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The Yearbook and the English Supplement are intended for perusal by representatives of the legislative, judicial and executive branches of the state administration, scholars, university instructors, practising lawyers, activists of civil society and other readers that are interested in legal reform issues. The e-version of the English Supplement of the LPRC Yearbook for 2009 can be accessed at: www.lprc.kz.

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CURRENT TRENDS IN THE CRIMINAL JUSTICE REFORM IN THE REPUBLIC OF KAZAKHSTAN[1]

To develop a new concept of legal policy in the Republic of Kazakhstan, the following *three issues* dealing with criminal and procedural reforms that have triggered a lot of discussion need to be analyzed more scrupulously:

a) the procedural regulation of the so-called "pre-investigation inspection";

b) the need for delegating the authority to courts to dismiss a criminal case based on the so-called "non-rehabilitating grounds" during the pre-trial stage of a criminal procedure;

c) reduced trial and pre-trial proceedings, including those relating to the so-called "bargains" between the prosecution and the defense.

Although a criminal procedure is a comprehensive system, and all of the above-mentioned issues are, in one way or another, inextricably intertwined, each of them is still an independent criminal and procedural aspect, and thus they will be analyzed separately in this paper.

I. Pre-trial inspection, initiation of a criminal case and inquiry

A major criminal and procedural dilemma that emerged virtually in all post-Soviet countries, including the Republic of Kazakhstan and which needs to be resolved as soon as possible boils down to a certain contradiction between two principles. These two principles, only at first glance, seem to be immutable criminal and procedural axioms. If we take a closer look, only one of them is a true and universal axiom, while the other one is false.

On the one hand, it is commonly accepted that full-scale criminal and procedural activities, including criminal and procedural proof, may commence only after making a formal decision to initiate a criminal case which, inter alia, states the criminal nature of a certain act and provides its preliminary, albeit extremely important for continuing a case, penal qualification.

On the other hand, it is understood that identifying the criminal nature of a certain case, and even more so, its penal qualification, requires accurate evidence on factual circumstances of a relevant event, and the role of

[1] This analytical document has been prepared by the Legal Policy Research Center and supported by the Freedom House Office in Kazakhstan. The positions and opinions expressed in the paper may be different from those supported by Freedom House.

relevant suspects, if any, in this event. This evidence cannot be obtained only from the so-called "grounds for initiating a criminal case," i.e. a formal source of information about the offense (a victim's complaint, testimony of third parties, etc), to say nothing of the fact that this source, as well as all information contained therein, should be verified rigorously.

Evidently, this contradiction that exists between the two principles *cannot be overcome*. Prohibition of criminal and procedural activities *before* initiating a criminal case and the natural need to determine the existence or absence of legal grounds *for* its initiation (including qualification of a particular action) are inversely proportional to one another. As a result, any attempt to *overcome what cannot be overcome* led to the emergence of various *surrogate* procedural activities in the Soviet criminal and procedural system, named *pre-investigation inspection,* and special investigation means. Post-Soviet criminal and procedural systems inherited these *surrogates*, on the one hand, realizing their lameness, and on the other, not seeing any ways to discard them.

However, the fact that we talk about a purely Soviet phenomenon means that it is not too difficult to overcome it from a technical point of view. All we need is to find the very ***element*** that, at some point, led to the deformation of the Soviet criminal and procedural system. Its absence in the so-called "developed legal systems" helps explain why the issue of pre-investigation inspection, which has always been a significant problem for all post-Soviet states, including the Republic of Kazakhstan, remains utterly unknown to, for instance, French and German lawyers. It should be stressed once again that solving the issue of pre-investigation inspection is not very difficult from a *technical* perspective. All difficulties are of a purely *psychological* nature, since entire generations of Soviet and post-Soviet lawyers were trained based on the *immutability* of some principles and ideas which, in fact, distort the criminal and procedural system and should therefore be jettisoned.

This specific Soviet ***element*** that, for many decades, has been turning the issue of pre-investigation inspection into some sort of squaring the circle is the above-mentioned principle that criminal proceedings may, ostensibly, commence only after reaching a decision about initiating a criminal case. In this case, such a decision should contain a formal penal qualification of a particular action. As a matter of fact, this principle that today seems axiomatic to almost all post-Soviet lawyers, was first proposed in 1934 as some kind of a guarantee against unjustified criminal prosecution that was taking place during one of the stages of Stalin's repressions. To understand the actual efficiency of this guarantee, it would suffice to recall that formalizing the initiation of criminal cases in 1934 was by no means an impediment to the well-known 1937 events.

Formal initiation of criminal prosecution, including a penal description of a particular action, is, no doubt, present in all criminal and procedural systems.

However, it is the beginning not of criminal proceedings, but rather of its trial stages only. Initiation of criminal proceedings (*bringing a public lawsuit* in France and *bringing a public accusation* in Germany) separates pre-trial police activities in the form of inquiry[2] from trial proceedings. In this sense, the equivalent of such bringing a case in post-Soviet criminal and procedural systems is compiling and approving a bill of indictment submitted to the court.

In this situation, it becomes self-evident that *it is not quite, and not only, pre-investigation inspection that we need to discard, but rather the concept of initiating a criminal case as an act that separates non-procedural activities from procedural ones*.

Criminal and procedural activities in all places start – and this cannot be otherwise – when relevant pre-trial investigation bodies (police) register an incoming message about some offense; at this point, the police are not supposed to determine the penal qualification of this particular action. After registering a complaint, or a message, about the offense, compiling a report about detecting the offense, or receiving some information about a hypothetical offense committed by public officials (including a prosecutor), the police continue, according to their investigative jurisdiction, with inquiry[3]. At this point, there is no decision made about *initiating a criminal case*. Such an inquiry should be given a reasonable amount of time, and this time should, approximately, equal what we have today. They may be differentiated based on various criteria (existence or absence of a suspect, etc), and also based on the following idea: the more obvious the offense and the offender, the shorter the police inquiry. As a result of such inquiry that will, *mutatis mutandis,* incorporate the existing post-Soviet pre-investigation inspection, special investigation means and preliminary investigation, the police transfer the case files to a prosecutor who should choose one of the following : 1) initiate a criminal case, provide the official penal qualification of the offense

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[2] It is also worth mentioning that the prevailing concept of inquiry *as a form of preliminary investigation* that still exists in post-Soviet criminal and procedural law is the result of historical distortion which took place during the Soviet era (starting from 1920s when the slogan about effacing boundaries between inquiry and investigation was first pronounced). These boundaries were obliterated so successfully that it remains impossible to restore them now. The goal of the 1920 reform was to empower workers' and peasants' inquiry officers and investigators with quasi-judicial functions, who superseded tsarist judicial investigators that, for the most part, turned out to be on the other side of the fence. Today, parallel development of inquiry and investigation as two types of investigative activities has lost its initial meaning. On the other hand, it became a serious impediment in returning post-Soviet criminal and procedural systems to their classic canon. In this sense, the only solution is to break, finally, the Soviet tradition and restore the meaning of inquiry which it now has in the continental law (police activities that separate the obtaining of information about a hypothetical crime and making a formal decision on initiating criminal prosecution or dismissing the case).

[3] The issue of terminology may be left open. Such criminal and procedural police activities may have any name in Kazakhstan's criminal and procedural law (*police investigation, pre-trial investigation*, etc). However, from a comparative legal point of view the most widespread term would be ***inquiry***.

and transfer the case to judicial institutions; 2) dismiss the case; or 3) use the so-called alternative measures to criminal proceedings, including mediation, etc.

Without going into details, which should be discussed not while developing a legal policy concept, but rather when editing specific criminal and procedural norms, we can mention two fundamental questions that arise: a) what should the human rights guarantees be at the inquiry stage, and b) what should the significance be, of evidence obtained by the police through their inquiry?

As regards human rights guarantees, it is becoming clear that nowadays police inquiry cannot involve a highly multifaceted judicial control. It should become evident in two mandatory and one optional aspects. *Firstly*, the police should not have the right to use criminal and procedural coercion measures independently, except for detaining a suspect for a short period of time at the crime scene for a few or several dozen hours required to bring this suspect to court. In other cases, procedural coercion measures (arrest, written undertaking not to leave a place, assets forfeiture, etc) may be used during inquiry by courts only, at the behest of police bodies and submitted to the court through a prosecutor. *Secondly*, police bodies should not enjoy the right to conduct investigative activities independently, restricting the rights and liberties of other individuals, except for urgent cases (personal search of a detainee, etc). In all other cases, such activities (house search, wiretapping of telephone conversations, obtaining information from technical communication channels, etc) may be held only based on a judicial decision. *Thirdly*, and this point is optional, the legislator may provide for judicial interference in order to ensure evidential information. For instance, the police attempt to consolidate testimony of a foreign national leaving the country shortly and use it as valid evidence. At the same time, the police are concerned that such evidence may be questioned during trial proceedings by the defense that will say it does not trust police records. In their attempt to anticipate such a response by the defense, the police, at the inquiry stage, approach the court, within judicial control, and request that a responsible judge interview this foreign national. In this situation, his or her evidence gains judicial significance, and becomes indisputable, which enables this individual to leave the country and thus prevents the state from resorting to very complicated international remedies. Apparently, we presented only one example of how courts may consolidate evidential information obtained during an interview by police bodies.

As regards the significance of evidence obtained by the police during inquiry in general, there are no grounds to view such evidence, *a priori*, as inadequate or deficient. A belief that there can be no worthy evidence before initiating a criminal case is again of Soviet origin. Physical evidence indentified by the police while investigating a crime scene, written documents that were received, as well as records relating to investigation experiments, examination of dead bodies and submission for identification, may well serve

as evidence and thus be used in courts by the prosecution. Two cases may be viewed as *exceptional*. The first one is obtaining evidence by violating human rights (physical evidence obtained during house search, information received by wiretapping of telephone conversations, etc). However, this requires a judicial decision, and consequently, if this decision is made, we talk about valid evidence with a *judicial component* to it. The second case refers to police interrogation records, which may not have any evidential force based on the principle that implies a direct trial hearing in the court and restricts evidence obtained outside the courtroom. However, this problems still exists. It has to do not with initiating or not initiating a criminal case, but rather with the fundamental principle of evidence that should be examined by the court directly. In the long run, the issue of whether or not police investigation records have evidential significance is handled by the court during trial proceedings, depending on whether there are grounds for making them public or not. Furthermore, a favourable role may be played by the mechanism of consolidating evidence judicially at the behest of the police, which was mentioned above.

In general, it is not a formal act on initiating a criminal case that seems to be the most important human rights guarantee during inquiry by the police, but rather other procedural institutions, such as judicial control, admissibility of evidence, direct examination of evidence by the court, etc. The only way to solve the issue of pre-investigation inspection is to replace it with fully-fledged police inquiry as an independent stage in criminal proceedings. This stage should incorporate pre-investigation inspection and special investigation means, which will thus gain procedural power, and the preliminary investigation we have today (including inquiry as it is understood now). Thus, the procedural construct of *initiating a criminal case* (initiating criminal prosecution, to be precise) should later be viewed not as an act that launches criminal proceedings, but rather as an act compiled by a prosecutor based on the results of police inquiry, provided there are sufficient grounds to submit this case to the court.

II. Should courts enjoy a monopoly to dismiss criminal cases on non-rehabilitating grounds?

Strictly speaking, in classic criminal and procedural systems a criminal case can be dismissed, based on any grounds, only at trial stages of criminal proceedings. This can be explained not by the presumption of innocence, but rather by basic procedural logic. Indeed, in order to talk about dismissing a criminal case, we need to first initiate it. As mentioned above, a criminal case is launched not in the beginning, but at the end of police inquiry, provided there are sufficient grounds to submit this case to the court. Therefore, a criminal case that was initiated can only be processed by judicial bodies which will decide whether to dismiss it or not. The police and a prosecutor only have the right to *refuse to initiate a criminal case*, and this refusal can be

based on any grounds, including the so-called *alternative ones* (conciliation, active repentance, making good the damage, etc).

If Kazakhstan's legislator normalizes pre-trial stages of criminal proceedings by bringing them in line with classic standards described above, the aforementioned logic will be appropriate for the criminal procedure in the Republic of Kazakhstan: pre-trial prosecution bodies (the police and prosecutors) will only enjoy the right to refuse to initiate a criminal case, while dismissing a criminal case will be the prerogative of the court. However, since we talk about the conceptual level only, this section of the analysis will be based on the *applicable* criminal and procedural law of Kazakhstan, in which initiation of a criminal case precedes preliminary investigation, and therefore, the right to dismiss a criminal case is vested not only in the court, but also in preliminary investigation bodies, including prosecutors.

Furthermore, even if we reform pre-trial stages of Kazakhstan's criminal proceedings and make them compliant with classic principles, this will not help us solve the issue of *rehabilitating* and *non-rehabilitating* grounds. There will be only a change in terminology. Indeed, instead of saying whether or not an investigator, inquiry officer or prosecutor has the right to dismiss a criminal case based on *non-rehabilitating grounds*, we will be discussing whether or not the police and/or a prosecutor have the right to *refuse* to initiate criminal prosecution (or simply criminal prosecution) based on the same *non-rehabilitating grounds*.

First of all, it is worth mentioning that the issue of *rehabilitating* and *non-rehabilitating* grounds for dismissing a criminal case is, no doubt, ***exaggerated*** in post-Soviet countries. On the one hand, it has to do with the fact that a police decision to dismiss a criminal case, due to the general procedural deformation that took place during the Soviet epoch, almost equals the decisions of judicial bodies, including the sentence. On the other hand, any attempt to resist this fact by the progressive part of academic circles, which were not systematic attempts, boiled down to simply criticizing, continually, the so-called *non-rehabilitating grounds* from the viewpoint of presumption of innocence that will be considered below.

The only hypothetical point for distinguishing between rehabilitating and non-rehabilitating grounds is that in the first case the state officially states the illegal nature of criminal prosecution and undertakes to make good the damage it caused (or to rehabilitate an individual). In other words, such grounds for dismissing a criminal case mean a legal fact entailing certain property and/or not-property liabilities on the part of the state, which are, for the most part, *civil* liabilities (inflicting damage). If there are some other grounds for dismissing a criminal case (amnesty, lapse of time, conciliation, etc), the state simply refuses to implement its right to criminal prosecution by terminating the case, while criminal prosecution is not considered illegal (it used to be legal, but it is no longer necessary). In this situation, the state

doesn't undertake to make good the damage it caused by this criminal case, and in this sense (and only in this sense) such grounds are referred to as non-rehabilitating grounds, or the ones that do not provide the right to indemnification (rehabilitation)[4].

Ironically, they are, no doubt, rehabilitating grounds for dismissing a criminal case only that may require a judicial decision, since they may entail civil repercussions (emergence of obligations arising as consequence of causing harm on the part of the state, which is envisaged by the Civil Code of the Republic of Kazakhstan).

In this sense, the argument supporting the delegation of authority to dismiss criminal cases based on non-rehabilitating grounds to courts only, which is clearly stated in the draft concept of legal policy in the Republic of Kazakhstan, seems befuddling. According to the draft, "this will, to a high degree, help finalize the separation of functions undertaken by the prosecution and the defense from the functions of deciding a criminal case on the merits, which complies with the constitutional provision on the role and the meaning of the judiciary." However, deciding a criminal case *on the merits* does not mean dismissing a case due to conciliation or lapse of time, since in this case the issue of "guilty" or "not guilty" is not relevant at all. Deciding a criminal case *on the merits* is dismissing a case due to the lack of an event, or elements of a crime, or based on the *rehabilitating grounds*, because both the *event* and *elements of a crime* are the cornerstone of a criminal dispute. What do the *non-rehabilitating grounds* have to do with it, then?

When a criminal case is dismissed for non-rehabilitating grounds, there is no – and there should be no – discussion on whether or not a particular person is guilty[5]; therefore, there can be no inconsistence with the proverbial constitutional principle of the presumption of innocence. If there are appropriate grounds for dismissing a criminal case, the issue of "guilty" or "not guilty" simply remains unsolved, since the case is not submitted to the court and not decided on the merits. Presumption of innocence remains non-denied (and no one tried to deny it), since it can be denied only by a court sentence that came into force; in other words, a person is till presumed to be innocent. Any attempt to give some other meaning to the resolution on dismissing a criminal case based on the appropriate grounds would imply misunderstanding and misinterpretation of the applicable law.

[4] Perhaps, it makes sense to go further and change the term which is used to refer to such grounds for dismissing a criminal case. The term *non-rehabilitating grounds* may be abandoned, since it can be wrongly associated with the mediaeval notion of *being left under suspicion*.

[5] If this particular person intends to discuss the issue of their guilt, or the lack thereof, on the merits, and insists that he or she be acquitted, they should, in any case, have the right to object to such dismissal of a criminal case based on the appropriate grounds. Sometimes, such *objection* is envisaged indirectly (when parties reconcile), but the essence of the matter remains the same.

This position is also upheld by the European Court of Human Rights (ECHR), which at some point had to consider complaints against Austria with regard to this issue (Ruling of the ECHR on Adolph's case as of March 26, 1982); Austria also has a phenomenon which is very similar to the post-Soviet relief from criminal liability based on the so-called non-rehabilitating grounds. In this particular case, the ECHR did not see any violation of the presumption of innocence and agreed with the opinion of the Austrian Supreme Court that ruled the following: the decision of criminal prosecution agencies to desist from criminal prosecution in such a situation "is not a statement equivalent to the inference on the evidence of guilt in the suspect's actions."

Therefore, dismissing criminal cases based on *non-rehabilitating grounds* by courts only cannot be viewed as some sort of an international standard[6]. This opinion would just be wrong.

Furthermore, if this power is delegated to courts, this will, to a large degree, make the procedure slower and more complicated, and also put some extra workload on courts, which won't be a good thing to do. Such a legislative decision will obstruct the possibility of using the so-called *alternatives to criminal prosecution* during pre-trial stages in Kazakhstan, which will be a major step back. In this regard, we should mention a very obvious contradiction contained in the new legal policy concept in the Republic of Kazakhstan. On the one hand, it talks about developing the so-called *alternatives to criminal prosecution*, including mediation, and on the other hand, it suggests that criminal prosecution agencies abjure their right to dismiss criminal cases based on *non-rehabilitating grounds*, including reconciliation of parties. It is well known, however, that mediation is used most vigorously in Western countries during police stages of criminal proceedings, before a case is submitted to the court. The further the proceedings unfold, the more difficult to make parties reconcile, since they tend to immerse into their legal dispute deeper and deeper.

As regards the human rights guarantees of parties, all concerns are superfluous if we have a judicial control. The court should intervene not to stamp decisions on dismissing criminal cases based on pre-trial reconciliation, amnesty or lapse of time, but rather when there is an actual legal dispute. In this regard, parties of a criminal procedure should be able, with no restrictions, to appeal pre-trial actions or decisions that take place when a criminal case is dismissed, irrespective of whether we talk about *rehabilitating* or *non-rehabilitating* grounds for dismissing a criminal case.

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[6] Furthermore, from the viewpoint of legal comparison, such attempts to delegate the power to dismiss criminal cases based on non-rehabilitating grounds to courts can be found only in post-Soviet countries. For instance, they were implemented in the Ukrainian criminal and procedural law. However, the experience of Ukraine cannot be called successful. According to our data, this particular legislative decision significantly hinders the development of various alternative measures (other than criminal prosecution) in this country, including *police mediation* which is so well known in Western countries.

As a whole, the provision saying that only courts should be able to dismiss criminal cases based on *non-rehabilitating grounds*, envisaged in the draft legal policy concept in the Republic of Kazakhstan, is clearly ***not good***, and is *supported neither by theory nor by practice*.

III. Shortened proceedings and *plea bargains*

Taking into account a great variety of actions and fundamentally different degrees of their social danger, which are prohibited by criminal legislation of the Republic of Kazakhstan (let alone other similar legal actions wisely highlighted in the draft legal policy concept and referred to as *administrative offenses*), it becomes clear that the state cannot respond in the same fashion to all these actions, using *one model*. And it cannot do so from both substantive and procedural points of view. In the long run, we end up observing the so-called *substantive differentiation* and *procedural differentiation* of the state's response to a crime.

Despite the fact that the results of substantive differentiation are necessarily used to conduct procedural differentiation, the former should not have purely procedural criteria as its basis. In other words, when trying to solve the issue of substantive differentiation, the legislator should abstract away from its further application within the construction of procedural norms.

The criteria for ***substantive differentiation*** are exclusively the criminal consequences of an offense, meaning, first of all, *punishment*. Trying to solve the issue on either preserving "crime categories" which are commonly used in post-Soviet countries or introducing the Western division of criminal actions into offenses and misdemeanors (optionally: offenses, misdemeanors and delicts), *we shouldn't be guided* by procedural considerations. In this case, we need to *separate fundamentally* punishment and other criminal and legal consequences of crimes, and then group criminal actions together depending on the type (and optionally, the scale) of punishment. If such grouping doesn't work, it means the issue is related to certain lagging in penology (the study of the punishment of crime), insufficient alternative sanctions, etc. It is in this direction that the legislator will have to work hard in order not to turn substantive differentiation into something formal and artificial. If this method is used, many drawbacks of the current legal system will, inevitably, come up to the surface, when some offenses regarded as *administrative* lead to short deprivation of liberty (even 15 or 30 days only), while others, formally declared as socially dangerous *criminal offenses*, do not entail any deprivation of liberty (even for a short period of time).

Having conducted a fundamental substantive differentiation of criminal actions depending on the type of punishment that may ensue, we may think about other criminal consequences. For instance, the attractiveness of *alternative punishment* (other than deprivation of liberty) wanes significantly

due to a unified approach to the notion of a criminal record: a person sentenced to the mildest form of punishment, such as a fine or public works, suffers due to having a *criminal record*, which reduces the preventive capacity of *alternative sanctions*, their stimulating role, etc.

In this regard, if we talk about the substantive aspect, we can think about the differentiation not only of punishment and then crimes, but also the notion of a *criminal record*. Thus, if a person is sentenced to *alternative sanctions*, their *criminal record* may, in the future, be replaced with another criminal consequence, or the so-called *adding to a judicial database*. Unlike the classic criminal records, such a consequence would be treated in a criminal sense only in case of repeated offenses, rather than the one applied to common citizens. In other words, access to this *judicial database* would be granted only to criminal prosecution agencies and courts in case of a repeated offense, but it would be totally inaccessible to all other physical and legal entities, government institutions, etc. Therefore, by sentencing a person to alternative punishment, the court would tell them that if they do not commit any other crime in the future, no one will ever have access to the information about their sentence, and thus their biography will be “clean”; if they do commit another crime, criminal prosecution bodies and courts will access this information, and it will be considered when determining punishment for this new crime. As it seems now, by not tarnishing people’s reputation, this mechanism would be a serious preventive measure.

Procedural differentiation is largely based on substantive differentiation, be it the continuous use by the procedural legislator of “crime categories” which are widespread among post-Soviet countries, or their division into offenses and misdemeanors as in the West. Substantive differentiation is considered, for instance, when identifying investigative and judicial jurisdiction, regime for applying measures of procedural coercion, clarification of grounds for dismissing a criminal case, etc.

However, all debates related to procedural differentiation, more often than not, have to do with the so-called *shortened proceedings* which do not depend directly on the substantive categorization of criminal actions. In this case, procedural differentiation should, at the conceptual level, be considered *separately* from substantive differentiation. In technical terms they may, no doubt, further overlap (which is almost inevitable), but this means only technical overlapping, and not a *conceptual dependence*.

Procedural differentiation is reflected during both pre-trial and trial stages on criminal proceedings, which in our case should be looked at separately.

a) *pre-trial stages.* The most comprehensive procedural differentiation during pre-trial stages of criminal proceedings depends on the fundamental decision to either confine them to police and procuracy activities or augment them by adding judicial and investigative activities. In this latter case, after carrying out police inquiry on most complicated and dangerous crimes (based

on the substantive differentiation of crimes) a prosecutor, while making a decision on whether or not to launch criminal prosecution, submits the case not to the court to be reviewed on the merits, but to an investigative judge (judicial investigator) to conduct preliminary investigation. We are talking about the classic French model. In this situation, the following will be an *abridged* scheme: *police – prosecutor – court*, while a full-fledged criminal prosecution will look as follows: *police – prosecutor – investigative judge – court*. Since an investigative judge is a full member of the judiciary, this allows to move the focus of an investigation from police inquiry to a pre-trial judicial investigation, and the latter becomes, which is crucial, a *preliminary*, and at the same time *judicial*, stage of the procedure[7].

If legislators in Kazakhstan opt for a procedural model that does not envisage judicial preliminary investigation, which nowadays disappeared in many countries of the continental procedural family (Germany, Switzerland, Austria, etc), differentiation is only possible within the framework of police inquiry[8].

Depending on various criteria, it is allowed to differentiate inquiry[9] based on the time, measures of procedural coercion, procedure for bringing charges, procedure for final stages of inquiry, etc. Not only substantive, but also purely procedural aspects, such as the *obviousness* or *unobviousness* of a crime, should be used as criteria for such differentiation. If a crime is obvious, an offender is arrested at the crime scene (for instance, while shoplifting in a mall), and the offense is not grave, there are no reasons to conduct an inquiry for several weeks or months. It can be done within several hours by compiling necessary records, registering the testimony of witnesses and their personal information, etc, after which a bill of indictment is produced (including its simplifies version), and the accused offender is taken to the court. The court then notifies the accused offender, if there are no reasons to keep them in custody, about the date for conducting a trial hearing on the merits, applying, if there is a need, an *alternative* measure of restriction.

[7] That said, legislators in Kazakhstan should bear in mind that the French mode of preliminary judicial investigation is undergoing reforms in France at the moment. Therefore, it should be viewed as a comparative legal example with a certain degree of precaution. Thus, in January 2009, Nicolas Sarkozy officially announced the beginning of efforts to draft new legislation which will aim to abolish the notion of an investigative judge and, as a result, the current notion of preliminary judicial investigation.

[8] Needless to say, the “police” nature of inquiry does not mean a lack of judicial control. On the contrary, such control is an important aspect of all differentiated versions of police activities in the form of inquiry, since the judicial guarantee of rights and liberties is *not subject to differentiation*; it is a constitutional and criminal and procedural constant.

[9] In this paragraph we talk not about a Soviet, but rather a classic inquiry. In other words, the inquiry differentiation should be preceded by its transition from the Soviet (post-Soviet) version to a classic one (See above).

Furthermore, the emergence of such simplified forms of inquiry is inevitable due to the inevitability of effacing fundamental differences between criminal offenses and administrative delicts. Proceedings related to administrative delicts are a testing ground used by post-Soviet countries to try numerous simplified forms of policy inquiry. In other words, when dealing with proceedings on administrative delicts, there are models we used today which, *de facto,* are simplified forms of inquiry. They should be analyzed and, if need be, improved (including from the viewpoint of human rights), and then decide to what extent they can either directly or *mutatis mutandis* cover a part of today's *petty criminal offences.*

b) *judicial stages.* Accused offenders admitting their guilt (agreement with the charges brought) are not the only possible criteria of differentiating judicial stages of criminal proceedings, by which we mean trial proceedings. However, this particular criterion is discussed most vividly today among post-Soviet countries, including the Republic of Kazakhstan; therefore, we would like to put aside all other possible criteria in this paper (gravity of a crime, composition of the court, public or private charges, etc) and focus exclusively on the issue whether or not a criminal procedure in Kazakhstan should include shortened judicial proceedings depending on accused offenders (defendants) who either admit their guilt or not.

First of all, we need to review the prospect of the so-called *plea bargains* in Kazakhstan's criminal proceedings, which seem to raise interest almost in all post-Soviet countries. It is worth mentioning that *plea bargains* are not a separate entity that can exist autonomously; rather, it is a phenomenon which is part of a certain system and is descriptive of Anglo-Saxon countries only. As we all know, in the UK and US there is no formalized preliminary investigation, no solid criminal case built before trial, no notion of *case proceedings*, and no person who would be leading such *proceedings*. In this situation, the court reviews only those files that are presented in front of them by the prosecution (other files stay in a prosecutor's suitcase and no one cares about them). Moreover, before reviewing these files (including evidence), the court attempts to determine the position of a defendant, asking whether they admit their guilt. If the defendant confessed their guilt, judges do not even open a file with documents and leave the courtroom to determine punishment (or can be done right in the courtroom). This is how the Anglo-Saxon adversarial trial (no dispute – no case) is manifested fully. Following this principle, parties are free to reach an agreement, or a *bargain*, when the prosecution will put only some documents against the defendant in front of a judge, and then bury the rest of them for ever in their vault provided that the defendant confessed their guilt based on the files presented. The prosecution obtains a guaranteed sentence, even if it is less severe than deserved by the defendant, and is exempt from the burden of proof, while the defendant faces a much milder sentence compared to that he could face if the prosecution continued with the trial. It is worth mentioning that in the Anglo-Saxon criminal

and procedural law there are no such procedural figures as the “aggrieved party” and/or “civil claimant,” which allows looking at *plea bargains* exclusively through the prism of procedural relations between the prosecution and the accused.

Obviously, the continental procedure, which is marked by an absolutely different formalization level of pre-trial stages and built on such notions as *criminal case*, *case proceedings*, *stay of proceedings*, *grounds for dismissing a case*, etc, cannot use the above-mentioned Anglo-Saxon *plea bargains* for some fundamental reasons. What will be the basis for leaving some case files in the drawer by the prosecution in exchange for confession? What will be the specific basis for staying proceedings? What do we do with the rights of the *aggrieved party* and the *civil claimant* that, unlike in the Anglo-Saxon system, are very important parties of the continental procedure? Does the *aggrieved party* have the right to, as part of the judicial control, appeal the decision on partial termination of criminal proceedings, and how will this appeal be handled, given the fact that a *bargain* has a factual basis, rather than a legal one, reflecting the willingness of the prosecution and the accused to reach an agreement based on mutual expediency? It is clear that such questions cannot be answered from the point of view of continental law. *Therefore, plea bargains in their pure form cannot be integrated in the continental procedure, which is well known from the theoretical perspective. Legislators in Kazakhstan should give up such attempts as far-fetched and delusive.*

However, although it is impossible to integrate *plea bargains* in their classic Anglo-Saxon form, this does not mean that the continental procedure is not able to, given its specific nature, absorb the idea that in some cases confessing one’s guilt may expedite judicial proceedings. This idea has been accepted recently by a plethora of continental criminal and procedural systems. Simply put, the following construct has emerged. When a criminal case finds its way to the court, the latter may, in case of agreement with regard to charges among all key stakeholders (state prosecution, aggrieved party, accused person and their defense attorney), decide *not to carry out a judicial investigation*, and reviews the case based on written files only (according to a special procedure). In this case, the accused is promised a milder sentence. Importantly, the continental procedure does not abandon its classic postulates in the sense that confession cannot be the only basis for passing a conviction. There should be other evidence proving a person’s guilt, but they don’t have to be examined verbally and directly in accordance with the general rules of judicial proceedings. As a classic example of this construct, we can mention Article 40 of the Russian Criminal and Procedural Code as of 2001, or the new French notion of *procédure de comparution sur reconnaissance préalable de culpabilité*, introduced in the French Penal Code after passing a Law on March 9, 2004. These procedures are sometimes called, for the purposes of discussion, continental *plea bargains*, trying to emphasize certain similarities with the Anglo-Saxon model, without claiming

to be absolutely correct academically. In fact, it would be more correct to speak about “shortened judicial procedures without judicial investigation in case of agreement between parties.”

Can these procedures be integrated in Kazakhstan’s criminal proceedings? Unlike Anglo-Saxon *plea bargains*, there should be no insuperable theoretical and practical obstacles on the way of creating something similar to continental “shortened procedures” in Kazakhstan. However, legislators in Kazakhstan, when reaching a decision, have a great opportunity to consider not only positive, but also negative consequences of this practice in many countries, including the Russian Federation. Let’s discuss two of these consequences.

Firstly, in countries with unstable law enforcement systems, which includes almost all post-Soviet states, introducing any form of procedural differentiation depending on confession is ***dangerous***. It is well known that in many cases such confession is the result of physical or mental pressure, including torture, rather than a conscious and voluntary choice. The norm which, among other countries, is envisaged by the Russian Criminal and Procedural Code, saying that a judge has to make sure the accused admitted their guilt voluntarily, is in fact only declarative. To make sure that the confession was voluntary (or involuntary), it would be required to interview the accused and to study some other evidence. In other words, this would require a judicial investigation, which in this case is not conducted. Therefore, everything boils down to a formal question asked by a judge (Is your confession voluntary?) and a formal response of the defendant, who oftentimes has to then return to a pre-trial detention facility. In this regard, a provision from Kazakhstan’s legal policy concept saying that a *plea bargain* is viewed as an alternative to jury trials raises a particular concern. This provision has been copied from the American legal system without considering the difference in the level of legal and procedural development in both countries. Jury trials are an expensive and *élite* phenomenon, and in cannot function with regard to all cases (there are too many of them). By considering *plea bargains* as an alternative to jury trials, legislators in Kazakhstan relegate an admission of guilt to the status of the only method for providing proper *throughput* of the judiciary. What will be the outcomes? This will lead to some additional interest (including budget interests at a time of the current financial crisis) of government bodies in the greater amount of *confessions* in criminal cases. And it is not difficult to guess what will be happening next. ***We do not think that Kazakhstan should create additional incentives and methods for investigation bodies to obtain an admission of guilt***.

Secondly, the practice of applying Article 40 of the Russian Criminal and Procedural Code revealed one more relevant issue that Kazakhstan should take into account, namely, the ***prejudicial*** significance of sentences passed in accordance with a special procedure (without any judicial investigation).

Let's illustrate this problem by giving a real criminal case as an example. Investigating a complicated economic crime, investigation agencies initiated, one by one, criminal cases against four individuals. Three cases were reviewed in accordance with Article 40 of the Russian Criminal and Procedural Code, since the accused, for the reasons we don't know, admitted their guilt. As far as the fourth case is concerned, the individual who was accused of organizing a crime did not admit his guilt. By the time the case was considered on the merits, during pre-trial proceedings, the defense encountered an obstacle that seemed impossible to overcome. The facts which were presented against their defendant were proved *prejudicially*, since the "circumstances identified by the sentence that came into force are considered by the court […] without additional examination" (Article 90 of the Russian Criminal and Procedural Code). Three sentences passed according to a special procedure created *prejudice* regarding the fourth case, defeating the purpose of all procedural guarantees, adversarial principle, right to defense, etc. At the same time, the defendant disavowing his guilt was not able to affect the above-mentioned sentences, since he didn't participate in the first three trial hearings that were conducted in accordance with a *special procedure*. As a result, using the same scheme, the prosecution *didn't have to prove anything* regarding those who admitted their guilt and the person who denied it, while *no single procedural norm was violated formally*. Admittedly, legislators in Kazakhstan should consider this special case and think well about the *prejudicial* impact of such sentences (provided that Kazakhstan decides to introduce something similar to the Russian notion of a *special procedure*).

Also, we need to take a separate look at another popular novelty, the so-called *plea bargains* (*bargains with justice*) regarding cases on organized crimes. The draft law on this issue was formulated in the Russian Federation and adopted by the Russian Parliament at the second reading while this paper was prepared, and is currently discussed by academic circles arousing mixed responses.

The underlying idea of the draft law is proposing those accused in cases on organized crime that seem difficult to prove to strike a bargain whereby they are obliged to testify against their accomplices in exchange for a much milder sentence or even total remission of punishment. As a result of a plea bargain, cases of such defendants are handled separately, considered in accordance with Article 40 of the Russian Criminal and Procedural Code, and reviewed pursuant to a *special procedure*.

It is worth mentioning that the draft law is criticized heavily in Russia, including the author of this paper who thinks the bill is ***extremely imperfect*** from the legal and technical point of view.

Firstly, the issue of *prejudice* is also present here. Formally, a sentence passed in accordance with a special procedure against the accused

cooperating with investigation agencies will be *prejudicial* in terms of determining the factual circumstances of a particular case, which may well defeat the purpose of reviewing the main case.

Secondly, passing a guilty verdict according to a special procedure with regard to someone cooperating with investigation agencies will, inevitably, lead to another problem: what do we do if someone is later acquitted in the main case? As an outcome, either there will never be acquittals in this situation, which will further discredit the notion of an acquittal (even now it is quite weak in post-Soviet countries) and an adversarial trial, or, in case of a non-guilty verdict, there will be a need to cancel the guilty verdict against the person who struck a bargain with the prosecution, to rehabilitate them, to compensate them for the damage caused by the state, etc. We do not think that such consequences will have a positive impact on the practical use of this notion and criminal justice in general.

Thirdly, a guilty verdict passed against the person cooperating with investigation agencies will become effective before the main criminal case on some organized crime group is considered on the merits. What are some guarantees that the person convicted on preferential terms will follow their obligations under the plea bargain and then testify in court against their accomplices? What do we do if they say in court that, after falling down, which will be proved by a medical certificate, they lost their memory or had a sclerosis, amnesia, etc in recent months? What liability will this person face? Is it possible, without making the criminal and procedural system absurd, construct a special basis for repealing a *preferential* sentence that came into force and provide for *memory loss*, for instance, as one such basis? What if the defendant becomes really ill and loses their memory, which may well happen hypothetically? There is no reasonable answer to all these questions that wouldn't undermine the legal and procedural logic.

Fourthly, and lastly, all curious offenders from criminal networks will definitely find out that one of the accused struck a bargain with investigation agencies. Making the bargain secret won't help. It will be clear that if one of the accomplices was sentenced in accordance with a *special procedure* and arrived at places of confinement *ahead of schedule*, this happened because he or she cooperated with investigation agencies. At the same time, we are talking about organized crime. What are some safety guarantees of this particular convict in regular places of confinement? This will require building specially protected places of confinement for those cooperating with investigation agencies, which do not exist in Kazakhstan or Russian, and which are highly unlikely to emerge in the near future taking into account the current financial crisis and a small number of cases when offenders from organized crime groups cooperate with investigation agencies.

In general, the concept of plea bargains on cases related to organized crime is still far from ***perfect***. *In this regard, legislators in Kazakhstan should*

not use, for instance, the appropriate draft law developed in Russia. It is important to stimulate cooperation with investigation agencies. However, in this case measures envisaged by criminal law will suffice, which includes flexible mechanisms for reducing sentences or releasing defendants if they testify against other accomplices during the main trial proceedings at the stage of judicial investigation. Cooperation with investigation agencies (the prosecution) should be present during the entire procedure (and not only at its initial stages) and be reflected in the main verdict, which, from the procedural perspective, will be enough to differentiate liability of those organized crime group members who cooperated with investigation agencies and those who decided not to do it.

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PROSPECTS OF REFORMING SECURITY AND CRIME-FIGHTING AGENCIES IN THE REPUBLIC OF KAZAKHSTAN [10]

First of all, to implement the reforms we need to clearly define “fight against crime” and the protection of national security with respect to intelligence and counterintelligence in the Republic of Kazakhstan at the conceptual and legislative and regulatory levels.

Intelligence and counterintelligence activities as far as they overlap with the “fight against crime” are pursued in three forms, each being subjected to its own logics of legal regulation or, alternatively, not needing it whatsoever.

Firstly, it may be pursued by means of “foreign intelligence” on the territories of foreign states. Any state including the Republic of Kazakhstan may of course completely refuse from being involved in such activities. However rejection of foreign intelligence or an intention to use it, is a purely *political* decision which has nothing to do with *law* as such. If the authorities of Kazakhstan deem it necessary to use (or continue to use) foreign intelligence, then on the legal level such a decision is to be documented on an exclusively institutional level – by creating a special agency (unit) carrying out foreign intelligence activities and by defining its political subordination, which may be parliamentary, presidential or governmental taking into account the current constitutional and legal system in Kazakhstan[11]. No other issues pertaining to procedural or quasi-procedural order are subject to any legislative regulation in the course of foreign intelligence activities; neither can they be considered to be a form of “field operation and search activities” or, even less so, “criminal procedural” activities, since the Republic of Kazakhstan is not entitled to address the issues related to the restriction of individual rights (invasion of privacy etc.) which would be inevitable in covert gathering of information outside of the boundaries of its national territory. Such regulation would immediately come in conflict with the legislation of the relevant foreign state where foreign intelligence would be deemed criminal, as well as with international legal instruments. This is why foreign intelligence

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[10] Decree of President of the Republic of Kazakhstan No 739 of February 17 2009 established “Syrbar” – Foreign intelligence service of the Republic of Kazakhstan – as a body directly subordinate to the President of the Republic of Kazakhstan, charged with the functions of an authorized body in the area of foreign intelligence.

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activities fall out of the “field of law” always and everywhere (in all countries). Any attempts to legalize it are naïve and senseless. The only exception existing in developed legal systems is connected to the existence of effective parliamentary control over the agencies (agency) involved in foreign intelligence activities. It is noteworthy however that such control, being a type of political control rather than legal, overlaps with the field of law exclusively within the framework of constitutional law – not, say, criminal proceedings or judicial fields etc.

Secondly, intelligence and counterintelligence activities are pursued through analytical processing of the so-called “open” information, obtained from entirely legal sources including the mass media. The activities of such “analytical services” do not require any legal regulation whatsoever since in-depth studies of national and foreign periodicals, reading of various websites and blogs etc. do not restrict anyone’s rights regardless of the purposes thereof.

Thirdly, collection of intelligence and counterintelligence information takes place on the basis of the establishment of various *personal databases.* Since in contrast to the abovementioned “open” or voluntarily publicized sources the collection of data in this case takes place contrary to the free will of individuals, such data collection should be considered to be an invasion of privacy. This is why it can take place exclusively on the basis of the *law*. However it must not be a criminal proceedings law or a law on field operations and search activities, since databases have to do with *a priori* right-minded citizens. It is necessary to adopt a separate special law to ensure transparent legal regulation and make sure that citizens are aware of the fact that data on them is entered into the relevant databases when they perform certain licit actions. For example, one may adopt a law providing that personal data (the list of such data should also be established by the same law) of any person crossing the state border of the Republic of Kazakhstan is entered into a special database. The same approach is acceptable in other cases: when one obtains a driver’s license, is issued a gun carrying permit. Here it is important to correctly define the circle of situations when information is entered into the database, a precise list of the relevant data, including personal information (including in certain cases anthropometric data, fingerprints, etc) and the body to be responsible for maintaining the database. It is important to take into account that the collection of data in such situations takes place *automatically* (on the basis of the law) rather than *selectively.* At the same time the existence of such law, which can be arbitrarily called “The law on collection of personal data” makes the situation totally transparent for the citizens and will not be considered an unlawful invasion of their privacy. Having said that, the relevant information, collected on entirely legal grounds,

becomes *open* for the authorized state entities[12] and may be used both for intelligence and counterintelligence purposes and to fight crime.

Thus at the legal level legalization of foreign intelligence activities requires minimal legislative interference: establishment of the relevant service and addressing the issue of its subordination as well as adoption, if necessary, of a special law on the collection of personal data. In other cases intelligence or counterintelligence activities take place outside of the boundaries of legal regulation or, if it implies informational invasion of the citizens' privacy on one's own national territory, it is absorbed by "fight against crime" since investigation of espionage or treachery including intent to commit such or preparation for such (incomplete forms of criminal activities) imply no procedural differences from the investigation of theft, robberies and homicides.

* * *

It appears that the main task in reforming crime-fighting agencies is to overcome conceptual deformation inherited from the Soviet times. Having not abolished certain conceptual discrepancies of the "Soviet inheritance," the Kazakh criminal justice system can barely count on entering the circle of the so-called "developed legal systems" which is beyond any doubt one of the global goals of the national legal policy. Otherwise the reforms will either be purely "cosmetic" in character or will actually exacerbate current deficiencies capable of leading to a full-scale crisis. Here one needs to clearly decide: does the Kazakh legislature intend to truly modernize the criminal justice system in the nearest decade or will it do for it to leave it for many more years in the protracted "transition state." It is also clear that without rejecting some of the conceptual postulates of the Soviet criminal and criminal proceedings doctrine, unconsciously inherited by the post-soviet doctrine, the hypothetical modernization is unreal and unattainable. In other words, one need to first ***reform*** whatever has been historically left ***deformed*** due to reasons out of control of the current Kazakh legislature.

When pursuing any reforms one needs to first take into account that crime-fighting activity is by nature ***policing*** regardless of which individual agency implements it. At the same time before a crime (offense) is committed, the police, whose function is to maintain public order (patrolling streets etc.) acts purely as an *administrative* police abiding by the rules and norms of administrative law. Issues of administrative police are outside of the scope of this analysis. It is noteworthy though that administrative police, acting in the absence of any data on a crime committed, deals exclusively

[12] At the same time such data should not be placed in public domain, naturally, and should only be open to a select number of persons.

with citizens, presumed to be right-minded and law-abiding, and thus in principle has no right to subject them to any duress except for document checks in certain cases. Having faced a hypothetical crime (offense) and having discovered grounds to prosecute a person (persons), the police automatically becomes *criminal* police which functions only after the crime (offense) is committed including incomplete crimes and crimes with the so-called “formal elements) (organization of a gang etc.).

It is extremely important to understand that “reforms of crime-fighting agencies” may lead to overcoming the Soviet inheritance and true modernization only if it considered to be a reform of the ***criminal police***. At this the reformers need to first *conceptually unify* criminal police activities at the institutional, procedural and material law levels to have the opportunity to *technically differentiate* these activities at these levels.

I. Conceptual unification of criminal police activities

1. The need for conceptual unification of criminal police activities at the institutional level. The criminal justice system should be constructed around the delineation of functions of three institutional elements: the police, the prosecutorial agencies and courts. Delineation of these functions reflects a more global idea of distribution of powers at the level of criminal proceedings.

