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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF KAZAKHSTAN

DRAFT OPINION

ON THE DRAFT CODE OF JUDICIAL ETHIC

on the basis of comments by

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I. Introduction

1. On 20 January 2016 the President of the Supreme Court of the Republic of Kazakhstan, Mr K. Mami, requested an opinion of the Venice Commission on the Draft Code of Judicial Ethics of Kazakhstan (hereinafter – "the Draft Code"). The Venice Commission was informed that the Draft Code had been prepared by the Union of Judges of Kazakhstan with the view to its intended adoption at the Conference of Judges of Kazakhstan in October 2016. The new Draft Code is to replace the existing Code of Ethics, adopted by the Union of Judges in 2009.

2. A working group was set up, composed of Ms C. Bazy-Malaurie, Mr N. Esanu and Mr J. Hirschfeldt. On 4 and 5 April 2016 the rapporteurs visited Astana and met with the Union of Judges, relevant State institutions, and with representatives of the expert community. The delegation is grateful to the Supreme Court of Kazakhstan for the excellent organisation of the visit and very useful exchanges it had in Astana.

3. This Opinion is based on the English translation of the Draft Code provided by the Kazakh authorities. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

4. *This opinion was adopted by the Venice Commission at its … Plenary Session (…).*

II. The Draft Code and the questions of disciplinary liability of judges

5. The first question to be discussed is the relevance of the Draft Code for the disciplinary procedures and sanctions which may be applied to judges in Kazakhstan. The request by the Kazakh authorities concerned only the provisions of the Draft Code. However, as it will be shown below, those provisions cannot be examined separately from the provisions of the Constitutional Law on the system of courts and the status of judges of 2000 (hereinafter the "Constitutional Law"),[1] which *inter alia* regulates the disciplinary liability of the judges. Therefore, in commenting on the Draft Code the Venice Commission will inevitably touch upon relevant provisions of the Constitutional Law.

A. Judicial ethics and disciplinary liability of judges – approach of the Venice Commission

6. In many European countries ethical codes are self-regulatory instruments generated by the judiciary itself and quite distinct from disciplinary rules (for example, in Italy, France, Estonia, Lithuania, Ukraine, Republic of Moldova, Slovenia, the Czech Republic and Slovakia).[2] In its two opinions on the codes of the judicial ethics of Tajikistan and Kyrgyzstan, the Venice Commission expressed preference for a code of ethics which has only the force of a recommendation, not a binding document applicable directly in the disciplinary proceedings. The Venice Commission stressed that *"[…] a code of ethics should not be directly applied as a ground for […] disciplinary sanctions.[…].The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for disciplinary procedure has grave potential implications for judicial independence."*[3]

7. That being said, the Venice Commission is aware that the distinction between discipline and professional ethics is not watertight. The same type of behaviour, depending on its gravity and

[1] A "constitutional law" in the legal tradition of Kazakhstan refers to a piece of legislation which does not amend the Constitution but develops some of its provisions. Such "constitutional laws" are adopted under a special procedure and have higher legal force than ordinary laws.

[2] See Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, pp. 41 et seq.; https://wcd.coe.int/ViewDoc.jsp?p=&id=1046405&Site=COE&direct=true

[3] CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§15 and 16; see also CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §§25-27.

effects, may result in a simple reprimand by a body on the matters of ethics representing the judicial community, or in a more serious sanction imposed by a competent disciplinary body.

8. The Venice Commission thus acknowledged that codes of conduct for judges adopted by the professional associations of judges "may give guidance to disciplinary authorities for their decisions in disciplinary matters".[4] It observed that "there will always be a certain interplay between the principles of ethical conduct and those of disciplinary regulations. In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice." [5] Thus, the Venice Commission is in favour of enumerating *in the law* an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague.

B. Short outline of the current regulations

9. Disciplinary proceedings against judges in Kazakhstan are conducted by a body created by virtue of Article 38-1 of the Constitutional Law: the Disciplinary Commission (hereinafter – the "Disciplinary Commission").

10. Under Article 39 p. 1 § 2 of the Constitutional Law, a judge may be brought to disciplinary liability by the Disciplinary Commission if s/he acted in breach of the Constitutional Law or contrary to the code of judicial ethics, which resulted in damaging the authority of the judiciary and the reputation of the (a) judge. Article 39 p. 1 § 3 (2) further provides that a judge may be brought to the disciplinary liability for having committed a "disreputable offence contrary to the judicial ethics".

11. However, the Constitutional Law does not develop the notion of "disreputable offence". What may be considered "disreputable" for a judge is, in practice, specified by the Code of Ethics, adopted by the Union of Judges. The Union is not a State authority but a private-law entity: according to its Statute, the Union is defined as a non-commercial public association (p.1.1 of the Statute), which is registered as a legal entity by the Ministry of Justice (p. 1.4 of the Statute). Each regional branch of the Union creates an Ethics Commission which examines complaints about the judges' behaviour. The first question to be addressed in the present opinion is what force the Code of Ethics has in the proceedings before the Disciplinary Commission, and what is the relationship between the Ethics Commission (a body of the Union of Judges) and the Disciplinary Commission (a disciplinary body established by the Constitutional Law).

