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(VENICE COMMISSION)

OPINION

ON THE DRAFT CODE ON JUDICIAL ETHICS
OF THE REPUBLIC OF TAJIKISTAN

Adopted by the Venice Commission
at its 97th Plenary Session
(Venice, 6-7 December 2013)

on the basis of comments by

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I. Introduction

1. The Venice Commission received a request for an opinion by letter of 17 September 2013 from Mr Zafar Nusratovich Azizov, Chair of the Judicial Council of the Republic Tajikistan, on the draft Code on Judicial Ethics of the Republic of Tajikistan (CDL-REF(2013)048).
2. The Venice Commission has invited Mr Richard Clayton, Mr Johan Hirschfeldt and Mr Konstantine Vardzelashvili to act as rapporteurs for this opinion.
3. A delegation of the Venice Commission went to Dushanbe, Tajikistan from 18-20 November 2013 to meet with the representatives of the Judicial Council, the Committee on legislation and protection of human rights of the *Majlisi Namoyandagon* of the *Majlisi Oli* (lower chamber of Parliament), the High Commercial Court, the General Prosecutor's Office, the Ministry of Justice, the Constitutional Court, the Supreme Court and the Working Group on the Code of Judicial Ethics. The delegation consisted of the rapporteurs, Mr Johan Hirschfeldt and Mr Konstantine Vardzelashvili who were accompanied by Ms Tanja Gerwien and Ms Svetlana Anisimova from the Secretariat of the Venice Commission.
4. This opinion is based on the comments written by Mr Richard Clayton, Mr Johan Hirschfeldt and Mr Konstantine Vardzelashvili and takes into account the information obtained during the above-mentioned visit.
5. The present opinion was adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013).

II. General remarks

6. The principle of the rule of law makes the role of the judiciary essential: the judiciary guarantees justice in a state governed by law. The judiciary must be independent so that it is free from external pressure or controlled by the other branches of government. It must be impartial so that it is not - even in appearance - prejudiced as to the outcome of the case.¹
7. The right to an independent and impartial judiciary is guaranteed by Article 10 of the Universal Declaration of Human Rights, by Article 14.1 of the International Covenant on Civil and Political Rights and by Article 6.1 of the European Convention on Human Rights. These rights have been secured by the Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly, and by the Bangalore Principles of Judicial Conduct of 2002 (as supplemented by the Commentary on the Bangalore Principles drawn up by the Judicial Integrity Group in March 2007) and by the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA² Region in 1997. The European Court of Human Rights has itself adopted a Resolution on judicial ethics.³
8. The Venice Commission has, however, set out the relevant standards to be applied in more detail in its Report on the Independence of the Judicial System Part I: the Independence of the Judges:⁴
 - Principles which ensure independence of the judiciary should be set out in the Constitution (or an equivalent text).⁵
 - All decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law.⁶

¹ Venice Commission Report on the Rule of Law (CDL-AD(2011)003rev), paragraph 54.

² Law Association for Asia and the Pacific (LAWASIA).

³ Adopted on 23 June 2008.

⁴ CDL-AD(2010)004.

⁵ Ibid, paragraph 22.

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- An independent judicial council should have a decisive influence on decisions affecting the appointment or career of judges.⁷
- Ordinary judges should be appointed permanently until retirement.⁸
- The principle of irremovability should be supported in the constitution.⁹
- The level of remuneration should be guaranteed by law in line with the dignity of a judicial office and the scope of a judge's duties.¹⁰
- Judges should be protected from external influence and, as a result, should enjoy a functional immunity.¹¹
- Judges should not put themselves into a position where their independence may be questioned, a principle which makes judicial office incompatible with other functions and operates to restrict political activities.¹²
- Judicial decisions should not be subject to revision outside the appeal process.¹³
- The principle of internal judicial independence is incompatible with a relationship of subordination of judges in their judicial decision-making activity.¹⁴

9. Judges represent the justice system of a country and the powers that are conferred on them are closely linked to the values of justice, truth and freedom.¹⁵ The ability of the judiciary to apply justice adequately and fairly, protect rights and freedoms of individuals therefore rests with them.¹⁶

