

Information for citation:

Tailakova, S. Dz. (2021) The Role of Judicial Power in Protecting Human and Civil Rights and Freedoms. *European and Asian Law Review*. 4 (2), 52–56. DOI: 10.34076/27821668_2021_2_1_52.

UDC 347.91

BISAC LAW012000

DOI: 10.34076/27821668_2021_2_1_52

Research Article

THE ROLE OF JUDICIAL POWER IN PROTECTING HUMAN AND CIVIL RIGHTS AND FREEDOMS

SALIYA DZ. TAILAKOVA

Osh State Law Institute

ORCID ID: 0000-0002-9055-1855

Courts of the Kyrgyz Republic are considered as an effective legal mean for protecting and ensuring the rights, freedoms and legitimate interests of citizens. The Constitution of the Kyrgyz Republic and legislation of the country guarantees the equality of all before the court, and the administration of justice should be realized through the principle of court independence. The author raises the question of whether the Kyrgyz Republic has an independent judiciary that is focused on protecting the dignity and interests of the individual. However, there are some doubts concerning this issue. The author analyzes the statistical data pointing that the number of complaints about actions or inaction of law enforcement and judicial authorities is steadily growing. It is highlighted that the solution of this issue is the following: it is necessary to state that the main function of the judiciary should be the protection of the rights and freedoms of the individual.

Key words: *human and civil rights, administration of justice, the Kyrgyz Republic, protection of human rights, human rights violations*

Introduction

State power in the Kyrgyz Republic is based on the principle of separation of state power into legislative, executive and judicial components (Article 3 of the Constitution of the Kyrgyz Republic). This principle assumes that each state authority performing one of the three functions of state power interacts with other state authorities. In this interaction, they make restrictions with respect to each other. This relationship is often referred to as ‘checks and balances’ (Mordovets, 1996: 31). The judicial authorities administer justice through constitutional, civil, administrative and criminal proceedings in the system of state power (paragraph 2 of article 82 of the Constitution of the Kyrgyz Republic).

Despite shortcomings that exist in forming civil society institutions in the Kyrgyz Republic, courts of all levels are an effective legal means for protecting and ensuring the rights, freedoms and legitimate interests of citizens. The court takes the position of an intermediary between the state and the individual, between various individuals and legal entities, thus defending constitutional freedoms. But the intermediary role can be effective only if it relies on respect and trust on both sides and if the independence, professionalism, and incorruptibility of the judiciary are real. The judicial system must ensure the stability of sentencing, the legality and validity of decisions, the possibility of correcting judicial errors and strict adherence to procedural rules at all levels. And most importantly, sentences and decisions of the courts that have entered into legal force must be executed without fail, without any deviations for reasons of expediency. One of the constitutional freedoms is the equality of all before the court, which is the foundation of the rule of law (Baglai, 2007: 625).

Materials and methods

In the process of research the author has relied on general scientific (analysis, deduction, induction) and specific scientific (statistical, formal-legal) methods.

Results

The results of the author's research are presented in the final part of the work – conclusions

Discussion

The judiciary is a self-sufficient and independent sphere of public power (along with legislative and executive powers), according to the theory of separation of powers. It is a set of powers to administer justice (Kachalova, 2000: 63–64). The legal status of the judiciary, its functions and strictly defined operating procedures provide a clear legal basis for the protection of individual rights, both when they are violated and when they are legally challenged. The organization and administration of justice is based on certain legal principles, the most important of which is the administration of justice by the court, which is enshrined in the Constitution of the Kyrgyz Republic (Article 93)¹ and the Law of the Kyrgyz Republic 'On the Supreme Court of the Kyrgyz Republic and local courts' (Art. 4)². Judicial protection of the rights and freedoms of the individual is carried out in a certain procedural form established by law. Persons directly involved in litigation have broad procedural rights, using which they can actively defend their rights and interests in the judicial case.

The guarantee of the administration of justice is the principle of equality of citizens regardless of origin, social and property status, race and nationality, gender, education, attitude to religion, type and nature of occupation, place of residence and other circumstances (paragraph 3 of article 13 of the Constitution of the Kyrgyz Republic). The law excludes the provision of any privileges and benefits to individuals and persons in the application of procedural rules. This principle applies to all persons, whether foreign or stateless. The Constitution of the Kyrgyz Republic guarantees foreign and stateless persons the rights and freedoms provided for by law, including the right to appeal to courts and other state authorities to protect their rights and freedoms (clause 3 of article 14; clause 4 of article 15). The legal basis for the administration of justice also includes the principle of publicity (clause 1 of article 88 of the Constitution of the Kyrgyz Republic). The implementation of this principle involves the consideration of legal cases in open court with the right to cover everything that happens in the media. This principle directly affects the provision of the subjective rights of citizens, since it allows for a better understanding of the legal case under consideration and the use of public control over the activities of the court.