C. The Draft Code as the only source of ethical standards

12. The Code of Ethics is repeatedly mentioned both in the Constitutional Law and in the Statute of the Union of Judges of Kazakhstan.[6] The Statute refers to the Code of Ethics several times, without, however, explaining who adopts the Code. Similarly, the Constitutional Law refers to the Code in Article 30 § 1 and Article 39 § 1, but, again, there is no indication as to which body adopts it. In addition, the Constitutional Law occasionally refers to "ethical norms" the judges must follow,[7] but does not explain whether those "norms" are fixed exclusively by the Code of Ethics or there may be other sources containing ethical standards. The question is whether the ethical standards for judges may be set not only in the Code of Ethics but elsewhere.

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[4] CDL-AD(2015)018, Report on the Freedom of expression of Judges, §23

[5] CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §31; see also CDL-AD(2014)006, Joint Opinion of the Venice Commission, the OSCE/ODIHR, and of the Directorate of Human Rights of the Council of Europe on the draft Law on disciplinary liability of Judges of the Republic of Moldova, §15

[6] A copy of the Statute in Russian has been provided by the Kazakh authorities

[7] See Article 9 p. 1 (5), Article 14 p. 1 (4), Article 20 p. 1 (6-1), Article 28 p. 1 (2), Article 31 p. 2 (2), Article 39 p. 1 (2), and Article 55-1 of the Constitutional Law

13. Although the Union of Judges is not a State institution *stricto sensu*, it is not similar to other professional associations in that it is specifically mentioned in the Constitutional Law. Thus, Article 37 of the Constitutional Law speaks of the "bodies of judicial community". This provision does not refer directly to the Union of Judges as the *only* association competent to represent the interests of judges; neither does the law describe the composition and functions of such bodies. The membership in the Union is voluntary (p. 3.2 of the Statute). Therefore, in theory nothing prevents the judges from forming other associations to defend their interests and develop ethical standards.

14. However, in practice, since its creation in the early 1990s, the Union has been the *only* public association representing the interests of the judicial community as a whole.[8] One may therefore assume that, as a matter of legal tradition, the Union of Judges is the "body of the judicial community" to which Article 37 of the Constitutional Law refers. It also appears that the Code of Ethics remains the *only* collection of ethical norms governing the behaviour of judges in Kazakhstan, and that, according to the prevailing interpretation of the Constitutional Law by the legal professionals in the country, the provisions of the Code should be followed not only by the members of the Union, but by other judges as well. In such conditions practical application of Article 39 p. 1 §3 (2) should not raise any difficulty.

15. That being said, the Constitutional Law does not explicitly exclude the existence of other organisations representing judges, which might develop their own standards of ethical behaviour. The Venice Commission recalls that a draft to Article 39 of the Constitutional Law has already been commented by the Venice Commission in an earlier opinion on Kazakhstan.[9] In that opinion the Venice Commission recommended as follows:

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

16. This recommendation is still valid now. In order to avoid any conflicting interpretations of Article 39 p. 1 § 3 (2) in future, it is advisable to align the Constitutional Law with the *de facto* situation and specify that ethical standards are set solely by the Code of Ethics which is adopted by the Union of Judges and which is applicable to all judges.[10]

D. To what extent a breach of the Code of Ethics may lead to a disciplinary liability of a judge?

1. Using the Draft Code in the proceedings before the Ethics Commission of the Union of Judges

17. Under Article 6 of the Draft Code, a "violation of ethical principles and rules of conduct" may be "established only by a decision of the authorized body of the judiciary". As it has been explained to the rapporteurs, the "authorised body" is one of the regional Ethics Commissions. According to the Statute on the Ethics Commissions of 5 February 2010,[11] an Ethics Commission may either limit itself to simply discussing the judge's behaviour, or issue a "public reprimand".

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[8] According to the information received by the delegates of the Venice Commission during the visit, over 95% of all sitting and retired judges are members of the Union. Furthermore, at least once the Constitutional Law mentions Union explicitly (see Article 16-1).

[9] CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §§60 – 67

[10] This is not the only possible way of setting ethical standards for the judiciary. The currently existing mechanism is an acceptable solution; however, it must be more clearly described in the Constitutional Law.

[11] Provided by the Kazakh authorities in Russian

18. In the opinion of the Venice Commission, in cases of *less serious* breaches of judicial ethics, it is legitimate for the Ethics Commissions to rely on the standards developed by the Union in the Code, provided that conclusions of the Ethics Commission do not go beyond a reprimand or other similar "soft" sanctions imposed as a result of the "peer review" of the actions of the judge concerned.

19. However, it appears that the applicability of the Code does not stop there. During the visit to Astana the rapporteurs of the Venice Commission understood that the provisions of the Code may also be relied upon in the disciplinary proceedings. This dimension of the Code deserves particular attention.

2. Using the Draft Code in the proceedings before the Disciplinary Commission

20. Article 7 of the Draft Code stipulates that the Ethics Commission may "raise an issue of bringing the judges to disciplinary liability" for "gross violation" of ethical standards. Apparently, "raising an issue" means transferring the case from the Ethics Commission to the Disciplinary Commission.

