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**UNITED NATIONS HUMAN RIGHTS COUNCIL**

**34<sup>TH</sup> SESSION OF THE UPR WORKING GROUP  
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**Submission of the International Bar Association's Human Rights Institute  
(IBAHRI) to the Universal Periodic Review of Kazakhstan**

## **ABOUT US**

The International Bar Association, established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 160 countries. The International Bar Association's Human Rights Institute (IBAHRI) is an autonomous and financially independent entity, which works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

1. The International Bar Association's Human Rights Institute (IBAHRI) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Kazakhstan. This submission focuses on key concerns with regards to the independence of the legal profession and the status of lawyers in the Republic of Kazakhstan vis-à-vis essential guarantees for the functioning of legal profession.
2. In particular, the IBAHRI would like to express concern over the following issues: (1) interference with the independence of the legal profession, (2) weakened guarantees for effective fulfilment of professional rights and responsibilities of lawyers, (3) creation of the Government Bar Association, (4) participation of Government-designated persons in disciplinary procedures against lawyers, (5) intimidation and harassment of lawyers, (6) interference with the integrity of the legal profession, (7) inadequate implementation of and disregard for recommendations of the UN human rights mechanisms.

### **Issues of concern since previous review**

3. The issues discussed below were touched upon during Kazakhstan's 2014 UPR. Several states made general recommendations to Kazakhstan to strengthen the role of defense lawyers (e.g. recommendation 124.13 of Czechia, 125.68 of France),<sup>i</sup> which Kazakhstan has accepted. Concerns were raised about lack of effective guarantees for the functioning of lawyers; violations of the equality of arms principle, especially in criminal and administrative proceedings; unjustified denial of access to necessary files; inquisitorial character of court proceedings (more than 98% of all court decisions in Kazakhstan are convictions); disciplinary measures against lawyers used as a tool for intimidation.
4. In the reporting period 2014 – 2019, Kazakhstan has vigorously amended its legislation. In January 2015, new Criminal Code and Criminal Procedure Code entered into force, a set of Constitutional amendments were adopted (2017), as well as amendments to the *Constitutional law on status of judges*, *Law on forensics*, and Civil Procedure Code. The IBAHRI notes that most of the changes did not improve the status of lawyers, as recommended by UPR, but rather targeted lawyers and their independence, and compromised their capacities to practice law.

## New legislation related to the legal profession

5. On 23 July 2018, a new *Law on the Professional Activities of Advocates and Legal Aid* entered into force. The law was drafted by the Ministry of Justice and raised immediate concerns within the legal community and the international fora. All the concerns were related to the excessive powers provided by the new Law to the Government over the legal profession, and interference with its independence.
6. In February 2018, the UN Special Rapporteur on the Independence of Judges and Lawyers pointed out that the new draft law “contains a number of provisions that are inconsistent with international legal standards relating to the independence of the legal profession. These include provisions concerning the creation of a “*State Advokatura*” (state Bar), the participation of members of the executive power in disciplinary proceedings, the removal of entrance fees for new lawyers and interference of the executive power in the process of attestation of lawyers.”<sup>ii</sup>
7. In December 2016, the Supreme Court adopted ambiguous *Normative Resolution on application of the legislation on involvement or complicity in crime*.<sup>iii</sup> The resolution provides for a broad interpretation of Kazakhstan’s Criminal Code provisions regarding criminal complicity and thus compromises attorney-client privilege. Article 5 of the Resolution opens the possibility for defense lawyers to be held criminally liable for pledged or unpledged concealment by hiding an offender, covering up any evidence of a crime. If a lawyer learns about a client preparing to commit a new criminal offense, when giving advice or providing other legal assistance, the lawyer shall be liable as an accomplice to the acts committed by the client. Such provision is incompatible with principle 22 of the UN Basic Principles of the Role of Lawyers that provides for confidentiality of lawyer-client consultation; the provision also might open doors for identification of lawyers with their clients or their clients' causes, which is again in contradiction to principle 18 of the UN Basic Principles of the Role of Lawyers.

