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THE PROBLEM WITH JUDICIAL INDEPENDENCE: WHAT LESSONS CAN BE LEARNT FROM THE USSR IN TODAY'S DEMOCRATISING STATES?

*SOPHIE GALLOP**

INTRODUCTION

Judicial independence benefits from both longstanding and widespread recognition.[1] This is in a large part down to the critical role it plays in promoting and securing of democratic principles in a State,[2] acting as a gatekeeper to *ultra vires* exercise of power by the executive and legislative branches of government.[3] Respectively, judicial independence plays an essential role in upholding human rights standards, providing a forum to hold 'deviant'[4] governments to account,[5] thereby upholding the rule of law for all citizens. Despite this recognition, judicial independence continues to be 'one of the least understood concepts in the fields of political science and law'.[6] The failure to properly understand judicial independence is largely owing to the complexities of the doctrine, both in its theory and its practical application.

The consequences of these intricacies are significant: primarily, the tortuousness of judicial independence invites the possibility of the standard being undermined in numerous different ways. This was evident in the Soviet Union where numerous aspects of both individual and institutional independence were eroded by the Communist regime.[7] Secondly, the intricacies inherent in its application makes monitoring the *de facto* standards achieved in a State a truly monumental, and nearly insurmountable, task. These components make it possible for States to undermine standards of judicial independence without attracting attention or criticism.

Similar problems with judicial independence have continued in the modern era. Since the 'third wave'[8] of democratisation began in the 1990s,[9] the governments of numerous

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1 Edward Hirsch Levi, 'Some Aspects of Separation of Powers' (1976) 76(3) Columbia Law Review 371–391; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–1989) 12 Australian Yearbook of International Law 82, 102–107.

2 Archibald Cox, 'The Independence of the Judiciary: History and Purposes' (1995–1996) 21 The University of Dayton Law Review 566, 571; Thomas Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008), 9; International Commission of Jurists *'International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1'* (International Commission of Jurists 2007), 18; Peter H Russell, 'Towards a General Theory of Judicial Independence' in Peter H Russell and David M O'Brien (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives From around the World* (University of Virginia Press 2001) 2.

3 Christopher Forsyth 'Of Fig Leaves and Fairytales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial' (1996) 55(1) *Cambridge Law Journal* (C.L.J.) 122–140.

4 E.A. Howard, 'The Essence of Constitutionalism' in Kenneth W Thompson and Rett T Ludwikowski (eds), *Constitutionalism and Human Rights: America, Poland, and France* (University Press of America 1991) 3.

5 UNGA 'Human Rights in the Administration of Justice: UN Res 50/181' (28 February 1996) UN Doc A/Res/50/181.

6 Christopher Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 American Journal of Comparative Law 605, 607.

7 Alena Ledeneva, 'Telephone Justice in Russia' (2008) 24(4) Post-Soviet Affairs 324, 328–330; Peter Rutland, *The Politics of Economic Stagnation in the Soviet Union: The Role of Local Party Organs in Economic Management* (CUP 2009) 44–49.

8 Samuel P. Huntingdon, *The Third Wave: Democratisation in the Late Twentieth Century* (University of Oklahoma Press 1991).

9 Michael McFaul, 'The fourth wave of democracy and dictatorship: Noncooperative transitions in the postcommunist world' (2002) 2 *World Politics* 212, 212–214.

ex-Soviet States[10] have claimed to be moving towards democratic governance.[11] True democratisation is contingent on adequate standards of judicial independence being attained in a State.[12] However, the complexities of judicial independence continue to allow States to subvert those standards, and conceal the reality from the international community. This can result in a two-fold problem. Perceived standards of democratisation in a state may not be as extensive as those claimed. Additionally, without assurances as to the achieved standards of judicial independence, in reality human rights protection in those 'democratising' States may be under greater threat than apparent to the international community.

This article seeks to address these issues; first, by examining the complexities of the theory, and practical application, of judicial independence; secondly, by examining those complexities in the context of the Soviet Union; and finally, by exploring what ramifications these complexities can have in the context of the 'third wave' of democratisation in ex-Soviet States.

JUDICIAL INDEPENDENCE: IMPORTANCE AND COMPLEXITIES

'Judicial independence' is used to describe the relationships that the judicial branch has with other branches of government.[13] It is bound together with the separation of powers doctrine, which requires that the legislative, executive, and judicial branches each have distinct and exclusive authority,[14] thereby ensuring that there is no interference by any one branch in another's affairs.[15] Judicial independence more specifically demands that neither the legislative nor executive branch, or indeed any other source, wields influence over the judiciary or its decision making process, and that the branch is effectively insulated or protected from any attempts to do so.[16]

The beginnings of the doctrine of judicial independence were established as early as 1215, when judicial fidelity to the law was included as an article in the Magna Carta Liberatum.[17] Throughout the centuries, the standard of judicial independence has evolved and in 1948 it was included in the inaugural United Nations human rights document, the Universal Declaration on Human Rights.[18] Since then judicial independence

[10] Adam Bodnar and Eva Katinka Schmidt, 'Rule of Law and Judicial Independence in Eastern Europe, the South Caucasus, and Central Asia' in Institute for Peace Research and Security (ed) *Yearbook of the Organization for Security and Co-Operation in Europe 2011* (Baden-Baden 2012) 289; see also the statements of Mr Rakhmonov (delegate from Uzbekistan) where he concluded that the Government was working towards an independent judiciary, and that considerable progress had been made. Human Rights Committee, Human Rights Committee Concludes Consideration of Uzbekistan's Third Report, Poses Questions on Child Labour, Use of Torture, Judicial independence. Experts Stress Discussion with States Meant to be a Forum for Dialogue; Delegation Notes 'Moments of Tension', but Says Welcomed Constructive Exchange, UN Doc. HR/CT/719, 12 March 2010, §10, 11.

[11] David Held, 'Democracy: From City-States to a Cosmopolitan Order' (1992) Special Issue, Political Studies 10,10; Peter Calvert and Susan Calvert, *Politics and Society in the Developing World* (3rd edn, Routledge 2007), 10.

[12] Russell, 'Towards a General Theory of Judicial Independence' (n2) 2.

[13] Owen M Fiss, 'The Limits of Judicial Independence' (1993–1994) 25 University of Miami Inter-American Law Review 57, 57.

[14] See generally Levi (n1).

[15] International Commission of Jurists (n2), 4.

[16] Fiss (n13) 59.

[17] John A Vickers, '*Thomas Coke: Apostle of Methodism*' (Wipf and Stock, 2013) 21; Magna Carta Liberatum, Clause 45 states 'We will appoint as justices ... only such as know the law of the realm and mean to observe it well'. In addition, Clause 40 states 'To no one will we sell, to no one will we deny or delay right to justice', and Clause 39 states 'No free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against, except by lawful judgment of his peers and the law of the land'.

[18] Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(II) (UDHR).

has been translated into numerous regional[19] and international human rights treaties,[20] and has been further incorporated into the majority of State constitutions.[21] The extensive acceptance of judicial independence is reflected in the fact that judicial independence, alongside other rights included in the Universal Declaration on Human Rights,[22] has become part of the general principles of international law.[23]

The integral nature of this judicial independence to the proper functioning of democracy has long been acknowledged, and its critical character has received widespread affirmation. In this respect the United Nations Special Rapporteur on the Independence of Judges and Lawyers has noted that

> '. . . The judiciary must be independent from other branches of Government; only then can human rights be fully respected . . . [Furthermore] Judicial Independence is an indispensable element to respect due process of law, Rule of Law and democracy'.[24]

Other international organisations, including the World Bank,[25] the World Trade Organisation,[26] and the Inter-American Development Bank[27] COE and OSCE, have all echoed this sentiment and placed great emphasis on the importance of securing judicial independence, pledging resources to States to encourage them to adopt effective standards.[28]

The separation of powers doctrine has long been heralded as a cornerstone of a democratic society,[29] and judicial independence as an 'essential feature of liberal

[19] *Ibid*; UN Congress on the Prevention of Crime and the Treatment of Offenders 'Basic Principles on the Independence of the Judiciary: UNGA Res 40/32 and 40/146' (endorsed 29 November 1985) UN Doc A/CONF.121/22/Rev.1; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (Protocol 1) Article 75(4); International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 14(1).

[20] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 08/27/79 No. 17955, Article 8(1); African Charter on Human and Peoples' Rights (adopted 27 June 1982, entered into force 21 October 1986) (1982) 21 ILM 58, Articles 7(1) and 26; European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 6(1).

[21] Robert M Howard and Henry F Carey, 'Is an Independent Judiciary Necessary for Democracy?' (2003–2004) 87 Judicature 284, 286.

[22] UDHR (n18).

[23] Article 38(c) Statute of the International Court of Justice, (adopted 26 June 1945, entered into force 24 October 1945) 33 USTS 993, Article 38(c); Simma and Alston (n1), 104; OSCE Office for Democratic Institutions and Human Rights *Legal Digest of International Fair Trial Rights* (OSCE/ODHIR 2012). There remains some debate as to whether those rights have attained the status as part of customary international law (see generally Simma and Alston (n1)).

[24] United Nations Special Rapporteur on the Independence of Judges and Lawyers Diego García-Sayán 'Presentation of the Report of the Special Rapporteur of the United Nations on the Independence of Magistrates and Lawyers, Diego García-Sayán, before the General Assembly of the United Nations, at the seventy-fourth session, on October 16, 2019: Report on the Independence of Judges and Lawyers' (*United Nations,* 16 October 2019) <https://independence-judges-lawyers.org/supplementing-the-un-basic-principles-on-the-independence-of-the-judiciary/> accessed 30th April 2022.

[25] Linn Hammergren, 'Diagnosing Judicial Performance: Toward a Tool to Help Guide Judicial Reform Programs' (*World Bank,* 1999) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/hammergrenJudicialPerf.pdf> accessed 20 February 2021.

[26] The World Trade Organisation demands that all contracting parties 'maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts'. See World Trade Organisation 'General Agreement on Tariffs and Trade' (1986) 55 UNTS 194, Article X(3).

[27] Jeffrey M. Sharman, 'Judicial Ethics: Independence, Impartiality, and Integrity' (*Inter-American Development Bank,* May 19–22 1996) <https://publications.iadb.org/bitstream/handle/11319/2681/Judicial%20Ethics:%20Independence,%20Impartiality,%20and%20Integrity.pdf?sequence=1> accessed 19 February 2022.

[28] Ginsburg and Moustafa (n2) 9.

[29] International Commission of Jurists (n2) 18.

democracy'.[30] Judicial independence commands this status by protecting democratic principles in such a way that all citizens are held accountable only under the rule of law. This guarantees that all citizens, in particular individuals and minority groups,[31] are shielded from *ultra vires* abuses of power by the executive and legislative branches,[32] and are free from the whim or wrath of the legislative or executive branch.

The guarantee that all citizens will only be held accountable under the rule of law means that judicial independence holds 'the central role of the administration in the promotion and protection of human rights'.[33] By acting as a bulwark against tyranny[34] the judiciary ensures that the executive and legislative branches of government do not act *ultra vires* of their jurisdiction by violating the rights of disfavoured individuals or groups. In this respect the United Nations has repeatedly noted the link between the gravity and frequency of serious violations of human rights and the absence of a truly independent and impartial judiciary.[35] That conclusion was reiterated in the Vienna Declaration and Programme of Action:

> '(t)he administration of justice . . . especially an independent judiciary . . . are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy.'[36]

The longevity of the recognition and acceptance of judicial independence and the widespread acknowledgment of its importance has not, however, been met with an extensive understanding of what this standard demands in practice. As Russell stated there is 'little agreement on just what this condition is or what kind or how much of it is required for a liberal democratic regime'.[37] Larkins echoed these sentiments, noting that judicial independence is 'one of the least understood concepts in the fields of political science and law'.[38]

In part this is owing to the inherent inconsistencies and contradictions that exist within the doctrine itself. On the one hand independence demands that there is no external interference or influence over the judicial decision-making process.[39] On the other hand, judicial independence relies on also ensuring judicial accountability for incidents of corruption.[40] To achieve this accountability there has to be legitimate oversight over judicial actions, which has the potential to undermine attempts to secure individual independence.[41] Moreover, absolute institutional independence is unobtainable. All branches of government are interdependent to some extent; whilst each branch has its own specific sphere of influence some functions require cooperation between

[30] Russell (n2) 2.

