JUDICIARY AND ITS ROLE IN IMPROVING AND DEVELOPING NATIONAL LEGISLATION

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ABSTRACT

The judiciary is considered as an institutional element of the legal environment, the system-forming role in which is determined by national sovereignty; the special role of justice is revealed through the general principle of justice, based on the spiritual, moral and historical-legal traditions of our society.

Keywords: Judiciary, Legal Environment, Sovereignty, Principle of Justice, Justice, European Court of Human Rights (ECHR).

INTRODUCTION

The judicial system in all countries plays an important role in ensuring the balance of power in the state and can help strengthen public confidence in the integrity of the government. Historically, the systems of general and civil law have different approaches to the development of the judiciary institution concept. These systems have evolved and have a mutual influence, leading to their constant convergence and important not only to know the history of the judicial system development of a particular country but also to notice and understand the changes that have occurred in recent years.

The judicial system traditionally has considerable power and independence that`s why always consider as a separate and independent branch of state power. The disadvantages in such systems include political characteristic, in some areas judges can be elected by the population than the professional nature.

Problems are more widespread transitioning from one political system to another, these processes occurs against the backdrop of political and economic struggle to determine a new state order, as well as in the conditions of crime and corruption. Corruption can instantly undermine hard-won confidence in government institutions. Public trust plays an equally significant role in the performance of the functions. Although the judicial systems in transitional societies may face the most difficult problems, all judicial systems should build and maintain public confidence in their ability to administer justice constantly.

To identify and understand the strengths and weaknesses of the system the expert should be able to identify opportunities for reform and development. Judicial and criminal justice technical assistance in the context of a broad strategic framework may include activities aimed in improving the following measures:

1. Support for the development of legislation that will ensure the independence of the functioning of the judicial system;
2. Strengthening the capacity of the judiciary in the field of training and education of judges and members of the judiciary;
3. Strengthening the integrity of judges and developing effective and transparent mechanisms criminal prosecution of corruption cases;
4. Strengthening the capacity of the judiciary to support human rights standards and norms in criminal cases;
5. Establishing and developing sustainable communication and close cooperation between all structures involved in the operation of criminal justice systems;
6. Development of joint systemic solutions to urgent problems faced by the criminal justice system;

MATERIALS AND METHODS

The term "*legal system*" has meaning of the national legal system characterizing a certain totality of national legal system which due to common features and characteristics can be attributed to one group. The legal system involves the features of evolution, structure, sources, legal ideology. Similarities and differences in each of the elements are considered when classifying families, assigning a system to one or another family. The starting points are for example classification features of R. David who pointed out two criteria: ideological and legal. The pragmatic approach of the founder of comparative law made it possible to distinguish three main groups of legal systems: the Romano-Germanic legal family, the common law family and the socialist law family. A kind of synthetic approach is considered in the classification grounds: the integration of the conceptual structures of legal systems or a hierarchy of various sources and the type of society.

> *"The legal system is a historically determined, interconnected (interdependent), hierarchically structured legal integrity, including law the prevailing legal ideology, legal practice and culture, exerting a regulatory impact on public relations to streamline them" (Kennedy, 2002).*

The authoritative scientists of the Soviet era considering the legal system in statics, distinguished the normative side (norms, principles & institutions), legal institutions (organizational element) and ideological element.

The effectiveness of public administration directly depends on the coordinated work of all power institutions which allows the best way to solve problems arising in society and the state. The institutional side of sovereignty is one of the basic elements of the national legal environment and reflects the fullness of the legislative, executive and judicial powers in the territory of the state and independence in international communication (Chatterjee, 1973). The indicated independence in the activities of state authorities, their complementarity, including various levels of control, including judicial (Heinrich, 2011). Legal justice which arose initially as an obligatory element of all historical systems with a weak formalization of legal categories remains the foundation of the modern judicial system. Cicero's statements that the law consists of *"nature, law, judicial decision, fair and good, and agreement"* do not lose their relevance

today. The formula "*law is the art of good and fair*" is known to every researcher of legal doctrines.

We also note that in international law the principle of justice is considered not so much as legal but as a philosophical category of "*moral, legal and socio-political consciousness, evaluating social activity from duty".* This is understandable, given that justice is a condition for the existence of other values, so this "*legal*" category has not only legal and theoretical significance but also practical value: "*fair*" decisions are respected and respected, which ultimately ensures their implementation (Mishra, 2009; Issakhov, 2018).

As a result, the increased role of international institutions, in particular, the European Court of Human Rights (hereinafter-the ECHR), provides it with powers that border the independent national court power as an independent public-law institution of a particular state. In such circumstances, the judiciary becomes an institutional element of the legal environment, ensuring state independence in interstate relations. The important positive role of the ECHR in protecting fundamental human values. We will point out an example worthy of imitation shown by the Federal Constitutional Court of Germany (hereinafter-the FCC) in defense of the national legislative and institutional judicial sovereign.

