Neither Check nor Balance: The Judiciary in Tajikistan

ICJ Mission Report
December 2020

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Introduction

"I solemnly swear to fulfil my duties honestly, fairly and at the behest of my conscience, observing objectivity and impartiality, to administer justice, obeying only the Constitution of the Republic of Tajikistan and the law".

The oath of a judge in Tajikistan, the Law on Courts, Article 17

The independence of the judiciary is a universal principle which, in accordance with international standards on judicial independence, must be guaranteed by the State, prescribed by law and respected by all branches of State power and all State authority.[1] In 1993 at the Vienna World Conference on Human Rights, all States around the world affirmed that: "The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development".[2] Without a judiciary which is capable of upholding the rule of law through a fair judicial process which respects and protects human rights, justice may not be delivered, and human rights are not reliably guaranteed Indeed, "judicial independence and impartiality are essential prerequisites for the operation of justice".[3] The judicial system is therefore central to human rights protection in any national context.[4] Not only parties to any given dispute, but society as a whole must be able to trust the judiciary to adjudicate fairly and independently, and to protect human rights.[5]

Fair judicial proceedings require a competent, independent, impartial tribunal established by law.[6] The ability of an individual judge or group of judges to deliver justice in a particular case depends on the institutional characteristics of the justice system as a whole and on the seeming technicalities which may often be hidden or unnoticeable to an ordinary user of the justice system or an outside observer. Yet, it is these nuts and bolts of the administration of justice, the internal procedures and mechanisms, upon which the ability of the judiciary to protect one person's human rights depends. By protecting judges from undue outside interference and influence, they should ensure a judges' ability to reason and decide independently.[7]

In this regard, it should be highlighted that the UN Human Rights Committee in its concluding observations upon review of Tajikistan's compliance with its obligations under

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1 UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, principle 1.

2 Vienna Declaration and Programme of Action, adopted by the World Conference of Human Rights in Vienna on 25 June 1993, para. 27.

3 See also, the Consultative Council of European Judges of the Council of Europe (CCJE), Magna Carta of Judges (Fundamental Principles), adopted at the 11th Plenary Meeting, November 2010, principle 2.

4 See sources in ICJ Practitioners Guide No. 1, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Geneva, 2007, p. 3; Legal Commentary to the Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Geneva, 2011, chapters 1 and 12.

5 Consultative Council of European Judges (CCJE), Opinion No. 1 (2001), On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, para. 12.

6 International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, article 14; UN Human Rights Committee, General Comment 32, para. 2.

7 UN Basic Principles, op. cit., principle 2.

the International Covenant on Civil and Political Rights (ICCPR) expressed concern "that the judiciary [in Tajikistan] is still not fully independent owing, inter alia, to the role of and influence exerted by the executive and legislative branches; the criteria for selection, appointment, reappointment and dismissal of judges".[8] The Committee called upon Tajikistan to bring the procedure in compliance with the Covenant.[9]

Indeed, the procedural 'nuances' of the organization of courts or regulation of the composition of a judicial body are the very foundation upon which the justice system's ability to be just rests. Their goal is to make the justice system capable of delivering justice in the society, in line with law and facts, without pressure or fear of reprisal.

Judges cannot deliver justice unless necessary institutional conditions allow for that. Whether a judiciary is independent largely depends on the institutions and procedures which internally regulate the function of the bodies and which concern pressure points of the judicial career. For this reason, the UN Human Rights Committee stressed as follows:

> *"The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."*[10]

This report considers how the institutions and procedures for judicial governance in Tajikistan protect judicial independence, and ensure that the judiciary can uphold human rights. It is based on a research mission carried out by the ICJ in 2019, with the goal of assessing the intricacies of the organization of the judiciary, which are not obvious or known to the general public in Tajikistan. This report aims to shed light on aspects of the functioning of the Tajikistan judiciary which have not so far been subject to significant national or international scrutiny, but which have substantial implications for the rule of law and human rights protection. The ICJ therefore, hopes that this report will contribute to ensuring that Tajikistan is able to develop a genuinely independent judiciary, in law and practice.

A brief historical background to the judicial reform in Tajikistan

Tajikistan belongs to the continental legal tradition.[11] Following the collapse of the Soviet Union in 1991, the country went through a civil war[12] in 1992–1993.[13] After years of

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[8] Human Rights Committee, Concluding observations on the third periodic report of Tajikistan, CCPR/C/TJK/CO/3, 22 August 2019, para. 37.

[9] *Ibid.*, para. 38.

[10] UN Human Rights Committee, General Comment 32, para. 19.

[11] E.g. Law of the Republic of Tajikistan — A Guide to Web Based Resources, by Oleg Stalbovskiy & Maria Stalbovskaya, https://www.nyulawglobal.org/globalex/Tajikistan1.html; Domestic Violence in Tajikistan, The Advocates for Human Rights, October 2008, https://www.theadvocatesforhumanrights.org/uploads/tajikistan_3_6_07_layout_-_final_mc.pdf, p. 28.

[12] National report submitted in accordance with para. 15(a) of the annex to Human Rights Council resolution 5/1*, UN Doc. A/HRC/WG.6/12/TJK/1 (2011), para. 3; Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial report submitted by the States parties, Tajikistan, UN Doc. E/C.12/TJK/1 (2006), para. 3.

[13] United Nations Mission of Observers in Tajikistan, https://peacekeeping.un.org/sites/default/files/past/unmot/Unmot.htm.

negotiations, including with the involvement of the United Nations Mission of Observers in Tajikistan (UNMOT), on 27 June 1997, a peace agreement was signed.[14]

Tajikistan's Constitution and its laws regulating the judicial system were adopted in the 1990s, similar to other post-Soviet States[15]: the new Constitution was adopted in 1995 following which five constitutional laws relating to the judiciary were enacted.[16] These laws established the Constitutional Court, the Supreme Court, the High Economic Court, the Military Court, the Court of the Gorno-Badakhshan autonomous region, the regional courts, the Court of Dushanbe city, city and district courts, the Economic Court of the Gorno-Badakhshan autonomous region, regional economic courts, and the Economic Court of Dushanbe.[17] On 8 August 2001, these laws were replaced by a unified Constitutional Law entitled "On Courts of the Republic of Tajikistan".[18] This was later complemented by a separate law "On the Constitutional Court" adopted in 2014.

Tajikistan is a party to a number of the principal human rights treaties: between 1995 and 2002, Tajikistan acceded to the International Covenant on Civil and Political Rights (ICCPR)[19] and the Optional Protocol to the ICCPR,[20] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[21] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[22] the Convention on the Rights of the Child (CRC)[23] and its Optional Protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography,[24] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[25] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[26] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW),[27] and the Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women.[28] The Convention on the Rights of Persons with Disabilities (CRPD) has recently been signed but not yet ratified.[29] Tajikistan is also party to the Convention relating to the Status of Refugees[30] and its 1967 Protocol.[31]

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14 Core Document Forming Part of the Reports of States Parties Tajikistan, UN Doc HRI/CORE/1/Add.128 (2004), para. 27, 8 Security Council Resolution 968 (1994).

15 In Azerbaijan the law "On Courts and Judges" was adopted on 10 June 1997; in Moldova the law "On Organisation of Judiciary" was adopted on 6 July 1995; in Belarus the Code on the organisation of the judiciary and the status of judges in the Republic of Belarus was adopted on 29 June 2006; in Georgia the law "On General Courts" was adopted on 13 July 1997; in Kazakhstan the law "On Courts and Status of Judges" was adopted on 25 December 2000; In Uzbekistan, the law "On Courts" was adopted on 2 September 1993; in the Baltic States, 1991–1994: in Latvia the law "On Judiciary" was adopted on 15 December 1992; in Lithuania the law "On Courts" was adopted on 31 May 1994; in Estonia the law "On Courts" was adopted in 1991.

16 The Constitution of the Republic of Tajikistan of 6 November 1994; Constitutional law of the Republic of Tajikistan of 3 November 1995, No. 84, "On the Constitutional Court of the Republic of Tajikistan"; of 3 November 1995, No. 86, "On Judiciary"; of 3 November 1995, No. 90, "On Supreme Court of the Republic of Tajikistan"; of 3 November 1995, No. 96, "On Military Courts of the Republic of Tajikistan"; of 4 November 1995, No. 98, "On Status of Judges of the Republic of Tajikistan"; of 4 November 1995, No. 102, "On Economic Courts of the Republic of Tajikistan".

17 *Ibid.*

18 Law on the Constitutional Court, op. cit.

19 The date of accession is 4 January 1999.

20 The date of accession is 4 January 1999.

21 The date of accession is 4 January 1999.

22 The date of accession is 11 January 1995.

23 The date of accession is 26 October 1993.

24 Both acceded to on 5 August 2002.

25 The date of accession is 26 October 1993.

26 The date of accession is 11 January 1995.

27 The date of accession is 8 January 2002.

28 The date of accession is 22 July 2014

29 Date of signature 22 March 2018.

30 The date of accession is 7 December 1993.

31 The date of accession is 7 December 1993.

Since 2007, a number of special State programmes on the reform of the judiciary have been adopted, with the declared aims of strengthening the judiciary and improving the judicial system, enhancing the role of courts in protection of human rights as well as the effective protection of the State, organizations and institutions.[32] These initiatives have sought to improve the organization and functioning of the judiciary, including professional qualification of judicial actors.[33] To date, Tajikistan has adopted four Judicial and Legal Reform Programmes, including the current State Programme for the period of 2019–2021. These programmes have led to some significant legal developments, for example, establishment and subsequent abolition of the Supreme Judicial Council, the adoption of the Code of Judicial Ethics[34] and the Code on Administrative Offences[35] (see Chapter II, Brief historical background, below).

ICJ mission to Tajikistan

From 29 April to 3 May 2019, the ICJ conducted a research mission on the independence of the judiciary in Tajikistan. The mission examined among other things the organization, structure and functioning of the judiciary, as well as the procedures regulating its operation. A lack of comprehensive research on Tajikistan's judiciary prompted the research mission to study in detail how the legal framework, institutional organisation and the actual functioning of the judiciary effectively ensure its independence in practice, as guaranteed by the Tajikistan Constitution[36] and defined in laws.[37]

The mission included Justice Martine Comte, who is an ICJ Commissioner and former justice of the Orleans Court of Appeal (France); Saman Zia-Zarifi, ICJ Secretary General; Temur Shakirov, ICJ Senior Legal Adviser of the Europe and Central Asia Programme; and ICJ Legal Consultants, Dmitriy Nurumov, Ulviya Hasanova, and Dilshod Jurayev.

The ICJ mission met with a wide cross-section of stakeholders, including senior State officials, some retired judges, the leadership and members of the Bar Association, as well as journalists and representatives of CSOs. Among the issues discussed by the ICJ mission were the internal procedures for selection, appointment and disciplinary procedures for judges, factors affecting the independent administration of justice as well as recent initiatives to reform the judiciary, including through the Judicial Reform Programme for 2019–2021 recently adopted by the President of Tajikistan.[38] As part of the mission, the ICJ conducted a roundtable seminar with the support of the OSCE Programme Office in Dushanbe. At the seminar, retired judges, civil society representatives and academics discussed current problems of the judiciary undermining its independence and effective functioning.[39]

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[32] E.g. see: the Judicial Reform Program in the Republic of Tajikistan for 2019–2021, Decree of the President of the Republic of Tajikistan of 19 April 2019, No. 1242, On the Judicial and Legal Reform Program in the Republic of Tajikistan for 2019–2021.

[33] E.g. the Programme of 2019–2021: "The Judicial Reform Program in the Republic of Tajikistan for 2019–2021 is a continuation of previous judicial reform programs in Tajikistan, based on the address of the President of the Republic of Tajikistan 'On the main directions of domestic and foreign policies of the Republic of Tajikistan' of 26 December 2018 years and provides for the implementation of the necessary measures to further strengthen the judiciary and improve legislation related to the activities of the courts, enforcement services, law enforcement and others their public authorities."

[34] The Judicial Reform Programme for 2011–2013, approved by the Decree of the President of Republic of Tajikistan No. 976, from 3 January 2011, available online at http://mmk.tj/ru/Government-programs/programs/court.

[35] *Ibid.*

[36] The Constitution of the Republic of Tajikistan of 5 November 1994, op. cit., article 84.

[37] See, for example: the Constitutional Law of the Republic of Tajikistan "On Courts of the Republic of Tajikistan" (Law on Courts), article 2.

[38] The Judicial Reform Programme for 2019–2021, approved by the Decree of the President of Republic of Tajikistan No. 1242, of 19 April 2019, available online at http://soi.tj/wp-content/uploads/2018/10/ПРОГРАММА-СУДЕБНО-ПРАВОВОЙ-РЕФОРМЫ-В-РЕСПУБЛИКЕ-ТАДЖИКИСТАН-НА-2019-2021.pdf.

[39] Tajikistan: ICJ concludes mission on the independence, organisation and functioning of the judiciary, 4 May 2019, https://www.icj.org/tajikistan-icj-concludes-mission-on-the-independence-organisation-and-functioning-of-the-judiciary/.

The report

This report examines the institutional and procedural aspects of the organization of the judiciary and the state of its independence in the Republic of Tajikistan. It aims to remedy the current lack of a reasonably comprehensive description and understanding of the organisation and functioning of the judiciary in Tajikistan. The report contains the key findings of the mission and provides an analysis of the legal framework of the judiciary, in particular, its structures and procedures of self-governance, and of the implementation of these laws in practice. It identifies some of the factors which impede the ability of individual judges to carry out their functions independently. It concludes by offering recommendations aimed at the judiciary, the legislature, the executive, [as well as international stakeholders] based on international human rights law and standards on the independence of the judiciary.

The ICJ hopes that this report will contribute efforts to reform of the justice system and strengthen the rule of law and human rights protection in Tajikistan. It should be of assistance for national and international stakeholders, including Government officials, policy makers, CSOs and experts as well international stakeholders based in and outside of Tajikistan in understanding the reform needed in the context of independence of judiciary and access to justice in Tajikistan.

The ICJ thanks all those who contributed to the drafting of the report, including national, international experts based both in and outside in Tajikistan who shared their valuable expertise in its preparation.

Legal instruments

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
Convention against Corruption	United Nations Convention against Corruption
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
UN Basic Principles	UN Basic Principles on the Independence of the Judiciary
Bangalore Principles	Bangalore Principles of Judicial Conduct
Draft Principles	Draft Principles Governing the Administration of Justice Through Military Tribunals
Recommendation No. R(94)12	Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges
Universal Charter	Universal Charter of the Judge
Magna Carta	CCJE, Magna Carta of Judges
Kyiv Recommendations	Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia

Chapter I. The Structure of the Court System

International law

International law safeguards designed to ensure judicial independence encompass guarantees related to the selection, appointment and promotion of judges. The right to a fair trial is a right guaranteed under article 14 of the ICCPR which states that: "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".[40]

Under the UN Basic Principles on the Independence of the Judiciary the independence of the judiciary must be guaranteed by the State and enshrined in the Constitution or in national law and "it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary".[41] As stressed by the Consultative Council of European Judges in its very first opinion, judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial as judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens.[42] "Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice."[43]

The UN Human Rights Committee, in explaining the scope of the obligation to ensure a fair trial under article 14 of the ICCPR, has emphasized that the requirement of independence of the judiciary inherent in the right to a fair trial refers not only to actual freedom from political interference but also to "the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions".[44]

The Committee explained that "the notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive."[45] This, among other things, includes the prohibition of double jeopardy under article 17.7 of the ICCPR, "namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted".[46]

The Court system of Tajikistan

According to the Constitution of Tajikistan: "[t]he judicial power being independent, is exercised on behalf of the State only by judges. The judiciary protects the rights and freedoms of a person and a citizen, the interests of the State, organizations, institutions, legality and justice."[47] The Tajikistan judiciary has three types of court with differing jurisdictional competencies: (i) general courts, (ii) economic courts and the Constitutional

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[40] ICCPR, article 14.

[41] UN Basic Principles, op. cit., principle 1.

[42] CCJE, Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) for the Attention of the Committee of Ministers of the Council of Europe on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges (Recommendation No. R(94)12 on the Independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields), para. 10.

[43] CCJE, Opinion No. 1, para. 10.

[44] Human Rights Committee, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

[45] UN Human Rights Committee, General Comment No. 32, para. 25.

[46] *Ibid.,* para. 3.

[47] The Constitution of the Republic of Tajikistan, op. cit., article 84.1.

Court. The courts of general jurisdiction, including specialized military courts, consider the largest variety of cases, including, civil, criminal, family, labour, military and other cases.[48] Courts of economic jurisdiction consider commercial disputes, and cases related to business and other commercial activities.[49] The Constitutional Court considers constitutional matters regarding compliance of laws with the Constitution of Tajikistan.[50] The primary focus of the ICJ's research and consultations during the mission were the courts of general jurisdiction, as they the deal with the overwhelming majority of cases which directly engage human rights.

Courts of general jurisdiction include three levels: the Supreme Court; regional courts or those designated with the status of regional courts; and district and city courts.[51] Economic courts have a two-tier structure: economic courts of the regions, Dushanbe and Gorno-Badakhshan autonomous region, and the High Economic Court as the highest court.[52] The Supreme Court and the High Economic Court are of equal rank and each is the highest instance for the types disputes that fall within their jurisdictions.[53]

Specialized military courts are considered courts of general jurisdiction.[54] They are organized according to the existing military units and have two levels: the military courts of the garrisons[55] and the Military Collegium of the Supreme Court of Tajikistan.[56] Therefore the Supreme Court is the highest appeals instance for cases heard by the military courts. At the same time, judges of military courts are military personnel, to whom the Minister of Defence awards military ranks[57] and the President of Tajikistan awards higher military ranks to the judges of Military Collegium of the Supreme Court.[58]

Criminal cases are considered by a single professional judge.[59] Tajikistan has preserved the Soviet system of lay assessors in criminal trials of the courts of general jurisdiction for particularly grave crimes. They are heard by a mixed bench of a professional judge and two lay assessors.[60] Lay assessors sit together with professional judges at all levels of courts, including military courts and the Supreme Court.[61] They enjoy the same rights and privileges as professional judges.[62] Lay assessors are elected, in accordance with the Regulation on Lay Assessors, in proportion of 20 lay assessors for each professional judge.[63] The Law on Courts provides that the procedures for election, remuneration, as well as guarantees and benefits are specified in the Regulation on Lay Judges.[64]

The Law prohibits establishment of extraordinary courts or any other courts not foreseen by the Law on Courts.[65]

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[48] Law on Courts, op. cit., articles 29, 32–36.

[49] *Ibid.*, article 45.

[50] The Constitution of the Republic of Tajikistan, op. cit., article 89.

[51] Law on Courts, op. cit., article 3.1.

[52] *Ibid.*

[53] *Ibid.,* articles 21–22 on the Supreme Court, articles 44–45 on the High Economic Court.

[54] Law on Courts, op. cit, articles 23 and 32; and Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report on a Mission to Tajikistan, E/CN.4/2006/52/Add.4, 20 December 2006, para. 10.

[55] Law on Courts, op. cit., articles 58.4, 61.

[56] *Ibid.,* article 58.4, articles 31–32.

[57] *Ibid.,* article 68.2–3.

[58] *Ibid.,* article 68.4.

[59] Criminal Procedure Code, article 34(4)

[60] *Ibid.,* article 34(2)

[61] Law on Courts, op. cit., article 23(1), 61(2), 70(1), 81(1).

[62] Law on Courts, op. cit., article 20.1; Criminal Procedure Code, article 34(3); Regulation on Lay Assessors, Majlisi Oli (the Parliament) of the Republic of Tajikistan, 28 June 2002, No. 685.

[63] Law on Courts, op. cit., article 20.2.

[64] Law on Courts, op. cit., article 20(3); Regulation on Lay Assessors, Majlisi Oli (the Parliament) of the Republic of Tajikistan, of 28 June 2002, No. 685.

[65] *Ibid.,* article 3.3.

A) Courts of general jurisdiction

The Supreme Court

According to the law, the Supreme Court of the Republic of Tajikistan is the highest judicial body and it exercises judicial supervision over 'the activity' of all courts of general jurisdiction in Tajikistan[66] in civil, criminal, administrative and other cases that fall under the jurisdiction of these courts.[67] It also considers cases within the scope of its competence in the first instance.[68] The Supreme Court consists of the Plenum of the Supreme Court,[69] and the Presidium of the Supreme Court,[70] as well as the so-called 'judicial collegia', groups of judges of the Court specializing in a particular type of cases.[71] These include the judicial collegium on civil matters;[72] the judicial collegium on family matters;[73] the judicial collegium on criminal matters;[74] the judicial collegium on administrative offenses;[75] and the military collegium of the Supreme Court.[76]

The Supreme Court judges include the President, First Deputy and deputies, judges and lay assessors, who are elected by the Parliament of the Republic of Tajikistan upon the proposal of the President of the Republic of Tajikistan.[77] The Constitutional Law does not specify any limit to the number of judges, providing that the number of judges of the Supreme Court is established by the President of the Republic of Tajikistan.[78] Thus the Constitution gives the President of the country the authority to change the number of judges appointed to the Supreme Court at will without any checks. Currently the Court is composed of 42 judges.[79] While there is no single international standard on the appropriate number of judges for Supreme or similar apex Courts, it is axiomatic that changing the number of judges at will may have significant consequences for the administration of justice and may raise issues of judicial independence where a matter of this importance can be decided singlehandedly at any time. For example, in one comparable national context, the Venice Commission recommended that Ukraine abstain from the reduction of the number of Supreme Court judges as the consequences of this had not been measured and the reduction in numbers was implemented without justification and within a short period of time.[80] Indeed, the dangers are obvious: where the highest official of the executive, in the case of Tajikistan the President of the country, can singlehandedly determine the composition of the Supreme Court, this court should be expected to act in a way which is favourable to the interests of the executive rather than the rule of law or the rights of those whose cases the court considers.

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66 Gorno-Badakhshan Autonomous Oblast Court, regional courts, the city of Dushanbe, military garrison courts, city and district courts, in article 21.

67 Law on Courts, op. cit., article 21.

68 *Ibid.,* article 22.

69 *Ibid.,* article 23(3).

70 *Ibid.*

71 *Ibid.,* article 23.

72 *Ibid.,* article 23(3).

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.,* article 23(1).

78 *Ibid.,* article 23(2).

79 Presidential Decree of 9 June 2016, No. 699, "On the structure of the apparatus, management scheme and staffing of the Supreme Court of the Republic of Tajikistan", http://www.adlia.tj/show_doc.fwx?Rgn=127151.

80 Commission for Democracy Through Law (Venice Commission), Ukraine opinion on amendments to the legal framework governing the supreme court and judicial governance bodies, Adopted by the Venice Commission at its 121st Plenary Session, Venice, 6–7 December 2019, para. 31.