[31] Open Society Institute 'Monitoring the EU Accession Process: Judicial Independence' (*Open Society* 2001), <https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf> accessed 19 February 2022.

[32] See generally Forsyth (n3).

[33] UNGA Res 50/181 (n5).

[34] Vickers (n17) 213.

[35] UNHCR 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers' (4 March 1994) UN Doc. E/CN.4/1994/132; UNCHR 'Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers' (11 April 1997) UN Doc E/CN.4/1997/23 preamble, 1.

[36] World Conference on Human Rights 'Vienna Declaration and Programme of Action' (25 June 1993) A/CONF.157/23, §27, 10; UNGA 'High Commissioner for the Promotion and Protection of all Human Rights' (7 January 1994) UN Doc A/RES/48/141.

[37] Russell (n2) 1.

[38] Larkins (n6) 607.

[39] John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1998–1999) 72 Southern California Law Review 353, 355; Fiss (n13) 59.

[40] See generally Judge J Clifford Wallace 'Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives' (1998) 28(2) California Western International Law Journal 341, 343.

[41] *Ibid*.

branches.[42] The legislature relies on the judiciary to apply the law in court proceedings; in turn the judiciary relies on the executive to respect the application of the law. Additionally, justifiable interference in the judicial branch is inevitable; as the judiciary polices the actions of the executive and legislative branches, the executive and legislative audit judicial actions, ensuring that it only acts *intra vires*.[43] The result is that neither institutional nor individual independence can be achieved absolutely.[44]

Functionally, judicial independence remains a relatively ambiguous standard owing to the intricacies of its practical application. Judicial independence can be broken down into two components: institutional independence and individual independence. Institutional independence requires the entire judicial branch remains free from interference in judicial decision-making. Institutional independence can be achieved in a number of ways, each of those ensuring that 'genuine threats'[45] are not able to 'diminish or regulate the powers of the judiciary as a whole'.[46] This can be achieved through insulating the judicial branch, ensuring that it is not reliant on other branches of government, which would otherwise compromise its ability to make completely independent judgments. To achieve institutional independence a number of different standards need to be attained, including assuring the judicial branch has financial autonomy,[47] and exclusive authority over legal matters.[48]

Individual independence demands that respective judges are able to conclude cases based solely on the facts, free from any extraneous influence.[49] If individual independence is effectively secured, judges should be able to undertake the decision-making process free from 'fear or anticipation of (illegitimate) punishments or rewards'.[50] This requires judges to be politically insulated,[51] ensuring they are free from illegitimate pressure, coercion, or threats from an external source,[52] designed to compel the judicial branch to adhere to the agenda of another group. To protect judges from external pressures, judges need to be assured of an objective selection and appointment process,[53]

[42] Ferejohn (n39) 357.

[43] *Ibid* 356.

[44] *Ibid* 357.

[45] *Ibid* 355.

[46] *Ibid* 360.

[47] Organization of American States (Inter-American Commission on Human Rights), 'Second Report on the Situation of Human Rights in Peru', (2 June 2000) OEA/Ser.L/V/II.106doc.59 rev 2000, §13, Chapter II; United Nations 'Basic Principles on the Independence of the Judiciary' (n19), Principle 7; European Association of Judges 'European Charter on the statute for judges' (8–10 July 1998), DAJ/DOC (98) 23, operative paragraph 1.6; Chief Justice of the LAWASIA region and other judges from Asia and the Pacific 'Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region' (19 August 1995), operative paragraph 41; See also Committee of Ministers of the Council of Europe, 'Recommendation No. R (94) 12' (*Council of Europe* 1994) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2> accessed 19 February 2022, para 16.

[48] United Nations 'Basic Principles on the Independence of the Judiciary' (n19), Principle 3; African Union, The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa DOC/OS/(XXX)247 (4–12 July 2003), Principle A, paragraph 4(c); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (n47), operative paragraph 33.

[49] United Nations Economic and Social Council 'Strengthening Basic Principles of Judicial Conduct (Bangalore Principles of Judicial Conduct)' (27 July 2006) ECOSOC Res. 2006/23, Value 1.1.

[50] Ferejohn (n39) 355.

[51] Fiss (n13) 58.

[52] Bangalore Principles of Judicial Conduct (n49) Value 1.1.

[53] UN Basic Principles on the Independence of the Judiciary (n19) Principle 10; International Association of Judges 'Universal Charter of the Judge' (adopted on 17 November 1999 and updated on 14 November 2017); Council of Europe Committee of Ministers of the Council of Europe 'Recommendation No. R (94) 12' (n47) Principle I.2; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (n48), Principle A, paragraphs 4 (i) and (k); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, (n47) operative paragraph 13; Commonwealth Secretary-General 'Commonwealth (Latimer House) Principles on the Three Branches of Government' (The Commonwealth 19 June 1998) <https://www.cmja.org/downloads/latimerhouse/commprinthree-arms.pdf> accessed 22 April 2022, Principle II.1.

adequate tenure,[54] objective dismissal proceedings,[55] and satisfactory pay and working conditions.[56] Individual independence also requires that judges do not participate in corrupt judicial practices, in particular ensuring that judges do not have 'inappropriate connections with . . . the executive and legislative branches of government',[57] or accept extraneous inducements.[58]

The fact that judicial independence is built on numerous foundations presents a two-fold problem. Primarily, each of those foundations needs to be adequately secured for true *de facto* judicial independence to be attained. If one of those elements is not realised then there is a real risk that the whole standard will be undermined, leaving judicial independence a right particularly vulnerable to weakening and erosion. Furthermore, the number of elements needed to secure judicial independence makes monitoring the level of judicial independence achieved a particularly cumbersome task. This is exemplified by the American Bar Association's Rule of Law Initiative, which monitors 30 different factors when determining the level of *de facto* judicial independence achieved in a State.[59]

Measuring those standards is further complicated by the secrecy that accompanies instances of compromised judicial independence, in particular where individual independence has been imperilled. Instances where judges experienced external influence are likely to remain inconspicuous, given that judges are unlikely to concede that they reached a particular judgment because of that pressure.[60] Instead judges are inclined to conceal 'their lack of autonomy'.[61] This may be in part be owing to the type of pressure exerted over members of the judiciary, which can vary from threats to a judges' employment[62] to death threats.[63] Those judges wishing to preserve their livelihood and lives are likely therefore to remain silent. Further, instances where judgments are reached due to external influence, rather than based on the rule of law, are likely to illicit feelings of shame and humiliation,[64] which judges presumably wish to keep from becoming public. These factors are likely to mean that instances where judges are faced with threats or other external pressures are likely to remain clandestine, preventing them from being brought to international attention. Moreover, instances where individuals

[54] UN Basic Principles on the Independence of the Judiciary (n19), Principle 11; Latimer House Guidelines (n53), Guideline II.1; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (n48) Principle A, paragraphs 4 (l) and (m); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (n47), operative paragraphs 18–20.

[55] UN Basic Principles on the Independence of the Judiciary (n19) Principles 18 and 19; Council of Europe Committee of Ministers of the Council of Europe 'Recommendation No. R (94) 12' (n47) Principles VI.2 and VI. 3; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (n48) Principle A, paragraphs (n), (p), (q) and (r); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (n47) operative paragraphs 22–26; Latimer House Guidelines (n53), Guideline VI.1, paragraphs (a) (i) and (a) (iii).

[56] Human Rights Committee, Concluding Observations of the Human Rights Committee on the Democratic Republic of The Congo, UN Doc. CCPR/C/COD/CO/3, 20 April 2006, [21],

[57] Bangalore Principles (n49) Value 1.3; see also ECtHR, *Indra v. Slovakia,* App No 46845/99 (ECtHR 1 February 2005) [49].

[58] United Nations Basic Principles on the Independence of the Judiciary (n19) Principle 2; Bangalore Principles (n49), Value 1.1; Council of Europe Committee of Ministers of the Council of Europe 'Recommendation No. R (94) 12' (n47) Principle I.2.d; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (n48), Principle A, paragraph 5 (a); Principle Q paragraph (d); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (n47) operative paragraph 39.

[59] American Bar Association Rule of Law Initiative 'Judicial Reform Index' (*American Bar Association*, 2016) <http://www.americanbar.org/advocacy/rule_of_law/publications/assessments/jri.html> accessed 19 February 2022.

[60] Albert P Melone, 'Legal Professionals and Judicial independence in Transitional Society: The Case of Bulgaria' (1994) (as cited in Larkins (n6) 616).

[61] *Ibid.*

[62] Larkins (n6) 622.

[63] See generally Amnesty International 'Guatemala: intimidation must not stop justice' (Amnesty International, 2001), <http://www.amnesty.org.uk/press-releases/guatemala-intimidation-must-not-stop-justice> accessed 19 February 2022.

[64] Tamar Frankel, 'Fiduciary Duties as Default Rules' (1995) 74 Oregon Law Review 1209, 1269.

are voluntary participants in activity compromising judicial independence are equally unlikely to become public. Judges involved in incidents of corruption and bribery are also likely to face shame and humiliation and be unwilling to allow their actions to become public knowledge. Additionally, incidents of bribery are likely to be of financial, social, or political benefit to participating judges, who may be unwilling to give up the advantages that engaging in such activity might bring.

THE SOVIET UNION AND THE COMPLEXITIES OF JUDICIAL INDEPENDENCE

The complexities of monitoring *de facto* levels of judicial independence are demonstrated by the experience of the judiciary in the former Soviet Union. The USSR provides a useful context in which to examine the complexities of judicial independence. The Soviet Union provides a rare opportunity for information about government policy from a 'deviant'[65] State to be made publicly available, where no surviving State government would be directly susceptible to diplomatic embarrassment for those decisions and undertakings. Additionally, the significant number of ways in which judicial independence was undermined by the Communist governments provides a particularly rich data set by which to assess the complexities of judicial independence. Finally, some members of the 'third wave'[66] of democratising countries are former Soviet States. In this context, the Communist legacy provides a useful framework to assess democratisation efforts in those States.

In tandem with expectations from the international community,[67] when the Communist Party came to power in 1922,[68] the Soviet government sought to establish that there had been a dramatic change from previous Tsarist policy.[69] Reforms pledged by the Communist party included assurances that the Soviet government would stringently adhere to international human rights standards,[70] including that of judicial independence.[71]

This illusion was achieved through the introduction of new legislation,[72] including extensive provisions in the Constitution of the Union of Soviet Socialist Republics that paid lip service to the protection of various human rights.[73] This included formal Soviet laws that established elements of the democratic model, including a clear separation

[65] Emilie Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) The American Journal of Sociology 1373, 1383.

[66] See generally Huntingdon (n8).

[67] Scott P Boylan, 'The Status of Judicial Reform in Russia' (1998) 13(5) *American University International Law Review* (Am.U.Int'l.L.Rev) 1327, 1330.