## Interference with independence of legal profession

8. The new 2018 *Law on the Professional Activities of Advocates and Legal Aid* flagrantly interferes with the independence of the legal profession and weakens the Republican bar and 17 regional bars functioning throughout the country.
9. The Law affords the Ministry of Justice excessive powers of control over the lawyers and their governance, and thus opens the door for making the lawyers completely dependent of the executive branch. Stripping the legal profession of its independence would affect the whole justice system in Kazakhstan, restrict access to justice and further obstruct the rule of law.
10. More specifically, the Law provides the Ministry of Justice with a power of oversight and control over the Republican Bar Association. For example, a number of internal rules and regulations adopted by the Republican Bar Association, such as *Rules on the internship procedure for the lawyers’ trainees*; or *Standards on improvement of lawyers’ qualification*, have to receive clearance (be approved) from the Ministry of Justice. This is in direct contradiction to the principle of self-governance, established

in principle 24 of the UN Basic Principles on the Role of Lawyers, as well as principle 17 of the IBA Standards for the Independence of Legal Profession.

11. Another concerning provision is Article 6 of the 2018 Law, which provides that in cases directly prescribed by law, prosecutors, courts and state institutions may interfere with the activities of lawyers. That is a vague provision, which potentially allows for a wide range of unjustified and illegal limitations to lawyers' independence, and their abilities to perform their professional duties effectively.

- *Admission to and removal from the legal profession*

12. The independence of the legal profession is further compromised by the fact that the Ministry of Justice maintains its exclusive power to decide on admission to the profession. In other words, the licensing of lawyers seeking to obtain the membership within the Bar Association is within the competence of the Ministry of Justice. Such practice is in contradiction to the principle 24 of the UN Basic Principles of the Role of Lawyers, which provides that "lawyers shall be entitled to form and join self-governing professional associations to represent their interests <...>. [Such] professional associations <...> shall exercise its functions without external interference".

13. The Ministry of Justice can also suspend the lawyer's license *ex officio* or initiate termination of the lawyer's license before the court skipping the disciplinary procedures within the bar association. They have done that in March 2019, for example, when they suspended the license of a well-known and critical lawyer Mr Sergey Sizintsev, and requested the court to terminate it altogether based on the unfounded allegation that, in violation of the law, Mr Sizintsev practiced law while holding a paid position as Executive Director within the Republican Bar Association.

- *Disciplinary proceedings*

14. According to the new Law, the disciplinary commissions within the bar associations consists of 11 members: six lawyers, three representatives of the public designated by the Ministry of Justice, and two retired judges. The Law does not specify how the three representatives of public designated by the Ministry of Justice and the two retired judges are to be selected, nor does it explicitly require these members to perform their duties independent of the instructions of the Ministry of Justice.

15. This allows for a strong control and influence by the executive branch over the Lawyers' disciplinary commissions, and consequently raises concern over the independence of such a body. This national provision is in contradiction with the principle 28 of UN Basic Principles of the Role of Lawyers, which provides that "disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession".

- *Creation of State (Government) Bar Association*

16. The 2018 Law provides for the establishment of the State bar association in Kazakhstan. The possibility of the creation of a fully Government-controlled Bar Association contradicts the very principle of the independent legal profession and is

inconsistent with international standards concerning the administration of justice. It is in breach of principle 24 of the UN Basic Principles on the Role of Lawyers.

17. The effective protection of society from potential threats emanating from the abuse of power and the circumvention of basic democratic principles rests on *inter alia* the existence of a system of checks and balances. The state attorney will be dependent on the Government and deprived of a degree of freedom to protect a person in cases against the government or anyone close to it.

- *Financial independence*

18. The new 2018 Law abolished admission fees for new-comers to the bar associations, leaving just membership fees and designated contributions. As reported by regional bar associations, this will have a strong negative impact on their financial independence, affecting their daily operational capacities, continuous legal education and other training programmes. The IBAHRI notes that bar associations as self-regulatory independent entities should manage their financing and budgeting questions independently, provided there is no abuse of power and no jeopardy to the access to justice for all.

