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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KAZAKHSTAN

OPINION

ON THE CONCEPT PAPER

ON THE REFORM OF THE HIGH JUDICIAL COUNCIL

Adopted by the Venice Commission
at its 117th Plenary Session
(Venice, 14-15 December 2018)

on the basis of comments by

Mr Gunars KŪTRIS (Substitute Member, Latvia)
Mr Bertrand MATHIEU (Member, Monaco)
Ms Jasna OMEJEC (Member, Croatia)

A Table of Contents

I. Introduction

1. By letter of 25 September 2018, Mr Talgat Donakov, the Chairman of the High Judicial Council of the Republic of Kazakhstan, requested an opinion from the Venice Commission on the Concept Paper on the reform of the High Judicial Council and of the system of selection, training and promotion of judges, hereinafter referred to as the Concept Paper (CDL-REF(2018)049).

2. On 15-16 November 2018 a delegation of the Venice Commission composed of Mr Gunars Kūtris, Mr Bertrand Mathieu, Ms Jasna Omejec, accompanied by Mr Grigory Dikov, legal officer at the Secretariat, visited Kazakhstan. The delegation met with the Deputy Head of the Presidential Administration, the Minister and Justice, the Prosecutor General, the President of the High Judicial Council (the HJC), the President of the Constitutional Council, presidents of parliamentary committees, deputies and senators, the president of the criminal chamber of the Supreme Court and other judges of the Supreme Court, NGOs, advocates and other stakeholders. The Venice Commission is grateful to the authorities of Kazakhstan for the preparation of the visit.

3. The English translation of the Concept Paper and of the laws in force was provided by the authorities of Kazakhstan. Inaccuracies may occur in this opinion as a result of incorrect translation.

4. The present opinion was prepared on the basis of the contributions of the rapporteurs and of the information provided by the interlocutors during the visit. It was adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018).

II. Analysis

A. Scope of the opinion

5. As stated in the preamble to the Concept Paper, the goal of the reform is to "increase the level of public trust to the judicial system, to ensure independence of judges, to introduce mechanisms for the selection of judges based on recognized international standards and best international practices, thereby to carry out selection of professional and dedicated judges". This is a very ambitious plan, and most of the proposals contained in the Concept Paper are intended to contribute to achieving these goals, which is commendable.

6. This opinion is limited to the material scope of the Concept Paper, which covers questions related to the judicial careers (training, recruitment, promotion of judges and discipline) and to the internal structure of the HJC. The opinion does not examine all the proposals contained in the Concept Paper, but only the most important and/or problematic ones. Observations formulated in this opinion should not be understood as putting in question the generally positive assessment of the overall direction of the reform.

7. While remaining within the material scope of the Concept Paper, the Venice Commission will also comment, where appropriate, on the broader legal framework. This framework includes the Constitution, the constitutional law "On the judicial system and the status of judges of the Republic of Kazakhstan" (see CDL-REF(2018)051, hereinafter "the constitutional law on the judicial system"), the law "On the High Judicial Council of the Republic of Kazakhstan" (see CDL-REF(2018)050, hereinafter "the Law on the HJC"), and the updated Regulations of the HJC of 2018 (see CDL-REF(2018)60).[1]

[1] An overview of the organisation of the judiciary in Kazakhstan was made by a group of the Venice Commission experts in 2016; see the collection "Judicial Systems in Central Asia" (in Russian): https://www.venice.coe.int/images/SITE%20IMAGES/Publications/CApublication.pdf

8. That being said, this opinion is not a comprehensive evaluation of the system of judicial governance in Kazakhstan. The Venice Commission recalls that in 2011 it adopted, jointly with the OSCE/ODIHR, an opinion on the constitutional law on the judicial system and status of judges of Kazakhstan.[2] Most of the analysis contained in the 2011 opinion is still relevant, even though the Venice Commission notes with satisfaction that the Concept Paper implements some of the recommendations of the 2011 opinion.

9. The Concept Paper does not propose specific amendments to the existing laws. It contains a general outline of the reform, describes its goals and the main principles and ideas which will be implemented in future. Therefore, any critical or positive remark made in this opinion should be interpreted with this in mind: the Venice Commission is only analysing the overall direction of the reform, and not a specific legislative text. If the Concept Paper is ultimately transformed into a draft law, this law will require a separate examination.

10. Finally, the Venice Commission recalls that Kazakhstan is not a member State of the Council of Europe. Therefore, the "European standards" in this area do not have the same authority in Kazakhstan as they would have in a member State. However, as it has been repeatedly stressed during the meetings in Astana, the Kazakh authorities want to gradually move in the direction of the European model of judicial governance. The present opinion will therefore often refer to the European standards and best practices.

B. Institutional arrangements

11. Articles 77 § 1 and 79 § 1 of the Constitution of Kazakhstan proclaim the principle of judicial independence. This is positive. However, it is not sufficient to proclaim that the judges are (or should be) independent. To ensure that a judge is truly independent it is necessary to assess a combination of factors, in particular conditions of his or her appointment, promotion, and dismissal. The Concept Paper makes a number of proposals in this area, mostly concerning the procedure of recruitment of new judges. But before looking at *how* the appointment decisions are made, it is necessary to examine *who* is taking those decisions.

12. The Concept Paper contains several proposals which aim at transferring some functions from the Supreme Court to the HJC. For example, the powers in the disciplinary field (see p. 5 (2) of the Concept Paper) will pass to the HJC. The HJC will form a "reserve list" of candidates for promotions.[3] Furthermore, the Concept Paper proposes to strip the presidents of the respective courts of their power to participate in the plenary meetings deciding on the promotion of judges and give their feedback on the candidates (see p. 5 (7)). This will increase the role of the HJC in the matters related to the judicial careers.

13. In the opinion of the Venice Commission, re-distribution of functions in this area may be envisaged. However, in order to be useful, it should be accompanied by changes in the status of the HJC itself, strengthening its independence. The Concept Paper contains several proposals which go in this direction. For example, it is proposed to expand the HJC by including more judges (who will henceforth be in the majority in the HJC), and more representatives of the legal community. These proposals are consonant with the European approach to the composition of the judicial councils. However, while those amendments are praiseworthy, they are not sufficient to achieve greater independence of the HJC. A more comprehensive reform is required. This reform may be conducted at two levels – constitutional and legislative. In the following section the Venice Commission explores both options; it is understood, however, that a constitutional reform may not be, for political reasons, a realistic option in the near future.

