

ICJ Recommendations on the Independence of the Legal Profession in the Republic of Tajikistan

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1. Introduction: ICJ seminar on reform of the Tajikistan legal profession

On 18 December 2015, the International Commission of Jurists (ICJ) held a round table seminar in Dushanbe on the reform of the legal profession in the Republic of Tajikistan. International experts took part in the discussion in order to contribute to the national debate on the reform of the legal profession currently underway in Tajikistan and to share comparative experiences from their countries. Participants discussed issues of law and practice pertinent to the reform of the legal profession. They included principles of the independence and self-governance of bar associations, the qualification process for lawyers and disciplinary action.

The experts contributing to the discussion included: Justice Tamara Morschakova, an ICJ Commissioner and former Judge of the Constitutional Court of the Russian Federation; Olga Swartz, a legal scholar from the Russian Federation and one of the drafters of the *Law "On Advokatura"* in the Russian Federation; Daniyar Kanafin, a lawyer from Kazakhstan and a member of the Board of the Almaty and Republican Bar Associations of Kazakhstan; Gulniza Kozhomova, President of the Bar Association of the Kyrgyz Republic; Almaz Osmanova, Member of the Board of the Bishkek Bar Association (Kyrgyz Republic); Jeroen Brower, Chair of the Ethics Commission of the Dutch Bar Association; and lawyers and other stakeholders from Tajikistan. The Organization for Security and Cooperation in Europe's Office in Tajikistan (OSCE OiT) provided support in facilitation of the event.

During the discussion, lawyers from Tajikistan participating in the event requested the ICJ to analyse the current situation and provide recommendations on the difficulties encountered by the legal profession in the course of the reform. The ICJ accepted the request and decided to provide this brief description, analysis and set of recommendations in order to support the creation of a strong and independent legal profession in Tajikistan, one that is organized and operates based on international law and standards on the role of lawyers.

2. The reform of the legal profession in Tajikistan

Adoption of the Law “On Advokatura” and amendments

A reform of the legal profession establishing a unified Bar Association—the Union of Lawyers—is currently underway in Tajikistan. Prior to this reform, no unified professional organization of lawyers existed in the country. Instead, there was a dual system of entering the legal profession: as a lawyer-attorney licensed by the Ministry of Justice or as a lawyer licenced by one of the independent Advocates’ Collegia. Lawyer-attorneys, after having been licensed by the Ministry of Justice, practiced law without belonging to any bar association. Other lawyers practiced as members of one of several independent collegia which organized qualification examinations for prospective lawyers and awarded successful candidates the status of lawyer. The collegia adopted their own charters and elected their governing bodies independently¹ both in law and in practice.² As the ICJ noted in a report of 2013, the *Independence of the Legal Profession in Central Asia*, the dual system of organization of the legal profession in Tajikistan was unique for the region. The fact that one means of access to the profession was within the control of the profession itself ensured the independence of a significant part of the profession.³

In 2012, a working group consisting of the representatives of the legal community and bar associations, representatives of the executive, law enforcement bodies and the judiciary, was convened to develop new legislation to reform the legal profession.⁴ A bill “*On Advokatura and Advocates’ Activities*” was drafted under which a unified bar association was to be established. The Bill made membership of the new unified bar association—the Union of Lawyers—compulsory for all lawyers.⁵ It introduced a single Code of Ethics for lawyers⁶ and universal procedures for their qualification,⁷ as well as common disciplinary proceedings.⁸ An ICJ mission organized in the midst of the discussion on the Bill in 2013, welcomed the reform but raised concerns that the Qualification Commission would be under the authority of the Ministry of Justice, and that many lawyers would be required to re-qualify in order to continue their practice under the new system. It noted in its final statement that “[t]he procedure would risk cleansing the profession of independent lawyers and leading to *de facto* domination of the profession by the Ministry of Justice, contrary to the UN Basic Principles on the Role of Lawyers.”⁹ Prior to adoption, the law was amended and certain improvements were made including a provision allowing lawyers with a prescribed number of years’ professional experience to re-qualify without an examination (see further below).

