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URGENT OPINION ON THE DRAFT CONSTITUTIONAL LAW OF THE REPUBLIC OF KAZAKHSTAN ON THE CONSTITUTIONAL COURT

KAZAKHSTAN

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Based on an unofficial English translation of the Draft Constitutional Law commissioned by the OSCE Office for Democratic Institutions and Human Rights.

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EXECUTIVE SUMMARY

Constitutional courts or comparable institutions empowered with constitutional judicial review play a key role to ensure that the principles of the rule of law, democracy and human rights are observed in all state institutions. While acknowledging the particular nature and specificities of constitutional adjudication, principles pertaining to the independence and impartiality of the judiciary have to be respected when reforming legislation regulating constitutional courts or the alike. In this respect, a proper selection mechanism for constitutional court judges is an important safeguard for a state governed by the rule of law, providing institutional guarantees for the independence, credibility and efficiency of constitutional review. The principle of judicial independence also requires that judicial proceedings before constitutional courts are conducted fairly, without political interference, and that the rights of the parties are respected.

ODIHR welcomes that, as a result of the recent constitutional amendments, the Constitutional Court was reinstated with broadened competences. It is particularly positive that constitutional proceedings are now open for citizens for the protection of their constitutional rights, though this should but further extended to any individual. At the same time, this *Urgent Opinion on the Draft Constitutional Law on the Constitutional Court* identifies some shortcomings, which should be addressed, especially those at the core of the institution's basic guarantees of independence, in line with Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards.

Particularly, the shortcomings are related to the eligibility criteria and appointment procedures, which are essential for ensuring the balanced, open, transparent, fair and legitimate appointment of the constitutional judges and ultimately enhancing public trust in the process and in this institution. While the review of eligibility requirements primarily asks for eliminating discriminatory criteria, the appointment procedures lack a clear, detailed and transparent regulatory framework to ensure a merit-based selection, thereby reducing to the extent possible the risk of politicization of the process, which may ultimately endanger the Constitutional Court's legitimacy. At the same time, certain provisions on the suspension and termination of the office of the constitutional judges, possibility of re-appointment, as well as constitutional proceedings, raise concerns with respect to judicial independence and the principle of separation of powers. Moreover, there is also a need for the establishment of appropriate legal mechanisms, which will facilitate the constitutional adjudication process itself and ensure its legal certainty, openness, transparency, fairness and legitimacy.

The under-representation of women in the existing Constitutional Council and in the judiciary in general warrants that gender and diversity considerations be taken into account throughout the nomination and appointment process, to ultimately reflect the constitutional principle of equality between women and men.

More specifically, ODIHR makes the following recommendations to improve the Draft Constitutional Law's compliance with OSCE commitments and international standards:

A. to specify the selection and appointment modalities of the Constitutional Court judges in order to avoid undue political influence, both by the executive and the legislative power, including by using strict professional qualification criteria during the appointment process, to assess candidates' ability, integrity and experience and ensure a merits-based selection, while providing for open and transparent selection/appointment procedures; and to allow the appointment of the President of

the Constitutional Court through the internal ballot by the Constitutional Court judges themselves instead of the President of the country; [paras. 35-36]

B. to consider introducing a single, longer term of office for Constitutional Court judges [para. 37], while limiting the appointment of the Court President to one term [para. 38]; and in order to ensure stability and uninterrupted functioning of the Court, to permit a judge to remain in office upon completion of a term until a replacement judge is appointed and takes office; [para. 40]

C. regarding the eligibility requirements to become a Constitutional Court judge:

   1. to remove the residency requirement for judges; [para. 41]
   2. to provide for the development of guidelines or clarifications on types of eligibility requirements to secure predictability, transparency and legal certainty of the process, and ultimately contribute to the establishment of merit-based selection for Constitutional Court judges; [para. 42]
   3. to regulate the documentation constituting suitable proof for legal experience requirement; [para. 43]
   4. to consider including ineligibility requirement based on holding active or recent political positions; [para. 44]

D. to consider supplementing the Draft Law by ensuring that gender and diversity considerations are taken into account throughout the appointment process; [paras. 50-54]

E. to clarify the types of criminal offences committed in the exercise of a judge's office that are not covered by the functional immunity and consider transferring the competence for lifting the immunity of Constitutional Court judges to the Constitutional Court itself, rather than by the Parliament, but if nevertheless retained by the Parliament, consider requiring a qualified majority decision when deciding on lifting the immunity of Constitutional Court judges; [paras. 56-57]

F. as to the suspension and termination of the term of office, to introduce more precise regulation as to the applicable majority rules for the Constitutional Court to suspend a judge coupled with clearer and more foreseeable grounds for suspension and termination; [para 56] while omitting the broad reference to the *"violation of the Constitution and the requirements of this Constitutional Law"* from Article 10.1.9; [para 61] and to reconsider entirely the President's and Parliament's powers to remove judges from office and transfer them to the Constitutional Court, by qualified majority; [para. 64]

G. to extend the right to appeal to the Constitutional Court to any individual, including foreigners and stateless people, who are under the country's jurisdiction; [para. 70]

H. to introduce an automatic allocation of the case to a Constitutional Court judge or provide that the President is bound by pre-determined clear, transparent and objective criteria for allocating cases; [para. 77]

I. to remove Article 57, which provides the opportunity for the Constitutional Court to interpret its rulings by a supplementary decision, and Article 58 which provides the possibility to review an already decided ruling on the initiative of President of the country or on the Court's own initiative based on the change of constitutional norms underlying the decision or on newly emerged circumstances; [paras. 84-85]

J. to introduce more realistic deadlines for deciding on the admissibility and merits of constitutional appeals; to provide an autonomous decision of the Constitutional Court on the urgency of a review regardless of the type of applicant; and to omit the

privilege granted solely to the President of the country to request an urgent procedure, while considering introducing shorter deadlines in cases and circumstances that will be clearly defined by law; [para.93] and

K. to revise Article 62.1 of the Draft Law to allow for the publication and enforcement of court's decision without delay. [para. 95]

These and additional Recommendations, are included throughout the text of this Urgent Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE human dimension commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 23 July 2022, the Commissioner for Human Rights in the Republic of Kazakhstan, sent to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) a request for a legal review of the Draft Constitutional Law on the Constitutional Court of the Republic of Kazakhstan (hereinafter the "Draft Law").
2. On 2 August, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of the Draft Law with international human rights standards and OSCE human dimension commitments.
3. Given the short timeline to prepare this legal review, ODIHR decided to prepare an Urgent Opinion, which does not provide a detailed analysis of all the provisions of the Draft Law but primarily focuses on the most concerning issues relating to the compliance of the Draft Law with international human rights standards and OSCE human dimension commitments.
4. This Urgent Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[1]

II. SCOPE OF THE OPINION

5. The scope of this Urgent Opinion covers relevant excerpts of the Constitution and the Draft Law, submitted for review. This legal review is limited as it does not constitute a full and comprehensive review of the entire legal and institutional framework regulating constitutional justice in Kazakhstan.
6. The Urgent Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the Draft Law. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Urgent Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality* and commitments to mainstream gender into OSCE activities, programmes and projects, the Urgent Opinion integrates, as appropriate, a gender and diversity perspective. [2]
8. The Urgent Opinion is based on an unofficial English translation of the Draft Law, which is attached to this document as an annex. Errors from translation may result. The Urgent

1 See in particular *OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area* (2008), point 4, where the Ministerial Council "*[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]*".

2 See the *UN Convention on the Elimination of All Forms of Discrimination against Women*, adopted by General Assembly resolution 34/180 on 18 December 1979; and the *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

Opinion is also available in Russian. However, the English version remains the only official version of the Opinion.

9. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

10. The key role of constitutional courts or comparable institutions empowered with constitutional judicial review, as key instruments to ensure that the principles of the rule of law, democracy and human rights are observed in all state institutions has been emphasized in the *OSCE Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008).[3] While acknowledging the particular nature and specificities of constitutional adjudication, key principles pertaining to judicial independence have to be respected when reforming legislation regulating constitutional courts or the alike. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.[4] The principle of the independence of the judiciary is also crucial to respecting the principle of the separation of powers and upholding other international human rights standards.[5] Specifically, this independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced or fearful of arbitrary disciplinary investigations and/or sanctions by the executive or legislative branches or other external sources. Judicial independence is also essential to engendering public trust and credibility in the justice system in general, in that everyone is treated equally before the law and seen as being treated equally, and that no one is above the law. Public confidence in the courts as being independent from political influence is vital in a democratic society that respects the rule of law.

11. Constitutional courts should maintain their independence and, as ultimate guarantors of the interpretation and observance of the constitution of a state, should protect the separation of powers and democracy and prevent undue restrictions of human rights. Constitutional review process is essential to guarantee the conformity of governmental action, including legislation, with the constitution, but also to ensure that constitutions, once adopted, remain relevant to people's daily life.

12. While acknowledging the political nature and specificities of constitutional adjudication, key principles pertaining to the independence and impartiality of the judiciary guaranteed

3 See OSCE, *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), para. 4.

4 See UN Human Rights Council, *Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers*, A/HRC/29/L.11, 30 June 2015, which stresses "*the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards*". As stated in the *OSCE Copenhagen Document 1990*, "*the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression*" (para. 2).

5 See *OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*, 6 December 2005.

by Article 14 of the *International Covenant on Civil and Political Rights*[6] (hereinafter "the ICCPR") have to be respected. The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are outlined in the *UN Basic Principles on the Independence of the Judiciary*,[7] and have been further elaborated upon in the *Bangalore Principles of Judicial Conduct*.[8] An international understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee and the UN Special Rapporteur on the Independence of Judges and Lawyers. In *General Comment No. 32 on Article 14 of the ICCPR*, the UN Human Rights Committee specifically provided that States should ensure "*the actual independence of the judiciary from political interference by the executive branch and legislature*" and "*take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws, and establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them*".[9]

13. OSCE participating States have also committed to ensure "*the independence of judges and the impartial operation of the public judicial service*" as one of the elements of justice, "*which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings*" (1990 Copenhagen Document).[10] In the 1991 Moscow Document,[11] participating States further committed to "*respect the international standards that relate to the independence of judges […] and the impartial operation of the public judicial service*" (para. 19.1) and to "*ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice*" (para. 19.2). Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the OSCE Ministerial Council also called upon OSCE participating States "*to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary*", as a key element of strengthening the rule of law in the OSCE area.[12] More detailed guidance is also provided by the *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) (Kyiv Recommendations).[13]

6 UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Kazakhstan ratified the ICCPR on 24 January 2006.

7 The *UN Basic Principles on the Independence of the Judiciary were* endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

8 The *Bangalore Principles of Judicial Conduct* were adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in resolution 2006/23 of 27 July 2006. See also *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity.

9 UN Human Rights Committee, *General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, para.19.

10 OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 5 June-29 July 1990), paras. 5 and 5.12.

11 OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (Moscow, 10 September-4 October 1991).

12 OSCE, *Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (Helsinki, 4-5 December 2008).

13 The *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence.

14. While the Republic of Kazakhstan is not a Member State of the Council of Europe (CoE), the European Convention on Human Rights and Fundamental Freedoms (ECHR),[14] the developed case law of the European Court of Human Rights (ECtHR) in the field of judicial independence, and other CoE instruments may serve as useful reference documents from a comparative perspective. To determine whether a body can be considered to be an "*independent and impartial tribunal established by law*" according to Article 6 par 1 of the ECHR, the ECtHR considers various elements, *inter alia*, the manner of appointment of its members and their term of office, whether irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.[15] The CoE's Committee of Ministers also formulated important and fundamental judicial independence principles in its Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, which expressly states that *"[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers*" (para. 46).[16]

15. The Opinion will also make reference to the opinions of the Consultative Council of European Judges (CCJE),[17] an advisory body of the CoE on issues related to the independence, impartiality and competence of judges; reports of the UN Special Rapporteur on the Independence of Judges and Lawyers; and to the opinions and reports of ODIHR and of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, of which Kazakhstan is a member.[18]

2. BACKGROUND

16. Following the announcement by the President of the Republic of Kazakhstan of profound reforms in the country, on 28 March 2022, the President established the Working Group on Constitutional Reform, which published for the first time the proposed changes to the Constitution on 25 April 2022. On 29 April 2022, the President proposed holding a national referendum on amending the Constitution of Kazakhstan.

17. The Constitutional Council subsequently confirmed that the draft constitutional amendments were in compliance with the Constitution.[19] On 4 May 2022, all 98 deputies of the *Majilis* (lower chamber of the Parliament) voted in favour of the draft amendments and on 5 May, the bill passed the Senate (the upper house of the Parliament) and was submitted to the President for signature. A final revised version of the proposed constitutional amendments was published on 6 May 2022, with a view to amend 33

14 The ECHR was, signed on 4 November 1950, and entered into force on 3 September 1953.

15 See e.g., ECtHR, *Campbell and Fell v. the United Kingdom* (Application nos. 7819/77, 7878/77, judgment of 28 June 1984), para. 78. See also ECtHR, *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), para. 38; *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), para. 103; *Morice v. France* [GC] (Application no. 29369/10, judgment of 23 April 2015), para. 78; on the relation of the judiciary with other branches of power, see e.g., ECtHR, *Baka v. Hungary* [GC] (Application no. 20261/12, judgment of 23 June 2016), para. 165; *Ramos Nunes de Carvalho E SÁ v. Portugal* [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), para. 144; ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC] (Application no. 26374/18, judgment of 1 December 2020), paras. 243-252.

16 Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges*: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.

17 The main task of the *Consultative Council of European Judges* (CCJE) is to contribute to implementation of the Framework Global Action Plan for Judges in Europe adopted by the Committee of Ministers on 7 February 2001.

18 See European Commission for Democracy through Law (Venice Commission) legal reviews on constitutional justice as well as Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, CDL-PI(2020)004. See also *Report on Judicial Appointments* (2007), CDL-AD(2007)028-e, 22 June 2007; *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), CDL-AD(2010)004, 16 March 2010 ; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016.

19 See the *official publication* in the online database of legal acts in Kazakhstan.

articles of the Constitution. These included provisions envisaging the establishment of the Constitutional Court.

18. On 5 June 2022, the constitutional amendments were voted in favour in a national referendum. Subsequently, the constitutional reform required a new Constitutional Law on the Constitutional Court. The Draft Law was prepared by the government with the aim that it enters into force on 1 January 2023. The Draft Law expands the competences of the Constitutional Court compared to the current Constitutional Council. Positively, the Draft Law provides the possibility for citizens and the Commissioner for Human Rights to bring a motion to refer a case to the Constitutional Court, and challenge the constitutionality of normative and regulatory acts. Overall, the re-establishment of the Constitutional Court is a positive development as it would strengthen the checks and balances in the reformed constitutional regime, provided that certain principles are met, including that the Constitutional Court is independent and free from influence by the executive power of the President of the country, and the jurisdiction of the Court guarantees an effective constitutional review.[20]

3. INDEPENDENCE OF THE CONSTITUTIONAL COURT AND CONSTITUTIONAL JUDGES

19. The importance of ensuring accountability, transparency and integrity in the judiciary is an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with applicable international human rights standards and the *UN Basic Principles on the Independence of the Judiciary* and other relevant principles and norms. As provided by the UN Basic Principles *"[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary*".[21]

20. The independence of the judiciary relates to both the independence of the court and of individual judges, which is crucial for the fairness of trials, and a constitutional matter of institutional checks and balances. In this context, it is of utmost importance that any political influence be prevented when appointing judges to the highest court. ODIHR has previously noted that *"[i]n order to comply with the requirements of judicial independence and a separation of powers, the court concerned must however be seen to be independent of the executive and the legislature at all stages of the proceedings*".[22]

21. In order to establish whether the Constitutional Court and its judges are considered independent, various elements need to be considered. These include the manner in which the judges are appointed and their terms of office, the existence of guarantees against outside pressure and whether the body in question appears to be independent. At the European level, the ECtHR also held that *"[t]he concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions*".[23]

22. The Constitution does not provide an explicit statement on the independence and autonomy of the Constitutional Court. However, its separate regulation in the

20 In 1995, the Constitutional Council replaced the Constitutional Court though a constitutional reform process.
21 See *Bangalore Principles of Judicial Conduct*; ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, para. 122, 12 March 2019.
22 See ODIHR, *Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland* (as of 20 December 2019), para. 38, 14 January 2020.
23 See the ECtHR, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, 27 February 2018, para. 44.

Constitution and the rules on the appointment of judges as well as the Court's jurisdiction should be interpreted in the light of these notions, which are explicitly mentioned in Article 1 of the Draft Law. Article 11 of the Draft Law further prohibits interference in the Constitutional Court's activities, as well as any form of pressure or other influence on the judges and the Court. However, certain aspects in the Draft Law, including the term of office for judges and appointment mechanisms (*see Section 4.1*) as well as constitutional proceedings (*see Section 6.4*) undermine the independence of the Constitutional Court.

23. Proper funding of the judiciary is a prerequisite of its independence. It is paramount that the courts receive sufficient funds to meet their obligation to ensure fair trials in accordance with international obligations. As provided by the UN Basic Principles of Judiciary *"[i]t is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions*".[24]

24. The Constitutional Court, according to Article 64 of the Draft Law, is financed directly from the state budget. Article 64 further stipulates that *"[t]he funding shall enable the full and independent exercise of powers for ensuring the supremacy of the Constitution on the entire territory of the Republic*", which is commendable.

25. Ultimately, decisions on funding the courts and the remuneration of judges fall under the responsibility of the legislature. The CCJE states that although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. It further notes that *"[d]ecisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence"*, and it is important that *"the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views*".[25]

26. In order to ensure that funds allocated to the Court are sufficient, it would be advisable to ensure that the views of the Court are taken into consideration. As noted by ODIHR, "*to further guarantee their independence and impartiality, [the judiciary] should enjoy financial independence, meaning that they should have the power and capacity to negotiate and organize their own budgets effectively, to ensure that they have adequate human, financial and material resources, including their own premises, to allow them to operate independently and autonomously*".[26] This could be implemented by including the Constitutional Court in the budgetary consultation process, either by enabling the Court itself to prepare a draft budget or enabling it to comment on a draft budget prepared by the competent ministry. **It is recommended that the Draft Law be amended by adding provisions that would envisage a role for the Constitutional Court in the preparation process of its budget. The legal drafters could also consider introducing guarantees excluding the possibility of disproportionate or arbitrary cuts of the Court's budget.**

27. The Kyiv Recommendations note that salaries of judges should be "*raised to an adequate level, which satisfy the needs of judges for an appropriate standard of living and adequately reflect the responsibility of their profession*". This requirement is reaffirmed by the Venice Commission, which stated that "*the level of remuneration should be*

24 See the *UN Basic Principles on the Independence of the Judiciary*.

25 See CCJE *Opinion no. 2 (2001)* to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society on the finding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European convention of human rights, paras. 5 and 10. See also ODIHR *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para. 6, June 2010.

26 See ODIHR, *Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* paras 56, 5 May 2017

determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria."[27] In addition, the level of remuneration of judges should be guaranteed by law and be "*commensurate with the dignity of their profession and the burden of their responsibilities*".[28]

28. The Draft Law offers a considerable package of social security and other benefits for judges. Having in mind that "*governments may retain the authority to design specific plans of remuneration that are appropriate to different types of courts*" and that "*a variety of schemes may equally satisfy the requirement of financial security*" of judges, it should be acknowledged that independence of judge is not impaired.[29]

29. Constitutional Court judges are paid from the State Budget. Article 15.1 of the Draft Law provides that salaries are fixed as prescribed by Article 66.9.1 of the Constitution, which states that the government approves a unified system of financing and remunerating in agreement with the President. As stated by ODIHR, referring to CCJE's views, "*all judges of the same seniority should receive the same remuneration, with the exception of any specific additional remuneration for special duties or additional burdens (e.g., night duty). […] any additional salary granted solely by virtue of a judge's sitting in the Disciplinary Chamber is not justified, because the specifics of the profession and the burden of responsibilities appear to be of equal weight for all Supreme Court judges*."[30] **With the current wording of Article 15.1, it is unclear whether equitability is ensured when deciding on the remuneration of judges. Unless already envisaged by a separate legislation, the Draft Law should be amended respectively and the legal drafters could consider safeguards guaranteeing an adequate level of remuneration commensurate to the burden of responsibilities of Constitutional Court judges.**

4. STATUS OF THE CONSTITUTIONAL COURT AND CONSTITUTIONAL JUDGES

4.1. Composition and Appointment

30. According to Article 3 of the Draft Law, the Constitutional Court consists of 11 members: the President of the Constitutional Court appointed by the President of the country, upon the consent of the Senate, four additional judges appointed by the President of the country, three appointed by the Senate and three by the *Majilis*, each upon recommendation of the chairperson of the respective chamber. The Vice-President of the Court is appointed from among the judges, upon recommendation of the President of the Court. These rules on the composition of the Constitutional Court reflect Article 71 of the Constitution.

31. Article 71 of the Constitution does not offer any further provisions related to the manner of appointment and only specifies that the regulation of organization and activities of the Constitutional Court should be regulated by constitutional law. The Draft Law does not, however, elaborate the criteria and procedure for appointment of the Constitutional Court judges. Namely, there are no rules on how the selection procedure both by the President and the Parliament is established and conducted (information on the nomination procedure, collection of nominations, control of the fulfilment of eligibility criteria, evaluation of nominees, time limits, voting, among others). The lack of clear criteria and

27 See Venice Commission, *Report on the Independence of the Judicial System*, para. 46.
28 See e.g., CoE, *Recommendation (94)12 of the Committee of Ministers of 13 October 1994 on the Independence, Efficiency and Role of Judges*, Principle III.1.b
29 See the *Commentary on Bangalore Principles on Judicial Conduct, the part on Conditions for Independence*, p. 29; see also *Magna Carta of Judges* (Fundamental Principles), para. 7
30 See ODIHR, *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland*, para. 62, 30 August 2017.

open and transparent procedure enables a potential politicization of the appointment process and may undermine the politically neutral image of the Constitutional Court.

32. A proper selection mechanism for constitutional court judges is an important safeguard for a state governed by the rule of law, providing institutional guarantees for the independence, credibility and efficiency of constitutional review. It is necessary both to ensure the independence of the judges of the Constitutional Court and to involve different state organs and political groups in the selection process so that the judges are not seen as being instruments of any one political force.[31] Therefore, the selection rules have to find an appropriate balance between the necessary independence, autonomy and impartiality of Constitutional Court judges on the one hand, and their accountability both to the law and to the principles of balance of powers on the other, especially in periods of democratic transition or democratic consolidation.[32]

33. A variety of mechanisms for judicial appointments are used across the OSCE region. Whichever format is chosen, it is generally emphasized that undue political influence over the appointment process should be avoided,[33] and that candidates are selected based on their merits and never on political considerations.[34] However, in the current setting, appointments are carried out only by the President of the country and the Parliament (both chambers), without further elaboration of the selection criteria, modalities and procedures. As a result, this may negatively affect the Court's appearance of independence as the public may perceive its composition as being influenced by political considerations, which may also undermine the Court's independence and impartiality and put at risk public confidence in the outcome of the decisions taken by such an institution. In this respect, a clear, detailed and transparent framework regulating appointment procedures to ensure a merit-based selection, helps reducing to the extent possible the risk of politicization of the process.

34. In principle, all decisions concerning the appointment and the professional career of judges, also to the highest posts within the judiciary, including constitutional court judges, should be based on merit, following pre-determined objective criteria set out in law, and open and transparent procedures.[35] Such criteria and procedures should aim at assessing the ability, integrity and experience of candidates, while ensuring that the composition of the Constitution Court is balanced in terms of gender[36] and promotes pluralism (see also Section 4.5 *infra*). The objective is to ensure that the respective selection decisions are based on merit, having regard to the qualifications, skills and capacity required to carry out constitutional adjudication.

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31 See Venice Commission, *Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court)*, paras 18 and 19; and *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary*, para. 8, noting that "*while the 'parliament-only' model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors*".

32 See Aslı Bâli, *Courts and constitutional transition: Lessons from the Turkish case*, International Journal of Constitutional Law, Volume 11, Issue 3, July 2013.

33 See 2010 CoE Recommendation CM/Rec(2010)12, para. 46; 2010 Kyiv Recommendations, para. 8; and 2007 *Venice Commission's Report on Judicial Appointments*, paras. 25 and 32.

34 See CCJE Opinion No. 10, para. 51; 2010 CoE Recommendation CM/Rec(2010)12, para. 44; and 2010 Kyiv Recommendations, para. 8. See also 2019 *ODIHR Opinion on the Appointment of Supreme Court Judges of Georgia*, paras. 26-28. See also *Beijing Statement of Principles of the Independence of the Judiciary* (1995), signed by 32 Chief Justices throughout the Asia Pacific region , Principle 12, which states that *"[t]he mode of appointment of judges […] must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed*".

35 See ODIHR-Venice Commission, *Joint Opinion on the Draft Law "on Introduction of Amendments and Changes to the Constitution" of the Kyrgyz Republic*, CDL-AD(2016)025-e, para. 52.

36 See para. 190 under Strategic Objective G.1: "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1); and *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, para. 1. See also UN Special Rapporteur on the independence of judges and lawyers, *Report on Gender and the Judiciary* (2011), para. 81.

35. In light of the foregoing, **the Draft Law should be supplemented to elaborate the selection criteria and modalities of open and transparent selection/appointment procedures, with a view to avoid undue political influence, both by the executive and the legislative power. It is recommended to use strict professional qualification criteria during the selection/appointment process, as appropriate, to assess candidates' ability, integrity and experience and ensure a merits-based selection** (see also Section 4.5 *infra* on gender and diversity in the composition)**.**

36. Finally, appointment of the President of the Constitutional Court at the sole discretion of the President of the country is problematic in terms of the actual and perceived independence of the institution. It is generally acknowledged that the election of the President of the Court by the Constitutional Court itself is preferable from the perspective of the independence of the Court.[37] **It is recommended that the appointment of the President of the Constitutional Court be carried out through the internal ballot by the Constitutional Court judges themselves. If appointment by the executive is nevertheless retained, the discretionary power of the President of the country to appoint the President of the Court should be restricted to a formal procedure of appointment.**

RECOMMENDATION A.

To specify the selection and appointment modalities of the Constitutional Court judges in order to avoid undue political influence, both by the executive and the legislative power, including by using strict professional qualification criteria during the appointment process, to assess candidates' ability, integrity and experience and ensure a merits-based selection while providing for open and transparent selection/appointment procedures; to allow the appointment of the President of the Constitutional Court through the internal ballot by the Constitutional Court judges themselves instead of the President of the country.

4.2. Term of Office

37. According to Article 6 of the Draft Law, the President and judges of the Constitutional Court are appointed for six-year terms and can be appointed for a maximum of two consecutive terms. Terms of office vary in OSCE participating States. Constitutional Court Judges may be appointed for life (or until retirement) or for fixed terms of office. However, "*limited and renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them*".[38] Six-year term provided by the Draft Law, which appears unusually short, in combination with a possibility of reappointment, undermine judges' independence when seeking another term. **Therefore, one single and longer term of office is recommended to promote and safeguard the independence of judges of the Constitutional Court**.

38. In addition, good practice provides that "*chairpersons should be appointed for a limited number of years with the option of only one renewal. In case of executive appointment, the term should be short without possibility of renewal*."[39] As recommended in para. 36 *supra*, the drafters should reconsider the appointment of the President of the Constitutional Court by the President of the country, and provide that s/he should be

37 See e.g., Venice Commission, *Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan*, CDL-AD(2008)029, para. 8; and *Opinion on the new Constitution of Hungary*, CDL-AD(2011)016, para. 94.

38 See Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, para. 76.

39 See 2010 Kyiv Recommendations, para. 15. See also *ODIHR and Venice Commission, Joint Opinion on the Constitutional Law on Judicial System and Status of Judges in Kazakhstan*, 17-18 June 2011, para. 42.

elected by his/her peers. At the same time, **it would be advisable to limit the appointment of the President of the Court to one term based on clearly defined selection procedure as mentioned above.**

39. According to Article 6.3 of the Draft Law, the President and the judges of the Constitutional Court shall be replaced within a month from the day of expiry of their term of office. However, should their term expire while they are examining a case their powers are extended until the Court renders a final decision on the case (Article 6.4). The timely replacement of judges is a precondition for a smooth operation of the Court. Conversely, the inability of the Court to carry out its duties due to the non-selection of judges may severely jeopardize its functioning and introduce a degree of legal uncertainty. The provided timeframe for the replacement of judges and the President of the Court (one month from the expiry of their term) is inadequate because of the lack of clear procedure on the modalities for selecting new judges. Moreover, having a judge remaining in office until a final decision on a case is rendered departs from the common practice where a judge with an expired mandate remains in office as long as the vacancy is unfilled. The Venice Commission has stated that institutional blockage of the Constitutional Court and its institutional stability can be ensured by extending the mandate of the judge to pursue his/her work until the formal nomination of their successor is conducted.[40]

40. In light of the above, **it is recommended that judges are permitted to remain in place upon completion of their term of office until a replacement judge has been appointed and takes office.**

RECOMMENDATION B.

To consider introducing a single, longer term of office for Constitutional Court judges, while limiting the appointment of the Court President to one term and, in order to ensure stability and uninterrupted functioning of the Court, permit a judge to remain in office upon completion of a term until a replacement judge is appointed and takes office.

4.3. Eligibility Requirements

41. Article 5 of the Draft Law lists the eligibility requirements for becoming a Constitutional Court judge. These include being a citizen of the Republic of Kazakhstan who has reached at least 40 years of age and has been permanently residing in the country for the last 10 years. While the requirement that a candidate must be a national of the state concerned is not considered discriminatory, a 10-year residency requirement could be problematic in relation to a constitutional prohibition on discrimination on the basis of place of residence under Article 14. 2 of the Constitution. In the caselaw of the ECtHR, the place of residence falls in the scope of discriminatory factors within the Convention's prohibition of discrimination in relation to "other status", which is among the list of protected characteristics.[41] The residency requirement is a particularly burdensome and discriminatory condition for nationals who have different but objective reasons to live outside of Kazakhstan. This would exclude qualified candidates, for example, scholars, legal professionals or judges (and their family members) who have carried out academic

40 See the Venice Commission, *Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia*, para. 15. See also Venice Commission, *Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings*, paras. 19 and 20.

41 See ECtHR, *Carson and Others v. the United Kingdom* [GC], Application no. 42184/05, judgment of 16 March 2010.

or professional work abroad. **It is recommended that the residency requirement for Constitutional Court judges is removed.**

42. Furthermore, eligibility requires a high legal education, and "*recognition as a highly skilled professional*", "*impeccable reputation*" and at least 15 years of experience in the legal profession. Such types of requirements are relatively common and present in different European Constitutions.[42] Nevertheless, requiring specific terms of "highly skilled professional" and "impeccable reputation" – may imply some form of subjective assessment and potentially lead to varied understanding and interpretation. The Venice Commission notes that such criteria "*not further explained by the draft Law might be difficult to ascertain with precision in practice, but is adequate*", noting that similar types of provisions also exist in other countries.[43] **It is recommended to provide for the development of guidelines or clarifications on these types of eligibility requirements to secure predictability, transparency and legal certainty of the process, and ultimately contribute to the establishment of merit-based selection for judges.**

43. A similar recommendation applies to the requirement of "*15 years of experience in the legal profession.*" In Croatia, for example, a similar requirement led to a judicial and subsequently constitutional dispute on what is considered to constitute relevant legal experience and how it may be proven.[44] It is worth noting that such a requirement should not be interpreted and/or reduced to as necessarily requiring 15 years of practice exclusively as a judge or prosecutor, thereby excluding years of other professional legal experience. This would otherwise have as a probable consequence that only career judges, prosecutors or attorneys would be able to become constitutional court judges, thereby leaving out other legal experts such as from the state or local administration, national human rights institution, civil society organizations etc. and thus running contrary to the objective of ensuring pluralism and diversity of the composition of the Constitutional Court (see para. 34 *supra*).[45] To avoid potential ambiguity, **it is recommended to regulate (by the Draft Law or other relevant legislation) the documentation constituting suitable proof for this requirement**. Moreover, **in order not to be indirectly discriminatory, it is advisable that seniority and years of professional experience continue to accrue during maternity, paternity or adoption leave, which should not be considered a break in the employment period**.[46]

44. Other ineligibility requirements may also be important to ensure the impartiality of Constitutional Court judges. For instance, the legal drafters could consider excluding candidates who at the time of nomination are active members of government or parliament, leaders of political parties, as well as officials serving in such positions in the immediate or recent past. Otherwise, such appointments may in practice jeopardize the impartiality and political neutrality of the Constitutional Court judges, or appearance thereof, when deciding on the constitutionality of legislative or executive norms.[47] **This,**

42 For instance Article 21 of the ECHR provides that *"[t]he judges [of the ECtHR] shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence"*.

43 See Venice Commission, *Opinion on the draft Constitutional Law on the Constitutional Court of Armenia*, para. 13.

44 See the *Decision of the Constitutional Court of the Republic of Croatia, U-III-443/09 (Official Gazette 65/09*).

45 See e.g., Venice Commission, *Opinion on the Two Draft Laws amending Law No. 47/1992 on the Organisation and Functioning of the Constitutional Court of Romania*, CDL-AD(2006)006, pars 16-17; and *Opinion on the Draft Constitution of Ukraine*, CDL-AD(2008)015, par 80. See e.g., Article 125 par 4 of the Constitution of Albania, which refers to "*a law degree, at least 15 years of experience as judges, prosecutors, advocates, law professors or lectors, senior employees in the public administration, with a renowned activity in the constitutional, human rights or other areas of law*"; Article 9 of the Law on the Constitutional Court of Montenegro, which refers to *"professors of legal sciences, judges, public prosecutors, lawyers, notaries, attorneys working for state authorities, state administration bodies and local self-government or local government authorities, as well as lawyers working in companies and legal entities enjoying a professional and personal reputation*"; Article 34 par 1 sub-paragraph of the *Special Act of 6 January 1989 on the Constitutional Court of Belgium* (as amended), detailing the types of professional legal experience.

46 See e.g., in relation to maternity leaves, International Labour Office, *Maternity Protection Recommendation*, 2000 (No. 191), para. 5; and *Maternity at Work – A Review of National Legislation* (2010), pp. 69-70. See also e.g., Canadian Human Rights Commission National Office, *Pregnancy & Human Rights in the Workplace - Policy and Best Practices* (2011), page 12.

47 See Article 125 para. 5 of the Constitution of Albania, which states that *"[t]he judge should not have held political posts in the public administration or leadership positions in a political party in the last past 10 years before running as a candidate*".

or similar ineligibility requirement based on holding recent political positions could be considered for inclusion if suitable in the national context.

RECOMMENDATION C.

On eligibility requirements for Constitutional Court judges:

- to remove the residency requirement for judges;
- to provide for the development of guidelines or clarifications on types of eligibility requirements to secure predictability, transparency and legal certainty of the process, and ultimately contribute to the establishment of merit-based selection for judges;
- to regulate (by the Draft Law or other relevant legislation) the documentation constituting suitable proof for legal experience requirement;
- to consider including ineligibility requirements based on holding active or recent political positions.

4.4. Incompatibilities with other Positions

45. Constitutional judges are usually not permitted to concurrently hold another office. This general rule serves to protect judges from influences potentially arising from their participation in activities in addition to those of the Constitutional Court. At times, an incompatibility between the office of a constitutional judge and another activity may not be apparent, even to the judge in question. Such conflicts of interests, real or perceived, can be prevented by way of strict incompatibility provisions.[48] At the same time, incompatibility provisions should not be too strict as to jeopardize the objective of ensuring a pluralist and diverse composition of the Constitutional Court.[49]

46. Article 23 of the Constitution prohibits the President and the judges of the Constitutional Court (as well as other high profile public officials) from membership in political parties, trade unions, or from supporting any political parties. Article 4.2 of the Draft Law provides that "*status of a judge of the Constitutional Court shall be incompatible with a deputy's mandate, membership in a political party, entrepreneurial activity, membership in a governing body or a supervisory board of a commercial organization, other paid positions, except those related to teaching, science or other creative activities.*" Contrary to the Constitution, the Draft Law does not mention the prohibition for trade union memberships. If there is an intention to amend the Constitution in line with this Draft Law, this would be welcomed.

47. In principle, judges, have a right to freedom of association, including membership in a political party, even though restrictions on this right may be justified to preserve their independence and impartiality and the appearance thereof, in particular when it is deemed necessary to maintain their political neutrality.[50] ODIHR and the Venice Commission have specifically acknowledged the possibility of imposing restrictions on the exercise of the right to freedom of association of some public officials in cases "*where forming or*

48 See the Venice Commission, *Composition of constitutional courts - Science and Technique of Democracy*, no. 20 (1997), pp.15-16.
49 See the 1997 Venice Commission's Report on *The Composition of Constitutional Courts - Science and Technique of Democracy*), which states that strict incompatibility requirements "*tend to produce a court composition of retiring members of society*", p. 16.
50 See, regarding public servants in general, ECtHR, *Ahmed and Others v. United Kingdom* (Application no. 22954/93, judgment of 2 September 1998), paras. 53 and 63.

joining an association would conflict with the public duties and/or jeopardize the political neutrality of the public officials concerned".[51] In that respect, judges' political involvement and membership in political parties may pose some issues regarding their independence, impartiality and separation of powers.[52] While there is no consensus at the international level on whether a judge has the right to be member of a political party,[53] judges should generally exert restraint in the exercise of public political activity to preserve the separation of powers and independence of the judiciary,[54] including the appearance of independence.[55] Accordingly, limitations pertaining to being a member of a political party may be acceptable,[56] especially in countries after a democratic transition.[57]

4.5. Gender and Diversity Considerations in the Selection Process

48. The legitimacy of a Constitutional Court and society's acceptance of its decisions may depend on the extent of the court's consideration of different social values and sensibilities. This may be facilitated by ensuring diversity in its composition.[58] To this end, the rules regarding the composition and selection/appointment should be designed to ensure gender balance and diversity in the Constitutional Court.[59] By reflecting the composition of society, a pluralistic composition can enhance a constitutional court's legitimacy for striking down legislation adopted by parliament as the representative of the people[60] and more generally trigger greater public trust in the impartiality of the Court.[61]

49. An independent, impartial and gender-sensitive judiciary has also a crucial role in achieving gender equality and ensuring that gender considerations are mainstreamed into the administration of justice.[62] Therefore, states should make an effort to evaluate the structure and composition of the judiciary to ensure adequate representation of women and provide necessary conditions for the advancement of gender equality within the judiciary at all levels.[63] The *OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life* calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies.*"[64]

51 See ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), para. 144.
52 See CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, para. 30.
53 See UN Special Rapporteur on the independence of judges and lawyers, *2019 Report on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors*, A/HRC/41/48, 29 April 2019 paras. 60, 64 and 109.
54 See *2019 Report of the UN Special Rapporteur on the independence of judges and lawyers*, para. 110.
55 *Ibid*. paras. 66 and 111. See also CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, paras. 27-36.
56 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), para. 147.
57 See ECtHR, *Rekvényi v. Hungary* [GC] (Application no. 25390/94, judgment of 20 May 1999).
58 See the Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, para. 112; and *The Composition of Constitutional Courts - Science and Technique of Democracy*, no. 20 (1997), CDL-STD(1997)020, p. 21.
59 See Venice Commission, *Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina*, para. 13; and *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, para. 119.
60 See e.g., Venice Commission, *Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina*, CDL-AD(2005)039, para. 3.
61 See e.g., Venice Commission, *Opinion on the Law on the High Constitutional Court of the Palestinian National Authority*, CDL-AD(2009)014, para. 48.
62 See Article 1 of CEDAW; and UN General Assembly, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on Gender and the Administration of Justice*, A/HRC/17/30, 29 April 2011, para. 45.
63 See also UN CEDAW Committee, *General Recommendation No. 23 (1997) on Political and Public Life*, para. 5; *Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women*, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), paras. 182 and 190, particularly Strategic Objective G.1. "Take measures to ensure women's equal access to and full participation in power structures and decision-making"; CoE, *Appendix to Recommendation Rec (2003)3 of the Committee of Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making*, adopted on 12 March 2003, which refers to the goal of achieving a minimum representation of 40% of women and men in political and public life, through legislative, administrative and supportive measures.
64 See OSCE Ministerial Council, Decision No. 7/09, para. 20.

50. The Constitution recognizes the equality between all citizens (Article 14). Gender-based discrimination is also prohibited through the Law on State Guarantees of Equal Rights and Equal Opportunities for Men and Women. However, as noted by the CEDAW Committee in its concluding observations on Kazakhstan, "the *legal framework on discrimination is fragmented and does not provide effective protection against discrimination in fields such as employment*".[65] There are also no provisions in the Draft Law that recognize and promote the nomination and selection of women judges to the Constitutional Court. In order to increase women's representation in the Court, **it is recommended to supplement the Draft Law with provisions ensuring that gender considerations are taken into account throughout the appointment process.** This could consist of introducing a mechanism that ensures that the relative representation of women and men on the Constitutional Court is taken into consideration during appointments, though not at the expense of the basic criterion of merit.[66]

51. The composition of the judiciary should also aim at reflecting the composition of the population as a whole, including the representation of persons with disabilities. Article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD)[67] prescribes the right to work for persons with disabilities, on an equal basis with others. This includes the right to gain a living by "*work freely chosen or accepted in a labor market and work environment that is open, inclusive and accessible to persons with disabilities"*. Persons with disabilities also have the right to participate on an equal basis in the justice system, not only as users of the system, but also as judges, prosecutors, jurors and lawyers. "Participation on an equal basis" in justice sector professions implies not only that selection and employment criteria must be non-discriminatory, but also that states are obliged to take positive measures to create an enabling environment for the realization of full and equal participation of persons with disabilities,[68] meaning that adequate conditions should be provided to facilitate the work of qualified candidates.[69] The 2020 International Principles and Guidelines on access to justice for persons with disabilities provide additional guidelines and recommendations in this respect, in particular under Principle 7.[70]

52. The Draft Law recognizes compensation for judges in the event they become disabled in the course of the fulfilment of their judicial duties (Article 16), which is welcomed. However, the Draft Law does not envisage any obligations or actions from the State to facilitating the return of these persons to their duties by creating suitable working environment.

65 See UN Committee on the Elimination of Discrimination against Women 2019, *Concluding observations* on the fifth periodic report of Kazakhstan, para. 11.

66 For example, in case of a tie between two candidates, the individual belonging to the under-represented gender within the Constitutional Court should be chosen; including provisions pertaining to the consequences of the violation of this gender balance requirement (for instance, providing that the selection of the candidates of the over-represented gender shall be annulled, see e.g., Article 75 of the French Law on Equality between Men and Women (2014); and 2013 *Report of the UN Working Group on the issue of discrimination against women in law and in practice* (A/HRC/23/50), para. 39). See also 2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges, Indicator no. I.8; See also *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, which specifically calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies*"; and 2019 ODIHR *Opinion on the Appointment of Supreme Court Judges of Georgia*), para. 49, regarding possible mechanisms. See also ODIHR and Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, Sub-Section 5.1.

67 See UN General Assembly, *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, 24 January 2007. The Republic of Kazakhstan ratified the Convention on 21 April 2015. See particularly Article 13 of the Convention, which imposes a positive duty on States to provide the necessary accommodations in order to facilitate effective role of persons with disabilities as direct and indirect participants in legal proceedings.

68 See recommended standards for judicial selection and training set forth in Part II of 2010 *Kyiv Recommendations*.

69 See Article 13 of the CRPD.

70 See the *International Principles and Guidelines on access to justice for persons with disabilities*.

53. Finally, the Draft Law is also silent in terms of the relative representation of national minorities within the Constitutional Court. As emphasized above, ensuring diversity at all levels of the judiciary, including in the highest instances, can help address lack of confidence on the part of minorities, make justice more accessible to them, promote the integration of society through participation in State institutions and build trust in the State more generally.[71] There may exist a variety of reasons preventing access to the judicial profession in a given country. In this respect, the OSCE High Commissioner on National Minorities *Graz Recommendations on Access to Justice and National Minorities* (2017) and ODIHR's publication on *Gender, Diversity and Justice* (2019) can serve as useful guidance tools to develop mechanisms and policies to ensure diversity within the Constitutional Court.[72]

54. In order to facilitate the representation of national minorities and persons with disabilities on the Constitutional Court, it is recommended **to supplement the Draft Law with provisions for ensuring that diversity is considered throughout the appointment process**.

> **RECOMMENDATION D.**
>
> To consider supplementing the Draft Law with provisions ensuring that gender and diversity considerations are taken into account throughout the appointment process.

4.6. Functional Immunity

55. Article 12.1 of the Draft Law provides that the judges of the Constitutional Court have judicial immunity during their term of office. Judges may not be detained, taken into custody, placed under house arrest, summoned, and subjected to administrative penalties imposed by the court, or prosecuted on criminal charges without the approval of the parliament, "*except when caught in the act or having committed grave or especially grave crimes*" (Article 12.1). According to Article 12.3, Constitutional Court judges shall not be subject to disciplinary liability. Article 12.4 further states that Constitutional Court judges "*may not be held liable in any way, including after the expiry of the term of office, for expressing a position while examining a case before the Constitutional Court, unless found guilty of criminal abuse of powers by an effective court ruling*".

56. In principle, the protection of judges from liability for their judicial decisions exists as an essential corollary of judicial independence and is expressed as a functional immunity for acts performed in the exercise of their judicial functions. This is essential to ensure that judges can engage in the proper exercise of their functions without their independence being compromised through fear of criminal, civil or disciplinary proceedings, including by state authorities.[73] ODIHR and the Venice Commission have previously noted that *"[t]here needs to be a balance between immunity as a means to protect the judge against pressures and abuses from state powers or individuals (e.g., abusive prosecution, frivolous, vexatious or manifestly ill-founded complaints) and the fact that the judges*

71 See e.g., OSCE High Commissioner on National Minorities (HNCM), *The Graz Recommendations on Access to Justice and National Minorities* (2017), Recommendation 5 and p. 23.

72 *Ibid.*, OSCE HCNM, *The Graz Recommendations on Access to Justice and National Minorities* (2017), pp. 25-27; and ODIHR, *Gender, Diversity and Justice: Overview and Recommendations* (2019).

73 See ODIHR-Venice Commission, *Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic* (CDL-AD(2014)018), para. 37. See also para. 85 in *Ernst v. Belgium*, ECtHR Judgment of 15 October 2003 (Application No. 33400/96), holding that barring suit against judges to ensure their independence met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued.

should not be above the law. In principle, a judge should only benefit from immunity in the exercise of lawful functions."[74] Article 12.4 provides that the functional immunity does not apply when the judge is "*found guilty of criminal abuse of powers by an effective court ruling*". In principle, a judge should only benefit from immunity in the exercise of *lawful* functions, meaning that if he or she commits a criminal offense in the exercise of his or her office (e.g., accepting bribes, corruption, traffic of influence or other similar offenses), he or she should have no immunity from criminal liability.[75] **The reference to "criminal abuse of powers" in Article 12.4, unless clearly defined in the Criminal Code, appears rather vague and should be clarified**.

57. In addition, the Draft Law gives direction to parliament to "lift immunity" and in some instances give consent to initiate an investigation against a judge (Article 12). If such a decision depends on the discretion of parliament, which also nominates some of the judges, this may expose judges to political pressure and jeopardize their independence.[76] It is generally considered preferable to have the immunity lifted by the plenary of the Constitutional Court, with the judge concerned not sitting.[77] The Draft Law may need to include safeguards for preventing or stopping an investigation or proceeding when there is no proper case for suggesting that any criminal liability exists on the part of the judge. If the unlawful act has been committed, it should only be the subject of an independent investigation. In light of the foregoing, **the process for lifting judicial immunity should be a function undertaken by the Constitutional Court itself, rather than by the Parliament. If the Parliament nevertheless retains such a competence, it is recommended to require a qualified majority by the parliament when deciding on the immunity of judges to limit to the extent possible politicization of the process.**

58. Finally, there does not seem to be any reason to totally exclude the potential disciplinary liability of Constitutional Court judges (Article 12.3 of the Draft Law). **It is recommended to the legal drafters to reconsider such exclusion, while at the same time providing that decisions on the disciplinary liability of Constitutional Court judges are adopted by the Constitutional Court itself, with the judge concerned by the procedure not sitting on the bench which takes such a decision**.[78] In any case, it is worth reiterating that rules relating to judges' discipline require (i) that there be a clear definition of the acts or omissions which constitute disciplinary offences; (ii) that the disciplinary sanctions be proportionate to the respective disciplinary offence; and (iii) that the disciplinary proceedings be of an appropriate quality.[79]

RECOMMENDATION E.

To clarify the types of criminal offences committed in the exercise of a judge's office that are not covered by the functional immunity and consider transferring the competence for lifting the immunity of Constitutional Court judges to the

74 See ODIHR and Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, paras. 37 and 41; and ODIHR *Opinion on the Law on the High Judicial Council of the Republic of Uzbekistan*, 1 October 2018, paras. 42 and 54. See also ECtHR, *Ernst v. Belgium*, Application no. 33400/96, judgment of 15 October 2003, para. 85, holding that barring suit against judges to ensure their independence met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued.

75 *Ibid.* para. 41 (2014 Joint Opinion).

76 See e.g., Venice Commission, *Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine*, CDL-AD(2013)014, para. 49

77 *Ibid.*, para. 49.

78 See Venice Commission, *The Composition of Constitutional Courts - Science and Technique of Democracy*, no. 20 (1997), CDL-STD(1997)020, p. 21; Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania*, CDL-AD(2016)009-e, para. 40.

79 See e.g., ODIHR and Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, Sub-Section 5.1.

Constitutional Court itself, rather than the Parliament, but if nevertheless retained by the Parliament, consider requiring a qualified majority decision when deciding on lifting the immunity of Constitutional Court judges.

5. Suspension and Termination of the Term of Office

59. The irremovability of judges forms a vital part of their independence. 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.[80] In this respect, Article 11.4 of the Draft Law ensures the irremovability of judges except in cases envisaged by the Draft Law. Article 9 provides instances for the suspension of judges by the Constitutional Court while Article 10 deals with the termination of office by the President of the Republic of Kazakhstan, the Senate of the Parliament or the Mazhilis of the Parliament, which appointed the Constitutional Court judge.

60. Some of the grounds are broadly worded and lack precise requirements for justified suspension or termination. For instance, it is unclear on what basis the Constitutional Court determines that a judge is unable to perform their duties due to health reasons (Article 9.1.1). Moreover, Article 9.2 does not specify the majority required for the Constitutional Court to adopt a decision to suspend a judge. In any case, it should not be at the discretion of the President of the Constitutional Court. **More precision and foreseeability of the suspension grounds and clarification about the applicable majority rules for the Constitutional Court to decide on the suspension of judges is desirable for legal certainty and for safeguarding the independence of the judges.**

61. Regarding termination, there lacks a definition on **what type of court verdict against a judge may lead to their termination of office** (Article 10.1.4) and **this should be specified**. Article 10.1.8 refers to another termination ground in case of "*judge's appointment in violation of the eligibility criteria stipulated by the Constitution and this Constitutional Law*". It is problematic to allow the President of the country or the Parliament to terminate the office of a judge due to potential errors that they, as appointing bodies, have made themselves. This may not only undermine the independence of the Constitutional Court but may also lead to questioning the legality of decisions made with participation of such (allegedly) unduly appointed judge(s) and thus should be dealt with great caution. Alternatively, the Draft Law could provide interested parties with a possibility to question the grounds for a judge's appointment but this should be done on the basis of clearly defined procedure, with an exhaustive list of those eligible to bring such appeals to the Constitutional Court and only within a reasonable (rather short) timeframe following appointment. Indeed, it would be problematic to allow for such a procedure at any moment during a Constitutional Court judge's term of office. In any case, such a matter should be considered and decided by the Constitutional Court itself, without the said judge sitting, and not by the President of the country or the Parliament. **The Draft Law should be amended accordingly**.

62. A crucial concern related to Article 10 is that one of the grounds for termination of office may be a "*violation of the Constitution and the requirements of this Constitutional Law*" (Article 10.1.9). Such a broad and vague scope of the violation implies that any type of misbehaviour by a judge could be interpreted as a violation of requirements of the Constitutional Law or the Constitution and accordingly used as a reason for the termination of office. The UN Human Rights Committee has emphasized that "*[j]udges*

80 See Venice Commission, *Report on the Independence of the Judicial System*, Part I: the Independence of Judges, paras. 39-43.

may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law".[81] Consequently, the wide discretion in interpreting the grounds for violation enables the dismissal of "disobedient judges" at any time.[82] **It is therefore recommended to delete from the Draft Law this termination ground as being potentially discretionary and unpredictable.**

63. It should be noted however that not all the termination grounds are of the same nature. Indeed, some of them are purely formal and may not even require a vote, such as the death (Article 10.1.7) or the expiry of the term of office of the Constitutional Court judge (Article 10.1.10). They should therefore be addressed separately. In addition, it is not clear what the difference is between Article 10.1.1 (a granted request for resignation) and Article 10.1.2 (a letter of resignation filed by the judge) as grounds for termination of office. It is recommended to clarify these provisions.

64. Lastly, the fact that political organs (the President of the country and the Parliament) have the powers to terminate a Constitutional Court judge's office may imply some form of political influence over the process and/or danger of pressure on the judge.[83] It is generally recommended that such powers fall within the competence of the Constitutional Court itself, with a vote by a qualified majority, or of an (independent) judicial council.[84] If such a competence is nevertheless retained by the Parliament, then a qualified majority of senators or deputies is recommended.[85] **The President's and Parliament's powers to remove judges from office should be omitted in line with the principle of separation of powers and transferred to the Constitutional Court, with decisions on removal to be adopted by qualified majority.**

RECOMMENDATION F.

To introduce more precise regulation as to the applicable majority rules for the Constitutional Court to suspend a judge coupled with clearer and more foreseeable grounds for suspension and termination; while omitting the broad reference to the *"violation of the Constitution and the requirements of this Constitutional Law"* from Article 10.1.9.

To reconsider entirely the President's and Parliament's powers to remove judges from office and transfer them to the Constitutional Court, by qualified majority.

5.1. Recusal

65. Article 11.5 of the Draft Law provides a judge with the possibility to file a motion for recusal "*provided his/her objectivity may be questioned due to his/her direct or indirect personal interest in the matter under consideration*". The final decision on a judge's recusal rests upon the Constitutional Court's evaluation, which is welcomed. At the same time, the *Commentary to the Bangalore Principles of Judicial Conduct* related to the principle on the need for disqualification from hearing observed that frequent

81 See UN Human Rights Committee, *General Comment 32, United Nations Human Rights Committee*, 9 to 27 July 2007 (CCPR/C/GC/32)
82 See e.g., ECtHR, *Volkov v. Ukraine*, January 2013, Application no. 21722/11.
83 See e.g., Venice Commission, *Opinion on the Draft Law on the Constitutional Court of Ukraine*, CDL-AD(2016)034, para. 26.
84 *Ibid.* See also e.g., *Venice Commission, Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015*, CDL-AD(2015)027, paras. 28 and 29; and *Opinion on the Law on the High Constitutional Court of the Palestinian National Authority*, CDL-AD(2009)014, para. 19.
85 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Law "On Introduction of Amendments and Changes to the Constitution" of Kyrgyz Republic*, CDL-AD(2016)025, para. 54.

disqualifications may impose unreasonable burden on a judge's colleagues.[86] Moreover, the *Bangalore Principles of Judicial Conduct* specify that "*disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case*" or if this "*could lead to a serious miscarriage of justice*",[87] for instance where the recusals would prevent the Constitutional Court to reach the quorum and thereby to adjudicate. Such caveats could be reflected in the Draft Law. Moreover, **the grounds for (self)recusal could also be better defined to also cover close family or personal connections with the parties to a case, or other circumstances which may question the impartiality of a judge.** Furthermore, the Draft Law does not foresee a possibility for participants to raise the issue of a judge's bias and reasons for recusal. **It would be advisable to include provisions on the recusal of a judge upon the motion of participants to the proceedings**.

66. Article 11.6 of the Draft Law provides that *"[a] judge of the Constitutional Court may not conduct defence or representation, other than legal representation, before a court or other state bodies*". This provision should not be interpreted as limiting Constitutional Court judges' right to a fair trial and to defend themselves in proceedings against him/her, though the Constitutional Court judges should otherwise not be allowed to act as an attorney elsewhere.

5.2. Retirement

67. The retirement age of Constitutional Court judges is not defined in the Draft Law, but it refers to the respective Law that regulates pension provisions. It is therefore understood that the retirement age of judges at the time of their appointment is determined according to such a general Law on pension. The Universal Charter of the Judge, approved by the International Association of Judges in 1999, specifically provides that *"[a]ny change to the judicial obligatory retirement age must not have retroactive effect*". Moreover, in a recent case, the ECtHR noted that "*the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement for these professions, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned. […] It concluded that the said measure gave rise to a difference in treatment on grounds of age which was not proportionate as regards the objectives pursued*."[88] **To prevent the manipulation of such provisions, the Draft Law may stipulate that any future reduction of the retirement age would not apply to existing judges without their consent.**

68. In addition to reaching a retirement age, retirement itself is also regarded as a termination of office in the form of an honorable resignation of a judge who has "*an impeccable reputation, whose length of service in the Constitutional Court is no less than the constitutional term of office, and who retains the title of judge of the Constitutional Court, guarantees of personal immunity and other financial and social guarantees set out in this Constitutional Law*" (Article 18.1 of the Draft Law). It is, however, unclear who would determine a judge's "*impeccable reputation*", a criterion that could be subjective and politicized. **It is recommended to remove this criterion from Article 18.1.**

69. Additionally, Article 18.6 envisages suspending and withdrawing benefits of a retired judge in a number of cases including the entry into force of a guilty verdict. This terminology is unclear, as it may encompass any criminal offence, including minor ones.

86 See *Principle 2.3*: "*A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases*".
87 *Bangalore Principles of Judicial Conduct* (2002), Principle 2.5.
88 See e.g., CJEU, *European Commission v. Hungary, Case C-286/12*, 6 November 2012, para. 67. See also ODIHR *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland*, paras. 112, 114, 117 120 and 136, 30 August 2017.

While the termination of all benefits may be justified in certain cases, the sanction imposed should be proportionate to the violation in the individual case.[89] **The present provision does not sufficiently detail the connection between the criminal offences leading to a guilty verdict and the sanction and should be further elaborated**. Article 18.6 also mentions "termination of citizenship" as a ground for terminating retirement benefits. Under international law, states have broad discretion in the granting and withdrawal of citizenship[90] as it is generally recognized that it is up to each state to determine who its nationals are[91] – although withdrawal is subject to certain limitations at the international level.[92] It is beyond the scope of this opinion to provide a full analysis of the compliance of the withdrawal of citizenship of the Republic of Kazakhstan with international human rights standards.

6. COMPETENCES, ORGANIZATION AND PROCEDURES OF THE COURT

6.1. Competences

70. The Constitutional amendments and Article 20 of the Draft Law increase the competences of the Constitutional Court compared to the Constitutional Council. Most notably, the Constitutional Court would be mandated to review and decide on the constitutionality of legal acts upon appeals brought by citizens, whose rights have been infringed, as well as by the Prosecutor General and the Commissioner for Human Rights. This is a welcome change, as it provides for an enhanced protection of constitutional rights of citizens, but also aims to settle human rights issues at the national level.[93] At the same time, guarantees of fundamental rights and freedoms should apply to everyone under the jurisdiction of a state, and not just to citizens.[94] **Hence, it is recommended to extend the possibility to appeal to the Constitutional Court to any individual, including foreigners and stateless persons, who are under the country's jurisdiction – though this may also require amending Article 72 of the Constitution.**

71. In addition, there are other related aspects that need to be clarified. For example, when Article 20 is read in conjunction with Article 42 of the Draft Law, it is unclear whether the Constitutional Court is authorized to decide only on the constitutionality of the norms, or on the concrete case, which was the basis of the petition. Article 42.2 provides that a complaint shall be admissible if "*the contested law or any other regulatory legal act was applied by the court in a specific case involving the person and if there is an effective*

89 See e.g., Council of Europe's Committee of Ministers, *Recommendation on Judges: Independence, Efficiency and Responsibilities*, para. 69.

90 See e.g., UN High Commissioner for Refugees (HCR), *Guidelines on Statelessness No. 1: The Definition of "Stateless Person" in Article 1 (1) of the 1954 Convention relating to the Status of Stateless Persons*, 20 February 2012, para. 48, <http://www.refworld.org/pdfid/4f4371b82.pdf>.

91 See e.g., Article 3 of the European Convention on Nationality: "1. Each State shall determine under its own law who are its nationals. 2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality".

92 The rules and principles of international law and the legal principles generally recognised in the sphere of nationality include: (i) it should be limited to cases of conduct seriously prejudicial to the vital interests of the State Party; (ii) statelessness must be avoided (see para. 48 of the 2012 UN HCR's Guidelines on Statelessness No. 1); (iii) no one may be arbitrarily deprived of their nationality (Article 15 of the Universal Declaration of Human Rights); (iv) as a punitive sanction, deprivation of nationality must be proportionate to the seriousness of the crime for which it has been imposed, and more generally, any individual decision relating to deprivation of nationality must respect the principle of proportionality; (v) deprivation must not have retrospective effect, which means that deprivation of nationality is admissible only for actions governed by a law expressly providing for it; (vi) the rules governing nationality must not contain any distinctions or include practices amounting to discrimination based on gender, religion, race, skin colour or national or ethnic origin; and must respect the principle of non-discrimination between nationals, whether they are nationals by birth or have acquired nationality subsequently; (vii) the rules governing procedure must be strictly followed, particularly those protecting the right of the person concerned to be heard, the right to a written, reasoned decision and the right to judicial review; see e.g., Venice Commission, *Opinion on the Draft Constitutional Law on "Protection of the Nation" of France*, CDL-AD(2016)006-e, para. 47.

93 See e.g., the Venice Commission *Study on individual access to constitutional justice*, paras. 3, 79 and 80. See also the Venice Commission *Opinion on the new Constitution of Hungary*, para. 97; *Amicus curiae* brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 25.

94 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic* (2021), para. 127.

court ruling on this case." It is, however, unclear whether the Court can also annul the unconstitutional court decision also in the case, when the law was found constitutional, but its implementation by the ordinary court was not.

72. Article 20.3 is in line with Article 72.1 of the Constitution, which foresees that the Constitutional Court shall "*officially interpret the standards of the Constitution*". Abstract constitutional interpretations of specific provisions of the Constitution, initiated at the request of national institutions regarding a specific constitutional issue also exist in other countries. However, an official interpretation of a norm of the Constitution can result in an authoritative interpretation of the Constitution without reference to any specific law. Furthermore, Constitutional Courts usually provide decisions on "*conflicts with other laws*" and have the benefit of hearing both sides before rendering a judgment. The risk of providing such a competence to the Constitutional Court is that it is required to render a judgment without hearing both sides of an issue. **It is advisable to reconsider this competence.**

73. As for the other competences: (1) decisions on the correctness of national level elections and referendum, (2) decisions on the constitutionality of laws, decisions and international treaties, and (3) interpretation of the constitutional norms, it is unclear as to the difference between "correctness" and "constitutionality." The correctness" is a legally undefined term and may lead to different interpretations. **To ensure legal clarity, it is recommended that the term "correctness" is replaced by "legality".**

> **RECOMMENDATION G.**
>
> To extend the right to appeal to the Constitutional Court to any individual, including foreigners and stateless people, who are under the country's jurisdiction.

6.2. Other Powers

74. According to Article 21.3 of the Draft Law, the Constitutional Court may suspend a normative legal act and execution of legal acts adopted on its basis, until the final decision of the Court, if the operation or execution thereof has resulted or may result in infringement upon human rights and freedoms or in irreversible consequences for the security of the country.

75. Granting power to the Constitutional Court to suspend the normative legal act and the execution of legal acts adopted on its basis is welcome as it enables the Constitutional Court both to prevent further possible damage and to give sufficient time to decide on the matter without pressure. However, the Draft Law reduces this power to the normative legal acts other than "constitutional law, code and law". This means that, pursuant to the Law on Legal Acts,[95] suspension may only be imposed in cases of normative decrees of Parliament, of the President, normative legal resolutions of the Government etc. **It is suggested to consider extending the possibility of suspension to all normative legal acts if the implementation could result in damages or violations which cannot be repaired once the unconstitutionality of the act challenged is established, stating though that the conditions for suspension should not be too strict and that especially for normative acts, the extent to which non-implementation itself would result in damages and violations that cannot be repaired, must be taken into account**.[96] **The Draft Law should also envisage a possibility to revisit the decision on suspension,**

95 See Article 10 of the Law on Legal Acts, <https://adilet.zan.kz/eng/docs/Z1600000480>.
96 See e.g., Venice Commission, *Study on Individual Access to Constitutional Justice*, CDL-AD(2010)039rev, para. 140.

allowing the Constitutional Court to lift it in light of new circumstances. This would contribute to greater legal certainty and strengthen mechanisms for human rights protection in the country. Of note, the wording "*if the operation of execution has resulted…in infringement"* may prejudice the final decision of the Constitutional Court. Apart from that, if the infringement has already happened, it is not entirely clear what the purpose of suspension may be. Unless a matter of translation, **it is recommended to omit the reference to the infringement having occurred from Article 21.3** while still referring to the possibility of infringement upon human rights and freedoms or other irreversible consequences.

76. In addition, the power of the Constitutional Court envisaged in Article 21.4 – to make decision drawing attention to violations of law established in the course of constitutional proceedings – falls beyond the constitutional scope of powers, and contravenes Article 1 of the Draft Law, which states that the Court *"shall abstain from establishment and investigation of issues in all cases within the competence of other courts or state bodies; and shall not be guided by political and other motives."* **Article 21.4 should be omitted.**

6.3. Powers of the President and Vice-President

77. The Draft Law attributes a scale of powers to the President of the Court (Article 24), which are similar to those granted in other countries. However, some appear to be problematic. For example, the President is entitled to allocate a case to a judge (Article 46.1) and a judge is obliged to prepare the materials for examination of the accepted application within time limit set by the President (Article 46.3). To protect judicial independence and ensure transparent and free from bias constitutional proceedings, it is important to ensure that case assignment cannot be influenced in any manner by preferences or views of the Court President and the timeline for preparing the case materials should be regulated normatively. Therefore, case allocation should be either random or organized on the basis of predetermined, clear, transparent and objective criteria,[97] taking into account the workload of judges, nature of a case, judges' specialization etc., and internal procedures defined by legislation or rules of procedure established by the Court. The general rules on allocation of cases to individual judges may also define grounds for exceptions – which should be motivated, and based on clearly defined criteria.[98] Indeed, if the court presidents have the power to influence the assignment of cases among the individual judges, this could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only certain specific cases, which may ultimately be a very effective way of influencing the outcome of the process.[99] Proper rules and procedures will render external interference more difficult.[100] **The Draft Law should introduce instead an automatic allocation of the case to a judge or the President should at least be bound by pre-determined clear, transparent and objective criteria e.g. a balanced caseload or by specialization**.[101] **More generally, the authority of the President should be precisely determined within the scope of powers to preserve the internal independence of judges.**

97 See 2010 ODIHR *Kyiv Recommendations*, para. 12. See Articles 3-4 of the 1999 *Universal Charter of the Judge*.
98 See e.g., ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia*, 3 March 2020, para. 178; and Venice Commission, *Report on the Independence of the Judicial System*, Part I: the Independence of Judges, paras. 80-81.
99 ibid. par 79 (2010 Venice Commission's Report on the Independence of the Judicial System).
100 See pages 60-61 of 2012 ODIHR *Legal Digest of International Fair Trial Rights*.
101 See ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia*, 3 March 2020, para. 180; and Section 7.4 of the Venice Commission's *Compilation on Constitutional Justice* (2020), CDL-PI(2020)004.

RECOMMENDATION H.

To introduce an automatic allocation of the case to a Constitutional Court judge or provide that the President is bound by pre-determined clear, transparent and objective criteria for allocating cases.

6.4. Constitutional Proceedings

78. The effectiveness of a Constitutional Court requires a sufficient number of judges, that the procedures are not overly complex and that the Court has the right to reject individual complaints that do not raise an issue of constitutionality.[102]

79. Article 22 of the Draft Law provides for the consideration of cases, with a quorum of two thirds of the total number of Constitutional Court judges. Articles 31 and 48 ensure transparency by holding open sessions, except for the cases involving state secrets. From the perspective of human rights protection, public proceedings are preferable at least in cases involving individual rights.[103] Open sessions also allow for the direct involvement of the parties, enables their direct contact with the judges and can accelerate the procedure The current Draft Law appears to be in line with this principle.

80. Article 22.3 foresees a possibility to decide on cases by a panel of judges. Since the constitutional complaint procedure can be initiated by individuals, it is possible that the Court will have to deal with a large number of such complaints; hence the possibility of panel discussion is welcomed.[104] However, the determination of forming such panels should not rest on possibility but rather on strict rules. Otherwise, the issue of validity of rendered decisions made by *ad hoc* panels (not established by law but by the decision of the Court) could arise.[105] In addition, the Draft Law fails to define the type of competences of such panel decisions, which may provide the possibility of arbitrary withdrawal of cases from the default plenary sessions. **Procedure for forming panels should be clearly prescribed in the Draft Law or reference should be made to other laws.**

81. Article 28 of the Draft Law recognizes the supremacy of the Constitution in the constitutional proceedings, and the Court is guided by the principle of collegiality when deciding on cases (Articles 30 and 55). The principle of collegiality implies the principle of majority voting, which the Draft Law appears to respect (Article 55.2). In case of a tie in a vote, the President's vote is decisive. The principle of collegiality entails the equality between the judges. Generally, in case of a tie, there should be a presumption of the constitutionality of the law being challenged. In addition, the Draft Law further foresees that the repeat vote is to be conducted with the participation of the President or a judge who did not participate in the first vote (Article 55.3). This appears to be redundant provided that neither the President nor the judge may have equal substantive insight in the case compared to those judges who have been part of the entire deliberation process. Moreover, there is no deadline for holding a repeat vote, which may create unnecessary delays. **Article 55.4 should be omitted.**

82. Article 56 foresees a possibility of dissenting opinions that are attached to the records of constitutional proceedings, but they are not made public. It should be noted that the

102 See e.g., Venice Commission, *The composition of constitutional courts - Science and Technique of Democracy*, no. 20 (1997), para. 22.
103 See the Venice Commission *Study on individual access to constitutional justice*, paras. 135 and 138
104 See the Venice Commission *Opinion on the Draft Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic*, paras. 15 and 16. See *Study on individual access to constitutional justice*, paras. 11, 224, 225 and 227.
105 See also Venice Commission *Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan*, para. 7.

possibility to publish dissenting opinion(s) is envisaged by the majority of constitutional courts with a few exceptions. Generally, dissenting opinions are not considered to weaken a Constitutional Court but rather have several advantages. They enable public, especially scientific, discussion of the judgments, strengthen the independence of the judges and ensure their effective participation in the review of the case in this respect. **The legal drafters could consider explicitly allowing, in Article 56, the publication of dissenting opinions together with the publication of the decision**. If this recommendation is followed, **amendment to Article 59 of the Draft Law, which outlines the content of final decisions, would also be needed.**

83. In addition, in some countries, judges are able to write concurring opinions, in which a judge agrees with the content of the majority decision, but with a different reasoning.[106] Separate opinions improve the quality of judgments, because those delivering a concurring or dissenting opinion must explain why they do not agree with the majority. It is important for the quality of judgments, and for the collegiality within the Court, for the majority to be able to react and respond to a written separate opinion and to amend the findings or the reasoning of the majority, if necessary. At the same time, "*both texts (the majority opinion and the separate opinion(s)) should be prepared at the same time […] so that the separate opinion does not appear to be a type of "rebuke" to the majority or even to a particular judge rapporteur, because of an alleged mistake they have made. It should rather be a parallel interpretation of a particular legal problem, usually concerning a conflict of values, for example why a minority would give preference to one constitutional value rather than another, preferred by the majority*."[107] **The legal drafters could consider supplementing Article 56 of the Draft Law accordingly.**

84. Article 57 provides the Constitutional Court with the opportunity to interpret its rulings by a supplementary decision. While Article 57.2.2 foresees a safeguard from not parting from the actual content of the decision, and this might be an opportunity to correct editorial errors, the wording of the Draft Law leaves room for interpretation. Such power of the Constitutional Court decreases the strength of the decision that ought to be interpreted since there is always a danger that the "spirit" of that decision changes. As a general rule, decisions of constitutional courts should be comprehensible, clear and justified by arguments[108] Any changes to it (with exception to editorial or stylistic corrections) or interpretation of the constitutional issue should only be allowed in the context of a separate constitutional appeal. However, the Draft Law fails to set the conditions for such a possibility to issue a supplementary decision that may potentially result in manipulation of the content of the original ruling, undermining the principle of legal certainty. **Such a possibility should be excluded from the Draft Law.**

85. In addition, the possibility provided in Article 58 to review an already decided ruling on the initiative of President of the country or on the Court's own initiative based on the change of constitutional norms underlying the decision or on newly emerged circumstances is problematic. First, it is important that only the Constitutional Court be able to revise its judgments if there is proof of a criminal act in adopting it. No other public authority can be authorized to do so as this compromises the independence of the Court. Second, the review of a decision in the case when the constitutional norm underlying the decision has changed is unnecessary since the decision at hand was a result of interpretation of the constitutional norm that existed at the time of interpretation and

106 See Venice Commission, *Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings*, para. 61. See also European Parliament, *Study on Dissenting opinions in the Supreme Courts of the member States*, para. 23

107 See the *Venice Commission Report on Separate Opinions of Constitutional Courts*, para. 47.

108 See the Venice Commission *Opinion on the Concept Paper for Improving the Legal Framework of the Constitutional Council of Kazakhstan*, para. 68; See the *Venice Commission Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan*, paras. 23, 24 and 25.

will not be relevant anymore because the constitutional norm ceased to exist or has been changed. Another problem is the possibility of reviewing a decision in the case of new circumstances. If this occurs, the Constitutional Court may enact a new decision within a new constitutional proceedings where adequate references to already existing decision(s) can be made, with proper reasoning justifying departing from previous decisions in light of changing circumstances.[109] **Articles 57 and 58 should be omitted altogether.**

86. The principle of legality requires that the form of the decision complies with the procedural rules. In that regard, the same process should apply to final decisions. Nevertheless, the content of final decisions (Article 59) is very complex and may in time become an obstacle in efficient execution of the Court's tasks. **Therefore, it is recommended to review the possibility to reduce the obligatory content of the decision, and to possibly generalize certain parts where possible.**

87. Article 35.1.1 foresees the termination of proceedings in case of a withdrawal of the application. Termination in such case bars the applicant to initiate the proceedings again on the same grounds. As underlined by the Venice Commission, *"[f]ollowing an application's withdrawal, the court should be able to continue to examine the case if this is in the public interest"* since *"[t]his is an expression of the autonomy of constitutional courts and their function as guardians of the constitution, even if the applicant is no longer party to the proceedings*".[110] The mere discontinuation of a case can be an insufficient means to secure human rights protection in cases of concrete review or individual complaints.[111] **In case this is necessary to protect the public interest, the Constitutional Court should be able to continue to analyze a petition, even if it is withdrawn, especially if the Court had a chance to consider the merits of the case.**

88. Further, Article 35.1.2 provides for the termination of the proceedings in case the act whose constitutionality is challenged has been annulled or lost its legal force. However, this provision fails to address situations where the infringement happened in the past and its effects remain irrespective of the annulment of the act. **The Draft Law should allow the possibility to evaluate the potentially unconstitutional effects of the annulled legal norms. Article 35.1.3 foresees the termination if the application falls beyond the jurisdiction of the Constitutional Court. However, this issue should be decided at the admissibility stage.**

89. It is legitimate to postpone the session of the Court for certain reasons, as foreseen by Article 49, which refers to lack of quorum, absence of participants, the need for requesting additional materials essential for the resolution of the application and other circumstances. However, the Draft Law does not envisage any rules or deadlines for postponement. The lack of detailed rules does not safeguard the right to a fair trial and effectiveness of the judiciary. An absence of deadlines could easily be abused to slow down proceedings and delay the handling of cases, especially in sensitive situations.[112] **Article 49 should be supplemented in this respect.**

109 See also the Venice Commission *Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova*, para. 66.

110 See the Venice Commission, *Study on Individual Access to Constitutional Justice*, para. 144

111 In its *Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia*, the Venice Commission underlined that, as an expression of their autonomy and their function as guardians of the Constitution, Constitutional Courts "should be able to continue to examine the case if this is in the public interest."

112 See Venice Commission *Opinion on the Act on the Constitutional Tribunal of Poland*, paras. 57- 58−61.

RECOMMENDATION I.

To remove Article 57, which provides the opportunity for the Constitutional Court to interpret its rulings by a supplementary decision, and Article 58 which provides the possibility to review an already decided ruling on the initiative of the President of the country or on the Court's own initiative based on the change of constitutional norms underlying the decision or on newly emerged circumstances.

6.5. Rights and Powers of the Parties to the Proceedings

90. The adversarial principle in constitutional proceedings is generally accepted in Constitutional Courts. According to the Study on the Individual Access to Constitutional Justice *"[t]he advantage of using an adversarial system in constitutional proceedings is that the court can take note of different viewpoints and consider conflicting argument; yet, this is also possible in other forms, e.g., if the parties of the original conflict as well as representatives of interest groups, experts and representatives of the executive and the legislature are given the opportunity to present their views. It should be ascertained whether the constitutional court may investigate on its own motion to determine the truth so as to have the tools that allow it to go beyond the arguments put forward by the parties.*"[113]

91. Article 39.1 gives equal procedural rights to the participants within the limits of their competences. However, the presented course of the proceedings creates an impression that dynamics of the civil and/or criminal proceedings is reasonably present in the proceedings whereas rights and obligations provided for the participants seem to go beyond common understanding of the constitutional proceedings and the role of the Constitutional Court. Namely, the participant who initiated the proceedings can change the ground of the application, extend or reduce the scope and withdraw it, while the opposite party, the participant whose acts are subjected to review, may recognize in whole or in part the claim set forth or may object them (Article 39.3). The ultimate question is, what kind of role is reserved on the side of the Constitutional Court in such proceedings, especially with a view of possible recognition of the application by the participant who issued the disputed act. On the other hand, if the party is entitled to change the scope of the application until final decision is rendered, a question remains on how this possibility will affect the collection of materials, opposite parties' arguments and involvement of other persons in the case (like expert) who also gave their arguments for something that possibly became obsolete. Thus, changing the subject or the scope of the constitutional appeal at a late stage of the constitutional proceedings may unduly prolong consideration of the case and render the court incapable to make a decision within the timeframe provided by the law. It may also take away significant time and recourses form other constitutional appeals.

92. In light of the foregoing, **it is recommended to review the scope of the right of an author of individual appeal in the process of the constitutional proceedings and set the limits with regard to the subject of the constitutional appeal. It is also suggested to remove the part of Article 39 related to the duties of the participants and rights of other persons whose presence in the proceedings is of pure professional nature in the Rules of Procedure.**

113 See the Venice Commission *Study on Individual Access to Constitutional Justice*, para. 131. See also *Opinion on the Draft Law on Constitutional Court of Tajikistan*, para. 35.

6.6. Timeline of Decisions and Transparency

93. The Draft Law prescribes a three-month deadline for a decision from the receipt of the petition, also allowing this term to be extended by the Constitutional Court for "*a reasonable period*" if a more thorough examination of a case is required (Article 50). In the light of the possible heavy caseload of the Constitutional Court, three month timeline may not be sufficient to decide on the admissibility and merits of the case and thus the court may face the need to routinely extend the deadline. It is therefore advisable to consider a more realistic timeframe, as well as specify in the Draft Law for how long the consideration of the case may be extended. The deadline could also be shortened to 10 days in the matters of urgency and if requested by the President of the country. While shorter deadlines may be necessary in certain cases, for instance, when considering claims related to elections or referenda, ratification of international treaties, or in other instances that should be clearly defined by law, it is problematic that the decision regarding the deadline is decided by the President of the country rather than by the Constitutional Court, further undermining its independence. As provided by the UN Basic Principles, *"[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*"[114] **It is recommended to introduce more realistic deadlines for deciding on the admissibility and merits of constitutional appeals. In addition, the Draft Law should be amended to provide an autonomous decision of the Constitutional Court on the urgency of a review regardless of the type of applicant, omit the privilege granted solely to the President of the country to request an urgent procedure, while considering introducing shorter deadlines in cases and circumstances that will be clearly defined by law.**

94. It is a prerequisite for the effectiveness of constitutional justice that decisions of a constitutional court be published. Article 63 provides that Court decisions are sent to the parties of the case as well as published on the Court's website and other media sources. This is an important step for transparency. However, while the Draft Law prescribes a five-day deadline for the decision to be sent to the parties, there is no deadline for the publication of the decision. It is a good practice to publish the decision once the court proceedings are finalized. It is also important that the published decision precisely reflect the conclusions reached by the Court.

95. In addition, the absence of the prescribed deadline within Article 62.1 of the Draft Law, which gives the discretion to the Court to decide on the enforcement and execution of its decision, may lead to inconsistent and subjective enforcement of the decisions. As a good practice, the legal authority regarding decisions of the Constitutional Court depend on their publication, while it is also possible that decision released by the Constitutional Court has itself legal effect even without its publication. The legal force of a court judgment cannot be dependent on whether or not that decision is published by someone other than the Court. Such control over the legal force of a judgement would egregiously violate the independence of the court and the rule of law.[115] **Courts decisions should be published and enforced without delay. Article 62.1 of the Draft Law should be revised.**

96. Additionally, the use of two languages in the constitutional proceedings requires also harmonization and redaction. It is also worth to pay attention to the volume of certain decisions which may consume more time than usual. **The five-day deadline for sending decisions of the Constitutional Court to the parties could be extended but should be**

[114] *UN Basic Principles on the Independence of the Judiciary*, Principle 1.

[115] See Venice Commission, *Rule of Law Checklist*, point II.E.1 and para. 86. See also Venice Commission *Opinion on the Act on the Constitutional Tribunal*, paras. 79-81.

done before the publication of the decision. Finally it seems a rather burdensome task to send decisions to the state bodies beside the official gazette as a public and obligatory source of information for the decisions of the Constitutional Court.

RECOMMENDATION J.

To introduce more realistic deadlines for deciding on the admissibility and merits of constitutional appeals, provide an autonomous decision of the Constitutional Court on the urgency of a review regardless of the type of applicant; and omit the privilege granted solely to the President of the country to request an urgent procedure, while considering introducing shorter deadlines in cases and circumstances that will be clearly defined by law.

RECOMMENDATION K.

To revise Article 62.1 of the Draft Law to allow for the publication and enforcement of court's decision without delay.

7. Other Remarks

97. Article 2 of the Draft Law follows the suggested hierarchy of legal provisions for the functioning of the Constitutional Court. There are a few considerations on this issue to highlight. Firstly, Article 2.1 provides that the Constitutional Court "*shall adopt the Rules of the Constitutional Court and other acts to govern issues related to organization and implementation of court's activities not regulated by the Constitution and this Constitutional Law*". Such an approach implies that Rules of the Court are independent of the Constitutional Law or even stand on an equal footing with other two legal bases regarding the activities of the Court. The Rules of the Constitutional Court should form a set of rules which closely relate or emanate from the rules established by the constitutional law and accordingly form a coherent structure of the legislation. In this respect, issues to be left to the internal rules of the Constitutional Court should be explicitly mentioned in the Draft Law, which would authorize the Court to regulate them independently, while being in strict compliance with the Constitution and the Constitutional Law. Secondly, some of the provisions of the Draft Law could potentially be regulated in the Rules of Procedure instead of the Draft Law, for example the court costs (Article 37), the rules on designation of representatives (Article 38 paras. 4, 5, 6, 7), rules on advisors (Article 66) etc. In this way, the Draft Law would be simplified for the sake of clarity and predictability of the substantive provisions.

98. The formalities with regard to filing applications are thorough and to a certain extent overly burdensome. It should be acknowledged that Constitutional Court is a state body with jurisdiction that assumes high cognition of the state of legislation in the country. For these reasons, requirements related to particularities (Article 41) appear to unnecessarily burden the formal content of the application. **It is suggested to review which parts could be simplified and this way facilitate access to the Constitutional Court**.

8. Recommendations Related to the Process Adopting the Draft Law

99. OSCE participating States have committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the*

condition for their applicability" (1990 Copenhagen Document, para. 5.8).[116] Moreover, key commitments specify that *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, para. 18.1).[117] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[118] With regard to the judiciary's involvement in legal reform affecting its work, international recommendations have stressed "*the importance of judges participating in debates concerning national judicial policy"* and legislative reform concerning their status and the functioning of the judicial system.[119]

100. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.[120] Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation.[121] To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process,*[122] meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings).

101. It is also key that proper time be allocated for the preparation and adoption of amendments. In that context, both the government and the Parliament should have sufficient time to review and evaluate the proposed Draft Law, and to take professional account of the opinions of the staff and the relevant committee, and consider the views of judicial stakeholders, civil society organizations and other experts. In principle, adequate time limits should be set prior to the actual drafting exercise, as well as for the proper verification of draft laws and legislative policy for compatibility with international human rights standards, including a gender and diversity impact assessment, at all stages of the law-making process.[123] Furthermore, given the potential substantive changes brought by the Draft Law, sufficient *vacatio legis* should be provided to allow adequate time to implement the proposed reform.

102. In light of the above, **the public authorities are encouraged to ensure that the Draft Law is subjected to transparent, inclusive, extensive and involve effective consultations, including with representatives of the judiciary, judges' and lawyers' associations, the academia, civil society organizations, offering equal opportunities for women and men to participate. According to the principles stated above, such consultations should take place in a timely manner, at all stages of the law-making process, including before Parliament. Adequate time should also be allowed for all stages of the law-making process, including discussions before the parliament. As**

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116 See *1990 OSCE Copenhagen Document*.

117 See *1991 OSCE Moscow Document*.

118 See Venice Commission, *Rule of Law Checklist*, Part II.A.5.

119 See CCJE *Opinion no. 18 (2015),* para. 31; 1998 *European Charter*, para. 1.8. See also 2010 CCJE Magna Carta of Judges, para. 9, which states that *"[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)*"; and ENCJ, *2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate*, Recommendation 5, which states that *"[j]udiciaries and judges should be involved in the necessary reforms"*.

120 *Ibid.*

121 According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"* (1 September 2016), paras 40-41.

122 See ODIHR, *Guidelines on the Protection of Human Rights Defenders (2014)*, Section II, Sub-Section G on the Right to Participate in Public Affairs, especially para. 221.

123 See 2015 *ODIHR Report on the Assessment of the Legislative Process in Georgia*, pp. 6-7.

an important element of good law-making, a consistent monitoring and evaluation system of the implementation of the Law and its impact should also be put in place that would efficiently evaluate the operation and effectiveness of the Draft Law, once adopted.[124] ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary or in other fields.

[END OF TEXT]

[124] See OECD, *International Practices on Ex Post Evaluation (2010).*