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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

KAZAKHSTAN

DRAFT OPINION

**ON THE AMENDMENTS
TO THE CONSTITUTION
OF KAZAKHSTAN**

On the basis of comments by

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I. Introduction

1. By a letter dated 31 January 2017, Mr Jaxybekov, Head of the Presidential Administration of the Republic of Kazakhstan requested the opinion of the Venice Commission on the draft law "On Introduction of Amendments to the Constitution of the Republic of Kazakhstan" CDL-REF(2017)016), hereinafter "the draft".
2. Ms T. Khabriyeva and Messrs O. Can, P. Dimitrov, G. Kutris, G. Harutyunyan, G. Papuashvili acted as rapporteurs on behalf of the Venice Commission.
3. The authorities provided the Commission with a specific document entitled "Comment on the draft amendments to the Constitution of Kazakhstan" which explains the reasons for introducing amendments to different chapters of the Constitution. Representatives of the Venice Commission had an opportunity to exchange with the authorities on these issues during the visit to Astana on 21-22 February 2017. The delegation is grateful to the Kazakh authorities for the excellent co-operation before and during the visit.
4. This Opinion is based on the English translation of the draft law provided by the Kazakh authorities, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.
5. The present opinion of the Venice Commission, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its ... Plenary Session (Venice, ... 2017).

II. The scope of the amendments

6. On 11 January 2017 the President of the Republic of Kazakhstan signed a decree on the establishment of the Working Group on the redistribution of powers between branches of State power. This act marked the start of the process of a constitutional reform in the Republic of Kazakhstan.
7. One of the main purposes of the current constitutional reform is to make changes in the distribution of powers between the President and other branches of state power. The examined draft law "On amendments and changes to the Constitution of the Republic of Kazakhstan" should increase the role of the whole Parliament and the Majilis of the Parliament (the lower chamber) and redistribute some of the powers currently in the hands of the President of the Republic of Kazakhstan between the Government and the Parliament. This shift does not represent a change in the nature of the constitutional system of Kazakhstan – the President of the Republic of Kazakhstan is not only the head of state and arbiter between different branches of powers, he keeps his role as the highest official determining the main directions of the domestic and foreign policy of the country, represents Kazakhstan within the country and in international relations, ensures the inviolability of the Constitution, ensures the respect of fundamental rights and freedoms.
8. However, the changes proposed in the draft amendment concerning the executive branch reduce some of the executive presidential powers in favour of the government, and the government is gaining more weight in carrying out the main policies. the decrease in the powers of the President also leads to the strengthening of the legislative power.
9. The second important change is related to the judiciary and concerns both the Supreme Court and the Constitutional Council. The fact that the Constitutional Council will examine constitutional amendments and referendum decisions before they enter into force can, of

course, be regarded as an important step in the protection of the constitution and constitutional rights and freedoms.

10. The third area focuses on the Prosecutor's office. The drafters propose to limit the constitutional provision to a general reference to the institution and to move provisions on its main powers to the relevant legislation on the Prosecutor's office.

11. The fourth change is that the right to property is no longer reserved to the citizens of Kazakhstan and the new provision covers foreigners and non-residents.

12. The draft amendments also contain new provisions relating to local governments and the procedure of amending of the constitution.

III. Preliminary remarks

13. There is no common standard in Europe or elsewhere for governmental models. While the parliamentary system is predominantly preferred in Europe, there are also countries that prefer a semi-presidential system. For this reason, the Venice Commission does not recommend any specific government model. However, whichever model is preferred, participatory democratic governance, the rule of law and fundamental rights and freedoms must be preserved.

14. The most important rule of a democratic constitutional order is that political power is divided among different institutions. Power sharing must be considered together with democratic balance and control mechanisms in order to guarantee a democratic political system. Finally, those in power must respect the constitutional boundaries; the rule of law and fundamental rights and freedoms.

15. Kazakhstan has a semi-presidential system of government with very strong presidential powers – the President plays a crucial role in forming, controlling, dismissal and oversight of the government. His powers generally exceed the presidential prerogatives in most of the countries of the Council of Europe. In this context, the aspiration of Kazakhstan's authorities to operate a redistribution of some of the powers from the president to the parliament and the government and to provide a more balanced system should be welcomed.

16. The objective of enhancing the role of the Parliament, in general, and the Majilis of the Parliament, in particular is a positive development which seems to follow the logic of previous constitutional reforms adopted in 1998 and 2007. It is suggested to achieve this aim by widening the role of the Majilis of the Parliament and its different political factions in the process of the formation of the Government, as well as by strengthening the supervisory powers of the Parliament and its Chambers over the activities of the Government. However, the President continues to play an important role in this process.