10. Public trust in the justice system is essential, without this, courts will have great difficulties having their decisions respected, let alone implemented. It is therefore crucial for judges to be seen as effective, independent, fair and impartial and as respecting the highest standards of ethics of their profession. The European Court of Human Rights in this respect has stated that "Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties."¹⁷

11. In this respect, a code of professional conduct or a code of ethics for judges, although not compulsory, serves an important purpose. Such a code will help judges in resolving questions of professional ethics, which in turn will give them the necessary autonomy in their decision-making power and will help them in guaranteeing their independence from other authorities. Such a code also informs the public about the standards of conduct it is entitled to expect from judges. Finally, such a code will also contribute in giving the public assurance that the administration of justice is independent and impartial.

12. Although there are countries in Europe and beyond that have achieved high standards of judicial conduct without adopting a code of conduct or ethics for judges, the Council of Europe recommends that a code be adopted: "...judges should be guided in their activities by ethical principles of professional conduct...These principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and the judiciary."¹⁸

⁶ Ibid, paragraph 23.

⁷ Ibid, paragraph 31.

⁸ Ibid, paragraph 38.

⁹ Ibid, paragraph 43.

¹⁰ Ibid, paragraphs 44 and 46.

¹¹ Ibid, paragraph 60.

¹² Ibid, paragraph 62.

¹³ Ibid, paragraphs 65-67.

¹⁴ Ibid, paragraph 72.

¹⁵ Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), paragraph 8.

¹⁶ The 8th recital of the Bangalore Principles states that the primary responsibility for promoting and maintaining high judicial standards lies with the judiciary.

¹⁷ Case of Prager and Oberschlick v. Austria, Application no. 15974/90, 26 April 1995, paragraph 34.

¹⁸ Recommendation CM/Rec(2010)12, paragraphs 72-73.

13. In addition, "new democracies" of Central and Eastern Europe and of Central Asia tend to acknowledge the need for establishing codes of professional conduct as part of an overall judicial reform. It is therefore to be welcomed that the judiciary of Tajikistan decided to draft guidelines for the ethical conduct of judges.

14. It is important that the drafting of such a code be the task of the judges themselves, since judges should play a leading role in the drafting of such a code.¹⁹ The Commentary to the Bangalore Principles recommends that any code of conduct should be formulated by the judiciary itself, since that is consistent with the principle of judicial independence and with the separation of powers.²⁰ The publication of a Code of Judicial Ethics, therefore, provides an important means of safeguarding judicial independence and impartiality.

15. Such a code, or in other words a statement of standards of professional conduct²¹, should also not be seen as a piece of legislation or other provisions of a legal nature, and it should be the judges and their organisation(s) that take the responsibility for the implementation of such a code.²²

16. In the implementation of a code of ethics, the possibility for judges to seek advice from a body within their organisation(s) should be included. The possibility of giving advice should be kept separate from disciplinary cases, which usually fall within the competence of the Judicial Council. A code of ethics should not be directly applied as a ground for criticism or disciplinary sanctions. Guidelines provide the principles which enable judges to assess how to address specific issues which arise in conducting their day-to-day work, whereas disciplinary procedures are designed to police misconduct and inappropriate conduct which calls out for some form of disciplinary sanction.²³

17. The Commentary on the Bangalore Principles therefore makes an important distinction between promoting standards and disciplining judges, where appropriate. The 9th recital to the Bangalore Principles is directed to securing and promoting the independence of the judiciary; and it is in this context that the Commentary makes a number of recommendations: that a charge or complaint made against a judge in his/her judicial capacity is processed expeditiously and fairly under an appropriate procedure, that the judge has the right to a fair hearing and that the examination should, initially, be kept confidential unless the judge requests otherwise.²⁴ Judges should be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.²⁵ All disciplinary, suspension or removal proceedings should be determined in accordance with established standards of judicial conduct.²⁶ Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review; but this principle may not apply to decisions of the highest court in impeachment proceedings.²⁷

18. The same approach is taken by the Council of Europe in Opinion no. 3 of the Consultative Council of European Judges (CCJE).²⁸ The CCJE is of the opinion that judges should be guided in their activities by principles of professional conduct,²⁹ but that liability to disciplinary proceedings raised different issues,³⁰ such as the conduct which should render a

¹⁹ Ibid, paragraph 73; Opinion no. 3 of the CCJE, paragraph 48 (ii).

