

Criminal Justice Reform in Kazakhstan and OSCE Commitments

Daniyar Kanafin

Defense lawyer of the Almaty Defense Bar Association, member of Association's Board, and member of Kazakhstan's Defense Attorney Union Board.

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It has been seventeen years since Kazakhstan gained independence, which is enough to measure the success of moving from the legal system based on Soviet totalitarianism to contemporary democratic standards. Such evaluation is indeed important, and not only because Kazakhstan will take the presidency of the Organization for Security and Co-operation in Europe (OSCE) in 2010 and will thus represent this highly reputed international human rights structure on the global arena. The objective analysis of the situation in this area is also crucial because the state of Kazakhstan's legal and political system may help determine the vitality of democratic values in the Asian part of the former USSR and increase the efficiency of their advancement in this region.

Apparently, it is impossible to analyze all changes that have taken place in the state and legal system of Kazakhstan during these years within the scope of one article. The subject of this research is the issue of judicial independence in criminal proceedings, since criminal justice is an indicator of how human rights and freedoms are respected in a particular state. It is independent judiciary only that can insure the effective fulfillment of all other OSCE commitments in this area. OSCE has been consistent and proactive in emphasizing the need to have independent courts. For example, the Document of the CSCE Conference on the Human Dimension, which was adopted in Moscow on October 3, 1991, says that 'the participating states will respect the internationally recognized standards that relate to the independence of judges and legal practitioners' and 'ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice.'¹ This principle is also reflected in the Copenhagen Document of the CSCE Conference on the Human Dimension as of June 29, 1990, Istanbul Document as of November 19, 1999, and others.²

Admittedly, during the time of its independence, Kazakhstan has done a lot in order to strengthen major principles of fair criminal trial in its national legislation. The overwhelming majority of relevant commitments imposed by OSCE on its members are reflected in the applicable constitutional and criminal and procedural law. Not only are these provisions prescribed in the laws but sometimes the procedure of their implementation is settled in other regulatory acts in great detail. For instance, the procedure for ensuring the right to a qualified defense attorney is spelled out in the Criminal and Procedural Code of the Republic of Kazakhstan appropriate regulatory resolution of the Supreme Court and other by-laws quite scrupulously, a fact that seems laudable by itself.³ Also, the norms of trial openness, presumption of innocence, etc. are detailed fairly well. However, similar to a good sermon which is not always followed by the sinful parish, humanism and democratization of the national legislation fails in practice. Regrettably, we should admit that criminal justice remains unjustifiably repressive, human rights and freedoms are frequently restricted by law enforcement agencies on no legal basis, and courts are not always able to be objective and impartial when dealing with criminal cases.

A large number of liberal norms notwithstanding, the application of criminal and procedural legislation is inquisitorial by nature. The amount of acquittals is not higher than one percent of the total number of

1 OSCE Human Dimension Commitments, Vol. 1, OSCE/ODIHR, 2006, p. 103

2 Id.

3 See. Articles 70-74 of the Criminal Procedural Court of the Republic of Kazakhstan, Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan, Ref. No. 26, as of 6 December 2002 'On the Practice of Implementing Criminal and Procedural Legislation Regulating the Right to Defense' (available online at <http://base.zakon.kz/class.asp?Parent=1>)

cases reviewed by courts.⁴ Often times a criminal procedure is used to tackle political opposition. Rampant corruption and inefficient procedural guarantees enable law enforcement bodies to interfere with people's privacy⁵ and business activities, as well as to use their authority for gaining illicit profits. In our opinion, such lugubrious state of law enforcement became possible due to a lack of real judicial independence.

In our opinion, this situation in the Republic of Kazakhstan is caused by the peculiarities of appointing judges and ways of managing the judicial system. In accordance with the applicable law, the Supreme Court judges of the Republic of Kazakhstan are selected by the Senate as proposed by the President of the Republic of Kazakhstan (hereinafter the President) based on the recommendation of the Supreme Judicial Council. Judges of local and other courts are appointed by the President as recommended by the Supreme Judicial Council.

Formally, the procedure for appointing Supreme Court judges by the Senate looks fairly democratic but in fact it is used by the executive power as a cover to recruit the judges they need. According to Article 50 of the Constitution of the Republic of Kazakhstan (hereinafter the Constitution), 15 Senate members, which is approximately one-third of their total number, are appointed by the President. All other senators are elected by maslihats⁶ under vigorous administrative control of akimats,⁷ which represent the executive branch at a local level. It should also be noted that none of the elections conducted in the Republic of Kazakhstan has been recognized by ODIHR/OSCE as fully compliant with international standards. Thus, the independence of this chamber of the Parliament raises certain doubts. Moreover, until recently senators could consider only those candidates who were proposed by the President, which means that Supreme Court judges were actually selected on a non-competitive basis.⁸ Consequently, there are no elections as such, while the Senate simply approves those candidates that are proposed by the President.

The participation of such an institution as the Supreme Judicial Council in appointing judges may create an impression of collective decisions and the democratic nature of this procedure. However, the in-depth analysis of the composition and functioning procedure of this body reveals its fairly limited independence and submissiveness to the executive power.

The Supreme Judicial Council is an institution without the status of a legal entity, which has been established in order to ensure the constitutional authority of the President to form courts and to guarantee the independence and immunity of judges.⁹ It consists of a Chairman, Secretary and other members who are appointed and dismissed by the President.¹⁰

4 See Early to Rest on Laurels, *Yuridicheskaya Gazeta*, issue 12 (1412), January 25, 2008; Is It Easy to Acquit? by Askar Keshkimbaev, *Yuridicheskaya Gazeta*, March 16, 2006 (available online at <http://base.zakon.kz/result.asp?uid=44FE6DE1-EB74-4C79-A1F1-5AAAF2D8304F&fromclass=1&class=3408&language=eng>)

5 The circumstances of illegal wiretapping on telephone conversations of some political figures in Kazakhstan are the most offensive cases of interference with individual privacy. For more information, check at www.kaztoday.ru

6 Local representative authorities elected by the public, often at the same time with parliamentary elections.

7 Local central executive bodies whose heads (akims) are appointed by the President.

8 See Basics of Anticorruption Measures: Guidebook, ed. by I. Rogov, S. Bychkova, Almaty, Transparency Kazakhstan, Interlegal, 2004, chapter 5, p. 84.

9 See Article 1 of the RK Law 'On the Supreme Judicial Council of the Republic of Kazakhstan,' N 203-II as of May 28, 2001 (available online at http://base.zakon.kz/pg_result.asp)

10 See Article 3 of the RK Law 'On the Supreme Judicial Council of the Republic of Kazakhstan,' N 203-II as of May 28, 2001 (available online at http://base.zakon.kz/pg_result.asp)

In many developed countries the head of the executive power appoints judges, and we do not view it as an obstacle to their independence. There is no doubt that not only the appointment, but also the selection of judges takes place under the vigorous control of the executive branch. Since all members of the Supreme Judicial Council are appointed by the President based on the criteria which are not directly specified in the law, we may assume that judges are factually appointed by the President with the participation of public officials and other individuals who are loyal to the executive branch.¹¹ In actuality, civil society cannot participate in the work of the Supreme Judicial Council or at least control the results of these activities. As a result, we have a situation when bureaucratic structures controlled directly by the President form the judicial manpower.

However, judges are dependent on the executive branch not only in terms of receiving their status. The existing system of managing justice administration restricts judges in their independence. In Kazakhstan judges are evaluated based on the number of overruled judicial decisions. These statistics significantly impact a judge's career growth and is a hidden form of managing their actions. Judges are afraid to announce verdicts which may not please higher ranking officials. Indeed, every overruling is perceived as poor performance and a certain number of such cases may give rise to negative conclusions about the professionalism of this particular judge, which may have other consequences as well. As testified by A. Kishkembraev, a judge of rayon court 2 of the Sary-Arkin district in Astana, 'we do have cases when first-instance courts study the circumstances of a case most fully and objectively and then announce a verdict which is later overruled. And a particular judge who acquits the defendant, in case he or she does not agree with the decision of the appeal court, does not have any legal means and possibilities to stand up for his opinion. Furthermore, hypothetically — and practically, too — it may happen that such a judge will have to face disciplinary punishment. In essence, we talk about being punished for your conviction reflected in the judicial act. Overruling or changing judicial acts in other countries does not result in a judge's punishment, since this is viewed as a violation of their status and independence. In our country if a judge overrules a few judicial acts, this may result in their punishment or even dismissal. In other words, the thought of a punishment is like a sword of Damocles dangling over the judge's head which does not contribute to their independence. In this sense, all criticism of defense attorneys participating in a case and questioning the independence of the judiciary is fair.'¹²

Moreover, chairmen of courts appointed by top executive officials hold an unjustifiable amount of power in their hands, which also restricts judicial independence. In the opinion of some authors, chairmen of courts control the distribution of cases among judges which means personal interference with the quality of judicial proceedings.¹³ Also, they have a lot of administrative authority, e.g. the right to initiate a disciplinary case against a judge based on their own decision to overrule the judicial act of this judge. In the long run, this practice 'leads to the implicit obedience of judges to the chairmen of the courts, and lower level courts to those of higher level.'¹⁴

11 According to the President's Edict 'On the Establishment and Composition of the Supreme Judicial Council of the Republic of Kazakhstan,' Ref. No. 696, as of November 21, 2008, the Supreme Judicial Council consists of the Chairman of the Council, two Parliament Members, Chief Justice, Prosecutor-General, three judges of the Supreme Court and President of the Defense Bar Association. The Secretary of the Council is Head of the State and Legal Department of the President's Administration (available at http://ru.government.kz/docs/u080696_20081121~1.htm)

12 Is It Easy to Acquit? by Askar Keshkimbaev, Yuridicheskaya Gazeta, March 16, 2006 (available online at <http://base.zakon.kz/result.asp?uid=44FE6DE1-EB74-4C79-A1F1-5AAAF2D8304F&fromclass=1&class=3408&language=eng>)

13 See Judiciary Decomposed from Inside by Kaisa Samat (available online at <http://www.zonakz.net> as of 25 February 2008)

14 See Judiciary Decomposed from Inside by Kaisa Samat (available online at <http://www.zonakz.net> as of 25 February 2008)

Interaction between the executive and judicial branches of power does not promote actual strengthening of judicial independence, since the material security of judges at the regional level depends on the benevolence of executive officials. 'Have you ever seen executive officials huddling together in a rented building?' Mr. S. Abdrakhmanov, Chairman of the Kostanai Oblast Court, said. 'As a rule, in oblasts and rayons, as well as in village councils, executive heads occupy the best building, warm and light, which is also located downtown or in the center of a village. And we have to go cap in hand to the executive heads and ask them to provide us with at least some court building. This is where judicial independence turns into dependence. Does all this promote total independence of the judiciary? Of course, not. This means that society, or the representative and executive branches of power, to be precise, do not want to have judicial independence,' he added. Obviously, the income level and social guarantees of judges leave much to be desired. The representatives of the judiciary, quite justifiably, complain about low salaries, poor social benefits, difficulties with housing, miserable working conditions, insufficient retirement benefits which are low for public officials of their rank, and other material and financial challenges. If there are no prospects of trouble-free retirement years in the future and proper income in the present, we cannot talk about a truly independent judiciary.

As a result of all these factors, the judiciary becomes an appendix of the executive branch of power, making all actions of latter legal.¹⁵ There is no doubt that in the area of tackling crime the government is interested in most effective and fast punishment of those breaking the law. However, in a law-governed democratic state with checks and balances courts restrict any repressive aspiration of law enforcement bodies and keep them within certain limits by protecting individual rights and freedoms from their undue infringement. In Kazakhstan the judiciary most often expresses the interests of the executive power, since they are one bone and one flesh. Also, the justice system leans strongly toward supporting the interests of public prosecutors. Therefore, sometimes judges feel free to subtly— and at times strongly — support public prosecutors in filling the gaps in case- related evidence. They may also condone self-evident cases of torture and other illegal investigation methods, ignore violations of the law by criminal investigation bodies, and oftentimes pay no attention to well grounded complaints and requests of the accused and their defense attorneys. Most dauntingly, courts may be used by authorities to deal with dissidents and political opponents. Lack of judicial independence has a negative impact on the country's economic development, because the state is not able to ensure the major postulate of a market-based economy, which is inviolability of property. The judiciary which is controlled by executive officials may, at any time, neglect the law and rule in favor of a raider or an unfair competitor, particularly if they are public officials or other related individuals themselves.

Apparently, the situation we observe in the area of judicial independence in Kazakhstan needs to be redressed as soon as possible. Being dependent on political elites and the state machine which is controlled by them, courts are not able to serve as full-fledged arbiters in handling legal disputes, nor guarantee the respect and protection of fundamental principles of a free democratic society. Under these conditions, Kazakhstan's promises to fulfill its commitments in front of OSCE will remain unsubstantiated and declarative, since the most important mechanism that would force the government to follow these obligations is missing.


Judicial independence is possible to strengthen through a number of specific measures. In our opinion, this

¹⁵ Some researchers agree with this conclusion: 'Starting in 1991, important steps have been made in Kazakhstan's judicial system to move from the significant dependence of justice on political priorities and administrative instructions to more solid fundamentals based on the rule of law. However, either directly or indirectly, the executive branch still plays the predominant role in the judicial system. As before, judges depend on political pressure and administrative orders, and are prone to corruption. Professional training in the area of ethical conduct among judges is still far from international standards, and particularly the Bangalore Principles of Judicial Conduct.' Road Map of Kazakhstan, Parts 5-8 (available online at <http://www.apn.kz/publications/print335.htm>)

OSCE standard could be achieved through expanding the authority of courts with jury trials, and also through using the classical Anglo-American model. The draft law on the Supreme Judicial Council which is being developed at the moment should envisage membership of NGO activists and, possibly, public associations and even political parties. Instead of being appointed, chairmen of courts should be elected by the court plenary meeting on a regular basis. Judges recalling judgments should not be subject to disciplinary liability, and other methods of evaluating their work should be applied. Maybe, the idea of electing judges should be discussed, using the procedure used in some US states and known as the Missouri procedure. In any case, it is obvious that the political will of the highest-ranking officials in Kazakhstan is required to ensure true judicial independence. Only when the authoritarian style of public administration is abandoned will the judiciary become genuinely independent.

We are full of hope that common sense will prevail, and widely accepted values of developed countries will, little by little, and through peaceful evolution, become part not only of our law, but also of its enforcement mechanisms. Chairmanship of the OSCE is a historic chance which will help Kazakhstan to make yet another step on the way to building a fair and law-governed state, where independent, objective, and impartial courts will be guarding human rights and democratic freedoms.





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Netherlands Helsinki Committee
Het Nutshuis
Riviervismarkt 4
2513 AM The Hague
The Netherlands

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