

SELECTION OF JUDGES IN THE KYRGYZ REPUBLIC AND INTERNATIONAL STANDARDS ON JUDICIAL INDEPENDENCE

FINAL REPORT

*Training seminar for the members of the Council for the
Selection of Judges of the Kyrgyz Republic*

Bishkek, 3-4 November 2011

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EXECUTIVE SUMMARY

Upon request of the newly established Council for the Selection of Judges (CSJ) of the Kyrgyz Republic, a number of organizations and donors hosted a training seminar for the members of the Council on 3-4 November 2011. The seminar was co-organized by the OSCE Centre in Bishkek, the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the Venice Commission of the Council of Europe, the EU-funded EU-UNDP Kyrgyz Republic Legal Framework Support Project, the UN Office of the High Commissioner for Human Rights, the Soros Foundation Kyrgyzstan, and the German Society for International Cooperation (GIZ).

As a result of the seminar and meetings, stakeholders of judicial reform in Kyrgyzstan including Members of Parliament, a representative of the Presidential Administration, members of civil society and the CSJ members, requested that the main recommendations and observations made during the seminar be officially shared with the relevant authorities in Kyrgyzstan. The present report serves this purpose and is intended to provide some guidance and additional considerations for the continuing reform debate related to the selection of judges in the Kyrgyz Republic.

Judicial independence is an indispensable element of the right to due process, the rule of law and democracy. The selection of judges represents an element of key importance for the overall degree of any judicial system's independence. The present report examines the current state of the system for selecting judges in the Kyrgyz Republic, taking into consideration the relevant provisions of the Kyrgyz Constitution of 2010, applicable legislation and ongoing developments. The report identifies a number of areas of concern while providing concrete recommendations about how to best address existing inconsistencies.

Main findings and issues of concern

- The current composition of the Council for the Selection of Judges (CSJ) does not seem to secure its immunity from a certain degree of politicization which could be prevented by increasing the transparency in the selection process of the civil society members of the CSJ.
- With a view to guaranteeing the CSJ's financial and functional independence, the lack of adequate funding to support the activities of the CSJ deserves more attention, as the CSJ was not provided with its own funding in the judicial system budget for 2011.
- The absence of detailed internal rules of procedure appears to hinder the work of and the decision making process within the CSJ. Adopting and communicating to the public such internal rules could help the CSJ gain trust, and contribute to restoring public confidence in the judicial system.
- While much has been achieved by the CSJ given its recent formation, addressing conflicts of interest, devising the content and procedure of exams and testing (including both psychological and professional testing of candidates), developing a realistic judge's profile and consistently implementing background checks are all areas where improvement is needed.
- The lack of adequate time for the CSJ to perform its core functions also emerged as a serious concern.

Summary of recommendations

Stemming from international standards and best practices from other countries, the recommendations included in the report could be of help in supporting ongoing efforts by the Kyrgyz authorities in a number of areas related to judicial reforms, and especially with regard to strengthening judicial independence and the selection of judges in the Kyrgyz Republic. The report suggests concrete steps that could be taken to address some of the shortcomings in relation to the transparency of the selection process, including in addressing the composition of the CSJ and reviewing the role played by the President and the Parliament in the selection of judges. Specific recommendations on issues such as background checks, testing, appeal procedures and adequate time for the selection process are also included in the report. A number of recommendations included in the report highlight the need to address some challenges of the judicial selection process in Kyrgyzstan by way of revising parts of the applicable laws, in line with the Constitution of 2010 and international standards. Such amendments would serve to address existing gaps in legislation, as well as to ensure that the ongoing reforms can result in building a strong and independent judiciary able to gain society's trust. This is most certainly needed in relation to the Law on the Council for the Selection of Judges. Another necessary measure suggested to address many of the current shortcomings is the development and adoption of internal rules of procedure by the CSJ.

The undeniable complexity of the tasks ahead requires all possible efforts to be undertaken to ensure legality is respected, that confidence in the judiciary prevails and that separation of powers is in place. The OSCE Centre in Bishkek, the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the EU-funded EU-UNDP Kyrgyz Republic Legal Framework Support Project, the UN Office of the High Commissioner for Human Rights, the Soros Foundation Kyrgyzstan, and the German Society for International Cooperation (GIZ) stand ready to offer further support and technical assistance upon request by the Kyrgyz authorities, including for e.g. embedding an expert to assist the CSJ to address some of the issues mentioned in this report.

CONSOLIDATED RECOMMENDATIONS

Recommendations to the Jogorku Kenesh

CSJ composition

- Determine at the legislative level a detailed list of criteria to be fulfilled by civil society representatives in order to be selected as members of the CSJ in order to ensure the exclusion of political affiliations within the CSJ.
- Set up a transparent and public selection process; the process should include two open and independent competitions to identify civil society representatives, from among which eight individuals should be elected separately and publicly by the parliamentary majority and the opposition respectively.
- Determine at the legislative level the composition and some basic rules regarding the selection commissions of the parliamentary majority and the opposition that determine the list of candidates from civil society.
- Discontinue the practice of dividing the vacancy list of civil society representatives to the CSJ among the parliamentary parties (factions).
- State explicitly in the law that all members of the CSJ are independent and act in their personal capacity and not as representative of the political forces that elected them.
- Ensure adequate representation of minority groups within the composition of the CSJ.

Financial independence of the CSJ

- Ensure sufficient funding for the CSJ within the judicial portion of the Annual budget.
- Amend the current legal framework to take away the administrative and secretarial support to the CSJ from the competence of the “authorized agency” and bring it under the umbrella of the CSJ.
- Clarify in the law whether and how the expenses of CSJ members related to their work shall be reimbursed.
- Consider including the possibility for civil society members to be paid for the actual time spent working within the CSJ.

Internal rules of procedure of the CSJ

- Clarify Article 7 of the Law on the Council for the Selection of Judges and other relevant norms governing issues of disciplinary responsibility (disciplinary procedure and types of disciplinary sanctions) of CSJ members, while ensuring a reasonable balance between the independence of the CSJ members and their accountability to society.
- In Article 7 paragraph 2, consider stipulating the procedure for deciding about cases mentioned in paragraph 1, including failure of recusal.

Evaluation of professional skills of candidate judges

- Clarify the provisions included in Articles 17-18 of the Law on the Council for the Selection of Judges in line with the opinion expressed by the Venice Commission with a view to eliminating contradictions between the principle of competitive selection and open votes on each candidate judge.
- Stipulate in Article 17 of the revised Constitutional Law on the Status of Judges the composition of the examination commission.

Transparency

- Streamline within the Law on the Council for the Selection of Judges the norms governing the workload of the three main channels for publishing information related to the work of the CSJ (Council's website, mass media and governmental publications) to increase consistency.

Lottery

- Abandon the proposal of a lottery as opposed to selecting the best candidates for the appointment through a fair, professional and transparent competition, as the lottery system would seriously jeopardise the transparency of the competition.

Security checks

- Follow up on the recommendation from the Venice Commission concerning the need to further clarify the provisions of Art. 3(2) of the Law on the Council for the Selection of Judges with regard to the competencies of the CSJ and the rights of candidates.

