Strasbourg, Warsaw, 8 June 2011

CDL(2011)049 *
Engl.only

Opinion No. 629/2001
ODIHR Opinion Nr.: JUD–KAZ/186/2011

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

AND

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT JOINT OPINION

ON THE CONSTITUTIONAL LAW ON THE JUDICIAL SYSTEM AND STATUS OF JUDGES OF KAZAKHSTAN

on the basis of comments by

Mr Karoly BARD (Expert for OSCE/ODIHR, Hungary)
Mr James HAMILTON (Substitute Member, Ireland)
Mr Kote VARZELASHVILI (Member, Georgia)

**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.*

TABLE OF CONTENTS

1. INTRODUCTION

1. By letter dated 25 April 2011, the Chairman of the Supreme Court of the Republic of Kazakhstan requested the OSCE/ODIHR to co-ordinate a review together with the Venice Commission on the Constitutional Law of the Republic of Kazakhstan on the Judicial System and Status of Judges of the Republic of Kazakhstan (hereinafter referred to as the "Law on the Judicial System and Status of Judges" or the "Constitutional Law").

2. The review of the Law on the Judicial System and Status of Judges was requested against the background of efforts undertaken to enhance the independence and effectiveness of the judiciary and strengthen the rule of law in Kazakhstan. A new draft of the Law on the Judicial System and Status of Judges is planned to be elaborated later in 2011 and in order to enhance the quality of the draft law, the request was put forward to receive expert opinions and assistance on amendments and additions to the existing Constitutional Law.

3. In response to the above-mentioned request, the OSCE/ODIHR and the Venice Commission have prepared this joint Opinion.

4. The OSCE previously provided an assessment of the Constitutional Law (hereinafter "OSCE's 2001 Assessment") upon the request of the OSCE Centre in Almaty in 2001, based on earlier consultations with the Supreme Court of Kazakhstan. The assessment, also conducted by Professor Karoly Bard, was presented in the same year to the Chair of the Supreme Court.

5. The present opinion was adopted by the Venice Commission at its … plenary session (Venice…).

2. SCOPE OF REVIEW

6. This Opinion covers only the Law on the Judicial System and Status of Judges, as requested. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing the judicial system and related aspects in the Republic of Kazakhstan.

7. The Opinion is based on an unofficial translation of the Law on the Judicial System and Status of Judges (CDL-REF(2011)027). Errors from translation may result.

8. This Opinion is without prejudice to any written or oral recommendations and comments to this or other related provisions that the OSCE/ODIHR or the Venice Commission may make in the future.

3. EXECUTIVE SUMMARY

9. The OSCE Office for Democratic Institutions and Human Rights and the Venice Commission welcome the initiative of the Supreme Court to seek an international assessment of the current Constitutional Law on the Judicial System and Status of Judges in view of indentifying areas for possible reform. The Constitutional Law has a number of positive aspects, which contribute to judicial independence. Nonetheless, in order to ensure the compliance of the Constitutional Law with international and domestic standards pertaining to the independence of the judiciary, it is recommended as follows:

3.1. Key Recommendations

A. That the High Judicial Council should be composed of a substantial amount of judges, who are to be appointed, or at least proposed, by their peers [par 20];

B. To limit the discretion of the executive authorities to appoint judge candidates nominated by the High Judicial Council to the nominated candidates and ensure that a decision to refuse appointment is reasoned [par 35];

C. To amend the principle of irremovability in Article 24 so that it also entails protection against transfer, except when disciplinary sanctions are applicable or there is a change in the organisation of the judicial system [par 45];

D. To specify that the decision of an authority of the executive to discharge a judge should only be taken pursuant to a decision or recommendation by a disciplinary body after due procedure [par 48];

E. To reform the system of suspension, termination of powers and discharge of a judge, under careful consideration of the principles of independence and irremovability [par 50];

F. To clarify and distinguish between the disciplinary and evaluating functions respectively in relevant provisions of the Constitutional Law [par 58];

G. To revise Article 38 so as to ensure that the disciplinary boards mentioned therein are independent and free from any influence of executive authorities [par 65];

3.2. Additional Recommendations

H. To stipulate the exclusive competence of the courts to determine their jurisdiction in the Constitutional Law [par 15];

I. In the case that it is not regulated by other provisions of law; to clarify in the Constitutional Law the type of liability that contempt of court entails [par 16];

J. To consider establishing in the Constitutional Law a specific section on administrative courts, which preferably should reflect the regular court system with three instances [par 17];

K. To clarify Article 22 par 1 (3-1) so that it does not in any way infringe the individual independence of judges [par 18];

L. To clarify the nature, status and functions of the Authorized Body [par 22];

M. To reconsider transferring powers of judicial administration from the Chairperson of the Supreme Court and the Authorized Body to the High Judicial Council, which shall then have the main competence to represent the judiciary in relation to the executive branch and other authorities [par 23];

N. That the High Judicial Council is provided with a role in the budgeting process [par 25];

O. To amend the Constitutional Law so as to clarify that case distribution should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated. [par 27];

P. To clarify Articles 9 par 1 (1) and 14 par 1 (1) to ensure that they do not in any way empower the Chairperson to direct or supervise individual judges while adjudicating a case [par 28];

Q. To consider restricting the voting rights of Chairpersons in the High Judicial Council so as to avoid excessive domination [par 29];

R. To specify in which situations the Chairperson of a court may receive individuals and to clarify that these visits may not in any way affect the substantial adjudication of individual court cases [par 30];

S. To clarify whether individual judges have a right to receive visits from parties to the proceedings [par 31];

T. To clarify in the Constitutional Law the purpose and content of the orders that Chairpersons are authorised to give [par 32];

U. To clarify who is authorised to chair the sessions of the Judicial Boards of the Regional Courts and the Supreme Court [par 33];

