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KAZAKHSTAN

DRAFT OPINION

**ON THE CONCEPT PAPER
FOR IMPROVING THE LEGAL FRAMEWORK
OF THE CONSTITUTIONAL COUNCIL**

on the basis of comments by

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I. Introduction

1. By letter of 20 January 2021, the President of the Constitutional Council of Kazakhstan requested an opinion from the Venice Commission on *the Concept Paper on improving the legal framework of the Constitutional Council* (hereinafter, the “Concept Paper”, CDL-REF(2021)014) in the context of reforms to law enforcement and in the judicial system of Kazakhstan.
2. Ms Claire Bazy Malaurie, Mr Jung-Won Kim and Mr Alexandru Tănase acted as rapporteurs for this opinion.
3. Owing to the sanitary situation due to the Covid-19 pandemic, a visit to Nur-Sultan could not be organised. A videoconference was therefore organised on 25 February 2021 with NGOs. Another videoconference was organised on 26 February 2021 with the Kazakh authorities, notably: the Chairman of the Constitutional Council, members of the Constitutional Council, the Secretary General of the Constitutional Council, the Deputy of the Senate of Parliament, the Chairman of the Committee on Legislation and Judicial and Legal Reform of the *Mazhilis* of the Parliament, the Head of State-Law Department of the President’s Administration, the Deputy Minister of Justice, Judge of the Supreme Court, the Head of Department (Office of the General Prosecutor), the Head of Unit (Office of the General Prosecutor), and representatives of other organisations: the Chairman and a member of the Republican Collegium of Advocates and the Director of the Institute on European Law and Human Rights.
4. This opinion was prepared in reliance on the English translation of the Concept Paper. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
5. *This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings and written comments from stakeholders. Following an exchange of views with ..., the opinion was adopted by the Venice Commission at its ...online Plenary Session (...).*

II. Preliminary requests to the Constitutional Council

A. General remarks

1. Comparative elements

6. Constitutional review was first introduced in the United States in 1803 in the US Supreme Court’s landmark case of *Marbury v. Madison* and where it was taken up much later by the Supreme Courts of Norway, Monaco and Romania.¹
7. There are two main types of *a posteriori* constitutional review: the main type is through the ordinary judges by a diffuse review (i.e. the American model), which allows the individual to question the constitutionality of any law that applies in a proceeding to which he or she is a party. The other is through concentrated review (i.e. the European or continental model) in which only

¹ Venice Commission, CDL-AD(2021)001, Revised Report on Individual Access to Constitutional Justice, paragraphs 7-8. See generally Louis Favoreu, American and European Models of Constitutional Justice, in *COMPARATIVE & PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN* 105, 105-20 (David S. Clark ed., 1990); MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 1, 132-49 (1989); ALLAN A. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 1, 125-37, 185-94 (1989).

one court, (typically a constitutional court), is given the power to review the constitutionality of normative acts and to remove unconstitutional acts from the legal order.²

8. The Kazakh model of constitutional justice comes closest to the European model of concentrated review, which is vested in the Constitutional Council.

9. In ordinary legal proceedings, the judge (and the parties) may encounter a legal provision that may be unconstitutional, but which the judge would be obliged to apply to the case at hand. In order not to force the adoption of a judgment on the basis of a possibly unconstitutional provision, the ordinary judge (judge *a quo*) may stay the proceedings in the case at hand and refer the question of the unconstitutionality of that provision to the constitutional court (judge *ad quem*).

10. These type of referrals to the constitutional court are variously called *preliminary requests* or, in some countries, *exception of unconstitutionality*, *priority question of constitutionality* or *concrete review*. Depending on the system, the doubt as to the constitutionality may originate with the ordinary judge or be based on a request by the parties. Depending on the system, the judge may either be obliged to make the request or s/he does so only if s/he is convinced that there is a serious doubt with respect to the constitutionality of a provision. The case pending with the judge *a quo* is stayed until the constitutional court renders its decision and it is resumed and decided on the basis of the decision of the constitutional court.