Timelines for selection of judges

- Consider setting new deadlines for the appointment of the judges of the Constitutional Chamber, reasonably taking into account the time necessary for the selection of judges by the CSJ, as well as (if applicable) for appointment of all the other judges.

Involvement of other branches of power in the selection/appointment of judges

- Streamline and detail relevant legislation on the role of the President and the Jogorku Kenesh in the appointment of judges for the Supreme Court and the Constitutional Chamber, and the role of the President in the appointment of local court judges, in line with the Constitution and international standards.
- In particular, revise the law to allow for the CSJ to re-nominate the same candidate to the Parliament for a position of Supreme Court judge or member of the Constitutional Chamber.
- Remove from the law the obligation of the CSJ to announce a new competition for positions of Supreme Court judges or members of the Constitutional Chamber after the Parliament refuses to appoint the nominated candidate.

Appeals

- Consider amending the Law on the Council for the Selection of Judges with a view to providing for appeal possibilities related to the administration of individual assessments during the selection procedure, bearing in mind that these appeals should be limited to relevant procedural grounds and should be in line with the prohibition on appeals following CSJ final decisions.
- In order to ensure a timely and effective remedy is available to claimants, consider the CSJ (or a separate chamber nominated from among the members of the CSJ) as an appropriate body for reviewing appeals.

Recommendations to the Presidential administration

Involvement of other branches of power in the selection/appointment of judges

- With regard to the role of the President and Jogorku Kenesh in the appointment of judges, support the Jogorku Kenesh in bringing the Law on the Council for the Selection of Judges in line with international standards.
- Exercise prerogatives in the appointment of judges for the Supreme Court and the Constitutional Chamber strictly in conformity with the relevant provisions of the Constitution and applicable secondary legislation, and taking into account the selection procedures carried out by the CSJ in line with its constitutional mandate.

Recommendations to the Council for the Selection of Judges

Internal rules of procedure of the CSJ

- At a plenary session of the CSJ, finalize and approve Internal Rules of Procedure which shall be mandatory for every member of the CSJ, and include rules of professional ethics guiding the behaviour of CSJ members in execution of their duties and in everyday life.
- Within the internal rules, determine specific procedures covering the withdrawal and/or removal from the selection process in cases of conflict of interest or other circumstances potentially affecting the impartiality of the CSJ.
- Include in the internal rules a duty of CSJ members to report to the Council on each case of attempted influence, pressure and/or bribery in connection with the selection of candidate judges.
- Include in the internal rules provisions regarding grounds and procedure for the launch of disciplinary investigations against a CSJ member if there is reason to believe that he/she committed an infringement of professional ethics, as well as provisions on forming an ad hoc ethics commission for this purpose consisting of CSJ members.

Evaluation of professional skills of candidate judges

- Determine the procedure for the qualification exam before selecting local court judges. Said procedure should harmonize the qualification exam and the various other decisions and assessments taken as part of the overall selection procedure, and naturally avoid discrepancies and duplications. The issue should be addressed within the framework of the internal rules of procedure of the CSJ and/or the
- Regulation of the Procedure of Interview (ex Article 22.2 of the Law on the Council for the Selection of Judges).

Development of the profile of a judge

- Develop a judge's profile to serve as a new and more refined instrument towards the professional evaluation of the personal traits and social skills of candidate judges.
- Outsource to professional psychologists the administration of standard analytical/cognitive tests and the testing of candidates' intelligence and emotional stability (the tests should be carried out in the presence of one or more members of the CSJ).

Transparency

- Increase consistency in the publication by the CSJ of various kinds of information and its outreach to the public.
- Ensure the timely publication of relevant documents such as the application criteria and objective criteria for the selection of judges, with a view to increasing the transparency and public trust in the process. Additional documents which may help the candidate judges to prepare for the selection process should also be published on the CSJ website (including relevant explanations about all the necessary procedural steps, application forms, information on the assessments and tests to be expected during the competition, results of previous competitions, the Code of Honour of Judges and others). The list of available documents should be complemented and/or reviewed on the basis of the experience matured by the CSJ.
- Make available on the CSJ website detailed information about the rules of procedures and the composition of the CSJ, including the approved internal rules of procedure and the names and professional backgrounds of all the members of the CSJ.
- Redefine the current practice of video and audio recording of the judicial selection with a view to divert unnecessary pressure on CSJ members and candidate judges, while ensuring reasonable access to the selection process by civil society, mass media and the interested public.

Security checks

- Make full use of the right to receive security checks as provided in Art. 3 of the Law on Council on Selection of Judges, and develop a list of documents and materials which may be requested by the CSJ (as part of the internal Rules of Procedure of the CSJ).
- While the final decision about a candidature on the basis of the security check report should only belong to the CSJ, make sure that candidate judges have the right to become acquainted with collected information concerning them and to appeal the results of security checks in court.

Recommendation to civil society

- Continue engaging constructively in the monitoring of the implementation of judicial reforms, including the selection of judges, in the Kyrgyz Republic.

METHODOLOGY

During the training seminar which took place on 3 and 4 November 2011 upon request of the CSJ, five international experts participated in the discussions and provided their views and expertise on applicable international standards and examples of national practices concerning the selection of judges: Torben Melchior (former President of the Danish Supreme Court); Henrikas Mickevičius (former judge in Lithuania, founder and executive director of the Human Rights Monitoring Institute and member of the Lithuanian Council for the Selection of Judges); Prof. Leonid Golovko (Moscow State University's Law School); Pavel Gontšarov (Chief Judge of the Viru County Court in Estonia and the Estonian *ad hoc* judge to the European Court of Human Rights); and Timo Ligi (Estonian expert on court administration). The pool of experts also included as National experts Ulan Satarov and Irina Letova who provided expertise on national legislation on the selection of judges throughout the seminar.

The training seminar was divided into four sessions. The first day focused on the selection of judges according to merit, and on a judge's profile. The discussion covered the criteria related to independence and impartiality, including integrity, professional competence, judicial temperament, experience, spirit of service, and neutrality. Applicable international standards and existing national legislation were discussed, as well as the role of the CSJ in assessing these criteria. The technicalities and procedures for conducting the selection of judges were also explored through practical topics such as the utility of background checks, professional examinations, interviews, and drawing of lots. The second day began with a mock interview of "candidates" and viewing of video evidence from a previous, authentic interview of a candidate, before moving to the theme of establishing public trust in judicial selection. Topics for this session included issues related to the structure and work of the CSJ, its composition, decision making processes within it, the conflict of interest of its members and other ethical issues related to the process of selection, as well as its relationship with the other branches of power. Each session was followed by a discussion in order to ensure interaction between the CSJ members and the experts.

This report is based on the experts' findings from their mission to Bishkek in November 2011 from the training seminar, their introductory meetings with members of the CSJ, representatives of the OSCE Centre in Bishkek and the EU-UNDP KR Legal Framework Support Project, with representatives of the other donors organising the seminar, as well as meetings with members of the Jogorku Kenesh (Kyrgyz Parliament), the President's representative at the Parliament, and civil society members. At the latter meetings, which took place after the close of the seminar, experts gave an initial assessment of the work done so far by the CSJ and identified issues to be dealt with in the future. The report analyzes the issues of concern from the perspective of international and, to a limited extent, European standards. Although Kyrgyzstan is not a member of the Council of Europe – and thus the European Convention on Human Rights is not applicable – the Convention and the case law of the European Court of Human Rights provide standards which the Venice Commission points out as being "relevant also for non-members from a comparative perspective."¹ Furthermore, the fact that the Venice Commission was requested to provide an opinion on Kyrgyz draft legislation reforming the system of judicial selection indicates that Kyrgyz authorities are interested in this comparison and willing to consider European standards.