[68] The Communist government came to power in Soviet Russia in 1917, after October Revolution led by the Bolsheviks. Between 1917 and 1922 the Russian communist party, the Russian Soviet Federative Socialist Republic, entered several former Russian Empire territories and provided assistance to local Communist seeking to succeed power. In 1922 these efforts resulted in victory, and the Union of Soviet Socialist Republics (USSR or Soviet Union) was created, and the Communist party took control of the Soviet government. See generally Peter Kenez *A History of the Soviet Union from the Beginning to the End* (2nd edn, CUP 2006); Geoffrey Hosking *History of the Soviet Union: 1917–1991* (3rd edn, William The 4th 1992).

[69] The rule of law and the separation of powers were not respected under the Tsarist regime, and human rights abuses were commonplace. See Boylan (n67), 1330.

[70] *Ibid.*

[71] *Ibid.*

[72] *Ibid*; *see also* Fundamental Principles on Court Organization of the USSR and the Union Republics (1924), Article 10; Fundamental Principles on Court Organization, Articles 4 and 5; Law of the USSR: On the Status of Judges (1989), item 223, Article 5(2).

[73] Конститу́ция (Основно́й Зако́н) Сою́за Сове́тских Социалисти́ческих Респу́блик (Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (as amended 1991)), Article 153.

of powers and judicial independence.[74] According to the Constitution of the Union of Socialist Soviet Republics the Supreme Court of the USSR was the highest judicial organ of the USSR,[75] and the ultimate arbiter of the law.

These assurances however conflicted with Soviet doctrine. In practice, Marxist-Leninist theory sought to establish a one-party State led by the Communist party as a means to develop Socialism in the Soviet Union.[76] In particular the Soviet regime believed that the Communist vanguard party represented the 'will of the proletariat'.[77] Marxist-Leninist theory therefore demanded that the executive branch exert control over all aspects of society, including over legal and judicial matters,[78] undermining judicial independence and the separation of powers. Under Soviet rule the judiciary was seen as another branch of the Communist regime,[79] and was used as a means by which to advance the Soviet agenda through legal avenues.[80] This was exemplified by the Soviet doctrine of *pravo kontrolia,*[81] which granted the Party ultimate control over all matters, including control over the law, as the 'guardian of ideological truth'.[82] Judges frequently adjudicated a number of crimes, including offences such as 'infringing on the activities of the State',[83] acknowledged as a means by which the Communist Party repressed dissidents.[84] In this context the Constitution was 'not a living document',[85] and was rarely used as a means by which to challenge unconstitutional executive action or to protect human rights standards.[86] The result was that the judicial branch became a tool of the 'omnipotent'[87] regime, and it was perceived that the sole function of the judiciary was the protection of the totalitarian agenda[88] and of the individuals in power.[89]

Certain methods employed by the Communist government to undermine the legal provisions guaranteeing judicial independence were far from inconspicuous. Exclusive authority was provided for in the Soviet Constitution, and demanded that no person be convicted of a crime other than by judgment of a court, in accordance with the law.[90] These sentiments were reiterated in other Soviet legal instruments, which stressed that all State organs should 'be obliged to fulfil the demand and ordinances of judges[91]

[74] *Ibid.*

[75] *Ibid*; Fundamental Principles on Court Organization of the USSR (n72), Article 10; Fundamental Principles on Court Organization (n72), additionally included articles protecting judges from 'interference in concrete cases' (Article 4) which would entail criminal responsibility (Article 5). These provisions were reiterated in Law of the USSR: On the Status of Judges (n72), item 223, Article 5(2) which prohibited 'influencing of any kind of judges . . . '.

[76] Aleksandras Shtromas, Robert Faulkner, and Daniel J Mahoney, *Totalitarianism and the Prospects for World Order: Closing the Door on the Twentieth Century* (Rowman & Littlefield 2013) 18.

[77] Michael Albert and Robin Hanel *Socialism Today and Tomorrow* (South End Press 1981) 24–25.

[78] *Ibid.*

[79] *Ibid.*

[80] *Ibid.*

[81] Mariusz Mark Dobek and Roy D Laird, 'Perestroika and a 'law-governed' Soviet State: Criminal Law' (1990) 16(2) Review of Socialist Law 135, 160.

[82] *Ibid* 150.

[83] Nina Berstein, 'Righting Wrongs, Case by Case' Newsday May 12 1991, (as cited in Randall T Shepard 'Telephone Justice, Pandering, and Judges Who Speak Out of School' (2001) 29(3) Fordham Urban Law Journal 811, 811).

[84] Stephen G Breyer, 'Comment: Liberty, Prosperity, and a Strong Judicial Institution' (1998) 61(3) Law and Contemporary Problems 3, 3

[85] Boylan (n67) 1339.

[86] *Ibid.*

[87] *Ibid.*

[88] Peter Costea, 'The Legal System and the Judiciary in the Marxist-Leninist Regimes of the Third World' (1990) 16(3) Review of Socialist Law 225, 253.

[89] *Ibid.*

[90] Constitution of the USSR (n73) Article 160.

[91] On the Status of Judges in the USSR (n72) Article 12(3).

including 'promptly answering ... inquiries'.[92] Regardless, the Communist Party repeatedly intervened in the affairs of the judicial branch.[93] The Communist Party justified this interference due to the belief it had the 'leading role'[94] in society, and therefore placed itself above the law.[95] This philosophy gave the Communist Party the final say in any and all government business for the benefit of the State[96] and ensured that judges adhered to Communist values when passing judgments.[97] Frequently aspects of cases or entire trials, including questions of guilt or innocence, were decided prior to trial, and appearances in court were simply to determine appropriate sentences.[98]

Other methods of executive control over the institutional independence of the judiciary were far subtler. The judicial branch was consistently deprived of financial autonomy, by making the judiciary solely reliant on the executive branch for financial support.[99] Throughout the Soviet era the Ministry of Justice managed the judicial budget,[100] making members of the judicial branch reliant on the executive branch for their salary and for any other expenditures in the court systems.[101]

The Communist government also utilised a number of strategies to compromise the independence of individual members of the judiciary. The process of judicial selection and appointment lacked a formal procedure, allowing the Soviet government to violate standards of individual independence. The failure to secure a strictly regulated selection and appointment process permitted local Communist leaders or *apparatchik* to select judicial candidates in a process known as *podbor kadrov*[102] (selection of cadres); allowing the election of persons who adhered to and promoted Communist policies.[103] This was exacerbated by the fact that the law on the selection of judges did not require candidates to have a legal education,[104] dressing the judiciary with unqualified and inexperienced judges.[105]

Public violations of standards of judicial tenure further undermined judicial independence. The law ostensibly sought to secure adequate judicial tenure. Whilst other officials elected to public office were given a maximum tenure of two consecutive terms,[106] judges were exempted from this restriction.[107] The length of judicial tenure varied throughout the existence of the Soviet Union. Prior to 1989 the term of judicial tenure was five years,[108] but this was modified in December 1988 when the Constitution was amended: doubling the period of tenure to ten years.[109] The express intention of

[92] *Ibid.*

[93] Ledeneva, 'Telephone Justice in Russia' (n7) 328.

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.*

[97] See generally Costea (n88).

[98] Peter H Solomon Jr,'The Role of the Defense in the USSR: The Politics of Judicial Reform under Gorbachev' (1988–1989) 31 Criminal Law Review Quarterly 76, 79; see generally N Dolapchiev, 'Law and Human Rights in Bulgaria' (1953) 29(1) International Affairs 59–68.

[99] Boylan (n67) 1334.

[100] *Ibid.*

[101] *Ibid.*

[102] *Ibid.*

[103] *Ibid.*

[104] Jane Henderson, 'Law of the USSR: On the Status of Judges in the USSR' (1990) 16(3) Review of Socialist Law 305, 320.

[105] *Ibid.*

[106] Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (n73) Article 91.

[107] *Ibid.*

[108] *Ibid* Article 152.

[109] *Ibid.*

this extension was to secure greater independence for judges.[110] Alongside this extension, legislation was rectified to limit instances where judges could be dismissed by the executive; further preserving judicial tenure.[111]

However, despite calls for lifelong tenure to be introduced during *perestroika* reforms, this was never achieved.[112] Consequently judicial tenure, whilst longer, remained temporary. Judicial tenure contingent on a temporal term, meant that judges had to seek reappointment at various intervals, leaving them susceptible to pressure from the appointing authorities, either because they were 'indebted'[113] to the those authorities, or because they wish to appease them to ensure re-election.[114] This was particularly true in the USSR, where judges were dependent on the local *apparatchik,* for re-election, and the approval of the Ministry of Justice to receive a nomination.[115] It was widely acknowledged by citizens throughout the Soviet era that regardless of judicial tenure, a judge could be 'dismissed, degraded, or transferred at will'[116] by the local *apparatchik*. Those who did not adhere to Communist 'guides'[117] were forced to retire.[118] In practice, therefore, judges were reliant on Communist party members both when being elected, but also in maintaining their office.

Another factor that compromised judicial independence was the wage awarded to those working within the judicial branch. Compared to their Western counterparts, Soviet judges were paid very inadequately.[119] There were repeated complaints from judicial advocates about the 'material distress'[120] of judges, who were often homeless and destitute.[121] Members of the court system averaged a wage that was a mere 63% of the national median,[122] and led to judges abandoning the judiciary in favour of higher paid employment.[123] Yet despite publicity, repeated calls for judicial wages to be increased, and official acknowledgment of these failures, nothing changed during the *perestroika* reforms.[124] This left judges reliant on the local *apparatchik* for provisions such as apartments and holidays,[125] and made them susceptible to bribery.

Regardless of *de jure* protections ostensibly provided to protect the independence of judges, this multiplicity of factors effectively undermined those legal safeguards. Instead, judges were dependent on the Communist party and local Communist *apparatchiks* when applying for office, when holding office, and to provide supplements for their otherwise meagre wage. This reliance meant that judges were susceptible to external pressures from the Communist party or local *apparatchiks* on the decision-making process. The

[110] Dobek and Laird (n81) 150.

[111] On the Status of Judges in the USSR (n72) Article 17(1).

[112] See generally Henderson (n104) 315.

[113] Institute for Democracy and Electoral Assistance (IDEA) 'Judicial Tenure, Removal, Immunity, and Accountability' (*International IDEA* August 2014) <https://constitutionnet.org/sites/default/files/2017-10/judicial-tenure-removal-immunity-and-accountability-primer.pdf> accessed 21 February 2022, 2.

[114] *Ibid.*

[115] Solomon (n98) 80.

[116] Dolapchiev (n98) 64.

[117] For example, the case of Judge Kudrin who was forced to retire after failing to adhere to the Communist *apparatchik* instructions, in Henderson (n104) 314–315.

[118] *Ibid.*

[119] Henderson (n104) 311–312.

[120] *Ibid* 311.

[121] *Ibid* 311–312.

[122] The average pay for employees of the Ministry of Justice was 137 roubles per calendar month, whilst the national average was 217 roubles per calendar month; see *Ibid* 312.

[123] Izvestiia 'The Judiciary' (CDSP 11 April 1989) 3 (as cited in Henderson (n104) 312).

[124] See generally Henderson (n104) 305–326.