[2] CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan

[3] Being on a reserve list gives the candidate additional chances to be promoted.

1. The role of the President of the Republic in the questions of judicial governance under the Constitution

a. The role of the President of the Republic in judicial appointment/dismissals

14. Under the Constitution, the President of the Republic plays a central role in the judicial appointments, promotions and discipline. Indeed, certain questions are decided in partnership with other constitutional bodies, such as the HJC, Parliament, or the Supreme Court. For example, as regards the appointment of the lower courts' judges, the President acts on the basis of a proposal by the HJC.

15. However, nothing suggests that the President of the Republic is *bound* by this proposal. The Venice Commission previously expressed preference for the President's powers in this field being essentially ceremonial.[4] As it was explained to the delegation of the Venice Commission in Astana, in practice the President always follows the recommendation of the HJC. That is positive, but it would be better if the limits to the President's veto power be circumscribed in the law. At the very least, the law might provide that the President should give reasons before rejecting a candidate proposed by the HJC.[5]

16. As regards the dismissal of judges, here again the President plays a crucial role. As regards ordinary judges, they are revoked by a presidential decree, on the basis of a decision of the Judicial Jury.[6] Again, it is not clear to what extent the President is bound by the opinion of the Judicial Jury in this respect. In the opinion of the Venice Commission, when it comes to the dismissals, the President should follow the proposal of the Judicial Jury,[7] and, in case of disagreement, should at least be required to state reasons for this. In addition, there should be an appeal against the decision by Judicial Jury to a court.[8]

b. The role of the President of the Republic vis-à-vis the HJC

17. Even more importantly, under the Constitution the President defines the composition and the number of members of the HJC.[9] This puts the HJC in a position of subordination vis-à-vis the President. This subordination is further strengthened by Article 4.8 on the HJC Law which

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[4] See, for example, CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, § 16; see also CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, § 137.

[5] The Venice Commission has already made this recommendation in CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, § 35. See a similar recommendation given in respect of the powers of the President of Armenia in CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), § 35.

[6] The Judicial Jury is a body composed of judges of different levels, which is dealing with disciplinary cases and professional evaluations of judges. The decision to remove a judge of the Supreme Court is taken by the President also with the approval of the Senate.

[7] The Concept Paper proposes to transfer disciplinary powers to the HJC, but this does not affect the conclusion about the role of the President of the Republic in this process.

[8] The need to have an appeal to an independent judicial instance becomes more important if the disciplinary functions, as provided by the Concept Paper, are transferred from the Judicial Jury to the HJC. As the Venice Commission held in CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 25 "[…] a judicial council should have a decisive influence on the […] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available."

[9] Article 82 § 4 provides that the HJC "shall consist of the Chairperson and other persons who are appointed by the President of the Republic." According to Article 4.1 of the 2015 HJC Law, the HJC consists of two groups of members, both appointed by the President of the Republic. The first group consists of State officials sitting there *ex officio* (the President of the Supreme Court, the Prosecutor General, the Minister of Justice, the Minister for Civil Service Affairs, chairpersons of respective standing committees of the Senate and the Mazhilis). The second group consists of "other persons", such as legal scholars, lawyers, foreign experts, representatives of the Union of Judges, etc.

prescribes that the members of the HJC are "independent and obey only the Constitution […], laws […], and *acts of the President of the Republic of Kazakhstan*." (italics added). It is not clear what sort of "acts" the law means, whether these are the acts *ad personam*, or only normative acts, and what those acts may regulate.

18. It was explained to the rapporteurs in Astana that until recently the HJC was just a department within the presidential administration. Following a reform it became a separate State institution, but the institutional links with the President remained very strong.[10]

19. In some European countries – for example, in France – judicial councils were originally largely subordinated to the President, and became more independent only gradually. Kazakhstan seems to follow this path, with the HJC being *autonomous* but not yet enjoying the same degree of *independence* as many of the European judicial councils.[11]

20. In most European countries judicial councils have a mixed membership: some members are elected by Parliament (sometimes by a qualified majority), others are elected by the judges, and others are appointed by the President or sit there *ex officio*. The Venice Commission always insisted on the independence of this body, and on its pluralist composition.[12] The baseline is that a substantial proportion of the members of the judicial council should be judges elected by their peers[13] and that Parliament should be able to appoint a certain number of members (the latter guaranteeing democratic legitimacy of this body).

21. The Law on the HJC (Article 4 p. 2) provides that judges and retired judges elected by the Plenary Supreme Court should compose at least half of the composition of the HJC. The Concept Paper proposes to go further and provide that the judges should represent a majority of the members (p. 6 (1) of the Concept Paper). In a country where judicial independence is not deeply rooted, such increase of the proportion of judicial members is justified, but the election of the judicial members by a general assembly of all judges (and not only of the Supreme Court judges) would be a better option. However, the overall composition of the HJC is not described in the Constitution. And under the law the judicial members are still appointed by the President, even if the candidates are proposed by the Plenary Supreme Court.

22. In addition, the Constitution does not define precisely the *number* of members of the HJC. Accordingly, the 2015 HJC Law does not prescribe either the number of HJC members or their qualifications. As follows from the English and Russian translation of the 2015 HJC Law, the President has unfettered right to appoint additional members to the HJC from the ranks of legal scholars, advocates, foreign experts, etc. So, it seems that the appointment of the HJC members from the second group (non-judicial members) falls within the President's discretionary power, and their number may vary from one composition of the HJC to another. In the opinion of the Venice Commission, it is quite unusual for a constitutional body to exist without the number of its members being clearly fixed (or at least without having a clear method of defining this number). The very idea of an "institution" implies that its composition is defined either in the law or in the Constitution, and is not left to the discretion of one person, even if this

[10] The subordination of the HJC to the President of the Republic is confirmed by Article 1 of the 2015 HJC law which defines the HJC as "an autonomous state institution established to *ensure constitutional powers of the President of the Republic of Kazakhstan".*

[11] This state of affairs has already been criticised in the 2011 opinion, § 20

[12] CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, § 30; CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, § 17

[13] The Committee of Ministers of the Council of Europe, in Recommendation CM/Rec(2010)12 ("Judges: independence, efficiency and responsibility") indicated as follows: "27. Not less than half of the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary".

is the head of the State. Absence of a fixed composition undermines the legitimacy of the decisions taken by the body.