21. The Draft Code itself defines the rules set by it as "mandatory" (see Article 3). It thus appears that the Draft Code will have relevance in the disciplinary proceedings against judges, and a breach of every provision of the Code might lead to a real disciplinary sanction.[12]

22. In its opinion on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine the Venice Commission observed as follows:[13]

> *"According to Article 92(1)3 the disciplinary liability may also arise in case of 'systemic or gross violation of judicial ethics rules that determine the authority of justice'. […] [I]n this clause it is unclear whether reference is made to an existing Code of Ethics or to general, unwritten rules. In a number of opinions, the Venice Commission has criticised the general penalisation of breaches of codes of ethics as too general and vague and insisted that much more precise provisions are needed where disciplinary liability is to be imposed."*

23. This analysis is well-beseeming *in casu*. Article 39 p. 1 § 3 (2) of the Constitutional Law allows punishing a judge for unethical behavior, but it does not develop the concept of judicial ethics in more detail. Instead the Constitutional Law relegates the detailed description of the ethical standards to the Code (see the analysis above). The Venice Commission considers that such method of regulating disciplinary liability is, in the circumstances, inappropriate.

24. The Venice Commission recalls that the rules on disciplinary liability have direct effect on the independence of the judges. Vague provisions (such as the "breach of oath" or "unethical behavior") increase the risk of their overbroad interpretation and abuse, which may be dangerous for the independence of the judges. This is why the Venice Commission has always been in favor of a more specific definition of disciplinary offences in the legislation itself.[14] "The

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[12] This reading of the Constitutional Law and the Draft Code is confirmed by a program document proposed by President Nazarbayev, entitled "The Nation Plan of 100 Steps'". As it has been explained to the rapporteurs in Astana, the adoption of the Nation Plan triggered the development of the new Code of Ethics. Indeed, p. 19 of the Plan provides that the new Code of Ethics will be used in the proceedings before the Judicial Jury.

[13] CDL-AD(2015)007, Join opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law, §50

[14] "[…] In general, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague, is a good practice/approach in conformity with international standards" (CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §15). See also CDL-AD(2014)018, cited above, § 24, and CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §90

obligation to typify disciplinary offences on the level of the law [emphasis added] also stems from the judgment *Oleksandr Volkov v. Ukraine* of the European Court of Human Rights".[15]

25. At the same time, it is not realistic to expect that the legislation would be capable of giving a very precise and exhaustive definition of unethical behavior. The Venice Commission agrees with the CCJE which noted, with reference to the situation in the European countries, that all national regulations ultimately have to "resort to general 'catch-all' formulations which raise questions of judgment and degree. […] [It is not] necessary […] or even possible to seek to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings and sanctions."[16] That being said, in the case at hand it is evident that, taken alone, Article 39 p. 1 § 3 (2) is too vague to serve as a legal basis for bringing the judges to disciplinary liability.

26. The Venice Commission believes that it is inappropriate to allow the Union of Judges – an association which has limited democratic legitimacy, no accountability before the general public, and which is likely to pursue essentially the interests of the judicial profession – to regulate nearly all aspects of the judge's behavior at work and in private life, given that this instrument may eventually be applied in disciplinary proceedings as a binding set of norms. The Constitutional Law sets virtually no limits for the Code: as it will be shown below, it does not prevent the Code from regulating private life of judges, their professional performance and their civil rights. It is not clear to what extent the provisions of the Code are susceptible to a judicial review and whether the judges may contest those provisions.

27. In sum, the Venice Commission believes that the types of unethical behavior which may lead to a disciplinary liability should be described in sufficient detail *in the Constitutional Law itself*. Naturally, it belongs to the Kazakh authorities to decide how precise the definition of unethical behavior in the law should be. There are multiple techniques which may help specifying the inevitable "catch-all" formulations of the law in the subordinate legislation or in the case-law of the disciplinary bodies. Thus, a more general statement may be illustrated with certain specific examples of the most common examples of unethical behavior. Furthermore, regular publication of the decisions of the Disciplinary Commission may help understanding the legislative provisions. Finally, the Code of Ethics may serve as a *supplementary tool* of interpretation of the law. However, the Code should not be used as the *one and only* instrument regulating the disciplinary liability of the judges – it should be, at the best, a subsidiary mean of interpretation of the legislative provisions.

28. Finally, the Constitutional Law should reflect the principle of proportionality. Most importantly, the law should make it clear that a judge may be brought to disciplinary liability only for "gross violations" of ethical standards. While Article 7 of the Draft Code stipulates that disciplinary proceedings may only be triggered in the cases of "gross violations", Article 39 of the Constitutional Law does not make this distinction. This creates an impression that *any* violation of ethical standards may lead to a disciplinary liability of a judge under the law. This is wrong: discipline takes the floor only when ethical recommendations have been *repeatedly* or *seriously* infringed, and the fault of the judge must be *gross and inexcusable* (done or omitted intentionally or with gross negligence) to entail serious disciplinary sanctions, such as the removal from office.[17] The text of the Constitutional Law should be coordinated with the correct

[15] CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §55

[16] Consultative Council of European Judges (CCJE), Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, p. 63

[17] See p. 25 in the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: "Disciplinary proceedings against a judge shall deal with alleged instances of professional misconduct that are gross and inexcusable and that bring the judiciary into disrepute." See also CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§42: "As concerns 'removal from office' [it] should be reserved to most serious cases or cases of repetition. It could also be applied in cases of incapacity or behaviour that renders judges unfit to discharge their duties."

provision of the Draft Code: a disciplinary liability should only be applied by the Disciplinary Commissions only in cases of *serious* and *flagrant* misbehaviour by the judge, and the gravity of the disciplinary sanction should be proportionate to the seriousness of the misbehaviour.