V. To clarify the obligations resting on the Chairperson of a court in preventing corruption [par 34];

W. That the Constitutional Law should state that vacancies for all judicial posts should be publicly announced and widely disseminated [par 36];

X. To provide opportunities for mid-career entry into the judiciary [par 37];

Y. To specify which paid positions are incompatible with the office of a judge [par 38];

Z. To define in the Constitutional Law the diseases, which could exclude a person from exercising the profession of a judge and confine them to those which may affect clear reasoning of a person [par 39]

AA. That the High Judicial Council's recommendations on the appointments of Chairpersons can only be rejected by reasoned decisions [par 40];

BB. To consider providing the judges with the opportunity to elect the Chairperson of their court [par 41];

CC. To consider whether the appointment as a Court Chairperson may be renewed and if so, to limit this to one possible re-appointment [par 42];

DD. To amend Article 34 par 1 so that the Chairperson of the Supreme Court is no longer able to extend the retirement age of judges [par 44];

EE. To consider limiting the immunity of judges to actions performed within the exercise of their judicial functions (functional immunity) [par 47];

FF. To clarify the role of the High Judicial Council in the discharge of Chairpersons and judges [par 49];

GG. To define the scale of the remuneration in the Constitutional Law [par 52];

HH. To consider, in the long term, whether the privileges provided to judges could be replaced by an increase in salary guaranteeing an adequate living standard [par 53];

II. To elaborate further Article 55 par 1, so that it describes in greater detail which offence or misdemeanour may trigger which sanction [par 54];

JJ. To amend Article 38 par 1 on the Judicial Jury so as to clarify that the evaluation of judges should be based on qualitative, rather than quantitative criteria, such as professional skills, and personal and social competence [par 56];

KK. To ensure that judge members of the Judicial Jury are chosen by their peers [par 57];

LL. That the Constitutional Law should contain provisions on regular and free training for judges [par 59];

MM. To amend Article 39 par 1 to clarify that an incorrect application of the law shall not entail disciplinary liability [par 60];

NN. To remove gross violation of the "labor discipline" stipulated in Article 39 par 1 (3) from the list of grounds based on which disciplinary proceedings may be instigated [par 61];

OO. To amend Article 39 par 2 in order to link the concept of judicial ethics to a specific code of ethics, which can be set out in a sub-legal regulation [par 62];

PP. To amend Articles 39 par 3, 16 par 1 (9-1) and 22 par 1 (7-1) so that appellate courts are limited in indicating gross violations of the law in a judicial act as grounds for disciplinary action as well as in reporting "low justice performance or systematic violation of law in legal proceedings" to the Judicial Jury [pars 63-64];

QQ. To ensure that the person(s) that have initiated disciplinary procedures under Article 41 cannot take part in the final decision considering the case under Article 43 [par 66];

RR. To state specifically in the Constitutional Law that fair trial principles shall be followed in disciplinary proceedings [par 66]; and

SS. That a procedure is put in place to seek review of a decision of a disciplinary board when the Republican Disciplinary and Qualification Board decides as first instance and to consider whether all disciplinary measures should be appealable to a court of law [par 67].

10. The OSCE Office for Democratic Institutions and Human Rights and the Venice Commission remain available for any further assistance to the Kazak authorities.

4. ANALYSIS AND RECOMMENDATIONS

4.1. International and Domestic Standards on Judicial Independence

11. The independence of the judiciary is a fundamental principle in any democratic nation based on the rule of law. A well-functioning, efficient and independent judiciary is an essential requirement for a fair, consistent and neutral administration of justice. In order for the judiciary to be truly independent, there needs to be a clear separation of powers between the executive power and the judiciary; a judge should be able to decide disputes and deliver judgments without being subject to external pressure. Also within the judicial system, safeguards should be put in place to guarantee that there is no undue interference with the work of each judge. While the Constitutional Law already contains certain safeguards to ensure judicial independence, this Opinion will focus on those areas where the Constitutional Law would benefit from amendments that would ensure greater conformity with international standards on the independence of the judiciary. In order to ensure that the initiatives to reform the Constitutional Law are successful in enhancing the independence and effectiveness of the judicial system, it is imperative that the legislative reform process is open and transparent and that it includes a wide variety of relevant stakeholders.

12. On an international level, the independence of the judiciary has been laid down in various human rights instruments, including the Universal Declaration of Human Rights[1] (Article 10)

[1] The Universal Declaration of Human Rights was adopted and proclaimed by the UN General Assembly on 10 December 1948, available at: <http://www.un.org/en/documents/udhr/>.

and the International Covenant on Civil and Political Rights[2] (hereinafter "the ICCPR") (Article 14). On the European level, the independence of the judiciary has become an additionally binding principle for many countries after accession to the European Convention on Human Rights[3] (hereinafter "the ECHR") (Article 6). OSCE participating States have committed to ensuring the independence of the judiciary in the Copenhagen Document[4] (1990), the Moscow Document[5] (1991) and the Istanbul Document[6] (1999). These Commitments were recalled and specified in the Brussels Declaration on Criminal Justice Systems[7] and in the Ministerial Council's Brussels Decision on Organized Crime, in which OSCE participating States were urged to pay due attention to the independence of the judiciary. At a Ministerial Council meeting in Helsinki in 2008, OSCE participating States were encouraged to enhance their efforts to strengthen the rule of law, in particular in the area of, *inter alia*, judicial independence.[8] In the Council of Europe framework, the Committee of Ministers adopted the Recommendation on Judges: Independence, Efficiency and Responsibilities, in 2010.[9]

13. Against the background of the above-mentioned international standards, a number of recommendations have been elaborated in various international forums. These contain a higher level of detail and are able to prescribe on a more practical level the steps that need to be taken to ensure the independence of the judiciary.[10] The request for this Opinion specifically mentions one of these instruments, namely the OSCE/ODIHR's Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia[11] (hereinafter "the Kyiv Recommendations").