17. The Government automatically resigns after the new Majilis of the Parliament is elected although the President retains the right to adopt a decision to terminate the powers of the Government on his own initiative.

18. The draft proposes to abolish the right of the President to issue decrees having the force a law, which will certainly strengthen the legislative power. However, the possibility to establish priorities in the adoption of different pieces of legislation might somewhat reduce the positive impact of this important change.

19. In the Constitution of Kazakhstan the President is equipped with strong powers. With the draft, some of the powers are transferred to the Government. This step brings the system closer to the semi-presidential system and thus it is to be welcomed. The abolition of the

right of the President to cancel or suspend the acts of the Government and the Prime Minister is a positive development.

20. The President receives the power to appeal directly to the Constitutional Council on the constitutionality of a law or any other legal act on issues related to the protection of the rights and freedoms of man and citizen, national security, sovereignty and integrity of the state. In addition the Constitutional Council is granted the power to review all constitutional amendments before their adoption as to their compliance with requirement the unitary nature of the state, territorial integrity, its form of governance and its independence. This amendment is also a positive move.

21. There are several changes in the constitutional provisions on the judiciary and on the Prosecutor's office which represent a positive trend in the legal order of Kazakhstan. The Supreme Court does no longer exercise the supervision over the activities of local and other courts. New provision on Prosecutor's office entrusts the institution with the "highest supervision over the legality", the task to represent the State interests in court and to criminal prosecution. This replaces the much wider definition of the powers of the prosecutor's office in the current constitution.

22. The protection of the property rights will cover every person regardless of her/his origin, citizenship or status on the territory of Kazakhstan. This important change in addressing the universal protection of fundamental rights could be extended in the context of the current reform to some other articles of the Constitution.

23. The legal framework for the activities of the local administration and local government is also modified. Although it is suggested that the President keeps the power to appoint the akims of regions, cities of republican level and the capital, the procedure of appointment or election of the akims of other administrative-territorial units is to be established by law, which implies to a certain extent, the transmission of this function to the Parliament. The pre-term termination of powers of maslikhats (local representative bodies) by the President of the Republic requires consultations with the Prime Minister and Chairpersons of the two chambers of Parliament. This means that such decisions integrate some elements of collegiality, which is a positive step to ensure their legitimacy and relevance.

IV. Analysis of specific amendments

24. The present section of the opinion will deal with the individual amendments in the order they appear in the text of the draft law "On amendments and changes to the Constitution of the Republic of Kazakhstan" (hereinafter "the draft law").

Human rights

25. Human rights and freedoms are usually not exclusively linked to citizenship or affiliation to a specific state. An exception could be the rights which are linked to the individual's special affiliation with their state, that is, an individual's civil rights to participate in state governance. At times, guaranteeing the extent of these rights may be related to the state's positive obligations and its economic opportunities.

26. The amendment to Article 26 of the Constitution of Kazakhstan on the protection of property rights proposes to change the words "*citizens of the Republic of Kazakhstan*" to the word "*everybody*", in order to ensure the right of ownership of foreign citizens and stateless persons. The proposed amendment in Paragraph 2 puts a stronger emphasis on the inviolability of property rights, which includes the specific cases indicated in Paragraph 3 of this same Article and the criteria for restricting rights as indicated in Article 39. It forbids any limitations or restrictions on legally obtained property rights by laws "unless otherwise

provided for by the constitution”, which is fully in line with the European democratic standards.

27. The proposed amendment to the Constitution complies with international acts on human rights, and significantly increases state protection of property rights in the Republic of Kazakhstan. The elimination of this difference of the constitutional status of citizens of the Republic of Kazakhstan and the constitutional status of foreign citizens and persons without citizenship in respect to the protection of property rights gives new possibilities for further improvement of Kazakhstan’s legal system.

28. This amendment is directly linked to the provision of Par. 4, Article 12 of the Constitution of the Republic of Kazakhstan which states that *"foreigners and stateless persons enjoy the rights and freedoms and bear the responsibilities established for its citizens, unless otherwise provided by the Constitution, laws or international treaties."* This provision embodies the general principle that defines the legal status of foreign citizens and stateless persons and distinguishes these individuals from citizens. Foreign citizens and stateless persons enjoy the same rights and bear the same obligations as citizens of the Republic of Kazakhstan; however, laws and international *treaties may establish exceptions from this rule.*

29. The presence of this general rule requires the legislator’s strict adherence to its principle: only in case of special clauses relating to the status of foreign citizens and persons without citizenship in the legislation or in international agreements the legal status of these persons can change compared to that of citizens of the Republic.