The police may confront a fact of criminal activity in three cases: a) by discovering it while maintaining public order (when fulfilling the functions of administrative police); b) upon receipt of a victim’s complaint or information about a crime from other persons; c) while acting on the basis of a prosecutor’s instruction. In any of these situations it only has the right to collect evidence of a crime and detain the suspect for several hours (dozens of hours) at the crime scene. At this criminal police activities are by nature incompatible with a legal assessment (classification) of a criminal deed and the application of other measures of procedural constraint. In other words, a police representative cannot make any procedural decisions in relation to the official criminal law classification of a criminal deed. His task is to merely collect evidence in the form which can be consequently accepted by court. In such a situation the beginning of criminal police activities is defined solely by the fact of registration of a communication about a crime and does not require any “decisions on the initiation of a criminal case” rooted in the Soviet legislative and regulatory acts of the 1930s and the attempts to use this method to somehow align the uncontrolled wave of Stalinist repressions. Incompatibility of criminal police activities with the official legal assessment of a deed (in the form of initiation of a criminal case, indictment etc.) and the application of any forms of criminal procedural constraint, with the exception of a short-term police custodial detention, as well as the need to collect

evidence in the form acceptable for the court, are sufficient and natural guarantees of protection from police abuse.

In this situation the prosecution should play the role of a “filter” separating the police from the court. It is the prosecutor that, having received evidence from the police, provides a legal assessment on a case and addresses the issue whether to initiate criminal prosecution before the court or dismiss a case. Without going into details, prosecutorial activities are different from policing insofar the quintessence of the former is to “legalize criminal prosecution” (classification of a criminal deed, making a decision on further criminal proceedings etc.) whereas the latter’s role boils down to the collection of evidence.

The task of the court in this situation is not only to solve a criminal case on the basis of the charges pressed by the prosecutor but also to make decisions in the order of judicial control on the application of procedural constraint measures associated with the restriction of individual rights at the pretrial stage, i.e. in the course of criminal police activities (such a restrain measure in the form of custodial detention, arresting property, searches of dwellings, listening to telephone conversations etc).

The Soviet legal system which did not acknowledge the division of powers, completely mixed police and judicial activities at the conceptual level, having delegated in essence prosecutorial and judicial functions to the police. The police started to provide legal assessment of deeds, make decisions on criminal proceedings, apply procedural constraint measures etc. Having vested the police with functions, not characteristic of it, Soviet law substituted at the theoretical level institutional delineation of the police, the prosecution and courts with a pseudo-procedural differentiation of different types of “investigators” and “inquirers”, “heads of investigative units” and “inquiry bodies”, “operational and investigative services” and “investigation bodies”. This, by the way, laid the foundation for numerous inherent contradictions between the “investigator’s procedural autonomy” and agency-based hierarchical control, between the right to resolve a criminal dispute on the merits (for example, by dismissing a criminal case on the grounds of absence of elements of a crime” and purely police (militia) status of a person resolving it, etc. Any attempts of such pseudo-procedural differentiation lead to a theoretical and practical dead end. No matter the name of a police representative (investigator, inquirer etc.), he has the right to be involved in solely criminal police activities with all inherent limitations mentioned above.

The goal of institutional reforms should be the good riddance of soviet-rooted pseudo-procedural differentiation of representatives of police bodies which leads to a hypertrophic role of a policeman in the position of the “investigator” or “inquirer” and the delegation to him of prosecutorial or judicial functions. At the institutional level there are conceptually no “investigation bodies” or “inquiry bodies” (and there should be none) – there are only

criminal police bodies. In this light the idea of the establishment of a single "investigation committee" should be assessed exclusively through the prism of a technical necessity of the establishment of a new police body or the absence of such. The investigation committee cannot be anything else but a "police entity" – the fact proven by the Kazakh reforms in the mid-1990s.

2. The need for conceptual unification of criminal police activities at the procedural level. The noted institutional problems rooted in the Soviet system cannot help but have an impact at the procedural level leading to yet another set of systemic deficiencies one should eliminate.

On the one hand, having rejected a clear delineation of the functions of the police, the prosecution and courts, Soviet law substituted the division of police and judicial activities by a completely artificial delineation of "procedural" and "non-procedural" activities. In other words, the border was drawn in the wrong place. As a result, the Soviet attempts to legalize the so-called "non-procedural activities" led to the emergence of a special phenomenon – field operations and search activities. The latter started to "surround" the allegedly refined procedural activities emerging only after the "initiation of a criminal case."

On the other hand, within the framework of "procedural activities" another artificial conceptual delineation emerged between preliminary investigation and inquiries which are carried out in the majority of cases by the same police entities and which are identical from the point of view of their objectives and procedural means. At the same time all attempts to theoretically justify this "parallelism" failed, which is logical. Any reforms should be based on ***procedural unity*** of criminal police activities whatever its name may be. In developed legal systems criminal policing is "procedurized" through the notion of ***police inquiries*** covering "preliminary investigation", "inquiry" and "field operations and search activities". Police inquiry may include a set of diverse activities in relation to the collection of evidence on a committed crime including activities set forth in the Kazakh Law "On field operations and search activities". The scope of inquiry is limited not by artificial formal "procedural decisions" but rather by a substantive understanding of the fact that it is about policing on the basis of institutional, genetic delineation of the functions of the police, the prosecution and courts with the relevant implication thereof (see above). At the same time if inquiry in Kazakhstan is called "preliminary investigation" (which is possible and is merely about choosing the most convenient wording), such "preliminary investigation" will also remain a policing activity and nothing more. As for "field operations and search activities," there is no, and there cannot be any grounds for its regulation at the level of an autonomous law and its consideration as a "non-procedural" activity. The relevant provisions of the Kazakh legislation on field operations and search activities should in this situation be incorporated in the CPC of the RK.

3. The need for a conceptual unification of criminal police activities at the level of material law. At the level of material law the Kazakh legal system inherited soviet-characteristic dualism of two forms of offenses that serve as the basis for the application of public legal state repression: *criminal offenses* and the so-called *administrative violations*. This dualism in itself is not a purely Soviet phenomenon – it is known in many other countries (Germany, Italy etc.). However the specificity of the Soviet approach, making it different from the named countries and inherited by Kazakhstan, boils down to the absence of the next step: merging of criminal offenses and administrative violations in one conceptual body, or some sort of *criminal law in a broader sense*, with identical principles and approaches. This is what the European court on human rights has been insisting upon for quite some time having developed a theoretical construct of penal matter (French - *matière pénale*).

The Kazakh legal system should not develop the theory of “administrative violations” as an institution of administrative law that arguable has nothing to do with criminal law. Otherwise deformation of the Kazakh legal system will only grow. In the area of policing this deformation manifests itself in the unjustified duplication of police authorities – the emergence of “criminal proceedings detention” and “administrative detention”, “criminal proceedings search” and “administrative examination” etc. In reality there can only be one “detention” and one “search” in a response to unlawful behavior that requires a harsh or a not so harsh punishment from the state (from a fine to a life term in prison). As mentioned above, delineation of functions of administrative and criminal police follows another criterion: depending on whether it acts before the crime is committed as crime prevention or after the crime is committed to bring those responsible to justice (repressive). In this situation not matter what adjectives we add to the word “offense” or “violation” (administrative, tax-related, disciplinary etc.) the police response to them is repressive, and that means criminal.

At the conceptual level it is necessary to unify as soon as possible all deeds that require state repression by bringing them together in a single “criminal law in a broader sense”. The result of such material law unification should be the reform of criminal-repressive policing. Any police response to any violation of the law falling into the category of criminal law in a broader sense including administrative violations may only take place in the form of police inquiry and should boil down to the collection of evidence. The only remaining measure of constraint that the police may use without a court decision should be short-term detention at the scene of a crime (offense) to be regulated by criminal proceedings law.

II. Technical differentiation of criminal policing

1. Possibilities of technical differentiation of criminal policing at the institutional level. A uniform understanding of police which is necessary for

its functional separation from the prosecution and courts ***does not imply*** that from the point of view of state machinery police functions should only be carried out by a single entity. In fact this does not exist in any country although as a rule Ministry of Interior plays a central role in this. In it unlikely that the Kazakh legal system should reject this postulate. But from the subject point of view optimization of executive activities does permit delegating the functions of the police to other entities for investigation of certain crimes (state, tax-related, customs-related etc.). This decision is a *managerial* decision rather than a legal one. It is the managerial rationale and administrative efficiency that create opportunities for technical differentiation of criminal policing at the institutional level.

But from the legal point of view another aspect is important: no matter which agency is charged with the function of investigation of crimes, it remains in any case a mere element of the general notion of the "police". Its authority in such a situation remains a *policing* authority and may not trespass on the above mentioned limits of criminal policing. As it has already been mentioned, nothing will change in this regard even if managerial rationale leads to the creation of a single investigation committee (it will remain to be nothing more than a police entity).

The fight for "investigation machineries" reflecting soviet-rooted institutional deformation should become a matter of the past and should be replaced by a thoughtful discussion of another issue: ***what agencies should be delegated criminal policing functions?***

2. Possibilities of technical differentiation of criminal policing at the procedural level. Uniform procedural understanding of criminal policing also does not imply the impossibility of its differentiation in a purely technical aspect. Furthermore such differentiation is in fact inevitable. It may also be reflected at the level of terminology.

It is clear that the procedural mode of police investigation (inquiry) should depend on the gravity of the hypothetical *punishment* for a violation of the law.

For the most "petty" criminal cases that cover first and foremost current "administrative violations" criminal policing may be limited to drafting an incident report, recording witness testimony (if available) and subpoenaing (delivery) of the person in question to court[13].

In principle contemporary developed legal systems frequently envisage (in the majority of cases in relation to traffic violations) the right of the police

[13] The issue of terminology here remains open although it is important – first of all, from the symbolic and psychological perspectives. In particular, to define the above mentioned categories of actions that are prohibited and subject to criminal prosecution (in a broad sense) one could think about the introduction of the term "criminal offense" and if it is decided that the adjective "criminal" here is redundant (yet again from the psychological point of view) one could use "act punishable by court".

officer to propose that the offender serves his punishment "on the spot", but only in the following three sets of circumstances: 1) in case of a fine (without one losing his driver's license etc.); 2) if the size of the fine for this violation is established by law and is not subject to personalization by the police officer; 3) if the fine is paid by the offender voluntarily (in case of refusal a judicial procedure is mandatory)[14].

In more serious cases (that as a rule include actions prohibited and prosecutable under the Criminal Code of the RK and, partially, the CAV of the RK[15]) police investigation may vary from the point of view of timeframes, allowed evidence collection actions, modes of short-term detention etc. In other words, conceptual unification of criminal proceedings activities which is necessary for the establishment of the ***limits*** of the rights of the police within the framework of criminal proceedings does not exclude all sorts of options of technical differentiation (establishment of more complicated or simpler procedural modes) ***within these boundaries***.

3. Possibilities of technical differentiation of criminal policing at the substantive level. Creation of conceptually unified "criminal (repressive) law in a broader sense" yet again leaves room for technical differentiation of various categories of crimes and (or) offenses. Defining each one of these categories is a purely terminological issue as we have already mentioned.

The criterion for substantive differentiation without which it would be difficult and next to impossible to carry out procedural differentiation should be the *gravity of criminal repression* or, in other words, the type and the size of potential *punishment*.

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[14] Here yet again an issue of terminology arises as regards the definition of a category of criminally punishable acts of lesser gravity, for which criminal proceedings are not mandatory but rather optional for the sake of simplification and acceleration of proceedings (it may be used only if the indicted person insists on it). Such deeds could be called "administrative delicts." It is necessary to emphasize though that this is the only case when the adjective "administrative" can be justifiably and logically used to describe a criminally punishable act, since the police rather than the court has the right to apply punishment as a representative of the executive (public administration) in the described circumstances. It is also noteworthy that most of the potential "administrative delicts" in Kazakhstan are contained in the Code of administrative violations, whereas, unexplainable as it is, the application of punishment for many of them is the exclusive prerogative of the court. Firstly, this by no means complies with global trends. Secondly, why the offense, punishment for which may be determined ***exclusively by court***, is considered an ***administrative*** violation?

[15] For example, petty theft (article 136 of the CAV of the RK), battery (article 79-1 of the CAV of the RK), causing medium-level harm to one's health out of negligence (article 79-3 of the CAV of the RK) etc.

Offenses punishable exclusively by fines should form a separate group[16]. At the same time it appears redundant to include their provisions in the Criminal Code of the RK. They may be codified at the level of individual legislative act(s) with the current CAV of the RK possibly being used as the basis for such act(s). In this situation, though, the Criminal Code should not be viewed as the only source of criminal law. It is of principle importance to understand that criminal policing is pursued regardless of whether one considers a violation of the CC or a violation of any other norm subject to public repression (even in the form of a fine etc).

As for technical substantive differentiation of other violations of criminal law (current "crimes" in the narrow sense), this issue is in principle addressed in the current Kazakh criminal legislation within the framework of the institute of "crime categories." Possible optimization of it is not a subject of this analysis though.

On the whole reform of "crime-fighting" bodies will only be effective if it is carried out on the basis of a unified understanding of "a violation of law that deserves application of public repression" (substantive level), "police inquiry (investigation)" (procedural level) and "police" (institutional level). Only with the development of such ***unified understanding*** it would be reasonable to proceed to a purely technical differentiation of criminal policing at all three mentioned and totally intertwined levels. Without this, a true modernization of the Kazakh legal system is impossible.

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[16] We defined them above as "administrative delicts" (one of the possible names). One should separate from them criminally punishable acts for which a fine may be envisaged not as an exceptional but rather as *one of the possible* punishments (we arbitrarily called them above "criminal offenses" or "acts punishable by court"). It is very important that punishment for an administrative delict is not subject to personalization and thus may be applied by the police with the consent of a person subjected to such liability, whereas punishment even in the form of a fine for a criminal (punishable by court) violation is subject to personalization (both from the point of view of its size and type) and thus may be determined exclusively by court.

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EXPERT OPINION ON THE DRAFT LAW OF THE REPUBLIC OF KAZAKHSTAN ON SIMPLIFIED PRETRIAL PROCEDURE [17]

Introduction

The Draft Law of the Republic of Kazakhstan: on "simplified pretrial procedure,"[18] is to be commended for its desire to eliminate the time-consuming and often unnecessarily cumbersome and pedantic preliminary investigation in cases of slight or mid-level gravity where the defendant has confessed his guilt and does not dispute the extent of harm caused, and, thus, the damages likely subject to an attached civil action (§ 190-1 Draft Law). Like Russia, Kazakhstan already provides for a more expedited investigation and charging of certain less-serious crimes through the use of the "inquest" (*doznanie*) (rather than the preliminary hearing (*predvaritel'noe sledstvie*)) which requires the case to be presented to the prosecutor for charging within 10 to 30 days.[19] Thus Kazakhstan, like Russia,[20] and other European countries, is trying to limit the full-blown preliminary investigation to only extremely grave, or perhaps extremely complicated crimes.

In Spain, for instance, an abbreviated trial procedure was introduced in 1988 which applies to cases in which no more than nine years of prison could be imposed. Pursuant to this procedure, the preliminary investigation is streamlined and the public prosecutor, rather than the investigating magistrate assumes the initiative in gathering the evidence. The trial procedure has also been streamlined. The defendant does not necessarily have any role in selecting this procedure, no confession is required and no statutory discounts are involved.[21]

If the simplified procedure is triggered by a confession we are essentially talking of a procedure which relies on the consent of the defendant, as confessions may no longer be compelled by torture or other

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[17] This analytical document has been prepared by the Legal Policy Research Centre and supported by the Freedom House Office in Kazakhstan. Positions and opinions expressed in the paper may be different from those supported by the Freedom House.

[18] Proekt. Zakon Respubliki Kazakhstan: "O vnesenii izmeneniy I dopolneniy v Ugolovno-protsessual'nyy kodeks Respubliki Kazakhstan po voprosam uproshchennogo dosudebnogo proizvodstva" (hereafter the Draft Law)

[19] § 285(1-3, 13) Ugolovno-protsessual'nyy kodeks Respubliki Kazakhstan (hereafter UPK-RK).

[20] § 223 Ugolovno-protsessual'nyy kodeks Rossiyskoy Federatsii (hereafter UPK-RF) provides for charging within 20-30 days through its inquest procedure.

[21] §§ 757-789 CCP-Spain.

use of deception, trickery, psychological pressure, threats or promises.[22] We will compare the proposed Kazakh procedure with other procedure that rely on the defendant's consent and those which may be triggered, for instance, by an arrest *in flagrante* or just by the simplicity of the case, without requiring consent of the defendant.

Since the defendant's consent is indirectly required in the Draft Law, then the Kazakh legislator should consider whether presence of defense counsel should be mandatory and not waivable, and also whether the pretrial confrontation with the defendant should be re-designed to be a discussion with counsel over the prospect of waiving the full preliminary investigation, or even accepting guilt in the manner of a guilty plea or plea of *nolo contendere* (i.e. accepting the truth of the accusation), but accompanied by a guarantee of a mitigated punishment.

I. The confession as trigger of the simplified procedure

1. Introduction. It is important to recognize that recognitions of guilt in the form of confessions have been the great simplifier of criminal procedure throughout its often ignominious history. When the defendant has confessed, the preliminary investigation may be curtailed or terminated. Similarly, when the defendant admits the charges at trial, the taking of evidence may be simplified, even to the extent that the case may move directly to closing arguments of the parties and the deliberation of the court.[23]

Even where defendants were not allowed to jurisdictionally bring criminal proceedings to a close by entering a plea of guilty, they were regularly either tortured or otherwise compelled, threatened, induced, or inveigled to produce a confession, which served traditionally as the "queen of evidence" upon which professional judges, juries or mixed courts would determine the guilt of the accused.[24] It was the great simplifier even of the

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[22] Kazakhstan ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on June 29, 1998. Art. 17(2) of the Constitution of the Republic of Kazakhstan (hereafter Const. RK) contains a similar prohibition of torture and other cruel, inhuman or degrading treatment.

[23] A study in 1972 by Caspar and Zeisel found that it took half as long to try a case where the defendant had confessed than where a confession was lacking. Even more time may be saved, today, due to the more complicated nature of trials. Joachim Herrmann, *Bargaining Justice–a Bargain for German Criminal Justice?*, 53 U.PITT. L. REV. 755,763 (1992).

[24] *See* Stephen C. Thaman, *Gerechtigkeit und Verfahrensvielfalt: Logik der beschleunigten, konsensuellen und vereinfachten Strafprozessmodelle*, in RECHT—GESELLSCHAFT—KOMMUNIKATION: FESTSCHRIFT FÜR KLAUS F. RÖHL 309 (Stefan Machura & Stefan Ulbrich eds. 2003). Damaska notes that the authorized use of coercion made it unnecessary for continental European officials to have to make concessions to defendants to get them to admit guilt. Mirjan Damaska, *Negotiated Justice in International Criminal Courts*, 2 J. INT'L CRIM. JUST. 1018, 1022 (2004). For the classic argument that plea bargaining replaced torture as the quintessential vehicle for coercing confessions of guilt, *see* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3-22 (1978).

formal, exhaustive preliminary investigation of classic inquisitorial stamp and justified the cessation of further evidence gathering, and the ultimate simplification of the oral trial in the mixed, post-reform inquisitorial systems.

2. The Pre-Trial Confession as Trigger for Expedited or Simplified Proceedings. Many of the expedited trial procedures used in Europe[25] and Latin America[26] allow for a skipping of the preliminary investigation and the setting of a trial within a short period of time if the defendant has given a credible confession to the police or the investigating officer during the pretrial stage. In Norway, a credible pretrial confession will lead to the case being tried by a single professional judge, rather than a mixed court or a jury. In Denmark, a confession will trigger a summary trial without the necessity of filing an accusatory pleading.[27]

In Japan, a suspect who confesses will normally be released from pretrial detention and, following a substantially simpler trial, will usually be sentenced to either credit for the time he had served in pretrial detention, or a substantially more mitigated punishment than she would otherwise have gotten had she remained silent and fought the charges. This arrangement has led some critics to characterize the Japanese system as one of "plea bargaining" although the Japanese themselves, like continental European in days past, condemn the American practice as antithetical to its system's principles.[28]

In the Argentine province of Córdoba, a defendant who has been arrested *in flagrante* or has given a full confession, can request an

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[25] Such as the Italian *giudizio immediato*, or the German *beschleunigtes Verfahren*, which may apply when the "facts are clear" as well. STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 43-44 (2nd ed. 2008)

[26] §§ 388, 395 CCP-Chile provides for a "simplified trial" (*procedimiento simplificado*) when the maximum punishment does not exceed 540 days of deprivation of liberty. In such cases, the judge of the investigation (*juez de garantías*) may impose punishment. Like the new Spanish *juicios rápidos*, the Chilean procedure seeks to induce an early *conformidad*. The procedure tries to link this with an early *acuerdo reparatorio*, which is a type of victim-offender conciliation. § 241 CCP-Chile. Christián Riego, *El procedimiento abreviado en Chile*, in EL PROCEDIMIENTO ABREVIADO 470-71 (Julio B.J. Maier & Alberto Bovino eds. 2001). In some countries, expedited trial procedures are used if the crime is insignificant, such as a misdemeanor, and no pretrial detention is involved. This is the case pursuant to §§ 497-500 CCP-Neuquén (Argentina), as long as there is no objection from the public prosecutor, victim or the defense, the case is not complicated. Gustavo Vitale, *El proceso penal abreviado con especial referencia a Neuquén*, in EL PROCEDIMIENTO ABREVIADO, *supra*, at 366.

[27] This procedure is only applicable if the maximum punishment is less than ten years. The public prosecutor must consent, in which case no formal accusatory pleading is filed and there will be virtually no further taking of evidence. Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, GENERAL REPORTS OF THE XVII CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 996 (K. Boele Woelki & S. van Erp eds. (2007).

[28] David T. Johnson, *Plea Bargaining in Japan*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 142-45 (Malcolm M. Feeley & Setsuo Miyazawa eds. 2002)

"abbreviated trial" without there being a full preliminary investigation. This appears to apply to all crimes, yet the benefit for the defendant appears to be the fact that he/she may get probation, and, upon successful completion thereof, have the case dismissed.[29]

3. Expedited or Simplified Proceedings Triggered by Flagrant Arrest or Simplicity of Case. Certain procedural mechanisms not necessarily related to the giving of consent by the defendant can, however, achieve the same end of skipping the formal preliminary investigation, or avoiding a full trial (by jury) with all the guarantees. Typical among these are expedited trials, where the defendant is arrested *in flagrante* or the evidence is otherwise clear due to an unequivocal confession or other manifest proof, where the prosecutor without consent of the defendant can immediately send the case to the trial court.[30] Where the evidence is actually overwhelming, of course, there is a good chance that many cases that follow such expedited procedures, will not end up in full-blown formal trials, but in consensual resolution of one kind or the other.[31] Finally, many countries provide for a more expeditious police or prosecution investigation of criminal cases of slight or medium-level importance (*misdemeanors*, infractions, etc.), in lieu of the

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[29] § 359 CCP-Córdoba (Argentina) is virtually identical with § 359 CCP-Mendoza (Argentina). DAVID MANGIAFICO & CARLOS PARMA, JUICIO ABREVIADO ARGENTINO 108-09 (2004).

[30] Such procedures were used for thieves already in Ancient Greece. RUSS VERSTEEG, LAW IN THE ANCIENT WORLD 247 (2002).On the French *comparution immédiate* and *convocation par procès-verbal*, *see* §§ 393-397-6 CCP-France, and discussion in JEAN PRADEL, PROCÉDURE PÉNALE 452-55 (9th ed. 1997). On the German *beschleunigtes Verfahren*, *see* §§ 417-420 CCP-Germany. In Italy, the public prosecutor may skip the preliminary investigation and the preliminary hearing in flagrant cases by choosing *giudizio direttissimo* or in cases involving otherwise clear evidence by choosing the procedure of *giudizio immediato*, which can result in the setting of the trial within 15 days. *See* Thaman, *Gerechtigkeit*, *supra* note 7, at 307-09. In Portugal, trial must be set in 48 hours following a flagrant arrest in cases punishable by less than three years imprisonment. Jorge De Figueiredo Dias, *Die Reform des Strafverfahrens in Portugal* 104 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 448, 454-55 (1992). For similar procedures, *see* §§ 356, 362 CCP-Bulgaria (summary and immediate procedures). Venezuela has introduced a similar provision which applies to flagrant crimes, but also to crimes punishable by less than four years deprivation of liberty or a fine only. §§ 372-73 CPP-Venezuela. *See* also the procedure for "clear crimes, uncovered in the moment of their commission," § 513(1) CCP-Moldova, which requires the police to submit a report of the crime to the prosecutor within 12 hours and for the prosecutor, if she believes a crime has been committed, to refer the case to the court, which must then hear it within five days, with one five-day extension. §§ 515-18 CCP-Moldova. Cf. §§452-59 CCP-Belarus, which provides in clear cases where the suspect does not deny responsibility, for submission of the case to the prosecutor within ten days, whereupon the case must be submitted to the judge who must set trial within five days. Expedited procedures for flagrant cases are not used in Paraguay, because prosecutors cannot break the habit of conducting the exhaustive preliminary investigation in every case, even though all evidence is theoretically ready to be produced at trial immediately after arrest. Cristián Riego, *Informe Comparativo Proyecto "Seguimiento de los Procesos de Reforma Judicial en América Latina",* Centro de Estudios de Justicia de las Américas (CEJA), at 56, http://www.cejamericas.org/doc/proyectos/inf_comp.pdf

[31] Thus, the new Spanish *juicios rápidos* provide for trials within 15 days of arrest in flagrant cases, but also ample opportunity to enter a type of guilty-plea, or *conformidad*, at the arraignment stage. §§ 795, 801, 802 CCP-Spain.

full-blown preliminary investigation, or a complete skipping of the preliminary investigation or preliminary hearing, which could be an incentive for a prosecutor to undercharge a case to gain the obvious savings of time and investigative resources.

II. Possibility of treating the confession as a kind of guilty plea which will also simplify proceedings but reward the defendant

1. Identical Treatment of Confession and Guilty Plea (or Stipulation to Charges). One can characterize systems in which a confessing defendant can achieve earlier release from pretrial detention,[32] mitigated charges,[33] or a promise of a mitigated punishment,[34] as plea bargaining systems, despite the protestations of the system's theoreticians who continue to proclaim adherence to the principles of legality and material truth and are openly hostile to American-style plea bargaining.[35] Nowadays, the guilty plea and the confession should be treated in a procedurally similar fashion and there are some indications of a move in this direction.

Nearly all systems allow police to interrogate suspects even before the formal preliminary investigation has been initiated,[36] and some even statutorily allot them a certain number of hours or days for this purpose before

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[32] In the Netherlands, police sometimes make promises of early release to induce confessions, but this is technically illegal. In Germany, a detained suspect will often be offered the prospect of release from pretrial detention, for a confession will render superfluous the detention ground of obstruction of justice. Thaman, *Plea-Bargaining*, *supra* note at 960. While it is illegal in Germany to offer release from pretrial detention as a condition for confessing, practitioners concede that it is commonly done. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 224 (2006). On the common practice in Japan of releasing a person from pretrial detention following a confession, *see* Johnson, *supra* note, at 146-47.

[33] In Germany, confessions are bargained for in exchange for instituting diversion procedures or proceeding by way of penal order in Germany. In Denmark, pretrial confession bargaining exists in exchange for limiting the charges, asking for less punishment, etc., but it is very controversial. It is supported by some in the literature, but strongly opposed by others who find it violates the principles of legality and material truth as well as the prohibition of coerced confessions. Thaman, *Plea-Bargaining*, *supra* note, at 960.

[34] In Norway, police may tell a suspect that the penal code permits a one-third reduction in sentence if he confesses, On the other hand, any promise to release from detention or to mitigate the charges or punishment upon a confession is illegal in Poland and Croatia. *Id.*

[35] In Japan, penal orders exist for minor criminality, a simple non-adversary trial for defendants who confess (92% of all cases between 1987 and 1992) and an adversarial trial with more severe punishment when one is convicted. Johnson, *supra* note, at 142-45, calls this a system of "plea bargaining." *See also* Turner, *supra* note, at 217, who openly calls the German system of *Absprachen* "plea bargaining."

[36] In some Latin American countries, such as Paraguay, police are prohibited from interrogating suspects altogether. Even though police in Paraguay continue to interrogate and characterize the statements as "spontaneous," the provision has led to a reduction in police abuse. Riego, *Informe*, *supra* note, at 41.

the suspect has a right to speak with defense counsel.[37] However most countries, Kazakhstan included, now recognize that a suspect should not be interrogated unless he or she has been advised of the right to counsel and to silence, and has waived those rights (§§ 114, 216(3), 217(2) UPK-RK).[38]

So-called *Miranda* rights are less effective in their protection of criminal suspects in those countries in which the suspect is permitted to waive the right to counsel and speak to the interrogator before he or she has actually had a chance to talk with a lawyer.[39] The Kazakh law is superior in this respect, for it appears that a suspect-defendant may only waive the right to counsel after counsel has actually been appointed (§ 73(1) UPK-RK.).[40] In Kazakhstan, the defendant has a right to speak to a lawyer before the first interrogation (§ 68(2) UPK-RK) and to have the lawyer present during the interrogation, though the right may be waived (§216(2) UPK RK). In Germany, the Netherlands, Norway and Scotland, however, presence of counsel during the interrogation may be denied by the interrogating official.[41]

The preferred position is to require counsel to be present during all interrogations,[42] just as counsel is required for all consensual procedures designed to elicit procedure-ending or procedure-simplifying admissions or

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[37] Three to six days in the Netherlands, Thaman, *Plea-Bargaining* , *supra* note, at 960, 20 hours in France (§ 63 CCP-France), and a minimum of 48 hours in Japan. Kuk Cho, *The Japanese "Prosecutorial Justice" and Its Limited Exclusionary Rule*, 12 COLUM. J. ASIAN L. 39, 54 (1998). In some systems a space for interrogation is illegally created by arresting a suspect under the pretext of an administrative violation and then questioning about a suspected crime. On the use of this practice in Japan, *Id.*¸ at 55-56, and Russia, *see* HUMAN RIGHTS WATCH, CONFESSIONS AT ANY COST: POLICE TORTURE IN RUSSIA 7 (1999).

[38] All former Soviet republics, with the exception perhaps of Tajikistan and Uzbekistan, have also recognized so-called *Miranda* rights. Stephen C. Thaman, *The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy*, in CRIME, PROCEDURE AND EVIDENCE IN COMPARATIVE AND INTERNATIONAL CONTEXT. ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMASKA 102-03 (John Jackson et al. eds. 2008). The landmark case is, of course Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* rights are also recognized in Germany, Denmark, the Netherlands, Croatia, Norway and Poland. Thaman, *Plea-Bargaining* , *supra* note, at 960. Cf. § 319(3)(6) CCP-Bulgaria. On the international spread of *Miranda* warnings, *see* Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L. REV. 581-624 (2001).

[39] This is of course permitted in the *Miranda* decision. Many of the post-Soviet republics allow for waiver before the suspect-accused has consulted with counsel: §§ 41(2)(6), 47(1) UPK-Belarus; § 48 CCP-Estonia (with exception of when counsel is mandatory); § 47(1) UPK-Kyrgyzstan; § 88(1) CCP-Latvia (unless defendant has requested a lawyer already); § 49 CCP-Lithuania; § 52 UPK-Tajikistan; § 83(1) UPK-Turkmenistan; § 52 UPK-Uzbekistan.

[40] Similar provisions can be found in § 72(2) UPK-Armenia; § 71(2) UPK-Moldova and in § 103(2) Model Code for the CIS.

[41] Thaman, *Plea-Bargaining* , *supra* note, at 961.

[42] This is the case in Croatia, Italy (§ 350(2) CCP-Italy) and Russia (§ 75(2)(1) CCP-Russia). *Id.* In Russia and Italy, no statement may be used if the defendant was interrogated without counsel being present, unless the defendant consents to its use. For a discussion, *see* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note, at 85-89.

stipulations. In this respect, Kazakh law is quite good, for it appears to require defense counsel to be present whenever defendant so requests, or if defendant is in pretrial detention (§§ 71, 134, 216, 217 UPK-RK). Because of the persistence of allegations of the routine use of torture and other coercive methods during police interrogations in Russia, § 75(2)(1) UPK-RF provides for the exclusion of any statements taken in the absence of counsel (even where this absence is due to the defendant's waiver), if the defendant retracts the statement at trial. Since similar accusations have been made in relation to Kazakhstan,[43] it would behoove the legislature to introduce a similar exclusionary rule. The problem does not end there, however. In Russia criminal investigators and police have resorted to the cynical appointment of so-called "pocket lawyers" who work with the police in either convincing suspects to talk, or standing by while force or illegal methods are used.[44] Thus it must be ensured that all appointments of counsel for the indigent or those otherwise in custody must go through local bar associations and not through law enforcement agencies.

Thus, once we treat the investigative procedure of interrogation as a right of the defendant, to which defendant and counsel must consent, and where all coercion, whether physical or psychological is excluded, then it begins to look like a pretrial hearing dedicated to a consensual resolution of the case, called "plea bargaining" in the U.S., but existing under other rubrics now in many if not most formerly inquisitorial countries of the civil law world.

Kazakhstan now requires a judicial resolution to detain a suspect pre-trial (§ 14(2) UPK-RK), thus requiring that an arrested person be brought before a judge within 72 hours.[45] The fact that defendants will now be seeing a judge much sooner in Kazakhstan than before the 2008 changes in the law, makes it easier to institute an early pretrial hearing where the parties and judge could discuss an early resolution of the case through consensual means.

Since the Draft Law limits the "simplified proceedings" to crimes of slight or mid-level gravity, that is, not exceeding five years deprivation of liberty in the case of intentional crimes,[46] then one could transform the procedure using a consensual model, such as that of the Italian *patteggiamento* or the French

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[43] Amnesty International, *Kazakhstan: Summary of Concerns on Torture and Ill-Treatment. Briefing for the United Nations Committee Against Torture. November 2008* (Sept. 2008) http://www.amnesty.org/en/library/asset/EUR57/001/2008/en/1bc36da3-8bd5-11dd-8e5e-43ea85d15a69/eur570012008en.pdf

[44] Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L. J. 355, at 376-77.

[45] This has been criticized by Amnesty International, rightfully, as still being too long a period of detention before a judge subject the arrest to review and thus too long a period for a suspect to be softened up for interrogation. Amnesty International, *supra* note, at 4.

[46]§10(2-3) Ugolovnyy kodeks Respubliki Kazakhstan, http://www.pavlodar.com/zakon/?dok=00087&ogl=02002&og=1

reconnaisance prelable de coupabilité which are limited to cases punishable by no more than five years (and grant a 2/3 discount in punishment), or that of the Spanish *conformidad* which is limited to crimes punishable by less than six years, but contains no discount. The advantage here would be that the procedure of taking the confession (guilty plea) would be in open court, and not in the back rooms of police stations or jails.

These models are preferable to the American model of plea bargaining, because, by being limited to less serious crimes, there is less pressure on defendants to accept "deals" due to the pressure of very long prison sentences if they go to trial, a problem discussed *infra* in relation to the American system. Less serious crimes are also those where there is less public need to have a full-blown public trial to determine guilt. Great savings can thus be made and can be justified if the procedures are fair, non-coercive, and conducted in open court.

I will now present a survey of various modes of consensual resolution of cases for mid-level crimes, comparing them with the American plea bargaining system. This material has been prepared for a future book, and could be useful if the Kazakh legislature decides to act upon these or similar suggestions.

2. Modes of Consensual Procedures Requiring a Confession of Guilt (Guilty Plea) or Stipulation.

1. The Gradual but Reluctant Acceptance of Guilty-Plea Mechanisms in Civil Law Jurisdictions. In the civil-law world, defendants were not normally allowed to enter a guilty plea which would constitute sufficient evidence for the court to immediately move to judgment without further evidence-taking. It did not matter if the trial was before a jury, mixed court, or one or more professional judges. To allow the defendant to dispose, himself, of the issue of guilt was seen to violate many important trial rights, among them, the presumption of innocence and the principle that only a judge may render judgment based on evidence presented at the trial.[47] This view still holds sway in many countries.[48] Despite judicial ideology which is hostile to the idea of negotiated justice, it is my opinion that the nature of the criminal process invariably leads to informal "deals" between prosecution and defense, which often include the judge. German *Absprachen* developed from just such an informal practice. Russian lawyers and prosecutors also now

[47] The Italian *patteggiamento*, discussed *infra*, does not involve any admission of guilt for the Italian legislator felt this would violate the presumption of innocence. William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties, of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE JOURNAL OF INTERNATIONAL LAW 1, 23 (1992); Hans-Heinrich Jescheck, *Grundgedanken der neuen italienischen Strafprozeßordnung in rechtsvergleichender Sicht*, in STRAFGERECHTIGKEIT: FESTSCRIFT FÜR ARTHUR KAUFMANN ZUM 70. GEBURTSTAG 670, 671 (Fritjof Haft et al eds. 1993).

[48] For instance, in Germany, Denmark, and Norway. Thaman, *Plea-Bargaining*, *supra* note, at 973.

admit that going as far back as Soviet times, cases were dismissed if the suspect agreed to work for the police, and criminal charges were reduced to administrative offenses following negotiations .[49]

An exception among civil law countries was Spain, where as early as the mid-19th century a defendant was allowed to terminate the taking of evidence and cause the trial to move to the imposition of punishment by expressing his conformity (*conformidad*) with the pleadings of the prosecution parties.[50] This tradition has continued in an uninterrupted fashion up to this day and has served as a model for some Latin American countries in the development of guilty-plea mechanisms.[51]

Otherwise, the first modern breaks in the wall erected in the civil law world against guilty pleas came, first with recommendations by the Council of Europe to introduce guilty pleas and trial-simplifying procedures in 1987[52] and then with the introduction in the CCP-Italy of 1988 of the "application for punishment upon request of the parties," commonly called the *patteggiamento* or "deal," which originally provided for up to a one-third discount on punishment and was limited to crimes punishable by no more than three years deprivation of liberty. The *patteggiamento* has become one of the most influential models for guilty plea mechanisms which have been

[49] S. Militsin. *Sdelki o priznanii viny: vozmozhen li rossiyskiy variant?*. ROSSIYSKAIA YUSTITSIIA. Vol. 12 (1999), at 41-42.

[50] Though the procedure was codified in § 655 CCP-Spain, enacted in 1882, there is evidence that the procedure was introduced as early as 1848. NICOLÁS RODGRÍGUEZ GARCÍA, EL CONSENSO EN EL PROCESO PENAL ESPAÑOL 78 (1997).

[51] The Spanish *conformidad* was the model for the *juicio abreviado* ("abbreviated trial") provided for in § 435 CCP-Argentina (Federal). Alberto Bovino, *Procedimiento abreviado y juicio por jurados*, in EL PROCEDIMIENTO ABREVIADO, *supra* note, at 65-66. A similar procedure was introduced in 1994 in the CCP of the Argentine Province of Tierra del Feugo under the name of "omission of the trial" (*omisión del debate*), Eugenio C. Sarrabayrouse, *La omisión del debate en el Dódigo Procesal Penal de Tierra del Fuego. Su régimen legal y aplicación práctica*, in EL PROCEDIMIENTO ABREVIADO, *supra* note, at 300-02. § 415 CCP-Córdoba (Argentina) provides for an "abbreviated trial" avoiding any taking of evidence if the defendant confesses, and the punishment may be no higher than that requested by the public prosecutor. Similar provisions can be found in other Argentine provinces: § 392 CCP-Chaco; § 367 CCP-Chubut, § 435 CCP-Corrientes; § 415 CCP-Entre Rios; § 377 CCP-La Pampa; § 373 CCP-Neuquén § 414 CCP-Salta; §§ 499,506 CCP-Formosa. MANGIAFICO & PARMA, *supra* note, at 95 (2004). The *conformidad* was also clearly the model for many of the "abbreviated procedures" introduced in other parts of Latin America in the last decade or so: § 373 CCP-Bolivia (1999); § 406 CCP-Chile (2000). The possibility of entering a "guilty plea" was broached in § 35 of the Model Code of Criminal Procedure for the Commonwealth of Independent States (MCCP-CIS) which was influential in many of the new post-Soviet CCPs.

[52] Council of Europe. Committee of Ministers. Recommendation R(87) 18, Concerning the Simplification of Criminal Justice (Sept. 18, 1987), § III.A.7 https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=608011&SecMode=1&DocId=694270&Usage=2 (hereafter COE, Simplification (1987).

subsequently introduced in Europe,[53] the former Soviet republics,[54] and some Latin American countries.

Finally, a more wide-open negotiation of guilty pleas has been adopted in some countries based on the classic American model and often as the result of American influence in the legislative process in those countries.[55]

2. The Scope of the Application of Guilty Plea-Nolo Contendere Mechanisms. In the U.S., a guilty plea may be accepted in relation to any charge, even the most serious, no further evidence will be taken, and the case will move to the sentencing phase and the imposition of punishment.[56] This is usually the model applied in countries of the common law, but it has made its way into some of the new criminal procedure codes in the civil law world.[57]

The consensual procedures in the civil law realm are, however, normally not applicable in prosecutions for serious or especially grave offenses.[58] The Spanish *conformidad* is applicable, in its traditional form, to

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[53] A similar procedure was introduced in Croatia in 2002. Thaman, *Plea-Bargaining*, *supra* note, at 973

[54] I drafted a chapter on consensual procedures for the official working group that was drafting the CCP-Russia, which was eventually passed in 2001. The legislator finally adopted a procedure which I had modeled on the Italian *patteggiamento*. *Rekomendatsii parlamentskikh slushaniy "O khode podgotovki proekta Ugolovno-protsessual'nogo kodeksa Rossiyskoy Federatsii" *po problemam, kasaiushchikhsia sokrashchennykh predvaritel'nykh slushaniy i form sudoproizvodstva)*. Jan. 16, 2001 (copy on file with author).

[55] Examples are to be found in Nicaragua, Venezuela, Estonia, Latvia, Lithuania, Moldova and Georgia, Thaman, *Plea-Bargaining*, *supra* note, at 974

[56] This should be distinguished from procedure where the defendant may admit guilt, thus shortening the trial, or even allowing for a trial before a professional bench, rather than one with lay participation.

[57] There appear to be no limits to the types of cases which may result in a guilty plea in § 373 CCP-Bolivia, in the "agreements" provided for in §§ 539-43 CCP-Latvia (2005) or in § 679 CCP-Georgia (2004 Amendments), *see* Jason D. Reichelt, *A Hobson's Experiment: Plea Bargaining in the Republic of Georgia*, 11 J. EAST EUROPEAN L. 159, 168 (2004). In Costa Rica, a *conformidad*-type procedure with a substantial reduction in punishment applies to all charges. Javier Llobet Rodríguez, *Procedimiento abreviado en Costa Rica, presunción de inocencia y derecho de abstención de declarar*, in EL PROCEDIMIENTO ABREVIADO, *supra* note, at 446. In § 403 CCP-Honduras, the "abbreviated procedure" applies to all crimes as long as the accused has no criminal record. The "agreement" (*acuerdo*) in § 61(para.1) CCP-Nicaragua appears to be very similar to the U.S. plea bargain, as it allows free negotiation of the charges in all types of cases. The "procedure for admitting the facts" in § 376 CCP-Venezuela is applicable to all cases, though the discount one receives differs depending on the seriousness of the offense. According to § 415 CCP-Córdoba (Argentina) and §§ 510-511 CCP-San Juan (Argentina), the only limit to punishment is that requested by the public prosecutor in the pleadings. MANGIAFICO & PARMA, *supra* note, at 95, 153.

[58] They apply only to misdemeanors in Poland, Thaman, *Plea-Bargaining*, *supra* note, at 975. Per § 239 CCP-Estonia, they may not apply to first degree offenses punishable by a minimum of four years or maximum of life imprisonment. According to § 504(2) CCP-Moldova they apply to all but "especially serious" crimes. For a cautious acceptance of consensual procedures for less-

crimes in which the prosecuting parties plead for imposition of a punishment which does not exceed six years deprivation of liberty.[59] The six-year period has been adopted in some Argentine provinces.[60] *Conformidad*-type procedures exist, however, where punishments may exceed six years,[61] or with even stricter limitations than the original Spanish variant.[62] In some Latin American jurisdictions the parties may agree to a disposition as to the facts and the sentence in minor cases and the judge may not sentence in excess of the agreed-upon limit.[63]

Although the Italian *patteggiamento* was originally limited to crimes punishable by no more than three years, the legislator extended its scope in 2003 to crimes punishable by up to five years.[64] This tendency to expand the

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serious crimes. Klaus Tiedemann, *13 Thesen zu einem modernen menschenrechtsorientierten Strafprozeß*, ZEITSCHRIFT FÜR RECHTSPOLITIK 107, 108-09 (1992).

[59] § 655 CCP-Spain definitely limits *conformidad* to six years in normal prosecutions, but the provisions in Spain's "abbreviated trial" (*procedimiento abreviado*), which were introduced in 1988, are confusing and have been interpreted by some to extend the *conformidad* to cases punishable by nine, or even twelve years. VICENTE GIMENO SENDRA ET AL, DERECHO PROCESAL PENAL 335 (1996). In practice, however, the courts uniformly limit its application to six years. Nicolás González-Cuéllar Serrano, *La conformidad en el proceso abreviado y el llamado "juicio rápido"*, LA LEY, No. 5895, Nov. 18, 2003, 1,3. In a 2002 Spanish law which introduced "expedited trials" (*juicios rápidos*), a defendant may express his/her *conformidad* in any case where the public prosecutor is requesting a sentence of three years or less, although the amount of actual prison time is limited to two years, as defendant gets a one-third reduction in these cases, making the procedure look more like the Italian *patteggiamento*. §§ 800(1), 801(1) CCP-Spain.

[60] Such as in the Federal Argentine CCP, Alberto Bovino, *Procedimiento abreviado y juicio por jurados*, in EL PROCEDIMIENTO ABREVIADO, *supra* note, at 65, as well as in the CCP-Chaco (Argentina) and CCP-Missiones (Argentina). MANGIAFICO & PARMA, *supra* note, at 144, 150.

[61] For instance, up to seven years in Cuba. Carlos Loarca & Mariano Bertelotti, *El procedimiento abreviado en Guatemala*, in EL PROCEDIMIENTO ABREVIADO, *supra* note, at 413. Procedures similar to *conformidad* apply to crimes punishable by up to eight years in the CCP of Buenos Aires, and to all crimes in the CCP of the Argentine province of Córdoba, Gabriela E. Córdoba, *El juicio abreviado en el Código Procesal Penal de la Nación*, in EL PROCEDIMIENTO ABREVIADO, *supra* note, at 249.

[62] The Model CCP for Ibero-America originally called for limiting such procedures to crimes punishable by no more than two years, Bovino, *supra* note, at 65. The CCP-Chubut (Argentina), limits the "abbreviated procedure" to crimes punishable by two years, and any jail time must be suspended. MANGIAFICO & PARMA, *supra* note, at 152-53. Three year lids apply in the CCP-Tierra del Fuego (Argentina), Sarrabayrouse, *supra* note, at 302, as well as in the "omission of trial" in Santa Cruz (Argentina), and the "acuerdo" in Neuquén (Argentina). MANGIAFICO & PARMA, *supra* note, at 146, 150. The Portuguese *processo sumarissimo* provides for acceptance of a punishment of no more than six months without trial. Jescheck, *supra* note, at 675.

[63] According to §§ 503-04 CCP-Neuquen (Argentina), the limit is two years and the judge in his/her judgment must accept the facts as agreed upon by the parties. Vitale, *supra* note, at 367. The Chilean "abbreviated procedure" applies, in the manner of a Spanish *conformidad*, if the public and private prosecutors in their accusatory pleadings request a punishment of deprivation of liberty which does not exceed five years, even though the maximum punishment for the crime could be higher. Riego, *supra* note, at 457-58.

[64] § 444(1) CCP-Italy. Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARVARD INT'L L. J. 1, 49 (2004). In reality, under the original version of the *patteggiamento*, the

applicability of consensual procedures in civil law jurisdictions extends to Russia, where the provision, modeled on the Italian *patteggiamento*, was applicable to crimes punishable by no more than three years upon first reading in the State Duma, was raised to five years upon passage of the CCP-Russia in 2001, and expanded to ten years in an amendment to the code in 2003.[65]

3. Statutory Discounts or Free Bargaining Between Prosecution and Defense? Statutory discounts for defendants who admit guilt are unknown in the U.S. Of course, there must be some incentive to plead guilty and waive the right to a full trial, whether by jury, mixed court, or even a court composed of professional judges or lay magistrates, and a guilty plea is usually considered to be a mitigating factor which will lead to a lesser sentence than if one were convicted at jury trial. While under the U.S. federal sentencing guidelines a plea of guilty is supposed to result in a one-third discount in sentence, the actual discount is really more like two-thirds, which can make the procedure inherently coercive.[66] While it is prohibited in England and Wales for a defendant to bargain with the judge for a discount if she enters a plea of guilty, discussions between prosecution and defense often lead to a dismissal of charges before a defendant pleads guilty.[67] It is generally accepted that English magistrates and crown courts will grant around a 1/3 discount to anyone who enters a timely guilty plea, though this is nowhere codified and is not binding.[68] Although there is no codified discount in Scotland, the High Court has ruled that the discount must be at least 1/3

court could substitute a fine for imprisonment, and could sentence to no more than two years deprivation of liberty after having reduced the penalty by one-third. The current version allows deprivation of liberty of up to five years after the one-third reduction, i,e., would be applicable to crimes with a substantially higher punishment. The French *reconnaissance préalable de culpabilité* (preliminary recognition of guilt) is also applicable to crimes punishable by no more than five years deprivation of liberty. § 495-7 CCP-France. Pursuant to § 420(1) CCP-Paraguay, the "abbreviated procedure" has a similar five year maximum, Loarca & Bertelotti, *supra* note, at 413. The Guatemalan "abbreviated procedure" was originally applicable to crimes punishable by a maximum of two years, but has now been extended to those punishable by up to five years. § 464 CCP-Guatemala, *Id*. at 413-14.

[65] § 314 CCP-Russia. *See* Thaman, *Two Faces*, *supra* note, at 110. Croatia's guilty-plea procedure also applies to crimes punishable by up to ten years. Thaman, *Plea-Bargaining*, *supra* note, at 976.

[66] In the U.S. there is often a huge differential between the likely sentence after a jury verdict and the public prosecutor's offer in plea negotiations. *Id*. Although the U.S. Sentencing Guidelines purportedly provide for a 1/3 discount following a plea of guilty, the discount in practice amounts to around 2/3, with the average sentence following a guilty plea being 54.7 months deprivation of liberty, in comparison to 153.7 months after trial. Turner, *supra* note, at 205.

[67] STEPHEN SEABROOKE & JOHN SPRACK, CRIMINAL EVIDENCE AND PROCEDURE: THE STATUTORY FRAMEWORK 275 (1996)

[68] For an estimate that the discount is from 25-30%, *see* THE ROYAL COMMISSION ON CRIMINAL JUSTICE ¶41 (Viscount Runciman of Doxford ed. 2003).

upon a timely entry of a guilty plea.[69] In Scandinavia, the discounts appear to be informally recognized, rather than codified.[70]

Only with the introduction of the Italian *patteggiamento* in 1988, did the legislator codify a discount in sentence for agreeing to waive the full trial with all its guarantees and not contest the charges. In those countries, which, following Italy, have introduced similar procedures, the great majority have maintained the discount of one-third of the punishment which the judge would have otherwise imposed, taking into consideration the gravity of the offense and the personal characteristics of the offender.[71] Although there was no statutory discount connected with the original version of the Spanish *conformidad*, the version applicable in the new *juicios rápidos* has been modeled on the *patteggiamento* and provides a 1/3 discount in punishment, from a maximum of three years to two.[72]

In Croatia, however, the sentence to be imposed may not exceed one-third of the maximum sentence, resulting in a 2/3 discount.[73] In Costa Rica, when the defendant accepts the maximum charges presented by the prosecuting parties (including the aggrieved party) in a *conformidad*-like procedure, he or she may not be sentenced to more than 1/3 of the statutory minimum required for the offense.[74] The "abbreviated procedure" introduced in El Salvador in 1998 applies to cases punishable by no more than three years deprivation of liberty, and the criminal code in such cases requires a sentence not including deprivation of liberty in cases where the punishment would have been from six months to one year, and allows the judge to

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[69] Thaman, *supra* note, at 977.

[70] A confession or admission of guilt will substantially mitigate in Denmark, and usually lead to a 1/3 discount in Norway. *Id.*

[71] Under the terms of § 444(1) CCP-Italy, a judge could, by taking into account mitigating circumstances, decide that the appropriate sentence was 7.5 years, and then reduce by 1/3 to get to the maximum allowable five years. § 37 CCP-Colombia allows a defendant to get a 1/3 discount on an "anticipated judgment" (*sentencia anticipada*) if she agrees to the charges before the preliminary investigation is complete but the discount falls to 1/6 if she makes this decision after the case is charged and before trial. Oscar Julián Guerrero Perralta, *Colombia*, in LAS REFORMAS PROCESALES PENALES EN AMÉRICA LATINA 197, 234 (Julio B.J.Maier et al eds. 2000). According to § 440(1) CCP-Lithuania, if a defendant subject to expedited proceedings agrees to admit guilt, the court may not sentence him to more than 2/3 of the maximum punishment and may sentence to 1/3 less than the minimum required sentence.

[72] The procedure for *juicios rápidos* applies to flagrant crimes punishable by no more than five years. §§ 795, 801(1-2) CCP-Spain. Nicolás González-Cuéllar Serrano, *La conformidad en el proceso abreviado y el llamado "juicio rápido"*, LA LEY, No. 5895, Nov. 18, 2003, at 1.

[73] Thaman, *Plea-bargaining*, *supra* note, at 977. According to § 376 CCP-Venezuela, the general discount in cases of *admisión de los hechos* is from 1/3 to ½ of the sentence which would otherwise be imposed. However, the discount is limited to 1/3 in relation to crimes of violence punishable in excess of eight years.

[74] §§ 373-75 CCP-Costa Rica, Llobet Rodríguez, *supra* note, at 434.

suspend jail sentences in cases punishable from one to three years.[75] In a similar way, the French guilty plea introduced in 2004, while applying to cases punishable by up to five year deprivation of liberty, allows, upon the "recognition of guilt," a prison sentence of no more than one year, and no more than one-half of the length of what the defendant would have received, and this prison sentence may be suspended.[76] A one-fourth discount is given according to the Honduran "abbreviated procedure."[77]

In the Estonian "settlement proceedings" the prosecutor, defendant and victim enter into a settlement agreement after free negotiations which then must be accepted by the judge in its entirety, or rejected, whereupon the case must be tried according to the normal procedures.[78] In Colombia, an *audiencia especial* (special hearing) may be convoked at which prosecution and defense may explicitly enter into bargaining, i.e., negotiate the elements of the charged crime and the level of defendant's participation.[79]

In some of the recently enacted consensual procedures, specific language links plea or sentence bargaining to what in the U.S. is called a "cooperation agreement." Conditions are thereby attached to the "deal" that require the defendant to aid in the prosecution of others by testifying, providing information, etc.[80] Similar provisions have been introduced in Latin America[81] and in some of the former Soviet republics.[82] In Latvia, the 2005

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[75] §§ 379-89 CCP-El Salvador. Edgardo Amaya Cóbar, *El procedimiento abreviade en el proceso penal de El Salvador*, in EL PROCEDIMIENTO ABREVIADO, *supra* note, at 402-03. Similarly the "abbreviated procedure" in Guatemala also allows for suspension of the imposition of prison sentences for up to three years and the commutation of sentences for up to five years. Loarca & Bertelotti, *supra* note, at 413.

[76] § 495-8 CCP-France.

[77] § 404(para.4) CCP-Honduras

[78] § 248 CCP-Estonia. The settlement includes an agreement as to the charges, the punishment and the amount, if any, of compensation or damages awarded to the aggrieved party or civil complainant. § 245 CCP-Estonia. The Nicaraguan "acuerdo" also allows unrestricted bargaining between the parties. § 61(para.1) CCP-Nicaragua.

[79] As of 2000, however, the procedure was seldom used. Guerrero Peralta, *supra* note, at 235-36. Pursuant to the "acuerdo" in § 503 CCP-Neuquén (Argentina), defense and prosecution can negotiate charge and punishment, as long as the latter does not exceed three years. MANGIAFICO & PARMA, *supra* note, at 150.

[80] *See* § 5K1.1 U.S. Sentencing Guidelines, which provides for so-called "downward departures" for cooperation with the federal authorities, which can lead to a sentence below the statutory minimum per 18 U.S.C § 3553(3). The federal prosecutor thus has virtually complete control over whether the "cooperation" of the defendant is sufficient to merit the lower sentence. Wade v. United States, 504 U.S. 181 (1992). *See also* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 217-19 (2004).

[81] *See* § 62 CCP-Nicaragua, where the testimony of a defendant must be truthful, or "the agreement is broken in relation to the punishment imposed and the judge shall sentence imposing the punishment which he deems adequate in relation to the acceptance of the acts by the accused and the evidence presented."

CCP recognizes a defense “right to cooperate” with law enforcement officials as a basis for its cooperation agreements[83] which can lead to dismissal of the charges in all but the most serious cases as long as the defendant has aided in solving a crime more serious than the one he or she was charged with.[84]

In the U.S. there are often no promises as to the extent of reduction of sentence or whether charges will be dismissed until the defendant actually “cooperates” and the prosecution has positively assessed the quality of such cooperation. This model appears to have also been adopted in Moldova, where no actual “plea bargain” is entered into and a formal sentencing hearing is conducted before the actual sentence is determined.[85] Cooperation agreements have been criticized as benefitting exclusively the “gravely guilty” who have important information about serious crimes to peddle, whereas the marginally guilty, bereft of such knowledge, are punished in a double fashion.[86]

4. Must the Defendant Admit Guilt? The Anglo-American guilty plea was originally based on the assumption that the defendant would admit the charges contained in the accusatory pleading, but over the years judges have also allowed the defendant, in the U.S., to accept a plea bargain with the

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[82] Chapter LXIV of the CCP-Georgia, signed into law on February 13, 2004, introduces a “plea agreement” designed to substitute for the full criminal trial. § 679-1(1) CCP-Georgia. The “plea agreement” appears to be primarily introduced to effectuate co-operation of the defendant in the prosecution of serious crimes, and especially public corruption. § 679-1(2) CCP-Georgia. In exchange, the prosecutor will ask for a reduced sentence or even, in the case of exceptional aid in solving serious cases, be able to dismiss the prosecution. §§679-1(5,9) CCP-Georgia. If the testimony or other co-operation proffered by the defendant is deemed to be unreliable or fail to prove guilt in the trial against the third party, the plea agreement shall be null and void. § 679-1(8) CCP-Georgia. According to §210 CCP-Lithuania, the preliminary investigation may be suspended in cases of suspects who help in the detection of the activities of a “criminal association” after the suspect has confessed to such participation. However, if the suspect refuses to give evidence in the case of a member of such association, the proceedings may be re-opened. § 505(1)(1) CCP-Moldova advises the prosecutor, when engaging in settlement discussions with the defendant, to take into account “the desire of the accused/defendant to aid in the realization of the criminal prosecution or in the accusation of other persons.” Co-operation agreements were recently introduced into Russian law. A suspect/defendant, who motion to enter a cooperation agreement is accepted, and who testifies or performs other task aimed at aiding the prosecution of other suspects, may be sentenced to below the statutory minimum, or even have sentence suspended. §§ 317.1, 317.6, 317.77(5) UPK-RF.

[83] The “right to cooperate” can be expressed in: (1) choosing a simpler type of procedure; (2) influencing the conduct of teh procedure; or (3) uncovering criminal acts committed by other persons. §§ 22, 66(1)(2) CCP-Latvia. §§ 64(2)(8,9,10,21) CCP-Moldova also recognizes the defendant’s “right” to admit the charge and conclude an agreement to plead guilty, to agree to special procedures and to reconcile with the victim.

[84] § 410(1,2) CCP-Latvia.

[85] Although the “agreement to admit guilt” is called a ‘deal between the public prosecutor and the accused...who gave his agreement to admit his guilt along with a shortening of the punishment, § 504(a) CCP-Moldova, it appears that any recommendation of the prosecutor can be rejected by the judge who determines the punishment after argument of the parties. §§ 508-09 CCP-Moldova.

[86] LUIGI FERRAJOLI, DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE 65 (5th Ed. 1998).

entry of a plea of *nolo contendere*, that is, to not contest the charges. Such pleas do not require an explicit admission of the facts underlying the accusatory pleading, and cannot be used as evidence of guilt in a civil action.[87] Some U.S. judges, however, will not accept a plea unless the defendant explicitly admits guilt.[88] Furthermore, some U.S. judges will even accept a "guilty plea" in cases where the defendant actually denies guilt of the charged offense. This practice was upheld by the U.S. Supreme Court as long as the judge makes sure there was a factual basis for the finding of guilt.[89]

The Spanish procedure of *conformidad*, somewhat like a U.S. plea of *nolo contendere*, does not require an explicit admission of guilt, but is tantamount to an expression that the defendant has no objection, that is, agrees with the validity of the charges.[90] The Italian *applicazione della pena sulla richieste delle parte* (application of punishment upon request of the parties) also is considered to be, not an admission of guilt, but a "request for punishment."[91] Some of the procedures modeled on the Italian *patteggiamento* also do not require any admission of guilt. An example of this is the Russian procedure for "agreement with the charges."[92] Occasionally a consensual procedure patterned on U.S. plea bargaining does not require an

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[87] Thaman, *Plea-Bargaining*, *supra* note, at 979. Some early 19th century plea bargaining, especially to violations of liquor laws, routinely allowed pleas of *nolo contendere*. FISHER, *supra* note, at 21-22.

[88] Fed. R. Crim. P. 11(f) allows each judge to decide whether he/she will require an admission of guilt. Thaman, *Plea-Bargaining*, *supra* note, at 980.

[89] North Carolina v. Alford, 400 U.S. 25 (1970). Such pleas are not accepted in England and wales. Richard Hatchard, *Criminal Procedure in England and Wales*, in RICHARD HATCHARD ET AL, COMPARATIVE CRIMINAL PROCEDURE 20 (1996). Federal Argentine judges will also sometimes reject a *conformidad* if the defendant denies guilt. MANGIAFICO & PARMA, *supra* note, at 85.

[90] In § 406 CCP-Chile it appears that the language of the Spanish procedure has been adopted, not requiring an explicit acceptance of guilt, though there is a dispute in the literature as to whether the *conformidad* is tantamount to a confession of guilt. Riego, *supra* note, at 462. An admission of guilt is neither required in Costa Rica, Llobet Rodríguez, *supra* note, at 440, nor in El Salvador, Amaya Cóbar, *supra* note, at 404. The same is true in many Argentine jurisdictions: the federal system, Chaco, Mendoza, Missiones, or San Juan provinces. MANGIAFICO & PARMA, *supra* note, at 80, 144, 151, 153, 174-75. § III.A.8 (ii) of COE, Simplificaiton (1987), *supra* note, require the defendant to utter a "positive response to the charges against him," which is sufficiently vague to include a *conformidad*-type admission.

[91] Comparing the *patteggiamento* with the American plea of *nolo contendere*, Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 374 (1994)

[92] Chapter 40, §§ 314-17 CCP-Russia. "Agreement of the Accused With the Accusatory Pleading." Some lower courts in Russia, however, maintain that the defendant must admit to all the allegations in the accusatory pleading. Stanislaw Pomorski, *Modern Russian Criminal Procedure: The Adversarial Principle and Guilty Plea*, 17 CRIM. L. FORUM 129, 138 (2006). In Croatia, the defendant may not present evidence of innocence after requesting punishment in order to try to achieve an acquittal, unless this evidence was newly discovered. Thaman, *Plea-Bargaining*, *supra* note, at 980.

admission of guilt as well.[93] On the other hand, an unconditional admission of guilt is a prerequisite for the application of guilty-plea-like procedures in some jurisdictions.[94]

5. Procedural Aspects: Stage of Proceedings, Veto by Judge, Prosecutor, or Aggrieved Party, Exclusionary Rule in Case of Failure in Negotiations. Procedural economy is maximized, of course, the earlier in the proceedings the defendant agrees to resolve the case consensually without a trial. On the other hand, without a minimum of investigative activity, there may be insufficient evidence for a judge to be able to assure a factual foundation for the judgment.[95] In the U.S., guilty pleas may be entered any time from the first appearance in court to the stage of jury deliberations after all evidence has been taken and closing arguments of the parties have been made.[96] In England and Wales, on the other hand, efforts have been made to prohibit, or at least lessen the discount on punishment for pleas made in the trial court, not to speak of after the trial has begun.[97] In international criminal

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[93] Estonian "settlement proceedings" do not require an explicit admission of guilt, though an earlier procedure called "simplified proceedings," introduced by amending the 1961 Soviet-era CCP, did require a confession. Meris Sillaots, *Admission and Confession of Guilt in Settlement Proceedings under Estonian Criminal Procedure*, JURIDICA INTERNATIONAL, Vol. IX. 116, 117 (2004)

[94] This is true in Denmark and Poland. Thaman, *Plea-Bargaining*, *supra* note, at 980. It is also true under § 382(4) CCP-Bulgaria; § 373 CCP-Bolivia; §§ 403(2), (3)(a) CCP-Honduras; § 420(2) CCP-Paraguay; § 376 CCP-Venezuela ("admission of the facts"); § 495-7 CCP-France ("admits the acts"); § 679-3(2) CCP-Georgia. It is one of the circumstances that must be taken into consideration by the prosecutor upon agreeing to accept a plea according to § 505(1)(4) CCP-Moldova. If an "agreement" is concluded during the trial in Latvia, the defendant must completely admit guilt. § 544(2)(3) CCP-Latvia. Pursuant to the Argentine federal CCP, the defendant must agree that the act charged is true and that he was the perpetrator. Bovino, *supra* note, at 66. Bovino sees this as being tantamount to a confession. Córdoba, *supra* note, at 242. For the "abbreviated trial" under § 415 CCP-Córdoba (Argentina) and § 442bis(a) CCP-Tucumán (Argentina) to be triggered, there must be a "complete and detailed" confession (*circunstanciada y llanamente*). This means the defendant must relate in detail his participation, and circumstances of his guilt in terms of time, method, place and accomplices. This is also true in Mendoza province when the procedure is triggered during the preliminary investigation, when all the evidence has not been gathered, but not when requested at trial. Although the province of Santa Cruz (Argentina) does not require such a confession to trigger the procedure, if it is forthcoming the court may pass sentence without taking any further evidence. MANGIAFICO & PARMA, *supra* note, at 95,98, 147, 149, 174-75.

[95] This criticism has been directed against the Guatemalan "abbreviated procedure" which may be triggered any time during the preliminary investigation, Loarca & Bertelotti, *supra* note, at 424-25.

[96] The same is true in Scotland. Thaman, *Plea-Bargaining*, *supra* note, at 98. In the Argentine provinces of Córdoba and Mendoza, the "abbreviated trial" may be triggered by defense motion at the beginning of the preliminary investigation (*juicio abreviado inicial*) or at the trial. Riego, *Informe*, *supra* note, at 25. However the judge of the investigation may reject the defendant's motion. MANGIAFICO & PARMA, *supra* note, at 108, 118.

[97] § 48 Criminal Justice and Public Order Act 1994, provides that the earlier the plea the greater the discount the defendant should receive. Michael Zander, *England and Wales Report*, in LAY PARTICIPATION IN THE CRIMINAL TRIAL IN THE XXIST CENTURY, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 121, 133 (2001).

proceedings a guilty plea may be proffered at initial appearance, during pretrial proceedings, or during trial.[98]

While many of the Argentine "abbreviated trials" may be initiated during the preliminary investigation, thus yielding real economic benefits in limiting the preliminary investigation and eliminating the trial, in some jurisdictions tactical or theoretical considerations have hindered the early use of the procedures. Thus, in the federal Argentine system, lawyers refuse to move for the procedure at the pretrial stage, because they think they can be more successful in negotiating a lesser sentence with the prosecutors at the trial stage.[99] In the province of Córdoba, on the other hand, it is the pretrial judges who do not want to mix their pre-trial control functions with those of rendering judgment.[100] In some Argentine provinces, however, the procedure is only available in the trial court before the case is sent out for trial.[101]

While the Spanish *conformidad* may be effectuated during the preliminary investigation, or at its termination,[102] among the new European procedures many, beginning with the Italian *patteggiamento*, foresee that the procedure will take place during the preliminary hearing before the *giudice dell'udienza preliminare*[103] after the preliminary investigation has been

[98] GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 264 (2005).

[99] MANGIAFICO & PARMA, *supra* note, at 74-75. There has been criticism, for instance, that the defendant can wait until the day before trial to request the "abbreviated trial." *Id*., at 130. In Italy, many lawyers have waited to the last possible time, just before opening statements at trial, to agree to the *patteggiamento*, thus defeating the gains in procedural economy. Susanne Hein, *Landesbericht Italien* in DIE BEWEISAUFNAHME IM STRAFVERFAHRENSRECHT DES AUSLANDS 165 (Walter Perron ed. 1995)

[100] The pretrial judges prefer the "abbreviated trial" to be initiated in the trial court, after the investigation is complete. Riego, *Informe*, *supra* note, at 26.

[101] § 512 CCP-San Juan (Argentina), MANGIAFICO & PARMA, *supra* note, at 154.

[102] In Croatia, requests for punishment may only be made up to and at the completion of the preliminary investigation. Thaman, *Plea-Bargaining, supra* note, at 981. In the Argentine federal CCP, the *juicio abreviado* may be triggered by the accused's *conformidad* at any time up to the setting of trial. Córdoba, *supra* note, at 231. In El Salvador, the "abbreviated procedure" must be commenced before the preliminary hearing, Amaya Cóbar, *supra* note, at 403. According to § 403(1) CCP-Honduras, the "abbreviated procedure" must be initiated before the case is set for trial.

[103] A preliminary hearing presided over by the investigating magistrate was introduced in the 1995 Spanish Jury Law and some courts, as well as the office of the public prosecutor, believe that a *conformidad* in a jury case should be reached during the preliminary hearing, rather than after selecting the jury as the law appears to stipulate. Jaime Vegas Torres, *Las actuaciones ante el Juzgado de Instrucción en el procedimiento para el juicio con jurado*, in LA LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA 148-49, 157 (Luis Aguiar de Luque & Luciano Varela Castro eds. 2004). In Costa Rica the motion for application of the *procedimiento abreviado* is made before the pretrial judge during the preliminary hearing and sentencing is before the trial judge. Llobet Rodríguez, *supra* note, at 440.

completed.[104] The procedures in Italy, as elsewhere, may also be implemented when the case is transferred to the trial court,[105] at the beginning of trial[106] or at times during the actual trial.[107]

In countries in which the composition of the courts vary depending on the seriousness of the charge, it is generally more likely that guilty pleas will be forthcoming in courts dealing with the lower and middle level offenses, than in the upper-level courts reserved for more serious offenses, which often have lay participation. This is because the guilty-plea mechanisms in Europe usually don't apply to the most serious offenses. The Spanish jury law of 1995, however, contains a controversial section which only allows a *conformidad* after the jury has been selected and the evidence heard, effectively eliminating any benefits of procedural economy.[108] Yet the overwhelming number of consensual resolutions of jury cases have nonetheless taken place during the preliminary investigation or preliminary hearing, with judges applying the law for normal and abbreviated trials despite the more particular provisions in the jury law.[109] Since most cases before the Spanish jury courts are homicides punishable by more than six years deprivation of liberty, *conformidades* have been mainly reached in

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[104] The request for a *conformidad*-like "abbreviated trial" is also made after the conclusion of the preliminary investigation in § 373 CCP-Bolivia. On the other hand, § 406 CCP-Chile provides that an "abbreviated trial" may be requested during a pretrial hearing in the trial court.

[105] The procedure takes place in the trial court if the case is tried by a single judge. Under a previous version of the law, when the prosecutor or judge of the investigation could veto the request for punishment, the judge following trial according to the normal procedures could nevertheless grant the defendant the 1/3 discount rejected at the preliminary hearing. THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note, at 167; Thaman, *Plea-Bargaining, supra* note, at 981.

[106] In Spain, a *conformidad* may be effectuated as late as the pretrial hearing in the trial court or even the interrogation of the defendant, which normally occurs at the beginning of the taking of the evidence.

[107] § 384(1) CCP-Bulgaria. The fact that the Venezuelan procedure for "admission of the facts" can take place during the trial has been criticized on grounds of procedural economy. ERIC LORENZO PÉREZ SARMIENTO, COMENTARIOS AL CÓDIGO ORGÁNICO PROCESAL PENAL 420 (3d. ed. 2000). While the Spanish jury law provides for settlement by *conformidad* only after the jury has been selected and the evidence adduced, the prevailing view in the literature, and among the courts, is that the provisions for *conformidad* applicable to normal trials, or "abbreviated trials" is applicable in supplementary fashion in the jury courts. In practice, nearly all *conformidad* agreements are thus reached during the preliminary investigation or at the preliminary hearing. Juan-Salvador Salom Escrivá, *Audiencia Preliminar, Arts. 30-35 LOTJ,* COMENTARIOS A LA LEY DEL JURADO 589 (Juan Montero Aroca & Juan-Luis Gómez Colomer eds. 1999).

[108] § 50 LOTJ-Spain. An earlier Spanish jury law of 1872 also provided for *conformidad* after selection of the jury, but the 1888 jury law, which was in force until the victory of General Franco in the civil war, had eliminated this seeming anomaly. Julio-Javier Muerza Esparza, *Art. 50, Disolución del Jurado por conformidad de las partes*, in COMENTARIOS, *supra* note, at 719-20.

[109] Joaquín Sánchez-Covisa Villa, *Experiencia de la Comisión de Estudio y Seguimiento del Tribunal del Jurado de la Fiscalía del Tribunal Superior de Justicia de la Comunidad Autónoma de Madrid* in LA LEY DEL JURADO, *supra* note, at 984-85.

cases involving the smattering of lesser cases also subject to the jury law, such as threats, trespasses, failing to render aid, or setting forest fires.[110]

The judge plays an active role in some U.S. jurisdictions, as well as in some of the guilty plea systems in other countries, and may reject a proposed settlement and set the case for a full-blown trial.[111] In the *conformidad*-like procedures of the Argentine federal CCP, the judge may often reject the "abbreviated trial" due to insufficient knowledge of the facts of the case or because the legal qualification of the offense does not correspond to the facts.[112]

Where the judge may veto the procedure, however, the judge's act will always reveal a pre-evaluation of the evidence which should, theoretically, make that judge biased when acting as trier of fact at the trial.[113] The prosecutor or defense may appeal the judge's veto to a higher court in some countries.[114] In some jurisdictions, the judge plays no role in plea bargaining, which takes place exclusively between the public prosecutor and the defendant.[115]

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[110] Salom Escrivá, *supra* note, at 588.

[111] This was possible in relation to the *patteggiamento* in Italy until amendments to the law in 1999. THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note, at 167. The judge in Spain may also reject a *conformidad*. § 382(7) CCP-Bulgaria allows the judge to reject an agreement if it is "contrary to law or morals." The same is true in Guatemala, Loarca & Bertelotti, *supra* note, at 427 and in § 373 CCP-Bolivia, § 410 CCP-Chile, §§ 679-3(2)(d), 679-4(4-6) CCP-Georgia, and § 541(6) CCP-Latvia. Either the judge of the preliminary hearing or the trial judge may reject a *conformidad* in Costa Rica if they doubt its veracity. Llobet Rodríguez, *supra* note, at 440. According to § 248 CCP-Estonia, the judge may either accept or reject the "settlement" entered into by prosecution and defense, but may not alter it. According to §§ 506-07 CCP-Moldova, the judge decides to accept or reject the plea after a detailed examination of the defendant regarding the voluntariness of the plea and his/her understanding of the charges. § 495-12 CCP-France also allows the judge to reject the procedure.

[112] § 431bis CCP-Argentina (Federal). Langer, Chapter 1, at 55; Judicial veto is allowed in all Argentine provinces, based on similar reasons. Sarrabayrouse, 310.

[113] If the judge thinks the punishment is too lenient, then he/she would be biased against the defendant and if he thinks an acquittal should be forthcoming, he is then biased against the prosecution. Vitale, *supra* note, at 376-78. This is a possible problem in Guatemala, where the code is unclear as to whether the same judge who rejects a consensual resolution will ultimately try the case. Loarca & Bertelotti, *supra* note, at 429. In Connecticut, judges participate in the plea negotiations, but may not sit at trial if the case is not plea bargained. Turner, *supra* note, at 248.

[114] Thaman, *Plea-Bargaining*, *supra* note, at 982-83.

[115] In Scotland, the court may not refuse to accept a plea and may only ask the prosecutor to reconsider. The imposition of punishment, however, which is not subject to bargaining, is completely up to the judge. Prosecutor and defense, following recent reforms, may also agree on a narrative of the offense for purposes of fixing the limits of aggravation and mitigation. *Id.*, at 983. In the U.S. the judge is prohibited from taking part in plea negotiations in the federal courts, Rule 11(c)(1) Fed. R. Crim. P., http://www.uscourts.gov/rules/crim2007.pdf, and in several states, including Missouri, yet may exercise his/her discretion and refuse to accept a plea. Turner, *supra* note, at 199.

The aggrieved party has no procedural role in most countries which allow defendants to admit or not contest guilt and move directly to sentence,[116] though his or her position on the case may affect the decision of the public prosecutor.[117] The civil action for damages is also not included in the "bargain" in most of these jurisdictions.[118] In Russia, however, a defendant, though willing to concede guilt and consent to the "special procedure," will not be able to avail himself of the procedure if he/she does not agree to satisfy the civil action.[119] In a minority of jurisdictions, however, the aggrieved party must agree for the procedures to be applied.[120] While in principle against plea bargaining, some German theorists see a positive role for plea bargaining *only if the victim plays an active role*. They see this as a possible model for a reprivatization of the criminal trial and restructuring it as a model of conflict resolution more than just a vehicle of one-sidedly ascertaining the truth, i.e. "as a more humane procedural model of the future."[121]

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[116] This is true in Scotland. In only seven U.S. states does the victim have a right to participate in plea bargaining proceedings. Thaman, *Plea-Bargaining*, *supra* note, at 983. In Connecticut, a victim's advocate may participate if the case involves serious injuries or heavy losses. Turner, *supra* note, at 262. The victim has no role in the abbreviated procedures in the Argentine provinces of Buenos Aires, Formosa, Misiones, nor in the Argentine federal code. MANGIAFICO & PARMA, *supra* note, at 104.

[117] In El Salvador the judge must hear the position of the victim, but may order the "abbreviated procedure" over her objection. Amaya Cóbar, *supra* note, at 404. The aggrieved party has a right to be heard in France, but are seldom heard. Claire Saas, *De la composition pénale au plaider-coupable: le pouvoir de sanction du procureur*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 827, 840 (2004). The opinion of the victim is heard, *inter alia*, in the Argentine provinces of Chaco, Tucumán and Missiones. MANGIAFICO & PARMA, *supra* note, at 145, 149, 151.

[118] Such as in the federal Argentine code, MANGIAFICO & PARMA, *supra* note, at 72. But in some Argentine provinces, the defendant and victim may agree to include it as part of the judgment. *Id.*, at 92, 149, 152, 154. In the province of Buenos Aires, however, the civil party can be made part of the abbreviated trial, the judge can order conciliation measures and decide the civil action as well. *Id.*, at 92.

[119] Pomorski, *supra* note, at 137-38.

[120] This is true in Poland in relation to the procedure of "stipulation to the charges." Thaman, *Plea-Bargaining*, *supra* note, at 983. Victims have a veto also pursuant to § 314(1) CCP-Russia, § 373 CCP-Bolivia, § 239(2)(4) CCP-Estonia. Under the Spanish *conformidad* procedures the defendant must stipulate to the truth of the accusatory pleading, whether that of the public prosecutor, the private prosecutor (victim), or the popular prosecutor, whichever seeks the most serious qualification of the criminal act and the highest punishment. Similarly, in Chile, if the victim charges a more serious crime that carries with it a punishment that exceeds five years, the *procedimiento abreviado* will not aply. § 408 CCP-Chile. The victim must also agree to the *conformidad*-like proceedings in the Argentine provinces of Tierra del Fuego. Sarrabayrouse, *supra* note, at 301, Córdoba, Mendoza, and Santa Cruz. MANGIAFICO & PARMA, *supra* note, at 103, 118, 146.

[121] Thomas Weigend, *Die Reform des Strafverfahrens. Europäische und deutsche Tendenzen und Probleme*, 104 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 486, 493, 459 (1992).

While the right to counsel may be waived in the U.S. and plea bargains accepted in the absence of counsel,[122] appointment of counsel is mandatory in many jurisdictions in order to even initiate settlement discussions[123] and some civil law jurisdictions require that the defendant have full discovery of the entire contents of the investigative file before negotiations take place.[124] In the U.S. the defendant must explicitly be advised of his or her right to remain silent, to confront and cross-examine the witnesses against him, and the right to jury trial and must waive these rights on the record in open court for the guilty plea to be accepted.

In proceedings before the International Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), four basic requirements are required for a plea to be accepted.[125] The plea must be made voluntarily in full cognizance of the nature of the charge and its consequences. It must be informed, not only in relation to the recognition of guilt, but also in relation to the implications of a guilty plea in the context of defense strategy. It must be unequivocal[126] and there must be a factual basis for the plea.[127]

In the U.S. and in some other countries the prosecution may not use any statements made by the defendant during discussions aimed at arriving at a consensual disposition of the case if the negotiations break down or the deal is rejected by the judge and the case goes to trial.[128]

6. Does Charge or Sentence Bargaining Precede the Application of the Procedure? As the term “plea bargaining” in the U.S. indicates, intensive bargaining and negotiations between the public prosecutor and the defense,

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[122] In Iowa v. Tovar, 541 U.S. 77 (2004), the U.S. Supreme Court held that counsel may be waived without the necessity of advising the defendant that the waiver may leave him ignorant of viable defenses and deprive him of the opportunity to obtain useful legal advice about the wisdom of pleading guilty. Thaman, *Plea-Bargaining, supra* note, at 983. The high court has even validated waivers of the right to counsel and pleas of guilty by arguably schizophrenic defendants charged with capital murder! Godinez v. Moran, 509 U.S. 389 (1993).

[123] § 384(2) CCP-Bulgaria; § 506(3)(1-2) CCP-Moldova; § 83(2) CCP-Latvia.

[124] This is not true in the U.S. where the prosecutor need not reveal exculpatory evidence prior to a plea and this hiding of evidence does not undermine the “knowing” nature of the plea. United States v. Ruiz, 536 U.S. 622 (2002). *See* Thaman, *Plea-Bargaining*, *supra* note, at 983.

[125] These requirements are listed in Rule 62bis of the ICTY RPE. IT/32/Rev. 40, July 12, 2007.

[126] Rule 62bis(iii) ICTY RPE. In the Erdemovic case in the ICTY the defendant pleaded guilty, but said that he had acted under superior orders and duress. Since this could have constituted a defense, the appeals chamber refused to accept the plea and ordered trial pursuant to the normal procedures. KNOOPS, *supra*, note, at 259-60.

[127] Rule 62bis(iv) ICTY RPE. Cf. Rule 11(b)(3) Fed. R. Crim. P. which requires a “factual basis” for a plea in the U.S. federal courts.

[128] Rule 410, Fed. Rules of Evid. http://www.uscourts.gov/rules/Evidence_Rules_2007.pdf. Cf. § 382(8) CCP-Bulgaria; § 679-5 CCP-Georgia. This is also true in § 431bis CCP-Argentina (Federal), and pursuant to § 420 CCP-Mendoza (Argentina), § 442bis CCP-Tucumán (Argentina), and § 437ter CCP-Missiones (Argentina); § 398 CCP-Buenos Aires (Argentina). MANGIAFICO & PARMA, *supra*, note, at 72, 136, 149, 157.

sometimes even including the judge,[129] in relation to both the charges and the punishment, usually precedes the defendant's guilty plea.[130] Judicial participation in the bargaining is frowned upon in many U.S. jurisdictions[131] because it is feared that it will compromise the judge's impartiality and may put too much pressure on defendants to deal.[132] This is especially the case when the bargaining judge will also be the trial judge.[133] On the other hand, Jenia Iontscheva Turner makes a convincing argument that:

"a judge's early input into plea negotiations can render final disposition more accurate and procedurally just. Judges can provide a neutral assessment of the merits of the case and prod defense attorney or prosecutor to accept a fairer resolution. They can offer a more accurate estimate of expected post-plea and post-trial sentences, and make it more transparent and more acceptable to public."[134]

In the United Kingdom, on the contrary, the existence of bargaining is generally denied. There, one allegedly pleads guilty only in expectation of a mitigated sentence.[135]

In most of the new systems that have sprouted up in civil law jurisdictions there is no specific mention of bargaining. Instead, as we have seen, many of the new codes provide for a codified discount to which the defendant is entitled upon agreeing to consensual resolution of the case. Sometimes a sentence is suggested by the public prosecutor, a practice similar to the Spanish *conformidad*, where the scope of the prosecuting

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[129] Judges routinely participated in plea bargaining in Alameda, California, from 1976-1987 when I was an assistant public defender there, though it appears that the practice is now being discouraged. Turner, *supra* note 15, at 202. It has been maintained, that sentences are usually lower when the defendant has a chance to bargain with both prosecutor and judge, than when only the prosecutor may participate. FISHER, *supra* note, at 221.

[130] For a fine history of this practice, *see* FISHER, *supra* note. In Scotland there is informal bargaining as to charge and even as to the narrative relating to the charge in the accusatory pleading so as to further restrict the judge's discretion in assessing aggravating and mitigating circumstances. Thaman, *Plea-Bargaining, supra* note, at 984.

[131] Judges are not supposed to engage in bargaining in the U.S. federal system and in many states, among them Missouri. At least nine other states also prohibit judicial involvement and follow the 1968 American Bar Association Standards of Criminal Justice which depict the judge's role as one of "passive verifier." Turner, *supra*, note, at 202.

[132] *Id.*, at 199.

[133] In Connecticut, the presiding judge of the court is directly involved in plea bargaining, but if a guilty plea is not forthcoming, then another judge will be assigned to conduct the trial. *Id.*, at 247-48.

[134] *Id.*, at 200.

[135] Hatchard, *supra* note, at 220. But see Anderson Ralph Coward [1980] 70 Cr. App. R. 70, 72-76, for a case in which the court criticizes the fact that in London the parties often try to get the judge commit to a particular sentence, but that the parties should never approach the judge in such a way except in exceptional circumstances.

parties' pleadings determines whether a resolution will be forthcoming, or the penal orders common for minor offenses.[136]

Bargaining between the prosecutor and defense, however, likely occurs in many of these systems, especially in relation to the punishment requested by the public prosecutor, as this triggers the applicability of the procedure in systems with *conformidad*-like procedural set-ups.[137] This practice was clearly evident in the first year of modern Spanish jury trials, when prosecutors lowered the punishment requested in their accusatory pleadings in non-homicide cases to reach a *conformidad*.[138] Though "charge bargaining" is officially frowned upon in most of the civil law countries which have turned to consensual proceedings,[139] it is also admitted that it nevertheless takes place.[140] In systems where the aggrieved party may veto the application of the new procedure, such as in Russia, this opens up the possibility of the defense negotiating with the victim in exchange for the victim's consent.[141] There are, however, a few countries, some of which were aided by American consultants, in which procedures have been introduced that clearly allow bargaining between prosecution and defense before "plea agreements" are reached.[142]

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[136] *See* § 495-8 CCP-France, where the public prosecutor makes a public recommendation of a sentence at the time of the guilty plea.

[137] As to the existence of bargaining prior to the agreement to a *conformidad* in Spain, GIMENO SENDRA ET AL, *supra* note, at 336; RODRÍGUEZ GARCÍA, *supra* note, at 84-85 (calling this bargaining a "virus"). It also exists in Italy, Thaman, *Plea-Bargaining*, *supra* note, at 984. As to the possibility of bargaining in Chile, *see* Riego, *supra* note, at 463-64. On negotiations with the trial prosecutor to lower the requested punishment in the Argentine federal courts, MANGIAFICO & PARMA, *supra* note, at 46, 74-75. In the Argentine province of Córdoba, prosecutors are governed by a strict legality principle and may not dismiss charges, so bargaining is limited to reducing the requested punishment and inducing the waiver of the full trial. Riego, *Informe*, *supra* note, at 25.

[138] Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT. & COMP. L. REV.241, 312-13 (1998). On how the legislator envisioned bargaining when the *conformidad* was extended to the abbreviated trial and the jury trial. Encarnación Aguilera Morales, *Observaciones críticas a las causas de disolución anticipada del jurado* Part 1, LA LEY, No. 4394, Oct. 14, 1997, at 1,3. In Italy, the sentence requested is also a product of bargaining between the parties., and in Croatia, the party requesting application of punishment will expressly state the type and length of punishment it desires and only this punishment will be imposed. Thaman, *Plea-Bargaining*, *supra* note, at 985.

[139] As to Russia, *see* Pomorski, *supra* note, at 139-40.

[140] In the Argentine province of Mendoza, however, prosecutors will negotiate and reduce the charges if the defendant will accept the "abbreviated trial" procedure. MANGIAFICO & PARMA, *supra* note, at 123. Defendant and prosecutor can negotiate the charge, and a sentence which does exceed three years, pursuant to § 503 CCP-Neuquén (Argentina), *Id.*, at 150. Negotiations are also allowed in the ICTY and the ICTR.

[141] Pomorski, *supra* note, at 139. The power of the aggrieved in charge bargaining is strengthened by the power given him/her by § 125 CCP-Russia to appeal prosecutorial decisions to dismiss charges and compel the case to be brought. *Id.* 143.

[142] The Estonian "settlement agreements" are a good example, Sillaots, *supra* note, at 117.

Conclusion

Despite the suggestions made in this analysis, Kazakhstan should continue trying to speed up the resolution of criminal cases of slight or mid-level gravity. Kazakhstan has gradually been modernizing its criminal procedure by introducing adversarial procedure, jury trial, judicial control of pretrial detention, and protecting the rights of defendants in many areas.

But since the Draft Law is basing the proposed procedure on confessions, and since confessions are really cloaked guilty pleas obtained in less than open settings and with less than ideal controls, I am suggesting that the Kazakh legislature bring this stage of the procedure into the open and concede that a judicially controlled procedure of guilty pleas (with or without bargaining) is the most honest way to proceed. The perhaps excessively detailed survey of modern types of guilty-plea procedures which I have provided can be of use to the legislator if it does decide to make its simplified version into a consensual procedure.

October 2009

APPENDIX

CODES OF CRIMINAL PROCEDURE

ARMENIA. http://www.base.spinform.ru/show.fwx?Regnom=7460

BELARUS -UGOLOVNO-PROTSESSUAL'NYY KODEKS RESPUBLIKI BELARUS'. Priniat Palatoy predstaviteley 24 June 1999. Odobren Sovetom Respubliki 30 June 1999. Yuridicheskiy tsentr Press. 2001. St. Petersburg. Augmented by web version with changes of to July 22, 2003.

BOLIVIA - Código de Procedimiento Penal Bolivia. Ley No.1970, Ley del 25 de marzo 1999.

BULGARIA-Criminal Procedure Code, Promulgated State Gazette, No. 86, Oct. 28, 2005, went into effect, April 29, 2006. Available at: http://www.mjeli.government.bg/Npk/docs/CRIMINAL_PROCEDURE_CODE.pdf

CHILE - Código Procesal Penal, Ley 19,696, Sept. 29, 2000, Final modification, Ley 19, 762, Oct. 13, 2001. http://wings.buffalo.edu/law/bclc/chile.html

ESTONIA-Code of Criminal Procedure, RT 1, 2003, 166, Passed February 12, 2003, amended Dec. 17, 2003.

FRANCE-Code de Procédure Pénale, http://www.legifrance.gouv.fr/WAspad/UnCode?code=CPROCPEL.rcv (Last viewed 17 June 2006).

GEORGIA-Chapter LXIX, amending the Georgian Code of Criminal Procedure, signed into law Feb. 13, 2004 by President Mikheil Saakashvili.

