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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS**  
**AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**JOINT OPINION**

**ON THE DRAFT AMENDMENTS TO THE LEGAL FRAMEWORK**  
**ON THE DISCIPLINARY RESPONSIBILITY OF JUDGES**

**IN THE KYRGYZ REPUBLIC**

**Adopted by the Venice Commission**  
**at its 99<sup>th</sup> Plenary Session**  
**(Venice, 13-14 June 2014)**

**on the basis of comments by**

**Mr Nicolae ESANU (Member, Moldova)**  
**Mr Viktor GUMI (Member, Albania)**  
**Mr Karoly BARD (Expert for OSCE/ODIHR, Hungary)**

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## **I. Introduction**

1. On 13 February 2014, the Secretary of the Council for Judicial Reform of the Presidential Administration of the Kyrgyz Republic, sent a letter to the OSCE Centre in Bishkek requesting assistance from the OSCE in reviewing a package of draft amendments to the legal framework pertaining to the disciplinary responsibility of judges, to assess their compliance with OSCE commitments and international human rights standards.

2. On 17 March 2014, the OSCE Centre in Bishkek transmitted to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "OSCE/ODIHR") unofficial English translations of the latest versions of the draft amendments provided as a courtesy of the UNDP Office in the Kyrgyz Republic. The above-mentioned package includes draft amendments to the following legal acts (CDL-REF(2014)019, hereinafter "the Draft Amendments"):

- the Constitutional Law "On the Status of Judges of the Kyrgyz Republic" (hereinafter "the Constitutional Law");
- the Law of the Kyrgyz Republic "On Judicial Self-Governance Bodies of the Kyrgyz Republic";
- the Code of Civil Procedure of the Kyrgyz Republic; and
- the Criminal Code of the Kyrgyz Republic.

3. By letter of 28 April 2014, the Chairman of the Parliamentary Committee on Judiciary Issues and Legality of the Parliament of the Kyrgyz Republic, Mr Toktogul Tumanov, requested the European Commission for Democracy through Law of the Council of Europe (hereinafter "Venice Commission") to provide an opinion on the draft amendments to the Constitutional Law. The Constitutional Law was already amended in 2011,<sup>1</sup> and the Venice Commission had issued an opinion on the draft amendments to this Constitutional Law at that time (hereinafter "2011 Venice Commission Opinion").<sup>2</sup> Mr Nicolae Esanu and Mr Viktor Gumi acted as rapporteurs for the Venice Commission.

4. Given the similar scope of the requests received from the Kyrgyz authorities, it was agreed that the Venice Commission and the OSCE/ODIHR will prepare a joint opinion on the Draft Amendments.

5. A delegation of the Venice Commission and OSCE/ODIHR visited Bishkek, Kyrgyzstan, on 20 May 2014 to meet with the Parliamentary Committees on Judiciary Issues and on Human Rights, Constitutional Legislation and State Structure; the Council of Judges; the Presidential Administration; the Constitutional Chamber; as well as civil society representatives. This joint opinion takes into account the information obtained during the above-mentioned visit.

6. Following an exchange of views with the Chairman of the Parliamentary Committee on Judiciary Issues and Legality of the Parliament of the Kyrgyz Republic, Mr Toktogul Tumanov, the present joint opinion was adopted by the Venice Commission at its 99<sup>th</sup> Plenary Session (Venice, 13-14 June 2014).

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<sup>1</sup> See the Law on Introduction of changes and amendments to the Constitutional Law "On the Status of Judges of the Kyrgyz Republic" (2011) available at [http://legislationline.org/download/action/download/id/4426/file/Law%20on\\_status\\_of\\_judges\\_2011\\_en.pdf](http://legislationline.org/download/action/download/id/4426/file/Law%20on_status_of_judges_2011_en.pdf).

<sup>2</sup> Venice Commission Opinion on the Introduction of Changes to the Constitutional Law "On the Status of Judges" of the Kyrgyz Republic, CDL-AD(2011)017, of 20 June 2011, adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session (17-18 June 2011) available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)017-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)017-e).

## **II. Scope of the Opinion**

7. The scope of this Joint Opinion covers only the Draft Amendments, submitted for review, and the legislation that they are amending. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the status and disciplinary responsibility of judges in the Kyrgyz Republic.

8. The Joint Opinion raises key issues and provides indications of areas of concern. In the interests of concision, the Joint Opinion focuses more on problematic areas rather than on the positive aspects of the Draft Amendments. The ensuing recommendations are based on relevant international human rights and rule of law standards and OSCE commitments, Council of Europe standards, as well as good practices from other OSCE participating States and Council of Europe member states. Where appropriate, they also refer to the relevant recommendations made in the 2011 Venice Commission Opinion.

9. This Joint Opinion is based on unofficial English translations of the Draft Amendments provided as a courtesy of the UNDP Office in the Kyrgyz Republic. Errors from translation may result.

10. In view of the above, the OSCE/ODIHR and the Venice Commission would like to make mention that this Joint Opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation that the OSCE/ODIHR and the Venice Commission may make in the future.

## **III. Executive Summary**

11. At the outset, OSCE/ODIHR and the Venice Commission welcome the Kyrgyz Republic's efforts to amend its legal and institutional framework relating to the disciplinary responsibility of judges, to bring it into compliance with international standards on the independence of the judiciary, particularly as regards the provisions to strengthen the independence and impartiality of, and ensure a clear division of tasks between, the Disciplinary Commission in charge of investigating and the Council of Judges in charge of deciding on the imposition of a disciplinary sanction. The OSCE/ODIHR and the Venice Commission also note favourably the genuine attempt to aim at a certain level of balanced representation of both genders in the composition of the Disciplinary Commission.

12. At the same time, the Draft Amendments could benefit from certain revisions and additions, to ensure the effectiveness of the provisions as well as their full compliance with international standards, and the importance of adequate interpretation and implementation in good faith must be stressed. In particular, grounds for disciplinary liability of judges need to be clearly and narrowly phrased, and the disciplinary procedures should be held before an independent and impartial body, and should ensure the fair trial rights of the affected judges. The OSCE/ODIHR and the Venice Commission thus recommend as follows:

### **1. *Key Recommendations***

- A. to suppress the non-compliance with the Code of Honour of Judges as a ground for initiating disciplinary proceedings and define in explicit and clear provisions the grounds for bringing judges to disciplinary responsibility; [pars 25-29]
- B. to supplement Article 28 of the Constitutional Law with other possible types of disciplinary sanctions to facilitate compliance with the principle of proportionality of disciplinary sanctions; [par 64]
- C. to supplement the draft amendments to ensure that the decision on the disciplinary responsibility of a judge is taken by an independent and impartial body, as follows:

- 1) introduce in Article 29 of the Constitutional Law the possibility for a member of the Council of Judges to abstain in case of conflict of interest and for the judge to request the recusal of one of its members; [par 99]
  - 2) delete in part 5 of Article 28 of the Constitutional Law the competences of the President and the Jogorku Kenesh pertaining to the dismissal of judges, or at minimum ensure that only a decision of the Council of Judges which has become final can be submitted to the President and that that the decision of the appellate court is binding upon the Council of Judges; [pars 100-104 and 111-113]
- D. to clarify and supplement Article 29 of the Constitutional Law to ensure that the right of a judge to a fair trial is respected, particularly as regards the public hearing of a case, the equality of arms, the right to a fair hearing as well as the motivation and publicity of the decision; [pars 106-108];
- E. to broaden the scope of the grounds for appeal stated in part 6 of Article 29 of the Constitutional Law to include the review of facts, evidence and correct application of law; [par 113]

## **2. Additional Recommendations**

- F. to delete the reference to the “ethics of the civil servants” from Article 5-1 par 1 sub-par (2) of the Constitutional Law; [par 31]
- G. to amend Article 14 of the Constitutional Law as follows:
- 1) specify in par 1 the entity in charge of authorizing the arrest or the search; [par 56]
  - 2) remove the word “unlawful” from par 2 as it relates to the functional immunity of judges (or clarify its meaning); [pars 40-41]
  - 3) consider excluding from the material scope of the functional immunity certain intentional crimes such as bribery, corruption or traffic of influence; [pars 42, 59-61]
  - 4) consider introducing personal immunity of the judges from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions; [par 49]
- H. to revise Article 28 of the Constitutional Law as follows:
- 1) clarify in part 2 the meaning of “form of judge’s guilt”; [par 65]
  - 2) state that divergence of legal interpretation among lower and higher courts, the assessment of facts or weighing of evidence, or alleged mistakes in applying the law, shall not fall under disciplinary responsibility, except in cases of malice and gross negligence; [par 36]
  - 3) delete the reference to the communication of the materials to the assembly of judges for their consideration from part 6; [par 110]
- I. to amend Article 29 part 2 of the Constitutional Law as follows:
- 1) clarify who can initiate disciplinary proceedings against a judge; [par 95]
  - 2) state that the examination of the complaint before the Disciplinary Commission shall be kept confidential, unless otherwise requested by the judge; [par 90]
  - 3) clearly state in par 3 (fourth indent) that a complaint that aims at repealing a judicial act, should be inadmissible; [par 35]
  - 4) expressly provide that the fact that a decision of a judge is overruled or modified on appeal does not constitute a ground for initiating disciplinary proceedings; [par 35]

- 5) specify the period of limitation for bringing an appeal in case of inaction of the Disciplinary Commission; [par 91]
  - 6) expressly state whether anonymous complaints will be accepted and that only the evidence collected in compliance with the rules of evidence contained in the civil procedure code will be admissible; [par 93]
- J. to clarify in part 6 of Article 29 of the Constitutional Law who can file an appeal; [par 114]
- K. to enhance the wording of the new Article 29-1 of the Constitutional Law as follows:
- 1) state in par 1 that by a certain date, the gender representation threshold should become no more than five members of the same gender out of nine; [par 72]
  - 2) provide that the nomination of candidates, as well as the rules and procedures for election of the members from the judiciary, and for the designation of the civil society representatives shall comply with the gender requirements stated in par 1 of this provision, and shall be further defined in a resolution adopted by the Council of Judges; [pars 73-75]
  - 3) mention that nominations of judge-candidates as well as election of the chairperson and deputy of the Disciplinary Commission are made by secret ballot; [pars 77 and 84]
  - 4) introduce certain safeguards to ensure the transparency and openness of the lot drawing process for selecting civil society members; [par 80]
  - 5) specify the modalities of the appointment of the candidates from civil society by the Jogorku Kenesh and by the President; [par 81]
  - 6) supplement par 7 to specify whether judges will be reimbursed for the costs relating to their function as member of the Disciplinary Commission and provide a mechanism for the proportional reduction of their workload; [pars 85-86]
  - 7) add a clear statement that all the members of the Disciplinary Commission are independent, equal and act in their personal capacity, independently from the body which nominated them and/or from their primary employers; [par 87]
  - 8) specify in which circumstances a member from the reserve list will temporarily substitute a permanent member of the Disciplinary Commission; [par 88]
- L. to lay down in part 5 of Article 30 of the Constitutional Law the broad principles to be followed by the Council of Judges when deciding to give consent to the initiation of criminal or administrative proceedings; [par 62]
- M. to review Article 9 of the Law on Judicial Self-Governance to ensure that it is fully in line with the revised provisions of the Constitutional Law and delete the reference to the communication of the materials to the assembly of judges for their consideration from part 3 of Article 10-1; [pars 82-83 and 110]
- N. to supplement or clarify the draft amendments of the Code of Civil Procedure as follows:
- 1) clarify in Article 258-4 the persons who can file an appeal and state that the period of 10 days starts from the moment when the decision is notified to the concerned judge and clarify the rules for computing the period of time; [pars 114-115]
  - 2) provide in Article 258-5 that certain valid reasons may warrant an adjournment; [par 116]
  - 3) in case of unlawful decision, allow for annulment of the decision as well as remedies; [par 117]
- O. to amend the Criminal Code as follows:
- 1) ensure that the definition of a “public official” encompasses the judiciary and clarify the provisions of Article 303 regarding the criminal offense of corruption; [par 43]

- 2) remove completely Article 328, or at a minimum re-phrase the provision to make it clear that only malicious conduct is covered and clarify the definition of the constitutive elements of the criminal offense; [par 48]
- P. to consider establishing an advisory body on ethics within the Council of Judges; [par 30] and
- Q. to review the draft amendments to ensure that all provisions are drafted in a gender neutral manner. [par 119]
13. The OSCE/ODIHR and the Venice Commission remain at the disposal of the Kyrgyz authorities for any further assistance they may need.

#### **IV. Analysis and Recommendations**

##### **1. International Standards relating to the Status and Disciplinary Responsibility or Liability, of Judges**

14. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law. At the international level, the independence of the judiciary is enshrined in key human rights instruments, including the Universal Declaration of Human Rights (Article 10) and the International Covenant on Civil and Political Rights (hereinafter “the ICCPR”) (Article 14).