11. To allow ordinary courts to refer preliminary questions to a constitutional court recognises their position at the frontlines of protecting constitutional law. They are the first to be confronted with a potential constitutional problem that may result from their application of a law. Therefore, their understanding of constitutional provisions crucially determines the overall quality of protection afforded by the constitutional order.³

12. Therefore, the effectiveness of preliminary requests heavily relies on the capacity and willingness of ordinary judges to identify potentially unconstitutional normative acts and to refer preliminary questions to the constitutional court or council. Depending on the model, it relies, to a lesser extent, on the ability of individuals to invoke this procedure⁴.

13. In the practice of many countries, especially in post-Soviet countries, ordinary courts that have to deal with an array of substantive and procedural provisions in their daily work are usually reluctant to assume the task of dealing with the unconstitutionality of a law. Constitutional courts, which have been established precisely for that purpose, are in a better position to accomplish this task. Forcing ordinary courts to take a definite position on the unconstitutionality of a provision rather than to limit it to (serious) doubt might set the threshold too high and could result in a very low number of findings of unconstitutionality by ordinary courts.⁵

2. Current scope of constitutional review in Kazakhstan

14. The Concept Paper on improving the legal framework of the Constitutional Council (hereinafter, the "Concept Paper") sets out Kazakhstan's intention to strengthen the mechanism for the protection of human rights through a more intensive review of the constitutionality of laws and other regulatory acts.

15. The Constitutional Council is currently in charge of *a priori* review and *a posteriori* review of laws (before and after their publication, respectively). For *a priori* review, Article 72.2 of the

² Venice Commission, CDL-AD(2021)001, Revised Report on Individual Access to Constitutional Justice, paragraphs 9-14.

³idem, paragraph 44.

⁴, idem, paragraph 45.

⁵ Venice Commission, CDL-INF(2001)028, Interim opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, section 2.2 Access for courts at all levels.

Constitution provides that the Constitutional Council “*considers the laws adopted by Parliament with respect to their compliance with the Constitution of the Republic before they are signed by the President*”, on request of the President, Parliament or the Prime Minister.

16. For a *posteriori* review, Article 78 of the Constitution stipulates that: “1. *The courts shall have no right to apply laws and other regulatory legal acts infringing on the rights and liberties of an individual and a citizen established by the Constitution. If a court finds that a law or other regulatory legal act subject to application infringes on the rights and liberties of an individual and a citizen it shall suspend legal proceedings and address the Constitutional Council with a proposal to declare that law unconstitutional*”. This provision is related to Article 74.2. of the Constitution, which stipulates that “*Laws and other normative legal acts, recognized unconstitutional, as infringing on the rights and freedoms of an individual and citizen secured by the Constitution, shall be cancelled and shall not be used.*”

17. A *posteriori* review, through preliminary requests from the ordinary courts exists since 25 years but only very 71 cases have reached the Constitutional Council in this period, between zero and two cases in recent years. The Concept Paper’s proposal is to operationalise this procedure which is not used sufficiently by the ordinary courts.

18. In order to achieve this aim, the Concept Paper foresees amending the Criminal Procedure Code, the Civil Procedure Code, the Administrative Offences Code and the Administrative Procedure Code as well as the Constitutional Law “on the Constitutional Council of the Republic of Kazakhstan”.

B. Analysis of the Concept Paper

1. Conditions for a motion by the parties

19. The Concept paper proposes to separately highlight the possibility of a motion of the parties in the proceedings to appeal to the Constitutional Council. Even though the Kazakhstan Constitution does not allow an individual or a citizen to directly access the Constitutional Council, it would be possible for an individual or a citizen to trigger the declaration of unconstitutionality from the Constitutional Council if he or she could utilize the channel of ordinary courts. Requiring to separately highlight the motion will help to know the scope of rights and freedoms as litigant interpret them, and thus also meet the goals of straitening a constitutional and legal awareness of them. **Therefore, the proposal to amend procedural laws is recommendable in order to achieve constitutional purity in the legal framework of Kazakhstan.**

20. In this respect, the Concept Paper proposes certain conditions with respect to form and substance for making such a request, which will be assessed by the ordinary judge (judge *a quo*). There are five such conditions:

- 1) the subject-matter of the referral should fall within the competence of the Constitutional Council;
- 2) the challenged provisions of the law are applicable in the resolution of the case;
- 3) there is no valid decision of the Constitutional Council on the constitutionality of the provision indicated in the motion;
- 4) the motion meets the established legal requirements for its form and content;
- 5) the applicable law infringes on the rights and freedoms of a person and a citizen enshrined in the Constitution.