[125] *Ibid.*

Soviet doctrine of *pravo kontrolia*[126] (the right of supervision)[127] effectively granted the party the right to intervene in any matter, thereby permitting 'the Party functionaries to dictate to the justices the desired verdict'.[128] The doctrine of *pravo kontrolia* permitted the practice of 'telephone justice'[129] (*telefonnoe pravo*)[130] to become commonplace in the Soviet Union. *Telefonnoe pravo* was used to refer to instances where a judge made a decision based on 'grounds external to the judge's own assessment of the law and the facts of a case'.[131] The phrase referred to a non-transparency in the legal system,[132] and was in fact an ironic term referring to the overruling of law so that Soviet 'justice' prevailed.[133] Telephone justice was achieved both through formal pressure to decide a case in a certain way,[134] and through informal pressure and subtler guises.[135] It allowed Communist members to pick up the phone and dictate to the judge how a particular case should be concluded,[136] including instances where judges were told to pursue cases with vigour or to drop them.[137] These decisions were often motivated for reasons entirely personal to the *apparatchik* dictating to the judge.[138] The problem was so extreme in some areas of the Soviet Union that in some instances judges wouldn't render a decision without consulting the local *apparatchik*,[139] and its widespread practice demonstrated that judges placed 'party loyalty (*partyinost)* above concerns for legality'.[140] It was therefore expected that judges would give any oral or written command from a member of the Communist Party precedence over written laws or decrees.[141] If there was a deviation between the written law and the oral instructions of the local *apparatchik*, then it was anticipated that the verbal instructions would hold.[142] This permitted unwritten rules to govern legal society, and allowed Party members to bend the law for friends and use it against enemies.[143]

Judges were also faced with significant informal pressure to make rulings in a particular way.[144] This pressure was communicated via various media outlets, which subjected judges to 'incessant . . . moral duress'.[145] These included:

> 'frenzied radio, press, and other propaganda but also by specially staged open 'people's meetings' which in fact passed the actual verdicts before the judicial decisions were determined'.[146]

[126] Dobek and Laird (n81) 150.
[127] Rutland (n7) 44.
[128] Dobek and Laird (n81) 150.
[129] Alena Ledeneva. 'Behind the Façade: Telephone Justice in Putin's Russia' in Mary McAulley, Alena Ledeneva, and Hugh Barnes (eds), *Dictatorship or Reform? The Rule of Law in Russia* (Foreign policy Centre 2006) 24, 30.
[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid* 26.
[133] *Ibid.*
[134] See generally Shepard (n83) 811–825.
[135] *Ibid.*
[136] Ledeneva 'Behind the Façade' (n129) 25.
[137] Solomon (n98) 84.
[138] *Ibid.*
[139] Boylan (n67) 1327.
[140] Ledeneva 'Telephone Justice in Russia' (n7) 329.
[141] *Ibid.*
[142] Timothy J Colton, *Yeltsin: A Political Life* (Basic Books 2007) 325.
[143] Ledeneva, 'Telephone Justice in Russia' (n7) 330.
[144] *Ibid.*
[145] Dolapchiev (n98) 61.
[146] *Ibid.*

Threats to judicial independence in the Soviet Union did not solely emanate from the Communist government. Judicial corruption, where judges were voluntarily involved in the activity that compromised their independence, was also commonplace in the USSR.[147] The law of the Soviet Union expressly prohibited corruption in all spheres of government requiring that a judge should act in a way that was just and humane,[148] and that honoured and dignified their profession.[149]

One of the factors that permitted judicial corruption to thrive in the USSR was the legal culture of the Soviet Union. The judicial branch was the least well-regarded branch of government in the Soviet Union,[150] and commanded little respect.[151] As a consequence there was little prestige or pride attached to holding the position of a judge. As Kurkchiyan noted:

> 'the perspective of legal culture shows us the importance of self-identity; the feelings of honour and pride that come with group membership.'[152]

The low esteem judges in the Soviet Union held their own profession in resulted in a failure to secure a legal culture that frowned upon or prohibited judicial corruption.[153] This problem was exacerbated by the propensity of the Soviet judiciary to hold 'closed ranks'[154] and protect those guilty members from any legal consequences.[155]

Furthermore, a spiral of corruption existed whereby enough individuals were involved in the culture of corruption that continued compliance with the culture could be secured through political blackmail.[156] The culture of corruption was a self-perpetuating one and spread from one governmental sphere to another;[157] given that no individual could come forward to expose the reality unless they were prepared to risk exposure of their own misconduct.[158]

Lenin acknowledged the problem of corruption in 1921 in Soviet Russia, when he stated that bribery was one of the 'three main enemies'[159] of Communism. This statement did not, however, acknowledge the factors, such as inadequate wages and poverty,[160] which had caused corruption to become so prevalent in the USSR; instead the problem of bribery was blamed on the vestiges of capitalist ideals.[161] The Russian Supreme Court reiterated this sentiment, noting that bribery was 'the most shameful

[147] James Heinzen, 'The Art of the Bribe: Corruption and Everyday Practice in the Late Stalinist USSR' (2007) 66(3) Slavic Review 389, 407.

[148] On the Status of Judges in the USSR (n72) Article 13(1).

[149] *Ibid.*

[150] Boylan (n67) 1327.

[151] *Ibid.*

[152] Marina Kurkchiyan, 'Judicial Corruption in the Context of Legal Culture' in Transparency International (ed) in *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007) 100.

[153] *Ibid.*

[154] See generally, Geoffrey Robertson QC 'The Media and Judicial Corruption' in Transparency International (ed) in *Global Corruption Report 2007* (Cambridge University Press 2007) 108, 109.

[155] *Ibid.*

[156] *Ibid.*

[157] Larkins (n6) 30.

[158] *Ibid.*

[159] Alongside Communist arrogance and illiteracy; *see* Vladimir Lenin (translated by Kharms D) *Polnoe sobranie sochinenii* [Full Composition of Writing] (5th edn, Gumanitarnoe Agentstvo, 1964), 173–74; Christopher Read, *Lenin: A Revolutionary Life* (Routledge 2009) 271; Sheila Fitzpatrick *The Commissariat of Enlightenment: Soviet Organization of Education and the Arts under Lunacharsky* (Cambridge University Press 2002) 252.

[160] Heinzen (n147) 409.

[161] Lenin (n159) 173–74; Read (n159) 271; Fitzpatrick (n159) 252.

relics of the capitalist past'.[162] The visibility of government rhetoric on the causes of corruption meant that bribery could no longer be heralded as a problem, given that the executive claimed to have eradicated capitalism from Soviet society.[163] Instead corruption was seen as a problem that could only affect bourgeois Western capitalist States.[164] This allowed activities such as bribery to pervade the Soviet judiciary and other branches of the Communist government, leading to a culture of corruption known as 'stealing the State'[165] or 'State capture'.[166] This situation was so extreme that it was an 'open secret'[167] in Soviet society, and in some instances unofficial 'price lists'[168] for justice were made available.

Bribery was one of the more common methods of corruption utilised in the USSR; in fact it was a 'phenomenon of everyday life'.[169] The RSFSR Criminal Code prohibited any 'inducements that improperly influenced the performance of an official's public function'.[170] Additionally the Criminal Code made both the offering[171] and acceptance[172] of a bribe unlawful, and punishable by up to fifteen years for repeat offenders.[173] Nonetheless, in practice prosecutions under the RSFSR Criminal Code for bribery were exceptional.[174] The fact that incidents of bribery were so common in the Soviet Union was in part due to factors outside of the control of judges that affected their susceptibility to bribery, including the inadequacy of their wage.[175] In the USSR members of the judiciary lived in 'material deprivation',[176] making it particularly tempting for judges to sell access to 'justice' in order to escape poverty.[177] This was particularly true in the Stalinist post-war era, which witnessed an upsurge in incidents of bribery[178] due to a shortage of rations[179] and a prevalence of poverty.[180] The result was that bribe taking in the Soviet Union became an enticing alternative method to help judges survive,[181] and drastically increasing their quality of life.[182] Despite the commonplace nature of bribe taking in the Soviet Union there was little official acknowledgment of it. This was in large part due to the fact that people would rarely admit to either paying or accepting a bribe,[183] in part due to the feeling that accepting such payment was not immoral

[162] Supreme Court of the USSR *Postanovlenie* (meaning 'decree of the Supreme Court) (1949) (F Chernov 'Bourgeois Cosmopolitanism and its Reactionary Role' in Bolshevik (ed) *Bolshevik: Theoretical and Political Magazine of the Central Committee of the All-Union Communist Party* (Communist Party of the Soviet Union 1949) 30–41).

[163] See generally Heinzen (n147).

[164] *Ibid.*

[165] See generally Steven L. Solnick, *Stealing the State: Control and Collapse in Soviet Institutions* (Harvard University Press 1999).

[166] Ledeneva 'Behind the Façade' (n129) 25.

[167] *Ibid* 24.

[168] *Ibid* 23.

[169] Heinzen (n147), 393.

[170] The Criminal Code of the Russian Soviet Federative Socialist Republic 27 October 1960 (as amended), Chapter VII Official Crimes, Article 174.

[171] *Ibid.*

[172] *Ibid* Article 173.

[173] *Ibid* Article 173.

[174] Heinzen (n147) 407.

[175] Henderson (n104) 311–312.

[176] Heinzen (n147) 409.

[177] *Ibid* 400–401.

[178] *Ibid* 401.

[179] *Ibid* 400.

[180] *Ibid* 400.

[181] *Ibid* 400–401.

[182] *Ibid* 400–401.

[183] *Ibid* 395.

given the poverty suffered by the Soviet population,[184] and therefore something that an individual should not have to admit to.

Whilst *de jure* provisions provided for the separation of powers in the Soviet Union,[185] in reality this was compromised through numerous guises. The Communist government undermined both institutional and individual independence in the Soviet Union, thoroughly eroding *de facto* judicial independence. Nonetheless, the Communist government repeatedly claimed that the judiciary was an independent and separate branch of government from the executive and legislative.[186] The executive was able to make these claims in part thanks to the plethora of ways in which the standard was compromised, which made demonstrating the nonexistence of judicial independence a near futile task.

The failure to secure judicial independence in the USSR had serious repercussions. Of all the government branches, the judiciary commanded the least respect,[187] and the public was very suspicious of the judiciary and the motives behind their judgments.[188] The rule of law was completely undermined, and cases before the courts were most often decided either by the local *apparatchik*,[189] by the Communist government,[190] or through the paying of bribes.[191] Furthermore, the judiciary was unable, or unwilling, to act as a safeguard against *ultra vires* executive action. This allowed the Communist government to take unilateral action without challenge or consequence, allowing human rights abuses in the Soviet Union to become prevalent.[192]

CONTINUING CHALLENGES: JUDICIAL INDEPENDENCE IN CIS STATES

The fall of the Soviet Union in 1991 revived focus and interest in judicial independence, in part due to the 'renewed emphasis on constitutionalism in the democratising world of the post-Cold war era'.[193] This interest coincided with a 'growing gap between promise and practice'[194] of judicial independence standards.[195] Less than two and a half years after the dissolution of the Soviet Union in 1991[196] concern about judicial independence around the world led to the creation of a UN Special Rapporteur on the Independence of Judges and Lawyers.[197] That mandate emphasised that judicial independence is an 'essential prerequisite for the protection of human rights and ensuring . . . justice',[198] and was created because that fundamental right continued to be frequently violated[199] and in need of specific protection.[200]

[184] *Ibid* 404.

[185] See generally Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (n73) Article 153; Fundamental Principles on Court Organization of the USSR (n72) Article 10; Law of the USSR: On the Status of Judges (1989) (n72) item 223, Article 5(2).

[186] See Boylan (n67) 1330.

[187] *Ibid* 1327.

[188] *Ibid* 1343.

[189] Solomon (n98) 78.

[190] *Ibid.*

[191] *See generally* Heinzen (n147) 407.

[192] Boylan (n67) 1339.

[193] Linda Camp Keith *Political Repression* (University of Pennsylvania Press 2012) 114.

[194] *Ibid* 155.

[195] *Ibid.*

[196] *Декларация Совета Республик ВС СССР от 26.12.1991 № 142-Н* [Declaration no 142-N of the Soviet of the Republics of the Supreme Soviet of the USSR No 142-N] 26 December 1991.

[197] UNHCR, 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers' (n35).

[198] *Ibid.*

[199] *Ibid.*

[200] *Ibid.*

Today the 'overwhelming majority of modern States claim to be democratic',[201] a claim contingent on adequate standards of judicial independence being attained in that State.[202] The desire to be seen as a 'democratising' or democratic state is based in part on the increased globalisation of the modern era, which created a greater interweaving of national and international politics.[203] This puts additional pressure on governments to be seen to be adhering to the global *status quo.* This is particularly true for newly independent States which may be anxious to be a credible member of the 'democratic community', given that '[d]emocracy bestows an aura of legitimacy on modern political life'.[204]

Emphasis from international organisations bestowing development funds, such as the World Trade Organisation[205] and the World Bank,[206] also encourages States to claim that those standards are being achieved regardless of the reality. Regardless of these claims,[207] over ten years after the creation of the Special Rapporteur on the Independence of Judges and Lawyers, problems securing judicial independence persist. In practice many States still fail to uphold standards of judicial independence,[208] correspondingly the mandate of the Special Rapporteur has been extended on a number of occasions.[209]

One of the purported aims of the Commonwealth of Independent States was the achievement of greater levels of democracy in its member states. Democratisation efforts of CIS through the 'deepening of democratic reforms'[210] include assurances that 'all persons shall be equal before the judicial system'.[211] Importantly this demands that 'everyone shall be entitled to a fair hearing within a reasonable time by an independent and impartial court'.[212]

Echoing the Soviet experience, however, in practice these aims have not been realised, and many principles providing for judicial independence have not been effectively executed. In fact, judicial reform has proven 'severely problematic in almost all post-Soviet countries'.[213] To this end, delegates at the Human Rights Committee have noted that that priority should be given to enforcing laws, not just writing them.[214] Similarly, as part of the attempt to achieve higher standards of judicial independence across Europe, the Organization for Security and Cooperation in Europe created the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus, and Central Asia.[215]

201 Calvert and Calvert (n11) 357; *see also* David Held, 'Democracy: From City-States to a Cosmopolitan Order' (1992) Special Issue, Political Studies 10, 10.

202 Russell (n2) 2.

203 Held (n201) 22.

204 *Ibid* 10.

205 WTO 'GATT' (n26), Article X (3).

206 See Hammergren (n25).

207 Calvert and Calvert (n11) 10.

208 Howard and Carey (n21) 286.

209 UN Human Rights Council, 'Mandate of the Special Rapporteur on the Independence of Judges and Lawyers' (18 June 2008) UN Doc A/HRC/8/52, §2, [29]; UNHRC 'Mandate of the Special Rapporteur on the Independence of Judges and Lawyers' (10 July 2014) UN Doc A/HRC/Res/26/7 [2].

210 Commonwealth of Independent States' Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms' (1995) preamble.

211 *Ibid* Article 6.

212 *Ibid.*

213 International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform. Asia Report No 150' (*International Crisis Group,* 2008) <https://d2071andvip0wj.cloudfront.net/150-kyrgyzstan-the-challenge-of-judicial-reform.pdf> accessed 21 February 2022, 1

214 Human Rights Committee, Human Rights Committee Concludes Consideration of Uzbekistan's Third Report (n10) §10, 11.

215 OSCE Office for the Democratic Institutions and Human Rights 'Judicial Independence in Eastern Europe, South Caucasus, and Central Asia: Challenges, Reforms and Ways Forward. Expert Meeting in Kyiv, 23–25 June 2010' (*OSCE,* 23–25 June 2010), <http://www.osce.org/odihr/71178?download=true> accessed 21 February 2022.

In several CIS member states the exclusive authority of the judiciary has not been adequately secured. In recent years, legislative amendments to secure the *de jure* exclusive authority of the Kazakh judiciary have been introduced. In particular, legislative amendments have moved the power to grant search and arrest away from the executive branch and to the judicial branch.[216] In addition, the Criminal Procedure Code was further amended to remove the power to grant extensions of custody from the Prosecutor's Office, and instead vest that power with the judiciary.[217] Similarly, in 2017, significant constitutional amendments meant that the President of Kazakhstan no longer had the power to veto decisions of the Constitutional Council.[218] However, significant problems remain. In particular, the Constitutional Council, the body which ensures the supremacy of the Kazakh constitution,[219] remains subject to significant influence from the President. The President retains the power to appoint three members of the seven members of the Council and has the power to appoint and dismiss the President of the Constitutional Council,[220] which commentators have noted gives President Nazarbayev the ability to 'significantly influence the work'[221] of the Council. In addition, even where domestic law has granted judiciaries exclusive authority in practice, those judiciaries are reluctant to challenge executive decisions and actions. In Tajikistan and Azerbaijan for example, both judiciaries have proven unwilling to exercise their exclusive authority over issues of civil liberties to challenge executive violations of human rights standards.[222]

In comparison, relatively great strides have been made securing the financial autonomy of CIS judiciaries. Generally, judicial branches are awarded an amount adequate enough to permit the completion of the day-to-day activities of the judiciary,[223] although in practice most remain dependent on the executive in this respect.[224] Both the Azerbaijani and Tajik judiciaries remain susceptible to the whim of the executive branch. The Azerbaijani judiciary has no guaranteed percentage of the government

[216] Criminal Procedure Code of the Republic of Kazakhstan (The Code of the Republic of Kazakhstan dated July 4 2014 No. 231) Article 53 (5–1)(8); Article 147(1).

[217] *Ibid* Article 55(1); Article 53(5).

[218] On Introducing Amendments and Additions to the Constitution of the Republic of Kazakhstan, The Law of the Republic of Kazakhstan dated March 10 2017 no. 51-VI 3PK, Article 1(18)

[219] Constitution of the Republic of Kazakhstan (1995, as amended 2017), Section VI. Constitutional Council, Article 72(1)(4).

[220] Government of the Republic of Kazakhstan 'Constitutional Council of the Republic of Kazakhstan: Answers to FAQs' (*Gov.KZ* 2022) <https://www.gov.kz/memleket/entities/ksrk/press/article/details/73223?lang=en> accessed 14 April 2022.

[221] Zhenis Kambayev, 'Recent Constitutional Reforms in Kazakhstan: A move towards Democratic Transition?' (2017) 42(4) Review of Central and East European law 294, 324–325; see also Nora Webb Williams and Margaret Hanson 'Captured Courts and Legitimized Autocrats: Transforming Kazakhstan's Constitutional Court' (2022) Law and Social Inquiry, 1–33.

[222] Freedom House 'Tajikistan: Nations in Transit 2021' (*Freedom House,* 2021) <https://freedomhouse.org/country/tajikistan/freedom-world/2021> accessed 21 February 2022; Fabio Belafatti 'The judicial system of Tajikistan and the situation of the opposition movement "Group 24": an assessment' (*Vilnius University,* 14 October 2015) <https://www.fairtrials.org/wp-content/uploads/TJK-judicial-Group-24-Final.pdf> accessed 21 February 2022, 8; International Bar Association's Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (*International Bar Association,* 2014) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=D168B0B4-C377-4EC7-A0B9-D029EF09A39C> accessed 21 February 2022, 50; Freedom House 'Azerbaijan: Nations in Transit 2021' (Freedom House, 2021) <https://freedomhouse.org/country/azerbaijan/freedom-world/2021> accessed 22 April 2022.

[223] Statement of Petr. P. Miklashevich, Chairman of the Constitutional Court of the Republic of Belarus 'Separation of powers and independence of Constitutional Court of Republic of Belarus' (*Council of Europe,* 2011) <http://www.venice.coe.int/WCCJ/Rio/Papers/BLR_Miklashevich_E.pdf> accessed 22 February 2022; American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (*American Bar Association*, December 2012) <https://www.americanbar.org/content/dam/aba/directories/roli/armenia/armenia_jri_vol_iv_english_12_2012.authcheckdam.pdf> accessed 24 April 2022, 39.

[224] International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213); Transparency Azerbaijan Advocacy and Legal Advice Center 'The Azerbaijani Judiciary' (*Transparency International,* 2014) <http://transparency.az/alac/files/JUDICIARY.pdf> accessed 22 February 2022; Dr Julinda Beqiraj and the European Commission for the Efficiency of Justice 'Access to Justice for Vulnerable Groups: Strengthening the efficiency and quality of the judicial system in Azerbaijan' (*Council of Europe* 2020) <https://rm.coe.int/access-to-justice-for-vulnerable-groups-in-azerbaijan-eng/1680a31544> accessed 13 April 2022.

budget,[225] and the Tajik judiciary has limited influence over the budget.[226] Whilst the Tajik judicial budget is based on proposals given by the Presidents of the Supreme Court and High Economic Court, they have no say in the ultimate figure awarded, and final budget is approved solely by the Government.[227] In this respect, problems have arisen in particular in Kyrgyzstan. Here in the 2006 and 2007 financial years, the Kyrgyz judiciary received less than fifty per cent of the allocated judicial budget.[228] In Kazakhstan, the Kazakh judiciary the judicial budget has not kept pace with the increased workload of the Kazakh judiciary and in 2020 the judicial budget accounted for a mere 0.47% of the Kazakh State expenses.[229]

Similarly, issues undermining judicial independence continue in CIS member states. In Kazakhstan,[230] Armenia,[231] Uzbekistan,[232] Azerbaijan,[233] Belarus,[234]

[225] Transparency Azerbaijan 'The Azerbaijani Judiciary' (n224); Transparency Azerbaijan 'National Integrity System Assessment: Azerbaijan' (*European Commission* 2014) <https://images.transparencycdn.org/images/2014_NISAzerbaijan_EN.pdf> accessed 13 April 2022, 12.

[226] ICJ 'Neither Check nor Balance: The Judiciary in Tajikistan' (*International Commission of Jurists* December 2020) <https://www.icj.org/wp-content/uploads/2020/12/Neither-Check-nor-Balance_Tajikisan_MR_ENG.pdf> accessed 13 April 2022.

[227] *Ibid.*

[228] International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213).

[229] Mark Beer 'Realities, Trends, and Prospects of an Improving Justice System: A Kazakhstan Case Study' (*Council of Europe,* January 2020) <https://rm.coe.int/supreme-court-of-kazakhstan-reforms-final-junel/16809ea631> accessed 13th April 2022.

[230] The President of the Republic of Kazakhstan appoints Judges and the Chairperson of the Supreme Court, Judges and the Chairpersons of the oblast courts, and Judges and Chairpersons of all other courts. See Constitution of the Republic of Kazakhstan (n219), Article 82(1)-(3); see also The Law of the Republic of Kazakhstan dated 4 December 2015 No 436-IV LRK, Article 3(2)-(3). This fact has attracted condemnation from the Special Rapporteur on the independence of judges and lawyers who noted that the 'President of the Republic retains crucial influence over the nomination process' see UNCHR 'Civil and Political Rights, including the questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Addendum: Mission to Kazakhstan' (11 January 2005) UN Doc E/CN.4/2005/60/Add.2, para 11.

[231] Upon the recommendation of the Council of Justice, the President appoints judges to the appeal courts, and first instance courts, and upon the recommendation of the National Assembly appoints judges to the Court of Cassation. See, The Constitution of the Republic of Armenia (1995), Chapter 3 'The President of the Republic of Armenia', Article 55(10)-(11). See also OSCE ODIHR 'Comparative Note on International Standards for Selection, Competencies, and Skills for Judges in Administrative Justice' (*OSCE* 4 December 2020) <https://www.legislationline.org/download/id/8944/file/04.12.20%20NOTE%20Kazakhstan%20Admin%20Justice%20FINAL%20for%20publication_eng.pdf> accessed 13 April 2022.