²⁰ Commentary on the Bangalore Principles of Judicial Conduct, September 2007, paragraph 16.

²¹ Opinion no. 3 of the CCJE, paragraph 46.

²² Ibid, paragraph 47 in fine.

²³ Ibid, paragraph 60.

²⁴ Commentary on the Bangalore Principles of Judicial Conduct, September 2007, paragraph 17.

²⁵ Ibid, paragraph 18.

²⁶ Ibid, paragraph 19.

²⁷ Ibid, paragraph 20.

²⁸ Opinion no. 3 of the CCJE.

²⁹ Ibid, paragraphs 49-50.

³⁰ Ibid, paragraphs 48(i) and 49(iii).

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judge liable to disciplinary proceedings, by whom and how proceedings should be instituted, by whom and how they should be determined and what sanctions should be available.³¹

19. This opinion has taken into account international and European standards in this field³².

III. Draft Code on Judicial Ethics of the Republic of Tajikistan

A. General comments on the draft Code

20. This Opinion is solely based on the version of the draft Code on Judicial Ethics of the Republic of Tajikistan (hereinafter, the draft Code) that was sent to the Secretariat of the Venice Commission on 17 September 2013 as it appears, translated into English, in document CDL-AD(2013)048.

21. The draft Code consists of twenty-four articles divided into five chapters. It is a positive step for the judiciary of Tajikistan. It is inspired by a number of international instruments on the topic and reflects most of the principles that appear in such instruments.

22. However, although a code of ethics for judges may positively contribute to the development of a well-functioning judiciary, this will also greatly depend on how the independence of the judiciary, other conditions and tasks of the judiciary and the individual judge are guaranteed and regulated by the Constitution and other laws. It is important to note that a code of ethics cannot be seen as replacing the constitutional and legal provisions on the judiciary based on the principle of the rule of law – which need to be set out distinctly.

23. It is noteworthy that the focus of the draft Code is almost exclusively on the obligations of the judiciary. It is also for this reason that it is important that the draft Code be considered within the context of the Constitution and other laws applicable in this area. This draft Code should help judges in resolving questions of professional ethics, which in turn will give them the necessary autonomy in their decision-making power and will help them in guaranteeing their independence from other authorities.

24. In this respect, it should again be noted that the draft Code does not seek to address the obligations of the State in relation to a number of areas, including: the appointment system or guarantees that appointments will be made objectively and on merit; any role for an independent judicial commission in the appointment process; the budget for the judiciary and how it is to be controlled; guarantees that judges will be free from external influences, have limited judicial immunities and are not subject to judicial revision outside the appeal process and the independence within the judicial process.

³¹ Ibid, paragraphs 59-77.

³² In particular: the Bangalore Principles of Judicial Conduct of 2002 and the Commentary on these principles (September 2007); the Beijing Statement of principles of the independence of the judiciary in the LAWASIA Region (1997); Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; European Court of Human Rights, Resolution on Judicial Ethics, adopted on 23 June 2008; Report on the independence of the judicial system Part I: the independence of judges (CDL-AD(2010)004); Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities; Opinion no. 3 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002); the European Charter on the statute for judges (1998).

25. As mentioned above, the Venice Commission has set out relevant standards to protect the independence of judges, including that ordinary judges be appointed permanently until they retire. It should be noted that the Constitution of Tajikistan currently limits the tenure of judges to ten years. However, the delegation of the Venice Commission that went to Dushanbe was informed that there are plans to reform the judiciary, which include amending the Constitution in order to extend the tenure of judges. This should be seen as an important step in the right direction, because limitations on tenure have significant implications for judicial independence.

26. However, as long as this constitutional issue is not solved in accordance with international standards it must be noted that the Code, which among other purposes, aims to protect the independence of the judiciary and the individual judge cannot, in itself, fully give a proper support to this essential principle.

B. Preamble

27. The Preamble of the draft Code should make reference to a number of international instruments such as the United Nations Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Beijing Statement of Principles of the Independence of the Judiciary.