In January 2015 the Bill was voted on by the Parliament and the Law “*On Advokatura and Advocates’ Activities*” (“the Law “*On Advokatura*””) was signed into law on 18 March 2015. On 18–19 September 2015, the First Congress of Lawyers was held where lawyers were to establish the governing bodies of the Union of Lawyers as was prescribed by the Law “*On Advokatura*”.¹⁰ Lawyer Saidbek Nuriddinov was elected as the Chair of the Board of the Union of Lawyers. As was mentioned at the round table discussion by many participants, the representative of the Ministry of Justice present at the event did not like the lawyers’ choice of Saidbek Nuriddinov as Chair and pressed them to elect a different candidate. Despite these demands, the lawyers present took an independent decision to elect Saidbek Nuriddinov contrary to the wishes of the Ministry of Justice.

Shortly after the Congress, the Ministry of Justice initiated amendments to the newly adopted Law “*On Advokatura*”. Unlike the original Law “*On Advokatura*”, which took several years to negotiate, these amendments were drafted very rapidly and adopted

¹ *The Law of the Republic of Tajikistan “On Advokatura” of 1995* (hereinafter *The old Law*), article 15(1).

² ICJ, *Independence of the Legal Profession in Central Asia*, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/09/Independence-of-the-Legal-Profession-in-CA-Eng.pdf>, p. 16.

³ *Ibid.*, p. 38.

⁴ *Tajikistan: ICJ warns of risk to independence of lawyers*, 18 November 2013, <http://www.icj.org/tajikistan-icj-warns-of-risk-to-independence-of-lawyers/>, p. 16.

⁵ *The Law of Tajikistan “On Advokatura and Advocates’ Activities”*, article 1.

⁶ *Ibid.*, article 36.

⁷ *Ibid.*, article 13.

⁸ *Ibid.*, article 41.

⁹ *Tajikistan: ICJ warns of risk to independence of lawyers*, *op. cit.*

¹⁰ *The Law “On Advokatura”*, *op. cit.*, article 47(5).

in a period of about two weeks. They were approved on 4 November 2015 by the Lower Chamber of the Parliament and on 26 November they entered into force. The amendments introduced certain restrictions on legal practice, including by amending article 12 of the *Law "On Advokatura"* that disqualifies individuals from qualifying as a lawyer. The amended law specified, *inter alia*, that anyone who had been dismissed from specified public offices, including judicial office, for violation of their oath, could not qualify as a lawyer (see further below).

One effect of these amendments was to disqualify Saidbek Nuriddinov, the elected Chair of the Union of Lawyers, from obtaining the status of a lawyer, since Mr Nuriddinov's had previously held a judicial appointment and been dismissed from his position. In 1998, whilst sitting as a judge, Mr Nuriddinov changed an order for detention to a restricted residence order. This was done at the request of the Prosecutor's Office as the person concerned had been detained for four months without any investigation being carried out. The decision provoked dissatisfaction among Mr Nuriddinov's colleagues and he was dismissed as a judge "for violation of the law". As a result, following the amendments to the *Law "On Advokatura"*, the Qualification Commission voted against granting him the status of a lawyer.

The amendments are widely believed by lawyers with whom the ICJ consulted to have been adopted specifically in order to prevent the elected Chair of the Union of Lawyers from taking up his position, thereby obstructing the lawyers' choice as the head of their organization. Indeed the ICJ has not heard any other plausible explanation for the need to introduce urgent amendments to the newly adopted law, amendments that were clearly applicable to the elected head of the Union of Lawyers.

As a result of the amendments, the elected head of the Union of Lawyers is currently in a paradoxical situation where he is not recognized as a lawyer following the amendments, but he has been elected as the leader of the legal profession. This situation is said to be having a negative impact on the ability of the profession to operate effectively in the first weeks and months of its unification and it may have further detrimental effect on the independence of the profession. This instance of the pressure exerted by the Ministry of Justice was one of the main concerns that the ICJ heard from lawyers in Tajikistan during the seminar.