E. Opinion of the Ethics Commissions as a pre-condition for disciplinary proceedings

29. During the visit to Astana the rapporteurs have learnt that, as a matter of practice, the Disciplinary Commission never decides on bringing judges to disciplinary liability for unethical behavior without first obtaining an opinion of the competent Ethics Commission.

30. This *modus operandi* does not clearly follow from the law. The Venice Commission is not aware of any legal provision which would prevent the Disciplinary Commission from proceeding with the case without obtaining an opinion of the Ethics Commission. This should be made clearer: the Constitutional Law must specify to what extent the examination of the case by the Ethics Commission is a pre-condition for any disciplinary proceedings under Article 39 of the Constitutional Law.

31. Furthermore, the Constitutional Law should specify whether the opinions of the Ethics Commissions are binding on the Disciplinary Commission. In other words, is it possible to bring the judge to disciplinary liability if the Ethics Commission did not establish any serious breach of ethical rules by that judge and refused to bring the case to the attention of the Disciplinary Commission? The Venice Commission recommends solving this matter in the Constitutional Law.

32. As a general remark, the Venice Commission notes that both the Ethics Commissions and the Disciplinary Commission seem to be composed solely of judges. This may give an impression that the question of disciplinary liability is decided within the judicial corporation by bodies which have no external elements and no links to the democratically elected bodies or the broader legal community. The Venice Commission often warned against the risks of corporatism;[18] however, it is not its task to assess the composition of the Disciplinary Commission, so, for the purposes of the present opinion, this issue may be left open.

III. Analysis of the specific provisions of the Draft Code

33. On the whole, the Draft Code is well conceived and internally coherent. The very idea of codification of ethical rules is praiseworthy. As mentioned before, the development of the new Code is apparently inspired by a large-scale institutional reform (called “The Nation Plan of 100 steps’”), proposed by President Nazarbayev.

34. As the rapporteurs learnt in Astana, the Draft Code had been prepared on the basis of various international instruments which set ethical standards for judges in their professional and private life. Furthermore, such international instruments, as follows from Article 4 of the Draft Code, may be directly applicable in cases where an issue is not regulated by the Draft Code. This is commendable. It reflects the intention of the authors of the Draft Code to ensure that the judiciary in Kazakhstan is in line with the highest international standards. In the opinion of the Venice Commission, relevant international standards should be applicable not only to fill in *lacuna* in the domestic regulations, but also as an additional authority applicable together with the Constitutional Law and the Code.

[18] See, for example, CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §9

35. That being said, although the idea of codification is commendable, some of the provisions of the Draft Code seem to go too far in regulating the judges' professional conduct, their behaviour in public and in private. This presents a certain risk for the judicial independence and even for the judges' rights and freedoms – especially given that the breach of those provisions may serve as a ground for disciplinary liability. The following analysis, while not being comprehensive, will highlight the most problematic provisions of the Code.

A. Structure and language of the Draft Code

36. The Draft Code contains a preamble and five chapters. There are no explanatory notes. There is always a need to find good balance between clarity of written ethical rules and the space for certain discretion in the assessment of individual cases. The technic of explanatory notes or commentaries could here be a useful tool giving specific examples to flesh out more general rules and principles.

37. The Draft Code often uses quasi-synonymic expressions in the same phrase: "morality" and "ethics" in Article 4, "behaviour" and "action" in Article 5. It appears that this is done for stylistic purposes only. If these terms are semantically identical, it would be better to choose one term and use it consistently throughout the text.

38. Two terms used by the Draft Code are particularly unclear: thus, Articles 6 and 7 speak of "ethical principles" and "rules of conduct", as if they were two different classes of norms. In the Draft Code "principles" and "rules of conduct" are put in different chapters – thus, Chapter II is entitled "Ethical principles of Judicial Conduct", the title of Chapter III is "Ethical rules of conduct for judges in the performance of professional duties" and the Chapter IV has the title "Ethical rules for judges' behaviour in their family and in everyday life".[19] However, it is difficult to see any difference between the norms formulated in Chapters II and III, for example – their language and their level of precision are very similar. Is there any hierarchy between "principles" and "rules of conduct"? Are "principles" more important for the disciplinary liability than "rules of conduct"? All of the "principles" formulated in Chapter I relate to the professional duties of the judge; does it mean that there are no principles applicable to conduct of the judge in the private sphere (to which Chapter IV is dedicated)? It is particularly important to know the answers to these questions, since Article 39 of the Constitutional Law does not make any distinction between different types of ethical norms. Probably, there is no real need to distinguish between "principles" and "rules of conduct", and the chapters may simply follow the logic of the text (rules of professional behaviour, limitations on civil and political rights, behaviour in private context, etc.).

39. Finally, for some reason, the terms used in the Code are explained in Article 8. It would be more logical to place these explanations in the beginning. It is also necessary to analyse if all the terms deserve to be defined in the Draft Code. Are the terms "judge" and "wife (husband)", for example, used in the Draft Code, have a meaning different from the other normative texts?

B. Application of the Draft Code to former judges

40. Article 3 of the Draft Code provides that "principles and rules established by the Code are mandatory for all judges […], as well as for the judges who are in retirement".

41. First, when it is the Union of Judges and not the legislator that decides on ethical standards, it seems preferable to use a wording that would reflect that those standards are recommendations rather than "mandatory" legal rules (cf. paragraph 21 above).

[19] Another question is the difference between "conduct" and "behaviour"; in the subsequent analysis we would presume that these words are used essentially as synonyms, since in the Russian text both titles use the same term (*правила поведения*).

