

**ANTI-CORRUPTION ASSESSMENT OF EIGHT ADMINISTRATIVE
CODES AND LEGAL ACTS OF THE REPUBLIC OF TAJIKISTAN**

**OSCE Office in Tajikistan
Dushanbe, 2015**

Author:**Primakov Denis Yakovlevich**

The materials in this document are intended for general information purposes only and provided “as is” without any guarantee including fitness for any particular purpose. OSCE, in particular, makes no representation as to the accuracy or completeness of the published information. Opinions, findings, interpretations and conclusions expressed herein are those of the author(s) and do not necessarily reflect the official position of the OSCE and/or its member states.

The OSCE shall not be liable for any loss, damage or costs incurred, which may arise out of or in connection with the use of the information contained in this document.

All rights reserved. The materials published herein may be freely used and copied for educational and other non-commercial purposes, provided that any such reproduction is accompanied by an acknowledgement of OSCE as the source. Any commercial use of this document requires a prior written consent of the OSCE.

COPYRIGHT © 2015 Organization for Security and Co-operation in Europe (OSCE).

Contents

| | |
|--|----|
| Introduction..... | 4 |
| Analysis of the Law “On Citizens' Appeals”..... | 7 |
| Analysis of the Law “On the Right to Access Information”..... | 9 |
| Analysis of the Administrative Procedure Code..... | 13 |
| Analysis of the Constitutional Law “On Courts”..... | 16 |
| Comparative analysis of legal procedures (PCAO, CPC and EPC)..... | 29 |
| Table of comparisons (PCAO, CPC and EPC)..... | 46 |
| Analysis of the Administrative Offences Code..... | 51 |
| Recommendations..... | 61 |
| Table of corruption risk provisions..... | 65 |

Introduction

This study aims to provide an assessment and a comparative analysis of 8 legal acts:

- **Law of the Republic of Tajikistan (RT) No. 344 of 14.12.1996 “On Citizens' Appeals”.**
- **Law of the RT No. 411 of 18.06.2008 “On the Right to Access Information”.**
- **Administrative Procedure Code of the RT.**
- **Procedure Code on Administrative Offences of the RT (PCAO of the RT).**
- **Civil Procedure Code of the RT (CPC of the RT).**
- **Economic Procedure Code of the RT (EPC of the RT).**
- **Administrative Offences Code of the RT (AOC of the RT).**
- **Constitutional Law No. 1084 of 26.07.2014 “On Courts”**

for corruption risk factors. This study will result in developing proposals for comprehensive resolving of conflicts between the above mentioned legal acts, as well as between these laws and others, and methods to minimize the bureaucratic pressure and limits of administrative discretion.

The study is conducted in the framework of “Methodology for Anti-Corruption Assessment” (2014), developed by the author for the OSCE Office in Tajikistan and used by civil servants and state authorities conducting anti-corruption assessments. According to this manual, the person authorized to carry out an anti-corruption assessment is supposed to analyze provisions of a law and (or) a legal act in terms of corruption risk factors, to describe these factors and to suggest solutions. Thus, any state anti-corruption assessment process should undergo 4 stages:

1) assessment of a legal act in terms of appropriateness of its adoption, systemic coherence and clarity;

- 2) analysis of a legal act in terms of anti-corruption factors;
- 3) suggesting solutions to eliminate corruption risk factors;
- 4) writing a conclusion.

At the same time, this study will focus on legal consistency of the legal acts mentioned above and their compliance with the proclaimed measures to combat corruption and to reduce bureaucratic barriers. Bureaucratic barriers include:

- 1) obstacles, created by executive officials;
- 2) redundant business rules established by administrative authorities;
- 3) restrictive measures imposed by regulations or individual administrative acts.

The content of administrative barriers varies depending on the subject and object of a regulatory or restrictive impact and on spheres of social life. Administrative barriers may be caused by gaps in legislation as well as over-regulation.

It should also be noted that most of the laws have much in common with the similar Russian laws (except for the PCAO and the Administrative Procedure Code), as well as with the laws of the countries of Central Asia (Kyrgyzstan). However, it's necessary to take into account the effect of "informal" rules that increasingly generate corruption risks. Therefore, these laws will be analyzed in a systematic unity of the Tajik legislation (the Constitution of the Republic of Tajikistan, the Criminal Code of the Republic of Tajikistan, the Law "On Protection of Consumer Rights" and others) taking into account the principles of administrative procedures:

- completeness, comprehensiveness and objectivity of the analysis of the problems and challenges to correctly apply the law;

- necessary conditions to realize rights, legitimate interests and duties of natural and legal persons;
- development of democratic governance, participation of civil society in policymaking and taking into account the opinion of the citizens;
- interaction with other government agencies, citizens and legal persons acting as services consumers;
- procedural economy;
- implementation of the principle of liability of each executive agency and officials for their activities.

Law of the Republic of Tajikistan “On Citizens' Appeals”

The Law of the RT No. 344 of 14.12.1996 “On Citizens' Appeals” regulates the procedure for citizens' appeals not only to government agencies, but also to NGOs (non-commercial and commercial). To define the concept “citizens' right to appeal” it's necessary, in the first place, to specify this right. The analysis of the provisions of the Constitution, the Law of the RT “On Citizens' Appeals” and other sources suggests the following features of the citizens' right to appeal:

1) possibility to exercise this right both collectively and individually (Art. 31 of the Constitution). A collective appeal is caused, as a rule, by a public interest, the reason for an individual appeal is an interest of one person;

2) it is realized by filing an appeal in oral, written and electronic form, which is very important in modern society;

3) it is exercised in order to participate in the management of the state, to protect (restore) and promote human rights and freedoms;

4) implementation of this right is governed by both international and national regulations.

Problem:

The wording, that this Law establishes the procedure for citizens to appeal to “institutions and organizations, regardless of ownership” (Preamble, Art. 1), gives reason to believe that the Law exceeds its jurisdiction, as commercial entities and non-governmental institutions are free to establish their own rules of relationships with customers and third parties. In addition, this norm leads to a conflict of legal provisions, since the disciplinary liability envisaged in Article 14 of this Law for the violation of procedure for handling appeals, in principle, applies only to civil servants, people working in government and the organizations, which have stipulated such liability in their local acts. Therefore, the provision intrudes into the regulation of other branches of law and may be considered as a corruption risk factor **“adoption of a legal act with excessive jurisdiction”**.

Solution:

The words “institutions and organizations, regardless of ownership” shall be removed from the Preamble and Article 1.

Problem:

Article 2 stipulates three types of appeals: proposals, applications and complaints, but it doesn't define the concept “application”. Further on in the text the term “application” is constantly referred to, but the difference between proposals, complaints and applications remains unclear. Thus, in this case there is a legal and linguistic ambiguity.

Solution:

The concept “application” shall be defined in Article 2.

Law of the RT No. 411 of 18.06.2008 “On the Right to Access Information”

This Law is connected with the Law “On Citizens’ Appeals” and determines legal procedures for access to public information (Art. 1-2).

Conflict of legal provisions

However, part 1b, Article 4 and part 2, Article 12 of the Law refer to natural and legal persons, who may apply for information, that is, there are inconsistencies within the Law itself, which could lead to discrimination of legal persons applying for information.

Broad discretion and provisions based on “has the right” formula

1. This law determines types of information, access to which can not be limited (Article 5), and grounds to deny access to information (Article 14), between these categories the state bodies and organizations (i.e. their leaders) are given broad discretion to restrict access to information.

Part 3, Article 14 of the Law provides for the denial of information on the strange grounds:

- *“failure to consider and satisfy requests stipulated by this Law may be appealed to a higher official or to court.*

- *Actions (inaction) of bodies, organizations and their officials, violating the right to access to information, may be appealed to appropriate authorities in accordance with the legislation of the Republic of Tajikistan.”*

The legislator's objectives are not clear, but these circumstances must be among the grounds for compulsory provision of information, regardless of whether the requestor would go to court or not.

2. Charging for provision of information is stipulated by Article 15 of the Law, but the right to decide whether the information is provided for a fee or free of charge is delegated to the bodies or organizations providing information (parts 2-3, Article 15).

Solution

1) Part 3, Article 14 shall be removed.

2) Part 3, Article 15 shall be amended as follows:

“The list of categories of persons, to whom information is provided free of charge, is determined by an order of the Ministry, which governs this body or organization.”

Ambiguous provision (legal and linguistic ambiguity)

Article 6 of the Law refers to the principle of information openness, but it is too general, as the procedure for providing information on government agencies differs from the procedure for providing information on NGOs and private companies. In addition, this Article lacks the principle of freedom to search, receive, transmit and disseminate information on the activities of government bodies and local authorities by any legal means.

Solution

Article 6 shall be supplemented with the following paragraph:

“Every person has the right to search, receive, transmit and disseminate information on the activities of government bodies and local authorities by any legal means.”

Lack of administrative procedures

The Law does not specify the procedure for providing information on court decisions. Since the courts, on the one hand, are public authorities and, on the other hand, their decisions are of individual legal nature, the procedure for providing information on court cases must be specifically regulated. Such a regulatory fault is a case of lack of administrative procedures.

Part 1d, Article 14 states, *“the materials of civil, criminal or administrative legal proceedings can not be disclosed in cases when disclosure of this information is prohibited by law, may violate the human right to a fair trial or endangers the life or health of citizens”*, but the procedures for providing information on court decisions, which have entered into force, and publishing the texts of court decisions are not reflected in this Law.

Incomplete administrative procedures

Article 15 of the Law provides for the terms of payment for government services (provision of information), but the payment procedure (the price of a government service, payers and payment methods) is not clearly defined. Furthermore, heads of government agencies have **broad discretionary powers** to determine payment rules, the category of the information provided and its volume - all of these in practice lead to corruption. At the same time, the rules of remuneration for receiving/providing information, set by the Government, do not clearly define the issues related to payment for provision of information, leaving

many aspects to the discretion of heads of government agencies and leaders of state organizations.

Solution

One of the solutions may be the introduction of a single list of paid services with a fixed fee.

Administrative Procedure Code of the Republic of Tajikistan

The Administrative Procedure Code of the RT (2007)¹ regulates legal relations between administrative bodies with the exception of the President, the Government and courts.

Problems:

1. The Code covers administrative procedures carried out by administrative bodies as well as civil courts (Chapter 6 of the Code). The fact that two different forms of procedures are stipulated by the Code contradicts to the nature of an administrative act, which governs administrative procedures.

