

Mandate of the Special Rapporteur on the independence of judges and lawyers

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 26/7.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **draft Law on lawyers' activity and legal aid**, which includes a number of provisions that jeopardise the independence of the legal profession.

According to the information received:

On 20 September 2017, the Government of the Republic of Kazakhstan tabled a draft Law on lawyers' activity and legal aid.

The aim of the draft Law is to reform the legal profession. The draft contains a number of provisions that are inconsistent with international legal standards relating to the independence of the legal profession. These include provisions concerning the creation of a "State Advokatura", the participation of members of the executive power in disciplinary proceedings against lawyers, the removal of entrance fees for new lawyers and interferences of the executive power in the process of attestation of lawyers. These provisions are analysed in greater details below.

Concerns have also been raised in relation to the lack of meaningful involvement of the Republican Bar Association of Kazakhstan (hereinafter, 'the Bar Association') in the drafting of the new law. Allegedly, the Bar Association expressed critical views about the reform of the legal profession that have not been taken sufficiently into account in the Government draft.

Serious concerns have been brought to my attention in relation to the content of this draft Law.¹ In a spirit of co-operation and dialogue, and in line with the mandate entrusted to me by the Human Rights Council, I would like to raise the following issues:

1. Creation of a State Bar (Advokatura) (Article 31(2) of the Draft Law)

The draft law provides for the establishment of a State *Advokatura* but do not contain further information about this body.

¹ The present opinion has been prepared on the basis of an unofficial translation of the draft Law. Inaccuracies may occur in this opinion as a result of incorrect translation.

The very notion of a Bar association established and controlled by the State is problematic. The United Nations Basic Principles on the Role of Lawyers (hereinafter, “the UN Basic Principles”) provide that 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”, and that “the executive body of the professional associations should be elected by its members and should exercise its functions without external interference” (principle 24).

The mandate of the Special Rapporteur on independence of judges and lawyers has on several occasions stated that “a bar association should not act as a part of a bureaucratic apparatus allowing for government control of the legal profession, but should operate as a professional association, working to protect the rights of its members” (see for example A/64/181, para. 22, and A/71/348, para. 86). Situations where the State, in particular the executive branch, controls all or part of a bar association, or its governing body, and where membership in such an organization is compulsory, are clearly incompatible with the principle of the independence of the legal profession. The Human Rights Committee and the Committee against Torture have also expressed concern at the subordination of lawyers to the control of the Ministry of Justice and an obligatory membership in a State-controlled professional association of lawyers.

2. *Participation of members of the executive in disciplinary procedures against lawyers (Article 75(1) of the Draft Law)*

The current legislation on the exercise of the legal profession provides that for the establishment, in each of the local bar associations in Kazakhstan, of disciplinary commissions as independent bodies in charge of considering complaints brought against lawyers in their professional capacity. This is in line with the UN Basic Principles, which state “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” (principle 28).

The draft law provides that disciplinary commissions will be composed by six lawyers, three representatives of the executive, and two former judges. This provision represents a significant step backwards, since the new composition of the disciplinary commissions – and in particular the presence of three representatives of the executive power – can no longer guarantee that this body “be free from any influence or pressure from the legislative or the executive branches of power or any other party” (A/64/181, para. 55). The mandate of the Special Rapporteur has on a number of occasions expressed concerns “about instances where State authorities control the bar or attempt to take control over it by adopting legal amendments or decrees, placing lawyers favourable to the government in the governing bodies or using direct or indirect threats, pressure or intimidation” (see for example A/71/348, para. 86).

In this regard, it is also worth noting that the UN Basic Principles require Governments to adopt all appropriate measures to ensure that lawyers “are able to perform all of their professional functions without intimidation, hindrance, harassment or

improper interference” and are not subject to prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics (principle 16). The presence of Government representatives in disciplinary commissions may have a chilling effects on lawyers, which may in turn have an adverse impact on the exercise of their professional functions.