30. It would seem logical to follow the approach in Article 12 and in the proposed amendment to Article 26 and to review other articles of the Constitution limiting some constitutional rights to Kazakh citizens. The current constitutional reform could be a good opportunity to revise, for example, Articles 32, 37 and 38, as the rights and obligations provided in these articles ought to apply to everyone in Kazakhstan, not only to citizens.

Separation of power and checks and balances within the executive

31. As it has been mentioned in the previous sections of this opinion, redistribution of some Presidential powers to other bodies increases the responsibility of these branches of state power, whilst retaining the general features of a presidential state. The President remains in charge of strategic development planning, representation of the state and foreign affairs, as well as national security and defence.

32. Based on the proposed amendments to Article 44, the President will henceforth decide on the structure of the Government, as well as appoint and dismiss almost all ministers (except for the ministers for foreign affairs and defence) only after consultation with the Majilis of the Parliament. Furthermore, the Prime Minister of the Republic will have to consult with the Parliament before submitting proposals to the President regarding the composition of the Government, and this increases the role of the Parliament. However, it remains to be seen if this will also improve the balance among the branches of state power.

33. The proposed amendments to remove the President’s power to “appoint central executive bodies outside of the Government, instruct the Government to prepare draft laws and submit them to the Majilis of the Parliament, approve state programmes, as well as approve the common state institution financing and employee salary system” can be considered as a positive step. These tasks should belong to the Government (relevant amendments are also proposed to Article 66, which sets out the responsibilities of the Government).

34. In this respect special attention should be given to the Governments authority to decide on a common system for remunerating employees of budget institutions foreseen in Article 66.9. Deeper understanding is necessary on what is meant by the term “common system” and to what categories of employees it applies to. The Parliament, courts and possible other independent state institutions that are financed from the state budget may lose their functional independence if the remuneration system for their employees is determined by the executive power. At the least, the remuneration system for courts ought to be set out in a specific law.

Relation of the Executive to Legislative power

35. The checks and balance system is not established only within the executive. The relationship of executive, legislative and judicial powers to one another should be regulated according to this understanding. Presidential or semi-presidential models require more rigid and precise lines separating executive and legislative powers. The set of amendments affecting the powers of the President (Par. 2, Article 45) goes in this sense and contains a proposal that the laws are the prerogative of the legislature alone. The President will have no longer the power to issue decrees having the force of law. This change is in line with Par. 4, Article 3 of the Constitution of the Republic of Kazakhstan and the principle of functional separation of powers into legislative, executive and judicial branches and their balanced interaction in accordance with the principle of checks and balances.

36. The amendment increasing the quorum (from 1/2 to 2/3) required for a chamber of the Parliament to propose to the President to remove from office any member of the Government (amendment of Par. 6, Article 57) seems problematic. This procedure actually forces the President to dismiss a member of the Government, but practice tells us that the balance of political power in parliaments is not so clear cut. If 2/3 of the members of a chamber consist of a single party or bloc of political parties, then for a minister to be dismissed there is even no need of a parliamentary vote, as the prime minister can initiate the removal. On the other hand, if the spectrum of political parties in the Parliament varies, opposition parties should give very serious arguments to convince the majority to adopt a motion of no confidence in a minister.

37. Although the amendments significantly improve (soften) the provisions of Par. 2, Article 61, it is difficult to agree with the rule that the President may indicate to the Parliament which draft laws are to be examined as a matter of priority. In all countries, the legislature is not only independent in its work, but also a reasonable guardian of public interests. In turn, cooperation among constitutional bodies is based on mutual respect, e.g., the legislature would certainly pay special attention to a draft law even if the President were to voice concerns over insufficient regulation of certain issues in a public address.

38. The amendments to Par. 4, Article 67 and Article 70 are well-considered and welcome as they improve the check and balance system of the branches of state power. The Prime Minister reports on the work of the Government not only to the President, but also to the Majilis of the Parliament (lower chamber). In turn, the Government steps down upon the election of a new convocation of the Majilis of the Parliament.

Amendments in the field of control of constitutionality

39. The President has the right to turn to the constitutional oversight institution and request its opinion about compliance of a law or another legal act or regulation with the Constitution. This approach has been included also in the proposed amendments, i.e. Par. 10.1, Article 44) of the Constitution on the rights of the president, as well as in Article 72 on the powers of the Constitutional Council. This proposal can be supported. Further consideration could be given to a possibility to extend this right to appeal on already enacted legislation to the

Parliament and to a relevant number of members of the Parliament as well to develop stronger constitutional review system in the country.