15. While the Kyrgyz Republic is not a member State of the Council of Europe (hereinafter “the CoE”), the Opinion will also refer as appropriate to the European Convention on Human Rights (hereinafter “the ECHR”) and other Council of Europe’s instruments, since they serve as useful and persuasive reference documents on the issue of the independence of the judiciary. The Joint Opinion will also make reference to the Venice Commission’s opinions and publications, given that the Kyrgyz Republic is a member of the Venice Commission since 1 January 2004.

16. OSCE participating States have also committed to ensuring the independence of the judiciary, particularly in the Copenhagen Document (1990), the Moscow Document (1991) and the Istanbul Document (1999).<sup>3</sup>

17. Against the background of the above-mentioned international standards, a number of recommendations have been elaborated in various international forums. These contain a higher level of details and are able to prescribe, on a more practical level, the steps that need to be taken to ensure the independence of the judiciary, particularly in relation to the disciplinary responsibility, or liability, of judges. These documents include, amongst others:

- the UN Basic Principles on the Independence of the Judiciary;<sup>4</sup>
- the Venice Commission Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)<sup>5</sup> (hereinafter “the Venice Commission Report on the Independence of Judges”); and

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<sup>3</sup> See par 5 of the OSCE Copenhagen Document (1990); pars 19-20 of the OSCE Moscow Document (1991); par 45 of the OSCE Istanbul Document (1999). See also the Brussels Declaration on Criminal Justice Systems (2006) and the Ministerial Council’s Decisions No. 5/06 on Organized Crime (Brussels 2006) and Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area (Helsinki 2008).

<sup>4</sup> UN Basic Principles on the Independence of the Judiciary endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

<sup>5</sup> CDL-AD(2010)004 available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx).

- the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia<sup>6</sup> (hereinafter “the OSCE/ODIHR Kyiv Recommendations”).

18. The Joint Opinion will also make reference to the following documents which serve as useful guidance, though not directly binding upon the Kyrgyz Republic:

- the Recommendation of the Council of Europe Committee of Ministers on “Judges: Independence, Efficiency and Responsibilities” adopted in 2010 (hereinafter “the CoE Recommendation CM/Rec(2010)12”);<sup>7</sup> as well as the judgments of the European Court of Human Rights<sup>8</sup> (hereinafter “the ECtHR”);
- the opinions of the Consultative Council of European Judges<sup>9</sup> (hereinafter “the CCJE”);
- the European Charter on the Statute for Judges;<sup>10</sup> and
- the Practitioner’s Guide on International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors developed by the International Commission of Jurists.<sup>11</sup>

19. While these instruments<sup>12</sup> prescribe numerous principles, there are three basic requirements which they set with respect to national laws governing the disciplinary responsibility of judges, namely: (i) that there be a clear definition of the acts or omissions which constitute disciplinary offences; (ii) that the disciplinary sanctions be proportionate to the respective disciplinary offence; and (iii) that the disciplinary proceedings be of an appropriate quality. It is from the perspective of these core principles that the subsequent review and analysis of the Draft Amendments is conducted.

20. At the domestic level, the main principles of the independence of the judiciary are laid down in Section VI of the Constitution of the Kyrgyz Republic<sup>13</sup> and in the Constitutional Law.

## 2. Definitions of Disciplinary Offences

21. Amended pars 2 and 3 of part 1 of Article 28 of the Constitutional Law define a disciplinary offence (дисциплинарный проступок) as “a wrongful act or an omission by the judge which does not correspond to the requirements of irreproachable conduct established by the present Constitutional Law, provisions of the Code of Honor of Judges”. Article 6 of the Constitutional Law as amended defines “irreproachable conduct” of the judge by referring to the absence of violations of the requirements listed under Article 5-1 of the

<sup>6</sup> The OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, available at <http://www.osce.org/odihr/KyivRec?download=true>.

<sup>7</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to CoE member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies, available at <https://wcd.coe.int/ViewDoc.jsp?id=1707137>.

<sup>8</sup> See, e.g., *N. F. v. Italy*, ECtHR Judgment of 2 August 2001 (Application no 37119/97).

<sup>9</sup> In particular Opinion No. 3 of the Consultative Council of European Judges to the attention of the CoE Committee of Ministers on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

<sup>10</sup> European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23].

<sup>11</sup> International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioner’s Guide. ICJ, Geneva (Switzerland), 2007.

<sup>12</sup> The UN Basic Principles, the Venice Commission Report on the Independence of Judges and the OSCE/ODIHR Kyiv Recommendations.

<sup>13</sup> Section VI of the Constitution is devoted to court and justice (Articles 75-84). Pursuant to Article 93 par 1 of the Constitution, justice in the Kyrgyz Republic shall only be exercised by the courts. According to Article 94 par 1, a judge shall “be independent and subordinate only to the Constitution and laws”. Furthermore, any interference in the administration of justice is prohibited according to Article 94 par 3.



Constitutional Law. Read together with Article 28 of the Constitutional Law as amended, activities deemed incompatible with the requirements set in Article 5-1 of the Constitutional Law may thus trigger disciplinary liability of judges and ultimately lead to early dismissal of the judge in cases where the conditions laid down in amended pars 5 and 6 of Article 28 of the Constitutional Law are met.

22. More particularly, newly worded item 8 of part 2 of Article 26 provides for early dismissal of judges in case of “systematic or gross disciplinary offence confirmed by the decision of the Council of Judges”. While it is welcome that the new wording qualifies the nature of the misconduct as compared to the current version (i.e. that the disciplinary offence should be either “systematic” or “gross”), this provision should be read together with Article 28 of the Constitutional Law and thus indirectly with Article 5-1 of the Constitutional Law, which contains some overly broad or vague grounds for pronouncing the early dismissal of a judge, e.g., the non-compliance with the ethical norms contained in the Code of Honor of Judges (see pars 25-29 *infra*) and the reference to the “dignity of judges” (see par 32 *infra*).<sup>14</sup>

23. It must be pointed out that internationally, there is no uniform approach to the organization of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations.<sup>15</sup> However, as they stand, the grounds for bringing judges to disciplinary responsibility are too broad or vaguely drafted and it is suggested that they be more restrictively framed, e.g., that the Articles of the Constitutional Law which define disciplinary offences and/or provide for the imposition of disciplinary sanctions state a more defined list of grounds or refer to the specific sub-paragraphs of the Articles of the Constitutional Law, and not directly or indirectly to the whole Article 5-1 of the Constitutional Law.

24. Article 5-1 of the Constitutional Law lists a number of requirements and prohibitions applying to serving judges. As stated in General Comment No. 32 of the Human Rights Committee on Article 14 of the ICCPR, “States should take specific measures guaranteeing the independence of the judiciary [...] through the constitution or adoption of laws establishing clear procedures and objective criteria for the [...] dismissal of the members of the judiciary and disciplinary sanctions taken against them.”<sup>16</sup> While the proposed draft does not amend Article 5-1 of the Constitutional Law, it is worth highlighting that since the gross or systematic violation of the requirements listed therein may lead to the imposition of disciplinary sanctions (see amended pars 5 and 6 of Article 28 of the Constitutional Law), it is essential that this Article be drafted in a sufficiently clear way. The reference to the requirement of “foreseeability” developed by the ECtHR serves as a useful benchmark in that respect. This requires that the conduct giving rise to disciplinary action be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct.<sup>17</sup> More specific and detailed description of grounds for disciplinary proceedings would also help limit discretion and subjectivity in their application.

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<sup>14</sup> See also page 70 (par 10) of the Istanbul Anti-Corruption Action Plan Second Monitoring Report on Kyrgyzstan, available at <http://www.oecd.org/corruption/acn/49882439.pdf>.

<sup>15</sup> See *Volkov v. Ukraine*, ECtHR Judgment of 25 May 2013 (Application No. 21722/11), pars 81-82, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115871#{"itemid":\["001-115871"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115871#{), referring to the Comparative Law Research Report on “Judicial Independence in Transition” of the Max Planck Institute for Comparative Public Law and International Law (2012).

<sup>16</sup> See par 19 of the General Comment No. 32 of the Human Rights Committee on Article 14: the Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 (hereinafter “General Comment No. 32 of the Human Rights Committee”), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en).

<sup>17</sup> See *N.F. v. Italy*, ECtHR Judgment of 2 August 2001 (Application No. 37119/97), pars 29-30; *Volkov v. Ukraine*, ECtHR Judgment of 25 May 2013 (Application No. 21722/11), par 173ff.

25. Article 5-1 par 1 sub-par (2) of the Constitutional Law states that a judge should “observe the requirements of the Code of Honor of Judges of the Kyrgyz Republic as well as the ethics of the civil servants as envisaged by law, avoid any circumstances which may discredit the authority and the dignity of judges”. This implies that the non-compliance with the ethical principles of professional conduct included in the Code of Honor of Judges may trigger the imposition of disciplinary sanctions. It must be pointed out that generally, given the nature of rules of professional ethics, they should not be equated with a piece of legislation<sup>18</sup> and directly applied as a ground for disciplinary sanctions. Additionally, these ethical norms are often drafted in general and vague terms<sup>19</sup> which do not fulfil the requirement of foreseeability.

26. The purpose of a code of ethics is to provide general rules, recommendations or standards of good behaviour that guide the activities of judges and enable judges to assess how to address specific issues which arise in conducting their day-to-day work, or during off-duty activities. In the majority of countries, codes of ethics have only unofficial status and the breach of the ethical principles does not constitute direct ground for disciplinary action.

27. This is entirely different from the purpose achieved by a disciplinary procedure which is designed to police misconduct and inappropriate acts which call for some form of disciplinary sanction.<sup>20</sup> According to the CCJE, “principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence”.<sup>21</sup> Breaches of the ethical norms should, in the end, usually result in moral rather than in disciplinary liability.<sup>22</sup>

28. In light of the above, using the non-compliance with the Code of Honour of Judges, which may contain provisions drafted in broad and vague terms, as a ground for initiating disciplinary proceedings may have grave potential implications for judicial independence, since such provisions leave room for discretion which may be abused and result in arbitrary decisions.<sup>23</sup> At the same time, serious violations of ethical norms could conceivably imply fault and acts of negligence that should, in accordance with the law, lead to disciplinary sanctions. Such disciplinary sanctions shall be based on explicit and clear provisions in the law and should be applied in a proportionate manner in response to recurring, unethical judicial practice. Consequently, it is recommended that the drafters specify in the Constitutional Law, in a clear and “foreseeable” way, which type of behaviour shall trigger which form of disciplinary responsibility (these provisions may also be based on ethical principles, if formulated in the manner set out above).

29. The same comments apply to par 2 of Article 28 part 1 which refers to “gross or systematic violations of rules of conduct in off-duty activities, set by the Code of Honour of Judges”. While judges should conduct themselves in a respectable way in their private life, it is difficult to lay down very precisely the standards applying to judges’ behaviour in their off-duty activities, also considering the constant evolution in moral values in a given country.<sup>24</sup>

30. With respect to ethical rules, it is worth highlighting that the CCJE “encourages the establishment within the judiciary of one or more bodies or persons having a consultative

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<sup>18</sup> See pars 44 and 46-47 of Opinion No. 3 of the CCJE.

<sup>19</sup> See par 31 of the Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan, CDL-AD(2013)035, of 10 December 2013, adopted by the Venice Commission at its 97<sup>th</sup> Plenary Session (6-7 December 2013) available at

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)035-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)035-e).

<sup>20</sup> See par 60 of Opinion No. 3 of the CCJE. See also pars 72-73 of CoE Recommendation CM/Rec(2010)12.

<sup>21</sup> See par 48 (i) of Opinion No. 3 of the CCJE.

<sup>22</sup> *Op. cit.* footnote 20, par 36 (Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan).

<sup>23</sup> *Op. cit.* footnote 20, par 30 (Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan).

<sup>24</sup> See par 29 of Opinion No. 3 of the CCJE.

and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules.<sup>25</sup> In that respect, as noted by the Venice Commission, it is important to ensure a strict separation of duties and responsibilities between the advisory body on ethics and the disciplinary body, since the judge should not have to face the risk that his/her request to the advisory body on ethics be transferred to another procedure that could result in a disciplinary sanction.<sup>26</sup> The stakeholders in the Kyrgyz Republic should discuss the formation of such advisory body on ethics.