3. *Removal of entrance fees (Article 59(1) of the Draft Law)*

At present, the Bar Association depends on the contributions of its members, which are essential to ensure its financial independence.

The draft law eliminates entrance fees for new lawyers, allegedly as a measure to facilitate access to the legal profession to new lawyers. This measure, however, does not take into account the need to maintain the financial independence of the Bar Association, which is in turn crucial to ensuring the very independence of the legal profession from the Government and any other party.

Furthermore, the measure constitutes an interference with the self-regulation of the legal profession. It is for the Bar Association as a “self-governing professional association” to decide on how to finance its activities. While it is appropriate for national legislation to determine in general terms the aims and objectives of bar associations, it is only for the single bar association as independent institution “to make its own decisions, following clear and transparent structures and procedures, to represent its members’ interests and to sustain itself” (A/71/348, para. 85).

4. *The Attestation Commission (Article 40 of the Draft Law).*

The current system of qualification of lawyers is not independent of the executive. In the current system, licenses to practice law are issued by the Ministry of Justice on the basis of decisions made by attestation commissions.

The draft law maintains the current system in place. According to article 40(1) of the draft law, attestation commissions continue to be part of regional departments of the Ministry of Justice, and are composed of seven members in total. Out of these seven members, only three are practicing lawyers.

The mandate of the Special Rapporteur has affirmed on a number of occasions that the authorization to practise as a lawyer or to accede to this profession should be taken by an independent body. The legal profession is best placed to determine admission requirements and procedures, and should thus be responsible for administering examinations and granting professional certificates (see for example A/64/181, para. 34).

Different mandate holders have acknowledged that there are different systems for admission to the legal profession throughout the world, and that the level of involvement of the legal profession in those systems can vary dramatically from one country to another. However, mandate holders have often expressed concerns about situations where the entry into or continued practice within the legal profession is conditioned or

controlled by the executive branch (see A/71/348, para. 75 and A/64/181, paras. 31-39). In many countries, State authorities use their control over the licensing of lawyers to prevent certain persons from entering the legal profession or to exclude lawyers who they deem to be “problematic” (these lawyers are often those who take human rights cases or other sensitive cases such as police abuse, corruption or terrorism-related cases).

In light of the above, I would like to recommend that the Kazakh Parliament consider reviewing the draft Law on lawyers’ activity and legal aid so as to bring it in line with existing human rights standards relating to the independence of the legal profession. In particular, I would recommend that

1. article 31(2) of the draft law concerning the establishment of a State Bar be eliminated;
2. article 75(1) of the draft law be reviewed in order to ensure that disciplinary proceedings against lawyers are handled by an impartial disciplinary committee established by the legal profession;
3. article 59(1) of the draft law be amended in order to avoid any interference with the self-regulation of the legal profession, including its prerogative to decide on how to finance its activities;
4. article 40 of the draft law be amended in order to ensure that the legal profession becomes responsible both for the administration of examinations and other requirements and for the granting of professional licenses, and to develop appropriate procedures to ensure that, when necessary, admission decisions are reviewed by an independent court of law.

I also recommend that your Excellency’s Government adopt all appropriate measures to protect the independence of the legal profession, and to ensure that lawyers are in a position to discharge their professional functions without intervention or interference of any sort.

It is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. Therefore, I would be grateful for any additional information and any comment you may have on the above mentioned allegations. I also welcome any clarifications on measures taken to ensure the compliance of the aforementioned legislation with Kazakhstan’s obligations under the aforementioned international human rights law and standards.

Finally, I would like to inform your Excellency’s Government that this communication will be made available to the public and posted on the web page of the mandate of the Special Rapporteur on the independence of judges and lawyers (<http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>). It will also be

included in the periodic communication reports of the Special Procedures to the Human Rights Council.

I would appreciate receiving a response within 60 days. Your Excellency's Government's response will also be made public on the webpage referred to above and included in the periodic communication reports.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers