



RESEARCH ARTICLE

THE PERSPECTIVES OF JUDICIAL REVIEW OVER PRE-TRIAL STAGE IN UZBEKISTAN

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Abstract

This paper identifies the role of judicial review and steps back from the controversy of the current proposals to reform judicial review to explore the wider constitutional context. It seeks to generate – and contribute to – a wider debate about the relevance of judicial review in protecting individual rights and freedoms.

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Introduction:-

Judicial review is the mechanism which allows people to challenge unlawful actions by public authorities before an independent and impartial tribunal. Judicial review is not a process which should be free from scrutiny, nor one that cannot be improved upon or streamlined consistent with the rule of law. However, in implementing any policy-based reforms and in interpreting and applying each of these new changes to judicial review practice and procedure, its important constitutional function must be the key criterion. As the courts have explained, “there is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review”.

Uzbekistan was significantly influenced by the former Soviet judicial system in the creation of a new judicial system. The main weaknesses of the old system were the lack of independence of the judiciary, concentration of powers with the prosecutor and failure to respect the rights of defendants and detainees. In response, several legal changes have been made to further the establishment of an independent judicial system in order to adhere to international standards. Despite these efforts, elements of the old Soviet judicial system have persisted. The road map for comprehensive reforms in many areas, especially the judiciary, was launched in 2017. In this context, important steps have been taken to establish an independent, functional and internationally compatible judicial system, and these efforts continue today. These changes included the expansion of the judge’s powers during the pre-trial investigation phase for supporting the full implementation of habeas corpus rights

The quest for a new judicial system and comprehensive judicial reform:

The Judiciary is one of the areas in which Uzbekistan needs to conduct substantial reforms to uphold the rule of law and ensure integrity in its legal system, as well as to support anti-corruption reforms in other spheres. First of all, international human rights instruments acknowledge the fundamental right of every person to access to due process of law, meaning a fair and public hearing by a competent, independent and impartial court established by law. Enforcement of such rights rely upon the capable administration of justice. A core element of the right to fair trial is the establishment of independent and impartial courts. Secondly, procedural equality of parties (equality of arms) is also an essential element of a fair trial. It is necessary to clearly divide the powers between actors in criminal proceedings and ensure that the samebody is not allowed to review complaints about its own alleged violations.

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From this perspective, a lack of these elements within a judicial system produces unfair and unpredictable decision making, due to courts not giving priority to the rule of law. It should be noted that a few legal uncertainties and contradictions should be eliminated during the preliminary investigation phase. As a simplified example, despite the Code on Criminal Procedure declaring that participants in criminal proceedings and other persons, as well as representatives of the enterprises, institutions and organizations, with an interest in the proceedings of a criminal case, have a right to complain about the procedural actions or decisions of the court, the exercise of this constitutional right to effective judicial protection as set forth in the Charter of Fundamental Rights (Article 47) remains unrealized.

However, the Law "On Courts" states that the court in the Republic of Uzbekistan is called upon to exercise judicial protection of the rights and freedoms of citizens proclaimed - inter alia – by "international acts on human rights, rights and interests of enterprises, institutions and organizations protected by law". To that end, the country has undertaken actions aimed at upgrading its legal and judicial systems to new democratic standards, including judicial protection of the rights and freedoms of citizens, but much remains to be done. The Presidential Decree (policy paper) "On Transfer of Right to Issue Arrest Warrants to Courts", in force from January 2008, provides for full transfer to courts of warrants to arrest people either suspected or charged with committing crimes. The Decree "On Measures for the further Reforms in Advocacy" (2008) supported the provision of free, independent legal advice to all detainees.

Rule of Law and Judicial Review:

"Ensuring the rule of law and further reform of the judicial and legal system of the Republic of Uzbekistan" is the second of five strategic priorities under the Action Strategy for Five Priority Areas of Development of the Republic of Uzbekistan in 2017-2021 (State Strategy). It is commonly recognized that the rule of law comprises the principal mechanism for restricting the power of state. The effectiveness of the rule of law can be seen not only through the strength of the judiciary but also in an array of non-judicial state agencies; for instance, in the police force and prison system, and in the improvement of criminal law and penal codes. According to the World Bank, the rule of law consists of three pillars: rules, process and institutions. The first pillar includes the objective rules that not only are known in advance but are actually enforced and are subject to modification or termination pursuant only to previously known practices. The second pillar consists of processes to ensure that the rules are not arbitrary, in other words that they are adopted in response to genuine needs of the people and applied and enforced to serve these needs. The third pillar is composed of well-functioning institutions that adhere to and apply regulations without arbitrariness.