[232] Members of the judiciary are appointed by the Supreme Judicial Council of the Republic of Uzbekistan. However, the membership of the Supreme Judicial Council is largely controlled by the President, who proposes the Chairman on the Council (Law of the Republic of Uzbekistan 'About the Supreme Judicial Council of the Republic of Uzbekistan' 6 April 2017 Law No ZRU-427, Article 5(1)), the Deputy Chairman of the Council is appointed by the President ('On Amendments and Additions to the Law of the Republic of Uzbekistan: On the Supreme Council of the Republic of Uzbekistan' 20 September 2021 Law No ZRU-717), and the eleven members of the Council are proposed by the Chairman, who is proposed by the President ('On Amendments and Additions to the Law of the Republic of Uzbekistan 'On the Supreme Judicial Council of the Republic of Uzbekistan' 24 July 2021 Law No ZRU-717).

[233] Judges are appointed to the Constitutional Court by the Milli Majilis of Azerbaijan on the proposal of the President of Azerbaijan (The Law of Azerbaijan Republic on Constitution Court, Chapter III Status of Judges of Constitutional Court, Article 12.1; The Constitution of the Republic of Azerbaijan (1995), Chapter VI, Article 109(9)). The President also submits proposals for the appointment of judges to the Supreme Court of the Azerbaijan Republic, and the Courts of Appeal of the Azerbaijan Republic (The Constitution of the Republic of Azerbaijan (1995), Chapter VI: Article 109(9)). Finally, the President appoints judges to the other courts of the Azerbaijan Republic, including first instance courts (The Constitution of the Republic of Azerbaijan, Chapter VI, Article 109(9)).

[234] The President of Belarus appoints judges to the Supreme Court, (Constitution of the Republic of Belarus (1994), Article 84(10)) upon the recommendation of the Minister of Justice and the Chief Justice of the Supreme Court. However, after the Constitutional Referendum of 2022, the power to appoint members of the Supreme Court will instead be given to the All-Belarusian People's Assembly (under Article 112 of the Proposed Constitution). In practice, however, the All-Belarusian People's Assembly will remain under the influence of the President, who will be the primary member of the Assembly (under Article 89 of the Proposed Constitution). The President also appoints judges of other courts (Constitution of the Republic of Belarus, Article 84(10)). This fact has attracted condemnation from the Special Rapporteur on the independence of judges and lawyers who noted that 'The Special Rapporteur considers that the placing of absolute discretion in the President to appoint and remove judges is not consistent with judicial independence'. See UNCHR 'Civil and Political Rights, Including The Questions Of Independence Of The Judiciary, Administration Of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers Dato: Mission to Belarus' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42' (1 February 2001) UN Doc E/CN.4/2001/65, 4.

Tajikistan,[235] and Kyrgyzstan[236] the President of the respective State has significant powers in the selection and appointment of members of the judiciary. Additionally in many States the process of selection and appointment continues to lack transparency. Issues are apparent in the selection and appointment process in Tajikistan[237] and Azerbaijan,[238] where the opaque nature of the judicial selection and appointment process has raised concerns. Both the Human Rights Committee and the International Commission of Jurists have noted that the executive branch in Tajikistan clearly exerts significant pressure over the selection process at different key stages of the process, such that the President can overrule a judicial selection decision without any reasoning.[239] In Azerbaijan, there have been reports that the subjective aspect of the appointment process permitted the rejection of 'high-scoring' candidates because of political factors.[240]

Standards of judicial tenure across CIS member states are also very variable. In Armenia,[241] Azerbaijan,[242] Kazakhstan,[243] and Kyrgyzstan[244] tenure for judges until a specific retirement age has been introduced.[245] Nonetheless, some concerns about the security of that tenure remain. In Azerbaijan,[246] Belarus,[247] and

[235] The President of Tajikistan presents the Majlisi Milli with candidates for the Constitutional Court, the Supreme Court, and High Economic Court (Constitution of Republic of Tajikistan (1994) with Amendments through 2016, Chapter Four: The President, Article 69(8)). The President appoints the judges of military courts, the court of the Gorno-Badakhshan Autonomous Oblast, oblasts (regional courts), the city of Dushanbe, the city, and rayon courts, judges of the economic court of Gorno-Badakhshan Autonomous Oblast, oblasts, and the city of Dushanbe (Constitution of Republic of Tajikistan 1994, Chapter Four: The President, Article 69(12)).

[236] The President of Kyrgyzstan submits to the Jogorku Kenesh (the Supreme Council of Kyrgyzstan) candidates for election as judges of the Supreme Court at the proposal of the Council of the Selection of Judges (Constitution of the Kyrgyz Republic, Section III: The President of the Kyrgyz Republic, Article 64(3)(1)). The President also appoints local court judges at the proposal of the Council on the Selection of Judges (Constitution of the Kyrgyz Republic, Section III: The President of the Kyrgyz Republic, Article 64(3)(3)). Under proposed Constitutional changes the Council on the Selection of Judges is being replaced by the Council of Judges, but the President will continue to submit candidates for the Supreme Court and the Constitutional Council of the Supreme Court to the Jogorku Kenesh (Draft Law 'On the Constitution of the Kyrgyz Republic', Article 70(4)(1)), and will appoint local court judges (Draft Law 'On the Constitution of the Kyrgyz Republic', Article 70(4)(3)). The Draft Constitution is available via the European Commission for Democracy through Law 'Kyrgyzstan: Draft Law 'On the Constitution of the Kyrgyz Republic' (*Council of Europe*, 23 February 2021) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)017-e> accessed 13 April 2022.

[237] American Bar Association Rule of Law Initiative 'Judicial Reform Index for Tajikistan: December 2008' (*American Bar Association* December 2008) <https://www.americanbar.org/content/dam/aba/directories/roli/tajikistan/tajikistan_jri_12_2008_en.authcheckdam.pdf> accessed 27 April 2022, 18.

[238] International Bar Association Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (n222) 45.

[239] ICJ 'Neither Check nor Balance' (n226), 39; UNHRC 'Concluding Observations on the Third Periodic Report of Tajikistan' (22 August 2019) UN Doc CCPR/C/TJK/CO/3, para 37.

[240] International Bar Association Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (n222), 18.

[241] Constitution of the Republic of Armenia (n231) Article 116(8) - Judges shall serve in office until reaching the age of 65 and judges of the Constitutional Court shall serve in office until reaching the age of 70.

[242] Law on Courts and Judges (1997 as amended 2021), Chapter XVII Authorities of Judges, Article 96 (Aze).

[243] On Judicial System and Status of Judges in the Republic of Kazakhstan N132 (2000) as amended by the Constitutional Law of the Republic of Kazakhstan N559-IV, Article 24(1); Constitution of the Republic of Kazakhstan (n230), Article 79; see also The European Commission for the Efficiency of Justice 'Evaluation of the judicial systems (2018–2020): Kazakhstan' (*The Council of Europe* 24 September 2020) <https://rm.coe.int/en-kazakhstan-2018/16809fe312> accessed 16 April 2022, 81–82.

[244] Constitution of the Kyrgyz Republic (n236), Section VI: Judicial Power in the Kyrgyz Republic, Articles 94(6) and 94(8)); it is worth noting that the Kyrgyz Constitution is currently under review. However, under the new Constitution there remains tenure until the retirement age of 70 years old, see European Commission for Democracy through Law 'Opinion No 1021/2021 Kyrgyzstan: Draft Law on the Constitution of the Kyrgyz Republic' (*Council of Europe* 23 February 2021) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)017-e> accessed 16 April 2022, Article 95(5), (6), and (8).

[245] The law on judicial tenure is currently in a state of flux in Uzbekistan and lifetime tenure is being introduced as part of a number of judicial reform initiatives. See generally International Crisis Group 'Uzbekistan: In Transition. Briefing No. 82' (*International Crisis Group*, 29 September 2016) <https://www.crisisgroup.org/europe-central-asia/central-asia/uzbekistan/uzbekistan-transition> accessed 22 February 2022.

[246] Law of the Azerbaijan Republic 'About Courts and Judges' 10 June 1997, Law No 310-IQ, Article 96.

[247] Code of the Republic of Belarus on Judicial Systems and the Status of Judges No. 139-Z (June 29 2006 as amended December 12 2020), Article 99.

Kyrgyzstan[248] a probationary system is in place that means that new judges have a primary tenure of five years. In Belarus in particular, the probationary process has come under criticism from the Organization for Security and Co-operation in Europe, which notes this mechanism creates a loophole leaving the career of probationary judges 'effectively at the discretion of the executive'.[249] In fact, in recent changes to the Belarusian Code on the Judiciary, the tenure of judges was amended so that life tenure would not automatically be afforded after the initial five-year probation. Instead, Article 81(3) states that after the five-year probation judges '*may* be reappointed for a new term or for life' (emphasis added),[250] which leaves judges dependent on reappointing authorities and may create a subservient judiciary.[251] Comparatively in Uzbekistan, judges are appointed for an initial term of five years, reappointed for a second term of ten years, before finally being reappointed until the mandatory retirement age.[252] This reliance on the executive for reappointment has left judges feeling vulnerable, with a significant number reporting their belief that reaching a lawful decision in a case, in spite of external pressure, might negatively impact their chances of re-election.[253]

In Belarus, the tenure of judges is further undermined by the Judicial Code, which permits the President to open disciplinary proceedings against any judge[254] and to impose 'any disciplinary measure on any judge without instituting disciplinary proceedings'.[255] According to the Organization for Security and Co-operation in Europe disciplinary measures can include dismissal, giving the President '*carte blanche*'[256] powers to remove judges. Similarly, historically in Armenia tenure has been comparatively undermined by executive influence, and numerous reports of politically motivated dismissals of judges from office have been reported.[257] This legacy has caused significant concern in recent months when, following a decision to release an opposition figure from detention, the Armenian Minister of Justice called for a mass dismissal of judges.[258]

[248] Constitution of the Kyrgyz Republic (n236), Section VI: Judicial Power in the Kyrgyz Republic, Articles 94(6) and 94(8)).

[249] Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus (March-July 2011)' (*Organisation for Security and Cooperation in Europe*, 2011) <http://www.osce.org/odihr/84873?download=true> accessed 22 February 2022, 34.

[250] Judicial Code of Belarus (n247) Article 81(3).

[251] Elliot Bulmer 'Judicial Tenure, Removability, Immunity, and Accountability' (*International Institute for Democracy and Electoral Assistance*, 2017) <https://www.idea.int/sites/default/files/publications/judicial-tenure-removal-immunity-and-accountability-primer.pdf> accessed 14 April 2021, 8.

[252] Law of the Republic of Uzbekistan 'About Courts' (28 July 2021) No. RK-703, Article 71.

[253] Botirjon Kosimov 'Judicial Tenure and its role in securing Judicial Independence: Practices from Uzbekistan and the United States' (2021) 3(4) The American Journal of Political Science Law and Criminology 125, 128.

[254] Judicial Code of Belarus (n247) Chapter 12: Suspension, Renewal, and Termination of Powers of Judges, Article 115.

[255] *Ibid* Article 112; for more detail on this see UNGA 'Situation of human rights in Belarus: Note by the Secretary General' (17 July 2020) UN Doc A/75/173, para 21

[256] Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus' (n249) 36.

[257] American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (n223) 45–46; Transparency International Anti-Corruption Center 'European Neighbourhood Policy: Monitoring Armenia's Anti-Corruption Commitments 2010' (*Transparency International,* 2011) <https://issuu.com/transparencyinternational/docs/2010_enparmenia_en?mode=window&backgroundColor=%23222222> accessed 22 February 2022, 9; see also generally Grigor Mouradian 'Independence of the Judiciary in Armenia' in Anja Seibert-Fohr (ed) Judicial independence in Transition (springer-Verlag Berlin and Heidelberg GmbH & Co. K 2012), 1197–1253.

[258] Lillian Avedian 'The ruling party is restricting judicial independence, critics warn' (*The Armenian* Weekly, 16 February 2022) <https://armenianweekly.com/2022/02/16/the-ruling-party-is-restricting-judicial-independence-critics-warn/> accessed 16 April 2022.