31. Article 5-1 par 1 sub-par (2) of the Constitutional Law also states that judges shall comply with the “ethics of the civil servants as envisaged by law”. This raises some issues in terms of guaranteeing the independence of judges. First, it is acknowledged that judges should play the leading role for the development of ethical principles of professional conduct applicable to their profession.<sup>27</sup> By referring to the ethics of civil servants, this implies that a body of ethical rules, normally established by the executive power, and to which the judges may not have contributed or been consulted about, would be applicable to the judiciary. Second, while the OSCE/ODIHR and the Venice Commission did not review the content of the ethical rules applicable to the civil servants, certain principles contained therein may jeopardize the independence of the judiciary, e.g., accountability to the internal hierarchy/superiors or the adherence to certain decision-making procedures or mechanisms. Judicial independence demands that individual judges be free not only from undue influence outside the judiciary, but also from within, e.g., that they be free from instructions or pressure from their fellow judges and *vis-à-vis* their judicial superiors.<sup>28</sup> Finally, the comments made in par 25 *supra* regarding the sometimes vague terminology of ethical rules are similarly applicable here. For the reasons set out above, it is therefore recommended to remove the reference to the “ethics of the civil servants as envisaged by law” from the wording of Article 5-1 par 1 sub-par (2) of the Constitutional Law.<sup>29</sup>

32. Article 5-1 par 1 sub-par (2) of the Constitutional Law states that a judge should “avoid any circumstances which may discredit the authority and the dignity of a judge”. A concept such as the “dignity of a judge” is relatively vague and too subjective to form the basis for a disciplinary complaint. According to Article 5-1 par 1 sub-par (6) of the Constitutional Law, a judge should “observe the working procedures established in the relevant court”. The working procedures established by a court may cover a great variety of judicial acts or tasks required from a judge, some of which may be quite insignificant. Disciplinary proceedings, on the other hand, should deal with gross and inexcusable cases of professional misconduct that also bring the judiciary into disrepute.<sup>30</sup> Additionally, it is not foreseeable which actions fall under the scope of this provision. Both of the above provisions under Article 5-1 par 1 (sub-par (2) and sub-par (6)) should thus not serve as a ground for the imposition of disciplinary sanctions.

33. As regards Article 5-1 par 2 sub-par (9) of the Constitutional Law, a judge should not be engaged in paid work except for “teaching, scientific and creative activity to the extent that it does not impede the execution of duties of a judge”. The latter part of the sentence seems to only refer to the incompatibilities with the actual performance of the work, e.g., due

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<sup>25</sup> See par 29 of Opinion No. 3 of the CCJE.

<sup>26</sup> *Op. cit.* footnote 20, par 46 (Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan).

<sup>27</sup> See par 49 iii) of Opinion No. 3 of the CCJE: “the said principles should be drawn up by the judges themselves”. See also par 73 of CoE Recommendation CM/Rec(2010)12.

<sup>28</sup> For reference, see *Parlov-Tkalčić v. Croatia*, ECtHR judgment of 22 December 2009 (Application no 24810/06), par 86, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96426#{"itemid":\["001-96426"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96426#{).

<sup>29</sup> See also page 70 (par 9) of the Istanbul Anti-Corruption Action Plan Second Monitoring Report on Kyrgyzstan available at <http://www.oecd.org/corruption/acn/49882439.pdf>.

<sup>30</sup> See par 25 of the OSCE/ODIHR Kyiv Recommendations.

to the time constraints, whereas such activities may, under certain circumstances, actually jeopardize the independence and the impartiality of judges. It is therefore recommended to expressly state in Article 5-1 par 2 sub-par (9) of the Constitutional Law that the teaching, scientific and creative activity should not jeopardize the judicial independence and impartiality of the judge and, additionally, should not raise legitimate concerns in an objective observer as to a judge's independence and impartiality. The drafters may also consider imposing a duty on the judge to disclose any paid work.

34. Finally, Article 5-1 par 3 of the Constitutional Law states that "[j]udges may not be members of a political party as well as speak in support or against any political party". This has already been commented on in the 2011 Venice Commission Opinion and the conclusions reached therein still remain valid overall.<sup>31</sup> However, with the passing of time, certain restrictions may constitute a disproportionate interference with the freedom of expression.<sup>32</sup> In that respect, it is unclear whether the prohibition of "speaking in support or against any political party" should be understood as a complete ban on expressing views on any political matter, including the functioning of the justice system. The ECtHR pointed out the "chilling effect" that the fear of sanctions such as dismissal has on the exercise of freedom of expression, for instance for judges wishing to participate in the public debate on the effectiveness of the judicial institutions.<sup>33</sup> Consequently, should the expression "speaking in support or against any political party" be interpreted as including speech on the functioning of the judicial system, the fact that this may lead to dismissal would constitute a disproportionate interference.

35. The amended Article 29 par 2 of the Constitutional Law states that the institution of disciplinary proceedings may be denied "in case of contestation of a judicial act". This provision is unclear. It may refer to a complaint aiming at challenging a judicial act. Such complaint, so far as it aims at repealing a judicial act, should be inadmissible, since this should be done through an appeal before the relevant court. However, the provision may also be interpreted as rendering the complaint inadmissible when the judicial act is in parallel being challenged before a court. The contestation of a judicial act and the review of the actions of a judge for the purpose of determining his or her disciplinary responsibility are two separate issues which should not be mixed. Consequently, the wording of amended Article 29 par 2 of the Constitutional Law should be clarified to expressly mention that any complaint aiming to repeal a judicial act, is inadmissible. Additionally, it would be advisable to clearly state in Article 28 of the Constitutional Law that the mere fact that a decision of a judge has been overruled or modified on appeal does not constitute a ground for disciplinary liability.

36. According to CoE Recommendation CM/Rec(2010)12, the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.<sup>34</sup> The drafters should consider introducing a similar provision in Article 28 of the Constitutional Law specifying that aspects related to the content of a judicial act including divergence of legal interpretation among lower and higher courts, the assessment of facts or weighing of evidence, or alleged mistakes in applying the law,<sup>35</sup> shall not fall under

<sup>31</sup> See par 17 of the 2011 Venice Commission Opinion. See also par 62 of the Venice Commission Report on the Independence of the Judicial System – Part I: The Independence of Judges: "judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges."

<sup>32</sup> On the relevance of the time factor, see e.g. *Vajnai v. Hungary*, ECtHR judgment of 8 July 2008 (Application No 33629/06), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87404#{"itemid":\["001-87404"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87404#{).

<sup>33</sup> See pars 94-96 and 99-100 in *Kudeshkina v. Russia*, ECtHR judgment of 26 February 2009 (Application No. 29492/05) available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91501>.

<sup>34</sup> See par 66 of CoE Recommendation CM/Rec(2010)12.

<sup>35</sup> See par 25 of the OSCE/ODIHR Kyiv Recommendations which states that "[d]isciplinary proceedings against judges shall deal with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute. Disciplinary responsibility of judges shall not extend to the content of their

disciplinary responsibility, except in cases of malice and gross negligence<sup>36</sup> (see also par 47 *infra*).

### 3. Functional Immunity and Criminal and Administrative Liability of Judges

37. At the outset, it must be highlighted that the protection of judges from liability for their judicial decisions exists as an essential corollary of judicial independence and is expressed as a functional immunity for acts performed in the exercise of their judicial functions. It is essential to ensure that judges can engage in the proper exercise of their functions without their independence being compromised through fear of the initiation of prosecution or civil action by an aggrieved party, including state authorities.<sup>37</sup>

38. As regards the immunity of judges, it is necessary to separate the substantive issue relating to the material scope of the functional immunity, which should provide the legal grounds to pronounce the inadmissibility of a complaint against a judge, from the procedural safeguards which exist to protect such functional immunity; these issues are addressed separately in the following sub-sections.

#### 3.1 Material Scope of the Immunity of Judges

39. Article 14 par 1 of the Constitutional Law provides that “[a] judge shall be entitled to the right of immunity and cannot be detained and arrested, be subject to search of premises or person unless when caught at the scene of the crime.” Article 14 par 2 of the Constitutional Law seems to introduce the idea of a functional immunity from criminal or administrative liability imposed judicially, for “unlawful actions committed by [the judge] during the performance of his/her judicial powers”, except if provided otherwise in the Constitutional Law. There seems to be a certain contradiction between Article 14 par 1, which makes no distinction between the commission of ordinary crimes and the “violation of the law in adjudication”, and Article 14 par 2 which seems to introduce the idea of a more limited functional immunity (see also comments on procedural safeguards in pars 56-57 *infra*). This should be clarified.

40. Moreover, in Article 14 par 2 of the Constitutional Law, what is meant by “unlawful actions” is unclear. The Venice Commission has on many occasions argued in favor of a limited functional immunity of judges, applying only in case of *lawful* acts performed in carrying out their functions.<sup>38</sup> Moreover, in its Opinion No. 3, the CCJE supports the rule that “[j]udges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g., accept bribes) cannot claim immunity from ordinary criminal process”.<sup>39</sup>

41. There needs to be a balance between immunity as a means to protect the judge against pressures and abuses from state powers or individuals (e.g., abusive prosecution, frivolous, vexatious or manifestly ill-founded complaints) and the fact that the judges should

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rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts.”

<sup>36</sup> See par 25 of the OSCE/ODIHR Kyiv Recommendations.

<sup>37</sup> See e.g. par 85 in *Ernst v. Belgium*, ECtHR Judgment of 15 October 2003 (Application No. 33400/96), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?#{"itemid":\["001-65779"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?#{), holding that barring suit against judges to ensure their independence met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued.

<sup>38</sup> See par 19 of the Amicus Curiae Brief of the Venice Commission on the Immunity of Judges for the Constitutional Court of Moldova, CDL-AD(2013)008, of 11 March 2013, adopted by the Venice Commission at its 94<sup>th</sup> Plenary Session (8-9 March 2013) available at

[http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD\(2013\)008-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD(2013)008-e) (hereinafter “the Amicus Curiae Brief of the Venice Commission on the Immunity of Judges in Moldova (2013)”).

<sup>39</sup> See par 52 of CCJE Opinion No. 3.

not be above the law. In principle, a judge should only benefit from immunity in the exercise of lawful functions. If he or she commits a criminal offense in the exercise of his or her office, he or she should have no immunity from criminal liability.<sup>40</sup> If the “unlawful acts” referred to in Article 14 of the Constitutional Law encompass certain intentional crimes, such as accepting bribes, corruption, traffic of influence or other similar offenses, functional immunity should not protect the judge in these cases. It is therefore advisable to remove from Article 14 of the Constitutional Law the word “unlawful”, or at least clarify its meaning, which is somewhat ambiguous.

42. Pursuant to Article 11 of the United Nations Convention against Corruption, which was ratified by the Kyrgyz Republic on 16 September 2005, State Parties agree to “take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary”. In that respect, the stakeholders should discuss and decide, given the circumstances in the Kyrgyz Republic, whether the Constitutional Law should expressly exclude from the scope of the functional immunity, certain intentional crimes (such as bribery, corruption or traffic of influence), as this has recently been done in other countries (e.g., Moldova).<sup>41</sup> While this could have a potential chilling effect on judges and the rule of law, it may be justifiable to single out these particular offenses<sup>42</sup> given that corruption in the public sector, including the judiciary, constitutes a particular problem in the Kyrgyz Republic.<sup>43</sup> However, such measure should only be considered as part of the comprehensive governance and anti-corruption reform initiatives currently underway, since international experience has shown that the fight against corruption is inseparable from the process of reform of the state power and administration (on the procedural safeguards relating to corruption and similar offenses, see also pars 59-60 *infra*). It is worth highlighting that even if the material scope of the functional immunity is reduced (e.g., by expressly excluding certain criminal offenses such as bribery, corruption or traffic of influence), the procedural safeguards described in pars 54-62 *infra* will still protect the judges e.g., from blackmail relating to an alleged crime committed in office, by ensuring that only duly substantiated claims or complaints will get the consent of the Council of Judges to proceed further.

43. As regards the criminal offences relating to bribery, it is noted that Articles 310 and 311 of the Criminal Code address the criminal offenses of bribe-taking respectively in the form of remuneration or other types of gratifications. However, the Organisation for Economic Co-operation and Development (hereinafter “OECD”) concluded that the definitions of these criminal offenses were not compliant with international standards, in particular because the definition of a “public official” does not encompass the judiciary.<sup>44</sup> As regards the criminal offense of corruption, the OECD reports that while Article 303 of the Criminal Code establishes an offence of corruption, it is vague and unclear and hence has

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<sup>40</sup> See par 61 of the Venice Commission Report on the Independence of the Judicial System – Part I: The Independence of Judges: “[judges] should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes”); see also par 3 of the Venice Commission Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, Chapter 7: Justice: Article 118 to Article 129 (1994).

<sup>41</sup> See the Amicus Curiae Brief of the Venice Commission on the Immunity of Judges in Moldova (2013).

<sup>42</sup> See pars 43-46 of the Amicus Curiae Brief of the Venice Commission on the Immunity of Judges in Moldova (2013). The Constitutional Court of Moldova actually recognized as constitutional the removal of the need to seek consent from the Superior Council of Magistracy for the initiation of criminal instruction and for instituting criminal proceedings against judges in cases of corruption offences (judgment of 5 September 2013, <http://www.constcourt.md/lib.php?l=en&idc=7&t=/Overview/Press-Service/News/&year=2013&month=9>).

<sup>43</sup> According to Transparency International Corruption Perceptions Index 2013, the Kyrgyz Republic ranks 150 out of 177 countries based on how corrupt the public sector is perceived to be, <http://www.transparency.org/cpi2013/results>. See also pages 34-35 and 37 of the OECD Report on Fight Corruption in Transition Economies: Kyrgyz Republic (2005), available at [http://www.keepeek.com/Digital-Asset-Management/oezd/governance/fighting-corruption-in-transition-economies-kyrgyz-republic-2005\\_9789264010840-en#page1](http://www.keepeek.com/Digital-Asset-Management/oezd/governance/fighting-corruption-in-transition-economies-kyrgyz-republic-2005_9789264010840-en#page1).

<sup>44</sup> See OECD (2011), “Kyrgyzstan, in the Criminalisation of Bribery in Asia and the Pacific, OECD Publishing, available at [http://www.keepeek.com/Digital-Asset-Management/oezd/governance/the-criminalisation-of-bribery-in-asia-and-the-pacific/kyrgyzstan\\_9789264097445-28-en#page1](http://www.keepeek.com/Digital-Asset-Management/oezd/governance/the-criminalisation-of-bribery-in-asia-and-the-pacific/kyrgyzstan_9789264097445-28-en#page1).

never been applied.<sup>45</sup> The drafters should review the recommendations made by the OECD in that respect and discuss possible amendments to the Criminal Code.<sup>46</sup>

44. Article 328 of the Criminal Code provides for criminal liability for “knowingly unjust judgments, decisions or any other judicial acts” (*Вынесение заведомо неправосудного приговора, решения или иного судебного акта*) imposed by a judge. The draft amendments to this article also introduce a new aggravating circumstance when the conduct led to the “unlawful forfeiting of property rights”. Article 328 of the Criminal Code thus provides for the criminal liability of judges directly linked to the very exercise of their judicial functions.

45. While several countries have introduced similar criminal offenses,<sup>47</sup> the UN human rights treaty bodies have, on several occasions, raised concerns regarding legal provisions aimed at subjecting judges to criminal liability for adopting “unjust judgments”, and thus endangering the independence of the judiciary.<sup>48</sup>

46. In addition, the wording of Article 328 of the Criminal Code is not clear, in particular the term “unjust”, and could be interpreted, in concrete situations, in such a way as to weaken judges’ internal independence. For instance, the situation where a judge knowingly departs from the existing case-law may conceivably be qualified as “unjust” (*неправосудный*) and could consequently fall within the scope of such provision, even if such departure is merely part of the judge’s discretion in deciding on a case. The essence of judicial function is to independently interpret legal regulations and the fact that a judge is knowingly challenging established case-law should, by itself, not become a ground for criminal sanction. The CoE Recommendation CM/Rec(2010)12 states that “the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in case of malice.”<sup>49</sup> Moreover, it is not clear whether Article 328 of the Criminal Code covers only the verdict or the punishment as well (e.g., when an acquittal was clearly/undoubtedly wrongful or a sentence unreasonably mild) and this should be clarified.

47. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion.<sup>50</sup> In that respect, the fear of the potential initiation of prosecution procedures based on Article 328 of the Criminal Code could indirectly put pressure on judges. For this reason, and given the concerns raised in that respect by UN human rights treaty bodies, it would be advisable to completely remove such offence. If not, at a minimum, the drafters should, following the wording of the CoE Recommendation CM/Rec(2010)12, re-phrase the provision to make it clear that only malicious conduct is covered, since, unless the result of

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<sup>45</sup> *ibid.* page 299. See also page 51 of OECD Report on Anti-Corruption Reforms in Eastern and Central Asia ; Progress and Challenges, 2009-2013, available at [http://www.keepeek.com/Digital-Asset-Management/oecd/governance/anti-corruption-reforms-in-eastern-europe-and-central-asia\\_9789264201903-en#page1](http://www.keepeek.com/Digital-Asset-Management/oecd/governance/anti-corruption-reforms-in-eastern-europe-and-central-asia_9789264201903-en#page1): “[Istanbul Anti-Corruption Action Plan] monitoring report concluded that [the offence of corruption] [...] is contrary to the rule of law principle of legal certainty”.

<sup>46</sup> *ibid.* page 307.

<sup>47</sup> See e.g. Article 446 of the Spanish Criminal Code (*Código Penal*) which provides for criminal sanctions to be imposed to the “[t]he judge or magistrate who, knowingly, dictates an unjust sentence or resolution”. See also Article 352 of the Criminal Code of Armenia (Adoption of an obviously unjust court sentence, verdict or other court act) and Article 375 of the Criminal Code of Ukraine (adoption of a knowingly wrongful decision by a judge).

<sup>48</sup> See par 17 of the Concluding Observations of the Committee Against Torture on the 3<sup>rd</sup> periodic report submitted by Armenia (2012), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fARM%2fCO%2f3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fARM%2fCO%2f3&Lang=en) See also par 8 of the Concluding Observations of the Human Rights Committee on the 2<sup>nd</sup> periodic report submitted by the Democratic People’s Republic of Korea (2001), CCPR/CO/72/PRK, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/443/78/PDF/G0144378.pdf?OpenElement>; par 10 of the Concluding Observations of the Human Rights Committee on Vietnam (2002), available at and those on Uzbekistan (2001), par 14, CCPR/CO/71/UZB, available at

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.71.UZB.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.71.UZB.En?Opendocument).

<sup>49</sup> See par 68 of CoE Recommendation CM/Rec(2010)12.

<sup>50</sup> See par 25 of General Comment No. 32 of the Human Rights Committee.

faulty translation, the current wording of Article 358 of the Criminal Code (“knowingly unjust”) seems to fall short of malice. The constitutive elements of the criminal offense should also be defined more precisely e.g., by stating that it is done in bad faith with the intent to benefit or harm a party to the proceedings. If the drafters decide to address such conduct through civil or disciplinary proceedings instead, the wording should similarly be clarified since civil or disciplinary liability should, in those cases, again only be imposed in cases of malice and gross negligence.<sup>51</sup>

48. Additionally, the draft amendments to Article 358 of the Criminal Code will introduce an explanatory note that specifies that “an institution of criminal case in relation to the judge is not allowed if the court of superior jurisdiction did not abolish the judicial act”. In principle, a person may incur criminal liability when the constitutive elements of the criminal offense, as defined by law, are present, usually requiring a guilty act (*actus reus* - here the “imposition of an unjust judgment”), together with a certain form of intent (*mens rea* – here “knowingly”). In fact, these constitutive elements may exist irrespective of the repealing of the judgment, which may be based on a variety of grounds, not necessarily linked to the criminal offense itself. It may also happen that the judgment is not repealed, but that the constitutive elements of the crime are nevertheless present. The potential criminal liability of a judge for a “knowingly unjust judgment” and the outcome of the appeals process are two separate issues which should not be mixed. If the purpose of the note is to protect the judges, the purported goal would be better achieved by defining the constitutive elements of the criminal offense in a more precise manner, as recommended in par 47 *supra*. Moreover, this note somehow introduces a ground for inadmissibility of the claim, but its legal effect seems uncertain if such ground for inadmissibility is not expressly stated in the Code of Criminal Procedure itself.

49. Article 14 of the Constitutional Law does not address the personal immunity of the judges from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions<sup>52</sup>, and should be supplemented in that respect. In addition, if not already provided for, the inadmissibility of such claims should be expressly stated in the Code of Civil Procedure.

50. Finally, when not exercising judicial functions, judges should in principle be liable under civil, criminal and administrative law in the same way as any other citizen,<sup>53</sup> though certain procedural safeguards may be provided to protect judges from unfounded or false, and vexatious accusations or complaints that are levelled against a judge in order to exert pressure on him or her (see pars 54-62 *infra* on the procedural safeguards). The wording of Article 14 could be supplemented accordingly.

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<sup>51</sup> See par 66 of CoE Recommendation CM/Rec(2010)12: “the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.” See also the OSCE/ODIHR-Venice Commission’s Joint Opinion on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan which also recommends that “disciplinary proceedings should deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the draft law or judicial mistakes.”

<sup>52</sup> See UN Basic Principle 16 on the Independence of the Judiciary which states that “[w]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions”.

<sup>53</sup> See par 71 of CoE Recommendation CM/Rec(2010)12 which states that “[w]hen not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen”. See also par 75 of CCJE Opinion No. 3: “i) judges should be criminally liable in ordinary law for offences committed outside their judicial office; ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions”. See also par 53 of the Amicus Curiae Brief of the Venice Commission on the Immunity of Judges in Moldova (2013).



### **3.2. Temporal Scope of the Immunity of Judges**

51. The proposed amendments to Article 14 par 2 of the Constitutional Law will expand the temporal scope of the functional immunity of judges from administrative and criminal liability to include the time after the termination of powers of the judges and their dismissal from office. Subject to the comments made in pars 39-41 *supra* regarding “unlawful acts”, it is positive that the functional immunity extends to the time after termination of office, since this is an additional guarantee of protection.

52. However, the proposed amendment does not distinguish between the cases involving termination of powers (presumably in cases of voluntary resignation, retirement or health reasons) and other cases of dismissal, and consequently somehow contradicts part 1 of Article 27 of the Constitutional Law which provides for the maintenance of the immunity of the judge in cases of resignation only. The drafters should discuss the scope *ratione personae* of the functional immunity of judges and the wording of the two provisions should be harmonized to ensure coherence.

53. It must be pointed out that the extended temporal scope should also apply to personal immunity from civil suits, if an additional provision on such immunity is introduced (see par 49 *supra*).

### **3.3 Procedural Safeguards to Protect Judicial Independence**

54. The UN Special Rapporteur on the Independence of Judges and Lawyers considers that procedures for lifting judicial immunity “must be legislated in great detail and should aim at reinforcing the independence of the judiciary”.<sup>54</sup>

55. As recommended by the CCJE, procedural safeguards may be provided for, in order to avoid false accusations or vexatious claims against judges. For instance, in a country such as the Kyrgyz Republic where a criminal investigation or proceedings can be started at the instigation of a private individual, “there should be a mechanism for preventing or stopping such investigation or proceeding [...] when there is no proper case for suggesting that any criminal liability exists on the part of the judge”.<sup>55</sup> The Venice Commission in its *amicus curiae* brief on the immunity of judges for the Constitutional Court of Moldova (2013) also noted that the need to maintain procedural safeguards before lifting the immunity of a judge prior to the initiation of criminal proceedings, depends on the context in each country and on whether there is a fear that unjustified charges could actually be brought against judges.<sup>56</sup>

56. Article 14 par 1 of the Constitutional Law prohibits the use of coercive measures (e.g., arrest, search) with the exception of cases of *in flagrante delicto*, irrespective of the type of the alleged criminal offense. If the immunity is limited to certain acts committed in the course of the exercise of the judicial function (i.e. the functional immunity), it is unclear why the use of coercive measures should be limited in case the judge is suspected of having committed an “ordinary” crime. In addition it is not clear who will authorize the arrest or the search (supposedly this is the Council of Judges). This should be expressly indicated in Article 14 par 1 of the Constitutional Law.

57. Article 14 of the Constitutional Law on the issue of immunity of judges should be read together with Article 30 of the Constitutional Law which provides for certain safeguard mechanisms. On the one hand, the Prosecutor General exclusively (without the possibility to delegate) has the competence to initiate a criminal investigation (par 1) and, on the other hand,

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<sup>54</sup> See pars 66-67 of the 2009 Annual Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41, 24 March 2009, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/125/63/PDF/G0912563.pdf?OpenElement>.

<sup>55</sup> See par 54 of CCJE Opinion No. 3.

<sup>56</sup> See pars 26-27 of the *Amicus Curiae* Brief of the Venice Commission on the Immunity of Judges in Moldova (2013).

a ruling by the Prosecutor General on instituting criminal proceedings (par 2) or a decision of the Prosecutor General to institute administrative proceedings (par 3) requires the consent of the Council of Judges.

58. At the outset, it should be pointed out that it is positive that the amendments to the Constitutional Law remove the possibility for the Prosecutor General to delegate his or her powers. Some may argue that granting the exclusive power to initiate criminal proceedings against judges to the Prosecutor General may leave the judge's fate in the hands of an individual organ and thus poses a threat to the judge's independence. On the other hand, this could arguably be seen as constituting one of the procedural safeguards of judges' independence since this means that the initiation of criminal investigations will be within the exclusive competence of the highest level of Procuracy, which should theoretically reduce the risk of an abuse of power by a lower-level prosecution service. To ensure that there is no abuse from that end,<sup>57</sup> the rules and procedures applicable to the accountability and liability of the Prosecutor General should expressly provide a mechanism to ensure that the Prosecutor General will be accountable in the discharge of his or her functions and will not abuse his or her competence.<sup>58</sup>

59. The legislator should also consider whether there should be exceptions to these procedural safeguards. Research shows that occasionally, judicial councils tend not to lift the immunity, i.e. give consent to the initiation of criminal proceedings against their peers, which may have a disastrous impact on the reputation of the judiciary as a whole.<sup>59</sup> One way to prevent this situation from occurring could be to involve more "external members"/non-judges in the Council of Judges that may counterbalance the risk of self-protection and cronyism<sup>60</sup> and prevent that judges who commit crimes such as corruption or bribery are protected from prosecution.

60. The Council of Europe's Group of States against Corruption (GRECO) also notes that procedural immunity (safeguards) sometimes "raise[s] serious problems in respect of an effective fight against corruption".<sup>61</sup> The stakeholders should therefore discuss whether the initiation of criminal proceedings for certain specific criminal offenses, such as bribery, corruption or traffic of influence, should be exempt from requiring prior consent by the Council of Judges. Article 30 of the Constitutional Law could be amended accordingly, i.e. by stating that consent of the Council of Judges is not required for the said offenses (see also pars 42-43 *supra*). Alternatively, part 5 of Article 30 of the Constitutional Law could state that consent of the Council of Judges should in principle be given in cases of alleged bribery, corruption or traffic of influence, unless the Council of Judges finds that the complaint is manifestly ill-founded (as defined by the grounds and procedures to be determined by the Council of Judges). A decision by the Council of Judges refusing to give its consent should also be subject to appeal.

61. To prevent abuse, a specific aggravating circumstance could be added to the criminal offenses of "Knowingly False Denunciation" (Article 329 of the Criminal Code) and/or "False

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<sup>57</sup> See the concerns raised in that respect as noted that the Istanbul Anti-Corruption Action Plan Second Monitoring Report on Kyrgyzstan available at <http://www.oecd.org/corruption/acn/49882439.pdf>.

<sup>58</sup> See par 120 of the 2012 Annual Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/20/19, 7 June 2012, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.19\\_En.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.19_En.pdf).

<sup>59</sup> See par 24 of the Amicus Curiae Brief of the Venice Commission on the Immunity of Judges in Moldova (2013), referring to Transparency International Global Corruption Report, 2007, p. 280.

<sup>60</sup> See par 7 of the OSCE/ODIHR Kyiv Recommendations: "Apart from a substantial number of judicial members elected by the judges, the Judicial Council should comprise law professors and preferably a member of the bar, to promote greater inclusiveness and transparency". See also Opinion of the CCJE No.10 (2007) on "The Council for the Judiciary at the service of society", par 16: "The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided."

<sup>61</sup> See page 41 of GRECO Thematic Article on "Immunities of Public Officials as Possible Obstacles in the Fight Against Corruption" (2005), available at [http://www.coe.int/t/dghl/monitoring/greco/general/Compendium\\_Thematic\\_Articles\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/general/Compendium_Thematic_Articles_EN.pdf).

Testimony, Expert Opinion, or Mistranslation” (Article 330 of the Criminal Code) when committed against a judge, as an additional protection safeguard.

62. Amended part 5 of Article 30 provides that the grounds and procedure for making a decision on giving or refusing to give consent to the initiation of criminal or administrative proceedings are determined by the Council of Judges. While the Constitutional Law cannot provide all the details and peculiarities, it would be preferable, given the importance of the issue for the independence of the judiciary, if it would at least lay down the broad principles. The Constitutional Law could expressly provide in which situations consent will not be given (e.g., when the proceedings concern a fact related to the exercise of judicial functions, see pars 35-36 *supra*), or should in principle be granted unless the complaint is manifestly ill-founded (see par 60 *supra*) or where the judge has been caught *in flagrante delicto*, as per Article 14 of the Constitutional Law.

#### 4. Proportionality of Disciplinary Sanctions

63. The proposed amendments to Article 28 of the Constitutional Law provide for only two types of measures as disciplinary sanctions: admonition and early dismissal.

64. Normally, having a reasonable range of possible sanctions facilitates compliance with the principle of proportionality when the competent body has to decide on a sanction. From this point of view, the authors of the draft should consider supplementing Article 28 of the Constitutional Law with other possible types of disciplinary sanctions, as is done in most jurisdictions. These could encompass e.g., downgrading or demotion, suspension of promotion, removal of certain honorary privileges defined in Article 27 of the Constitutional Law, withdrawal of cases from a judge, transfer to another judicial office<sup>62</sup> (in which latter case Article 23 of the Constitutional Law would need to be amended accordingly). Other sanctions could also include the temporary suspension from office, as well as distinguishing between early dismissal with or without pension benefits.

65. It is positive that the amended part 2 of Article 28 of the Constitutional Law expressly states the criteria to be taken into consideration by the Council of Judges when choosing the disciplinary measure. These criteria include the scope and the nature of the offense, its consequences, the form of the judge’s guilt, as well as other aggravating or mitigating circumstances to be defined by the Council of Judges. This should theoretically serve as a useful guidance to apply a sanction proportional to the offense committed, if the range of possible disciplinary measures were not limited to only two. Additionally, one of the criteria, the “form of judge’s guilt” (*форма вины судьи*) is unclear. It could refer to the nature of the liability, i.e. administrative, criminal or civil; or to the nature of the conduct, e.g., intentional, malicious or with gross negligence. It is recommended to clarify the provision in that respect.

66. Moreover, the drafting of part 2 of Article 28 of the Constitutional Law could be further enhanced by explicitly mentioning the proportionality principle, for instance by expressly stating that disciplinary measures must be in proportion to the gravity of the infraction committed.

67. It is welcome that the draft amendments to part 5 of Article 28 of the Constitutional Law set the principle that early dismissal is applied only as an extreme measure, in case of “systematic or gross violations of requirements to the irreproachable conduct of judges” . It is positive that such a principle is expressly stated in the Constitutional Law, given that international standards acknowledge that the irremovability of judges is a main pillar of judicial independence and that dismissal as a disciplinary sanction should be reserved to the

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<sup>62</sup> See par 52 of CoE Recommendation CM/Rec(2010)12 which provides that “[a] judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system”.

most serious cases.<sup>63</sup> The attempt of the proposed amendments to define the terms “systematic” (three admonitions in a year) and “gross” (single serious violation of the requirements of part 1 of Article 5-1 of the Constitutional Law) is also welcomed. However, the concerns raised earlier as to the reference to the Code of Honour of Judges, as well as to the unforeseeability of certain provisions of part 1 of Article 5-1 (see pars 21-32 *supra*) remain valid.

68. Article 26 of the Constitutional Law provides twelve grounds for the early dismissal of a judge. However, these various grounds are of a very different nature. The provision does not distinguish the cases of early termination of office following a disciplinary or criminal verdict from cases of termination due to voluntary resignation, transfer to another profession not related to the administration of justice, retirement or termination on medical grounds. It may be useful to cluster these different categories of early termination, since given their different nature, they should in principle trigger different consequences. For instance, in cases of early termination, where judges maintain the honorary title of judge and certain privileges, such as personal immunity and affiliation to the judicial community (as well as pension benefits), as defined in Article 27 par 1 of the Constitutional Law, this will usually be due to their voluntary resignation or inability to exercise the powers of a judge due to state of health, as confirmed by the conclusion of a medical commission.

69. On the other hand, in cases where the early dismissal will be based on certain objective criteria, but certain benefits may be maintained (e.g., pension benefits and functional immunity), this will usually involve cases of actual membership in a political party or candidacy for certain political offices, transfer to another job not related to the administration of justice or refusal of a local court judge to be transferred to another local court on the grounds envisaged in paragraph 2, part 1 of article 23 of the present constitutional law.

70. Finally, there are the situations where an in-depth review of the particular case will have to be carried out by the Disciplinary Commission, for example to assess whether there was a systematic or gross violation of certain specific provisions of the Constitutional Law and to determine the appropriate disciplinary measure. It would be a welcome amendment if such differentiation could be introduced into Article 26 of the Constitutional Law, as this would facilitate the application of the proportionality principle.

## **5. Composition of the Disciplinary Commission and Nomination and Selection of its Members**

### **5.1. Gender Balance Requirements**

71. First and foremost, the OSCE/ODIHR and the Venice Commission welcome the genuine attempt to introduce provisions to achieve a more balanced representation of both genders in the composition of the Disciplinary Commission, which is in principle a laudable step. This objective is in line with the Beijing Platform of Action, which urges States to establish the goal of gender balance in the judiciary,<sup>64</sup> with OSCE/ODIHR Kyiv

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<sup>63</sup> See par 20 of General Comment 32 of the Human Rights Committee which states that “[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.” See also UN Basic Principle 18 on the Independence of the Judiciary which provides that “judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties”; par 66 of the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, A/HRC/11/41, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.41\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.41_en.pdf) which states that “only in exceptional circumstances may the principle of irremovability be transgressed”; and for reference, par 50 of CoE Recommendation CM/Rec(2010)12 which states that “[a] permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law”.

<sup>64</sup> See par 190 under Strategic Objective G.1. “Take measures to ensure women's equal access to and full participation in power structures and decision-making” of the Beijing Platform for Action, Chapter I of the Report

Recommendations<sup>65</sup> and with good state practices.<sup>66</sup> At the same time, for these measures to be effective and fully in line with international standards, they would benefit from certain revisions and additions, particularly with regard to the proposed gender ratio, as well as in terms of mechanisms to ensure compliance. It is also worth mentioning that representation of minorities within the judiciary should also be encouraged.<sup>67</sup>

72. While this provision constitutes a positive measure, this ratio relates to the UN Economic and Social Council (hereinafter “the ECOSOC”) target of 30% of women in leadership positions, an aim which was to be reached by 1995.<sup>68</sup> With the threshold of 70% (i.e. no more than six out of nine members) provided by new Article 29-1 of the Constitutional Law, there may not be much incentive left to further enhance gender balance beyond 30% and this could constitute a “glass ceiling” for representatives of a certain under-represented gender. More generally, in this area, experience has shown that defined aims and pre-decided time-bound targets are important instruments for guaranteeing results.<sup>69</sup> Consequently, the stakeholders should discuss whether to introduce a timeline attached to a decrease of the threshold of 70%, in order to create proper incentives to, over time, reach a more balanced representation of both genders in the composition of the Disciplinary Commission. This could be done by stating in par 1 of Article 29-1 of the Constitutional Law that by a certain date, the gender representation threshold should become no more than five members of the same gender out of nine.

73. Furthermore, the introduction of such quota target would not reach its intended goal if no gender requirements are introduced in both the nomination process to identify candidates, as well as in the respective rules and procedures governing the election (by the Council of Judges), lot drawing (for civil society representatives) and appointment (by the Jogorku Kenesh and by the President) of the members of the Disciplinary Commission.<sup>70</sup> Examples of how to achieve this could be, e.g., proposing two nominees of each gender (for candidates nominated by the assembly of judges in the respective courts as well as for those nominated by the civil society),<sup>71</sup> adapting voting modalities<sup>72</sup>, the process of drawing lots<sup>73</sup>

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of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>.

<sup>65</sup> See par 24 of the OSCE/ODIHR Kyiv Recommendations which states that “[g]enerally, it would be desirable that the composition of the judiciary reflects the composition of the population as a whole.”

<sup>66</sup> See par 81 on the “Adequate Representation of Women in the Judiciary” of the 2011 Annual Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/15/PDF/G1113015.pdf?OpenElement>.

<sup>67</sup> See par 24 of the OSCE/ODIHR Kyiv Recommendations.

<sup>68</sup> Recommendation VI of the UN Economic and Social Council Resolution (E/RES/1990/15), adopted on 24 May 1990, available at

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NR0/765/31/IMG/NR076531.pdf?OpenElement> (page 22). Note that the CoE Parliamentary Assembly sets a higher objective for its Member States, namely that the representation of either women or men in any decision-making body in political or public life should not fall below 40% - See the Preamble of the Appendix to the CoE Recommendation CM/Rec(2003)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision-making adopted on 30 April 2002 (hereinafter “the CoE Recommendation CM/Rec(2003)3”, available at <https://wcd.coe.int/ViewDoc.jsp?id=2229>). See also par 6.1 of the Resolution 1489 (2006) of the CoE Parliamentary Assembly, on Mechanisms to ensure women’s participation in decision making, adopted on 17 March 2006, available at [http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1489.htm#P16\\_112](http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1489.htm#P16_112).

<sup>69</sup> See e.g. paragraph VI of the Explanatory Memorandum on CoE Recommendation Rec (2003)3.

<sup>70</sup> See e.g. regarding the nomination and election of judges to international tribunals and court, the International Criminal Court Discussion Paper No 4 on Nomination and Election of Judges by Thordis Ingadottir (June 2002), available at [http://www.pict-pcti.org/publications/ICC\\_paprs/election.pdf](http://www.pict-pcti.org/publications/ICC_paprs/election.pdf).