Solution:

1. Appeals against actions (Art. 147 of the Code) and acts (Art. 126 of the Code) of administrative bodies shall be referred to Chapter 24 of the Civil Procedure Code of the RT (“Legal proceedings against decisions, actions (inaction) of state authorities, local government bodies, state officials and civil servants”).

2. Removing an administrative legal act from the list of objects, which may be appealed in court, is groundless, since in any law-governed state all the regulations, including local administrative acts, may be challenged in court – the principle of judicial control over the activities of all the executive entities. Moreover, judicial protection should cover the following aspects:

- judicial protection against unlawful administrative acts adopted by state authorities;
- protection against inaction of state authorities;
- protection against unlawful interference of state authorities in private affairs of citizens, who are not subject to administrative proceedings;

¹ Similar laws were adopted in most countries of the region. For example, the Law of the Republic of Kazakhstan “On Administrative Procedures” (2000), the Law of the Republic of Belarus “On Fundamentals of Administrative Procedures” (2008), the Law of the Republic of Armenia “On Fundamentals of Administration and Administrative Proceedings” (2004), the Law of the Republic of Kyrgyzstan “On Administrative Procedures” (2004), the Law of the Republic of Azerbaijan “On Administrative Procedure” (2005).

- processing of complaints.

3. Conflict of legal provisions

Paragraph 2, Article 10 of the Code, which states that responding to enquiries of any higher or lower administrative authority is not a legal assistance, comes into conflict with paragraph 5, Article 12 of the Code, which affirms that receiving no reply from an administrative authority within 15 days is considered as a refusal to provide legal assistance.

4. Article 8, stating that *“officials can not participate in administrative procedures, if they have personal interests or if there are other circumstances that may affect their decisions”*, generates inconsistencies as well as legal and linguistic ambiguity, since it does not define the concept “personal interest”. Personal interest is a part of the concept “conflict of interest”, so the phrase “personal interest” should be replaced with “conflict of interest”, which needs to be explained via a blanket reference to another legal act, e.g. to the Law on Conflict of Interest, or a definition in the Code itself.

5. Article 64 of the Code stipulates that an administrative decision must be taken within 7 days after the hearing. A similar rule concerning adoption of administrative decisions under public administrative procedures is provided for in part 1, Article 71 of the Code – the decision is taken within 10 days. The question is whether the time of taking a decision coincides with the time needed for its compilation. The decision is taken within 7-10 days or announced immediately after the hearing, but was the statement of reasons issued in due time? Such ambiguity caused by **lack of administrative procedures** bears corruption risks, as the authorized body may influence decisions within 7 days (10 days) after the conclusion of hearings.

6. Chapter 7 of the Code describes administrative procedures in connection with administrative complaints against administrative legal acts, which should be considered by the Administrative Commission under the Government of the Republic of Tajikistan (Article 136 of the Code), but the peculiarities of the Commission's functioning are not specified, which can be considered as a corruption risk factor, namely **lack of administrative procedures**.

Constitutional Law No. 1084 of 26.07.2014 “On Courts”

Article 1 of the Constitution proclaims the Republic of Tajikistan as a social and rule-of-law state², where the separation of powers is a constitutive feature of the legal system. It should be noted that the OECD recommendations for the third round of monitoring under the Istanbul Action Plan and EU standards affirm that Tajikistan should seek to build an independent judiciary. An independent judiciary is of particular importance in combating corruption, since judges as “final” law-enforcers have a huge impact on the implementation of the rule-of-law principle. However, the Procedure Codes, the previous Constitutional Law (CL) No. 30 of 6.08.2001 “On Courts of the Republic of Tajikistan”³ and the new Constitutional Law No. 1084 of 26.07.2014 “On Courts” contain provisions, which do not indicate that judges are independent of the other branches of power.

Problem 1: Lack of principle on security of tenure

Institutionally judicial activity in Tajikistan is subordinate to other branches of power. For example, according to Article 15 of the CL “On Courts” the tenure of judges is limited to 10 years, which corresponds to Article 84 of the Constitution. Thus, judges face additional pressure associated with the risk that their employment contract will not be renewed for a new term without valid reasons.

So other provisions aimed to guarantee independence, stipulated by Article 9 (“Immunity of Judges”) and Article 10 (“Ensuring Security of Judges”) of the Law, are not sufficient without security of tenure or automatic contract renewal after 10 years of excellent work as a judge.

² The rule-of-law concept (Germ. *Rechtsstaat*) has the following characteristic features: separation of powers, independence of judiciary, legitimate authority, legal protection of citizens against violation of their rights by government authorities and compensation for damage caused by public institutions.”The constitutional principles of a democratic rule of law are: separation of powers and independence of judiciary, which are interrelated, since if the political forces are well-balanced, the interaction of the three powers is based on coordination, not subordination, which gives reason to talk about the independence of judiciary.”*Pound R. “The Theory of Judicial Decision” // Harvard Law Review. 1923. № 36. P.641.*

³<http://soi.tj/upload/iblock/50c/wq%20awlvapzfq1%20bmwomugdyxrafuqrfadb%20qdczyrzdilfvhthbzlxzd.pdf>

The list of circumstances causing recall or dismissal of a judge from office (Article 18 of the Law) doesn't contribute to strengthening of the independence of judges. Firstly, the Law does not specify the difference between a recall and dismissal of a judge from office and their legal consequences. Secondly, such circumstances as the violation of labour laws or court reorganization do not correspond to the peculiarities of regulation of judges' work different from the legal status of civil servants. There is a wide range of criteria for dismissal, which are used discretionally. For example, paragraphs 9 and 14 providing for dismissal of judges on grounds of "*reorganization of a court (courts) or redundancy*" (9), "*revealed inaptitude of a judge to the position held*" (14) should be potentially considered as a tool of pressure and persecution of judges, especially by political authorities.

Recall or dismissal of a judge from office is a response to his inaptitude to the position held, at the same time, according to part 2, Article 8 recall of a judge is regarded as a guarantee of his independence. Moreover, in accordance with part 5, Article 131 "*In case of recall or dismissal of a judge from office on the grounds, stipulated by paragraphs 11 and 14, part 1, Article 18 of this Constitutional Law, his family is paid a lump sum equal to a five-month salary of the judge*", where as a retired judge is paid a lump sum equal to his three-month salary (paragraph 7, Article 131).

Nevertheless, the Law doesn't specify the difference between the recall of a judge as a response of authorized authorities to his inaptitude or as a means to guarantee his independence, as well as the difference between the procedures for a recall and dismissal of a judge. Such legal and linguistic ambiguity generates corruption risks.

Moreover, in Article 11 of the Law the length of professional experience required for the post of a judge in the Economic Court is unreasonably reduced to 3 years. It is known that economic cases (bankruptcy, tax disputes, etc.) are rather complex and require high-level competence, which is difficult to gain after just 3

years of professional experience. The term, required for judges of regional courts and the Dushanbe city court, is 5 years – the same term (or longer) must be set for judges of the Economic Court. The introduction of trainee-judges (Article 108 of the Law) doesn't solve the problem, because paragraph 2, Article 108 states:

*“Persons, first nominated for a post of a judge upon the recommendation of the examination commission of the Council of Justice of the Republic of Tajikistan, **may** in the course of one year work as trainee-judges and this term is included in their professional work experience”.*

As far as the norm “has the right” is optional and non-mandatory, not all the persons will go through this stage.

Solution:

1. To strengthen judicial independence through the introduction of the rule that in 10 years judges, if they wish, can occupy the post until the maximum retirement age for judges. Article 15 shall be supplemented with paragraph 3 as follows:

Paragraph 3: *“On the expiry of 10 years, employment relations with a judge are automatically prolonged for a similar period, provided that he is willing to keep on working and his service was faultless”.*

2. In paragraph 2, Article 108 the word “may” shall be replaced with the word “must”.

3. Paragraphs 9 and 14, Article 18 shall be amended as follows:

Paragraph 9: *“reorganization of a court (courts) or redundancy in case that the judge twice refuses to transfer to another court”.*

Paragraph 14: *“revealed inaptitude of a judge to the position held, formalized as a decision of the Qualification Commission in order stipulated by Articles 107-110 of this Law”.*

4. The difference between the procedures of “dismissal from office” and “recall of a judge” shall be specified; Article 18, parts 1-2 of Article 113 and Article 127 shall be amended accordingly.

5. If “recall of a judge” is a negative reaction to his inaptitude to the position held such procedure should not be followed by excessive social guarantees. Consequently, paragraph 5, Article 131 shall be removed. The words “recall of a judge” shall be removed from part 2, Article 8.

Problem 2: Impact of the prosecutor's office on courts

According to Chapter 9 of the Constitution of the RT the prosecutor's office is not a part of the judiciary and oversees exact and uniform application of laws (Article 93 of the Constitution). However, mandatory participation of the Prosecutor General in plenary sessions of the Supreme Court (Article 24 of the Constitutional Law “On Courts”), meetings of the Presidium of the Supreme Court (Article 30 of the Law), plenary sessions of the Supreme Economic Court of the Republic of Tajikistan (Article 49 of the Law) and statements in plenary sessions of the Supreme Court and the Supreme Economic Court on issues related to giving courts explanatory directives on application of criminal, civil, administrative and economic legislation (Article 25; part 1, Article 48 of the Law) violate the principle of separation of powers stipulated by Article 9 of the Constitution. First of all, according to Article 94 of the Constitution of the Republic of Tajikistan the Prosecutor General is accountable to the Parliament and the President, and the activity of the Prosecutor's Office rather refers to the executive branch. Therefore, attending plenary sessions of the Supreme Court of the Republic of Tajikistan and the Supreme Economic Court, the Prosecutor General may influence the decisions of this court. Moreover, the explanatory directives, prepared by the Prosecutor General for the plenary sessions of the both

supreme courts, directly impact on the activities of the courts, meaning the direct interference in the work of the judiciary.

The role of prosecutors in civil and arbitral proceedings is debatable, since their main function is to coordinate pre-trial investigations and to prosecute indictments, in other words, the essence of the prosecution manifests itself in the sphere of criminal justice. This assertion agrees with Recommendation Rec(2000)19, adopted by the Committee of Ministers of the Council of Europe on October 6, 2000, stating that public prosecutors are “public authorities who, on behalf of the society and in public interest, ensure the application of the law, where the breach of the law entails criminal sanctions, taking into account both the rights of citizens and the necessary effectiveness of the criminal justice system”.⁴ But in cases, where equal entities take part in civil disputes, the influence of the state represented by a prosecutor should be minimized.

In addition, according to Article 10 of the Law the Prosecutor General is authorised to:

- initiate a criminal case or an administrative offence case against judges;
- take coercive procedural measures, such as placement a judge in custody, house arrest, suspension from office, and others.

The Basic Principles on the Independence of the Judiciary of the United Nations (1985), Recommendation of the Council of Europe No. R (94) 12 on the Independence, Efficiency and Role of Judges (1994)⁵, the European Charter of the Council of Europe on the Statute for Judges (1998), and the Bangalore Principles of Judicial Conduct (2002) emphasize that legislative regulation of judges' immunity should contain the following principles: 1) inadmissibility of bringing a judge to responsibility for the court decision, unless his guilt in making knowingly unjust decisions is proved; 2) a special procedure for criminal

⁴ Cited from http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/JAReport2010_GB.pdf, P.181.

⁵ http://www.businesspravo.ru/Docum/DocumShow_DocumID_44524.html

prosecution; 3) peculiarities of legal regulation concerning detention, personal inspection of a judge, taking him into custody, arranging procedures for investigation and preliminary hearings; 4) peculiarities of administrative and disciplinary liability.

Solution

1. Participation of the Prosecutor General in plenary sessions of the Supreme Court of the RT, meetings of the Presidium of the Supreme Court of the RT and plenary sessions of the Supreme Economic Court of the RT shall be limited to cases in which the Prosecutor General is a party to the case (in order of supervise and due to newly discovered facts). Participation in meetings of Plenums and Presidiums of the Supreme Court and the Supreme Economic Court especially in those, dedicated to issues of the internal organization of the judiciary, shall be prohibited, unless the Supreme Courts consider that the participation of the Prosecutor General in the meeting is mandatory.

2. In order to enhance judges' independence Article 10 of the Law shall be supplemented by the following paragraphs:

“The Prosecutor General initiates criminal proceedings against judges and approves investigations:

- only after agreement with the Presidium of the Supreme Court of the Republic of Tajikistan in respect of judges of general jurisdiction;

- only after agreement with the Presidium of the Supreme Economic Court of the Republic of Tajikistan in respect of judges of economic courts;

- only with consent of the Chairman of the Constitutional Court of the Republic of Tajikistan in respect of judges of the Constitutional Court of the RT”.

Paragraph 2: *“The judge cannot be detained, taken into custody, brought to criminal liability for a court decision, unless his guilt in making a knowingly unjust decision is proved”*.

Problem 3: Violation of the principle of impartiality

Provisions, allowing chairmen of the supreme courts (Articles 37, 53) and their deputies (Articles 38, 54), chairmen of the supreme courts panels and their deputies (Articles 41, 55), as well as chairmen of the courts of general jurisdiction and economic courts of Gorno-Badakhshan Autonomous Region, regional courts, the Dushanbe city court (Articles 63-64, 77-78 of the Law), chairmen (deputy chairmen) of municipal and district courts (Articles 83-84 of the Law) to conduct personal reception of citizens, violate the principle of impartiality and is considered as a corruption risk factor, because it creates conditions for power abuse by public authorities. Since courts chairmen and their deputies have organizational and administrative powers over judges of a subordinate court, it may lead to a conflict of interest and cause pressure on judges.

These organizational and managerial powers in conjunction with personal reception of citizens violate the principles of impartiality and independence in administration of justice, because during personal reception citizens may complain about the judges of a subordinate court, trying to persuade to take a decision or to facilitate decision-making by a judge of a subordinate court.

Solution

All the judges, including chairmen of courts, shall be forbidden to conduct personal reception of citizens.

The paragraph “reception of citizens” shall be removed from Articles 37-38, 41, 53-55, 63-64, 77-78, 83-84.

Problem 4: Administrative and organizational powers are not separated from the powers associated with administration of justice

The system, in which chairmen of courts conduct personal reception of citizens, distribute cases among judges (the Law states, “*approves the procedure for distribution of cases among judges*”) and at the same time appeal against criminal judgments of other judges, which have come into force, vests them with excessive discretion, which is a corruption risk factor leading to misapplication of the law.

As mentioned above, chairmen of courts not only hear cases in court, but also perform administrative and organizational duties in relation to other judges. In addition, the procedure for distribution of cases among judges is not transparent and is not settled in the Law (lack of administrative procedures).

According to Article 125 the chairmen of a court may initiate disciplinary proceedings against the judges of this court “*for gross violations of legislation of the Republic of Tajikistan in civil, family, criminal cases and cases of administrative offences*”. To some extent, appealing against judgements of other judges, which have entered into force, can also be a proof of a law violation and may serve as a motive for an administrative case. Here the conflict of interest between the chairman-judge and the chairman-administrator is evident.

Solution

1. According to Recommendation of the Council of Europe No. R (94) 12 “On the Independence, Efficiency and Role of Judges” (1994) the distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

In the realities of Tajikistan may be used the system for automatic distribution according to alphabetic order.

2. The chairman of a court shall be released from the majority of economic and administrative duties, which he performs now. For this matter, it is necessary to introduce the institution of court administrators, who would report to the Council of Justice.

Problem 5: Impact of the Council of Justice on the selection and promotion of judges

The Council of Justice refers to the executive authorities, as the Head and the deputy head of this body are appointed and dismissed by the Presidential Decree (Article 102 of this Law). According to paragraph 2, Article 99 the President of the Republic of Tajikistan establishes the Council of Justice, approves its structure, the number of members and the Statute of the Council of Justice.

1. The Head of the Council of Justice is authorized to appoint or dismiss trainee-judges and to impose on them disciplinary sanctions (Article 103). Surely, special transitional status of trainee-judges may differ from the status of judges, but when a trainee-judge starts to perform legal duties, the influence of executive authorities should be considered as interference in justice and violation of the principle of independence.

2. In addition, according to international law the authority taking the decision on selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules. However, under the Council of Justice operates the Qualification Commission. To set it up the Head of the

Council of Justice convenes a conference of judges and takes chair at its first meeting (Article 106). The Qualification Commission (Article 107):

- on submission of the Head of the Council of Justice of the Republic of Tajikistan shall deliver its opinion to the Council of Justice on assignment of qualification grades to chairmen of the courts of Gorno-Badakhshan Autonomous Region, regional courts, and the Dushanbe city court;

- on submission of the Head of the Council of Justice shall deliver its opinion to the Council of Justice on the possibility to re-elect judges to new terms or to promote them to a higher court;

- on submission of the Head of the Council of Justice and with due account for the results of the qualifying examination shall deliver its opinion to the Council of Justice whether to recommend appointment of judges first nominated for this position or to reject;

- on submission of the Head of the Council of Justice of the Republic of Tajikistan shall deliver its opinion to the Council of Justice on assignment of qualification grades.

Other powers of the Council of Justice concerning judges:

- Judges are appointed (paragraph 2, Article 16), dismissed (paragraph 2, Article 18), and resigned (paragraph 8, Article 19) by the President on submission of the Council of Justice (except judges of the Supreme Court and the Supreme Economic Court of the Republic of Tajikistan).

- The Head of the Council of Justice gives the Plenum of the Supreme Court of the Republic of Tajikistan “explanatory directives on issues of laws application” (paragraph 1, Article 25).

- Military ranks to judges of military tribunals are awarded by the Minister of Defence of the RT on submission of the Head of the Council of Justice of the RT (paragraph 3, Article 68).

- The number of judges of all courts (except for the supreme courts) is established by the President on submission of the Council of Justice of the RT (paragraph 1, Article 61; paragraph 3, Article 66; paragraph 2, Article 70; Article 100).

- In accordance with paragraph 3, Article 96 of this Law, officials of the Council of Justice of the Republic of Tajikistan shall inspect organizational and financial activities of courts (except for the supreme courts) following the instructions approved by the Council of Justice of the Republic of Tajikistan.

- It sets up an examination commission (Article 100).

- According to paragraph 2, Article 125 of this Law, the Head of the Council of Justice is authorised to initiate disciplinary proceedings against all judges (except for judges of the supreme courts and the Constitutional Court of the Republic of Tajikistan)⁶.

Thus, all the legally significant actions in respect of a judge career, in particular disciplinary proceedings, are agreed with the Council of Justice, which is an executive authority. This violates the principle of non-interference of executive authorities in the judiciary and threatens judges' independence.

Solution

1. The legal status of a trainee-judge shall be equated to the status of an acting judge or, as an alternative, his status shall be equated to the status of a judge assistant.

⁶ Disciplinary procedures against judges are carried out in most countries by judicial bodies. In Estonia judges are subjected to disciplinary measures by the decision of a special official - the Chancellor of Justice, in the Czech Republic and Latvia - the Minister of Justice.

The norm “appoints and dismisses trainee-judges” in Article 103 shall be considered void.

2. Disciplinary inspections of all judges (except for judges of the supreme courts) shall be delegated to judicial bodies, such as the qualification commission of the relevant court.

Paragraphs 2 and 6 shall be removed from Article 125.

The words “in the first paragraph” shall be removed from paragraph 5, Article 125.

3. Paragraph 1 shall be removed from Article 25.

Problem 6: Disciplinary liability of judges

The UN Basic Principles on the independence of the judiciary stipulate that a complaint made against a judge in his judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure; and the judge shall have the right to a fair hearing (principle 17). The standards of the Council of Europe state, that disciplinary proceedings should be conducted “with all the guarantees of a fair trial” and provide the judge with the right to challenge the decision and sanction.⁷ The procedures guaranteeing full rights of defence are of particular importance in matters of discipline of judges⁸.

⁷ Recommendation of the Council of Europe CM/Rec(2010)12 adopted by the Committee of Ministers on 17.11.2010, Article 69. See also the European Charter on the statute for judges, which stipulates that proceedings shall “involve the full hearing of the parties, in which the judge proceeded against must be entitled to representation”. The UN Human Rights Committee emphasizes that “judges should be removed only in accordance with an objective, independent procedure prescribed by law”, Concluding observations No CCPR/CO/75/MDA of the UN Human Rights Committee, Republic of Moldova, paragraph 12.

⁸ Opinion No 1 (2001) of the Consultative Council of European judges for the attention of the Committee of Ministers of the Council of Europe “On Standards concerning the Independence of the Judiciary and the Irremovability of Judges”, paragraph 60(b)

Article 125 gives the closed list of persons, who can initiate disciplinary proceedings, but it doesn't specify the reasons for filing complaints against judges by the citizens involved in the process. Logically, complaints about illegal actions of judges should be directed to the Judicial Qualification Commission in accordance with Article 126. **Lack of administrative procedures** leads to discrimination against persons who may file complaints against judges.