42. Second, as to the retired judges, their behaviour may affect the image of the judiciary and may, at least to some extent, be regulated by the Code. However, the requirements for a retired judge cannot be the same as for an active judge, and this should be properly reflected in the Draft Code. For example, the involvement in the public life is probably one of the areas where drastic limitations which may be justified for the serving judges are not necessary in respect of former judges. The Venice Commission reiterates its position expressed in the opinion of the code of judicial ethics of Tajikistan, cited above (§41):

> *"There are a number of restrictions imposed by this draft Code (including relations with the media, political activities, legal practice, limits related to acceptable remuneration, etc.), which should logically not be applicable to individuals after they retire from judgeship."*

C. Procedures before the Ethics Commission

43. There are two types of procedures provided for by the Draft Code. Within the first type a judge him/herself turns to the Ethics Commission for an advice about how to behave in future (Article 5). Another procedure is where the Ethics Commission, at the request of a third party, conducts an *ex post facto* examination of the behaviour of a judge in a specific situation (Article 6).

44. The very idea that a judge may turn to the Ethics Commission for a preliminary advice is praiseworthy. For example, certain State institutions in France appoint nowadays a "déontologue" - a person who may give advice about how to behave in certain situations. But such officer (or a collective body) should be completely separate from a disciplinary body, which is not the case under the Draft Code.[20]

45. Even more so, advices given under Article 5 of the Draft Code are "mandatory for execution", and this is very problematic. It is very difficult to assess ethical appropriateness of somebody's behaviour *in abstracto*, without taking in consideration particular circumstances of a given case. Therefore, advices given to the judge under Article 5 should have only the force of guidelines, recommendations, etc.

46. As regards the *ex post facto* examination of complaints about the judge's behaviour (Article 6), it seems that such procedure may be triggered by any citizen or organization and by any government agency, even by those which are not affected in any way by the judge's behaviour. If this is a correct understanding, it may open the door to an excessive number of procedures, which may have a chilling effect on the judges and may overburden the Ethics Commissions. It is thus recommended to provide that only persons who have an interest in the case may introduce such a complaint.

47. The Venice Commission expresses its concern with the power of the presidents of the courts to introduce such requests before the Ethics Commission.[21] In many post-soviet countries the presidents of the courts retain excessively strong influence on the carrier of judges, which is detrimental to the internal judicial independence. The Venice Commission thus recommends removing from the Draft Code the power of the presidents to trigger proceedings before the Ethics Commission. Equally, the Venice Commission has previously warned against provisions giving the Minister of Justice the right to initiate disciplinary proceedings against judges.[22]

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[20] See the above-cited opinion on Tajikistan, CDL-AD(2013)035, §46.

[21] See CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17.

[22] See CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §68).

48. The Venice Commission also recommends excluding the possibility for the Ethics Commission to start the examination of the case on its own initiative, since it may raise serious doubts as to its impartiality during the ensuing consideration of it. A possible solution would be to give the right to bring proceedings to interested persons and to any member of the Ethics Commission, who in this case should not sit on a panel deciding on the issue.

49. The provision of the Draft Code in Article 7 that the issue of disciplinary responsibility of judges for violation of ethical standards may be raised only "in cases provided by law" and only for "gross violations" of ethical standards, must be welcomed. However, the uncertainty remains as to whether a decision of the Ethics Commission is mandatory in those cases where the disciplinary case is also initiated on "ethical grounds". Is it possible for an aggrieved person to go to the Disciplinary Commission directly, without first obtaining an opinion of the Ethics Commission? The Constitutional Law is silent on this point. The Venice Commission thus reiterates its recommendation to explain *in the law* the role which the proceedings under the Code play within the disciplinary proceedings before the Disciplinary Commission under Article 39 p. 1 § 3 (2) of the Constitutional Law.

D. Rules of professional behaviour contained in the Draft Code

50. Articles 9 – 21 regulate the behaviour of judges in the professional context.[23] The Venice Commission observes that in this part the Draft Code reproduces certain basic principles of fair trial. Thus, Article 9 proclaims that the judge should base his/her conclusions solely "on the evidence and data verified at the court hearing",[24] while Article 10 requires the judge to "ensure the principle of equality before the courts and the law".

51. In principle, such rules are more suitable for a procedural code than a code of ethics: a *serious* breach of the principle of equality of arms should normally lead to the quashing of a judgement on appeal. On the other hand, similar approach (reaffirming certain basic principles of fair trial in a code of ethics) may be found in some other countries.[25] Probably, it is a question of degree and nature of the breach: the Draft Code is intended to regulate only such inequality in treatment of the parties which, albeit regrettable, does not affect the validity of the judgment.

52. The Venice Commission recalls in this respect that in its opinion on the code of judicial ethics of Tajikistan, cited above, it often referred to the "appearances" (see §§6, 48, 53, 54, 55, and 68). Probably, the focus of any ethical code should be not so much on the actual breaches of procedural rules, but on the "appearances", on the image which a judge may leave on the parties and on the general public.