GERMANY-Strafprozessordnung. 1. Februray1887 (RGBl 253), in LUTZ MEYER-GOßNER, STRAFPROZESSORDNUNG, GERICHTSVERFASSUNGSGESETZ, NEBENGESETZE UND ERGÄNZENDE BESTIMMUNGEN (50th ed. 2007).

HONDURAS- Código Procesal Penal, Norma 9-99-E

ITALY. CODICE DI PROCEDURA PENALE. (Giulio Ubertis ed. 2005). Raffaello Cortina Editore. Milan. Entered into force Oct. 24, 1989. Published in Gazzetta ufficiale on Sept. 22, 1988, no. 447. Cf.). http://studiocelentano.it/codici/cpp/

KAZAKHSTAN (KA): UGOLOVNO-PROTSESSUAL'NYY ZAKON RESPUBLIKA KAZAKHSTAN. Almaty: Yurist (2003). Changes up to Sept. 25, 2003. Originally passed Dec. 13, 1997. No. 206-I.

LATVIA (LA). UGOLOVNO-PROTSESSUAL'NYY ZAKON. Adopted by the Seym. April 21, 2005 and Proclaimed by the President of the Government on May 11, 2005. With changes as of January 19, 2006. BIB. "Biznesa inform cijas birojs". Riga. 2006. Translated by "Biznesa inform cijas birojs".

LITHUANIA (LI), Code of Criminal Procedure *Baudziamojo proceso kodekso palvirtinimo ir igvendimino* Entered into force May 1, 2003.

MODEL CODE OF CRIMINAL PROCEDURE FOR THE COMMONWEALTH OF INDEPENDENT STATES (MCCIS) Model'nyy ugolovno-protsessual'niy kodeks dlia stran SNG.

MOLDOVA (MO): UGOLOVNO-PROTSESSUAL'NYY KODEKS RESPUBLIKI MOLDOVA. S.A. Cartea, Kishinev 2003). No. 122-XY. March 14, 2003. Went into force June 12, 2003.

NICARAGUA (NI): Código Procesal Penal de la Republica de Nicaragua, Ley No. 406, Signed by President Dec. 18, 2001.

PARAGUAY (PAR), Código Procesal Penal, signed by President of the Republic July 8, 1998.RSFSR I POSTANOVLENIIA VERKHOVNOGO SOVETA RSFSR. Moscow: Supreme Soviet RSFSR

RUSSIA-UGOLOVNO-PROTSESSUAL'NYY KODEKS ROSSIYSKOY FEDERATSII (http://www.consultant.ru/popular/upkrf/11_52.html#p4146

TADZHIKISTAN (TA). Ugolovno-protsessual'nyy kodeks Respubliki Tadzhiskistan. August 17, 1961. Dushanbe.

TURKMENISTAN, UGOLOVNO-PROTSESSUAL'NYY KODEKS TURKMENISTANA http://www.turkmenistan.gov.tm/_ru/laws/?laws=01fe

UZBEKISTAN (UZ), UGOLOVNO-PROTSESSUAL'NYY KODEKS RESPUBLIKI UZBEKISTAN. Confirmed by Law of RU of 9.22.94, No. 2013-XII, went into effect on April 1, 1995. Last amendment by N. 254_II on 8.29.2001.

VENEZUELA (VE), Código Orgánico Procesal Penal, Gaceta Oficial # 5208, Jan. 23, 1998. As revised in 2001.

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BALANCING THE INTERESTS OF THE STATE AND THE RIGHT TO A FAIR CRIMINAL TRIAL WHERE STATE SECRETS ARE INVOLVED: A STUDY OF THE LEGAL PRACTICE OF THE UNITED KINGDOM [143]

I. Summary

The divulgence of State secrets to defence lawyers raises dilemmas. State agencies, prosecuting authorities and crime investigation bodies will wish to have prosecutions conducted without their secrets being divulged to the accused, his lawyers or the wider public. Situations often arise where the accused may not have a fair trial unless such secret material is divulged or at least assessed by an independent person. If an accused cannot have a fair trial without such access to the material and the state agencies remain opposed to disclosure then the prosecution must not proceed.

Who then should determine the following questions?

1. Is the material secret in its nature?
2. Can the accused have a fair trial without access to the material?

The answer could be:

a) The state agency which owns the secret.
b) The prosecuting authority.
c) The court.

Should the defendant's lawyer or an independent lawyer have access to the material in order to make representations on questions 1 and 2? If the answer is "Yes" (as it most certainly will be if fair trial standards are to be achieved) defence representations to a) or b) may fall on deaf ears and there is no meaningful appeal process. It therefore follows that only a court should determine the answers to the questions.

This paper does not seek to prescribe solutions to the dilemmas. Rather, its purpose is to state the practice and law prevailing in the United Kingdom (to be precise the paper relates to the constituent countries of England and Wales).

The proper functioning of all aspects of a legal system depends not only on the body of law and practice but also upon the independence and integrity of the judiciary and legal profession. On the question of access to state secrets this aspect is of great importance and therefore I have added an

[143] This study was prepared by the Legal Policy Research Centre with the support of the Organization for Security and Cooperation in Europe (OSCE) Center in Astana.

appendix to the paper devoted to the appointment procedures of the British judiciary and the governance of the legal professions.

Before an explanation of the law and practice relating to “secret” material it is appropriate to set out the position in relation to ***the rights and duties of the prosecution and defence in relation to disclosure of the parties’ respective cases or knowledge where State secrets are not involved:***

II. Disclosure of the case relied on against the accused

The UK legal practice of disclosure has its parallel in the Convention for Protection of Human Rights and Fundamental Freedoms 1950 Council of Europe Article 6 (3):

Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

In accordance with the Human Rights Act 1998 of the United Kingdom courts must interpret law in accordance with the Convention and decisions of the European Court of Human Rights and public authorities must not act in a way that is incompatible with Convention rights.

Before the Human Rights Act 1998 it was already an established rule that the Prosecution must disclose to the Defence the material it is to rely on at trial. Disclosure should be sufficiently in advance of the trial that the Defence has adequate time to prepare its response.

III. Disclosure of the material in the possession of the prosecution not relied on against the accused but generated during the course of the investigation

The principles governing disclosure are set out in an Act of Parliament entitled the Criminal Procedure and Investigations Act 1996

The Act applies to criminal cases where the Defendant has pleaded NOT GUILTY. The material to which the Act applies is defined as material of all kinds, and in particular includes references to information and objects of all descriptions. [It should be noted at this point that the 1996 Act preserves the common law (judge made law) concerning the principles to apply where a State agency distinct from the prosecuting authority seeks non-disclosure of material as a matter of public policy – but this area of the UK law will not be developed in this paper. However, it is sufficient to note that the approach of

the courts to the law and procedure in this area reflects closely the position explained below.]

In relation to material in the possession of the prosecution not relied on against the accused but generated during the course of the investigation the prosecutor must:

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused , or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

Prosecution material is material—

(a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or

(b) which, in pursuance of a code of practice, he has inspected in connection with the case for the prosecution against the accused.

Where material consists of information which has been recorded in any form the prosecutor discloses it for the purposes of this section—

(a) by securing that a copy is made of it and that the copy is given to the accused, or

(b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;

and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.

Material must not be disclosed to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly. See below for further discussion.

Material must not be disclosed to the extent that it is material the disclosure of which is prohibited by the Regulation of Investigatory Powers Act 2000 – that is to say evidence of the State's authorized interception of communications which is inadmissible in evidence under current law.

IV. Disclosure by the accused

If the prosecutor complies with the initial duty of disclosure or purports to comply with it and the prosecutor has served on the accused a copy of the indictment (the formal court document setting out the criminal charges) and a copy of the set of documents containing the evidence which is the basis of the charge the accused must give a defence statement to the court and the prosecutor.

Where the charge is to be tried in the lower magistrates' court that deals with less serious crimes the service of a defence statement is voluntary.

A defence statement is a written statement—

(a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,

(b) indicating the matters of fact on which he takes issue with the prosecution,

(c) setting out, in the case of each such matter, why he takes issue with the prosecution

The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material which—

(a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and

(b) has not been disclosed to the accused.

If at any time there is any such material the prosecutor must disclose it to the accused as soon as is reasonably practicable. If the prosecutor considers that he is not so required, he must give to the accused a written statement to that effect.

V. Application by the accused for disclosure

Where the accused has given a defence statement and the prosecutor has complied with the duty of continuing disclosure or has purported to comply with it or has failed to comply with it, if the accused has at any time reasonable cause to believe that there is prosecution material which is required to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him.

VI. Public interest: review for summary trials – the lower criminal courts

At any time after a court makes an order that it is not in the public interest to disclose material the accused may apply to the court for a review of the question whether it is still not in the public interest to disclose material affected by its order.

In such a case the court must review that question, and if it concludes that it is in the public interest to disclose material to any extent it shall so order and the prosecutor must act accordingly unless he decides not to proceed with the case concerned.

VII. Public interest: review in Crown court (judge and jury cases)

The court must keep under review the question whether at any given time it is still not in the public interest to disclose material affected by its order. The court must keep the question mentioned under review without the need for an application; but the accused may apply to the court for a review of that question.

VIII. Applications: opportunity to be heard by third parties

Where an application is made to the Court by the prosecutor not to disclose material and a person claiming to have an interest in the material applies to be heard by the court, and he shows that he was involved (whether alone or with others and whether directly or indirectly) in the prosecutor's attention being brought to the material, the court must not make an order unless the person applying has been given an opportunity to be heard.

IX. Confidentiality of disclosed information

If the accused is given or allowed to inspect a document or other object under the disclosure provisions of the law he must not use or disclose it or any information recorded in it.

The accused may use or disclose the object or information in connection with the proceedings for whose purposes he was given the object or allowed to inspect it, and to the extent that the object has been displayed to the public in open court, or the information to the extent that it has been communicated to the public in open court. The accused may ask the court's permission to disclose in other circumstances. It is a contempt of court for a person knowingly to use or disclose material if the use or disclosure is in contravention of these principles. Unauthorized disclosure is punishable by imprisonment of up to two years.

The right of the prosecution to apply to the court for permission NOT to disclose material to the Defence is known in UK practice as a "Public Interest Immunity" or "PII" application. The approach of the UK courts to PII applications is shaped by both UK legal traditions of fair trial and the European Convention on Human Rights (ECHR) Article 6 (1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

There may be circumstances under the ECHR in which material need not be disclosed to the defence on grounds of public interest immunity; but they must be subject to strict control by the courts. In Rowe and Davies v UK (2000) 30 EHRR 1, the European Court held:

"…the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused . . . In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1) . . . Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities."

Public interest immunity hearings on an ex parte basis (without notice to the defence) do not necessarily breach Article 6 (Jasper v UK (2000) 30 EHRR 97; Fitt v UK (2000) 30 EHRR 223). Such a procedure can be justified where the giving of notice of the application runs the risk of revealing the nature of the material and thus defeating the protection of the public interest any Court order is intended to establish.

The approach to be adopted by domestic courts was spelt out by the UK's highest court of the time the House of Lords in The Queen v H [2004] 2 AC 134. This was a case concerning disclosure of police surveillance in a major illegal drug importation operation. The Court sought to answer the following questions:

"1. Are the procedures for dealing with claims for public interest immunity made on behalf of the prosecution in criminal proceedings compliant with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms?

2. If not, in what way are the procedures deficient and how might the deficiency be remedied?"

The Court recognised that "*Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure*

may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial."

The House of Lords approved the procedure to deal with PII applications set out by the Court of Appeal in the case of R v Davis [1993] 1 WLR 613. The court there distinguished between three classes of case:

*In the **first class**, comprising most of the cases in which a PII issue arises, the prosecution must give notice to the defence that they are applying for a ruling of the court, and must indicate to the defence at least the category of the material they hold (that is, the broad ground upon which PII is claimed), and the defence must have the opportunity to make representations to the court. There is thus an inter parties (both parties attending) hearing conducted in open court with reference to at least the category of the material in question.*

*The **second class** comprises cases in which the prosecution contend that the public interest would be injured if disclosure were made even of the category of the material. In such cases the prosecution must still notify the defence that an application to the court is to be made, but the category of the material need not be specified: the defence will still have an opportunity to address the court on the procedure to be adopted but the application will be made to the court in the absence of the defendant or anyone representing him. If the court considers that the application falls within the first class, it will order that procedure to be followed. Otherwise it will rule.*

*The **third class**, described as "highly exceptional", comprises cases where the public interest would be injured even by disclosure that an ex parte application is to be made. In such cases application to the court would be made without notice to the defence. But if the court considers that the case should be treated as falling within the second or the first class, it will so order.*

Appointment of special counsel to represent the interest of the defence in the second and third class cases:

In some areas of the law a novel procedure designed to protect the interests of a party against whom an adverse order may be made and who cannot (either personally or through his legal representative), for security reasons, be fully informed of all the material relied on against him, has been established.

The procedure is to appoint a person, usually called a "special advocate", who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party, but who, subject to those constraints, is charged to represent that party's interests. This procedure was first introduced in relation to special immigration cases in proceedings concerned with exclusion or

removal of a person as conducive to the public good or in the interests of national security.

A Special Advocate is a specially appointed lawyer (typically, a barrister) who is instructed to represent a person's interests in relation to material that is kept secret from that person (and his ordinary lawyers) but analysed by a court or equivalent body at an adversarial hearing held in private. The Special Advocate has the advantage that he can go behind the curtain of secrecy, but also considerable disadvantages.

Cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial. Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to co-operate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.

The approach of the Court to deciding on applications by the prosecution not to disclose material on the grounds of public interest immunity was stated by the House of Lords on R v H in the following terms:

Judges are to address a series of questions in sequential order:

(1) The court must first identify whether the material which the prosecution seeks to withhold is material that may weaken the prosecution case or strengthen that of the defence. If the material cannot be so described — because for instance it is neutral or damaging to the accused — then it should not be disclosed. If it can be so described, the rule is that disclosure should be made unless public interest immunity considerations prevent it.

(2) Next, in determining whether public interest immunity applies, the court is to apply the test of whether there is a real risk of serious prejudice to an important, and identified, public interest. If the material does not satisfy that test, it does not attract public interest immunity and must be disclosed.

(3) If the material does attract public interest immunity, the court must then consider whether the accused's interests can be protected without disclosure or whether disclosure can be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence.

(4) In considering whether limited disclosure is possible, the court must give consideration to ordering the prosecution to make admissions, prepare summaries or extracts of evidence, or provide documents in an edited or anonymised form.

(5) If the court is minded to order limited disclosure of this kind, it must first ask whether it represents the minimum derogation necessary to protect the public interest in question. If not, then it must order more disclosure. If, however, the effect of limited disclosure may be to render the whole trial process unfair to the accused, fuller disclosure should be ordered even if this leads the prosecution to discontinue the proceedings.

(6) The issue of disclosure of the material should be reviewed as the trial unfolds, evidence is adduced and the defence advanced.

It is to be noted that where a court orders disclosure and the prosecution still wish to keep the material secret the prosecuting authorities must discontinue the case. Thus the prosecuting authorities must balance the competing interests of proceeding with the prosecution of the accused concerned against the risk of damage to the public interest by the disclosure of the material at a trial.

As with all matters of law and practice the effectiveness of the procedures set out by Parliament or the courts depends to a vital extent on the honesty and integrity of all official persons involved in the case – whether investigating officers, advocates or judges.

Concluding remarks

The approach to the question of whether State secrets should or should not be disclosed to the defendant and his own advocate in order to ensure a fair trial that is compliant with Article 6 of the European Convention on Fundamental Freedoms and Human Rights developed by the United Kingdom maybe of assistance to the development of law and practice in Kazakhstan. It is understood that the present position in Kazakhstan may entail restrictions on the liberties of Kazakhstan defence advocates involved in cases where State secrets may need to be disclosed.

The authorities of Kazakhstan may wish to consider the merits of the procedures developed in the UK that entrust to the judges the secret material in question for a decision as to whether disclosure is necessary to ensure a fair trial and the appointment of special counsel to assist the court and defence without running the risk of unnecessary disclosure to the accused or his own lawyers.

APPENDIX

I. Appointment of the Judiciary

The independent Judicial Appointments Commission (COMMISSION) selects candidates for judicial office on merit, through fair and open competition from the widest range of eligible candidates. It was set up to maintain and strengthen Judicial independence by taking responsibility for selecting candidates for Judicial Office out of the hands of the politically appointed Lord Chancellor while making the appointments process clearer and more accountable.

In accordance with the statute, there are fifteen Commissioners, including the Chairman. All are recruited and appointed through open competition with the exception of three judicial members who are selected by the Judges' Council. Membership of the Commission is drawn from the judiciary, the legal profession, tribunals, the magistracy and the public

Under the Constitutional Reform Act 2005 the COMMISSION has a responsibility to develop and implement its own selection processes. It has very specific duties in the selection of Judges and Tribunal members, both legal and non-legal. Its key statutory responsibilities are:

- to select candidates solely on merit;
- to select only people of good character;
- to have regard to the need to encourage diversity in the range of persons available for selection for appointments.

Its role is to select and recommend candidates, not to appoint them. For each vacancy, Commissioners select one candidate to recommend to the Lord Chancellor for appointment. The Lord Chancellor is a political appointee. The Lord Chancellor can accept or reject a recommendation, or ask for it to be reconsidered. If he does so he is required to provide his reasons in writing to the Commission. He can only exercise that power once for each candidate and cannot select an alternative candidate.

Since October 2006, the COMMISSION has been using a new system for selecting Judges, and new criteria for what makes a good judge. It developed a set of Qualities and Abilities against which to measure judges,

and a new system for selecting judges. See http://www.judicialappointments.gov.uk/application-process/112.htm

To be appointed to the first rung of judicial office in the higher criminal court – the Crown Court – requires qualification as a solicitor or barrister (the two principal branches of the legal profession) for at least seven years.

II. Governance of the Legal Profession

States should aspire to regulate and govern their legal professions in accordance with international standards. Reliance can be placed upon the declaration entitled The Basic Principles on the Role of Lawyers - 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 Articles 16 – 21

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

Meeting these international norms the United Kingdom statutory governance of the legal professions is set out in an Act of Parliament entitled the Legal Services Act 2007. Section 1 states the objectives of regulation:

1. The regulatory objectives

(1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of -

(a) protecting and promoting the public interest;
(b) supporting the constitutional principle of the rule of law;
(c) improving access to justice;
(d) protecting and promoting the interests of consumers;
(e) promoting competition in the provision of services;
(f) encouraging an independent, strong, diverse and effective legal profession;
(g) increasing public understanding of the citizen’s legal rights and duties;
(h) promoting and maintaining adherence to the professional principles.

(3) The “professional principles” are—

(a) that authorised persons should act with independence and integrity,
(b) that authorised persons should maintain proper standards of work,
(c) that authorised persons should act in the best interests of their clients,
(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
(e) that the affairs of clients should be kept confidential.

Under the Act a Legal Services Board is appointed by the Lord Chancellor (a political appointment and by convention always a member of the legal profession). The Legal Services Board regulates the various independent regulators of the different branches of the legal profession.

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MEMORANDUM ON LEGAL SAFEGUARDS AGAINST APPLICATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT BY THE LAW ENFORCEMENT AGENCIES IN KAZAKHSTAN[144]

Introduction

This analytical note discusses safeguards adopted in the legislation of the Republic of Kazakhstan regarding prevention of torture and other cruel, inhuman or degrading treatment by the law enforcement agencies including during the pre-trial investigation stage of crimes. The main objective of this analysis is to examine whether legislative safeguards are consistent with the international obligations of Kazakhstan in relation to prevention of torture and other cruel, inhuman or degrading treatment. It should be noted, however, that this document does not discuss the actual situation regarding the existence of torture in Kazakhstan.

I. Definition of torture

As stated in the Report of the Committee against Torture, the definition of torture adopted in Article 347-1 of the Criminal Code of Kazakhstan "does not contain all the elements of article 1 of the Convention [Against Torture]".[145] According to the current criminal law of Kazakhstan, investigators, police officers and other officials can be prosecuted for acts of torture if these officials commit such acts themselves. At the same time, law enforcement officials cannot be prosecuted for acts of torture committed at the instigation of or with consent or acquiescence of these officials. The impunity of officials who can witness acts of torture committed by their colleagues or officials who place the detained person in a situation where he or she can be subjected to torture by cellmates, encourages use of torture by law enforcement agencies.

The provision of Article 347-1 of the Criminal Code of Kazakhstan, which excludes physical and mental suffering caused as a result of "legitimate acts" on the part of officials, can be interpreted too broadly. The criminal law does not explain what constitutes "legitimate acts" of the officials. For instance, if Kazakhstani legislation allows or does not directly prohibit certain so-called

[144] This Expert Conclusion has been developed by the Legal Policy Research Center and supported by the Freedom House Office in the Republic of Kazakhstan. All opinions and ideas expressed in this Expert Conclusion may be different from those of Freedom House and reflect the author's perspective of the issue.

[145] U.N. Committee against Torture. CAT/C/KAZ/CO/2. 21 November 2008 (para. 6).

"harsh" or "enhanced" interrogation techniques, this provision can be used as exclusionary rule for the use of torture.

II. Criminal liability for acts of torture

The Criminal Code of Kazakhstan imposes very lenient minimum and maximum punishment for application of torture. At present, acts of torture are punished by a maximum of five years' imprisonment, aggravated acts of torture which result in death of the victim are punishable by a maximum of ten years' imprisonment. The state should increase the minimum and maximum sanctions for acts of torture. The maximum punishment for acts of torture should be life sentence for acts resulting in death of the victim.

III. Investigation of torture

Another problem with enforcing criminal sanctions for the use of torture is that the state may charge the torturer with a less serious offence, for example, excess of authority or official power or coercion to extract a confession. There may be a variety of reasons why the state may choose not to prosecute law enforcement officers for use of torture, including the lack of impartiality of authorities conducting the investigation of torture. According to Article 192(4-1) of the Criminal Procedure Code of Kazakhstan, investigation of torture is conducted by either the police or the National Security Committee. Since in practice the investigation unit is part of the same agency against which the victim of torture has brought the complaint, there is obviously a conflict of interests. For this reason, the Government of Kazakhstan should consider establishing an independent ***Agency for Investigating Torture (AIT)***, which would investigate complaints against police brutality, including allegation of use of torture. Ideally, it should be a completely independent agency (see paras. 9-10 of this note), composed of civilian investigators. These investigators cannot be serving or former police officers or members of any law enforcement agency.

IV. Administration of pre-trial detention facilities

Although Kazakhstan transferred the power to administer prisons to the Ministry of Justice a few years ago, the Ministry of Internal Affairs and the National Security Committee control and administer temporary isolation facilities (IVSs) and some of the investigation isolation facilities (SIZOs)[146], where risk of subjection to torture and other cruel and inhuman treatment for a detained person is very high. It is obvious that the law enforcement agency which is responsible for successful investigation of crimes should not be in charge of security of suspects. Since the police may arrest a person based on administrative procedural rules, all facilities, which are used for detention as an administrative sanction for a minor offence, should be transferred to the

[146] Law of the Republic of Kazakhstan of 30 March 1999 No. 353-1 "Procedure and conditions of detaining suspects and persons accused of crimes" Articles 7-9.

Ministry of Justice. In future, a comprehensive reform of the administrative offences and police legislation should be conducted in order to restrict police detention only to criminal proceedings (including short term police detention on suspicion of committal of a criminal offence). The remaining investigation isolation facilities (SIZOs) should be transferred to the Ministry of Justice.[147] Use of temporary isolation facilities/ rooms for the detained (KVZ, KAZ) are to be restricted only to short term police detention and regulated solely by the criminal proceedings legislation.

V. Rights of the suspect

The most critical time when the arrested person could be tortured by the police and officers of other law enforcement agencies, is the period between actual apprehension of the person and his or her placement in a detention facility. Hence, it is vital to ensure that the arrested person has access to a lawyer and can exercise other rights granted to the suspect and the accused from the moment of his or her apprehension by the police. According to the current legislation of Kazakhstan, the police do not have to inform the detainees about their rights, including the right to a lawyer during the arrest or immediately after the actual arrest.[148] The law provides the police with three hours after the actual arrest to write an arrest report and then inform the detained person of his/her rights including the right to "invite" a lawyer. Although Article 68(2) of the Criminal Procedure Code of Kazakhstan grants the detained persons the right to make a phone call to the place of their residence or work "immediately", this right is hardly exercised. Firstly, the law does not require the police to inform the detained persons of their right to make a phone call. Secondly, there is no clear definition of the term "immediately". Does "immediately" mean "after the person has been apprehended by the police" or "after the person has been informed of his or her rights"? Thirdly, the provision regarding the right of the suspect to make a phone call and inform relatives etc. of his/her whereabouts contradicts other provisions of the Criminal Procedure Code of Kazakhstan. For example, Article 138(1) requires the police to notify relatives of the detained person or give him/her an opportunity to notify relatives within 12 hours. Again, it is not clear from what moment. Moreover, according to Article 138(3), this period can be postponed for 72 hours in exceptional circumstances. In other words, the right to "invite" a lawyer cannot be exercised unless the police contact the lawyer directly or contact the relatives. In order to prevent abuse of power by the police the legislator should amend the Criminal Procedure Code of Kazakhstan with the requirement that the police must notify the suspect during the arrest or immediately after the actual arrest of his/her right including his/her right to make a phone call to his/her lawyer and/or his/her

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[147] Law of the Republic of Kazakhstan of 30 March 1999 No. 353-1 "Procedure and conditions of detaining suspects and persons accused of crimes" Articles 7-9.

[148] Criminal Procedure Code of Kazakhstan, Article 134.

relatives. Instead of declaring the right of the detained person to make a phone call, the police have to be obliged to give the detained person an actual opportunity to make a phone call and notify his/her relatives and his/her lawyer during or immediately after the actual arrest.

The law should also prohibit in all circumstances interrogation of the detained person before he/she has an opportunity to consult with his or her defence counsel. The legislator in Kazakhstan should consider adopting the rule introduced in some post-Soviet countries which requires that any confession made without a defence counsel being present during interrogation, including cases of waiver of the right to a defence counsel, is deemed inadmissible evidence.[149] It is also recommended that the defence counsel be allowed to be accompanied by an independent medical professional who can conduct a medical examination of the detained person at any time before the initial police questioning or after. In some cases this would help not only to prevent acts of torture, but also obtain evidence of torture.

VI. Agency for Investigating Torture (AIT)

The preferred option for Kazakhstan would be the model of an independent Police Complaints Agency for investigating allegations of torture and other forms of ill-treatment by law enforcement agencies (various police bodies, the National Security Committee), which will be directly accountable to Parliament and not responsible to either the Ministry of Internal Affairs, the Office of the Prosecutor or any other police or executive agency. The Director of the Agency for Investigating Torture (AIT) should be appointed by Parliament from a list of candidates submitted by the High Judicial Council (Vysshii sudebnyi sovet). This would make the selection process less politically motivated, fairer and transparent. A candidate for this position cannot be affiliated to the police or any other law enforcement agency or the Office of the Prosecutor. Ideally, he or she has to be a civil rights lawyer or a former judge. In every province (oblast') of Kazakhstan the office of the AIT should have representatives, or a provincial AIT department, appointed by the Director of the AIT. Civilian investigators should have the status of police investigators and their powers should be stipulated in the Criminal Procedure Code of Kazakhstan.

The powers of the AIT and its departments should include but not be limited to the following:

(1) investigation of all incidents of death and assault of persons in law enforcement custody as well as any other places of deprivation of liberty where persons are kept against their will or as a result of law enforcement actions;

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[149] See e.g. Article 81(4)(1) of the Criminal Procedure Code of Kyrgyzstan and Article 75(2)(1) of the Criminal Procedure Code of the Russian Federation.

(2) investigation of any complaint against law enforcement officers including complaints from victims, their relatives or witnesses of law enforcement misconduct, law enforcement officers against their peers and from a trial judge who suspects that a defendant has been the victim of torture; including any reports or communications from the National Preventions Mechanisms (NPMs); and, in case of the need to discipline police officers or other state officials, report to the specialized disciplinary boards of the law enforcement bodies;

(3) opening of a criminal case against any law enforcement officer suspected of a crime and full investigation of the crime;

(4) presentation of an annual report on results of investigations to Parliament.

VII. Admissibility of coerced confessions

Admissibility of coerced confessions is a very serious issue, which is not properly addressed by the criminal procedure law of Kazakhstan. Article 116(1) of the Criminal Procedure Code of Kazakhstan prescribes that evidence obtained by torture, force, threats, deception or any other illegal method has to be considered inadmissible. The question arises, however, as to who has the burden of proof that alleged torture has or has not been used during pre-trial investigation. In other words, it is unclear from the Criminal Procedure Code whether the accused should prove that he or she was subjected to torture and other forms of police ill-treatment and his or her confession or other evidence has been obtained by coercion or whether the onus is on the prosecution to prove beyond reasonable doubt that the confession and other evidence has been obtained by legal means and without coercion. If the burden to prove allegations of torture is upon the accused, who is the victim of torture, this is hardly possible to discharge since trials may take place months after application of torture when there is no trace of violence or medical records available to the court. In other words, although Kazakhstani criminal procedure law prohibits the use of torture and other forms of oppression in relation to detainees, they are not protected against illegal methods, since the law and practice in Kazakhstan are based on the presumption of legality of criminal proceedings conducted by the police and other law enforcement agencies. Hence the legislator must amend the Criminal Procedure Code with the requirement that any allegation of torture has to be rebutted by the prosecution. The prosecution cannot simply declare that it has investigated the issue through its internal investigation (proverka) and that the results of this investigation did not confirm allegations of torture. The prosecutor must be required to present evidence that torture has not been used during pre-trial investigation. For example, when disputing allegations of torture in relation to voluntariness of the confession made by the accused, the prosecutor might present the whole footage of interrogations involving the accused. If the judge is not convinced that torture has not been

applied, he/she rules such evidence inadmissible. In other words, the role of judge is not to investigate torture as a crime beyond reasonable doubt, but only to be convinced that suspicious evidence was excluded.

As mentioned above (para. 10), the trial judge should be allowed to order the AIT to investigate allegations of torture which might have been applied by the police during pre-trial investigation in a case under consideration. The results of the investigation by the AIT, however, should not be used by the prosecution to appeal a judge's decision to exclude evidence as inadmissible. It would be illogical to assume that unsuccessful investigation of allegations of torture can serve as proof that torture has not actually been administered to the accused.

Another issue related to the admissibility of alleged coerced confessions in trials with participation of lay assessors (jurors)[150] is access of lay assessors (jurors) to the defence position regarding voluntariness and admissibility of the pre-trial confession. Although the Criminal Procedure Code of Kazakhstan prohibits judges from presenting any inadmissible evidence to jurors, it does not prohibit parties from making motions in the presence of jurors. In practice, however, Kazakhstani courts have adopted the approach existing in Russian courts whereby trial judges exclude lay assessors from court hearings regarding admissibility of pre-trial confessions on the ground that information regarding the use of torture cannot be revealed to lay assessors. The jury trial monitoring project conducted by the OSCE in 2007 revealed that trial judges very often send lay assessors (jurors) to another room when the defence tries to challenge the voluntariness of confessions and argue that the police used torture.[151] Such practices should be abolished in order to effectively combat torture during criminal investigations.

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[150] In January 2007 Kazakhstan introduced a system of mixed courts consisting of two professional judges and nine lay assessors who deliberate and adjudicate both questions of guilt and sentence together. This type of court tries only the most serious felonies punishable by life imprisonment.

[151] OSCE/ODIHR. Report on Results of Monitoring of Trials with Participation of Jurors in the Republic of Kazakhstan in 2007. Almaty, 2008.

Elina STEINERTE, PhD

INVENTORY OF EXISTING MECHANISMS OF MONITORING IN KAZAKHSTAN AND THEIR COMPLIANCE WITH OPCAT STANDARDS FOR NATIONAL PREVENTION MECHANISMS[152]

The Optional Protocol to the United Nations Convention of the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[153] is a rather different international human rights treaty in that it does not require a state party to submit reports on the domestic compliance with the provisions of the instrument, like, for example, International Covenant on Civil and Political Rights (ICCPR)[154]. Rather the central obligation of a state party to OPCAT is to set up, designate or maintain at the domestic level one or more visiting bodies, a national preventive mechanism (NPM)[155] and it is to do so within one year of its ratification of the instrument[156]. The OPCAT however contains no blue-print as to how these NPMs ought to look like, how they should be constituted or how should they be structured. Part IV of the instrument deals with the issue of NPMs and Article 18 only stipulates that the states parties are to guarantee the functional independence of NPMs and the independence of the personnel; ensure that NPMs' experts have the necessary capabilities, professional experience and strive towards adequate representation of ethnic and minority groups in the country; make available the necessary resources for the functioning of the NPM and give due regard to the Paris Principles[157] when establishing NPMs.

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[153] UN GA Res. 57/199 on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199, adopted on 18 December 2003 by 127 votes to 4, with 42 abstentions. The OPCAT came into force on 22 June 2006 and as of March 2009 has 46 states parties; See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=131&chapter=4&lang=en (last accessed on 18 March 2009).

[154] See Article 40 of the ICCPR.

[155] Article 3 of the OPCAT.

[156] Article 17 of the OPCAT.

[157] Principles Relating to the Status of National Institutions, General Assembly Resolution 48/134, 1993.

The Republic of Kazakhstan (Kazakhstan) signed the OPCAT on 25th September 2007 and ratified the instrument on 22 October 2008[158]. Thus the country is to designate its NPM by the 22nd October 2009[159], as prescribed by Article 17 of the OPCAT. The aim of this paper is to examine the obligations that OPCAT lays upon Kazakhstan in respect of the NPM and to assess the level to which various existing mechanism in the country comply with those. The report is based on the experience accumulated during the research project which is being carried out by the OPCAT research team of the Law School of the University of Bristol[160]. It is not aimed as a prescription on how an NPM in Kazakhstan ought to look like but rather as an analysis of the various options and issues that ought to be considered when choosing an NPM for the country. The Report is divided in two main sections: the first one will consider the institutional characteristics of an NPM and the second will deal with its functional aspects. Throughout the Report particular attention is paid to the existing mechanisms in Kazakhstan: the Office of the Commissioner for Human Rights (Ombudsman's Office) and its supporting entity, the National Centre for Human Rights (the Centre) and the so-called Public Monitoring Commissions (PMC) as these institutions are the only bodies in the country that currently exercise some activities that would fall within the remit of an NPM[161].

I. Institutional Characteristics of an NPM

Article 17 of the OPCAT gives states parties three options as to the creation of an NPM: to establish, maintain or designate. 'Establish' was aimed at those potential states parties which did not have a body that would comply with NHRIs standards for the purpose of an NPM and thus would require

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[158] See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=131&chapter=4&lang=en (last accessed on 18 March 2009).

[159] Please note that in its alternative report to the CAT, Amnesty International states that Kazakhstan entered a declaration under Article 24 of the OPCAT in respect of Part IV of the OPCAT, which means that the country can postpone its obligation to designate an NPM by three years: see Amnesty International *Kazakstan Summary of Concerns on Torture and Ill-Treatment. Briefing before the United Nations Committee Against Torture.* November 2008; AI Index: EUR 57/001/2008; p. 8.

The relevant UN web page of the OPCAT ratifications however contains no such information: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=131&chapter=4&lang=en (last accessed on 19 March 2009).

[160] The three year research project is funded by the Arts and Humanities Research Council (UK) and started in June 2006. The project director is Prof Rachel Murray (Рейчел Мюррей) and co-director is Prof Malcolm Evans (Малколм Эванс). The two research associates on the project are Mr Antenor Hallo de Wolf (Антенор Хелло де Вольф) and Dr Elina Steinerte (Элина Штейнерте). For more details about the project please visit: http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html.

[161] See the Inventory Paper of 16 February 2009; produced by the Legal Policy Research Centre (Kazakhstan).

creating an entirely new body with the requisite powers to fulfil the tasks of an NPM. The option of 'maintaining' was reserved for those states that already had national bodies with the necessary powers and thus would only require maintaining such entities. Finally, 'designation' was envisaged for those states which had several human rights or visiting bodies that could be designated as a 'bunch' to make up the NPM.

These three options are the only prescriptions in the OPCAT about the creation of NPMs. It is thus clear that the establishment is an obligation- an NPM must be designated and this cannot be left to a voluntary initiative of individuals. This however is the case with the PMCs which are to be established on a voluntary basis[162].

Moreover, Article 18(4) contains a direct reference to the Paris Principles which allows to 'import' some more, additional requirements that states must follow when choosing their NPM, the two most important ones being the legal basis and the quality of the process of establishment.

1. Process of Establishment. The Paris Principles call for a transparent and inclusive process in the composition and appointment of the members of NHRIs[163]. Certainly this is a very important aspect when creating an NPM, a body which will have to carry out a rather complex mandate. Features such as legitimacy, trustworthiness and reputation, perceived legitimacy perhaps being the most important characteristic here, are vital and will ultimately add to the potential effective operation of an NPM. The involvement of all the relevant stakeholders, such as various governmental departments, existing statutory visiting bodies, civil society and non-governmental organisations (NGOs) is thus paramount so as to ensure not only an inclusive and transparent process, the 'end product' of which is an NPM suited to the specifics of the country, but also to ensure that these stakeholders accept the outcome of the process, the NPM. Consequently the quality of the NPM establishment process has direct repercussions for the legitimacy and reputation of this body. An excellent example of such a transparent and inclusive process could be observed in Paraguay[164], where in 2006 a Working Group was elected from a National Forum, which was charged with the duty of analysing the implementation of OPCAT and was composed of over 100 stakeholders from the government and civil society. This Working Group, composed of 13 individuals, acting in an individual capacity, represented state institutions and civil society and drafted an NPM proposal in open and

[162] See: Постановление Правительства Республики Казахстан об утверждении «Правил образования областных (города республиканского значения, столицы) общественных наблюдательных комиссий» от 16 сентября 2005 г. № 924.

[163] Principles Relating to the Status of National Institutions, General Assembly Resolution 48/134, 1993; Principle B.

[164] APT '*National Preventive Mechanisms. Country-By-Country Status under the Optional Protocol to the UN Convention Against Torture (OPCAT)*'; Report of 09 March 2009; pp. 48-49.

inclusive meetings, where outsiders were also welcomed. This draft law is currently under the consideration by the legislature. It is clear that an NPM which is created through such an inclusive and transparent process will draw an outstanding legitimacy from such a process and is less likely face challenges to its mandate.

To this end, the roundtables of 20 November 2008 and of 26-27th February 2009 both in Astana must be remarked. Both of these events brought together a number of relevant stakeholders and provided a starting point for the discussions on the issue of appropriate NPM for Kazakhstan.

The creation of the so-called national anti-torture working group in Kazakhstan must also be noted here: the thirteen-person entity was established in 2008 under the auspices of the Ombudsman's Office to examine the use of torture and other forms of ill-treatment in the country and its mandate also includes the implementation of OPCAT[165]. The membership of this body is wide as it includes representatives from the Ministries of Justice and Interior, Prosecutor's Office, Committee of National Security, Commission for Human Rights, National Centre for Human Rights as well as three NGOs[166].

It is important that the process of the establishment of NPM in Kazakhstan continues to be an inclusive and transparent process and that the 'end product' of this process is not imposed by the state but rather outcome of inclusive discussions.

2. Legal Basis. The Paris Principles also require that an institution such as an NHRI has a legal basis, either in the constitutional or regular legislative instrument of the state in question[167]. It has been however argued that, in the case of the NHRIs having the constitution as a legal base for the entity can be very beneficial, especially in transitional societies[168]. The same can be said about the NPMs: a constitutional basis would lend more legitimacy to the body, add to the perceived independence and authority of such entity and generally such texts are more difficult to amend.

However, a constitutional basis is not a strict requirement and the downsides must be acknowledged: since constitutional texts are generally more difficult to amend, it may be counterproductive to include detailed NPM provisions in the constitutional provisions as any changes in the future may be difficult to achieve.

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[165] Ibid; p. 92.

[166] Ibid.

[167] Principles Relating to the Status of National Institutions, General Assembly Resolution 48/134, 1993; Principle A (2).

[168] Richard Carver and Alexey Korotaev 'Assessing the Effectiveness of National Human Rights Institutions'; Report on the behalf of the UNDP Regional centre in Bratislava, October 2007; Part 2; p. 6.

In any case, it is clear that for an effective functioning of an NPM, a clear legal basis is a must: being established through an act of legislature not only lends the body legitimacy but also acts as a certain guarantee of its independence since changes in legislation are more difficult to achieve than for example, amendments in the acts of executive. Indeed, in practice this has been generally followed by the countries that have designated NPMs so far. Thus, for example, in case of Denmark, the Parliamentary Commissioner for Civil and Military Administration (Danish Ombudsman) was designated as the Danish NPM in the national legislation on the ratification of OPCAT that was presented to the Parliament even though there were no amendments made in the basic law on the Danish Ombudsman[169].

The situation is rather different in Mali, however, where the National Human Rights Commission of Mali has been designated as NPM through a Presidential Decree and there is no specific NPM legislation or other instruments adopted to this end[170]. This of course raises concerns about the legitimacy of the NPM as well as its prospects of fulfilling its mandate effectively.

The Office of Ombudsman in Kazakhstan is established pursuant to the Decree of the President of the Kazakhstan No 947 of 19th September 2002[171]. The President, according to Article 40 of the Constitution of Kazakhstan, is the head of the government and according to Article 20 (1) of the Constitutional Law on the President[172] such Decrees have binding force in the territory of Kazakhstan. While pursuant to Article 1 of the Law on Legal Acts[173], the Presidential Decrees are considered to be legal acts in the country, nevertheless these are clearly acts of the executive and not of the legislative.

In addition, the work of the Ombudsman, as noted in Article 30, is supported by the Centre, the statute of which is also approved by the Presidential Decree[174].

Consequently the institution of Ombudsman and its supporting institution, the Centre, both rest on executive Decrees which may give rise to serious concerns in terms of the independence of the body. The need to 'anchor' the

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[169] APT '*National Preventive Mechanisms. Country-By-Country Status under the Optional Protocol to the UN Convention Against Torture (OPCAT)*'; Report of 09 March 2009;; p.75-76.

[170] Ibid; p. 17.

[171] Указ Президента Республики Казахстан от 19 сентября 2002 года № 947 «*Об учреждении должности Уполномоченного по правам человека».*

[172] Конституционный закон Республики Казахстан от 26 декабря 1995 года № 2733 «*О Президенте Республики Казахстан».*

[173] Закон Республики Казахстан от 24 марта 1998 года № 213-I «*О нормативных правовых актах».*

[174] Указ Президента Республики Казахстан от 10 декабря 2002 года N 992 «*О создании Национального центра по правам человека».*

institution of Ombudsman in the Constitution of Kazakhstan has been pointed out by the Venice Commission of the Council of Europe (Venice Commission)[175]. It has been recommended that the constitutional text need not contain detailed provisions of the Ombudsman institution and be limited to granting the entity a constitutional status[176]. In addition, it has been recommended that the details of the functioning of the institution be set out further in detail in the normative text, normal legislation of the country, adopted by the legislature of the Kazakhstan[177].

The PMCs were established through legislative amendments of 29th December 2004[178] and thus these bodies are 'anchored' in the normal legislation of Kazakhstan. However the details of the establishment of these Commissions as well as their operational details are set out in the Decision of the Government[179], which according to Article 1 of the Law on Legal Acts[180], are not considered to be legislative acts in the country. Thus the operational aspects of the PMCs are subjected to the regulation of the executive which may give rise to serious concerns in terms of the independence of these bodies. This has been noted as a shortcoming by the national NGOs too[181].

Consequently neither the Ombudsman's Office of Kazakhstan nor the PMCs have sufficient legal basis to fulfil the criteria of the OPCAT for an NPM.

3. Independence. Independence is the central requirement for the NPM as set out in Article 18 of the OPCAT, which calls ***for functional independence and independence of the personnel***.

a) *Functional Independence.* Article 18 (3) obliges states parties to provide their respective NPMs with the necessary resources for their functioning and the Paris Principles require that:

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175 European Commission for Democracy Through Law (Venice Commission) *Opinion on the Possible Reform of the Ombudsman Institutions in Kazakhstan* Adopted by the Venice Commission at its 71st Plenary Session; Opinion No. 425/2007 of 5 June 2007; paras 10 and 30.

176 Ibid; para 7.

177 Ibid; para 11.

178 Закон *«О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам органов юстиции»* от 29 декабря 2004 г. № 25-III.

179 See: Постановление Правительства Республики Казахстан об утверждении «Правил образования областных (города республиканского значения, столицы) общественных наблюдательных комиссий» от 16 сентября 2005 г. № 924.

180 Закон Республики Казахстан от 24 марта 1998 года № 213-I «*О нормативных правовых актах*».

181 Yevgeni Zhovtis *Summary of Remarks at the International Conference "OPCAT in an OSCE region: its meaning and implementation"* Presentation in the Conference *OPACT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-16 November 2008; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/law/research/centres-themes/opcat/pragueseminar.html#docs (accessed on 19 March 2009).

‘The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.’[182]

Further guidance on the budgetary issues is provided by the Subcommittee on the Prevention of Torture (SPT), which has noted that NPM budget should be ring-fenced in its Guidelines for the on-going development of NPMs (NPM Guidelines)[183].

Thus there are two basic requirements in terms of the NPM budget that emerge: it should be sufficient to allow the entity to carry out its mandate and only the NPM itself should decide how that budget is spent.

The budgetary provisions of the Ombudsman’s Office are very scarce as Article 35 only provides activities are funded by the state budget, but there are no further stipulations as to who determines the size of such budget or what are the powers of the Ombudsman to decide how that budget is spent. However some international bodies have expressed concerns over the independence of the body due to budgetary issues. Thus the United Nations Committee against Torture (CAT) has expressed its concerns over the lack of own budget for the Ombudsman’s Office, noting that this impedes the independence of the entity[184]. Furthermore, the Venice Commission has recommended that legislation on the Ombudsman should provide for the adequate budgetary allocation as well as ensure budgetary independence of the body[185]. It thus appears that the current budgetary provisions of the Ombudsman’s Office would fail to satisfy Article 18 of the OPCAT.