- *Lack of procedural safeguards*

19. The 2018 Law provides that licensed lawyers (*адвокаты*) can represent persons before courts in criminal and administrative cases, and lawyers who do not have a license, i.e. legal consultants (*юридический консультанты*), cannot represent clients before courts in criminal cases and work mostly on civil disputes. The Law does not provide legal consultants the same guarantees as qualified lawyers, such as, for example, lawyer-client privilege. Such regulation creates potential risks for the integrity of the profession, and also does not provide sufficient safeguards regarding the quality of legal services provided by non-licensed lawyers.
20. Kazakh legislation does not guarantee the legal and personal security of lawyers. Guarantees established in the 2018 *Law on the Professional Activities of Advocates and Legal Aid* (Art. 35) do not include safeguards when it comes to searches carried out at a lawyer's office. Furthermore, as practice shows, lawyers themselves are often called in for questioning on the circumstances that became known to them in connection with their professional duties; covert investigative actions are carried out in relation to lawyers. Such a practice is in breach with principle 22 of the UN Basic Principles of the Role of Lawyers, which provides for confidentiality of lawyer-client consultation.
21. The equality of arms principle is rather disregarded and does not operate properly as lawyers do not enjoy the same safeguards as prosecution when it comes to collecting and presenting defense evidence in courts. The dominant role of the prosecutors throughout judicial proceedings, and the lack of power of defense lawyers to collect and present evidence, often results in court decisions relying disproportionately on evidence presented by the prosecution.<sup>iv</sup>
22. Lawyers are subject to more restrictions than prosecution upon entering courts or law enforcement agencies. Unlike prosecutors, lawyers have to undergo inspections at

the entrance. Such discriminatory practices violate lawyers' personal integrity and potentially constitute a breach of professional secrecy.

23. Finally, not all lawyers are allowed to represent clients in cases involving state secrets. Only those lawyers who were pre-selected in a closed procedure by the national security bodies can serve as legal representatives. This effectively means that persons are denied the right to call upon the assistance of a lawyer of their choice provided for in principle 1 of the UN Basic Principles of the Role of Lawyers.

#### *- Intimidation and harassment of lawyers*

24. Lawyers' efforts in defense of their clients in Kazakhstan often lead to the issuance of interlocutory rulings (*частное постановление*) against lawyers by judges. Such rulings can be issued on various unfounded allegations, such as "interference in investigative actions"; "counteracting the court"; "violation of the secrecy of the investigation"; "dragging out the judicial process". These rationales are mere pretexts for control and intimidation of lawyers as they can lead to disciplinary actions.
25. The authorities of Kazakhstan use intimidation to prevent lawyers from freely and effectively performing their duties. Most commonly, lawyers are threatened with the disbarment. This happens most often in politically motivated cases, cases of alleged torture, and cases involving opponents of those in power. Lawyers are forced to collude with the prosecution under threat of losing their license.
26. Since 2018, there were attempts or threats to disbar or disciplinary punish the following lawyers in connection with the exercise of their professional duties: Ms Raisa Yakubenko (Aktobe), Mr Mikhail Shyur (Kostanai), Ms Khamida Aitkaliyeva (Astana), Mr Kuat Dalabayev (Ust-Kamenogorsk), Ms Zhanna Urazbahova (Almaty), Mr Sergey Sizintsev (Petrovsk), Mr Jokhar Utebekov (Almaty) (the list is not exhaustive). Mr Viktor Zolotov (Pavlodar) and Mr Valeriy Yakubenko (Aktobe) were disbarred under dubious allegations while being involved in sensitive cases and opposing the local authorities.
27. In the past two years, criminal cases were initiated on unfounded grounds against the following lawyers: Mr Bauyrzhan Azanov (Pavlodar), Mr Yerlan Gazimzhanov, Mr Amanzhol Mukhamedyarov and Ms Assel Tokayeva (Astana). All lawyers worked on high-profile and sensitive cases.
28. In contradiction to principle 16 of the UN Basic Principle on the Role of Lawyers, lawyers also often face physical threats or psychological pressure, e.g. repeated phone calls from an unknown number, repeated knocks on the door at night, text messages or letters from an unknown sender, threatening with physical assault on lawyers or members of their families. These cases are not properly investigated by the authorities.

#### **Recommendations of UN human rights bodies**

29. Kazakhstan's record of implementation of the UN human rights treaty bodies' recommendations remains very poor.<sup>v</sup> Kazakhstan has not yet established a robust legal mechanism for the implementation of the decisions of the UN human rights

treaty bodies in response to individual communications. The authorities keep referring to the “recommendatory, non-binding character” of decisions despite the fact that the ratified international treaties (UN Conventions and Covenants) are an integral part of legislation of Kazakhstan.

