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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON THE CONSTITUTIONAL LAW
ON BODIES OF JUDICIAL SELF-REGULATION
OF KYRGYZSTAN**

**on the basis of comments by
Ms Angelika NUSSBERGER (Substitute Member, Germany)
Mr James HAMILTON (Substitute Member, Ireland)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. By letter dated 6 May 2008, the Chair of the Constitutional Court of Kyrgyzstan, Ms Svetlana Sydykova, requested an opinion on: (1) the draft Law amending and supplementing the Law on constitutional proceedings in Kyrgyzstan (CDL(2008)064); (2) the draft Law amending and supplementing the Law on the Constitutional Court (CDL(2008)065); (3) the Law on the Status of Judges (CDL(2008)099); (4) the Law on Court Juries (CDL(2008)069); (5) the Law on Bodies of Judicial Self-regulation (CDL(2008)098) and (6) the Law amending and supplementing the Law on the Supreme Court and local courts (CDL(2008)097).

2. The Law on Bodies of Judicial Self-regulation (5) is dealt with in this opinion; laws (1) and (2) were dealt with in Opinion 481 (CDL-AD(2008)029) and laws (3) and (4) are covered in separate opinions.

3. The present opinion was drawn up on the basis of comments by Ms Nussberger and Mr Hamilton, who were invited by the Venice Commission to act as rapporteurs. Their comments figure in documents CDL(2008)106 and CDL(2008)107, respectively.

4. A conference on the topic "Supremacy of law and the independence of the judiciary – guarantees for the stability of democratic institutions" was organised in Bishkek, Kyrgyzstan on 27-28 May 2008 together with the Constitutional Court (CDL-JU(2008)022 synopsis). The purpose of the conference was to inform the Venice Commission about the current judicial reform in Kyrgyzstan, in the context of the request for an opinion on the six draft laws/amendments mentioned above.

5. This opinion was adopted at the ... Plenary Session of the Venice Commission (Venice, ...).

GENERAL REMARKS

6. The Law on Bodies of Judicial Self-regulation is relatively short and establishes two bodies of judicial self-regulation: (1) the Congress of Judges and (2) the Council of Judges. It sets out the basic principles for their organisation and activity and establishes their legal status.

7. This is a framework law, which does not provide many details, and how the system works in practice will depend on what other legal and regulatory acts will be adopted to govern its working.

8. With respect to judicial self-regulation, it is also important to note that the Kyrgyz Constitution provides in its Article 91 that:

"1. Judicial self-regulation shall be used to resolve internal issues concerning the activities of judges.

2. The Congress of Judges and the Council of Judges shall be the bodies of judicial self-regulation in the Kyrgyz Republic.

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

3. The organisation and activities of the judicial self-regulatory bodies shall be defined by law."

LAW ON BODIES OF JUDICIAL SELF-REGULATION

9. The new Law does not go into much detail on precisely what functions the two bodies will have, but describes them in fairly general terms. Article 1.1 defines *judicial self-regulation* as “*the means of organising the judicial community, making it possible to resolve questions concerning the internal activities of judges through its own bodies.*” This form of self-regulation is understood as being a prerequisite, in Article 4.1, of “*expressing and defining the interests of both judges and other persons vested with judicial power.*” However, the procedure for their formation and activity is to be determined by the Congress.

10. The Congress is to meet once every three years and is the supreme body of judicial self-regulation (Article 6.2). Extraordinary congresses may be convened at the initiative of one-third of all judges or of the Council of Judges. The latter, which has fifteen members, is to be elected by the Congress (Article 8.3) and is subordinate to it (Article 6.1) and its function is to implement the Congress’ policy in the period between congresses (Article 8.1).

11. It is noted that the entire Council is to be elected by the judges. The Venice Commission, in its report of 16-17 March 2007 on Judicial Appointments (CDL-AD(2007)028), recommended that Judicial Councils should include members other than those elected by the judiciary.

12. Article 5 provides for the aims of the two bodies of judicial self-regulation, which are to protect the rights and lawful interests of judges, to assist in improving the judicial system and proceedings, and to represent the interests of judges in dealings with state bodies, public associations and international organisations. It seems, therefore, that the idea is to provide a framework to form coherent standpoints for the judicial community with respect to all questions concerning judges.

13. Regulating self-regulation seems to be a contradiction, however, if such a law is deemed necessary its provisions should not be too rigid. Although it is important to provide a solid basis for judges’ self-regulation, it is important not to suffocate it.

14. In this respect, there are a number of provisions that raise doubt. First, Article 4.4 provides that the status of individuals exercising the activities of judicial self-regulation is governed by the Law on civil service. The content of this Law is not known to the Venice Commission, but it might be too rigid if it provides for strict regulations on responsibilities or perhaps even regulations subordinating the representatives to the administration.

15. Second, it seems unnecessary for **the Congress to be convened by the President of the Kyrgyz Republic**, as foreseen by Article 6.2. This provision contradicts the very idea of self-regulation.