28. The Preamble sets out that the judges adopt the Code. The delegation of the Venice Commission that visited Dushanbe was indeed informed that the draft Code would be submitted to the Conference of Judges of Tajikistan for adoption in December 2013. However, concerns have also been voiced that judges took no active part in the preparation of this draft Code. In this respect, it should be underlined that "Judges should play a leading role in the development of such codes"³³, as this may be an effective way to ensure that ethical standards of judicial conduct are established and upheld in practice.

C. Article 1 – Subject matter

29. Article 1 sets out that the rules of conduct established in this draft Code are "binding on all judges in the performance of their professional activities relating to the dispensation of justice...". But it is unclear how this draft Code will be applied. It provides no monitoring mechanisms and contains no reference on how it (or ought to be) related to the legal system on sanctions (criminal, civil and disciplinary).

30. Codes of conduct are generally aimed at establishing high professional standards and should not, as such, result in sanctions (among others dismissal or exclusion of an individual from a particular profession). According to the CCJE, "...principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence".³⁴ They should provide general rules, recommendations or standards of good behaviour that guide the activities of judges, that help to resolve questions of professional ethics, provide judges with autonomy in their decision-making rather than be seen as binding legal provisions.³⁵ The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for disciplinary procedure has grave potential implications for judicial independence.

³³ Recommendation CM/Rec(2010)12, paragraph 73.

³⁴ Opinion no. 3 of the CCJE, paragraph 48 (i).

³⁵ Ibid, paragraph 44.

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31. However, serious violations of ethical norms could also imply fault and acts of negligence that should, in accordance with the law, lead to disciplinary sanctions. Judges may be held accountable accordingly for their unethical conduct by appropriate institutions, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.³⁶ There will always be a certain interplay between the principles of ethical conduct and those of disciplinary regulations. In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice.

32. The question on whether and to what extent a violation of the code of ethics should be relevant for disciplinary measures, which are provided within the law, is a sensitive matter. The answer will depend on the context and content of the provisions of the laws and of the code of ethics in question and ultimately on the general legal and political environment of the state and its judiciary. However, this issue also raises important questions about the nature of the disciplinary procedure; and it is important to draw attention to the fact that the draft Code does not specify the nature of the disciplinary procedure envisaged or its relationship with the Code. That omission is significant because utilising the Code as a disciplinary process may, in itself, have adverse implications for judicial independence.

33. Among other requirements, the draft Code stipulates that judges may not be members of political parties; they should not discriminate against parties on the basis of gender, religion, ethnicity etc. It seems to be intended that violations of these norms may and should result in disciplinary sanctions. However, it would be problematic to discipline judges for merely criticising judicial decisions (violation of Article 13.3) or “assessments with regard to the activities of state authorities and local authorities, and of the heads of those authorities” (Article 18.2).

34. The codified principles on ethical judicial conduct should not only “include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves”.³⁷

35. The draft Code, however, is largely focused on duties; is sometimes vague; focuses too much on procedural aspects; and offers little guidance to judges in complicated, controversial situations.

36. It should also be clarified if and to what extent established norms of ethical conduct are distinct from or overlap with disciplinary rules. Breaches of the norms should, in the end, usually result in moral rather than in disciplinary liability.

37. In this respect, the Basic Principles on the Independence of the Judiciary establish that:

“18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review....”³⁸

³⁶ The Bangalore Principles of Judicial Conduct, 2002.

³⁷ Recommendation CM/Rec(2010)12, paragraph 72.

³⁸ Basic Principles on the Independence of the Judiciary (1985).

D. Article 2 - Scope

38. Although Article 1 sets out that the Code of Judicial Ethics "...shall establish rules of conduct, which shall be binding on all judges in the performance of their professional activities relating to the dispensation of justice and in their extrajudicial activities..." thus linking the need to apply standards of judicial conduct to the very fact of conferring judicial powers on a particular individual - Article 2.1 stipulates that provisions of this draft Code shall also apply to retired judges.

39. The delegation of the Venice Commission that visited Dushanbe was informed that the term "retired" only refers to judges who chose to retire following at least 25 years of impeccable service. Such a "retired" judge is entitled to receive social benefits and special treatment which is different from that of ordinary retirement. Thus, the restrictions imposed by this draft Code to acting judges refer only to the category of judges who "retired with honour". If a retired judge violates the requirements of this draft Code, s/he will risk losing these benefits.

