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INTERNATIONAL STANDARDS AND TASKS FACED BY ADVOCACY IN KAZAKHSTAN

The people of Kazakhstan have already done a lot in terms of promoting the development of independent advocacy. Our achievements in this regard - the adoption of the Constitution, which protects the fundamental human rights, including freedom of expression and conscience, freedom of meetings and protection of the rights to due legal process in criminal proceedings.

In 2005, the government of Kazakhstan has ratified the International Covenant on Civil and Political Rights, which includes measures to protect the rights of a criminal defendant's for attorney assistance. [1] In addition, the government of Kazakhstan has agreed to adhere to the OSCE commitments in the field of human dimension, including the promotion of independence of judges and bar association, equality of parties / competition in criminal cases, and the independence and impartiality of the courts. [2] The international community understands, what are the goals of Kazakhstan in the field of legal reforms, and strongly supports them.

Comparative analysis of Russian and Kazakh advocacy

My scientific experience focuses on Kazakhstani advocacy³, but I also made time for the study of the Russian advocacy and analysis of Draft of alterations and amendments to the laws relating to the Kazakhstani advocacy presented by Majilis earlier this year. So now I am better able to analyze the parallels between the two systems with the same structure and make some suggestions.

I'll start with the positive parallels, and there are a lot of those. In both countries, the work of thousands of highly educated attorneys reflects the serious professional and ethical values. Many qualified lawyers working in the field of education, and human rights specialists help raise the level of public awareness on the importance of legal reform. Both countries have adopted constitutions and laws that allow for international standards and fix the civil, political, economic and social rights, including the right to qualified legal assistance. Russian and Kazakh attorneys now have the freedom to choose their own form of work, from a one-man practice to work in the organization of large scale, such as legal advice agencies, and large

firms. They also have the right to form attorney, through which they can advocate for legal reforms, and use them to improve their professional level. This is a major achievement in terms of promoting the ideals of liberal democracy, civil society and the rule of law.

In negative terms, Russia and Kazakhstan continue to struggle with the elements of corruption against the reforms in law enforcement. These elements undermine the right to due legal process, including the work of attorneys. Torture of suspects is a problem, especially in Kazakh custody. According to Anuar Kurmanbaevich Tugel, president of the Union of Attorneys of Kazakhstan, law enforcement officials often hard on defenders. Mr. Tugel argues that "the current law protects the privilege of "defender - client" but it does not work in practice. There is no legal mechanism to bring to justice those who hinder the implementation of the attorney activity". [3]. Alimkulov Erbol Temirhanovich, assistant professor of criminal law, criminal procedure and criminology argues that the violation of human rights in Kazakhstan continues partly because bureaucrats operate under an internal written policy, rather than on the basis of national or international guidelines. [4, p.48]

In order to solve these and similar problems, it is necessary to focus on reforming the law enforcement, not the strengthening of system of state control over the advocacy. This *should be* the guiding principle. One step forward for Kazakhstan will be reform of prosecution, as did Russia, so that prosecutors do not have oversight of the legality of the administration of justice, and focused its forces exclusively on the prosecution of crimes. Independent monitoring groups should also get free access to places of detention.

Second, attorneys should not be treated as if they are public servants. Attorneys and their activity should not be subject to

legislation governing measures to combat corruption, aimed at public officials who violate the law. The only obligation of attorney, imposed on him by the state, subject to Art. 13.3 of the Constitution of Kazakhstan (the universal right to qualified legal assistance). This can be achieved by improving the quality of legal education, maintenance of the independence of advocacy governing bodies and state guarantees of constitutional right to have legal representative.