As noted above, the law stipulates that the Supreme Court carries out "judicial supervision over the activity" of lower courts.[81] The law speaks of the 'activity' rather than specifying the supervisory appellate function of the Supreme Court over the decisions of lower courts. Therefore, it is unclear from the text of the law itself what activities such supervision should encompass. Specifically, it is unclear whether this function is confined to the Court's appellate function to review judicial decisions, or whether "judicial supervision" functions extend also to certain managerial competencies over the administrative functions of the lower courts. Indeed, the law mentions various functions which are akin to those of judicial governing bodies, e.g. that the Supreme Court is responsible for organizing the work of the Supreme Court itself, regional and district courts.[82]

The law suggests broad powers of the Supreme Court in selection, appointment and dismissal of judges, organization of qualification exams and provision of appraisals for the sitting judges' appointment, selection and training of candidates for the position of judge.[83] In many other jurisdictions, in particular those, like Tajikistan, with civil law traditions, such functions belong to specialized judicial bodies, such as, for instance, a Supreme Judicial Council.[84] In Tajikistan, such functions, vis-à-vis other courts and judges, were transferred to the Supreme Court from the Judicial Council following the latter's dissolution in 2016 (see Chapter II, Brief historical background, below).

Currently therefore, the Supreme Court in Tajikistan appears to combine both adjudicative and administrative and managerial functions for the judiciary as a whole. This may raise certain issues with regard to judicial independence. The OSCE's 2010 (Kyiv Recommendations)[85] specifically advise that competences in judicial administration should be divided between several judicial institutions:

> *"[...] In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection (see paras 3–4, 8), promotion and training of judges, discipline (see paras 5, 9, 14, 25–26), professional evaluation (see paras 27–28) and budget (see para. 6). A good option is to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree."*[86]

In Tajikistan, many of the administrative functions of the Supreme Court, as discussed in the next chapter, are concentrated in the hands of the Court President, which means

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[81] Law on Courts, op. cit., article 21.

[82] Including the Gorno-Badakhshan Autonomous Oblast Court, the Oblast and Dushanbe City Courts, military courts of garrisons, cities and districts.

[83] Law on Courts, op. cit., article 21.

[84] CCJE, Opinion No. 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, Adopted by the CCJE at its 8th meeting (Strasbourg, 21–23 November 2007).

[85] OSCE, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia — Judicial Administration, Selection and Accountability — Kyiv, 23–25 June 2010. Following an in-depth research of legal systems and practices regarding judicial independence, ODIHR and Max Planck Institute for Comparative Public Law and International Law (MPI) selected three themes that are of particular relevance for judicial independence: (1) Judicial Administration with a focus on judicial councils, judicial self-governing bodies and the role of court chairs; (2) Judicial Selection — criteria and procedures; and (3) Accountability of Judges and Judicial Independence in Adjudication. The meeting concluded with the adoption of a — non-exhaustive — set of recommendations (enclosed "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia"). The purpose of these recommendations is to further strengthen judicial independence in the region within the three selected topical areas.

[86] *Ibid.,* para. 2.

further concentration of powers within an organ of the judiciary not necessarily best placed for these functions, as well as in the hands of just one or two high level judicial officials.

Consistent with international standards, either a Judicial Council or a similar independent non-adjudicative body under the purview of the judiciary should be tasked with such functions. In this regard, the CCJE has noted:

> *"[b]eyond its management and administrative role vis-à-vis the judiciary, the Council for the Judiciary should also embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary."*[87]

The Special Rapporteur on the Independence of Judges and Lawyers has drawn particular attention to the paramount importance of the judicial councils in guaranteeing the independence of the judiciary, and recommended that UN State parties establish an independent body responsible for the selection and discipline of judges, and adopt necessary measures to guarantee its plural and balanced composition.[88] The Committee of Ministers of the Council of Europe,[89] the CCJE and the Council of Europe's Venice Commission have similarly called for the establishment of such bodies.[90]

Contrary to these standards and recommendations, the amalgamation of powers within the Supreme Court in Tajikistan concentrates and conflates the adjudicative and administrative functions of the judiciary, in a way that undermines the principle that judges should be independent from pressure exerted both from within and outside the judiciary.

The Plenum of the Supreme Court

The Plenum of the Supreme Court of the Republic of Tajikistan (the Plenum) is constituted of all judges of the Supreme Court, and exercises substantive judicial power and administrative functions (see below).[91] It is composed of the President of the Supreme Court, his or her first deputy, deputies, the secretary of the Plenum and judges of the Supreme Court.[92]

The Plenum of the Supreme Court exercises considerable powers. Courts of all levels report on their work to the Plenum of the Supreme Court,[93] and presidents of the city and districts courts[94] report to it on the practice of application of laws.[95] In addition, the Plenum approves the number and composition of the Presidium of the Supreme Court (see the following section) as well as of presidiums of city and district courts,[96] approves

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87 CCJE, Opinion No. 10 (2007), op. cit., para. 12.

88 Diego García-Sayán, the Special Rapporteur on the independence of judges and lawyers, Report on the importance of judicial councils, A/HRC/38/38, 2 May 2018, paras 91–96.

89 See: Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), paras 26–29; CCJE, Opinion No. 1 (2001), para. 45.

90 The Venice Commission's Report on the Independence of the Judicial System, Part I: the Independence of Judges (para. 32), adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010), recommend the establishment of such Councils.

91 Law on Courts, op. cit., articles 24 and 25.

92 *Ibid.,* article 24.1.

93 The Presidium of the Court of the Gorno-Badakhshan Autonomous Region, Presidiums of the courts of the regions, the city of Dushanbe, the military courts of garrisons, cities of the districts see article 25.1 of the Law on Courts.

94 Including Gorno-Badakhshan Autonomous Oblast Court, regional courts, Dushanbe city, garrison military courts, city and district courts see article 25.1 of the Law on Courts.

95 Law on Courts, op. cit., article 25.1.

96 The Presidium of the Court of the Gorno-Badakhshan Autonomous Region, Presidiums of the courts of regions and the city of Dushanbe see Law on Courts, op. cit., article 25.1.

the chairs and composition of the judicial collegia of the Supreme Court,[97] and 'elects' the secretary of the Plenum of the Supreme Court.[98] It provides 'guiding clarifications' (generalisation) on court practice to ensure 'uniform standard of court practice' (generalisation of court practice) and correct application of laws, and considers the submissions of the Prosecutor General on providing such 'guiding clarifications' to courts on civil, family, criminal and administrative cases. The Plenum also establishes[99] the Scientific Advisory Board of the Supreme Court.[100]

The role of the Prosectuor's office in providing 'guiding clarifications' to the courts creates a difficulty in that there does not appear to be adequate separation between the prosecutorial authority — which falls under the executive — and the judicial authority, breaching the principle of separation of powers. According to the UN Basic Principles, "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[101] They further stipulate that there should not be "any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision".[102] The Guidelines on the Rule of Prosecutors stipulate that "the office of prosecutors shall be strictly separated from judicial functions".[103] This, among other things, means that "[d]ecisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law".[104] It is generally improper under international standards for an Attorney General or similar executive authority to exert undue influence over judicial decisions.[105] The procedure existing in Tajikistan, which allows the Prosecutor's office to provide certain guiding clarifications breaches the principles of the independence of the judiciary and separation of powers. It also may raise further questions as to capacity of the judiciary to ensure a fair trial, since the undue influence of prosecutors may cause an overall imbalance in equality of arms, which is a fundamental tenet of the right to a fair trial.[106]

The Presidium of the Supreme Court

The Presidium of the Supreme Court (the Presidium) is the highest adjudicating body within the Supreme Court.[107] It consists of the President of the Supreme Court, its first deputy, deputies[108] and judges of the Supreme Court.[109] The Presidium, through the supervisory procedure, considers civil, family, criminal and administrative cases, and reviews the legality and validity of judicial acts.[110] Such matters can be considered on the submissions of the President of the Supreme Court or following an opinion of the Prosecutor General on the need to resume criminal proceedings in cases where there

97 Law on Courts, op. cit., article 25.1 "On the proposal of the President of the Supreme Court".

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 UN Basic Principles, op. cit., principle 2.

102 *Ibid.,* principle 4.

103 Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para. 10.

104 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), para. 16.

105 See in this regard the UN CAT Concluding Observations: Burundi, UN Doc. CAT/C/BDI/CO/1 (2006), para. 12.

106 UN Human Rights Committee, General Comment No. 32.

107 Law on Courts, op. cit., article 29.

108 According to the website of the Supreme Court currently there are two deputies of the President of the Supreme Court, https://sud.tj/en/obshchaya-informatsiya/rukovodstvo-verkhovnogo-suda/.

109 Law on Courts, op. cit., article 29.

110 *Ibid.*

are newly discovered circumstances.[111] The Presidium can also consider applications of the parties, the prosecutor, or other persons in the case, to review its decision in the case, based on newly discovered circumstances.[112] The Presidium also 'generalizes' court practice and judicial statistics; and provides "practical assistance to the courts in the proper application of the law".[113]

Regional courts

Regional courts in Tajikistan constitute the second tier of the judicial system and include the Court of the City of Dushanbe, regional courts as well as courts of Gorno-Badakhshan Autonomous Region.[114] These courts consist of the presidents of courts, their deputies, judges and lay assessors.[115] They hear civil, family and criminal cases and cases of administrative offenses in the first instance. They also control the execution of judgments,[116] review cases through cassation and supervisory proceedings,[117] consider submissions of the President of the Supreme Court or the opinion of the prosecutor to reopen criminal or administrative proceedings based on new evidence; and analyze court statistics and practice related to the region concerned.[118] Like the Supreme Court, the total number of judges of the regional courts is defined by the President of Tajikistan, but in this case the proposal is made by the President of the Supreme Court.[119] Regional courts include judicial boards in civil, criminal, family and administrative cases.[120]

District and city courts

City and district courts are the lowest level courts in Tajikistan.[121] They consider on the merits civil and criminal cases, and cases of administrative offenses attributed by law to their jurisdiction.[122] They consist of the president of the court, judges and lay assessors.[123] Presidents of the courts of cities and regions are appointed and dismissed by the President of the Republic of Tajikistan on the proposal of the President of the Supreme Court (see competences of court presidents Chapter II. Self-governance structures of the judiciary in Tajikistan).[124] The number of judges in each court of cities and districts is established by the President of the Republic of Tajikistan on the proposal of the President of the Supreme Court.[125]

Military courts

Military Courts form part of the general court system, yet are established as part of the military forces based on territorial divisions of military garrisons[126] and consist of military courts of garrisons and the Military Collegium of the Supreme Court.[127] Their work

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111 *Ibid.*

112 *Ibid.*

113 *Ibid.,* article 29.

114 *Ibid.,* article 70.

115 *Ibid.,* article 70.1.

116 The court that adopted a judicial act controls its execution, Law on Courts, op. cit., article 11(2).

117 There are several types of appeals procedure in the regional courts, appeal (when challenging the decision of the lower court) cassation (decisions which entered into force) and supervisory (the court reconsiders the case on its own motion).

118 Law on Courts, op. cit., article 71.

119 *Ibid.,* article 70.

120 *Ibid.,* article 70.3.

121 *Ibid.,* articles 85, 89.

122 *Ibid.,* article 85.

123 *Ibid.,* article 81.

124 *Ibid.*

125 *Ibid.*

126 *Ibid.,* article 58.2.

127 *Ibid.,* article 58.4.

was initially regulated by the Law on Military Courts which was replaced by the unified Constitutional Law on Courts.[128] Structurally, the Garrison Military Courts consist of the President of the Court, deputies, judges and lay assessors.[129] Under the law, it is the Military Collegium, which operates as part of the Supreme Court, which is the higher instance for lower military courts.[130]

The law provides that military courts administer justice 'in' the Ministry of Defence, the National Guard, and other listed State bodies, primarily law enforcement agencies.[131] The jurisdiction of the level of courts depends on the rank of the accused: a Garrison Military Court has jurisdiction over the alleged crimes of persons with ranks up to and including lieutenant colonel.[132] The Military Collegium of the Supreme Court adjudicates cases of alleged crimes of persons with military ranks of colonel and above, or holding the posts of regiment commander and persons equal to them in official position, as well as cases of all alleged crimes carrying penalties of life imprisonment or the death penalty.[133] Garrison military courts consider the following cases as a court of first instance:

- civil, family, criminal cases and cases of administrative offenses;[134]
- cases involving complaints against actions and decisions of military authorities and military officials;[135]
- where there are newly discovered circumstances in a case previously decided by the Garrison Military Court, it can reconsider the case on the basis of the application of the parties, the prosecutor, or other participants in the case.[136]

The Military Collegium is one of the collegia (on the collegia see above) of the Supreme Court and is a higher judicial instance of the courts of military garrisons.[137] The Military Collegium considers criminal, civil, family and administrative cases as a court of first instance and, in accordance with the law, supervises the execution of judgments. It also considers cases in cassation and supervisory reviews and checks the legality and validity of judgments. The Collegium decides on resumption of criminal proceedings in view of newly discovered circumstances upon submissions of the President of the Supreme Court or the resolution of the Prosecutor General; and considers the application of the parties, the prosecutor and others involved in the case, to review, in newly discovered circumstances, decisions or rulings that have entered into force.[138]

The jurisdiction of military courts and the procedures governing their establishment and operation are set out in the Constitutional Law on Courts.[139] As mentioned above, the jurisdiction of military courts extends to cases of law enforcement and related agencies.[140] The Garrison Military Courts and the Military Collegium of the Supreme

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128 *Ibid.*

129 *Ibid.,* article 61.2.

130 *Ibid.,* article 32.1.

131 *Ibid.,* article 58.1.

132 Criminal Procedure Code, article 254.8.

133 *Ibid.,* article 254.9. Tajikistan introduced a moratorium since 2004 through the Law on Death Penalty Suspension of 15 July 2004.

134 With the exception of cases that are under the jurisdiction of the higher court, Law on Courts, op. cit., article 62.1.

135 *Ibid.,* article 62.1.

136 *Ibid.*

137 *Ibid.,* article 32.

138 *Ibid.*

139 *Ibid.,* articles 32 and 62.

140 *Ibid.,* article 58.1: the Ministry of Defense, the National Guard, the State Committee for National Security, the Main Directorate of Border Troops of the State Committee for National Security, the Committee for Emergency Situations and Civil Defense under the Government, the Interior Troops of the Ministry Internal Affairs, the Convoy Brigade on the execution of criminal penalties of the Ministry of Justice, the Agency for the special property of the Government, enterprises, institutions and other organizations of the Armed Forces and all military units.

Court can both act as courts of first instance, yet the latter is a higher instance and considers cases in cassation and supervisory procedures.[141] The law allows Garrison Military Courts to appeal to the Constitutional Court regarding constitutionality of legal acts and provisions applied in a case before them.[142] The Military Collegium also considers the submission of the President of the Supreme Court or the resolution of the Prosecutor General on the need to resume criminal proceedings in view of newly discovered circumstances[143] and 'generalizes' the court practice based on which it "submits proposals to relevant bodies".[144]

As noted above, pursuant to the law, military courts consider both civil and criminal cases.[145] Importantly, the jurisdiction of military courts extends over civil cases, provided one of the parties is a member of the military, even if another party is a civilian.[146] Moreover, military courts examine criminal cases concerning both military and civil persons provided that at least one of the crimes (in case of several crimes committed) or one of the accused (in case of several accused) is subject to the jurisdiction of a military court.[147] For example, the mission heard that in cases of, hooliganism, where one person in the group belongs to the military, all of the individuals concerned are tried by a military court.

Under international law, the jurisdiction of military courts should be restricted solely to specifically military offences committed by military personnel and they should not, in general, be used to try civilians. The UN Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity state that: "[t]he jurisdiction of military tribunals must be restricted solely to specifically military offenses committed by military personnel".[148] The same principle is mentioned in the UN Draft Principles Governing the Administration of Justice Through Military Tribunals ("Decaux Principles"),[149] which state that: "[m]ilitary courts may try persons treated as military personnel for infractions strictly related to their military status".[150] The UN Special Rapporteur on the independence of judges and lawyers has also highlighted that "the only purpose of military tribunals should be to investigate, prosecute and try matters of a purely military nature committed by military personnel".[151] The UN Human Rights Committee has stressed that "the trial of civilians in military or special courts raise serious problems as far as the equitable, impartial and independent administration of justice is concerned".[152] It has also repeatedly called on countries to prohibit trials of civilians before military courts.[153] Moreover, a UN Special Rapporteur

141 *Ibid.,* article 32.1.

142 *Ibid.,* article 62.3.

143 *Ibid.*, article 32.2.

144 *Ibid.*

145 *Ibid.,* article 62.

146 *Ibid.,* article 63.

147 Criminal Procedure Code, article 254.4.

148 Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

149 Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58 (2006) at 4 ["Decaux Principles"].

150 *Ibid.,* principle 8.

151 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285, (2013), para. 34.

152 UN Human Rights Committee, General Comment 32, "Article 14: Right to Equality before courts and tribunals and to a fair trial", (General Comment 32) UN Doc. CCPR/C/GC/32, para. 22.

153 UN Human Rights Committee, Concluding Observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997), para. 20; Lebanon, UN Doc. CCPR/C/79/Add.78 (1997), para. 14; Chile, UN Doc. CCPR/C/CHL/CO/5 (2007), para. 12; Tajikistan, UN Doc. CCPR/CO/84/ TJK (2004), para. 18.

has emphasized that the use of military tribunals should be limited to trials of military personnel for acts committed in the course of military actions.[154]

In extending jurisdiction of military courts to civilians and non-military offences, the law in Tajikistan is in conflict with this well-established principle of international law. Indeed, a number of international bodies have already recommended that Tajikistan reform the system where military courts have jurisdiction over civilians. For example, in its report on the mission to Tajikistan in 2005, the Special Rapporteur defined abolishing of military trials of civilians as a priority area and recommended that "[m]ilitary courts should not have jurisdiction over cases other than those related to military crimes, nor should they be competent to conduct proceedings in which one of the parties is a civilian".[155] A similar concern was expressed by the UN Human Rights Committee in its Concluding Observations on Tajikistan.[156]

Under Tajikistan law, judges of military courts are obliged by law to have a military rank.[157] This, the mission was told, results in their dependence on the military hierarchy. Such dependence raises serious concerns of lack of independence of military courts, since a judge may be subject to the command authority of a person with higher rank.

B) Economic courts and the High Economic Court

The High Economic Court is the highest judicial body for resolving economic disputes and other cases related to business or economic activities.[158] It exercises judicial supervision of all lower economic courts.[159] The High Economic Court has a structure similar to that of the Supreme Court and consists of Plenum of the High Economic Court; Presidium of the High Economic Court and the judicial board of the High Economic Court.[160]

The High Economic Court is composed of the President, first deputy, deputies and judges.[161] There are 16 judges in the High Economic Court.[162] The number of judges is established by the President of the Republic of Tajikistan.[163] The President of the High Economic Court has a similar mandate to the President of the Supreme Court and through the Examination Commission exercises powers on the selection and training of candidates for the position of judges of economic courts, capacity building of judges and court staff, election, appointment, disciplinary proceedings, dismissal and appraisal of judges.[164] As in the Supreme Court, a Scientific Advisory Council functions in the High Economic Court.[165]

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154 Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report, A/63/223, 6 August 2008, para. 28. See also: Draft Principles Governing the Administration of Justice Through Military Tribunals, E/CN.4/2006/58, 13 January 2006: "[p]rinciple No. 5 establishes that 'Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts' (para. 22)". Meanwhile, Principle No. 9 stipulates that "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes" (paras 20–21); A/HRC/Sub.1/58/30 (2006), para. 46.

155 Leandro Despouy, the Special Rapporteur on the independence of judges and lawyers, Report on a Mission to Tajikistan, E/CN.4/2006/52/Add.4, 30 December 2005, para. 91.

156 UN Human Rights Committee, Concluding Observations: Tajikistan, 18 July 2005, CCPR/CO/84/TJK, para. 18.

157 Law on Courts, op. cit., article 68.

158 *Ibid.,* articles 44–45. According to articles 1–2 of the Economic Procedure Code, the main tasks of economic courts while considering cases within their jurisdiction are protection of violated or disputed rights and the legitimate interests of enterprises, institutions, organizations and citizens in the field of entrepreneurial or other economic activity.

159 *Ibid.,* article 45.

160 *Ibid.,* article 46.

161 *Ibid.,* article 46.1.

162 The official website for the High Economic Court, http://soi.tj/?page_id=2236&lang=en; Human Rights Centre, Judge's Choice: small salary, fair judgment, http://hrc.tj/pravosudiya/232-vybor-dlya-sudi-malenkaya-zarplata-chestnoe-sudeystvo-ili.html.

163 Law on Courts, op. cit., article 46.2.

164 *Ibid.,* article 53.

165 *Ibid.*, article 57.

Like the Supreme Court, the High Economic Court can consider cases at first instance.[166] Where there are newly established circumstances in a case, or a first-instance decision reverses earlier decided court decisions, the High Economic Court is entitled to review the case.[167] The High Economic Court considers cases in cassation and supervisory review, and applications for review on the basis of newly discovered circumstances and can address the Supreme Court about constitutionality of the laws applied.[168] The High Economic Court also establishes a uniform standard of court practice of economic courts (the so called generalisation of court practice), analyses the court's judicial statistics, provides jurisprudence on judicial practice issues and has the right to make legislative proposals.[169]

It is important to mention that like with the Supreme Court, the number of judges of the High Economic Court is determined by the President of the country. As is the case with the Supreme Court described above, this raises concerns as to sufficiency of guarantees to ensure that judges are not put in a position of dependence on the executive in the absence of checks to change the number of judges in the Court.

C) The Constitutional Court

The Constitutional Court of the Republic of Tajikistan is an independent judicial authority tasked with constitutional review, and, according to the law, established "to ensure the supremacy and direct application of the norms of the Constitution of the Republic of Tajikistan".[170] The Constitutional Court consists of seven judges, one of whom represents Gorno-Badakhshan Autonomous Region.[171] As of the time of this report, the website of the Constitutional Court had made available 18 decisions which it has decided in the period of its operation since 1995.[172]

The jurisdiction of the Court is established in the Constitution,[173] and is further detailed in the Law on the Constitutional Court.[174] This jurisdiction is restricted to constitutional matters and related issues.[175] The Law on the Constitutional Court[176] adopted in 1995, was given a positive assessment by the Venice Commission concluded, which noted that the draft law would "provide a firm basis for an effective work of the Constitutional Court".[177]

The Court mainly considers the constitutionality of legislation[178] and disputes between State organs relating to their competencies.[179] The Constitutional Court also has jurisdiction over cases of state treason allegedly committed by the President of the Republic.[180] Importantly, the Court is also competent to deal with individual complaints of citizens on alleged violations of their constitutional rights and freedoms resulting from

166 *Ibid.*, article 45.

167 *Ibid.*

168 *Ibid.*

169 Law on Courts, op. cit., article 45.

170 Law on the Constitutional Court, op. cit., article 1.

171 *Ibid.,* article 7.

172 Official Website of the Constitutional Court of Tajikistan, http://constcourt.tj/ru/tainotho/.

173 The Constitution of the Republic of Tajikistan, op. cit., article 89.

174 Law on the Constitutional Court, op. cit.

175 Law on the Constitutional Court, op. cit., articles 34 and 35.

176 The Law on the Constitutional Court, op. cit., https://www.legislationline.org/download/id/5188/file/Tajikistan_const_law_courts_2001_am_2013_RU.pdf.

177 Venice Commission, Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, adopted at 99th Plenary Session (Venice, 13–14 June 2014), CDL-AD(2014)017-e, para. 76.

178 Some of the legal acts include: laws, joint acts of the Parliament, decrees of the government and other state bodies, international agreements not yet in force, legal acts of self-governing bodies etc.; also the draft amendments to the Constitution and draft laws that are to be considered on the national referendum, according to article 14.