In addition, according to Article 19 of the Decree on the National Centre for Human Rights[186], the material and technical supplies services for the Centre are provided by the Administration of the President. While Article 18 stipulates that the financial plan of the Centre is approved by the Head of the Centre together with the Ombudsman, there are no further provisions on, for example, whether any other institution or authority can interfere with such

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[182] Supra note 5; Composition and Guarantees of Independence and Pluralism; para 2.

[183] *First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; CAT/C/40/2; 14 May 2008; Section II, Part B; para 28; section vii.

[184] Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. *Concluding Observations of the Committee Against Torture. Kazakhstan*. CAT/KAZ/CO/2 of 12 December 2008; para 23.

[185] European Commission for Democracy Through Law (Venice Commission) *Opinion on the Possible Reform of the Ombudsman Institutions in Kazakhstan* Adopted by the Venice Commission at its 71st Plenary Session; Opinion No. 425/2007 of 5 June 2007; para 30; part VI.

[186] Указ Президента Республики Казахстан от 10 декабря 2002 года N 992 «*О создании Национального центра по правам человека*».

plan or whether such plan must be met by the Administration. Therefore there appears to be a rather large scope of potential influence of the executive over the budget, which gives similar concerns in terms of the functional independence of the Centre as those in respect of the Ombudsman described above.

The Decision of the Government on the PMCs, Article 1 (3) stipulates that such commissions operate on the voluntary basis which, coupled with absence of any provisions on the budget, strongly suggests that such bodies have no budgets[187]. This raises serious concerns in terms of Article 18 of the OPCAT as may impede or even halt the ability of the body to carry out tasks of the NPM.

Therefore it appears that neither the Ombudsman's Office, nor the Centre and the PMCs satisfy the requirements of OPCAT in terms of their budget.

Turning further to the free operation of the NPM, Article 20 of OPCAT sets out more detailed requirements about its unimpeded operation. The Paris Principles, which are refereed to in Article 18 (4) of the OPCAT further specify that:

'Within the framework of its operation, the national institution shall:

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
(f) Maintain consultation with the other bodies, whether jurisdictional'[188].

In the light of these requirements, serious concerns arise when examining the relevant provisions relating to the Ombudsman's Office. The powers of the Ombudsman to consider complaints are very narrow as, according to Article 18, he/she has no power to consider complaints against actions and decisions of the President, Parliament and its members, the Government, Constitutional Council, Prosecutor General, Central Electoral

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[187] See the Inventory Paper of 16 February 2009; produced by the Legal Policy Research Centre (Kazakhstan); p. 12.

[188] Principles Relating to the Status of National Institutions, General Assembly Resolution 48/134, 1993; Methods of Operation.

Commission and the courts. This is a very restrictive provision which calls in question the ability to operate in any meaningful way.

The operational freedoms of the PMCs are even more restrictive: Article 1 (4) of the Decision of the Government on the PMCs stipulates that when exercises the public control, the PMCs may not interfere with the operation of the correctional institutions, which is rather broad formulation, calling into question the ability of such commissions to carry out meaningfully the tasks prescribed for the NPM.

Finally, Article 35 of the OPCAT also prescribes that the NPMs be accorded such privileges and immunities as are necessary for the independent exercise of its functions. The Decision of the Government on the PMCs has no provisions on the matter and neither does the Decree on the Ombudsman's Office or the Decree on the National Centre for Human Rights, which clearly falls short of the OPCAT requirements.

Consequently, as the above analysis suggests, neither the Ombudsman's Office and the Centre nor the PMCs comply with the requirements of functional independence of an NPM as set out in Article 18 of OPCAT.

b) *Independence of Personnel.* Article 18 (2) of the OPCAT requires that states parties ensure that the members of the NPM have the necessary expertise and that the appointment process strives for a gender balance and the adequate representation of ethnic and minority groups in the country. Further, reference to Paris Principles in Article 18 (4) allows for some additional guidance on the matter as these require that the appointment procedure be such as to 'afford all the necessary guarantees' and includes a wide variety of representatives from government (in advisory capacity only), NGOs and parliament[189]. Moreover, there is a requirement 'that appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.'[190]

Thus clearly there is an obligation upon states parties to provide the necessary facilities and resources to ensure an appropriate NPM appointment process[191]. The Decree on the Ombudsman in section 2 sets out the appointment procedure for the Ombudsman. However the criteria stipulated give rise to some serious concerns in the light of the independence requirements set out in the OPCAT and Paris Principles. Thus Article 8 states that the Ombudsman is appointed by the President after consultations with

[189] Ibid; Composition and Guarantees of Independence and Pluralism; para 1.

[190] Ibid; para 3.

[191] Rachel Murray '*National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size Does Not Fit All'* in Netherlands Quarterly of Human Rights, Vol. 26/4 (2008); p. 497.

the Committees of the Parliament while the list of candidates is determined by the President. This does not suggest an inclusive and transparent process as the selection of the candidates appears to be in the exclusive competency of the executive. Moreover, upon appointment, the Ombudsman is to be adjured by the President in the presence of the Chairmen of the Chambers of the Parliament, Chairmen of the Parliamentary Committees and other officials and give an oath, as prescribed by Article 12. Such a procedure, the prominent involvement of executive in it most importantly, gives rise to concerns at least in respect of the perceived independence.

Furthermore, the Ombudsman can be removed from the office by the President (Article 8) however the grounds for removal, as described in Article 14, are very vague: for example, the Ombudsman can be removed for gross abuse of official duties, commission of misdeed inconsistent with the post and undermining the authority of the state. Without any further stipulation as to what this entails and in the absence of any procedure whereby the potential removal of the Ombudsman would be considered in an open and transparent process, the personal independence of the Ombudsman is seriously compromised.

In addition, the work of the Ombudsman, as noted in Article 30, is supported by the National Centre for Human Rights, the statute of which is approved by the Presidential Decree[192]. According to Articles 14 of this Decree, it is the Ombudsman who is in complete charge of the structure of the Centre and appoints/removes the Head Centre (Article 15). This is a very positive aspect as it means that the Ombudsman is in charge of the entity, which supports his/her work. The factor that gives rise to concern is the questionable guarantees towards the personal independence of the Ombudsman, as described above, which may adversely impact the independence of the Centre.

Turning to the PMCs, section 2 of the respective Decision of the Government sets out the establishment procedures for these bodies. According to Article 6 such Commissions are established by the initiative of NGOs who wish to carry out public control in detention facilities. The selection process thus appears rather inclusive whereby members of domestic NGOs and citizens are recruited through newspaper advertisements[193]. The running of the Commissions is completely in hands of the Commissions themselves and the leadership is provide by the Chairperson who is elected by majority of the members of the Commission (Article 8). However there is nothing in the Decision on the way the Commission is constituted- who receives applications from the potential candidates, who makes selection or what are

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[192] Supra note 22.

[193] Amnesty International *Kazakstan Summary of Concerns on Torture and Ill-Treatment. Briefing before the United Nations Committee Against Torture.* November 2008; AI Index: EUR 57/001/2008; p. 7.

their terms of office. A potential further problem rests with the fact that the establishment of such Commissions is not compulsory but entirely voluntary, as already noted above.

Consequently it appears that neither the current stipulations on the Ombudsman's Office, nor the Centre and the PMCs satisfy the requirements of OPCAT in terms of the independence of personnel of the NPM.

4. Composition. Article 18 (2) also stipulates that there should be a variety of expertise reflected the in the membership of the NPM. Given the wide scope of the definition of 'deprivation of liberty' in Article 4 of the OPCAT, the details of which will be addressed in the next section of this Report, the NPMs are either to have the necessary variety of expertise 'in-house' or have the ability, both legally and financially, to contract it in. Thus the NPMs are not to be bodies composed solely of lawyers, but should strive to have aboard experts from different backgrounds, like medical doctors, social workers, forensic scientists, psychiatrists etc.

The Decree on the Ombudsman specifies in Article 7 that the candidate to the post ought to have a University degree in law or humanities and have at least three years of experience in legal work or in the field of human rights. Certainly legal education can be very useful in carrying out the Ombudsman's mandate. However the OPCAT calls for the need of diversity on the NPMs expertise. Undoubtedly, the Centre could also play a role in supplementing the necessary expertise. The Decree on its establishment however contains no provisions on the diversity of expertise. Moreover, neither the Decree on the Ombudsman nor the Decree on the Centre provide for a possibility to contract-in expertise in case of a necessity.

Pursuant to Article 7 of the Decision on the PMCs, a Commission may be formed in each of the administrative regions of the country and in fact all 14 administrative regions have one Commission formed[194]. However some Commissions have reported difficulties in recruiting enough members[195] which may have implications for the functional abilities of these entities. Nevertheless, it is reported that generally PMCs have some diversity of expertise among their membership as most are composed of lawyers, advocates, journalists[196].

Moreover, it should be noted that Article 18 (2) of the OPCAT also requires that the NPM be representative of the minority and ethnic groups within the country as well as strive for a gender balance. Such requirements

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[194] Supra note 9; p. 11.

[195] Amnesty International *Kazakstan Summary of Concerns on Torture and Ill-Treatment. Briefing before the United Nations Committee Against Torture.* November 2008; AI Index: EUR 57/001/2008; p. 8.

[196] Supra note 29.

are not present in Decree on Ombudsman, on the Centre or in the Decision on the PMCs.

II. Functioning of an NPM

The functions of the NPM are set out in Articles 19-23 of the OPCAT, which set out the minimum powers that NPMs must have, the duties of the states parties towards the NPM and gives some details of the way NPMs are to operate.

The main aim of the NPMs mandate is that of prevention and to this end the main venue envisaged in the text of the OPCAT is visiting places of deprivation of liberty, as noted in Article 1. Nonetheless, if this provision is read together with the Preamble to the instrument, it becomes evident that the scope of the mandate to prevent is wider than just visiting places of deprivation of liberty. Para 5 of the OPCAT's preamble calls for 'education and a combination of various legislative, administrative, judicial and other measures'.

However, before embarking upon the examination of NPMs preventive mandate, special attention should be paid to the notion of 'deprivation of liberty' in the OPCAT as it has direct implications for the scope of the NPMs mandate.

1. Notion of 'deprivation of liberty'. Article 4 of the OPCAT states:

"1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 [the SPT and NPMs] to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

This is certainly a very broad definition of 'deprivation of liberty'. Thus the NPMs, as stipulated by Article 4(1) of the OPCAT, are to visit not only more 'traditional' establishments like prisons and police cells, but also such less 'traditional' places as psychiatric institutions, refugee camps, centres for juveniles, immigration centres, transit zones at international points etc. Moreover, the specifics of each country may add to the list of such places: for example, in some countries it has been suggested that it may be necessary

to detain people in order to contain contagious diseases[197] which would then in turn expand the scope of the places to be visited. In other words, the list of the places of deprivation of liberty must be kept flexible so as to accommodate the specifics of each state party as well as intricacies dictated by the contingencies of each situation.

Furthermore, Article 4(1) states that the visits must be allowed to places where persons ‘are or *may* be deprived’ (emphasis added) which means that not only actual but also potential places of deprivation of liberty are subjected to the visiting scheme.

The SPT in its NPM Guidelines has stipulated that the definition of places of deprivation of liberty in national legislation of states parties must reflect this broad definition adopted in OPCAT[198] and that the work programme of NPMs must cover all potential and actual places of deprivation of liberty[199].

The reach of the mandate of the Ombudsman in Kazakhstan however is phrased in more limited terms. Article 15 (5) of the Decree states that the Ombudsman may enter and stay on the territory and its premises of the state agencies, organisations, including military units and detachments as well as detention areas. This leaves off the list any potential private institutions to whom the state might have contracted out some of its functions. While such places may not exist in Kazakhstan at the moment, the legislation should not exclude the possibility of their existence in future.

The powers of the Centre to visit places of deprivation of liberty in the meaning of OPCAT are less clear as the Decree contains no specific reference to such rights. However, according to Article 8 (2), the Centre is to facilitate the fulfilment of Ombudsman’s mandate, which, if interpreted widely, could also encompass visits to places of deprivation of liberty. Nevertheless such an interpretation would stand at odds with the rest of Article 8, which sketches in the Centre as an entity, which is to carry out primarily research and information gathering and analysing activities.

Finally, turning to the mandate of the PMCs, the amendments in legislation that established these Commissions, Article 19 (1) allows them access to correctional institutions and pre-trial detention centres (investigatory isolation wards). It has been reported that the PCMs do not have access to military places of deprivation of liberty[200], for example, and

[197] Conference Report of the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT) ‘The Optional Protocol to the UNCAT: Preventive Mechanisms and Standards’ Law School, University of Bristol, April 19-20, 2007; p. 17.

[198] Para I of NPM Guidelines.

[199] Para VIII of NPM Guidelines.

[200] See the Inventory Paper of 16 February 2009; produced by the Legal Policy Research Centre (Kazakhstan); p. 13.

thus it appears that non-traditional places of deprivation of liberty are excluded from the scope of mandates of the PCMs.

Consequently none of the three institutions have the powers to visit the wide scope of places of deprivation of liberty as stipulated in the provisions of OPCAT.

2. Mandate to prevent. As was explained earlier, the main rationale of the NPMs mandate is prevention of torture and other forms of ill treatment. This can be further usefully divided into two cohorts: ***visiting places of deprivation of liberty and other preventive measures***.

a) *Visits to places of deprivation of liberty.* Visits to places of deprivation of liberty are at the heart of the NPM mandate: Article 1 calls for a system of regular visits by the NPMs and the SPT. There are several main features about the visiting mandate of the NPMs that can be distinguished: visits are to be regular (Article 1 of the OPCAT); NPMs are free to choose the places they want to visit and the persons they want to interview (OPCAT, Article 20 (e)), to have private interviews (OPCAT, Article 20 (d)) as well as have free access to relevant information (OPCAT, Article 20 (a) (b)) and any place and installation of the given establishment (OPCAT, Article 20 (c)); the NPMs are to make recommendations to authorities and the authorities have a corresponding obligation to enter to consider these recommendations (OPCAT, Articles 19 (b) and 22) and there must be guarantees against reprisals against those who communicate with the NPM (OPCAT, Article 21). Another important aspect of the visiting mandate is the question of unannounced visits. Even though the OPCAT does not expressly mention the option of 'unannounced visits', the examination of the drafting process shows that it was clearly understood that both the SPT and the NPMs were to be able to conduct unannounced visits to any place of detention as defined under Article 4[201]. The mandate to conduct unannounced visits can also be interpreted from Articles 12, 14 and 20 of the OPCAT, as well as the overall preventive objective of the instrument as defined in Article 1, so that both the SPT and NPMs must be able to choose when they want to carry out a visit, which is essential to facilitate the overall effectiveness of the SPT's and NPM's visits as a preventive tool.

Furthermore, it must be underlined that visiting places of deprivation of liberty as per OPCAT is not an aim in itself. Rather it is a starting point of a continuous dialogue with the authorities on the implementation of the recommendations of the NPM. The authorities are obliged to consider the recommendations and the dialogue with the NPM about their implementation should be meaningful.

When examining the relevant provisions of the respective institutions in Kazakhstan, some serious shortcomings emerge. The Decree on the

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[201] Manfred Nowak and Elizabeth McArthur*, The UNCAT: A Commentary,* p. 906, §44 and p.1011, §24-27.

Ombudsman does not stipulate the need for a system of visits to places of deprivation of liberty. While suggestions have been made that such visits are carried out on a basis of a plan, it is also noted that such visits are not unannounced but rather the plan is produced in consultation with the authorities of the respective places of deprivation of liberty[202]. Moreover, even though it has been reported in fact that the Ombudsman's office carries out visits to a variety places of deprivation of liberty, also 'non-traditional places, like military places and medical institutions, it is noted that such visits are normally in response to complaints received from those detained in these places[203]. Such visits, while certainly having an important role in the overall aim of torture prevention, do not however constitute the type of system of regular preventive visits as envisaged in the OPCAT.

A further practical aspect that may impede the ability of the Ombudsman's Office to comply with the OPCAT requirements, is the fact that the institution does not have regional representatives. Kazakhstan is a vast country covering a territory of 2.7 million square kilometres[204], which raises serious doubts as to whether a body based in the capital would be practically able to carry out visits on a regular basis without some presence in the regions.

Moreover, it appears that the Ombudsman is not carrying out unannounced visits, and while the reports on visits can be published in the mass media (Article 15 (7) of the Decree), there are no provisions about the recommendations to be issued to the authorities and no obligation upon authorities to engage with the Ombudsman on the implementation of recommendations. Thus the essential feature of the preventive visiting as per OPCAT, the dialogue with authorities, is missing.

Furthermore, when looking into the provisions on details of visits, it emerges that the Ombudsman's powers currently do not meet the requirements of Article 20 in terms of the rights to have private interviews with those detained and others and in terms of access to information: while the Ombudsman may request information (Article 15 (1)), there is no corresponding obligation to provide such information or even to reply to the request. Moreover, no information can be requested from the President, Parliament and its members, the Government, Constitutional Council, Prosecutor General, Central Electoral Commission and the courts (Article 15 (1).

Turning to the PMCs, the Decision clearly stipulates that access to places of deprivation of liberty is not free but must obtain a permit from the

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[202] See the Inventory Paper of 16 February 2009; produced by the Legal Policy Research Centre (Kazakhstan); p. 5.

[203] Ibid.

[204] See: http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1298071.stm (accessed on 20 March 2009).

Head of the respective institution or from the body governing the given institution[205]. Such a system certainly does not correspond to the requirements of OPCAT. Moreover, as reported by the PMCs themselves, in fact some of the administrations of the places of deprivation of liberty deny access to the members of the PMCs as well as ignore their recommendations[206]. On this latter point, it must be noted that the Decision does not oblige the authorities of the respective institutions even to engage with the PMCs on their recommendations, which the PMCs also have no obligation to produce. Furthermore, the PMCs also do not have the right of unannounced visits. This is a right that the members of these Committees have noted as important for their effective functioning and have thus called for its establishment in law[207]. Finally, the Decision does not provide for the rights of the members of the PCMs to conduct interviews in private with those detained and others, to receive information it deems necessary as well as there is no stipulation about free access to all parts and installations of the establishment. Therefore the existing visiting mandate of the PCMs does not meet the requirements set out for the NPM mandate in the OPCAT.

Finally there are no guarantees against reprisals against those who have communicated with the Ombudsman or the PCMs as required by Articles 21 and 15 of the OPCAT.

Therefore, as the above analysis indicates, there are serious shortcomings in the existing visiting powers of both the Ombudsman and the PMCs if compared to the mandate of the NPM as set out in OPCAT.

b) *Other Preventive Measures.* As noted earlier, para 5 of OPCAT's Preamble calls for 'education and a combination of various legislative, administrative, judicial and other measures' in order to achieve effective prevention of torture and other forms of ill-treatment. This means that the NPMs are to engage in wider activities aimed at the prevention, like awareness-raising campaigns and work with the legislation[208]. On this latter point, Article 19 (c) expressly requires that the NPMs have the powers to submit proposals and observations concerning the existing legislation.

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[205] См. п. 4, 12 Правил посещения гражданами учреждений, исполняющих наказания, следственных изоляторов от 7 января 2003 года № 6// Электронный юридический справочник «Параграф», 2009

[206] See Almaty Helsinki Committee Press Release on the Monitoring of Human Rights No 05/2006 of May 2006; Available at: http://www.humanrights.kz/press_review_12.php (accessed on 20 March 2009)

[207] See Almaty Helsinki Committee Press Release on the Monitoring of Human Rights No 08/2006 of August 2006; Available at: http://www.humanrights.kz/press_review_17.php (accessed on 20 March, 2009)

[208] Nele Parrest *The Concept of Prevention* Presentation in the Conference *OPACT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-16 November 2008; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationparrestnotes.pdf (accessed on 20 March 2009)

The Decision on the PMCs contains no such rights for the Commissions and generally it appears that the remit of these entities is limited to carrying out visits to places of deprivation of liberty. Therefore these bodies are not endowed with the preventive mandate as that envisaged in the OPCAT for the NPMs.

The Ombudsman, according to Article 19 of the Decree, has the right to contribute to the improvement of the legislation; however it is unclear whether such a 'contribution' may entail submission of legislative proposals.

According to Article 20, the Ombudsman is to facilitate legal education in the field of human rights and freedoms, be involved in development of curricula and raising the level of public awareness on legislation and international human rights instruments. While this is a welcome step towards the preventive mandate of the NPM as per OPCAT, it is unclear why it is limited to the legal education only as curricula of other professions, like medical doctors, psychiatrists, social workers etc may need to have a human rights component. Moreover, it must be underlined that a stipulation in law is only the first step and it is therefore necessary to ascertain to what extent these powers are actually utilised by the Ombudsman's Office.

The Centre appears to have many tools at its disposal, which could facilitate the implementation of the preventive mandate. Pursuant to Article 9, the Centre has the mandate to conduct studies, gather information, produce analytical reports, engage in public awareness raising campaigns, analyse the existing legislation etc. It should be once again underlined here that it is important that these are actually carried out by the Centre, i.e., the effectiveness on the ground is the important factor.

However there is a wider problem that the Ombudsman's office would have to face should it be considered for the role of the NPM. The Ombudsman's office in Kazakhstan possesses the traditional role envisaged for such institutions: it is charged with more of a reactive mandate, i.e., it deals with complaints. The OPCAT on the other hand requires a preventive approach, which in turn seeks pro-active engagement with authorities. The challenge for the Ombudsman Office thus will be how to adapt to this as that will require not only a shift in terms of ethos of the institution, but also in terms of thinking and methodology[209].

3. NPM Report. Article 23 of the OPCAT prescribes the need for the NPMs to produce annual reports and puts an obligation upon states parties to disseminate these reports. Moreover, in order to make the reporting process more effective, it is advisable that the NPM report is also discussed by, for

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[209] Summary and Recommendations for the Conference *OPACT in the OSCE region: What it means and how to make it work?* Prague, Czech Republic, 25-16 November 2008; p. 6; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf (accessed on 20 March, 2009).

example, in a Parliament session or special meetings of the relevant stakeholders.

The Decree on the Centre in Article 9 (12) provides that the centre ensures the timely preparation of the Ombudsman's Report which is submitted to the President[210]. Certainly this report concerns the activities of the Ombudsman's office as such and adjustments would need to be made for an NPM report. Moreover, it would be an obligation upon state to disseminate the NPM reports.

The Decision on the PMCs contains no provisions about the annual reports. Therefore it is evident that the requirements of the OPCAT in respect of the NPM report are not met by either of the entities.

4. Work with the SPT and other bodies. Article 20 (f) of the OPCAT gives the right to the NPMs to meet with the SPT, to send information to it and to meet with it and the states parties are obliged to grant NPMs such a right.

The Decree on the Centre in Article 9 (13) states that upon the authorisation of the Ombudsman the Centre facilitates the interaction with other institutions of human rights in Kazakhstan as well as with international and foreign human rights organisations. However there is no provision about the rights to meet and peculiarly, nothing about the cooperation with international human rights organisations is mentioned in the Decree on the Ombudsman. Similarly, nothing on the matter is stipulated in the Decision on the PMCs.

III. NPMs in other states parties to the OPCAT

The research conducted in the Law School of the University of Bristol on the implementation of OPCAT around the world[211] suggests that states parties to the OPCAT commonly look at the practice of each other when selecting an appropriate NPM. To a large extent this is prompted by the lack of detailed guidelines in the text of the instrument as to how NPMs ought to look like as well as by the uniqueness of the role that this international instrument prescribes to a national body. Therefore when looking for an appropriate NPM in Kazakhstan, it is worth examining the practice of other states parties to OPCAT.

So far there are three NPM models emerging:

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[210] See also Article 23 of the Decree on Ombudsman.

[211] The three year research project is funded by the Arts and Humanities Research Council (UK) and started in June 2006. The project director is Prof Rachel Murray (Рейчел Мюррей) and co-director is Prof Malcolm Evans (Малколм Эванс). The two research associates on the project are Mr Antenor Hallo de Wolf (Антенор Хелло де Вольф) and Dr Elina Steinerte (Элина Штейнерте). For more details about the project please visit: http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html.

1. the designation of existing NHRIs as NPMs: Ombudsman Offices or National Human Rights Commissions (like, for example, Estonia, Armenia, Czech Republic and Mexico);

2. the designation of a number of institutions, like New Zealand where the NPM is composed of five institutions: the Human Rights Commission (as a central body), Office of the Ombudsman, the Independent Police Conduct Authority, the Office of the Children's Commissioner and the Inspector of Service Penal Establishments of the Office of the Judge Advocate General of the Armed Forces or Slovenia and Moldova, where in both countries the mandate of the NPM is carried out by the respective Ombudsman Offices together with local NGOs;

3. the creation of a totally new institution for the purposes of the NPM, like the creation of the general Inspector of Places of Deprivation of Liberty in France in July 2008 or the forthcoming National Committee for the Prevention of Torture in Paraguay and the very recent decision (February 2009) to create the office of the National Observer of Places of Deprivation of Liberty for the purposes of the NPM in Senegal.

It should be noted that the establishment of an NPM in a country ought to be viewed as a process, and the proclamation of a certain body or bodies as NPMs should not be taken as an end but rather the very start of such a process. It has been highly recommended that such decision be revisited after a period of time and that review of the work and mandate, review of the NPM composition and well as review of funding takes place[212]. Indeed, state practice so far already indicates that revision of NPM designation is necessary: in Denmark, the designation of the Parliamentary Commissioner for Civil and Military Administration (Danish Ombudsman) as the Danish NPM was deemed straight-forward by the government, requiring no amendments in any of the existing legislation or practices. Now, two years down the road, the government is openly admitting that changes in legislation may be necessary.

Both the Maldives and Mauritius established provisional NPMs in the anticipation of the SPT's visit to these countries in 2007. Now both countries are undergoing processes leading to the proper establishment of their respective NPMs that may well differ from the provisional ones.

Consequently, as state practice shows, it is vital to view the NPM designation as a starting point of the NPM process, which is kept under review and it is important that Kazakhstan authorities take note of this emerged state practice.

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[212] Summary and Recommendations for the Conference *OPACT in the OSCE region: What it means and how to make it work?* Prague, Czech Republic, 25-16 November 2008; Recommendation (a); p. 10; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf (accessed on 20 March, 2009).

Conclusion

Establishment of an NPM for any state party to the OPCAT has not been an easy task: even countries that initially thought that their existing bodies meet the requirements of the NPM and thus designated such entities, now find themselves with the need to adjust their mandates so as to meet requirements of OPCAT. The respective authorities of Kazakhstan must therefore ensure that the process of NPM establishment is transparent and inclusive not only because such a process is required by the OPCAT, but also because such a process will allow arriving at an NPM model which is most suited to the specific geo-political, social, cultural and legal features of the country. Such a process will also lend legitimacy to the body, which is an essential prerequisite for the potential effectives of it in future.

As this Report demonstrates, none of the existing institutions in Kazakhstan (the Ombudsman, the Centre and the PMCs) comply with the criteria set forth in the OPCAT. The two roundtables that have been organised in Astana have already produced useful suggestions for ways forwards in the given situation: it has been suggested that the Ombudsman's office could carry out the coordinating function of the NPM, while the PCMs which have presence in all administrative regions of the country, could be the entities that carry out the day-to-day work of the NPM[213]. Certainly, this would still require that all the requirements of Part IV of the OPCAT, as analysed in this report, would be met. Moreover, not only legislative amendments would have to be made, the practices of the existing bodies would need to be re-examined so as to ensure that the pro-active and wide preventive mandate of the NPM is actually reflected not only in the law but also in the practice of the Kazakhstan's NPM. It is also vital to make the necessary provisions in the establishing NPM legislation for a periodic review of the designation, which would include review of the work, mandate, composition and funding of the Kazakhstan's NPM.

Finally, the process of establishment of the NPM can also serve another useful purpose in Kazakhstan- the review of the mandates of the existing bodies, such as Ombudsman's Office. It has received considerable criticism for failure to comply with the Paris Principles[214], something that can be usefully addressed through a thorough review that the country is undergoing when looking for its NPM.

June 2009

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[213] Yevgeni Zhovtis *The Concept and Establishment of the National Preventive Mechanism in the Republic of Kazakhstan* Presentation in the international conference *'Prevention of Torture in the Republic of Kazakhstan: from discussions to practical implementation'* Astana, Kazakhstan; 27 February; p. 6.

[214] See: Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. *Concluding Observations of the Committee Against Torture. Kazakhstan*. CAT/KAZ/CO/2 of 12 December 2008; para 23; *Alternative Report of NGOs of Kazakhstan on the Implementation of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Almaty, 2008; p. 33; Yevgeni Zhovtis *Summary of Remarks at the International Conference "OPCAT in an OSCE region: its meaning and implementation"* Presentation in the Conference *OPACT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-16 November 2008; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/law/research/centres-themes/opcat/pragueseminar.html#docs (accessed on 19 March 2009). It should also be noted that the institution has not been accredited by the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights.

EXPERT OPINION ON THE CONSTITUTIONALITY OF THE PROVISIONS OF THE LAW OF THE REPUBLIC OF KAZAKHSTAN "ON INTRODUCTION OF CHANGES AND SUPPLEMENTS TO SEVERAL LEGISLATIVE ACTS OF THE REPUBLIC OF KAZAKHSTAN ON ISSUES OF FREEDOM OF RELIGIOUS ORGANIZATIONS" [215]

Although they contradict other normative legal acts of the Republic of Kazakhstan and are internally contradictory, the majority of the provisions of the Law are in accordance with the Constitution of the Republic of Kazakhstan of 1995.

Nevertheless, there are several provisions that appear problematical from the point of view of their constitutionality.

1. The proposed new version of Article 4 of the Law "On Freedom of Religious Practice and Religious Organizations" (Part 1).[216] *Article 4. The State and Religious Organizations."*

1. Religions, religious organizations and religious groups are separate from the state and are equal before the law. No religions, religious organizations or religious groups may have any privileges over any others. An organization of citizens that undertakes religious activity must be registered in the form of a religious organization or a religious group. Religious organizations and religious groups that are not registered according to the provisions of the legislation of the Republic of Kazakhstan may not function.

The Constitution of the Republic of Kazakhstan does not contain any provisions concerning the necessity or lack of necessity for the registrations of religious organizations or groups. In Point 1 of Article 22 the Constitution simply states that everyone has the right to freedom of conscience.

What constitutes freedom of conscience is also not spelled out in detail in the Constitution of the Republic of Kazakhstan. Therefore, and considering that this is one of the most fundamental human rights, it is useful to turn to the international legal acts ratified by the Republic of Kazakhstan. This is particularly true in that Point 3 of Article 4 of the Constitution states that international treaties ratified by the Republic apply directly except in cases

[215] This analytical note has been put together by the Legal Policy Research Centre (LPRC) with the support of Freedom House Kazakhstan.

[216] The basis for the unconstitutionality of Article 4 also holds for the new version of Article 375 of the code of Administrative Violations of the Republic of Kazakhstan, which is analogous to the Law and provides the basis for state organs to refuse requests for registration.

where the international treaty requires that a law be passed for it to be applied.

In accordance with Article 18 of the International Convention on Civil and Political Rights (1996), which was ratified by the Republic of Kazakhstan on November 28, 2005, *every person has the right to freedom of thought, conscience and religion. This right includes the freedom to have or to adopt the religion or beliefs of one's choice and the freedom to practice one's religion and express one's beliefs both singly* <u>*and together with others*</u>*, either publicly or privately, to carry out services and religious or ritual rites and study.*

According to the proposed Part 1 of Article 4, the freedom of joint practice of a religion is conditioned by the requirement to receive prior permission from state institutions. If one accepts that the Republic of Kazakhstan recognizes the understanding of freedom of conscience contained in the ICCPR, this contradicts Point 1 of Article 22 of the Constitution regarding the right to freedom of conscience. The requirement for obligatory registration and the ban on activities by unregistered organizations or groups denies citizens the right to practice their religion together with others. In essence it is, therefore, a limitation on freedom of conscience. Point 3 of Article 39 of the Constitution states that in no case should the rights and freedoms laid out by the individual articles of the Constitution, including Article 22, be abridged.

Beyond that, the demand for obligatory registration contradicts Point 1 of Article 39 of the Constitution of the Republic of Kazakhstan, in accordance with which the rights and freedoms of a person and a citizen may be limited only by laws and only to that extent necessary to defend the constitutional order, protect social order, the rights and freedoms of the individual, or the health and morals of the population. The activity of unregistered religious organizations or groups in itself is not a threat to the constitutional order, the social order, the rights and freedoms of individuals, or the health and morals of the population. Thus, the ban on the activities of such organizations and groups is not in accordance with Point 1 of Article 39.

2. The re-introduced "Article 4-3. Religious Groups (Part 2). *"Members of religious groups have the right to carry out religious rites and ceremonies, teach and study religion* <u>*only among themselves*</u> *and* <u>*in buildings (facilities) belonging to members of the group and on the territory*</u> *on which the religious group is registered."*

In accordance with Article 22 of the Constitution of the Republic of Kazakhstan, everyone has the right to freedom of conscience. The practice of this right to freedom of conscience should not condition or limit general human and civil rights and duties to the state.

Thus, the Constitution does not condition the practice of freedom of conscience on the territory or place where religious rites, study and teaching take place or the fact of a citizen's membership in any particular organization.

Part 2 of the re-introduced Article 4-3 violates the right set forth in the Constitution to freedom of conscience (Article 22) because it limits the holding of religious rites and services to particular territories, buildings and groups of citizens. In accordance with Point 3 of Article 39 of the Constitution, in no case should the rights and freedoms set out by the individual articles of the Constitution, including Article 22, be abridged.

In accordance with Point 1 of Article 39 of the Constitution of the Republic of Kazakhstan, the rights and freedoms of an individual and citizen may be limited only by laws and only to the extent necessary to defend the constitutional order, protect social order, the rights and freedoms of the individual, or the health and morals of the population. The fact of a person's membership in a religious group may not serve as the basis for imposing a limitation in accordance with Point 1 of Article 39 of the Constitution in as much as it does not threaten those conditions spelled out in that point.

Moreover, in accordance with Article 14 of the Constitution of the Republic of Kazakhstan, all are equal before the law and the courts. No one may be the victim of any kind of discrimination for reasons of ancestry, social, official or economic situation, sex, race, nationality, language, relation to religion, beliefs, place of residence or for any other reason. The appearance of thea Article 4-3 means that the rights of members of religious groups are limited in comparison with those of members of religious organizations, to which the limitations set forth in Article 4-3 do not apply. In addition, in accordance with Point 3 of Article 39 of the Constitution, rights and freedoms set out in Article 14 of the Constitution should not be limited in any circumstances.

Thus, Part 2 of the re-introduced Article 4-3 contradicts Articles 14 and 22 and Points 1 and 3 of Article 39 of the Constitution of the Republic of Kazakhstan.

3. *New Version of Article 13 (Parts 2 and 5).* The re-introduced Sub-point 5 of Article 6.2.

"The import of religious literature and other informational materials of a religious character into the territory of the Republic of Kazakhstan, with the exception of articles intended for personal use, is allowed after a religious examination is carried out (Article 13 part 2)."

"The distribution of religious literature, other informational materials of a religious character and items of religious significance among citizens in public places is allowed only in stationary locations specially designated by the local authorities (Article 13, Part 5)."

“5) [local authorities] will designate special stationary locations for the distribution of religious literature and other informational materials of a religious character and items of religious significance (Sub-point 5 of Article 6-2).”

In accordance with Point 2 of Article 20 of the Constitution of the Republic of Kazakhstan, each individual has the right to freely receive and distribute information by any method not forbidden by law. As in the case of freedom of conscience, the right to receive and distribute information may only be limited in order to defend the constitutional order, protect social peace, individuals’ rights and freedoms and the health and morality of the population (Point 1 of Article 39 of the Constitution). The receipt and distribution of religious literature and other informational materials is the normal practice of all religious organizations and according to the spirit of Point 1 of Article 39 cannot serve as the basis for the limitations set forth in this point.

Thus, the limitation of the right to receive information through the institution of a requirement that religious literature and other informational literature of a religious character be imported only after an obligatory religious examination, and the limitation on the right to distribute material by the institution of specialized locations for such distribution and the de facto ban on distribution in other places both contradict Point 2 of Article 20 and Article 39 of the Constitution of the Republic of Kazakhstan.

4. New version of Article 7 (Parts 3 and 4). *“A Central Religious Organization is a religious organization created on the initiative of plenipotentiary representatives of Local Religious Organizations operating <u>on the territory of at least five oblasts</u> (the city of national significance, the capital) who call a founding meeting (congress, conference), at which its statutes are adopted and structures formed. The basis for receiving the status of a Central Religious Organization is the undertaking of the plenipotentiary organ that the local organizations and participants (members) that form the Central Religious Organization will abide by the Law of the Republic of Kazakhstan.”*

“4. In accordance with their statutes, <u>Central Religious Organizations</u> have the right to create organizations for spiritual (religious) education that carry out professional programs of study to prepare clergy.”

In accordance with Point 1 of Article 1 of the Constitution, the Republic of Kazakhstan professes itself to be a democratic, secular law-based and social state, which holds as its highest value the individual, his or her life, rights and freedoms. In current Kazakhstani constitutional doctrine and legislation, the secular character of the state is linked with the separation of religion from the

state.[217] Separation presupposes that the state does not interfere in the internal matters of religious organizations if their activities do not contradict the laws of the Republic of Kazakhstan. The creation of centralized, religious and other hierarchical structures or organizations is an internal matter for religious groups and depends to a significant extent on religious norms and traditions.

Thus, the procedure set forth in the Law for the foundation of Centralized Religious Organizations and institutions of religious education, which may not accord with the rules of the religious organization, is an example of state interference in the internal affairs of religious organizations and violates the constitutional provision regarding the secular character of the Kazakhstani state as set forth in Point 1 of Article 1 of the Constitution.

5. The re-introduced Part 5 of Article 3 of the Law on Freedom of Religious Practice and Religious Organizations. *"Freedom to practice a religion or to spread beliefs may be limited by laws of the Republic of Kazakhstan only with the goals of protecting public order and security, life, health, morality or the rights and freedoms of other citizens."*

In accordance with Point 1 of Article 39 of the Constitution of the Republic of Kazakhstan, human rights and freedoms may be limited only by law and then only to the extent necessary to defend the constitutional order, protect public order, a person's rights and freedoms and the health and morality of the population.

The re-introduced Part 5 does not correspond with the Constitution for two reasons.

First, it introduces an additional ground for the limitation of freedom to practice a religion that is not included in the Constitution: protection of security (of society).[218]

Second, Article 39 of the Constitution states that limitations may be introduced with the goals of protecting a person's rights and freedoms,

[217] See, for example, the Constitution of the Republic of Kazakhstan, a Commentary, Edited by G. Sapargaliev, Almaty, Zheti Zhariy, 1998. Pg. 10; The Decree of the Constitutional Council of the Republic of Kazakhstan of April 4, 2002, No. 2 "On the Verification of the Constitutionality of the Law of the Republic of Kazakhstan "On the Introduction of Changes and Supplements to Several Legislative Acts of the Republic of Kazakhstan on the questions of Freedom of Religious Practice and the Activity of Religious Organizations."

[218] In accordance with Point 3 of Article 18 of the International Convention on Civil and Political Rights (1966), the freedom to practice a religion or express beliefs may only be limited by laws that are essential to protect public safety, order, health and morals and the basic rights and freedoms of other people. Thus, the ICCPR allows such bases for limiting the freedom to practice religion and express beliefs as the security of society. Nevertheless, the Constitution of the Republic of Kazakhstan does not formally include such a basis.

whereas the proposed amendment speaks of the possible limitations of the rights and freedoms of other citizens. It is clear that the approach and text of the Law differs from the approach and text of the Constitution in this case.

6. New version of Article 7 (Part 3). *"A Local Religious Organizations is a religious organization formed with the goal of jointly satisfying religious interests and needs by a group of no fewer than 50 adult citizens of the Republic of Kazakhstan who call a founding meeting (congress, conference), at which its statutes are adopted and structures formed".*

The right to freedom of conscience as described in Article 22 of the Constitution refers to a number of natural rights and freedoms. It is for this reason that the right to freedom of religious practice is given to everyone in the territory of the Republic of Kazakhstan and not just to citizens. As already demonstrated by the prior analysis of Article 4 of the Law, the right to freedom of conscience includes the right to freely practice one's religions and express one's beliefs both individually and together with others, which supposes the creation of a religious organization. As is the case with the Constitution, the ICCPR speaks of this right as not being limited to citizens.

The proposed Part 3 denies foreign citizens the right to create religious organizations and thus the right to jointly practice their religion and express their beliefs (since religious organizations may only be formed on the initiative of citizens of the Republic of Kazakhstan). This limits the right guaranteed them by the Constitution to freedom of conscience and thereby contradicts Point 1 of Article 22 and Point 3 of Article 39 of the Constitution.

Thus, the re-introduced Part 5 of Article 3 of the Law on Freedom of Religious Practice contradicts Point 1 of Article 39 of the Constitution.

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PROSPECTS OF ESTABLISHING INDEPENDENT JUDICIARY IN THE REPUBLIC OF UZBEKISTAN[219]

I. Methodological approach to analyzing the issue of establishing an independent judiciary in the Republic of Uzbekistan.

From the methodological perspective, the issue of establishing an independent judiciary in the Republic of Uzbekistan *under current conditions* should be viewed based on ***three*** fundamental ideas which we think have to be considered as some sort of "*working assumptions*" (at least for the purposes of this analysis). They don't need to be justified separately due to their theoretical self-evidence or because they were proved empirically.

First point: *a truly independent judiciary can, under no conditions, exist under authoritarian political regimes, which means that they are not compatible* ***as such****.* In other words, an independent judiciary and an authoritarian political regime are two mutually exclusive notions. An authoritarian form of government[220] is *a priori* characterized by control over all branches of power and government institutions, including, of course, the judiciary. Otherwise, such form of government will no longer be *authoritarian*. There is no reason why we should not observe a strict authoritarian form of government with the personified presidential power in the Republic of Uzbekistan, and therefore, any hopes to possibly establish a Western-type independent judiciary in this country are mere illusions.

The second point is based on the first point, moving from the objective perspective to the ***subjective*** one: *in authoritarian political regimes there is no – and there can be no – political will aimed at establishing an independent judiciary.* In other words, the first point is very obvious not only to outside observers or civil society, but to authorities themselves which, if they have to choose between authoritarianism and independent courts, opt for the

[219] This analytical document has been prepared by the Legal Policy Research Center and supported by the Freedom House Office in Kazakhstan. The positions and opinions expressed in this paper may be different from those supported by *Freedom House*.

[220] We do not deem it necessary in this paper to discuss the classification of political regimes, dividing them into authoritarian, authoritarian and totalitarian, totalitarian, etc., trying to understand where the Republic of Uzbekistan belongs. No matter what the results of such an analysis might be, which in some other cases may be very important, they will not affect the meaning of the *first point*. Therefore, for the purposes of this paper, we will be using a generic notion referred to as "authoritarian political regime."

inviolableness of their authoritarian power.[221] We cannot expect something totally different from an authoritarian political regime, since it would be a mere illusion, too.

However, such lack of political will and political interest in establishing a truly and fully independent judiciary on the part of authoritarian governments does not mean that sometimes such governments cannot make certain positive steps toward providing courts with some elements of independence.[222] Such ***stimuli*** to establish an independent judiciary, which are always limited and do not contradict any of the aforementioned points (but rather make them somewhat *less rigid*), appear or may appear mostly in ***three*** cases.

Firstly, it may happen due to the inevitable need faced by all governments, including authoritarian regimes, to maintain, at least somehow, the efficiency of criminal and civil justice. In this regard, an authoritarian government may allow, or even wish to have, some moderate elements of independence among judges in those cases (which are, for the most part, insignificant) that don't have any political overtone to them and where serious economic issues are not involved. In other words, if authorities believe that a particular judicial reform is only technical, politically neutral and beneficial for society they may often agree to discuss, approve and even initiate it.

Secondly, this may take place because all governments also strive, inevitably, for international prestige and legitimacy in front of the international community. At the present time, none of the political powers, at least in the former Soviet Union, proclaims and cannot proclaim openly its authoritarian nature or reluctance to follow the fundamental principles of international law, including an independent judiciary. Post-Soviet authoritarian states can no longer proclaim themselves an *empire* or an *absolute monarchy*, and they don't have an opportunity to use old institutional theories that used to reject the idea of an independent judiciary and to view it as a derivative of monarchical power, as some sort of a *delegated justice*, etc. In this situation, they don't have any chance to find some theoretical background in order to create an institutional system that would be harmonious with the authoritarian reality, and therefore, the current institutional system and reality inevitably *contradict* each other. Post-Soviet authoritarian states formally remain within the contemporary international and constitutional legal environment, and therefore, they have to juggle between law and reality, and occasionally (most often when pressured by the international community or in exchange for

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[221] We should bear in mind that in authoritarian countries, or at least in the former Soviet Union, profound economic interests may underlie political power, and therefore, if someone attempts to make an encroachment upon this power, including an independent judiciary, authoritarian rulers may view it as an attempt to encroach upon their property.

[222] Independent judiciary is not an absolute category, but rather a *dynamic* one, and therefore, we can talk about the "level of independence," "elements of independence," "manifestation of independence," etc.

something) make some limited institutional concessions, including those related to an independent judiciary.

The first two stimuli to some restricted independence of the judiciary are clear to authorities themselves and international experts, and more often than not they account for all hypothetical positive reforms meant to make judges independent which take place in post-Soviet authoritarian states after the disbandment of the Soviet Union.