The most important guarantee of the administration of justice is the principle of court independence as well as its subordination only to the Constitution and legislation of the Kyrgyz Republic.

Without independence, the judiciary may be unable to protect the rights and freedoms of citizens, or the observance and enforcement of the law. The principle of independence of the judiciary means that the judicial authorities in their activities are guided only by the Constitution and laws of the Kyrgyz Republic. The judicial authorities are recognized as independent and have the right to act independently of other branches of government.

The guarantees of judicial independence are: the irremovability of judges, their personal immunity, the responsibility of judges for their decisions only before the law, the extensive use of a jury in criminal proceedings, the ban on the creation of extraordinary courts (clause 3 of article 82 of the Constitution of the Kyrgyz Republic), the financing of courts only from the national budget (clause 1 of article 87 of the Constitution of the Kyrgyz Republic).

Does the Kyrgyz Republic have an independent judiciary that is focused on protecting the dignity and interests of the individual? It may raise doubts. Although the legislation establishes the principle

¹ Law of the Kyrgyz Republic 'On the new edition of the Constitution of the Kyrgyz Republic' of May 5, 2021.

² Law of the Kyrgyz Republic 'On the Supreme Court of the Kyrgyz Republic and Local Courts' of June 18, 2003 No. 153. IN KR No. 32 (362).

of judiciary independence, it is very far from its real implementation. There are a number of reasons for this. Firstly, candidates for the position of judges of the Supreme Court of the Kyrgyz Republic are submitted by the President of the Kyrgyz Republic, and judges at all other levels are appointed by him, thereby already violating the principle of judiciary independence. Secondly, the judiciary being self-sufficient and independent of the legislative and executive branches should have real powers to control the legality of the activities of the legislative and executive branches. Such a right, however, is not fully assigned to the judicial authorities by the current legislation.

The tradition of recognizing the judiciary as a tool to protect the dignity of the individual, the inalienable rights and freedoms of a person and citizen has not yet been established in the Kyrgyz legal system, and thus, the mechanism of protecting human rights by applying to international courts has not been applied in practice.

It is not customary in the judiciary to admit mistakes, but human rights are above professional corporate ambitions, and justice must be restored. However, the path to achieving this may be very difficult and long. In this regard, we believe it is necessary to intensify legislative activities aimed at bringing the national legislation regulating criminal proceedings in line with international standards for ensuring individual rights in this area. Special attention should be paid to the decisions of the European Court of Human Rights, which are one of the most important sources of international law in the sphere of protecting the rights of citizens.

Human rights violations are present in the resolution of lawsuits. The Akyikatchy ombudsman receives complaints with very sensitive content, the reliability of which is almost impossible to verify with the powers available to them.

Statistics show the delay in the judiciary's response to human rights violations. For example, in 2020, the Ombudsman's office sent 20 acts of response to the judicial authorities: 15 to the Council of Judges; 3 to the Supreme Court; 1 to the Council for the Selection of Judges; 1 to the Talas city court³. In relation to the Council of Judges, the responses to the acts of response were formal in nature and, as a rule, they contained the answers: '... to initiate disciplinary proceedings against a judge – abjudicate'. In this regard, the institution of the Ombudsman recommended that the Council of Judges should promptly respond to the reports from the Akyikatchy about human rights violations revealed during the monitoring of trials.

The number of complaints about actions or inaction of law enforcement and judicial authorities is steadily growing. This is stated in the report of the Ombudsman on the observance of human and civil rights and freedoms in Kyrgyzstan in 2020.

As shown by a monitoring of the Office of the Ombudsman, the applications were distributed by type of authority as follows:

- 65.7 % – citizens' applications are complaints against judicial and law enforcement authorities,
- 2.3 % – complaints against local self-government bodies,
- 2.1 % – complaints against social security authorities,
- 1.7 % – complaints about healthcare institutions,
- 1.3 % – complaints against educational and scientific authorities⁴.

The ombudsman's office received applications regarding individual legal entities and individuals, various organizations with which citizens had civil legal relations, or they needed legal advice.

The largest number of complaints is still related to the actions of law enforcement officials and representatives of the judiciary. Thus, out of 2,483 written applications received in 2020, 1,632 (65.7 %) contain complaints about the actions of employees of law enforcement agencies and the judiciary.

Therefore, in the current conditions of forming a civil society and rule of law in the Kyrgyz Republic, ensuring the legal guarantees of civil rights and freedoms is primarily associated with the creation of a strong, accessible to citizens, and independent judiciary. However, some theorists and practitioners argue that the concept of a model of justice, which is based on the theory of the isolation of the repository

³ *Aki-Press* (June 2, 2020) Bishkek.

⁴ Central Asia (27 May 2020) News. Available at: <https://centralasia.media/> [Accessed: 01 October 2021].

of the judicial power, is a misunderstanding of the essence of the doctrine of the judiciary. This does not contribute to forming the conviction that implementing the human rights function in the judiciary is a priority in all judicial activity (Kashepov, 1998: 66–67).

Thus, based on the study of the regulatory framework, official policy documents, law enforcement practice, including positive foreign experience, it can be assumed that during the formation of a civil society in the Kyrgyz Republic, the main means of ensuring the rights and freedoms of individuals, legal entities and the state should become an increasing role, especially of the judiciary at all levels, in the implementation of various types of legal proceedings, improving the way the courts exercise their powers and strengthening guarantees of the rule of law. The main function of the judiciary should be the protection of the rights and freedoms of the individual.

In our opinion, the system of judicial guarantees of individual rights should be based on the principle of the rule of law and legality and the administration of justice based on the principles of intrinsic rights, or natural justice, which are understood as reasonableness, impartiality and fairness. In general, the courts, when applying and interpreting the law, are guided in most cases only by the letter of the law, ignoring its meaning and content, and not taking into account general legal principles. Since the Kyrgyz legislation still contains many contradictions between the norms of the Constitution and other laws, and moreover, the identification of right and law continues to dominate the legal consciousness, we believe that the criteria of justice and reasonableness (even beyond the framework of the law itself) are especially important. In our view, the fact that a right is broader than a law and the law is only one of its sources is confirmed by the fact that a right has other forms of expression, which include legal customs, judicial precedents, normative agreements, bylaws, and, in some countries, legal doctrine. It follows from this that the law includes real legal relations, legal awareness, and general legal principles. From this standpoint, in legal science, law (in a broad sense) is identified with justice, personal freedom, equality, rationality, etc.

Conclusion

The mechanism of judicial protection of the rights and freedoms of the individual when forming a civil society is complex and consists of interrelated areas of judicial activity:

- implementation of measures aimed at preventing offenses by the judiciary;
- activities related to the restoration of already violated rights and freedoms;
- consideration of cases on the cancellation or recognition of illegal (contrary to the law) normative acts (of a bylaw nature), as a result of which there was a violation of the legal rights of the individual;
- consideration of issues on compensation for property and moral damage (harm) to a person caused as a result of an unlawful decision;
- taking measures in accordance with the law on bringing to legal responsibility the subject (s), through whose fault there was a violation of the legal rights and interests of the individual.

With the adoption of new legislative acts, the judiciary in the Kyrgyz Republic acquires a new status – not a formal one, but a real guarantor of human and civil rights and freedoms. Often, the judicial authorities lack professionalism and competence, and many civil and criminal cases are considered for years. Foreign experience is very useful here, especially the activities of judges for the protection of human rights. The establishment of a state governed by the rule of law, a developed democracy, where the rights and freedoms of the individual are protected and guaranteed, depends on the existence of a strong, independent judiciary, on the effective functioning of the court as a body of justice.

References

- Mordovets, S. A. (1996) *Sotsial'no-yuridicheskii mekhanizm obespecheniya prav cheloveka i grazhdanina* [Socio-legal Mechanism for Ensuring Human and Civil Rights]. Saratov. (in Russian)
- Baglai, M. V. (2007) *Konstitutsionnoe pravo Rossiiskoi Federatsii* [Constitutional Law of the Russian Federation]. 6th ed. Moscow, Norma. (in Russian)

Kashepov, V. P. (1998) *Institut sudebnoi zashchity prav i svobod grazhdan ikh sredstva realizatsii* [The Institute of Judicial Protection of the Rights and Freedoms of Citizens and their Means of Implementation]. *Gosudarstv i pravo*. (2), 66–67. (in Russian)

Kachalova, O. V. (2000) *Sudebnaya sistema v skhemakh i tablitsakh: Uchebno-prakticheskoe posobie* [The Judicial System in Schemes and Tables: Educational and Practical Guide]. Moscow, Izdatel'stvo Prior, INFRA-M. (in Russian)

Information about the author

Saliya Dz. Tailakova – Candidate of Juridical Sciences, Associate Professor, Osh State Law Institute, the Kyrgyz Republic (Osh, the Kyrgyz Republic; e-mail: salia1510@mail.ru).

© S. Dz. Tailakova, 2021

Date of Paper Receipt: October 28, 2021

Date of Paper Approval: November 2, 2021

Date of Paper Acceptance for Publishing: December 10, 2021