



# **JUDICIAL REFORM INDEX**

FOR

# **KAZAKHSTAN**

***February 2004***

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## Introduction

The Judicial Reform Index (JRI) is a tool developed by the American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI). Its purpose is to assess a cross-section of factors important to judicial reform in emerging democracies. In an era when legal and judicial reform efforts are receiving more attention than in the past, the JRI is an appropriate and important assessment mechanism. The JRI will enable ABA/CEELI, its funders, and the emerging democracies themselves, to better target judicial reform programs and monitor progress towards establishing accountable, effective, independent judiciaries.

ABA/CEELI embarked on this project with the understanding that there is not uniform agreement on all the particulars that are involved in judicial reform. In particular, ABA/CEELI acknowledges that there are differences in legal cultures that may make certain issues more or less relevant in a particular context. However, after a decade of working in the field on this issue, ABA/CEELI has concluded that each of the thirty factors examined herein may have a significant impact on the judicial reform process. Thus, an examination of these factors creates a basis upon which to structure technical assistance programming and assess important elements of the reform process.

The technical nature of the JRI distinguishes this type of assessment tool from other independent assessments of a similar nature, such as the U.S. State Department's *Human Rights Report* and Freedom House's *Nations in Transit*. This assessment will *not* provide narrative commentary on the overall status of the judiciary in a country. Rather, the assessment will identify specific conditions, legal provisions, and mechanisms that are present in a country's judicial system and assess how well these correlate to specific reform criteria at the time of the assessment. In addition, this analytic process will not be a scientific statistical survey. The JRI is first and foremost a legal inquiry that draws upon a diverse pool of information that describes a country's legal system.

## Assessing Reform Efforts

Assessing a country's progress towards judicial reform is fraught with challenges. No single criteria may serve as a talisman, and many commonly considered factors are difficult to quantify. For example, the key concept of an independent judiciary inherently tends towards the qualitative and cannot be measured simply by counting the number of judges or courtrooms in a country. It is difficult to find and interpret "evidence of impartiality, insularity, and the scope of a judiciary's authority as an institution." Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 611 (1996). Larkins cites the following faults in prior efforts to measure judicial independence:

- (1) the reliance on formal indicators of judicial independence which do not match reality, (2) the dearth of appropriate information on the courts which is common to comparative judicial studies, (3) the difficulties inherent in interpreting the significance of judicial outcomes, or (4) the arbitrary nature of assigning a numerical score to some attributes of judicial independence.

*Id.* at 615.

Larkins goes on to specifically criticize a 1975 study by David S. Clark, which sought to numerically measure the autonomy of Latin American Supreme Courts. In developing his "judicial effectiveness score," Clark included such indicators as tenure guarantees, method of removal, method of appointment, and salary guarantees. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L. Q. 405 – 442 (1975).

The problem, though, is that these formal indicators of judicial independence often did not conform to reality. For example, although Argentine justices had tenure guarantees, the Supreme Court had already been purged at least five times since the 1940s. By including these factors, Clark overstated . . . the independence of some countries' courts, placing such dependent courts as Brazil's ahead of Costa Rica's, the country that is almost universally seen as having the most independent judicial branch in Latin America.

Larkins, *supra*, at 615. Reliance on subjective rather than objective criteria may be equally susceptible to criticism. *E.g.*, Larkins, *supra*, at 618 (critiquing methodology which consisted of polling 84 social scientists regarding Latin American courts as little more than hearsay). Moreover, one cannot necessarily obtain reliable information by interviewing judges: "[j]udges are not likely to admit that they came to a certain conclusion because they were pressured by a certain actor; instead, they are apt to hide their lack of autonomy." Larkins, *supra*, at 616.

## **ABA/CEELI's Methodology**

ABA/CEELI sought to address these issues and criticisms by including both subjective and objective criteria and by basing the criteria examined on some fundamental international norms, such as those set out in the *United Nations Basic Principles on the Independence of the Judiciary*; *Council of Europe Recommendation R(94)12 "On the Independence, Efficiency, and Role of Judges"*; and *Council of Europe, the European Charter on the Statute for Judges*. Reference was also made to a Concept Paper on Judicial Independence prepared by ABA/CEELI and criteria used by the International Association of Judges in evaluating membership applications.

Drawing on these norms, ABA/CEELI compiled a series of 30 statements setting forth factors that facilitate the development of an accountable, effective, independent judiciary. To assist assessors in their evaluation of these factors, ABA/CEELI developed corresponding commentary citing the basis for the statement and discussing its importance. A particular effort was made to avoid giving higher regard to American, as opposed to European concepts, of judicial structure and function. Thus, certain factors are included that an American or European judge may find somewhat unfamiliar, and it should be understood that the intention was to capture the best that leading judicial cultures have to offer. Furthermore, ABA/CEELI reviewed each factor in light of its decade of experience and concluded that each factor may be influential in the judicial reform process. Consequently, even if some factors are not universally accepted as basic elements, ABA/CEELI determined their evaluation to be programmatically useful and justified. The categories incorporated address the quality, education, and diversity of judges; jurisdiction and judicial powers; financial and structural safeguards; accountability and transparency; and issues affecting the efficiency of the judiciary.

The question of whether to employ a "scoring" mechanism was one of the most difficult and controversial aspects of this project, and ABA/CEELI debated internally whether it should include one at all. During the 1999-2001 time period, ABA/CEELI tested various scoring mechanisms. Following a spirited discussion with members of the ABA/CEELI's Executive and Advisory Boards, as well as outside experts, ABA/CEELI decided to forego any attempt to provide an overall scoring of a country's reform progress to make absolutely clear that the JRI is not intended to be a complete assessment of a judicial system.

Despite this general conclusion, ABA/CEELI did conclude that qualitative evaluations could be made as to specific factors. Accordingly, each factor, or statement, is allocated one of three values: *positive*, *neutral*, or *negative*. These values only reflect the relationship of that statement to that country's judicial system. Where the statement strongly corresponds to the reality in a given country, the country is to be given a score of "positive" for that statement. However, if the statement is not at all representative of the conditions in that country, it is given a "negative." If the conditions within the country correspond in some ways but not in others, it will be given a

“neutral.” Cf. Cohen, *The Chinese Communist Party and ‘Judicial Independence’*: 1949-59, 82 HARV. L. REV. 972 (1969), (suggesting that the degree of judicial independence exists on a continuum from “a completely unfettered judiciary to one that is completely subservient”). Again, as noted above, ABA/CEELI has decided not to provide a cumulative or overall score because, consistent with Larkin’s criticisms, ABA/CEELI determined that such an attempt at overall scoring would be counterproductive.

Instead, the results of the 30 separate evaluations are collected in a standardized format in each JRI country assessment. Following each factor, there is the assessed correlation and a description of the basis for this conclusion. In addition, a more in-depth analysis is included, detailing the various issues involved. Cataloguing the data in this way facilitates its incorporation into a database, and it permits end users to easily compare and contrast performance of different countries in specific areas and—as JRIs are updated—within a given country over time.

Social scientists could argue that some of the criteria would best be ascertained through public opinion polls or through more extensive interviews of lawyers and court personnel. Sensitive to the potentially prohibitive cost and time constraints involved, ABA/CEELI decided to structure these issues so that they could be effectively answered by limited questioning of a cross-section of judges, lawyers, journalists, and outside observers with detailed knowledge of the judicial system. Overall, the JRI is intended to be rapidly implemented by one or more legal specialists who are generally familiar with the country and region and who gather the objective information and conduct the interviews necessary to reach an assessment of each of the factors.

One of the purposes of the assessment is to help ABA/CEELI — and its funders and collegial organizations — determine the efficacy of their judicial reform programs and help target future assistance. Many of the issues raised (such as judicial salaries and improper outside influences), of course, cannot necessarily be directly and effectively addressed by outside providers of technical assistance. ABA/CEELI also recognizes that those areas of judicial reform that can be addressed by outsiders, such as judicial training, may not be the most important. Having the most exquisitely educated cadre of judges in the world is no guarantee of an accountable, effective, or independent judiciary; and yet, every judiciary does need to be well-trained. Moreover, the nexus between outside assistance and the country’s judiciary may be tenuous at best: building a truly competent judiciary requires real political will and dedication on the part of the reforming country. Nevertheless, it is important to examine focal areas with criteria that tend toward the quantifiable, so that progressive elements may better focus reform efforts. ABA/CEELI offers this product as a constructive step in this direction and welcomes constructive feedback.

## Acknowledgements

Lisa Dickieson, Director, Judicial Reform Programs, the American Bar Association’s Central European and Eurasian Law Initiative (ABA/CEELI) (1995 to 2000), and Mark Dietrich, Member, New York State Bar and Advisor to ABA/CEELI developed the original concept and design of the JRI. Scott Carlson, Director, Judicial Reform Programs at ABA/CEELI (2000-2003) directed the finalization of the JRI. Assistance in research and compilation of the JRI was provided by Jenner Bryce Edelman, Program Associate at ABA/CEELI, and James McConkie, Student Intern, ABA/CEELI.

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## Kazakhstan Background

Kazakhstan is the largest country in Central Asia and, after Russia, the second largest of the states of the former Soviet Union. Bordered on the north by Russia, on the east by China, on the south by Kyrgyzstan, Uzbekistan, and Turkmenistan, and on the west by the Caspian Sea and Russia, Kazakhstan has a population of 15 million and a land mass of over one million square miles. It is divided into 14 administrative regions, or oblasts, ruled by governors (akims) appointed by the President. The subdivisions of oblasts are called rayons. In addition to the 14 oblasts, there are two major cities, Almaty, the commercial center and former capital, and Astana (formerly Aqmola), which was established as the new capital in 1997.

As with the other Central Asian republics, Kazakhstan has essentially been ruled by one man since the demise of the Soviet Union. President Nursultan A. Nazarbayev first came to office in April 1990 and most recently was re-elected in 1999 to a term of office scheduled to end in 2006. Unlike most of the other Central Asian republics, Kazakhstan enjoys rich natural resources, in particular extensive oil and gas reserves in the Caspian Sea region, and in 2003 enjoyed an estimated GDP growth rate of 9.1%.

## Legal Context

Kazakhstan ratified its first post-Soviet Constitution in 1993, but after conflicts between the executive and the legislature a new Constitution was adopted in 1995. The Constitution defines the form of government as “presidential,” and, indeed, President Nazarbayev and the executive branch dominate the political scene, including the judiciary. The 1995 Constitution, for example, abrogated the former Constitutional Court and replaced it with a Constitutional Council, over whose decisions the President retains veto power. The President also has the right to dismiss the government and, under certain conditions, dissolve the parliament (which is bicameral, consisting of a Senate and a lower house, called the Majilis). The President may also issue decrees that have the force of law throughout the country. Freedom House, in its annual *Nations in Transit* surveys, has consistently given Kazakhstan low marks in its democratization and rule of law ratings. Moreover, the most recent presidential elections, in 1999, were not viewed by international observers, led by the Organization for Security and Cooperation in Europe (OSCE), as being free and fair.

Kazakhstan has signed but has not yet ratified the International Covenant on Civil and Political Rights (ICCPR). It is not a member of the Council of Europe, and so has not acceded to the European Convention on Human Rights or to the jurisdiction of the European Court of Human Rights in Strasbourg. According to the Constitution, duly ratified international agreements enjoy priority over domestic legislation but are subordinate to, and may not contradict, the Constitution.

The primary law governing the judiciary is Constitutional Law No. 132 of December 25, 2000 “On the Judicial System and the Status of Judges in the Republic of Kazakhstan” (hereinafter “Law on the Judicial System”).

## History of the Judiciary

Kazakhstan’s legal system is based largely on the Soviet law traditions and, to a more limited extent, on pre-revolutionary Tsarist law and Kazakh customary law (known as *adat*). The Soviet Union knew no rule of law as we conceive of it today: “As an authoritarian state with a largely state-owned and administered economy, the USSR treated law as simply one of a number of instruments of rule, and not even as the dominant one. Both political decisions and administrative regulations ... took precedence over law, and even the application of regulations took an ad hoc form and was strongly influenced by personal relationships.” P. SOLOMON AND T.

FOGLESONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM, 4 (Westview Press, Boulder, Co. 2000). Although laws that enshrined fundamental human rights may have been well crafted, they were either not applied at all or applied only selectively. The judiciary knew little independence. Rather, judges were reliant on local Communist Party officials. Decisions concerning politically sensitive cases were dictated by party officials to the courts through a system known as “telephone justice.” It is worth emphasizing that Kazakhstan was not recognized as a sovereign state until 1991, and, unlike the countries in transition in Central Europe, had no experience with democracy or the modern mechanism recognized as essential for rule of law. The baseline for establishing an independent and effective judiciary is, accordingly, quite low.

Unfortunately, the Kazakh judiciary throughout its young history has remained largely within the control of the executive. The President has the power to determine how many judges the country should have and how much they should be paid. Except for the Supreme Court, whose members are elected by the Senate based on the President’s recommendation, all judges are appointed directly by the President. In some important respects, the legal system has not changed significantly since the Soviet times. Prosecutors rather than judges, for example, retain the right to issue search and arrest warrants. They can also “protest” and suspend judicial decisions. Corruption is also believed to be widespread, both among judges and prosecutors, as well as advocates.

Nevertheless, Kazakhstan has taken some important steps away from its Soviet past. It has, for example, de-criminalized many offenses, and has introduced probation and community service as alternative forms of punishment. It has also imposed a moratorium on the death penalty and is currently debating the introduction of a jury system, although it remains unclear what form this might take. In terms of the judiciary, Kazakhstan stands in notable contrast to its neighbors in allocating significant amounts of resources to improving work conditions for judges. Each judge has his or her own office, secretary, and computer, and judges recently received significant pay increases. Courthouses are in relatively good condition.

The essential question is whether these changes will result in a more independent and fair legal system or one that is simply more comfortable and efficient in handing down decisions mandated by the central power or purchased by wealthy and well-placed litigants. Moreover, legal reform must encompass more than just judicial reform: the prosecutorial body (the procuracy) and the defense bar (the advocatura) must also change. During the Soviet era, the prosecutors were often the eyes and ears of the Communist Party, with the power to challenge and overrule administrative and judicial decisions. As already noted, the procuracy retains many of these powers, including the right to intervene in any civil or commercial matter, whether or not the state has a clear interest in its outcome. It is reported that the procuracy exercises this right on a regular basis. At the same time, there are categories of criminal offenses that private citizens may prosecute, such as minor assaults and batteries akin to some tortious causes of action in the American legal system, but also including rape, in which the procuracy does not intervene unless the victim first files a complaint and thus initiates proceedings, despite a clear state interest in maintaining order and prosecuting serious criminals such as rapists. In other words, the procuracy seems to be intervening in cases where the state may not have a real interest but where it may be able to solicit bribes, while at the same time failing to provide protection to citizens whose cases seem less important to the local authorities or who cannot afford to prosecute the matter privately.

The advocatura also requires reforming. It needs greater powers to collect evidence so that it can act as a true counterbalance to the procuracy. It also needs to develop a stronger voice for those accused of crimes, rather than acting – as is currently generally the case – as a relatively passive cog in the machinery of justice. The very low acquittal rates in Kazakhstan – less than 1% – are a testimony not only to the power of the procuracy and the passiveness of the judges, but also to the powerlessness and poor work of the defense bar.

Another concern regarding the overall context and a challenge to conducting the Judicial Reform Index in Kazakhstan is the lack of openness and transparency in the system. Statistics were generally difficult to obtain. Many judges, for example, had files with statistics concerning their court's caseload on their desks but were unwilling to share them and said that they should be obtained from the official repository of justice statistics, the Prosecutor General. Despite repeated requests, the procuracy declined to provide statistics or to meet with the assessment team. Some statistics were obtained from published reports and from the Supreme Court, but, as one government official argued, Kazakhstan should publish an annual white book that makes all such justice statistics publicly available. Moreover, while the assessment team was able to observe some judicial proceedings, special permission was required, and in one instance the prosecutor objected to the team's presence. Some judges declined to meet with the assessment team, and others (but certainly not all) were clearly hesitant about voicing their opinions and concerns. True justice reform must be based on a complete understanding of the system and its failures (as well as successes), which requires opening the process up to greater public scrutiny.