21. The Concept paper proposes to establish specific grounds for refusal by the ordinary judge (judge *a quo*) to grant motions by the parties. This is to be welcomed.

22. The failure to meet any of the above-mentioned requirements serves as a ground for the refusal by the court to grant such a motion by the parties. These conditions therefore serve as a “filter” at the level of ordinary courts.

2. Scope of parties

23. With respect to who are the parties to such a motion, the Concept Paper cites “individual and citizens” in reference to Article 78 of the Constitution. This will be interpreted as excluding legal persons, while they exercise rights and freedoms (property rights, access to justice and others) – this is an issue that might also be considered.

24. According to the replies to the list of questions the Venice Commission received from the Kazakh authorities with respect to who can be a party to such a motion (and whether the prosecutor could be a party): parties to civil proceedings are the plaintiff and the defendant, in criminal proceedings - the prosecution and defense. The prosecutor may bring a claim in the interests of the state and, accordingly, be a plaintiff. When considering criminal cases in court, the prosecutor is the public prosecutor and represents the prosecution.

25. With respect to other subjects, the reply received indicated that NGOs or other legal persons may be a party to the proceedings and are, accordingly, entitled to apply to the court for referral to the Constitutional Council. In addition, there is a provision in the Constitutional Council's Rules of Procedure according to which organisations specialising on issues that are the subject of proceedings before the Constitutional Council may submit “initiative opinions” on the law being reviewed. Even if this issue does not directly affect their rights. This seems to be equivalent to amicus curiae opinions.

3. Subject of review - laws and legal acts

26. As regards the competence of the Constitutional Council, the Concept Paper only uses the term “law”, whereas Article 78 of the Constitution also includes “*other regulatory legal acts infringing on the rights and liberties of an individual and a citizen established by the Constitution*”. Also, the list of state bodies, whose regulatory legal acts may be challenged, is not directly addressed in the Concept Paper (see below on the difference between laws and legal acts).

27. Different types of reviews may apply to different types of acts adopted by state bodies – not only constitutional review. There are legal acts issued by state bodies which may be subject to the control of legality in administrative litigation and which are not subject to constitutional review. The lack of precision could mean that there is a restriction with respect to the kind of act that can be challenged: this may be clear to a judge who must know what the dispute is about, but this is likely not to be the case for a citizen, party to the proceedings. This should be clarified, notably to avoid any confusion between the competence of the Constitutional Council and the courts.

28. Particular care should also be taken to avoid overburdening the Constitutional Council. Such a risk exists when, as is currently the case, the Constitutional Council deals not only with issues of constitutionality of laws, but also undefined other “legal regulatory acts,” a task which, in the European continental legal system, is more often attributed to administrative courts.

29. As explained by the Kazakhs authorities, a law is a normative act, which regulates the most important social relations, establishes the fundamental principles and norms provided by the Constitutions, while a legal act is a broader concept, including laws and non-normative legal acts of different levels. Therefore, for different types of acts adopted by the state bodies there might be different types of control, not only constitutionality review. The lack of clarity on this issue risks creating confusion between the competence of the Constitutional Council and the administrative courts. In this respect, Kazakhstan has adopted a Law “On Legal Acts”.

4. Form of the motion/Written form

30. The explicit requirement of the Concept Paper of bringing a motion for a referral of the case to the Constitutional Council is a positive step. Currently, the motions of the parties can be oral.