Paragraph 6, part 4, Article 127 vests officials of the Judicial Qualification Commission with **unreasonably broad discretion**, which may be considered as a corruption risk factor. Therefore, decisions concerning dismissal, recall of a judge or initiating against him a criminal case or an administrative offence case are taken not by the Judicial Qualification Commission, which only delivers its opinion in accordance with parts 1-3 of Article 113, but by the bodies, which initiated the disciplinary inspection, that contradicts to the principles of impartiality in disciplinary cases.

Solution

1. Article 125 shall be supplemented with paragraph 9 as follows:

Paragraph 9: *“Persons involved in the process and others (except for the prosecutor) may file complaints against judges directly to the Judicial Qualification Commission”*.

2. Parts 1-3, Article 113 after the words “considers matters of disciplinary liability of the judges of the Supreme Court of the Republic of Tajikistan” shall be supplemented as follows:

“also gives permission to dismiss, recall a judge or initiate against him a criminal case or an administrative offence case”.

3. Paragraph 6, part 4, Article 127 shall be removed.

Comparative analysis of legal procedures (PCAO, CPC and EPC of the RT)

The Procedure Code on Administrative Offences regulates administrative legal proceedings. Administrative liability is stipulated by the Administrative Offences Code. However, it makes sense to compare this Procedure Code with other procedure codes – **the Civil Procedure Code** (CPC of the RT) and **the Economic Procedure Code** (EPC of the RT), but taking into account the peculiarities of administrative process. Participation in the administrative process presupposes liability of an administrative body (officials) and persons involved in the process for the validity and legality of actions and decisions taken, efficiency and effectiveness of the process. The important characteristic features of civil and economic processes are their adversarial nature and responsibility of the parties for their legal actions.

It is also necessary to take into account that an administrative process provides for the participation of many regulatory authorities (Articles 94-130 of the PCAO), some of which may impose administrative sanctions for 19 administrative offences (customs authorities), some deal only with one offence, for example, government authorities in accordance with Article 119 of the PCAO deal with cases stipulated only by Article 501 of the AOC. Some authorities duplicate the functions of other bodies (seeds testing authorities, veterinary services, phytosanitary agencies, etc.) Because of so many controls (36), their functions blur, which creates favourable conditions for bureaucratic barriers and administrative corruption.

Problem 1. Wording of legal provisions

It should be noted that the OECD recommendations for the third round of monitoring under the Istanbul Action Plan and EU standards affirm that Tajikistan should seek to build an independent judiciary. An independent judiciary is of particular importance in combating corruption, since judges as

“final” law enforcers have a huge impact on the implementation of the rule-of-law principle. However, the Procedure Codes, as well as the Constitutional Law “On Courts” (see chapter on this Law) contain provisions, which do not indicate that judges are independent of the other branches of power. For example, the principle of judicial independence, as stipulated in Article 17 of the Procedure Code on Administrative Offences of the Republic of Tajikistan (PCAO), Article 5 of the EPC and Article 9 of the CPC, is in a sense devalued by the principle of legality, which obliges the judge to “*exactly and consistently apply and comply with the provisions of the Constitution, the present Code and other legal acts of the Republic of Tajikistan*” (Article 8 of the PCAO).

This wording (similar is found in Article 12 of the CPC) can not be considered felicitous, as the literal interpretation of this provision requires from the judge to apply all the legal standards, even if the court deals with the case on a conflict of legal provisions or unconstitutionality of a legal act. In addition, the administrative law prohibits resolving conflicts by analogy, therefore the requirement “*to comply with other legal acts of the Republic of Tajikistan*” contradicts the provisions on prohibition of analogy. A better wording of the principle of legality is found in Article 6 of the EPC.

The next contradiction is connected with the fact that only provisions of the CPC (Article 12) stipulate that “*courts are required to adjudicate on the basis of the Constitution, this Code, laws of the Republic of Tajikistan and other legal acts of the Republic of Tajikistan, as well as **international instruments recognized by Tajikistan***”. Compliance with international standards is a constitutional norm, provided for in Article 10 of the Constitution, but it is not included in the PCAO and the EPC of the RT.

Solution

1. Article 8 of the Procedure Code on Administrative Offences shall be amended as follows:

“Legality in administrative cases is ensured by correct application of laws of the Republic of Tajikistan, international instruments recognized by Tajikistan and compliance with the provisions of this Code.”

2. Article 6 of the EPC of the RT shall be amended as follows:

“Legality in cases considered by economic courts is ensured by correct application of laws and other legal acts, international instruments recognized by Tajikistan and compliance with the provisions of economic proceedings legislation on the part of all the judges of economic courts.”

Problem 2: Representation

In the Procedure Code on Administrative Offences there are no provisions limiting representation (a lawyer for the person subjected to administrative liability and a representative of the affected party), whereas provisions on limiting representations in civil proceedings do not mention officials of the Council of Justice and court officers. At the same time, the provision limiting representation applies only to persons, who may have a conflict of interest between private interests and official duties. Therefore, paragraph 1, Article 59 of the EPC is most consistent with the principle of objectivity.

Solution

1. Article 29 of the Procedural Code on Administrative Offences shall be supplemented with paragraph 7 as follows:

Paragraph 7: *“Judges, investigators, prosecutors, officials of the Council of Justice of the Republic of Tajikistan and court officers may not act as defenders and representatives in administrative offences cases. This rule does not apply to the cases, in which these persons act as legal representatives”.*

2. Article 52 after the word “prosecutors” shall be supplemented with the following words:

“...officials of the Council of Justice of the Republic of Tajikistan and court officers”.

Problem 3: Interim measures

According to Article 144 of the CPC, interim measures are taken without informing the parties. In other words, the court decides on interim measures taking into account only the facts given by the plaintiff. The defendant is deprived of the opportunity to defend himself and give arguments before the interim measures are taken. If paragraph 1, Article 92 of the EPC is interpreted literally, the decision to impose interim measures shall be taken during the trial, i.e. having informed the parties. But the question remains: is it possible to inform the person at the court hearing one day before it is to be held? In accordance with paragraph 2, Article 147 of the CPC, the repeal of the interim measures is settled in court. The persons involved in the case shall be informed on the time and place of the session, but their absence is not an obstacle to consider the repeal of the measures securing the claim. Normally the whole procedure takes two to three months, as the court session on the repeal of the measures is conducted with notification of the parties (paragraph 2, Article 147 of the CPC of the RT). This implies that a dishonest plaintiff may evade receiving a summons that delays processing of the defendant's application.

The law takes into account that interim measures restrict defendant's rights and cause damage to his interests. So, following the principle of procedural equality of the parties, the law provides for guarantees of the defendant's interests. Thus, any ruling concerning interim measures is subject to a separate appeal. According to paragraph 2, Article 148 of the CPC, the deadline for filing an appeal in cases, when the ruling on interim measures was issued without

summoning the claimant, shall be calculated from the date of informing him of the ruling. This provision, nevertheless, is not included in the EPC of the RT. The norm provided for in paragraph 5, Article 96 of the EPC, states: *“The ruling of an economic court on repeal of interim measures and on refusal to repeal interim measures may be appealed”*. But this is not enough, as far as the appeal procedure and the legal consequences of the appeal are not specified, so we acknowledge **lack of administrative procedures**.

The second corruption risk provision is found in paragraph 5, Article 95 of the EPC, according to which, in case of refusal to satisfy the claim, leaving the claim without consideration and termination of proceedings, interim measures remain valid until the relevant court decision takes legal effect. The decision shall enter into force upon expiry of the time limit for appeal or when the cassation decision is taken. This is a fairly long period. A similar provision is stipulated by the CPC (paragraph 3, Article 147 of the CPC). This paragraph contains an important proviso: *“However, the judge files a ruling on repeal of interim measures while considering the case or having resolved it”*, which prevents the dishonest party from delaying tactics. At the same time, according to the EPC of the RT, following the entry into force of the court decision, an additional court session may be conducted in order to repeal interim measures:

“After the entry of the judicial act into legal force the economic court upon the application of a person participating in the case shall issue a ruling to repeal interim measures or shall indicate to it in judicial acts concerning the refusal to satisfy the claim, leaving the claim without consideration and termination of proceedings in respect of the case. In these cases, in the adopted judicial act it is necessary to indicate the information on the return of the funds paid as counter securing into the deposit account of the court” (paragraph 5, Article 95).

The essence of interim measures is to prevent withdrawal of money during the trial. After the end of the litigation and adjudication, the conscientious party has no sense to delay the repeal of interim measures, but the dishonest party is

provided with a mechanism for such delaying by the EPC. Why should interim measures be kept after the refusal to satisfy the claim, leaving the claim without consideration and termination of proceedings? The provision on the possibility of holding an additional hearing for the repeal of interim measures can be considered as a **corruption risk factor, viz., broad discretionary powers**.

Solution

1. Article 144 of the CPC shall be amended as follows:

“An application for securing a claim shall be considered by the court trying the case at the latest on the day following the date, when the application comes to the court. An application on interim measures is to be considered by a single judge”.

2. Paragraph 5, Article 96 of the EPC shall be supplemented as follows:

“In cases, when the decision on interim measures was taken without summoning the claimant, the deadline for filing an appeal shall be calculated from the date of informing him of the decision”.

3. Paragraph 5, Article 95 of the EPC shall be amended as follows:

“In case of refusal to satisfy the claim, leaving the claim without consideration and termination of proceedings, interim measures remain valid until the relevant court decision takes legal effect. However, the judge may issue a ruling to repeal interim measures simultaneously with taking decision on the case or after the trial. If the case is satisfied the interim measures remain valid till the execution of judgment”.

Problem 4: Restoration of procedural terms

The civil proceedings legislation doesn't provide for time limits, within which the court session on restoration of terms is to be conducted, and this may contribute to delaying the case. This provision creates conditions for abuse by the court (corruption risk factor).

Solution

Part 2, Article 114 of the CPC after "is considered in court session" shall be supplemented with the words "within five days".

Problem 5: Court notices

The system of judicial notices delivery should be convenient for the parties and not expensive for the state. It particularly concerns business entities and participants of economic proceedings.

Since the Law "On Citizens' Appeals" contains the new provision (Article 2.2) on the possibility to submit an application by e-mail and introduces the concept of "digital signature", the same measures of legal proceedings informatization should be stipulated in the EPC. Such changes will decrease the burden on the court, reduce state expenses on mail, lessen bureaucracy and increase the responsibility of the parties.

