on the exams taken. The type of documents to be provided should be established in advance and has to be the same for all candidates in comparable situations. In case of doubt about the accuracy or veracity of facts or documents an investigation should be conducted by police or prosecution authorities. The draft Law should also refer to applicable data protection provisions.

21. Article 4 of the draft Law repeats the provisions of Article 95 of the Constitution on the composition of the Council by adding two elements: firstly, that the Council shall have 24 members, and secondly, that "the full membership of the Council shall be approved" by Parliament (*see* Article 5.4).

22. This composition contains a number of positive elements.

- First, the Council is only composed of judges and representatives of the civil society. The presence in the Council of members of the executive power as well as any other persons employed in the civil service is definitely excluded.
- Second, it is to be welcomed that representatives of the civil society are included in the composition of the Council. The Venice Commission has made it clear that "the best

safeguard against corporatism is the presence of civil society representatives (whether or not legal specialists)" in a judicial council[5].

- Third, the parliamentary opposition is directly involved in the formation of the Council; one third of the composition of the Council (i.e. 8 members) is elected by the parliamentary opposition.
- Fourth, judge members of the Council are elected by the Council of Judges which is a constitutionally established body of judicial self-regulation[6].

23. Nevertheless, this provision gives rise to certain critical remarks:

24. The number of judges in the entire composition of the Council (only 8 out of 24 members) does not seem to be adequate. The limitation of the number of judges to one third falls short of the standards requiring a substantial judicial representation within such institutions. The Venice Commission has stressed that "[i]n all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges"[7].

25. The Law should specify that the judicial members of the Council are to adequately represent all judicial instances, including first level courts.

26. The three years mandate of the Council's members could give rise to problems related to the independence and impartiality of the Council. Because of the relative short mandate Parliament will have a possibility of political influence on the selection of the judges, especially in the light of Parliament's powers to appoint the two thirds non-judicial members.

27. Article 4.4 provides for the non-reappointment of the members of the Council. This is unusual. Such limits usually exist for the Head of State. The purpose of this provision is probably to ensure the independence and impartiality of the members. This can be better ensured by providing for a single but long term.

28. During the discussions in Bishkek, the Commission's delegation was informed about the intention to increase the number of members of the Council to 27 in order to exclude the possibility of a tie vote and to ensure parity between persons with legal and non-legal education designated by the majority and opposition. However, the number of 24 members seems to be too high already. A large number of members can result in organisational difficulties and higher costs. The goal sought can better be achieved by decreasing the number of members of the Council.

29. According to Article 95.7 of the Constitution, the Council has three components: "[t]he Council of Judges, the parliamentary majority and the parliamentary opposition correspondingly shall elect one third of the composition of the Council on selection of judges". Article 95.7 of the Constitution also provides that "[t] he Council on selection of judges is composed of judges and representatives of the civil society", but does not determine the distribution of judges and representatives of the civil society for each of the three components. Even under the current Constitution, it seems possible to achieve a composition with a substantial part of the members of the Council being judges, even if not all of them would be elected by their peers. To that end,

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[5] CDL-AD(2002)021 Supplementary Opinion on the Revision of the Constitution of Romania (adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002), para. 21-22.

[6] *See* CDL-AD(2008)040, Opinion on the Constitutional Law on Bodies of Judicial Self-Regulation of Kyrgyzstan (adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008)).

[7] CDL-AD(2010)004, Report on the Independence of the Judicial System. Part I: The Independence of Judges (adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para. 32.

the draft Law could provide that the majority and the opposition elect also some judges to the Council.

30. In the absence of sufficient objective criteria, the draft Law does not exclude a membership of the Council with strong political affiliation, which could result the appointment and transfer of judges based on political criteria. The mere fact of being member of civil society does not rule out such party affiliation.

31. Article 5.2 delegates the determination of the procedure for the election of the judges' component of the Council to the Congress of Judges. While it is possible to have practical questions of the procedure decided by the Congress, at least its principles should be set out in the draft Law. For example, in order to be in line with the standards it is necessary to provide that the Council of Judges has to elect judges respecting the proportion between all instances of courts, including first instance courts.

32. Article 5.3 sets out that the members of the Council who are proposed by the majority and the opposition of Parliament are to be elected separately at the meeting of the fractions. However, this mechanism can be used only when the majority and the opposition are composed of a single fraction or parliamentary group. In practice, the majority and opposition each will often be composed of more than one fraction. The Council's members should be elected at separate meetings of the deputies from majority and opposition. In order to avoid a blocking of the process (especially by the opposition) within these meetings, the draft Law should establish a low quorum or even no quorum at all.

33. Article 5.6 calls for a gender balance within the Council. This is to be welcomed but may remain a mere declaration because no mechanism for the implementation of such a balance is provided for.

34. Article 6 provides that persons who are in the state or municipal service cannot be elected as members of the Council. This is welcomed but may be insufficient. Persons who have a close affiliation to public authorities like directors or members of administrative councils of state enterprises or commercial societies with important state participation are not excluded. During the discussions in Bishkek, it seemed that some Members of Parliament considered they would be eligible themselves. Such participation would however lead to an inacceptable politicisation of the membership and has to be ruled out.

35. The minimum age of 30 years for membership in the Council is questionable. Article 70 of the Constitution provides a minimum age of 21 years for Members of Parliament and the same rule should apply for the Council.

36. The requirement of 10 years of experience for judges should be reconsidered because it will make the election of qualified candidates from all levels of the judiciary, especially from first level courts, very difficult.

37. During the meetings in Bishkek, the Commission's delegation was informed about the intention to amend the draft Law in order to provide more requirements for the members of the Council. This is strongly recommended. This is one of the key points of the draft Law because the credibility of the Council depends on the independence of its members. The Law should expressly provide that the members of the Council are independent and that they act in their personal capacity and not as representatives of the political forces which elected them.

38. Article 7.10 provides that a member of the Council shall be dismissed if s/he fails to attend three consecutive sessions of the Council "without good reason". However, the notion of "good reason" is not determined and could be misused, for example by convoking upon short notice three sessions of the Council during the holidays of an 'unwelcome' member.

39. Article 7.11 provides that the "failure to make an announcement of recuse" is another ground for dismissal. In practice, a member of the Council might not even be aware that s/he there are grounds for recusal in given case. Both for the present case and dismissal because of repetitive absence above, the Commission recommends to provide that these facts will be established by the whole Council and not only by its President. In addition, an appeal to a court against such a dismissal should be available.

40. Article 7.2 provides for the suspension of the membership "by the decision of the Council in case of institution of criminal proceedings (as an accused person) or institution of administrative proceedings in an action at law". As concerns cases of institution of criminal proceedings, the element of seriousness of the criminal offence concerned could be inserted. As far as administrative proceedings are concerned, they should be deleted. If an administrative sanction is not foreseen as a ground for the termination of the powers of a Council member, why should the mere fact of institution of administrative proceedings that may or may not result in the imposition of such a sanction, give rise to the suspension of the membership?

41. According to Article 10.1.6, a member of the Council has a right to sign the decision of the Council. Article 18.9 provides that "[t]he decision shall be signed by the chairperson and the members of the Council who attended the meeting". It seems not necessary that the decisions of the Council should be signed by all the members who attended the meeting. It is difficult to argue the necessity that the decisions to be signed by other members than the Chairperson and secretary of the Council. If this provision were kept in the draft Law, it would be necessary to provide a solution for cases when some members refuse to sign or would be unable to sign. Otherwise dissenting members would be able to prevent the Council from taking decision simply by refusing to sign them.

42. In accordance with Article 11.1 the Secretary of the Council is the "designated employee of the authorised agency". This seems to imply that the Secretary is provided by a government agency. This solution questionable from viewpoint of the independence of the Council, especially taking in consideration that Article 21 of the draft Law provides that the members will act on a *pro-bono* basis. In this case, all the administrative tasks of the Council will depend on the executive power, which could influence the procedure of selection of judges, for example, by withholding documentation from the Council. The Secretary should be responsible only to the Council and not to any other government agency.

43. Article 13.2 provides that if one of the candidates who was properly informed about the time and place of the meeting is absent, the selection process will continue without him or her. What is the meaning of "properly informed" in this case? What if the candidate can prove that s/he was not "properly informed"? Is this information addressed individually to the candidates? It seems preferable to provide information about the selection process in the media and on the official site of the Council and to exclude absent candidates from the selection process in all cases, unless the public information was not provided appropriately.

44. According to Article 16.6 the Secretary notifies a decision of the Chairperson to return documents which "are incomplete or which do not meet the requirements of the constitutional law". This seems to result in a rejection of the application without appeal. However, not in all cases it will be evident whether the documents submitted respect all requirements and whether they are incomplete. It seems doubtful if even smallest *lacunas* or a very short disregard of a deadline should have such a harsh result. This could lead to the disqualification of excellent candidates on purely formal grounds. There should be a possibility of an appeal to the plenary Council in which the candidate can explain reasons for these problems. Any further appeal to a court would have to be strictly limited in order not to block the appointment procedure by endless lawsuits.

45. The express provision in Article 16.6 that the letter signed by chairperson has to state the reasons for the return is to be welcomed. However, such reasons are not useful in the the absence of a mechanism appeal, first to the plenary Council and then to a Court.

46. Article 17.5 provides that "[b]ased on the outcomes of the competitive selection, the Council shall have an open vote on each candidate and make the decision to propose candidates for the position of a judge of the Supreme Court, the Constitutional Chamber and a local court". This provision includes two contradictory rules. The first part of the sentence provides that the selection of the candidates must be made "[b]ased on the outcome of the competitive selection", that means on the basis of objective criteria as the result of the competitive selection, whereas the second part provides that the Council "shall have an open vote on each candidate" in which the members of the Council are no longer bound by objective criteria. If there is an objective and competitive selection, there cannot be an open vote, which would potentially disregard the objective results.

47. A merely formal vote to approve the results of the selection process in general would not be problematic. However, the Council will have an open vote on each candidate and those candidates who receive positive vote will be offered the post of judge (see Article 18.6 and 18.7 of the draft Law). In such a system, the results of the competitive selection would be useless because the Law does not oblige the Council to appoint the candidate who achieved the best score in the competitive selection. There is a real danger that persons will be recommended for appointment as judge who have the sympathy of the members of the Council rather than those having been found qualified according to objective criteria.