31. Applications to a constitutional court must be made in writing, and sometimes they must even follow very strict formal rules. The written motion will create more transparency and traceability. However, an applicant needs to be given the possibility to correct or complete a motion within a certain time limit, and only under specific conditions. This is especially important where formal requirements are very strict. It is even more important where legal representation is not mandatory⁶. Overall, this diminishes the risk that review would be refused on purely formalistic grounds.

32. The written motion should be subject to strict rules with respect to the mandatory elements that should be reflected in its content, as provided by the Concept Paper. If the motion does not meet the established legal requirements for its form and content, this is a ground for its refusal.

33. On the introduction of this new procedure, it is recommended that only the presence of elements of content, may be as indicated in the concept paper, be verified to initiate the proceeding.

34. It might be excessive to require that this be done in a specific template, which might be too detailed and could well be a source of technical mistakes, taking into consideration the lack of a well-established practice.

35. The Constitutional Council could, however, adopt a recommended, but not mandatory, template and publish it on its website, in order to assist the parties, as well as courts, to better structure their arguments.

5. Level of conviction or doubt

36. According to the English translation of Article 78 of the Constitution, „*[i]f a court finds that a law or other regulatory legal act subject to application infringes on the rights and liberties of an individual and a citizen it shall suspend legal proceedings and address the Constitutional Council with a proposal to declare that law unconstitutional.*” The use of the word “*finds*” could imply that a judge should be fully convinced of the unconstitutionality of a law.

37. However, such an interpretation would go too far because the Kazakh Constitution opted for concentrated review. It is the Constitutional Council that decided on constitutionality. Furthermore, such an interpretation would not value sufficiently the motions from the parties, which are the purpose of the Concept Paper. In conclusion, it would be advisable to leave this assessment of constitutionality to the Constitutional Council itself.

38. Practice varies from one country to the next with respect to how much discretion is given to ordinary courts. In this regard, the Constitutional Court of Korea requires a reasonable suspicion beyond a simple doubt on the unconstitutionality (Case no. 93Hun-Ka2). This position could be understood as an intermediate position between a simple doubt and the conviction required by the German Federal Constitutional Court. The difference seems to stem from their jurisdiction. In Germany, final judgments of ordinary courts may be challenged in the form of a constitutional complaint. Therefore, in case of an ordinary court’s refusal of a request to address to the Constitutional Court, there is still a possibility for constitutional review before the Constitutional Court.

⁶⁶ Venice Commission, CDL-AD(2021)001, Revised Report on individual access to constitutional justice, paragraphs 82,83.

39. As the Venice Commission has noted previously, when there is no direct individual access to constitutional courts, it would be too high a threshold to limit preliminary questions to circumstances in which an ordinary judge has to be fully convinced of the unconstitutionality of a provision; serious doubt should suffice as the threshold for referring a case to the Constitutional Council.⁷ The “finding” by the ordinary court would therefore relate to doubts, not to a full assessment of constitutionality, which is reserved to the Constitutional Council.

40. Moreover, the Russian version of the Constitution uses the word „если суд усмотрит”. The meaning of this word in Russian is not that categorical. It could be understood as noticing or seeing. Therefore, a doubt is a solution which seems to be permitted under the Constitution in its Russian version.

6. Position of the judge a quo

41. Another issue concerns the degree of independence required from an ordinary judge to question the constitutionality of a law adopted by Parliament, considering the latter’s power to influence a judge’s career. It can be very difficult for an ordinary judge to challenge the constitutionality of acts adopted by Parliament. These difficulties may be reflected in the statistical data that show the insignificant number of referrals addressed by ordinary courts under the already existing system.

42. Judges are usually faithful in applying the law, not in challenging it. Their desire to be more activist is also curbed by the fact that they are part of a court hierarchy, in which they are promoted from lower to higher courts according to professional competence and seniority. Constitutional review being a *quasi*-legislative function, is considered to differ substantially from “regular” judicial work. It is, therefore, assigned to a special procedure before a separate constitutional organ with justices specifically selected for this politically sensitive activity.

