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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

ON THE CONSTITUTIONAL LAW ON THE STATUS OF JUDGES

AND

**ON THE LAW ON BODIES OF JUDICIAL SELF-REGULATION
OF THE KYRGYZ REPUBLIC**

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1. The opinion of the Venice Commission has been sought in relation to two draft laws:
 - 1) The Law on the Status of Judges
 - 2) The Law on Judicial self-regulation

The Law on the Status of Judges

2. The Constitutional Law on the status of judges has three declared objectives.

Firstly, to create legal machinery guaranteeing the status of judges,

Secondly, to provide judges with guarantees of independence, and

Thirdly to make provision for the election, appointment, transfer, rotation, discharge from office, liability and material and social provisions of judges.

Chapter 1

3. Chapter 1 of the law states a number of general principles including the exclusive exercise of justice by courts, access to justice free of charge, the autonomy of courts and independence of judges, equality before the law, examination of cases in public, and the binding nature of judicial acts. (Article 3) These provisions seem appropriate.
4. Article 4 headed "unity of status of judges" states as follows:

"Not all judges of the Kyrgyz Republic shall enjoy the same status. Special characteristics of the legal situation of certain categories of judges may be established by a law of the Kyrgyz Republic."

It is not clear to the writer what is the thinking behind this provision. It would be desirable that the Article define what differences in status are intended and what are the "special characteristics of the legal situation" which would justify such distinctions.

5. Article 6 prohibits judges from membership of or support for political parties, from being part of the legislature or the executive, from entrepreneurial activity or paid work, except for teaching or academic work or participation in judicial self-regulation bodies. It would be useful to extend this exception to permit judges to participate in international associations of judges or to participate in expert bodies both on the national and the international level – for example, as the draft stands there might be some doubt whether a Kyrgyz judge could be appointed to a body such as the Venice Commission or undertake work as an expert on their behalf.
6. Articles 8-10 provide for different classification categories for judges which in turn determine their pay. The deprivation of a classification category is permitted only under a judicial procedure as a type of additional sanction imposed by a court sentence in a criminal case. This seems to imply that a judge convicted of a criminal offence may remain as a judge, albeit on a reduced salary. It needs to be clarified in what circumstances this can happen. If an offence is so serious as to warrant punishment by a substantial diminution of salary, how can the person who committed it remain as a judge?

Chapter 2

7. Chapter 2 deals with guarantees for the independence of judges. This represents a difficult balance. On the one hand a judge has to be put in a position where interference with the judge's work or person by third parties is made difficult. On the other hand this should not be done in such a way as to put the corrupt or dishonest judge beyond the reach of the law.
8. Insofar as the law provides that the activity of judges may not be interfered with, that judges may not be removed except in accordance with the Constitution and the law, and that proper material and social provision needs to be made for judges, these are appropriate provisions.
9. Articles 11 and 14 read on their own appear to provide for a complete immunity of judges. Such an immunity goes too far. However, Article 30 does provide a mechanism whereby a judge can be made criminally liable, although the relationship between Articles 14 and 30 is not very clear. Presumably Article 30 is intended as an exception to Article 14. The three Articles reflect Article 83(2) of the Constitution which provides for immunity (except where a judge is caught at the scene of a crime) which may be waived by the Jogorku Kenesh in the case of Constitutional Court and Supreme Court judges and by the President for local court judges. A judge should have no immunity from criminal liability if he commits a crime. Of course, it may be reasonable to take measures to prevent any arbitrary harassment of a judge under the pretext of law enforcement. This can be achieved by such measures as providing that the consent of a person such as the President of a court or the chief prosecutor is required in order to authorize arrest, search or detention as is indeed provided for in Article 30.
10. Similarly, it is reasonable to grant immunity from civil suit to a judge acting in good faith in the performance of his duty, but it should not be extended to a corrupt or fraudulent act carried out by a judge.

Chapter 3

11. Chapter 3 deals with the procedures for electing the judges of and appointing the presidents and vice-presidents of the Constitutional Court and the Supreme Court.