53. The Venice Commission admits that *manifest, gross and deliberate* disregard of procedural rights of one of the parties which resulted in a denial of justice may exceptionally lead to a disciplinary liability. That being said, the Venice Commission always warned the States from disciplining judges for errors of law or of fact – see the previous opinion on Kazakhstan.[26] If these provisions are to remain in the Code as "ethical obligations", and if they may ultimately lead to the disciplinary liability, the Code should make it clear that procedural errors are to be corrected primarily through the system of appeals, and not through disciplinary liability. It is only when a judge has roughly and systematically infringed his/her own competence – in such a way that his/her decision cannot be considered as a judicial act – that such procedural errors can be considered as a ground for a disciplinary sanction.[27]

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[23] These Articles are contained in two Chapters – one is entitled "Principles" and another is "Ethical rules of judges' behaviour …"

[24] By itself this requirement is not entirely exact: a judge may also rely on the facts established in other court proceeding, or on the commonly known facts which do not need to be formally verified in the hearing.

[25] See, for example, the Ethical principles for Norwegian judges, adopted in 2010, http://www.coe.int/t/dghl/cooperation/CCJE/cooperation/Ethical%20_principles_Norwegian_judges.pdf

[26] Joint Opinion by the Venice Commission and OSCE/ODIHR, CDL-AD(2011)012, §60.

[27] See also the OSCE Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus and Central Asia, p. 25; http://www.osce.org/odihr/KyivRec?download=true

54. The provision in Article 9 p. 3 reads as follows: "public discussion of the activities of judges, criticisms against him/her, no matter where they come from, shall not affect the [lawfulness and substantive reasonableness] of the court decision on the case [under consideration]". Indeed, the judge should be able to withstand pressure by the public opinion or the media. However, this norm should not be interpreted as regulating behaviour of the public or the media – the Code may only regulate the behaviour of the judges themselves. And, *a fortiori*, this norm should not be seen as limiting the public discussion about the pending cases. The Venice Commission recommends reformulating this provision in order to make it clear.

55. The obligation to report on the facts of illegal interference in judicial activity (Article 9 p. 4) is not only an ethical norm but should be regarded as a legal obligation. The "illegal interference" and "direct or indirect pressure" on a judge is a *crime* and must be reported to the prosecuting authorities in all cases. Moreover, the judge should report to the competent authorities even in cases where there is only an *appearance* of "interference" or "pressure" and let them decide whether there is a case to answer.

56. As regards Article 9 p. 5, it was explained to the rapporteurs that this provision speaks of internal meetings within a court, usually called at the initiative of the president,[28] where particular decisions of a specific judge may be discussed. Indeed, fellow-judges should only criticise decisions of their colleagues with caution, in order to maintain constructive and friendly working atmosphere.[29] It would be wrong to ban such discussions completely; however, even where a particular judicial decision has been quashed by a higher court, it should not be the reason to call a meeting in order to chastise the judge concerned before his/her colleagues.

57. As regards Article 10, the Venice Commission repeats that the choice to state the principle of equality and non-discrimination as an ethical principle is questionable (even if it can be found in the Bangalore principles and some other ethical codes). To treat the parties without discrimination is, first of all, a legal obligation of the judge. Furthermore, it is unclear why, when speaking of discrimination, the authors of the Draft Code preferred a closed list of the grounds for distinction which are considered as discriminatory. This provision should be redrafted in order to provide expressly that discrimination is not accepted on any ground.

58. Article 11 establishes the duty of a judge to inform competent authorities about attempts to bribe him/her. Again, this should be a *legal obligation*, not only a moral duty. Failure to report about such "offers" should entail legal liability (disciplinary and even criminal), even if the judge has ultimately refused the offer. As to the gifts "in connection with his/her professional activities, not related to the administration of justice", it is not clear what it means. Indeed, there should be a limit to the maximum amount of gifts a judge may receive, for example, from his colleagues, from the academic institutions, etc. (i.e. arguably the gifts "in relation to professional activities"). Gifts which are "related to the administration of justice" are, in essence, bribes, and should be prohibited outright. But even private gifts (i.e. not related to the administration of justice) may be regulated by the ethical rules - especially when they do not come from very close relatives or friends. Even when a person making an expensive gift has no intention to corrupt the judge, such gifts may create an *appearance* of corruption, which makes it perfectly legitimate to regulate such gifts, at least at the level of ethical rules.

59. Article 11 p. 2 prohibits disclosing private information which the judge may learn through working on a case. However, such disclosure may take procedural forms – for example, private information may become known from the testimony of a witness, or from the court judgement itself. When disclosure serves a specific procedural purpose (for example, to establish the facts of the case), and is in the interests of justice, it should be allowed (with some exceptions which may be justified by the interests of minors, protection of witnesses etc.). The Code may only

[28] Referred to in the text as the "official of judicial system endowed with institutional powers".
[29] See the Venice Commission Opinion on Tajikistan, cited above (CDL-AD(2013)035), where the Venice Commission held that "the judges should indeed exercise caution while discussing or criticizing the work of their colleagues" (§65).

regulate "non-procedural" disclosures (such as relating "spicy details" of a criminal case to the press, where there is no procedural need for doing it).