23. Furthermore, the law provides for a very short mandate of the members of the HJC (three years) and does not guarantee their tenure. Quasi-total (excluding *ex officio* members) renewal of the composition of the HJC every three years may affect the institutional continuity of this body. The Concept Paper proposes a mid-term renewal of a part of the composition of the HJC (see p. 6 (2)); the Venice Commission is in favour of this proposal but recommends also to extend the duration of the mandate of the HJC members.

24. Finally, it is unclear who may remove members of the HJC before their term, and on which grounds (at least, Article 4 p. 10 of the HJC law is silent on this point, only referring in very general terms to other applicable legislation). Possibly, this power belongs to the President, as the appointing authority, but it is only a guess.

25. All that weakens the independence of the HJC vis-à-vis the President. The rapporteurs were told that in practice the President respects the autonomy of the HJC and that all members nominated by the Plenary Supreme Court were appointed by the President. Thus, there is a sort of a constitutional convention limiting the President's powers. However, there is no guarantee that this convention will be strictly followed by the next President, who will still have the formal powers to appoint and (seemingly) dismiss members of the HJC at his or her will.

26. In conclusion, the Kazakh authorities may consider a more fundamental reform of the HJC, which may require amendments to be made to Article 83 § 3 of the Constitution, in line with the standards outlined above. The new constitutional provision should ensure the pluralistic composition of this body and its institutional and functional independence. That being said, naturally, the national authorities are in principle better placed than the Venice Commission to appreciate whether such a constitutional amendment is, from a political perspective, a viable option.

27. As it was explained to the rapporteurs in Astana, the Kazakh authorities prefer a gradual, evolutionary approach to legal reforms. For example, the fact that the exact composition of the HJC was defined neither in the Constitution nor in the law was not an omission, but a conscious decision to leave this question open, in order to experiment with different compositions and find an optimal solution. This is a prudent approach, which may be appropriate in times of political stability where constitutional conventions are loyally followed. However, the political climate may become more troubled. Thus, even if the constitutional reform is not a viable option in the near future, it is necessary to set out certain basic characteristics of the HJC at least at the legislative level.

2. Possible changes at the legislative level

28. Article 85 § 5 of the Constitution provides that the status of the HJC is to be regulated by law. Thus, the legislator has a certain latitude in defining how the HJC is to be composed, and what status its members enjoy. The current law regulates a large array of questions related to the composition of the HJC (although with insufficient precision in some places, as noted above). This suggests that it should be possible to regulate a lot of issues in the law (without, however, encroaching on the essence of the power of the President to appoint members of the HJC, proclaimed in Article 85 § 4).

29. In the opinion of the Venice Commission, at the legislative level it is advisable to:
- define the exact number of the members of the HJC;
- provide for a longer mandate, with a partial renewal of the membership of the HJC (as proposed already by the Concept Paper);

- introduce guarantees against early removal of members of the HJC, which should be limited to cases of very serious misbehaviour and require a decision of the HJC;
- provide for the *nomination* (even if not the ultimate appointment) of a certain number of members by Parliament, and for the *nomination* of the judicial members by the general assembly of all judges, and not only the Plenary Supreme Court. Judicial members, as proposed by the Concept Paper, may represent the majority of the HJC;
- as to the representatives of the legal community outside of the judiciary (which is already proposed by the Concept Paper), they may be delegated by the respective organisations (the Bar Associations, law schools etc.), subject to the appointment by the President of the Republic.

3. Other institutional changes

30. The Concept Paper contains a number of other proposals related to the organisation and functions of the HJC, which can only be welcomed (see p. 6 of the Concept Paper). Thus, the idea of "digitalization" of the activities of the HJC is welcome (p. 6 (5)). It is reasonable to give the HJC a role in proposing legislative amendments, and the function to present annual reports on the situation within the judiciary (p. 6 (4)).

31. On the last point the Venice Commission notes that the 2018 Regulations on the HJC provide for a permanent Expert Advisory Commission under the HJC, which will advise the HJC on "the most significant issues for the judicial system, including those related to the improvement of national legislation". This Commission includes members of the HJC and some external experts; however, it would make more sense for this Commission to be composed of a majority of experts, who would provide their external point of view to the HJC.

32. Proposal contained in p. 6 (3) of the Concept Paper, namely the question of providing salaries for the members of the HJC representing other legal professions (advocates, legal scholars, etc.), may need a more thorough examination. On the one hand, it is reasonable for all members (except *ex officio* members) of the HJC to have the same status: either a full-time employment, or a part-time participation (in the latter case they may keep their jobs elsewhere). The question is whether the HJC will have enough work to justify full-time employment for all of its members. Moreover, it is unclear whether the salary proposed to the members of the HJC will be attractive enough to guarantee that the best advocates and legal scholars are competing for a position in this body. These factors should be kept in mind while implementing this proposal.

C. Recruitment, promotion and professional evaluation of judges

33. At the outset, the Venice Commission notes that some of the proposals contained in the Concept Paper are aimed at raising the bar for those who wish to become judges. President Nazarbayev, in his annual address to the nation, expressed concerns over the quality of young judges entering the system. That gave impetus to the reform, and explains the general direction taken by the Concept Paper.

34. The President's concerns are certainly well-founded, but it should be remembered that the severity of the selection process is not a goal in itself. It is the result that matters. The selection process should be organised in such a manner as to ensure that only the most knowledgeable, capable and honest candidates become judges. However, if the priorities are set wrongly, or if the method of selection is deficient, some good candidates may be eliminated.

35. There are many models of selection of judges, and, probably, none is perfect. The Venice Commission is not well-placed to propose one particular system, it will only formulate a few recommendations, leaving the rest to the wisdom of the national legislator. That being said, the Venice Commission underlines that the quality of the judiciary also largely depends on the

attractiveness of the judicial career for young lawyers. During the meetings in Astana many interlocutors observed that judicial salaries at the level of local courts remain modest. As a result, the most competent lawyers prefer other legal professions. So, probably, the solution to the problem of the quality of the candidates lies partly in the financial sphere.

36. Another preliminary comment is called for. Under the current legislation the system of judicial appointments and promotions is very complex and involves many actors and procedures. This complexity may create an impression that the system is safe, and that it is virtually impossible for incompetent people to become judges. However, this complexity may also become a breeding ground for cronyism and corruption. If the bar is set too high, if the legal procedures are too intricate and if the final decision depends on too many actors, there will always be a temptation to take the path of informal arrangements.

37. In sum, in parallel with making adjustments to the recruitment procedures, as described below, the authorities of Kazakhstan should consider (1) the increase in the remuneration of judges, especially at the lower level, and (2) the simplification of the whole system of recruitment.

1. Recruitment and promotion procedures under the current rules

38. The currently existing system of recruitment of new judges is quite complex. Although the HJC plays a central role here, the opinion of the judiciary about the candidates is also very important; the candidates are appointed on the basis of the recommendations given by the "Council on cooperation with the courts", by the plenary sittings of the regional courts or of the Supreme Court, on the basis of the "personal sureties" of senior judges, etc. The last word in the appointments belongs to the President of the Republic.

39. In order to be eligible, a graduate of a law school has two options: (1) either to pass a "qualification exam", conducted by a qualification commission created by the HJC, or (2) to complete successfully a masters' programme at the Judicial Academy under the Supreme Court, which involves two exams (at the entry to the Academy and after the completion of the course). However, passing a qualification exam or obtaining a diploma from the Academy does not guarantee the appointment – it is only the beginning of the process.

40. After the qualification exam the candidate undergoes a paid one-year internship in courts of different levels. At the end of this internship the candidate has to obtain a positive recommendation from the plenary session of the regional court, which opens the way to his or her participation in a subsequent competition for a particular post. The candidates who obtained the diploma from the Academy of Justice may participate in the competition without the internship.

41. The competition to the judicial positions is conducted by the HJC, which then proposes the candidates for appointment to the President of the Republic. A candidate, before participating in the competition for the entry-level position, should receive a recommendation of the "Council on cooperation with the courts" and of the plenary session of the regional court. According to the figures received in Astana, only about 1/3 of candidates who completed the internship following the qualification exam and obtained a positive recommendation were later appointed as judges as a result of the competition.

42. To be promoted to a position in a regional court, the candidate should have, in addition to the pre-conditions for the initial recruitment, a 5-years' experience as a judge (Article 29 p. 2 of the constitutional law on the judicial system), and has to obtain a recommendation of a plenary session of the respective regional court and personal "sureties" of two regional court judges and one retired judge. To be promoted as a judge of the Supreme Court the candidate should have

a 10-years' experience as a judge (including 5 years in a regional court) and similar recommendation of the Plenary Supreme Court and personal "sureties" of judges.

43. Candidates for the promotion to the position of presidents of regional courts and presidents of the chambers of the regional courts and the Supreme Court are proposed by the President of the Supreme Court to the HJC for approval.

2. The proposed reform of the recruitment and promotions

a. Qualification exam

44. The law does not describe the process of examination at the end of the master's program in the Academy. Apparently, those matters are left in the discretion of the Academy. So, the Venice Commission will not comment on this avenue of obtaining access to the competition. By contrast, the law contains quite detailed rules on the alternative avenue – the "qualification exam". These rules the Concept Paper purports to modify.

45. Currently the qualification exam consists of several stages: a computer-based test of legal knowledge, an oral examination in which the future judge should analyse a hypothetical case, a "psychological test" (Article 13 § 10), and testing with the lie detector (Article 15). The results of the "psychological" and the "lie detector" testing are not binding on the HJC.

46. The Concept Paper proposes, in p. 1 (2), to introduce a new element of the qualification exam: a written essay. This is done in order to check writing skills of candidates, evaluate their literacy and overall intelligence. This is a reasonable proposal.

47. Another proposal (p. 1 (3)) is to broaden the scope of the computer-based test, by including questions related to 11 legal disciplines (and not 6, as it is the case now). The "hypothetical cases" will become interdisciplinary and thus more difficult as well. The Venice Commission does not have any comments on this proposal: this change may have either positive or negative effects, depending on how the questions/cases are selected and formulated. Those who formulate the questions should remember that modern lawyers have access to all sorts of legal databases, and, hence, do not need to memorise the texts of the statutes and precedents. It is more important to check analytical skills of candidates and their systemic understanding of the legal doctrine and the ability to find information quickly. From this perspective, the candidate may be given access to the legal databases during certain stages of the exam, for example when analysing hypothetical cases.

48. P. 1 (4) of the Concept Paper proposes to involve external observers in order to increase the transparency of the examination. It is not specified how these observers will be selected, and what procedural rights they may have. Nevertheless, this is an interesting idea, which is worth exploring further, since it may increase public trust in the selection process.

49. The most problematic proposal is made in p. 1 (1): to make the results of the psychological testing mandatory for the qualification commission of the HJC. As rightly noted in the Concept Paper (p. 1 (1)), a candidate cannot be assessed only on the basis of his or her knowledge; psychological characteristics are also important. However, as transpires from the HJC Regulations (p. 30), psychological testing is to be conducted by professional experts in psychology, not by the members of the qualification commission under the HJC. Furthermore, the methods of testing are unknown, and it is unclear whether they are scientifically sound and well-adapted to the specific context of the judicial work. The Venice Commission agrees that it is important to assess skills and attitudes of candidates, but it can be done by the experienced

members of the HJC, in the course of personal interviews.[14] These interviews may be conducted during the competition (see below), or may be a part of the qualification exam.

50. As to the use of the "lie detector", even if the results of this test are not binding, it is a major source of concern for the Venice Commission, since the reliability of this method is open to discussion, and it is unclear how the answers received from the candidate in the course of this test may be used. There is a risk that this test will involve irrelevant questions (for example, questions about political preferences of the candidate). Moreover, a lie detector may at most establish whether a statement was accurate but is not useful to evaluate skills of a candidate. The Venice Commission calls on the authorities of Kazakhstan to be extremely cautious with this method; if there is no other way, the results of the "lie detector" test may only be used to trigger additional security checks in respect of the candidate, and should not become a part of the candidate's file accessible to the HJC. But a better solution would be to avoid the "lie detector" test altogether.

51. The Venice Commission observes that each stage of the qualification exam appears, from the law, to be eliminatory (i.e. based on the pass/fail principle). As a result, all successful candidates end up being essentially in the same position; it does not matter how good they were at each stage. What matters is that they all had a necessary minimum grade to pass each step.

52. The question is whether this system guarantees the selection of best candidates. According to the figures communicated to the rapporteurs in Astana, in the recent period only 5 out of 100 candidates passed the exam. One should remember that, in order to be admitted, all 100 candidates should have a law degree and a practical experience of 5 years (for law clerks and court secretaries) or 10 years (in other legal professions). So, only 5% of legal professionals with university diplomas were fit to be admitted to the competition – and, as shown above, not all those who pass the qualification exam succeed in the competition and are appointed as judges.

53. These figures may be a sign that the general system of legal education is not doing well. Therefore, in the first place, it may be necessary to pay attention to the law schools and to improve the quality of legal education there, so that their graduates are not eliminated at the early stages of the qualification exam.

54. Another explanation for those figures is that the bar was set too high, and that the requirements of the qualification exam were too demanding. However, the Venice Commission does not have sufficient information to develop this assumption: it does not know how the questions are formulated, how difficult the hypothetical cases are, etc.

55. Finally, it is not excluded that the very method of the exam is questionable, and that another exam system would give better results. For example, instead of each stage being eliminatory, it is possible to introduce a cumulative score, which would be calculated on the basis of several consecutive tests: written essay, computer-based test, analysis of hypothetical cases, interview (which may replace the psychological test).[15] The cumulative score will help to *grade* all winning candidates.[16] More importantly, the grade received as a result of the qualification exam may later become a major factor defining the success of this candidate in the phase of "competition" (now the results of the qualification exam are just an additional consideration of unknown weight – see Article 18 § 2 (3) of the law on the HJC).

[14] See CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, § 113

[15] The system of cumulative score does not exclude that at each stage of the exam the candidates should receive a certain minimum number of points in order to pass to the next level.

[16] The term "winning candidate" implies the possibility of elimination of a candidate who did not obtain a minimum number of points at each stage.

56. The Venice Commission cannot propose a ready-made model of the qualification exam for Kazakhstan. It simply reiterates that the severity of the qualification exam should not become a goal in its own. As an alternative to the current system, where each stage of the qualification exam is eliminatory, it is possible to introduce a system which would result in the grading of all successful candidates.

57. As additional measure to ensure objectivity of the qualification exam, it is recommended to make certain parts of it anonymous, so that the evaluators do not know whose results they are checking. Of course, this would apply only to those parts of the exam where there is no need to have a direct personal contact between the evaluators and the candidate.

b. Internship

58. The constitutional law does not describe the process of internship in courts. The Concept Paper proposes to reform this process, apparently by adding new regulations at the sub-legislative level. In particular, it is proposed to adjust the content of the internship in order to give the interns an insight into different specialised areas of law (p. 2 (1)); introduce an interim assessment of the progress of the interns, in addition to the final assessment (p. 2 (2)); introduce incentives for the interns and their mentors (p. 2 (3)), vary the length of the internship depending on the professional experience of the candidates (p. 2 (4)), and involve the Academy of Justice to the process of internship (p. 2 (5)). All those proposals appear on the face reasonable and do not require extensive comments.

c. Competition

59. Competition is regulated by Articles 16-18 of the Law on the HJC. Article 18 § 2 contains a list of criteria for selecting best candidates: solid legal knowledge, high ethical standards and impeccable reputation. With all matters being equal, preference is given to candidates who obtained a master's degree from the Academy of Justice, who have a greater work experience, who have better results of the qualification exam, who participated in the competition for more than 3 times, and who have the better grades in the general law school diploma.[17] However, the relative weight of criteria and of those additional arguments is not specified, at least not in the law.

60. The nomination decision is taken by voting, by a qualified majority of the HJC members present at the session. Following the voting the successful candidates must undergo a "special check", which is conducted by the secretariat of the HJC and, if necessary, by the prosecutor's office. Apparently, following such "special check" the HJC may cancel the nomination decision, although the law does not specify what could be the reasons for the cancellation.

61. The Concept Paper proposes to supplement the competition with several new elements. In particular, it is proposed to introduce "*objective and differentiated*" criteria for selecting best candidates (p. 3 (1)). It is also proposed to introduce *interviews* of candidates with the members of the HJC as a mandatory step of the competition process (p. 3 (2)).

62. Pursuant to opinion No 1 (2001) of the CCEJ, "every decision relating to a judge's appointment or career should be based on objective criteria […]." However, a lot depends on what sort of "objective" criteria are used, and how they relate to more "subjective" elements.

[17] These additional criteria are applied to the candidates to the entry-level positions in the judicial system. As to the candidates to the positions in the regional courts or the Supreme Court, they have their own list of additional criteria for selection, which includes "the quality of the adjudication". This criterion will be discussed separately below.

63. The qualification exam in Kazakhstan contains elements which can be regarded as "objective" (like, for example, the computer-based test of knowledge of the law). By contrast, the decision to nominate the candidate in the phase of competition is taken by the HJC *by voting*. This voting will necessarily reflect the sum of subjective perceptions (by the members of the HJC) of the moral and professional qualities of the candidate. There is nothing wrong in the appointment decision being based *partly* on such subjective perceptions. It is important, however, that the law describes the relation between more "objective" and more "subjective" elements in the overall assessment of the candidate.

64. The Venice Commission examined a similar situation in an opinion on Armenia,[18] where it reasoned as follows:

> *"§ 117. It is not excluded that a candidate who received a good grade at the written exam may be unsuccessful at the interview, and, as a result, be downgraded and even completely disappear from the list. A certain measure of discretion and subjectivism is unavoidable here. However, under the Draft Code, once the written exam is over, all candidates selected for the interview find themselves essentially in the same position, and the grades they received do not matter anymore. Or, at least, it is unclear how important the grades are: everything is decided at the interview.*
>
> *§ 118. Under this system the strongest candidate may be replaced after the interview with the weakest one. That would create a strong impression of arbitrariness, and may jeopardize public trust in the process of recruitment. This would look particularly unfair if there was a big gap in grades between the best candidate who failed the interview and the worst one, who succeeded and was selected in place of the former. The Venice Commission invites the authorities to revisit the selection procedure and address those issues. […] [T]he authorities should reflect on a principle that would permit to commensurate the results of the written exam with the results obtained at the interview. The Draft Code does not necessarily need to address those issues in detail; the task of developing appropriate rule may be delegated to the [Supreme Judicial Council of Armenia]."*

65. This analysis is relevant in the context of Kazakhstan. At present, the multi-step appointment process contains both objective and subjective elements.[19] Article 18 § 2 indicates which criteria are used for assessing candidates during the competition, but does not set out their relative weights. As a result, the results of the "objective" assessment may be lost amongst the results of the subjective assessment.

66. Here again, the Venice Commission does not have any magic formula. It is positive that the Concept Paper proposes to introduce more "objective and differentiated" criteria for the selection of judges. Rating of candidates on the basis of their graduation exam in the Academy of Justice or the qualification exam may contribute to this goal. It is important, however, to specify the respective weight of different elements ("objective" and "subjective") in the final decision.

67. Other proposals of the Concept paper regarding the recruitment process do not raise any questions. The Venice Commission is in favour of making the recordings of the sessions of the HJC available on-line (p. 3 (3) of the Concept Paper): a candidate to a judicial position should be prepared to that kind of public scrutiny. The proposal to indicate in the law specific grounds which prevent appointment of a judge (p. 3 (4)) is also worth praise. At present the law speaks of a security check, but it does not identify factors (besides the candidate's criminal record)

[18] CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, § 118

[19] Recommendations given by the courts and "personal sureties" given by the senior judges also reflect a more subjective assessment of the qualities of the candidates.

which may force the HJC to reverse its nomination decision. It would be good to specify those criteria in the law.

68. The Concept Paper attempts to make the competition procedure more "user-friendly": it is proposed to fix in advance an annual plan of the competitions (which will help candidates to prepare for such competitions more in advance), to shorten the duration of the competition and reduce the number of documents required to participate (p. 4 (2), (3), and (4)). These proposals appear on the face reasonable; indeed, just the description of documents to be presented by a prospective candidate, as enumerated in p. 46 of the current HJC Regulations, runs to three full pages.

3. Opening access to mid-career positions within the judiciary to other legal professionals

69. The judiciary of Kazakhstan is currently based on a so-called "civil service model": to make a career one have to enter the system at the lowest level, and then progress to the regional and then to the Supreme Court. It is impossible for a lawyer with no judicial experience to enter the judicial system directly at the level of a regional court or the Supreme Court. And, naturally, a successful lawyer of 40-50 years of age will not want to become a judge if his or her career is to start at the district court level.

70. The Concept Paper proposes to change this approach, by allowing experienced lawyers to enter the system at the level of the appellate courts (p. 4 (1)). In their 2011 opinion on Kazakhstan the Venice Commission and OSCE/ODIHR recommended that "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" (§ 37), so, this proposal implements the earlier recommendation of the Venice Commission.

71. The legislator may consider a further opening up of the system, up to the level of the Supreme Court. In the Supreme Court, as a cassation instance, there is a special need for analytically-minded people familiar with complex interpretative techniques. People with other legal backgrounds (like very experienced barristers, for example, or renowned legal scholars, law professors etc.) may, potentially, be a useful addition to the career judges there.

72. Finally, p. 4 (2) of the Concept Paper proposes to introduce competitive selection of presidents of the judicial chambers of the courts of appeal. At present, the competition is organised only for a position of a judge, a president of a district or a regional court, and presidents of the chambers within the Supreme Court. The idea is that presidents of the chambers of the regional courts are also be appointed through the competition by the HJC is welcome.

4. Professional evaluations

a. Interrelation between ethical breaches, disciplinary offences and profession evaluations

73. Professional evaluations are governed by Article 30-1 of the constitutional law on the judicial system. Evaluations are conducted by the Qualification Commission of the Judicial Jury. This commission consists of seven members, all of them judges or retired judges. Between 2016 and 2018 the work of 1,541 judges has been evaluated, which resulted in the recommendation to dismiss 5 judges for professional ineptitude. The Qualification Commission also gives recommendations to the position of a higher court judge or a president of the court. In the recent period the Qualification Commission gave positive recommendations to 84% of candidates to promotion, whereas 16% did not receive a recommendation.

74. The constitutional law seems to create a link between evaluation and disciplinary liability. Under Article 34 § 1 (11), the judge may be dismissed on the basis of a decision of the Qualification Commission for "professional ineptitude". It appears that the "ineptitude" may be established following an evaluation conducted under Article 30-1. As a part of the regular evaluations the Qualification Commission considers *inter alia* breaches of the work discipline and of the ethical rules committed by the judge (see Article 30-1 § 2 (2) of the constitutional law). Thus, a breach of ethical rules (as defined in the Code of Judicial Ethics – see Article 39 § 1) may lead to a bad evaluation which may, in turn, result in the dismissal.

75. The Venice Commission recalls that "detecting wrongdoing should not be the main task of an evaluation".[20] In the 2011 opinion on Kazakhstan, the Venice Commission noted that "evaluating the performance of judges is profoundly different from conducting disciplinary proceedings and it is essential that these mechanisms are kept separate."[21] Furthermore, in a number of opinions, the Venice Commission has criticised the general penalisation of breaches of codes of ethics as too general and vague and insisted that much more precise provisions are needed where disciplinary liability is to be imposed.[22]

76. In a more recent opinion on "the former Yugoslav Republic of Macedonia" the Venice Commission acknowledged[23] that the border between disciplinary liability and bad evaluation is not watertight. A negative performance can originate from other factors than a disciplinary offence – for example, from the sudden increase in the work-load of the judge, shortage of court personnel etc. On the other hand, "this does not mean that bad evaluation can never lead to a disciplinary sanction. The CCJE acknowledges, in p. 29 of Opinion no. 17, that judicial tenure may be terminated where 'the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard, objectively judged.' Thus, for the CCJE, this is a matter of degree: to serve as a ground for dismissal, 'bad evaluation' should convincingly demonstrate total ineptitude of the judge to perform judicial functions." To become a ground for dismissal, the "total ineptitude" should be assessed over a considerable period of time, and the reasons for sub-standard performance of the judge should be carefully examined.

77. Indeed, the standard of "total ineptitude" is a very high one. In the countries where the lack of professionalism of judges is a major problem, one may be think of introducing a gradual system of more lenient sanctions which would be applied to unprofessional behaviour falling short of the "total ineptitude". The question, however, remains how those sanctions should relate to the process of professional evaluation of judges. While some disciplinary breaches may result from the lack of professionalism, in the opinion of the Venice Commission, professional evaluations should be kept separate from the disciplinary proceedings: they have different purpose and are based on different principles. Where there is a risk of a sanction, the situation should be analysed in terms of the disciplinary liability: in particular, the body imposing the sanction should demonstrate the fault of the judge. As the Venice Commission held previously, "[…] only failures performed intentionally or with gross negligence should give rise to disciplinary actions. […]".[24] In addition, if there is a risk of a sanction, the proceedings should

[20] CDL–AD(2014)007, § 105
[21] § 58
[22] CDL-AD(2015)007, Join opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law, on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, § 50
[23] CDL-AD(2018)022, "The former Yugoslav Republic of Macedonia" - Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts, § 59
[24] CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, § 19

be accompanied by the appropriate procedural safeguards. In particular, there should be a possibility for the judge to contest the sanction before a judicial body.[25]

78. *A fortiori*, there may be an overlap between breaches of judicial ethics and disciplinary offences. What is important for the Venice Commission is that the grounds for disciplinary liability are described with sufficient precision in the law itself. The Code of Ethics adopted by the Union of Judges of Kazakhstan cannot be the source of law here; at the best, it may serve as a tool for interpreting the norms of the law on the grounds of disciplinary liability. The Venice Commission discussed this issue at some length in the 2016 opinion on the Draft Code of Judicial Ethics of Kazakhstan.[26]

79. The constitutional law on the judicial system is still flawed in this respect: it does not distinguish clearly between simple ethical breaches, disciplinary offences (which should always entail the examination of the fault of the judge concerned), and bad evaluations. All of these situations may lead, under the constitutional law, to the dismissal of the judge. The Venice Commission invites the legislator to revisit the text of the law in order to distinguish these three types of situations, and to explain how they relate to each other.

b. Evaluation criteria

80. The 2011 opinion recommended to include in the constitutional law "basic principles on evaluation criteria". Those criteria are now set out in Article 30-1 § 2; they include:

- "indicators of the quality of the administration of justice", and
- compliance with the working discipline and with the norms of the judicial ethics.

The Concept Paper proposes to go in the direction of the recommendations of the 2011 opinion by "limiting the grounds for conducting professional assessment of judges and introducing more objective standards, methods and criteria for assessing the performance of judges by the judiciary community" (p. 5 (3)).

81. The Venice Commission supports the idea that the notion of "indicators of the quality of the administration of justice" needs to be developed further in the law. At present, it is not clear what is measured in the course of the professional evaluations, what those "indicators" are. Two observations are called for, however.

82. In some countries, where the judiciary became independent relatively recently, professional evaluations rely heavily on the rate of reversals. The Venice Commission has concerns about this approach: "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".[27]

83. This does not mean that the number of reversals is completely irrelevant, but the threshold here should be set particularly high,[28] to become a factor in the evaluation result – otherwise, the risk is to produce a very timid judiciary.

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[25] See CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 23; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 76; the CCJE Opinion no. 3 of 2002 recommends to introduce "an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court" (p. 72). The Committee of Ministers requires to provide for an appeal in the case of bad evaluation (see Recommendation CM/Rec(2010)12, p. 58 of the appendix): "the procedure [of assessment] should enable judges to express their view on their own activities and on the assessment of these activities, as well as to challenge the assessment before an independent authority or a court".

[26] CDL-AD(2016)013, §§ 20 et seq.

[27] CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, § 55

[28] CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 40

84. An alternative solution would be not to look at the ratio of reversals, but to concentrate at the essence of the decisions taken by the judge and the gravity of errors committed by him or her. A manifestly fallacious legal analysis or irrational assessment of facts in a particular case may tell more about the professionalism of a judge than the average ratio of reversals. But such a system has its weaknesses as well. It will require an in-depth examination of the judgments, which will be more time-consuming and, inevitably, more subjective. What is more important, in such a system one should have trust in the professionalism and impartiality of the evaluators. So, in the light of those considerations, a particularly high and persistent "rate of reversals" may be a more objective evaluation criteria than the quality of the judicial reasoning. That being said, it belongs to the national legislator to select indicators of the judge's professionalism (or a mixture of them), provided that the chosen model does not penalize judges for the reasonable exercise of judicial discretion, even when their decisions are overturned on appeal.[29] Simply put, a judge should have a right to err.[30]

85. As to the individual productivity levels of each judge (i.e. the numerical output of cases), it is reasonable to have it as one of the indicators of professionalism. The rapporteurs of the Venice Commission were told in Astana that, in average, judges of Kazakhstan have around 140 cases and other "materials" per month to be processed. The judges in Kazakhstan are seen as overworked, and the legislator is looking for solutions to decrease their workload (by simplifying certain procedures, introducing mediation, etc.). This is positive. However, as the Venice Commission held in another opinion, "productivity levels set in advance by the Judicial Council may prove to be unfeasible; hence, they should be applied with due regard to the real situation the judge faced".[31]

86. Two other elements of the professional evaluations mentioned in Article 30-1 § 2 of the constitutional law are more problematic. The Venice Commission has already commented on the relation between ethical breaches and the professional evaluations. As to the "working discipline", it is understood as the compliance with the general requirements of the labor law (such as, for example, respecting working hours). The Concept Paper proposes not to impose *disciplinary liability* for breaches of the "working discipline" (p. 5 (5)). This is positive. However, compliance with the "working discipline" requirements is also mentioned as one of the criterion for professional evaluations. The question remains whether the working discipline could be taken into account in the process of the professional evaluation. Probably, the breaches of the "working discipline" may affect the results of the professional evaluation not by themselves, but only to the extent that they resulted in a significant loss of productivity or had other negative consequences on the quality of the judge's work.

87. With those observations in mind, the Venice Commission supports the proposal of the Concept Paper to describe the evaluation criteria in more detail. There are other aspects of the professional evaluation system which may need to be addressed in future – for example, the composition of the Qualification Commission of the Judicial Jury and the method of selection of its members, the possibility for the judge concerned to contest the results of the professional evaluation, etc. However, the Concept Paper does not contain proposals in this respect, and the Venice Commission considers it possible to leave those questions open.

[29] See, for example, CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, § 18

[30] See CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, § 60

[31] CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", § 103

5. Role of the court hierarchy in the judicial governance

88. Some proposals contained in the Concept Paper aim at reducing the role of the Supreme Court and of the court presidents in the system of judicial governance. In principle, the core function of the Supreme Court is to maintain consistency of the case-law through cassation review of the lower courts' judgments. It is not excluded that the Supreme Court may perform some other functions, more of an administrative character and not related to the adjudication. However, those non-core functions may be quite burdensome and hinder the performance of the Court's main function – adjudication of individual cases and harmonization of the case-law. Thus, in the States which created a separate Judicial Council, functions related to the judicial governance should rather be transferred to the latter, provided that the Judicial Council is independent and has an appropriate composition.

89. Some of the interlocutors told the rapporteurs in Astana that the judiciary in Kazakhstan has an informal vertical hierarchy. If this is the case, this is dangerous for judicial independence. The Venice Commission has always underlined that judicial independence is not limited to external independence from outside influence but includes internal independence of judges.[32] Even though higher courts have the power to annul decisions of the lower courts, judges of the higher courts should not be seen as hierarchical superiors of the lower courts' judges. Thus, assuming that the proposed reform may reduce this informal influence of the courts' presidents and of the most senior judges, this reform is welcome.

90. The Concept Paper makes several steps in this direction: for example, the candidates for the promotion will not need to obtain "personal sureties" from more senior judges (p. 5 (5)). Second, the Concept Paper proposes to exclude the presidents of the courts from the plenary sessions of those courts which give recommendations to the candidates to the judicial positions, and to introduce secret voting at those sessions (p. 5 (7)). Third, the Concept Paper suggests that the court presidents cannot be appointed to their positions or to similar positions in other courts for more than two terms consecutively (p. 5 (2)). These are welcome proposals which may weaken the informal vertical hierarchy and contribute to the internal independence of the judiciary.

91. The proposal to transfer the disciplinary functions to the HJC (see p. 5 (2) of the Concept Paper) has been already analysed above: such transfer makes sense, but only if the HJC is reformed and its independence is increased.

92. There is also a proposal to abolish the presidiums of the regional courts and of the Supreme Court (p. 5 (6)), in order to exclude their influence in the matters of promotion. However, the exact role of the presidiums in practice in this and in other areas is not very clear to the Venice Commission,[33] so it is hard to assess all *pros* and *cons* of this idea.

93. The Venice Commission notes that the Concept Paper did not touch upon many other elements of the current system of judicial governance, which reinforce the hierarchical model of the organisation of the judiciary of Kazakhstan. In particular, the powers of the court presidents and of the plenary sessions of higher courts in disciplinary sphere and the power to give recommendations to candidates to the judicial positions remain unchanged. Given the overall direction of the reform, set out in the Concept Paper, it would be useful to assess critically those powers and their effect on the internal independence of judges.

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[32] CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, § 68

[33] Under Articles 16-1 and 22-1 of the constitutional law, the Presidium have the function of bringing a disciplinary case against the judge before the Judicial Jury, and may perform other functions which do not belong to the exclusive competency of other bodies of the court.

III. Conclusions

94. The Concept Paper on the reform of the High Judicial Council aspires to ensure independence of judges, raise their professionalism and increase public confidence in them. Most of the proposals formulated therein contribute to these goals, and are in line with the European standards. The Venice Commission hopes that the proposals of the Concept Paper will be soon incorporated in the legislation.

95. However, the Concept Paper has some gaps or, in places, is not ambitious enough. This risks to reduce the efficiency of the reform. That being said, the Venice Commission understands that the authorities of Kazakhstan prefer an evolutionary approach, and that a comprehensive revision of the legal framework may not be on the political agenda of today, but be envisaged for a longer perspective.

96. The Venice Commission notes, at the outset, that the system of recruitment of judges in Kazakhstan is very complex, involves many procedures and different actors, and will certainly benefit from some simplification. Furthermore, besides reforming the system of recruitment of judges, it may be necessary to make the judicial career more attractive for young lawyers, financially or otherwise.

97. The Concept Paper proposes to redistribute some powers and functions related to the judicial careers from the Supreme Court and its bodies to the High Judicial Council (the HJC) and its bodies. It is a reasonable approach, but it should be accompanied by the corresponding change in the status of the HJC. It should become more independent, which will require either an amendment to the Constitution, or at least some legislative amendments, if constitutional entrenchment is impossible.

98. In particular, the law must define the exact number of the members of the HJC, introduce guarantees against their early removal, provide for the nomination of a certain number of members by Parliament, and for the nomination of the judicial members (who should be in the majority) by the general assembly of all judges. The law should also provide that the President is normally bound by the proposal of the HJC as regards judicial appointments, and that the rejection of such proposal by the President should be reasoned.

99. Most of the proposals of the Concept Paper regarding judicial careers deserve praise. In addition, the following recommendations should be considered:

- the qualification exam should not involve psychological testing by external experts; assessment of strengths and weaknesses of candidates may be done at the interview in the “competition” phase. It is better not to use the “lie detector” test altogether;
- the severity of the qualification exam should not be a goal in its own. The legislator may consider introducing a system which would result in grading all successful candidates after the exam. These grades should play a major role in the phase of the competition; the law should define the relative weight of “objective” and “subjective” criteria for selection of judges;
- the law should distinguish clearly between ethical breaches, disciplinary offences, and bad evaluations. Indicators for professional evaluations should be clearly defined in the law; evaluations should not rely heavily on the rate of reversals. As to the underperformance, judges should not be penalised for not reaching unrealistic goals;
- in addition to the proposals already contained in the Concept Paper, it is necessary to reconsider the role of court presidents and of the higher courts in the matters related to the judicial careers (appointments, promotion and discipline);

100. The Venice Commission remains at the disposal of the authorities of Kazakhstan for further assistance in this matter.