Problematic aspects of the new Law "On Advokatura" and subsequent amendments

The *Law "On Advokatura"* includes a general provision that the Union of Lawyers is an independent non-governmental, non-commercial organization. Despite this, the Qualification Commission, which regulates entry to the profession, is established under the Ministry of Justice.¹¹ The head of the Qualification Commission is one of the Deputy Ministers of Justice *ex officio*¹² and all sessions of the Commission are convened by the Deputy Minister of Justice.¹³ Significantly, the *Law "On Advokatura"* (as amended by the November 2015 amendments) includes a requirement that all lawyers must re-qualify (see below) and this re-qualification is carried out by the Qualification Commission.¹⁴

It was not entirely new for Tajikistan that the Ministry of Justice is involved in the qualification of lawyers. As previously mentioned, one route to qualification under the previous system was through the Ministry of Justice, for 'lawyer-attorneys'. However, under the old system, lawyers could also qualify without involvement of the Ministry of Justice, through the collegia, which were fully self-regulated in law and in practice. The governing bodies of the collegia were elected by lawyers and consisted of lawyers only¹⁵ and the collegium had full control over the qualification process for lawyers wishing to join it¹⁶ The new *Law "On Advokatura"* deprived the collegia of this function and devolved it to the Union of Lawyers.

As was mentioned above, soon after the Congress of Lawyers was held, amendments were made to the new *Law "On Advokatura"*, principally in regard to the qualification criteria.

¹¹ *Ibid.*, article 1.

¹² *Ibid.*, article 13(3).

¹³ *Ibid.*, article 13(5).

¹⁴ *Ibid.*, article 12(3).

¹⁵ *The old Law, op. cit.*, article 15(1).

¹⁶ *Ibid.*, article 18.

The amendments in particular introduced new provisions on exclusion from qualification as a lawyer. Article 12(1) of the law already provided that candidates could sit the examination if they had knowledge of the State language (i.e. Tajik), a law degree, two years of professional experience as a lawyer or experience as a trainee lawyer. The amendments made explicit that anyone not meeting these criteria was disqualified from sitting the examination. They further banned the following categories of people from qualification:

- A person who has been convicted of a crime;
 - A person whose appointment to or employment with State bodies, judicial bodies, bodies of the Ministry of Justice, the Prosecutor's Office, *advokatura*, other law enforcement bodies, military service has been terminated for violation of the professional oath and committing actions of a corrupt character;
- A person released from criminal responsibility under the Criminal Procedure Code of the Republic of Tajikistan on grounds of amnesty, repentance, reconciliation, change of circumstances or application of the statute of limitations.¹⁷

Further, the law prior to the amendments allowed practicing lawyers with ten years of experience and those from a broader group of lawyers with twenty years of experience to join the Union without an examination.¹⁸ The amendments altered this provision and made it compulsory for all lawyers to pass through a re-qualification procedure.¹⁹

Under article 13 in conjunctions with article 45, the *Law "On Advokatura"* provided that, as a transitional measure, the five lawyers (one per each of the five regions of Tajikistan) who would become the first members of the Qualification Commission to qualify lawyers in the transition period, would be accorded the status of lawyers through an exceptional procedure by vote of the regional meetings of lawyers of collegia and lawyers-attorneys.²⁰ After the Congress elects five regular members of the Qualification Commission the powers as members of the Commission of these lawyers are terminated and they are awarded a status of lawyers without examination.²¹ They therefore did not need to pass the qualification examination.

As the President of the Union of Lawyers, Saidbek Nuriddinov was also elected as one of the first five members of the Qualification Commission. According to article 45.4 of the *Law "On Advokatura"*, he should therefore have been awarded the status of a lawyer automatically. However in practice, following the Congress, his status of a lawyer was not recognized since, as noted above, he had previously been dismissed from his office as a judge, one of the grounds for non-qualification under the amended *Law "On Advokatura"*.

It was reported that by February 2016, only around 100 lawyers had passed the examination successfully. Lawyers expressed concern that the exclusion criteria, together with the delays in the examination process might mean that by 28 March 2016, the end of the transitional period, there would not be a sufficient number of lawyers qualified to allow the justice system to operate normally. There was particular concern that the requirement of knowledge of the Tajik language, as a precondition for sitting the examination, excluded some lawyers from re-qualification, as a number of lawyers in Tajikistan speak only Russian.

Further concerns were expressed in regard to the administration of the re-qualification process. In several reported instances allegations were made that the Commission prevented some candidates from qualifying, in an arbitrary manner. It was also said that at least one candidate could not obtain the results of her examination. It was alleged that her phone was taken from her in order to prevent her making a copy of the results of the examinations.

