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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

by

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

1. The Venice Commission and ODIHR have been asked to provide a joint opinion on the above-entitled draft law. I have been furnished with a draft opinion drawn up by ODIHR.
2. The draft opinion is in my opinion clear, comprehensive and concise. It consists essentially of an evaluation of the draft law with particular attention paid to the principles articulated in the Kyiv Recommendations. I have only a small number of comments to make.
3. Paragraph 26 of the draft opinion makes the case very clearly for random assignment of cases. I think, however, that we should not exclude the possibility of assigning particular classes of case to specialized judges or panels of judges in appropriate cases. Of course the criteria for and method of doing so should be clear and pre-determined.
4. The last sentence of paragraph 36 advocates the election of Court chairpersons by the members of the court itself. I appreciate that the Kyiv Recommendations refer to such a system as 'a good option' (paragraph 16). I would have thought such a system could have both advantages and disadvantages. It seems to me that in certain circumstances the judges' sense of self interest might lead them to support a candidate who might not necessarily be the most suitable. Much would depend on the state of development of Kazakhstan and I do not know enough about that to form a judgment. I would not be inclined to go no further than to suggest the authorities might consider such a solution but that they should make the choice of method having regard to actual conditions in Kazakhstan.
5. Finally, I have to admit that I am not fully convinced by the arguments in the Kyiv Recommendations to the effect that court chairpersons should not sit on judicial councils. These arguments are strongly reflected in paragraph 28 of the draft opinion. It seems to me there is a case for saying that the experience and wisdom one might expect to find in a court chairperson would benefit a judicial council were that person to be a member. I would have thought, too, that the fragmentation of the judiciary's power to administer the court system likely to weaken rather than to strengthen judicial independence. Far from prohibiting court chairpersons from sitting on judicial councils I would have thought there is a case for having them entitled to attend meetings and speak on an *ex officio* basis although perhaps without a vote.
6. An issue which has been frequently commented on by the Venice Commission when evaluating laws such as the present on is that of judicial immunity. The Commission has consistently argued that only a functional immunity should be conferred on the judge. Article 27 of the draft law appears to go much further. The extension of immunity to all premises, property and documents would make criminal investigation very difficult. The procedures envisaged in the Article are unclear- does the General Prosecutor have to petition the judicial council? I must admit I would be wary of giving the function of lifting judicial immunity to a judicial council consisting largely of judges elected by their peers.
7. There are a couple of typos in the draft. In paragraph 9 the last word should be stakeholders. In paragraph 14 foreseeability should be all one word.