However, *thirdly*, there is one more potential incentive for authoritarian governments to develop a certain willingness to conduct positive judicial reforms, although this incentive is not properly conceptualized theoretically in post-Soviet states and probably not realized by those in power. By this we mean that independent courts trusted by the public are the only institutional safeguard in overcoming political crises that nowadays occur in authoritarian states during almost all elections. Authorities in post-Soviet states haven't realized yet that any elections, excluding Soviet-type elections with only one party and one candidate, can be nothing but a political conflict, and the only way to solve this conflict that would help avoid chaos and unrest is an independent judiciary recognized by both parties to this conflict. That is why such chaos and turmoil do not exist in countries with a highly developed judicial system, no matter how heated political confrontation is. Similarly, that is why chaos and disorder become, sooner or later, inevitable in those countries where the only way to overcome political conflict is police repressions. If there is no independent judiciary, authorities will always have to "chase" new revolutionary technologies by introducing, *post factum,* while looking at outdated technoligies used in other countries, various, often inane, police measures restricting the activities of non-governmental organizations, limiting the use of the Internet, etc. It is not that incumbent authorties are not able to win elections, but rather, if there is no independent judiciary, they don't have any chance to justify their vicotry legitimately in front of the public. This definitely leads to some social outburst, which is a matter of time. In this sense, an independent judiciary should be viewed as the only political *alternative* to various chaotic expressions of public anger and the only *guarantee* of a country's step-by-step non-revolutionary development. To a certain degree, and in general, such a hidden, and not yet realized by authorities in post-Soviet countries, stimulus to conduct a judicial reform and to create an independent judiciary can be presented as "independent judiciary vs. colour revolution."

Third point: *conducting extensive political reforms*[223] *in the absence of properly developed judicial institutions and clear ideas about how to create them as soon as possible and how they should function makes no sense, and*

[223] It is not important in this case whether such reforms are initiated by authorities themselves (some representatives), i.e. from inside, or by opposition leaders, i.e. from outside. In other words, the term "political reform" is used in a very broad sense in this paper.

sometimes it is even dangerous. In other words, a new political system cannot function without an appropriate framework. Since in post-Soviet countries this framework cannot be taken from the old system and used immediately by the new system, i.e. it cannot be inherited naturally (it never existed during the Soviet epoch and wasn't created after the disbandment of the Soviet Union), it should be designed before conducting political reforms. Furthermore, it should be designed taking into account local conditions, using those legal constructs and institutions that, due to some historical circumstances, already exist in the national law, either in reality or just formally, are legitimated in the minds of lawyers and/or the public, are technically correct and compliant with international standards. Those legal constructs and institutions that do not meet these requirements should be identified, modified theoretically or abolished, while missing constructs and institutions should added, again theoretically at this point. While this institutional designing is going on, new lawyers at the national level should be trained, supporting the ideas of potential judicial institutions and understanding their meaning.

If we neglect the third point mentioned above, political reforms are often doomed to be unsuccessful, despite certain plausible goals pursued by the reformers. If there is no appropriate judicial framework, a new political system will not be able to function effectively during the post-reform period. This will either lead to a permanent institutional chaos, or the state, while looking for effective measures, will go back to authoritarian police governance methods followed by economically and legally unjustified interference with the economy. Any chance of social stabilization provided by political reforms will be lost, while society starts questioning, which is as alarming, not only these political reforms, but also their underlying ideas (democracy, liberalism, multi-party representation, etc.)

Empirically, the post-Soviet practice has proved many times the irrevocability of adverse repercussions for a particular society if the third point is neglected. We also see multiple examples of the two possible consequences, an institutional chaos and a partial step back to authoritarianism, while sometimes they may occur at the same time. As an example, we would like to demonstrate two private cases, when there was a positive political will and favourable political trends, but certain institutional mistakes that took place due to insufficient integration of post-Soviet legal ideas (which remained Soviet among some concrete individuals) in the international intellectual and legal environment entailed some clearly negative consequences in terms of political and economic development in certain countries. These problems remain unsolved today. The *first example* is the Russian Civil Code adopted in the mid-1990s, which was later copied by many post-Soviet states. In this Code, a very important and laudable task of developing the market economy was followed by recognizing the state as the subject of private law (sic!), and it was done not because of someone's ill

intent, but due to somewhat incorrect and/or outdated comparative and legal ideas among those who drafted the Code. At the same time, instead of commerce and administrative courts with clear competence in the private and public fields respectively, some private and public (civil and administrative) *arbitration courts* with no clear competence were established. In some countries, including Uzbekistan, they were called *economic courts*. Should we be surprised and feel angered, which is the case with those who drafted the Russian Civil Code, for example, because the state, officially allowed to enter the market as the "subject of civil law," forced out other actors in no time at all and started dominating there? It is not surprising that arbitration (economic) courts turned into some sort of monsters serving the state, gaining, little by little, and among other things, certain criminal (sic!) authority in the form of imposing *administrative sanctions*. *Another example* is a vulgarized understanding of administrative justice from the substantive perspective (i.e. courts controlling the administration), which is devoid of any theoretically verified institutional limitations, formed in Ukraine during its recent history and significantly undermining the effective development of the political system. Driven by the correct and fair assumption that actions of public officials can be complained against by citizens in courts, Ukrainian policy-makers started interpreting it too broadly and in the absolute sense. They started using this assumption, for example, to complain against the President's decision to dissolve the Parliament in a City Administrative Court, or to square their political accounts with someone, etc. As a result of this specific understanding of administrative justice, the institutional chaos not only didn't mitigate, but even became worse.[224] Obviously, no state in the world will be able to function properly when any individual or political figure have the right to approach city or district courts and to appeal, for example, against the decisions of the Head of State on appointing some Minister, dissolving the Parliament, etc., when an average judge starts evaluating their "legitimacy" and "validity," and when the decisions of this average judge become subject to review by courts of other instances, etc. It is clear that this issue in the West was comprehended a long time ago and gradually conceptualized for the purpose of finding a reasonable balance between the fundamental right to seek judicial protection and the need for effective political governance.[225] It is

[224] See the concerns raised by Human Rights Watch as of October 21, 2008, where the situation is dicussed from the viewpoint of a certain threat to an independent judiciary (http://www.hrw.org/ru/news/2008/10/28).

[225] For instance, in France where administrative justice appeared as we know it today, the High Administrative Court (State Council) formulated, little by little and as a result of those problems it had to face many times, a theory of the so-called "political acts of government" (*actes de gouvernement*). Unlike other government's actions and decisions (including election-related disputes), such acts are not subject to judicial appeal. Otherwise, given political pluralism comprising millions of opinions, the Head of State will never be able to appoint a Minister of Finances or a Minister of Defense. To learn more about the theory of "political acts of government" that exist, *mutatis mutandis,* in all countries with a highly developed administrative justice, see : K.

also clear that the lack of a comprehensible institutional doctrine of administrative justice means that when the relevant right to appeal the actions of public officials is proclaimed years or even decades may pass to find the best institutional framework with all appropriate risks and consequences (political chaos, return to authoritarian methods, forced neglect of appropriate judicial decisions repealing strictly political presidential decrees, pressure on judges, etc). Given appropriate institutional designing and required competence, a decision in this situation (taking into account the comparative and legal experience) could be received in advance, explicated doctrinally, and made known to citizens and parties to a political process, etc.

Going back to the issue of establishing an independent judiciary in Uzbekistan which stands out among other post-Soviet states *in terms of personalities and trends*, *and not from the institutional perspective*, and also based on the aforementioned points, we can make the following conclusions that may serve as a methodological basis for conducting relevant reforms:

- establishing a fully independent judiciary in an authoritarian environment is an illusion and a far-fetched task;

- even in an authoritarian environment there are certain possibilities, and some limited improvement of the judiciary is feasible, which can be aimed at providing judges with more independence (local reforms);

- the number of such possibilities from the viewpoint of their increase and success of local reforms largely depend on how deeply those in power perceive the idea of independent courts as the *only alternative* to any grassroots social unrest, no matter what it looks like, that would be legitimate in the eyes of the international community;

- within this *realm of possibilities*, local reforms should be used for the purpose of *partial institutional normalization*, i.e. creating separate institutional elements that can later be used to form a full-fledged independent judiciary;

- beyond this *realm of possibilities*, a *comprehensive doctrinal normalization* is required, i.e. developing a full-fledged design of an independent judiciary that can later be used in the environment of conducting a hypothetical political reform;

- developing a full-fledged doctrinal design should be followed by a progressive preparation, in various forms, of *national* lawyers who would be ready to perceive it and understand the underlying idea and meaningfulness of reforms.

Beshe-Golovko, *Administrative Liability of State : Development Experience in French Law*, in *Comparative Constitutional Review*, 2009, issue 1, pp. 73-74.

II. Typology of legal deformations in the Uzbek judicial system impeding the development of an independent judiciary and requiring institutional normalization

One of the issues relating to almost all attempts to establish an independent judiciary in post-Soviet countries (and which should preferably be avoided in Uzbekistan) is an insufficiently clear conceptualization of the subject that should be reformed. It is impossible, in the absence of such conceptualization, to set the task appropriately and to determine precisely the reform agenda and strategy (in the short-term and long-term perspectives).

If we assume that reforms are required not just to eliminate some minor "shortcomings" (in this case we would be dealing with routine *legislative improvements*, as it has always been called during the Soviet and post-Soviet periods), but to overcome certain ***deep deformations*** of Uzbekistan's judicial system, then such deformations are not *homogeneous*. As a result, the means and methods which will be used to overcome them should not be homogeneous either (in other words, means and methods of institutional normalization).

In general, we can distinguish two major types of institutional and legal deformations at the theoretical level which *a priori* may hamper the establishment of an independent judiciary. At the empirical level, these two types of deformations are easily recognized in Uzbekistan's judicial system. For the purposes of this paper, let us call them ***simple deformations*** and ***complex deformations***.

A simple deformation is characterized by the following major features which make it possible to differentiate it from complex deformations:

a) it can be eliminated through a one-time regulatory and legal interference, i.e. it would be enough to either amend a law or adopt a new law in order to do away with it;

b) it *can* be a necessary condition to establish an independent judiciary, but is *never* a sufficient condition;

c) its presence is more or less obvious to any educated post-Soviet lawyer, i.e. the criticism of this deformation is compatible with the post-Soviet legal mentality and does not require any excessive intellectual efforts.

A complex deformation is identified by the opposite:

a) it cannot be eliminated through a one-time regulatory interference, including adoption of a new comprehensive codified act;

b) it is both necessary and sufficient in order to establish an independent judiciary, i.e. if it is overcome, the goal of the judicial reform will be achieved;

c) it is not obvious to the overwhelming majority of post-Soviet lawyers (regardless of their political views, be they right-wing, left-wing, liberal, conservative, etc), who do not view it as a *deformation*, but rather a *norm*.

Interestingly, almost any discourse in post-Soviet countries related to the *judicial reform* and *independence of judges* is confined to discussing how to overcome simple deformations. Even the most radical suggestions are, for all intents and purposes, just a set of technical decisions within the *necessary*, but not *sufficient*, measures (and sometimes even this is not true). It cannot be otherwise, taking into account the aforementioned signs of both types of deformations, such as obviousness and eliminability of simple deformations and unobviousness and poor eliminability of complex deformations. Only through separating simple and complex deformations from one another, which presuppose different methods and even timelines of institutional normalization, will we able to avoid the excessive optimism among those who propose concrete steps toward reforms and pessimism of those who excoriates the former for "ungrounded illusions."

Apparently, it is through understanding the nature of one or another deformation correctly that we will be able to determine precisely the reform agenda and strategy. The elimination of *simple* deformations is possible, and should preferably be done, in he *short-term* perspective, whereas the full-scale elimination of *complex* deformations requires not only a *long-term* programme of legislative decisions, but also long-lasting doctrinal and educational efforts. In other words, in the last case scenario, a more thorough academic preparation is absolutely required that would allow to detect and systematize complex deformations. It is also important to conduct educational activities along with it that would enable to train national lawyers, for who such deformations will no longer be a *norm*, but rather *deformations* that need to be eliminated. Otherwise, even if someone is, with the help of, for instance, international experts, able to do the impossible hypothetically, i.e. solving the issue of a one-time regulatory elimination of complex deformations (by, for example, total dismantling and replacing of the legal system), without any doctrinal and educational preparation (which should not be indiscriminate, but rather continuous), such legal novelties *will not be understood* or *will be distorted at the law enforcement level*. In this regard, a complex deformation should never be viewed as a simple deformation. They cannot be confused or interchanged.[226]

It is also obvious that in an authoritarian environment the *realm of possibilities* (see above) includes only overcoming some simple deformations. It is in this area that reformers should work the most, since a full elimination of complex deformations entails the true establishment of an independent judiciary, a judicial power that would, by its very nature, be incompatible with such form of government (also see above). At the same time, this

[226] In a sense, *complex deformations* can be referred to as *negative legal traditions*.

authoritarian period can be used to reveal doctrinally and conceptualize complex deformations, taking into account the above-mentioned third point and the need to support academically their institutional normalization.

In the long run, only after overcoming complex deformations will we be able to talk about the true *judicial reform*. Using this expression while talking about the elimination of simple deformations (particularly partial elimination) is not only unfounded theoretically, but also dangerous, because it leads reformers away from their actual goal and enables those in power to use this term as a way of populism, confining themselves to show half-measures.

It is impossible to analyze the typology of institutional deformations of the judicial legal system of any post-Soviet state, including the Republic of Uzbekistan, without taking into account one more criterion that can be conditionally called *historic*. This criterion itself is evident and does not cause difficulties. According to it, all deformations of the judicial-legal system by Uzbekistan can be divided into *Soviet deformations* inherited from the Soviet past and *post-Soviet deformations* caused by the development of post-Soviet authoritarianism. Soviet deformations are universal for all post-Soviet states while post-Soviet deformations already often have a national slant, although here a certain “universalism” (both positive and clearly negative) connected with comparative legal influences within the post-Soviet space can also be found.

There is a very important fact that *complex deformations* are more often *Soviet deformations* or can be explained by the Soviet past – this is why, as was mentioned earlier, they are difficult to overcome, first of all from the mental point of view, but then they are more or less neutral for post-Soviet regimes. It significantly simplifies their identification and their doctrinal criticism, since the authorities in power do not perceive such criticism as an encroachment on their foundations. *Complex deformations of post-Soviet origin*, of course, also can be found, although as an exception only. At the same time, in the absence of proper reforms, a steady growth of their numbers can be forecasted. This growth can be explained by both political factors because of which they are not politically neutral *a priori* and by gross errors in the institutional-legal planning during the transition from the Soviet legal system to the systems of the Western model.

Yet, *post-Soviet deformations* are still more often *simple deformations* – that’s why the overcoming of such deformations is not so much an institutional problem, given their brief history and the rejection of them (or, at least, realization) by the majority of educated lawyers, as it often is a political problem. For the authorities in power these deformations, as a rule, are not so politically neutral as are Soviet deformations. Of course, *simple deformations of Soviet origin* also can be found, but their numbers are steadily decreasing, since they are, but again, for the most part, politically

neutral for the modern power and can be relatively easily overcome (that was, by the way, the overcoming of these deformations the main focus of post-Soviet procedural reforms was directed to).

At the same time there are some *Soviet* deformations that simultaneously are both simple and complex, i.e. it is somewhat difficult to apply the proposed typologization to them. They can be considered *simple* because they are capable of being easily removed by a single act/regulation and are necessary but an insufficient condition of ensuring the independence of judges (have first and second signs of simple deformations). But, at the same time, due to their long history, they "took so deep roots" in the mentality of post-Soviet lawyers that they became an absolute norm for them. Thus, by the third sign they lose the property of simple deformations becoming complicated deformations. However, from the methodological considerations, we will regard them as simple deformations, considering that capability to be removed by a single act/regulation is *dominant* for the purposes of this analysis.

Thus, all institutional deformations that impede the formation of an independent judiciary in the Republic of Uzbekistan can be divided into ***simple*** and ***complex***. Both of these deformations are divided, by a historical criterion, into *Soviet* and *post-Soviet*. By using "from the simple to the complex" principle which, to some extent, *corresponds to an optimal program of the judicial reform* with its division into short-term and long-term prospects we first will consider concrete post-Soviet simple deformations of the Uzbekistan judicial-legal system, then – its simple Soviet deformations to dwell on the most fundamental, in our opinion, complex deformations (post-Soviet and Soviet) without the elimination of which an independent judicial power in Uzbekistan can hardly come about.

III. Simple deformations of the Uzbek judicial system that impede the formation of an independent judiciary

1. Simple deformations of the Uzbek judicial-legal system of post-Soviet origin. The main problem of the newest Uzbek legislation that regulates the status of judges is the increasing subjection of the latter to the control of the executive power, first of all on the part of the President of the country. Moreover, on the one hand there is a clearly evident attempt to preserve some norms and democratic-oriented institutions introduced in the first years after gaining independence and on the other hand – to circumvent these norms through creating more or less "disguised" specific institutional "constructions" that do not meet international requirements and standards.

International standards for ensuring the principle of independence of judges – the principle proclaimed in articles 106 and 112 of the Constitution of the Republic of Uzbekistan – require the main role when forming judiciary and controlling it (selection of judges, charging them from office, holding them liable, etc.) to belong to a judicial community body independent of the rest authorities. It seems that the Uzbek authorities are aware of such international standards – that is why the system of Qualification Boards of Judges created soon after gaining the independence is now in place in Uzbekistan (see Regulation on Qualification Boards of Judges in the acting edition approved by Resolution of the Parliament of December 7, 2001). On the whole, the institution itself of Qualification Boards of Judges does not rouse censure from the point of view of the independence of judges, keeping in mind, above all else, that Qualification Boards are genuine bodies of the judicial community that are formed by appropriate judicial meetings (the Plenary Session of the Supreme Court of the RU, other courts conferences, etc.) *exclusively* from among judges themselves. It does not necessarily mean that the Uzbek institution of Qualification Boards does not have certain drawbacks. Say, doubts can arise about the justification of the separate concurrent existence of Qualification Boards of Judges of general jurisdiction courts and judges of economic courts; formation of the Supreme Qualification Board of Judges (SQBJ) exclusively from among judges of the Supreme Court (and not from among representatives of all judiciary), which transforms it from a judicial community body into all but a subdivision of the Supreme Court of the Republic of Uzbekistan – some kind of “disciplinary board” the decisions of which are without appeal, etc. Theoretically, these drawbacks should be removed, however, they are not an insuperable obstacle on the way to forming an independent judiciary in Uzbekistan.

But other dangerous tendency is really an obstacle – the marginalization of the Qualification Boards and creation of an institutional superstructure in the form of the High Qualification Commission for Selection and Recommendation for Offices of Judges Attached to the President of the RU (further referred to as High Qualification Commission, Commission or HQCSROJ) that, in fact, destroys their independence. The creation of this Commission was a result of a certain evolution that reflects, by all appearances, a disturbing attempt of the political power to subject the judiciary to its total control making the legal regulation rather difficult ***to preserve appearances of compliance to the international standards (this method of legal regulation often practiced within the post-Soviet space can be designated as a method of «*****developing regulatory schemes for circumventing some or other universal principle or guarantee*****», alternative to their formal and undisguised abolishment). In particular, first, resolution of the President of the RU of July 30, 1999 "On creation of Commission for dealing with issues related to appointment and dismissal of judges» was adopted, then the resolution was replaced***

with the decree of the President of the RU of May 4, 2000 «On creation of HQCSROJ”. Finally, at the present time, High Qualification Commission reached even more high level of institutionalization acting under the Regulation “On HQCSROJ” approved by the decree of the President of RU of March 17, 2006.

Two facts do not raise any doubts.

First, the HQCSROJ is an instrument of the presidential power. This is evidenced by both the regulatory control of its activity (presidential decrees) and a direct indication in clause 2 of the Regulation of March 17, 2006 that the HQCSROJ is a “constantly acting body attached to the President of the RU”. In fact, not even the traditional and somewhat hypocritical cliché that the Commission is created for “executing the policy of ensuring the true (sic!) independence of the judiciary” can convincingly argue otherwise. The connection of the Commission with the executive power is also evidenced by its composition that, by the way, is approved by the President himself of the RU. In the composition of the Commission one can find representatives of the Ministry of the Interior, the Ministry of Justice, the Prosecutor General’s Office, and other “qualified specialists”. The inclusion of deputies and representatives of the Supreme Court and Higher Economic Court by no means indicates the “democratic character” of the Commission as Uzbek political elites would think, but it does indicate the full blending of all branches of power, their subjection to the presidential power and marginalization of the judiciary that is forced to take part in sessions of commissions together with policemen, prosecutors and other officials.

Second, the HQCSROJ subjected to its total control such bodies of the judicial community as Qualification Boards of Judges, depriving them of all independence. Moreover, it is not only and not so much a covertly political subjection as it is open formally institutional subjection. In particular, according to clauses 5 – 7, 24 of the Regulation “On HQCSROJ” “the commission is vested with *key* powers with regards to determination of candidates of judges and premature termination of judges”, it is “the *last* authority that prepares recommendations for appointment of judges”, exercises *control* over the activity of Qualification Boards of Judges, “gives *recommendations* to improve their activity”, “hears reports of the chairpersons of Qualification Boards of Judges”, “assigns matters to qualified judges”, etc. Moreover, already on a strictly personal level the HQCSROJ not only “hears systematically reports of the chairpersons of the Qualification Boards of Judges concerning work with judicial manpower”, but it has the right to submit a written presentation concerning holding the chairperson of the relevant Qualification Board liable, up to his or her dismissal from office (!) (clause 8 of the Regulation of Qualification Boards of Judges). Basically, in Uzbekistan, the judicial community bodies have exclusively auxiliary role in the process of assignment, reassignment and dismissal of judges from office. Say, they can form a “reserve of candidates for judges”, although even in this case

Qualification Boards act under the “watchful eye” of the HQCSROJ on whom they also find themselves, in an administrative and disciplinary manner, dependent.

If we look closer at these two above-mentioned facts, it will become clear that in Uzbekistan the judicial community bodies are not only dependent, but they are in direct hierarchical subjection to the presidential power represented by the HQCSROJ.

At the same time it would be incorrect to think that the activity of the HQCSROJ is limited to the control over the activity of the judicial community bodies when selecting, assigning, reassigning and dismissing judges from office. To the same degree, it touches courts and judges when they directly administer justice. In particular, according to the Law of the RU of September 2, 1993 “On Courts” (in acting edition) it is entrusted with organizational ensuring of activity of courts. Given that material and technical maintenance of activity of courts is performed by special authorized bodies attached to the Ministry of Justice that act under the Regulation approved by the President of the RU, who also approves the structure and the number of employees of the Supreme Court of the RU, space for any independence is very limited. But the most shocking provision of the newest Uzbek legislation on the status of judges is the institution of *court inspection* attached to the same HQCSROJ, i.e. it belongs to the presidential power. The composition of the court inspection headed by two members of the HQCSROJ and including besides them 4 mysterious “leading inspectors” speaks for itself. The President of the RU personally appoints members of the court inspection. There is no doubt that this is the body for direct control and subjection of active judges, since the court inspection “analyzes how judges observe their oath of office”, takes measures (!) to prevent violation of the judicial ethics”, “gives its opinion regarding candidates of judges”, etc. (clause 38 of the Regulation on HQCSROJ). It is not very difficult to guess what measures the court inspection takes to “prevent”, say, violations of the judicial ethics if, according to other very eloquent provision of the above-mentioned Regulation, it should “respect the honor and dignity of judges, observe professional confidentiality, etc.” Such reservation is only possible when it is a mysterious *secret police* which acts as one of the presidential structures to control the judiciary. If it exists, there is, in fact, no point in further discussing the independence of Uzbek judges.

In this situation, the ***foremost measure*** to take to potentially form an independent judiciary in Uzbekistan is the ***abolishment of the HQCSROJ and the court inspection attached to it***. At the same time it is necessary to specially discuss the issue regarding what powers of the HQCSROJ should pass to Qualification Boards and what powers should disappear at all. In any case, the powers of the court inspection belong to the second category. Moreover, reconstruction of the role of the Qualification Boards does not eliminate at all the issue regarding optimization of their status and the

procedure of their formation that should include the international guarantees in order to remove relevant drawbacks (see above). It is equally important to begin to discuss the issue of correct interpretation of the institution of "assignment of judges by the head of state", although in this case we talk about overcoming of a complex deformation, not a simple one (see further), which suggests exclusively doctrinal level of discussion and the absence of unjustified illusion of quick results.

Another problem that requires parallel, but not necessarily simultaneous, solution is *strengthening the status of appointed judges*.

First of all, it is necessary to refuse the most odious provisions that almost fully neutralize the institution of immunity of judges. In particular, at the present time, intrusion into the home or office, search, seizure, eavesdropping on telephone conversations and other similar actions against judges are performed with *the sanction of the prosecutor* (art. 70 of the Law of the RU "On Courts"), which completely contravenes the principle of the independence of judges contained in the international law and in the Constitution. It is clear that permission to perform such actions should be given only by the judicial community bodies, otherwise we can forget about the independence of judges.

Moreover, the most important task to be accomplished during the upcoming period of potential reforms is introduction of the institution of *irremovability of judges* in Uzbekistan. At the present time they are appointed for the term of 5 years after which they undergo the procedure of "reassignment" passing again the qualification examination, going "through the sieve" of the Qualification Boards and the HQCSROJ, etc. But even during 5 years the judge cannot even theoretically work calmly and independently, since he or she is always under institutional administrative pressure in the form of the "***qualification certification***", "qualification classes", etc. Thus, when 3 years after appointment to office have passed, i.e. long before the expiration of the term of office, the judge should undergo the ***qualification certification for which it is necessary to present a «report on the judge» (!) and a testimonial from the relevant chairperson of the court. (clauses 28 and 35 of the Regulation «On Qualification Boards of Judges»). This procedure can have only one purpose – to turn the judge into a subordinate person. The institution of «qualification classes» is subject to the same logic and even its symbols and vocabulary resemble those used in the army (for instance, the phrase*** "term of validity of qualification classes"***). In particular, according to the Regulation «On qualification classes of judges» approved by resolution of the Parliament of December 14, 2000 there are six qualification classes in Uzbekistan and the highest qualification class is assigned personally by the President of the RU (it is something like the rank of a general). These classes create an additional system of incentives for the judge through influencing the salary and by turning,***

in necessary cases, into promotion (assignment of a qualification class) or sanction (withdrawal of the qualification class), i.e. they make the judicial activity bureaucratic and transform the judge, according to the intention of the authorities, into an obedient and subordinate official. For court employees (clerks) there is a separate bureaucratic and military-like «table of ranks» named the system of class ranks. It, of course, is less shocking, however, it also contributes to the bureaucratization of the judicial system, especially if we take into account «insignia» for every class rank (clause 14 of the Regulation «On Class ranks of court employees»... approved by resolution of the Parliament of December 14, 2000), i.e. some kind of «epaulets» for judges.[227]

In such situation, introduction of the institution of irremovability of judges, i.e. lifetime appointment of judges (up to reaching a certain age) should be among top priority ***measures. But also*** there should be a comprehensive list of grounds for premature dismissal from office provided by the law and a decision regarding premature dismissal from office should be taken by the appropriate body of the judicial community (Qualification Board). Simultaneously, the institutions of ***qualification certification***, ***qualification classes***, and ***class ranks*** (for court employee) should be ***abolished*** completely. Possible financial losses of active judges should be compensated by conversion of relevant benefits into regular and stable salary. Any objections that the abolishment of the qualification certification, qualification examination when reassigning, etc. will negatively influence the professional training of judges cannot be taken into account. First, the work of judges is definitely a complex intellectual activity and a bureaucratic control over it cannot be effective even theoretically (a judge, like a scientist or a university professor, cannot be subjected to a constant professional control). Control over the professional level of the judge can be only procedural (from a court of superior jurisdiction when hearing complaints) or intellectual without the participation of any institution (from the civil society and legal science). Second, even when in individual specific cases a theoretically possible contradiction can arise between the independence of the judge and the control over his or her professional competence (*independence vs. control over competence*) priority should be given to the imperative of ensuring the independence of the judge, since the absence of the independence is a system-based institutional vice while incompetence is a random and personal vice, which of course does not mean that ways for optimization of a certain

[227] This description has not been provided simply as a hyperbole. Presumably, it most perfectly reflects the spirit of the current judicial system in Uzbekistan. To illustrate this point, we can refer to a specific instruction contained in the Regulations on Courts and Justice Agencies Development (adopted by the Government of Uzbekistan as of March 18, 2003) which directly states that "judges and staff members of justice bodies should be provided with *company uniforms*."

control over competence when forming judiciary should not be discussed at the institutional level.

Another problem connected with the bureaucratization of the judiciary and the one that extremely negatively influences the independence of judges is related to the excessive role of the chairperson of courts in the Uzbek judicial system. The current Uzbek judicial legislation views the chairpersons of the courts less in the traditional spirit of *primus inter pares* (first among equals) when the chairperson is vested with certain *special* powers that, for the most part, are exclusively technical or ceremonial and do not *infringe* the powers and the status of other judges, and more as the "superior" (with regard to the judges of "his" or "her" court) and, simultaneously, as the "subordinate" (with regard to higher judges); thus, the chairperson is part of the bureaucratic, hierarchic system. In other words, these are the functions of the chairperson of the court that, to the significant degree, transform the Uzbek judicial system from a procedural system into a bureaucratic one. In particular, *on the one hand*, in the Uzbek legislation there is, say, a system of "reports" when at the session of the higher court the administrative reports of the chairpersons of the inferior court concerning the results of the work, work performance, quantity of the reversed judgments, etc. are considered (see, for example, art. 17, 24 of the Law of the RU "On Courts"). *On the other hand*, the chairperson of the court has clearly institutional means of pressure on the other judges of this court. If we even do not go back to his prerogative when conducting, say, the qualification certification of judges (see above), etc. it is sufficient to say that the chairperson of the court has the right to bring the judges to disciplinary liability "for violation of legality" and, what is more, one of the measures of such liability is a fine (!) (see clauses 38 and 44 of the Regulation "On Qualification Boards of Judges"). It is clear that any attempt to show independence in such situation will be suppressed through the personal initiative of the chairperson of the court or "through him" under the initiative of higher judges to whom the chairperson regularly gives account.

We do remember that, first of all, the total bureaucratization of the judiciary is, in the aggregate, not a simple deformation but a complex one to which we will have to go back later and that a number of powers of the chairpersons of the courts are inherited from the Soviet law (we will go back to them too) it is necessary as one of the ***top priority measures*** to perform a complex revision of the Uzbek judicial legislation in order to free it from all post-Soviet additions that strengthen bureaucratic functions of the chairpersons of the courts and their subordinate role with regard to higher courts. Every such addition should be considered as a simple deformation requiring an immediate overcoming. In the Uzbek judicial system, higher courts should not "hear" reports of the chairpersons of the inferior courts, the chairpersons of the courts should not have special powers to bring other

judges to disciplinary liability[228] and there should not be any similar measures.

Another problem is that the principles of separation of powers and independence of judges proclaimed in the Constitution of the RU are ignored not only on the fundamental level (from the point of view of the status of judges) but also on the level that would seem to be simply technical. In particular, for example, under Resolution of the Cabinet of Ministers of March 18, 2003 a foundation of the development of courts and judicial bodies was created in Uzbekistan and, what is more, it was created, in principle, with a good purpose – to improve the material and technical base of courts and the monetary pay of judges. In particular, a certain percent of monetary fines collected by courts, of litigation fees, etc. should be transferred to the foundation to be used for the material and technical development of courts (repair of buildings, purchase of equipment, etc.) and for payments to judges (additional incentives, additional payments etc.). It is clear that despite the supposedly good intentions this idea itself is *absolutely vicious*, since it is directed to the creation a *punitive motivation* for the judge. Can the judge be absolutely impartial, considering a case regarding the levy of a large fine, if he or she knows that if the fine is levied, the judiciary will receive a corresponding addition to their budgetary funds and if he or she does not levy a fine there will be no monetary addition? And the bigger is the amount of the levy, the better will be the financial situation of the judiciary as a whole and of the individual judge in particular. But the organization of the foundation is more surprising: it is led by the supervisory council headed by the Minister of Justice and this council has among its members the chairpersons of the Supreme Court and the Higher Economic Court (clause 8 of the Regulation "On the Foundation"). In other words, the leaders of the highest judicial bodies of the country are under direct subordination to the line minister. Against this background the fact that the supervisory council of the foundation (among members of which there are highest judges of the country) sends regular reports to the administration of the President of the RU is almost a "trifle".

Another, albeit less shocking, example is the activity of the Center for monitoring the realization of standard legal acts attached to the Ministry of Justice that was created pursuant to the President's Decree as of December 15, 2006. Once again, this Center was established with a fairly good and exclusively analytical purpose. However, if we look closer, we will see that the Center should, in particular, "exercise a constant control over to what extent

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[228] This does not mean, however, that chairmen of courts should be deprived of their right to approach the relevant qualification collegium and raise the issue of misconduct on the part of some particular judge. Their right, however, should be of general, rather than special or, even more so, exclusive nature, being no different from the same right belonging to any other judge, defense attorney, litigant, etc. *In other words, a court chairman cannot enjoy some disciplinary power with regard to other judges*.

standard legal acts are realized in the course of the activity of the ministries, state committees, departments […] *judicial bodies*, subdivisions of the Ministry of Justice… ". The enumeration of supposedly "independent" courts ("judicial bodies") in one line with ministries, departments and even subdivisions of the Ministry of Justice speaks for itself. But even more important thing is that there is an evident attempt to officially introduce police bureaucratic methods of control over judicial activity, which does not correspond at all to the principle of the independence of judges. Even if we suppose that the political power was guided by the best intentions to optimize the judicial practice, analysts with class ranks, insignia, etc. should not, in any case, be considered as a substitute for complex and laborious doctrinal (scientific) work for evaluation and ***crystallization of judicial decisions and, what is more, we have already pointed to the theoretical lameness of any attempts of a bureaucratic intellectual control.***

On the whole, it is clear that among the top priority measures ***for ensuring the independence of judges in Uzbekistan there also are a speedy abolishment of the Foundation for the development of judges and judicial bodies. The state should give a good financial support to the courts and judges, however, a complex work on the formation of the state budget and stable funding of the judicial system cannot be replaced with any attempts to put the judges on partial "self-support and self-financing" if one recalls a well-known Soviet term. As*** for the Center for monitoring of realization of standard-legal acts we do not say that it should be abolished completely, since we do not deny the necessity of watching the realization of standard legal acts by officials of different levels. However, such Center can only act within the framework of the executive power and should not touch the judiciary as a whole and judges in particular, i.e. the status of the Center should be brought in line with this requirement as soon as possible. As for judges, a non-procedural control over the quality of their decisions is a task for an academic doctrine only and this doctrine, frankly speaking, does not deal with it at the present time. However, this problem is among complex deformations and we will have to go back to it.

2. Simple deformations of the Uzbek judicial-legal system of Soviet origin. The majority of deformations of Soviet origin that impede the formation of an independent judiciary in Uzbekistan have a mixed nature and touch both the legislation in question on the status of judges and purely procedural mechanisms and institutions regulated by criminal procedural legislation, civil legislation, economic procedural legislation, etc. This makes us specify two things. *First*, we, here, cannot discuss in detail the problem with optimization of the relevant processes – it is a too difficult and extensive problem. We will only discus in brief the procedural institutions that need a careful analysis and reforming and are reflected directly in the legislation on the courts and judges. *Second*, the removal of the relevant deformations that

impede an institutional independence of judges requires not only amendments, say, in the Law of the RU "On Courts", but also requires preparation of a new Code of the Criminal Procedure, new Code of Civil Procedure, etc. (or, at least, their new editions), which is a complex, laborious and relatively long work. So we think that the overcoming of the deformations described below is among task of the ***second priority*** – it does not mean that they do not need an immediate removal, but it does mean that an ***immediate removal*** of them (among the top priority measures) is ***technically impossible***.

The main problem of the Uzbek legislation of soviet origin that makes the transition to a genuinely independent court difficult and that can be considered according to the capability of being removed by a single act/regulation as a "simple deformation" is connected with the procedural institution of review of judicial decisions in *the exercise of the supervisory power*. What is more, up to now this institution in Uzbekistan exists not in a softened "post-Soviet" form, as in some Post-Soviet states where it is turned into an ordinary way of review of judicial decisions, but in its paradigmatic soviet form incompatible with an independence of the judiciary.

This is the procedural institution of "supervision" that explains a shocking from the point of view of the principle of the independence of judges provision that the Supreme Court of the RU has the right "to supervise the judicial activity of the inferior courts" which is reflected not only in the legislation (art. 13 of the Law of the RU "On courts") but also in the Constitution of the RU (art. 10). It is this provision that explains many excessive powers of the chairpersons of the courts of the highest and medium level (and also of deputies of the former): to register, under personal initiative, protests against decisions of the inferior courts that entered into force, to suspend the enforcement of the court decisions, to require the court to return the case (art. 26 and 34 of the Law of the RU "On courts"). By the way, the same problem also touches the system of economic courts that were created in the post-Soviet period and adopted the soviet system of "supervision".

In such situation we should not only refuse the "soviet supervision" together with which all cited provisions of the Law "On courts" will also disappear. We need a new institutional modeling of the procedural system which, at the present time, has obvious drawbacks that, in the end, affect the independence of judges. For example, we should refuse the powers of the Supreme Court to hear the case as a court of the first instance and as a result of which it itself has to review its decisions in appeal procedure or in cassational procedure (art. 13 of the Law of the RU "On courts"). This provision definitely has no institutional logic. If we think in a more general sense, the principle itself of blending of different powers of instances in one branch of the judicial system when one court can be a court of first instance, of appeal instance, of cassational instance (let alone supervisory instance) (see also art. 30 of the Law of the RU "On courts") deserves a critical

rethinking, since it does not form an institutional base for creation of procedural conditions for the independence of judges. We should replace it with another principle – one branch, one instance. However, although more detailed discussion of these problems is necessary we cannot continue it here since it belongs to a purely procedural area which is not a subject of this analysis.

The most serious non-procedural deformation of Soviet origin perceived as almost an indispensable legal standard by the majority of post-Soviet lawyers is the right of the Supreme Court of the RU to give the inferior courts so-called “guiding instructions” (art. 13 of the Law of the RU “On courts”), i.e. the Plenum of the Supreme Court of the RU can issue decrees that are regulatory and abstract by their nature and obligatory for all courts and judges. We will dwell on the nature of this phenomenon further, since it is a reflection of a deeper phenomenon – regulatory bureaucratization of the judicial activity. This phenomenon is definitely a complex deformation of the Uzbek judicial-legal system. But this does not impede us to consider the specific provision itself on “the right to guiding instructions” as a simple deformation, since its abolishment (by amending art. 13 of the Law “On courts”) does not involve any technical difficulties. In any case, the institution of “decrees of the Plenum of the Supreme Court” despite all its traditional character and strong penetration of national-legal mentality is an indisputable obstacle on the way to the independence of judges in the Republic of Uzbekistan – it is incompatible with a genuine independence of the judiciary.

In conclusion, we will pay our attention to one more manifestation of the “Soviet legacy” – cases related to the “state secrets” are within competence of military courts (art.41 of the Law of the RU “On judges”). Based on the uniformity of the status of all Uzbek judges and their equal degree of independence it is impossible to explain the meaning of this provision, since not all “secrets” are connected with the military sphere and being in the military service by itself does not give any special knowledge in the area of the “state secrets”. The legislator proclaims the right principles on the “uniformity of the status”, “independence”, etc. at the same time reveals its true intentions by disproving these principles in the specific provisions in which an obvious preference is given to those judges who are considered more “reliable”, i.e. more dependent. It seems that we should refuse the special competence of the military courts when considering cases related to the “state secrets” as did legislators in many other post-Soviet countries, which did not cause any national catastrophe anywhere.

IV. Complex deformations of the Uzbek judicial-legal system that impede the formation of an independent judiciary

First of all, it should be noted that any "complex deformation" of the judicial-legal system is within not only internal institutional-legal sphere, but also far beyond its limits – in political area, social area, etc. However, we, taking this into account, from purely methodological considerations, do not consider here inevitable and very important external institutional effects on the judicial-legal system (political, economical, social etc.) – we simply put them aside, staying in the purely *legal field*.[229]

We will dwell only on those complex deformations of the judicial-legal system of Uzbekistan that, in our opinion, have a *direct* negative effect on the independence of judges putting aside complex deformations of other "sections" of the legal field. The latter are no less destructive to the positive development of post-Soviet states and, in the end, have a clearly negative effect on the independence of judges but their influence on it is, in any case, more or less *indirect* (it is, for example, incorrect differentiation between private law and public law, incorrect interpretation of criminal law, blending of police activity and judicial activity, etc).[230] In other words, we will discuss only ***internal institutional*** complex deformations of the legal system of Uzbekistan directly connected with the problem of the independence of judges.

In our opinion, it is necessary to single out ***four*** complex deformations of this kind. *One* of them, with which we will begin, is a post-*Soviet* deformation and has an obvious *political nuance* while *other* deformations are connected mostly with the fundamental problems of interpretation of law inherited from the *Soviet* period of Uzbekistan's history.

1. Complex deformation of the Uzbek judicial-legal system of post-Soviet origin. When it emerged, independent Uzbekistan did not have and could not have any positive institutional traditions of forming the judiciary. It should be recollected that Soviet judicial law was based on the fundamental principle "appointment of judges by election" but, in practice, it was an undemocratic election without any alternative that was subjected to a strict control from the party. So the transition of all post-Soviet states, including the Republic of Uzbekistan, to the "principle of appointment" when judges are appointed to office by the head of state and in relevant cases (judges of supreme courts) by the parliament was definitely a *positive* step. First, now the "model of appointment" itself is definitely dominant from the comparative

[229] Strictly speaking, in order to analyze external impacts and methods to overcome them more deeply and thoroughly, interdisciplinary research is required, i.e. the concerted efforts of lawyers, political scientists, economists, sociologists, etc.

[230] Some of these complex deformations have been already studied regarding Kazakhstan's legal system (See: Golovko L., Prospects of Reforming Security and Crime-Fighting Agencies in the Republic of Kazakhstan, Analytical paper, LPRC, Almaty, 2009). Fundamentally, they are also true if we talk about the legal system in Uzbekistan.

legal point of view and does not raise any doubts from the point of view of international law, i.e. it is universal and legitimate model. Second, this model made it possible, in due season, to refuse the "principle of appointment by election" that discredited itself in the post-Soviet space and to fairly quickly depoliticize the judiciary.[231]

However, very soon another problem became evident – now it is already a "complex deformation" that is clearly seen in the Uzbek judicial system. The principle of appointment of judges by the head of the state is now understood in the sense which does not correspond the international standards: according to international standards, this principle consists in *legitimation of judicial functions* by the highest political power elected by the people that does not participate in the selection of candidates for judges and that ensures the maximum degree of independence. But in Uzbekistan this principle is understood in almost opposite way. In the majority of post-Soviet states, including Uzbekistan, the power of the head of state to appoint judges implies that he or she has the *absolute* right to exercise a *total* control over selection of worthy candidates for judges and he or she realizes this right through his or her omnipotent administration. It is clear that with this interpretation of "appointment of judges", a "penalty" in the form of dismissal of judges who have not justified the confidence of "the superior" is quite logical.

Concerning the reasons for emergence of this deformation, one of them is obviously political: there is no doubt that the excessive interpretation of the "principle of appointment of judges" is quite corresponding to the authoritarian development of the Republic of Uzbekistan. But this should not hide from us another reason which is more dangerous in a long term prospect: when replacing soviet "appointment of judges by election" with the post-Soviet "appointment" the majority of reformers trained in the Soviet period, including liberal ones, did not realize too well constitutional and legal-technical points of the principle itself of "appointment" and its comparative legal sense. The presidential omnipotence when appointing judges even was not considered then and is not considered now (including intellectual opposition) as "deformation" – the right of the head of state, which he realized through his administration, to control, when appointing, the composition of all judges is viewed by the majority of lawyers as *doctrinally legitimate* and *corresponding with the international legal standards*. In such situation nobody is shocked by the constant control by the administration of the president over the judiciary, by emergence inside the administration of different commissions on "judicial personnel" and, in the end, the creation of the HQCSROJ. The creation of the

[231] We believe that the model was selected appropriately. It is hard to imagine how much more difficult a situation would be in authoritarian post-Soviet countries with regard to virtual multi-party system and actual multi-party system if reformers had, at some point, tried to replicate, for instance, a system of electing judges by the public based on party lists which exists in some states in the US. It is clear that all judges in Uzbekistan would belong to one party, although on paper the mechanism of forming the judiciary would look quite democratic.

latter, to some degree, is even viewed as a positive phenomenon, since it brings the personnel policy of the presidential structures out of the "backstage shadows" into the "regulatory legal light."

In such situation it is clear that the overcoming of the simple deformation through a desirable abolishment of the HQCSROJ (see above) will hardly give immediate positive results. Most likely, its powers simply will pass to various commissions and departments of the administration of the president. Strictly speaking, without the removal of the simple deformation in question (and this removal, first of all, should be performed *at the doctrinal level*[232]*)* we will be doomed to a vain "pursuit" of countless "simple deformations" which will assume the form of another presidential "commission", "committee" or "department" for control over judges and, what is more, we will be doomed regardless of the political conjuncture.