<sup>71</sup> For instance, in cases where public bodies or organizations nominate candidates for appointment, certain countries have introduced an obligation to always propose two nominees, a woman and a man (e.g. the example in Denmark, Appendix IV to the Explanatory Memorandum on CoE Recommendation CM/Rec(2003)3).

<sup>72</sup> For instance by stating that each elector from the Council of Judges is required to vote for at least two candidates from list A (one gender) and two candidates from list B (other gender), and for a fifth candidate from either list.

<sup>73</sup> For instance, ensuring compliance with gender balance targets for representatives from civil society could be achieved by drawing lots separately per gender.

and appointment modalities (respectively by the Jogorku Kenesh and by the President)<sup>74</sup> to ensure gender balance, while ensuring that also reserve lists are drawn up in a manner that ensures gender balance.<sup>75</sup> Since under certain circumstances, it may not always be possible to nominate two candidates from a different gender, or a nominee from one gender may decline, a derogation may be provided in certain specific circumstances.

74. Finally, the Constitutional Law does not include provisions pertaining to the consequences of the violation of the gender quota target.<sup>76</sup> In order for new Article 29-1 of the Constitutional Law to be effective, the drafters should supplement the provision by stating the consequences for infringement of the gender balance target.<sup>77</sup>

75. While it may not be necessary to outline all of the above in detail in a Constitutional Law, at minimum, the newly introduced Article 29-1 of the Constitutional Law should expressly state the overarching principle that the nomination of candidates, as well as the rules and procedures for election of the members from the judiciary, and for the designation of the civil society representatives (through lot-drawing and appointment by the Jogorku Kenesh and the President respectively) shall comply with the gender requirements stated in par 1 of Article 29-1 of the Constitutional Law, and shall be further defined in a resolution adopted by the Council of Judges. The lower level regulation that will be adopted by the Council of Judges could then provide more details, and use certain of the modalities proposed in par 73 *supra*. The draft amendments to Articles 9 and 10-1 of the Law on Judicial Self-Governance Bodies should also be supplemented to expressly state that the election of judge representatives by the Council of Judges and the modalities for drawing lots determined by the Council of Judges shall comply with gender balance requirements.

## **5.2. Nomination and Selection Processes of the Members of the Disciplinary Commission**

76. The newly introduced Article 29-1 of the Constitutional Law defines the composition of the Disciplinary Board (five judges and four representatives of the civil society). Such composition is to be welcomed as it should help ensure transparency, as well as community involvement in disciplinary proceedings, while also averting the risk of judicial corporatism.<sup>78</sup> In addition, par 3 of Article 29-1 of the Constitutional Law provides that the members of the Council of Judges,

<sup>74</sup> See par 8 of the General Assembly Resolution 66/130 adopted on 19 March 2012, available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/66/130&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/130&Lang=E), which encourages States “to appoint women to posts within all levels of their Governments, including, where applicable, bodies responsible for designing constitutional, electoral, political or institutional reforms”. See also, for reference, pars 9-10 of the Appendix to the CoE Recommendation CM/Rec(2003)3. If the drafter choose to lower the threshold to no more than five members of the same gender out of nine in the future (as recommended in par 67 of the joint opinion), the appointment by the Jogorku Kenesh could be organized after the election by the Council of Judges of the judge representatives and the lot drawing of civil society representatives, and followed at last by the appointment made by the President which should be in compliance with the gender balance requirements stated in par 1 of Article 29-1 of the Constitutional Law.

<sup>75</sup> For instance, rules governing replacement should specify that the new member from the reserve list shall be of the same gender as the exiting member.

<sup>76</sup> See par 39 of the 2013 Report of the UN Working Group on the issue of discrimination against women in law and in practice (A/HRC/23/50) adopted on 19 April 2013, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50_EN.pdf), which states on a different though related matter, the UN Working Group on the issue of discrimination against women in law and in practice noted that “[q]uotas work best when accompanied by sanctions and closely monitored by gender-responsive independent bodies”.

<sup>77</sup> The practice varies greatly amongst countries. As an example, according to the newly introduced draft Law on Equality between Men and Women currently before the French Parliament, the appointments of the members of the executive board of certain administrative bodies shall be annulled if gender balance is not respected (except for appointments of members from the under-represented gender); at the same time, the annulment of the appointments will not render null and void the decisions that may have already been adopted by said body; see the draft French Law on Equality between Men and Women, available at <http://www.senat.fr/leg/etudes-impact/pjl12-717-ei/pjl12-717-ei.html>.

<sup>78</sup> See par 9 of the OSCE/ODIHR Kyiv Recommendations.

the Council for the Selection of Judges and the deputies of the Jogorku Kenesh cannot be members of the Disciplinary Commission, which is a further guarantee of independence and impartiality,<sup>79</sup> and is a positive introduction.

77. As regards the nomination of judge representatives by the meetings of judges from the respective courts, Article 29-1 par 4 of the Constitutional Law should expressly mention that nominations of candidates are made by secret ballot. The proposed amendments to part 3 of Article 10-1 of the Law on Judicial Self-Governance should be changed accordingly.

78. As mentioned in par 73 *supra*, it would be advisable to provide for the nomination of two candidates, one from each gender and the draft amendments to part 3 of Article 10-1 of the Law on Judicial Self-Governance should be changed accordingly.

79. Judge-members of the Disciplinary Commission shall be elected by the Council of Judges amongst candidates nominated by the meetings of judges from the various courts and may include one judge of the Supreme Court and Constitutional Chamber of the Supreme Court. The vote within the Council of Judges should also be organized by secret ballot, and it is recommended to supplement Article 29-1 par 4 of the Constitutional Law in that respect.

80. The new Article 29-1 par 5 of the Constitutional Law provides that the representatives from the civil society will be designated through lot drawing amongst the candidates nominated by educational or scientific establishments, bar associations and other non-commercial organizations with the exception of political parties. While the lottery system could help prevent possible cases of politicization, corruption and/or private arrangements regarding the composition of the Disciplinary Commission, such a mechanism may not necessarily guarantee the selection of the best candidates in terms of values and merits. A selection mechanism through a fair, professional and transparent competition should in principle be favoured,<sup>80</sup> but this also depends on the circumstances in a given country. At the meetings in Bishkek, it was pointed out that such mechanism could, to a certain extent, prevent corruption or other private arrangements, provided that certain safeguards are in place to ensure the openness and transparency of the lot drawing process and proper oversight, e.g. by organizing it in public and providing that an independent body oversees the process. Moreover, to ensure the transparency of the nomination and lot drawing processes, it would be advisable to specify that the list of admissible candidates (those who comply with the criteria) is published prior to the lot drawing process, as well as the list of members of the Disciplinary Commission once appointed. It is recommended to supplement the new Article 29-1 par 5 of the Constitutional Law to provide such safeguards.

81. While Article 29-1 is quite detailed on the selection of the two representatives of the civil society nominated by civil society entities, nothing is said in this new provision about the modalities of the selection and appointment of the two other candidates from civil society by the Jogorku Kenesh and by the President. In particular, it is not clear whether they may choose freely the candidates, provided that they respect the criteria laid down in par 5 of Article 29-1 of the Constitutional Law or whether they have to select candidates from the nominees proposed by civil society entities/bodies. Moreover, the draft amendments do not specify what would be the required majority of the Jogorku Kenesh when appointing these members. In that respect, requiring a majority of more than 50% of all the members of the Jogorku Kenesh, together with an appropriate anti-deadlock mechanism,<sup>81</sup> would encourage the majority and minority to agree

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<sup>79</sup> *ibid.*

<sup>80</sup> See par 48 of the See par 58 of the Joint OSCE/ODIHR-DHR-Venice Commission Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova, CDL-AD(2014)006, of 24 March 2014, adopted by the Venice Commission at its 98<sup>h</sup> Plenary Session (21-22 March 2014) available at [http://www.legislationline.org/download/action/download/id/5196/file/Joint\\_VC\\_Opinion\\_JUD\\_MLD\\_24March2014\\_en.pdf](http://www.legislationline.org/download/action/download/id/5196/file/Joint_VC_Opinion_JUD_MLD_24March2014_en.pdf).

<sup>81</sup> While there is no single model for anti-deadlock mechanisms, one option could be to provide for different, decreasing majorities in subsequent rounds of voting, but this has also the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Another method is to empower other bodies (e.g. the Ombudsperson) to make proposals for new candidates after a failed vote. See e.g.

on neutral and independent experts from civil society. Additionally, as mentioned in par 73 *supra*, it is recommended to expressly state that such appointments should be in compliance with the gender requirements mentioned in par 1 of Article 29-1 of the Constitutional Law. Even if not all the details of the appointment procedure need to be expressly stated, at least the broad principles could be laid down.

82. In that respect, the draft amendments to part 2 of Article 9 of the Law on Judicial Self-Governance, pertaining to the powers of the Council of Judges, are not fully in line with the revised provisions of the Constitutional Law. For instance, the newly introduced par 17 of part 2 of Article 9 of that law adds one duty ("electing the members of the Disciplinary Commission"), whereas the Council of Judges only formally elects the five members from the judiciary. Additionally, the Constitutional Law on several occasions provides for the determination of certain rules and procedures by the Council of Judges, i.e. the list of aggravating and mitigating circumstances to determine the applicable disciplinary measure (part 2 of Article 28 of the Constitutional Law), the procedure for drawing lots to designate the members from the civil society (par 5 of Article 29-1) and the grounds and procedures for consent by the Council of Judges to initiate criminal or administrative proceedings (part 5 of Article 30). Part 2 of Article 9 of the Law on Judicial Self-Governance should be supplemented to reflect such tasks, which should in turn comply with the gender requirements set out in par 1 of Article 29-1 of the Constitutional Law.

83. In light of the comments in par 73 *supra*, the drafters could consider supplementing the draft amendments to the Law on Judicial Self-Governance with the additional task of adopting rules and procedures for the nomination of candidates, as well as the election, appointment and lot drawing of members of the Disciplinary Commission, which comply with the gender requirements set out in par 1 of Article 29-1 of the Constitutional Law.

84. The election of the chairperson and deputy of the Disciplinary Commission should be made by secret ballot<sup>82</sup> and Article 29-1 of the Constitutional Law should be supplemented accordingly.

85. It is welcome that par 7 of Article 29-1 of the Constitutional Law provides for the reimbursement of expenses for representatives of the civil society. At the same time, it is noted that this provision does not inform about the treatment of members from the judiciary. It is recommended to supplement par 7 in that respect to specify whether judges will also be reimbursed (particularly for some of the judges coming from local courts, costs related to travel and accommodation may arise), as well as how (including from which budget). This would be in line with the provisions of Article 5-1 of the Constitutional Law which contemplates the reimbursement of expenses related to work in Judicial Self-Governance Bodies.

86. Moreover, it is generally good practice to provide a mechanism for the proportional reduction of the workload of the judge-members of the Disciplinary Commission. Even if the detailed mechanism for doing so could be decided in a lower level regulation, the principle itself should be clearly stated, as foreseen in Article 21.1 of the Law on the Council for the Selection of Judges.<sup>83</sup> This is of particular significance if the judge-members come from a local court, and they thus require travel time to perform their duties as members of the

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par 8 of Venice Commission Draft Opinion on the Draft Amendments to Three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, CDL(2013)033, of 24 June 2013, available at

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2013\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2013)033-e).

<sup>82</sup> See par 58 of the Joint OSCE/ODIHR-DHR-Venice Commission Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova, CDL-AD(2014)006, of 24 March 2014, adopted by the Venice Commission at its 98<sup>th</sup> Plenary Session (21-22 March 2014) available at

[http://www.legislationline.org/download/action/download/id/5196/file/Joint\\_VC\\_Opinion\\_JUD\\_MLD\\_24March2014\\_en.pdf](http://www.legislationline.org/download/action/download/id/5196/file/Joint_VC_Opinion_JUD_MLD_24March2014_en.pdf).

<sup>83</sup> See page 16 of the Final Report on the Selection of Judges in the Kyrgyz Republic and International Standards on Independence (2011) available at <http://www.osce.org/odihr/89289?download=true>.



Disciplinary Commission, and may need to ensure the reconciliation of family and professional responsibilities.

87. Since the functions of members of the Disciplinary Commission are exercised on a part-time basis, the members will continue to work and receive salaries for their usual functions as judges. This will inevitably involve a certain material, hierarchical and administrative dependence of the members on their primary employers. Therefore, the drafters should consider adding a clear statement in the newly introduced Article 29-1 of the Constitutional Law that all the members are independent, equal and act in their personal capacity, independently from the body which nominated them and/or from their primary employers.