12. Judges of the Constitutional Court are elected by the Jogorku Kenesh (parliament) on the proposal of the President of the Republic as provided for by Article 83(5) of the Constitution. If a candidate is rejected the President may propose the same or another candidate. The law does not specify how a deadlock is to be resolved if the President were to repeatedly nominate a candidate who was repeatedly rejected.
13. There is no technical input by a body such as an expert committee who would vet the suitability of candidates for election. In my view such an input would be desirable.
14. In the case of the Supreme Court, where there is a vacancy the National Council holds a competition in which any judge of more than 5 years standing as a judge who has at least 10 years experience as a judge may apply. The Council then submits candidates to the President, who nominates one candidate. The Jogorku Kenesh then takes a decision. Again, there is potential for deadlock. I have no information concerning the composition of this National Council which I assume is the National Council for the Judiciary referred to in Articles 83 and 84 of the Constitution.
15. In deciding what candidates to submit to the President the Council considers the judges' personnel files. It is not clear what information is kept on these files or who compiles them.
16. In paragraph 9 the following provision appears:-

“In the event of no other candidate being available, the National Council shall submit to the President of the Kyrgyz Republic other candidates from among those having participated in the competition.”

I do not find this very clear. Does it mean that if the President and the Jogorku Kenesh fail to appoint anyone the Council is to look at the applications again?

17. Paragraph 10 says that among persons disqualified from being judges of the Constitutional Court or the Supreme Court are “persons who have a conviction, including a quashed conviction.” Surely if a conviction is quashed it is not a conviction and should not be a bar to appointment? What if it had been wrongfully obtained by perjured evidence?
18. The presidents and vice-presidents of the two courts are to be appointed by the President with the consent of the Jogorku Kenesh. There is potential for deadlock here.

Chapter 4

19. Chapter 4 deals with the appointment and transfer of judges of local courts. Candidates require 5 years legal experience or to have passed an examination set by the Council of Judges. Again, persons who have a quashed conviction may not be local judges.
20. The National Council holds a competition for local judges. The applicants must provide certain documentation but may also supply “other documents (references, recommendations) describing the applicant's personal qualities”. Where serving judges are concerned their documents shall contain “private opinions pronounced in respect of the judge”. This does not seem desirable or transparent.

21. There is then a qualifying examination and an interview. The National Council makes recommendations and the President of the Republic makes the appointment. The judge is then assigned to a specific local court (Article 22(3)).
22. Article 23 provides for transfers by the President of the Republic on the proposal of the National Council, at the judge's wish, in the case of a reorganization, when the judge has served more than 10 years, or in circumstances beyond the judge's and the State's control, including the judge's state of health.
23. Presidents and vice-presidents of local courts are appointed by the President of the Republic on the National Council's proposal. Private opinions may be taken into account.

Chapter 5

24. Chapter 5 deals with suspension, dismissal and termination of powers.
25. Suspension occurs where a judge is a candidate for political office. The suspension ends where the person is no longer such a candidate. I do not think it desirable that a judge should be able to contest political office without first resigning. If a judge is a candidate and fails to be elected he or she is nonetheless identified with a political tendency to the detriment of judicial independence.
26. Article 25 also provides that the decision to suspend or restore a judge's powers is to be taken by the President of the Republic. It should be made clear that this is not a discretionary decision.
27. A judge is to be dismissed from office or discharged from exercising judicial duties by the President of the Republic on the proposal of the National Council if criminal proceedings are instituted, or administrative proceedings under judicial procedure or if a motion for discharge is lodged. I would have thought that a judge should not be dismissed, but merely suspended, pending the determination of proceedings. Dismissal followed by restoration to office seems envisaged by Article 25(3) and (4). In English, the terminology is confusing. The Article speaks of suspension of powers, dismissal from office, and discharge from exercising duties without defining clearly what is the difference between them. Salary continues to be paid during suspension but not following dismissal (although on restoration to office outstanding salary can be paid).
28. Article 26 sets out ground for discharge from office. They are:
 - 1) Reaching retirement age,
 - 2) On the judge's own application,
 - 3) Health grounds (attested to by a medical commission)
 - 4) Failure to report for work for more than four months (excluding reasons of pregnancy or child-care),
 - 5) Appointment to another court or position,
 - 6) Refusal to accept transfer,
 - 7) A guilty criminal verdict,