2. Complex deformations in the Uzbek judicial-legal system of Soviet origin.

a) Granted the level of understanding of the role of the law that had evolved during the Soviet period and, paradoxically as it may sound, has deteriorated even further in many sovereign post–Soviet states, it is unlikely that the judiciary would gain either true independence or an appropriate standing in the post–Soviet space, including the Republic of Uzbekistan. It is not even legal positivism, but rather *vulgar normativism*, where law is viewed not as a search for fair decisions, but as detailed and comprehensive instructions that resemble "an operation manual for some technical device". Moreover, any attempts to go beyond the framework of the "instructive regulation" and to overcome its formalism trough the use of the fundamental legal categories (legal principles, human rights, etc.) are subject to an immediate obstruction being condemned as "judicial arbitrariness", "departure of the principle of legality", "loophole for corruption", etc., which completely discredits the judicial function. At the same time, it is not possible to say that the authorities artificially impose such interpretation of law on those who do not share it, be they the society in general, or the legal community in

[232] There is no doubt that this judicial deformation is inextricably intertwined with the fundamental deformation of the constitutional system, i.e. the existence of two *parallel* governments, the formal Cabinet Council and the actual President's Administration. Strictly speaking, countries with a highly developed political and legal system have what is called a President's Administration, which also acts as a government, and that is why they don't have ministers and their Cabinet Council (USA). The opposite is also true: those countries that have a Cabinet Council don't have any President's Administration, and a small technical group ensuring the activities of a Cabinet Council is not the President's Administration (France). In this situation, such an important fact that judges, for example, in France are appointed by the President, and not the Government, means that he doesn't have any *physical opportunity* to control the individual composition of judge candidates. In other words, the *appointment principle* replicated from the West appears to have been put by post-Soviet countries in some distorted constitutional context, which predetermined the emergence of this complex deformation we are interested in.

particular. On the contrary, here, the authorities, lawyers and the society are surprisingly unanimous sincerely thinking that freedom of judicial discretion, the right of the judge to go beyond the letter of law, etc. are the absolute evil, and the judge being bound by regulatory instructions is the absolute good. In such situation the problem of the interpretation of law can be successfully solved only at the cost of significant educational efforts with the help of which it could be possible to demonstrate the lameness and backwardness of the very *value system*. In other words, educational and pedagogical efforts should be directed not only and not so much to the technical channel as to the axiological one.

It seems important to find out the historical reasons of the emergence of such interpretation of law and sociological reasons of its current dominance (despite the integration of post-Soviet countries into the international legal space, reforms of the 1990s, etc.), which of course requires special investigations. As for the technical sphere, we, confining ourselves to the deformation of the mentality of professional lawyers (including judges themselves), will pay our attention to the dominance of incompetent ideas about the role of sources of law in the continental legal systems in post-Soviet countries. It is about a peculiar "legend about the Roman-German legal family" where a regulatory legal act is the only source of law, which serves as a theoretical justification of the radical post-Soviet normativism and supports the illusion of its "comparative legal adequacy." In post-Soviet countries, the fundamental transformations that took place in the continental legal systems, say, in France or German, from the end of XIX and throughout XX when the law ceased to be all-sufficient and the center of the scientific-doctrinal analysis switched to the judicial practice, which led to the huge growth of prestige of judges and their decisions are simply unknown. The majority of post-Soviet lawyers with no access to the original sources still associate, say, the French interpretation of law with the legal centrism that dominated there soon after the adoption of the Napoleon codes up to the emergence of so-called "scientific school" (Gény, F., Saley R.) that tore the legal centrism to tatters both in theoretical area and, which is the most important, in the practical area.

In this regard, we think that different discussions about a "judicial precedent" that ostensibly separates the Anglo-Saxon model of law and continental model of law, which makes it possible for the post-Soviet normativism to use the false façade of the "Roman-German legal family" as a shelter, are unproductive. In such situation adherents of the elemental standardization of ideas about sources of law and the role of judges in the legal regulation are viewed as supporters of Anglo-Saxon legal system who ostensibly try to impose on post-Soviet states that develop, so to speak, in the Roman-German direction, legal constructions that are alien to them. It seems that a debunking of the myth of the "continental legal centrism", which requires a special attention to be paid to the evolution that took place in the

last decades in Germany and France themselves where judicial rulemaking long ago took up strong positions even though it is traditionally not called a "judicial precedent" there. Only a detailed familiarization with the newest continental practice will make it possible for post-Soviet lawyers to get rid of the above-mentioned illusion of "comparative legal adequacy".

Moreover, it is necessary to overcome an idea commonly considered as proper that for a judge and an ordinary official of the executive power (including a policeman) there is the uniform and universal interpretation of law. In other words, an institutional separation of the judiciary and the executive power will not be effective if it is not supported by the idea that for an official and judge there should be different levels of interpretation (we will designate this idea as an *imperative for the differentiation of the interpretation of law*). If an ordinary official really should be subjected to a strict normativism, i.e. to the requirement of a scrupulous observance of the instruction, there is no, and there can be no instruction for a judge – he or she is, first of all, guided by the principles that form the basis of law. So far this thought is absolutely alien to the post-Soviet legal mentality that does not see a substantial difference between an official and a judge exactly from the point of view of the interpretation of law. For a post-Soviet lawyer both of them are just obedient "servants of law".

b) Next complex deformation is a logical continuation of the previous one or, in other words, its concretization. It is a phenomenon of the r*egulatory bureaucratization of the judicial activity* when a judge is completely bound not only by the will of the legislator, but also by endless instructions hidden under different names that circulate inside the judicial system and come from his or her "judicial superiors" (higher courts, chairpersons of the courts, etc.).

This deformation of course is closely related to the two simple deformations of the judicial-legal system of the Republic of Uzbekistan mentioned above: The Supreme Court and the Higher Economic Court have the right to give "guiding instructions" in the form of "decrees of the plenums" and the excessive role of the chairpersons of the courts. However, in general, this is a complex deformation, since it is unlikely that legislative changes aimed at the overcoming of the indicated simple deformations will be sufficient for the debureaucratization of the judiciary, including a regulatory debureaucratization. There is a great risk that, say, "decrees of the plenums" will be replaced with some informational letters by the superior courts, with their new instructions, etc., i.e. there is a great risk of an exclusively formal solution to the problem.

At the same time the regulatory bureaucratization is carried out, as a rule, under ostensibly good slogans "ensuring the unity of the judicial practice", "struggle with judicial errors", "increasing the competence of judges", etc. the victim of which is the independence of judges. In practice,

such slogans have nothing to do with the real improvement of judges. On the contrary, they lead to opposite results, since a judge confined within the bureaucracy does not become more competent – he or she simply cease to be a judge in the genuine sense of the word. Moreover, above, we dwelled on the theoretical approaches to the solution to the hypothetic dilemma “independence vs. control over the competence” and we will not go back to it again.

One thing is clear: the judicial-legal system of Uzbekistan should, in prospect, *completely* refuse any instructions or regulatory directions from higher courts to inferior courts regardless of the form these directions assume and slogans they are covered. Control from higher courts over inferior courts can be only exercised in procedural forms – by considering complaints regarding specific cases and by taking appropriate judicial decisions. The prestige, say, of the Supreme Court of the RU should be determined not by its regulatory powers, but by the level of its decision it takes as the highest judicial body. It is quite another matter that this prestige is ensured also by a corresponding doctrinal work which is the one we will consider next. As for regulatory powers of courts, they can only be in the form of some “self-regulating” when one or other judicial instance adopts, if necessary, some open procedural rules at a general meeting of judges (regarding case assignment procedure, work of chancellery, judicial preparation of a case, etc.), but they should be adopted exclusively *for itself* and not for inferior courts.

c) The formation of a genuinely independent judiciary in the Republic of Uzbekistan is impossible without changing the focus of the development of the *national university doctrine*. It is not even that these are the Uzbek universities which have to form judicial manpower capable of overcoming at the mental level all indicated deformations, first of all complex deformations. As long as these deformations are present in the legal mentality of professors of law themselves, it is difficult to expect that this complicated problem will be solved. And, obviously, there is no need to comment on this problem. But the role of the university doctrine manifests itself not only in exclusively pedagogical functions (with all its colossal importance).

Only and exclusively the university doctrine can exercise non-bureaucratic control over current judicial decisions, first of all over decisions of highest courts helping to overcome the painful legal centrism and re-establish the prestige of the judicial practice. Only it should carry out “monitoring” of judicial decisions making brilliant decisions the absolute authority equal, by its significant, to the authority of the law and subjecting bad decisions to a scientific and critical discredit, i.e. depriving them of any authority.

To perform this mission, the scientific doctrine should depart from Soviet and post-Soviet methods when only a standard legal act has been in focus (famous ‘will of the legislator’) and the judicial practice only has the role of “sociological routine.” The interest of the doctrine should be switched to specific momentous judicial decisions which it should be able to comment on, identify the main point in them, explain their logic and meaning, etc. Judges should work not *under the bureaucratic* pressure but *under the doctrinal pressure* knowing that their decisions can become, in the scientific sense, both “classic” and the national “legal catastrophe”.

In this situation, to successfully carry out the indicated task some kind of a “doctrinal revolution” is required, i.e. rethinking of the technique and methods of a doctrinal analysis of legal material aimed at understanding of not only standard legal acts, but specific judicial decisions. This is the kind of the revolution that took place, for example, in the second half of XIX century in the USA (the emergence of the *casebooks* technique) and in the beginning of XX century in France (crystallization of the *note d’arrêt* and afterwards the origin the tradition to publish corpuses *Les grands arrêts*...), which leaves no room a historical pessimism with its destructive references to the centuries-old traditions of the West and the absence of such traditions in the post-Soviet space. We will also stress that both the American and the French doctrinal revolutions were accompanied by an increase in the university prestige and optimization of the faculty, i.e. a deliberate creation of various incentives for universities to hire their most talented graduates.

Unless the national university doctrine in the Republic of Uzbekistan, as well as the methods, techniques and quality of its work, are updated, including a full-fledged integration in the global legal intellectual environment, we should hardly expect that the “complex deformations” of the judicial system may be overcome, if at all.

August 2009

Sergei Pashin, PhD

EXPERT OPINION ON THE DRAFT LAW OF THE REPUBLIC OF UZBEKISTAN “ON JUVENILE JUSTICE”[233]

The Draft Law of the Republic of Uzbekistan “On Juvenile Justice” raises a very important issue which has always been the focus of attention for the international community, namely, measures for protecting the rights of and ensuring well-being among juvenile delinquents.

Special reference norms related to the juvenile justice system and detention of juvenile delinquents are envisaged in the following international documents: Convention on the Rights of the Child that was adopted and made open for signing, ratification, and joining by the UN General Assembly Resolution 44/25 as of 20 November 1989; United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”); Standard Minimum Rules for the Treatment of Prisoners that were approved by the Economic and Social Council in its resolutions as of 31 July 1957 and 13 May 1977); and other sources of international law. Among them are a number of regional documents, in particular, Recommendations of the Committee of Ministers under the Council of Europe, e.g. Recommendation R (2003) 20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice.

Those who drafted the law, on the one hand, intentionally confine the range in which the proposed norms can be applied to dealing with juvenile delinquents that violated both criminal and administrative legislation, leaving behind a broader area of deviant behavior among adolescents. On the other hand, the traditional issue of juvenile justice has been broadened in the draft law, incorporating norms related to protecting the rights of minor victims and witnesses.

In general, the draft law (Articles 1, 4 and others) is consistent with the ideas on the purpose of juvenile justice provided for in the Beijing Rules: “The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence” (Item 5.1 of the Beijing Rules).

[233] This Expert Conclusion has been developed by the Legal Policy Research Center and supported by the Freedom House Office in the Republic of Kazakhstan. All opinions and ideas expressed in this Expert Conclusion may be different from those of Freedom House and reflect the author’s perspective of the issue.

Despite thoroughness in spelling out the norms and high quality of the draft law presently under revision, it still has a number of shortcomings that need to be taken into account by the drafting committee.

1. This draft law is, no doubt, a comprehensive legal act containing the norms from various areas of legislation. This is how it should be when we talk about juvenile justice.

With that said, we should still distinguish between different subjects of regulation inside the draft law. Seemingly, in a number of cases there is some confusion of criminal and procedural norms, on the one hand, and administrative and procedural ones, on the other, with a lack of clarification every now and then, which leaves much room for guessing.

For instance, according to the draft law, a juvenile court deals with both criminal and administrative offenses committed by minors (Articles 2, 9, 35 and others).

However, Section 1, Article 11 literally means that a prosecutor is not allowed to take educational measures with regard to juveniles who committed an administrative offense, while the article talks about such type of punishment as deprivation of freedom, which is a criminal penalty, and not an administrative one. In Section 2, Article 11 the term “offense” is used, but again, Section 3 talks about the termination of a criminal case, and not administrative proceedings. The same discrepancies are found in Article 14 that first talks about measures caused by an “offense,” and at the end we read about consequences of a crime (“actions punishable by deprivation of freedom”).

Article 18 regulates the details of arrest as applied to a juvenile delinquent within criminal and administrative proceedings. Article 21 contains a broader notion and talks about “arrest and bringing to police.” There are certain doubts that it is appropriate to regulate the legal state of a juvenile delinquent in a combined manner – at least from the viewpoint of the time in custody – if such different preventive measures are used against them, namely, arrest as in the Criminal and Procedural Code, arrest as in the Code of Administrative Liability, and bringing to police. The same is true of some other articles of the draft law (Articles 25, 27 and others) regulating procedural actions with regard to juvenile delinquents and establishing a procedure for providing them with high-level legal assistance. It should be clearly expressed whether these rules apply only to “suspects” and “defendants” as in the criminal and procedural legislation, or they also refer to minors facing administrative charges.

Similarly, there is enough room for guessing and certain discrepancies in Articles 39-47 that talk, alternately, about judicial proceedings with regard to “offenses” committed by minors, on the one hand, and criminal cases and criminal penalties, on the other. It would be appropriate to separate these

procedures and lay down the details of applying administrative penalties to minors.

In essence, Article 54 dealing with execution proceedings against minors envisages the enforcement of administrative penalties, while Article 7 of the draft law does not contain a special paragraph that would spell out all relevant particulars and procedures.

2. The draft law does not provide for the establishment of special juvenile courts, since this body is defined by Article 2 as a special judge (composition of the court). These officials should submit written notification to the "chairman of the relevant court" if proceedings are suspended or postponed (Article 44).

However, such special judges dealing with minors seem to employ some approaches that are meant not to promote the well-being of defendants, but rather to correct their behavior and rehabilitate them, thus intimidating others ("general prevention"). Chairmen of relevant courts may entrust other criminal cases to such judges in which the defendants are grown-up individuals. Specialization of judges may be viewed as the first transitional step on the way to organizing and separating the juvenile justice system and establishing separate juvenile courts.

Another matter of concern is transferring supervision of social and legal aid centers for minors to law enforcement agencies (Article 2).

It is not quite clear how "defense units" will be incorporated in the juvenile justice system (Article 5), and what "preliminary state attestation" will mean in this case. It would not be fair to deny those defense attorneys who didn't pass through such attestation the right to protect the interests of juvenile delinquents in courts or during pre-trial proceedings.

3. The draft law should be commended for referring to restorative justice (Article 2) and even calling it a priority (Article 4).

However, what we have seen through our experience working with minors in Moscow, St. Petersburg, Perm, Dzerzhinsk and other places of the Russian Federation demonstrates that restorative justice requires the involvement of professional mediators during preliminary investigation and judicial proceedings who would arrange conciliation meetings between the offenders and the victims. Item b, Part V of the Recommendation R (98) 1 by the Committee of Ministers under the Council of Europe says that "states should set up mechanisms which would enable legal proceedings to be interrupted for mediation to take place."

Developing a draft law on juvenile justice is a good opportunity to make such practices legal and to promote their wider-spread application. It is worth mentioning mediators with university degrees in law can be used as a human

resource to appoint juvenile judges and other officials working in the juvenile justice system.

4. Pre-trial educational measures undertaken by a prosecutor (Article 11 and others) is a brave and ingenious idea related to transferring what is viewed as judicial functions to a criminal prosecution body. Interestingly, Article 13 says that pre-trial measures can be undertaken not only by a prosecutor, but also by court. Such discrepancies make it difficult to understand this new practice introduced by the drafting committee.

Unfortunately, the draft law does not consider the victim’s position, nor their consent to conciliation or ways of making good the damage caused to the victim when deciding on further steps with regard to their complaint. There is no reference to how such decisions can be made by a prosecutor. Presumably, it would be appropriate to make decisions on pre-trial educational measures only after hearing all interested parties, which should be done in a quasi-judicial hearing. The same is true of a situation described in Article 29 of the draft law.

5. Also, there are some more specific comments and ideas.

Thus, viewing proactive interaction with minors (Article 4) as one of key principles of juvenile justice is not quite clear.

Notably, there is some omission in Article 8: an offender who turns 18 in the course of proceedings may face only criminal punishment, while an adult individual charged with a juvenile offense may also face educational measures. Moreover, it is important to consider the issue of applying some educational measure with regard to those who came of age.

Section 2 of Article 14 is fairly vague, providing a judge with broad, and thereby dangerous, discretion in choosing penalties with regard to minors.

Those under arrest have the right to silence before and after meeting their defense attorney (Article 19).

In light of the provisions of Article 25, it is worth mentioning that the procedure for interrogating a juvenile delinquent is quite strict, including compulsory presence of their legal representative. However, sometimes sincere efforts to ensure their presence during interrogation may fail. We cannot oblige a legal representative (and sometimes a defense attorney) to become familiar with interrogation records and provide their comments, which they may not have. A prohibition on additional interrogation of juvenile delinquents is too strict, given the fact that only the court may substantiate certain circumstances. Even if an investigator thinks that some facts are substantiated, such assumption may be refuted in the course of interrogation.

In Article 31 and other articles that follow, the maximum time in custody with regard to minors assigned to courts should be specified. It should be also clarified whether or not the time in custody includes the time required to make juvenile delinquents familiar with the case files.

The content of Articles 2 and 35 makes us wonder whether or not the "court of relevant jurisdiction" is a juvenile court.

A new piece of evidence emerges as a result of a social research (Article 36), namely, a report of the social worker about the living conditions and upbringing of an adolescent. This evidence, which resembles the "other document," has too important features. Firstly, it is a result of research activities conducted by a public official who is not part of an investigation agency or court, i.e. it is hearsay evidence. Secondly, it may be difficult to verify the accuracy of information in the report, because some sources of information cannot be disclosed. All this requires amendments to the criminal and procedural legislation and the norms contained in the law of evidence.

Notably, the notion of "medical examination" introduced in Article 38 makes it unclear in what cases courts may call for their own forensic assessment, which may be either inpatient or outpatient, or be conducted in court. We should keep in mind that the article envisages the involvement of the court in selecting individual medical experts, which is difficult to achieve.

Article 39 confers too much discretionary authority upon courts, which contradicts the adversarial nature of litigation and the idea of legal certainty.

Article 41 provides for mandatory closed court hearings with regard to juvenile delinquents and offenses they committed. Thus, at least 15% of all criminal cases will be heard behind closed doors. Not only is it inadvisable, but it also contradicts Article 14 of the International Covenant on Civil and Political Rights, and questions the compliance of the entire judicial system with the international principles of justice. What indeed should be introduced is a prohibition to address juvenile delinquents and the victims by their names in media publications.

Article 47 says that juvenile convicts may face deprivation of freedom only for "very serious or repeated very serious" offenses. Some additional criteria introduced by Sub-item c), Item 17.1 of the Beijing Rules may be applied in this case that talk not only about serious offenses, but also about "a serious act involving violence against another person."

Measures to protect juvenile victims and witnesses may include, along with those mentioned in Article 50 of the draft law, such procedural means as interrogating juvenile witnesses in the absence of the defendant and keeping secret the identity of juvenile witnesses or victims (the so-called *faceless witnesses* whose participation is considered legal by international human rights bodies provided that the final verdict is not based on their testimony entirely).

Mandatory medical examination of juvenile victims and witnesses (Article 51) is not justified. It may result in the humiliation of their honor and dignity and lead to intimidation. There is little practical value in this measure, indeed.

Section 6 of Article 51 envisages what seems to be a revolutionary norm, which is the right of a juvenile victim to a free lawyer. However, it should be clarified in what cases a juvenile plaintiff will be able to exercise this right (there are no victims in civil proceedings that are also mentioned in this article). In terms of legislative proceedings, this norm can make it difficult to enact the bill or postpone it due to government's unwillingness to allocate money from the state budget which is always limited in such cases.

Article 52 imposes certain obligations on the court, which makes it part of the prosecution counsel similar to a prosecutor, rather than an impartial arbitrator.

Apparently, a juvenile delinquent and his or her parents should have the right to file a motion to court, requesting to release the minor offender from a specialized educational facility, irrespective of the view held by the special commission on minors (Article 64).

Article 85 does not provide for any specific time limits that, if violated, may lead to some sort of liability. It simply addresses the consideration of complaints submitted by minors as "first priority."

6. Enacting the bill will require immediate amendments to the Criminal and Procedural Code, Code of Administrative Liability and other legislative acts. All relevant amendments may be included in one package along with the draft Law "On Juvenile Justice."

I would like to express my sincere hope that the above-mentioned views and recommendations will further promote the development of legislation in the Republic of Uzbekistan with regard to strengthening human rights guarantees in line with international standards.

April 2009

Daniyar Kanafin, PhD

EXPERT OPINION ON THE LAW OF THE REPUBLIC OF UZBEKISTAN NO. 3RU-198 OF 31.12.2008 "ON THE INTRODUCTION OF CHANGES AND ADDITIONS TO SEVERAL LEGISLATIVE ACTS OF THE REPUBLIC OF UZBEKISTAN IN CONJUNCTION WITH IMPROVEMENTS TO THE INSTITUTION OF THE BAR"[234]

The *subject* of this expert commentary is changes and additions introduced into the Criminal[235], Criminal-Procedural[236], and the Criminal-Executive[237] Codes of the Republic of Uzbekistan, the Code of the Republic of Uzbekistan on Administrative Responsibilities, and the laws of the Republic of Uzbekistan "On the Bar" and "On Guarantees of the Activities of Lawyers and the Social Protection of Lawyers."

The goal of this expert commentary is to determine the degree to which the changes and additions introduced into the legislation of the Republic of Uzbekistan meet international standards for fair criminal process and the principles for the organization and functioning of the Bar as laid out in international law. This expert commentary does not pretend to be a comprehensive investigation of all issues related to the reform of the Bar in the Republic of Uzbekistan.

I. General Description of the Changes and Additions Introduced into the CC, CPC and the Code of the Republic of Uzbekistan on Administrative Responsibilities

The law frees witnesses who refuse to testify against themselves from criminal liability. It also introduces important changes in criminal-procedural legislation that significantly broaden the rights of the defense. Among other things, the law replaces the old versions of Articles 46 and 48 of the CPC, which were based on the repressive principles of Soviet jurisprudence. The new versions foresee major improvements in the legal possibilities open to suspects and the accused, including:

- The right to a telephone call or to otherwise inform a lawyer or a close relative of the fact and place of their detention;

[234] This document has been put together by the Legal Policy Research Centre (LPRC) with the support of Freedom House Kazakhstan.

[235] Hereafter the "CC".

[236] Hereafter the "CPC".

[237] Hereafter the "CEC".

- The right to have a lawyer from the moment of detention or the issuance of official notification that a person is a suspect, and to meet with the lawyer one-on-one with no limit on the number or length of these meetings[238];
- The right to demand an interrogation not later than 24 hours after detention;
- [The right to] refuse to give evidence and to be informed that your testimony can be used as evidence against you in a criminal trial;
- [The right to] make copies, at one's own expense, of materials and documents or in other ways to use technical means to copy the information contained in them.

The procedure through which a defense lawyer becomes involved in a case is also changed. Now, when a person is detained, the lawyer has a right to enter the process from the moment of factual deprivation of the right to freedom of movement.[239] In addition, in cases when the lawyer is provided at the state's cost, the head of a law firm must provide a lawyer within four hours of being informed by the appropriate state agency that an lawyer should be provided.[240] The law includes a clarification spelling out that a lawyer may participate in a case after producing his identification as a lawyer and the order empowering him to undertake a specific case.

The rights of the defense lawyer are broadened to include the following procedural possibilities:

- To gather and present data that can be used as evidence;
- To make, at his own expense, copies of materials and documents or in other ways to use technical means to copy the information contained in them[241];
- To meet with a suspect, accused or convicted person one-on-one without any limit on the number or duration of their meetings without the permission of state agencies or officials responsible for the criminal case[242];
- To apply to the state agency responsible for the trial to call a specialist to provide clarifications.[243]

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[238] With the exception of meetings during the period in which the question of sanctioning of arrest is being made.

[239] Article 49 of the CPC.

[240] Article 51 of the CPC.

[241] Analogous rights are provided to the victim and to parties in civil cases.

[242] Articles 53 and 230 of the CPC.

[243] Article 69 of the CPC.

For the first time, the law makes concrete the legal status of a witness' lawyer, regulates the procedure for them to provide legal assistance to their clients and details the procedures for interrogating witnesses in the presence of their lawyers.[244]

One of the most important new elements included in this law is the broadening of a defense lawyer's authority in revealing, corroborating and withdrawing factual information. In accordance with the new version of Article 87 of the CPC, defense lawyers have the right to collect data that can be used as evidence by: questioning individuals who possess information related to the case and receiving, with their agreement, written explanations; requesting and to receiving information, evaluations, clarifications and other documents from state agencies, firms, institutions and organizations. Requests by defense lawyers to include in the case materials gathered in accordance with part two of this article must be approved by investigators and prosecutors.

The law requires that upon detention of a suspect in connection with a criminal case employees of the Interior Ministry and other competent officials explain his procedural rights to a telephone call or to otherwise inform a lawyer or close relative, to have a defense lawyer, and to refuse to give testimony, and that any testimony he does give may be used as evidence in a criminal case against him.[245]

In addition, the Code of the Republic of Uzbekistan on Administrative Responsibility was supplemented by the addition of a section setting out civil responsibility for failure to answer a lawyer's request, or for taking any type of action against a lawyer designed to prevent his participation in a case or to force him to take a position that contradicts the interests of his client.

The procedure whereby the accused is assured the right to receive legal assistance has also been changed. In accordance with the new version of Article 10 of the CPC, meetings with lawyers may be arranged not only on the request of the accused, but also on the request of the lawyer. Moreover, the law guarantees that these meetings will be one-on-one. A refusal to grant a lawyer's request for a meeting with the accused in order to provide legal assistance justified by the refusal of the accused to meet with the lawyer must be confirmed after a one-on-one meeting between the lawyer and the accused through a protocol signed by the accused, the lawyer and a representative of the administrative facility where the accused is being held. Lawyers are given the right to lodge complaints and make requests of the administration of such facilities.

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[244] Articles 66-1 and 114 of the CPC.

[245] Article 224 of the CPC.

II. Analysis of the Changes and Additions Introduced into the CC, CPC and the Code of the Republic of Uzbekistan on Administrative Responsibilities

Without a doubt, the law's addition to existing legislation of norms broadening the rights of suspects, the accused and defense lawyers is deserving of praise. The provision of the ability to make a telephone call or to otherwise inform a lawyer or a close relative that one has been detained is an effective guarantee of many other human rights such as: the right to a defense and to qualified legal assistance, the right to file complaints and motions and present evidence, etc. At the same time, the ability to make a phone call protects the suspect from the danger of being held *incommunicado* and the use of illegal methods to force confessions.

Nevertheless, we feel it necessary to make some recommendations that are essential to guarantee this right under the conditions of post-Soviet criminal procedural practice. It is clear that these new provisions have been borrowed from criminal justice systems in some developed countries, where this right is protected broadly and effectively.[246] However, the practical implementation of this norm in democratic states is guaranteed by well organized judicial supervision, a high level of legal culture, the professionalism of lawyers and other judicial and political means. The criminal process in the majority of the states of Central Asia does not include such means, as they are, unfortunately, little more than lightly modernized versions of the repressive Soviet judicial model in which homage to the independence of the courts and lawyers and faithfulness to international legal principles regarding fair criminal trials are, for the most part, simply window dressing. In accordance with existing traditions in our procedural system, participants' rights in a trial cease to be mere fictions only when the procedure for realizing a right is made clear in the law and is ensured by a requirement that the appropriate government agency records all activities taken to guarantee the particular right. In other words, the steps taken to explain this right, to make it possible for the detained to take advantage of this right, and the consequences of the actions taken with the goal of implementing this right all need to be reflected in detail in the procedural documents drawn up when a person is detained.

The proposed changes in Article 224 of the CPC regarding the explanation to the detained of their rights are insufficient, as the new version of Article 225 of the CPC does not require that these steps be recorded in the

[246] The question of introducing an analogous norm into criminal procedural legislation has been fairly actively discussed in the Russian Federation. See: Explanatory Note to the Draft Federal Law "On the Introduction of Changes in Article 5 of the Law of the Russian Federation 'On the Police.'" Available (password required) at: http://asozd.duma.gov.ru/work/dz.nsf/ByID/35A00DDDECA34377C32573B1003C5BAD.

protocol of detention. In this regard, we propose that the law be strengthened by adding a requirement that the following information must be included in the protocol of detention: the fact that the detainee was informed of his right to a make a telephone call or otherwise inform a lawyer or close relative of his detention, the time the call was made, the number called and the results of the call. In addition, we believe it is not useful to limit the range of people detained persons may contact to lawyers and close relatives. It seems to us that the detained should be allowed to decide themselves who in this situation cares about them most. This could be a friend, a spouse or a colleague at work. Therefore, we believe it is a mistake to set forth in the law the legal status of the person who can be informed that a person was detained.

The provision giving people the right to the assistance of a lawyer from the moment of detention or the issuance of official notification that a person is a suspect is another major step forward on the path of liberalizing the criminal process. The inclusion of a concrete, four hour period during which the head of a law firm must name a lawyer also deserves support. Without a doubt, the possibility of consulting with a lawyer before the first interrogation, of agreeing on a line of defense, of receiving from a defense lawyer a detailed description of one's rights and, most of all, a description of how they can be realized, will demonstrably facilitate the equality of the sides in a criminal proceeding, and will guarantee that important human rights such as the right to refuse to testify and the right to file a complaint are implemented. In addition, the entry of a lawyer into the legal process at this stage is very important as it is an effective means of preventing torture and other illegal treatment of the detained. It will also help the detained to fully realize the possibilities of the procedure of Habeas Corpus by allowing sufficient time to prepare a defense for the court hearing on the sanctioning of arrest.

The Kazakhstani example in implementing analogous legal provisions shows that law enforcement agencies are not, as a rule, interested in the detained availing themselves of this right. Clearly, the presence of a lawyer at such an early stage in the case is a serious obstacle to the active operational and criminological preparation of the suspect. As a result, investigative practice almost always seeks means to remove this obstacle. One such means is, through various means, to get the suspect to refuse in writing to have a defense lawyer. In spite of the legal demand that such a refusal be made in the presence of a lawyer, investigators have not overly concerned themselves with obeying this requirement, and for a considerable time Kazakhstani judges closed their eyes to such violations. It is clear that in order to ensure this right in Uzbekistan, where the judicial process has the same inquisitorial character as in Kazakhstan, judges should take a principled approach not only to analyzing the procedures under which a suspect was detained, but also the process of obtaining initial testimony from the accused and, in particular, that Part 1 of Article 52 of the CPC was obeyed. Only the creation of judicial precedents condemning the practice of producing a refusal

to accept a defense lawyer without the defense lawyer being present can guarantee that this right will be fully protected.

Another means by which the right to the assistance of a defense lawyer from the moment of detention is violated is the practice of cooperation between investigators and lawyers, who violate their code of ethics and their professional responsibilities. Colloquially such lawyers are known as “pocket lawyers.” They at times simply sign procedural documents, often backdated, that claim they were present during a procedural step, although in fact they provided no legal assistance. This allows the investigator to claim that they abided by the formalities connected to guaranteeing the right to a defense. Unfortunately, the legal community in many post-Soviet states is not free of members who cooperate with law enforcement agencies even though this damages the interests of their clients. There can be many reasons for such cooperation: participation in corrupt schemes (serving as the middle man in the provision of bribes), recruitment by law enforcement agencies, or simply friendly or other personal relations. In additions to legislative methods to clean the ranks of the legal community of such collaborators, it is possible to implement organizational procedures that would preclude such illegal schemes. For example, it is essential to strengthen both in law and in the statutes of the legal community that lawyers will be appointed at state expense only by the leadership of regional professional organizations of lawyers through a clearly defined procedures and forbidding lawyers to personally cooperate with agencies involved in the criminal process. It is essential to lay out a single set of special orders for participation in cases where a lawyer is being provided at state expense and ensure strict control over their issuance. It is possible that such measures are already in use in some Uzbekistani law firms, but this practice should be spread and unified in all sub-units of the Bar Association. Of course, this will not fully resolve the problem of the fictitious provision of legal assistance by corrupt lawyers. It will, however, allow for better control of the situation and more effectively bring to book those who are guilty of violating the rules of professional ethics.

Provisions broadening of the ability of a suspect to meet with his defense lawyer without limitation of the number or length of the meetings and the right of the lawyer to do this “without the permission of the state organs or officials responsible for the criminal case” are positive. It goes without saying that this norm brings national legislation in this area into accord with the demands of international criminal procedure standards.[247] In our view, the limitation of this right during the period when the question of choosing the method of confinement is being decided is fully justified, as at this point in the process the timeline of the actions of all the participants in the process are fairly tightly regulated and the guaranteed two hours for a meeting can be seen as a

[247] See: The Leadership of International Amnesty on Fair Criminal Process. Moscow, Publishing House “Human Rights,” 2003, p. 41-43.

perfectly acceptable guarantee of the right to defense and qualified legal assistance.

The creation of a right to demand an interrogation within 24 hours after detention may have been seen by lawmakers as a means of codifying the position of international law under which every person detained should quickly be informed of the charges against him since it is during an interrogation that, in accordance with Article 111 of the CPC, this should be done.[248] It is necessary to note that an analogous norm already exists in Article 110 of the CPC. We believe this clarification does not contradict international standards for fair criminal process and on the whole is designed to guarantee other of the accused's rights. In addition, this provision indirectly sets out the minimum period during which a defense lawyer should become involved in a case. Thus, according to Part 1 of Article 230 of the CPC, "The first one-on-one meeting between the detained and the defense lawyer should take place before the first interrogation." If this interrogation should take place no later than 24 hours from the moment of detention it follows that before that point the lawyer should enter the case and hold a first meeting with his client.

The addition in Articles 46 and 48 of the CPC of the right to refuse to testify and to be informed that any testimony could be used against you as evidence in a criminal trial amounts to the incorporation into national law of the principle of testimonial immunity, which is generally accepted in international law. Point g) of Part 3 of Article 14 of the International Covenant on Civil and Political Rights guarantees everyone the right not to be forced to give evidence against themselves or to confessing guilt.[249] This is a welcome change, as it provides an effective guarantee against self-incrimination.

The law clarifies several organizational issues related to the right to a defense. The rights of the accused are expanded to include the right to make copies, at one's own expense, of materials and documents or by other technical means to record the information contained in them. To a practicing lawyer, this provision seems both timely and positive, as it provides significant practical assistance to the defense in carrying out its work. It is worth noting that at the pre-trial phase, criminal proceedings in most post-Soviet states are carried out in writing, and at this stage the investigative authorities have significantly more rights than the defense. The requirement the parties to a case be equal formally applies only to the trial phase, to which the defense should come prepared in order to put its case competently. In order to do so, it is very important to have access to all information related to the case and to

[248] International law does not differentiate between acts of official accusation and formulations of suspicion in regard to a person being held criminally liable. Therefore, the standards for ensuring an individual's rights in such cases operate in equal measure.

[249] The International Convention on Civil and Political Rights, On Human Rights: Handbook of International Documents, Warsaw, 2002, p. 91.

have the ability to use it during the trial. In this connection, this change in the legislation should be fully welcomed. It should be noted that a similar norm has existed in Kazakhstani criminal procedure and has fully proven itself in practice. The provision of the same rights to the sides in civil cases is fully justified as the practice has already proven itself from the point of view of assuring the equality of the parties in criminal proceedings.

Broadening the right of defense lawyers by allowing them to gather and present information that can be used as evidence is another significant change in the legislation. It is possible we are witnessing the first steps in Uzbekistan towards the institution of investigations by lawyers. It should be mentioned that as a carryover from Soviet times, the criminal procedural codes of many post-Communist states include defense lawyers' formal right to "present evidence." Nevertheless, because there is no set procedure for doing so, this right remains little more than a judicial phantom that cannot be taken advantage of in practice. It is positive that Uzbekistani lawmakers have increased defense lawyers' authority in this regard with quite concrete means of gathering evidence, giving them the right to question people who have information related to the case and receive written explanations with their approval, and to file requests for and receive documents from government agencies. Here too, one could add the provision in Article 69 of the CPC giving defense lawyers the right to petition for a specialist to be called to give testimony.

However, there is still the question of how to ensure the credibility and admissibility of the information received, especially in statements by people possessing information about a case. It is also worrisome that the law does not name such people witnesses, which would give them the status of full-fledged participants in a criminal proceeding and thus guarantees that their rights would be protected. In particular, it is not clear if a person being questioned by a defense lawyer should be warned that he faces criminal liability if he provides false statements, has immunity from self-incrimination, or the right to give his statement in the presence of his lawyer. And if it is not necessary to do so, then how can the credibility of the written information provided to the defense lawyer be ensured? For example, the investigator or judge could simply doubt the existence of such a witness. And since the law does not specify a procedure for confirming the identity of the person being questioned, it is possible that all of the testimony presented by the defense lawyer could be ruled inadmissible as evidence. Moreover, it is possible that a person who has already provided information could later declare that the defense lawyer or a relative of the accused forced him to give such testimony. How can a defense lawyer protect himself in such a situation?

In order to deal with such problems in the legislation it is necessary to more precisely regulate in the law the process by which defense lawyers gather factual information. For example, it would be worthwhile to require notarial confirmation of the identity of the deposed or to require that the

agency conducting the criminal case re-interrogate the person who provided information to the defense lawyer. In addition, it is necessary to make more concrete in the law the authority of the defense lawyer to name alternative experts, thus guaranteeing the real equality of the sides in the proceeding. Such procedural clarifications would truly facilitate the spread of the principle of equality to the pre-trial phase of the process and turn the defense lawyer from a mere supplicant into a full-fledged fighter in the ring of a criminal proceeding.

In addition to these comments on the changes in criminal procedural legislation, it is also necessary to express satisfaction with the change in the Code on Administrative Responsibilities creating criminal responsibility for failure to respond to a lawyer's petition. One hopes that this article will have the necessary effect on a defense lawyers' ability to gather evidence.

The provisions regulating the legal status of witnesses' lawyers and the procedures for a witness to be questioned in his lawyer's presence also deserve a positive appraisal. It is clear that the right to a defense and to receive qualified legal assistance should not be guaranteed only in cases when an official indictment has been issued against a specific person, but also in other circumstances that result in a person being brought into the orbit of the criminal justice system. Therefore, these changes in the legislation are both fitting and timely.

The changes in criminal-executive legislation guaranteeing the right to legal assistance are also a positive step. It is positive that the legislators decided to allow lawyers to request a meeting with the accused, as the latter – being under detention -- is often not in a position to make such a request. It is also sensible to allow the accused to refuse such a meeting only during a meeting with the lawyer. One would hope that this procedure will make the human rights situation in the criminal justice system more open to civil society and allow for effective efforts to fight misconduct.

III. A General Description of the Changes and Additions Introduced in the Laws of the Republic of Uzbekistan "On the Bar" and "On Guarantees of the Activities of Lawyers and the Social Protection of Lawyers"

The changes and additions to the law "On the Bar" clarify the legal status of lawyers and the procedure for achieving that status. In particular, lawyers' rights were broadened in a way analogous to what was done in the criminal-procedural legislation for defense lawyers. Lawyers' responsibilities were made more concrete, particularly as concerns their abiding by the ethical rules of the profession and the unallowable nature of conflicts of interest in

their work. The law regulates in detail the legal position of law firms, untenured lawyers, and the form and content of agreements for the provision of legal assistance. For the first time, the legal status of the Uzbekistan Bar Association has been codified as a non-commercial organization based on obligatory membership of all lawyers and forming the profession's only system of self-administration. In addition, changes were made in the provisions for licensing lawyers and more precision was added on issues related to disciplinary procedures.

Provisions were added to the law of the Republic of Uzbekistan "On Guarantees of the Activities of Lawyers and the Social Protection of Lawyers" according to which lawyers may be taken into custody by district (city) criminal courts on the petition of the Prosecutor General of the Republic of Uzbekistan, the Prosecutor of the Republic of Karakalpakistan, regional prosecutors, the prosecutor of the city of Tashkent and other prosecutors of equal rank. The law was strengthened with a provision that bans the requirement for special permissions (other than an order and a lawyer's identification) or the placement of any barrier in the way of a lawyer performing his functions.

IV. Analysis of the Changes and Additions Introduced in the Laws of the Republic of Uzbekistan "On the Bar" and "On Guarantees of the Activities of Lawyers and the Social Protection of Lawyers"

Most of the provisions noted above were intended to address issues that previously had not been sufficiently clearly addressed in the law. Many of the changes are of an organizational or technical character. Therefore, this section of the analysis will concentrate only on those provisions that, in the authors' opinion, are disputable from the point of view of strengthening the principle of the organization and functioning of the bar as an independent professional organization of lawyers as laid out in international law.

The procedure for gaining the status of lawyer set forth in Article 3-1 of the law "On the Bar" is, in the opinion of the authors, overly bureaucratic, does not clearly define the authority of the professional community in granting access to the profession, and gives the executive branch of government unlimited possibilities to control this process. According to the provisions of the law, lawyers are licensed by agencies of the Ministry of Justice on the basis of a decision of a qualifications commission after passing a qualifying exam. The law does not regulate the composition or the work procedures of the qualifying commissions or the procedure for the exams. It is clear that these issues are addressed in normative acts that don't have the force of law and which depend on the desires and preferences of executive branch

agencies. In this manner, the Bar does not have any real guarantee that it can participate as a full partner in the process of forming its own membership and remains in a dependant position vis-à-vis the government.

In addition, the process of joining the Bar is unnecessarily involved. Thus, according to parts 4 and 6-8 of the law "On the Bar," candidates who have passed the qualifying exam must petition within three months to the appropriate agency of the Ministry of Justice to receive a license. If the candidate does not apply within this period, he or she may only request licensing after again passing the qualifying exam. Having received a license, the candidate must take the lawyer's oath within three months and either form a law firm or join an existing one. It is only after receiving the registration of the law firm or documents testifying to the fact that the candidate has been employed at an existing law firm that the authorities will, within three days, issue a lawyer's identification document. And it is only after receiving this document that a candidate receives the status of lawyer, about which fact the authorities must inform the appropriate territorial sub-division of the Bar Association within three days. At this point the lawyer finally becomes a member of the Bar.

It is difficult to understand why someone who has passed the qualifying exam should not automatically be issued a license. Why should a candidate be required to apply to the authorities and why should failure to apply within a three month period require that the (quite difficult) qualifying exam be passed again? Why should the authorities issue a lawyer's identification document and not the professional organization of lawyers itself? The candidate is not applying for the civil service but for membership in a society of free defense lawyers! Taken as a whole, this looks more like a procedure for directing someone to a job or assignment than like the process of joining a self-governing, non-commercial organization. The law says nothing as to whether or not the agreement of the Bar Association is required for accepting a new member. It is clear that no one cares about this acceptance or about the opinion of a new member regarding the charter of the organization or the rules for its activities. These nuances would lead one to doubt the real independence of the Bar Association and speak of the unacceptably strong control the Ministry of Justice exercises over the Bar Association.[250]

The expansion of lawyers' authority in Article 6 of the law "On the Bar" deserves a positive appraisal. The majority of the expanded rights included in this section repeat those guaranteed to defense lawyers in the modifications to the CPC, and we have already commented on them above.

[250] It is possible that the implementing decrees issued by the executive branch regarding procedures for licensing and taking the qualifying exam will take a liberal and simple approach. But because these issues have a principled importance for the Bar and determines the degree of its independence and the independence of lawyers themselves, they should be regulated by law and include all the guarantees that are characteristic for the profession.

Nevertheless, the procedures for realizing these additional rights need to be spelled out more concretely.

For example, lawyers are given the right, with their clients' agreement, to question and receive written responses from experts as necessary in order to render legal assistance to their clients. Unfortunately, the procedure whereby lawyers may choose experts in not regulated in the legislation. Institutions where experts work are, for the most part, government offices and by no means are always willing to cooperate with lawyers, particularly in cases involving legal conflicts with state agencies, as is the norm in criminal cases. Therefore, this right needs to be reinforced by additional regulations in criminal-procedural and civil-procedural legislation.

In this same article, lawyers are given the right to insure themselves against malpractice. Such a right is only necessary in countries in which it is normal practice for clients to sue their former lawyers, and in these countries this issue requires special regulation. In most cases, legislation not only gives lawyers the right but actually requires that they be insured against malpractice suits. In the conditions of post-Soviet states, however, making malpractice insurance a requirement would lead to an increase in the cost of legal assistance, as all of the costs would be passed on in the form of higher lawyers' fees. This would make legal assistance even less accessible, particularly for the poorer part of the population. We therefore think circumstances are not yet ripe for the inclusion of such a provision.

The new text of Article 7 of the law "On the Bar" is also deserving of approval. We believe the legislators succeeded in regulating in greater detail questions regarding corporate ethical rules adopted by the legal community, describing situations in which conflicts of interest might arise and formulating concrete means of resolving these problems. In addition, it seems perfectly legitimate to include among a lawyer's responsibilities improving his qualifications. We also support the introduction of a special procedure for sanctioning the arrest of a lawyer. This norm, which provides some privileges for lawyers in the criminal process, will increase the status of the profession and creates a small, and perhaps mostly declarative, defense for lawyers against law enforcement agencies at the lowest level of the system.

One of the most controversial new elements of the law is, in our view, the legal status of the Bar Association of Uzbekistan. In accordance with Article 12-1 of the law "On the Bar," the Bar Association is a non-commercial organization formed on the basis of obligatory membership of all lawyers in the Republic of Uzbekistan, which together with its territorial branches in the Republic of Karakalpakistan, the regions and the city of Tashkent forms the only system of lawyers' self-administration.

We are concerned about the idea of creating a gigantic, nationwide professional organization of lawyers. Our doubts are only increased by the procedures spelled out in the law for organizing the Association and for its

functioning. For example, according to Article 12-3 of the law "On the Bar," the Convention of the Association elects the Association's Board. The Ministry of Justice nominates one member of this Board to serve as Chairman. This candidate is then elected by the Convention for a term of five years. The Chairman has the power to appoint and dismiss the leaders of the regional branches of the Association (per Article 12-4 of the law).