¹⁷ *The Law "On Advokatura"*, *op. cit.*, article 22; Code of Criminal Procedure of the Republic of Tajikistan, articles 27(1), 29–32.

¹⁸ *The Law "On Advokatura"*, *op. cit.*, article 45(1).

¹⁹ *Ibid.*

²⁰ Article 13: "8. During the transition period members of the Qualification Commission that are lawyers are to be elected as prescribed by article 45 of the present Law". Article 45: "2. During the transition period, at the joint meetings of lawyers of collegia and lawyers-attorneys, one representative per 5 regions of the Republic (Gorno-Badakhshan Autonomous Region, regions, Dushanbe, cities and districts of the republican subordination) are elected as members of the Qualification Commission. The candidature of the person elected is to be submitted to the Ministry of Justice of the Republic of Tajikistan no later than one month from the date of entry into force of this Act."

²¹ Article 45(4): "After the election by the Congress of Lawyers of the members of the Qualification Commission, the powers of five of lawyers, elected by the regions to be members of the [transitional] Qualification Commission are terminated and they are to be awarded the status of a lawyer without passing a qualification exam."

3. Analysis and recommendations in light of international law and standards

Allegations of interference with the elections

The ICJ received allegations of interference by the Ministry of Justice in the elections of the representatives of the Union of Lawyers. The ICJ notes that under international law and standards, lawyers have a right to form professional associations. *The UN Basic Principles on the Role of Lawyers* guarantee that “[l]awyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.”²² *The UN Basic Principles*, in common with other international standards on the role of lawyers, further specify that the “executive body of the professional associations of lawyers shall be elected by its members and shall exercise its functions without external interference.”²³ *The International Bar Association Standards* state that professional organization executives should be “freely elected by all the members without interference of any kind by any other body or person.”²⁴

There has been a history of interference of the executive in the governance of the Tajikistan legal profession. In 2013, for instance, the UN Human Rights Committee, in its *Concluding Observations on Tajikistan’s periodic reporting under the International Covenant on Civil and Political Rights (ICCPR)*, concluded that lawyers were “subject to external interference, particularly from the Ministry of Justice.”²⁵

The kind of undue pressure that lawyers reported occurred at the September 2015 first Congress, demanding that the Union of Lawyers elect a President acceptable to the Tajikistan Government, would be an example of interference with the independence of the legal profession contrary to the UN Basic Principles on the Role of Lawyers.

The independence of bar associations from government does not, however, preclude their cooperation with governments on appropriate matters. *The UN Basic Principles* recognize that such cooperation will often be necessary to ensure effective and equal access to legal services and that lawyers are able to advise and assist their clients in accordance with the law and recognized professional standards and ethics, without improper interference.²⁶

The ICJ is concerned at the attempt to exert pressure on the election process for the Chair of the lawyers’ association, against the free will of the members of the legal profession itself. Such actions constitute an interference with the independence of the legal profession, contrary to *the UN Basic Principles*, and set a worrying precedent for the governance of the newly-established Union of Lawyers.

The ICJ recommends that the independence of the Union of Lawyers be ensured in law and in practice and that the authorities abstain from interference with the free election of office-holders of the self-regulating profession in accordance with international principles on the role of lawyers.

Adoption of amendments to the Law “On Advokatura”

The ICJ is concerned at the credible allegations that the hastily-adopted amendments were initiated for reasons other than *bona fide* regulation of the profession. It is of particular concern that members of the legal profession were not consulted when these amendments were rapidly drafted and voted into law.

The UN Basic Principles on the Role of Lawyers provide:

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made

²² *Basic Principles on the Role of Lawyers*, UN Doc. A/CONF.144/28/Rev. 1, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September, 1990, principle 24.

²³ *Ibid.* See also *Draft Universal Declaration on the Independence of Justice (‘Singhvi Declaration’)*, prepared by Dr L. V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, para. 97.

²⁴ International Bar Association, *Standards for the Independence of the Legal Profession*, 1990, article 17.

²⁵ *Concluding observations on the second periodic report of Tajikistan*, 22 August 2013, CCPR/C/TJK/CO/2, para. 18.

