



Constitutional Elements of Judicial Independence: are they enough in the Constitution of Uzbekistan?

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ABSTRACT

This article argues that there are not sufficient constitutional elements of judicial independence in the Constitution of the Republic of Uzbekistan. For foreign practice, the article analyzes the Constitution of the United States for the rules on ensuring judicial independence. Based on the analysis the article suggests that de-jure judicial independence is as important as de-facto judicial independence and Uzbekistan should improve its Constitution in order for it to have more standard constitutional elements aimed at ensuring judicial independence.

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Sud hokimiyati mustaqilligining konstitutsiyaviy elementlari: ular O'zbekiston Konstitutsiyasida yetarli?

ANNOTATSIYA

Kalit so'zlar:

sud hokimiyati,
sudyalar,
sudlar,
sud hokimiyati mustaqilligi,
sudyalarning vakolat
muddati,
sudyalarni tayinlash,
sudyalarning ish haqi.

Ushbu maqolada O'zbekiston Respublikasi Konstitutsiyasida sud hokimiyati mustaqilligining konstitutsiyaviy elementlari yetarli emasligi asoslab berilgan. Maqolada Amerika Qo'shma Shtatlari Konstitutsiyasining sud hokimiyati mustaqilligini ta'minlash bilan bog'liq normalari tahlil qilingan. Tahlillardan kelib chiqqan holda, maqolada sud hokimiyati mustaqilligining de-yure mustaqilligi de-fakto mustaqilligi kabi muhimligi qayd etilgan va O'zbekiston Konstitutsiyasini sud hokimiyati mustaqilligini ta'minlashga qaratilgan standart konstitutsiyaviy elementlar bilan boyitish taklif etilgan.

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Конституционные элементы независимости судебной власти: достаточно ли их в Конституции Узбекистана?

АННОТАЦИЯ

Ключевые слова:

Судебная власть,
судьи,
суды,
независимость судебной
власти,
срок полномочий судей,
назначение судей,
заработная плата судей.

В данной статье утверждается, что в Конституции Республики Узбекистан недостаточно конституционных элементов судебной независимости. В статье анализируются нормы Конституции США касающиеся обеспечения независимости судебной власти. На основе проведенного анализа в статье делается вывод о том, что де-юре независимость судебной власти так же важна, как и де-факто независимость судебной власти, и Узбекистану следует усовершенствовать свою Конституцию, чтобы в ней было больше стандартных конституционных элементов, направленных на обеспечение независимости судебной власти.

The Constitution of the Republic of Uzbekistan ensures judicial independence with its declarative rules, which say, “The judicial authority in the Republic of Uzbekistan shall function independently from the legislative and executive authorities, political parties, other public associations” [1] and “Judges shall be independent and subject solely to law. Any interference in the work of judges in administering law shall be inadmissible and punishable by law” [2]. Today, 77 percent of the world constitutions have declarative rules stating that the judiciary is an independent branch of government [3].

Constitution of the Republic of Uzbekistan has also some specific rules on ensuring judicial independence and they concern separation of powers [4], judicial appointment [5], prohibition of judges being members of political parties, participating in political movements [6]. In addition, the Constitution provides that “the immunity of judges shall be guaranteed by law” [7] and “Before the completion of his term of office, a judge may be relieved of his post only on grounds specified by law” [8]. The rules do not establish concrete rules for ensuring the immunity of judges and constitutional grounds for removing judges from office.

The challenge is that declarative rules on judicial independence in Constitution of Uzbekistan are not enough to ensure judicial independence as they just declare that judiciary is independent and they do not frame the mechanism for ensuring judicial independence.

As for the existent specific rules, judicial appointment rules only concern the judges of the Constitutional Court and the Supreme Court. Disputes on separation of powers are not heard by any courts as none of them has such a jurisdiction.

We argue that Constitution of Uzbekistan should have more specific rules on ensuring judicial independence. As J. Melton and T. Ginsberg assert, declarative rules on the independence of the judiciary cannot fully ensure the independence of the judiciary. Because declarative rules cannot prevent judges from retaliation towards judges due to their decisions, which are unpleasant to government authorities. They turn the independence of judiciary into an abstract concept. Therefore, the constitution should include special guarantees – institutional protections aimed at ensuring the independence of the judiciary [9].

J. Melton and T. Ginsberg state that constitutions should reflect the following measures to ensure judicial independence: 1) statement of judicial independence; 2) judicial tenure; 3) selection procedure; 4) removal procedure; 5) limited removal conditions; 6) salary insulation [10].

The Constitution of the United States followed the same way with exception of declaring the judiciary independent with a declarative rule. Judicial independence is more referred to in the Federalist papers, which can be widely used to interpret this notion in research and cases.

Specific rules on ensuring judicial independence can be found in different parts of the United States Constitution. Article II Section 2 of the United States Constitution endows the power of appointing federal judges to the President of the USA, stating: *“he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law...”*

This constitutional appointment clause specifies by whom federal justices are nominated, confirmed, appointed. In this clause four sequential acts are contemplated for appointment of judges as follows: 1) getting advice by the President on judicial nominee from the Senate; 2) submitting a judicial nominee by the President to the Senate; 3) giving consent to judicial nominee by the Senate; 4) appointing the consented nominee to the judicial position by the President.

The consent of the Senate to the judicial nominee is advisory and this consent does not make the President bound to the appointment or does not authorize the confirmed candidate. The Senate is empowered to confirm or reject a nominee [11].

Article III Section 1 of the United States Constitution ensures a lifetime judgeship for federal justices specifying: *“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior...”* According to this constitutional clause, federal judges hold their office “during good behavior” which means they sit on the bench as long as they have good behavior. This is why “during good behavior” is often paraphrased as appointed “for life” to mean that federal judges hold their office for lifetime within good behavior. Holding federal judicial office for life is a guarantee for judicial independence because federal judges do not have to stand reappointment or reelection.

There is a question that which sense of the phrase “good behavior” is intended in the constitutional provision. Acts within “good behavior” cannot be fully embraced in the constitution. However, deeds beyond “good behavior” are meant that judges must keep away from *treason, bribery, high crimes and misdemeanors* as Article II Section 4 of the United States Constitution states as follows: *“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”*. By saying “All civil Officers of the United States” Article II Section 4 also implies all federal judges.

In accordance with 28 U.S. Code § 371, any judge of the USA appointed to hold office during good behavior may retire from the office after attaining a certain age and meeting the service requirements. The judge doing so, for the rest of lifetime, receives an annual salary equal to the one he was receiving at the time of the judge’s retirement. A judge attaining age 65 may retire with 15 years of service. A judge attaining age 70 may retire with 10 years of service. The other ages between 65 and 70 require respective years of service between 15 and 10 years [12].

Pursuant to the above-mentioned article of the Constitution, federal judges can be removed from their office only by impeachment. Judicial impeachment is a long process in which an impeachment charge is brought against a judge by the House of Representatives with a simple majority vote as Article I Section 2 of the Constitution states that *“The House of Representatives... shall have the sole Power of Impeachment”*. In the next step the impeachment is tried by the Senate as Article I Section 3 specifies that *“The Senate shall have the sole Power to try all Impeachments... And no Person shall be convicted without the Concurrence of two thirds of the Members present”*.

In accordance with Article I Section 3 of the United States Constitution, the dismissal of federal judges by impeachment results in that once a judge is removed from office, he or she cannot be elected or appointed to another office of honor, trust or profit. Furthermore, removing a judge by impeachment does not make an exception that a judge may be liable and tried and punished for any crime like an ordinary citizen. Federal judges who are aware of bad impeachment consequences keep themselves from doing wrong as they know that they are certain to be dismissed for bad behavior and fall into the miserable condition.

Judicial compensation is a crucial character required for judicial independence. Judicial compensation clause in Article III Section 1 of the United States Constitution provides that *“The Judges, both of the supreme and inferior Courts, shall hold their Offices... receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office”*. By the word “compensation” judicial salary is implied. Judicial compensation “can be raised but cannot be decreased once the judge has taken office” [13], which means “Congress cannot cut a judge’s pay. This prevents members of Congress from punishing judges when they do not like their decisions” [14]. Moreover, judges are granted “unreduced salary so that they won’t be afraid to make an unpopular decision” [15].

Constitution of Uzbekistan also should have specific rules on judicial tenure, selection procedure, removal procedure, limited removal conditions, and salary insulation. This would make the judiciary from a de-jure perspective, which is very important for de-facto judicial independence.

A judicial tenure is a matter of constitutional regulation. Nearly all world constitutions provides a judicial tenure. Constitution of Uzbekistan established a term of office for the President, khakims, public prosecutors and members of the parliament and the deputies of the local representative bodies. However, it fails to provide a judicial tenure, which is very important for judicial independence [16]. The legislature removed a 5-year judicial tenure amending the Constitution in 2017 and regulated the terms of judges of the general jurisdiction courts in the Law “On Courts” and the judges of the Constitutional Court in the Constitutional Law “On the Constitutional Court of the Republic of Uzbekistan”.

Now, according to Article 71 of the Law “On Courts”, judges are elected or appointed for an initial five-year term, another ten-year term and a subsequent indefinite period of tenure. The term of judge office is calculated on the basis of their total length of service as a judge. The age limit for serving as a judge of the Supreme Court of the Republic of Uzbekistan is seventy years, for judges of other courts – sixty-five years. The age limit for serving as a judge of the Supreme Court of the Republic of Uzbekistan may be extended with their consent to five years by the President of the Republic of

Uzbekistan, and judges of other courts up to five years by the Supreme Judicial Council of the Republic of Uzbekistan. The judge retains the right to retire in accordance with the legislation. The term of office of the chairperson, deputy chairperson of the court is five years [17].

As for the judges of the Constitutional Court of Uzbekistan, their term of office is different. According to Article 7 of the Constitutional Law “On the Constitutional Court of the Republic of Uzbekistan”, a term of a judge of the Constitutional Court is five years upon initial election and ten years upon the next election. The age limit for holding office as a judge of the Constitutional Court is, as a rule, seventy years. The same person cannot be elected as a judge of the Constitutional Court more than twice.

I conducted a survey among 75 judges in 2021 and the survey had a question “Would you believe that the fact that if you decide a case only according to law without caring any influence during your first term, do you still have a chance to be elected or appointed to the next judicial term?”

45.3% of the judges answered the question, “If I work based on such principle, I do not think I will take the next term”, 14.7% answered, “I cannot say anything”. These figures lead to the conclusion that even if the judge elected for the first five-year term, despite any influence, decides the case, it does not guarantee for them to be elected or appointed for the next ten-year judicial term. This conclusion, in turn, is a paradox in relation to the intended purpose of reviewing the term of judicial office.

I believe that electing and appointing all judges directly for an indefinite period, but up to the age of 65 would be appropriate for ensuring their independence. This should be fixed in a constitutional rule. Many countries where judges are not appointed for life have established a system that judges must retire at age 65. As D. Garrow [18], L. Epstein, J. Knight and O. Shvetsova [19] assert, the only purpose of setting the age limit for working as a judge is to prevent mentally challenged persons from working in the judicial system.

The constitutional rules on judicial appointment are limited to the judges of the Constitutional Court and the Supreme Court of Uzbekistan. As judicial appointment is a matter of constitution, Constitution of Uzbekistan should also govern how judges of lower courts are appointed.

In accordance with point 13 of Article 93 of the Constitution of Uzbekistan, the President proposes to the Senate judicial nominees for chairpersons and judges of the Constitutional Court, the Supreme Court. Pursuant to points 2-4 of Article 80 of the Constitution, the Senate elects the judges of the Constitutional Court and the Supreme Court upon the nomination of the President.

Appointment of lower courts is governed by the Law “On Courts” and the Law “On the Supreme Judicial Council of the Republic of Uzbekistan”. Article 69 of the Law “On Courts” provides that the judge of the regional, Tashkent city court, the Military court of the Republic of Uzbekistan, the Administrative court of the region, the city of Tashkent, the inter-district, district, city court, territorial military court are appointed by the Supreme Judicial Council of the Republic of Uzbekistan. Article 70 specifies that the chairperson, deputy chairperson of the regional, Tashkent city court, the Military court of the Republic of Uzbekistan, the Administrative court of the region, the city of Tashkent are appointed by the President of Uzbekistan on the proposal of the Supreme Judicial Council.

This means that judges of the highest courts are elected by the Senate, judges of lower courts are appointed by the Supreme Judicial Council and the President only appoints judges who are the chairpersons of the middle-level courts and their deputies. However, as mentioned above this is not fully governed by the Constitution of Uzbekistan.

The next issue is that the Constitution does not involve the rules on judicial removal and limited removal conditions. Article 112 of the Constitution provides that before the completion of his term of office, a judge may be relieved of his post only on grounds specified by law. By this rule, the Constitution delegates the parliament to enact a law, which provides grounds for removing judges. However, the Law “On Courts” does not use a term “removal” as the Constitution does, but a term “Prematurely termination of the powers of judge”. Article 79 provides that the powers of a judge are terminated prematurely if 1) a judge violates a judicial oath; 2) a judge submits a written application; 3) a judge continues activities incompatible with the position of a judge after a warning or suspension of their powers by the relevant qualification board of judges; 4) a judge is recognized by the court as incapable or partially incapacitated; 5) a judge exits and loses citizenship of the Republic of Uzbekistan; 6) a judge enters into force of a guilty verdict of the court against them; 7) a judge dies or be declared dead by a court decision; 8) a judge becomes unable for health reasons or other valid reasons to perform the duties of a judge for a long time; 9) the term of office of the chairperson of the court expires if he or she does not agree to occupy another judicial position; 10) a judge commits actions specified in Article 74 of the Law, for which, by decision of the relevant qualification board of judges, a disciplinary sanction in the form of termination of powers is imposed on the judge.

According to the law, the powers of judges are terminated by those who are empowered to elect or appoint them. The Constitution of Uzbekistan would more ensure judicial independence from a de-jure perspective if it provides rules on what grounds judges can be removed along with the rules on what figures or government bodies take part in the relevant process. Constitutional rules are more stable than rules in other laws. Therefore, I suggest providing the grounds and mechanism for judicial removal at the constitutional level.

The Constitution of Uzbekistan is silent about judicial salary. The practical realization of judicial independence directly depends on such factors as financial independence of the judiciary. When we conducted a survey among judges, I asked a question “Which of the following do you think would lead to increased judicial independence?” 50.7% of the judges chose an answer “Strengthening the material and technical base of courts” and 72% chose an answer “Increasing salary of judges and not reducing it”.

Funding of courts in Uzbekistan, their material and technical and other support, protection and maintenance of buildings is carried out at the expense of the republican budget. The amount of allocated funds is approved by the Budget Code of the Republic of Uzbekistan [20].

As F. Muhiddinov asserts, “in history, “cheap justice” was never able to effectively protect people’s rights” [21]. Therefore, judicial salary is one of the factors that affects directly the individual independence of the judiciary. This can be evidenced by the result of the survey conducted among judges. 90.7% of judges answered “Yes” for the question “Do you think that giving high salaries to judges would have a positive effect on their independent decision-making?” while 9.3% of judges answered “No”.

For the question “How many times has your monthly salary been reduced during your career as a judge?” 29.3% of judges answered “Once”, 9.3% of judges answered “Four times and more”, 2.7% of judges answered “Twice”, 2.7% of judges answered “Three times”. This shows that there are problems with judicial salary in Uzbekistan.

The salary of judges in Uzbekistan is determined by the document of the President. However, executive authorities play an important role in preparation of draft documents of this category and submission to the Administration of the President. This indicates that there is the influence of the executive branch in determining the monthly salary of judges. Therefore, it is appropriate to determine the salary of judges based on the recommendation of the Supreme Council of Judges by the decision of the Oliy Majlis.

In addition, we propose including in the Constitution of Uzbekistan a rule that salary of judges must not be reduced and it must be increased in parallel with inflation in a timely manner. The constitutional legitimacy of non-deduction of judicial salaries and inflation-adjusted salaries prevent political figures from trying to reduce judicial salaries at any time or the whims they may show in increasing judicial salaries. It also would give judges financial peace of mind.

In conclusion, the Constitution of Uzbekistan ensures de-jure judicial independence with its declarative and some specific rules. Although the existent rules are important, they are not enough to ensure de-jure judicial independence in full. Integration of the specific rules regarding judicial tenure, removal procedure, salary insulation would serve strengthening the independence of judiciary in Uzbekistan.

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