179 Law on the Constitutional Court, op. cit., article 14.d.

180 *Ibid.*, article 34.2–3, 4.

application of legislative or judicial acts.[181] However, this remedy is not provided for directly in the Constitution and appears to have been used only rarely.[182] Decisions of the Constitutional Court are final.[183]

Conclusion

Tajikistan has a relatively well-structured system of courts with three separate jurisdictions — the general, the economic and the constitutional ones — which may constitute a good basis for further development and reform. The two Supreme Courts play a leading role both in administration of justice and in court administration. They appear to have significant functions that should not properly belong to adjudicating bodies. This leads to a certain distortion of roles and disbalance in power distribution within the judiciary (discussed in greater detail in the following chapter).

The law does not ensure a stable composition of the Supreme Courts as the President of Tajikistan can change the number of judges singlehandedly, which also leads to a risk of abuse and political interference in the administration of justice. By design, such procedure does not ensure sufficient guarantees for the independence of the supreme judicial jurisdictions.

The courts of Tajikistan appear to have a strong element of lay assessors whose participation goes as far up in the hierarchy of the courts as the Supreme Court. While it is welcome that they enjoy the same guarantees as professional judges, they do not seem to play a significant role as a counterbalance to the professional judges. In particular, they are unable to mitigate the problems which will be described in Chapter VI of the present report.

Furthermore, the powers of higher courts to reopen proceedings "based on newly established evidence" raises concern as this procedure may run contrary to the guarantees against double jeopardy in criminal proceedings. It appears that these courts have an unchecked possibility to reopen proceedings once new circumstances emerge. The significant role played by the Prosecutor's Office in this procedure is particularly problematic given the overall dependence of the judiciary on the decision of the Prosecutor's Office in Tajikistan (see Chapter VI on lack of acquittals in criminal proceedings).

Military court of Tajikistan exercise jurisdiction over civilians. This is inconsistent with international law which limits the reach of court martial to military personnel and military offences. Furthermore, these courts appear to be less independent as the judges of these courts are obliged to have a military rank and are therefore institutionally dependent on the chain of command within the military.

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181 *Ibid.*, article 34.3.

182 Leandro Despouy, the Special Rapporteur on the independence of judges and lawyers, Report on a Mission to Tajikistan, E/CN.4/2006/52/Add.4, 30 December 2005, para. 9.

183 Law on the Constitutional Court, op. cit., article 60.2.

Chapter II. Self-governance Structures of the Judiciary in Tajikistan

International standards

In accordance with international standards, the administration of courts should be transparent, must enhance independent and impartial adjudication by the judiciary, and must never be used to influence the content of judicial decision making.[184] The requirement of independence has consequences for the procedure and criteria for the appointment of judges, for guarantees relating to their security of tenure as well as for the conditions governing promotion, transfer, suspension and cessation of their functions. It also requires the independence of judges in practice from political interference by the executive branch and legislature.[185] Importantly, as stressed by, among other sources, the UN Human Rights Committee in relation to State obligations under article 14 ICCPR, to guarantee judicial independence "States should take specific measures `protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them'".[186]

As judicial systems vary, the systems for judicial governance have to be framed and adapted to the specific national environment, while respecting the independence of the judiciary and the independence and impartiality of individual judges.[187] There is no model of the structure and function of judicial bodies which must be applied universally, but a body which is accorded powers of judicial governance such as those of a Judicial Council — whatever the name or whichever body exercise such functions — should meet specific standards.

Furthermore, it is important to avoid excessive concentration of power in one judicial body. As the OSCE Kyiv recommendations affirm, the different functions and competences must be kept distinct, including selection, promotion, training, discipline, professional evaluation and budget,[188] with various authorities placed in charge of these functions rather than being subjected to the control of a single institution or authority.[189]

Setting a standard for judicial bodies, the Consultative Council of European Judges (CCJE) stressed in regard to Judicial Councils that:

> *"[b]eyond its management and administrative role vis-à-vis the judiciary, the Council for the Judiciary should also embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary."*[190]

The role of Court President is essential in maintaining both institutional independence of judiciary and the individual independence of judges.[191] The CCJE in its Opinion 19 highlighted principles essential in the relations between the court president and other

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184 OSCE, Kyiv Recommendations on judicial independence, para. 1.

185 UN Human Rights Committee, General Comment No. 32, Right to equality before courts and tribunals and to a fair trial (General Comment No. 32), UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19.

186 *Ibid.*

187 CCJE, Opinion No. 19 (2016) on the Role of Court Presidents, para. 25.

188 OSCE, Kyiv Recommendations on judicial independence, para. 2.

189 *Ibid.*

190 CCJE, Opinion No. 10 (2007) on the Council for the Judiciary in the service of society, para. 12.

191 CCJE, Opinion No. 19 (2016) on the Role of Court Presidents, para. 6.

judges of the court, stressing that "internal judicial independence requires that individual judges be free from directives or pressure from the president of the court when adjudicating cases".[192] According to the CCJE "[c]ourt presidents, acting as guardians of the court's independence, impartiality and efficiency, should themselves respect the internal independence of judges within their courts".[193] As with relations between court presidents and other judges, the managerial functions of the presidents should also be based on fundamental values. The presidents should never engage in any actions or activities which may undermine judicial independence and impartiality.[194] The CCJE further highlighted the risk of excessive accumulation of different powers within the court president's authority which may have a negative effect on the independence of the judiciary and the confidence of the public in its impartiality.[195]

In addition, while the non-judicial branches of the State may have discretion in defining the specific role and responsibilities of court presidents, it is important to ensure that court presidents do not hold excessive powers over their peers which may impede the independence of the court.[196] The Kyiv Recommendations outline the competence of court presidents as follows: "The role of court chairpersons should be strictly limited in the following sense: they may only assume judicial functions which are equivalent to those exercised by other members of the court. Court presidents must not interfere with the adjudication by other judges and shall not be involved in judicial selection. Neither shall they have a say on remuneration [...]".[197] The European Court of Human Rights decided in regard to superiors within the judiciary as follows: "[t]his internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified".[198] According to the Special Rapporteur on judges and lawyers "[j]udges need to work in an environment which is conducive to independent decision-making. To avoid having the internal judicial hierarchy run counter to the independence of judges, the Special Rapporteur encourages Member States to consider introducing a system whereby court presidents are elected by the judges of their respective court".[199]

Brief historical background

In 1999, President of Tajikistan established the Council of Justice.[200] Later the same year, the Law on the Courts was amended to add provisions governing the functioning of Council, according to which it was "a collegial body of judicial self-governance, whose

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192 See the ECtHR judgments: *Baka v. Hungary*, Grand Chamber Application No. 20261/12, Judgment of 23 June 2016, para. 4 of the concurring opinion of Judge Sicilianos; *Parlov-Tkalčić v. Croatia*, Application No. 24810/06, Judgment of 22 December 2009, para. 86; *Agrokompleks v. Ukraine*, Application No. 23465/03, Judgment of 6 October 2011, para. 137; *Moiseyev v. Russia*, No. 62936/00, Judgment of 9 October 2008, para. 182.

193 "ECtHR Judge Siciliano[s] has raised the question whether article 6(1) of the ECHR could be interpreted in such a way as to recognise, in parallel to the right of persons involved in court proceedings to have their cases heard by an impartial court, a subjective right for judges to have their individual independence safeguarded and respected by the state, see the ECtHR judgment: *Baka v. Hungary*, Grand Chamber, Application No. 20261/12, Judgment of 23 June 2016, paras 5–6 and 13–15 of the concurring opinion of Judge Sicilianos". Cited from CCJE, Opinion No. 19 (2016) on the Role of Court Presidents, footnote 7.

194 *Ibid.*

195 CCJE, Opinion No. 19 (2016), op. cit., para. 51.

196 *Ibid.*, paras 8, 52.

197 OSCE, Kyiv Recommendations on judicial independence, para. 11.

198 *Parlov-Tkalčić v. Croatia*, ECtHR, Application No. 24810/06, Judgment of 22 December 2009, para. 86.

199 Special Rapporteur on the independence of judges and lawyers, Report, A/HRC/11/41, 24 March 2009, para. 49.

200 Established by Presidential Decree of 14 December 1999.

functions included selection and recommendation of candidates for the position of a judge, the dismissal of judges, the organization of qualification examinations, development of proposals for the judicial reform".[201]

The Council was abolished in 2016 by Decree of the President of Tajikistan.[202] The main declared goal of the abolition under the Decree was reducing the influence of the executive on the judiciary,[203] as this body had been continuously criticized for its lack of independence.[204] For example, the Chair and Vice-chair of the Judicial Council were appointed and could be dismissed by the President of the Republic of Tajikistan.[205] The President also established its structure, the number of members of which was composed and its internal regulations.[206] The Organisation for Economic Cooperation and Development (OECD) Anti-Corruption Division recommended in 2016 that the institutional independence of the Judicial Council be strengthened "so that it would not depend on any other branches of power and would be the guarantor of independence of the judicial power".[207] However, its full disestablishment had never been recommended by any international or expert bodies.[208] The function of appointment of judges was transferred to the Qualification Collegium,[209] which has assumed some but not all of its functions while most of its self-governance competence were transferred to the Supreme Court.[210]

Institutions of governance of the judiciary in Tajikistan

The organization and functioning of the judiciary in Tajikistan is governed primarily by the Constitution,[211] the Constitutional Law on Courts,[212] the Law on the Constitutional Court, and the Law on Countering Corruption.[213] The procedural aspects of the work of Judiciary are regulated by the procedural codes, including the Civil Procedure Code, the Criminal Procedure Code,[214] the Economic Procedure Code,[215] as well as the Code on Administrative Offences.[216] The internal administration and governance are regulated by by-laws such as the Regulations on the Qualification Collegium, Regulations on Lay Assessors, and Regulations on Examination Commission.[217] The judiciary in Tajikistan also employs a Code on Judicial Ethics,[218] as well as internal regulations or guidelines adopted by the Supreme Court.

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201 Law on Courts, op. cit., article 95 (was removed).

202 Decree of the President of Tajikistan of 9 June 2016, No. 698, http://president.tj/ru/node/12134.

203 *Ibid.*

204 See, for example, Anti-corruption assessment of eight administrative codes and legal acts of the republic of Tajikistan, p. 25. Available online at https://www.osce.org/programme-office-in-dushanbe/201616.

205 Judicial systems of Central Asia, a comparative overview Edited by G. Dikov, 2015, pp. 211–212.

206 *Ibid.*

207 OECD, Istanbul Anti-Corruption Action Plan Third Round Of Monitoring Tajikistan, Progress Update, 15 September 2016, p. 35. Available online https://www.oecd.org/corruption/acn/Tajikistan-Progress-Update-2016-ENG.pdf.

208 OECD, Istanbul Anti-Corruption Action Plan Fourth Round Of Monitoring Tajikistan, 13 September 2017, p. 61, https://www.oecd.org/corruption/acn/OECD-ACN-Tajikistan-Round-4-Monitoring-Report-ENG.pdf.

209 The Judicial Qualification Collegium was formed pursuant to article 111 of the Constitutional Act on the Courts.

210 The powers of the Council of Justice with regard to the provision of organizational and logistical support for the courts, the selection and training of candidates for posts of judge and advanced training for judges and court employees were conferred on the Supreme Court and the Supreme Economic Court.

211 The Constitution of Tajikistan, op. cit.

212 Law on the Constitutional Court, op. cit.

213 Law of the Republic of Tajikistan "On Counteracting Corruption" of 25 July 2005, No. 100.

214 Civil Code of the Republic of Tajikistan of 20 June 1999.

215 Economic Procedure Code of the Republic of Tajikistan of 5 January 2008.

216 Code on Administrative Offences of the Republic of Tajikistan of 31 December 2008.

217 The word "regulations" is used to translate the word "низомнома" in Tajik and "положение" in Russian used for these documents.

218 Venice Commission, Opinion on the Draft Code on Judicial Ethics of the Republic of Tajikistan, CDL-AD(2013)035-e, 10 December 2013, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)035-e.

A number of bodies of the judiciary play a role in internal procedures which are essential in selection, appointment, evaluation of performance and disciplinary procedures against judges: the Conference of Judges; the Qualification Collegium of Judges; the Examination Commission; the Association of Judges; and bodies of the Supreme Court, including the Presidium of the Supreme Court, the Plenum of Supreme Court, and the Judicial Unit. Each of these is considered in somewhat greater detail below.

The Conference of Judges

The Conference of Judges is a meeting of judges, of all judges of courts of different levels, including the Supreme Court, the High Economic Court and judges of lower courts.[219] It is summoned by the chair of the "Association of Judges of the Republic of Tajikistan" (see below).[220] The quorum for the Conference of Judges is at least two-thirds of the judges of the Republic of Tajikistan.[221] Under the law on Courts, the functions of the Conference of Judges include election of the members of the Qualification Collegium.[222]

According to the law, the Conference of Judges is regulated by the Regulations on the Conference of Judges,[223] however this document appears to be publicly unavailable nor could ICJ obtain this document. Surprisingly, ordinary judges do not appear to have access to the document or be aware of its existence. The ICJ could not confirm that the document exists, yet reference to it was made during the mission.

The mission was informed that the Conference is not convened on a regular basis and that since 2002 only one or two Conferences took place. One of the reasons for this was that the Association of Judges, which by law should summon the Conference, has failed to do so over the years. Given that under article 111 of the Law on Courts members of the Qualification Collegium are elected for the term of judges in office, it remains unclear how the Qualification Collegium members are elected in case the Conference has not indeed been held for the last ten or more years.

The Association of Judges of Tajikistan

The Association of Judges is a professional association,[224] which is vested by law with judicial governance functions.[225] The Association is said to have been created in the early 1990s as a grassroots initiative of judges.[226] In 1993, the Association was officially registered with the Ministry of Justice and now has the status of a public union, a status which includes NGOs[227] while by amendments to the law on Courts of 2016, it acquired certain functions in the administration of the judiciary, which are prescribed by law.

The Association consists of active and retired judges.[228] The law does not prescribe the structure of the Association of Judges. The role of the President and the Presidium of the Association is referenced in the Law when describing the procedure for the election of judges to the Qualification Collegium of Judges (QCJ)(see next section below).[229]

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219 Law on Courts, op. cit., article 112.1.

220 *Ibid.*, article 112.2.

221 *Ibid.*, article 112.3.

222 *Ibid.*, article 112.2.

223 *Ibid.*, article 112.8.

224 The Law of the Republic of Tajikistan "On Public Associations", article 5, "Public association is a voluntary, self-governing, non-profit association of citizens who have united on the basis of a commonality of interests to achieve the goals specified in the charter of the public association."

225 Law on Courts, op. cit., article 112: "[f]or the election of members of the Judicial Qualification Board, the chair of the public association 'Association of Judges of the Republic of Tajikistan', established in accordance with the legislation of the Republic of Tajikistan, convenes a conference of judges of the courts of the Republic of Tajikistan"; see also: OECD, Istanbul Anti-Corruption Action Plan Fourth Round Of Monitoring Tajikistan, Progress Update, 4 July 2018, p. 61, https://www.oecd.org/corruption/acn/OECD-ACN-Tajikistan-Progress-Update-2018-ENG.pdf.

226 Avesta information agency, Judges as guinea pigs, http://avesta.tj/2004/12/03/sudi-kak-podopytnye-kroliki/.

227 Law on Courts, op. cit., article 19.1.

228 Based on the interview during the Mission.

229 Law on Courts, op. cit., articles 112.5 and 112.7.

The Association of Judges takes part in the selection of the members of the QCJs[230] by calling a Conference of Judges, which votes for the candidates of the Collegium.[231] As the mission was told, one of the main goals of the Association was "to contribute to strengthening democratic transformations, strengthening the authority of the judiciary and independence". However, the document is not in the public domain and the ICJ was unable to obtain an official text to acquaint itself with its Charter. These difficulties in having access to some of the basic documents in respect to the organisation and functioning of the judiciary in Tajikistan point to a general problem of the lack of access of the public and judges to the documents regulating the functioning of the judiciary.

Currently, the Association of Judges is headed by the President of the Supreme Court, which is problematic given the disproportionately broad administrative functions of the Supreme Court, (see Chapter I. The structure of the Court System, above) and the President of the Supreme Court (see this Chapter below) The mission was told that this concentrates various functions which should be shared across the governance bodies of the judiciary, within the hands of one official.

The mission heard criticism from experts, who monitor the developments within the judiciary, that unlike during its early years of existence, the Association of Judges has ceased to be an active and independent organization of judges acting to advance the interests of its individual members. Independent experts shared the view that the body has mostly ceased functioning at least to a degree where its work would be visible and plays a rather 'decorative' role.[232] It appears that the 'promotion' of the Association through its assumption of functions under legislation and the formalization of its role as a body of the judiciary has had a detrimental effect on its operation.

The Qualification Collegium of Judges

The Qualification Collegium of Judges (QCJ) is a body which takes part in selection and nomination of candidates for the position of judges, their certification as well as disciplinary responsibility.[233] It was established in 2016 as a single body to replace the previous three Qualification Collegia.[234] It is composed of the Chair, Deputy Chair and 11 members.[235]

Members of the QCJ are selected on the Conference of Judges.[236] For the election of members of the QCJs, the chairperson the Association of Judges convenes a Conference of Judges of the Republic of Tajikistan (see Chapter I. The structure of the Court System, above).[237] Judges are elected as a member of the QCJs if they are voted for by the majority of the judges participating in the vote.[238] The chairperson of the Association of Judges of the Republic of Tajikistan (currently the Supreme Court President) convenes the first meeting of the QCJs, where a majority of votes from among its members elect the chairperson and deputy chair of the QCJs by open or secret ballot.[239] The mission was informed that in practice the vote is not secret, which of course may and, apparently does in practice influence the choices of its members. When the process is complete, the Presidium of the Association of Judges of the Republic of Tajikistan issues a resolution with the composition of the Qualification Collegium on the basis of

230 *Ibid.*, article 112.2.

231 *Ibid.*, article 112.5.

232 Based on interviews during the Mission.

233 Law on Courts, op. cit., Chapter 11.

234 OECD, Fighting Corruption in Eastern Europe and Central Asia, Anti-corruption reforms in Tajikistan, 4th round of monitoring of the Istanbul Anti-Corruption Action Plan, 2017, p. 57; Law on Courts, op. cit., article 111.

235 Law on Courts, op. cit., article 112.

236 *Ibid.*, article 112.1.

237 *Ibid.*, article 112.2.

238 *Ibid.*, article 112.4.

239 *Ibid.*, article 112.5.

the minutes (under Tajikistan law 'protocol') submitted by the Conference of Judges.[240] According to the law, the QCJ functions 'on its own account' ('самостоятельно'), and is based in the city of Dushanbe.[241] The reference to acting 'on its own account' is likely to refer to its functional or institutional independence, but the exact meaning of the wording was unclear to the mission.

Unlike the Conference of Judges and the Association of Judges, the Law provides for a more detailed description of the composition and organization of the QCJ. The QCJ is composed of a Chairperson, a Deputy Chair and 11 members with proportional representation of regional and economic courts, including two judges of the Supreme Court; two judges of the High Economic Court; one judge of the courts of the Gorno-Badakhshan Autonomous Region; two judges of each of the courts of the Khatlon region,[242] Sughd region,[243] the city of Dushanbe,[244] and other regions.[245] The legislation does not establish other specific criteria for the election of members of the QCJ or the grounds or mechanisms for termination of their powers. They appear to combine their activities as QCJ members with the position of a judge, with a judge's membership of the QCJ ending upon termination of the judicial term.[246] The law does not specify any additional guarantees or immunities afforded to them in relation to holding this additional position.

The law specifies that one of the responsibilities of the QCJ is "protection of the rights and legitimate interests of judges and seeking responses from the State bodies, enterprises, institutions, other organizations and officials".[247] These two functions, included in one sentence of the law, appear to be distinct from one another. According to the Law, the QCJ has responsibilities regarding the qualification, appointment, promotion and discipline of judges. It issues recommendations on the appointment of a prospective judge to the judiciary,[248] on the appointment of judges to particular judicial positions,[249] and on the qualification certification and qualification class of judges.[250] It also provides opinions on the withdrawal and dismissal of judges[251] and considers issues of disciplinary responsibility of judges.[252]

The mission was told that the QCJ in practice does not function independently. Various experts, including those with judicial experience, said that the relatively detailed prescription of the procedure in the law is not reflective of the reality that the QCJ does not in fact take independent decisions. It was alleged that the lists of those who should

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240 *Ibid.,* article 112.7.

241 *Ibid.,* article 112.9.

242 One of whom is a judge from the regional economic court.

243 One of whom is a judge from the regional economic court.

244 One of whom is a judge from the court of the military garrison.

245 Law on Courts, op. cit., article 112.

246 *Ibid.,* article 111.2.

247 *Ibid.,* article 113.4.

248 *Ibid.,* article 113.

249 It issues opinions on judges including deputy presidents and judges of the Supreme Court, High Economic Court, presidents, deputy presidents and judges of the Gorno-Badakhshan Autonomous Region Court, regional courts, Dushanbe city, garrison military courts, courts of cities and districts, the Economic Court of the Gorno-Badakhshan Autonomous Region, the economic courts of the regions and the city of Dushanbe, in article 113 of the Law on Courts.

250 This includes judges of the Supreme Court, presidents, deputy presidents, judges of the Gorno-Badakhshan Autonomous Region Court, regional courts, Dushanbe city, garrison military courts, city and district courts, to judges of the High Economic Court, presidents, deputy presidents and judges of the Economic Court of the Gorno-Badakhshan Autonomous Region, economic courts of the regions and the city of Dushanbe, in article 113 of the Law on Courts.

251 This includes judges of the Supreme Court, presidents, deputy presidents and judges of the Gorno-Badakhshan Autonomous Region Court, regional courts, Dushanbe city, garrison military courts, cities and districts courts as well as judges of the Supreme Economic Court, president, deputy presidents and judges of the Economic Court of the Gorno-Badakhshan Autonomous Region, economic courts of the regions and the city of Dushanbe.

252 Law on Courts, op. cit., article 113.

be voted for are prepared in advance and that in fact the Commission has little room in deciding on the concrete candidates. The mission was also told that the work of the QCJ is not transparent and that the decisions are made 'behind closed doors' in a way that does not make the results credible for independent observers. Concerns were raised that the work of the QCJ does not result in the selection of the candidates who are able to exercise their functions as judges in an independent manner.