14. The main principles of the independence of the judiciary are also enshrined in the Constitution of the Republic of Kazakhstan. Section VI of the Constitution is devoted to court and justice (Articles 75-84). It is clear from Article 75 par 1 that justice in the Republic of Kazakhstan shall only be exercised by the courts. According to Article 77(1), a judge shall, when executing justice, "be independent and subordinate only to the Constitution and the law".

---

[2] The International Covenant on Civil and Political Rights (ICCPR) was adopted by UN General Assembly UN General Assembly resolution 2200A (XXI) on 16 December 1966 and entered into force on 23 March 1976, available at: <http://www.hrweb.org/legal/cpr.html>. The Republic of Kazakhstan ratified the ICCPR on 24 January 2006.

[3] The European Convention on Human Rights and Fundamental Freedoms was adopted by the Council of Europe on 4 November 1950, available at: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

[4] The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen, 5 June - 29 July 1990) (Copenhagen Document), available at: <http://www.osce.org/odihr/elections/14304>, par. 5.

[5] Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), pars. 19 and 20.

[6] Document of the Istanbul Meeting (19 November 1999), Charter for European Security: IV. Our Common Instruments, par. 45.

[7] Brussels Declaration on Criminal Justice Systems, Ministerial Council of the OSCE (MC.DOC/4/06) (5 December 2006).

[8] Decision on Further Strengthening the Rule of Law in the OSCE Area, Ministerial Council of the OSCE (Decision No. 7/08) (5 December 2008).

[9] Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010.

[10] See e.g. UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders (26 August – 6 September 1985), The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), the European Charter on the Statute for Judges (1998) (DAJ/DOC (98) 23), Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, (23 November 2001) (CCJE (2001) OP N°1), OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (23-25 June 2010), CDL-AD(2010)004 Report on the Independence of the Judicial System, Part I: the Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (12-13 March 2010) and the Magna Charta of Judges, adopted on the 11th Plenary Meeting of the Consultative Council of European Judges (Strasbourg, 17-19 November 2010).

[11] Kyiv Recommendations, op. cit., note 10.

Furthermore, any interference in the activity of a court is prohibited according to Article 77 par 2.

4.2. The Judicial System and Administration of Courts

4.2.1. The Court System

15. Article 1 of the Constitutional Law provides basic rules on the powers of courts in the Republic of Kazakhstan. The provision stipulates a number of relevant rule of law principles; in particular it states that courts are the only entities entitled to administer justice and that court acts are binding on all state actors. At the same time, an issue not covered by this provision is how to resolve disputes of competence between the court and other state entities. In accordance with international principles on the judiciary, courts should have exclusive competence to decide whether a case falls under their competence as defined by law.[12] It is therefore recommended that this principle be clearly stated in the Constitutional Law.

16. Contempt of court shall entail liability according to Article 1 par 3 of the Constitutional Law. This is in principle a commendable provision. However, the Law does not stipulate what kind of liability this entails, nor does it refer to any other relevant acts, where this may be found. Therefore, unless clearly regulated in other provisions which fall outside the scope of this opinion, it should be clarified what kind of liability this entails (administrate or criminal) in order to increase the foreseeability of the law.

17. The court system laid out in Article 3 of the Constitutional Law follows a three instance system (district courts, regional courts and the Supreme Court). The law allows for the establishment of "specialized courts" for certain types of cases. In particular, a system for administrative courts, deciding on appeals of administrative acts, can be very beneficial for the development of respect for the rule of law and good governance in public administration. When revising the Constitutional Law, following the draft law on Administrative Procedures that ODIHR has recently commented on,[13] it may be considered beneficial to draft a specific section on administrative courts, preferably establishing a system similar to the regular court system with three instances.

18. According to Article 22 par 1 (3-1) of the Constitutional Law, the Supreme Court plenary session shall "review, in order of supervision, the previous court cases, as prescribed by law". It is not clear what this provision means; if it refers to powers to supervise the lower courts by issuing directives, explanations or resolutions, binding on the lower court judges, then this could well represent an infringement of the individual independence of judges.[14] It is recommended to clarify this provision so as to exclude any possibility of violations of the independence of lower court judges.

4.2.2. Judicial Administration

19. An independent judicial administrative body may serve as a safeguard against outside influence on the judiciary. However, judicial administration should never influence the content of judicial decision-making in individual cases - this should always be left to the individual judge.[15] In order to ensure that the judiciary has well-functioning and independent representative bodies, it is important that their functions and composition are clear.

[12] UN Basic Principles on the Independence of the Judiciary, op. cit., note 10, par. 3.
[13] OSCE/ODIHR Opinion the draft Law of the Republic of Kazakhstan on Administrative Procedures, Nr.: GEN – KAZ/170/2010 Warsaw, issued on 29 December 2010.
[14] Kyiv Recommendations, op. cit., note 10, par. 35.
[15] Kyiv Recommendations, op. cit., note 10, art 1, and the Council of Europe's Committee of Ministers Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 29.

20. Article 36 of the Constitutional Law regulates the formation of a High Judicial Council, which shall consist of a Chairperson, a secretary and other members appointed by the President of the Republic. As the provision stands today, the President has unlimited powers to appoint members of the High Judicial Council, which could raise issues with regard to judicial independence. Members of the High Judicial Council appointed by the President may not be perceived as independent and representing the interests of the judiciary. It is recommended that the Constitutional Law be amended so that the High Judicial Council is composed of a substantial number of judges from both the first instance and appellate level courts, who are to be elected, or at least proposed, by their peers, following a transparent procedure laid down in the Constitutional Law. [16] Apart from judge members, other representatives such as law professors and members of the bar could also be represented in order to promote inclusiveness.