²⁶ *Basic Principles on the Role of Lawyers*, *op. cit.*, principle 25.

aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

These provisions make clear that professional associations must be involved in the process of setting criteria for entry to the profession, and that this is not a matter for governments to legislate unilaterally.

Indeed, the UN Special Rapporteur on the Independence of Judges and Lawyers has emphasized that “*the legal profession is best placed to determine admission requirements and procedures,*”²⁷ and that, “[c]riteria and the procedure for admission to the legal profession *should be defined by the legal profession.*”²⁸ The Special Rapporteur has recommended that:

Legislation regulating the role and activities of lawyers and the legal profession be developed, adopted and implemented in accordance with international standards; such legislation should enhance the independence, self-regulation and integrity of the legal profession; *in the process leading to the legislation’s adoption, the legal profession should be effectively consulted at all relevant stages of the legislating process;*²⁹

The Human Rights Committee in its *Concluding Observations on Tajikistan* of 2013 recommended that “[t]he State party should also ensure that the procedures and criteria for access to and conditions of membership of the Bar do not compromise the independence of lawyers.”³⁰

The ICJ is concerned that the amendments were rushed through the legislative process without adequately considering possible impacts on the independence of the newly-unified legal professional body and profession, and without effective consultation of the legal profession. Further, the amendments, if they are or are perceived by the legal community to represent retaliation for an independent choice of the profession in electing its Chair, can be expected to have a chilling effect on the independence of the Union of Lawyers and the profession as a whole and thereby constitute an interference with the independence of lawyers.

The ICJ recommends that lawyers’ independence be secured including by means of non-interference with the regulation of the profession under the law. Amendments enacted in November 2015 should, through meaningful consultation with the Union of Lawyers, be repealed or replaced. In future, any amendments affecting the legal profession should be subject to a process of effective consultation with the legal profession at all stages of the legislative process. All branches of government must refrain from any acts that negatively impact on the independence of the legal profession, whether such impacts are unintentional or deliberate, including measures of any kind in retaliation for disfavour with the person elected to the executive of the Union of Lawyers. Procedures and criteria for qualification for the legal profession should be determined by the Union of Lawyers.

Independence of the Qualification Commission

Under the new *Law “On Advokatura”*, the Qualification Commission is not a constituent body of the Union of Lawyers but functions under the Ministry of Justice. Furthermore, it is the Deputy Minister of Justice who holds the permanent presidency of the Commission *ex officio*.

²⁷ UN Special Rapporteur on Independence of Judges and Lawyers, *Report to the General Assembly (concerning Independence of lawyers and the legal profession)*, UN Doc. A/64/181 (28 July 2009), para. 34 (emphasis added).

²⁸ *Ibid.*, para. 112(b) (emphasis added).

²⁹ *Ibid.*, para. 105(c) (emphasis added).

³⁰ *Concluding observations on the second periodic report of Tajikistan, op. cit.*, para. 18.

Under international law and standards, associations of lawyers must be independent from government and other executive and private interests. In particular, the “executive body of the professional association of lawyers shall be elected by its members and shall exercise its functions without external interference.”³¹ It is the function of the association of lawyers to ensure that “there is free access to the profession for all persons having the requisite professional competence.”³²

The UN Special Rapporteur on Independence of Judges and Lawyers has expressed concern when “access to the legal profession is conditioned or controlled by the executive branch, with the legal profession having no role or a very limited role in licensing procedures.”³³ The Special Rapporteur has further stated that:

“the legal profession is best placed to determine admission requirements and procedures and should thus be responsible for administering examinations and granting professional certificates. This would further help in preserving its independence and self-governance, as advised in the Basic Principles. In this connection, it may be recalled that Principle I (2) in [Council of Europe] Recommendation No. R (2000) 21 also provides that all decisions concerning the authorization to practise as a lawyer or to accede to this profession should be taken by an independent body,”³⁴

and has accordingly recommended:

- that legislation on the legal profession should provide, as basic standards, among other things, that “admission to the legal profession shall be the responsibility of the lawyers association”;³⁵
- that in States where admission to the legal profession has been “conducted or controlled by the authorities, such responsibility should be gradually transferred to the legal profession itself within a determined time frame”;³⁶ and
- that “an examining body of the legal profession, appointed by the bar association, should decide on the admission of the candidates.”³⁷