On the other hand, the salaries of judges in CIS member states have drastically improved since the Soviet era.[259] Whilst there are still complaints that salaries are low, especially in comparison to their Western counterparts,[260] generally judges are now paid comparably to, or higher than, other public sector employees. Nonetheless, in Azerbaijan,[261] Kyrgyzstan,[262] Tajikistan,[263] and Uzbekistan[264] the relatively low salaries have been cited as a factor in the continued corruption in the respective judicial branches. The U.N. Special Rapporteur has also raised concerns that judicial salaries of Kazakh judges remain a 'quasi exclusive domain of the President of the Republic',[265] and the OECD has recommended that salary rates be specified in law to help ensure the independence of judges.[266] Nonetheless, in general, steps have been taken to secure judicial independence through the provision of adequate judicial salaries across CIS member states.

Unfortunately, the same progress has not been made in precluding executive interference in judicial decision-making. In fact, this element of individual independence has shown little improvement. In this respect, with respect to the Azerbaijani judiciary, US AID concluded 'although the Constitution provides for an independent judiciary, judges were not functionally independent of the executive branch'.[267] Similarly Freedom House noted that the Kazakh judiciary continues to be 'instrumentalized to persecute and intimidate dissent'.[268] A number of themes are apparent across CIS member states in this regard.

The misuse of the judiciary by the executive branch as a political weapon continues across a number of CIS States. In Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, and Tajikistan the courts have repeatedly been used as a tool to suppress political opposition figures.[269] In Kazakhstan, Freedom House noted that in 2012 all cases

[259] *See generally* American Bar Association Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (*American Bar Association*, December 2008) <https://www.americanbar.org/content/dam/aba/directories/roli/kazakhstan/kazahstan-jri-2004.authcheckdam.pdf> accessed 27 April 2022, 25; American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (n223), 41–42; Courts and Judges Act (Aze) (n242), Chapter XVII Authorities of Judges, Articles 106–107; Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus' (n249), 36; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n237), 40–41; International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213), 10.

[260] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n259), 24.

[261] EMDS et al 'Azerbaijan: Universal Periodic Review – Third Cycle: Submission on Corruption and Human Rights in Azerbaijan' (*United Nations*, October 2017) <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=5182&file=CoverPage> accessed 10 April 2022.

[262] Jasmine Cameron 'Kyrgyzstan: Why human rights have been declining over the last 20 years and what happened to the 'Switzerland' of Central Asia?' (*The Foreign Policy Centre* 1 March 2021) <https://fpc.org.uk/kyrgyzstan-why-human-rights-have-been-declining-over-the-last-20-years-and-what-happened-to-the-switzerland-of-central-asia/> accessed 20 April 2022; International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213), 9.

[263] ICJ 'Neither Check nor Balance' (n226), 60; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n237), 41.

[264] American Bar Association Rule of Law Initiative 'Judicial Reform Index for Uzbekistan: 2002' (*American Bar Association* 2002) <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan017570.pdf> accessed 22 February 2022, 27.

[265] UN ECOSOC 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Mission to Kazakhstan' (n230) 11.

[266] OECD 'Istanbul Anti-Corruption Action Plan, Fourth Round of Monitoring: Kazakhstan Progress Update (*OECD* 2019) <https://www.oecd.org/corruption/acn/OECD-ACN-Kazakhstan-Progress-Update-2019-ENG.pdf> accessed 20 April 2022.

[267] US Department of State '2020 Country Reports on Human Rights Practices: Azerbaijan' (*US Department of State,* 30 March 2021) < https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/azerbaijan/> accessed 24 April 2022.

[268] Freedom House 'Kazakhstan: Nations in Transit 2021' (*Freedom House*, 2021) <https://freedomhouse.org/country/kazakhstan/nations-transit/2021> accessed 24 April 2022.

[269] US Department of State '2020 Country Reports: Azerbaijan' (n267); UNHRC 'Situation of human rights in Belarus: Report of the Special Rapporteur on the situation of human rights in Belarus, Anaïs Marin' (2020) UN Doc A/75/173; Annette Bohr et al *Kazakhstan: Tested by Transition* (Chatham House, 2019), vi; International Federation for Human Rights 'Kyrgyzstan: Arrest and judicial harassment of three anti-war protesters and their lawyer' (*FIDH* 2022)

involving politically motivated charges resulted in a conviction by the courts.[270] In Tajikistan the courts have been used to silence political opponents of the executive regime, [271] to suppress leaders and advocates of various religious minorities,[272] and to pressure human rights lawyers.[273] Similarly, the Special Rapporteur for the Situation in Belarus has highlighted the judicial harassment of human rights defenders, journalists, and bloggers in the country.[274] Recently, in Kyrgyzstan the courts have been weaponised to arrest and prosecute human rights defenders who were peacefully protesting the Russian invasion of Ukraine.[275] The prevalence of executive misuse of judicial power is reflected in the Freedom House scores assigned to these States for judicial freedom, which range from between 1[276] and 1.5[277] (1.00 representing the lowest level of judicial independence possible), with Armenia being the only State to break the threshold of 2, with a score of 2.5.[278]

The influence of the executive over the judicial branch is also apparent in respect to acquittal rates. In all States in this study the acquittal rates are extremely low,[279] but in Azerbaijan,[280] Belarus,[281] and Tajikistan[282] the acquittal rates of those accused of a criminal offence fall below 1%. In particular, the acquittal rates in Belarus fell to 0.3% in 2019.[283] In most instances the reluctance to acquit is due to fear of retaliation for unfavourable verdicts.[284] In particular, judges fear summary dismissals, discipline, and the removal of opportunities for promotion. In this respect the International Commission of Jurists has criticised the Kazakh judiciary for the use of disciplinary sanctions and

<https://www.fidh.org/en/issues/human-rights-defenders/kyrgyzstan-arrest-and-judicial-harassment-of-three-anti-war> accessed 24 April 2022; US Department of State '2020 Country Reports on Human Rights Practices: Tajikistan' (*US Department of State*, 2020) <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/tajikistan/> accessed 24 April 2022.

270 Freedom House 'Kazakhstan: Nations in Transit 2021' (n268).

271 Government critics have been prosecuted for crimes including fraud and extremist activity. See Freedom House 'Tajikistan: Nations in Transit 2022' (*Freedom House*, 2022) <https://freedomhouse.org/country/tajikistan/nations-transit/2022> accessed 22 February 2022; see generally Belafatti 'The Judicial System of Tajikistan' (n222).

272 In particular Muslims and Jehovah's Witnesses have been prosecuted by the Tajik courts see Freedom House 'Tajikistan: Nations in Transit 2022' (n271).

273 Human Rights Lawyers have been arrested for a number of crimes including fraud, terrorism, corruption, and bribery. See Freedom House 'Tajikistan: Nations in Transit 2022' (n271271).

274 UNHRC 'Situation of human rights in Belarus: Report of the Special Rapporteur on the situation of human rights in Belarus, Anaïs Marin' (2020) UN Doc A/75/173

275 FIDH 'Kyrgyzstan: Arrest and Judicial Harassment' (n269).

276 See Freedom House 'Azerbaijan: Nations in Transit 2021' (n222). Azerbaijan scored the lowest possible score of 1 out of 7; Freedom House 'Belarus: Nations in Transit 2022' (*Freedom House*, 2022) <https://freedomhouse.org/country/belarus/nations-transit/2022> accessed 24 April 2022. Belarus scored 1 out of 7; Freedom House 'Tajikistan: Nations in Transit 2022' (n222). Tajikistan scored 1 out of 7.

277 See Freedom House 'Kazakhstan: Nations in Transit 2021' (n268). Kazakhstan scored 1.25 out of 7; Freedom House 'Uzbekistan: Nations in Transit 2021' (*Freedom House,* 2021) <https://freedomhouse.org/country/uzbekistan/nations-transit/2021> accessed 24 April 2022. Uzbekistan scored 1.25 out of 7; Freedom House 'Kyrgyzstan: Nations in Transit 2021' (*Freedom House,* 2021) <https://freedomhouse.org/country/kyrgyzstan/nations-transit/2021> accessed 24 April 2022. Kyrgyzstan scored 1.50 out of 7.

278 Freedom House 'Armenia: Nations in Transit 2021' (*Freedom House,* 2021) <https://freedomhouse.org/country/armenia/nations-transit/2021> accessed 24 April 2022.

279 *Ibid*, acquittal rates in Armenia have been described as 'extremely low'; Alexei Trochev 'Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts' (2017) 50(1) Cornell International Law Journal 107, 127.

280 In 2018 the acquittal rate in Azerbaijan was 0.7% (in 89 cases out of 12,539), see Aytan Mammadova 'Why do the Azerbaijan Courts not acquit' (*Open Azerbaijan*, 12 July 2019) <http://openazerbaijan.org/en/blog/az-rbaycan-m-hk-m-l-ri-niy-b-ra-t-vermir/> accessed 24 April 2022.

281 In 2019 of approximately 39,000 cases, there were 114 acquittals giving an acquittal rate of circa 0.3%. See US Department of State '2021 Country Reports on Human Rights Practices: Belarus' (*US Department of State,* 2021) <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/belarus> accessed 24 April 2022.

282 Whilst official statistics are not available, the ICJ has noted that the acquittal rate in Tajikistan appears to be close to zero, see ICJ 'Neither Check nor Balance' (n226), 63.

283 US Department of State '2021 Country Reports on Human Rights Practices: Belarus' (n281).

284 Trochev (n279) 122–123; ICJ 'Neither Check nor Balance' (n226), 64.

threats of criminal prosecution against a judge who refused to issue convictions in two cases despite demands from senior judges and the procuracy.[285] In Armenia, this pressure has led judges to work with prosecutors to convict defendants,[286] and in Tajikistan this pressure has led judges who fear they cannot return a guilty verdict to send back the case for additional investigation to avoid acquittal.[287]

In Belarus executive authority over the judiciary is particularly pronounced and includes both direct and indirect influence. Judges are pressured to reach 'correct decisions', knowing that where judicial decisions are considered 'too lenient' they may be sanctioned with a reduction of up to 50% of their salaries.[288] Additionally the consistent 'overt presence'[289] of members of the executive branch in courtrooms has been categorised by OSCE as amounting to at least intimidation, 'if not outright interference'.[290]

Influence on the judicial decision-making process is also apparent from within the judicial branch. In Tajikistan it is commonplace for court presidents to interfere with cases before ordinary judges.[291] Similarly, in Uzbekistan, the Court presidents have been described as having 'excessive influence' over the decisions of Uzbek judges.[292]

Finally, corruption also remains a significant factor undermining judicial independence in modern CIS States. Corruption remains a significant problem in the judicial systems in Kazakhstan,[293] Azerbaijan,[294] Tajikistan[295] and Kyrgyzstan.[296] The US Department of State has noted that in Kazakhstan 'corruption is evident at every stage of the judicial process'.[297] With respect to the Kyrgyz judiciary, the preponderance

[285] International Commission of Jurists 'Disciplinary Action against Judge Zhumasheva is an attack on Judicial Independence' (*ICJ,* 2012) <https://www.icj.org/kazakhstan-disciplinary-action-against-judge-zhumasheva-is-an-attack-on-judicial-independence/> accessed 22 February 2022.

[286] Freedom House 'Armenia: Nations in Transit 2021' (n278).

[287] ICJ 'Neither Check nor Balance' (n226), 65; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n237), 30.

[288] Rechters voor Rechters 'Judge in Exile: State of Judiciary in Belarus is 'Deplorable'' (*Rechters voor Rechters,* 10 August 2021) <https://www.rechtersvoorrechters.nl/judge-in-exile-state-of-judiciary-in-belarus-is-deplorable/> accessed 24 April 2022.