21. All regulation on the status and organisation of the work of the High Judicial Council shall be elaborated in law according to Article 36 par 2 of the Constitutional Law. However, Article 20 of the Constitutional Law clearly reveals that certain functions normally entrusted to a judicial council are instead performed by the Chairperson of the Supreme Court. In particular, the Chairperson, according to Article 20 par 2, represents the judiciary of Kazakhstan in relation to agencies of other branches of state power and international organizations. He/she also has the power to coordinate the work of judicial boards under Article 20 par 1(8) and submit proposals for legislation as well as for candidates for Court Chairperson posts in Article 20 pars 2 (3) and (4). Furthermore, the Chairperson of the Supreme Court is also directly involved in court administration as according to Article 6 par 2, he/she proposes the total number of judges for the district courts.

22. The so-called "Authorized Body for organizational and logistic support to the Supreme Court" also has powers of judicial administration, as it selects the number of judges for each court on the proposal of the Chairperson of the Supreme Court under Article 6 par 3. It is further noted that the Chairperson of the Supreme Court has substantial powers over the Authorized Body, in particular the authority to appoint and dismiss the head of this body according to Article 20 par 1 (9-2) of the Constitutional Law. The nature, status and the functions of the Authorized Body are not clear. It is therefore recommended that the Constitutional Law is amended as to clarify these aspects.

23. The division of competences in the field of judicial administration between the High Judicial Council, the Chairperson of the Supreme Court and the Authorized Body needs to be clarified. Generally, the High Judicial Council, preferably consisting of a substantial amount of judge members chosen by their peers, would be the ideal body to represent the interests of an independent judiciary. Most of the powers of general judicial administration could be vested in such a body. It is therefore recommended to consider transferring such powers from the Chairperson of the Supreme Court and the Authorized Body to the High Judicial Council, so that this latter body will assume a key position in representing the judiciary in relation to the executive branches and other authorities.

[16] See e.g. Kyiv Recommendations, op. cit., note 10, par. 1, the Consultative Council of European Judges' Magna Charta of judges, op. cit., note 10, Article 13, and Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 32. It can be noted that the Council of Europe's Committee of Ministers Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 27, recommends that at least half of the members of the judicial councils should be judges.

4.2.3. Funding

24. One important aspect related to judicial administration is proper funding. In order to guarantee judicial independence, it is paramount that the courts receive sufficient funds to live up to their obligations to ensure fair trials in accordance with international standards.[17] The judiciary shall, according to Article 4 par 6 and Article 57 par 1 of the Constitutional Law, be financed directly from the Republic's budget, which is commendable. Furthermore, Article 57 par 2 states that sufficient funds should be provided for the courts' exercise of their constitutional powers.

25. In order to ensure that the funds allocated to the judiciary are sufficient, it would be advisable to ensure that the views of the judiciary are taken into consideration in budgetary procedures. The High Judicial Council could represent the judiciary in this regard and have some influence on budgetary decisions regarding the needs of the judiciary.[18] This influence could be exercised by preparing a draft budget or by commenting on a draft received from a competent ministry. Against this background, it is recommended that the Constitutional Law be amended by adding certain provisions on the budgeting process that would envisage a role for the High Judicial Council.

4.2.4. The Role of Court Chairpersons

26. The role of Court Chairpersons is imperative in creating a functioning working environment in which individual judges receive appropriate support to work efficiently and independently. Designing the functions of Chairpersons is a delicate task as on the one hand they need to organise the work of the court, but on the other hand they should not be able to (or seen to be able to) interfere in the adjudication work of other judges.[19] Administrative decisions that directly affect adjudication should therefore not be within the exclusive competence of Chairpersons.[20] Furthermore, a plethora of Chairpersons' competencies potentially affecting the career of judges could be perceived as a type of pressure that could call into question the independence of judges and should thus be avoided.

27. Case assignment to the judges of the court should not be at the discretion of the Chairperson, but should be decided according to clear and pre-determined criteria.[21] The removal of individual influence on the distribution of cases is in practice a very important issue and key to guaranteeing to every person the right to an impartial judge. Random and neutral case distribution can be performed in a number of different ways (by drawing lots, by alphabetical order etc.) as long as the criteria are pre-established, clear and transparent. In the Constitutional Law, the Court Chairpersons are responsible for the organisation of the review of court cases by judges of the court according to Article 9 par 1(1) and Article 14 par 1 (1). It is not clear exactly what powers this provision entails or if it also involves the assignment of cases to judges of the court. It is recommended to clarify the Constitutional Law in this regard so as to clearly state that case distribution should be performed randomly according to clear and pre-determined principles, taking into account each judge's case-load. This does not exclude the possibility of assigning particular types of cases to specialised judges or panels of judges in appropriate cases. Of course, the criteria for and method of doing so should be transparent and pre-determined.

---

[17] See ECHR, op. cit., note 3, Article 6, and ICCPR op. cit., note 2, Article 14.
[18] See the Kyiv Recommendations, op. cit., note 10, art 6, the Recommendation on Judges: Independence, Efficiency and Responsibilities op. cit., note 9, par. 40, and Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, pars. 54-55.
[19] Kyiv Recommendations, op. cit., note 10, par. 11.
[20] Kyiv Recommendations, op. cit., note 10, par. 12.
[21] Kyiv Recommendations, op. cit., note 10, par. 12, Recommendation on Judges: Independence, Efficiency and Responsibilities op. cit., note 9, art 24, and Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 81.

28. At the same time, the powers of the Chairpersons to organise the review of court cases in Articles 9 par 1(1) and 14 par 1 (1) should not in any way authorise the Chairpersons to direct or supervise individual judges in the adjudication of their cases. It is therefore recommended that the above-mentioned articles be clarified in this regard.

29. Considering their role as representatives and managers of the courts, and to avoid excessive concentration of powers in their hands, it has been considered that Chairpersons should not have excessive control over the High Judicial Council.[22] Furthermore, it is important that the High Judicial Council has an adequate participation of judges that are mainly performing the core functions of a judge (adjudication). However, in order that the discussions in the High Judicial Council may benefit from the experience of the Chairperson, it may be considered appropriate to entitle Court Chairpersons to attend the meetings of the High Judicial Council and speak on an *ex officio* basis, although perhaps without a vote.