- 8) A court judgement to apply compulsory medical measures,
 - 9) A disciplinary infringement incompatible with the calling of a judge, confirmed by decisions of the Council of Judges or the National Council,
 - 10) Activity incompatible with the office of judge.
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29. It is not clear what is meant by “activity incompatible with the office of judge” which is not otherwise covered (Article 26(9)). Who is to determine this?
 30. On the proposal of the President of the Republic judges of the Constitutional Court and the Supreme Court may be discharged early on a two-thirds vote of the total membership of the Jogorku Kenesh. No criteria for such an early discharge are stated and in my opinion this is an undesirable provision for this reason. The procedure to be adopted is not set out and it is not even clear that any grounds must be stated or what rights of defence the judge has. No involvement by an expert body is provided for.
 31. Local judges may be discharged by the President of the Republic on the proposal of the National Council. No criteria or procedures are set out in the provision.
 32. Article 27 sets out the grounds for the ceasing or termination of the judge’s powers (as distinct from discharge from office). The Article begins with a tautology “a judge’s powers shall cease in connection with the expiry of their powers”. The grounds for early termination are:
 - 1) Loss of citizenship or acquisition of foreign citizenship,
 - 2) Limited legal capacity or declared incapacity,
 - 3) Death,
 - 4) Notification of death and
 - 5) Recognition as a missing person.
 33. Early termination is effected by the body which appoints or elects them. It is not clear who this is where there is involvement of more than one body, e.g. if the consent of parliament to an appointment is required must it also consent to early termination?
 34. It remains unclear to me why certain happenings result in discharge from office and others in termination of powers, e.g. reaching the age limit leads to the former and death to the latter.

Chapter 6

35. Chapter 6 deals with the disciplinary and criminal liability of judges.
36. Article 28 deals with disciplinary liability of judges and has to be read in conjunction with Article 6 which sets out the duties of the judge. Two possible penalties are provided for – an observation or reprimand, and early discharge from office.
37. Violation of the obligations in Articles 6(1)(1) and (2) of the law are punishable by either penalty. In some respect these obligations are somewhat vague. “Anything that might besmirch the authority or dignity of a judge” may be open to a subjective interpretation. It would be desirable that this provision be more precise.

38. Violation of the obligations in Article 6(1) (3) to (7) lead to an observation for a first violation, a reprimand for a second and early discharge for a third. It may be that some greater flexibility would be appropriate. A first violation might be very serious, for example, a failure to deal with a serious conflict of interest or to make a correct declaration of property or income. Conversely, a second or third violation might be trivial, such as a failure to comply with the rules of working arrangements in some trivial respect. Breaches of Article 6 (3) to (5) lead to early discharge (these relate to taking part in political activity or entrepreneurial activity or other work).
39. Complaints may be made by any individual or legal entity, or public authority, or the president of a court. They may also be instituted by the private opinion of a higher-ranking court (Article 29(1)). This latter provision seems unjust. How can somebody defend himself from a private complaint?
40. After complaint, the Council of Judges establishes a committee to investigate. The committee has extensive powers to question the judge, the complainant and witnesses. The judge against whom the complaint is made is to be given "sufficient time to familiarise themselves with the case materials". The draft law does not indicate that the judge has the right to confront and question witnesses or make submissions. There is no reference to a right to legal representation.
41. After examining the committee of examination's report the Council of Judges makes a decision. There is no provision for an appeal to a court of law and this omission should be rectified. The ultimate decision to discharge the judge is then taken by the Jogorku Kenesh at the proposal of the President based on the Council of Judges' decision. It is not clear whether the President and the parliament have a discretion in the matter and if so by what criteria it is to be exercised.
42. Article 30 concerns the bringing of criminal proceedings against a judge. The decision to do so must be taken by the Prosecutor General and he must have the consent of the National Council. Likewise, administrative proceedings require the National Council's consent. The National Council must refuse consent if the proceedings were "prompted by the statute adopted by the judge in the exercise of their judicial powers". It is not clear whether this is the only basis on which consent can be refused. It is not clear how exactly these provisions relate to those concerning the judge's immunity but presumably they are intended as an exception.
43. Article 31 provides that the carrying out of operational or search measures against a judge can take place only after the institution of criminal proceedings. This seems to me to pose a difficulty in a case where one could not know whether there was sufficient evidence to justify charges only after the search or other investigation.

Chapter 7

44. Chapter 7 deals with social guarantees of the status of judges. The law provides for guarantees for salaries, official accommodation, paid leave, pregnancy and childbirth leave, medical insurance, compensation, for work related injury, life insurance, death benefit, pensions, lump sums and protection where there is a threat to the judge. The provisions seem appropriate.