¹ CoE Venice Commission, Opinion No. 624 / 2011, CDL-AD(2011)019, 20 June 2011, para. 9.

BACKGROUND

A new Constitution was adopted by nationwide referendum on 27 June 2010. Section Six of the Constitution, “The Judicial Power in the Kyrgyz Republic”, introduced a number of novelties. The Constitutional Chamber of the Supreme Court was established to replace the Constitutional Court. The Constitutional Chamber was stripped of the authority to issue opinions on the constitutionality of presidential elections or on impeachment processes concerning the President, but was given the authority to issue opinions on the constitutionality of international treaties before their ratification in Kyrgyzstan. The requirements for candidate judges to the Constitutional Chamber were also changed: in particular, the minimum age for qualification was increased to 40 (an increase of 5 years), and the minimum years of work experience to 15.

The newly established Council for the Selection of Judges, which includes judges and civil society representatives, was tasked with the selection of Supreme Court and Constitutional Chamber judges, and with the selection, nomination, and transfer (rotation) of local court judges. Furthermore, the role of judicial self-government bodies was enhanced. In particular, the Council of Judges is authorized to submit to the President proposals on early termination of judges’ tenure and to approve the criminal or administrative prosecution of judges. Another novelty in the Constitution is the procedure for selection/dismissal of chief or deputy chief justices on decisions by the meeting of judges, the primary judicial self-government body. The length of tenure for chief and deputy chief justices is three years.

Importantly, the law regulating the entry into force of the new Constitution reads that the judges of the Supreme Court and ordinary judges “preserve their powers until new judges are selected and appointed in accordance with the new Constitution” (Art. 1(8); the law was approved by national referendum together with the new Constitution in 2010).

On July 12, 2010, the Deputy Chair of the Provisional Government of the Kyrgyz Republic formed a task group to bring existing legislation in line with the new Constitution. The task force prepared the following draft laws with assistance from the EU-UNDP KR Legal Framework Support Project:

1. Constitutional law “On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic”;
2. Constitutional law “On Changes to the Law ‘On the Status of Judges in the Kyrgyz Republic’”;
3. Law “On Changes to the Law ‘On the Supreme Court and Local Courts of the Kyrgyz Republic’”;
4. Law “On Changes to the Law ‘On Judicial Self-Government Bodies’”;
5. Law “On the Council for the Selection of Judges in the Kyrgyz Republic”.

The European Commission for Democracy through Law (Venice Commission) reviewed three of the above draft laws (on the Constitutional Chamber of the Supreme Court, on the Status of Judges, and on the Council for the Selection of Judges), and it appears that the Parliament took the proposals and comments by the Venice Commission’s experts into consideration when finalizing these laws. On June 13, 2011, the Parliament passed all the above laws.

On 8 July 2011, the Parliament approved the membership of the Council for the Selection of Judges in the Kyrgyz Republic and elected Zamirbek Bazarbekov as its Chair.

On 27 July 2011, the CSJ began screening the applications of 114 candidates for 35 vacancies at the

Supreme Court, and the applications of 29 candidates for 11 positions at the Constitutional Chamber. On 3-4 August 2011, the CSJ completed the process, having selected 29 candidates for the Supreme Court, and 11 candidates for the Constitutional Chamber.

The selection process faced both internal and external criticism: upon completion of the interviews, several CSJ members publicly expressed their disapproval over the grading of candidates. Civil society organizations held a number of peaceful protests denouncing the lack of transparency and openness of the vote and the conflict of interest for two successful candidates for judicial posts who are also members of the CSJ.

On 5 August 2011, the CSJ proposed its selection of candidates to the President to be submitted to the Parliament. On 8 August 2011, current Supreme Court judges criticized the selection criteria, the treatment of complaints and the lack of transparency of the vote. An umbrella group of concerned NGOs (the Civic Council for the Control of the Judicial System) announced their intention to monitor the selection of local judges.

President Rosa Otunbaeva interviewed the candidates proposed by the CSJ for the Constitutional Chamber positions on 13 and 14 August 2011, and three of these were submitted to the Parliament for election to Constitutional Chamber positions. She also proposed to Parliament 14 candidates out of the 29 candidate judges shortlisted for Supreme Court positions. On 15 August 2011, an extraordinary session of the Parliament dedicated to the election of judges was interrupted by a peaceful protest held in front of the Parliament building in Bishkek by representatives of political parties and civil society demanding the dismissal of the CSJ as an agency that did not merit the people's trust. A similar protest was staged in Osh.

The Parliament ultimately approved two candidates for Constitutional Chamber positions out of the proposed candidates. The President subsequently withdrew the proposition related to the 14 candidates for Supreme Court positions.

These moves from both the Parliament and the President were criticized by civil society, denouncing an excess of authority with respect to the judiciary. Four non-selected candidates for the Constitutional Chamber later made statements accusing the President of exceeding her constitutional authority by conducting interviews with candidate judges.

On 25 August 2011, Shamara Maychiev was elected as new Chair of the CSJ in place of Zamirbek Bazarbekov, who had resigned.

In response to the criticism of the existing judge selection procedures voiced by many Jogorku Kenesh members, civil society representatives, and judges, on 28 September 2011, President Otunbaeva established a commission tasked with preparing proposals on amendments of the laws regarding the judicial system. The Commission, chaired by MP Tekebaev (Ata Meken), included representatives of five political parties, the CSJ and the Council of Judges Chairmen, Presidential Administration officials, and civil society members. Supported by the EU-UNDP KR Legal Framework Support Project, the Working Group developed the following draft laws:

- constitutional draft law “On Changes to Some Legislative Acts of the Kyrgyz Republic” (On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, On the Status of Judges in the Kyrgyz Republic); and

- draft law “On Amendments and Changes to the Law ‘On the Selection of Judges in the Kyrgyz Republic’”.

These draft laws aimed to eliminate the problems and difficulties that had arisen in the process of selecting judges for the Constitutional Chamber and the Supreme Court. On 7 October 2011, the draft laws were approved by the Parliament and sent to the President for signing.

On 15 November 2011, the President vetoed the above laws.

Currently, a Conciliatory Commission established by the Parliament is reviewing the President’s objections.

In her last speech to parliament on 30 November, the outgoing President expressed her regret at the judicial reform process not having moved ahead fast enough. Civil society organizations voiced their concern that parliamentarians of the ruling coalition might be advancing the idea of dissolving the CSJ. In a statement released on 21 November, civil society organizations stressed that the dissolution would create a dangerous precedent of arbitrariness and lead to primacy of the legislative branch of power over the judiciary.

The CSJ requested technical, material and financial assistance and the support of training activities from the OSCE Centre in Bishkek and other donors already in June 2011.