## **Structure of the Courts**

As set forth in the Constitution and the Law on the Judicial System, Kazakhstan has three levels of courts. At the apex is the 48-member Supreme Court, which is divided into civil, criminal, and supervisory sections. It hears cases in panels of nine or three judges depending on the seriousness of the matter, and also meets in plenary to issue guiding opinions to the lower courts. It generally hears supervisory appeals and protests, as well as appeals on decisions of the oblast courts, on a de novo basis. The intermediary courts are the oblast courts, again divided into civil, criminal, and supervisory sections. These courts, with 572 judges, sit in each of the country's 14 oblasts, plus in the cities of Almaty and Astana. The oblasts courts may either hear de novo appeals from the lower courts or act as courts of first instance in more serious matters, such as murder cases. The primary first instance courts are the rayon courts, of which there are about 260 located around the country, with 1,851 judges. The rayon courts are not officially divided into sections, although as a practical matter most judges specialize in criminal or civil cases. They preside over cases individually. There are also 16 economic courts (one in each oblast and in the cities of Almaty and Astana), which are analogous to the rayon courts and which hear commercial disputes among entrepreneurs and enterprises.

Military courts, at both the rayon and oblast levels, have jurisdiction over crimes committed by members of the military and disputes between military units. Appeals from the military courts may go to the Supreme Court, although it has abolished its military section.

Kazakhstan is also introducing, on an experimental basis, specialized administrative courts to resolve challenges to administrative fines. So far these courts exist only in Almaty and Astana. In addition, a program incorporating juvenile justice and providing for establishment of specialized juvenile courts has been initiated but is yet to be implemented.

Kazakhstan does not currently have any form of jury trial or use any lay assessors, although it is debating the introduction of jury trials. It remains unclear whether the jury system will follow the Russian model or the more traditional civil law model as in Germany.

Administrative support for the courts was formerly provided by the Ministry of Justice, but is now handled by the Court Administration Committee of the Supreme Court. This body is responsible for providing books, computers, and furniture to the courts, training judges and other court personnel through the newly created Judicial Academy, and paying the salaries of judges and other court staff. It is also responsible for the bailiffs, some of whom provide court security (court bailiffs) and others who are required to enforce civil judgments (enforcement bailiffs).

The seven-member Constitutional Council, which replaced the Constitutional Court under the 1995 Constitution, decides on the constitutionality of legislation and decrees. Its decisions may be vetoed by the President, although a two thirds majority vote can overturn that veto.

## **Conditions of Service**

### ***Qualifications***

All judges must be citizens of Kazakhstan, have graduated from a law school, be at least 25 years old, and have two years of prior legal experience. Oblast-level and Supreme Court judges must have five years of prior legal experience, including two years as a judge.

### ***Appointment and Tenure***

Supreme Court judges are elected by the Senate based on the recommendation of the President, who in turn receives a recommendation from the Higher Judicial Council (HJC). The HJC also recommends appointments to the oblast courts, but those judges are appointed directly by the President. Rayon court judges are also appointed by the President, but on the recommendation of the Ministry of Justice and the Qualification Collegium, which oversees the examination process for such judges. Judges serve until retirement age (63 for men, 58 for women), although they may be removed from office. Supreme Court judges are removed by Parliament and lower court judges by the President for a variety of reasons as set forth in the Constitution and the Law on the Judicial System.

### ***Training***

Although all judges must be graduates of law schools, there is no formal requirement that judges undergo any additional training before they take the bench. In 2001, Kazakhstan established a Judicial Academy to provide re-training to sitting judges and which is now beginning a two-year program to train future judges. Beginning in 2004, all future judges reportedly will be required to attend the Judicial Academy. The Union of Judges of Kazakhstan, the country's association of judges, also provides some training to sitting judges, while each court conducts regular in-house training programs.

## **Assessment Team**

Mark Dietrich, former ABA/CEELI liaison to Romania and former ABA/CEELI Country Director for Russia, led the assessment team, assisted by CEELI's staff attorneys Alla Kalinina and Volodya Voevodin and liaison Marit Rasmussen. ABA/CEELI expresses its gratitude to the many judges, lawyers, law professors, government officials, members of parliament, and representatives of the donor community who met with the team during the review process in February 2004. ABA/CEELI Washington and Almaty staff members Julie Broome, Chris Krafchak, Katherine Lauffer, Rachel Glahe, and JRI Coordinator Andrew Solomon served as editors. Records of relevant authorities and interviews conducted are on file with ABA/CEELI. ABA/CEELI Legal Analyst Olga Ruda provided research and analytical assistance and prepared the report for publication.

## Kazakhstan Judicial Reform Index (JRI) 2004 Analysis

While the correlations drawn in this exercise may serve to give a sense of the relative status of certain issues present, ABA/CEELI would underscore that these factor correlations possess their greatest utility when viewed in conjunction with the underlying analysis, and ABA/CEELI considers the relative significance of particular correlations to be a topic warranting further study. In this regard, ABA/CEELI invites comments and information that would enable it to develop better or more detailed responses in future JRI assessments. ABA/CEELI views the JRI assessment process to be part of an ongoing effort to monitor and evaluate reform efforts.

### Table of Factor Correlations

<b>I. Quality, Education, and Diversity</b>		
<b>Factor 1</b>	<b>Judicial Qualification and Preparation</b>	<b>Neutral</b>
<b>Factor 2</b>	<b>Selection/Appointment Process</b>	<b>Neutral</b>
<b>Factor 3</b>	<b>Continuing Legal Education</b>	<b>Neutral</b>
<b>Factor 4</b>	<b>Minority and Gender Representation</b>	<b>Neutral</b>
<b>II. Judicial Powers</b>		
<b>Factor 5</b>	<b>Judicial Review of Legislation</b>	<b>Negative</b>
<b>Factor 6</b>	<b>Judicial Oversight of Administrative Practice</b>	<b>Neutral</b>
<b>Factor 7</b>	<b>Judicial Jurisdiction over Civil Liberties</b>	<b>Negative</b>
<b>Factor 8</b>	<b>System of Appellate Review</b>	<b>Negative</b>
<b>Factor 9</b>	<b>Contempt/Subpoena/Enforcement</b>	<b>Neutral</b>
<b>III. Financial Resources</b>		
<b>Factor 10</b>	<b>Budgetary Input</b>	<b>Positive</b>
<b>Factor 11</b>	<b>Adequacy of Judicial Salaries</b>	<b>Neutral</b>
<b>Factor 12</b>	<b>Judicial Buildings</b>	<b>Neutral</b>
<b>Factor 13</b>	<b>Judicial Security</b>	<b>Neutral</b>
<b>IV. Structural Safeguards</b>		
<b>Factor 14</b>	<b>Guaranteed Tenure</b>	<b>Neutral</b>
<b>Factor 15</b>	<b>Objective Judicial Advancement Criteria</b>	<b>Neutral</b>
<b>Factor 16</b>	<b>Judicial Immunity for Official Actions</b>	<b>Neutral</b>
<b>Factor 17</b>	<b>Removal and Discipline of Judges</b>	<b>Negative</b>
<b>Factor 18</b>	<b>Case Assignment</b>	<b>Neutral</b>
<b>Factor 19</b>	<b>Judicial Associations</b>	<b>Positive</b>
<b>V. Accountability and Transparency</b>		
<b>Factor 20</b>	<b>Judicial Decisions and Improper Influence</b>	<b>Negative</b>
<b>Factor 21</b>	<b>Code of Ethics</b>	<b>Neutral</b>
<b>Factor 22</b>	<b>Judicial Conduct Complaint Process</b>	<b>Negative</b>
<b>Factor 23</b>	<b>Public and Media Access to Proceedings</b>	<b>Neutral</b>
<b>Factor 24</b>	<b>Publication of Judicial Decision</b>	<b>Neutral</b>
<b>Factor 25</b>	<b>Maintenance of Trial Records</b>	<b>Negative</b>
<b>VI. Efficiency</b>		
<b>Factor 26</b>	<b>Court Support Staff</b>	<b>Neutral</b>
<b>Factor 27</b>	<b>Judicial Positions</b>	<b>Neutral</b>
<b>Factor 28</b>	<b>Case Filing and Tracking Systems</b>	<b>Neutral</b>
<b>Factor 29</b>	<b>Computers and Office Equipment</b>	<b>Positive</b>
<b>Factor 30</b>	<b>Distribution and Indexing of Current Law</b>	<b>Positive</b>

## I. Quality, Education, and Diversity

### Factor 1: Judicial Qualification and Preparation

*Judges have formal university-level legal training and have practiced before tribunals or, before taking the bench, are required (without cost to the judges) to take relevant courses concerning basic substantive and procedural areas of the law, the role of the judge in society, and cultural sensitivity.*

Conclusion	Correlation: Neutral
To be eligible for appointment to the bench in Kazakhstan, one must have obtained a university-level degree in law and have at least two years of legal experience. The law does not prescribe the type of legal experience required. Beginning in 2004, all future judges will be required to undergo additional training at the Judicial Academy before taking the bench.	

#### Analysis/Background:

According to Article 79(3) of the Constitution, in order to become a judge, one must be a citizen of the Republic, be at least 25 years old, “have a higher juridical education,” have worked for two years in the legal profession, and pass a qualification examination. Article 29(1) of the Law on the Judicial System adds that, to be a judge at a rayon court, one must undergo an internship at the court and received a positive reference from the plenary of the oblast court. To become a judge at the oblast level or at the Supreme Court, one must have five years experience in the legal profession, including two years as a judge. Id., Art. 29(2). The law does not otherwise specify what type of practice one must have had during the two years experience to become a rayon court judge or the five years to become a judge at the higher-level court.

Although candidates for the judiciary must be graduates of law schools, some issues were raised concerning the quality of legal education in Kazakhstan. Preliminarily, it should be noted that a law degree is obtained at the undergraduate level, after having attended university for four or five years. While this is the norm for civil law countries, the problem in Kazakhstan, as in other former Soviet countries, is that there has been a significant increase in the number of law schools established since independence. During the Soviet period, there were two principal law schools in Kazakhstan (Kazakhstan State University in Almaty and Karaganda State University), as well as several other institutions of secondary and higher legal education affiliated with different government agencies. The student body in full-time and correspondence/evening divisions of the two civilian law schools consisted of about 4,500 students. Now there are almost 150 schools, with 26 in Almaty alone. Nationwide, in 2003, there were approximately 65,000 law students and 16,000 law school graduates. This means that there are now an inadequate number of qualified law professors. Some opined that there are really only two or three law faculties that provide a sufficient theoretical underpinning in the law. Others pointed out that at all law faculties, the legal education is overly theoretical. At the same time, it is notable that Kazakhstan's Ministry of Education has recently begun paying special attention to the quality of legal education. Since June 2004, an interim state evaluation of all full-time second-year law students has been introduced. This evaluation is conducted in the form of a centralized national written exam covering five subjects. Those students wishing to continue on to the third year are now required to submit a special state certificate with results of this exam. Students who failed the exam will be allowed to re-take it in the beginning of the academic year; those who fail on the second attempt will be either expelled from the law school or required to repeat the second-year curriculum.

New judges are not required to undergo any specialized training before taking the bench, although the Judicial Academy this year (2004) will start a two-year program to train 45 recent law



graduates to become judges. The curriculum had not yet been decided on at the time of the assessment team's visit, although the director emphasized that instruction will be based on interactive methods, by reviewing and discussing actual case files. It is also expected that students will attend court sessions and work with the judges. Recently, it has also been reported that starting from 2004, attendance at the Judicial Academy will be a mandatory pre-requisite to being a candidate for a judgeship. It is expected that each person who passes the final examination, which should be the same as the examination administered by the Qualification Commission (see Factor 2, below), will be appointed to the bench.

## Factor 2: Selection/Appointment Process

***Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system should foster the selection of independent, impartial judges.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
<p>The appointment of rayon-level judges is in part based on an examination, as well as on other criteria such as law schools grades and reputation in the community. The appointment of oblast-level and Supreme Court judges does not depend on any examination, but other criteria such as experience, professionalism and reputation are considered. The President, who appoints the lower court judges and recommends Supreme Court judges for Senate approval, wields enormous power in the appointment process.</p>	

### Analysis/Background:

Under the 1993 Constitution, rayon-level judges were elected by the city councils, while oblast-level and Supreme Court judges were elected by the Supreme Council for 10-year terms, with little or no qualification process. This has changed in 1995, with some definite improvements, although concerns and room for improvement remain.

The three main tiers of judges are appointed through three different processes.

The Chair and the judges of the Supreme Court (SC) are elected by the Senate, at the proposal of the President, based on the recommendation of the High Judicial Council (HJC). Const., Arts. 55(1), 82(1). The chairs of the panels of the SC are nominated by the HJC following the recommendation of the Chair of the Supreme Court. Law on the Judicial System, Art. 30.

The judges of oblast courts are appointed by the President upon the recommendation of the HJC. Const. Art. 82(2). The chair of an oblast court is nominated by the HJC on the recommendation of the Supreme Court Chair, and again is appointed by the President. Law on the Judicial System, Arts. 30, 31.

The President forms the High Judicial Council. Const., Art. 44(20). Article 82(4) of the Constitution further provides that the Chair of the HJC is appointed by the President and that other members include the Chair of the Constitutional Council, the Chair of the Supreme Court, the Prosecutor General, the Minister of Justice, two deputies of the Senate, and six judges, two from each level. See also Law on the Judicial System, Art. 36. The HJC meets quarterly. It does not administer any type of examination, but simply reviews the files of candidates and interviews them.

The chairs and the judges of rayon courts are appointed by the President “at the proposal of the Minister of Justice based on a recommendation of the Qualification Collegium of Justice.” Const., Art. 82(3); Law on the Judicial System, Art. 30. The chair of a rayon court is nominated by the Qualification Collegium based on the proposal of the Supreme Court Chair, with the consent of the plenary of the oblast court. For both positions, the Qualification Collegium makes a recommendation to the Minister of Justice, who then submits the recommendation to the President, who then makes the appointment. Law on the Judicial System, Art. 30.

Article 82(4) of the Constitution provides that “[t]he Qualification Collegium of Justice shall be an autonomous, independent institution formed from deputies of the Majilis, judges, public prosecutors, teachers and scholars of law and workers of the bodies of justice.” See *also* Law on the Judicial System, Art. 36. The Majilis appoints two representatives to the Qualification Collegium of Justice. Const., Art. 56(5). The Qualification Collegium is currently made up of 13 members: seven judges from all levels, two deputies from parliament, two law professors, one representative of the Prosecutor General, and the Deputy Minister of Justice. It has no real staff, although two assistants from the Legal Department of the President provide some support.

In practice, the system works as follows. The Qualification Collegium will publish a notice that it is holding examination for those who wish to become judges. The examinations are held on a quarterly basis, and candidates must come to Astana, the capital, to take the test. The examination begins with a standardized multiple choice test with the questions based on suggestions made by oblast-level judges, given over a computer. Candidates who pass this test (with a score of at least 70%) must take an oral exam before the Qualification Collegium. Those who pass receive a certificate which enables them to obtain 3-12 months internships with a rayon court, after which the oblast court plenary decides whether the performance in the internship has been satisfactory. The individuals who pass this process are then put on a list of potential appointees. Sitting judges applying for vacant judicial positions can participate in this selection process but they are exempt from the examination requirement. The same is true for former judges, provided they held judicial offices for at least three years and less than six years had passed since their dismissal or resignation. See Internal Regulations of the Qualification Collegium of Justice, Section 33. The final decision as to whether to recommend a person for an appointment – and where – is left largely to the discretion of the Qualification Collegium.