Expansion of judicial control over the inquiry and preliminary investigation within the framework of further expansion of the institution of "Habeas Corpus" based on best practices of foreign countries must become an effective means of ensuring protection of citizens' rights and freedoms from criminal encroachments, as well as avoiding violations of their legitimate interests.

The utmost priority in modernizing our criminal justice system should be enduring greater independence of the judiciary and strengthening judicial control, in particular at the pre-trial stage. Judicial power in the field of public law has grown significantly since the 1990s. Judicial reforms further increased judicial power by engaging courts in rights-based adjudication: determining if the legislation and the acts of public authorities infringe upon the rights stipulated in the Constitution and international frameworks upon human rights and fundamental freedoms. Judicial review is a process by which individuals and other parties can challenge the lawfulness of decisions or actions of the public authorities over prejudicial inquiry.

Recommendation:-

According to current established procedure, complaints against the actions and rulings of the investigator shall be filed with the head of the investigative unit and procurator overseeing the lawfulness of the investigative proceeding. But such procedure contradicts the general rule which states that it is necessary to clearly divide powers between actors in criminal proceedings and ensure that the same body is not allowed to review complaints about its own alleged violations.

One may challenge a decision or action on three main grounds:

Illegality:

for example, when a decision was not taken in accordance with the law that regulates it, or goes beyond the powers of the body;

Irrationality:

for example, when the decision did not take account of all relevant factors, or when the decision is not reasonable by any means; and

Procedural unfairness:

for example, a failure to consult properly or to act in accordance with the procedural rules.

However definite protections should be provided against spurious claims: only those with essential interest are able to challenge a decision, and they must first obtain permission for their case to be heard, so that scope of judicial review should be carefully delineated.

Such challenges are often described as a remedy of last resort: the courts will normally expect parties to have tried all other avenues where they are available. Significant contributions to the growth of judicial power have come from The Universal Declaration of Human Rights, which declares that everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him or her by the Constitution or by law.

The significance of judicial review to the rule of law is acknowledged by the international judiciary, which describes judicial review as “the rule of law in action”, “a critical check to ensure lawful public administration”, “a crucial means of holding Government to account” and “a critical check on the power of the State”. The importance of judicial review is in maintaining the rule of law, including creation of a balance between the two sides in judicial processes. Successful democratic systems can only be built on a basis of the rule of law and public trust. Without these foundations, disorder would ensue, which could threaten the entire system.

There is, however, another relevant principle which must exist in a democratic society. That is the rule of law itself. The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be adopted rationally, and in accordance with a fair procedure and within the powers conferred by Parliament. The judge is best placed to be an independent and impartial overseer of adherence to human rights and freedoms in the pre-trial phase of criminal proceedings. Thus, the judge must have the authority to issue arrest warrants, to conduct operational search actions, to execute wiretapping, search and other investigative actions that may infringe human rights. Moreover, the judge considering the arrest warrant should have the right to decide first on the validity of the probable cause of apprehension and the lawfulness of detention, as well as to release the detained person if the detention is found to be unlawful. This right must be granted to the court, as required by Article 9 of the ICCPR and the international judicial practice of its interpretation and application.

The judge should have the power to review the legality of an arrest and detention, and to order the suspect's release if the arrest or detention was unlawful. The decision to apply preventive measures should be reasoned and should not be motivated solely by the severity of the crime. In order to justify the necessity to use preventive measures, substantive and procedural grounds have to be demonstrated by the prosecutor or the investigator. The substantive ground to be demonstrated is a reasonable suspicion that the suspect committed the criminal offence in question, while the procedural ground includes a serious risk for the suspect to abscond, hindrance to the course of justice, or commission of a new crime if no preventive measure is applied.