30. One of the tasks of Court Chairpersons is receiving individuals under Articles 9 par 1 (3), 14 par 1 (10) and 20 par 1 (10) of the Constitutional Law. As the representative of a court, it is normal for a Chairperson to receive members of the public and represent the court externally. Indeed, this could be very useful in that it might make the court more accessible for the public, while at the same time preventing parties to proceedings from directly trying to influence or disturb trial judges in charge of their particular case by paying personal visits. However, it must be clear that the Chairperson can only represent the official view of the court and does not have any power to affect the adjudication of the judge assigned to a certain case. It is therefore recommended to specify in which circumstances the Chairperson may receive individuals and clarify that these visits cannot in any way affect the substantial adjudication of individual court cases.

31. The current provisions on the Court Chairperson's right to receive individuals imply that he/she can receive persons who are parties to an ongoing court case. However, it is not clear if this limits the rights of other judges to receive such persons (who are party to ongoing court cases) and whether a judge who receives an individual may be subject to liability under the Constitutional Law. Therefore, it is recommended to clarify Articles 9 par 1 (3), 14 par 1 (10) and 20 par 1 (10) of the Constitutional Law in this regard.

32. Court Chairpersons also have the authority to issue orders, according to Articles 9 par 1 (6), 14 par 1 (8) and 20 par 1 (11). It is not clear what type of orders these provisions refer to and to whom they are addressed. Presumably, the orders concern administrative matters that are within the competencies described in the foregoing paragraphs of the relevant articles, but it would be advisable to clarify this in these provisions. It is recommended that the purpose and content of the orders be clarified in the Constitutional Law.

33. The Judicial Boards of the Regional Court and the Supreme Court are to be chaired by their respective Chairperson according to Articles 15 par 1 (2) and 21 par 1 (1). However, the Chairpersons of the regional and Supreme courts appear to have the same authority to chair the meetings of the judicial Boards according to Articles 14 par 1 (2) and 20 par 1 (2). This is an unclear division of authority and it is recommended to clarify who is authorised to chair the sessions of the Judicial Boards.

34. According to Article 9 par 1 (5), the Chairman of the Court should "ensure measures on preventing corruption". It is not entirely clear how the Chairman of the Court, who has no power over and is not superior to other judges, can ensure effective anti-corruption measures to be taken and be enforced. Furthermore, it is not clear whether responsibility would rest with the

[22] See Kyiv Recommendations, op. cit., note 10, par. 7, in which it is recommended that a Chairperson appointed to a Judicial Council should resign.

Chairperson if corrupt practices of some of the judges were to be revealed and whether this could lead to disciplinary (or other) liability of the Chairperson. It is therefore recommended to clarify the obligations of the Chairperson of a court to prevent corruption.

4.3. Appointment and Dismissal of Judges

4.3.1. Appointment of Judges

35. A key element in the establishment of an independent judiciary is the establishment of a fair and transparent recruitment process. The selection procedure in the Constitutional Law has incorporated many good qualities for fair selection, such as the principle of non-discrimination under Article 30 par 1, and a competitive selection procedure with a test (Article 29 par 1). The High Judicial Council selects the candidates meeting the requirements "on a competitive basis", according to Article 30 par 2. The High Judicial Council then recommends candidates for the posts and the final appointments are then performed by the Senate, as regards the judges of the Supreme Court, and the President, as regards all other judges. An issue not regulated in the text of the Constitutional Law is how the situation will be resolved if the President or the Senate disagree with the recommendations of the High Judicial Council. It is recommended that the discretion of the President and the Senate to appoint judges should be limited to the candidates nominated by the High Judicial Council and that a decision to refuse appointment should be reasoned.[23]

36. In order to increase transparency and openness in the selection procedure, it is recommended that the Constitutional Law should state that vacancies for all judicial posts, including those of Court Chairpersons, should be publicly announced and widely disseminated.[24]

37. The selection procedure for district court judges foreseen in the Constitutional Law appears to be directed at recent graduates with some but not extensive working experience. In order to enrich the judiciary with legal practitioners from other branches of law (e.g. lawyers or prosecutors) it might be considered to permit midcareer entry into the judiciary by expanding the selection criteria accordingly.[25] Article 29 par 2 appears to envisage such a possibility of midcareer entry into the judicial profession; however, the language of this provision is unclear as it merely refers to the fulfilment of the requirements of Article 29 par 1, entailing an examination and an internship.

38. According to Article 28, the "office of a judge shall be incompatible with a deputy's mandate, any paid position <u>except teaching, research or other creative activity, business activity, or being a member of the management body or supervisory board of a commercial organization</u>." Unless by reason of translation, the wording of provision implies that judges are allowed to engage in a business activity or be a members of the management in a company, which would be problematic. It is recommended to clarify which paid positions are incompatible with the office of a judge and in case the understanding of the provision is correct, re-assess the compatibility of taking the office of a judge and serving on the management or supervisory body of a commercial organisation.

39. Article 29-1 requests a medical examination of a candidate "to confirm absence of the diseases interfering [with the] execution of professional duties as a judge". Par 2 of the same Article states that the "list of the diseases interfering [with the] execution of professional duties of a judge, shall be developed pursuant to the regulatory act issued by the authorized government body". It is strongly advisable to clarify in the Constitutional Law which types of

[23] Kyiv Recommendations, op. cit., note 10, par. 23.
[24] Kyiv Recommendations, op. cit., note 10, pars. 16 and 21.
[25] Kyiv Recommendations, op. cit., note 10, par. 17.

diseases could obstruct the candidate from becoming a judge. Unless a disease prevents a person from clear reasoning, it should not constitute an impediment to fulfilling the function of a judge. Furthermore, handicapped persons must not be discriminated against. It is also not clear which agency will be empowered to define such a list. This is especially important in light of the Article 34 of the Constitutional Law, which states that existence of certain diseases (medical opinion) could become a reason for the suspension and discharge of the judge. It is therefore recommended to define the type of diseases, which would interfere with the profession of a judge and confine them to those which clearly may affect clear reasoning of a person.

4.3.2. Appointment of Court Chairpersons

40. Court Chairpersons are appointed by the President of the Republic upon recommendation of the High Judicial Council, according to Article 31 of the Constitutional Law. It is not uncommon for the Presidential and executive authorities to have a decisive influence in this appointment procedure. However, in order for these authorities not to have excessive influence it would be recommendable to stipulate that recommendations of the High Judicial Council can only be rejected by a reasoned decision. Upon rejection of the recommended candidate, the High Judicial Council could propose a different candidate or additionally be vested with powers to override the veto by a qualified majority vote.[26]

41. Additionally, involving peer judges in the election of Chairpersons might strengthen the role and acceptance of the Chairperson as the first among equals and also reinforce the perception of the Chairperson as a guarantee and safeguard for judicial independence, protecting the judges of their courts from undue influence and pressure. According to Article 30 par 3 of the Constitutional Law, the regional courts' plenary sessions will give an opinion on candidates for positions as Chairperson in the district courts and the Supreme Court's plenary session will have the corresponding authority as regards candidates for Chairpersons of the regional courts. This process reflects a more hierarchic model. It might instead be considered to provide those judges who will work under the supervision of the Chairperson with the opportunity to provide an opinion on the Chairperson candidate. Another solution would be to have the Chairperson elected by the judges (plenary session) of the respective court but the choice of method should be made having regard to actual conditions in Kazakhstan.[27]

42. If executive authorities are to have a decisive influence on the appointment procedure for Chairpersons, appointments should be for a fixed term and there should be a limit to possible renewals.[28] This is important in order to reduce the influence on judges through Chairpersons, which will grow ever stronger over a longer period of time. Further, renewable terms of office may also substantially jeopardise the independence of a Chairperson, who may at some point be influenced in his/her work by the desire to be reappointed by the executive. According to Article 31 of the Constitutional Law, Court Chairpersons are appointed for a 5-year term. Article 31 par 7 would appear to indicate that re-appointments are possible and does not mention any limit on the number of reappointments. It is thus recommended to consider whether the renewed appointment of a Chairperson should be possible at all. If so, then the Constitutional Law should limit this possibility to one re-appointment.

4.3.3. The Principle of Irremovability

43. The irremovability of judges forms a vital part of their independence as it guarantees that a judge perceived as uncomfortable by outside forces cannot be suspended or removed in order to effectively stop his or her work on certain cases.[29] Article 24 of the Constitutional Law

[26] Kyiv Recommendations, op. cit., note 10, par. 16.
[27] *Ibid*.
[28] Kyiv Recommendations, op. cit., note 10, par. 15.
[29] See the Report on the Independence of the Judicial System, Part I: the Independence of Judges, *op. cit*., note 10, par. 39-43.

enshrines the principle of irremovability and states that the powers of judges may only be suspended or terminated in accordance with the rules of the Constitutional Law. The tenure of a judge is permanent until the compulsory retirement age of 65 according to Article 34-1 of the Constitutional Law.

44. In order to ensure full independence and impartiality, it is recommended to remove the possibility for the Chairperson of the Supreme Court to extend the retirement age of judges in Article 34-1 of the Constitutional Law. This power could rest with the High Judicial Council as the neutral and impartial representatives of the judiciary.

45. An important aspect of the principle of irremovability is that a judge should not be transferred from his or her court without consent, unless in exceptional circumstances, e.g. following disciplinary sanctions or in case of a reform of the organisation of the judicial system.[30] It is commendable that the Constitutional Law in Article 31 par 8 stipulates that the consent of a judge is needed in order to recommend him or her for a position at another court in the case of reorganisation or liquidation of a court. However, this appears to conflict with Article 34 par 1 (8), whereby the refusal to accept a vacant position is already a ground for discharge. It is therefore not clear on what grounds a judge can be transferred to another court. Furthermore, according to Article 33 par 1 (4), the powers of a judge will effectively be suspended upon transfer. It needs to be clarified under which circumstances a judge can be transferred and who is entitled to make this decision. It is therefore recommended that the provision on the principle of irremovability in Article 24 is amended to specify that it also entails protection against transfer, except when disciplinary sanctions are applicable or there is a change in the organisation of the judicial system.

4.3.4. Immunity

46. The Venice Commission has consistently argued that only a functional immunity should be conferred on the judge. Article 27 of the Constitutional Law appears to go much further. It provides wide immunity: “A judge may not be arrested, taken into custody, subjected to administrative punishments imposed in the judicial procedure, or charged with criminal liability without the consent of the President of the Republic of Kazakhstan, based on the opinion of the Supreme Judicial Council of the Republic […] except for cases of detention at the scene of the crime or the commission of a serious crime. Inviolability of the judge shall include inviolability of his/her personality, property, private premises and offices, both personal and office vehicles used by him/her, documents belonging to him/her, luggage and other property.”

47. The very idea of immunity for judges may be questioned; however, the current Constitutional Law acknowledges the need to introduce some safeguards in this regard. It seems that a higher degree of protection is offered if a judge is charged with a relatively minor offence. However, no protection is offered if the/she allegedly commits a ”serious crime”. If the need for immunity is acknowledged, it should be provided in all circumstances, with the exception of minor administrative offences, such as lesser violations of traffic rules, etc., which seems not to be the case according to the current Constitutional Law. Furthermore, the extension of immunity to all premises, property and documents would make criminal investigation very difficult. In addition, the procedures envisaged in the Article are unclear - does the General Prosecutor have to petition the High Judicial Council for an opinion on the measures listed in Article 27(1)? It seems delicate to give the function of lifting judicial immunity to a judicial council consisting largely of judges elected by their peers. For these reasons, it is recommended to consider limiting the immunity of judges to actions performed within the exercise of their judicial functions (functional immunity).