40. Paragraph 3 of article 91 of the draft gives the Constitutional Council the power to review all the Constitutional amendments before their adoption in regard to their compliance with requirement of Par. 2, Article 91 providing that the provisions on the unitary nature of the state, its territorial integrity, its form of governance and independence cannot be changed. This amendment is also a positive step; however, it would be advisable to complete this list with a reference to the democratic form of government and unalienable constitutional rights.

Amendments concerning the judiciary and the Prosecutors office

41. The proposed amendment to Par. 3, Article 79 that leaves the requirements for the appointment of judges to be provided by law can hardly be considered as an improvement *per se* but does not contradict the practice in a number of European countries. However, any constitutional law should be drafted with due consideration of potential risks to judicial independence.

42. The new wording of article 81 excludes the supervision power of the Supreme Court over lower courts. This is positive which will have to be reflected in the implementing legislation.

43. If compared to the existing constitutional provision, the powers of the Prosecutor's Office (still covered in the Constitution's Section on Judicial Power) covered by the provisions of Article 83 go in the right direction. Leaving the detailed description of the powers of the prosecution to the specific law facilitates any future reforms of the institution. However, certain considerations could be useful in respect of the proposed wording of the new Article. Firstly, the Prosecutor's Office is tasked with the oversight of conformity with the law (beginning of Article 83), which would imply that the Prosecutor's Office is primarily concerned about lawfulness, not solely the interests of the state. Secondly, in civil cases, and especially in administrative (public administration) cases, a prosecutor's defence of the interests of the state would definitely put the other party to the case in a vulnerable position (loss of procedural balance). Thirdly, in the relevant areas of law the interests of the state should be represented by an official from the public institution in question. Finally, the defined task of a prosecutor could be accepted only if it applied to special or exceptional cases. For instance, by maintaining not only an accusation in a criminal case, but also by claiming a compensation for the damages suffered by the state. Further consideration of limitation of supervision powers of the prosecutors not only in legislation but also on a constitutional level would be a positive step in line with the international standards.

Local self-government

44. The Constitution of the Republic of Kazakhstan is supposed to keep the current procedure for appointment of akims of regions, major cities and the capital. The procedure for appointment or election to the position of other administrative-territorial units' akims is to be established by law and not by a statutory act of the President.

45. Thus, certain centralization of public administration at the so-called "middle-level" is clearly preserved. It is still unknown what will be the procedure for filling vacancies of akim positions of other administrative-territorial units. However, referring this matter to the Parliament, which will make decision by adoption of a law, indicates as a whole a trend towards the democratization of form and procedure of addressing this issue.

46. At the same time there is some inconsistency in the proposed wording of the Article 87. In accordance with the par. 4 of the Article 87 of the draft "the akims of other administrative-

territorial units are appointed or elected to office pursuant to the procedure established by law. The President has the discretion to release akims from office”.

47. However, if the procedure for the appointment or election of akims of other administrative-territorial units is determined by the law, it would be logical if the release of akims from office was the subject of legislative regulation too. It would be reasonable if it was the law that authorized the President to release akims from office in certain cases. This would improve the stability and certainty in the relationship between the authorities.

48. The draft proposes to revise the procedure for early termination of the powers of maslikhats. In this regard, the new paragraph 5 of the Article 86 of the Constitution, as opposed to the existing practice, proposes to establish that the powers of a maslikhat shall be terminated early by the President of the Republic after consultation with the Prime Minister and the Chairs of both chambers of the Parliament.

49. Undoubtedly, this procedure is in general more democratic in nature than the current one because there are elements of collegiality in the decision making process, and in this regard it can be supported. Engaging other public bodies in the procedure for the early termination of powers of maslikhats, will be a platform for a more objective assessment of the circumstances that require early termination of powers. Meanwhile it would be preferable if some statutory act (law) gave an indicative list of grounds for such early termination of maslikhat's powers.

V. Conclusions

50. The proposed constitutional amendments submitted for review represent a considerable step forward in the process of democratisation of the state. Revision of the competences of the branches of power and setting up a system of checks and balances is a difficult task. Many aspects of these efforts can only be assessed over time, when practical experience has revealed the most appropriate approach, taking into account historical development and traditions, societal development, the society's attitude towards the processes around, as well as international developments. But there can be no doubt that the reform goes in the right direction and constitutes a clear step forward. Other steps could follow in the future.

51. The Commission hopes that the drafters will give due consideration to different proposals that will be formulated as a result of public consultations on constitutional amendments organised in January – February 2017 as well as to considerations and recommendations included in the present text.

52. As announced by the representatives of different institutions of Kazakhstan during the visit of representatives of the Venice Commission to Astana in February 2017 the proposed amendments will be followed by significant changes in national legislation. The Commission remains at full disposal of the authorities for further co-operation in the field of constitutional reform and any further work concerning its implementation.