Thus, the principle of presumption of innocence should be borne in mind. Moreover, systematic and regular review on the application of preventive measures must be put in place. The extension of the measure cannot be automatic, and new evidence has to be presented to justify the continuing need for the imposed measure. Legislation must foresee the possibility for the judge to order a measure different from the one requested by the prosecutor or investigator. In addition, the use of non-custodial measures is particularly important where vulnerable groups are concerned.

The application of preventive measures should be decided at an oral hearing in the presence of the suspect represented by a defense lawyer. Conducting a court hearing is essential for the process to be adversarial, as it

provides the suspect with an opportunity to challenge the petition of the prosecutor or investigator on the court and present his or her arguments, while being assisted by a lawyer. A hearing in front of a judicial body also helps in uncovering and remedying possible abuses related to deprivation of liberty.

The judge in criminal proceedings should act as a guarantor for the right to a fair trial. The oversight functions of such a judge should include taking actions aimed at protecting human rights (particularly in cases where detention has been ordered), authorizing investigative measures which limit human rights of defendants, such as searches or covert investigation measures, and reviewing complaints and appeals by the parties during the pre-trial phase. Allowing the judge, a presumably independent officer of an impartial body, to have these functions could help ensure equality of arms and guarantee adversarial proceedings.

Thus, legal framework regulating pre-trial stage must reflect on the following questions:

1. What is the proper balance of powers between the pre-trial judge, the prosecutor and the investigator in terms of approval of investigative measures and oversight of their legality? Who is in charge of the investigation? What is the role of the lawyer?
2. What should be proven prima facie in order to have the investigative measure approved? How and to what extent should the decisions for the conduct of investigative measures be substantiated?
3. What is the framework for assessing reasonable suspicion (or probable cause) for the purposes of arrest/police custody? Concerning arrests/police custody, is the obligation to bring a detained person to a judicial authority fulfilled in practice? If yes, how long since the deprivation of liberty does this appearance usually take place?
4. Are there specific issues related to the registration of the actual date and time of arrest in practice? Are all necessary procedural safeguards, such as access to legal counsel upon arrest implemented in practice?
5. What are the mechanisms of reviewing the legality of arrests/police custody and who is in charge of this review? Who can initiate such review?

Enacting primary legislation, regulations, internal rules and codes of conduct that meet international standards will eventually increase awareness of the Uzbek public regarding their rights. Thus, the analysis allows drawing the following conclusions:

1. Preventive measures against a suspect should be authorized solely by a judge who will not be presiding over the trial.
2. Material and procedural grounds must be proved by the prosecutor or investigator in their application for preventive measures. In particular, the severity of the crime cannot be the sole ground for imposing a preventive measure.
3. Non-custodial preventive measures should be considered first before ordering pre-trial detention. The latter should be ordered only when non-custodial measures are found unsuitable. Systematic and regular review of the applicability of a preventative measure must be ensured, as there should be no automatic renewal of such measures.
4. Scope of application of preventive measures such as bail, personal recognizance, and electronic measures of control should be expanded.
5. Defendants, assisted by a defense lawyer, should benefit from a court hearing where he or she can present arguments against the prosecutor or investigator's request for deprivation of liberty or other preventive measures to the judge.

Judges, prosecutors and defense lawyers should have targeted training to prepare for the hearing on preventive measures.

Conclusion:-

Uzbekistan is introducing major legislative changes aimed to democratize and liberalize its criminal justice system.

Despite that there has been some progress in the justice system, the lack of access to justice, judicial inefficiencies, and inconsistency in the application of laws and codes remains problematic. It is important to identify Uzbekistan as "ensuring the rule of law and further reforming the judicial system" as one of the five important issues to be addressed between 2017 and 2021. In this regard, it is essential that we commit to strengthening the independence of the judiciary and the guarantees of reliable protection of citizens' rights and freedoms, enhancing the effectiveness of administrative, criminal, civil and economic legislation, developing a system to combat crime, and improving the

quality of legal services. In the years to come, it will be necessary to enact reforms to strengthen judicial independence, as well as to take measures to reflect these laws in practice.

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