40. Although the State may attach certain conditions to the social benefits it extends to retired individuals (for example, social benefits may be suspended temporarily if retired an individual engages in a fulltime job), however, most restrictions foreseen by this draft Code seem excessive.

41. There are a number of restrictions imposed by this draft Code (including relations with the media, political activities, legal practice, limits related to acceptable remuneration, etc.), which should logically not be applicable to individuals after they retire from judgeship.

42. Article 2.5 provides a possibility to "lodge an appropriate request for clarification, which may not be refused, with the ethics committee of the judges' association of the Republic of Tajikistan" in case a judge has difficulties in determining whether conduct in a particular situation may conflict with the requirements of professional ethics. This is a positive aspect, as the standards applying to judges' behaviour cannot always be laid down too precisely.³⁹

43. In this respect, the CCJE "encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules."⁴⁰

44. However, it should be clarified how the ethics committee of the judges' association of the Republic of Tajikistan is selected. During the visit in Dushanbe, the delegation of the Venice Commission was informed that the members of this association would be selected by the Conference of Judges of Tajikistan that gathers all the judges in the country. The delegation was also informed that the "ethics committee" are in fact "committees" the members of which are chosen by judges.

45. The delegation of the Venice Commission that visited Dushanbe was told that the body that deals with disciplinary actions against and responsibility of judges was the Qualifications Collegium⁴¹, which may open a case on the recommendation of an ethics committee. It was also mentioned that citizens could send complaints against judges to an ethics committee, which could refer the matter to the Qualifications Collegium. A decision by this Qualifications Collegium can be appealed to a court of law.

³⁹ Recommendation CM/Rec (2010)12, paragraph 74.

⁴⁰ Opinion no. 3 of the CCJE, paragraph 29.

⁴¹ The Law on Courts of the Republic of Tajikistan provides for the establishment of such a Qualifications Collegium.

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46. It is important to clarify how this procedure will be separated from disciplinary procedures (and removal procedures). A strict separation of duties and responsibilities should be made here. An advisory body would ideally just have the possibility and duty to give confidential advice to judges. The judge should not have to face the risk that his/her request to such a board be transferred to another procedure that could result in a disciplinary sanction. If this were to happen, judges would be very reluctant to seek advice on ethical dilemmas. This would result in an important aspect of the code of ethics being lost. It is important that the legitimacy of advisory ethic committees among judges be upheld.

E. Article 4 – Requirements concerning compliance with the legislation and the Code of Judicial Ethics and Article 5 – Requirements concerning the priority to be given to professional activities

47. Articles 4 and 5 refer to judges' duties set down in the Constitution and by the laws. Even without such a reference, it is clear that the law must be followed and applied by the judges. As mentioned above, legislation on legal principles for courts and judges is more important than a code of ethics and must, necessarily, regulate disciplinary sanctions explicitly. In this respect, Article 4.3 accurately sets the tone for a code of ethics by stating that "Compliance with the Code of Judicial Ethics shall be adopted by the judge as an inner conviction and a rule of life...".

48. Article 5.4, which prohibits activities that hamper judicial functions, should be extended to activities that "give the **appearance** of interfering or impeding judicial functions."

F. Article 8 – Principle of independence

49. This Article proclaims the principle of independence "as a constitutional principle guaranteeing the rule of law in the administration of justice...", and also establishes that judges have "a duty to support the independence of the judiciary and to abide by the principle of independence".

50. Institutional and personal independence is crucial for the judiciary. This principle is enshrined in most (if not all) national and international instruments that establish norms of judicial conduct. However, mere recognition of this principle is not sufficient. The independence of judges should be widely respected in practice, and the legal and political environment should provide the necessary guarantees for the institutional and personal independence of judges. This includes conformity of the procedures of selection, appointments, promotion and dismissal of judges (or disciplinary sanctions against them) with international norms, prohibition of the interference with the work of a judge and providing for an effective investigation in case of such interference. It also implies that there is the necessary degree of autonomy on issues of administrative and financial management of courts.

51. Article 8.3 sets out what judges should do when there are any attempts to influence them or put undue pressure on them. It might be useful to recommend that the president of the court in question act in support of the individual judge concerned when notifying the judicial community and the law enforcement agencies of this situation.

52. Article 8.4 needs to be clarified. It seems to request judges to inform the "persons participating in a case" that the nature or content of their "extra-procedural application" may result in a conflict of interest. Apart from merely "informing" parties, a judge should request the termination of the communication, which may lead to the conflict of interest. Judges are under the obligation not to allow communication from the parties to a case (or other individuals), in which they may engage intentionally or by mistake, if such communication

may lead or may be seen as leading to the conflict of interest and thus result in the disqualification of the judge from the case.

G. Article 9 – Principle of objectivity and impartiality

53. Article 9.2, which refers to judges in the “discharge of their professional duties”, should be extended to cover activities which give the **appearance** of impartiality.

54. Article 9.3 regarding conflict of interest, should be extended to cover activities which might give the **appearance** of a conflict of interest.

55. Article 9.4 (first sentence) and its sub-paragraph “d” contain a certain contradiction. Paragraph 4 is comprised of four sub-paragraphs that list instances where a judge **shall refuse** to examine a case. However, sub-paragraph “d” stipulates that if judges or their families are subject to pressure, threats or outside influence, a judge **may refuse** to examine a case. This provision should also extend to activities which give the **appearance** of a conflict of interest or which cast doubt on impartiality. The failure to address the appearance of bias is particularly troubling when appearance only is expressly considered in Article 9.5, which covers family relationships.

56. It should indeed be up to the judge to define if s/he is capable of continuing to consider a case despite intimidation or attempts of unlawful outside influence. However, a judge should not be obliged to automatically recuse himself/herself if s/he is threatened or pressured. Under such circumstances, authorities should act swiftly and provide effective protection to the judge in order to allow him/her to continue to deal with the case.

57. The reasons and grounds for recusal should be defined by law. It seems unusual to list some of the instances of recusal in a code of ethics. This may also create the impression that this draft Code should contain an exhaustive list of reasons for recusal. As the CCJE has observed, codes of professional conduct “can give the impression that they contain all the rules and that anything not prohibited must be admissible.”⁴²

58. It might be useful to describe the circumstances rather than just to provide a non-exhaustive list of instances that lead to a conflict of interest. The Bangalore Principles state that “a judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer” and “Justice must not merely be done but must also be seen to be done”.⁴³

H. Article 10 – Principle of equality

59. Article 10.3 empowers judges to request from the parties to the proceedings to refrain from showing bias or prejudice *vis-à-vis* any individual, except in instances that are connected to the establishment of legal facts. This provision does not seem to be in its right place and should not be a part of a code of ethics. In addition, it seems excessive to demand from the parties to the proceedings not to show any bias or prejudice regarding individuals (such as witnesses or experts) participating in the case, as it may be part of a defence strategy.

I. Article 11 – Competence and conscientiousness of judges

60. Article 11.5 requires judges to follow the case law of the Constitutional Court and the Supreme Court. It is extremely encouraging and commendable to see that the draft Code also requires judges to be conversant with legal practise of European or international judicial

⁴² Opinion no. 3 of the CCJE, paragraph 46.

⁴³ The Bangalore Principles of Judicial Conduct, 2002.

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bodies. Learning and monitoring developments in international (human rights) law will undoubtedly contribute to enhancing the professionalism of judges.

61. There is a requirement of judges, in Article 11.6, not to disclose **any** information in the performance of their duties which seems excessive. It would be appropriate to refer to confidential information. In this respect, standards established by the Resolution on Judicial Ethics of the European Court of Human Rights would be sufficient: “Judges shall exercise the utmost discretion in relation to secret or confidential information relating to proceedings before the Court. They shall respect the secrecy of deliberations.”⁴⁴

J. Article 12 – Rules of conduct in the exercise of organisational and administrative powers

62. In order to improve the protection of the independence and integrity of the individual judge, Article 12.3 might be slightly amended to read: “...court presidents (or deputy court presidents) shall not **perform or** allow any actions (or omissions) which compromise the independence of judges...”.