Therefore the following changes shall be introduced:

a) courts shall consider all the applications, including claims, submitted in electronic form and signed with the applicant's electronic digital signature online using e-mail or filling in a special form on the official website of the court;

b) upon a written request of participants of the process or an electronic application submitted in accordance with paragraph “a”, courts shall send copies (scanned images) of judgments (orders) to the applicants by e-mail.

Peculiarities of the CPC of the RT

Since the participants of civil proceedings are natural persons, the provisions of the CPC on court notices (Articles 115-120 of the CPC) shouldn't be changed. This is due to the fact that not all citizens of Tajikistan have access to the Internet, many have no e-mail. However, the methods of notification of litigating parties can also be optimized.

For example, according to paragraph 1, Article 121 of the CPC “*When the actual location of a defendant is unknown, the court shall issue a ruling on public serving a summons and attached documents after receiving a subpoena or other notification with a note certifying their receipt by a housing organization, local authority or the relevant enforcement body at the last known place of residence of the defendant, or the administration at the last known place of work*”. Litigation is delayed, and due to this the plaintiff suffers losses. Public summoning refers to the defendant search procedure provided for in Article 122 of the CPC, which regulates the search of a defendant only in certain cases – tort liability, maintenance obligations and obligations to the state. Public summoning is not applicable to all cases, because it may interfere with private and family life of a citizen (for example, issues of adoption, establishment of paternity, etc.) and personal data processing.

Solution

1. Paragraphs 1.1-1.2, Article 120 of the EPC shall be supplemented as follows:

“1.1. Information on acceptance of the statement of claim, time and place of the court hearing or other procedural actions of the economic court shall be posted on the official website of the court or sent by e-mail to the parties, referred to in the statement of claim (except for citizens), not later than 15 days before the court hearing or another procedural action, unless otherwise provided by this Code. If the court posts the information on the official website or sends an e-mail, it shall be considered proper notification.

1.2. Court notices addressed to citizens are sent to the place of their residence”.

2. The norm concerning public summoning should be removed, and the court shall start an investigation of the case after receiving the information from the last known place of the defendant's residence. This norm is stipulated in Article 119 of the CPC of the Russian Federation, Article 129 of the CPC of Kyrgyzstan⁹ and paragraph 1, Article 135 of the CPC of Kazakhstan¹⁰.

Problem 6: Special rulings

Special rulings are used to address causes of offences. They deal with issues, although beyond the dispute, but related to it, and elimination of the law violations and shortcomings in the work of organizations, which were discovered in legal proceedings. Thus, a special court ruling is a means to restore person's rights and to ensure the rule of law in general. This decision is taken in relation to public authorities, officials or enterprises, institutions and organizations.

This procedural mechanism is provided for in Article 145 of the PCAO and Article 231 of the CPC, but it's not stipulated in the EPC. Paragraph 1, Article 231 of the CPC states that *“having revealed facts of law violations the court may*

⁹ <http://www.wipo.int/edocs/lexdocs/laws/ru/kg/kg010ru.pdf>

¹⁰ http://online.zakon.kz/Document/?doc_id=1013921#sub_id=1290000

issue a special ruling”, but the formula “has the right” in this context generates corruption risks and diminishes positive potential of this mechanism. Paragraph 1, Article 145 of the Procedure Code on Administrative Offences stipulates that an official or a judge trying an administrative offence case, in the event of revealing law violations, shall submit *a statement*. Paragraph 3 of this Article states: “*If in the course of the judicial review of an administrative case it is established that the actions related to registration, administrative investigation and proceedings did not comply with the provisions of this Code and other legal acts of the Republic of Tajikistan, the judge may issue a special ruling against persons, who have committed the offence*”. It remains unclear why the word “may” is used, which increases the risk of corruption (corruption risk factor – using the “has the right” formula).

Absence of provisions on special rulings in the EPC shall be considered as a legislative gap.

Solution

1. Paragraph 1, Article 231 of the CPC shall be read as follows:

“Having revealed facts of law violations, the court shall issue a special ruling and send it to the relevant organizations or officials, who are obliged within a month to report on the actions taken.”

2. Paragraph 1, Article 145 of the Procedure Code on Administrative Offences, after the words “Republic of Tajikistan” shall be changed to “the judge shall issue a special ruling against persons, who have committed the offence”.

3. The EPC shall be supplemented with the following article:

“Having revealed facts of law violations in the course of the proceedings, the economic court shall issue a special ruling and send it to the relevant organizations or officials, who are obliged within a month to report on the actions taken.”

Problem 7: Proof

Paragraph 2, Article 58 of the CPC states:

“Any statement of a party on the circumstances of the case, which was not objected by the other party, shall be considered acknowledged and therefore indisputable that shall relieve the other party of the burden to prove such circumstances.”

This provision is not consistent with the adversarial principle. In addition, the Civil Procedure Code provides for proceedings in absentia (Chapter 22 of the CPC), which enables the court to consider the case in defendant’s absence, so any statement of the plaintiff according to paragraph 2, Article 58 of the CPC will be prejudicial. In the EPC the fact of relief of proving circumstances shall be entered to the record of the court session and shall be certified by the signatures of the parties. The acknowledgement stated in writing shall be attached to the materials of the case (paragraph 3, Article 69). In such wording this provision reduces abuse by the court and the participants of the process.

Solution

Paragraph 2, Article 58 of the CPC shall be supplemented with the words: *“The fact of acknowledging by the parties of circumstances shall be entered by the court to the record of the court session and shall be certified by the signatures of the parties. The acknowledgement stated in writing shall be attached to the materials of the case”*.

Problem 8: Accepting an application

The CPC stipulates several opportunities to review the case in the absence of one of the parties. For example, Article 120 of the CPC (“Change of address

during the legal proceedings”), Article 227 of the CPC (one of the reasons to leave the application without consideration is: “the parties have not requested to consider the case in their absence and do not appear in the court for the second time”), paragraph 4, Article 170 of the CPC.

“The court may consider the case in absentia, if any party, duly notified about the time and the place of the court session, fails to appear in the court without having reported about a valid reason, or if the reason is considered by the court invalid”.

At the same time according to paragraph 5 of this Article

“the court may consider the case in the absence of a plaintiff or a defendant, notified about the time and the place of the court session in accordance with Chapter 22 of this Code, if they haven’t informed the court of valid absence reasons or haven’t requested to consider the case in their absence”.

Thus, the court is vested broad discretions in choosing the way to consider the case in the absence of one or both parties – from delaying of the court session to conducting it in absentia. In case of passing a default judgment according to Chapter 22 of the CPC of the RT, the defendant is granted additional guarantees to appeal it unlike the proceedings in absentia.

Similar provisions are stipulated in Articles 123, 155 of the EPC, but opposed to the CPC economic courts of the Republic of Tajikistan have no right to conduct proceedings in absentia and this reduces guarantees of the parties and could violate the adversarial principle.

Solution

However, procedural economy and economy of public money should not hinder the access of natural and legal persons to justice and prevent them from defending their positions. **So it is necessary to specify the criteria for**

determining when the case is considered in the absence of a defendant or without both parties.

Problem 9: Immunity of a witness

Witness immunity is a person's right not to testify, which applies to specific persons, subdivided into two groups:

1) persons, who are not allowed to be questioned as witnesses (professional immunity of judges, lawyers);

2) persons, who have the right to choose not to testify or not to answer the questions of an interrogator (relatives).

Article 51 of the Constitution of Tajikistan does not provide for witness immunity for representatives of the state legislative bodies, but according to paragraph 4, Article 72 of the CPC deputies of state representative bodies may refuse to testify in civil cases on the facts, which they got to know while performing their parliamentary duties. Neither the PCAO, nor the EPC provides for such rule.

However the PCAO and the EPC do not stipulate witness immunity for:

- representatives in a civil case or attorneys in a criminal case – concerning the circumstances they have learned about in connection with performance of their duties as a representative or an attorney;

- judges, people's assessors – concerning the issues, which have arisen in the consultation room in connection with the discussion of the circumstances of a case when passing a court decision, a ruling, a resolution or a verdict;

- priests of the religious organizations, which have passed state registration – concerning the circumstances, which have become known to them from a confession.

Absence of rules on witness immunity in the PCAO and the EPC is not correct from the point of view of legal logic and leads to inequality of the same entities in different jurisdictions.

Solution

1. Article 31 of the PCAO shall be supplemented with the following paragraph and the following article shall be introduced to the EPC:

“1. The following persons shall not be questioned as witnesses:

- persons who due to their physical or mental disabilities are not able to perceive facts and provide accurate testimony about them;

- representatives in a civil case or attorneys in a criminal case – concerning the circumstances they have learned about in connection with performance of their duties as a representative or an attorney;

- judges, people's assessors – concerning the issues, which have arisen in the consultation room in connection with the discussion of the circumstances of a case when passing a court decision, a ruling, a resolution or a verdict;

- priests of the religious organizations, which have passed state registration – concerning the circumstances, which have become known to them from a confession.

2. *The following persons have the right to refuse from giving witnesses' evidence:*

- a citizen against himself;

- *a spouse against his/her spouse, children against their parents and parents against their children;*

- *brothers and sisters against one another, a grandmother and a grandfather against their grandchildren, and grandchildren against their grandfather and grandmother.*”

Problem 10: Revision of judicial acts

1. Chapter 12 of the PCAO stipulates the procedure for revision of resolutions of courts and authorised bodies, as well as for appealing (including cassation) and protesting against decisions of officials and administrative offences courts (Article 148). In accordance with Article 150 of the Code a resolution may be appealed against and protested (by a prosecutor) within ten days after the delivery or receipt of a copy of the decision by the persons participating in the case.

The EPC and the CPC provide for two types of appeals: against decisions, which have not entered into force (Chapter 31 of the EPC and Chapter 39 of the CPC) and against decisions, which have entered into force (Chapter 33 of the EPC and Chapter 40 of the CPC). According to part 2, Article 238 of the EPC “*a cassation appeal shall be filed within a month after the delivery of the decision of the economic court to the persons participating in the case*” and Article 327 of the CPC “*a cassation appeal and a protest may be filed within one month from the date of delivery of the decision to the parties*”. A problem may occur if the parties receive copies of judicial decisions and administrative rulings at different times, so the deadline to appeal may be different for the parties. Such provisions can be referred to such corruption risk factor as lack of administrative procedures.

2. The system of revision under the supervisory procedure has certain drawbacks. So, according to paragraphs 4-5, Article 365 of the CPC, the

Prosecutor General of the Republic of Tajikistan may file a supervisory protest against decisions, which have come into force, of any court of the Republic of Tajikistan, except for decisions of the Supreme Court of Tajikistan. In order to file a supervisory protest against decisions, which have come into force, the Prosecutor General must request the case from the relevant court. A similar norm is stipulated by paragraph 1, Article 270 of the EPC, but the procedures for application and certiorari are not specified.