The ICJ takes account of the stated commitment of the State delegation of Tajikistan before the UN Human Rights Committee during its session in Geneva in 2013, that the Qualification Commission would not permanently remain a body of the Ministry of Justice, but was under the Ministry of Justice only as a transitional measure, following which it would become a body of the Union of Lawyers itself.³⁸ Reassurances in this regard were reiterated to the ICJ during its mission to Tajikistan in November 2013.³⁹

The stated intentions of the authorities to bring the institutional affiliation of the legal profession in line with international standards is welcome. The ICJ notes, however, that so far no legal initiative has in fact been put forward actually to transfer the Qualification Commission to the Union of Lawyers, and this despite the relatively rapid tabling and enactment of other amendments to the *Law “On Advokatura”* in November 2015, described above. Therefore, the institutional affiliation and lack of independence of the Qualification Commission remains a concern.

The ICJ recommends that the independence of the Qualification Commission from the executive be ensured in particular by making it a body of the Union of Lawyers, on an established time frame that implements the transfer as rapidly as possible. This should include ending the ex officio membership and presidency of the Ministry of Justice and introducing a rotation of the Presidency of the Commission.

³¹ *Ibid.*, principle 24. See also *Singhvi Declaration, op. cit.*, para. 97.

³² *Singhvi Declaration, op. cit.*, article 99(i).

³³ *Report to the General Assembly (concerning Independence of lawyers and the legal profession), op. cit.*, para. 31.

³⁴ *Ibid.*, para. 34.

³⁵ *Ibid.*, para. 105(d).

³⁶ *Ibid.*, para. 105(e).

³⁷ *Ibid.*, para. 112(b).

³⁸ *Tajikistan: ICJ warns of risk to independence of lawyers, op. cit.*

³⁹ *Ibid.*

Members of the Qualification Commission

It appears that the Union of Lawyers has failed to implement the provision of the *Law "On Advokatura"* that provides that "[a]fter the election of the members by the Congress of Lawyers of the members of the [permanent] Qualification Commission, the powers of the five lawyers elected by the regions to be members of the [transitional] Qualification Commission are terminated and they are awarded the status of a lawyer without passing a qualification exams."

In particular, the situation where not all the five lawyers who are qualified through a special procedure—a vote by the regional meetings—in order to sit on the Qualification Commission during the transitional period, have been awarded this status is in contradiction with the text of the *Law "On Advokatura"*. The reasons for ignoring a clearly prescribed provision of the law are unknown.

The ICJ therefore recommends that the status of all the members of the new Qualification Commission is recognized as prescribed by the Law "On Advokatura".

The re-qualification process

The ICJ re-iterates its concern, expressed in 2013,⁴⁰ that the requirement for all lawyers to re-qualify under the new *Law "On Advokatura"* puts the independence of the profession at risk, particularly in light of the lack of independence of the Qualification Commission from the Ministry of Justice (discussed above).

The ICJ's concerns regarding the re-qualification process have been heightened by the Amendments to the Law of November 2015, which extended the requirement of re-qualification to all lawyers, irrespective of seniority.

The reports that only approximately one hundred lawyers had re-qualified as of February 2016, i.e. about one month before the end of the transition period, is of concern, Tajikistan risks having a situation of a significant shortage of lawyers who would be in a position to defend the rights of clients. The right to assistance by a lawyer is one of the fundamental guarantees of the right to a fair hearing under the *ICCPR*⁴¹ and is essential to uphold the right to liberty, the freedom from torture and other cruel, inhuman and degrading treatment, and the right to an effective remedy for violations of human rights. *The UN Basic Principles on the Role of Lawyers* state that any person arrested, detained, imprisoned, has a right to have adequate opportunities, time and facilities to communicate and consult with a lawyer without delay.⁴²

The crisis in the reform which prevents a prompt and sufficiently speedy qualification of lawyers risks creating a stalemate by 28 March 2016, where at the end of the transitional period, there would not be a sufficient number of lawyers qualified. This will affect both lawyers who cannot qualify because of the paralysis in the operation of the bodies and those whose rights to qualified legal representation must be guaranteed.