ASSESSMENT AND ANALYSIS OF ISSUES OF CONCERN

As an initial assessment of the ongoing reform and selection of a new judicial corps, experts acknowledged a number of positive aspects: for instance that a lot of work had been done in a very short period of time. They also identified several issues of concern that should be tackled either by amending the relevant laws or by elaborating internal rules of procedure by the CSJ. The following sections elaborate on the main shortcomings (as identified by international and national legal experts, members of the CSJ, and civil society) and provide recommendations for further reform.

1. Composition of the Council for the Selection of Judges

The composition of the CSJ is determined by the Constitution of the Kyrgyz Republic (adopted by referendum on 27 June 2010). According to Article 95(7), the CSJ is composed of judges and representatives of the civil society. As was pointed out by the Venice Commission, it is commendable that representatives of the executive branch of power are excluded, and that the Council membership includes civil society representatives.² Moreover, it is commendable that judge members of the CSJ are elected by the Council of Judges.³ It is also welcome that the Law on the Council for the Selection of Judges calls for increasing gender equality in the CSJ membership (Article 5(6)).⁴

Article 95(7) stipulates that “the Council of Judges, the parliamentary majority and the parliamentary opposition shall elect one third of the composition of the CSJ respectively.” Consequently, representatives from the judiciary constitute only a third of the CSJ. While this ratio does not fully reflect a number of recommendations of international bodies and experts,⁵ it is grounded in relevant constitutional provisions and, what is more, it is justified by the legislature and other actors from a substantive point of view: namely that the purpose of the most recent constitutional and judicial reform in the Kyrgyz Republic is to reinvigorate the judiciary and to help it regain public trust which is reportedly very low. Therefore, the legislature decided that civil society should play a major role in selecting judges, rather than representatives of the discredited judiciary itself. This approach is expected to give back the necessary legitimacy to the judiciary as well as help the judiciary regain public confidence in its independence. Similar arguments were put forward by all the national actors (civil society, parliamentarians, national experts) when explaining the logic of the relevant constitutional provisions regarding the composition of the CSJ.

² CoE Venice Commission, Opinion No. 624 / 2011, CDL-AD(2011)019, 20 June 2011, para. 22

³ The ODIHR/Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia recommend specifically that the judge members should be elected by their peers and representing the judiciary at large, including judges from first level courts, para. 7. The Kyiv Recommendations are available at <http://www.osce.org/odihr/73487>.

⁴ The OSCE Ministerial Council called on participating States to “consider providing for specific measures to achieve the goal of gender balance in all (...) judicial and executive bodies.” (Athens 2009, Decision No. 7/09).

⁵ “A substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications”, European Commission for Democracy Through Law (Venice Commission) CDL(2007)003, para (50). “In all cases the council should have a pluralistic composition, with a substantial part if not the majority of the members being judges elected by their peers”, Venice Commission CDL-JD(2009)001, para (27). Venice Commission, see CDL-AD(2002)021, para. 24. *The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* suggest “a substantial number of judicial members” in special bodies for the selection of judges, see para. 8. The Kyiv Recommendations also suggest that the “inclusion of other professional groups is desirable (law professors, advocates) and should be decided on the basis of the relevant legal culture and experience. Its composition shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office”, para. 8.

According to Article 6(2) of the Law on the Council for the Selection of Judges, half of the sixteen civil society representatives who are members of the CSJ are required to have a law degree and at least five years of experience in the legal profession, while the other half may be specialists without legal background. This approach is also quite justifiable and a reasonable compromise in the current constitutional and political context. On the one hand, it ensures that no less than two thirds of the 24 CSJ members are lawyers (judges, lawyers, law professors and others); on the other hand, it allows for engaging genuine civil society representatives as members of the CSJ, making it as open as possible and not prone to judicial cronyism.⁶

At the same time it became apparent that the selection procedure of the CSJ representatives of civil society suffers from lack of transparency. The absence of clear criteria and procedural provisions for this selection in 2011 provoked a reaction from civil society which translated in the establishment of the above mentioned “alternative” Committee of Civic Control monitoring the work of the CSJ. As a result, it seems that civil society does not influence the CSJ from within the institution (as conceived by the drafters of the Constitution) but from the outside, sometimes with less than constructive results. Moreover, the “civil society representatives” in the CSJ are in practice quite often former members of political parties who discontinued their membership literally on the eve of their election to the CSJ. There is also a practice whereby the five parties represented in Parliament informally agree about the “division in equal parts” of the list of non-judicial members of the CSJ (16 persons) among themselves by appointing their representatives who become *de facto* “political party delegates” to the CSJ rather than independent members. Such practices do not appear to conform to the spirit of the Constitution, and they can result in the perception, if not the actual risk, of political influence and corruption distorting a merit-based fair selection process.

The Kyiv Recommendations (para. 8) suggest that the composition of a body deciding on judicial selection should “ensure that political considerations do not prevail over the qualification of a candidate for judicial office.”

One essential step that may be taken to counter the above mentioned risks is to determine, at the legislative level, the criteria that should be fulfilled by civil society representatives in order to be selected as members of the CSJ. There is also a need to establish a transparent process of selection; this would entail holding two open and independent competitions (one for the list of eight civil society representatives elected by the parliamentary majority, one for those elected by the parliamentary opposition). When defining the criteria, civil society members with a strong political affiliation, e.g. as implied by very recent membership in a political party, should be excluded.⁷

Based on the two competitions, two lists of candidates from civil society should be compiled (each with eight candidates); one will be submitted for approval to the parliamentary majority, and the other to the parliamentary opposition. The right to participate in the competition should be afforded to all politically independent civil society groups and organizations whose activities are consistent with the interests of justice and whose candidates meet the criteria established by law. Individuals should be able to participate in the competition, as long as they fulfil the above-mentioned criteria including absence of a strong political affiliation. Announcements of competitions must be publicly available, published in print and

⁶ Similar arguments for inclusion of civil society representatives generally in judicial councils to counter corporatism were put forward by the Venice Commission, see CDL-AD(2002)021, para. 21-22.

⁷ See also Venice Commission, see CDL-AD(2002)021, para. 30.

electronic media, allow for sufficient time to prepare for the competition, and contain all information necessary to participate in the competition, including the compulsory indication of whether the listed candidate is subject to approval by parliamentary majority or parliamentary opposition. The law shall also define the composition and some basic rules regarding the selection commissions that determine the list of candidates from civil society and submit them for approval to the parliamentary majority and parliamentary opposition.

A further recommendation entails the discontinuation of the practice of dividing the vacancy list of civil society representatives to the CSJ among the parliamentary parties (factions). The parliamentary majority and parliamentary opposition should take their decisions to approve or disapprove the list of candidates proposed by the selection commissions in two separate sessions, open and accessible by the public. One of the two sessions should be attended by all the deputies of the parliamentary majority, the other attended by all the deputies from the parliamentary opposition.

Additionally, it should be explicitly stated in the law that all members of the CSJ are independent and act in their personal capacity and not as representatives of the political forces that elected them.⁸

Lastly, in relation to minority representation, the Kyiv Recommendations (para. 24) highlight that “it would be desirable that the composition of the judiciary reflects the composition of the population as a whole [...]”. This recommendation is applicable to both the judiciary in general and to the composition of bodies dealing with the selection of judges.

2. Budget, including compensation for work of full time Council members

Judiciaries need to be afforded the resources that are necessary to discharge their functions appropriately. Inadequate resources may render the judiciary vulnerable to corruption, which results in a weakening of its independence and impartiality. It also undermines the independence of the judiciary when its organs and representatives are not participating in the elaboration of its budget and the distribution of the allocated resources. When the other branches of power have significant influence on the judicial budget, this entails a risk of influencing individual judges and ultimately some sensitive cases.⁹ This is all the more relevant when it comes to the financial independence of judicial bodies implementing delicate tasks such as judicial selection. It is a truism that the risk of corruption is particularly high where an individual or entity is entrusted with a task and related authority, but not given the necessary support and resources.

A number of points should be highlighted with regard to the CSJ’s financial and functional independence. According to the Law on the Status of Judges and the Law on the Council for the Selection of Judges, administrative support for the CSJ is ensured by the “authorized state agency on ensuring the activity of local courts” which, *inter alia*, designates one of its employees as the Secretary of the CSJ. Among other issues, the Secretary of the Council sees to the preparation of the Council meetings (Art. 11 and 21 of the Law on the Council for the Selection of Judges). It can therefore be inferred that the funding for administrative and secretarial support comes from the budget of this authorized agency. The legal framework does not provide enough detail to ascertain whether the support provided by the authorized agency is sufficient to cover the needs of the Council: where necessary, the law should be amended so as to ensure that administrative and secretarial support fall under the umbrella of the Council. It is also open

⁸ See also Venice Commission, see CDL-AD(2002)021, para. 37

⁹ See International Commission of Jurists, International Principles On The Independence And Accountability Of Judges, Lawyers And Prosecutors - A Practitioners’ Guide, 2004, pp.30-31.

to question to what degree the Secretary can draw upon the resources of the authorized agency. This issue deserves further analysis, including analysis that is based on the first months of experience of the Council.

It is also questionable whether provisions of the current legislation might be interpreted as supporting reimbursement of the costs of the Council members' work in this capacity. In other countries these costs are reimbursed at all times. It could be argued that the obligations of the authorized agency and the Secretary, laid down in Article 21 of the Law on the Council for the Selection of Judges as obligations to provide "organizational, material, technical and methodological support" for the Council and "prepare its meetings", include the full reimbursement of related costs (travel, meals, and accommodation, if necessary).

Article 21 of the Law on the Council for the Selection of Judges is also quite problematic in providing that the Council members shall work on a pro-bono basis, i.e. without pay. The article reads: "1. The members of the Council shall work on a pro-bono basis. [...] 2. Organizational, material, technical and methodological support to the work of the Council shall be provided by the authorized agency upon agreement by the Council [...]". Considering that the CSJ is an institution of constitutional status which plays a critical role in the process of the selection of judges, as has already been stated by the Venice Commission of the Council of Europe "it is doubtful that such a huge task can be fulfilled by a body only composed of members working on a pro-bono basis". The Venice Commission argues that at least some members of the Council should work on permanent basis.¹⁰

The pro-bono work by judges sitting in the CSJ should be considered separately. Under applicable international standards, in order to preserve their independence judges can be additionally remunerated only for creative work and teaching. Remuneration for judges could also create an undesirable incentive to sit in the Council rather than adjudicate. On the other hand, a proportional reduction of their workload in courts, as foreseen in Article 21.1 of the Law on the Council for the Selection of Judges, is a sufficient compensation for the work within the CSJ.

With regard to the members of the CSJ representing civil society, they should be entitled to compensation based on the time actually spent working for the Council. The "authorized agency" could develop a standard time-sheet to record the time spent in CSJ meetings and for their preparation.

It seems the only way to guarantee compensation for CSJ members, in one way or another, is for the Parliament to change Article 21 of the Law on the Council for the Selection of Judges along the lines mentioned above.

3. Ethics and internal rules of procedure

The Law on the Council for the Selection of Judges foresees the adoption of internal rules of procedure by the CSJ.¹¹ The existing rules of procedure of the CSJ do not cover all its practices and norms in full. It is a reason for concern with regard to the technical procedures governing the conduct of meetings and interviews with candidates, but even more fundamentally with regard to the internal norms that define the ethical duties of CSJ members: such norms should lay down, *inter alia*, the grounds for a CSJ member's withdrawal/removal from an affected selection process, and the legal consequences in case of a breach of

¹⁰ CoE Venice Commission, Opinion No. 624 / 2011, CDL-AD(2011)019, 20 June 2011, paras. 54-55.

¹¹ The Law on the Council on Selection of Judges uses the term Rules of Procedure of the Council (see Art. 3, last para, Art. 22.2). The Law also speaks about the Regulation on Procedure of Interview (Art. 22.2).

ethics by the CSJ member. A number of CSJ members indeed voiced the concern that it is unclear how to proceed in difficult ethical and legal situations: for example, when individual CSJ members are suspected of dubious activity, or when there were attempts of undue influence from representatives of political parties or third parties in connection with their professional activities.

The CSJ should finalize a regulation which will be mandatory for every CSJ member and will include rules of professional ethics guiding the behaviour of CSJ members in the execution of their duties and in everyday life. These internal rules shall, among other things, specify procedures for the withdrawal/removal of individual members from the selection process – based either on the member’s own initiative or based on a motion from another member – in cases of conflict of interests or the emergence of other circumstances capable of casting doubt on the impartiality of the individual member and/or the entire CSJ.

In addition, the regulation should stipulate the duty of a CSJ member to report to the Council on each case of attempted bribery, pressure, and/or other influence in connection with the selection of candidate judges. Moreover, the regulation should have provisions regarding grounds for and mechanisms regarding the launch of a disciplinary investigation against a CSJ member if there is reason to believe that he/she committed an infringement of professional ethics, as well as the provision on forming an *ad hoc* ethics commission for this purpose consisting of CSJ members.

At the same time, issues of disciplinary responsibility (disciplinary sanction) of the CSJ members should be a subject of regulation by law (while taking into account the special legislative status of judge-CSJ members), and the system and types of such sanctions should ensure a reasonable balance between the independence of the CSJ members and their accountability to society.

4. Evaluating, testing and comparing professional skills and experience

In Kyrgyzstan, the mechanisms for the objective evaluation of professional competence remain to be developed. Article 17 of the Constitutional Law on the Status of Judges developed by the Commission indicates that one of the requirements for entering the profession is that candidates pass a qualification exam.¹²

The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (para. 27) emphasise that good judicial skills include professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal competence (ability to cope with the work load, ability to decide, openness to new technologies), and social competence (ability to mediate, respect for the parties). Judicial candidates should be tested for the same skills to ensure merit-based selection.

Before the selection of local court judges starts, it needs to be determined how the required qualification exam fits into the current legal framework and practice of the CSJ in the selection of judges, in order to avoid discrepancies and/or duplications. Certainly, said examinations would result in the overall level of professional competence among judges being raised. However, in order to attain this much desired

¹² “[Candidate judges] have to present a certificate attesting the passage of a qualification exam (hereinafter referred to as the exam). Such an exam is passed after the completion of full-time or extramural tuition of applicants. The certificate is valid for a period of three years. The training program, the membership of the examination commission as well as the procedure of passing the exam are to be approved by the Council of Judges”.

effect, certain conditions relating to the administration of the exams needs to be satisfied: namely, the content of examinations must be relevant and the examination body sufficiently competent to conduct the exam and ensuing evaluation of candidates – the latter condition is surely more likely to be fulfilled if all the members of the examination body are themselves lawyers (preferably with a half being experienced judges).

The examination commission referenced in Article 17 should ideally be different from the CSJ. The Kyiv Recommendations (para. 3) suggest that “[...] a separate expert commission should be established which is entrusted with the competence to conduct written and oral examinations in the process of judicial selection.” In case an expert body is not in place, the alternative of creating an examination board within the CSJ composed of judges and lawyers should be considered as reasonable.

If not regulated in statutory legislation, the issue could be dealt with by internal rules of procedure of the CSJ¹³ and/or the Regulation of the Procedure of Interview mentioned by the Law on the CSJ (Article 22.2). The Council of Judges should be consulted on the content of the exams. The results of the examination should be taken into account by the CSJ, along with other available selection criteria. In practice there should be a transparent grading system by which candidates earn a certain amount of points for their exam results. The points may be decisive for being called for an interview with the CSJ, and they may also play a role in the final ranking of candidates and selection decision by the CSJ, along with points for other criteria.

As an example, in Lithuania out of the maximum 100 points a candidate judge can earn, 50 points can be collected on the basis of the results of the entry exam, the length of legal experience and the nature of legal experience of a candidate (judges, prosecutor, private attorney and so forth). The remaining 50 points depend on the candidates’ performance before the CSJ.

In its opinion on the draft Law on the Council for the Selection of Judges, the Venice Commission of the Council of Europe underlined the contradiction between the principle of competitive selection and an open vote on each candidate.¹⁴ This serious issue still remains to be addressed.

5. Developing criteria (judge’s profile), psychological test/questions

The CSJ made significant progress in developing criteria for the evaluation of candidates’ personal and social competence in a short period of time. Interviews based on developed questionnaires allow

13 These could make an autonomous set of rules, separate from the CSJ’s rules of procedure discussed earlier in para. 3 of this section of the report, or could be a part of the latter (as a separate chapter, etc). In any case consolidation of all rules governing the CSJ’s activity in one set or their separation into several sets of rules is a technical issue to be determined by the CSJ itself. It does not affect the substance of the recommendations made herein.

14 CoE Venice Commission, Opinion No. 624 / 2011, CDL-AD(2011)019, 20 June 2011, paras. 46-47 read: “Article 17.5 provides that “[b]ased on the outcomes of the competitive selection, the Council shall have an open vote on each candidate and make the decision to propose candidates for the position of a judge of the Supreme Court, the Constitutional Chamber and a local court”. This provision includes two contradictory rules. The first part of the sentence provides that the selection of the candidates must be made “[b]ased on the outcome of the competitive selection”, that means on the basis of objective criteria as the result of the competitive selection, whereas the second part provides that the Council “shall have an open vote on each candidate” in which the members of the Council are no longer bound by objective criteria. If there is an objective and competitive selection, there cannot be an open vote, which would potentially disregard the objective results. [47] A merely formal vote to approve the results of the selection process in general would not be problematic. However, the Council will have an open vote on each candidate and those candidates who receive positive vote will be offered the post of judge (see Article 18.6 and 18.7 of the draft Law). In such a system, the results of the competitive selection would be useless because the Law does not oblige the Council to appoint the candidate who achieved the best score in the competitive selection. There is a real danger that persons will be recommended for appointment as judge who have the sympathy of the members of the Council rather than those having been found qualified according to objective criteria.

for reasonable deductions to be made with regard to several personal qualities of candidates, such as dedication and motivation, and their view on the profession of a judge. The development of a judge's profile is hereby recommended as the next, more refined, instrument towards professional evaluation of candidates' personal traits and social skills. The CSJ should initiate and embark on the development of the Kyrgyz Judge's profile, possibly with the assistance of external expertise.

Models of judge's profiles from other participating States discussed at the training, including the often referenced Dutch model could be used as inspiration, and certain elements (such as the ability to listen, power of expression, decisiveness, and the ability for self-analysis), could be included in the Kyrgyz Judge profile.

A more intricate issue is how to test candidates' emotional stability and intelligence, in particular their ability to analyse. The need for more attention to be paid to the analytical skills of judges is also highlighted by the Kyiv Recommendations. The mock selection conducted in Bishkek showed that the CSJ does attempt to test certain qualities, e.g. behavioural skills. It needs to be emphasized that analytical/cognitive tests and testing candidates' intelligence and emotional stability should be administered by professional psychologists. It is recommended that a standard psychological test be developed and conducted before the interview by randomly-selected psychologists in the presence of one or more members of the CSJ.

6. Transparency

According to Article 1.3 of the Law on the Council for the Selection of Judges of the Kyrgyz Republic the CSJ shall perform its activities based on the principles of independence, openness, collegiality, good faith and legality. The provision thereby contains a clear legal obligation for the CSJ to carry out its activities in an open and transparent manner. The above mentioned law also includes several specific obligations regarding transparency, such as the duty to inform mass media of CSJ meetings (Article 12.3); publish vacancy announcements for judge positions in the governmental publication as well as on the official website of the CSJ along with information on how to apply (Article 16.2, 16.3); publish the final list of candidates in the governmental publication, on the official website of the CSJ and in the mass media (Article 16.7); and publish all decisions of the CSJ on its official website as well as in the mass media (Article 19.3).

The Kyiv Recommendations on Judicial Independence (para. 21) stipulate the main criteria for a transparent selection process, namely: "In order to ensure transparency in the selection process, the procedure and criteria for judicial selection must be clearly defined by law. The vacancy note, as well as the terms and conditions, should be publicly announced and widely disseminated. A list of all candidates applying (or at least a short list) should be publicly available."

The above mentioned provisions laying out the legal framework governing the transparency of the process of selecting judges can generally be deemed sufficient for this purpose. The following recommendations should therefore be considered as concrete expert suggestions to improve the implementation of the legal framework and enhance public trust in the selection through increased transparency.

The Law on the Council for the Selection of Judges mentions the CSJ's website, the mass media, and governmental publications as the channels for the publication of information regarding the work of the Council. It is, however, questionable whether the channel prescribed in each case properly reflects actual communication needs and effectively reaches the target audience. For instance: Article 12.3 requires that

information about Council meetings be published in the mass media, but not necessarily on the Council's website or in governmental publications; Article 16.2, that competition announcements for vacancies be published in governmental publications and on the Council's website, but not necessarily in the mass media. The choice of channels prescribed thus emerges as somewhat incoherent.

It is the experts' opinion that the CSJ website should contain all information related to its work. Starting with the rules of procedure and the composition of the CSJ, the website should further include internal rules of procedure and the names and professional backgrounds of all the members of the CSJ. Particular regard should be given to the application criteria and objective selection criteria: their publication indeed represents the cornerstone of any transparent selection process. In light of the fact that application and selection criteria are adopted with a decision of the CSJ, and that all decisions are to be published according to Article 18.13 of the Law on the Council for the Selection of Judges, there should be no doubt about the need to publish them on the CSJ website.

Generally, all documents which may help candidates prepare for the selection process should be published on the website: from competition announcements, to information on the Council's meetings and decisions. In addition the website should include clear explanations about the procedural steps (e.g. how to get a foreign diploma recognized), relevant application forms, information about the kind of assessment and tests that can be expected during the competition (see Recommendation 4), an explanation of the scoring system, information about previous competitions, the Code of Honour of Judges (cf. Article 5.1 of the Law on the Status of Judges), and any other such detail as needed by applicants.

Governmental publications should be used to make official announcements only, as when announcing competitions and their results (and results should actually include such details as the names of candidates). With regard to the mass media, the CSJ should be proactive in its approach, hence it should favour its use to guarantee a wider reach but also ensure that the media be in a position to publish all information that is available in governmental publications and on the CSJ website.

While at this early stage the current practice of video and audio recording of the judicial selection may be necessary to increase public trust in the judiciary and in the selection process, it is not advisable to retain this practice in the long run. Apart from providing access to the selection process to civil society and the general public, audio and video recording of the interviews may currently serve as helpful study material to familiarize candidate judges with the selection process. However, audio and video recording should not be considered as a substitute for objective selection criteria and their consistent application (see Recommendation 5). On the contrary, recording of interviews may place unnecessary pressure on the Council members as well as on the candidate judges and thereby hinder objective selection of the best possible candidate according to merit. Furthermore, competent candidates may decide to refrain from applying (either for judicial posts or for membership in the Council) due to their reluctance to undergo a public scrutiny of their skills and knowledge and the risk of being affected by smear campaigns.

7. Lottery

During the training seminar and related meetings, CSJ members and representatives of civil society presented the idea of conducting a lottery in order to choose judges out of a pool of pre-selected equally qualified candidates. Some members of the Council and representatives of civil society strongly support the idea, arguing that such system would prevent possible cases of corruption and/or private deals within

the Council during the selection of judges. At the seminar, however, experts strongly opposed such a solution, explaining that it would prevent choosing the best candidates for the profession of judge and could actually discredit the CSJ as a group of professional decision makers. Adopting such solution reveals a deep lack of trust in the Council, its members and their integrity. This lack of trust and its causes need to be addressed. It must however not be allowed to shape policy decisions. Furthermore, it can be argued that the human factor is anyhow present at other stages of the procedure, and thus the risk of corruption will only be shifted to an earlier or later stage of the selection, testing or nomination procedure.

Best candidates should be selected through a fair, professional and transparent competition. The transparency of the competition will be lost in case of implementing a lottery for the purpose of selecting judges. Therefore experts strongly recommend to the Council not to select final candidates for the appointment by means of a lottery.

8. Background/security checks

Due to objective time constraints the Council does not use to the full extent its right for security checks of candidates provided in Art. 3 of the Law on the Council for the Selection of Judges. The article provides: “The Council shall have the following rights for the execution of its powers: 1) Request and receive necessary information, documents and other materials from the state agencies, local self-governance bodies and organizations as well as officials thereof; 2) Hear verbal and request written explanations from officials of the state agencies and local self-governance bodies; 3) Invite to its meetings officials from the state agencies and local self-governance bodies, representatives of organizations and citizens. The list of documents and materials which may be requested by the Council, should be approved in the Rules of Procedure of the Council.”

Security checks of candidates are also mentioned in para. 22 of the Kyiv Recommendations: “[...] if there are background checks, they should be handled with utmost care and strictly on the basis of the rule of law. The selecting authority can request a standard check for a criminal record and any other disqualifying grounds from the police. The results from this check should be made available to the applicant, who should be entitled to appeal them in court. No other background checks should be performed by any security services. The decision to refuse a candidate based on background checks needs to be reasoned.” The aim of security check of candidates is to assess their integrity and the absence of circumstances which could possibly influence their impartiality and independence in case of appointment as a judge. Such checks can be a useful means to combat corruption in the judiciary. In this vein, it would be relevant to check for the absence of any factors which could make a candidate dependant or vulnerable to external pressures and influence (for example: suspicious relationships, abuse of alcohol, gambling, etc), as well as the proportion of income and expenses

Conducting security checks should be within the competence of the Ministry of Interior or a defined special police service. It should be stressed that the final decision regarding the security check report about a candidate should only belong to the CSJ. The CSJ should have the possibility to question a candidate on the basis of information collected that concern him/her. Clearly, candidates should have the right to get acquainted with this information and to appeal the results of the security check in court.¹⁵

Furthermore, the experts support the recommendation elaborated by the Venice Commission of the

¹⁵ Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para. 22.

Council of Europe concerning the need to further clarify the provisions of Art. 3(2) of the Law on the Council for the Selection of Judges regarding the powers of the CSJ and the rights of candidates.¹⁶

9. Timelines for selection of judges

Article 1(8) of the Law on enactment of the Constitution of the Kyrgyz Republic provides that the sitting judges of the Supreme Court and judges of local courts remain in their positions until the selection and appointment of new judges in accordance with the new Constitution. Article 61(1) of the Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic provides the period of formation of the Constitutional Chamber, stating that the full membership of the Constitutional Chamber shall be formed no later than sixty days since the enactment of the present constitutional law. While the Law entered into force on 17 June 2011 and the CSJ proposed 11 nominees to the President in a timely manner, only two of the candidate judges were appointed by the President. Members of the Council mentioned to the visiting experts that the end of 2011 was also set as deadline for the selection of local court judges.¹⁷

For example, in many European states a reasonable time for the selection of judges from the announcement of a competition until the appointment is considered to range from five to nine months.¹⁸ At the moment in Kyrgyzstan short time limits for the selection of new judges risk undermining the formation of a new professional, reliable, impartial and independent judiciary and increase the risk of selecting and appointing weak candidates.

Considering that the majority of judges of the Constitutional Chamber are still not appointed and that the deadline for their appointment as set in Article 61(1) of the Law on the Constitutional Chamber has not been met, it is essential that the Parliament set a new deadline that takes into account the actual time necessary for the selection of judges by the CSJ. This recommendation should also apply to the appointment of all other judges and related timelines in place.

When defining new deadlines for the appointment of judges it should be taken into account that the CSJ should have enough time for: receiving and checking the data presented by the candidates; evaluating, testing and comparing professional skills and experience of the candidate judges, including requesting background/security checks and receiving related reports; conducting a professional evaluation of the personal abilities and psychological background of candidates.

10. Involvement of the President and the Parliament in selection/appointment

Kyrgyz legislation requires the CSJ, based on its decision related to the selection of all judges, to submit a proposal to the President. While in the case of local court judges, the President would appoint them, in the case of Supreme Court and Constitutional Chamber judges, the President would further submit the proposal to the Parliament for election. In both cases, the President has the right to return a proposed

¹⁶ CoE Venice Commission, Opinion No. 624 / 2011, CDL-AD(2011)019, 20 June 2011, para. 19 reads: “The provisions concerning the powers of the Council to request necessary information or documents and to convoke any official or private person for explanations are too broad and would be appropriate rather for an investigative agency. These provisions are not clear as they do not set out what information should be provided. What kind of information can be collected and received? What kind of procedure regulates the collection of this kind of information? What is the state of knowledge of the candidate about this information? Does the candidate have the right to contest this information? These provisions should be clarified in order to bring them into conformity with applicable standards.”