The Examination Commission for the candidates for the position of judges and trainee-judges

The Unified Examination Commission for candidates for the position of judges and trainee-judges (ECJ) is a specialized body responsible for assessing candidates' knowledge, experience and skills necessary for a judicial position.[253] The ECJ is a relatively new body created not by legislation, but by Decree of the President of Tajikistan.[254] Furthermore, the Statute and composition of the ECJ, is within the powers of the President of Tajikistan who acts based on the joint submission of the Presidents of the Supreme Court and the Supreme Economic Court.[255] On the basis of the Regulations on the Examination, the ECJ conducts a qualifying exam for candidates who are first submitted for the post of judges and interns.[256]

Previously the Examination Commission consisted of judges, but the mission was told that after the reform the composition of the Commission had evolved towards a greater representation of the executive. The ECJ consists of:

- The assistant to the President of the Republic of Tajikistan on personnel issues;
- The Deputy President of the Supreme Court of the Republic of Tajikistan;
- The President of the Higher Economic Court of the Republic of Tajikistan;
- The Prosecutor General of the Republic of Tajikistan;
- The Deputy Director of the Agency for the Public Service under the President of the Republic of Tajikistan;
- The Director of the National Legislation Centre under the President of the Republic of Tajikistan;
- A representative of the Tajik National University.[257]

At the time of the last examinations, held in May 2018, the membership of the ECJ included the Assistant to the President of the Republic of Tajikistan on personnel issues, the Deputy President of the Supreme Court, the Deputy President of the High Economic Court, the First Deputy of the Prosecutor General, the First Deputy Director of the Civil Service Agency, the Director of the Agency for State Financial Control and the Fight against Corruption, the Deputy Director of the National Centre for Legislation and the Dean of the Faculty of Law of the National University of Tajikistan.[258]

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253 Third periodic report of Tajikistan on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/C/TJK/3, 27 December 2016, para. 129.

254 Regulation on the Unified Examination Commission for the Candidates for Trainee Judges, approved by the Decree of the President of the Republic of Tajikistan on 5 April 2017, No. 866; see also: Supreme economic court of the Republic of Tajikistan, The examinations for trainee judges have started, http://soi.tj/?p=3578&lang=ru.

255 Law on Courts, op. cit., article 107.

256 *Ibid.*

257 OECD, Istanbul Anti-Corruption Action Plan Fourth Round Of Monitoring Tajikistan, Progress Update, 4 July 2018, p. 23, https://www.oecd.org/corruption/acn/OECD-ACN-Tajikistan-Progress-Update-2018-ENG.pdf.

258 Supreme Economic Court of the Republic of Tajikistan, The examinations for trainee judges have started, http://soi.tj/?p=3578&lang=ru.

Under international law and standards, the body which is tasked with selecting judges, should be composed of at least a majority of judges.[259] Recommendation No. R(94)12 of the Committee of Ministers states:

> *"The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules."*[260]

The UN Special Rapporteur on the Independence of Judges and Lawyers has underlined the standards according to which the body selecting judges should constitute the majority of the body:

> *"[t]he composition of this body matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges. While a genuinely plural composition of this body is recommended with legislators, lawyers, academicians and other interested parties being represented in a balanced way, in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference. In the Special Rapporteur's view, if the body is composed primarily of political representatives there is always a risk that these 'independent bodies' might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly."*[261]

In Tajikistan, the involvement of the executive in this key body of qualification of judges, is conspicuous. The composition of the Examination Commission, consisting of only two members of the judiciary out of seven members, clearly puts the body which is key for the selection of the judges under significant influence of the executive, compromising its independence. Moreover, during the mission, the ICJ heard concerns that members of the Examination Commission have not shown themselves to be independent. In its most recent Concluding Observations, the UN Human Rights Committee criticized the procedure of appointment and reappointment of judges in Tajikistan as being inconsistent with the States obligations under the ICCPR:

> *"...the Committee remains concerned that the judiciary is still not fully independent owing, inter alia, to the role of and influence exerted by the executive and legislative branches; the criteria for selection, appointment, reappointment and dismissal of judges; and the lack of security of tenure of judges."*[262]

The Unit on the Cadres and Special Work

The mission learned of the existence of various units within the Supreme Court which exercise some of the functions of the governance of the judiciary. The units were created based on the Decree of the President of Tajikistan.[263] In particular, the mission discussed the functioning of the Unit Cadres and Special Work (UCSW), a specialized administrative body of the Supreme Court responsible for monitoring and evaluation

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[259] Among others see: Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary, para. II.1.

[260] Recommendation No. R(94)12, principle I.1.c.

[261] Leandro Despouy, the Special Rapporteur on the independence of judges and lawyers, Report "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development", A/HRC/11/41, 24 March 2009, para. 28.

[262] UN Human Rights Committee, Concluding observations on the third periodic report of Tajikistan, CCPR/C/TJK/CO/3, 22 August 2019, para. 37–38.

[263] Decree of the president of Tajikistan the structure of the apparatus, management scheme and staffing of the Supreme Court of the Republic of Tajikistan. Also see the structure of the Supreme Court of Tajikistan: https://sud.tj/ru/obshchaya-informatsiya/struktura-apparata-verkhovnogo-suda/.

of the work of courts and judges. Operating within the Supreme Court, it is apparently answerable to the President of the Supreme Court. Such units, which are said to consist of three members, operate as well at the regional level, forming regional units which are also directly answerable to the Supreme Court rather than to the courts where they are deployed. This body is not mentioned in any of the publicly available laws or regulations, but its role appears to be fundamental in controlling the performance of judicial functions by individual judges.

The mission heard that members of the UCSW as a rule conduct periodic reviews of the work of courts and of judges and check cases, decided by judges, where there is an allegation or a complaint of misconduct. When the Supreme Court receives a complaint, the UCSW takes initial steps to conduct an inquiry into the allegations and in case of sufficient grounds to initiate disciplinary proceedings, it transfers the case to the QCJs.

The mission's attention was drawn to the fact that the significant powers of the UCSW are marked by a lack of transparency of the regulation of their organization as well as a lack of guarantees for their independence from the Supreme Court. Not only is the existence and functioning of the body not provided for by a publicly available law, the documents which regulate its operation, including the criteria and procedures it uses, remain unknown not only to the public but to the judges themselves.

It was said by former members of the judiciary that, because of this lack of transparency and clarity in the work of these bodies, many judges feel unprotected from inquiries by UCSWs. This institutional setting raises concern as to its compliance with international law and standards, according to which, the disciplinary system should be transparent and independent, including independence within the judiciary.[264] The Council of Europe Committee of Ministers has affirmed that where judges fail to execute their duties "in an efficient and proper manner" disciplinary proceedings may follow, but has stipulated that such proceedings should be conducted by an independent authority or court with all the guarantees of a fair trial and should provide the judge with the right to challenge the decision.[265]

The UN Human Rights Committee has highlighted the importance of responsibility for disciplinary action against judges being vested in an independent body or mechanism.[266] In order to ensure an independent and objective review of the complaint, a "court president should not have the power to either initiate or adopt a disciplinary measure".[267] The UN Human Rights Committee has further highlighted that the procedure before an independent disciplinary body must be in compliance with due process and fair trial guarantees.[268] As the Special Rapporteur on the Independence of Judges and Lawyers has pointed out, the effective implementation of judicial accountability mechanisms should exclude corporatism and the use of accountability proceedings as an instrument of reprisal or internal pressure.[269] Moreover, "the rule of law [...] requires that accountability mechanisms and procedures be clearly established by law to enhance

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264 OSCE, Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus and Central Asia, 2010, para. 26.

265 Council of Europe, Committee of Ministers Recommendation No. R(2010)12, Judges: independence, efficiency and responsibilities, article 69.

266 UN Human Rights Committee, Consideration of reports submitted by states parties under article 40 of the Covenant, 18 July 2005, UN Doc. CCPR/CO/84/TJK, para. 17; UN Human Rights Committee, Consideration of reports submitted by states parties under article 40 of the Covenant, 25 April 2005, UN Doc. CCPR/C/79/Add.118, para. 14.

267 OSCE, Kyiv Recommendations on judicial independence, para. 14.

268 UN Doc CCPR/C/93/D/1376/2005 (footnote 75), para. 6.5; CCPR/C/78/D/933/2000 (footnote 77), para. 5.2; CCPR/CO/75/MDA, para. 12; see also: Case of the *Constitutional Court v. Peru*, Inter-American Court of Human Rights, 31/1/2001, paras 74 and 84; *Apitz Barbera et al. v. Venezuela*, Inter-American Court of Human Rights, para. 44.

269 Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report, A/HRC/26/32, 28 April 2014, para. 71.

the transparency, fairness, integrity and predictability of public and private institutions and entities".[270]

Presidents of Supreme Court and High Economic Court

As noted earlier in this chapter, the role of court presidents should be strictly limited to only assuming "judicial functions which are equivalent to those exercised by other members of the court".[271] In Tajikistan, however, the functions of court presidents and especially of the presidents of the highest judicial instances, go far beyond the well-known maxim of *primus inter pares*, i.e. "first among equals".

In Tajikistan, Presidents of the highest courts are appointed by the Parliament on the proposal of the President of the Republic of Tajikistan.[272] According to the information made available to the mission, in practice, there is typically only a single candidate for these positions and the decisions are approved automatically without discussion. Presidents of the Supreme Court and of the Higher Economic Court are not subordinate to each other, as the Supreme and High Economic Courts constitute separate jurisdictions and their functions mirror each other as prescribed in articles 37 and 53 respectively.

By law and in practice, presidents of the Supreme and High Economic courts have a wide range of functions ranging from administrative, managerial and judicial. They have a role in:

i) appointments,

ii) dismissals of judges,

iii) supervision of the decisions of the ordinary judges.[273]

Among many other functions they carry out the following tasks:

- they personally receive individuals [who wish to file complaints to courts] and organize work on consideration of complaints;[274]
- they chair hearings of Presidiums of their courts;[275]
- they distribute workload among first deputy and other deputies;
- they manage the administrative apparatus of the courts;
- they manage the work on harmonizing court practice;
- they represent their courts in engagements with State officials, diplomatic representations, international organizations;[276]
- they submit proposals to the President of the Republic on establishment of new courts;[277]
- they submit information on the number of judges, lay judges, managing employees of the court, staff members, financial premises of courts.[278]

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[270] *Ibid.,* para. 19.

[271] OSCE, Kyiv Recommendations on judicial independence, para. 11.

[272] The Constitution of the Republic of Tajikistan, op. cit., article 69.8.

[273] Law on Courts, op. cit., articles 37, 53.

[274] *Ibid.*

[275] *Ibid.,* article 37.1.

[276] *Ibid.,* article 53.1.

[277] *Ibid.,* articles 37 and 53.

[278] *Ibid.*

It is notable that court presidents have the competency to transfer cases from one court to another and can make decisions on the transfer of a civil or family case to a supervisory instance court for consideration on the merits.[279]

Another significant function of the Presidents of the Supreme Courts is initiating disciplinary cases against judges of the Supreme Court and High Economic Court, presidents, deputy presidents and judges of regional courts, military courts of garrisons, city and district courts.[280]

Concentration of significant functions in the hands of court presidents vests decisive powers in the hands of a single individual, rather than distributing these key functions among specialised bodies of self-governance of the judiciary. Indeed, they appear to concentrate some of the functions which in other jurisdictions, including those with similar traditions to Tajikistan, would usually belong to the self-governing bodies of the judiciary.[281] In this regard the CCJE has noted that although court presidents play an important role in contributing to the work of bodies of self-government, concentration of functions and powers in the hands of only a limited group of persons should be avoided.[282]

The existing institutional framework in Tajikistan creates significant imbalance within the judiciary, as it serves to disempower the institutions within the judiciary while personalizing the functions by concentrating them in the hands of few individuals. This inevitably undermines the democratic self-governance of the judiciary and, more broadly the role of judicial institutions. It is furthermore unclear how this procedural and institutional arrangement is capable of securing personal independence of judges and their accountability to institutions within the judiciary, rather than specific individuals.

Presidents of the courts of the regions and of Dushanbe

Besides their judicial functions, presidents of the regional courts, as well as the Court of the Gorno-Badakhshan Autonomous Region[283] and the city of Dushanbe, carry out administrative tasks.[284] These include supervision of the activities of their court; approval of its schedule; distribution of duties between the deputy presidents of the court; distribution of cases among judges; and oversight of the execution of judgments of their court.[285] They address the judicial collegia of the Supreme Court when considering cases in cassation; report cases to judicial collegia and the Presidium of the relevant courts; convene the Presidium of the court; direct the organization of the work of the court apparatus, and appoint and dismiss employees.[286] They are in charge of initiating disciplinary cases against court presidents, deputies and other judges of lower courts.

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279 The Constitutional Law on Courts, op. cit., articles 37, 53 stipulate that the President of the Supreme Court of the Republic of Tajikistan, the President of the Supreme Economic Court, the presidents of lower courts of general jurisdiction and economic courts shall distribute cases between judges of the respective courts. The presidents of the higher courts also decide on the transfer of the case from one court to another. There is no clear regulation of rules for the allocation of cases.

280 Another important mandate appointed to the president of the Supreme Court According to articles 37, 53, 77 and 83 of the Law on Courts is the initiation of disciplinary proceedings against judges.

281 For example, judicial councils are established and function in Uzbekistan in the form as a constitutional body — the Supreme Judicial Council, in Preliminary observations on the official visit to Uzbekistan (19–25 September 2019) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25043&LangID=E; in Russia — Council of Judges of Russian Federation, official website http://www.ssrf.ru, also ICJ Report, p. 7; The Supreme Judicial Council of the Republic of Kazakhstan, official website http://sud.gov.kz/eng/kategoriya/supreme-judicial-council-republic-kazakhstan, see also CDL-AD(2018)032, Venice Commission Opinion No. 938/2018 of 17 December 2018.

282 CCJE, Opinion No. 19, op. cit., para. 8.

283 Gorno-Badakhshan Autonomous Region is an autonomous region in eastern Tajikistan. Located in the Pamir Mountains, it makes up 45% of the land area of the country but only 3% of its population.

284 Law on Courts, op. cit., article 77.

285 *Ibid.,* article 77.1.

286 With the exception of the bailiff, consultant and assistant to the president of the court, in Constitutional Act ZRT of 23 July 2016, No. 1328.

Court presidents also have the duty to "take measures to organize the qualifications of judges and court staff",[287] and manage studies of court practice and statistics.[288]

Presidents of the district courts

Presidents of the district courts supervise the activities of the relevant court and approve the court's work plan;[289] consider cases in the court of first instance and supervise the execution of judicial decisions;[290] distribute cases among judges; determine which judges will consider family cases and cases of administrative offenses, as well as criminal cases against minors; work to harmonize court practice; make submissions to State bodies, organizations and officials on the cessation of violations of the legislation of the Tajikistan; supervise the court administrative apparatus; recruit and dismiss employees of the court, with the exception of the bailiff, consultant and assistant to the presidents of the courts;[291] organize work to build capacity of court employees, as well as work to increase the legal knowledge of lay judges and court staff.[292]

In addition to these competences, it is important to mention that presidents of various courts,[293] where such decision is being made, are entitled to express 'disagreement' with a judge's decision not to transfer the case to the supervisory procedure for consideration on the merits.[294] In such instances, the president of the relevant court or the deputy President of the Supreme Court makes their decision to transfer the case to the appeal court for consideration on the merits.[295]

The mission was told on many occasions that the actual powers of court presidents go beyond even these formal and already broad powers afforded to them by law. It was alleged that, apart from the functions mentioned above, court presidents in practice interfere with the decision-making of ordinary judges of courts. The mission heard that on multiple occasions that the sole decision makers in their courts were court presidents rather than ordinary judges. Court presidents, the mission was told, are instructed to bear full responsibility for the decisions which are issued by judges of their respective courts. Thus, it is reliably reported that court presidents' competences go far beyond the competencies provided by the law but extend as far as deciding in cases of judges of their courts.

A former judge pointed to the fact that judges are told what decision should be made by court presidents because eventually it is court presidents who will effectively be responsible for that decision. The responsibility is therefore on the Court President as a decision is issued in that court, rather than individual judges. This is not to say that judges would not be held accountable in any case, but rather points to an arrangement where court presidents have greater judicial powers or competences than ordinary judges. Thus, the mission observed that the functions prescribed by law as well as the state of affairs in practice are in no way close to the notion of court presidents being all judges being equal on purely judicial matters, even they distinct responsibilities in judicial administration. The recommendation that "[c]ourt chairpersons must not interfere with the adjudication by other judges and shall not be involved in judicial selection"[296] is therefore neglected. Furthermore, court presidents appear to take decisions both about

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287 Law on Courts, op. cit., article 77.1.

288 For full list see Law on Courts, article 77.

289 *Ibid.,* article 83.

290 *Ibid.*

291 Constitutional Act ZRT of 23 July 2016, No. 1328.

292 Law on Courts, op. cit., article 77.1.

293 President of the court of the Gorno-Badakhshan Autonomous Region, presidents of the regional courts, president of the Dushanbe city court, President of the Supreme Court, his/her deputies.

294 Civil Procedure Code, article 372.2.

295 *Ibid.*

296 OSCE, Kyiv Recommendations on judicial independence, para. 11.

the career of their colleagues and the actual decisions they take (further details see Chapter III. The procedure for selection and appointment of judges, below).

Conclusions

Some of the key bodies of the self-governance of the judiciary in Tajikistan, including the Unit on the Cadres and Special Work (UCSW), do not appear to be regulated by law and the documentary material on which their procedure of functioning is regulated are not publicly available. It appears to be difficult or impossible to obtain some of the key documents regulating Tajikistan's judicial bodies and these documents are not available neither for the public nor for judges themselves. Where some judicial bodies are not established by law, and where key documents are unavailable, it leads to a lack of transparency in the functioning of the judiciary.

The UCSW, a judicial body, is not included in the Law on Courts, while possessing the functions upon which the independent work of judges depends. Besides, the legal framework regulating its methods of work does not appear to be available to the public or to the judges the ICJ spoke to.

Furthermore, other key bodies for the administration of the judiciary — including the Conference of Judges or the Association of Judges — do not appear to operate regularly or at all. Given the essential nature of these bodies for the operation of the judiciary, it is unclear how in the absence of regular work of these bodies, their functions are carried out.

The significant functions of court presidents is striking. It is clear that they play a disproportionately large administrative role which would more appropriately be allocated to institutions rather than individuals and which may impinge on the independence of judges of their courts. Their administrative functions are broad and are already problematic due to the dependence of judges on their superiors' decisions vis-à-vis their judicial career or material benefits. But their informal functions raise further concerns as they extend as far as interfering in decision making in specific cases therefore undermining the independence of judges and potentially depriving judges of their ability to exercise their judicial functions altogether.

Chapter III. The Procedure for Selection and Appointment of Judges

International Standards

Under international law and standards on the independence of the judiciary, judges should be appointed based on specific criteria and in a transparent manner in order to ensure impartiality.[297]

The UN Basic Principles provide that "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."

Fair and independent judicial appointment procedures, as a guarantor of judicial independence, are necessary to a fair trial, protected by article 14 of the ICCPR, as highlighted by the UN Human Rights Committee "[t]he requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges [. . .]".[298] Unless judges are appointed and promoted on the basis of their legal skills, integrity and ability the judiciary runs the risk of not complying with its core function: imparting justice independently and impartially.[299]

The European Court of Human Rights has held that:

> *". . . [i]n determining whether a body can be considered to be 'independent'—notably of the executive and of the parties to the case—the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."*[300]

The authority in charge of the selection and career of judges should be independent of the government and administration.[301] It should be an independent authority with substantial judicial representation chosen democratically by other judges which is "particularly important for countries which do not have other long-entrenched and democratically proved systems".[302] However, where judges are appointed by the government, "there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above".[303]

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297 ICJ Practitioners Guide, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Geneva, 2007, p. 41, https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Procecutors-No.1-Practitioners-Guide-2009-Eng.pdf.

298 General Comment No. 32, para. 19.

299 ICJ Practitioners Guide, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Geneva, 2007, p. 41.

300 *Campbell and Fell v. The United Kingdom*, ECtHR (Application No. 7819/77; 7878/77), Judgment, 28 June 1984, para. 78.

301 Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges.

302 CCJE, Opinion No. 1 (2001), On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, para. 45.

303 Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges, principle 1.2.

An appropriate method for guaranteeing judicial independence, according to the Venice Commission, is "the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy".[304] Such a council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.[305]

The Implementation Measures for the Bangalore Principles provide in part as follows:

> "*12.5 Where an independent council or commission is constituted for the appointment of judges, its members should be selected on the basis of their competence, experience, understanding of judicial life, capacity for appropriate discussion and appreciation of the importance of a culture of independence. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism.*"[306]

Once an independent judicial body has recommended a candidate, this recommendation should be respected. In particular, the Kyiv recommendations elaborated: "Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, QCJ or Expert Commission; [. . .]). Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law."[307]

Any method of judicial selection must safeguard against judicial appointments for improper motives.[308] The UN Basic Principles establish that: "[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".[309] International standards prohibit discrimination, on any status grounds, against a person who is a candidate for judicial office.[310] The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification.[311] Opinion No. 1 of the CCJE recommends in addition that "the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are 'based on merit, having regard to qualifications, integrity, ability and efficiency'".[312]

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304 Venice Commission Opinion No. 403/2006, 22 June 2007, CDL-AD(2007)028, para. 48.

305 *Ibid.,* para. 49.

306 Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (Judicial Group on Strengthening Judicial Integrity, 2010).

307 OSCE, Kyiv Recommendations on judicial independence, para. 23.

308 Universal Charter of the Judge, article 9, European Charter on the statute for judges, operative paragraph 2.1, Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges, adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies), principle 1.2.

309 UN Basic Principles, op. cit., principle 10.

310 *Ibid.,* see also: ICJ Practitioners Guide No. 1, p. 41; Universal Charter of the Judge, article 9; European Charter on the statute for judges, doc. cit., operative paragraph 2.1; Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges, adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies), principle 1.2; the African Principles and Guidelines on the Right to a Fair Trial establish that: "The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability."

311 Universal Charter of the Judge, article 9; Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges, principle 1.2.

312 CCJE, Opinion No. 1 (2001), On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, para. 25.

Selection of judges in Tajikistan

i) The procedure of selection of judges

The stages of selection of judges in Tajikistan include: an application, examination,[313] traineeship[314] and final appointment.[315] The main bodies involved in selection process are the Qualification Collegium[316] the Examination Commission,[317] Presidents of the Supreme Court and High Economic Court,[318] Parliament[319] and the President of Tajikistan.[320] First time candidates for judicial appointment have to undergo a traineeship prior to appointment as a judge.[321] New judges are initially appointed to lower level courts, such as military garrison courts, city and district courts and regional economic courts of first instance. For the initial appointment as a judge, a candidate must successfully pass the qualification examination for the position of a trainee judge.[322]

In accordance with regulations,[323] and on the basis of a joint instruction of the Presidents of the Supreme Court and the High Economic Court, a Commission that receives applications for the position of trainee judges is established.[324] The official media outlets and the Supreme Court and the High Economic Court publish announcements about the competition for the position of a judge-trainee.[325] Not later than five days prior to the examinations, the President of the Supreme Court and the High Economic Court approve the list of candidates to take the examination, and the list is published on the websites of the Supreme Court and the High Economic Court,[326] as is the date of the exams.[327] At the exam, representatives of the media may be present, and the process of the examination itself is displayed on the monitors installed in the building where the exam is held.[328] As the ICJ mission learned, the President of the Supreme Court has discretionary powers not to allow a candidate to take the exam, for example in case of "questionable relationships or conflict of interests". The ICJ was told that, during the application process, all candidates are checked in regard to their relatives and personal relationships. The law, however, does not prescribe this procedure. These checks were said to be carried out by security services, but the mission was not able to obtain more clarity on this procedure.

According to the information available to the ICJ, the examination consists of two stages, the first of which is an evaluation of Tajik language knowledge and writing skills. The second stage is an examination of the legal knowledge of candidates. The first examination is conducted in writing, while the second may be conducted orally based on examination cards (tickets).[329] The ICJ was told that most of the exams in practice are oral.