A mass withdrawal of existing qualifications to practice, whether as part of a re-qualification requirement such as is underway in Tajikistan, or otherwise, appears arbitrary and inconsistent with international standards on independence of the legal profession.⁴³

Further, the allegations that in certain instances persons do not qualify, in an arbitrary manner despite meeting the necessary qualification criteria, is of concern. Under *the UN Basic Principles on the Role of Lawyers*: "[g]overnments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin,

⁴⁰ *Tajikistan: ICJ warns of risk to independence of lawyers, op. cit.*

⁴¹ HRC, *General Comment 32*, para. 33.

⁴² *Basic Principles on the Role of Lawyers, op. cit.*, principle 8.

⁴³ See e.g., *Report to the General Assembly (concerning Independence of lawyers and the legal profession), op. cit.*, paras. 38–39 (referring critically to states that require lawyers "to reapply to the Ministry of Justice for re-registration or re-licensing after a certain period of time," and stating also, "The arbitrary withdrawal of lawyers' licences, registration or practicing certificates is a measure applied by the executive branch that the Special Rapporteur has also noted frequently throughout his mandate. ...In the view of the Special Rapporteur, no withdrawal of licences should take place without the prior consent of the relevant lawyers' association, and any formal decision should be subject to judicial review."). See also para. 105(d), (v) and (f).

property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.”⁴⁴

The ICJ considers it to be a matter of priority for the leadership of the Union of Lawyers as well as the Ministry of Justice as the State body that plays by law a significant role in the process of qualification takes measures to avoid a possible shortage of qualified lawyers in the country at the end of the transition period specified by law.

The ICJ recommends that the requirement that already-qualified lawyers re-apply for qualification or lose their right to practice be repealed; or, at minimum, that the transition period for re-qualification of lawyers under the new Law "On Advokatura" is extended to guarantee that lawyers do not lose their status and are able to represent their clients for a sufficient period of time past the current deadline, and that any lawyer who applies for re-qualification and is not provided with qualification has the right to prompt, impartial and effective judicial review of the decision.

Criteria for qualification as a lawyer

No comparable Tajikistan legislation provides for so many grounds on which a person cannot hold a particular position, as the Law "On Advokatura". By way of example, the Law "On the Bodies of Prosecution" contains no provision that would introduce any limitations on those who can become a Prosecutor;⁴⁵ and the provisions of the Law "On the Courts" which regulates judicial appointments only mentions general requirements for judicial office such as citizenship, age and professional experience.⁴⁶ The detailed list of disqualifications for licensing as a lawyer provided in the Law "On Advokatura" therefore stands out as a legislative anomaly in Tajikistan.

As mentioned earlier, the ICJ is concerned that the additional qualification requirements were enacted in November 2015 without effective consultation with the legal profession and in circumstances that suggest they were designed to retaliate for the election of an independent candidate as head of the Union of Lawyers, as well as to impair his ability to discharge the functions of his office and to practice as a lawyer. The ICJ is also concerned about the broad sweep of the criterion that a candidate cannot be a person whose appointment to or employment with State bodies, judicial bodies, bodies of the Ministry of Justice, the Prosecutor's Office, advokatura, other law enforcement bodies, military service has been terminated for violation of the professional oath and committing actions of a corrupt character, particularly given that there seems to be no requirement that any such decision to terminate employment or appointment itself have been proved to have been impartial and justified in the circumstances. The ICJ is further concerned that the Union of Lawyers (nor even for the time being, the existing Qualification Commission) appears to have no discretion under the legislation to examine the personal circumstances of a candidate to evaluate whether there are reasons not to disqualify him or her on one of the grounds added in November 2015.

Under the amended Law "On Advokatura", one of the new grounds for barring a candidate from qualifying as a lawyer is lack of knowledge of the Tajik language. Given that in the local context, Russian is widely spoken, and laws are regularly officially published in both languages, some lawyers have practiced their profession through Russian for many years. The ICJ is therefore concerned that this restriction may have consequences for access to justice and the right to a fair hearing in Tajikistan if certain lawyers are prevented from re-qualifying because of failure to fulfill a language requirement which is not necessary to their effective discharge of their professional duties. Article 27 of *the International Covenant on Civil and Political Rights* recognizes the rights of "linguistic minorities . . . to use their own language", and the UN Special Rapporteur on minority issues has urged that governments and professional bodies, not only not to discriminate against the entry of linguistic and other minorities into the legal profession, but to take concrete steps to encourage greater representation of such minorities in the legal profession.⁴⁷

⁴⁴ *Basic Principles on the Role of Lawyers*, op. cit., principle 10.