88. Finally, the draft amendments to the Constitutional Law do not specify in which circumstances the member from the reserve list will temporarily substitute a permanent member of the Disciplinary Commission (presumably this will be in case of abstention due to conflict of interest, or similar cases). It would be advisable to supplement the provisions of the Constitutional Law in that respect. This would strengthen confidence in the integrity, objectivity and impartiality of the Disciplinary Commission when conducting the investigation. In addition, Article 29-1 of the Constitutional Law does not envisage the possibility of early termination of the term of office of one of the members of the Disciplinary Commission (e.g. for failure without valid reasons to fulfil the duties of the member of the Disciplinary Commission provided in the law). Since such a case may occur, it would be useful for the draft amendments to envision such a situation.

## **6. Quality of Disciplinary Proceedings**

89. First, the OSCE/ODIHR and the Venice Commission welcome the fact that the draft amendments to the Constitutional Law introduce provisions to strengthen the independence and impartiality of, and a clear division of tasks between, the body in charge of investigating (the Disciplinary Commission) and the body in charge of deciding on the imposition of the disciplinary sanction, i.e. the Council of Judges. This is in line with international recommendations which suggest the establishment of an independent body to initiate disciplinary proceedings, which is separate from the independent body or court which will take the decision relating to the disciplinary liability of a judge.<sup>84</sup>

### **6.1. Initiation of Disciplinary Proceedings**

90. The amended Article 29 part 2 of the Constitutional Law states the main rules pertaining to the initiation of disciplinary proceedings and investigation carried out by the Disciplinary Commission. The UN Basic Principles on the Independence of the Judiciary require that “the judge shall have the opportunity to comment on the complaint at the initial stage” and that “[t]he examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge”.<sup>85</sup> Article 29 part 2 of the Constitutional Law does not contain such protective measures and it is recommended to supplement this provision to that effect.

91. Article 29 part 2 par 2 of the Constitutional Law states that the Disciplinary Commission is supposed to conduct investigations within a month of the submission of the complaint. It also provides for the possibility to appeal the decision of refusal to initiate investigations to the Council of Judges within two months. However, this provision relating to

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<sup>84</sup> See par 69 of the CoE Recommendation CM/Rec(2010)12. See also pars 68, 69 and 77 of the CCJE Opinion 3 (2002) and par 5 of the OSCE/ODIHR Kyiv Recommendations: “In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures.”

<sup>85</sup> See par 17 of the UN Basic Principles on the Independence of the Judiciary.

the period of limitation for bringing an appeal should also contemplate cases of inaction of the Disciplinary Commission, where it does not issue any decision within a month. Article 29 part 2 par 2 of the Constitutional Law should be supplemented accordingly.

92. On a related matter, the amended Article 28 part 1 of the Constitutional Law provides for the suspension of the period of limitation for not more than three months, from the date of initiating disciplinary proceedings. However, such date may not always be clearly identifiable since the amended provisions do not provide for the issuance of a decision by the Disciplinary Commission informing about the initiation of disciplinary proceedings. It is therefore recommended to refer to the date of submission of the complaints instead.

93. Article 29 part 2 par 4 of the Constitutional Law describes the types of investigative means that may be used by the Disciplinary Commission to collect evidence. However, the requirements relating to the nature of evidence permitted in the disciplinary process remain unregulated. It is not clear which evidence is considered to be relevant, admissible or sufficient and what criteria are used for that purpose. For instance, it is not stated whether the Disciplinary Commission will accept and decide on anonymous complaints or whether it will consider evidence obtained by unlawful means (e.g. stolen) whereas they would be considered inadmissible in civil, administrative or penal procedure. This potentially has further implications when considering the appeal before a court, where certain of the evidence taken into consideration by the Council of Judges may then be considered inadmissible. It is recommended to supplement Article 29 part 2 of the Constitutional Law to clarify whether anonymous complaints will be accepted and state that only the evidence collected in compliance with the rules of evidence contained in the civil procedure code will be admissible.

94. The decision of refusal to initiate disciplinary proceedings should be motivated, since this will allow the complainant to evaluate the legality of the decision taken, as well as analyze the possibility to successfully achieve the desired result by means of an appeal. This should be reflected in Article 29 part 2 par 2 of the Constitutional Law, which should also require the reference to one of the grounds for denial of the institution of disciplinary proceedings listed in amended part 2 par 3 of Article 29 of the Constitutional Law.

95. Moreover, amended part 2 of Article 29 of the Constitutional Law addresses the issue of the temporal (*ratione temporis*) and material (*ratione materiae*) competence of the Disciplinary Commission, but does not cover the aspects relating to its personal competence (*ratione personae*), i.e. who can bring a complaint against a judge. In that respect, practice varies greatly and some countries limit this right to certain public entities, while other countries have in addition opened the possibility for any person to bring a complaint, in which case disciplinary proceedings are initiated if certain admissibility requirements are met.<sup>86</sup> It is recommended to supplement the said provision and clarify who can initiate disciplinary proceedings against a judge, while excluding the members of the Council of Judges since they are in charge of adjudicating cases of judicial discipline.<sup>87</sup>

96. Finally, since the Disciplinary Commission is in charge of the investigation, it would be advisable if Article 29 part 2 of the Constitutional Law could elaborate further the content of the “conclusion” that will be sent to the Council of Judges for consideration. For instance, the provision could state that the “conclusion” of the Disciplinary Commission shall contain a description of the facts alleged by the complainant, the evidence presented by the complainant and that collected during investigations by the Disciplinary Commission, as well as mention of the disciplinary charge.

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<sup>86</sup> See pages 10-11 of “A comparative analysis of Disciplinary Systems for European judges and prosecutors” (2012) available at

<http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20ERFURT%20DOCUMENT/Written%20paper%20France%203.pdf>.

<sup>87</sup> See par 26 of the OSCE/ODIHR Kyiv Recommendations.

## **6.2. Decision on Disciplinary Liability of a Judge**

97. The amended part 4 of Article 29 of the Constitutional Law describes the procedures and modalities for the Council of Judges to adopt a decision. The UN Basic Principle 19 states that “all disciplinary [...] proceedings should be determined in accordance with established standards of judicial conduct”. Further, they proclaim that the judge has to have the right to a fair hearing. General Comment No. 32 of the Human Rights Committee on Article 14 of the ICCPR emphasizes the importance for States to ensure that “[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law”.<sup>88</sup>

98. The Human Rights Committee has considered that civil proceedings are compatible with the ICCPR, as long as the said decisions are capable of review on at least one occasion by a competent, independent and impartial tribunal established by law (as it is assumed is the case for courts of first instance in the Kyrgyz Republic).<sup>89</sup> While the Opinion will not analyse in depth whether the Council of Judges constitutes an independent and impartial tribunal, the Constitutional Law should still contain some safeguards in this respect.

99. More specifically, it is noted that Article 29 of the Constitutional Law does not provide for the possibility for a member of the Council of Judges to abstain in case of conflict of interest, nor may a judge request the recusal of one of its members. Unless this is already provided in other provisions, it would be advisable to introduce such possibilities as this would strengthen confidence in the objectivity and impartiality of the Council of Judges when deciding on the disciplinary liability of a judge.

100. Furthermore, the amended part 5 of Article 28 of the Constitutional Law on early dismissal of judges of the Supreme Court and the Constitutional Chamber of the Supreme Court provides that such decision is taken by the Jogorku Kenesh upon the recommendation (*по представлению*) of the President, which is in turn based on a decision of the Council of Judges. This provision actually reflects the powers stated in the Constitution of the Kyrgyz Republic.<sup>90</sup>

101. This raises a number of issues in terms of guaranteeing the independence of judges. First, the involvement of political organs in the proceedings related to the status of judges, including their early dismissal, creates a risk of political influence or intervention which may jeopardize the judges' independence.<sup>91</sup>

102. Second, it is not clear to what extent the decision of the Council of Judges is binding on the President, and on the Jogorku Kenesh. During the meetings in Bishkek, it was pointed out that in practice, the President and the Jogorku Kenesh have always followed the recommendations/decisions made by the Council of Judges. However, this is not expressly stated either in the Constitution or in the Draft Amendments. Consequently, it is not possible to rule out a situation where the President and/or the Jogorku Kenesh would not follow the recommendation/decision of the Council of Judges, thus undermining the authority and the independence of such body. All the more, even if the Constitutional Law was to expressly state that the decision of the Council of Judges is binding upon the President and the Jogorku

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<sup>88</sup> See par 20 of General Comment No. 12 of the Human Rights Committee.

<sup>89</sup> See par 18 of General Comment No. 12 of the Human Rights Committee.

<sup>90</sup> Article 64 of the Constitution of the Kyrgyz Republic states that the President “shall dismiss local court judges at the proposal of the Council of Judges in cases envisaged in the constitutional law.” Article 74 of the Constitution of the Kyrgyz Republic provides that the Jogorku Kenesh “upon submission of the President [...] in cases envisaged by the constitutional law shall dismiss [the judges of the Supreme Court] upon submission of the President”. Article 95 of the Constitutional Law of the Kyrgyz Republic further states that “[j]udges of the Supreme Court may be dismissed early from their office by the majority of not less than two-thirds of the total number of deputies of the Jogorku Kenesh upon submission of the President based on the proposal of the Council of judges.”

<sup>91</sup> See par 7 of the OSCE/ODIHR Kyiv Recommendations which states that “[t]he work of the Judicial Council shall not be dominated by representatives of the executive and legislative branch.”

Kenesh, it is unclear how two-thirds of the total number of deputies of the Jogorku Kenesh could be bound to follow the decision/recommendations of the Council of Judges.

103. Third, amended part 6 of Article 29 of the Constitutional Law introduces the possibility to appeal the decision of the Council of Judges, which is a positive development. Consequently, maintaining the powers of the President and of the Jogorku Kenesh to dismiss certain judges without being bound by the decision of the appellate court would have the effect of creating a possibility for executive and legislative bodies to reverse a decision of the judiciary outside the judicial appeals procedures, which is not in line with international rule of law standards. This would also potentially violate Article 96 of the Constitution of the Kyrgyz Republic which states that the Supreme Court is the highest body of judicial power, in charge of revising court rulings of local courts upon appeals.

104. In view of the above, such competences of the President and the Jogorku Kenesh pertaining to the dismissal of judges should be suppressed (but this would also require amending the Constitution). If this is not done, at minimum, the provisions of the Constitutional Law should expressly state that only a decision of the Council of Judges, recommending the early dismissal, which has become final (i.e. after ten days following the notification of the decision of the Council of Judges to the judge if no appeal was filed) can be submitted to the President. In addition, it should be clearly stated that the decision of the appellate court is binding upon the Council of Judges, i.e. if the Council of Judges decided in favour of the dismissal of a judge but the court repealed such decision, then the Council of Judges cannot submit any recommendation for early dismissal to the President, and thus indirectly to the Jogorku Kenesh.

105. The procedure before the Council of Judges for taking a decision on the disciplinary responsibility of a judge is only very briefly mentioned in part 4 of Article 29 of the Constitutional Law. Disciplinary proceedings involving dismissal fall within the ambit of Article 14(1) of the ICCPR and fair trial guarantees are thus applicable.<sup>92</sup> In that respect, the case-law of the ECtHR could also serve as a useful guidance, given that Article 6 par 1 of the ECHR, on its civil limb, has been considered applicable to disciplinary proceedings against judges.<sup>93</sup> Consequently, it is recommended to supplement part 4 of Article 29 of the Constitutional Law to ensure that the right to a fair trial is respected.

106. In particular, while it is positive that the Council of Judges' meetings are generally public, it would be helpful to specify in which circumstances the judge affected by the disciplinary proceedings may request a closed session. In this context, it should be highlighted that OSCE participating States have agreed that proceedings may only be held *in camera* in the circumstances prescribed by law and consistent with obligations under international law and international commitments.<sup>94</sup> Consequently, a closed hearing should not be granted automatically upon the request (ходатайство) of the judge. The Council of Judges shall instead decide whether the request is justified<sup>95</sup> and such decision should be taken on a case-by-case basis with a factual assessment of the circumstances, with due consideration of the right of the judge to the protection of his or her honour, privacy and reputation as guaranteed under Article 17 of the ICCPR. Moreover, in order to effectively ensure the publicity of hearings, the Council

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<sup>92</sup> See e.g. par 5.2 of *Casanovas v France*, Human Rights Committee Communication 441/1990, UN Doc CCPR/C/51/D/441/1990 (1994); and par 9.2 of *Pertterer v Austria*, Human Rights Committee Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004). See also par 17 of the UN Basic Principles on the Independence of the Judiciary which states that "[t]he judge shall have the right to a fair hearing".

<sup>93</sup> See, for reference, pars 91 and 95 in *Volkov v. Ukraine*, ECtHR Judgment of 25 May 2013 (Application No. 21722/11), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115871#{"itemid":\["001-115871"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115871#{).

<sup>94</sup> See par 12 of Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990.

<sup>95</sup> See par 26 of the OSCE/ODIHR Kyiv Recommendations. See also *Diennet v. France*, ECtHR Judgment of 26 September 1995 (Application No. 18160/91), available at <http://www.bailii.org/eu/cases/ECHR/1995/28.html>.

of Judges must make information available to the public regarding the time and venue of such oral hearings<sup>96</sup> and the location must be easily accessible to the public.