60. Articles 14 – 16 contain provisions which relate partly to labour discipline and managerial duties of the judge (the duty to start the hearings on time, the duty to oversee the work of the employees of the court, etc.) and partly to the quality of the judicial decision-making and procedural propriety (draft clear and well-reasoned texts, do not adjourn hearings because of poor knowledge of the case materials, etc.). However, these rules should be applied with caution: the judge should enjoy wide discretion in conducting the proceedings, and there is no single standard of "convincing, logical and well-reasoned" decisions. And, again, the judge should not be disciplined and even reprimanded for the sole reason that the higher instance disagreed with his or her position in a given case.[30]

E. Limitations on the freedom of speech, assembly, etc.

61. The regulations related to the judges' involvement in "politics" (Article 17) is another example of a rule which is rather a legal obligation than an ethical standard. Certain duties of the judges – for example, to cease membership in political parties or in their organs upon appointment to a judicial position – should be directly mentioned in the law.[31] As to the Draft Code, it is necessary to ensure that it does not regulate the rights and obligations of the judges but rather provides them with specific guidelines which will allow them to know which conduct to adopt where there is no clear legal rule, but where the judge should be recommended to show *self-restraint and moderation*.

62. The question of the judges' involvement in politics and in the civic life is a difficult one; the extent of those limitations varies from country to country.[32] It belongs to the Kazakh legislator to define the extent to which political involvement of judges must be restricted. However, the law should nevertheless be precise. The Venice Commission considers that it is rather difficult to make the difference between what is and what is not "politics". It is easy to accept that a judge should not be a member of a political party or speak publicly at political meetings (i.e. those which are organised by the political parties or their leaders or closely associated with them). It is reasonable to expect that a judge would avoid from publishing an article in support of a particular candidate at the elections.[33] But what if a judge participates in an academic discussion regarding a reform of a particular State institution – does it amount to the involvement in "politics" or not? Even defending constitutional values in a public statement may arguably be regarded as a political (yet loyal) statement. In any event, the total prohibition for a judge to express publicly his/her political views and beliefs must be reconsidered as it limits excessively the freedom of expression of judges.[34]

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[30] See the Kyiv Recommendations, cited above, p. 25 and, in particular, p. 28: "How a judge decides a case must never serve as the basis for a sanction."

[31] In some jurisdictions simple membership of the judges in political parties is allowed. It belongs to the Kazakh legislator to define the extent to which political involvement of judges may be allowed.

[32] See CDL-AD(2015)018, Report on the Freedom of expression of Judges, §82: "In comparative law, the level of restriction of the exercise of the above freedoms for judges differs from country to country according to their respective legal cultures. Although judges can be member of a political party in Germany and Austria, this is prohibited in Turkey, Croatia or in Romania. Whereas in Lithuania, judges should avoid publicly declaring their political views and in Ukraine, they should not participate in any political activity, there are much less restrictions on political speeches by judges in Sweden also as a consequence of the principle of "reprisal ban". In Germany, although political statements by judges are not ruled out, they are expected not to enforce those statements by emphasising their official position."

[33] CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §62

[34] The Venice Commission reiterates what it has said in the opinion on Kyrgyzstan, sited above (CDL-AD(2014)018), §34: "[…] [I]t is unclear whether the prohibition of 'speaking in support or against any political party' should be understood as a complete ban on expressing views on any political matter, including the functioning of the justice system. The ECtHR pointed out the 'chilling effect' that the fear of sanctions such as dismissal has on the exercise of freedom of expression, for instance for judges wishing to participate in the public debate on the effectiveness of the judicial institutions. Consequently, should the expression 'speaking in support or against any political party' be interpreted as including speech on the functioning of the judicial system, the fact that this may lead to dismissal would constitute a disproportionate interference."

63. Probably, the Draft Code should use another technique and rather give several examples of the most typical cases of "political involvement" which a judge should avoid,[35] while leaving a space for the participation of judges in academic and similar discussions. Such model is used by Article 21 in respect of statements which "criticise the laws and legal policy of the State" but which, are, apparently, allowed as not being "political". A provision might also be made allowing the judge's participation in the work of non-political associations (such as, for example, a wildlife protection foundation or an archaeology club).[36]

64. Article 18 prevents the judge from publicly demonstrating his/her religious affiliation. In principle, this is a sound rule. In an opinion on Bosnia and Herzegovina the Venice Commission held as follows (§35):[37]

> *"This Article is intended to prevent the judge from showing any signs of religious, political, ethnic or other affiliation and is to be welcomed. The references to 'signs' and to 'such insignia' suggest that it is only physical emblems which are covered. The prohibition should also extend to conduct such as praying or religious gestures or utterances."*[38]

65. Articles 18 and 19 prevent the judges from giving legal advice to political parties and members of religious associations. Probably, the judge should refrain from acting as a legal advisor in all situations, and not only on political and religious matters (a possible exception may cover informal legal advice given to the members of the judge's family in purely private matters).

66. Article 20 of the Draft Code provides that a judge is not entitled to comment on court decisions not entered into legal force. This rule is sound, but it should not be interpreted as giving the judge an absolute freedom to attack publicly court decisions which did enter into legal force. While a judge may participate in academic discussions about the case-law, s/he should be very careful when criticising *specific decisions* on public *fora*, since virulent criticism may undermine the credibility of the judiciary and do more harm than good. This provision should not, however, prevent the judges from engaging in the legal analysis of conflicting judicial decisions for the purposes of adjudicating a case.

67. Article 21 prevents judges from criticizing publicly the laws and legal policies of the State. First of all, every judge will inevitably have to interpret legal norms which are not clear or which contradict other norms. "Critical assessment" of such norms which is a necessary part of the process of adjudication is perfectly admissible, and the Draft Code should expressly allow it (even when it is expressed in open procedural documents). As regards more abstract criticism, not connected to the adjudication of a specific case, indeed, the judge should speak with caution, especially when expressing him/or herself on a *fora* accessible to the general public (as opposed to more closed discussions amongst the professionals of the law; thus, the exception covering "the scientific and practical conferences, round tables, seminars and other events of educational character", where it is possible for the judge to express critical views, is reasonable). However, judges should not be excluded from sharing experiences and giving voice to opinions on legislative matters. It may be particularly useful for the Government, within or before a legislative process, to invite judges to take part in a general discussion on legal matters at a conference or through submitted opinions (not just from courts as such or from courts presidents but also from individual judges).

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[35] The formula describing the participation of a judge in the events of religious organisation may be used as an example.

[36] See, for example, CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §53

[37] CDL-AD(2013)015, Opinion on the Draft Law on the Courts of Bosnia and Herzegovina.

[38] Indeed, this prohibition should not be seen as preventing the judge from attending a mosque or a church, or, for example, wearing a cross or another insignia in a manner not visible to others. Indeed, any limitation should be proportionate and should primarily concern expression of religious beliefs in the professional setting; however, the ECtHR seems to accept more serious limitations in respect of judges – see *Kalaç v. Turkey*, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV.

F. Limitations in the private sphere

68. Chapter IV of the Draft Code regulates the judge's behaviour in private. Indeed, even outside the courtroom a judge should behave with dignity and give an example of a responsible member of the society. That being said, certain provisions of this Chapter are overly intrusive into the judge's private life.

69. Articles 22-24 of the Code may be interpreted as establishing the judge's liability for acts of his/her close relatives. While the judge may be held legally responsible for the behaviour of his/her *minor* children, the Draft Code should make it clear that the judge should not answer for his/her grown-up kids and other adults. At the same time a judge might be required to distance him/herself from those family members who infringed the law, and avoid even giving an impression that s/he might use the influence and the prestige of the judicial office to defend them (see Article 25 which speaks of such situations, which seemingly fall short of the clear "abuse of office" but are very close to it).

70. The obligation to provide assistance to the disabled parents and other family members (Article 22) is not linked to the limits set by law or, at least, to some reasonable limits. Of course, this is a very sensitive issue which largely depends on the traditions of a given society. However, it is necessary to ensure that this is not an overburdening requirement; probably, a reference to the legal obligations of support should serve as a benchmark.

71. Article 22 of the Draft Code goes too far when it requires that the judge should inform the president of the court and the judicial community body about the fact of the divorce and, in particularly, about the reasons thereof. The Venice Commission does not see any justification for this rule. On the one hand, it may create a wrong impression that the judge's private life is fully controlled by the presidents of the courts, and that divorcing is an unethical act, which is not. The Venice Commission recalls that a judge may divorce because of circumstances which are not due to his or her moral fault or even nobody's fault at all. On the other hand, even if this duty to inform exists and is properly enforced, realistically speaking there is nothing a president of the court can lawfully do to prevent the divorce. And, in any event, it should not be the president's business to decide whether the divorce is justified or not.

72. Finally, the duty of the judge to maintain a healthy lifestyle (see Article 29) is both unclear and excessive. The "healthy lifestyle" is a very vague definition: for example, smoking is clearly a not healthy habit, but it would be excessive to consider that smokers cannot be good judges. Probably, the Draft Code might refer to particular "unhealthy practices" – such as serious and persistent problems with the alcohol, use of prohibited substances, etc. – which may undermine the judge's public image and may be considered as incompatible with the ethical standards. Reference to "immoral behaviour" is open to overbroad interpretation and should be avoided. Again, as with the "healthy lifestyle", the authors of the Draft Code might simply give several most typical examples of immoral behaviour which they had in mind when drafting this provision.

IV. Conclusions

73. The Venice Commission welcomes the initiative of developing a new ethical code for the judges of Kazakhstan. It is an important step which may help reinforcing public trust in the judiciary. However, the rules of ethical behaviour contained in the Draft Code, and related procedures, should not replace the legal provisions on the disciplinary liability of judges and corresponding disciplinary procedures. It is therefore important that the Draft Code is developed and adopted in parallel and consistently with the revision of the Constitutional Law and other laws applicable in this area.

74. Amongst the most important recommendations, aimed at improving further the legislation and the Draft Code, the Venice Commission would like to stress the following:

- the Constitutional Law should describe in more detail the grounds on which a judge may be brought to disciplinary liability for the breach of "ethical rules"; in addition, it should specify that disciplinary sanctions may be imposed only for manifest and gross violations of judicial ethics; finally, the Constitutional Law should specify to what extent the findings of the Ethics Commissions are mandatory in the disciplinary proceedings against the judges;
- the Draft Code should specify that professional errors may be punishable with disciplinary liability only when a judge has roughly and systematically infringed his/her own competence - in such a way that his/her decision cannot be considered as a judicial act;
- while certain limitations on the freedom of speech of judges contained in the Code are permissible, the Court should specify that the judge should be able to express, *with necessary moderation*, critical opinions about the State's policies; application of the Draft Code to former judges should be limited to the strict minimum;
- in regulating the behaviour of the judges in the private context the Draft Code should avoid relying on vague concepts such as "immoral behaviour" or "healthy lifestyle"; certain most intrusive regulations (such as, for example, the duty to report to the president of the court on the grounds of divorce) should be removed.

75. The Venice Commission remains at the disposal of the authorities of Kazakhstan and is ready to offer its help in the further revision of legislation on the status of judges, their independence and accountability.