⁴⁵ *The Constitutional Law of the Republic of Tajikistan "On the Bodies of Prosecution of the Republic of Tajikistan"*, 25 July 2005, No. 107.

⁴⁶ *The Constitutional Law of the Republic of Tajikistan "On Judges"*, 6 August 2001, No. 30, article 11.

⁴⁷ UN Special Rapporteur on Minority Issues, report on minorities and the criminal justice process, UN Doc. A/70/212 (30 July 2015), paras. 79–80 and 109.

The ICJ recommends that the qualification criteria under the amended articles 12(1) and 12(2) of the Law "On Advokatura" be reconsidered. In particular, the criteria added by the November 2015 amendment should, through meaningful consultation with the Union of Lawyers, be repealed or replaced. In future, any amendments affecting the qualifications for entry to the legal profession should be only as based on recommendations from the Union of Lawyers, and any such changes to admission criteria should be subject to a process of effective consultation with the legal profession at all stages of the legislative process. No discrimination, direct or indirect, should be permitted as regards entry into the profession. Consideration should be given to allowing lawyers competent in Russian but not the Tajik language to qualify.

Conviction as a bar to qualification as a lawyer

The ICJ is concerned that the stipulation in article 12(2) of the Law "On Advokatura" that "a person who has been convicted of a crime" cannot sit the qualification examination to be a lawyer may create confusion and legal uncertainty since it is at odds with provisions in the Criminal Procedure Code setting out the criteria which apply to disqualification for other offices or professional status in Tajikistan.

Article 84(7) of the Criminal Code of Tajikistan (CC) states that "A cancellation or removal of a conviction cancels legal consequences of criminal responsibility." While the term "conviction" as provided by article 84 of the CC and "has been convicted"—the term used in the Law "On Advokatura"—are very close, the Law "On Advokatura" does not use the exact and well-defined notion of the criminal law. There is scope for the term "has been convicted" to be interpreted by the courts or other bodies as being broader than the term used in the CC which would put lawyers outside the existing guarantees offered by the legal framework.

The application of this disqualifying criterion and its relationship to article 84 of the CC is further confused by that additional provision on disqualification, also added in November 2015, in relation to persons "released from criminal responsibility under the Criminal Procedure Code" in certain circumstances.

Under international human rights law, the right to respect for private life, protected *inter alia* under article 17 of the ICCPR, may be at issue if someone is disqualified or prevented from practicing their profession.⁴⁸ Any interference with this right must be "in accordance with the law". This does not refer solely to adoption of the relevant legislative acts or provisions, but also relates to the "quality of the law, requiring it to be compatible with the rule of law."⁴⁹ Rules must be formulated with sufficient precision to be reasonably foreseeable, to enable individuals to regulate their conduct accordingly, and must be clear and accessible to the general public.⁵⁰

Further, as mentioned earlier, the ICJ is concerned that these and other additional qualification requirements were enacted in November 2015 without effective consultation with the legal profession and in circumstances that suggest they were enacted for improper reasons, and that there is no discretion given to the Union of Lawyers (or the existing Qualifications Commission) to consider the individual circumstances of a given candidate.

In light of these principles, if the criterion is not otherwise repealed or amended, the ICJ recommends that the term "convicted" used in the Law "On Advokatura" is clarified and that it is interpreted and applied in line with the wider legislative framework of Tajikistan, in particular article 84(7) of the Criminal Code of the Republic of Tajikistan.

⁴⁸ See e.g. *Oleksandr Volkov v. Ukraine*, Application No. 21722/11, Judgment of 9 January 2013, para. 166.

⁴⁹ ECtHR, *Malone v. United Kingdom*, Judgment of 2 August 1984, para. 67.

⁵⁰ *General Comment No. 34*, article 19: Freedom of opinion and expression, para. 25.

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