My comparative analysis of the challenges and strengths of the Russian and Kazakhstani advocacy showed that Kazakhstani attorneys, in particular, do not have sufficient access to clients whose cases are considered in the secret / private litigation. In order to obtain a special permit in order to protect these clients, Kazakhstani attorney usually must agree to supervision by the National Security Committee. In addition, there is no public and legal procedures for obtaining such permission (of which no mention is made in the Criminal Procedure Code of Kazakhstan), without the possibility of appeal, if such permission is denied. This arbitrary procedure should be abolished immediately. It is contrary to international legal standards, such as those set out in the Art.14.3 ICCPR and Standard 9 of Standards of independence of the legal profession, adopted by the International Lawyers Association. [5] The procedures governing the way defenders must get security clearance are not regulated by the domestic law of Kazakhstan, and thus there is no transparency in the way the practice is carried out, and as a result it is likely to become a victim of arbitrary action by law enforcement bodies. Any licensed attorneys should be allowed to represent the accused in the politically sensitive cases in the regular courts, as currently practiced in democratic countries. [6] National Security Committee (KNB) has no legal grounds to deny the right of criminal defendants to have attorney of their own choosing and

the right to work with a qualified attorney when prepare his case. [7, p.214]

Furthermore, two related negative qualities that are present both in the Russian and in Kazakhstani legal systems - is the lack of attorneys, particularly in rural areas (where about 18% of Kazakhstani attorneys are working) and the fact that many attorneys are overloaded by free legal assistance for which they are poorly paid. How to increase the number of attorneys? Although this issue should be resolved primarily by the governing bodies of advocacy, the government can help advocacy associations by providing financial incentives for lawyers to ensure that they were in the less populated regions and worked as attorneys. Such incentives should include an increase in hourly pay for cases related to the provision of free legal assistance to low-income clients, and providing more favorable conditions for obtaining their pensions at retirement age. Government of Kazakhstan should allocate more of their income from the sale of natural resources in the legal education programs in 14 regions of Kazakhstan. It is necessary to enter the human rights courses in secondary schools as a strategy to build a legal culture in order to allow for more young people the careers in advocacy has become a more attractive alternative than work in other areas.

Draft of alterations and amendments to the laws relating to advocacy and legal profession

The main purpose of my analysis was to determine what reforms would ensure the fact that, in accordance with the international legal obligations of Kazakhstan, Kazakhstani advocacy became a strong civil society organization whose members can provide expert legal assistance and manage their own corporate affairs, including the imposition of disciplinary sanctions on its members. In the draft of alterations and amendments there are several steps that must be taken, despite the fact that they must be formulated in such a way that the judiciary could not control the management of advocacy organizations. This will allow the advocacy associations to continue to manage its own affairs, including the management and the imposition of sanctions on its members without undue interference.

Legislative changes that would facilitate the development of independent advocacy

Licensing of attorneys, as it described in Art. 9, is not contrary to international standards and is the norm in many civil law countries, including Europe, and in the common law countries, including some territories in Canada. Placement requirements before receiving a license to practice advocacy, as set out in Art. 9.2, will help to improve the skills of attorneys. I agree with the Research Institute of legal monitoring, all candidates to advocacy must pass the entrance exam. I want to pay that, according to Art. 9.3, only lawyers with limited work experience should take this examination. [8] It is useful to compare the qualifications needed to practice advocacy in Canada (Ontario). In Ontario, the licensing process has two licensing exam (one - checking professional knowledge of solicitor, attorney, acting only in the lower courts, and the second - professional knowledge of a barrister, attorney of the highest rank, having the right to appear in the higher courts); 10-month internships in law offices (called "articling", although some exceptions are allowed), and a positive response, confirming their "good reputation". [9]

In principle, the new Art. 9-1, which describes in detail the work of the Certification Commission will not have a negative impact on the independence of the legal profession. However, this article should be supplemented with information about who, exactly, will be to the commission and how these people will be elected. From the way it is worded now, it is not clear how this will form the membership of the commission. This is an important topic, since it can have an effect on the independence of the Bar. Most of the committee members must be lawyers. Examination Board should be in every region of Kazakhstan, as well as a Qualification Commission in every region of Russia, and in every state in the United States and every province of Canada. It may be objected that these my country is a federal state, and Kazakhstan - unitary. I look at this issue through the lens distances. Russia, the U.S., Canada, Kazakhstan is a large-sized country. Therefore, in Kazakhstan licensing process, at least, should be decentralized so that candidates do not have to go to Astana to take the exam and

provide proof of qualifications. Such a requirement is certainly burdensome and costly for young lawyers, for example. Finally, Art. 9.4, dedicated to licensing decisions should be either deleted or reworded so that the Evaluation Commission, and not the Ministry of Justice, was the main decision-making body for licenses.

In principle, the new Art. 9-1, which describes in detail the work of the Certification Commission will not have a negative impact on the independence of advocacy. However, this article should be added with information about who, exactly, will be in this commission and how these people will be elected. From the way it is formed now, it is not clear how this will form the membership of the commission. This is an important topic, since it can have an effect on the independence of advocacy. Most of the committee members must be attorneys. Certification Commission should be in every region of Kazakhstan, as well as a Qualification Commission in every region of Russia, and in every state in the United States and every province of Canada. It may be objected that these mentioned countries are federal states, and Kazakhstan - unitary. I look at this issue through the lens of distances. Russia, the U.S., Canada, Kazakhstan is a large-sized countries. Therefore, in Kazakhstan licensing process, at least, should be decentralized so that candidates do not have to go to Astana to take the exam and provide proof of qualifications. Such a requirement is certainly burdensome and costly for young lawyers, for example. Finally, Art. 9.4, dedicated to licensing decisions should be either deleted or reworded so that the Certification Commission, and not the Ministry of Justice, was the main decision-making body for licenses.

Further details of the provisions of Art. 15, prescribing the duties of attorneys, does not, *inter alia*, damages to independence of advocacy. The reference in the Art. 15.1.1 on the obligation of attorney to observe the Code of professional ethics is an important and appropriate addition. But the language of Art. 15 should be clear, especially with a view to avoid the situation where judicial authorities may use it freely to pursue principled attorneys. In particular, I agree with the opinion of the Scientific Research Institute of legal monitoring that Art. 15.1.3, which states the obligation of continuously improvement of their professional quali-

cations may be misinterpreted by members of the Justice. Perhaps this should be restated as follows: "To continue to take courses of legal education in the future in order to be aware of the new law practice and legislative changes".

Measures that would hinder the development of independent advocacy

Art. 34.2 in the draft of alterations and amendments, is gravely contrary to international legal standards. It prescribes the creation of new commissions, government-run, considering complaints against attorneys. These practices can lead to the inappropriate government control over the management of the affairs of advocacy. In the form in which it was formulated at the moment, it is not clear which complaints will be considered by new commissions, in contrast to the presidium. The practice of empowering the judiciary to analyze complaints against attorneys is contrary to international legal standards. For example, according to the Art. 28 of UN Basic Principles on the role of attorneys, adopted by the Eighth Congress of United Nations on the prevention of crime and the treatment of offenders, held in August 1990: "Disciplinary procedures against attorneys shall be an impartial disciplinary commission established by attorneys, an independent statutory body or the court, and shall be subject to independent judicial review. "[10]. According to the Standard 18 b) of Standards of independence of the legal profession of the International lawyers association, the "functions of proper attorney association to ensure the independence of advocacy should, *inter alia*, maintain the honor, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession". The current practice undertaken within the presidiums of Attorney College falls under Art. 28 of "United Nations Basic Principles on the role of attorneys" and the Standard 18 of Standards of independence of the legal profession, adopted by the International lawyers association.

Finally, all references in the draft of alterations and amendments of the requirements for bar association to provide the Ministry of Justice statistics on the profession should be excluded from the draft of alterations and amendments. This also means the exclusion of this provision from Art. 25, which contains the requirement that

the Chairpersons of the presidiums of lawyers should sent statistics data on performance of legal assistance to the Ministry of Justice. This practice is a legacy of the Soviet era, when there existed mentality of the "plan performance" and the fear of reprisals, and it symbolizes the function of supervision of advocacy on the part Justice. This practice is not accepted in the legal systems of legal states, as it is a supervisory authority of state bureaucrats, and implies that attorneys are public servants, but they are not.

Conclusion

Everyone knows that there is no country, the legal system of which will not be without drawbacks, and the changes to the law are never sufficient factor in establishing the rule of law. Before legal reforms will be fully implemented, *people's attitudes* should change. In addition, persons responsible for making policy decisions, should devote more resources to educate public and free legal aid to the poor and must create new incentives to encourage all concerned persons- especially law enforcement agencies - to support the reforms.

Kazakhstan is in the perfect position to show the world its progress towards democracy and the rule of law. One of the safe ways to do so would be to provide a situation in which the legal profession would remain independent professional organization belonging to civil society, and not be controlled by the public authorities.

According to the International lawyers association, the independence of advocacy "is an important guarantee for the development and protection of human rights and is needed for effective and adequate access to legal services." [11]. Kazakhstan has made a strong beginning to enact laws that are in accordance with international standards of independent advocacy. Moreover, it already has a group of highly educated, hard-working and professional-minded attorneys, and they are a valuable asset in efforts to promote the rule of law. As I said earlier, the people responsible for making policy decisions in Kazakhstan should focus on restructuring of law enforcement bodies, and not on strengthening the mechanisms of state control over the legal profession. This *should be* the guiding principle.

References:

1. Text of International Covenant on civil and political rights in English is on <<http://www2.ohchr.org/english/law/ccpr.htm>>. Measures concerning participation of protector in criminal proceedings is set out in Article 14.3 [(b).
2. In terms of the independence of the judiciary and advocacy associations see Articles 20.1-20.4 in Part 2.4.2 "Obligations relating to the structural components of a democratic society - the rule of law: the independence of persons who practice the judiciary and legal profession, and the impartiality of the public judicial service" at <http://www.osce.org/publications/odhr/2005/09/16237_444_en.pdf>.
3. Bulat Mustafin. "Anuar Tugel: "First knock recognition, and then invite attorney", megalopolis.kz, November 11, 2010, at <http://megalopolis.kz/art/Anuar_Tugel_Snachala_vibyt_priznanie_a_potom_priglasheyut_advokata_>.
4. Alimkulov E.T. Participation of attorney in criminal cases. Caspian Public University. Scientific works "Adilet" № 3, 2011. P.48.
5. Standards of independence of the legal profession of the International bar association, adopted in 1990, are on <www.ibanet.org>. Standard 9 states: «No court or administrative authority shall not refuse to recognize the right of attorney qualified in that jurisdiction, to appear before him to defend his client."
6. Legal Policy Research Centre (Almaty, Kazakhstan). "Legal regulation of the admission of lawyers to engage in criminal cases, materials that contain information constituting a state secret (national legislation and international law rules)," December 2009.
7. Human Rights Watch, «Kazakhstan: US Should Press for Rights Reform, April, 2010, is located at <<http://www.hrw.org/en/news/2010/04/10/kazakhstan-us-should-press-rights-reform>>.
8. Letter from «Research Institute of legal monitoring, examination and analysis" LLP of 11 June, 2010 № 01/4-609: «The conclusion of the scientific anti-corruption assessment of the draft Law of the Republic of Kazakhstan "On alterations and amendments to some legislative acts of the Republic of Kazakhstan on Bar".
9. As described in the "Politics of the licensing process" of the Law Society of Upper Canada, at <http://rc.lsuc.on.ca/pdf/licensingprocesslawyer/policy/lp14pol_Policies>.
10. Text of the "Basic Principles on the Role of Attorneys", adopted by the Eighth Congress of United Nations on the Prevention of Crime and the Treatment of Offenders, in August 1990, in English is located at <<http://www2.ohchr.org/english/law/lawyers.htm>>.
11. Preamble, "Standards of independence of the legal profession", adopted in 1990, the English text is at <www.ibanet.org>.