The Law on Bodies of Judicial Self-Regulation / Self-Government

45. Article 91 of the Constitution of the Kyrgyz Republic provides as follows:-

- “1. Judicial self-regulation shall be used to resolve internal issues concerning the activities of judges.
2. The Congress of Judges shall be the bodies of judicial self-regulation in the Kyrgyz Republic.

The Council of Judges shall protect the rights and lawful interests of judges, exercise supervision over the drawing up and implementation of court budgets, organise basic and further training for judges and consider questions of disciplinary proceedings against judges.

3. The organisation and activities of the judicial self-regulatory bodies shall be defined by law.”
46. The draft law is a short one which establishes two bodies of judicial self-regulation, the Congress of judges and the Council of judges. The congress is to meet once every three years and is the supreme body of judicial self-regulation. Extraordinary congresses may be convened at the initiative of one-third of all judges or of the Council of Judges. The Council which has fifteen members is to be elected by the Congress. It is subordinate to the Congress and its function is to implement the Congress’ policy in the period between congresses.
47. The draft law is a framework law which in many respects is quite short on detail. How the system works in practice will depend very much on what other legal and regulatory acts are adopted to govern its working.
48. The draft law does not go into much detail on precisely what functions the two bodies will have but describes their functions in fairly general terms. “Judicial self-regulation” is defined as “the means of organising the judicial community, making it possible to resolve questions concerning the internal activities of judges through its own bodies”. The function of the two bodies is described in Article 4 as that of “expressing and defending the interests of both judges and other persons vested with judicial power”. However, the procedure for their formation and activity is to be determined by the Congress. Article 5 provides that the fundamental aims of the bodies are, firstly, to protect the rights and lawful interests of judges, secondly, to assist in improving the judicial system and judicial proceedings, and thirdly to represent the interests of judges in dealings with state bodies, public associations and international organizations.
49. Article 7 goes on to specify the powers of the Congress. In addition to the representational role already referred to it confers a policy-making function and an executive role on the Congress. Among the powers are 1) to establish rules of procedure of both bodies 2) to establish a Blueprint for judicial reform 3) to establish a Judges’ Code of honour as well as 4) to determine the main thrusts of policy of the judicial branch of authority and assign tasks to the Council of Judges aimed at guaranteeing the independence of courts and also protecting the rights and lawful interests of judges and 5) to resolve other questions concerning the judicial community. While it is expressly provided that the Congress may not intervene in matters of dispensing justice, it is provided that the Congress’ decisions are to be binding on judges.
50. Article 9 provides for the power of the Council. Again, these include important executive powers as well as advisory and recommendatory powers. Among these are the supervision over the drawing up and implementation of the courts budget, the examination of questions of instituting disciplinary proceedings against judges,

and the organization of training and further training of judges and court staff, and the receipt of annual reports from the heads of the judicial department and the training centre. In addition the Council has various representational and advisory functions. The law, however is silent as to how exactly most of these functions are to be carried out, and presumably further legal instruments will deal with issues such as discipline, training and the budget.

51. There are a number of other points worthy of note. Under Article 2, retired judges are to retain their membership of the judicial community. While I see the advantage of using the talents and wisdom of retired judges, for the purpose of electing the Council I wonder if it might not be wiser for retired judges to have a separate representation? It is conceivable that retired judges would outnumber serving judges. Should they be entitled to vote at a Congress? It is not clear whether the law in fact provides for this since two different terms "judges" and "members of the judicial community" are used and arguably retired judges deemed to be members of the judicial community are not judges.
52. The law provides for the Congress to elect the fifteen members of the Council but is silent on the method of election. Should different courts form different constituencies or should all the judges vote in a single constituency? Is the principle to be "one judge one vote"? What if some important courts have no representation? Is there not a risk of the Council being mainly (or even wholly) composed of judges from the local courts?
53. The law provides that judges may not be elected to the Council for a second consecutive term. This means a complete turnover in the membership every three years. Is some continuity not a desirable thing? Might some thought be given to staggering the terms of office?
54. It is noted that the entire Council is to be elected by the judges. The Venice Commission in its report of 16-17 March 2007 on Judicial Appointments recommended that Judicial Councils should include members other than those elected by the judiciary. However, in the draft law the Council of judges is not given any role in relation to the appointment or promotion of judges.