48. In accordance with Article 18.1, "[d]ecisions of the Council shall be made by open vote by the majority of the total number of the members of the Council with the use of individual ballot papers". It is unclear why "individual ballot papers" are needed if the decisions are adopted by open vote. In any case, given the number of the members of the Council ballot papers do not seem necessary to ensure an accurate vote count.

49. In addition, not all decisions of the Council will be on recommendations for the appointment of judges. There may also be purely formal decisions like the adoption of an agenda. Article 18.1 as it stands would require the use of ballot papers even in such simple matters.

50. Article 18.12 provides that "[t] he decisions of the Council are not subject to appeal". However, the decisions of the Council affect not only the judiciary such but also the individual rights of the candidates. When the candidates consider that the selection process was not in conformity with the law, these persons must have possibility to appeal for the control of legality of the decisions taken, which affect their rights. Therefore, an appeal to a court should be provided for, at least on procedural grounds.

51. Article 19.2 provides that when the President rejects the candidate proposed by the Council s/he must adopt a motivated decision. This is a step in right direction but it is not enough. The Law should oblige that the President can reject a candidate proposed by the Council only when the selection procedure was conducted in violation of the law. In previous opinions, the Venice Commission regularly recommended to curb the discretionary power of the President by limiting him or her to verify whether the selection procedure had been followed. The President should in other words act similar to a "notary". If after a re-examination, the Council proposes the same candidate, the President should be obliged to follow the recommendation and appoint the proposed candidate[8].

[8] *See*, in this regard, Joint Opinion on the Draft law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe (adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010)), Para. 38.

52. During the discussions in Bishkek, the Venice Commission delegation was informed that the draft would be amended in order to provide expressly that a presidential veto could be based on procedural grounds only and that a second presidential veto would not be possible. If the draft were to remain as it is, this would undermine the authority and independent status of the Council. Moreover it contradicts Article 22.2 of the Draft Constitutional Law on the Introduction of Changes and Amendments to the Constitutional Law on the Status of Judges, which states that if the Council decides to re-submit a proposal on the same candidate to the President, the person concerned "shall be subject to mandatory appointment within ten days".

53. Furthermore, it is necessary to revise Article 19.2, which provides for a presidential veto against the candidates for the Supreme Court. According to the Constitution, the President has no competences in the procedure of the appointment of the judges to the Supreme Court, except for the competence to submit to Parliament the names of the candidates selected by the Council. The appointing body is the Parliament and it seems appropriate that this body verified whether the Council followed the procedures established by the Law.

54. Article 21.1 provides that the "members of the Council shall work on a pro-bono basis". According to the Constitution the Council has a key role in the process of the appointment and transfer of judges. It is doubtful that such a huge task can be fulfilled by a body only composed of members working on a *pro-bono* basis. In order to diminish the dependence of the Council on the secretariat, composed of civil servants, it is necessary to ensure that at least a part of the members of the Council act on permanent basis.

55. Even if the members act on a *pro-bono* basis, it is necessary to provide for the reimbursement of costs (travel expenses and, if necessary, accommodation), at least for members residing outside Bishkek because it is unacceptable to force them to bear costs or in order to avoid that problem not to elect members residing outside Bishkek

IV. Conclusions

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

1. The composition of the Council should be reconsidered to ensure that a substantial part if not a majority of the members are judges.
2. Within the judge's component of the Council, a balanced representation of all levels of the judiciary should be ensured.
3. Article 5 should clarify that candidates for membership in the Council of the parliamentary components are elected by a majority of the members of Parliament present and not of all the members of the factions.
4. The draft law should provide that the members act independently in their personal capacity and do not represent the groups, which have elected them.
5. More detailed requirements for candidates for membership in the Council should be added in order to reduce the risk of political influence and close party affiliation of the members should be excluded.
6. Article 7.1.4 and 7.1.5 should refer to serious criminal offences, taking into account that not all criminal cases or convictions would necessarily justify dismissal.
7. A fair procedure including a right to appeal should be available in cases of dismissal because of repeated absence from the meetings or the failure to recuse (Article 7.1.10 and 7.1.11);
8. The provision of Article 7.2 providing for the suspension from the Council in the event of the institution of administrative proceedings should be deleted.
9. Elements of procedure, which are contained in Articles 8 to 14 and Article 18, should better be adopted as rules of procedure rather than at the level of law.

10. The draft Law should provide that a presidential veto against the Council's recommendations may be based on procedural grounds only and that the president can raise objections only against candidates for local and specialised courts. The provision envisaging a second presidential veto should be deleted. The same provisions should be included also in the procedure of appointment of the judges of the Supreme Court and the Constitutional Chamber by the Parliament.
11. The publication of decisions of the Council should be considered.
12. The law should provide for judicial review of decisions of the Council relating to appointments and transfers of judges.

62. The Venice Commission remains at the disposal of the Kyrgyz authorities for further assistance.