There is no objective means for placing people higher or lower on the list or for the Collegium to determine to which region the candidates may be sent. According to one member of the Collegium, it decides based on the applicants’ prior experience, what law school they went to and what their grades were, their overall reputation, and how they did on the tests administered by the Collegium. The Qualification Collegium makes recommendations to the Ministry of Justice, which makes a pro forma review before passing them on to the President for final appointments. It was reported that neither the Ministry of Justice nor the administration of the President frequently, if ever, rejects a recommendation of the Collegium.

The process is somewhat competitive. One member of the Qualification Collegium reported that out of 300 applicants, 120 were appointed to judicial positions when the examinations were last held. Another member of the Collegium said that there are 25 applicants for each position. On the other hand, the internship does not seem very rigorous. According to a report prepared by the Chair of the Supreme Court, only seven out of 404 candidates received negative recommendations after their internships. “Efficiency of the Judiciary,” *Yuridicheskaya Gazeta*, Feb. 11, 2004.

As noted above, the appointment process has been criticized for lack of transparency and objectivity in deciding who is placed at the top and the bottom of the list. Some respondents believe that the process is based more on cronyism or corruption than on objective criteria. According to one observer, a judgeship in Almaty can be purchased for \$100,000. These allegations, of course, could not be confirmed, but surely a better method would be to place the candidates in a hierarchical order and appoint them according to the grades that they receive in



the examinations. Another concern, of course, is that the President has great control over the appointment process. He appoints many of the members of the HJC and the Qualification Collegium, and has ultimate control over the appointment of the lower court judges. It would be preferable to open the process up and to allow civil society or the legislature to play a greater role in the appointment process.

Despite some of these problems, most lawyers interviewed felt that the quality of judges has improved since the new appointment process has been put into place. Judges also seem to think that the process is working better. Out of thirty judges polled, nine felt that the testing process thoroughly tested the skills that a judge should have, three thought it somewhat tested the skills but could have been more thorough, and only five felt that the test was not meaningful. Thirteen did not express an opinion on this question.

One other point worth noting is that there may be a trend of former prosecutors (as well as other former law enforcement officers) joining the judiciary. Twelve out of thirty judges who responded to a poll had previously worked with the Procuracy, while only one had been an advocate.

### Factor 3: Continuing Legal Education

***Judges must undergo, on a regular basis and without cost to them, professionally prepared continuing legal education courses, the subject matters of which are generally determined by the judges themselves and which inform them of changes and developments in the law.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
There is no mandatory regimen of continuing legal education for judges in Kazakhstan, although a number of ad hoc opportunities exist. For example, the Judicial Academy and the Union of Judges of Kazakhstan, working with the support of the donor community, provide training to judges on issues that the judges have requested assistance. In addition, individual courts hold weekly or monthly meetings at which new laws, recent Supreme Court decisions and directives, and errors or reversals in the courts are often discussed.	

#### Analysis/Background:

Continuing legal education is not mandatory for sitting judges, although opportunities do exist for judges to obtain such training. The primary means for training is through the Judicial Academy, which was established in 2001 and enjoys the support of the Kazakh government. It is managed and funded through the Court Administration Committee of the Supreme Court, which last year provided it with spacious new headquarters. The Academy also receives about \$300,000 per year from the national budget, although that amount is also expected to cover the costs for the preparation of new judges (see Factor 1). Last year, the Academy conducted month-long training sessions for 400 judges, as well as shorter training programs in various oblasts. The topics were largely based on court practice, i.e., studying decisions that had been reversed, although requests from the judges themselves were also considered. One issue of concern is that this means that the training provided by the Academy is largely retrospective, and the Academy may want to consider placing a greater emphasis on preparing judges to interpret and apply new legislation and to understand emerging topics. The instructors for these programs are either experienced judges or law professors, some of them with international expertise (from GTZ, for example, which is supporting a program to train judges on commercial law topics).

The Union of Judges of Kazakhstan (UJK) also provides periodic training and participates in some of the trainings in the oblasts. With support from ABA/CEELI, it has conducted limited training, for example, on media relations, judicial ethics, and judicial independence.

Finally, it was reported that, as during the Soviet period, the individual courts may hold weekly or monthly meetings at which new laws, recent Supreme Court decisions and directives, and errors or reversals in the courts are discussed.

Although all this activity is no doubt useful, it is essentially ad hoc. It remains to be seen whether the Academy can develop a program to ensure that all judges are trained on at least a core group of new and necessary topics. Lawyers and judges provided conflicting testimony concerning the impact of the current training programs. Some of the judges interviewed were not at all familiar with these efforts, while others had participated in them and found them useful. Some lawyers said that judges were generally well educated concerning the law, while others said that they frequently had to bring copies of the law to court and explain it to the judges, which would indicate that a greater effort in the area of continuing education may be necessary. A poll taken of 30 judges showed that 29 of them had attended trainings at the Academy, of which 27 could recall using the information that they were trained on (mostly ethics, decision writing, and criminal procedure) in their work.

Judges may also become better informed and learn about significant legal and judicial developments through periodicals. As reported by the Court Administration Committee, the judiciary is becoming more active in subscribing to the national periodical publications. In 2003, the judiciary subscribed to a total of 1,464 publications, a 5.6 times increase compared to 2002. "Interview with Vladimir Borisov, Chairman of the Court Administration Committee," *Yuridicheskaya Gazeta*, Feb. 6, 2004.

#### **Factor 4: Minority and Gender Representation**

***Ethnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally.***

<b><u>Conclusion</u></b>	<b><u>Correlation: Neutral</u></b>
Women are well represented in the judiciary, except at the leadership positions. Ethnic minorities are also represented, but not at the same percentages as in the general population.	

#### **Analysis/Background:**

Article 30 of the Law on the Judicial System states that judicial appointments should be made without consideration of economic status, ethnic origin, gender, or political or religious views. In practice, gender balance does not seem to be a problem in the court system at large. For example, eight of fifteen judges in the Almaty Economic Court are women. In the 19-member Mangistau Oblast Court, ten judges are women. In a rayon court in Aktau, six out of ten judges are women. A rayon court in Almaty had six men and six women.

Women are under-represented in the leadership positions of the judiciary. The chairs of all sixteen oblast courts are men, and only 16 of the 46 members of the Supreme Court in 2003 were women (34%).

Ethnic balance may be more of a concern than gender representation. According to the United States Department of State 2003 Country Report on Human Rights Practices (Feb. 25, 2004), the population of Kazakhstan consists of about 56% ethnic Kazakhs and 32% ethnic Slavs

(Russians, Ukrainians, and Belarusians), with the remainder made up of many other minorities such as Uzbeks and Germans. In some courts, ethnic minorities are well-represented. For instance, in one rayon court in Almaty, five of the twelve judges were from ethnic minorities (Russian, Uighar, and Tatar) (41% minority representation). On the Supreme Court, there are an estimated thirteen non-Kazakhs out of 46 judges in 2003 (28% minority representation). Out of fifteen judges in the Almaty Economic Court, three are ethnic Russians (20% representation). The picture is not as positive in other courts, perhaps due to the fact that the representatives of national minorities tend to be concentrated in northern and central oblasts of the country. In the criminal section of the Almaty City Court, out of 25 judges two are Russian and one is ethnic Korean (12%). In the Mangistau Oblast Court, out of nineteen members, there is one Russian, one Ukrainian, and one Korean (19% minority representation). In one rayon court in Aktau, there was only one minority representative (a Chechen) among the 10 judges (10%).

A related issue arises from the perception that Kazakh is the only official language in the country, and the fear that this will be used to limit the number of non-Kazakhs hired into the judiciary. In fact, the Kazakh and Russian languages are both officially recognized. According to Article 7(2) of the Constitution, “[i]n state institutions ... the Russian language shall be officially used equally with the Kazakh language.” This rule is reiterated in the procedural codes, according to which the legal proceedings must be conducted in state (i.e., Kazakh) language, however “where necessary, Russian or other languages may be used in the proceedings equally with the state language.” Civil Procedure Code, Art. 14; Criminal Procedure Code, Art. 30. In civil proceedings, the language would generally be the same as the language in which a complaint was filed. In addition, if a party or another participant in the proceedings is not proficient in the language that was selected for the particular proceedings, that person may use his/her mother tongue or another language, as well as use a translator’s services free of charge. On this point, the United States Department of State 2003 Country Report on Human Rights Practices (Feb. 25, 2004) found that “these language rights were generally respected.”

## II. Judicial Powers

### Factor 5: Judicial Review of Legislation

***A judicial organ has the power to determine the ultimate constitutionality of legislation and official acts, and such decisions are enforced.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Negative</i></b>
Currently, only a quasi-judicial body, the Constitutional Council, has the power to determine the constitutionality of legislation, but its decisions can be vetoed by the President.	

#### Analysis/Background:

Under the 1995 Constitution, the power to determine the constitutionality of legislation rests with the Constitutional Council. Specifically, the Constitutional Council has jurisdiction over the following matters:

- To determine “the correctness of conducting the elections” of the President, deputies of Parliament, and of the national referenda;
- To consider the laws adopted by Parliament with respect to their compliance with the Constitution, before they are signed by the President;

- To consider whether international treaties comply with the Constitution, before they are ratified;
- To “officially interpret the provisions of the Constitution;”
- To participate in the process for the removal of the President, as stipulated in Article 47 of the Constitution; and
- To consider the appeals of courts in cases stipulated by Article 78 of the Constitution (if a court finds that a person’s rights have been unconstitutionally infringed upon by a law or another legal act, it refers the matter to the Constitutional Council with a recommendation that the law be declared unconstitutional). Const., Art. 72

Despite these apparent powers, however, the Constitutional Council is largely a creature of the executive: three of the seven members, including the Chair, are appointed by the President (two other members are appointed by the Chair of the Senate, and the final two by the Chair of the Majilis). If a deadlock occurs in any particular case due to lack of the required majority of votes, the vote of the Council’s Chair (i.e., Presidential appointee) becomes decisive. Ex-Presidents of the country become lifetime members of the Council. Const., Art. 71. Despite the fact that the legislature appoints the majority of the Constitutional Council’s members, this majority is not always sufficient: for instance, as described below, overturning the President’s veto requires a supermajority vote.

Perhaps the most important indication of presidential control over this body is enshrined in Article 73(4) of the Constitution. It provides, “[t]he President of the Republic may object, in whole or in part to the resolutions of the Constitutional Council. These objections shall be overruled by two-thirds of the votes of the total number of the members of the Constitutional Council. If the objections of the President are not overruled, the resolution of the Constitutional Council shall be considered not adopted.”

In other words, the President can veto the decisions of the Constitutional Council. These vetoes can be overturned only by a two-thirds vote, which may be unlikely considering that the President appoints three of the seven members, sufficient to block any effort to overturn a veto. It is also notable that the Constitutional Council does not seem to have direct jurisdiction over decrees issued by the President.

At the same time, the Constitutional Council has been willing to object to decisions of the President. The Council’s website ([www.constcouncil.kz](http://www.constcouncil.kz)) reports that it has heard 120 appeals since its creation in February 1996. During this time, the President has vetoed the Council’s decisions three times; two of these vetoes have been overturned by a two thirds majority vote of the Council members.

Another concern is that only a limited number of government officials may bring cases to the Constitutional Council. Only the President, the Chair of the Senate, the Chair of the Majilis, not less than one-fifth of the total number of deputies of Parliament, and the Prime Minister may take appeals to the Constitutional Council, although, as described above, the courts may refer certain matters to the Council. Const., Art. 72. It should be noted that the judiciary has been the most active petitioner before the Constitutional Council: out of 120 appeals heard by the Council since its inception, 48 (or 40%) were initiated by the courts. However, only 17 of these appeals were heard on the merits. See Status of Constitutional Legality in the Republic in 2003: Annual Address of the Constitutional Council to the Parliament of the Republic of Kazakhstan. Private citizens may not bring cases to the Constitutional Council directly (they may only do so by applying to courts of general jurisdiction as per the procedure set forth in Article 78 of the Constitution), although they had such right with the Constitutional Court that existed prior to 1995.

The members of the Constitutional Council are appointed for six-year terms. Const., Art. 71(1). In order to be eligible for membership on the Council, a person must be a citizen of Kazakhstan and permanently reside in the country, be at least 30 years old, hold a degree in law, and have a minimum of five years of “professional legal experience.” Presidential Decree on the

Constitutional Council, Art. 4. The Chair and the members of the Constitutional Council enjoy structural safeguards similar to those granted to judges of the courts of general jurisdiction. They cannot be elected as deputies, engage in entrepreneurial activities, or hold other paid positions, “except teaching, research, or other creative activity.” Const., Art. 71(4). The Chair and the members of the Constitutional Council may not be arrested, detained, or subjected to administrative punishment without the consent of Parliament, unless they are apprehended at the scene of a crime or committing a serious crime. Const., Art. 71(5). A crime is defined as “serious” if the maximum possible penalty is between 5 and 12 years of imprisonment. Criminal Code, Art. 10. Otherwise, there is no legal definition of “serious crime” in terms of prohibited conduct or protected interest.

## Factor 6: Judicial Oversight of Administrative Practice

***The judiciary has the power to review administrative acts and to compel the government to act where a legal duty to act exists.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
The judiciary has the power to review administrative acts and to compel the government to act where it has a legal duty to do so, but it is unclear how often that power is exercised and to what extent such decisions are enforced and respected.	

### Analysis/Background:

According to the Civil Procedure Code, the judiciary has the power to review administrative acts. Civil Procedure Code, Art. 24(3). According to the Chair of the Supreme Court, the total number of civil cases brought by private parties against the various government entities increased by more than twofold since 1992. “Important Issues in Application of Law by the Courts,” *Supreme Court’s Website – News*, Dec. 19, 2003.

The assessment team received conflicting testimony concerning how often the courts enter decisions against state agencies and whether these bodies comply with them. On one hand, one perhaps overly cynical lawyer said that “unless it is authorized from above, the court will not decide against the state.” Sometimes, he explained, the central power can use a claim against a mayor or governor (akim) to punish the local official. Another lawyer concurred that it is difficult to win cases against the state authorities, but made clear that it is possible, saying that she had won 25% of her cases against the tax agency. A panel of lawyers interviewed generally felt that judges continue to favor the state over the individual. It was also reported that one judge told a lawyer who was opposing a state agency, “I know you are right, but I am not a hero of the Soviet Union.” The implication was that he would be “sacrificed” if he rendered a decision against the state.

On the other hand, one judge stated that the state agencies are “usually responsive, and if they disagree, they may appeal.” Another judge opined that the state agencies “are getting used to the role of the courts.” One administrative court judge said that he reversed the decisions of the tax authorities about 90% of the time, and that the tax authorities complied with his decisions some 80% of the time. This contention seems to be in line with the information available from the Supreme Court, according to which some 80% of all cases brought against the government are resolved in favor of the private parties. To illustrate this point, the Court cited a recent case in which a private plaintiff was awarded KZT 300,000 (approximately \$2,000) as compensation for moral damages caused by police officers who unlawfully detained and assaulted the plaintiff. One of the most interesting points about this case is that the damages will have to be paid by the Government of Kazakhstan. “Important Issues in Application of Law by the Courts,” *Supreme Court’s Website – News*, Dec. 19, 2003.

It should be noted that the resolution of tax cases and cases against law enforcement officers in favor of private plaintiffs is a relatively new phenomenon in Kazakhstan's legal system. For instance, according to one NGO representative, five years ago it was unheard of for a tax case to be resolved in favor of a taxpayer, while two years ago it was not possible for a private party to win a case against a police officer. This NGO representative expressed the view that such turn of events became possible only after the executive branch (represented by the President) made a political decision to allow courts to rule in a certain manner, and that the judiciary is now merely implementing this political decision in its verdicts. Thus, favorable resolution of tax claims may be related to the executive "proposal" to use judicial protection of business as a balance to limit the abuses and disrespect of the law by tax officials, while cases against police officers may be seen as a means to show the international community that Kazakhstan is trying to change its law enforcement system to comply with the applicable international standards, such as ICCPR.

At the same time, the Court Administration Committee of the Supreme Court, responsible for overall enforcement of judicial decisions, recognized that it can be difficult to enforce judgments against the state, noting that last year was the first year in which the Ministry of Labor actually paid out all the judgments that had been entered against it. Overall, it has been reported that out of 12,060 court orders to enforce payment of almost KZT 6 billion (\$40 million) by various ministries and organizations funded from the national and the local budgets in 2003, only 5,357 orders, or 56%, have been enforced, resulting in collection of approximately KZT 3.5 billion from the national budget and approximately KZT 627 million from the local budgets (\$23 million and \$4 million, respectively). The lowest compliance levels were recorded in Almaty, East Kazakhstan and Pavlodar oblasts, as well as in the city of Astana. "Interview with Vladimir Borisov, Chairman of the Court Administration Committee," *Yuridicheskaya Gazeta*, Feb. 6, 2004. The low enforcement levels may partly be due to lengthy special procedures stipulated to collect judgment awards from the state organizations. According to this procedure, the Government must first incorporate the total judgment amounts due in the budget for the next year and receive the Parliament's approval, then transfer the money to the organizations liable for payment, and only after that the winning party can actually collect the award. This procedure can easily take more than one year and often takes more than two years.

Overall, the idea of using the courts as recourse against administrative silence or inaction remains undeveloped, even though Article 278 of the Civil Procedure Code specifically provides for such remedy in the face of administrative silence: "[p]rivate individuals and legal entities have the right to dispute a decision, action (or inaction) of a state body, local self-government body, public association, organization, official person, or civil servant directly before the court. Preliminary appeals to higher-level bodies, organizations, and officials shall not be a prerequisite for submitting a complaint to the court or for the court's acceptance of a complaint for consideration on the merits."

In apparent contradiction to this provision, however, one administrative court judge stated that in the face of administrative silence one should apply first to the higher level of the administration and then to the procuracy. Notably, he did not even mention the option of going to court.



## Factor 7: Judicial Jurisdiction over Civil Liberties

*The judiciary has exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties.*

<b>Conclusion</b>	<b>Correlation: Negative</b>
Prosecutors, not judges, issue arrest and detention orders, and may also intervene in civil cases in which the state does not have a clear and legitimate interest. Prosecutors may also suspend certain judicial decisions.	

### Analysis/Background:

Kazakhstan's Constitution and procedural codes send conflicting messages concerning whether the courts or the procuracy have exclusive, ultimate jurisdiction over cases concerning civil rights and liberties. Article 75 of the Constitution states that "[j]ustice ... shall be exercised only by the court. ... The establishment of special and extraordinary courts under any name shall not be allowed." See also Law on the Judicial System, Art. 1(1) ("Justice in Kazakhstan shall be administered only by the court."). Likewise, Article 1(1) of the Law on the Judicial System states that "[p]etitions, applications, and complaints ... may not be considered or supervised by any other bodies..." The same law provides "[e]veryone shall be guaranteed the court protection from any unlawful decisions and acts of state authorities, organizations, official and other persons, which infringe or restrict the rights, freedoms and legitimate interests provided for by the Constitution and laws of the Republic."

In contradiction to the above provisions, Article 83 of the Constitution seems to preserve some of the old powers of the procuracy: "[t]he procuracy on behalf of the state shall exercise the highest supervision over exact and uniform application of law, the decrees of the President of the Republic of Kazakhstan and other legal acts on the territory of the Republic, over legality of preliminary investigation, interrogation and inspection, administrative and executive proceedings, and take measures for exposure and elimination of any violations of the law, as well as protest the laws and other legal acts contradicting the Constitution and the laws of the Republic."

This conflict between the functions of the judiciary and the procuracy gives rise to three specific areas of concern relevant to this factor.

First, prosecutors rather than judges issue arrest, search, and detention warrants. Although Article 16(2) of the Constitution and Article 150(1) of the Criminal Procedure Code both indicate that such warrants may be issued by either the courts or the prosecutors, in practice they are issued by prosecutors, while Article 150(4) of the Criminal Procedure Code provides that prosecutors have the general right to issue arrest warrants. It appears that the Code only allows the courts to issue detention warrants if "the issue on application of detention as a measure of suppression in respect of the accused person arose at the court." Criminal Procedure Code, Art. 150(8). Search and seizure warrants can only be issued by prosecutors. Id., Art. 232. Investigators may detain suspects for up to 72 hours and must present the resolution on detention for the prosecutor's sanction not later than six hours prior to the expiration of this period. Id., Arts. 134-136, 150(2); see also Const., Art. 16(2) ("[w]ithout the sanction of a prosecutor, a person may be detained for a period of no more than 72 hours.") In practice, however, it was reported that this period is sometimes extended, in violation of the law.

Legislation also provides that a "detained person shall be provided with the right to appeal." Const., Art. 16(2), although the judiciary's power to review the acts or decisions of criminal investigators and prosecutors is limited. First, Article 108 of the Criminal Procedure Code seems to require that complaints by private individuals against investigation and interrogation officers be

directed to “the prosecutor who supervises the compliance with the law when preliminary investigation and interrogation are conducted,” while complaints against the prosecutors are to be submitted “to the upper prosecutor.” However, rayon courts do have the power to hear private complaints challenging the “performance of procedural acts infringing the rights and legitimate interests of citizens and organizations ... directly or after a similar complaint is left without satisfaction by the relevant prosecutor.” *Id.*, Art. 109(1). There is a limitation period of one month following the receipt of a notice of prosecutor’s refusal to satisfy the complaint, and the decisions of the rayon court may not be appealed to upper-level courts. *Id.*, Arts. 109(2), 109(4). However, if the subject matter of judicial review relates to allegedly illegal detention sanctioned by the prosecutor, the decision of rayon court may be appealed to the oblast court within 72 hours. *Id.*, Art. 110(5).

Lawyers indicated that they have had success in getting judges to overturn arrest warrants issued by prosecutors. Thus, according to a report by the Chair of the Constitutional Council, as cited by the United States Department of State 2003 Country Report on Human Rights Practices (Feb. 25, 2004), there were 3,788 unjustified arrests in 2002. Moreover, 41 criminal cases against 63 law enforcement officers who allegedly violated citizens’ rights were heard by the courts during the first nine months of 2003, resulting in 19 convictions.

A second concern is that the Prosecutor General (as well as the Chair of the Supreme Court) may suspend the implementation of both criminal and civil judgments for a period of up to three months. Criminal Procedure Code, Art. 466; Civil Procedure Code, Art. 396. However, no information is available as to how commonly the procuracy resorted to this right.

Finally, Article 55 of the Civil Procedure Code gives the procuracy the power to intervene at any stage in any civil case, whether or not that case involves a legitimate state interest. It states:

1. The supreme supervision of the precise and uniform application of laws in the civil proceedings on behalf of the state shall be carried out by the Prosecutor General of the Republic of Kazakhstan, either directly or through prosecutors subordinated to him.
2. The participation of a prosecutor in the civil proceedings shall be obligatory in the cases where it is provided for by the law or where the need for the prosecutor’s participation in a given case is recognised by the court. The prosecutor shall have the right to intervene in the proceedings upon his initiative or upon the initiative in order to provide a conclusion on the merits of the case for the purposes of exercising the duties entrusted to him and for the protection of the rights, freedoms and legitimate interests of citizens, rights and legitimate interests of organisations, public or state interests.

This provision has been frustrating to judges. One judge reported a case in which the two litigants were going to settle, but then the procuracy intervened, even though there was no apparent state interest in the matter. This judge felt that the prosecutors are simply trying to affirm their authority over the courts, in particular by uncovering judicial mistakes. Others feel that the procuracy is accepting bribes to intervene in such cases (see *also* Factor 20).

Essentially, the procuracy is still clinging to its old Soviet position at the apex of the legal system while the courts, more in line with modern western standards, are trying to establish themselves as the new defenders of fundamental rights and freedoms. Many, however, still look to the prosecutor as the primary defender of human and civil rights. The Office of the National Ombudsman reported, for example, that if a serious violation of rights (such as failure to provide an advocate for a criminal defendant) comes to its attention, it will refer the matter to the Prosecutor General for further investigation and correction rather than to the courts. In addition, the courts have a long way to go before they can be seen as the defenders of individual rights. As described in Factor 20, they are sometimes used by the executive power to intimidate political opponents of the executive power, while the very low (less than 1%) acquittal rates indicate that they remain unwilling to oppose the power of the prosecutor.



Another disturbing trend that adds to the negative perception of the judiciary as the defender of individual rights and liberties is that the courts, overwhelmingly, fail to undertake measures to rehabilitate individuals acquitted on criminal charges and in particular, to recognize and explain their right to compensation of damages caused by illegal accusation or detention, in direct contradiction to the requirements of Chapter 4 of the Criminal Procedure Code. According to a study conducted by the Supreme Court, only 17 acquittal verdicts issued between January 2002 and September 2003 contained a reference to the right to compensation. None of the defendants, however, received a copy of the verdict with a written explanation of the procedure for claiming compensation. As a result, during this period only three acquitted individuals obtained compensation for material damages pursuant to the rules of criminal procedure. Only one person received an official written apology for illegal accusation, again in direct contradiction to Article 44 of the Criminal Procedure Code. In addition, 104 individuals brought separate civil claims for compensation of material and moral damages and for reinstatement of certain rights, out of which 76 claims were satisfied in whole or in part. The courts ordered the payment of KZT 20.7 million (\$138,000) in compensation of moral damages and KZT 12.9 million (\$86,000) in compensation of material damages. “Review of Courts’ Practice of Rendering Acquittal Verdicts,” *Supreme Court’s Website – Judicial Acts and Reviews*, Jan. 2004.

## Factor 8: System of Appellate Review

***Judicial decisions may be reversed only through the judicial appellate process.***

<b>Conclusion</b>	<b>Correlation: Negative</b>
While judicial decisions may only be reversed through the judicial appellate process, prosecutors can take special appeals on cases that have been closed, and may also suspend the implementation of court decisions pending such special appeals.	

### Analysis/Background:

The judicial appellate process is another area where the procuracy wields considerable power. Rayon courts are the courts of first instance for less serious criminal cases and most civil cases. All parties have a right to appeal rayon court decisions to the oblast courts, which hear appeals in panels of three on a de novo basis. However, certain decisions of rayon courts, most notably those concerning the complaints against prosecutorial decisions or acts pursuant to Article 109 of the Criminal Procedure Code, may not be appealed to the oblast level. The oblast court is the last level of appeal as of right for cases that begin in the rayon courts, and the judgment is enforced upon the conclusion of the appeal. Oblast courts are divided into three sections: civil, criminal, and supervisory. Even after a final decision is entered and enforced, parties can seek further review by the supervisory section of the oblast court. The chair of the supervisory panel assigns the request for a supervisory review to one of the judges on the panel, who then considers the matter and decides whether to recommend to the chair of the supervisory panel, who retains the final right to decide on the issue, that the full panel should hear the supervisory appeal. By contrast, prosecutors have an automatic right to a supervisory appeal, or “protest,” and the court is obligated to consider such protests. Finally, rayon level litigants can also seek supervisory appeal before the supervisory section of the Supreme Court, following the same basic procedure as with the supervisory section of the oblast court. A protest must be filed within one year of the entry into force of the final judgment in a civil matter. Civil Procedure Code, Art. 388. In criminal matters, there is a general six-month limitations period for filing protests on acquittal verdicts or protests based on the grounds that may worsen a convicted person's position; however, no limitations period applies if a protest is based on the grounds that may improve a convicted person's position. Criminal Procedure Code, Art. 461.

Oblast courts hear more serious crimes and some civil cases as a court of first instance. These cases include, for instance, crimes for which the possibility of the death penalty is provided, such as aggravated murder, terrorism, treason, genocide etc. Although Kazakhstan has introduced a moratorium on execution of death sentences in December 2003, the courts may still issue sentences imposing the death penalty. Further, oblast courts are courts of first instance for cases where defenses of insanity or inability to stand trial by reason of mental illness are raised, and civil cases where a foreign or international entity is named as one of the parties. See Criminal Procedure Code, Art. 291; Civil Procedure Code, Art. 28. Such cases can be appealed as of right to the Supreme Court. It hears such appeals de novo, and decisions are enforced after the conclusion of the appeal. The Supreme Court is also divided into civil, criminal, and supervisory sections. Parties may seek a supervisory appeal even after the enforcement of a decision, by applying to the supervisory panel of the Supreme Court, following the same basic procedure described above. Again, the Supreme Court's supervisory panel is obligated to hear protests filed by the procuracy. Depending on the seriousness of the matter, the Supreme Court may hear appeals and protests in panels of three or nine judges.

Supervisory protests give prosecutors an unfair advantage over defense counsel and other litigants in the appellate process. Such protests by a prosecutor can suspend the implementation of a judicial decision pending the final protest. Civil Procedure Code, Art. 396; Criminal Procedure Code, Art. 466; Law on the Procuracy, Art. 19. Some judges defended the process, arguing that the prosecutors often represent criminal defendants in these appeals. The assessment team sought, but did not obtain, statistics that would show how often that was the case. The assessment team was also interested in finding out how often the procuracy intervened at the protest level in civil cases where the state did not have a clear interest, but again was unable to obtain such statistics (and it remains unclear whether such statistics are kept). According to statistics provided by the Supreme Court, however, in 2003 the procuracy submitted 7,319 protests of civil cases in the oblast courts. Of those, 992 were withdrawn and 5,387 were considered. Of those, 2,900 protests were granted, including 1,177 which were granted only in part. Representatives of the Supreme Court reported, however, that the number of protests filed by the procuracy is dropping, while the courts are granting such protests less frequently, which may be indicative of deteriorating quality and effectiveness of such protests. According to the Supreme Court's website ([www.supcourt.kz](http://www.supcourt.kz)), the average number of protests being satisfied has decreased over the past three years, from 66% in 2001 to 64.4% in 2002, to 60.5% in 2003.

Another concern related to the appellate process is that judges can be subjected to disciplinary sanctions if too high a percentage of their cases are overruled. "The most important concern for a judge," one lawyer said, "is that his decision not be overturned." While not many disciplinary proceedings have been commenced against judges for reversals, as one judge said, "it is unpleasant for a judge to hear his name come up as a person whose decisions are reversed a lot." It seems, however, that most decisions are affirmed. According to a report prepared by the Chair of the Supreme Court, the reversal rate is dropping, with 98% of lower court decisions being affirmed in 2003. There are some noteworthy exceptions however. For instance, in the South Kazakhstan oblast, almost every other decision is reversed. "Efficiency of the Judiciary," *Yuridicheskaya Gazeta*, Feb. 11, 2004. Other courts with above-average reversal rates include Astana and Almaty City Courts, Atyrau, Kostanai and Pavlodar Oblast Courts, and rayon courts in Mangistau oblast. However, despite the downward trend, reversal rates are still higher for appeals heard by the Supreme Court. Out of 176 decisions that were appealed to the civil section of the Supreme Court in 2003, 117 (66%) were affirmed, compared to 122 out of 216 decisions (56%) affirmed in 2002. The majority of cases heard on appeal by the Supreme Court were related to contracts, job reinstatement, pecuniary and moral damages, suspension and termination of business licenses, bankruptcy, and review of administrative acts or omissions. "Overview of Appellate Practice of the Civil Section of the Supreme Court for 2003," *Supreme Court's Website – Judicial Acts and Reviews*, Jan. 2004.

Statistics obtained from the Supreme Court show a longer-term trend towards affirming lower court decisions:

#### Appellate Reviews of Rayon Courts' Criminal Decisions

Year	Sentences Reversed		Sentences Amended	
	Total	% of all cases	Total	% of all cases
1999	1,794	2.2	2,148	2.7
2000	1,591	1.7	2,569	2.8
2001	1,264	1.3	3,147	3.3
2002	875	1.0	3,361	3.8
2003	549	0.7	2,976	3.7

#### Appellate Reviews of Rayon Courts' Civil Decisions

Year	Sentences Reversed		Sentences Amended	
	Total	% of all cases	Total	% of all cases
1999	3,165	1.8	796	0.5
2000	4,036	2.2	834	0.4
2001	4,460	2.1	1,068	0.5
2002	3,888	1.8	1,424	0.7
2003	2,876	1.2	2,181	0.9

In any event, judges confirmed in their discussions with the assessment team that the use of reversal rates to measure their effectiveness has a chilling effect on their independence. Sixteen out of thirty judges responding to a poll indicated that one of their greatest concerns as judges was being reversed on appeal.

### Factor 9: Contempt/Subpoena/Enforcement

*Judges have adequate subpoena, contempt, and/or enforcement powers, which are utilized, and these powers are respected and supported by other branches of government.*

<b>Conclusion</b>	<b>Correlation: Neutral</b>
Although judges seem to have adequate subpoena and contempt powers, serious problems were reported concerning the enforcement of civil and commercial decisions.	

#### Analysis/Background:

"Decisions, verdicts, and other judgments of courts shall have an obligatory force throughout the entire territory of the Republic." Const., Art. 76(3); see also Law on the Judicial System, Art. 1(3) ("Court decisions and requirements of judges ... shall be obligatory for compliance by all state bodies and official persons, natural persons, and legal entities."). In practice, however, questions remain.

Judges do have adequate subpoena and contempt powers. For example, the court, in civil proceedings, may hold in contempt and subject to administrative or criminal responsibility any individual "for interfering with the consideration of judicial cases, threatening the judge, insulting the judge, failure to perform court orders, demonstrating disrespect of the court, violating the courtroom order, failure to undertake measures required by a private resolution of the judge or the court, and other unlawful actions." Civil Procedure Code, Art. 118. Also, if a civil defendant

does not appear for hearings, a default judgment may be entered against him/her if there was no notice of the reasons for failure to appear, if the reasons were found insufficient, or if the court concluded that a defendant is intentionally delaying the proceedings. *Id.*, Arts. 187, 260. That judgment can subsequently be challenged before the issuing court or may be protested by the prosecutor. *Id.*, Art. 264. To obtain a reversal of a default judgment, a party against whom it was issued must establish before the court that his failure to appear “was caused by sufficient reasons of which he had no opportunity to communicate to the court timely,” as well as present additional “evidence that may affect the contents of the decision.” *Id.*, Art. 269 and Art. 265. However, if a party fails to appear for a scheduled court hearing after a reversal of default judgment, the judge is authorized to issue a new judgment on the merits, which is not regarded as default judgment. *Id.*, Art. 270. The court may also issue a default judgment against the victim who fails to appear in private prosecution proceedings instituted pursuant to Article 33 of the Criminal Procedure Code. Criminal Procedure Code, Art. 318(4).

Procedural rules also grant the judge the power to subpoena the parties and other participants in the proceedings (such as witnesses, experts, or specialists) to appear and participate in the proceedings. Criminal Procedure Code, Art. 310; see also Civil Procedure Code, Art. 80 (“A person subpoenaed as a witness must appear before the court at the designated time and testify truthfully.”). If a judge has sufficient grounds to believe that a defendant, victim, or witness will attempt to evade participation, or if any of these persons have previously failed to appear without justification, they may be required to provide written assurances of future appearance. Criminal Procedure Code, Art. 157. The judge may also order that a defendant, victim, or witness in a criminal case, and a defendant, witness, expert, specialist, or translator in a civil case, be forcibly brought before the court. *Id.*, Art. 158; Civil Procedure Code, Arts. 120, 188. However, this measure cannot be applied against individuals whose failure to appear was due to illness, death of a relative, or natural disaster, as well as against minors under the age of 14 and pregnant women. Criminal Procedure Code, Art. 158. Finally, the court may consider a criminal case in the absence of certain parties; provided, however, that consideration in the absence of a criminal defendant is allowed only if the person is outside of Kazakhstan and is evading the service of subpoena. *Id.*, Art. 315(2). Most lawyers and judges reported that this system for compelling the appearance of witnesses and parties worked sufficiently well.

The Civil Procedure Code also provides for the court's power to subpoena, upon request of the parties and other participants in the proceedings, the submission of documentary evidence. Both the participants in the proceedings and any third parties must comply with the subpoena order by either submitting the requested documents directly to the court or providing a justified explanation for failure to submit the documents. Failure to comply with this requirement will result in a fine in the amount of 10 monthly indexes (equivalent of about \$55), while any repeated failure to comply will result in a fine of up to 20 monthly indexes (\$110). Imposition of a fine, however, does not relieve the obligation to submit the requested documents. Civil Procedure Code, Arts. 82-83.

Similarly, judges seem to have adequate powers for maintaining order in the court. By law, everyone present in the courtroom during the hearings is required to obey the judge's instructions to maintain order. Criminal Procedure Code, Art. 326; Civil Procedure Code, Art. 178. The judge may remove from the courtroom or subject to administrative penalties any person who disrupts the order of the court. However, a party or another participant in criminal proceedings, as well as any person present in the courtroom in civil proceedings, must first be given a warning that a repeated disobedience will result in such removal or penalties. Criminal Procedure Code, Art. 327; Civil Procedure Code, Arts. 121, 179. The judge may impose additional monetary fines on a victim, witness, specialist, or translator who violates courtroom order or fails to perform his/her procedural duties. Criminal Procedure Code, Art. 160. The judge may also forward the information to a prosecutor if he believes that a sanctioned person should also be subjected to criminal penalties. *Id.*, Art. 327; Civil Procedure Code, Art. 179. Moreover, if mass violations of courtroom order occur during the civil proceedings, the judge may remove all non-participants from the courtroom and conduct a closed hearing. Civil Procedure Code, Art. 179. However, the judge lacks the authority to remove a criminal prosecutor or a defense advocate from the

courtroom or to subject a criminal defendant to administrative penalties. Criminal Procedure Code, Art. 327.

Problems arise with the enforcement of civil and commercial judgments, which is the responsibility of the Department of Bailiffs of the Court Administration Committee of the Supreme Court. Judges, lawyers, and government officials all viewed this as an area of serious concern. Quantifying the problem, however, proved challenging to the assessment team. According to a panel of lawyers interviewed, it had recently been reported that only 12.8% of all judicial decisions were being enforced. One lawyer estimated, however, that she collects two thirds of the judgments she wins quickly and easily, but that the remaining one third may never be enforced. Other statistics from the Supreme Court indicated that only 35% of the total amount awarded in civil judgments in 2003 have been collected (KZT 31.1 billion out of KZT 88 billion, equivalent to \$207 million out of \$587 million), which is 12% below the collections rate for 2002. "Efficiency of the Judiciary," *Yuridicheskaya Gazeta*, Feb. 11, 2004. On the other hand, the Court Administration Committee reported that 68.5% of all decisions had been enforced, which is 7% higher than the enforcement ratio for 2002. "Interview with Vladimir Borisov, Chairman of the Court Administration Committee," *Yuridicheskaya Gazeta*, Feb. 6, 2004. A total of 461,153 court orders were actually executed, which is 22% more than the number of court orders executed in 2002. *Id.* The Office of the National Ombudsman reported that 5.5% of the 1,200 complaints that he had received in 2003 related to the lack of enforcement of judicial decisions. Concerns relating to the enforcement of judgments against government agencies are described in Factor 6.

Part of the problem with enforcement is attributable to a lack of human resources. According to the Court Administration Committee, it enforces over 1 million judgments per year, and collected KZT 123 billion (\$820 million) in judgments last year. But, it also reported that it has too few resources to fully enforce all judgments. According to legislation, the number of enforcement bailiffs must be equal to the number of judges. Law on Execution Procedures and the Status of Executive Bailiffs, Art. 82(4). Currently, however, there are 2,471 judges in the country, but only 1,496 enforcement bailiffs, even though some 300 bailiffs were added last year. As a result of this shortage in the number of executive bailiffs, the monthly caseload per bailiff averages 300-400 cases. "Being in Executive Bailiff's Shoes: Executive Bailiff's Status Is Usually That of a Beggar," *Yuridicheskaya Gazeta*, July 16, 2003. Further, there is lack of qualified personnel to fill the positions of the bailiffs, as no law school in the country provides special training on execution of judicial decisions. *Id.*

Lawyers and government officials agreed that corruption also contributes to the problem, noting that bailiffs are paid about \$65 per month. The Court Administration Committee stated, however, that there had been a 50% decrease in corruption cases filed against bailiffs in 2003 (15) compared to 2002 (27), although he also said that some 1,000 administrative penalties had been levied against enforcement bailiffs last year for minor infractions.

Efforts are being made to address these concerns, and Law No. 409-II "On Amendments to Certain Laws of the Republic of Kazakhstan Related to Execution Procedures" passed on May 5, 2003, included 105 revisions to improve enforcement mechanisms. In particular, executive bailiffs have been granted a number of new powers. They now may undertake measures to secure the enforcement of judicial decisions, such as placing a debtor's property under arrest or confiscating a debtor's property in possession of the third parties upon their own initiative and not only upon a request of the party seeking enforcement of a judgment. *Id.*, Art. 4(24) (amending Art. 33 of the Law on Execution Procedures and the Status of Executive Bailiffs). The amendments have also created special procedures for enforcement of judgments that require a debtor to undertake, or to abstain from undertaking, a certain action, mandate the eviction of a debtor, or may place the party seeking enforcement of a judgment in possession of the premises. *Id.*, Arts. 4(36)-4(37). Further, the amendments have improved the mechanisms for cooperation between executive bailiffs from different rayons and oblasts, by providing that bailiffs may request their counterparts in different administrative divisions to perform certain executory actions



necessary to enforce the judgment. Id., Art. 4(48) (amending Art. 86 of the Law on Execution Procedures and the Status of Executive Bailiffs).

Bailiffs can also invoke certain quasi-contempt powers. Thus, in the event of persistent evasion by a criminal convict to pay a fine, which was set as the principal punishment, the bailiff may petition the sentencing court to substitute the fine with a different type of punishment. Id., Art. 4(33) (amending Art. 60 of the Law on Execution Procedures and the Status of Executive Bailiffs). See also id., Art. 4(48) (amending Art. 86 of the Law on Execution Procedures and the Status of Executive Bailiffs, providing that bailiffs may petition criminal prosecution and investigation authorities to hold criminally responsible those who persistently evade the enforcement of a judgment. Executive bailiffs are also entitled to receive, free of charge, information and explanations related to enforcement of judicial decisions from any authorities, organizations, officials, and private individuals, who must provide such information immediately upon receipt of request, or within 3 days if it is necessary to prepare special documents. Id.

Nevertheless, certain provisions in Law No. 409-II look like a step backwards, in that they further reinforce the power and discretion of prosecutors in the enforcement stage. For instance, the law provides that in order to begin enforcing a judicial decision for collection of money from legal entities and individuals engaged in private entrepreneurial activity, an executive bailiff must first obtain permission from a prosecutor. Id., Art. 3 (amending Art. 20 of the Law on Payments and Money Transfers).

An issue of special concern relates to enforcement of arbitral awards. Although Kazakhstan is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which calls for the rapid enforcement of such awards, a draft law was recently circulated that would have allowed the courts to essentially re-litigate the findings of international arbitration panels. That draft has since been withdrawn, but the Constitutional Council recently held that domestic arbitration decisions could not be enforced in Kazakhstan because the Constitution provides the citizens' right of access to the judicial system and, in its view, private arbitration agreements were in violation of that right.

### III. Financial Resources

#### Factor 10: Budgetary Input

***The judiciary has a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches, and, once funds are allocated to the judiciary, the judiciary has control over its own budget and how such funds are expended.***

Conclusion	Correlation: Positive
The judiciary, through the Court Administration Committee of the Supreme Court, seems to have a meaningful opportunity to influence the amount of money allocated to it and to control how such funds are expended. The judiciary has received increased amounts of funding over each of the past three years.	

#### Analysis/Background:

The development of the budget for the lower courts is handled by the Court Administration Committee of the Supreme Court, based on a review of the prior year and with input from chairs of the courts and the Committee's regional offices. The Supreme Court develops its budget on its

own. Article 80 of the Constitution states that “[f]inancing of courts [and] provision of judges with housing shall be performed from the republican budget and must ensure the possibility of complete and free exercise of justice.” See also Law on the Judicial System, Arts. 4(6), 25(4) (“Financing of the courts, material support of the judges, as well as providing them with housing shall be carried out at the expense of funds of the Republic’s budget in the amounts which are sufficient for full and independent administration of justice.”). Previously, the budget for the judiciary was developed and handled by the Ministry of Justice, and courts frequently obtained material support from the local governments, giving rise to conflict of interest concerns because local government agencies were frequent litigants in the courts.

Designation of the Court Administration Committee as the budgeting agency for the judiciary seems to have had a salutary impact on the budgeting process and on the amounts allocated to the judiciary. According to the Committee, each of the last three years has seen an increase of 12% in the amount budgeted to the Committee. This is of course less than what the Committee requested, and has remained fairly static as a percentage of the national budget, but it is nevertheless a positive development. Data pulled from the state budget for each of the past four years confirms that increased amounts have been allocated to the judicial system:

#### **Funding Allocated to the Judiciary (in thousand KZT)**

<b>Year</b>	<b>Total State Budget</b>	<b>Total Allocated to Judiciary</b>	<b>% Allocated to Judiciary</b>
2001	391,243,591	3,807,303	0.97
2002	465,612,615	5,185,166	1.1
2003	710,173,753	5,761,876	0.81
2004	875,896,221	8,005,722	0.91

The Court Administration Committee has provided some breakdown on major categories of expenditures allocated to the judiciary in 2003. Approximately KZT 1.3 billion (\$8.7 million) has been spent for procurement of goods and services, resulting in an increase in the total volume of goods purchased and services rendered by 18.5% compared to 2002. Another KZT 174 million (\$1.17 million) was allocated for capital repairs of the court buildings. In addition, KZT 130 million (\$870,000) has been allocated for the purchase of housing for judges and KZT 355 million (\$2.4 million) for the purchase of vehicles for courts in 2004. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004.

The increased support to the judiciary can be seen in the improved salary of judges, the computers and other equipment that can be found in every court, and improved work conditions in terms of office and courtroom space. Kazakhstan, because of its relative economic strength, has the capacity to improve its judiciary and should be commended for investing in its justice system.

In terms of the process for developing the budget, the representatives of the Court Administration Committee felt that more could be done, and expressed regret that the judiciary is not represented on the national budget committee, although its representatives may and do attend plenary sessions of that committee.

The Court Administration Committee also has sufficient powers to oversee the budgetary performance by the judicial system. In 2003, a special unit was set up for this purpose and for conducting inspections of court administrators to uncover spending violations. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004.

Finally, unlike in some countries, the court system does not retain any of the fees and fines that it collects, but rather all such fees are paid directly into the state budget. Typically, a filing fee of 3% is levied on each property claim brought by a legal entity, and an additional 1.5% on an appeal.

In the case of an individual plaintiff, the filing fee is 1%. For some categories of cases, such as consumer claims brought by a state agency or by a public consumer rights protection organization, a filing fee is not required, although it was reported that some judges question plaintiffs concerning why a fee has not been paid, even when it is not necessary.