43. Kazakhstan is at the stage where it is developing a satisfactory system to protect individual civil rights. Based on the above, limiting the discretion of ordinary judges would prevent the problem of interference with constitutional jurisdiction. Therefore, it is recommended to express that reasonable doubt suffice for a court to submit a referral to the Constitutional Council.

44. In addition, in the grounds for refusal, the Concept Paper indicates that “if there is insufficient data, indicating the rights and freedoms of a person and a citizen enshrined in the Constitution are infringed by law”. There is a risk that the wording “insufficient data” could be interpreted in an arbitrary manner by the courts and thereby excessively restrict access by the parties to constitutional review.

7. Form of decision on request for referral by the parties

45. For reasons of procedural economy and to facilitate the task of the judge a quo, decisions on the motions to initiate proceedings for review of constitutionality could be taken a ‘lighter’ form. In case of acceptance of the motion, it a simplified form could be used, merely referring to the arguments brought by the parties attached. In case of a refusal of the parties’ motion the court’s decision should be reasoned and explain why the parties’ arguments cannot be followed.

46. When providing that a request be rejected if the Constitutional Council has already dealt with the matter, it is recommended to explain that this should be the case only if the

⁷ Venice Commission, CDL(2021)001, Revised Report on individual access to constitutional justice, paragraph 53.

circumstances of the case before the ordinary court do not provide call for examining the legal provision from a different angle.

8. Possible delays because of suspension of ordinary court proceedings

47. According to the Concept Paper, a case is suspended by the court that made the proposal. In similar cases, other courts in the country should have the right to suspend proceedings in pending cases. In any event, the courts should not make a final decision on the case until the end of the proceedings before the Constitutional Council. This is important as the suspension of proceedings secures the compliance with the hierarchy of norms and the priority given to rights and freedoms.

48. As stated previously by Venice Commission, ordinary proceedings before the judge *a quo* should be stayed when preliminary questions in this case are referred to the Constitutional Council. It must always be ensured that the ordinary judge not have to apply a law s/he finds unconstitutional and the constitutionality of which is to be decided by the Constitutional Council.⁸

49. Therefore, the proposed clarifications in the Concept Paper are in line with the recommendations made by the Venice Commission and may also be in line with Article 72 of Constitution – which will be up to the Constitutional Council to decide.

50. It seems that there are no serious problems with delays in ordinary court proceedings and the Constitutional Council works within very strict time limits. Where there are other pending cases, also other courts should be able to postpone a decision in their case until the Constitutional Council has handed down a ruling on the constitutionality of a law.

51. In order to address the concern of possible excessive length of proceedings, practical arrangements could be made in the working methods of the Constitutional Council. In case a referral is found inadmissible, the operative part of the decision is immediately sent to the court without waiting for the reasoned decision to be drafted.

52. Article 19.1.8 of the current Constitutional Law on the Constitutional Council provides for the adoption by the Council of Rules of the Constitutional Council. In addition to the legal provisions according to the concept paper, these Rules should provide more detailed regulations for the internal handling of referrals from ordinary courts.

53. In the light of the possible heavy caseload of the Constitutional Council, the possibility of dealing with cases in a written procedure could be foreseen, at least for admissibility decisions, that could be taken in chambers. Article 27 of the Constitutional Law on the Constitutional Council provides for (compulsory) public hearings in consideration of an appeal accepted for processing. Some discretion of the Constitutional Council for written proceedings could be considered. Given the likely workload the Constitutional Council will have to deal with, it is not realistic to hold all proceedings, including on admissibility, in hearings, especially where there is no chamber system.

54. Also, a procedure should be defined for the allocation of cases to reporting judges in an objective manner. To that end, the Venice Commission was informed that the Constitutional Council was working on introducing an automatic case allocation. This is to be welcomed.

9. Separate appeal

⁸ Venice Commission, CDL-AD(2021)001, , Revised Report on individual access to constitutional justice, paragraph 152.

55. The Concept Paper provides for a separate appeal to a higher court against the court's non-admission of a motion of the parties to refer the case to the Constitutional Council. This is a positive step and is to be welcomed.

56. It is important that the rules that apply to the appeals' system clearly set out who may appeal a decision. It could be the same persons who brought the case at the first level, but it could also mean that all persons involved at the first stage may appeal the decision. This needs to be clearly provided for.

57. It is also crucial that courts be required to provide a well-reasoned decision, especially when rejecting a motion by the parties.

III. Execution of Constitutional Council decisions

A. Requirement of action by Parliament or other State bodies

58. Article 74 (2) of the Kazakh Constitution provides that "laws and other normative legal acts, recognized unconstitutional, as infringing on the rights and freedoms of an individual and citizen secured by the Constitution, shall be cancelled and shall not be used." This means that provisions found unconstitutional by the Constitutional Council can no longer be applied with an *erga omnes* effect but technically they "remain in the books". This may be sufficient if the mere non-application of a provision is sufficient but in other cases new legislation by the Parliament will be required.

59. The Concept Paper proposes that if legislative measures must be taken, then the authorised state bodies, no later than six months after the publication of the decision of the Constitutional Council, shall ensure the submission of a draft law to the *Mazhilis* of Parliament or the adoption of other legal acts. **Until the adoption of a new legal act, the Constitution of the Republic of Kazakhstan and the decision of the Constitutional Council shall be directly applied.**

60. The respective jurisdiction and institutional setting of the various constitutional courts in Europe vary widely. In particular, the rules on the execution of judgments, where such rules exist, differ for every constitutional court. Some countries do not regulate the enforcement of Constitutional Court decisions and the others assign this task to other state powers. Only in the Republic of Moldova can the Constitutional Court itself impose administrative fines.⁹ While some courts have the task of monitoring the execution of their judgments or may assign the task of execution to a specific organ or body, no other court seems to have the overall responsibility of ensuring the execution of its judgments itself.¹⁰ Outside Europe, for instance in Korea, if a law is found not to be in conformity with the Constitution, it loses legal effect after a specific period of time specified by the Constitutional Court. The Constitutional Court of Korea then periodically (twice per year) urges Parliament to act – but such measures are not mandatory and merely take on the form of a notice or reminder. Consequently, there are no strict common standards on the execution of judgments of constitutional courts.

61. The execution of constitutional court judgments is an essential requirement of the rule of law.¹¹ Leaving the choice of whether to follow the judgments of the Constitutional Court to Parliament does not live up to this requirement.

62. In its previous opinions, the Venice Commission recommended amending the Constitution to ensure that a legal provision found unconstitutional as such by the Constitutional Court loses legal force with the publication of the judgment of the Court. In order to avoid legal gaps, the

⁹ Although this power has never been applied in practice.

¹⁰ Venice Commission, CDL-AD(2017)003, Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 15, 26 and 38.

¹¹ Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, II.2.di.i.

Constitutional Court could be empowered to postpone the entry into force of the repeal of the provision found to be incompatible with the Constitution by a specified period (typically up to one year). This would allow Parliament to phase in new legislation before the unconstitutional provisions lose their force.¹²

63. The legal force of a Constitutional Council decision cannot be dependent on whether a subsequent action is taken by some actor other than the Council itself, including Parliament. Such control over the legal force of a judgment would violate the independence of the Council and the rule of law.¹³ When this concerns the Constitutional Council, this is a challenge to its authority as the final arbiter on constitutional issues. It cannot be left to Parliament to repealing the law or other normative act declared unconstitutional.

64. An explicit legislative or, even better, constitutional provision on the effects of the decisions of the Constitutional Council would be useful. Such a provision should bring about an effect similar to declaring null and void the law or other normative act declared unconstitutional. This would contribute to the status of the decisions of the Constitutional Council as envisaged by the Kazakh Constitution.

65. Otherwise, and failing the formal repeal of the provision declared unconstitutional, it would have to be specified whether judgments of the Constitutional Council have an *ex nunc* or an *ex tunc* effect.¹⁴

66. Such a provision should also clearly regulate whether, and if so, how the annulment of the normative act by the Constitutional Council affects other, past decisions with *res judicata* force, which are based on this act. The Constitutional Council might be given the possibility to decide on the effects (annulment *ex nunc*, *ex tunc*) in each case. In the case of annulment *ex tunc* the decision should have *erga omnes* effect, because the legal norm on which the challenged judicial or administrative act was based is declared null and void as from its coming into force. Thus, other individual acts based on the same norm would become invalid too. Here, the principles of individual remedy on the one hand and legal security on the other should be balanced. At least sentences in criminal cases should be reopened by the ordinary courts following the annulment of the criminal norms on which they were based. A time limitation for reopening final court decisions could be foreseen. Consideration should be given to expressly regulate these matters.

C. Binding decision on the interpretation of a law in conformity with the Constitution

67. The Concept Paper proposes to expressly include in the legislation that the Constitutional Council may decide that a law is in conformity with the Constitution by means of a decision on constitutionality dependent on a specific interpretation.¹⁵ This type of constitutional decision is a common practice of constitutional courts.

68. In general, it is important to stress the relevance of a constitutional court's reasoning, which should provide guidance to ordinary courts and other state bodies. Respect shown by ordinary courts and other state bodies to the constitutional court's reasoning is key in providing an interpretation that is in conformity with the constitution. This is due to the fact that only the constitutional court or council may provide a constitutional interpretation. Ordinary courts or state

¹² Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, paragraphs 77, 78.

¹³ Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, II.E.3.iii.

¹⁴ Venice Commission, CDL-AD(2019)003, Opinion on the proposed revision of the Constitution of Luxembourg, paragraphs 115 and 116.

¹⁵ *Réserve d'interprétation* in France.

bodies will only be able to apply a given law in a manner that is in line with the constitution if they base themselves on this interpretation.

69. The problems with other courts often result from the fact that they follow the operative part, but not the reasoning of a constitutional court.¹⁶

70. An explicit legislative – or even better constitutional – provision obliging all other state bodies, including the courts, to follow the constitutional interpretation provided by the Constitutional Council, including the legal reasons of the decision of the Constitutional Council, when they adopt a decision or a normative act would provide an important element of clarity in the relations between the Constitutional Council and ordinary courts or other state bodies. It would also serve as a basis for individuals to claim their rights before the courts and other state bodies.

IV. Conclusions

71. The Concept Paper on improving the legal framework of the Constitutional Council of Kazakhstan intends to strengthen the mechanism for the protection of human rights through a more intensive review of the constitutionality of laws and other regulatory acts. It sets out important procedures, which may serve as a sound basis for enhancing the use of referrals by courts to the Constitutional Council in a coherent manner, which is welcome.

72. Notably the express clarification of the parties' right to request ordinary courts to introduce a referral to the Constitutional Council is to be welcomed. The proposals of the Concept Paper to clarify the procedure of execution of the decision of the Council are positive as well.

73. Nonetheless, the Venice Commission makes the following recommendations:

- 1) to provide that for the ordinary judge (judge a quo) reasonable doubt should suffice in order to challenge the constitutionality of a law or other normative act before the Constitutional Council and to remove the ground of "insufficient data" to refuse a referral by motion of the parties;
- 2) to simplify the formal elements for the file to be submitted to the Constitutional Council;
- 3) to provide that a referral to the Constitutional Council can be adopted in a lighter form, by reference to the arguments to a motion from the parties, whereas rejections of such motions have to be clearly motivated;
- 4) to provide for the establishment of chambers within the Constitutional Council to deal at least with admissibility decisions in a written procedure;¹⁷
- 5) to provide for the obligation of other state bodies to follow the legal reasoning of the Constitutional Council when it provides an interpretation of a law in conformity with the Constitution).

74. As the adoption of the changes of the Concept Paper could lead to a significantly higher case-law, the Constitutional Council should prepare for this possible wave of referrals. This implies an increase in staff and proper training for staff and exchanges of experiences with other constitutional courts and councils.

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

¹⁶ Venice Commission, CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 71.

¹⁷ Article 27 of the Law provides for (compulsory) public hearings in consideration of appeal accepted for processing.