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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON THE CONSTITUTIONAL LAW ON COURT JURIES
OF KYRGYZSTAN**

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

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

2. The present opinion was drawn up on the basis of comments by Ms Nussberger (CDL(2008)105, who was invited by the Venice Commission to act as a rapporteur.

3. 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.

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

GENERAL REMARKS

5. The draft *Law on Court Juries in the Kyrgyz Republic* forms a part of a series of laws aimed at reforming the judicial system of Kyrgyzstan and has been introduced as a result of the constitutional changes made in this area.

6. This opinion is based on an English version of the draft Law. It is important to note that the Venice Commission has been given one draft out of various existing drafts currently debated in Kyrgyzstan. An analysis in Russian prepared for the OSCE refers to another draft.

LAW ON COURT JURIES

7. The explanatory memorandum of the draft *Law on Court Juries* sets out that the aims of this Law are "to bridge the gap between the judicial system, courts and society" and to put an end to corruption. Although the perception that a jury system can enhance fair trial and lead to higher acquittal rates may be explained through historical evidence, this view should be approached with caution. Jury systems in and of their own are no guarantee for the independence and fairness of the justice system. This will depend on the legal framework and the practical application of the rules.

Participation in the dispensing of justice – right or duty?

8. The draft Law's constitutional basis are Articles 15 and 82 of the Constitution. According to Article 15.6 "Everyone shall have the right to have their case examined by a court with the participation of jurors in cases stipulated by law." Article 82 stipulates that "1. Judicial authority of the Kyrgyz Republic shall be exercised solely by a court. In the cases and under the procedures provided for by law, citizens of the Kyrgyz Republic shall be entitled to participate in the administration of justice. 2. Judicial authority shall be exercised by means of constitutional, civil, criminal, administrative and other forms of legal proceedings. 3. The judicial system of the Kyrgyz Republic shall be established by the Constitution and laws and shall consist of the Constitutional Court, the Supreme Court and local courts. Specialised courts may be

established by constitutional law. The creation of extraordinary courts shall not be permitted. 4. The organisation and operating procedure of the courts shall be defined by law."

9. Article 82 therefore grants an entitlement to participate in the administration of justice. The wording is reminiscent of other participation rights, such as the right to participate in state government (e.g. Article 23 of the Constitution). This approach differs from other European constitutions, which only determine the right of the accused to be judged by a jury in cases of especially serious crimes (cf. Article 22 of the Russian Constitution), not a citizen's right to participate in the adjudication of cases. Accordingly, taking part in a jury trial is perceived not as a right, but as a duty.

10. The draft Law mirrors the constitutional provisions and explicitly states, in Article 1.1, that citizens are "*entitled, in circumstances provided for in law, to participate in the dispensing of justice.*" At the same time, Article 1.3 explains that the participation in the exercise of justice is a "*civil duty*". In this context, **the notion of participating in the dispensing of justice might be clarified.**

11. Article 7.3 provides that candidates for jury service are chosen by "*means of random selection*", therefore the entitlement mentioned in Article 1 has to be understood as a right to take part in the random selection process.

12. It is also not clear how the civil duty mentioned in Article 1.3 can be enforced in case the chosen candidate refuses to serve jury duty.

Number and status of jurors

13. Article 4 defines what a juror is and sets out the basic requirements, explaining that jurors take part in the adjudication of "*criminal cases regarding particularly serious crimes.*" They can be involved at the "*request of a party admissible under the procedure established by the Code of Criminal Procedure.*" Apparently, this includes the accused person, the prosecutor (*prokuror*) and the victim - to the extent that the latter can become a party.