[289] Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus' (n249), 39.

[290] *Ibid*, 38–39.

[291] ICJ 'Neither Check nor Balance' (n226), 33.

[292] United Nations Special Rapporteur on the independence of judges and lawyers, Mr Diego García-Sayán **'Preliminary Observations on the official visit to Uzbekistan (19–25 September 2019)' (United Nations 26 September 2019) <https://www.ohchr.org/en/statements/2019/09/preliminary-observations-official-visit-uzbekistan19-25-september-2019> accessed 24 April 2022.**

[293] USAID noted that the high-level corruption in the judiciary was one of the critical challenges the Kazakh judiciary faced when gaining public trust, see USAID 'Final Performance Evaluation of Kazakhstan Judicial Program' (*US Department of State,* 2019) <https://pdf.usaid.gov/pdf_docs/PA00WGCV.pdf> accessed 27 April 2022, 26; US Department of State '2020 Country Reports on Human Rights Practices: Kazakhstan' (*US Department of State,* 2020) <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kazakhstan/> accessed 24 April 2022; Diplomacy in Action 'Kazakhstan 2015 Human Rights Report' (United States Department of State, 18 May 2016) <http://www.state.gov/documents/organization/253177.pdf> accessed 22 February 2022; Richard A. Remias 'Judicial Reform Activities Evaluation for Kazakhstan' (*USAID,* April 2005) <http://pdf.usaid.gov/pdf_docs/Pdacf229.pdf> accessed 22 February 2022.

[294] Helsinki Foundation for Human Rights *The Functioning of the Judicial System in Azerbaijan and its Impact on the Right to a Fair Trial of Human Rights Defenders* (Netherlands Helsinki Committee 2016), 7; EMDS et al 'Azerbaijan: UPR' (n261) 16; International Bar Association's Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (n222) 47.

[295] The ICJ noted that there is a 'significant gap between the official salaries of judges in Tajikistan and the actual cost of living . . . [which] are visibly out of step with the affluent lifestyles demonstrated by some of the judges'. See, ICJ 'Neither Checks nor Balances' (n226), 60; see also US Department of State '2021 Country Reports on Human Rights Practices: Tajikistan' (*US Department of State* 2021) <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/tajikistan/> accessed 27 April 2022; Belafatti 'The Judicial System of Tajikistan' (n222), 1.

[296] Freedom House has noted that 'Corruption among judges, who are generally underpaid, is already widespread'. See Freedom House 'Kyrgyzstan: Nations in Transit 2021' (n277). Guilherme France 'Kyrgyzstan: Overview of corruption and anti-corruption' (*Transparency International,* 2019) <https://www.jstor.org/stable/pdf/resrep20462.pdf?refreqid=excelsior%3Ad0666da0a6b5b6b3cd45aa8a86083f40&ab_segments=&origin=> accessed 24 April 2022, 7; International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213) 9.

[297] US Department of State '2020 Country Reports: Kazakhstan' (n293).

of corruption is so great that 28% of the Kyrgyz population believes that *all* judges and magistrates are corrupt.[298] In respect of Azerbaijan, GRECO has suggested that priority should be given to establishing a format for judges to disclose their assets and ensure that judges are given regular anti-corruption training.[299]

CONCLUSION: THE CONTINUING PROBLEM WITH JUDICIAL INDEPENDENCE

In some respects, CIS member states have made great steps in securing judicial independence. In broad terms institutional independence is far more respected in CIS States than it was in the Soviet Union. Generally, the exclusive authority of judicial branch seems to be upheld to a far greater extent than under the Communist regime of the USSR. Additionally, the financial security of the judicial branches in CIS States seems to be adequately attained, notwithstanding the fact that this security has not been met with the required standard of autonomy.

Aspects of individual independence have also improved, and in particular judicial selection and appointment processes, judicial salaries, and to a lesser extent, standards of judicial tenure, are far more adequate than those under the Soviet government. Nonetheless, despite claims from CIS governments that standards of judicial independence are being realised in these States,[300] in practice areas of serious concern remain. In fact, over the last five years, Freedom House has concluded that Judicial Independence has only improved in one State in this study,[301] whereas it has remained the same in three States,[302] and has deteriorated in the remaining three States.[303] In particular, the repeated exertion of external influence over the judicial decision-making process remains a prevalent factor undermining judicial independence. Furthermore, incidents of corruption remain rife.[304]

There are a number of factors that have contributed to the failure to secure *de facto* judicial independence in CIS member states. The traditions of democracy, separation of powers, and judicial independence in these States are comparatively young.[305] There is no strong foundation on which to build these principles, and they are not ingrained in judicial or executive behaviour. Instead, these judiciaries are built on, and have

[298] France (n296) 7. In addition a further 34% believed that the majority of judges and magistrates are corrupt.

[299] Group of States against Corruption (GRECO) 'Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors. Compliance report: Azerbaijan' (*Council of Europe* 17 March 2017) <https://rm.coe.int/16806fe9f2> accessed 22 February 2022, 10.

[300] Bodnar and Schmidt (n10) 292–293; *see also* the statements of Mr Rakhmonov in Human Rights Committee Consideration of Uzbekistan's Third Report (n10).

[301] In Uzbekistan, between 2016–2021, the Freedom House score for Judicial Framework and Independence rose from 1.00 to 1.25. See Freedom House 'Uzbekistan: Nations in Transit 2021' (n277).

[302] In Belarus the Freedom House score for Judicial Framework and Independence remained at the lowest possible score of 1.00 between 2016–2022. See Freedom House 'Belarus: Nations in Transit 2022' (n276); In Azerbaijan the Freedom House score for Judicial Framework and Independence remained at the lowest possible score of 1.00 between 2016–2022. See Freedom House 'Azerbaijan: Nations in Transit 2022' (n222). In Armenia, the Freedom House score for Judicial Framework and Independence remained at 2.50 between 2016–2022. See Freedom House 'Armenia: Nations in Transit 2022' (n278).

[303] In Kazakhstan, the Freedom House score for Judicial Framework and Independence fell from 1.5 to 1.25 between 2016 and 2021. See Freedom House 'Kazakhstan: Nations in Transit 2021' (n268). In Kyrgyzstan, the Freedom House score for Judicial Framework and Independence fell from 1.75 to 1.5 between 2016 and 2021. See Freedom House 'Kyrgyzstan: Nations in Transit 2021' (n277). In Tajikistan, the Freedom House score for Judicial Framework and Independence fell from 1.25 to 1.00 between 2016 and 2021. See Freedom House 'Tajikistan: Nations in Transit 2021' (n222).

[304] See pages 33–34.

[305] Bodnar and Schmidt (n10), 291.

inherited,[306] the legacy of the USSR. Indeed, many aspects of the Soviet mentality are still visible as undercurrents in modern CIS judicial thinking. In particular, vestiges of deference to the procuracy[307] and executive,[308] and the idea that judges are 'public officials' of the government[309] remain apparent. It is unsurprising that many of the problems that afflicted the Soviet judiciary continue to impact judiciaries built upon that foundation. For judicial independence measures to be truly effective[310] there must be recognition from both the executive and the judiciary that an important role of the judicial branch is that of gatekeeper to *ultra vires* executive or legislative action.[311] This shift in attitude will inevitably take some time. As Bodnar and Schmidt concluded, 'rule of law and judicial independence are features of a democratic State that cannot be achieved all at once'.[312]

Long-term shifts in attitude will need to occur 'from the ground up'. This demands investment in the judicial branch. In several CIS member states, some judges still live in relative poverty,[313] and others are paid less than members of the procuracy and police.[314] Until judicial salaries and judicial buildings reflect the prestige of the judicial position, there will not be a culture that condemns behaviour that brings the judiciary into disrepute.[315] Additional investment in judicial education,[316] in particular ensuring that judges are effectively educated as to their role in the separation of powers and their responsibility to operate as an objective forum, will help to erode ingrained attitudes.

The problems securing an effective balance between judicial independence from the executive and judicial accountability for incidents of corruption were apparent in the Soviet judiciary. Those problems remain conspicuous in CIS States. On the one hand incidents of external influence and interference in the judiciary demonstrate that *de facto* judicial independence requires far greater protection. On the other hand, the pervasive nature of judicial corruption demonstrates that increased monitoring of the judicial branch is necessary to secure judicial accountability.

The Soviet judiciary undermined judicial independence in a variety of ways, eroding both institutional and individual independence. The CIS experience has not markedly improved. Whilst significant steps towards securing aspects of institutional and individual independence have been achieved, in practice the continued violations of individual independence, in particular incidents of external interference and corruption, completely undermine the entire standard. One cannot in good faith conclude that adequate steps towards judicial independence are being undertaken in a State where a judiciary has financial security, but the executive regularly dictates the outcome of cases. In this respect, governments that violate standards of judicial independence benefit from the failure of the international community to propose 'sufficiently detailed,

[306] USAID 'Kazakhstan Judicial Assistance Project: Annual Report 2006' (USAID 2006) <http://pdf.usaid.gov/pdf_docs/Pdacj359.pdf> accessed 22 February 2022, 29.

[307] ABA Rule of Law Initiative 'Judicial Reform Index in Armenia' (n223), 59.

[308] US AID 'Kazakhstan Judicial Assistance Project' (n306), 29.

[309] Marina Shin and others 'Implementation of judicial in Uzbekistan and Kazakhstan in the rule of law context' (2004) 46(6) Managerial Law 86, 95.

[310] UN ECOSOC 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Mission to Kazakhstan' (n230), 112.

[311] Forsyth (n3), 122–140.

[312] Bodnar and Schmidt (n10), 291.

[313] Shin and others (n309) 94; EMDS et al 'Azerbaijan: UPR' (n261); Cameron (n262); ICJ 'Neither Checks nor Balances' (n226) 60.

[314] *Ibid.*

[315] Robertson (n154) 107–110.

[316] Bodnar and Schmidt (n10) 293.

internationally recognized rules (sic)'[317] and the failure to recognise the intricacies of the doctrine.

Finally, both the CIS and Soviet experience demonstrate the culture of secrecy that surrounds incidents of non-independence. The executive branch of the USSR went to great pains to illustrate judicial independence, making statements regarding its implementation,[318] and enacting legislation that should have effectively protected that standard.[319] Similarly in CIS States there has been comprehensive enactment of legislation purportedly protecting judicial independence. Furthermore, members of various CIS governments have made numerous statements emphasising their respect for judicial independence.[320] Indeed, members of affected judiciaries deny the existence of problems undermining judicial independence.[321]

The experience of the Soviet judiciary demonstrates that *de jure* provisions are insufficient on their own to secure *de facto* judicial independence. It further demonstrates that judicial independence is a standard that is vulnerable to subversion in a plethora of ways. This remains true in CIS member states. There is room for the improvement of legislation providing for judicial independence in a number of CIS States,[322] including the provision of blanket lifetime tenure, adequate protection from executive dismissal or discipline, and true transparency in selection and appointment of judges.[323] The real task however is changing social, executive, and judicial attitudes to judicial independence, and ensuring any provisions are effective in practice.

[317] *Ibid* 298.

[318] Boylan (n67) 1330.

[319] Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (n73) Article 153; Fundamental Principles on Court Organization of the USSR (n72) Article 10; Fundamental Principles on Court Organization of the USSR (n72) Articles 4 and 5; Law of the USSR: On the Status of Judges (n72) Article 5(2).

[320] Bodnar and Schmidt (n10) 292–293; *see also* the statements of Mr Rakhmonov in Human Rights Committee Consideration of Uzbekistan's Third Report (n10).

[321] See ABA Rule of Law Initiative 'Judicial Reform in Tajikistan' (n237) 55.

[322] Bodnar and Schmidt (n10) 289.

[323] Shin and others (n309), 95.