107. Moreover, the Constitutional Law is silent as to the right of the judge to be informed in advance and in detail of the nature of the disciplinary charge and the alleged facts of the charge. The principle of equality of arms calls for a “fair balance” between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent.<sup>97</sup> It would be advisable to supplement draft Article 29 of the Constitutional Law in that respect. Additionally, part 4 of Article 29 of the Constitutional Law should state expressly that the judge subject to the disciplinary proceedings shall be present or represented at the disciplinary hearing<sup>98</sup> and shall be assisted by a lawyer of his or her choice.<sup>99</sup>

108. Once the Council of Judges has issued a decision, this decision should be motivated and state the essential findings, evidence and legal reasoning,<sup>100</sup> so that the judge or the complainant may evaluate the legality of the decision taken, as well as analyze the possibility to successfully achieve the desired result by means of an appeal. Moreover, as recommended in the OSCE/ODIHR Kyiv Recommendations, the Constitutional Law should specify that final decisions on disciplinary measures shall be published.<sup>101</sup>

109. Article 29 of the Constitutional Law does not specify the deadline within which the Council of Judges shall render a decision. Since the Code of Civil Procedure provides for the possibility to file an application before the court of first instance in case of inaction of the Council of Judges (see the newly introduced Article 258-4 of the Code of Civil Procedure), it would render such provision ineffective if no clear deadline is set in the Constitutional Law. Part 4 of Article 29 of the Constitutional Law should therefore be supplemented accordingly.

110. Finally, the amended part 6 of Article 28 of the Constitutional Law provides that in case the disciplinary proceedings are terminated due to the insignificance of the disciplinary offense, the materials of the disciplinary proceedings should be transferred “for consideration to an assembly of judges of an appropriate court”. The newly introduced power of the assembly of judges in part 3 of Article 10-1 of the Law on Judicial Self-Governance mirrors such provision by stating that the assembly of judges “considers and discusses materials of disciplinary proceedings in relation to the judge of the relevant court submitted by the Council of Judges”. It is unclear from this wording what would be the consequences of this “consideration” by the assembly of judges. Since the Council of Judges has the exclusive competence to decide on disciplinary matters, the assembly of judges shall not have the possibility to take any decision related to the disciplinary responsibility of the judge. Therefore, in order to ensure that the competency to decide on disciplinary matters is not extended to additional bodies/fora, it is recommended to delete the reference to the communication of the materials of the disciplinary proceedings to the assembly of judges for their consideration from both part 6 of Article 28 of

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<sup>96</sup> See par 6.2 of *Van Meurs v the Netherlands*, Human Rights Committee Communication 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990).

<sup>97</sup> See, for reference, par 63 of *Werner v. Austria*, ECtHR Judgment of 24 November 1997 (Application 21835/93), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58114#{"itemid":\["001-58114"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58114#{).

<sup>98</sup> See par 7.4 of *Aarela and Nakkalajarvi v Finland*, Human Rights Committee Communication 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001). See also, for reference, par 5.1. the European Charter on the Statute for Judges (1998): “the judge proceeded against must be entitled to representation”.

<sup>99</sup> See par 8.7 *Kulov v Kyrgyzstan*, HRC Communication 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010). See also par 13.9 of the OSCE Concluding Document of the Vienna Meeting, Vienna 1989, available at <http://www.osce.org/mc/40881?download=true>.

<sup>100</sup> See par 26 of the OSCE/ODIHR Kyiv Recommendations: “[t]he decisions regarding judicial discipline shall provide reasons”. See also par 29 of General Comment No. 12 of the Human Rights Committee. See also e.g. in the case of a decision on disciplinary responsibility taken by a Bar Council, par 53 of *H. v. Belgium*, ECtHR Judgment of 30 November 1987 (Application No. 8950/80), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57501#{"itemid":\["001-57501"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57501#{).

<sup>101</sup> See par 26 of the OSCE/ODIHR Kyiv Recommendations and par 29 of General Comment No. 32 of the Human Rights Committee.

the Constitutional Law and part 3 of Article 10-1 of the Law on Judicial Self-Governance. Alternatively, the wording of these provisions should be clarified to expressly exclude any negative consequences for the judge or specify that such referral takes place only for educational or other positive purposes that will not affect the individual judge.

### 6.3. Appeal

111. The amended part 6 of Article 29 of the Constitutional Law provides for a possibility to appeal the decision of the Council of Judges before a court, which is in line with international standards.<sup>102</sup> As recommended in par 104 *supra*, to ensure that this right to appeal can be effectively exercised, the provisions of the Constitutional Law should expressly state that only a decision of the Council of Judges recommending the early dismissal which has become final can be submitted to the President and that the decision of the appellate court is binding upon the Council of Judges. It is also recommended to specify in amended part 6 of Article 29 of the Constitutional Law which court will be competent to hear the appeal.

112. It is further stated that the “[d]ecisions of Jogorku Kenesh, the President about the early dismissal of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court and local court are not subject to appeal”. In principle, the right to institute proceedings before a court in civil matters, such as in the case of disciplinary proceedings, constitutes a key aspect of the “right to a court”.<sup>103</sup> Article 40 of the Constitution of the Kyrgyz Republic also supports the judicial protection of the interests of the judges in these cases. The ECtHR has expressly recognized that fair trial rights, including the right to appeal, are applicable to disputes concerning a judge’s removal from office.<sup>104</sup> Therefore, a judge should in principle be entitled to appeal the decisions relating to his or her early dismissal. However, the ECtHR also stated that the domestic law can exclude access to a court for certain category of staff where this exclusion is justified by the State’s objective interest.<sup>105</sup>

113. In that respect, the key element is to determine whether the judge has access to a court under the domestic system to challenge the decision on early dismissal. According to the newly introduced part 6 of Article 29 of the Constitutional Law, a judge will actually have the possibility to file an appeal against the decision of the Council of Judges before a court. However, the appeal grounds appear to be very limited as the provision only refers to cases of “violation of the procedure [порядок] of bringing a judge to disciplinary responsibility”. First, it is unclear what would constitute a violation of the procedure (e.g. failure to respect time limits, the admissibility of a complaint which should have been denied or the subjective or objective impartiality of the members of the Council of Judges) and it would be advisable to clarify part 6 of Article 29 of the Constitutional Law in that respect. Second, while there is in principle no entitlement to appeal in non-criminal proceedings,<sup>106</sup> the grounds for appeal may seem unduly limited and the drafters should consider broadening the scope of the appeal to the review of facts, evidence and correct application of law.<sup>107</sup> If the court can indeed fully examine the merits of the case, then the judge subject to the decision of early dismissal should in principle be considered to have had access to a court under the

<sup>102</sup> See par 26 of the OSCE/ODIHR Kyiv Recommendations which suggests the right to appeal to a competent court. See also UN Basic Principle 20 according to which decisions in disciplinary matters should be subject to independent review.

<sup>103</sup> See par 54 of *Juricic v Croatia*, ECtHR judgment of 26 July 2011 (Application No 58222/09), available at <http://hudoc.echr.coe.int/webservices/content/pdf/001-105754>.

<sup>104</sup> See pars 31-44 of *Olujić v. Croatia*, ECtHR judgment of 5 February 2009 (Application No 22330/05), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91144#{"itemid":\["001-91144"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91144#{). See also *Baka v Hungary* (although not final), Application no. 20261/12, decision of 27 May 2014, para. 77, at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"%22itemid%22":\["%22001-144139%22"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

<sup>105</sup> See par 34 of the *Olujić v. Croatia* judgment.

<sup>106</sup> See e.g. par 6.2 of *I.P. v. Finland*, Human rights Committee on Communication No. 450/1991, UN Doc CCPR/C/48/D/450/1991 (1993), available at <http://www1.umn.edu/humanrts/undocs/html/450-1991.html>.

<sup>107</sup> See e.g. par 7.3 of *Riedl-Riedenstein et al. v. Germany*, Human rights Committee Communication No. 1188/2003, UN Doc CCPR/C/82/D/1188/2003 (2004).

domestic system, and consequently the fact that the decisions of the Jogorku Kenesh and of the President are not appealable would not as such deprive the judge of his or her right to a court.

114. Additionally, it is not clearly specified in part 6 of Article 29 of the Constitutional Law who can bring an appeal against the decision. The newly introduced Article 258-4 of the Code of Civil Procedure only refers to the possibility to file a complaint against the decision on disciplinary responsibility of a judge which may imply that no person other than the judge may appeal. The Draft Amendments should be clarified in that respect.

115. The newly introduced Article 258-4 of the Code of Civil Procedure states that the appeal can be filed with the court within ten days from the date of the decision or omission. Additionally, the provision does not clearly state the rules for computing the period of time in case of an absence of decision by the Council of Judges. It would be advisable to state in the newly introduced Article 258-4 of the Code of Civil Procedure that the period of 10 days starts from the moment when the decision is notified to the concerned judge (not from the moment when the decision is made) and to clarify the rules for computing the period of time.

116. Moreover, the newly introduced Article 258-5 of the Code of Civil Procedure provides that the “default of appearance of [the appellant or representative of the Council of Judges] who have been properly notified about the time and place of the judicial hearing is not an obstacle for the consideration and resolution of the case”. While this constitutes a preventive tool against obstructive non-appearances before the court, the article does not provide for any exception, e.g. where valid reasons such as illness or other serious impediment may warrant an adjournment. In principle, the right to a “fair” hearing in Article 14(1) of the ICCPR implies the entitlement of the accused or suspected person to be present or represented.<sup>108</sup> The principle of equality of arms will demand that if one of the parties in the proceedings is given the benefit of being present, then the same benefit should be accorded to the other party, including the ability to contest all the arguments and evidence adduced by the other party.<sup>109</sup> Article 258-5 of the Code of Civil Procedure should be amended to comply with this principle.

117. The newly introduced Article 258-6 of the Code of Civil Procedure states the content of the decision that may be adopted by the court. It provides that in case the court recognizes the decision as unlawful, it may cancel the decision or eliminate the suffered violation. It is unclear why the court cannot take a decision annulling the unlawful decision, and additionally remedy the other negative effects that the disciplinary decision may have had on the activities of the judge.<sup>110</sup> Moreover, it is uncertain what the term “cancel” will imply, e.g. whether the decision will be annulled and the case sent back to the Disciplinary Commission. Article 258-6 should be clarified, and should also allow cumulative annulment and remedy negative effects.

118. Finally, Article 258-6 of the Code of Civil Procedure states that the decision of the civil court could be subject to a supervisory procedure. While it is not the purpose of the Opinion to assess the compliance of the supervisory procedure with the right to a fair trial, it should be highlighted that such review is exercised by the Supreme Court against a final decision and may be initiated both by parties to the trial and a prosecutor, even if the latter has not earlier taken part in the trial, “to protect state or public interests”. The procedure of supervisory review of court decisions may, in its current form, contradict the *res judicata* principle (principle of observing final binding court decisions), and undermine legal certainty,

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<sup>108</sup> See also as reference par 5.1. the European Charter on the Statute for Judges (1998): “the judge proceeded against must be entitled to representation”.

<sup>109</sup> See par 7.4 of *Aarela and Nakkalajarvi v Finland*, Human Rights Committee Communication 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001).

<sup>110</sup> See par 76 of the Venice Commission Opinion on the Draft Law on Judges and Prosecutors of Turkey, CDL-AD(2011)004, of 29 March 2011, adopted by the Venice Commission at its 86<sup>th</sup> Plenary Session (25-26 March 2011) available at

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/d-tr/dv/1128\\_17\\_/1128\\_17\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-tr/dv/1128_17_/1128_17_en.pdf).

thus conflicting with the rule of law.<sup>111</sup> Therefore, appeal to the ordinary appellate court following the ordinary appeals procedures could be a better option.

## 7. Gender Neutral Legislative Drafting

119. It is noted that, while the draft amendments tend to use gender neutral drafting, on some occurrences, certain provisions use the male gender (in particular). This is not in line with general international practice which normally requires legislation to be drafted in a gender neutral manner, thereby applying to both genders equally. It is recommended to review the respective provisions and replace “he” (он) when referring to a judge by “he or she” (он или она) and as appropriate “his” (его) by “he or she” (его или её) when referring to the deputy of the Prosecutor General (Article 30 par 5), or other gender neutral formulation.

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<sup>111</sup> See page 71 of the Istanbul Anti-Corruption Action Plan Second Monitoring Report on Kyrgyzstan, available at <http://www.oecd.org/corruption/acn/49882439.pdf>. See also pars 51-58 on the supervisory procedure in Russia, in *Ryabykh v. Russia*, ECtHR Judgment of 24 July 2003 (Application No. 52854/99), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61261#{"itemid":\["001-61261"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61261#{).