The FCC examined the issue of whether the ruling of the European Court of Human Rights has such a legal force that would annul rulings of the German courts. According to the legal position of the FCC

> *"the main law aims to integrate Germany into the legal community of peaceful Free states, but it does not provide for the renunciation of sovereignty, enshrined primarily in the German constitution. Therefore, it does not contradict the goal of adherence to international law if the legislator does not comply with the law of international treaties; this is the only possible way to avoid violation of fundamental constitutional principles" (Kaliyeva, 2013).*

Sociologist, ethnographer, and culturologist Levi-Strauss (1996) pointed out one error which he considered the formula of false evolutionism

> *"When different simultaneously existing states of human societies are interpreted as different stages of a single development process moving towards the same goal."*

Such an approach leads to a fundamental error in comparing different civilizations as passing a certain common path for all. The fundamental difference between archaic European and so-called primitive societies is not that they didn`t develop but the history of their development was not accompanied by the accumulation of invention. The development of human society is not equivalent to technological progress but it necessarily includes the worldview aspects of spiritual education.

Outstanding scientist Hayek (2006) considering the relationship between law and justice criticized the ideologues of legal positivism who equated law and justice. He leads to the idea of the anthropomorphism of this category. According to Hayek (2006):

> *"Only human behavior can be called fair or unfair; concerning things this term will only make sense if we hold someone accountable for what has happened."*

Such circumstances of public life find their objective historical reflection in the form of relevant norms of legislation and judicial practice, the rapid technological development posed

issues for a society that went beyond the old humanistic norms that existed for a long time (Bremmer & Welt, 2007).

The conclusion of the American philosopher and political economist Fukuyama formulated by him based on the results of a study of the problems building a modern strong state. He noted that the leading trend in world politics has been weakening statehood, a decrease in the share of the public sector but the growth of the global economy has led to the destruction of the autonomy of sovereign nation-states increasing the speed of information exchange and capital mobility. Therefore, the researcher concludes "*twilight of statehood*" should first explain what exactly will replace in the modern world;

> "*In fact, this diverse gulf was filled by a motley collection of international organizations, criminal syndicates, terrorist groups and so on which may possess a certain degree of power and legitimacy. In the absence of a clear answer, we can only return to the sovereign nation-state and again try to understand how to make it strong" (Kanafin, 2009).*

RESULTS AND DISCUSSION

Judicial system is the one of important components of law. It has a direct impact on the attitude of citizens of Kazakhstan legal policy, on the level of public confidence in the government i.e. the quality of the administration of justice is one of the main indicators of our country's progress. This idea has been repeatedly emphasized in legal literature:

> *"An independent judiciary becomes the core of the rule of law and constitutionalism, the main guarantee of the freedom of the people".*

The court directly or indirectly provides solutions to other issues in the process of administering justice such as clarification of current legislation on judicial practice, monitoring the legality and validity of decisions, ensuring enforcement sentences, decisions of court and other bodies.

The formation of judicial system of the RK was marked by the adoption on October 25, 1990, of the Declaration on State Sovereignty of the Kazakh SSR which for the first time established the most important principle for the functioning of state power-its division into three branches:

> *"State power in the Republic is exercised based on its division into legislative, executive and judicial".*

The State program of legal reform in the RK approved by the Decree of the President of the RK dated February 12, 1994, also played a major role in improving the judicial system. The reform of judicial system should increase the social prestige of judges, make the court a reliable guarantor of the protection of individual rights and freedoms, contribute to the lawful and fair resolution of conflicts in society and resolve issues of legal and social protection of judges and members of their families (Prashant, 2006).

The adoption of the New Constitution of the RK on August 30, 1995, marked the beginning of a crucial stage in the formation of the judiciary-the stage of implementation of the State program. We can trace a significant transformation of the judiciary based on its conceptual provisions in the state mechanism. (Berestova et al., 2020)

1. The unity of the judicial system has been consolidated within the framework of which the Supreme Court and local courts operate the system.
2. The Constitutional Council has been created-an extra-judicial body of constitutional review.
3. The Program the appointment of lower and middle judges by the President of the RK and the election of judges of the Supreme Court were introduced by the Senate of the Parliament.
4. The Constitution provided for the formation of the Higher Judicial Council and the Qualification Collegium of Justice.
5. The guarantees of the independence of judges have been strengthened their status and role in the system protecting human rights and freedoms.
6. The Constitution in a comprehensive form enshrines the principles of the administration.
7. Following the amendments and additions made to the Constitution on October 7, 1998.

The first stages (1991-2000) of the judicial reform can be stated significant shortcomings and omissions of an objective and subjective nature, they played a significant role in shaping the ideas of powers separation in the public and professional consciousness and judicial independence (Lefkow, 2006). The Judicial Administration Committee under the Supreme Court is an authorized state body that provides logistical and other support for the activities of regional, district and equivalent courts.