¹⁷ Research within existing legislation of the Kyrgyz Republic did not reveal any norm reflecting this deadline.

¹⁸ The selection of judges takes between four and seven months in Finland and Latvia. In Estonia, it takes even longer.

candidate's file with a motivated decision. The CSJ can then re-submit the same candidate for appointment within thirty days.¹⁹

According to international standards all decisions affecting the selection, recruitment, and appointment of a judge should be taken by an authority independent of the executive and legislative powers.²⁰ If the final appointment of a judge is entrusted with a country's President, his or her discretion to appoint should be limited to the candidates nominated by the national selection body. Any refusal by the President to appoint a candidate nominated by the national selection body should be based solely on procedural grounds and should be reasoned (cf. also Kyiv Recommendations, para 23).

It is commendable that Article 19 of the Law on the Council for the Selection of Judges prescribes that the President has no right to veto if the Council resubmits the same candidate once again. On the other hand, the provision enables the President to refrain from appointing a candidate nominated by the CSJ upon first-time submission. This presidential veto was criticized by the Council of Europe Venice Commission in relation to Supreme Court judges.²¹ The legal provision also does not limit the right to refuse a candidate to procedural grounds. Positively, the Working Group established by President Otunbaeva in September 2011 proposed to amend this provision and stipulate that the presidential refusal would be limited to procedural grounds; this would bring the law in line with international recommendations. The amendments, though not exactly in the form proposed by the Working Group, were approved by the Parliament; in spite of this the President refused to accept them and returned them to the Parliament with comments on 15 November 2011.

The experts find that applicable Kyrgyz laws should be amended in order to exclude or minimize the possibility of interferences in the selection process. The appointment of judges for the Supreme Court and the Constitutional Chamber is a constitutional prerogative of the Jogorku Kenesh (Parliament) and should remain such also in the Law on the Council for the Selection of Judges of the Kyrgyz Republic. The President can currently decide not to submit to the Parliament a candidate for the Supreme Court or the Constitutional Chamber nominated by the CSJ. The Council can resubmit the candidature in which case the President (according to Article 19.2) shall present the candidate to the Parliament within ten days. Nevertheless the law considerably broadens the powers of the President and possibly does so in an unconstitutional manner: in the appointment of the judges for the Supreme Court and for the Constitutional Chamber the Kyrgyz Constitution does not envisage any role for the President and therefore it is questionable whether the law should provide for such a role.

According to the existing legal framework the Parliament can decide not to appoint a candidate to the Supreme Court or Constitutional Chamber. However, unlike what is foreseen in the procedure for appointment of local court judges, in the event of non-election, the Council cannot re-nominate a candidate to the Parliament and must announce a new competition (Article 19.3 of the Law on the

19 Article 19 of the Law on the Council for the Selection of Judges of the Kyrgyz Republic.

20 See Article 1(3) of the CoE European Charter on the Statute for Judges. Which reads: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."

21 CoE Venice Commission, Opinion No. 624 / 2011, CDL-AD(2011)019, 20 June 2011, para. 53: "Furthermore, it is necessary to revise Article 19.2, which provides for a presidential veto against the candidates for the Supreme Court. According to the Constitution, the President has no competences in the procedure of the appointment of the judges to the Supreme Court, except for the competence to submit to Parliament the names of the candidates selected by the Council. The appointing body is the Parliament and it seems appropriate that this body verified whether the Council followed the procedures established by the Law".

Council for the Selection of Judges of the Kyrgyz Republic).

It is advisable for the law to allow re-nomination of the same candidate by the CSJ in case the Parliament does not appoint the candidate the first time. It should be up to the Council to decide whether to submit the same candidate again or not. Secondly, the obligation to announce a new competition after Parliament rejects a proposed candidate seems to be too rigid. It is possible that several very good candidates participated in the same competition and if the CSJ's first choice is not appointed, this does not mean that the other candidates (whom the CSJ considers worthy) cannot be appointed by the Parliament. Again, it should be up to the CSJ to decide whether to organise a new competition, to select a new worthy candidate from the participants of the same competition or to re-nominate the same candidate. Generally, the powers of the Parliament in the appointment process should be clearly detailed in the relevant laws.

Although there is room for improving the current legal framework, the ongoing selection of judges should take place in line with the letter of applicable laws. For instance, the experts were informed that during the appointment procedure of the judges for the Supreme Court and the Constitutional Chamber (August 2011), the President of Kyrgyzstan held interviews with the candidates nominated by the Council. Doubts regarding the professional abilities and knowledge of the candidate judges should be dealt with during the initial selection procedure carried out by the Council. The selection procedures within the Council or the CSJ composition should allow for proper testing of professional competence. The interview/examination of candidate judges by the country's President is neither foreseen in the applicable procedure for the selection of judges, nor contemplated in the Kyrgyz constitution and international standards.

11. Appeals

In its current version, the Law on the Council for the Selection of Judges of the Kyrgyz Republic stipulates that the decisions of the Council are not subject to appeal (Article 18(12)).

While international standards provide limited guidance on appeal against decisions by national bodies dealing with the selection of judges, the Kyiv Recommendations specifically advise providing an appeal opportunity related to the background checks (para. 22 reads "The results from this check should be made available to the applicant, who should be entitled to appeal them in court [...] The decision to refuse a candidate based on background checks needs to be reasoned." See also Recommendation 8 above for further details).

The above mentioned provision of Kyrgyz legislation follows relevant international recommendations and practice, especially concerning appeals to final decisions related to the nomination of candidate judges. However, taking into account the recommendations in sections 4 and 5 above (where it is advised that the selection procedure for candidate judges should include more specific assessments carried out by the CSJ itself e.g. assessment of the legal knowledge, or by other specialists e.g. psychological assessments, background tests) it may be necessary to allow for appeal possibilities on these specific assessments. Such appeals should exclusively be limited to procedural issues, such as those related to ensuring equal opportunities to all candidates. For example, if working with copies of legal acts or case-law during an examination is permitted and such a right has been denied in the case of one or more candidates, the facts should be promptly investigated and if necessary the candidate(s) should be given a second chance to take the exam on equal terms with others.

The appropriate body for reviewing the appeals should be the CSJ itself or a separate chamber/board

nominated from among the members of the Council (preferably chosen from those with a judicial background). A chamber with a small membership would enable an efficient and timely review of the appeals. The timeframe for reviewing appeals would have to be short in order to allow for effective participation in the ongoing competition (e.g. not more than 10 working days).

It is recommended that if the selection procedure will in the future include specific assessments which affect the decision of the CSJ to nominate, candidate judges should be given the right to appeal the individual assessments on a basis limited to procedural grounds. The main principles of the appeal procedure (including but not limited to the grounds for appealing, the composition of the body reviewing the appeals, the timeframe for reviewing the appeals) should be included in the revised version of the Law on the Council for the Selection of Judges of the Kyrgyz Republic.

WAY FORWARD

The present report is intended to provide some guidance and additional considerations for the continuing reform debate related to the selection of judges in Kyrgyzstan. OSCE and other donors are ready to assist further in the judicial reform process generally, and more concretely the CSJ in enhancing the process of selecting judges in the Kyrgyz Republic.