K. Article 13 – Relations with the media

63. In the second sentence of Article 13.1, the word “co-operate” should be replaced by wording which expresses that judges should act with transparency and care, respecting the important role played by media in society – however, with the understanding that although media perform a vital role in society, they must also respect the role and the principles of the judiciary.⁴⁵

64. Article 13.3 stipulates that judges “**may** exercise restraint and be correct when commenting on the decisions of their colleagues”. It would be preferable to replace the word **may** with **should**.

65. Article 13.3 seems to imply that judges may express disagreement with the conduct of colleagues for the purpose of remedying shortcomings in judicial proceedings and eliminating violations only within the judicial community of judges. As indicated above, judges should indeed exercise caution while discussing or criticizing the work of their colleagues. Indeed “they shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality.”⁴⁶

66. However, judges should not be limited in their freedom to discuss shortcomings of the judiciary outside the circle of their colleagues (for instance, at events such as seminars, conferences, in academic or educational circles). Judges must not fear sanctions for expressing their views publicly on issues that are problematic for the judiciary.

L. Article 16 – Restrictions related to the practice of law

67. According to Article 16.1, judges may not practise law or provide legal services during the period in which they hold the office of judge - while Article 16.2 extends these limitations to retired judges, “unless otherwise provided by law”. The text of these provisions implies that retired judges are permanently limited in the possibility of engaging in law practice, which is clearly an unnecessary and excessive limitation. Although there may be some restrictions, such as temporarily limiting the possibility of a former judge to act as a lawyer before the court of which that judge was a member, they should be narrowly targeted and proportional. The draft Code as well as relevant legislation should indicate that retired judges who engage

⁴⁴ Resolution on Judicial Ethics, European Court of Human Rights, adopted by the Plenary Court on 23 June 2008.

⁴⁵ Opinion no. 3 of the CCJE, paragraph 40.

⁴⁶ Resolution on Judicial Ethics, European Court of Human Rights, paragraph V on discretion.

in remunerated work may or will risk losing their social benefits or have them suspended, **as determined by law.**

M. Article 18 – Interaction with state authorities and local authorities

68. Article 18.1 should extend to activities that give the **appearance** of interfering or impeding judicial functions.

69. Article 18.2 demands that “judges shall refrain from making public statements, judgments and assessments with regard to the activities of state authorities and local authorities, and of the heads of those authorities.” However, judges should not be barred from commenting on actions of authorities, which could be related to the work of the judiciary, for instance in cases where authorities fail to respect their obligations regarding the judiciary. It is also not clear why the “heads of those authorities” should be specifically protected from such assessments.

N. Article 20 – Remuneration received in connection with the performance of extrajudicial activities

70. Article 20 demands that the amount of a judge’s remuneration from extrajudicial activities be “commensurate with the amount of remuneration received by other persons for similar activity, and does not exceed reasonable limits, and in particular does not exceed the amounts of daily remuneration received by the judge for carrying out their professional activity”. The average salary of a judge in Tajikistan should be taken into consideration. In addition, circumstances such as when a judge is engaged in academic, educational activity (in more than one institution) or if s/he receives an honorarium for a publication should also be taken into consideration.

O. Article 22 – Freedom of expression

71. This Article is a general provision on the freedom of expression and although it is well-drafted it is important that certain main safeguards for the independence of judges that have been commented on in this opinion in the paragraphs above, be repeated here. This relates notably to Articles 1 (subject matter), 2 (scope), 11 (Competence and conscientiousness of judges), 13 (Relations with the media) and 18 (Interaction with state authorities and local authorities) - which deal with different aspects of a judge’s conduct.

72. For instance, should a judge violate an ethical norm, s/he should be held accountable before appropriate institutions that are independent, impartial and are intended to supplement existing rules of law and conduct in a way that favours the freedom of expression. It is also important that it is clear which established norms of ethical conduct are distinct from or overlap with disciplinary rules (see comments for Articles 1 and 2 above).

IV. Conclusions

73. This Opinion is solely based on the version of the draft Code that was sent to the Secretariat of the Venice Commission on 17 September 2013 as it appears, translated into English, in document CDL-REF(2013)048. This means that any modifications made to the draft Code after that date could not be taken into consideration in this opinion.

74. It is to be welcomed that the judiciary of Tajikistan decided to draft a code of ethics for judges. It is an important and positive step for the independence of the judiciary of this country.

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75. Nevertheless, it is also important to note that a code of ethics cannot be seen as replacing the constitutional and legal provisions on the judiciary based on the principle of the rule of law. It is therefore important that the draft Code be considered within the context of the Constitution and other laws applicable in this area. In particular, it is important that procedural principles on the relationship between ethical standards and disciplinary provisions be established by the law.

76. Although the draft Code is a positive step, the Venice Commission would like to make the following recommendations, notably:

- a) the Preamble should refer to a number of international instruments, such as the United Nations Basic Principles on the Independence of the Judiciary and to the Bangalore Principles of Judicial Conduct and the Beijing Statement of Principles of the Independence of the Judiciary;
- b) the Venice Commission believes that there are serious potential risks for judicial independence if the code of ethics becomes part of a disciplinary procedure and would strongly recommend against such a step;
- c) it should be clarified whether and if so, to what extent, established norms of ethical conduct are distinct from or overlap with disciplinary rules;
- d) a number of restrictions imposed by this draft Code should not be applicable to individuals after they retire from judgeship. Regarding retired judges: although there may be some restrictions, these should be narrowly targeted and proportional;
- e) Article 2.5 provides a possibility to refer a question to the ethics committee of the judges' association - it should be clarified how this ethics committee is selected and how this referral procedure will be separated from disciplinary procedures (and removal procedures);
- f) Article 5.4, which prohibits activities that hamper judicial functions, should be extended to activities that "give the appearance of interfering or impeding judicial functions";
- g) Article 8.3 which deals with circumstances where judges are faced with attempts to influence them or put undue pressure on them – this provision might include that the president of the court in question act in support of the individual judge concerned when notifying the judicial community and the law enforcement agencies about the circumstances;
- h) Article 8.4 seems to request judges to inform the "persons participating in a case" that the nature or content of their "extra-procedural application" may result in a conflict of interest. Apart from merely "informing" parties, a judge should request the termination of the communication, which may lead to the conflict of interest;
- i) Article 9.2, which refers to judges in the "discharge of their professional duties" should be extended to cover activities which give the appearance of impartiality;
- j) Article 9.3 regarding conflict of interest, should be extended to cover activities which might give the appearance of a conflict of interest;
- k) Article 9.4 (first sentence) and its sub-paragraph "d" contain a contradiction. Paragraph 4 is comprised of four sub-paragraphs that list instances where a judge **shall refuse** to examine a case. However, sub-paragraph "d" stipulates that if judges or their families are subject to pressure, threats or outside influence, a judge **may refuse** to examine a case.
- l) Article 9.4 should also extend to activities which give the appearance of a conflict of interest or which cast doubt on impartiality;
- m) it seems unusual to list some of the instances of recusal in a code of ethics – the reasons and grounds for recusal should be defined by law;
- n) Article 10.3 empowers judges to request the parties to proceedings to refrain from showing bias or prejudice *vis-à-vis* any individual, except in instances connected to establishing legal facts. This provision should be taken out of the code of ethics;
- o) Article 11.6 requires judges not to disclose **any** information in the performance of their duties - which seems excessive. It would be appropriate to only refer to confidential information;

- p) Article 12.3 might be slightly amended to read: "...court presidents (or deputy court presidents) shall not **perform or** allow any actions (or omissions) which compromise the independence of judges...". This would improve the protection of the independence and integrity of the individual judge;
- q) the word "co-operate" in Article 13.1 (second sentence) should be replaced by appropriate wording that refers to the fact that judges should act with transparency and care, respect the important role played by media in society – however, with the understanding that although media perform a vital role in society, they must also respect the role of and the principles of the judiciary;
- r) Article 13.3 provides that judges "**may** exercise restraint and be correct when commenting on the decisions of their colleagues". It would be preferable to replace the word **may** with **should**;
- s) Article 18.1 should extend to activities that give the appearance of interfering or impeding judicial functions.

77. The Venice Commission remains at the disposal of the Tajik authorities for any further assistance they may need.