## **RECOMMENDATIONS:**

### **The independence of the legal profession:**

- (1) To amend relevant provisions (Articles 21, 32, 41-44) of the 2018 *Law on the Professional Activities of Advocates and Legal Aid* so as to transfer the authority of licensing lawyers from the executive to the legal profession itself;
- (2) To remove the provisions of the 2018 Law giving the authority to the executive branch to control and approve/disapprove internal regulations or rules adopted by the bar associations;
- (3) To remove Article 21(3) from the 2018 Law, which provides for the establishment of the State (Government) Bar Association;
- (4) To amend Article 73 of the 2018 Law so to ensure that disciplinary bodies and procedures are within exclusive competence of the bar associations;
- (5) To amend Article 6 of the 2018 Law, which provides that in cases directly prescribed by law, prosecutors, courts and state institutions may interfere with the activities of lawyers;
- (6) To amend Article 5 of the *Supreme Court’s Normative Resolution on application of the legislation on involvement or complicity in crime*, that opens the possibility for defense lawyers to be held criminally liable for safeguarding attorney-client privilege;
- (7) To amend national legislation in order to enable all defense lawyers (not just the ones selected by the state authorities) to represent their clients in cases containing state secrets, by giving a lawyer to sign a nondisclosure form;
- (8) To amend Article 88 of the 2018 Law in order to allow the bar association establish and collect reasonable entrance fees from lawyers admitted to the bar;
- (9) To amend Article 35 of the 2018 Law in order establish necessary safeguards when it comes to searches carried out in lawyer’s offices;
- (10) To eliminate harassment and prosecution of lawyers who are critical towards the government or take on sensitive cases; to eradicate harassment of lawyers in the form of interlocutory rulings adopted by judges; and effectively investigate cases of pressure and harassment of lawyers;
- (11) To ensure equality of arms principle at all stages of the criminal proceedings, including gathering and presenting evidence;
- (12) To ensure free access for lawyers to courts and law enforcement agencies without discriminatory inspections and seizures of lawyers’ computers and other means of communication.

### **Implementation of international standards**

- (1) To develop national mechanisms and adopt relevant legislation for the implementation of decisions of the UN human rights treaty bodies on individual complaints;
- (2) To consult international lawyers’ organizations, such as the International Bar Association, on the current legislation or legal reforms affecting the legal profession in Kazakhstan to make sure they are in accordance with the international standards and rule of law principles.

## ENDNOTES:

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<sup>i</sup> UPR Info, Database of Recommendations. UPR NGO submission matrix [https://www.upr-info.org/sites/default/files/document/kazakhstan/session\\_34\\_-\\_november\\_2019/upr\\_ngo\\_submission\\_matrix\\_kazakhstan\\_3rdcycle.docx.doc](https://www.upr-info.org/sites/default/files/document/kazakhstan/session_34_-_november_2019/upr_ngo_submission_matrix_kazakhstan_3rdcycle.docx.doc)

<sup>ii</sup> Communication of Diego García-Sayán, the UN Special Rapporteur on the independence of judges and lawyers to the Minister of Justice of the Republic of Kazakhstan (January, 2018) <https://www.ohchr.org/Documents/Issues/IJudiciary/Communications/OL-KAZ-17-01-18.pdf>

<sup>iii</sup> The Resolution is available in Russian at <http://adilet.zan.kz/rus/docs/P160000014S>

<sup>iv</sup> The UN Committee against Torture, Concluding observations (2014) CAT/C/KAZ/CO/3, para 15, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/KAZ/CO/3&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/KAZ/CO/3&Lang=En)

<sup>v</sup> Kazakhstan has ratified almost all key the UN human rights treaties, except for the International Convention on the Rights of Migrant Workers, Optional Protocols to the ICESCR, CRDP, Second Optional Protocol to ICCPR, Optional Protocol on communication Procedure under the Convention on the Rights of the Child). Kazakhstan accepted jurisdiction of individual communications of 3 bodies: the Human Rights Committee, CEDAW Committee and the CAT Committee