

«CRITICAL ANALYSIS, STRICT DISCIPLINE AND PERSONAL RESPONSIBILITY»: SOME REFLECTIONS ON STRENGTHENING THE INDEPENDENCE OF THE JUDICIARY IN CENTRAL ASIA



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Despite the fact that the Constitutions and relevant laws of all the states in Central Asia include guarantees of judicial independence, the World Economic Forum placed some of the region's states in the second half of its judicial independence ranking for 2017 – 2018. The article considers some obstacles to the exercise of judicial independence in the region such as corruption, structural links between the judiciary and law enforcement organs, the duration of judicial appointments, and the influence of the executive branch with the further suggestions on the possible ways to overcome such obstacles. The analysis is based on the factual data, legislative acts, according recommendations from international organisations, and the expert opinions. Particular attention is paid to the academic qualifications of candidates for judicial offices, and to the role of international and comparative law in judges' professional purview. It is suggested that the quality of the administration of justice matters not only for the resolution of specific disputes among individuals and legal entities but, more generally, for improving social welfare, and for states' social and economic development. Accordingly,

increasing the judicial independence should be among the most urgent priorities in Central Asian states. This goal can be reached by effectuating long-term judicial appointments of candidates from among the most qualified and experienced lawyers in civil, family and criminal matters, as well as by considerably improving judges' financial provision.

Keywords: Central Asia, corruption, courts, independence, judges, judicial reform, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan.

1. Introduction

On 6 July 2017, Uzbekistan's official UzA Information Agency published an *Address by Judges of the Republic of Uzbekistan to the People of Uzbekistan*.¹ This groundbreaking text acknowledged the existence of "serious problems and deficiencies in the judicial system", as pointed out by the President of the country, called upon Judges to "cardinally revisit [their] attitude to [their] work", and contained a number of programmatic promises. The main part of the Address reads as follows:

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¹The full text of the Address (in Russian) is available at: <https://www.gazeta.uz/ru/2017/07/06/court/> (last accessed 15 July 2019).

First, we will expand in our activities the practice of constant, direct and open dialogue with the people, we will take measures to restore the violated rights of citizens by providing active assistance in solving their problems and establishing justice.

Second, we will critically analyze our activities, provide reliable protection of the rights and freedoms of citizens, resolutely eliminate obstacles in the administration of justice, direct all our knowledge and experience to turning the court into a genuine "Abode of Justice". We guarantee that a fair decision will be made [with respect to] each address of citizens to the court.

Third, we will consider cases impartially, objectively and fairly, as required by the judicial duty and conscience, we take full responsibility for ensuring that every decision we make is legal, reasonable and consistent with the principles of justice and humanism.

Priorities in our activities, on which the fate of a person sometimes depends, will be justice, truth and decency.

Fourth, we will show a serious, responsible and proactive attitude to the implementation of the reforms envisaged by the Action Strategy, we will live with a sense of belonging to the fate of the country.

Fifth, we will form a judiciary capable in any situation of ensuring justice, consisting of judges distinguished by strong will and honesty, high spirituality and professionalism. For this, we are all responsible.

Sixth, deeply aware of the complexity and, at the same time, honour and high status of judging, we will consider any unlawful act that tarnishes the honour of a judge as an "extraordinary event," uncompromisingly deal with employees who betrayed the ideals of justice and keep our ranks clean.

Seventh, we will take urgent measures to improve the training of judges, simplify court proceedings, including through the widespread introduction of information and communication technologies, preventing bureaucracy and red tape.

Eighth, on the basis of an ongoing analysis of judicial practice, we will identify systemic violations of the law and take measures to fundamentally eliminate the existing shortcomings in the sphere by improving legislation and law enforcement practice.

Critical analysis, strict discipline and personal responsibility will become our daily norm, the main criteria of our activity.

We promise to fulfil the responsibilities entrusted to us honestly and conscientiously, to administer justice, obeying only the law, to be always faithful to our oath given to the people and the President!²

²Ibid.

It appears from the Address that the leadership of Uzbekistan became seriously concerned about the quality of the administration of justice in the country. It is notable that the World Economic Forum's biennial ranking of judicial independence for 2017 – 2018³ did not contain any data on Uzbekistan and Turkmenistan, whereas Kazakhstan (79th position, 3.6 points) and Kyrgyzstan (102nd position, 3.2 points) featured in the second half of the ranking, together with Georgia (87th position, 3.6 points), Russia (90th position, 3.5 points), Armenia (96th position, 3.3 points), and Ukraine (129th position, 2.3 points). By contrast, Tajikistan and Azerbaijan held respectively the 49th and 50th positions in the ranking, with 4.4 out of maximum 7 points. It may be assumed that Uzbekistan might feature in the ranking's future editions, as a result of the State's increasing transparency. Kazakhstan is also taking steps to improve the quality of justice; thus, on 9 December 2016, the First President of Kazakhstan promulgated a programme entitled 100 Steps for five Institutional Reforms.⁴ Steps 16 – 26 relate to the administration of justice, whereas steps 17 – 19⁵ are specifically designed to further strengthen the independence of the judiciary, and to reinforce judges' professionalism.