Another historical event in the judicial system of the Republic was the adoption on December 25, 2000, of the new Constitutional Law *"On the Judicial System and the Status of Judges of the RK"* which significantly increased the authority of the court, secured the irremovability and inviolability of judges, and changed the procedure for appointing a judge. A fundamentally significant decision related to the improvement of the Kazakhstan judicial system is the transfer of functions to authorize arrests to the courts which important step aimed at strengthening the key principles of democracy and the rule of law, ensuring guarantees and protecting constitutional rights and freedoms.

The judge's independence at the stage of special operational-search measures is not fully ensured. The task of increasing the authority of the judiciary remains relevant. The media is actively publishing various materials on corruption in the judiciary. Such materials appear in both central and local press. Further deepening judicial reform involves effective measures in several areas, among which the leading place is the improvement of the legal regulation of relations. This is a complicated process to regulate the behavior of subjects as conflicts. (Bekturova et al., 2017). The system of legal norms should express the requirements of civilization; normatively objectify these requirements (Tikhomirov, 2013). Strengthening guarantees for the independence of judges usually involves measures of material and social security. This is directly stated by Article 80 of the Constitution of the RK, imperatively establishing the need to allocate the amount of financing of the courts, providing the possibility of full and independent administration of justice. It is necessary to provide in the Constitutional Law "*On the Judicial System and the Status of Judges*" the norms establishing:

1. Independent formation by the judicial authority of the budget of the judicial system with its subsequent coordination with the Government of the RK;
2. Maintaining the previous salary for judges during the reorganization or abolition of the court, reducing the total number of judges appointed to the position of a judge of the equivalent or lower court;
3. Providing judges with annual leave of forty-five calendar days and paying judges who are retired, benefits for rehabilitation in the amount of two official salaries of a judge working in the relevant court;
4. Payment to a retiring judge if he has been a judge for at least fifteen years a tax-free monthly allowance in the amount of fifty percent of the salary of a judge working in the relevant court;

5. Implementation of a system for providing judges with housing and scientifically substantiated workload standards for judges and employees of the judicial system.

The responsibility of the judicial community for the quality of the judiciary, it should also provide for the possibility of maximum participation of judges in the selection of candidates for the position of judge. At least half of the composition of the High Judicial Council should be appointed from among the judges. It is necessary to improve the mechanisms for appointing to judicial posts, providing for the possibility of horizontal movement of the chairmen of the district and equivalent courts, judges of local and other courts based on the recommendation of the Supreme Judicial Council (Rosati, 1987; Radha, 1990).

According to this Professor Dworkin`s approach that each legal problem has only one legal solution, since the law is a closed system that contains a solution for each difficult problem and leaves no room for judicial discretion (Dworkin, 2013).

Supporters of a different, directly opposite approach to the problem of judicial discretion take a fundamentally different position. In their opinion, judicial discretion is present in every case: both difficult and easy. Barak (2007) under judicial discretion means "*the authority that the law gives the judge to make a choice of several alternatives, each of which is legal"*. He emphasizes that the choice of dispute resolution option at the discretion is possible only within the zone of formal legality. According to Barak (2007), discretion takes place not only when there is no legal norm governing the dispute but also when such a norm exists.

Firstly, the court independently forms a new rule and in the second case, the court's discretion consists in establishing the circumstances of the case and selecting the necessary legal norm from among the existing ones. Besides, Barak (2007) believes that "*judicial discretion should be applied objectively"* that is the option chosen in the absence of a legal norm, according to a certain community of lawyers.

The thirdly, on the problem of the existence of judicial discretion is a kind of compromise between the first two approaches and that the judicial discretion still exists, but exists where the necessary legal norms are missing and also it`s difficult to qualify the dispute or establish it correctly circumstances of the case.

Given all the arguments of both opponents and supporters of judicial discretion, it should nevertheless be emphasized that the legislator with all his wills. The judge is convinced that normative legal acts infringe upon the rights and freedoms of a person and citizen enshrined in the Constitution; he will have the right to resolve the case on the merits. This will increase the authority of the court, its independence in assessing the constitutionality of normative legal acts.

The next direction in improving the judicial system and administration of justice is the question of the extent to which the law is concretized in normative decisions of the Supreme Court, the legal nature of which has not yet been fully explored and has not been determined doctrinally. At the legislative level, regulatory decisions are considered as existing. The ambiguity in this definition is caused by the uncertainty of the legislator himself in the legal nature of the normative decisions of the Supreme Court. They have declared a valid law, acts of regulatory content with all the features of a regulatory document: accepted by the authorized body. All these questions require special scientific research.

CONCLUSION

Main directions having shown in judicial reform, its successes and achievements, as well as unresolved problems and ways to overcome them, it should be emphasized that despite all the difficulties of the transition period, the difficult legacy we have inherited from the imperial-totalitarian time, the RK confidently follows the path of building a rule of law:

> *"We have a lot of difficult passes and difficult transitions ahead. Many times on the way of the nation, a scale headwind will strike in the face and knockdown. There will be many more to tear and throw us. It will be necessary to endure and overcome everything"*.

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