## Factor 11: Adequacy of Judicial Salaries

***Judicial salaries are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment, without having to have recourse to other sources of income.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Natural</i></b>
After salary increases in 2002, judges became among the highest paid government officials. Although these salaries are still modest, they should be sufficient to enable judges to live without other sources of income. An area of greater concern, however, is that judicial salaries are determined solely by the President.	

### Analysis/Background:

Judicial salaries are paid through the Court Administration Committee of the Supreme Court. Judges received a significant increase in salaries in 2002, and now are among the highest paid government officials. Nevertheless, the amounts paid, by western standards and considering the resources of Kazakhstan, are modest. According to a poll of thirty judges, only six reported that their salaries were sufficient for them to live comfortably without resorting to other forms of income. According to the United States Department of State 2003 Country Report on Human Rights Practices (Feb. 25, 2004), the average monthly salary nationwide in 2002 was \$162. The same report goes on to say that rayon court judges are paid about \$325 per month, oblast court judges are paid about \$550 per month, and Supreme Court judges can earn more than twice that amount. These amounts were confirmed in interviews with judges.

One problem, however, is that judicial salaries are determined solely by the President (Law on the Judicial System, Art. 47(2)), which may undermine judicial independence. To balance this discretion, however, the legislation establishes a prohibition on decreasing judicial salaries. Id., Art. 47(1) ("The material support of judges must be consistent with their status ... and it may not be reduced."); see also id., Art. 26(1)(5).

Another concern is that, according to Article 51 of the Law on the Judicial System, the state is required to provide housing to judges. The responsibility of the executive to allocate housing for judges may provide it with another means of exercising undue influence over judges, who may worry about being provided with less favorable housing if they find against the state in important matters. Again, however, this influence may be balanced by a guarantee contained in Article 51.(3) of the Law on the Judicial System, which prohibits the eviction of a judge and his family from the state-provided housing in the event of a judge's release from the office, unless other housing space is provided. It should also be noted that some judges do not consider their right to state-provided housing to be a real benefit. As one judge recognized, although she had the right to such housing, she had not taken the time to go "stand in line" at the appropriate government office to obtain it. Nevertheless, it would be preferable to pay judges more and to let them obtain their own housing.

According to the Court Administration Committee, as of the end of 2003, a total of 579 judges lacked adequate housing. During 2003, the government provided housing to 81 judges, and was planning to provide it to additional 140 judges during 2004. "Interview with Vladimir Borisov,



Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004. Out of thirty judges polled, only ten reported that the government was providing them with housing.

Finally, it should be noted that, after having spent 10 years in office, judges may purchase their apartment at the residual value price. Law on the Judicial System, Art. 51(2). However, the judges interviewed were not certain how this provision would work in practice, because less than 10 years had passed since the passage of the Law.

Similarly, the state must provide vehicles to the courts. To date, only 19% of the overall vehicle needs of courts have been met. In 2003, 81 new vehicles were purchased, but an additional 335 vehicles need to be purchased in order to fully meet the requirements of the courts. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004.

## Factor 12: Judicial Buildings

***Judicial buildings are conveniently located and easy to find, and they provide a respectable environment for the dispensation of justice with adequate infrastructure.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>
Judicial buildings are conveniently located and easy to find, and for the most part provide a respectable environment for the administration of justice, although all cages should be removed from the courtrooms.	

### Analysis/Background:

The Court Administration Committee of the Supreme Court is responsible for providing and maintaining courthouses. According to the Committee, as of the end of 2003, buildings of 114 courts have been renovated or undergone major repairs. In 2003 alone, KZT 174 million (\$1.2 million) was allocated for capital repairs of oblast courthouses in Aktobe, Atyrau, Zhambyl, North Kazakhstan, Kostanai, Pavlodar, and South Kazakhstan oblasts. In addition, 14 new courthouses have been provided for the new economic and administrative courts, with only Almaty Administrative Court remaining without a separate building. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004.

Most courthouses seem to be in a good location, are clearly identifiable, and are easy to find. Most, if not all, judges have their own offices. The courtrooms themselves seem to be clean and well lighted, and have the requisite minimal furniture (seating for the judges on a raised podium, desks and chairs for advocates and prosecutors, and benches for the public).

However, most courtrooms still have cages in them in which criminal defendants are kept. These cages should be removed, especially if jury trials are to be introduced, in order to maintain the presumption of innocence.

### Factor 13: Judicial Security

***Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
Very few resources have been allocated to judicial security, although there have also been very few cases of attacks against judges.	

#### Analysis/Background:

Article 26 of the Law on the Judicial System provides “[j]udges, their family members and property shall be under the protection of the state whose relevant bodies shall be obligated to take timely and exhaustive measures to provide for the security of judges and their family members and the safety of their property, if an appropriate petition is received from a judge or his family members. Harm caused to a judge and his property in connection with professional activities shall be compensated at the expense of the Republic's budget.”

Most courthouses in Kazakhstan lack adequate security. There are few guards, and in some buildings there is easy access to the judge's offices. There are no metal detectors. At the trials observed, there were no uniformed guards present, although the assessment team was informed that such guards are usually present when serious criminal cases are being considered. The court bailiffs, who, among other duties, are required to provide security in the courtrooms, are not trained in security issues, and there is a shortage of them. In one oblast, which has over 80 judges, there are only 18 court bailiffs. In one rayon court in Almaty, there were four court bailiffs for twelve judges.

Fortunately, security for judges has not been a serious problem in Kazakhstan, although a bomb was reportedly placed beneath the car of one Astana judge, but did no damage. Nevertheless, the issue of security is one of great concern for Kazakhstan's judges, and further resources should be allocated to address it. It is noteworthy, therefore, that the situation is likely to change in fiscal year 2005, during which time the government is planning to allocate funding for the provision of security services to the courts by a special division of Kazakhstan's Ministry of Interior. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004.

## IV. Structural Safeguards

### Factor 14: Guaranteed tenure

***Senior level judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
Although judges are supposed to remain in office until retirement age, there were unconfirmed reports that some have been pressured out of office early. In addition, the law provides broad exceptions to security of tenure that can be the subject to abuse.	

### Analysis/Background:

Until December 2000, judges were elected for 10-year terms. The law now provides that judges are “entrusted with their powers on a permanent basis.” Law on the Judicial System, Art. 24(1). In practice, this means that judges serve until retirement age, which is 63 for men and 58 for women. Chairs of the courts serve for five years. Law on the Judicial System, Arts. 30-31.

Although this length of tenure seems sufficient, some concerns should be noted. First, the law seems to indicate that judges can be removed from office for a variety of reasons that could be subject to abuse (as discussed in Factor 17 below), including if a judge is appointed to another position or if a court in which a judge sits is dissolved and he/she does not accept assignment to another location. Law on the Judicial System, Art. 34. Second, it was reported that judges have been persuaded to accept early retirement on a number of occasions. It was impossible to confirm how often judges had left office before retirement age and for what reasons, but it was clear that, despite the apparent protections of the law, judges still feel susceptible to being ousted from office. See Factor 17.

## **Factor 15: Objective Judicial Advancement Criteria**

***Judges are advanced through the judicial system on the basis of objective criteria such as ability, integrity, and experience.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
Although ability, integrity, and experience are considered in the advancement of judges, the process is not considered to be objective or transparent.	

### Analysis/Background:

Judges are advanced to the higher courts following the appointment process for the oblast courts and the Supreme Court (according to which the High Judicial Council makes a recommendation to the President), as described in Factor 2. As already discussed, there are some serious concerns regarding the transparency and objectivity of this process, although ability, integrity, and experience of candidates are reportedly considered.

## **Factor 16: Judicial Immunity for Official Actions**

***Judges have immunity for actions taken in their official capacity.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
Judges have immunity in Kazakhstan, but it can be lifted by the President. There were no reports of judges being unfairly prosecuted or of their conditional immunity being violated.	

### Analysis/Background:

The Constitution provides that, unless apprehended at the scene of a crime, a judge may not be arrested, detained, or subjected to administrative or criminal punishments without the consent of the President based on a recommendation from the High Judicial Council. Const., Art. 79(2); see

also Law on the Judicial System, Art. 27; Criminal Procedure Code, Art. 498. A criminal case against a judge may be instituted only by the Prosecutor General. Law on the Judicial System, Art. 27; Criminal Procedure Code, Art. 498.

It is problematic that the President has another form of power over the courts by being able to lift judicial immunity, but no abuse of this power was reported.

## Factor 17: Removal and Discipline of Judges

***Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.***

<b><u>Conclusion</u></b>	<b><u>Correlation: Negative</u></b>
The grounds for removing, suspending, or otherwise punishing a judge are, in some instances, ill-defined, and the President has ultimate authority to remove lower court judges. The process for hearing disciplinary charges against judges is not transparent.	

### Analysis/Background:

The laws governing the removal and discipline of judges are somewhat ambiguous.

According to Article 39 of the Law on the Judicial System, the bases for disciplining judges include:

- “violation of legality when handling court cases;
- commission of a defiling act conflicting with judicial ethics;
- gross violation of work discipline.”

The Law goes on to provide, “[r]eversal or amendment of a judicial act by itself shall not entail liability of the judge, unless gross violations of the law were made and indicated in the judicial act of the higher court instance.” Id., Art. 39(3). As discussed above in Factor 8, however, judges are very concerned that they can be subject to disciplinary sanctions for having a high percentage of cases reversed. As one judge reported, once or twice a year the judge with the most reversals in a court may be subjected to a reprimand by the chair of the court.

A judge may be subject to the following punishments, according to Article 40 of the Law on Judicial System:

- Criticism;
- Reprimand;
- Demotion;
- Removal from office.

According to Article 34 of the Law on the Judicial System, the powers of a judge can be terminated, and the judge removed from office, on the following grounds, among others:

- A criminal sentence is entered against the judge;
- The judge loses his citizenship;
- Transferal to a different job;
- Dissolution of the court, if the judge does not agree to be transferred to another position;
- Disciplinary violations determined by the Disciplinary Qualification Panel.

For members of the Supreme Court, the removal order is issued by the Senate on the recommendation of the President, but for all lower courts the judge may be removed by presidential order.

According to Article 33 of the Law on the Judicial System, the powers of a judge may be suspended by the Chair of the Supreme Court if:

- The judge registers as a political candidate;
- The judge is declared missing;
- The judge is indicted in a criminal case;
- The judge is transferred to a different job.

There is an obvious confusion in designating the grounds for terminating and suspending the powers of a judge. For instance, transferal to a different job is mentioned under both articles, with identical wording. The assessment team tried but was unable to obtain any clarification of this provision from either the judges or lawyers.

Regarding the disciplinary process, the Chair of the Supreme Court has the right to commence disciplinary proceedings for any judge in the country, and the chair of the oblast court has the right with regard to the judges in that oblast. Law on the Judicial System, Art. 41.

The Republic Disciplinary Qualification Panel, made up of five judges of the Supreme Court elected from among the members of the Supreme Court by secret ballot, hears complaints regarding members of the Supreme Court and chairs of the oblast courts. It also hears appeals from the Oblast Disciplinary Qualification Panels, also made up of five members from the lower courts, which hear complaints about lower level judges. Both the Republican and the oblast-level panels are elected for a two-year term. The complaining party is not present at hearings of the disciplinary qualification panels, although the judge is present. A clerk keeps track of the hearing and prepares a protocol.

A number of concerns arise over the process for the discipline and removal of judges. First, some of the grounds for suspension or removal are unclear. It could be easy, for example, to get rid of a politically independent judge by offering to transfer him/her to a less desirable location, or transferring him/her to a different position, or even dissolving the entire court. This is particularly troubling since the power to do these things ultimately rests with the discretion of the President. The assessment team could not confirm whether these powers had ever been misused, but clearly they constitute another implicit control over the judiciary, which can chill independence. Several interviewees mentioned that a number of judges had retired under pressure from the executive. Again, those reports could not be confirmed, but some of the powers noted above could be used to persuade a judge to leave office prior to retirement.

The process for removal is also questionable, as only court chairs may commence disciplinary procedures, and they are not conducted in the open. It is also troubling that civil society does not play a role in the disciplinary process.

The Supreme Court has recently publicized statistics on the number of judges and types of issues for which disciplinary proceedings have been brought. Serikkeldi Abdarakhmanov, Chairman of the Republican Disciplinary Qualification Panel, "Performance of Republican and Oblast-Level Disciplinary Qualification Panels in 2003," *Turabi*, No. 1, 2004. In 2003, the chairs of oblast courts initiated 321 proceedings against 276 judges, compared to 280 proceedings against 268 judges in 2002. The total number of private resolutions issued against judges in 2003 was 871. The largest numbers of disciplinary proceedings were brought in East Kazakhstan, Karaganda, and Almaty oblasts, while the lowest numbers were brought in Kostanai, Zhambyl, and Aktobe oblasts. As a result of disciplinary proceedings, 115 judges were criticized for minor misconduct, while 114 judges found guilty of more serious violations were reprimanded or removed from the office.

In addition, following the inspections carried out by oblast courts, 19 chairs of rayon courts were disciplined for improper performance of their official duties. The majority of disciplinary proceedings in 2003 (206, or 64.1%) were initiated on the basis of private resolutions of oblast courts, while 41 cases were initiated following the inspections carried out by oblast courts. The bulk of privately initiated disciplinary proceedings against judges had to do with minor misconduct, most commonly related to improper application of the law which did not cause any reprehensible consequences. The following table summarizes the types of issues for which disciplinary proceedings have been brought in 2002 and in 2003:

#### Grounds for Disciplinary Proceedings Initiated Against the Judges

Type of misconduct	2002	2003
Violation of legality (red-tape, negligence, falsification)	244	277
Commission of a defiling act conflicting with judicial ethics	12	14
Gross violation of judicial discipline	9	3
Improper performance of judicial duties	15	27
Corruption	n/a	2
Total number of disciplinary proceedings	280	321

In addition, 36 decisions of oblast disciplinary qualification panels were appealed to the Supreme Court's Republican Disciplinary Qualification Panel, although one appeal was subsequently withdrawn by the judge against whom the decision was issued. Decisions in 17 of these cases were affirmed, including 8 cases where judges were ordered removed from office. Id.

According to a report prepared by the Chair of the Supreme Court, 24 judges were removed from office in 2002 and 17 were removed in 2003 for "failure to meet the requirements imposed on judges." The Supreme Court Chair also reported that corruption charges are most frequently brought against the judges in Almaty, South Kazakhstan, and Atyrau oblasts, as well as in the cities of Astana and Almaty. "Efficiency of the Judiciary," *Yuridicheskaya Gazeta*, Feb. 11, 2004. More specific details concerning the reasons for their removal were not available, but in interviews the implication was that corruption or abuse of position were the primary reasons. At the same time, statistics obtained directly from the Supreme Court show a much higher rate of judicial turnover, with 46 judges being dismissed in 2001, 128 being dismissed in 2002, and 49 being dismissed in 2003. The Supreme Court also reported that 12 judges were convicted of corruption charges in 2003, and 11 in 2002.

In addition to the disciplinary process described above, the Union of Judges of Kazakhstan (UJK) has established a mechanism to hear complaints about the conduct of judges, in particular concerning the violations of the UJK Code of Conduct. It has established an Ethics Commission in each of the oblasts, as well as in Almaty and Astana. In Almaty, for instance, the Ethics Commission consists of two judges from the Almaty City Court and 5 judges from the rayon level courts. The Commissions are elected by the UJK for a two-year term, although some members serve longer. It was reported that getting judges to serve on the Commissions is a problem because this adds to their workload without any additional salary. The UJK is considering asking retired judges to serve on the Commissions. The Commissions receive their complaints from private individuals, officials, and organizations, and may also initiate disciplinary proceedings on their own. They have 30 days in which to review the complaints, and may call in the original complaining party. The judge in question will also be called before the Commission. If the Commission finds that there has been a violation, it may recommend a private reprimand, a public reprimand, or it may refer the matter to the Disciplinary Qualification Panel for further action. It rarely undertakes the latter option because there is a very short statute of limitations (three months from the discovery of the offense) for charges to be brought before the Disciplinary Qualification Panel.

As one member of the Almaty Ethics Commission noted, it is not a very powerful institution. Complaining parties and judges are not required to take an oath, and most judges do not take it very seriously. “A public reprimand,” she said, “is almost nothing.” Moreover, out of thirty judges responding to a questionnaire, only ten reported that they had read the UJK Code of Conduct.

In 2003, the Almaty Ethics Commission received over 100 complaints. Only half of those turned out to be actual ethics complaints (many were matters that should be heard on appeal), and many concerned rudeness of the judges. Only nine penalties were imposed. Overall, since the inception of the Ethics Commission in August 2001, 26 judges have been disciplined.

## Factor 18: Case Assignment

***Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise, and they may be removed only for good cause, such as a conflict of interest or an unduly heavy workload.***

<b>Conclusion</b>	<b>Correlation: <u>Neutral</u></b>
In most jurisdictions, chairs of the courts still assign cases, but the Court Administration Committee of the Supreme Court has begun to introduce a computerized method for randomly assigning cases.	

### Analysis/Background:

The chair of each court determines the procedure for assigning cases and, in most instances, assigns the cases himself. Law on the Judicial System, Arts. 9, 14, 20. The Court Administration Committee of the Supreme Court is now experimenting with an electronic process for randomly assigning cases, which has been introduced in the Almaty City Court. The program reportedly takes into account the current caseload of the judges and their areas of expertise before making the assignment. One concern is that court chairs retain the right to override the decision of a computer, and some lawyers complained that this right is being used to circumvent the entire new process. It was impossible to confirm this allegation. One judge said that only two cases initially assigned to him had been reassigned because he did not have the requisite expertise, and thought that the process was working well. In any event, it would be preferable, should a case be initially assigned to a judge who does not have the time or expertise to consider it, for it to be returned to the clerk for reassignment by a computer rather than by the court chair.

## Factor 19: Judicial Associations

***An association exists, the sole aim of which is to protect and promote the interests of the judiciary, and this organization is active.***

<b>Conclusion</b>	<b>Correlation: <u>Positive</u></b>
Almost all judges belong to the Union of Judges of Kazakhstan, which has lobbied to promote the interests of the judiciary, drafted a code of ethics for judges, provided training programs for judges, and publishes a magazine for judges.	



### Analysis/Background:

The Union of Judges of Kazakhstan (UJK), established in December 1996, is the country's association of judges. Almost all judges in Kazakhstan are members of the UJK, and they pay KZT 1,200 per year (about \$8) for their membership. The UJK maintains a small office in Astana, provided by the Supreme Court, which houses an accountant and a secretary. It also has a small office in the Judicial Academy. It is not required to pay rent for either of these premises.

The UJK has been fairly active. For example, it drafted the Code of Judicial Ethics and developed the (albeit imperfect) means for enforcing it. It reportedly lobbied the government and the parliament to have the rayon courts managed by the Court Administration Committee of the Supreme Court rather than by the Ministry of Justice. The UJK has also participated in the power struggle currently ongoing between the judges and the prosecutors, writing a letter to protest a special law that enabled the prosecutors to suspend judicial decisions (discussed in Factor 7 above).

As noted in Factor 3, the UJK has also provided some training to judges, in coordination with the Judicial Academy and the donor community. It also publishes a monthly magazine.

Not all judges are convinced, however, of the utility of membership in the UJK. One judge said that he had been a member of the UJK since 1996 because he thought it was important for the judiciary to have a voice, but he could not articulate what its impact had been. Another judge said that she was a member but did not see the real impact of the association. A third judge said he was not a member and was not familiar with anything the UJK had done. Overall, out of 30 judges responding to the poll, 29 were members of the UJK. Sixteen of them said that they had joined because they "wanted to be a part of an organization that speaks out on behalf of the judiciary." But eleven also said that they joined "because it is mandatory for all judges," which is not the case. Only ten reported that they had read the UJK Code of Conduct.

## **V. Accountability and Transparency**

### **Factor 20: Judicial Decisions and Improper Influence**

***Judicial decisions are based solely on the facts and law without any undue influence from senior judges (e.g., court presidents), private interests, or other branches of government.***

<b><u>Conclusion</u></b>	<b><u>Correlation: Negative</u></b>
Courts are reported to be subject to undue influence both from state powers as well as private economic interests.	

### Analysis/Background:

Article 77 of the Constitution provides, "[a] judge when administering justice shall be independent and subordinate only to the Constitution and the law. Any interference with the activity of the court in the administration of justice shall be inadmissible and accountable by the law. Judges shall not be held accountable with regard to specific cases." Likewise, Article 1(3) of the Law on the Judicial System provides, "[j]udges when administering justice shall be independent and shall only be subordinated to the Constitution and the law. It shall not be allowed to adopt laws or other legal acts that diminish the status and independence of Judges." See *also* *id.*, Art. 25.



Despite these provisions, judges are clearly subject to undue pressure from a variety of sources. As already discussed, the procuracy has the power to review and suspend certain judicial decisions. Moreover, judges are fearful of having their decisions overturned. This means that they are extremely hesitant to find against the state or to oppose the procuracy. According to the United States Department of State 2003 Country Report on Human Rights Practices (Feb. 25, 2004), “[t]he judiciary remained under the control of the President and the executive branch...”

This tendency of the courts to bow to the will of the executive branch is most dramatically demonstrated by the very low acquittal rates in Kazakhstan. A panel of lawyers estimated that they obtain acquittals in less than 1% of their cases. An Almaty City Court judge said that there were only 2-3 acquittals per year in her court, and that these are always very difficult decisions. Two of her acquittals had been reversed, and she had to go back to the Supreme Court on supervisory appeal to convince it to reinstate them. In a rayon court in Aktau, a judge reported that in 2003 she had reached an acquittal verdict against the procuracy (as opposed to in private prosecutions, which are also available) in only two cases out of 148 that went to verdict. That is an acquittal rate of 1.5%.

The assessment team was also able to obtain official statistics on the number of acquittals. According to a report prepared by the Chair of the Supreme Court, there were 334 acquittals out of 58,523 criminal verdicts rendered in 2002, and 379 acquittals out of 46,282 criminal verdicts rendered in 2003, amounting to acquittal rates of 0.57% and 0.81%, respectively. “Efficiency of the Judiciary,” *Yuridicheskaya Gazeta*, Feb. 11, 2004. According to the “Review of Courts’ Practice of Rendering Acquittal Verdicts,” *Supreme Court’s Website – Judicial Acts and Reviews*, Jan. 2004, the highest acquittal rates are found in the courts of Karaganda, East Kazakhstan, and South Kazakhstan oblasts (18%, 11%, and 8%, respectively, of all cases heard by these courts), while the lowest acquittal rates were reached by the courts in Aktobe and Atyrau oblasts (2% each) and by military courts (1.5%). At the same time, according to statistics provided by the Prosecutor’s General office (as cited by the Supreme Court), between 2000 and 2002 there has been a downward trend in the number of acquittals reached both by the courts of first instance and courts of appeal. However, the number of acquittals reversed by appellate courts has been also decreasing. This information is summarized in the table below (all data obtained from *Yuridicheskaya Gazeta*, except for the final figures for 2003, which were obtained from “Strengthening the Positive Trends,” *Supreme Court’s Website – News*, Feb. 10, 2004).

#### Acquittals by Courts of All Levels in Kazakhstan

	2000	2001	2002	2003
Acquitted by courts of first instance	423	383	334	379
Acquitted by appellate courts	201	199	177	250
Acquittals reversed on appeal	n/a	89	68	31*

\* Figure shown is only for the first nine months of 2003.

By far the largest number of acquittals were rendered in cases of private prosecution brought under Article 33 of the Criminal Procedure Code (98 acquittals in 2002 and 118 acquittals during the first nine months of 2003; this is 29% and 43%, respectively, of all acquittals). In addition, a large number of acquittals involved defendants charged with fraud, murder, drug-related offenses, and excess of authority (a total of 84 acquittals in 2002 and 51 acquittals in 2003; 25% and 19%, respectively, of all acquittals). The bulk of all acquittal verdicts (66%) were reached due to the prosecution’s failure to prove all required elements of the crime.

At the same time, it should be noted that the Supreme Court has recently acknowledged that judicial errors in many cases preclude the courts from rendering acquittal verdicts. There have been cases where, despite the lack of conclusive evidence against the defendant and the inability to discover additional incriminating evidence, the courts postponed the issuance of acquittal verdicts (contrary to the law) and remanded the cases for additional investigation. Moreover,

despite the fact that many illegal verdicts are reversed by appellate and supervisory level courts on such grounds as inadequacy of preliminary investigation, failure to consider all circumstances of the case, gross violation of criminal procedure law, and improper evaluation of evidence, the Supreme Court noticed that oblast courts are becoming increasingly reluctant to reverse illegal rayon court verdicts. “Review of Courts’ Practice of Rendering Acquittal Verdicts,” *Supreme Court’s Website – Judicial Acts and Reviews*, Jan. 2004.

The state’s undue influence over the courts is also demonstrated by the fact that it sometimes uses the judiciary as a political weapon.

According to the United States Department of State 2003 Country Report on Human Rights Practices (Feb. 25, 2004), the government has used the courts to selectively prosecute political opponents, citing the cases of Mukhtar Ablyazov, a former Minister of Energy who was convicted of abuse of power and sentenced to six years in prison, and Galymzhan Zhakiyanov, a former Akim (Governor) of Pavlodar oblast who was sentenced to seven years imprisonment on corruption charges. Both were arrested “only months after [they] founded an opposition political movement.” As further stated in the Report, “observers at the 2002 trials ... reported that both the judicial process and the judges themselves, particularly in the case of Zhakiyanov, heavily favored the State’s case.... The judges applied the force of subpoena during the trials only to prosecution witnesses, and many of the witnesses, primarily government officials, stated during testimony in court that they had been intimidated during the investigation by the threat of legal action. ... The judges denied most motions filed by the defense.” Indeed, as one government official underscored, there remains an imbalance in the powers to investigate cases between the procuracy and the defense bar, making it more difficult for judges to find in favor of criminal defendants.

In another case, independent journalist Sergey Duvanov, who published an article on an opposition website criticizing the President, was convicted and sentenced in January 2003 to three and a half years in jail on (allegedly) politically motivated charges of raping a minor. Despite the “serious procedural irregularities” observed during his trial, in October 2003 “the Supreme Court refused to consider Duvanov’s appeal, insisting that proper procedures were followed throughout the investigation and the trial.” United States Department of State 2003 Country Report on Human Rights Practices (Feb. 25, 2004).

One international lawyer complained that state agencies seek to influence courts by having senior officials come to court not to participate in the process, but rather to exert influence over the judge or the court chair. In another matter, the tax authorities wrote a side letter to the judge, which was subsequently and accidentally released to the other side, instructing the judge to find in favor of the state. Finally, another lawyer inadvertently explained how he used what would seem to be improper means of swaying judicial opinion: he would bring powerful and connected individuals to sit in the court when important matters were at stake. “Thank God our proceedings are open!” he rejoiced.

Some evidence of greater independence from the central power was provided, however. One former judge recalled how there had been “telephone justice” during the Soviet era and said that he experienced “some pressure” as an oblast judge, but that he had not experienced any attempts to improperly influence his decisions when he was on the Supreme Court. Another lower court judge said that she had never experienced any attempts to pressure her, from private or government sources.

The judiciary is widely presumed to be corrupt. See United States Department of State 2003 Country Report on Human Rights Practices (Feb. 25, 2004) (“Corruption was evident at every stage and level of the judicial process.”). According to a November 2001 poll conducted by the Association of Political Scientists and Sociologists, cited in the 2002 Country Report [United States Department of State 2002 Country Report on Human Rights Practices (March 31, 2003)], only 17% of respondents described the court system as completely or partially free of corruption.

The 2003 *Nations in Transit* by Freedom House found that “[c]orruption is rampant at every level of the judicial system, and bribes, rather than appeals to higher courts, ordinarily settle cases... Lawyers and human rights monitors testify that judges, prosecutors, and other officials solicit bribes in exchange for favorable rulings in nearly all criminal cases. The chairman of the Supreme Court revealed in 2002 that one in four judges had been disciplined for accepting bribes, and six judges were indicted for corruption during the first half of the year.” (p. 326). The Supreme Court also reported that 12 judges were convicted of corruption charges in 2003, and 11 in 2002.

One lawyer spoke quite openly about corruption, saying that \$10,000 (paid to the police or the procuracy) can ensure protection from prosecution. Another option, he explained, is to pay a bribe to a clerk at the court to “misplace” a file. He went on to describe how there were two “mafias” of lawyers – one that worked with prosecutors and another that worked with judges. He also made clear that judges do not take bribes directly, but use intermediaries, frequently retired judges. He told how if you do not “stimulate” the judge to be fair, he or she will accept a bribe from the other side. The price range for a bribe, he said, ranged from \$100 for a simple case at a rayon court to several thousand dollars for a more complicated case at an oblast court, where three judges hear cases. In certain property claims, the price may be 10-30% of the amount sought, 50% paid to the judge in advance. Another lawyer recounted an instance where her opponent told her that he had paid \$1,000 to the judge.

Discussing the increased salaries of judges (see Factor 11), one observer asked, rhetorically, whether this made judges less corrupt. “No,” he responded to his own question, “just more cautious. They take fewer bribes, but in larger amounts.” He went on to point out, however, that despite all the attention placed on judges and the public perception that they are corrupt, prosecutors are even more corrupt. (Although other informants said that they felt the procuracy was more honest.) He also pointed out that the widespread corruption amongst the judges makes it easier for them to be controlled by the procuracy: since every judge has skeletons in their closet, they are less likely to go up against the procuracy for fear of prosecution.

Thirty judges responded to a poll which revealed some interesting, albeit limited, information. Six reported that a civil litigant had offered him/her money or favors in return for a favorable decision. Another eight reported that advocates had offered them money or favors. Only three said that a friend or a relative had asked them to decide a case in a certain way as a favor. Ten responded that no private individuals had sought to unfairly sway them to decide a case in a certain way. Seven judges reported that government officials had told them to decide in favor of the government because that was their duty, and three reported that they had been told to decide a case in a certain way or they would face investigation or other official punishment. Fourteen reported that no government employee had sought to convince them unfairly to decide a case in a certain way. Asked what their greatest concerns were as a judge, sixteen reported that it was having their decisions overturned, seven that they would be attacked in the mass media for the decisions they make, five that they would be unfairly subjected to disciplinary procedures, and three that they would be removed from office prior to retirement. Two judges added to the questionnaire that they had no fears because they were confident in themselves.

Another area of concern also relates to potential corruption within the procuracy. For instance, according to one NGO representative, prosecutors commonly abuse their power to protest court decisions in criminal cases that have not yet become effective. They generally protest about the punishment being too mild, offering quite openly (usually through defendants’ advocates) to withdraw the protests if certain amount of money is paid. The bribe amount may range from several hundred dollars to \$1,000-1,500 per withdrawal.

Further, as under the Soviet Union, prosecutors, at their own initiative, may intervene in any civil case, whether or not the state has a clear interest in the matter. The prosecutor must intervene where it is necessary to protect the rights of a minor or an incompetent person, or where there is a clear state interest. Civil Procedure Code, Art. 55. The law also provides that a prosecutor who

intervened in a civil case has to present his conclusion on the merits of the case after both parties have presented their oral arguments and before closing arguments. *Id.*, Art. 213.