[30] European Charter on the Statue of Judges, op. cit., note 10, article 3.4, the Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 43, the Recommendation on Judges: Independence, Efficiency and Responsibilities op. cit., note 9, par. 52.

4.3.5. The Suspension, Termination of Powers and Discharge of a Judge

48. The reasons for termination of the powers of a judge are outlined in Article 34. The powers of a judge can be terminated pursuant to the decision of a disciplinary and qualification board according to Article 34 par 2, presumably following a disciplinary procedure. However, according to Article 34 par 4, the Senate can discharge the Chairperson and the judges of the Supreme Court pursuant to the proposal of the President and the President can discharge judges of the other levels. It is not clear whether or not the Senate's and the President's powers to discharge a judge are directly linked to the decision of the disciplinary boards in Article 34 par 2. Since there is no clear link between the two, the present wording implies an unfettered right for the Senate and the President to discharge any judge. This raises serious concerns as regards the judicial independence of the judges and the principle of irremovability. It is therefore recommended that the authority of the executive to discharge a judge should only be exercised pursuant to a decision or recommendation by a disciplinary body after due procedure.

49. Article 34 par 6 stipulates a number of circumstances in which the recommendation of the High Judicial Council is *not* required prior to discharging a judge from office or terminating the powers of judges. This provision appears somewhat confusing as the Constitutional Law does not indicate circumstances in which a recommendation from the High Judicial Council is actually required prior to discharge or termination of the powers of a judge. It is noted that the Chairperson of the Supreme Court can, according to Article 20 par 2 (5), submit materials and proposals to discharge Chairpersons or judges; however, it is not clear how the High Judicial Council is authorised to act on these proposals. It is recommended that the role of the High Judicial Council in the discharge of Chairpersons and judges is clarified.

50. Against the background of the findings above, the provisions in the Constitutional Law concerning suspension, termination of powers and discharge from office appear to be somewhat inconsistent, both as regards the grounds for action and as regards who has the final authority to take certain decisions. It is recommended to reform this system, while giving careful consideration to the principle of irremovability and the general recommendations on such matters found in international instruments, including the issues raised above.

4.4. Remuneration and Benefits

51. Reasonable remuneration is an important factor in securing the independence of the judiciary as it increases the ability of the judges to withstand outside pressure. In this regard, it is commendable that Article 47 of the Constitutional Law states that financial support to a judge should "conform to his status and ensure the possibility of full and independent administration of justice*".*

52. According to Article 47 par 2 of the Law "Judges' remuneration shall be determined by the President of the Republic of Kazakhstan in accordance with Article 44 par 1 (9) of the Constitution taking into account the status of the judge, procedure of his/her assignment and election, and also functions s/he exercises." In addition, Art 44 par 1 (9) of the Constitution of the Republic of Kazakhstan[31], provides no further guidance with regard to the scale of remuneration. Although there is no strict international requirement in this regard, it would be advisable to define the scale of the remuneration for the different types of positions within the judiciary, in the Constitutional Law.

[31] Constitution of the Republic of Kazakhstan (adopted on 30 August 1995, entered into force on 5 September 1995).

53. Furthermore, the Constitutional Law regulates housing provisions in Article 51, medical care in Article 53, and compensation in the event of injury in Article 54. In the long run, it may be beneficial to consider replacing these privileges with an increase in salary guaranteeing an adequate living standard.[32]

54. All of the privileges provided to a judge, as well as retirement benefits, can be withdrawn pursuant to a decision terminating the powers of a judge by the Disciplinary and Qualification Board or a decision by the Judicial Jury according to Article 55-1. The termination of all benefits may be justified in certain cases, however, the sanction imposed should be proportionate to the violation in the individual case.[33] The present provision does not in sufficient detail outline the connection between the breaches of ethics or other offences and the sanction. It is recommended that the provision is further elaborated and describes in more detail which offence or misdemeanour can trigger which sanction.

4.5. Evaluation of Judges

4.5.1. Evaluation Procedure

55. Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation.[34]

56. The Constitutional Law establishes a Judicial Jury in order to evaluate the professional competence of an operating judge according Article 38-1. This body is made up of judges and thus constitutes a body for peer review. The details of the evaluation could also be set out in a separate law, but it is recommended that the basic principles on evaluation criteria stated above, should be incorporated in the Constitutional Law.

57. The Constitutional Law is silent on how the Judicial Jury should be appointed. In order to ensure its independence and credibility among judges, it is recommended that the judge members should be chosen by their peers in a fair and transparent procedure.[35]

58. Also, the role of the Judicial Jury in the Constitutional Law is not altogether clear; it is to evaluate judges, however there are other indications that it also deals with disciplinary cases. The Judicial Jury is to be informed when the appellate court finds that a judge is not behaving correctly (Article 16 par 1 (9-1)) and the recommendations of the Judicial Jury can form grounds for suspension or dismissal of judges according to Articles. 33 par 1 (3-1) and 34 par 1 (9). Evaluating the performance of judges is profoundly different from conducting disciplinary proceedings and it is essential that these mechanisms are kept separate. It is therefore recommended that the provisions on the disciplinary and evaluating bodies are enhanced so that their competences are clarified and distinct from one another.[36]

---

[32] *See* Kyiv Recommendations, op. cit., note 10, par. 13.
[33] Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 69.
[34] Kyiv Recommendations, op. cit., note 10, pars. 28 and 34.
[35] Recommendation on Judges: Independence, Efficiency and Responsibilities op. cit., note 9, par. 52
[36] Kyiv Recommendations, op. cit., note 10, par. 28.