14. The number of jurors is set at 12. This seems to have been controversial, as the presidential administration wanted to have only 7 or a maximum of 9 jurors. **However, it is better to have 12 jurors, as a larger number of jurors helps to base the decision on a broader consensus.**

15. The wording of Article 4.3 is rather vague. It provides that "*any influence on that process by persons with an interest in the outcome of the case*" shall be precluded. In order to become operational the Venice Commission **recommends that "*interest in the outcome of the case*" be clearly defined and that a procedure be set up for excluding those having a specific interest.** This may have been done by the Code of Criminal Procedure – but this document was not available for analysis.

Prerequisites for being a juror

16. According to its heading, Article 5 regulates the "*requirement imposed on jurors*", when in fact it explains who is excluded from being a juror. The age limit is set at 25 years and this might be seen as age discrimination. Nevertheless, similar age limits are not uncommon in European practice with respect to both judges and jurors.

17. In addition to excluding certain people from the lists of candidates for jury service, Article 5.3 provides that some people can be excluded from the examination of a given criminal case. According to Article 5.3.2 **people who do not speak the language in which the proceedings are going to take place can be excluded.** This provision can only be judged on the basis of

the provisions on the languages used in criminal proceedings. **There is a danger that such a provision might lead to the exclusion of minorities.**

Selection mechanism

18. Article 6 et seq. of the draft Law set out in detail the procedure for identifying and selecting candidates. It is mainly based on a co-operation between the President of the Supreme Court and the regional administration in order to identify candidates. The basic idea is to have a random selection among those registered as voters. **The draft Law should explain the process of “random selection” in order to exclude any misuse and corruption.**

19. It is noted that under Article 7.10 **all citizens have the right to submit written notification concerning unfounded inclusion and exclusion of candidates. It is difficult to imagine how this procedure is going to work in practice** and if it is possible for the administration to check the written notifications within 5 days only (Article 7.11).

20. The obligations of officials and leaders of organisations to submit information concerning the compiling of the list are set out in Article 8. It is not clear in which context such additional information is necessary insofar as the selection process is based on the lists of the registered voters only. It would be useful to know which organisations are meant in this provision.

21. Article 9 is of great importance as it regulates who can be excluded from the list of candidates by the administration. **This provision excludes a wide range of professionals such as judges, prosecutors (*prokuror*), military servicemen etc. This is to be highly welcomed.**

Material compensation and guarantees

22. Article 12 regulates **the material compensation for jurors.** This **seems to be acceptable** insofar as it does not place jurors at a financial disadvantage due to their work.

23. The regulations on independence and immunity of jurors are very short also in comparison with earlier versions of the draft. **The guarantees of the independence and immunity of judges on the basis of the *Law on the status of judges of the Kyrgyz Republic* is extended to jurors and members of their family. It is however strange that immunity also applies to the members of the family.**

24. Article 13.2 establishes that a person hampering a juror in the fulfilment of his or her function shall bear liability. This provision is extremely vague and the Venice Commission recommends that **what is meant by “hampering the fulfilment of duty” be clearly explained in the draft Law.**

CONCLUSION

25. Although the overall concept of including jurors in criminal trials on the most serious crimes seems to be a promising approach to enhance fair trial, a number of details in the draft Law remain vague. This applies in particular to the exclusion of people having an “interest” in the outcome of the proceedings, to the guarantees of independence and immunity and to the procedure of “random selection”.

26. The Venice Commission would therefore recommend the following:

- Article 1.1: the notion of “*participating in the dispensing of justice*” should be clarified;
- Article 1.3: a procedure is needed to clarify how the civil duty can be enforced in case a chosen candidate refuses to serve jury duty;

- Article 4.3: “*interest in the outcome of the case*” should be clearly defined and a procedure should be set up for excluding those people having a specific interest;
- Article 5.3.2: regarding the language of the proceedings, this provision might lead to the exclusion of minorities and should be reconsidered;
- Article 6 et seq.: the process of “*random selection*” in order to exclude any misuse and corruption should be explained in this draft Law;
- Article 13.2: the meaning of “*hampering a juror in the fulfilment of his or her function*” should be fully explained in this provision.

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

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