On the other hand, there are a variety of types of criminal cases which can be prosecuted by individuals rather than by the state authorities. Under Article 33 of the Criminal Procedure Code, private citizens can institute private criminal proceedings resulting in imprisonment, without the participation of the procuracy. Most of these cases are similar to tortious causes of action in the American legal system, such as causing negligent or minor damage to health, coercion into sexual intercourse, menacing, insult, slander, infringement upon privacy, disclosure of confidential medical information, and negligent destruction of property. The proceedings in these cases can be instituted only upon a victim's complaint and are terminated upon the reconciliation between the defendant and the victim, which the court is required to encourage. Criminal Procedure Code, Arts. 32(2), 393. However, some causes of action, in which private-public criminal proceedings can be instituted under Article 34 of the Criminal Procedure Code, involve serious crimes, such as intentionally causing serious damage to health, illegal performance of an abortion, simple rape, violent coercion into sexual actions, child abuse by persons with custody, infringement of intellectual property rights, industrial espionage, and abuse of authority by corporate officers, may be terminated upon the reconciliation between the defendant and the victim only if the defendant can be classified as the first-time offender and if he compensated all damages caused to the victim. *Id.*, Art. 32(3). It should be noted, however, that in cases of both private and private-public proceedings, a prosecutor may institute the proceedings if a victim is in helpless or dependent position or is otherwise unable to represent him/herself. *Id.*, Arts. 33-34.

The procuracy, in other words, intervenes in cases where it might obtain some pecuniary benefit but in which the state has no clear interest. At the same time, the state often fails to intervene in important criminal matters, such as rape, which the state does or should have a clear interest in prosecuting.

## Factor 21: Code of Ethics

***A judicial code of ethics exists to address major issues such as conflicts of interest, ex parte communications, and inappropriate political activity, and judges are required to receive training concerning this code both before taking office and during their tenure.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
The Union of Judges of Kazakhstan has promulgated a Code of Judicial Ethics to supplement various statutory provisions, some of which properly address concerns regarding conflicts of interest and political activities. However, no law prohibits ex parte communications, and training on ethics is not mandatory.	

### Analysis/Background:

Article 79(4) of the Constitution provides that a judge cannot be a member of parliament or engage in any business or remunerative activities, other than "teaching, research, or other creative activity." The Law on the Judicial System adds that judges must "comply with the requirements of the judicial ethics and avoid anything that may defile the prestige or dignity of the judge or cast doubts on his impartiality and objectivity," and prohibits judges' membership in trade unions and political parties. *Id.*, Art. 28.

The Union of Judges of Kazakhstan (UJK) adopted the Code of Judicial Ethics which consists of seven broadly stated articles encouraging judges to maintain high ethical standards, to act in good faith and to avoid the appearance of any prejudicial viewpoints. There are few clear rules

established, however, other than those already provided for in the Law on the Judicial System. Although ethical standards of the UJK Code apply to all judges in Kazakhstan, including the retired ones, they seem to be more of an aspirational nature, as “[t]he violation of provisions of [the] Code shall result in moral responsibility of the judges....” Code of Judicial Ethics: Basic Principles of Judicial Behavior, Art. 7. Moreover, as mentioned in Factor 17, few judges are even familiar with the requirements of the Code, as only ten out of thirty judges surveyed reported having read it.

None of the procedural codes or other laws prohibit ex parte communications, which are reported to be common, and little or no training is provided on judicial ethics. In October 2002 the Supreme Court held a meeting on issues of judicial ethics, which instructed the chairs of oblast courts to take appropriate measures to eliminate ex parte communications and to prohibit judges from accepting complaints directly from individuals and representatives of legal entities. However, no information on the implementation of this directive has been reported.

## Factor 22: Judicial Conduct Complaint Process

***A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning judicial conduct.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Negative</i></b>
The only really meaningful way for the public to register complaints concerning judicial misconduct is through the court chair, who has broad discretion to refer the matter to the Oblast Disciplinary Qualification Panel, to the less effective Union of Judges of Kazakhstan Ethics Commission or to do nothing.	

### Analysis/Background:

The chair of each court hears complaints from citizens. Law on the Judicial System, Arts. 9, 14. Lawyers also reported that the principal way of acting on misconduct by a judge is to complain to the chair of the court. The chair then decides whether to turn the matter over to the state-supported Disciplinary Qualification Panel, which can recommend that the judge be removed, or to the less powerful Ethics Commission, which is supported by the Union of Judges of Kazakhstan (UJK). This process seems to vest a great deal of discretionary power with the chair of the court, who may opt to do nothing with a complaint. It would seem preferable if citizens could register complaints directly with the Disciplinary Qualification Panels.

On the other hand, lawyers can ask the chair of the court to change the judge assigned to the case if they feel, for example, that there is a conflict of interest. Civil Procedure Code, Art. 40. This is not a hollow procedure. One lawyer said that in the seventeen instances in which she had sought to have a judge reassigned from a case, she had prevailed ten times. Another lawyer reported that she had succeeded in having judges reassigned in four out of eight attempts.

The newly appointed National Ombudsman also receives complaints about the judiciary. The Ombudsman was just completing his first annual report to the President at the time of this assessment. In this report, the Ombudsman summarizes the nature of the total of 1,200 complaints he received during his first year in office. Of these, 27% related to the courts, but only concerned the decision itself (in other words, the applicant was treating the ombudsman as another venue for appeal). An additional 5.5% of all complaints dealt with the failure to enforce judgments, and 3% to the failure of judges to act on cases (judicial delays). The office of the Ombudsman reported that it will usually refer such complaints back to the chair of the court.



Finally, the public can register complaints with the UJK Ethics Commission, which has a phone number to call in with the complaints posted in the lobbies of the oblast court buildings. Details regarding the procedure for considering the complaints by the Ethics Commissions are outlined in Factor 17. As mentioned previously, the power of the UJK Ethics Commission is very limited.

## Factor 23: Public and Media Access to Proceedings

*Courtroom proceedings are open to, and can accommodate, the public and the media.*

<b>Conclusion</b>	<b>Correlation: Neutral</b>
Court proceedings are supposed to be open, but violations of this general rule have been reported.	

### Analysis/Background:

According to law, court hearings are to be conducted openly, unless the matter concerns state secrets or open hearings would violate personal privacy rights or commercial secrets. In addition, criminal cases that involve sex offenses or concern juveniles may be heard in a closed court. Civil Procedure Code, Art. 19; Criminal Procedure Code, Art. 29. Furthermore, children under the age of 16 are not allowed in the courtroom unless they are a party or a witness in a case. Civil Procedure Code, Art. 19; Criminal Procedure Code, Art. 326. However, even if the proceedings have been closed, the court must be fully open when the judge announces the verdict in a criminal matter. Criminal Procedure Code, Art. 29.

The degree to which this provision is complied with is another matter. The Chair of the Supreme Court has recently noted that some judges still unjustifiably deny the media representatives access to the hearings, thereby violating the requirement of openness of judicial proceedings. "Efficiency of the Judiciary," *Yuridicheskaya Gazeta*, Feb. 11, 2004. While one lawyer responded that she had never had a problem with open hearings, she said that other lawyers reported that they had encountered problems. In one of the two hearings the assessment team observed, the prosecutor raised concerns about the team's presence. Freedom House's *Nations in Transit* for 2003 stated that at the 2002 trial of independent journalist Sergey Duvanov a few foreign observers were permitted, but "no local observers or journalists were allowed in the courtroom."

Unlike in some other countries, there seem to be generally enough courtrooms to handle the caseload. In the Almaty Economic Court, for example, there were nine courtrooms for the fifteen judges who work there. In Mangistau Oblast Court, there were four courtrooms for nineteen judges, which were reported to be sufficient. Despite this, judges still hear small cases in their offices.

Civil cases can be filmed, videotaped and broadcast live on radio and television, provided both parties agree and recording does not interfere with the normal court proceedings. Anyone present in a courtroom during open hearings may also tape-record and take written notes of the proceedings. Civil Procedure Code, Art. 19(8). In criminal cases, it is up to the presiding judge to decide on whether to allow any form of recording. Criminal Procedure Code, Art. 326.

Some observers noted that the media can sometimes play a deleterious role in the administration of justice by unfairly attacking judicial decisions and siding with parties who have financial or personal connections with the outlet in question. Commendably, Kazakhstan has taken some steps to counter this phenomenon, including creating the position of court press secretary. Press secretaries have been hired for the Supreme Court and all oblast courts, and are charged with



explaining judicial decisions to the press, helping them gain access to information, and working to ensure that the media understands the judicial process.

## Factor 24: Publication of Judicial Decisions

***Judicial decisions are generally a matter of public record, and significant appellate opinions are published and open to academic and public scrutiny.***

<b><u>Conclusion</u></b>	<b><u>Correlation: Neutral</u></b>
Decisions of the Supreme Court and the oblast courts are generally available, while decisions of the lower courts generally are not. Unpublished decisions may only be released to third parties with the permission of the chair of the court.	

### Analysis/Background:

The Supreme Court has developed a website ([www.supcourt.kz](http://www.supcourt.kz)) on which it publishes many of its decisions, as well as some oblast court decisions, although the timing of publication is often delayed. A commercial company, Jurist, also offers a legislative database that includes most Supreme Court and some oblast court decisions. Most lower court decisions are not published anywhere. It should also be noted that few judges are sufficiently familiar with the Internet to access these websites when searching for published decisions. If decisions are not published, according to a tradition (no law or regulation governs the practice), it is up to the chair of the court to release them to third parties or to journalists. The same holds true for the files relating to the case.

Despite the availability of these materials, the legal academic community, however, has not yet started to review and analyze higher court decisions in the same manner as in the West.

Another concern is that the quality of written decisions is very poor. Most decisions, in particular in the lower courts, do not include any explanation of the facts and how the law applies to them. The decision typically cites the relevant code and the conclusion of the court. One encouraging development was reported by the United States Department of State 2002 Country Report on Human Rights Practices (March 31, 2003): "A Supreme Court interpretive decision during the year began requiring courts to base their legal reasoning on arguments presented by both the defense and prosecution, in accordance with the law. The Court had found a disproportionately high volume of written court decisions based only on the prosecution's case." Unfortunately, however, the assessment team was unable to obtain any information on the implementation of this interpretive decision by lower courts during 2003.

## Factor 25: Maintenance of Trial Records

***A transcript or some other reliable record of courtroom proceedings is maintained and is available to the public.***

<b><u>Conclusion</u></b>	<b><u>Correlation: Negative</u></b>
Currently, no full transcript of the court proceedings is maintained; rather, the court clerk takes down in longhand a summary of the testimony and the arguments of the lawyers. Third parties may obtain trial records only with the permission of the court chair.	

## Analysis/Background:

Typically, the court clerk takes a longhand version of events in the courtroom, frequently as summarized by the judge. Lawyers may also submit their arguments in writing for inclusion in the record. Parties and witnesses may review the record (called a protocol) to ensure that the clerk has taken their statements down accurately. At one appellate proceeding the assessment team attended, however, there did not seem to be anyone taking down notes. Notably, the process went on despite the absence of defendant or his lawyer.

Some courts in Almaty are reportedly beginning to use audio recordings of the proceedings. The Court Administration Committee also indicated that it is interested in improving the process of court reporting throughout the country and is looking at a variety of ways of addressing this issue.

As is the case with releasing unpublished judicial decisions, there is no law or regulation that governs the public's access to trial records. One of the judges interviewed noted that while chairs of the courts may, according to a tradition, grant third-party access to the records, it is not possible to compel the chair to provide such access if he/she refuses to do so.

## **VI. Efficiency**

### **Factor 26: Court Support Staff**

*Each judge has the basic human resource support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.*

<b>Conclusion</b>	<b>Correlation: Neutral</b>
Most respondents felt that the court system employed a sufficient number of support staff, other than bailiffs.	

## Analysis/Background:

The court system employs some 5,744 support staff – archivists, clerks, secretaries, drivers, etc. (but excluding enforcement bailiffs). The judicial system employed an additional 300 support staff in 2003. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004. Given that there are a total of 2,471 judges, this is a ratio of 2.3 support staff per judge. It was reported that each judge has his or her own secretary. The numbers are better at the Supreme Court where there are 131 support staff for 48 judges, for a ratio of 2.7 support staff per judge.

The Almaty Economic Court, with 15 judges, reported that each judge has a secretary, and that there were about 20 other support staff, including bailiffs, clerks, and judicial clerks. One rayon court in Almaty, with 12 judges, reported that it had 12 secretaries, seven clerks, and two judicial clerks.

Some rayon court judges complained that they did not have sufficient support staff, specifically assistants, to help them prepare for and consider cases. These judges, it should be remembered, consider cases individually, unlike the oblast courts which sit in panels of three, and further support should be provided to them.

Another problem area is the shortage of bailiffs, both for the enforcement of judgments and to help maintain order in the courts. As discussed in Factors 9 and 13, this is an area that requires more personnel.

## Factor 27: Judicial Positions

***A system exists so that new judicial positions are created as needed.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>
A system, largely under the control of the President, provides for the creation of new judicial positions as needed. Many new positions have been created over the past three years, and most judges seem to be managing their caseloads, but some feel that more judicial positions need to be created.	

### Analysis/Background:

The President of Kazakhstan establishes the total number of judges of the Supreme Court, on the recommendation of the Chair of the Supreme Court. Law on the Judicial System, Art. 18. The President also decides on the total number of judges for all oblast and rayon courts, on the recommendation of “the authorized body.” Id., Arts. 6(2), 10(2). The Court Administration Committee of the Supreme Court has been designated as “the authorized body” pursuant to Article 11(2) of Regulations of the Court Administration Committee (promulgated by the Presidential Decree #471 of October 12, 2000). The Committee, in turn, makes its recommendation to the President according to submissions it receives from the chair of each rayon and oblast court, who proposes the total number of judges for his/her court. Id.; see also Law on the Judicial System, Arts. 6(3), 10(3) (“The total number of judges for each individual ... court shall be established by the authorized body on the basis of the proposal of the chair of that court.”). Overall, this procedure places significant discretion with the President. It would be preferable for the numbers of courts and judges to be established by legislation.

There are currently 1,851 judges at the rayon level, 572 at the oblast level, and 48 members of the Supreme Court. Over the past three years, 600 judges have been added to the system. Three hundred judges were added in 2003 alone. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004. According to the Chair of the Supreme Court, 86% of the available judicial positions have been filled and presently, more than 500 judges have been in office for under 2 years. “Efficiency of the Judiciary,” *Yuridicheskaya Gazeta*, Feb. 11, 2004.

Available statistics show a large and growing caseload, but one which the judiciary seems to be handling, at least for the time being. According to the Chair of the Supreme Court, as reported in “Efficiency of the Judiciary,” *Yuridicheskaya Gazeta*, Feb. 11, 2004, 1,003,587 cases and claims were submitted to the courts in 2003. This is an increase of 27.8% from the prior year, when there had been some 785,033 filings, and more than twice the number of cases and claims filed in 2000 (394,443 filings). A large part of the increase was due to a higher number of administrative offenses, which increased by 72.8% (from 305,000 cases in 2002 to 529,000 cases in 2003), which was due in turn to a number of offenses being de-criminalized. Interestingly, most of the cases filed in the court system, over 960,000, were settled under relatively new legislative provisions enabling the litigants to settle both civil and private criminal actions. Criminal Code, Art. 67; Civil Procedure Code, Arts. 193, 342. Nevertheless, the courts issued more decisions in 2003 (232,152) than in 2002 (219,244). At the same time, there was a decrease in the number of criminal verdicts, down from 58,523 in 2002 to 46,282 in 2003.

The number of criminal cases which took longer than their allotted time period (one month) decreased almost fourfold, from 546 in 2002 to 141 in 2003 (0.7% and 0.2% of all cases, respectively). