



Strasbourg, 6 June 2011

CDL(2011)053 *
Engl. only

Opinion No. 629 / 2011

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

by

Mr Konstantin VARDZELASHVILI (Substitute Member, Georgia)

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

1. Contempt of Court - article 1 par 3: the kind of liability (administrative or criminal) would be always up to the legislator to choose. The liability for the contempt can be included in the administrative or criminal legislation or in both at the same time. For instance, the sanctions for the contempt of court could include fine and even imprisonment (in some countries quite lengthy one). Thus, from my point of view, we should not be concerned if the detention is formally defined by the administrative or criminal law, it is important to analyse types and severity of the sanctions and grounds for their application. In any case I do not believe that this law must deal with such issues.

2. Art 47 para 2 states that: "Judges' remuneration shall be determined by the President of the Republic of Kazakhstan in accordance with Article 44.9) of the Constitution taking into account the status of the judge, procedure of his/her assignment and election, and also functions he/she exercises.

Although there is no strict international requirement in this regard, it would be advisable to define the scope of the remuneration by the law.

It should also be noted that Art 44.9 of the Constitution provides no guidance with regard to the scale of the remuneration.

3. According to the Article 9, para 1, sub-para 5 the Chairman of the court should "ensure measures on preventing corruption".

It is not entirely clear how the Chairman of the Court, who has no power over and is not superior to other judges, can ensure effective anti-corruption measures.

Would it be the responsibility of the Chairperson if corrupt practices of some of the judges are revealed? Will it result in disciplinary liability of the Chairperson?

4. The Venice Commission suggests that assignment procedures should also take into account the "caseload" as well as nature of the cases already assigned to the judges, as the cases may have a very different degree of complexity. Thus the random selection will not always ensure the effective assignment procedures (Opinion 588 / 2010).

5. It should also be clarified if and on what grounds the Chairperson should have a right to receive individual who happens to be a party to the case being considered by the Court? (Articles 9, 14 and 20)

From the text it seems that this is not the right but rather an obligation of the Chairperson.

It should also be clarified if this provision limits the **right** of other judges to receive individuals. In case if ordinary judge receives an individual will this be a violation of the law or "labor discipline"?

6. According to the Art 28, "the office of a judge shall be incompatible with a deputy's mandate, any paid position except teaching, research or other creative activity, business activity, or being a member of the management body or supervisory board of a commercial organization. This wording implies that judges are allowed to engage in a business activity or be a member of the management in a company. It may be a problem of the translation but the Russian version of the law seems to have similar provision.

7. Art 29-1 of the law requests medical examination of a candidate to confirm absence of the diseases interfering execution of professional duties as a judge. Para 2 of the same article further states the list of **the** diseases interfering execution of professional duties of a judge, shall be developed pursuant to the regulatory act issued **by the authorized**

government body. It would be strongly advisable to clarify in the law what diseases could obstruct the candidate from becoming judge. It is also not clear which agency will be

empowered to define the list of specific diseases which could be a reason for the disqualification of the candidate. This is especially important in the light of the Art 34, which states that existence of certain diseases (medical opinion) could become a reason for the suspension and even discharge of the judge.

8. According to the VC "...no single non-political "model" of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary". However, in some states, political involvement in the appointment procedure may endanger the neutrality of the judiciary.

According to the recommendations of the Committee of Ministers (Recommendation CM/Rec(2010)12) on the Independence, Efficiency and Responsibilities of Judges:

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.

Apart from that the Report adopted by the VC on Judicial Appointment (CDL-AD(2007)028) stipulates: "What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. As long as the President is bound by a proposal made by an independent judicial council ... the appointment by the President does not appear to be problematic.

It should be mentioned that the current law fails to meet these recommendations.

9. I believe that issues of immunity deserve a separate attention.

According to the Art 27 "A judge may not be arrested, taken into custody, subjected to administrative punishments imposed in the judicial procedure, or charged with criminal liability without the consent of the President of the Republic of Kazakhstan, based on the opinion of the Supreme Judicial Council of the Republic, and in the case stipulated by Article 55.3) of the Constitution, without the consent of the Senate of the Parliament of the Republic of Kazakhstan, except for cases of detention at the scene of the crime or the commission of a serious crime."

There are different viewpoints regarding the immunity of the Judges. The very idea of immunity may be questioned; however, the current law acknowledges the need to introduce some safeguards in this regard. It seems that higher degree of protection is offered in case if judge is charged with relatively minor offence and no protection is offered if he/she allegedly commits a "serious crime".

If the need for immunity is acknowledged, I believe it should be offered in all circumstances, probably with exception of the minor administrative offence (misdemeanour), such as violation of the traffic rules, etc., which seems not to be the case according to the current law.

The definition of the serious crime may also raise some concerns.

10. I would also suggest removing the sub-para 3 of the Para 1 of Art 39 according to which the judge may be subject to the disciplinary proceeding for the gross violation of the "labor discipline". It is not entirely clear what is implied under the "labor discipline". Who defines the principles of the labor discipline and where should they be found?