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313 Law on Courts, op. cit., Title XI.

314 *Ibid.,* Title X, article 108: "[r]egulation on trainee judge is approved by the President of he Supreme Court of the Republic of Tajikistan."

315 *Ibid.,* article 16.

316 *Ibid.,* article 111.

317 *Ibid.,* article 107.

318 *Ibid.,* article 16.2.

319 *Ibid.,* article 16.1.

320 *Ibid.,* article 16.2.

321 *Ibid.,* article 108.

322 *Ibid.*

323 Regulation on the Unified Examination Commission for candidates for the position of judge and trainee judges approved by the Decree of the President of the Republic of Tajikistan on 5 April 2017, No. 866.

324 OECD, Istanbul Anti-Corruption Action Plan Fourth Round Of Monitoring Tajikistan, Progress Update, 4 July 2018, p. 23, https://www.oecd.org/corruption/acn/OECD-ACN-Tajikistan-Progress-Update-2018-ENG.pdf.

325 *Ibid.,* p. 25.

326 *Ibid.*

327 *Ibid.*

328 *Ibid.*

329 Using cards is a system of examination which is used in different former USSR: a number of cards is prepared containing several questions each, candidates can select randomly placed face down cards. Upon sometime of preparation they should give answers to the questions they have in the cards they have picked.

It was explained to the mission that the Examination Commission decides on the qualifications of the candidates and submits its opinion to the Presidents of the Supreme and High Economic Court, who then make a submission to the Qualification Collegium of Judges (QCJ). Based on the results of the examination, and the submission of the presidents of Supreme Court and High Economic Court, the Qualification Collegium adopts a decision on the eligibility of candidates for judicial appointment.[330] Taking into account the conclusions of the QCJ and the Examination Commission, the Presidents of the Supreme Court and High Economic Court then decide on the appointment of trainee judges. Thus, the opinion of the Presidents of the Supreme Court and High Economic Court is decisive in the process of appointing a judge and they have an important role at least twice in the process of selection of judges: when deciding on the eligibility and when deciding on the actual appointment. After all stages have been completed the list of selected judges is submitted to the President of Tajikistan.[331]

As follows from the description above, the decision of the QCJ is not final. The QCJ only gives opinion on the candidates to be approved by the President of the Supreme Court and High Economic Court, which is then approved by the President of the State. The ICJ has heard that in most cases the candidates are approved by the President, but the President is not bound by the qualification result. The Kyiv Recommendations in this regard specify that the examination should have a decisive role as follows: "[u]nless there is another independent body entrusted with this task, a separate expert commission should be established to conduct written and oral examinations in the process of judicial selection. In this case the competence of the Judicial Council should be restricted to verifying that the correct procedures have been followed and to either appoint the candidates selected by the commission or recommend them to the appointing authority."[332]

Once the candidates are finally approved for appointment, the President of the Republic of Tajikistan directly appoints judges of the first and second level courts of general jurisdiction and economic courts on the respective recommendations of the Presidents Supreme Court and the High Economic Court.[333] The composition of the Supreme Court of the Republic of Tajikistan and the High Economic Court of the Republic of Tajikistan are approved by Parliament upon the recommendation of the President of the Republic of Tajikistan.[334]

It was explained to the ICJ mission that a unit called the Commission on Personnel Policy, which functions under the President of Tajikistan, also takes an active part in preparing the submission of the President of the Republic of Tajikistan on appointing judges of the Supreme Court and the Decree of the President of the Republic of Tajikistan on the appointment of judges of courts of general jurisdiction.

In this regard, under international standards such an appointment should generally follow without alteration of the advice of an independent body, even if it may be appropriate for the executive to act formally as a final appointing authority. The Venice Commission has said in particular: "[a]s long as the President is bound by a proposal made by an independent judicial council, the appointment by the President does not appear to be problematic".[335] The Kyiv Recommendations on judicial independence elaborate on the same principle as follows: "[w]here the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, QCJ or Expert Commission; [...]). Refusal to appoint such a candidate may be based on procedural grounds only and must be

330 Law on Courts, op. cit., article 113.1.

331 *Ibid.,* article 17.

332 OSCE, Kyiv Recommendations on judicial independence, para. 3.

333 Law on Courts, op. cit., article 16.

334 *Ibid.*

335 Judicial Appointment, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16–17 March 2007), para. 14.

reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote."[336]

The law and practice in Tajikistan do not appear to meet the above-mentioned international standards. The decision of the President is not required to be reasoned nor can it be overruled by the judicial authority. Furthermore, the role of the Commission on the Personnel Policy in appointing judges raises issues as to its conformity with international law and standards on the independence of the judiciary. In particular, while the Head of State, government or legislature may, in some systems, make decisions concerning the appointment or career of judge, in such circumstances "an independent and competent authority drawn in substantial part from the judiciary [...] should be authorized to make recommendations or express opinions which the relevant appointing authority follows in practice".[337]

The Commission on Personnel Policy, unlike the other bodies in the appointment procedure, is an organ of the Executive. Its operation and functions are not prescribed by any of the laws which regulate the operation of the judiciary. It is unknown what, if any, criteria it uses to evaluate and select the candidates. The UN Human Rights Committee in regard to a similar body in the Russian Federation expressed concern about "[...] the significant role of the Presidential Commission in the selection and appointment process".[338] The Committee recommended to "[r]educe the role of the Presidential Commission in the process of the appointment of individuals proposed by independent bodies established to govern appointments".[339]

ii) Criteria for candidates for a judicial position

The Law on Courts established the main criteria for the selection of judges. Candidates for the position of a judge of the first instance courts should meet the following requirements: they should be citizens of the Republic of Tajikistan of at least 25 years old, have a degree in law and have professional work experience of at least three years.[340]

Judges appointed to the Supreme Court, the High Economic Court, district and regional courts must be citizens of the Republic of Tajikistan of at least 30 years of age, having a law degree and work experience as a judge for at least five years.[341] Citizens of the Republic of Tajikistan of at least 30 years of age who have a law degree and work experience of over 10 years in law can be elected to the position of judges of the Constitutional Court.[342] The knowledge of Tajik (which has the status of the State language) is compulsory for all abovementioned positions.[343]

The ICJ could not obtain information about the percentage of former prosecutors, lawyers or representatives of academia appointed to the position of judges, although it was said that such cases did not constitute a regular practice. With rare exceptions, the mission was told, bailiffs who were assigned by the Ministry of Justice were allowed to apply for the position of a judge. The ICJ mission also heard of practice of an unofficial ban on judicial appointments of children of sitting judges. This was said to be an anti-corruption measure.

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336 OSCE, Kyiv Recommendations, para. 23.

337 Recommendation of the Council of Europe (2010)12, On judges: independence, efficiency and responsibilities, paras 3.1 and 1.3.

338 Human Rights Committee, Concluding observations on the seventh periodic report of the Russian Federation, CCPR/C/RUS/CO/7, 28 April 2015, para. 17.

339 *Ibid.,* para. 17(b).

340 Law on Courts, op. cit., article 12.2.

341 *Ibid.,* article 12.1.

342 Law on the Constitutional Court, op. cit., article 8.2.

343 *Ibid.,* article 8; Law on Courts, op. cit., article 12.2–3.

While it is understandable how this could reduce a risk of nepotism within the judiciary, the measure itself appears to be arbitrary by the mere fact of not being provided for by law. It also appears to be discriminatory as it automatically excludes individuals who may merit an appointment irrespective of any undue influence. The ICJ has also obtained information that only persons who studied in specific universities have the highest chance for appointment as judges. In particular, graduation from the full-time department at the Tajikistan National University was said to be one of the conditions for a successful application for a judicial career.

Appointment of judges

Once a person successfully passes the qualification exam, they may undergo traineeship as an initial step in a judicial career.[344] This requirement was introduced in 2008, the mission was informed, as a general practice, though the text of the law does not make the training mandatory. Where a judge undertakes a traineeship, this period is counted towards their professional work experience.[345]

Trainee judges do not adjudicate cases. They receive a monthly remuneration of an equivalent of approximately USD 100, which is close to average income in the country.[346] The mission was told that judges undergo a one-year training programme at the Judicial Training Centre and an internship in courts. For example, in February 2020, 58 new young judges appointed for the first time conducted all their traineeship at the Training Centre under the Supreme Court.[347] Based on the internship results, the trainee judges must pass an exam, the results of which are valid for three years.[348] Candidates who have not been appointed within three years must retake the exam. Trainee judges who have completed one-year training are credited to the reserve of candidates for the position of judge.[349]

According to the information the ICJ obtained, there have been no cases where a trainee judge has been dismissed from an internship for academic failure. According to the information obtained during the mission, after completing a traineeship and when opening a vacant position in the lower courts, the President of the Supreme Court and High Economic Court make a submission to the President of the Republic of Tajikistan on the appointment of the candidate from the reserve list to a judicial position. This procedure is not mentioned in Article 16 of the Law on Courts, which regulates appointment.[350]

Conclusions

Judicial selection and appointment processes in Tajikistan are on their face procedurally complex and thorough, yet on closer scrutiny it appears that the key stages of the selection are not controlled by specialized independent institutions with a clearly defined role and the powers to determine the final outcome. Rather, the role of the specialised bodies is limited and their decisions are not final.

It is evident that in practice the executive exercises significant power over the selection at different key stages of the process, through representatives of law enforcement

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344 Law on Courts, op. cit., article 108.2.

345 *Ibid.,* article 108.1.

346 World Bank, Tajikistan Country Economic Update Fall 2018, http://pubdocs.worldbank.org/en/624741547182513272/Tajikistan-CEU-Fall-2018-FINAL.pdf, p. 8.

347 Asia Plus. Emomali Rakhmon appointed 58 University graduate to the positions of city and regional judges. https://asiaplustj.info/ru/news/tajikistan/power/20200207/emomali-rahmon-naznachil-58-vipusknikov-vuzov-na-dolzhnosti-sudei-gorodov-i-raionov.

348 OECD, Istanbul Anti-Corruption Action Plan Fourth Round Of Monitoring Tajikistan, Progress Update, 4 July 2018, p. 24.

349 *Ibid.*

350 Law on Courts, op. cit., article 16.

agencies in the relevant bodies. Furthermore, within the judiciary itself, the procedure is under the influence and control of the judicial hierarchy where presidents of the Supreme and High Economic courts play a leading role, which may also provide a channel for inappropriate executive influence. The role of judicial bodies in this setting is reduced to an advisory rather than a final decision-making one. For example, a recommendation of the Examination Commission does not constitute the final decision on qualification of a candidate automatically leading to a recommendation for appointment, but is rather subject to a check by the presidents of the two highest courts.

Furthermore, the QCJ is formed by the decision of the Association of Judges which is chaired by the President of the Supreme Court and therefore its composition is influenced directly by the judicial hierarchy which is then also involved in the selection and appointment procedure in its own right.

The process of selection does not appear to ensure protection against arbitrary decisions made under executive influence throughout the process of selection, including through the involvement of security bodies. This includes the system of evaluation and grading of candidates which should be predictable, objective to exclude any element of bias, favour or corrupt purpose. In this regard, the information about pre-approval of the list of candidates is of concern as it may render the selection process futile.

Finally, it should be stressed that the appointment is made with the help of a body of the executive, the Commission on Personnel, whose operation and rules of procedure are not prescribed by law. In a number of respects, therefore, while the procedure of selection and appointment of judges is complex and at times labyrinthine, it does not ensure the level of independence necessary to meet international law and standards on the independence of the judiciary.

Chapter IV. Security of Tenure and the Judicial Career

International Standards

Security of tenure of judges is a prerequisite of judicial independence and it is guaranteed under international law and standards on the independence of the judiciary.

The UN Human Rights Committee has indicated, in relation to State obligations under the ICCPR to provide for an independent judiciary to administer justice through fair trials and proceedings:

> *"[t]he requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature."* [351]

It is a general standard that judges should be appointed either permanently [352] or until their retirement.[353] The UN Basic Principles stipulate that "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".[354] International standards do allow for a fixed term of appointment, however, where judges are appointed for a limited period of time only, not generally subject to renewal.[355] Reappointment is only possible where it is done by independent appointment body, and where decisions are made on merit and on the basis of objective criteria without political considerations.[356]

A fair system of promotion of judges is an important factor for the independence of the judiciary, as it directly affects the individual independence of judges when they perform their function.[357] Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.[358]

Furthermore, evaluation of judges should contribute to improving the quality of the judiciary and can thereby safeguard the appropriate accountability of the judiciary towards the public.[359] However, as stated in CCJE in Opinion No. 17:

> *"[. . .] the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence. When an individual evaluation has consequences for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated*

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351 General Comment 32, para. 19.

352 Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998, Guideline II.1.

353 Two footnotes above. See also: Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41, 24 March 2009, para. 53; Special Rapporteur on the Independence of Judges and Lawyers, A/67/305, 13 August 2002, para. 51.

354 UN Basic Principles, op. cit., principle 12.

355 CCJE, Opinion No. 1, para. 52.

356 *Ibid.*

357 UN Basic Principles, op. cit., principle 12; Recommendation No. R(94)12, principle 1 (2)(iv)(c).

358 *Ibid.*, principle 13. See also Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41, 24 March 2009, para. 72.

359 CCJE, Opinion No. 17 (2014), On the evaluation of judges' work, the quality of justice and respect for judicial independence, para. 7.

> *judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way, that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which might in some situations come from the attitude of other judges, including presidents of courts."*[360]

The UN Basic Principles provide that removal may be only for "reasons of incapacity or behaviour that renders them unfit to discharge their duties"[361] and such reasons should be defined in precise terms by the law.[362] Security of tenure should be guaranteed[363] and promotion should be based on objective factors in particular ability, integrity and experience.[364]

The UN Basic Principles also provide that "[w]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions".[365]

Judicial career under Tajikistan law

i) Term of office

In Tajikistan, judges of all levels are elected or appointed for a term of ten years.[366] At the end of the term of service of a judge, the QCJ provides an opinion on whether judges should be appointed for a new term of office or promoted to a higher court — regional, Supreme Court or High Economic Court.[367] The retirement age is 58 years of age for female judges and 63 for male judges.[368] Pursuant to the law, judges achieving the retirement age are automatically removed from their posts.[369] When a serving judge is appointed to a new court, the ten-year term is calculated from the date of the new election or appointment.[370]

Regular qualification certification of a judge (hereinafter referred to as attestation) is carried out[371] by the QCJ "in order to assess the professional activities of judges, to stimulate their interest in enhancing their professional level and check their responsible adjudicating of cases according to the Constitution and laws of Tajikistan".[372] Attestation is carried out during: 1) awarding qualification classes to a judge; 2) upon appointment and election of a judge to a higher court; 3) when appointing and electing a judge for a new term of office 4) when the need arises to determine whether the judge complies

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360 *Ibid.,* para. 6.

361 UN Basic Principles, op. cit., principle 18.

362 Council of Europe, Recommendation No. R(94)12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, principle VI(2).

363 UN Basic Principles, op. cit., principle 12.

364 *Ibid.,* principle 13.

365 *Ibid.*, para. 16.

366 Law on Courts, op. cit., article 15.1.

367 *Ibid.,* article 113.

368 *Ibid.,* article 12.3.

369 *Ibid.,* article 18.1.

370 *Ibid.,* article 15.

371 *Ibid.,* article 116.1.

372 *Ibid.,* article 114.1.

with requirements of the position.[373] The ICJ was told that in practice attestation takes place after five decisions of a judge have been reversed on appeal.

The type of attestation of a judge to determine the suitability for the position is carried out regardless of the time of the last attestation.[374] The law does not directly indicate who can initiate attestation, but it suggests that this initiative belongs to the President of the Supreme Court and High Economic Court.[375] The consecutive attestation of the judge is held no later than one month from the date of expiration of the period of stay in the qualifying class (on qualification classes see below) assigned to judge.[376] Early attestation can be held no earlier than two years from the last attestation.[377] Persons appointed for the first time as judges undergo attestation within six months after the appointment to a qualification class.[378]

The law establishes an attestation procedure that begins with a 'characterization', which is a document akin to a letter of recommendation,[379] that sets out their "professional and moral qualities and assesses judges' professional activity".[380] The characterization is drafted by the President of the Supreme Court or the High Economic Courts (for judges of the Supreme Court or the High Economic Courts) or Presidents of City and District courts and transmitted for consideration to the QCJ.[381] The judge should become familiar with the characterization no later than fifteen days before the attestation.[382] As the ICJ has previously noted in a similar national context, "[t]his reference given to judges by court presidents may play a decisive role in the appointment process. The importance of such references in securing a judicial appointment tends to make a judge in some respects dependent, from the very outset, on the court president who has supported his or her appointment."[383]

The attestation of a judge is conducted in the presence of the judge concerned.[384] The conclusion and decision of the QCJ are adopted by a majority vote of the members of the collegium participating in the meeting,[385] in the absence of the judge concerned.[386] It is set out in writing, signed by the chairperson and members of the QCJ participating in the meeting,[387] and must contain the date and place of its adoption, the composition of the Collegium, and the reasons for the decision.[388] Members of the collegium have the right to express a dissenting opinion in writing, which is attached to the case, but this is not subject to public disclosure.[389] The decision and conclusion of the QCJ may be appealed to the Supreme Court within 10 days from the date of delivery.[390]

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373 *Ibid.,* article 114.

374 *Ibid.,* article 116.1.

375 *Ibid.,* articles 37.1, 53.1.

376 *Ibid.,* article 116.2.

377 *Ibid.*

378 *Ibid.,* article 116.3, see also: Regulation on qualification classes assignment to judges, para. 3.

379 *Ibid.,* article 117.1.

380 *Ibid.,* article 117.

381 Regulation on qualification classes assignment to judges, para. 4.

382 *Ibid.,* para. 4.

383 Appointing the judges: Procedures for Selection of Judges in the Russian Federation, ICJ Mission Report, 2014, available online at https://www.icj.org/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf, p. 38.

384 Law on Courts, op. cit., article 117.

385 *Ibid.,* article 121.4.

386 *Ibid.,* article 121.2. When considering a question in relation to a judge who is a member of the QCJ, the latter may not participate in the voting: Law on Courts, op. cit., article 121.3.

387 *Ibid.,* article 121.4.

388 *Ibid.*

389 *Ibid.*

390 *Ibid.,* article 121.6.

In practice, the ICJ heard that positive attestation results are taken into account when appointing judges to the position of a President of a court or to a court of higher instance. In case of failure of attestation by judges who are subject to certification to determine compliance with their position, they can be dismissed by the QCJ.[391] From the explanations received by the ICJ during the mission, it appears that the conclusions of the QCJ are approved by the President of Supreme Court and further by the President of the Republic of Tajikistan.

The mission's attention was drawn to the practice of attestation following a number of reversals of a judge's decisions by the upper instances. The ICJ has heard that five such reversals normally lead to an attestation. This practice is not part of official or publicly known rules but was said to be standard practice. In this regard, it should be stressed that this practice may have direct impact on the ability of judges to exercise their functions independently as the independence of judges may be undermined where they may face sanctions as a result of their decisions.[392] The Kyiv Recommendations mention in particular that

> *"[j]udges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal). How a judge decides a case must never serve as the basis for a sanction. Statistics on the efficiency of court operations shall be used mainly for administrative purposes and serve as only one of the factors in the evaluation of judges."*[393]

The CCJE in its Opinion No. 17 on the evaluation of judges' work, the quality of justice and respect for judicial independence said on this issue: "because of the principle of judicial independence, neither the numbers of decisions reversed on appeal nor the reasons for the reversal are taken into account, unless they reveal grave mistakes".[394]

Therefore, the practice of checking a judge's aptness for judicial office following five or indeed any other number of reversed decisions amounts to a disciplinary action and as such interferes with the judicial function therefore being inconsistent with the independent of judges in deciding cases based on law and fact.

The ICJ further stresses that the absence of a permanent appointment of the judge until the age of retirement is not in line with the international law and standards on the security of tenure of judges and it undermines judicial independence. Regular reappointment of judges creates uncertainty and puts judges in a position where they are dependent on their superiors. Besides, the regular reappointments are contrary to the security of tenure which judges should enjoy throughout their judicial career.

Finally, there can be no permissible justification for the differential retirement age of male and female judges, which allows for five years greater tenure for men, that would not fall afoul of the prohibition of discrimination on grounds of gender. According to international law, there must be no discrimination in appointments on any grounds, including sex.[395] In particular, article 11 of the Convention on all Forms of Discrimination against Women, to which Tajikistan is a party, provides that State Parties "shall take all appropriate measures to eliminate discrimination against women in the field of employ-

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391 *Ibid.,* article 18.

392 OSCE, Kyiv Recommendations, para. 28.

393 *Ibid.*

394 CCJE, Opinion No. 17 (2014), On the evaluation of judges' work, the quality of justice and respect for judicial independence, para. 13.

395 See generally: UN Basic Principles, op. cit., and res. 40/146 (13 December 1985), principle 10 (and see also 13); UN Human Rights Committee, General Comment No. 32, Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc CCPR/C/GC/32 (23 August 2007), paras 18–22.

ment in order to ensure, on a basis of equality of men and women, the same rights". The UN CEDAW Committee has made clear that "older women are particularly affected by different mandatory retirement ages to those of men which constitutes discrimination on the basis of age and sex".[396] Therefore, "States parties have an obligation to ensure that retirement ages in both the public and private sectors do not discriminate against women".[397]

ii) Qualification classes

According to the law, all judges have the same judicial status and differ only in their jurisdiction and competence.[398] Nonetheless, judges possess different 'qualification class', i.e. the grades denoting their level of seniority within the judicial hierarchy.[399] Qualification classes are awarded by the President of the Republic of Tajikistan on the proposal of the President of the Constitutional Court, the President of the Supreme Court, and the President of the High Economic Court, based on the opinion of the QCJ.[400] Tajikistan law provides for six levels of qualification classes for judges which start with fifth class, follow with the fourth, and have at the top of the hierarchy 'highest class'.[401] Persons appointed to the position of a judge for the first time shall undergo qualification attestation in order to be assigned a qualification class within six months after their appointment.[402] As judges are promoted from one class to the other their salary is raised.[403] The amount of the salary is decided and approved by the president of Tajikistan.[404]

The presidents, deputy presidents and judges of the Constitutional Court, the Supreme Court, and the Higher Economic Court are assigned the highest, first qualification classes.[405] The president, deputy president and judges of the Military Court, the Court of the Gorno-Badakhshan Autonomous Region, the courts of the regions, the city of Dushanbe, cities and districts, the Economic Court of the Gorno-Badakhshan Autonomous Region, the courts of the regions and the city of Dushanbe are assigned the first, second, third, fourth and fifth qualification classes.[406]

According to the law, judges cannot stay within the same class indefinitely. The minimum period of stay within the qualification class, which provides the possibility to assign the next qualification class, is established by the law: for the fifth and fourth qualification classes it is three years; for the third and second qualification classes it is five years.[407] The duration of stay within the first (highest) qualification class is not limited.[408]

As is evident from the above description, the present system of awarding the class ranks to judges is not carried out through a transparent and predictable system which excludes bias, favouritism or other improper motive or purpose. The procedure puts judges in a position where their career depends on their superiors, in particular the

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396 CEDAW, General Recommendation No. 27, On older women and protection of their human rights, UN Doc. CEDAW/C/GC/27, para. 41.