In the following paragraphs, a few key indicators relative to judges' independence are considered, and observations and recommendations relative to a few structural aspects of the administration of justice in Central Asian States are made. It appears that "critical analysis, strict discipline and personal responsibility" referred to in the Address of Uzbekistan's judges may be seen as functional criteria for measuring the quality of judicial performance. It is understood that the following reflections are the author's, and are not necessarily reflective of the official positions of institutions, which the author is or was affiliated with.

2. Indicators of judges' independence

Provisions relative to the independence of judges are included in the Constitutions⁶ and respective laws of all Central Asian States.⁷ The main indicators of judges' independence include the procedures for their election or appointment, transfer or recalling; prohibition of interference with judicial activity, the inviolability of judges, and guarantees of respect for the court, endowed with criminal sanctions; and rules regarding the material provision of judges. As fundamental as these indicators are, they can be influenced by multiple

³The ranking is available at: http://reports.weforum.org/pdf/gci-2017-2018-scorecard/WEF_GCI_2017_2018_Scorecard_EOSQ144.pdf (last accessed 15 July 2019).

⁴The full text of the programme (in Russian) is available at: <http://www.adilet.gov.kz/ru/articles/100-shagov-po-5-institucionalnym-reformam#2> (last accessed 15 July 2019).

⁵Step 17 is about optimising minimum qualification criteria for judges, step 18 provides for transferring the Institute of Justice, which provides in-service training to judges, from the Academy of State Management under the President of the Republic of Kazakhstan to the Supreme Court, and step 19 deals with the accountability of judges on the basis of a new Ethical Code for Judges, whereby individuals should be able to bring complaints against judges before a Judicial Jury under the Supreme Court.

⁶Cf. Article 79(1) of the Constitution of Kazakhstan; Article 94(4) of the Constitution of Kyrgyzstan; Article 84 of the Constitution of Tajikistan; Article 98 of the Constitution of Turkmenistan; Article 112 of the Constitution of Uzbekistan.

⁷Cf. Articles 25 and 26 of Kazakhstan's Constitutional Law "On the Judicial System and the Status of Judges of the Republic of Kazakhstan"; Article 11 of Kyrgyzstan's Constitutional Law "On the Status of Judges of the Kyrgyz Republic"; Article 8 of Tajikistan's Constitutional Law "On Courts of the Republic of Tajikistan"; Article 4 of Turkmenistan's Law "On the Court"; Article 67 of Uzbekistan's Law "On Courts".

factors, some of which are selectively considered below. The selectivity is conditioned by the limited volume of this article.

3. Corruption

All Central Asian States rank quite low in Transparency International's *Corruption Perception Index*.⁸ Judiciary is a strategic area where corruption must be combatted, because the quality of justice affects not only specific disputes but, more generally, the economic and social climate in a State. With due regard to this, paragraph 4.4 of Kazakhstan's Anti-corruption Strategy for 2015 - 2025 provides as follows:

The effectiveness of the state anti-corruption policy primarily depends on the rule of law system, the main element of which is an impeccable justice system.

To increase confidence in the judicial system, improve the quality of administration of justice, measures will be taken to eliminate corruption in the activities of judges, including by tightening the requirements for candidates for judges.

A simplification of legal proceedings, increasing [their] efficiency, automating the activities of courts will ensure free access to justice, increase transparency in the activities of the judicial system [...]⁹

Notably, paragraph 4.1 of the same Strategy provides for a gradual increase of State officials' salaries and social benefits:

To reduce the level of corruption in the state apparatus, further gradual increase in salaries and social benefits of officials is envisaged as the financial capacity of the state expands. This task becomes ever more important in view of the fact that the remuneration of civil servants is still not competitive enough in comparison with the private sector.

The proposed measures are in line with Transparency International's recommendations pertaining to combatting corruption in the judicial sector:

Fair salaries and pensions for judges make court personnel less vulnerable to bribery. These should reflect experience, performance and an honest track record. In the face of powerful interests, several measures can also protect judges from pressure. These include investigations of credible allegations against them, and limited liability for decisions. Court officials must be aware that if corruption is proved, they'll be removed in a fair, open way.¹⁰

International organisations such as the Organisation for Economic Co-operation and

⁸ According to the 2018 ranking, Kazakhstan ranks 124th, Kyrgyzstan the 132nd, Tajikistan the 152nd, Turkmenistan the 161st, and Uzbekistan the 158th.

⁹ The full text of the Strategy (in Russian) is available at: <http://kyzmet.gov.kz/ru/pages/antikorrupcion-naya-strategiya-respubliki-kazahstan-na-2015-2025-gody> (last accessed 15 July 2019).

¹⁰ See: <https://www.transparency.org/topic/detail/judiciary> (last accessed 15 July 2019).

Development (OECD) may be instrumental in supporting anti-corruption reforms in Central Asia. All Central Asian States received from OECD comprehensive sets of recommendations,¹¹ which, if implemented, could significantly reinforce the independence of judges at all levels and, more generally, reduce corruption risks in the judicial sector. Also, putting in place anti-corruption courts with judges having relevant expertise may be useful.¹²

4. Professional background of judges

An expert report produced under the auspice of the Venice Commission notes, symptomatically, that in Central Asia, most judges are appointed from among former assistant judges or court secretaries.¹³ This largely follows Russia's trend where, according to the Supreme Court statistics of a few years ago, over 93 per cent of regional courts' judges were promoted from district or city courts, some 2.65 per cent of judges were former prosecutors, followed by former law professors, legal advisors to State organs, experts, policemen, and investigators.¹⁴ Only about 0.2 of judges are former defence lawyers.¹⁵ Such appointments are usually justified by candidates' familiarity with domestic criminal procedures and experience in criminal trials.¹⁶ However, as a matter of practice, this approach suffers from judges' professional deformation, and results in an overwhelming numbers of convictions in criminal trials. In the words of N. Polozov, a Russian lawyer who defended clients in a number of landmark trials, notes that "the professional deformation of the world view is inevitable. If an individual became accustomed to engaging in accusations, he would hardly display any miracles of humanism".¹⁷ In the early post-Soviet years, the extent of prosecution's bond with the judiciary was such that prosecutors' territorial offices were *physically* sharing buildings with the respective courts. Given the extent of judiciary's integration with prosecution, both intellectual and physical, the former's independence was jeopardised to a significant extent.

In more recent times, measures were taken to separate prosecution from courts physically but more must be done to reduce the appointments of former prosecutors and law enforcement officials to judicial offices.¹⁸ In this author's view, it would be appropriate to restrict, as a matter of law, access to judicial appointments for candidates with predominant

¹¹See: <http://www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm> (last accessed 15 July 2019).

¹²Cf. for example, Ukraine's experience: <https://bykvu.com/bukvy/114667-v-ukraine-zapustili-rabotu-vysshego-antikorrupcionnogo-suda> (last accessed 25 April 2019).

¹³See: Диков Г. (ред.), Обзор судебных систем стран Центральной Азии (Москва, "Юриспруденция", 2015). С. 52.

¹⁴See: http://www.ng.ru/politics/2012-07-27/1_sudy.html (last accessed 23 April 2019).

¹⁵Ibid.

¹⁶Notably, the number of acquittals in Uzbekistan increased considerably since 2017: <https://nuz.uz/sobytiya/29733-v-2017-godu-sudy-vynesli-opravdatelnye-prigovory-262-obvinyaemym.html> (last accessed 25 April 2019).

¹⁷See supra note 13.

¹⁸Cf. the first part of Article 61 of Uzbekistan's Law "On Courts", which stipulates that candidates for judicial appointments must have at least five years of experience in a legal profession, "above all, in law enforcement organs".

professional experience in law enforcement organs, or to introduce, as a mandatory criterion, a significant minimum term (at least, ten years) of uninterrupted experience as a trial lawyer in criminal or civil matters, immediately before applying for a judicial appointment.

Another – significantly undervalued – pool of potential candidates for appointments to judicial offices are (senior) law professors. As members of a nation's intellectual elite, they could improve the quality of justice significantly, by using their sense of objectivity and wisdom.

5. Academic background of judges

It is crucial that judges are appointed from among candidates with the highest academic scores. In addition to general and professional experience, which are key to a judge's profile, his or her academic ability must be seen as a crucial criterion. Whereas a judge in a civil law system has a lesser space for maneuver in interpreting law than a judge would have in a common law country, he or she must still be able to display creativity, because each (civil or criminal) case is individual, and judgments must be made with due regard to specific circumstances surrounding each given case. This is only possible, if a judge's academic background is superior. In addition to having a profound understanding of applicable law and jurisprudence, a judge must have a profound theoretical understanding of fundamental legal concepts, which underlie specific rules of law, because such understanding would enable him or her to make nuanced judgments. Law is all about nuances. Judges must have a practical understanding of applicable international law, because their issuing judgments with due regard to a State's obligations under international law would reduce the amount of future individual petitions to international bodies monitoring compliance, in particular, with international human rights law. In other words, judging with awareness of a State's international obligations reduces future risks for the State's image and treasury. Finally, judges who are well versed in comparative law are more likely to produce judgments of quality. Certainly, most judgments are made on the basis of domestic law but sooner or later, judges adjudicating civil and criminal cases alike would be required to apply foreign law, and its proper application would require intellectual efforts well beyond the average, including, possibly, some knowledge of respective foreign languages. What is more, the comparative law method may be useful in the adjudication of purely domestic cases, because the study of useful foreign experiences should drive the progressive development of one's own law and practice.¹⁹ It is submitted that such challenges would best be dealt with by candidates with superior academic records, and applications from less successful applicants should be discarded.

The relationship between a candidate's academic record and his or her independence as a judge is direct. A judge's work requires broad experiential horizons, an advanced ability to seek, select, digest and assess information, exceptional communication skills, as well as critical thinking. This means that he or she must be inquisitive, and for this, he or she must possess an independent and objective mind. If the quality of justice is to improve visibly, it

¹⁹See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edition (Oxford University Press, 1998). Pp. 20-21.

is recommended that Central Asian States offer access to judicial appointments at all levels only to the very top law graduates, and enforce this policy strictly.

6. Duration of judicial appointments and relationship with the executive

Approaches to the duration of judicial appointments vary among Central Asian States.²⁰ Of these, Kazakhstan's approach appears optimal, as it allows judges to exercise their powers, subject to lawful and ethical performance, without temporal limitations. In Kyrgyzstan and Uzbekistan, judges can progress, subject to satisfactory performance, to terms of office of an unlimited duration after initial appointments for specified terms. By contrast, in Tajikistan and Turkmenistan, judges are elected or appointed for specified terms,²¹ which could potentially affect their independence in the performance of judicial activities. Limited terms of office make judges relatively more dependent on the executive (i.e. Head of State) who plays a key role in making the appointments (and, probably more importantly, re-appointments) of judges. It appears that extending the duration of judicial appointments should have a positive effect on furthering the independence of judges in Tajikistan²² and Turkmenistan.

7. Conclusion

The independence of judges is among the key indicator's of a State's efficiency. It shows the State's commitment to the rule of law, attests to the State's compliance with its obligations under international law – in particular, under international human rights law – and contributes to creating a favourable climate for international investors. Furthering this independence must be among Central Asian States' most urgent priorities. Whereas the legislative framework for ensuring judges' independence is overall quite sufficient, some fine-tuning could be done, especially as far as basic professional and academic requirements for judicial appointments, especially at the entry levels, are concerned. Corruption in the judicial sector must be combated resolutely, in particular, by means of raising judges' salaries. Finally, doing away with temporal limitations of judges' tenures should quite significantly contribute to their independence and reduce the judiciary's structural dependence on the executive.

²⁰In accordance with Article 24(1) of Kazakhstan's Constitutional Law "On the Judicial System and the Status of Judges of the Republic of Kazakhstan", judges "shall be endowed with powers on a permanent basis". The second sentence of Article 94(8) of Kyrgyzstan's Constitution provides that judges of local courts are initially appointed for a five-year term, and subsequently, "until the attainment of the ultimate age". In accordance with Article 15 of Tajikistan's Constitutional Law "On Courts of the Republic of Tajikistan", judges are elected or appointed for a term of ten years. In Turkmenistan, the duration of a judge's office is five years (cf. Article 54 of Turkmenistan's Law "On the Court"). In Uzbekistan, a judge is elected or appointed for an initial five-year period, a following ten-year period, and a subsequent unlimited period (Article 631 of Uzbekistan's Law "On Courts").

²¹In the past, this was also the case in Uzbekistan.

²²It must be recalled here that Tajikistan already holds the highest position, among Central Asian States, in the World Economic Forum's ranking of judicial independence, see *supra* note 2.

С.В. Саяпин: «Сыни талдау, қатаң тәртіп және дербес жауапкершілік»: Орталық Азияда сот билігінің тәуелсіздігін күшейту туралы ойлар.

Орталық Азия мемлекеттерінің барлығының Конституциялары мен сәйкес заңдары сот билігінің тәуелсіздігі кепілдіктерін бекітетініне қарамастан, аймақтың кейбір мемлекеттері Дүниежүзілік Экономикалық Форум жариялаған 2017–2018 жылдардағы сот билігінің тәуелсіздігі рейтингінің екінші жартысынан орын тепті. Мақалада аймақтағы сот билігінің тәуелсіздігіне кедергілердің кейбіреуі қарастырылады – атап айтқанда, сыбайлас жемқорлық, сот жүйесі мен құқыққорғау органдарының арасындағы құрылымдық байланыстар, судьялардың өкілеттік мерзімдері және биліктің атқарушы тармағының ықпалы – және осындай кедергілерді жеңудің ықтимал жолдары ұсынылады. Талдауға негіз болған: фактілік мәліметтер, заңнамалық актілер, халықаралық ұйымдардың тиісті ұсынымдары, сондай-ақ мамандардың пікірі. Судьялыққа үміткерлердің академиялық біліктілігіне және судьялардың кәсіби өйөрісіндегі халықаралық құқық пен салыстырмалы құқықтанудың рөліне ерекше көңіл аударылады. Сот төрелігін атқарудың сапасы жеке және заңды тұлғалардың арасындағы нақты дауларды шешу үшін ғана маңызды емес, оның әлдеқайда кең ауқымды маңызы бар – әлеуметтік әл-ауқатты жақсарту, мемлекеттердің әлеуметтік және экономикалық дамуына септігін тигізу. Тиісінше, сот билігінің тәуелсіздігін арттыру Орталық Азия мемлекеттерінің маңызды басымдықтарының бірі болуы керек. Осы мақсатқа үміткерлер ішінен азаматтық, отбасылық және қылмыстық істер бойынша ең білікті және тәжірибелі адвокаттарды судья лауазымдарына ұзақ уақытқа тағайындау, сондай-ақ судьяларды материалдық қамтамасыз етуді айтарлықтай жақсарту арқылы қол жеткізуге болады.

Тірек сөздер: Қазақстан, сыбайлас жемқорлық, Қырғызстан, тәуелсіздік, сот жүйесін реформалау, судьялар, соттар, Тәжікстан, Түрікменстан, Өзбекстан, Орталық Азия.

С.В. Саяпин²³: «Критический анализ, строгая дисциплина и персональная ответственность»: размышления об усилении независимости судебной власти в Центральной Азии.

Несмотря на то, что Конституции и соответствующие законы всех государств Центральной Азии содержат гарантии независимости судебной власти, некоторые государства региона разместились во второй половине рейтинга независимости судебной власти за 2017 – 2018 годы, опубликованного Всемирным Экономическим Форумом. В статье рассматриваются некоторые препятствия независимости судебной власти в регионе – в частности, коррупция, структурные связи между судебной системой и правоохранительными органами, срок полномочий судей и влияние исполнительной ветви власти, – и предлагаются возможные пути преодоления таких препятствий. Основой для анализа являются фактические данные, акты законода-

²³Сергей Вячеславович Саяпин – LL.B., LL.M., Dr. iur., ассоциированный профессор международного и уголовного права и директор программы бакалавриата по международному праву Школы права Университета КИМЭП (Алматы, Казахстан); s.sayapin@kimep.kz.

тельства, соответствующие рекомендации международных организаций, а также мнения специалистов. Особо подчеркивается академическая квалификация кандидатов в судьи и роли международного права и сравнительного правоведения в профессиональном кругозоре судей. Качество осуществления правосудия имеет значение не только для разрешения конкретных споров между физическими и юридическими лицами, но и в более общем смысле – для улучшения социального благополучия, социального и экономического развития государств. Соответственно, повышение независимости судебной власти должно быть одним из важнейших приоритетов государств Центральной Азии. Эта цель может быть достигнута путем долгосрочного назначения на судебские должности кандидатов из числа наиболее квалифицированных и опытных адвокатов по гражданским, семейным и уголовным делам, а также существенного улучшения материального обеспечения судей.

Ключевые слова: Казахстан, коррупция, Кыргызстан, независимость, реформа судебной системы, судьи, суды, Таджикистан, Туркменистан, Узбекистан, Центральная Азия

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С постоянно растущим распространением искусственного интеллекта (ИИ) мы становимся свидетелями рождения новой эры, ознаменовавшейся появлением ранее неизвестных отраслей и прорывных инноваций в медицине, биоинженерии, робототехнике, вооружении и освоении космоса. Автор шаг за шагом представляет подробный обзор основных вех развития искусственного интеллекта, переходит к текущему применению ИИ в повседневной жизни, представляет основные черты национальных стратегий искусственного интеллекта в ряде стран.