The procedure, according to which the Prosecutor General may request any case, is a manifestation of **unreasonably broad discretion**. Participants of civil and economic legal proceedings are legally capable persons, who may themselves if they wish appeal under the supervisory procedure. The Prosecutor General as the representative of the state should not assume such powers, especially in civil proceedings, the participants of which enjoy full rights and can themselves file an appeal. As stated above, broad discretions of the Prosecutor General violate constitutional principles of separation of powers, non-interference of the executive with the judiciary and the independence of judges.

3. Another significant drawback of supervisory proceedings is the fact that the civil legal relations regulated by the court may suspend for the whole year and impede civil circulation (paragraph 2, Article 365 of the CPC), whereas according to paragraph 3, Article 270 of the EPC an appeal under the supervisory procedure may be filed only within 6 months after the date when the decision enters into force. We recommend the period of 6 months as reasonable for revision of a case under the supervisory procedure, in both civil and economic proceedings.

Solution

1. It is advisable to provide for a single deadline for the preparation of final decision, after which the term for appeal starts. For example, 5 days after the announcement of the operative part of the decision.

2. Article 365 of the CPC shall be amended as follows:

In paragraph 2 the phrase “within a year” shall be replaced with “within 6 months”.

Paragraphs 4 and 5 shall be considered void.

3. Paragraph 1, Article 270 of the EPC shall be amended as follows:

The words “concerning the cases specified in Article 51 of this Code at the protest of the Prosecutor General of the Republic of Tajikistan” shall be removed.

Table of comparisons

| | Procedure Code on Administrative Offences (PCAO) | Economic Procedure Code (EPC) | Civil Procedure Code (CPC) |
|--|---|--|--|
| international norms | <p>Priority of international norms is not fixed (Art.3)</p> <p>Note: to provide for priority of international norms</p> | <p>Priority of international norms is not fixed (Art.1)</p> <p>Note: to provide for priority of international norms</p> | <p>Priority of international norms (p.2, Art.1)</p> |
| Principle of legality and principle of independence | <p>Judges are subject only to the Constitution and the Law (Art. 17)</p> <p>Courts, authorized state bodies (officials) when considering cases on administrative offences are required to exactly and consistently apply and comply with the provisions of the Constitution, the present Code and other legal acts of the Republic of Tajikistan (Art. 8).</p> | <p>Judges are subject only to the Constitution and current legislation (Art. 5)</p> <p>Legality in cases considered by economic courts is ensured by correct application of laws and other legal acts and by compliance with the provisions of economic proceedings legislation on the part of all the judges of economic courts (Art. 6)</p> | <p>Judges are subject only to the Constitution and the Law (Art. 9)</p> <p>The court must adjudicate on the basis of the Constitution of the Republic of Tajikistan, this Code, laws of the Republic of Tajikistan and other normative legal acts of the Republic of Tajikistan, as well as international instruments recognized by Tajikistan. Courts resolve civil cases in accordance with the requirements of usual business practice in cases, stipulated by legal regulations (Art. 12).</p> |
| Solution to conflict of legal provisions | <p>If a court, authorised state authorities (officials) in the proceedings determine that the applied norm of the legislation encroaches on the constitutional rights and freedoms of a person, they are obliged to suspend legal proceedings and address the Constitutional Court of the Republic of Tajikistan on establishing compliance of this provision with the Constitution. Upon receipt of the decision of the Constitutional Court the proceedings are resumed (p. 2, Art. 8).</p> | <p>If while considering a particular case the economic court comes to the conclusion that the law applied or to be applied in the present case doesn't comply with the Constitution of the Republic of Tajikistan, the economic court addresses the Constitutional Court of the Republic of Tajikistan with the request to review the constitutionality of this law (p. 3, Art. 13).</p> | <p>If while considering a case the court finds out that a normative legal act does not conform to the legal act of higher legal force, the provisions of the act with higher legal force shall be applied (p. 2, Art. 12).</p> |
| Principle of equality | <p>Parties – natural persons (Art. 10)</p> <p>Note: Article 10 after the words “All are equal before</p> | <p>Parties – natural and legal persons (part 1, Art. 8)</p> | <p>Parties – natural and legal persons (Art. 7)</p> |

| | | | |
|---|--|---|--|
| | the law and the courts. The state guarantees the rights and freedoms of every person regardless of nationality, race, sex, language, religion, political beliefs, education, social status or wealth” shall be supplemented with the following words: “Also, the state guarantees the rights of legal entities regardless of their legal status, ownership, location, subordination, and other circumstances”. | | |
| System of principles | Specified in a separate chapter (10 principles) | Not specified (7 principles) | Not specified (7 principles) |
| Reasons for recusation of a judge | <p>Articles 38-40 do not stipulate the following conditions:</p> <ul style="list-style-type: none"> - he is or previously has been officially or in any other way dependent on a person participating in the case, or on his representative; - he has made public statements or has given opinions on the merits of the case under consideration. | <p>The following conditions are provided for (Art. 20):</p> <ul style="list-style-type: none"> - he is or previously has been officially or in any other way dependent on a person participating in the case, or on his representative; - he has made public statements or has given opinions on the merits of the case under consideration. <p>Note: These conditions shall be introduced to the PCAO and the CPC.</p> | <p>The following conditions are not provided for (Art. 18):</p> <ul style="list-style-type: none"> - he is or previously has been officially or in any other way dependent on a person participating in the case, or on his representative; - he has made public statements or has given opinions on the merits of the case under consideration. |
| Mechanisms for recusation of a judge | <p>Part 1, Art.41 The question of recusation of a judge or other participants of the proceedings, filed during the trial, shall be resolved by a ruling of the court passed in the consultation room.</p> | <p>Part2, Art. 32 The question of the recusation filed against a judge who is considering the case alone shall be resolved by the chairman of the relevant economic court or his deputy.</p> <p>Note: this system of challenging a judge is more considered and allows to take balanced decisions on recusation</p> | <p>Part.2, Art. 22 The question of the recusation filed against a judge who is considering the case alone shall be resolved by the same judge.</p> |
| Securing a claim | | <p>Art. 92 An application for interim measures is considered by the economic court, at the pre-trial stage, not later than the day following the receipt of the</p> | <p>Art. 144 An application for interim measures is considered on the day of its receipt by the court without notification of the defendant and other persons involved in</p> |

| | | | |
|--|--|--|--|
| | | application by the court. The application for interim measures is considered in a court session by a single judge. | the case. The court shall issue a ruling on interim measures. |
| Restoration of procedural terms | | <p>Part 3, Art. 116</p> <p>A petition for the restoration of a missed procedural term shall be filed with the court where the procedural action is to be committed and is considered in the court session within five days following its receipt by the economic court. Persons participating in the case shall be informed of the time and place of the hearing and their failure to appear shall not preclude the consideration of the petition.</p> | <p>Part 2, Art. 114</p> <p>A petition for the restoration of a missed procedural term shall be filed with the court where the procedural action is to be committed and is considered in the court session. Persons participating in the case shall be informed of the time and place of the hearing and their failure to appear shall not preclude the consideration of the petition.</p> <p>Note: It's necessary to set a time limit within which the hearing is to be held.</p> |
| Principle of publicity | Part 2, Art.21 In order to increase the educational and preventive role of the proceedings on administrative offences, a case may be considered directly at the place of work, study or residence of the person, who has committed an administrative offence. | | |
| Representation | Articles 27-29 | <p>Part 2, Art. 50</p> <p>The rights and legitimate interests of disabled citizens shall be protected in an economic court by their legal representatives, that is, parents, adoptive parents, custodians and guardians, which may entrust another representative selected by them with the conduct of a case in an economic court.</p> <p>Note: strange norm, characteristic rather of CPC (is not included in the CPC).</p> | Art. 50 |

| | | | |
|--------------------------------------|---------------|---|--|
| Restriction of representation | - | P. 1, Art. 59 Judges, investigators, prosecutors, officials of the Council of Justice of the Republic of Tajikistan and court officers may not act as representatives in economic courts. The given rule shall not extend to instances when said persons act in an economic court as representatives of appropriate bodies or as legal representatives. | Art. 53 Judges, investigators and prosecutors can not act as representatives in courts, unless they participate in the process as representatives of appropriate bodies or as legal representatives. Note: officials of the Council of Justice and court officers are not mentioned |
| Special ruling | Art. 145 | - | Art. 231 |
| Evidence | | P. 3, Art. 64 Each person participating in a case shall have to disclose the circumstances he refers to as to the ground of his claims and objections to other persons participating in the case prior to the court session, unless otherwise provided by this Code. | P.2, Art. 58 Any statement of a party on the circumstances of the case, which was not objected by the other party, shall be considered acknowledged and therefore indisputable that shall relieve the other party of the burden to prove such circumstances. |
| Witness immunity | Art. 31 no | no | Art. 72 The following persons shall not be questioned as witnesses: - persons who due to their physical or mental disabilities are not able to perceive facts and provide accurate testimony about them; - representatives in a civil case or attorneys in a criminal case – concerning the circumstances they have learned about in connection with performance of their duties as a representative or an attorney; - judges, people's assessors – concerning the issues, which have arisen in the consultation room in connection with the discussion of the circumstances of a case when passing a court decision, a |

| | | | |
|--|--|--|--|
| | | | <p>ruling, a resolution or a verdict;</p> <p>- priests of the religious organizations, which have passed state registration – concerning the circumstances, which have become known to them from a confession.</p> <p>4. The following persons have the right to refuse from giving witnesses' evidence:</p> <p>- the deputies of the legislative bodies – in respect of information which has become known to them in connection with their discharge of deputies' powers.</p> |
|--|--|--|--|

Administrative Offences Code of the RT (AOC)

One of the main problems unresolved so far in the AOC is the distinction between the elements of criminal and administrative offences (see below paragraphs a-c). But fuzzy legality and legal ambiguity are widespread phenomena in the analyzed Code. There are four types of offences, where the disposition does not correspond to the characteristics of legal certainty.

Problem 1: The reference “if there is no evidence of a crime” generates broad discretion

Many administrative offences of the AOC are distinguished from identical criminal offences with the reference “if there is no evidence of a crime”, which contradicts to the principle of legal certainty, especially with regard to provisions that impose responsibility. Despite the principle of legality (Article 7), the requirement that “the content of this Code shall be interpreted in strict accordance with the text” (paragraph 6, Article 7) and the prohibition of analogy (paragraph 3, Article 7), law-enforcers shall apply the provisions which are coherent and consistent.

In the AOC I have found 74 articles, in which the only difference between an administrative and criminal offence, given in the disposition, is the reference “if there is no evidence of a crime” (Art. 86-87, 90-91, p.1 Art.93, 95, 121, 127-128, 133, p.1 Art.134, p.1 Art.135, p.1-2, Art.140, 141, 147, 153, 165-166, p.3 Art.182, p.1 Art.183, 189, 191, 195, 237, 242, 261, p.2 Art.285, 327, 334, p.1 Art.374, p.1 Art.376, 406, 415, 461, p.1-2 Art.464, p.1 Art.470, 471(1), 483(1), 487, 498, p.2 Art.506, p.1-3 Art.521, 527, 541-542, 545, 556, p.2 Art.566, p.2 Art.572, 577, 598, p.2 Art.599, p.2 Art.601(1), 606, 618, 627, 638, 646, 649, 659, 661-675, p.2 Art.683). For the purpose of this study Chapter 38 of the AOC (“Administrative offences related to corruption”) is of particular interest, as its articles contain this reference:

1. “Abuse of public office” (Art. 661);
2. “Illegal transfer of public financial and material resources to the election funds of individual candidates and NGOs” (Art. 662);
3. “Unjustified failure to enforce acts of law-enforcement, supervisory and judicial authorities” (Art. 663);
4. “Using the information, obtained while performing public functions, for personal or group advantage” (Art. 664);
5. “Unlawful interference with the activities of economic entities” (Art. 665);
6. “Violation of the procedure for valuation and disposal of assets, as well as auction and tender procedures” (Art. 666);
7. “Illegal disposal of public funds” (Art. 667);
8. “Violation of the procedure for bringing to administrative responsibility for administrative offences” (Art. 668);
9. “Drawing, registration, approval or recording of acts, transactions or contracts with distortions concerning disposition, usage and transfer of assets” (Art. 669);
10. “Artificial creation of obstacles to natural and legal persons in the exercise of their rights and legitimate interests” (Art. 670);
11. “Providing tangible and intangible benefits to officials authorized to perform state functions” (Art. 671);
12. “Failure to provide information and to report to law-enforcement authorities on offences related to corruption” (Art. 672);

13. “Failure to submit or late submission of acts and materials of audits and inspections to an authorized body or a person” (Art. 673);

14. “Malicious evasion of conducting business financial transactions, distortion and destruction of documents and reports” (Art. 674).

For example, Article 671 of the AOC stipulates liability for “*providing tangible and intangible goods, services and benefits to officials and persons having equivalent status authorized to perform public functions with a view to inducing them to certain actions (inaction) in the interests of the person providing the goods and services, if there is no evidence of a crime*”, which is identical to the crime provided for in Article 320 of the Criminal Code “Bribery (Note: money, securities, other assets or property benefits for actions (inaction) in favour of the briber or persons represented by him, if such actions (inaction) are included into service powers of the official) of a public official”.

As a result, the classification of the action as an administrative offence or as a crime doesn’t depend on any objective criteria, and is left to the subjective judgment of a law-enforcement authority, thus increasing corruption risks. This can be referred to such corruption risk factors as broad discretion and legal and linguistic ambiguity.

Solution

1. A more precise distinction may be made through indicating the amount of the bribe (corrupt practices) or the amount of damage. For example, part 2, Article 572 of the AOC provides for administrative liability for non-payment of customs duties “if there is no evidence of a crime”. Compare: analogous provision of part 1, Article 291 of the Criminal Code (“Evasion of customs duties”) stipulates liability for non-payment of relevant fees in a large amount. The comment to this article explains that “a large amount” means the amount exceeding 5000 calculation units. Consequently, failure to pay fees amounting to less than 5000 calculation units shall be classified according to part 2, Article 572

of the AOC. But for a precise distinction, provisions of part 2, Article 572 of the AOC shall be specified:

“Evasion of payments in an amount not exceeding 5000 calculation units.”

1. As regards Article 671 of the AOC, the amount of tangible benefits is to be specified, for example:

*“Providing tangible goods, not exceeding **one calculation unit**, and intangible goods, services and benefits to officials and persons having equivalent status authorized to perform public functions with a view to inducing them to certain actions (inaction) in the interests of the person providing the goods and services, if there is no evidence of a crime”.*

Problem 2: The features to distinguish between administrative and criminal offences are not provided for.

Some articles of the AOC do not provide for a criterion for the reference “if there is no evidence of a crime”.¹¹ For example, Article 658 of the AOC stipulates *“Enjoying extralegal advantages when receiving and returning loans, credits, purchasing securities, immovable or any other property, paying taxes and performing other obligations by an official”*. Virtually, these actions are nothing but receiving a bribe, provided for by part 1, Article 319 of the Criminal Code, as the concept of a bribe includes “property benefits”. As it follows from the Decision of the Plenum of the Supreme Court of the Republic of Tajikistan No. 11 “On judicial practice in cases of bribery and corrupt business practices”, adopted on December 19, 2008, “Property benefits shall be understood as, in particular, undervaluation of transferred property and objects being privatized, reduction of lease payments and interest rates on bank loans (debts)”.

¹¹ See: Anti-corruption reforms in Tajikistan. Round 3 of the Istanbul Anti-Corruption Action Plan. OECD report dated to April, 2014.

At the same time, in accordance with part 1, Article 11 of the Criminal Code of the RT, if the wording of a criminal provision is dubious or may be interpreted ambiguously, this provision shall be interpreted in favour of the accused (defendant, convict).

In the above situation, taking a bribe in the form of property by an official personally or through an intermediary, namely enjoying by an official extralegal advantages when receiving and returning loans, credits, purchasing securities, immovable or any other property, paying taxes and performing other obligations for actions (inaction) in favour of the briber or persons represented by him, will be classified not as a crime (Article 319 of the Criminal Code), but as an administrative offence (Article 658 of the AOC).

Another example: Article 657 of the AOC stipulates administrative liability for *“Accepting gifts or services by an official in connection with performance of public duties or similar functions from subordinates, as well as giving presents and rendering services to senior officers”*.

As in the previous case, these actions are elements of the crime stipulated by Articles 319 and 320 of the Criminal Code, namely receiving/giving a bribe for the overall protection and connivance in the service and, accordingly, shall be classified as a crime.

Solution

Articles 657-658 of the AOC shall be considered void, since the provisions included in these articles are stipulated in the Criminal Code.

Problem 3: Conflict of legal provisions within the AOC

Provisions of Article 551 of the AOC, stipulating liability for selling goods and rendering services untrue to advertisement:

“Selling goods and rendering services that do not correspond to the form, in which they were presented or shown in the advertisement, as well as advertising or providing goods or services with no intention to sell them”,

are identical to other norms provided for by Article 546 of the AOC (“false advertising”):

“Dissemination by an advertiser of knowingly false information on production and sale of goods or rendering of services misleading consumers of advertisements, which contains false information”.

The content of both articles is identical, but the sanctions differ: Article 546 of the AOC provides for a more severe punishment – imposing a fine on natural persons in the amount of ten to twenty, on officials – forty to fifty and on legal entities – one hundred to two hundred calculation units.

Moreover, this article may be turned into a criminal one (as the article itself contains the reference “if there is no evidence of a crime”) – “knowingly false advertisement” (Article 276 of the Criminal Code):

“Use in advertising of knowingly false information about goods, works or services, or about their manufacturers (executors or sellers), which is prompted by mercenary interest”.

Sanction: a fine of 250 to 365 calculation units or imprisonment for a term up to two years, or restraint of liberty for the same term.

Thus, the law-enforcer is suggested to choose in his discretion out of the three options, which will inevitably lead to corruption. In addition, paragraph 1, Article 16 of the Administrative Code states: *“If the provisions of this Code have two or more meanings or interpretations, they are interpreted in favour of the person, who has committed an administrative offence”*, therefore, the law-enforcer may apply an article either with a minor offence or with a crime, if he doesn’t find inconsistencies between the provisions.

Problem 4: Over-regulation and overlapping provisions

While establishing administrative procedures and responsibility for their violation, the legislator shall strive to ensure that administrative procedures do not become administrative barriers. For this purpose, the following criteria shall be taken into account:

- compliance with the rules of legal drafting methodology (coherence, consistency, accuracy and clarity of provisions);
- criterion of administrative procedures utility;
- emergence and development of market economies;
- feasibility of administrative procedures;
- systemic unity;
- compliance of administrative procedures with their intended function.

The following are examples, where over-regulation becomes a bureaucratic barrier and generates corruption.

The first example. Chapter 30 of the AOC (“Administrative proceedings in the sphere of antitrust legislation”) contains many provisions, which provoke selective enforcement, excessive regulation, and thereby give rise to corruption. The AOC regulates liability in the sphere of advertising by means of eight articles (Articles 546-551 (2)). At the same time, the essence of Article 547 of the AOC (“Improper advertising and counter advertising”) – *“Improper advertising or denial of counter-advertising by business entities (group of persons)”* is unclear.

In addition, following the principle of freedom of a civil contract and the essence of business activity aimed at making profit by any legitimate means, we have to recognize the right of business entities to advertise their goods, i.e. to

disseminate information about their products or services by any available means in order to draw attention to the subject of advertising, to arouse and keep up interest in it and to promote it in the market. Consequently, regulating civil relations by means of the AOC is unnecessary, for example:

“Selling goods and rendering services that do not correspond to the form, in which they were presented or shown in the advertisement” (Article 551 of the AOC),

and

“Dissemination by an advertiser of knowingly false information on production and sale of goods or rendering of services misleading consumers of advertisements, which contains false information” (Article 546 of the AOC).

The mere fact of improper coverage of products in the media cannot be considered as an administrative offence, or a crime, because for prosecution it is necessary to establish: firstly, the fact of violation (question: what expertise can analyze truthfulness of an advertisement?); secondly, damage caused to social relations; and thirdly, cause and effect between the advertisement and the damage. The message of the legislator, who has criminalized the provision on “false advertising”, is not clear. It is also unclear what damage to the state (natural or legal persons) may be caused by these actions.

The second example. Article 645 of the AOC (“Concealment of product defects”) states that “concealment of product defects, evasion of exchange of goods of poor quality” may occur “while purchasing and selling goods”, but the quality of goods shall be challenged between the buyer and the seller at the pre-trial and trial stage, rather than through state authorities.

The third example concerns Article 631 of the AOC (“Violation of legislation on protection of consumer rights”), which stipulates administrative penalties for violation of any provision of the Law (“also violation of other

requirements of legislation on protection of consumer rights”). This provision contradicts to the principle of legality (Article 7), namely prohibition to apply norms by analogy. The debates on protection of consumer rights shall be resolved in court in accordance with Article 17 of the Law of the Republic of Tajikistan No. 72 of 9.12.2004 “On Protection of Consumer Rights”¹². According to Article 39 of the Law “On Protection of Consumer Rights” the list of powers of the authorities, responsible for controlling the quality of goods and services, among other functions includes filing legal actions against producers. However, these bodies are not authorised to impose administrative sanctions for violation of this Law. The state intervention in this case is excessive and increases corruption risks and abuses on the part of the authorized persons.

The fourth example – overlapping provisions. Article 624 of the AOC (“Violation of trade and service regulations”) duplicates provisions of Article 631 of the AOC. Firstly, this norm:

“Violation of trade and service regulations by enterprises and organizations, regardless of ownership, and by individuals”

is legally indefinite, namely the list of violations, which lead to imposing administrative sanctions, is not specified. Secondly, the provisions of this article regulate protection of consumer rights, which is reflected in other norms, such as Article 631 of the AOC and the Law “On Protection of Consumer Rights”, overlapping them. This provision creates conditions for abuses by public authorities and promotes emergence and development of market environment.

Solution

1. The following articles shall be removed:

- Article 551 of the AOC (“Selling goods and rendering services untrue to advertisement”);

¹² <http://www.mmk.tj/ru/legislation/legislation-base/2004/>

- Article 547 of the AOC (“Improper advertising and counter advertising”);
- Article 624 of the AOC (“Violation of trade and service regulations”);
- Article 631 of the AOC (“Violation of legislation on protection of consumer rights”);
- Article 645 of the AOC (“Concealment of product defects”).

Problem 5: Legal and linguistic ambiguity

Article 650 of the AOC stipulates administrative liability for:

“Failure to apply necessary measures for improvement of state property; usage of state property as intended or failure to use it without a valid reason, usage of state property in excess of the norm”.

Literal interpretation of this norm doesn’t explain what actions (or inaction) entail responsibility. Firstly, it is impossible to establish with certainty which actions (or inaction) imply improvement or deterioration of the property, except for natural depreciation. Secondly, it is not clear what officials fall within the purview of this article (in fact, not all the officials are responsible for the technical equipment of their workplace). Thirdly, the norms “failure to use state property without a valid reason” and “usage of state property in excess of the norm” are not detailed.

In addition, Article 661 (“Abuse of public office”) and Article 667 (“Illegal disposal of public funds”) provide for liability for misuse of property, therefore, the provisions overlap each other, and the authorities are given unreasonably broad discretion to decide on the article to be applied.

Solution

Article 650 shall be considered void.

RECOMMENDATIONS

The following recommendations were worked out after the analysis of 8 legal acts. This list is not exhaustive, and more detailed guidelines can be found in the study. At the same time, we can state that the most corruption-prone legal acts are the AOC of the Republic of Tajikistan and the Constitutional Law “On Courts”. The new Constitutional Law, which is in force since June 2014, does not contain several corruption-prone provisions of the last law (for example, distribution of cases by the Council of Justice, mandatory participation of the Prosecutor General in the meetings of Plenums and Presidiums of the Supreme Courts), but hasn’t avoided certain problems in this sphere.

The AOC of the Republic of Tajikistan is an example of over-regulation, which generates bureaucratic barriers and leads to corruption. But, in fact, it only legalizes relations characterised by excessive control and supervision in the economic sphere. Any violation of internal regulations and by-laws shall be considered illegal. Overlapping and identical provisions lead to abuses by officials and numerous inspecting authorities.

1. Deregulate civil legal relations (at least in the AOC), e.g. contractual relations and legal relations concerning protection of consumer rights.

2. Introduce RIA (Regulatory Impact Analysis). The cost-benefit analysis method is used in the OECD member-states to assess the potential effects that may occur as a result of the introduction of certain regulatory measures.

3. Involve business communities in joint work at draft laws in the field of economy and trade. They can draw conclusions on draft laws, which may be taken into account in the process of law adoption.

4. Shift from the state control to a risk-based and differentiated approach, the supervision of those organizations and activities that actually put the health and life of the population at risk.

5. Ensure transparency of inspection procedures, set terms for inspections (no more than once every three years).

6. Prohibit executive authorities to determine service consumers, special conditions of payment for services and the price of services. Such matters should be regulated at the level of a ministry or by a separate law, which would provide for a list of paid services and their cost.

7. Decriminalization of administrative offences. In other words, if an administrative offence entails liability, there is no need to include an identical provision in the Criminal Code.

8. In accordance with the UN Convention against Corruption, crimes related to corruption should be punished more severely than others, so if identical offences are stipulated by both the AOC of the Republic of Tajikistan and the Criminal Code, it is necessary to leave only the provisions of the Criminal Code.

9. Supplement the EPC with the notion “a special ruling”, i.e. the ruling, which is issued by the court against officials, if the fact of their violation of the law is revealed during the proceedings.

10. Oblige judges to issue a special ruling against officials, if the fact of their violation of the law is revealed during the proceedings (CPC, EPC and PCAO of the RT).

11. Supplement the EPC with a provision on witness immunity.

12. Supplement the PCAO with an article on limiting representation (a list of persons who can not act as defenders and representatives in administrative cases). This provision must comply with the one stipulated by the EPC. Supplement provisions of the CPC on limiting representation with the following persons: officers of the court and the Council of Justice.

13. It is necessary to specify the criteria for determining when the case is considered in the absence of a defendant or without both parties. Bring procedural codes into compliance in order to equalize parties.

14. Deprive the Council of Justice and the Prosecutor General of the right to give “explanatory directives” to supreme courts.

15. Deprive the Prosecutor General of the right to file a supervisory protest against decisions, which have come into force, of any court of the Republic of Tajikistan. The Prosecutor General shall be prohibited to request the case from the relevant court in order to file a supervisory protest against decisions, which have come into force.

16. Chairmen of courts and their deputies shall be forbidden to conduct personal reception of citizens in order to avoid a conflict of interest or loss of impartiality.

17. The chairman of a court shall be released from the administrative duties non-relevant to his position. For this matter, it would be useful to introduce the position of a court administrator, reporting to the Council of Justice, whose responsibilities would include all issues relating to economic and technical maintenance of the court.

18. Give citizens the right to file complaints against judges directly to the Judicial Qualification Commission. Describe in details the procedure for such applications.

19. Release the Council of Justice from the functions directly related to decisions on judges’ career: recusation and dismissal, imposing administrative sanctions, participation in the meetings of the Judicial Qualification Commission, inspection of the work of judges.

20. Courts (except for judicial activity) should be inspected through checking the work of court administrators. Judges to fill judicial vacancies should be selected jointly by the Council of Justice and chairmen of courts.

21. Improve transparency of the judicial system: launch a website of the Supreme Court of Tajikistan and each court, publish valid judgments of courts of all levels, not only the decisions of the Constitutional Court of the Republic of Tajikistan and the Supreme Economic Court. Create a website of the Council of Justice, where vacancy notices to fill judicial posts (as well as court personnel) would be released. Publish all decisions of the Judicial Qualification Commission concerning appointment and dismissal of judges.

22. Provide delivery of notifications via electronic means of communication in economic courts (Internet, personal account on the website of the Supreme Economic Court).

23. Enable judges to appeal against decisions of the Judicial Qualification Commission to the Supreme Court and the Supreme Economic Court; fix this norm in the Constitutional Law "On Courts". The Constitutional Court may be authorised to consider these appeals (judges' complaints against decisions of the Judicial Qualification Commission) as the last instance.

| | Conflict of legal provisions | Broad discretions Provisions based on “has the right” formula | Ambiguity of provisions (legal and linguistic) | Incompleteness or lack of administrative procedures Provisions, creating conditions for abuses | Overlapping provisions | Notes |
|---------------------------------------|---|---|---|--|-------------------------------|--|
| Constitutional Law “On Courts” | | Art.9, 14, 18; p.2 Art.108; Art.125, p.6 part 4 Art.127 | p.2 Art.8, Art.18, p.5 Art.131 | Art.37-38, 41, 53-55, 63-64, 77-78, 83-84, 125-126 | | |
| PCAO | Art.17 | p.1 Art.145, 661, 667 | | 1. Witness immunity is not stipulated – Art.31. 2. Representation is not limited. | | |
| CPC | Art.10, 12, p. 2 Art.58, 120, 138, p.4-5 Art.170, 227 | Art. 9, 147, p.4-5 Art.170, p.4-5, 231, Art.365 | | Art.53, p.4 Art.72, Art.320-327, 390-395 | | |
| EPC | Art.5-6, 61, 123, 155 | Art. 92, p.5 Art.95, 123-124, p.2 Art.147, p.1 Art.270. | | p.5 Art.96, p.1 Art.270, Art.236-238 1. Witness immunity is not stipulated. 2. Special rulings are not provided for. | | The characteristic features of this Code are broad discretion and incompleteness or lack of administrative procedures |
| AOC | Art.546, 551, 661, 670 | Art.86-87, 90-91, p.1 Art.93, 95, 121, 127-128, 133, p.1 Art.134, p.1 Art.135, p.1-2, Art.140, 141, 147, 153, 165-166, p.3 Art.182, p.1 Art.183, 189, 191, 195, 237, 242, 261, p.2 Art.285, 327, 334, p.1 | Art.650, 671 | | Art.547, 551, 624, 631, 645 | One of the most corruption-prone codes; its provisions are the outcome of over-regulation and bureaucracy(bureaucratic barriers) |

| | | | | | | |
|---|--------------------------------|--|--------|-----------------|--|--|
| | | Art.374, p.1 Art.376, 406, 415, 461, p.1-2 Art.464, p.1 Art.470, 471(1), 483(1), 487, 498, p.2 Art.506, p.1-3 Art.521, 527, 541-542, 545, 556, p.2 Art.566, p.2 Art.572, 577, 598, p.2 Art.599, p.2 Art.601(1), 606, 618, 627, 638, 646, 649, 659, 661-675, part 2 Art.683 | | | | |
| Administrative Procedure Code | p.2 Art.10; p.5 Art.12 | | Art.8 | Art.64, 136-137 | | |
| Law “On Citizens’ Appeals” | Art.1 | part 3 Art.14, parts 2-3 Art.15 | Art.2 | | | |
| Law “On the Right to Access Information” | p.6 part 1 Art.4, part2 Art.12 | Art.5, 14-15 | Art. 6 | | | |