In our view, this procedure contradicts Paragraph 24 of the Basic Principles on the Role of Lawyers adopted by the UN in 1990, according to which: "Lawyers shall be entitled to form and join ***self-governing*** professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions ***without external interference*** [*emphasis added*]."[251]

The election of the Chairman of the Bar on the nomination of the Minister of Justice turns this process into a fiction, as it allows a government agency to interfere in the election process. The independence and self-governing nature of the Bar supposes that the society of lawyers is able on its own to choose its leaders, without unnecessary supervision by the Ministry of Justice. As Yu.I. Stetsovskiy correctly noted: "…together with the Ministry of Justice the leadership of the Bar is perfectly capable of carrying out the policy of the Communist Party of the Soviet Union, but not of providing qualified legal assistance."[252]

We doubt that simple lawyers will be able to take any real part in the work of the executive bodies of the Bar Association or in any other way oversee their activities. But the Association will have power over them as, according to Part 6 of Article 12-1 of the law "On the Bar," decisions of the Bar Association and its territorial branches are binding on all law firms and lawyers. We agree with the opinion of the famous Russian scholar S. A. Pashin, who concludes that "such a structure cannot help but become bureaucratized; it will quickly take on quasi-governmental characteristics, and instead of a self-governing organization of lawyers will become an instrument for their financial and professional oppression."[253]

We believe that in order to ensure its independence, the legal community should be organized by lawyers themselves in each region and the capital. The executive bodies of these organizations should be formed through direct, secret ballot elections at general meetings of all lawyers. Candidates for

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[251] See: Lawyers' Activities and the Bar. Handbook of Normative Acts and Documents, Edited by E. V. Semenyako and Yu. S. Pilipenko, Moscow, Yurist, 2005, p. 25.

[252] Yu. I. Stetsovskiy, The Bar and the State, Moscow, Yurist, 2007, p. 96.

[253] Recommendations of OSCE/ODIHR in connection with the draft law of the Republic of Kyrgyzstan "On Lawyers' Activities and the Bar Association of the Republic of Kyrgyzstan," accessible on the internet at: http://www.lexkz.net/UserFiles/File/pashin2RECkg2005augLawyers.pdf.

these elections should be put forward in advance by law firms.[254] The national Bar Association should play a representative role and should not have any power over the regional Bar Associations.

We have doubts about the concept of giving the Ministry of Justice the right to initiate disciplinary procedures against lawyers, or to suspend or revoke their licenses. Such repressive measures should not be in the hands of an agency of the executive branch of government, as they are a direct means of leverage on the Bar and contradict paragraph 16 of the Basic Principles on the Role of Lawyers, which states that governments should ensure that lawyers have the ability to fulfill all of their professional obligations without intimidation, hindrance, harassment or improper interference.[255]

We believe that the power to initiate disciplinary proceedings should be given to the competent professional organization of lawyers. If they find sufficient cause, they should in turn petition the Ministry of Justice to begin a legal case before the courts regarding the revocation of the license of a lawyer who has committed a violation. Similarly, the Ministry of Justice should only suspend licenses upon the request of the regional Bar Associations.

The law of the Republic of Uzbekistan No. 3RU-198 of December 31, 2008 “On the Introduction of Changes and Additions in Several Legislative Acts of the Republic of Uzbekistan in Connection with the Improvement of the Institution of the Bar” requires law bureaus, collegiums and firms already operating on the day the law enters into force and all the lawyers working in them to conform to the requirements of the law regarding their organizational-legal status and individual licenses (Article 7). The text of the article is such that one can assume that firms and lawyers will need to be re-registered and lawyers will be required to take qualifying exams and receive new licenses. We consider such an approach excessively severe as it applies to already practicing lawyers and would consider it more just to convey legal status on already practicing lawyers and already existing law firms.

V. Conclusions and Recommendations

1. The broadening by the legislation of the rights of suspects, the accused and defense lawyers is positive. Such legislative changes contribute to the humanization and liberalization of practices, the assurance of the right to a defense, the equality of the parties in a criminal proceeding and other generally accepted standards of just jurisprudence.

[254] A similar method has been quite effectively employed in the Almaty City Bar Association.

[255] See: Lawyers’ Activities and the Bar. Handbook of Normative Acts and Documents, Edited by E. V. Semenyako and Yu. S. Pilipenko, Moscow, Yurist, 2005, p. 23.

2. With the goal of effectively guaranteeing the right to a telephone call, we propose to strengthen the law by requiring that the arrest protocol include the fact that the right to a telephone call or to otherwise inform of one's detention was explained, the time the call was made, the number called, and the results. We do not believe it is appropriate to specify in the law the legal status of the person to whom the call may be made.

3. In order to guarantee qualified legal assistance in all cases in which it is provided at government expense, both the law and the statutes of the Bar should include a single procedure to be used throughout the country to name lawyers upon the decision of the government agency in charge of a criminal case. In this regard, it would be preferable for this question to be addressed only by the management of law firms, forbidding lawyers from personally working with employees of law enforcement agencies and judges on this question. There should also be a special form of orders for participation in this category of cases, and there should be tight control of how appointed lawyers carry out their obligations and abide by the rules of professional ethics.

4. In order to make clear the authority of the defense, we consider it essential to spell out in detail in the law the procedure by which lawyers may gather factual information. It is necessary to work out procedural means to strengthen the testimony given by people deposed by lawyers and also to make concrete in criminal-procedural and civil-procedural legislation the procedures by which defense lawyers name alternative experts and receive their opinions.

5. It is necessary to simply the procedure for receiving the status of a lawyer, leaving this issue to the competence of the professional community and removing unnecessarily bureaucratic obstacles from the process.

6. In order to ensure the independence of the legal community, we propose it be decentralized and based on regional associations formed by lawyers themselves. It is essential that these structures' executive bodies be created through direct, secret ballot elections at general meetings of all lawyers. The national Bar Association should play a representative role and should have no power over the regional Bar Associations.

7. The power to initiate a disciplinary process should belong to the competent professional organization of lawyers. The Ministry of Justice should only bring to court cases for the suspension or revocation of a lawyer's license on the request of a regional Bar Association.

8. We propose to recognize the status of currently active lawyers and law forms without the need to pass a new qualifying exam or to undergo re-registration.

March 2009

Leonid GOLOVKO, PhD

DEGRADATION OF THE STATUS OF LAWYERS IN UZBEKISTAN (ANALYSIS OF MOST RECENT BY-LAWS ON THE LEGAL PROFESSION)[256]

In October 2009, the Ministry of Justice of the Republic of Uzbekistan registered two agency-level by-laws regulating some issues related to the legal profession. These by-laws are the Resolution of the Ministry of Justice of the Republic of Uzbekistan and the Department on Combating Tax and Currency Crimes and Legalization of Illicit Proceeds under the Prosecutor-General's Office in the Republic of Uzbekistan "On Approving the Internal Control Regulations on Counteracting the Legalization of Illicit Proceeds and Financing Terrorism in notary offices and law firms" (registered on October 19, 2009 and came into force on October 29, 2009) and the Order signed by the Minister of Justice of the Republic of Uzbekistan "On Measures for Promoting Professional Development of Defense Lawyers" (registered on October 6, 2009 and came into force on October 16, 2009). Notably, the former regulates the activities of both defense lawyers and notary offices (public and private). However, all conclusions and comments contained herein apply, *mutatis mutandis*, to notary offices to the extent to which they, similar to defense lawyers, are supposed to provide legal assistance to physical and legal entities. We will refer *in brevi* to this issue further on in this paper with no special focus on it. Instead, this paper will, first and foremost, deal with current development trends in the legal profession in Uzbekistan.

Being somewhat previous, we should admit that both legal acts mentioned above are a manifestation of one trend which we deem fairly *dangerous*, or even *disastrous* for the Uzbek legal system and civil society. The trend we mean is a clear ***obliteration*** of classic Western-type legal practice in the Republic of Uzbekistan, which is based on such principles as institutional independence and separation of the state from self-governance. This trend has become obvious over the past several years, and it hasn't passed unnoticed by experts.[257] The by-laws in question are its further and, to

[256] This analytical document has been prepared by the Legal Policy Research Center and supported by Freedom House. The positions and opinions expressed in the paper may be different from those supported by *Freedom House*.

[257] See also: D. Kanafin, *Expert Report on the Edict of the President of the Republic of Uzbekistan as of May 1, 2008 "On Measures Aimed at Further Legal Practice Reform in the Republic of Uzbekistan"* (Yearbook of the Legal Policy Research Center - 2008, Almaty, LPRC, 2009, pp. 17-29) ; S. Pashin, *Expert Report on the Edict of the President of the Republic of Uzbekistan as of May 1, 2008 "On Measures Aimed at Further Legal Practice Reform in the Republic of Uzbekistan" and Resolution of the Cabinet of Ministers of the Republic of Uzbekistan as of May 27, 2008 "On Organizing the Activities of the Bar Chamber in the Republic of Uzbekistan"* (Yearbook of the Legal Policy Research Center - 2008, Almaty, LPRC, 2009, pp. 30-38)

a certain degree, grotesque continuation, demonstrating unequivocally that all concerns of experts with regard to "measures on the legal practice reform" undertook in 2008 were well founded.

In this case, both agency-level by-laws mentioned above, each one of them being aimed, *grosso modo* and given its purpose, at depriving defense lawyers of their institutional independence and thereby presenting yet another step toward ultimate degradation of status among defense lawyers in the Republic of Uzbekistan, may well be viewed, in terms of their principles, *in tandem*. At the same time, from the technical point of view, they reflect different mechanisms of influence upon the legal profession that require an independent analysis at the micro-level. Therefore, for editorial reasons, they will be discussed separately from one another, with a special section on the issue of "professional development for defense lawyers" in this paper (3). It is worth mentioning that the Resolution endorsing "Internal Control Regulations on Counteracting the Legalization of Illicit Proceeds and Financing Terrorism in notary offices and law firms" raises serious doubts not only in terms of its content, which is a far cry from the notion of a law-governed state (2), but also in terms of its form which serves as an outstanding example of a deformation that took place with regard to place and role of the legal profession in the Republic of Uzbekistan (1).

I. Form of the legal and regulatory act on "internal control"

If we deviate from the content of the document in question and focus exclusively on its evaluation as a source of law, we will notice that the Resolution endorsing "Internal Control Regulations on Counteracting the Legalization of Illicit Proceeds and Financing Terrorism in notary offices and law firms" is, at first glance, a traditional agency-level by-law[258] issued by two executive agencies, the Ministry of Justice and a respective department under the Prosecutor-General's Office.[259] Such acts are oftentimes called "circular" or "instructive," since they are, in essence, instructions (a circular) in which the head of an agency addresses his/her staff and expatiates on the internal regulations in this agency and nuances of law application related to the agency, etc. No doubt, such agency-level acts can never be addressed to the public, legal entities, etc, or even staff members of other agencies, since they are, first and foremost, *ratione personae*, *agency-level* acts. For this very reason, various kinds of "joint" agency-level instructions are practiced that

[258] Literally "subordinate legal and regulatory act" (*Translator's note*).

[259] In this case, we are not interested in the status of the Prosecutor-General's Office in the Republic of Uzbekistan, i.e. whether or not it is a Western-type executive agency or a Soviet- and post-Soviet-type independent government body. It is of little importance from the viewpoint of our analysis.

enable to reach out to staff members of several agencies regarding the scope of certain regulations, which is also observed in our case, provided that heads of all these agencies approve such instructions.

If we refer back to the Resolution in question, this is where we encounter a serious legal and technical problem. All expectations notwithstanding, the Resolution addresses not the personnel of the Ministry of Justice or the Department under the Prosecutor-General's Office, but rather, first and foremost, defense lawyers, notaries, law firms, etc. How can this be interpreted from the legal perspective? If we resort to the classic understanding of an "agency-level act," the Ministry of Justice or the Department under the Prosecutor-General's Office cannot use such an act to address defense lawyers, private notaries or law firms, simply because the latter are not staff members of the above-mentioned public executive agencies. Even more so, Articles 1 and 4 of the Law of the Republic of Uzbekistan "On Legal Practice" directly point out to the independence of, for instance, defense lawyers and the legal profession. If we put it differently, in this case such an "agency-level act" should look as obvious nonsense and an invalid document. If we cast no doubt over the validity of the Resolution in question and base our assumptions on the fact that agency-level acts of the Ministry of Justice or the Department under the Prosecutor-General's Office may apply to defense lawyers and their law firms, we should forget then the above-mentioned norms of the Law "On Legal Practice," declare them, almost officially, as *showcase* norms and recognize the legal profession as yet another "department" of the executive branch and defense lawyers as "staff members" of respective agencies. There can be no other *third solution* here, and there is no need to justify separately the lameness of the two solutions proposed.

We assume that those who initiated and drafted the Resolution on "internal control" knew very well the act they were about to issue was, obviously, a legal nonsense. It would be difficult to explain the exquisite legal and technical move they made otherwise. Although the Resolution itself, as was mentioned above, was issued by the Ministry of Justice and the respective Department under the Prosecutor-General's Office in full compliance with the technique of "agency-level acts," the Regulations that were approved by this Resolution were signed (N.B.) by the Chairman of the Bar Chamber and coordinated with the Bar Chamber itself. This decision looks strange in itself, taking into account that the appendices to the legal act (in this case, *Regulations*) cannot be different, in terms of legal force, from the act itself (in this case, *Resolution*). However, this is not what matters the most. What is much more important is that by trying to solve what seems to be a strictly regulatory and technical issue the "agency-level regulators" clearly demonstrated that the legal profession is now perfectly built in to the executive chain of command. Indeed, it now issues, in fact, joint agency-level regulatory and legal frameworks together with the Ministry of Justice and

Prosecutor-General's Office, in which it addresses both public officials and defense lawyers. In this case, what makes defense lawyers different from public officials? I'm afraid to admit that the answer is "nothing."

Evidently, in actuality out of the two options suggested above the second option will prevail, since in order to repudiate an agency-level regulatory and legal act an effective administrative justice system is required, which is not the case in Uzbekistan. It is also clear that no one will question the validity of an agency-level act in which the executive branch addresses defense lawyers, even more so because this act was "coordinated" with top hierarchs in their midst. Lastly, it is clear that the very *form* of such agency-level acts indicates the declarative nature of independence for defense lawyers and their practice set forth in the Law of the Republic of Uzbekistan "On Legal Practice." Admittedly, though, if we become familiar with the *content* of the agency-level by-law in question, we'll be even more convinced it is true.

II. Content of the legal and regulatory act on "internal control"

If we take a quick look at the title and content of the Resolution "On Approving the Internal Control Regulations on Counteracting the Legalization of Illicit Proceeds and Financing Terrorism in notary offices and law firms," the logic of its drafters, as well as the goal pursued by them, remain quite nebulous. An impression may arise that law enforcement bodies in the Republic of Uzbekistan possess some veracious and alarming information, according to which major forces on financing international terrorism and legalization of illicit proceeds now moved to Uzbekistan's law firms and notary offices used by them to cover up their extremely dangerous activities.

A thorough analysis of "Internal Control Regulations" does not support this hypothesis, though. Moreover, it enables to understand the meaning of and logic behind agency-level regulation, although this logic is, unfortunately, far from positive international standards and such principle as the rule of law. Strictly speaking, those who initiated the adoption of such a regulatory act have, as can be seen, no slightest complaint against defense lawyers or notaries as such. By simply using the trust-based nature of the relations between defense lawyers and their clients, they attempt to make an additional hidden *instrument* out of the legal profession (something similar to a subdivision of the financial police) in order to receive the information they need. Without any doubt about the need to combat various crimes, including the legalization of illicit proceeds and financing of terrorism, we believe that using the legal profession as an instrument for collecting information by abusing the trust of clients toward their lawyers is a "forbidden trick" abandoned by the civilized world long ago along with other effective, but

inhumane, instruments of this kind, including torture, intimidation, harassment of family members, etc.

This is exactly why the mechanism suggested in the “Internal Control Regulations” cannot conform with those principles that have been developed in relation to defense lawyers at the international and national levels, including constitutional and legislative provisions of the Republic of Uzbekistan, unless, of course, we view the latter exclusively as a non-binding declaration. Non-compliance with fundamental principles and standards is manifested, first and foremost, through the fact that the mechanism we're discussing (a) vests police functions in defense lawyers which they are not supposed to have, and (b) basically negates the idea of the attorney-client privilege.

1. Mixing the legal profession with the police work (attaching police functions to the legal profession). Evidently, a purposeful collection of information about any type of illegal activities, including dangerous crimes, is a classic *police function* which is necessary for every state to have. However, it should not, under any conditions, be imposed on those entities that are meant to fulfill a totally *different function*, i.e. providing legal aid, and we first of all mean defense lawyers.[260] In this sense, the “Internal Control Regulations” we are discussing in this paper present a completely ***new type of functional deformation***, which was never observed not only in post-Soviet, but also in Soviet law (at least formally). Until now, one of the major problems in all post-Soviet countries was that of mixing police, prosecutorial and judicial functions, when judges would often enjoy both police and prosecutorial authority and police officers, on the other hand, would have judicial functions. Whereas, a *mixture of the police work and the legal profession* when defense lawyers find themselves obliged to collect

[260] Strictly speaking, defense lawyers are key in providing legal assistance, but their pratice of law is not the only way of doing it. In those countries that have the so-called Latin-type notarial system, or private notaries, the latter are also supposed to provide legal assistance. Therefore, their relationship with their clients is fully subject to the same principles and logic as the one between defense lawyers and their clients, such as confidentiality, independence, loyal attitude toward a client, etc. It is not fortuitous that the *Basic Principles on the Role of Lawyers* (adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990), which are normally translated into Russian as *Basic Provisions on the Role of Defense Lawyers*, are rendered as *Basic Principles Regarding the Role of Lawyers* on the official UN website (See: http://www.un.org/russian/documen/convents/role_lawyers.htm). The idea behind this translation is that these principles apply not only to defense lawyers in the formal sense of the term, but also any *lawyer* (a generic term in Russian that means anyone specializing in law – *Translator’s note*) who are supposed to provide legal assistance professionally, and this also includes notaries. Therefore, everything that applies to defense lawyers in this paper also applies, to the same extent, albeit with some minor reservations in certain cases, to notaries, taking into account the notarial system functioning in the Republic of Uzbekistan. It is as inadmissible to impose police functions on notaries, and their relationship with their clients should also remain within the realm of such principles as confidentiality, and so on.

information about hypothetical crimes and transfer it to the police and prosecutors, as far as we know, has never been observed anywhere.

In accordance with the “Internal Control Regulations,” from now on defense lawyers, along with notaries, will have to carry out such “police” functions in Uzbekistan in all areas that are in one way or another related to business activities (para. 2 of the Regulations). In essence, there are no longer business lawyers in this country aimed at protecting the rights of clients. Instead, there is something close to a special financial police department disguised as defense lawyers. Suffice it to say, now defense lawyers are supposed to “undertake measures related to due inspection of clients,” “detect and study beneficiary owners,” “detect suspicious transactions,” “provide information (documents) on suspicious transactions to the Department [under the Prosecutor-General’s Office] on a timely basis,” “ensure data storage,” “creating a database on conducted or attempted suspicious transactions,” etc (para. 4 of the Regulations). Furthermore, the agency-level act in question introduces a new notion, which is “due inspection of a client.” In fact, it presupposes defense lawyers (and notaries) conducting a full-fledged police investigation that includes “studying a client thoroughly,” verifying information received from a client, collecting information about the business reputation of a client and his/her relationship with other law firms, identifying the actual beneficiary from a transaction concluded by a client, etc (para. 16-23 of the Regulations).

It may seem we are talking about special situations only when defense lawyers come across exclusively “suspicious transactions” aimed at the legalization of illicit proceeds and financing terrorism which, most probably, made the drafters justify the adoption of the “Internal Control Regulations” and authorize Uzbekistan’s defense lawyers to carry out police functions inimical to the legal profession. In other words, a very important task of combating terrorism and legalization of illicit proceeds which has been shifted to the international level long ago legitimizes any methods of achieving it, including collection of information about untrustworthy clients by those who are supposed to protect them, rather than to accuse them, i.e. by defense lawyers. However, *firstly*, even if the drafters of the Regulations were indeed sincere in their aspiration to contribute as best as they could to the high-minded mission of combating terrorism and legalization of illicit proceeds (rather than attempting to find a convenient excuse to take one more step toward restricting the independence of defense lawyers which seems as plausible), their conceptual approach is in any case profoundly wrong. No single international, constitutional or legislative act allows to deform the status of a defense lawyer, *ratione materiae* or *ratione personae*, i.e. with regard to certain offenses or in relation to certain categories of persons, no matter what threat the latter may be posing. A defense lawyer should remain a defense lawyer and not turn into a police agent, irrespective of who approaches him/her, be it a casual offender, a dangerous terrorist or someone involved in

serious financial fraud. *Secondly*, the so-called “suspicion criteria” for transactions are spelled out in the “Internal Control Regulations” (para. 24-29) so broadly that they completely dismiss the possibility of discussing some categories of crimes *ratione materiae* or categories of persons *ratione personae*. Thus, defense lawyers may turn into police agents, i.e. when they have an obligation to transfer *immediately* relevant information to authorized law enforcement bodies, to put it down in a “special log,” etc, any time they encounter such “significant” manifestation of illegal activities as a “non-motivated refusal” by a client to provide information (including that about the principal), “excessive concerns” on the part of a client about confidentiality, “unfounded” hastiness coming from a client, the lack of relevant “information” on his/her part, etc. In this situation, it becomes clear that any person in his/her right mind who approached a defense lawyer for legal assistance, experiencing bewilderment as to why this particular lawyer transformed into a “quasi-policeman” interrogating him/her, expressing his/her doubts about the legitimacy of the lawyer’s demands for additional information or simply asking the lawyer to act as swiftly as possible, is viewed, by default, as a “suspicious person” in relation to whom the lawyer has to collect relevant information and report it to the “department.” In fact, the “Internal Control Regulations” are compiled in such a way as to deem every client “suspicious” even if he/she does not have anything to do with financing terrorism or legalizing illicit proceeds. This proves, once again, that combating “terrorism,” “legalization,” etc is juts a pretext to put defense lawyers and their clients in the firm information and police ring that would be impossible to escape. In other words, there is every likelihood that the declared and the actual goals of adopting the Regulations in question mismatch with one another completely.

A mechanism of building the legal profession in to the “police structure” which has to do with the emergence of the so-called “special departments” among Uzbekistan’s defense lawyers is also quite notable. Thus, head of every law firm has, by his/her order, appoint a “responsible person” *from among defense lawyers* whose duty will be to control the “implementation of the Regulations” (in fact, this means control over other defense lawyers), along with the requirement to inform the relevant executive body (local department of justice) within 10 days. If a defense lawyer has his/her own private practice (law bureau), they become their own “special department” turning into a “responsible person” *ex officio*. Such defense lawyers who become “responsible persons” gain quite a bit of authority with regard to their colleagues, which makes Uzbekistan’s legal practice even more bureaucratic. As a matter of fact, they control all other lawyers, enjoying the right to request any documents (including electronic files), copy them, and so on (para. 10 of the Regulations). If we put it differently, the relationship between defense lawyers and their clients in Uzbekistan are no longer based on trust, being subject to total control by the “responsible persons.” In turn, the latter report, as part of the hierarchy, to executive bodies represented by special officials in

local departments of justice. Not only do such special executive officials receive information about “suspicious transactions” and regular progress reports from “responsible defense lawyers,” but they also arrange their “training” (on what?) and “professional improvement” (in what?). After that, all information is communicated by special officials of local justice departments to the Ministry of Justice, and then from the Ministry it goes to the Department on Combating Tax and Currency Crimes and Legalization of Illicit Proceeds under the Prosecutor-General’s Office. As a result, an information and police vertical structure is created. An integral part of this structure is every Uzbek defense lawyer controlled by a “special” unit represented by his/her specifically appointed colleague who, in turn, is a link in the executive power system. Information is circulated within this vertical structure in two ways: (a) in the form of “immediate” notification about all so-called “suspicious transactions,” and (b) in the form of special “reports” produced by “responsible lawyers” about the results of their activities at least once a year.

In this situation, *functional* deformation of Uzbekistan’s legal practice caused by imposing strictly police functions on it will inevitably result, *at the institutional level*, in the bureaucratization of the legal profession, its hierarchic subordination to police and prosecutorial bodies, creating special positions among lawyers, subordination of some lawyers to the others, etc. The only way to refer to such measures is ***disastrous destruction*** of the legal profession in the civilized meaning of the term. The fact of turning the legal profession in Uzbekistan into a special police department cannot be justified by any effective slogans such as “war on terror” or “combating the legalization of illicit proceeds.”

2. Abandoning the idea of the attorney-client privilege. There are no doubts about the fact that the “Internal Control Regulations” not just limit the scope of the attorney-client privilege (which is inadmissible in itself), but they actually obliterate it completely.

Such absolute replacement of values that has been observed in Uzbekistan’s regulatory and legal acts related to the legal profession causes astonishment (there is no better word to describe it). As is well known, the trend that exists in the development of international and national law is aimed toward reducing possibilities of receiving any information about clients from a lawyer. Furthermore, most of legislations exclude whatsoever the use of information obtained from communication sources between a lawyer and his/her client as evidence, even if such information, for instance, was obtained accidentally. This is why in modern criminal procedure legislations there is a prohibition on using the correspondence between a lawyer and his/her client and their wiretapped conversations as evidence, or searching offices of defense lawyers, let alone the classic prohibition to interview a lawyer as a witness regarding certain circumstances that became known to

them while carrying out their professional duties of providing legal assistance. There is one explanation to all these approaches, which is a desire to ensure absolute confidentiality in the attorney-client communication (in fact, this is the underlying idea of the attorney-client privilege). Unless this is the case, one of the fundamental individual rights, the right to legal assistance, will be totally ineffective.

However, in our view, none of the participants of the ongoing debate about the limits of the attorney-client privilege, the extent to which it should be observed, the possibility of making exceptions from this principle, etc has not yet developed a simple, albeit unthought-of for the developed legal awareness, idea that inspired the drafters of the "Internal Control Regulations." Why interview or search defense lawyers formally, bumping into a number of inevitable legal impediments and problems, if the former can be simply transformed into obsequious informers and voluntary-compulsory[261] police assistants who will be "bringing" information about their clients themselves? In other words, why find it difficult to deal with various "civilized" restraints such as a prohibition on interrogating, wiretapping or searching a lawyer, if these can be readily circumvented through some unnoticeable agency-level act, *turning a lawyer from the potential, albeit legally inaccessible,* ***object*** *of receiving information into the* ***subject*** *of providing this information*? Indeed, if a lawyer cannot be the object of information (witness, etc), then he/she should become the subject of information (some sort of a police agent). In practical terms, this will mean that by the time all relevant legislative restrictions and prohibitions become effective, all necessary data will be submitted by a lawyer and long kept by the police outside procedural limits. The rest will be just theatrical scenery discrediting the role and the status of a lawyer who may later protest, quite vigorously and with spurious dignity, in front of his/her client against some actions aimed at information seizure, call them illegal, complain against such actions in court, etc. What will be the use of all his/her "statements" and other actions meant to provide legal assistance? How can this situation be grasped not only at the legal level, but also in terms of basic human ethics, let alone long established rules of deontology among defense lawyers?

Striking as it may seem, Uzbek authorities are guided by the above-mentioned deformed "logic" that has little to do with law (and sometimes seems hardly plausible), with a defense lawyer remaining an "impregnable information fortress" at the legislative level, while at the agency level they are transformed into trivial "informers." In this case, any confidentiality safeguards in the relationship between lawyers and their clients are out of the question, irrespective of what the applicable Criminal Procedure Code and the Law "On Legal Practice" say. How should we interpret then the provisions set forth in

[261] Said of something that is voluntary in theory but compulsory in practice (ironic) – (*Translator's note*)

Articles 9 and 10 of the Law of the Republic of Uzbekistan "On Legal Practice" that guarantee, ostensibly, the attorney-client privilege and contain a rather modern prohibition on forcing lawyers to provide any information received while carrying out their professional duties? Obviously, these norms will have little actual value while the "Internal Control Regulations" with all mechanisms and constructs contained therein remain in effect (*vide supra*).

As a result, no single physical or legal entity seeking legal assistance from a law firm in Uzbekistan can be assured that information about their financial standing, concluded transactions and any other activity that will seem "suspicious" will not be communicated immediately to law enforcement bodies or be reflected in the special report produced by the "responsible attorney." As regards such categories as "tax lawyer," "business lawyer," etc, they may well sink into oblivion, because approaching a "tax lawyer," in accordance with the "Internal Control Regulations," is tantamount to applying directly to the tax police.

At the same time, we should realize that actual obliteration of the attorney-client privilege in Uzbekistan also means almost total renunciation of the fundamental right to legal assistance enshrined in Article 116 of the Constitution of the Republic of Uzbekistan. The right to legal assistance cannot be real and effective unless people seeking legal assistance from a lawyer are fully confident that the latter is loyal and that information conveyed to him/her will remain confidential. Currently, one cannot be confident about such things in Uzbekistan (and in some cases one can be confident about the opposite). It is not fortuitous that para. 22 of the *Basic Principles on the Role of Lawyers* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders envisages the commitment of governments "to recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential." We have already ascertained how far the Government of Uzbekistan is from abiding by this provision. We should also remember that the UN Human Rights Committee pointed out that the states had an obligation to follow the above-mentioned Principles in order to "adequately implement Article 14 of the International Covenant on Civil and Political Rights."[262] *Under these circumstances, the implementation of Article 14 of the International Covenant on Civil and Political Rights is far from "adequate."* Isn't this a very high political and legal price of an agency-level regulatory and legal act aimed at, as it seems, solving a rather local issue?

[262] A. Avtonomov, *International Standards on Justice Administration*, Moscow, 2007, p. 57 (reference to the above-mentioned decisions of the UN Human Rights Committee is contained herein).

III. Independence of defense lawyers and control over their professional qualification

The Order of the Minister of Justice of the Republic of Uzbekistan “On Measures for Promoting Professional Development of Defense Lawyers” is much more simple in terms of its structure and content. It establishes a rule according to which every defense lawyer has to improve his/her qualification skills at least once every three years in the special Center under the Ministry of Justice, after which their receive a certificate. If a defense lawyer neglects this requirement of the executive body, he/she will face the strictest disciplinary sanction that is disbarment.

First of all, we may question the legal grounds for issuing this Order by the Minister. The Order says, *inter alia*, that it was issued in order to enforce Article 7 of the Law of the Republic of Uzbekistan “On Legal Practice,” which may seem as an appropriate basis for its formal and regulatory legitimacy. However, if we read Article 7 of the Law of the Republic of Uzbekistan “On Legal Practice,” we will be much surprised. This Article of the Law says nothing about a lawyer’s obligation to “improve his/her qualification skills at least once every 3 years” or about his/her obligation to “improve qualification skills” at all. The assumption that Article 7 may have been amended with us being unaware of this fact has not been affirmed either, even more so, the Order refers to the initial version of the Law “On Legal Practice” (Newsletter of Oliy Majlis of the Republic of Uzbekistan, 1997, No. 2, p. 48). It would be good to know why the Minister of Justice creates additional obligations for defense attorneys. Presumably, there are no legal grounds for that whatsoever, if they have to refer to an article in the law that doesn’t even talk about such obligations. In any case, such method of developing agency-level regulatory acts seems quite strange.

Certainly, the crux of the matter is not about interpretation of words and expressions contained in Article 7 of the Uzbek Law “On Legal Practice.” If this article indeed referred to the obligation of defense lawyers to improve their professional skills at least once every three years, control over the implementation of this provision would have to be imposed not upon the executive body (Ministry of Justice), but on bar associations (literally – “self-governing bar associations” – *Translator’s note*). Unless this is the case, we should forget about the fundamental principle of independence for defense lawyers and in their practice set forth in Article 1 and 4 of the Law of the Republic of Uzbekistan “On Legal Practice.” Obviously, professional training for defense lawyers certified by the executive authorities, which means, in fact, that lawyers have to pass examinations in front of public officials on a regular basis, makes all lawyers in general and every individual lawyer in particular totally dependent on the executive branch of the government. Therefore, control over the professional competence of lawyers should be

maintained by bar associations whenever a new candidate is willing to join the bar. If someone joins the bar, his/her professional competence is presumed, even more so, this presumption may be rebutted only in case there are appropriate grounds to do so (complaints from clients, court order, etc) and within the frameworks of a specific procedure focusing on the decision of a bar association. In this situation, there should be no discussion about any "improvement of qualification skills." Why should one professional control the knowledge of another? A lawyer is not a student who should be subject to such regular control. Any doubts regarding the professionalism of a lawyer, even if they are well founded, are either someone's personal opinion, or grounds for initiating appropriate disciplinary procedures. Under these circumstances, nothing prevents a community of professionals to get rid of a lawyer discrediting them by his/her lack of professionalism. However, this should be accomplished through a disciplinary procedure, which holds off executive officials who've been historically procedural adversaries of defense lawyers from participating in the "control of a lawyer's skills." In this regard, it should be reminded that in accordance with para. 28 of the *Basic Principles on the Role of Lawyers,* "disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review." No executive bodies are mentioned here, and they even cannot be mentioned.

In this situation, it is obvious that the Order of the Minister of Justice "On Measures for Promoting Professional Development of Defense Lawyers" falls short of the principle of institutional independence for defense lawyers and the legal profession. Furthermore, it creates, quite unnoticeably, a "perfect" mechanism at the agency level for disbarring undesirable lawyers under the pretence of failed examinations. In fact, we are talking about a disguised form of quasi-disciplinary liability among lawyers, defeating the purpose of various disciplinary safeguards and procedures. Any lawyer, for instance, feeling qualms about the need to carry out his/her duties of an "informer" appropriately as stipulated by the "Internal Control Regulations," understands perfectly than within three years he/she will have to take examinations in the Ministry of Justice whose staff he/she is obliged to "inform." As a result, truly independent lawyers will have to either follow the "rules" established for them that are far from their profession's ideals, or remember that their career will last till the first upcoming round of "professional improvement" in the Lawyers' Professional Improvement Center under the Ministry of Justice. It may well be the underlying idea of the Order in question issued almost at the same time as the "Internal Control Regulations" which doesn't seem to be a mere coincidence.

In conclusion, it is worth mentioning one more circumstance. In 2006, a fairly reputable Council of Bars and Law Societies of Europe adopted the Charter of Core Principles of the European Legal Profession (*Charte des*

principes essentiels de l'avocat européen), which is now applied as an annex to the Code of Conduct for European Lawyers as of 1988. We realize that the Charter does not formally apply in the Republic of Uzbekistan. However, it is a document that may, for all intents and purposes, be deemed a full set of commonly recognized international standards in the legal profession, even more so because the drafters of the Charter refer in their preamble to the Universal Human Rights Declaration, Basic Principles on the Role of Lawyers as of 1990, and Code of Professional Conduct for Counsel adopted by the International Bar Association (IBA), as well as Recommendation No. R(2000)21 of the Committee of Ministers of the Council of Europe on the freedom of exercise of the profession of lawyer as of October 25, 2000. In other words, the Charter is, in fact, the most recent codification of fundamental international standards on the legal profession which should be followed by the state claiming to be "civilized" and defense lawyers carrying out their activities in this state. The Charter highlights ***10*** such fundamental standards, and we don't deem it expedient to list all of them in this paper. What matters the most is the following: *agency-level regulatory and legal frameworks of the Republic of Uzbekistan analyzed in this paper will result in a situation when Uzbek lawyers won't be able to comply with* ***four*** *of these standards (****almost half of them****)*, such as:

- independence and freedom in protecting the client's interests;
- respect for the professional secret and confidentiality of materials that found their way into the hands of lawyers;
- dignity, honor and integrity;[263]
- loyalty toward the client.

If Uzbek authorities maintain such an attitude toward the legal profession and the status of defense lawyers, any political declarations about opting for the European, Western, etc way of development mustn't be taken seriously.

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[263] Informing law enforcement bodies secretly, or basically "whistle-blowing," does not seem to be in one line with the ideas of honour and integrity.

Leonid GOLOVKO, PhD

SUMMARY CONCLUSIONS REGARDING THE DRAFT LAW OF THE KYRGYZ REPUBLIC "ON PROTECTION OF STATE SECRETS OF THE KYRGYZ REPUBLIC"[264]

The draft law of` the Kyrgyz Republic "On Protection of State Secrets of the Kyrgyz Republic" includes a number of *principled* provisions that are worthy of approval and support, particularly as they relate to the goal of insuring individuals' rights. On the other hand, the draft suffers from very serious shortcomings. Its adoption in its current form will hardly contribute to the rule of law in the Kyrgyz Republic.

Among the positive elements, the draft law:

a) Is limited *ratione personae:* it applies only to those people who are obliged not to reveal state secrets *ex oficio* or who "took upon themselves" such an "obligation" (Article 1). Put another way, no other citizens (including journalists, scientists, etc.) can under any circumstances be held legally accountable for revealing state secrets.

b) Lists information that in no case may be considered state secret. Most importantly, this list includes "facts regarding the violation of rights and freedoms" and "facts regarding violations of law" (Article 13).

c) Includes guarantees that when necessary judges and lawyers will be given access to state secrets without the need for special permission, and bans in their case the introduction of any kind of "clearance procedures" (Article 26).[265]

On the other hand, however, some provisions of the draft law are technically lacking, while others reflect a lack of understanding of contemporary legal values on the part of the bill's drafters.

I. Technical Problems

Legislation on state secrets should be intended in the first instance to define the maximum extent of the classification of information *ratione personae* and *ratione materiae,* and, in the second instance, to construct a

[264] This analytical note was prepared by the Legal Policy Research Centre with the support of the Freedom House.

[265] In this manner the draft law rules out the possible creation in the Kyrgyz Republic of Soviet-style categories of "special judges" and "special lawyers" that divided judges and lawyers into those who have access to state secrets and those who do not. This provision of the draft law is particularly worthy of praise given that in several other post-Soviet states there has been a legal and/or de facto return to the Soviet practice.

mechanism for classifying information in each of these categories, including the forms of control over groundless classification of information.

Information is classified *ratione personae* through the listing of those persons who may be held responsible for divulging state secrets. Information is classified *ratione materiae* by listing information that may not be classified under any circumstances. Thus, even those persons who in principle may be held responsible for divulging state secrets cannot be held responsible if the information they divulge is included on the list of information defined in the draft as *open source* by its very nature (*ex natura sua*). As concerns procedures for classifying information, it is clear from the logic of the functioning of the state that for the most part the agencies that are empowered to do so belong to the executive branch since they have the responsibility of protecting national security, conducting foreign intelligence, defense, etc. In this situation, the only effective form of control over their activities is parliamentary control, as the information in question is *a priori* classified and thus inaccessible to citizens, civic organizations and the media.

To what extent does the draft law correspond to this theoretical logic? Unfortunately, we must admit that it does not by any means do so in full measure.

First, in addition to the list of information that may not be considered state secret, the draft law inexplicably also includes a list of information that is considered state secret (Articles 7-10). In attempting to create a *positive* list of information that is considered state secret, the legislators sought to fulfill what is *a priori* an impossible task. As a result, the list of secret information includes very strange provisions. How, say, should we understand the fact that information that “reveals the substance or volume of economic cooperation with foreign governments during a particular period” (Article 9) is included in the list of secret information? Why was information on “questions of foreign policy, domestic trade, and scientific-technical communications” included in the list of state secrets if they “reveal the strategy and tactics of the foreign or domestic policy” (Article 9)? After all, they are fairly openly publicized by the head of state in various speeches, interviews, etc. So from who and why should such information be made secret? Why should information that reveals “the forces, means and methods devoted to the battle with organized crime, terrorism, religious and other forms of extremism” be classified by legislation, or information that “reveals the forces, means and methods of investigating criminal cases that involve security interests” (Article 10)? If we begin with the assumption that Kyrgyz law enforcement agencies do not employ illegal means or methods in the fight against crime (which we do not doubt), then the only real result of legislatively classifying the means and *methods* they employ in the fight against crime is the resurrection of the Soviet practice of publishing theoretical, methodological handbooks defining which categories of critical cases fall under the heading “secret,” as well as the resurrection of Soviet-

style special “secret” dissertation committees for the defense of dissertations in which the terms “terrorism” or “organized crime” are used. There is no point in even mentioning how effective and beneficial such procedures would be.

These are simply examples that demonstrate the damaging nature of the approach adopted in the draft law and illustrate that it should not include a list of information considered to be state secret. The inclusion of such a list also creates a contradiction within the draft law. Article 6 does not give parliament the authority to create a list of information considered to be state secrets, making the list contained in Articles 7-10 completely incomprehensible. In addition, Article 18, whereby parliament is given the authority to declassify information by amending Articles 7-10, also contradicts Article 6. These contradictions should be resolved by resigning from any effort to positively regulate the reach of the law on state secrets *ratione materiae.*

Second**,** the draft law does not include any effective instruments for parliamentary control over the executive branch’s actions in classifying information. The authority of the parliament is amorphous; it is simply the “manager of budgets” and one of the “protectors of secrets” (Article 6), but not a fully empowered controller, which should be its role.

Instead of this, the draft law contains a not fully understandable norm to the effect that the correctness of a decision to declare particular information a state secret “can be appealed through the courts” (Article 11). The question arises, *by whom can it be appealed* bearing in mind that we are talking about secret information? It is clear that this norm is nothing more than a formality, an “excuse” by the lawmakers, with no practical applicability. It is doubtful that such a window dressing of judicial control, having no logical or theoretical basis, would provide any guarantee against potential abuse by the relevant agencies of the executive branch of their authority under the law to classify information.

Since the classification of information is primarily a *political* decision, control will only be effective if it too is of a political nature. The only form of such control is parliamentary control, about the possibility of which the draft law is silent. As a result, we must admit that the draft law leaves the classification process in essence *without any control.*

II. The Incompatibility of the draft Law with Several Contemporary Legal Values

The draft law also includes two provisions that are unnecessary for the creation of a legal system governing state secrets and that at the same time violate several fundamental legal values, deforming them to conform to the legal system of the Kyrgyz Republic.

First, among the list of state agencies required to ensure the protection of state secrets the draft law includes "agencies of the judicial branch" (Article 6). The draft goes on to spell out that agencies of the judicial branch are required to ensure the protection of state secrets in two cases: (a) while reviewing cases; and (b) in defining "the authority of relevant persons in ensuring the protection of state secrets in agencies of the judicial branch" (Article 6).

The first of these two cases is strictly procedural and should be regulated by procedural legislation. The procedural duty of a judge to close hearings when the case involves "secret" materials is foreseen in criminal procedural and civil procedural legislation and cannot serve as a basis for including judges in some kind of special executive branch bureaucratic system for ensuring the protection of state secrets. *The second* case raises even more doubts. What does "defining the authority of relevant persons in ensuring the protection of state secrets in agencies of the judicial branch" mean if, as we understand it, the same draft excludes the very possibility of dividing judges into those who have access to state secrets and those who do not? As a result, there is a risk of the resurrection *de facto* of the institution of "special courts" that contradicts contemporary legal values.

Clearly, the judicial branch should not be included in the list of agencies required to protect state secrets. Its function is different: to administer justice and guarantee that procedural rules set out in criminal procedural, civil procedural and other legislation are followed. The physical protection in courts of secret materials does not in its nature differ from the protection against dangerous defendants or ensuring their transportation to the courts, both of which are functions of the executive, not the judicial branch.

In sum, the current version of Article 6 creates additional, baseless grounds for bringing the judicial branch into the "bureaucratic vertical," and levies on the judiciary unnecessary administrative-bureaucratic requirements that present a risk to the principle of the independence of the judiciary, a principle which is already quite brittle and not well ensured in the post-Soviet space.

Second, the list of types of information that the creators of the draft law list as "state secrets" includes one item that is worthy of particular note: "the results of operational-investigative activities not used in criminal trials…" (Article 10). Moreover, operational-investigative information may be declassified only if it is used in a criminal trial. In other situation it will remain state secret *indefinitely* and may not be declassified (Article 18).

The indefinite secret status of this type of information makes access to it impossible, and thus makes impossible any type of outside control over the legality of measures that limit individuals' constitutional rights. In other words, control can only be exercised "within the special services," which is particularly dangerous given the absence in the draft law of any type of effective parliamentary control over the classification of information or the

activities of the secret services. As a result, the preconditions are created for the practically unlimited and uncontrolled creation of "secret dossiers" on anyone of interest to the special services.

Operational-investigative measures should *always* be carried out with the goal of obtaining evidence to be used in a criminal trial.[266] If operational-investigative information does not become criminal-procedural evidence it can mean only one thing: there was no basis for accusing an individual of committing a crime or, at the very least, that there was a procedural obstacle to such an indictment (expiration of the statue of limitations, death, etc.). In its judicial nature, the fact that operational-investigative information was not used in a criminal case as criminal-procedural evidence does not differ from the case of the termination of a criminal case during the preliminary investigation. But what happens under the principle of "investigative confidentiality" when a preliminary investigation is dropped? The person against whom the case was conducted has the right to acquaint himself with the materials gathered, the procedural decisions, etc. even though these materials are not available to the wider public. *The same should be the case with information gathered through operational-investigative means.* There is no reason that operational-investigative information should remain indefinitely secret if one assumes it was collected only in order to uncover and investigate real, dangerous crimes (the only legally acceptable goal). None of the hypothetical ideas about the importance of maintaining the secrecy of the "tactics" and "methodology" of operational-investigative measures appear serious. After all, no catastrophe results when they are revealed to the accused after indictment.

In legally developed systems the general tendency is to require the appropriate agencies to reveal to the subject of an investigation within a set period of time information on any "special" police measures employed, even when no indictment was issued. It is exactly at this moment that the degree of legality and the basis for the operational-investigative measures is revealed and the basis laid for any complaints. This provides the maximum possible guarantee of individual rights and compensation in cases of their having been unnecessarily abridged as a result of "special operations" and, in the final analysis, ensures we do not slide down to the level of a totalitarian police state.

The draft law should be amended so as either to completely drop reference to questions related to operational-investigative measures or to include a *time limit* on the classified nature of operational-investigative information not used in criminal cases and procedures.

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[266] It is for this reason that in Western jurisprudence there is no concept of "operational-investigative measures," as they are completely integrated into the fabric of the criminal process.

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