397 *Ibid.*, para. 42.

398 Law on Courts, op. cit., article 13.3.

399 Judicial qualification class is awarded taking into account the position, length of service as a judge, professional training. Judicial class is not an honorary or special rank. ICJ Mission Report 2014, Appointing the judges: Procedures for Selection of Judges in the Russian Federation, https://www.icj.org/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf, p. 45.

400 Law on Courts, op. cit., article 115.

401 Regulation on qualification classes assignment to judges, approved by the Decree of the President of the Republic of Tajikistan of 15 October 2008, No. 551.

402 *Ibid.,* article 3.

403 Regulation on qualification classes assignment to judges, para. 5.

404 *Ibid.*

405 *Ibid.*, para. 2.

406 *Ibid.*

407 *Ibid.*, para. 3.

408 *Ibid.*

presidents of the two highest jurisdictions. This system where judges may be prone to seek a favourable attitude of their superiors means that their ability to adjudicate in an independent manner may be jeopardised. The fact that classes depend on the executive, as they are awarded by the President of the State, places the decision making about the career of individual judges further in the hands of the executive. This system does not appear to have sufficient guarantees in place to protect personal independence and the independence of the judiciary as a whole.

iii) Reappointment of judges

Following the expiration of a ten-year period in office, a judge may be reappointed.[409] If a judge has been reappointed in the course of his ten-year term from one court to another, the ten-year period restarts from the moment of the new appointment.[410] An assessment of judges ("qualification attestation of judges") of courts of general jurisdiction is carried out by the QCJ among others in case of election or appointment for a new term as a judge or when electing or appointing a judge to a higher court.[411] The attestation in most cases is carried out at the motion of the Presidents of the Supreme and High Economic Courts.[412]

The law does not provide for special criteria for the appointment to the position of the presidents of courts and courts of higher instance. The mission heard that when appointing to the position of the president of the court and courts of higher instance, the length of judicial experience is taken into account. This will mean more than ten years for the judges of the Constitutional Court, and five years[413] for the judges of the Supreme Court, the Supreme Economic Court and regional courts. In addition, positive results of the attestation of judges and the quality of judicial work are factored in. Judges of military courts should also meet the requirements of the law "On the Universal Military Duty".[414]

The ICJ was informed that the staff of the Assistant President of the Republic of Tajikistan on Personnel Policy typically take an active part in preparing the list of candidates on the appointment of judges of the Supreme Court and the Decree of the President of the Republic of Tajikistan on the appointment of judges of courts of general jurisdiction. The Presidential Personnel Commission plays a significant role in this process, which raises the same issues in regard to the inappropriate involvement of the executive in judicial appointments described earlier in this chapter. In addition, the role of the Supreme and High Economic Court Presidents appears to be key.

As noted above, in accordance with international law and standards, judges should either be appointed for life,[415] to a reasonable age of retirement, or to a fixed period long enough not to endanger the judge's independence.[416] The authorities in charge of appointment and promotion should give effect to objective criteria, to ensure that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency".[417] The CCJE in its Opinion No. 17 noted that "[w]hen an individual evaluation has consequences for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated

[409] Law on Courts, op. cit., article 15.1.

[410] *Ibid.,* article 15.2.

[411] *Ibid.,* article 114.

[412] *Ibid.,* articles 113.1, 37.1, 53.1.

[413] *Ibid.,* article 12.1.

[414] *Ibid.,* article 12.4.

[415] E.g. Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998, Guideline II.1.

[416] Universal Charter of the Judge, approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on 17 November 1999, article 8.

[417] Council of Europe, Recommendation No. R(94)12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, principle 1(2)(c).

judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic."[418] According to the Kiyv Recommendations: "[w]hile a Judicial Council may play a role in specifying the criteria and the procedure, professional evaluations should be conducted at the local level. Evaluations shall be conducted mainly by other judges. Court presidents should not have the exclusive competence to evaluate judges, but their role should be complemented by a group of judges from the same and other courts."[419]

iv) Transfer to another court (rotation)

According to the law, transfer of a judge from one court to another is allowed only with his or her consent.[420] To be transferred to a different court, the judge should submit a transfer application.[421]

The mission was also told that a practice of regular rotation of judges exists in Tajikistan. The rotation is initiated by the QCJ, and it is carried out with the appearance of a voluntary application for transfer, as provided by law. In this way, the formal procedure is respected. However, the ICJ was told that the real voluntary nature of this consent for transfer is not always respected in practice. Often judges are transferred to a remote locality without the necessary level of consultation or without their consent. The mission also heard that transfers may be done without the necessary logistical support for the judges transferred, for example, without providing sufficient housing. A refusal, it was reported, may lead to a disciplinary sanction or even withdrawal of the status of the judge.

As mentioned above, transfer of a judge to a different court restarts the date of his or her appointment.[422] Whatever the intent of the authors of this provision was, in practice it has far reaching consequences for the judicial career in Tajikistan. Indeed, a transfer to another court can in principle be used to bypass the 10-year restriction for judicial appointments and the need to undergo the regular evaluation for the judge's reappointment following the end of the 10-year period. The transfers system opens the door for manipulation and ways to bypass or exploit the flaws of other procedures. This may open the door for corrupt decisions or favouritism, though the mission did not hear of specific examples in practice.

Conclusions

The ten-year term for judges in Tajikistan is an obvious weak point in the career of a judge in Tajikistan and it may result in undermining the security of tenure for judges. The judicial career appears to depend on the judge's superiors within the judicial hierarchy and the qualifications required are not transparent nor well developed to provide a genuine assessment of the professional capacities of judges. As noted in Chapter IV. Security of Tenure and the Judicial Career, regular reappointment of judges is not in line with international law and standards on the independence of the judiciary. Furthermore, the unjustified difference in retirement age is discriminatory on the basis of gender.

The appointment, evaluation and reappointment of judges in Tajikistan do not procedurally or in practice ensure the security of tenure of judges as they place significant powers in the hands of individual senior judges without putting a system of checks and

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418 CCJE, Opinion No. 17, para. 6.

419 OSCE, Kyiv Recommendations, para. 30.

420 Law on Courts, op. cit., article 18.3.

421 *Ibid.*

422 *Ibid.,* article 15.2.

balances for their decisions. In practice this system makes judges' careers dependant on the decision of their superiors in a way that may undermine their ability to adjudicate independently.

The procedure for the promotion of judges seems to lack clear criteria or transparency. The characterization and evaluation procedure does not meet the standard of predictability or provide sufficient safeguards against arbitrariness. Furthermore, questioning judicial professionalism through an evaluation procedure, based on a particular number of reversed decisions is highly problematic. This directly interferes with the judicial function and undermines the ability of judges to exercise judicial functions independently.

Finally, the role of the key body in judicial appointment, evaluation and reappointment — the Commission on Personnel — is not regulated by law and its procedures and criteria are unclear. Thus, one of the key bodies which impacts on the judicial career appears to be outside the regulation by the law on the judiciary. The role of the Commission on Personnel allows the executive a decisive role in the professional career of judges, which puts judges in a position where an independent adjudication can hardly be expected.

Chapter V. Disciplinary Responsibility of Judges

International Standards

International standards on judicial independence require that disciplinary action against judges must be carried out by independent bodies that include substantial judicial representation[423] in accordance with established standards of judicial conduct.[424] The UN Basic Principles provide that complaints against judges should be processed expeditiously and fairly under an appropriate procedure in which a judge enjoys the right to a fair hearing.[425]

The Council of Europe's Recommendation on judges provides that disciplinary proceedings:

> *should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.*[426]

A similar principle is expressed in the Singhvi Declaration,[427] the Universal Charter of the Judge,[428] the European Charter on the Statute of Judges,[429] the Magna Carta of Judges,[430] the Bangalore Principles Implementing Measures,[431] and are endorsed by the Consultative Council of European Judges[432] and by the Venice Commission.[433]

Judges should be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.[434] Proceedings for dismissal of judges or other disciplinary measures should be held before a court or a board predominantly composed of members of the judiciary. In the event that the power to remove or discipline is vested in the legislature, the action should be taken only upon a recommendation of such a court or board.[435]

Disciplinary, suspension or removal proceedings decisions must be made subject to an independent review.[436] Such proceedings should be conducted by an independent authority, preferably a judicial body, with all the guarantees of a fair trial and should provide the judge with the right to challenge the decision and sanction, which must also be proportionate to the misfeasance.[437]

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423 The Universal Charter of the Judge, article 11, second indent.

424 UN Basic Principles, op. cit., principle 19.

425 *Ibid.,* principle 17.

426 *Ibid.,* principles 17–20; 52 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies (Council of Europe Recommendation on judges), para. 69.

427 Singhvi Declaration, para. 26(b), that continues: "The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board . . ."

428 Universal Charter of Judges, Approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on 17 November 1999, article 11.

429 European Charter on the Statute of Judges, Council of Europe, DAJ/DOC (98) 23, para. 5.1.

430 CCJE, Magna Carta of Judges, Strasbourg, 17 November 2010, CCJE (2010)3, para. 6.

431 Bangalore Principles Implementing Guidelines, para. 15.4.

432 CCJE, Opinion No. 3 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, CCJE (2002) Op. No. 3, 19 November 2002 , paras 77 ii–iv.

433 Venice Commission, Report on Independence of the Judiciary, op. cit., para. 43.

434 UN Basic Principles, op. cit., principle 18.

435 Singhvi Declaration, article 26 (b).

436 UN Basic Principles, op. cit., principle 20.

437 Council of Europe Committee of Ministers, Recommendation No. R(2010)12 to Member States on judges: independence, efficiency and responsibilities, article 69.

Furthermore, "principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence".[438] They should provide general rules, recommendations or standards of good performance that guide the activities of judges, that help to resolve questions of professional ethics, and provide judges with autonomy in their decision-making rather than be seen as binding legal provisions.[439]

The purpose of codes of ethics is distinct from that of a disciplinary procedure,[440] and "using a code as a tool for disciplinary procedure has grave potential implications for judicial independence".[441] The Venice Commission stresses that it is also important to make clear which established norms of ethical conduct are distinct from or overlap with disciplinary rules.[442]

The procedure for disciplinary responsibility

In Tajikistan, the procedure for disciplinary accountability of judges is regulated by the Law on Courts which includes the following grounds for disciplining judges: 1) gross violation of the law when considering cases;[443] 2) violation of the internal labour regulations;[444] 3) committing an offense discrediting the image of the judiciary, the honour and dignity of a judge;[445] and 4) violation of the Ethics Code of Judges.[446] The Law includes a statute of limitations for disciplinary misconduct: a disciplinary sanction cannot be applied later than six months from the date of the misconduct.[447] As a result of disciplinary proceedings, judges may be subject to either a warning or a reprimand,[448] but not to dismissal. Although dismissal of a judge is possible, it is not a form of disciplinary action, but instead is provided for under the general provision on the termination of office as defined in article 18 of the Law on Courts (check vis-à-vis Chapter 12 of the Law on Courts).

These abovementioned grounds are not precisely defined and may not meet the requirement of legal certainty and predictability of what behaviour may cause certain negative consequences for the judge. In this regard, the CCJE has emphasized the importance of establishing a clear definition in national law of the precise grounds for disciplinary action, taking note of the great generality with which these are usually stated.[449]

According to the law, only court presidents, with the exception of the court presidents of the lowest level courts, can initiate disciplinary proceedings against judges. Court presidents competent to initiate disciplinary proceedings include: 1) the President of the Supreme Court in relation to all judges, with the exception of judges of economic

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438 CCJE, Opinion No. 3, para. 48 (i).

439 *Ibid.,* para. 44.

440 *Ibid.,* para. 45: "[...] standards of professional conduct are different from statutory and disciplinary rules. They express the profession's ability to reflect its function in values matching public expectations by way of counterpart to the powers conferred on it. These are self-regulatory standards which involve recognising that the application of the law is not a mechanical exercise, involves real discretionary power and places judges in a relationship of responsibility to themselves and to citizens"; see also: Venice Commission Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, CDL-AD(2013)035, para. 36.

441 Venice Commission, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, CDL-AD(2013)035, paras 15 and 16.

442 *Ibid.,* para. 36.

443 Law on Courts, op. cit., article 123.

444 *Ibid.*

445 *Ibid.*

446 *Ibid.*

447 *Ibid.,* article 127.

448 *Ibid.,* article 127.2.

449 CCJE, Opinion No. 3, para. 65.

courts;[450] 2) the President of the High Economic Court in relation to all judges of economic courts;[451] and 3) the Presidents of regional courts in relation to presidents, their deputies, judges of the courts of regions and district courts, Gorno-Badakhshan autonomous region and the city of Dushanbe.[452]

There is no separate Disciplinary Commission established within the judiciary. Disciplinary cases are considered by the QCJ.[453] Consideration of a disciplinary case takes place at a meeting of the QCJ with the participation of the judge concerned, and other interested parties.[454] The QCJ has the right to consider a disciplinary case in the absence of the judge concerned if they have been notified of the place and time of the meeting, and if it considers the reasons for absence invalid.[455] The judge has the right to request in writing to consider the case in their absence and to receive a copy of the decision or opinion.[456]

The judge in respect of whom a disciplinary case is conducted has the right to study the casefile before it is transferred to the QCJ.[457] The judge may also submit further explanations or request a further examination.[458] The law does not prohibit a judge from having a representative, but it does not guarantee such representation as a right.[459] Furthermore, the judge has the right to appeal the decision of the QCJ to the Supreme Court within 10 days from the date of the delivery of the decision.[460] While the law does not specify this, the mission was informed that a case against a judge is considered according to the proceedings applied in cassation.

A disciplinary case begins with verification of information on the case by the QCJ, after which disciplinary proceedings are initiated and considered.[461] The presidents of courts authorized to initiate disciplinary proceedings make a preliminary review of the information regarding possible misconduct and seek a written explanation from the judge concerned.[462]

The ICJ was informed during the mission that when an individual complaint is made about a decision of a judge or allegations that a judge made a judicial error, a Unit on Cadres and Special Work (UCSW) (see Chapter II. Self-governance structures of the judiciary in Tajikistan, for a more detailed description), may initiate a check into the work of the judge. The UCSW is not mentioned in the law, but established under a Decree of the President of Tajikistan.[463] The mission heard that the UCSW carries out an inquiry into the work of the judge concerned, including visits to the court where the judge works, interviewing the judge and others as well as examining decisions of the judge and other relevant documents. Based on this inquiry, the UCSW issues a resolution. The mission was told that once adopted, depending on the case and the type of court involved, the resolution is submitted to the President of the Supreme Court, the President of High Economic Court and Presidents of Regional Courts who have the authority

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450 Law on Courts, op. cit., article 125.2.

451 *Ibid.*

452 *Ibid.*

453 *Ibid.,* article 111.1; see also: Title XII of the Law on Courts.

454 *Ibid.,* article 126.2.

455 *Ibid.*

456 *Ibid.*

457 *Ibid.,* article 125.7.

458 *Ibid.*

459 *Ibid.,* article 126.

460 *Ibid.,* article 121.6.

461 *Ibid.,* article 124.

462 *Ibid.,* article 125.1.

463 A Decree of the President of Tajikistan on the Structure of the apparatus, the scheme of management and staffing of the Supreme Court of the Republic of Tajikistan of 9 June 2016, No. 699.

to initiate disciplinary proceedings.[464] The ICJ mission was told that the UCSW enquiries are carried out based on internal documents, yet, while being of essential importance for the administration of justice these documents, they are not publicly available. Several judges interviewed by the mission said they do not know these internal regulations. The role of a body such as the UCSW that essentially prepares a disciplinary case should be spelled out in the law, in order to meet standards of legal certainty.

Based on the findings of the hearing, the QCJ may make the following decision related to the consideration of a disciplinary case:

- to apply a disciplinary sanction against the judge;
- to terminate the disciplinary case against the judge;
- to forward the materials to the bodies or officials who have the right to make submissions on the release or recall of a judge or to the Prosecutor General of the Republic of Tajikistan to decide on initiation of the criminal or administrative case,[465] in which case, the disciplinary proceedings are suspended.[466]

It is notable that the QCJ may decide to forward the materials of the case to the Prosecutor General.[467] This directly links disciplinary proceedings to criminal or administrative offence proceedings, which is problematic, as such offences should be considered only in accordance with the procedures established for and appropriate to the administration of justice for criminal and administrative offences.

Under international law, to safeguard judicial independence, judges should in principle be immune from criminal proceedings in relation to the content of their orders and judgments (i.e. the interpretation of the law, assessment of facts, or weighing of evidence).[468] On the other hand, international standards contemplate that judges should remain liable for ordinary crimes not related to the content of their orders and judgments.[469] While judges, like any other person, are subject to liability for misconduct under criminal law and may be held criminally liable, there are certain types of malfeasance arising from their judicial functions that should never be subject to criminal sanction.

In its Opinion 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, the CCJE stated:

> *"...the CCJE does not regard the introduction of such [criminal] liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment."*[470]

Where the two types or proceedings are conflated or one flows from the other, these principles may be violated, leading to a risk of an introduction of criminal prosecution

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464 Law on Courts, op. cit., article 125.

465 *Ibid.,* article 127.1.

466 *Ibid.*

467 *Ibid.*

468 UNSRIJL, Report on guarantees of judicial independence, UN Doc A/HRC/11/41 (2009), paras 66, 98; UNSRIJL, Report on judicial accountability, UN Doc. A/HRC/26/32 (2014), paras 52, 84, 87; Human Rights Committee, Concluding Observations on Democratic Peoples' Republic of Korea, UN Doc. CCPR/CO/72/PRK (2001), para. 8 (Criminal Code provision subjecting judges to criminal liability for "unjust judgements" seriously endangering the impartiality and independence of the judiciary); Bangalore Implementation Measures, article 9.3 (by implication excluding other remedies for such errors; CCJE, Opinion No. 3, para. 75(ii); CCJE, Opinion No. 18, para. 37.

469 See e.g. Bangalore Implementation Measures, article 9.1; Council of Europe, CM/Rec(2010)12, paras 68, 71; CCJE Opinion No. 3, paras 52-53, 75(i); CCJE, Magna Carta of Judges, article 20.

470 CCJE, Opinion No. 3, para. 53.

for purely judicial conduct. Judges should never be subject to criminal liability for due discharge of their judicial duties.[471]

On a separate but related issue, the ICJ was informed of a consistent practice of suspending judicial status when initiating a criminal case against a judge. The ICJ heard of a number of cases where the criminal charges against a judge were ultimately dropped, but the judge was never reinstated in their judicial status. It was reported by the ICJ interlocutors that there is in fact no procedure to reinstate a judge in his or her status following termination of criminal proceedings. Therefore, while an unfounded criminal prosecution may be terminated, the judge loses his or her judicial position as a result of the mere fact of its initiation. This practice potentially creates a way to dismiss judges from office in a manner which bypasses legal guarantees for security of tenure.

Termination of judicial office

The Law on Courts specifies grounds for termination of judicial office. All grounds for such termination can be grouped into three categories: voluntary termination; resignation, for reasons outside the will of a judge; and recall — incompatibility of the judge's actions with judicial activity. More precisely, the law provides for a number of reasons for dismissing judges, including, but not limited to:

i) retirement,
ii) carrying out activities incompatible with the position of a judge,
iii) criminal conviction of a judge,
iv) violation of the procedure established by the legislation of the Republic of Tajikistan to practice traditional celebrations and rites in the Republic of Tajikistan,
v) inability to perform their duties for health reasons or other valid reasons for a long time (at least four months in a row),
vi) reorganizing the structure of the court(s) or reducing the number of judges,
vii) violation of the law in the consideration of cases or the commission of an act discrediting the honour and dignity of a judge,
viii) violations of the labour legislation of the Republic of Tajikistan,
ix) the unsuitability of the judge for office.[472]

The procedure of termination of judicial office is separate from the disciplinary procedure,[473] and is carried out by the Parliament, in cases of judges of the Supreme Court and judges of High Economic Court upon submission of the President of the Republic;[474] and by the President of the Republic, regarding judges of first instance courts and economic courts upon submission of the President of the Supreme Court or President of High Economic Court respectively.[475]

It should be noted, that judges do not appear to be dismissed often. Yet, the mission's attention was specifically drawn to a particular ground of dismissal of a judge: violation of the Law of 8 June 2007, No. 272, "On the regulation of traditions, celebrations and rites" (the Law on Traditions).[476] This ground for termination of office was introduced with the adoption of the law in 2007. The mission was told that Tajikistan has a tradition of large celebrations of various communal events, including birthdays, marriages, and religious rites. The law is said to be aimed at reducing excessive spending on social events,

[471] ICJ Practitioners' Guide 13, Judicial Accountability, https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf, p. 28.

[472] Law on Courts, op. cit., article 18.

[473] Law on Judges, article 18 and Chapter 12.

[474] *Ibid.,* article 18.2.

[475] *Ibid.*

[476] Law of the Republic of Tajikistan "On Regulating Traditions, Celebrations and Rituals" of 8 June 2007, No. 272.

poverty alleviation and public order. The law applies to all government bodies and individuals and aims to regulate official celebrations, birthdays, circumcisions, weddings, funerals and mourning as well as pilgrimage.[477] It limited the scope of some events and forbade a number of celebrations. Large fines and penalties are provided for breaking the law including a specific penalty for judges, who can be stripped of their status.

The mission was told that judges are required to periodically report on their compliance with the Law on Traditions. ICJ is concerned about the application of this requirement to the tenure of a judge. In particular, it is unclear why the Law on Courts makes a direct reference to the violation of the Law on Traditions by judges and how this is related to judges' capacity to exercise judicial functions. According to the UN Basic Principles cited earlier in the report "[j]udges should be subject to suspension or removal only for reasons of incapacity or behaviour the renders them unfit to discharge their duties".[478] The same principle is confirmed in various other international documents concerning judicial independence.[479]

It is unclear why judges are particularly targeted by the law with provisions which are broad and potentially interfere with the judges' private life by, among other reasons, not meeting the principle of legality.[480] By way of example, in a number of instances, the law makes a reference to the 'family circle' yet Tajikistan legislation contains no guidance as to what this term may mean, which may open door for a broad interpretation and potential misuse or even abuse. This requirement directly undermines the security of tenure and independence of judges in Tajikistan. The European Court of Human Rights in the case concerning disciplinary proceedings against judge Oleksandr Volkov's stated as follows:

> *"[. . .] in the context of disciplinary law, there should be a reasonable approach in assessing statutory precision, as it is a matter of objective necessity that the actus reus of such offences should be worded in general language. Otherwise, the statute may not deal with the issue comprehensively and will require constant review and updating according to the numerous new circumstances arising in practice. It follows that a description of an offence in a statute, based on a list of specific behaviours but aimed at general and uncountable application, does not provide a guarantee for addressing properly the matter of the foreseeability of the law. The other factors affecting the quality of legal regulation and the adequacy of the legal protection against arbitrariness should be identified and examined."*[481]

The law may further arbitrarily interfere with the right to a private life protected under article 17 of the ICCPR. The UN Human Rights Committee explained that the notion of arbitrary interference may extend to cases provided for under the law.[482]

The retirement of a judge is, according to the law, an honourable resignation from the judicial position.[483] A retired judge retains the title of judge, personal immunities, half of the salary, and membership in the judicial community through membership in Association of Judges.[484] Any judge with the professional experience of not less than

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477 *Ibid.,* articles 7–12.

478 UN Basic Principles, op. cit., principle 18.

479 E.g. Resolution adopted by the Human Rights Council on 22 June 2017, 35/12, Independence and impartiality of the judiciary, jurors and, assessors, and the independence of lawyers, A/HRC/RES/35/12, para. 3; IBA Minimum Standards of Judicial Independence (Adopted in 1982), para. 30; Mount Scopus International Standards of Judicial Independence, Approved on 19 March 2008, Consolidated 2015, para. 5.5.

480 *Halford v. the United Kingdom*, ECtHR, Application No. 20605/92, Judgment 25 June 1997, para. 49.

481 *Volkov v. Ukraine*, ECtHR, Application No. 21722/11, Judgment of 9 January 2013, para. 178.

482 UN Human Rights Committee, General Comment No. 16, article 17, para. 4.

483 Law on Courts, op. cit., article 19.1.

484 *Ibid.*

35 years, which includes at least 25 years as a judge, has a right to retirement.[485] The retirement of a judge is accepted by the body which selected or appointed the judge for the judicial position.[486] The law provides further benefits connected to the judicial status upon judicial retirement.[487]

The retirement is terminated if the judge does not meet the requirements for a judge (see criteria for judicial appointments Chapter III. The procedure for selection and appointment of judges), as well as in the event of their election or appointment to the position of judge.[488]

Code of Ethics of Judges

In Tajikistan, the Code of Judicial Ethics was adopted in 2013 and consists of a set of principles and rules of conduct for judges during and out of service.[489] The Code applies to both judges and lay assessors as well as retired judges.[490] According to the Code, a judge in all cases must strictly observe the Constitution of the Republic of Tajikistan, constitutional laws, and other laws, as well as demonstrate high moral and ethical standards of behaviour, and use their knowledge and professional experience in the performance of their duties.[491] A judge must also "be honest and conscientious, maintain personal dignity in any situation, avoid everything that could diminish the authority of the judiciary and damage the reputation of the judge".[492] A judge must conscientiously exercise [their] civil rights and perform civil duties.[493] A judge should not use his or her official position to gain personal advantages in civil law relations.[494]

The Code establishes that judges should not enter into contracts that entail financial obligations with persons who are professionally dependent on them, or with participants in legal proceedings in cases assigned to them.[495] Furthermore judges "[s]hall not use their status for the purpose of securing any benefits, services or commercial or other advantages whatsoever" for themselves or for their family or friends; and they must not demand or accept any benefits, payments and advantages not provided for by law.[496] Moreover, judges must take reasonable steps to prevent such benefits being secured by their family members in connection with the professional activity or lack of activity by a judge.[497]

The Code provides that non-compliance with its terms may result in the judge's responsibility in accordance with applicable law.[498] This provision of the Code of Ethics should, most likely, be read in conjunction with article 123 of the Law on Courts, according to which the judges may commit a disciplinary offence when they violate the rules of the code of conduct.

The ICJ observes that ethical principles which are described in the Code of Ethics may in principle ensure judicial integrity. They include some of the key principles for judicial

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485 *Ibid.,* article 19.2.

486 *Ibid.,* article 19.1.

487 *Ibid.,* article 19.

488 *Ibid.,* article 19.6.

489 Code of Ethics, article 1.

490 *Ibid.,* article 2.

491 *Ibid.,* article 1.

492 *Ibid.,* article 6.1.

493 *Ibid.,* article 6.2.

494 *Ibid.,* article 6.3.

495 *Ibid.,* article 6.2.

496 Code of Ethics, article 6.3. The following examples are given in this article: securing of a loan, concluding agreements on conditions other than those available to other individuals. for example advances, interest-free loans, services, paid entertainment, leisure or transport.

497 *Ibid.*

498 *Ibid.,* article 1.3.

conduct which are universally recognized. Yet, questions remain as to the relations of the Code with the disciplinary violations and proceedings, and whether the overall framework of the organization of the judiciary creates sufficient conditions for the judges to be independent. In this regard, the ICJ concurs with the Opinion of the Venice Commission when analysing the Draft Code of Judicial Ethics of Tajikistan: "[...] although a code of ethics for judges may positively contribute to the development of a well-functioning judiciary, this will also greatly depend on how the independence of the judiciary, other conditions and tasks of the judiciary and the individual judge are guaranteed and regulated by the Constitution and other laws".[499]

The ICJ further notes that in regard to the grounds for disciplinary responsibility, the CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, and in particular on ethics, incompatible behaviour and impartiality stresses that it is "incorrect to correlate breaches of proper professional standards with misconduct giving rise potentially to disciplinary sanctions", as professional standards represent best practice.[500] According to the CCJE, "principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence".[501]

When assessing the Code of Judicial Ethics of Tajikistan, the Venice Commission said: "The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for disciplinary procedure has grave potential implications for judicial independence."[502] The Venice Commission concluded in this regard that there were "serious potential risks for judicial independence if the code of ethics becomes part of a disciplinary procedure" and it "strongly recommend against such a step".[503] It further recommended that "it should be clarified whether and if so, to what extent, established norms of ethical conduct are distinct from or overlap with disciplinary rules".[504]

Immunities of judges under Tajikistan law

The Constitution of Tajikistan provides for immunity of judges,[505] which according to the law extends to [their] life, honour and dignity, housing and office space, means of transport and communications used by [them], as well as [their] correspondence, belongings and documents.[506] The law in Tajikistan does not specify use the term 'immunity' but from the text of the law it could be understood as a procedural matter affecting both criminal and administrative cases, as it requires establishing a special procedure for holding the judge liable and obtaining permission to carry out procedural measures.[507] Thus, criminal and administrative cases may be instituted against a judge only by the Prosecutor General and are considered by the Supreme Court.[508] The law prohibits the conviction of judges for criminal or administrative offences, or the imprisonment or house arrest of a judge of the Supreme Court or the High Economic Court,

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499 Opinion on the Draft Code on Judicial Ethics of the Republic of Tajikistan, Adopted by the Venice Commission at its 97th Plenary Session (Venice, 6–7 December 2013), para. 22.

500 CCJE, Opinion No. 3, para. 60.

501 *Ibid.,* para. 48 (i).

502 Venice Commission, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, CDL-AD(2013)035, para. 30.

503 *Ibid.*, para. 76(b).

504 *Ibid.*, para. 76(c).

505 The Constitution of the Republic of Tajikistan, op. cit., article 91.

506 Law on Courts, op. cit., article 10.

507 Black's Law Dictionary (8th edition) defines immunity as any exemption from a duty, liability, or service of process, especially such an exemption granted to a public official. Webster's Dictionary defines immunity as the quality or state of being immune, that is free, exempt, or marked by protection.

508 Law on Courts, op. cit., article 10.3.

without the consent of the Senate,[509] or of judges of other courts without the consent of the President of the Republic of Tajikistan.[510]

Certain measures may be imposed on judges only at the request of the prosecutor or the investigator, with the consent of the Prosecutor General and when sanctioned by the Supreme Court. These include arrest; house arrest; temporary suspension from office; inspection or search of home or office; arrest of property or funds; tapping and recording telephone and other communications; arrest, inspection or seizure of correspondence, or objects and documents containing information about bank deposits.[511] Detention, compulsory appearance, personal search of a judge, inspection of property, vehicles and means of communication used by a judge are allowed only when he or she is detained in flagrante delicto, and in other cases, allowed only in an opened criminal case against a judge in the manner prescribed by legislation.[512] Judges of the Constitutional Court enjoy the same privileges.[513]

During the visit, the ICJ mission was told, that these guarantees which seem to provide a high level of protection against arbitrary prosecution, may not provide for a strong guarantee against possible pressure on judges in practice.

Conclusions

The institutions and procedures for judicial disciplinary action do not appear to be sufficiently strong or functional in Tajikistan. The mission concluded that the Supreme and High Economic Courts' Presidents play a key role in the disciplinary procedure. These high-level judicial officials can by law initiate disciplinary procedures against every single judge at all levels. De facto, this means that the two higher Court Presidents hold an administrative power over all judges. This excessive role of Court Presidents also has negative ramifications for the independence of individual judges.

The law governing the disciplinary system is not adequate to protect judges from arbitrary disciplinary proceedings, and thereby uphold security of tenure. It contains vague grounds for disciplinary responsibility which do not allow to protect judges from their arbitrary interpretation, application and sanction. In particular, the law on Customs and Traditions creates room for a broad and unforeseeable interpretation and possible arbitrary sanctioning of judges which may undermine their independence or interfere with their human rights.

The fact that the internal documents upon which the UCSW is organized and operates are not publicly available, is unacceptable from the point of view of transparency of the procedure governing the organization and administration of the judiciary. These documents play an essential role in the disciplinary process, and thereby in ensuring independence and accountability of judges. They should therefore be available to the pubic as well as to members of the judiciary itself.

[509] *Ibid.,* article 10.4.

[510] *Ibid.,* article 10.5.

[511] *Ibid.,* article 10.6.

[512] *Ibid.,* article 10.7.

[513] Law on the Constitutional Court, op. cit., article 12.

Chapter VI. Additional Issues Affecting the Independence of Judiciary in Tajikistan

This chapter addresses some of the additional issues brought to the attention of the ICJ mission, which impede the independence of the judiciary of Tajikistan. These issues do not necessarily concern the institutional or legal framework analysed in greater detail in the previous chapters. Some of the issues arise from Tajikistan law, others are rooted in practice, and in fact in some cases be in direct contradiction to the legal framework of Tajikistan.

Budgetary autonomy of courts and remuneration of judges

Under international standards, the judiciary must have budgetary autonomy in order to ensure that judges are able respond appropriately to internal and external pressures. A minimum condition for judicial independence is financial security.[514] An adequate budget, based upon objective and transparent criteria, makes the judiciary less vulnerable to undue influence, and, at the same time, it can ensure integrity and competence of the judges through the proper allocation of resources on judicial salaries and training.[515]

Recommendation (94)12 of the Committee of Ministers of the Council of Europe On the independence, efficiency and role of judges provides that judges' remuneration should be guaranteed by law[516] and commensurate with the dignity of their profession and burden of responsibilities.[517] The European Charter on the Statute of Judges extends this principle to guaranteed sickness pay and retirement pension.[518]

The CCJE adds in Opinion No. 1 On standards concerning the independence of the judiciary and the irremovability of judges that "it [is] generally important ... to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living".[519]

The UN Special Rapporteur on the independence of judges and lawyers notes that remuneration is an important factor affecting the vulnerability of the judiciary to corruption.[520] "Low salaries and salary arrears are critical factors contributing to corruption within judicial systems."[521] The UN Convention against Corruption,[522] to which Tajikistan is party, contains a provision recommending that States take measures to promote the adequate remuneration of public officials.[523]

In Tajikistan, the budget for the functioning of courts is approved by the Government (i.e. the Cabinet of Ministers), respectively, on the proposal of the President of the Supreme Court and the President of the High Economic Court.[524] This appears to be in line with the standard that the courts' budget should be prepared "in collaboration with

514 European Network of Council for the Judiciary (ENCJ), Funding the Judiciary, 2016, https://www.encj.eu/images/stories/pdf/workinggroups/encj_2015_2016_report_funding_judiciary_adopted_ga.pdf.

515 *Ibid.*

516 CoE, Recommendation (94)12 "On the independence, efficiency and role of judges", principle I.2b.ii.

517 *Ibid.,* principle III.1.b.

518 European Charter on the statute for judges, paras 6.3 and 6.4.

519 CCJE, Opinion No. 1 on standards concerning the independence of the judiciary and the irremovability of judges, para. 62.

520 UN Special Rapporteur on the independence of judges and lawyers, Report, A/67/305, 13 August 2012, para. 55.

521 *Ibid.*

522 Republic of Tajikistan acceded to the United Nations Convention against Corruption on 25 September 2006. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&lang=en.

523 United Nations Convention against Corruption, article 7(c).

524 Law on Courts, op. cit., article 128.

the judiciary having regard to the needs and requirements of judicial administration".[525] Yet, here as in other areas, the central role of Presidents of the highest courts is conspicuous.

Although the judiciary, through the Presidents of the highest courts, participates in the design of the budget for the judiciary, many of the interlocutors the mission met informed the mission of a very low salary level for judges. It seemed to the mission to be 'a universal truth' among the national stakeholders and experts that judicial salaries in Tajikistan cannot ensure financial independence of judges. There is a significant gap between the official salaries of judges in Tajikistan and the actual cost of living. Moreover, the low salaries, the ICJ was told, often are visibly out of step with the affluent lifestyles demonstrated by some of the judges.

The ICJ mission heard, with the reference to the National Statistics Committee, that the average judicial wage in the Republic of Tajikistan was 1,600 somoni (approximately 160 US dollars) per month. The average salary of the Judge of the Supreme Court, including salary, qualification class awards and length of service pay is approximately 4,500 somoni (approximately 450 US dollars) per month. The average salary of a judge of the Military Court is approximately 6,200 somoni or 990 US dollars per month.

The ICJ is not in a position to recommend a specific salary scale for judges in Tajikistan, yet it should be noted that many of the ICJ's interlocutors in Tajikistan said that low level of salaries for judges create conditions for corruption. The lack of financial security of Tajik judges should be seen also in a broader context of the issues that are raised in this report, including risks posed by ad hoc and periodic qualification attestations, the uncertainty of tenure, the oversized role of Presidents of courts in all aspects of the organization of the judiciary in the Republic of Tajikistan. In similar legal and economic context, the UN Human Rights Committee expressed concern that "the applicable attestation procedure for judges, the requirement of re-evaluation every seven years, the low level of salaries and the uncertain tenure of judges may encourage corruption and bribery".[526] Therefore, along with other measures necessary to strengthen independence of the judiciary, there is a need to re-consider the salary scale for judges in light of the real cost of maintaining a good standard of living in Tajikistan, without recourse to other sources of income.

The system of allocation of cases

The establishment of appropriate criteria and procedures for caseload allotment is another indicia of and independent and impartial judiciary. The Council of Europe Recommendation No. R(94)12 On the Independence, Efficiency and Role of Judges (1994) reflects the principle that the distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.[527] The UN Special Rapporteur on the Independence of Judges and Lawyers has pointed out that a non-transparent and subjective case-assignment system is vulnerable to manipulation and corruption.[528] There should be a clear, objective and preferably random electronic system, which is continuously reassessed.[529] Information about the system of case assignments should

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525 CCJE, Opinion No. 2 (2001), On the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights, para. 10; the Singhvi Declaration, article 34; CoE, Venice Commission, Report on the Independence of the Judicial System, Part I: the Independence of Judges, CDL-AD(2010)004, para. 55.

526 UN Human Rights Committee, Concluding Observations on Kyrgyzstan, UN document CCPR/CO/69/KGZ, para. 15.

527 CoE, Recommendation (94)12 "On the independence, efficiency and role of judges", Principle 1-2-(e).

528 UN Special Rapporteur on the independence of judges and lawyers, Report, A/67/305, 13 August 2012, para. 65.

529 UN Special Rapporteur on the independence of judges and lawyers, Report, A/HRC/11/41, 24 March 2009, para. 47; UN Special Rapporteur on the independence of judges and lawyers, Report, A/HRC/20/19, 7 June 2009, para. 80.

be available to the public in order to counter suspicions of malpractice and corruption in the assignment of cases and provide greater transparency.[530]

The ICJ mission was informed about the absence of a system of allocation of cases among judges, which could be qualified as transparent, predictable and objective and which would exclude manipulation or preference through random distribution. Courts in Tajikistan to date employ manual distribution of cases, which is done by court Presidents. In accordance with the established practice, court presidents are required to distribute cases among judges, taking into account the workload and expertise of judges. New cases are assigned to judges who have the smallest backlog of cases and more complex cases are given to more experienced judges. At least in some regions, geographic factors play a role. Cases are distributed based on the pre-assignment of certain territories as 'jurisdictions' of certain judges.[531] The ICJ could not obtain any indication that there is a specific regulation for the court presidents' management of the allocation of cases. Many of the ICJ interlocutors emphasized that the approach to distribution of cases is prone to manipulation and does not ensure a fair distribution of cases among judges, given almost full discretion of presidents of courts in this matter.

The ICJ was provided with examples of cases in which personal bias or preference was credibly alleged to have influenced the outcome of a case. The ICJ also was told of concerns that at least in some cases the President informally examines the court applications themselves and only after that decides if a case would be formally registered with the court. This creates additional obstacles to the accessibility of the court, as cases are sometimes dismissed even before they reach a judge to decide on the admissibility grounds.

Tajikistan as a priority measure for the improvement of the functioning of the judiciary should adopt a mechanism for the consideration of cases in court in compliance with the principle of their random distribution. A preferable solution would be an electronic system of randomized allocation of cases, which should be regularly audited by independent commission representing the public, the media and the recognized experts on the organisation of the judiciary, including international experts.[532] The presidents of the courts should not play any role in the management of the automatic distribution of the cases. This should be done by the Office of the Register of the court, which should be created to manage all aspects of judicial document circulation in courts of Tajikistan. Such a measure would enhance the credibility of the judiciary in the eyes of the public, contribute to fair and impartial administration of justice and increase the independence of individual judges.

Openness and accessibility of the hearings

Under international law, all court hearings must be open to the public in order to ensure transparency of proceedings. This principle is provided as a legal obligation, in respect the right to a fair trial under article 14 of the ICCPR: "The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of

[530] UN Special Rapporteur on the independence of judges and lawyers, Report, A/67/305, 13 August 2012, para. 65.

[531] Central Asia Media, Electronic system — the path to transparency in Tajikistan court, https://ca-news.org/news:1446155.

[532] OECD, Report, Anti-corruption Reforms in Tajikistan, Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan, 18 April 2014, p. 99. See also: OSCE, Anti-Corruption Assessment of Eight Administrative Codes and Legal Acts of the Republic of Tajikistan, 2015, Recommendation 19, available at https://www.oecd.org/corruption/acn/Tajikistan-Progress-Update-Oct-2015-ENG.pdf.

the oral hearing."[533] This is an important safeguard for the rights of those concerned in the case, and for society as a whole.[534] Only in exceptional circumstances, the public, including the media, can be excluded from all or part of a trial,[535] when it is strictly necessary to protect the interests of justice (for example when it is necessary to protect witnesses);[536] when certain considerations involving private lives of the parties so require (for example, in cases involving the trial of juveniles, cases in which juveniles or children are victims or those in which the identity of victims of sexual violence needs to be protected);[537] or when it is strictly necessary for reasons of public order, morals or national security.[538] Any such restriction must, however, be strictly justified and assessed on a case-by-case basis and be subject to on-going judicial supervision.[539] In order to ensure openness of the hearing the information about its conduct must be widely accessible through the court and media.

Under the Tajikistan Constitution, proceedings in all courts are open, unless otherwise provided for by law.[540] This principle is reproduced in the Law on Courts.[541] Under the Criminal Procedure Code of Republic of Tajikistan, a judge must ensure open trial of cases, with the exception of cases where this may lead to the disclosure of State and other secrets protected by law.[542] Closed court proceedings, in addition, are allowed by a judge's order accompanied by a reasoned decision in cases of crimes committed by persons under the age of sixteen, crimes against freedom, sexual and other crimes, in order to prevent the disclosure of information about the intimate aspects of life of persons involved in the case or information degrading to their dignity.[543] This is required by the security interests of participants in the process and witnesses, their family members or close relatives.[544] The Civil Procedure Code of the Republic of Tajikistan contains a similar provision.[545] This restriction is aimed at protecting the legitimate rights and interests of the state and society as a whole.[546]

The Plenum of the Supreme Court of the Republic of Tajikistan issued a decision dated 29 September 2014 "On publicity and openness of the trial and the right to access information on the activities of the courts", wherein it confirmed that the examination of cases in all courts shall be open, except the cases that are stipulated by law.

The mission's attention was drawn to the practical impediments to access to court hearings. As the ICJ was informed, obstacles exist for the public, including family members, court observers and the media to enter court buildings as well as the courtrooms to attend public hearings. The timing of hearings is not always announced or published on the websites of the courts. In certain cases, it is difficult to obtain information about the schedule of hearings. Moreover, widespread last-minute changes in the schedule of the hearings also often prevent members of the public from attending the public hearings.

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533 UN Human Rights Committee, General Comment 32, para. 28.

534 *Ibid.*

535 *Ibid.*, para. 29.

536 *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], ECtHR, Applications Nos. 55391/13, 57728/13 and 74041/13, Judgment of 6 November 2018, para. 187.

537 *B. and P. v. the United Kingdom*, ECtHR, Applications Nos. 36337/97 and 35974/97, 24 April 2001, para. 38.

538 *Zagorodnikov v. Russia*, ECtHR, Application No. 66941/01, 7 September 2007, para. 26; ECtHR, *B. and P. v. the United Kingdom*, Applications Nos. 36337/97 and 35974/97, Judgment of 24 April 2001, para. 39.

539 Inter-American Commission Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr., 22 October 2002, Section D(3), para. 262(a).

540 The Constitution of the Republic of Tajikistan, op. cit., article 88.

541 Law on Courts, op. cit., article 5.4.

542 Criminal Procedure Code of Tajikistan, article 273.1.

543 *Ibid.,* article 273.2.

544 *Ibid.,* article 273.

545 Civil Procedure Code of Tadjikistan, article 11.

546 *Ibid.*

There are other logistical obstacles which impede openness of the trial. The mission was told that the majority of court buildings in Tajikistan do not have sufficient facilities to hold public hearings, which makes judges hold hearings in their offices rather than in designated court rooms equipped for a hearing. Holding hearings in the offices of judges often means that not everyone is physically able to attend the trial as judges' offices are unable to accommodate a sufficient number of people. The mission heard that small courtrooms or courtrooms that have insufficient number of seats are often used. Moreover, the mission heard allegations that small rooms were chosen for hearings in politically or otherwise sensitive cases , with the apparent aim of excluding members of the public.

Another issue brought to the attention of the ICJ mission is that trials are often ruled to be secret, even if the grounds for closing such hearings may be questionable. Legislation has strict and clear criteria for determining when closed court sessions can be held. However, courts tend not to adhere to these standards. Requests to declare cases secret were said to usually come from the prosecuting authority. The ICJ was told that in practice in almost all cases the court easily tend to these prosecutorial requests, without critically examining the presence of the legal grounds for such rulings.

Sometimes court hearings are in theory open, but take place in closed institutions, such as pre-trial detention facilities (SIZOs). The public and the media are in practice excluded from attending such trials as these detentions facilities as such are not opened for public, family members or/and the media. The practice of holding hearings in detention facilities has increased as a reaction to the COVID-19 pandemic.

Admission to court buildings is also an issue. Usually representatives of State authorities, investigators and prosecutors enjoy unimpeded accesses to the court building, often also outside normal working hours. They enter the court building without undergoing security checks. The mission heard reports that State prosecution representatives sometimes spend lunch breaks during the trial in the offices of the judges or otherwise show indications of close connections with the judges.

Entering the court building is a lengthy and burdensome procedure for witnesses, lawyers, journalists and more generally, members of the public. They are required to provide detailed information about the purpose of their visits, produce identification and judicial documents and undergo a meticulous security check. Mobile phones, laptops and sound recording equipment are taken for storage as such items are banned for carrying into court rooms. Court buildings lack specialized rooms for lawyers to meet with their clients, or adequate conditions for accommodation of defendants and witnesses while they are awaiting the hearing.

Lack of acquittals in criminal trials

One of the indirect indicators that show that the administration of justice in criminal proceedings cannot be fair is that the acquittal rate in criminal trials appears to be close to zero[547] in the Republic of Tajikistan, though no official statistics on this are available.

The mission learned that once a criminal case reaches the court, the chances of a person to be acquitted are almost zero. Some retired judges said that they came across acquittals only a few times in their entire judicial career. These accounts are particularly striking as former judges spoke of the absence of acquittals in their judicial career of multiple years or even decades.

While there can be no universal standard as to the reasonable or preferred rate of acquittals, their almost complete absence in practice and the intolerance of the justice system to acquittals serves as a serious indication of the lack of respect for the presumption of innocence. It simply cannot be the case in any criminal justice system

[547] Avesta Information Agency, Tajik judges pronounce 6 acquittals, http://avesta.tj/2013/07/08/tadzhikskie-sudi-vynesli-6-opravdatelnyh-prigovora/.

that a significant portion of criminal trials will not end in acquittal. The presumption of innocence is enshrined in Tajikistan law.[548] In accordance with this law, judges should be guided by the principle that all doubts about the guilt of the accused, which cannot be eliminated in the manner established by this Code, are interpreted in favour of the accused.[549] However, full acquittals appear to be foreign to the Tajikistan justice system.

More generally, acquittal rates that are close to zero are an indicator of unfair trials and of courts that are neither independent nor impartial. In this respect, The UN Special Rapporteur on the Independence of Judges and Lawyers has pointed out that extremely low acquittal rates pose a threat to the independence of judiciary and indicate poor enforcement of the presumption of innocence in practice.[550] Addressing similar problems in respect of an exceedingly low acquittal rate in the justice system of the Russian Federation, the Special Rapporteur stated:

> *"[A]ccording to many sources, it is easier for judges to ignore the poor quality of an investigation rather than take the responsibility of acquitting the defendant. Some judges seem to be unaware of their duty to acquit the accused when the prosecutor fails to provide sufficient evidence for his or her prosecution. In other instances, judges are said to be under pressure from the prosecution to issue a guilty verdict."*[551]

This is in contrast to at least one other State in Central Asia, Uzbekistan, where the Special Rapporteur noted in 2019 that "[a]n encouraging indicator of a progressive move towards judicial independence is represented by the increase in the acquittal rate in the last three years".[552]

In practice, it appears that full acquittals on all charges are not among the possible decisions that judges are able to adopt at the end of proceedings, at least not without adverse consequences to the judge. An acquittal may lead to disciplinary or other sanctions taken against any judge who would be 'sufficiently reckless' to acquit an individual, the mission was told. The ICJ interlocutors stressed that the problem of lack of acquittals is not a problem of individual judges but a systemic one and requires a systemic response.

A closely related problem mentioned to the mission were 'confessions': self-incriminating statements, which apparently continue to be used as the primary evidence for a conviction. Law-enforcement bodies consider obtaining a self-incriminatory statements as the primary objectives of the investigation. The need to extract a 'confession' which would then serve as the basis of conviction was said to lead to various types of abuse of rights of those under investigation. In particular, it will incentivize the use of torture or other forms of ill-treatment or coercion. At the same time, courts are often said to fail to give serious consideration to challenges as to voluntary nature of confessions. This practice exists in Tajikistan despite the formal existence of the exclusionary rule for evidence obtained by torture or other violation of human rights, consonance with obligations under the Convention against Torture.

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548 Criminal Procedure Code, article 15: "1. Nobody shall be considered guilty of a crime until the convicting judgment by the court has entered into effect. 2. The prosecuting attorney shall bear the burden of proof. 3. The suspect, the accused and the defendant shall not be required to prove their innocence. 4. Any doubt in respect of the defendant's guilt that cannot be eliminated pursuant to the procedure established by this Code, shall be interpreted for the defendant's benefit. 5. A convicting judgment cannot be based on assumption."

549 *Ibid.,* article 15(4).

550 Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report, A/HRC/26/32/Add.1, 30 April 2014, para. 45; see also: Special Rapporteur on the independence of judges and lawyers, Report on a Mission to Kazakhstan, E/CH.4/2005/60/Add.2, 11 January 2005, para. 31.

551 Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report on a Mission to Russian Federation, A/HRC/26/32/Add.1, 30 April 2014, para. 45.

552 Diego García-Sayán, Special Rapporteur on the independence of judges and lawyers, Preliminary observations on the official visit to Uzbekistan (19–25 September 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25043&LangID=E.

Cases decided by the UN Human Rights Committee on Tajikistan are particularly telling in this regard. They demonstrate a clear pattern of the use of ill-treatment to obtain self-incriminating statements.[553] Torture was determined to have been used in the majority of cases decided by the UN Human Rights Committee against Tajikistan.[554] In almost all cases the victims succumbed to torture and ultimately agreed to produce written 'confessions'.[555] These confessions were used in the courtroom as the basis for conviction.[556] Even though the UN human Rights Commitete applicants generally retracted their 'confessions' later in the proceedings or in court,[557] they were often disregarded by prosecutors and judges.[558]

The ICJ's interlocutors during the mission pointed an 'inquisitorial' role of judges in the Tajik criminal proceedings. The ICJ was told that the process of 'additional investigation'[559] is commonly used where the prosecution fails to present sufficient evidence to sustain its case against an accused.[560] Thus, a case is typically sent back to a prosecutor when there is not enough evidence to establish guilt or/and when there are substantial breaches of lawfulness. Furthermore, a decision to send the case back to the prosecutor may even be taken by a court at cassation level. This practice, demonstrating a prosecutorial bias built in the proceedings, was also brought to the attention of the UN Human Rights Committee.[561] For example, in *Kurbonov v. Tajikistan* the Committee decided as follows:

> *"the facts presented by the author clearly demonstrate that the Supreme Court acted in a biased and arbitrary manner with respect to the complaints related to the [detainee's] torture during the preliminary detention, because of the summary and unreasoned rejection of the evidence, properly and clearly documented by [him], that he had been tortured. In their effect, the action of the courts placed the burden of proof on the [accused], whereas the general principle is that the burden of proof that the confession was made without duress is on the prosecution."*[562]

Access to final judgment and other court documents

Access to the final judgment pronounced by the court is a requirement of a fair trial. The right to a public judgment in article 14(1) of the ICCPR provides that "any judgment rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children". The Human Rights Committee explained that "[a]part from such exceptional circumstances, a hearing must be open to the gen-

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553 *Idieva v. Tajikistan*, paras 2.2, 9.2 and 9.3; *Dunaev v. Tajikistan*, para. 2.3; *Sattorova v. Tajikistan*, paras 2.4 and 8.3; *Khuseynova and Butaeva v. Tajikistan*, paras 2.2, 2.9, 2.14, 3.1, 3.3, 3.6, 3.7 and 8.3.

554 ICJ, Cases Decided by the UN Human Rights Committee Concerning the Allegation of Torture and other Forms of Ill-Treatment (articles 7 and 10), A Compilation and Analysis of Views, Tajikistan, https://www.icj.org/wp-content/uploads/2020/01/Tajikistan-HRC_casebook_torture-Advocacy-2020-ENG.pdf.

555 *Shukurova v. Tajikistan*, para. 2.3; *Boimurodov v. Tajikistan*, para. 2.3; *Aliboeva v. Tajikistan*, para. 2.4; *Khalilova v. Tajikistan*, para. 2.5; *Kurbanova v. Tajikistan*, para. 2.2; *Toshev v. Tajikistan*, para. 2.7.

556 *Boimurodov v. Tajikistan*, para. 2.2; *Khomidova v. Tajikistan*, para. 2.5.

557 *Toshev v. Tajikistan*, para. 6.6; *Kurbonov v. Tajikistan*, para. 2.5; *Idieva v. Tajikistan*, para. 2.6; *Khuseynova and Butaeva v. Tajikistan*, para. 2.9 and 2.17; *Boimurodov v. Tajikistan*, para. 2.6; *Saidova v. Tajikistan*, para. 6.2.

558 *Sharifova, Safarov and Burkhonov v. Tajikistan*, para. 2.14; *Toshev v. Tajikistan*, paras 1.12 and 6.6; *Sattorova v. Tajikistan*, para. 2.10; *Khuseynova and Butaeva v. Tajikistan*, paras 2.9.a and 2.17.b; *Idieva v. Tajikistan*, para. 2.6.a; *Saidova v. Tajikistan*, para. 2.8.

559 "Институт дополнительного расследования" in Russian.

560 Also see: ICJ, Cases Decided by the UN Human Rights Committee Concerning the Allegation of Torture and other Forms of Ill-Treatment (articles 7 and 10), A Compilation and Analysis of Views, Tajikistan, https://www.icj.org/wp-content/uploads/2020/01/Tajikistan-HRC_casebook_torture-Advocacy-2020-ENG.pdf.

561 *Ibid.*

562 *Kurbonov v. Tajikistan*, UN Human Rights Committee, above note 4, para. 6.3.

eral public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children."[563] Article 6(1) of the European Human Rights Convention stipulates that judgment "shall be pronounced publicly", allowing no exceptions.[564]

The publication of court decisions is also important for the public to examine the manner in which courts usually approach cases and the principles that apply to resolve them.[565] As observed by the European Court of Human Rights, the object pursued by article 6(1) with regard to the publicity of judgments is "to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial".[566] Access to court files enhances efficiency, public trust in the judicial system, and fair administration of justice.[567] In addition to promoting public confidence in the judiciary, allowing public access judicial decisions is an additional incentive for judges to act fairly, consistently and impartially, and allow the public to access information on the decision and the reasons for it.[568] Even where the system is not based on precedent, lawyers as well as judges may not exercise their functions adequately without being able to read and analyse the judgments delivered by courts in similar circumstances.

The ICJ mission learned from many interlocutors that judgments in Tajikistan are not always publicly available. They are not published online nor are they available for access by other means. A member of the public who is not a party to the proceedings would not therefore have a possibility to consult or study court decisions. The mission was told that access of members of the public, researchers or other independent individuals who are not parties to the specific proceedings, to court decisions is not necessarily seen by the justice system as an integral element of its transparency. In the same manner, courts' websites do not contain decisions adopted by them.[569] Neither do the courts publish the schedule for hearings or for the pronouncement of judgments, making it difficult for members of the public to attend on the appropriate day for the pronouncement of a particular judgment.[570]

Conclusion

Some judges in Tajikistan appear to have rather low salaries, which carries necessarily adverse consequences for their independent functioning, leaving judges vulnerable to corruption. In particular, while judges of higher courts, especially military courts, may

563 See also: UN Human Rights Committee, General Comment 32, para. 29.

564 See also: Article 8(5) of the American Convention on Human Rights (ACHR) refers only to the publicity of the judgment in criminal proceedings, while the African Charter on Human and Peoples' Rights (ACHPR) does not contain such rights. Articles 22(2) and 23(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia provide for the delivery "in public" of the judgment of the Trial Chamber. According to article 74(5) of the Statute of the International Criminal Court, the "decisions or a summary thereof shall be delivered in open court".

565 CCJE, Opinion No. 10, supra note 78, para. 95: In context of proceedings against judges, publication, when the decision is formal and final, can "inform, not only the whole of the judiciary, but also the general public of the way in which the proceedings have been conducted and to show that the judiciary does not seek to cover up reprehensible actions of its members".

566 *Pretto and Others v. Italy*, ECtHR, Judgment of 8 December 1983, Series A, No. 71, para. 27.

567 Open Society Justice Initiative, Report on Access to Judicial Information, March 2009, at ii, www.right2info.org.

568 Sharon Rodrick, "Open Justice, the Media and Avenues of Access to Documents on the Court Record", in The University of New South Wales Law Journal, 90, 93–95 (2006) in Open Society Justice Initiative, at iii.

569 The website of the Constitutional Court contains some decisions published, however, the latest decision was made public in 2017, http://www.constcourt.tj.

570 Websites of courts in Tajikistan in general appear to be underdeveloped and are not maintained to degree which would facilitate access to justice in line with the best practices. According to the research conducted by the Centre for Human Rights in Tajikistan in 2018, 56 sites were registered at courts of various levels, however, those websites are not updated regularly. Besides, in 2019 43 websites of courts were closed down.

have an adequate official income, the salary of judges of lower courts raises questions as to adequacy. Increasing salaries of such judges should be a priority for the presidents of the highest courts as they are entrusted to deliver such proposals to the government.

The extreme intolerance of the judicial system to acquittals is disturbing and undermines the public's perception of the independence and fairness of the judiciary and the judicial system. It is exacerbated by the fact that and the criminal justice system continues to rely on self-incriminating statements which creates an environment conducive to use of ill-treatment, as evidenced by the fact that the practice is widespread in the country.

The lack of access to the final outcome of the judicial proceedings — the court judgment — does not serve the interests of justice and undermines trust in administering justice. It is therefore essential that judgments become easily available to interested members of the public, ideally through their regular publication online. Schedules of hearings should also be posted online.

Chapter VII. Conclusions and Recommendations

An independent and impartial judiciary is essential to protect the human rights of individuals and to ensure that the exercise of, State power is held to account. Judicial independence is not a privilege of the judges, but indispensable for the justice system's ability to ensure the rule of law. In Tajikistan, the judiciary has not yet succeeded in fulfilling this role. It is structured in a way that does not ensure the independence of the judicial power from the executive. This lack of independence is enabled by the laws, structures and procedures of judicial administration, as well as by some customs and practices that are without legal basis.

The internal organization and administration of the judiciary is essential to protect both institutional and personal independence of the judiciary. The bodies of judicial governance do not only play a technical role, but ensure that judges are fully empowered by their judicial status to exercise their functions independently and impartially. In Tajikistan's judiciary, paradoxically, the bodies that exist in law may not work regularly or at all, while other bodies, which do not appear to be established by law, may exercise significant powers in the operation of the judiciary. They play a role in selection and appointment processes as well as in disciplinary procedures.

The institutional framework for judicial self-governance in Tajikistan is complicated and the actual role of the multiple governance bodies is not readily apparent. The roles ascribed to them by legislation require careful scrutiny to understand what specific competences belong to each of the bodies, where the pressure points of procedures exist in practice, and where the actual decision-making power is concentrated. A closer look can dissipate the fog of these intricacies and a rather straightforward system of centralized decision making emerges, with de facto power exercised either directly by the executive, or concentrated in the hands of a small number of high-level judicial office holders. It is a system of disempowered judicial institutions which play a technical, supportive role, without possessing actual decision-making functions. This disempowerment of the institutions of self-governance is perhaps one of the key findings of the mission and this report.

Multiple judicial reforms in Tajikistan have not yet resulted in a judiciary with strong self-governance institutions which are capable of protecting judges who can therefore independently apply the law. An examination of the justice system's organization reveals the rudimentary nature of judicial institutions, unevenness in distribution of function among them, legal gaps and institutional add-ons which have no basis in law. This points to the need of a significant institutional reform to re-design a system of self-regulation that would allow individual judges to administer justice independently, not fearing to take an independent decision without a formal or informal check or approval from superiors. But most importantly, any such reform needs practical implementation, so that the safeguards it provides for are not overridden by informal practices.

In the current context, judges may often find themselves in a situation where they are unable to adjudicate cases fairly without a risk of negative consequences for independent decisions. Presidents of courts retain overly broad powers to influence decision-making in cases within this system, while the role of other judges risks becoming an auxiliary one, dependent on approval of the court president.

The deficiencies in the administration of justice in Tajikistan have real consequences for human rights protection. The justice system of Tajikistan is clearly highly intolerant to acquittals in criminal trials. The lack of acquittals does not appear to be a personal choice of judges, but a systemic problem of exclusion of the option of taking independent decisions in criminal cases. Acquittals are vanishingly rare, to the extent that the

overwhelming majority of judges the ICJ met have never issued a single acquittal in their careers and some judges have never heard of one. This puts into the question the genuine role of judges who are unable to adjudicate independently in the cases before them without facing a risk of reprisal.

Recommendations

Bearing in mind the findings of the report on the organization, administration and functioning of the judiciary in Tajikistan, based on international law and standards on the independence of the judiciary, the ICJ recommends that the executive and the Parliament, acting in full consultation with the judiciary, should take steps to strengthen the institutional independence of the judiciary. In particular they should:

In regard to the governing bodies of the judiciary

As a matter of priority, undertake a thorough revision of how the organization and functioning of the judiciary is regulated by law and ensure that law is sufficiently comprehensive to eliminate regulation by the decree of the executive or the legislature or other acts other than law voted on by the Parliament. In no instance should there be a body which takes a role in the self-regulation of the judiciary which functions outside the existing laws on the judiciary or whose procedures are not prescribed by publicly available law.

Ensure that laws, regulations, rules and other documents which concern the work of the judiciary, are fully publicly available; among other resources, they should be made available on the websites of courts and legislation databases in order to ensure full transparency of the legal framework in regard to the judiciary;

Reform the role of court presidents in order to reduce their formal and informal roles in governance or individual court cases, which should be independent from this improper influence. Such functions should be transferred to the competence of the different judicial institutions. Neither in the career nor disciplinary mechanisms concerning individual judges, should presidents of courts play a decisive role.

Provide a framework for reform, by the judiciary itself, of the Association of Judges, which has become inactive, to transform it into a functioning, independent institution, providing effective representation and contributing to the self-governance of the judiciary;

In regard to the system of appointment of judges

Reform the processes for the selection and appointment of judges through legislation and regulations, to ensure that independent judicial bodies have real decision-making power over the evaluation of candidates without participation of law enforcement bodies or other members of the executive. Court presidents, including the Supreme and High Economic Court Presidents, should not be in a position to exert influence in this respect unless they take part in the actual evaluation of judges as members of the examination bodies.

Introduce a rigorous, transparent and predictable system of testing and selection of judges, to ensure that judicial appointments are based on merit and that any manipulation or undue influence of the process of selection is excluded. In this system, the role of judicial institutions of self-governance rather than judicial officials should be decisive.

The judiciary, in particular, the Qualification Collegium, should put in place a credible, fair and transparent system of evaluation of examinations which ensures that objective evaluation is not undermined by personal preferences.

Legislate to limit the role of the bodies of the executive, in particular the Commission on Personnel, to a purely formal role in judicial appointments except in exceptional cases, which should be prescribed by law. In any exceptional cases of non-appointment of

candidates by decision of an executive body, it should provide reasoned and substantiated written explanation for such non-appointment. The rules, procedures and the criteria applied in such cases should be clear, transparent and consistent with judicial independence.

In regard to the security of tenure and career of judges

Reform the system of judicial terms in office to introduce life-appointment or an appointment to a lengthy fixed term without a possibility of reappointment. Where a judge is reappointed under the existing system, this should be determined by objective criteria similar to that which would appropriate for removal, ie, incapacity or related to incapacity or conduct rendering them unfit to fulfil their duties. Under no circumstance should it depend on the dispositions of cases, in particular on the number of decisions overturned, in order for judges to be protected against undue interference in their judicial function. Whatever system is put in place, security of tenure of judges should always be guaranteed. This, in particular, should mean that in practice it is not possible to remove judges from their position as a result of a decision they take in a specific case or cases, but only for reasons of incapacity or behaviour that renders them unfit to discharge their duties, in accordance with established standards of judicial conduct.

Reform the system of evaluation and promotion of judges so that it is based on merit, excludes bias, preference or any other discriminatory, corrupt or any arbitrary practice. Judges in their appointment and promotion must be free from discrimination on any status grounds. Promotion should be based on clear, objective, developed and transparent criteria which exclude bias and are credible for the public. Decisions should be taken by independent judicial bodies and should not depend on individual court presidents.

Amend legislation on the retirement age of judges to establish the same age of retirement for both male and female judges, in line with international law obligations of non-discrimination.

In regard to the disciplinary system

Reform the disciplinary system to reduce the role of court presidents and vest powers in the hands of independent institutions which apply clearly prescribed, objective criteria, to strengthen judicial independence and integrity.

Clarify in law or regulations the grounds for disciplinary action, distinguishing this from breaches of the Code of Judicial Ethics of Tajikistan. Delete the provision on applicable responsibility from the Code of Ethics of Tajikistan.

Separate disciplinary and criminal responsibilities and liabilities clearly in law and regulations. to ensure that disciplinary proceedings do not result in criminal prosecution of judges for conduct that should be of a purely disciplinary nature.

Provide safeguards to ensure, in law and in practice, that disciplinary proceedings are not applied against judges as a result of decisions they issue in specific cases, including acquittals in criminal cases.

Amend the Law on Customs and Traditions to remove its application to judges, in line with international human rights law obligations.

Reform the legal framework for the Unit on Cadres and Special Work, to make it independent of the Supreme Court, and to make its regulations and procedures clear and publicly available.

In regard to other issues

Legislation should include safeguards to ensure that judges are the only judges in their cases, and the governing bodies of the judiciary itself should take practical measures to ensure that judges can in practice adopt decisions without any interference, verifi-

cation or checking by court presidents of their or any other courts, or by other actors from within or outside the judiciary. Such verification of decisions should be considered interference with judicial functions and as such should lead to disciplinary or other appropriate proceedings against the judges involved. Among other practical steps, decisions should be certified by the stamp by the secretariat through a transparent and automatic procedure, once the decision is issued by a judge, rather than by court presidents or any other authority which may interfere with the substance of the decision.

As a matter of priority, Tajikistan's judiciary as well as other relevant stakeholders should reconsider how to change the practice under which acquittals on all charges are nearly excluded as an outcome of criminal proceedings. Acquittals should constitute a regular outcome of a criminal process and the system and culture of judicial decision-making should be developed to allow this. Judges should be protected against any negative consequences to their career where they issue acquittals as part of independent administration of justice in accordance with law, judicial ethics and their oath.

Ensure financial independence of the judiciary including by establishing a separate transparent budget of the judiciary, which takes account of the need of the judiciary for sufficient funding and is sufficient to satisfy the logistical needs of the court system, and the need to carry out and implement efficient reform of the judiciary as proposed in this report;

Establish a transparent and objective system for the calculation of salaries of judges, which does not depend on the discretion of the executive. Within such a system, consideration should be given to increasing judicial salaries to ensure that their level corresponds to the financial needs of judges, reflecting current economic realities;

The judiciary should consider introducing a randomized system of distribution of cases to exclude any possibility of manipulation when a case is assigned to a judge.

Any statement made as a result of torture or any other form of coercion must not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. Courts should be granted explicit powers to initiate proceedings against alleged perpetrators where the are reasons to believe that a evidence was obtained as a result of ill-treatment.

The legislature, the judicial authorities, and the executive should take urgent measures to ensure that court judgments are made accessible to the public through available online tools and in courts as part of access to justice. Besides, access to court hearings should not be impeded both for lawyers and for members of the general public in order to ensure in practice the implementation of open hearings.

The judiciary should regularly organise capacity building activities for judges in Tajikistan on questions of judicial independence, ethics and accountability, and on protection of the right to fair trial and other human rights protections in national and international law.

International actors and diplomatic community should take account of the structural, legislative and policy and practical deficiencies which undermine the independence of the judiciary in Tajikistan and should tailor their programmes supporting the justice system reform in Tajikistan to effectively address these issues. In particular, establishing institutional and procedural frameworks, security of tenure for judges, access to justice and fair trial rights, including increasing the level of acquittals should be prioritised among other issues analysed in the present report.

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