16. Third, Article 8.4 sets out that “*The organisational, technical, material, financial and methodological resources for the activity of the Council of Judges shall be provided by the Judicial department of the Kyrgyz Republic.*” This could create a strong dependency that would be incompatible with the idea of self-regulation.

17. Fourth, the rules for the election of the representatives are also very rigid, for instance, the prohibition of the re-election of members of the Council of Judges for a second consecutive term (Article 8.8). This means a **complete turnover in the membership every three years. Some continuity may be desirable, perhaps the terms of office could be staggered (partial renewal).**

18. It is not clear who the members of the bodies of judicial self-regulation are going to be. On the one hand it seems to be evident that only judges can be members. However, on the other hand, the Law explicitly refers to “*the interests of both judges and other persons vested with*

judicial power" (Article 4.1). **Who is meant by "other people" and are they allowed to participate in self-regulation?**

19. Article 4.1 explicitly mentions the powers of the bodies of judicial self-regulation. Article 4.6 determines the forms of regulation, such as decisions and communications. It is important to note that these regulations should be read in conjunction with the Council of Judges' list of tasks.

20. Article 7 sets out the specific powers of the Congress and, in addition to the representational role, it confers a policy-making function and an executive role on the Congress. The powers include (1) to establish rules of procedure of both bodies, (2) to establish a blueprint for judicial reform, (3) to establish a Judges' Code of honour as well as (4) to determine the main thrusts of policy of the judicial branch of authority and assign tasks to the Council of Judges aimed at guaranteeing the independence of courts and also protecting the rights and lawful interests of judges and (5) to resolve other questions concerning the judicial community. **With respect to establishing blueprint for judicial reform, it is not clear what the legal consequences are. Are all judges bound to defend the position of the Congress of judges? Does the legislator have to take this decision into account? If so, how?**

21. While it is expressly provided that the Congress may not intervene in matters of dispensing justice, it is provided that the Congress' decision are to be binding on judges.

22. Article 9 provides for the powers of the Council. This provision also covers important executive powers as well as advisory and recommendatory powers. These include the supervision over the drawing up and implementation of the courts budget, the examination of questions of instituting disciplinary proceedings against judges, and the organisation of training and further training of judges and court staff, and the receipt of annual reports from the heads of the judicial department and the training centre. **As regards disciplinary proceedings against judges, do such decisions concern concrete judges and are these decisions binding?** An appeal against disciplinary measures to an independent court should be made available (see also CDL-AD(2007)028, paragraph 25).

23. The Council also has various representational and advisory functions. The Law, however, is silent as to how most of these functions are to be carried out and presumably further legal instruments will deal with issues such as discipline, training and the budget. **It is also not quite clear in which cases binding decisions are adopted and what the legal consequences of those binding decisions are.**

24. A number of other points are worthy of note: under Article 2 on "Judicial Community", retired judges are to retain their membership of the judicial community. It can be an advantage to use the talents and experience of retired judges, however for the purpose of electing the Council, it might be better for retired judges to have separate representation. It is possible that retired judges outnumber serving judges. Should they be entitled to vote at a Congress? **Due to the fact that the Law uses two different terms "judge" and "judicial community", it is not entirely clear whether the law provides for this and it may be argued that retired judges deemed to be members of the judicial community are not judges.**

CONCLUSION

25. The new law is very short, but contains some important provisions. These include the organisation of training and further training of judges and the whole court structure. Time and practice will tell if the implementation of the relatively strict rules concerning the self-regulation of judges leaves enough room for real self-regulation and for an open debate among judges on

the problems of the judicial system and thereby leading to an improvement in the adjudication of concrete cases.

26. The Venice Commission would, however, recommend the following:

- Article 2: consider clarifying the position of retired judges;
- Article 4.1: the membership of the bodies of judicial self-regulation should be clarified (who is meant by “other people” and are they allowed to participate in self-regulation?);
- Article 4.4: ensure that the Law on civil service does not provide regulations on responsibilities that are too strict or that subordinate the representatives to the administration;
- Article 6.2: delete this provision, as it seems unnecessary for the Congress to be convened by the President of the Kyrgyz Republic, which is not in line with self-regulation;
- Article 7: with respect to establishing a blueprint for judicial reform, set out the legal consequences, e.g. are all judges obliged to defend the position of the Congress of Judges? Does the legislator have to take this decision into account? If so, how?
- Article 8.4: revise this provision to ensure that there is no strong dependency on the Judicial department of the Kyrgyz Republic that is incompatible with the idea of self-regulation;
- Article 8.8: as regards the prohibition of the re-election of members of the Council for a second consecutive term, staggering the terms of office should be introduced;
- Article 9: as regards disciplinary proceedings against judges, clarify whether such decisions concern concrete judges and whether they are binding;
- Include, in this Law, how the Council’s various representational and advisory functions are to be carried out. It should also be clarified in which cases binding decisions are adopted and what the legal consequences of those binding decisions are.

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

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