4.5.2. Training of Judges

59. Regular training of judges is important in order for them to be well informed about recent developments of the national and internal law, especially human rights law, which is an essential element of their possibility to resist outside pressure and remain independent, as well as their public perception as a professional and independent branch of power. The judges should therefore be provided with initial and in-service training, entirely funded by the state.[37] Training of judges is not dealt with in the Constitutional Law. It is recommended that the Constitutional Law should contain provisions on regular and free training of judges.

4.6. Liability and Appeals

4.6.1. Disciplinary Proceedings

60. Disciplinary proceedings should deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the law or judicial mistakes.[38] The basic rules on disciplinary misconduct are outlined in Article 39 of the Constitutional Law. The first ground mentioned therein, namely "breaching the law while reviewing court cases", is open to a very wide application. In 2007, the Venice Commission made the following comment on a similar provision in the Georgian law: "In this provision, the grounds on which a judge may face disciplinary responsibility centre exclusively on a judge's conduct whilst discussing a case and when handing down a verdict or ruling. They therefore apply to the judicial process itself, to the judge's interpretation of the law while considering a case and to the very essence of a judge's function i.e. independent adjudication. It encroaches on the extremely delicate sphere of judges' independent decision making in accordance with constitution and law".[39] Against this background, it is recommended that Article 39 par 1 (1) is amended in order to clarify that it only refers to gross and inexcusable misbehaviour and not to the incorrect application of the law.

61. It is recommended to delete Article 39 par 1 (3), according to which the judge may be subject to the disciplinary proceedings for a gross violation of the "labor discipline". It is not clear what is implied under "labor discipline", who defines the principles of the labor discipline and where these may be found?

62. Article 39 par 2 stipulates the second ground for disciplinary misconduct, namely misdemeanours contradicting "judicial ethics". The provision does not refer to any particular standards of judicial ethics. In order to prevent abusive application of this provision, it is recommended that the Constitutional Law is amended in order to link the concept of judicial ethics to a specific code of ethics, which can be laid out in a sub-legal norm.

63. Involving appellate courts in the disciplinary system might increase internal pressure within the judiciary, which would be detrimental to the independence of the individual judges. Appeal proceedings should therefore not be combined with disciplinary actions and appellate courts should not be vested with powers to penalise judges personally for judicial errors. Instead, this should be entrusted to an independent authority outside the court system.[40] It is therefore commendable that Article 39 par 3 states that the reversal of a judicial act shall not entail liability of the judge. However, as an exception to this principle, the second part of this sentence provides the higher instance courts with the opportunity to indicate when a gross violation of law

[37] Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 56.
[38] Kyiv Recommendations, op. cit., note 10, art. 25, and Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 68.
[39] Venice Commission Opinion on the law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia adopted by the Venice Commission at its 70th Plenary Session (Venice, March 2007), par. 18.
[40] Kyiv Recommendations, op. cit., note 10, par. 26.

has been committed. This is a problematic combination of appeals proceedings and disciplinary action which should be avoided. It is therefore recommended that the second part of Article 39 par 3 be removed from the text of the Constitutional Law.

64. The appellate courts are also vested with the possibility to transfer materials to the Judicial Jury against a judge deemed to have a "low justice performance" or who allows "systematic violation of law in legal proceedings" according to Article 16 par 1 (9-1) and Article 22 par 1 (7-1). This would appear to permit penalising judges on the basis of the content of their decisions or rates of reversals. Such a wide application of the Constitutional Law would greatly endanger the independence of these judges and should not be permitted.[41] For these reasons, as well as for the reasons mentioned in the paragraph above, it is recommended that these provisions be limited in the text of the Constitutional Law.

65. Disciplinary boards should be impartial and independent from the executive authorities.[42] They can be composed not only of judges, but also of members from outside the judicial profession. However, they must not be controlled by the executive branch or politically influenced. The Republican and Regional Disciplinary Boards are in charge of disciplinary actions under the Constitutional Law. They are appointed in accordance with regulations promulgated by the President according to Article 38 of the Constitutional Law. Against the background of the principles stated above, the appointment to the disciplinary boards should be regulated in a different manner, possibly in a way that involves input from the High Judicial Council. It is therefore recommended that Article 38 on the disciplinary boards is revised so as to ensure that the boards are independent and free from excessive influence from executive authorities.

66. As a part of general fair trial principles, the body entrusted with initiating disciplinary proceedings should not be composed in an identical manner as the one responsible for considering the case.[43] In the Constitutional Law, the Republican and Regional Disciplinary and Qualification Boards are entitled to both initiate disciplinary proceedings and consider the cases according to Articles 41 and 43 respectively. In this regard, it is recommended that the person(s) that initiate a disciplinary proceeding, as member(s) of the disciplinary and qualifications boards, are not allowed to also take part in the final decision considering the case. It is also recommended to clearly state that fair trial principles shall be followed in these proceedings, including the possibility for the accused judge to present a defence.[44]

4.6.2. Appeals on Disciplinary Decisions

67. There should be a possibility for an independent review against a decision following the completion of a disciplinary procedure, unless the decision is taken by the highest court in the country.[45] Preferably, the appeal should be to a court of law.[46] According to Article 46, the decision of the Regional Disciplinary and Qualification Board can be appealed to the Republican Disciplinary and Qualification Board, which will then issue a final decision. However, in the case of the judges from Regional Courts, the Republican Disciplinary and Qualification Boards is the first instance, whose decisions may not be appealed (Article 46 par 2). It is therefore recommended that a procedure is put in place whereby judges may seek review of a decision of a disciplinary board, preferably to a court of law, at least in cases where the Republican Disciplinary and Qualification Board decides as first instance.

[41] Kyiv Recommendations, op. cit., note 10, par. 28.
[42] Kyiv Recommendations, op. cit., note 10, par. 9.
[43] Kyiv Recommendations, op. cit., note 10, par. 26.
[44] Kyiv Recommendations, op. cit., note 10, par. 26, and Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 69.
[45] Basic Principles on the Independence of the Judiciary, op. cit., note 10, par. 20.
[46] Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 43.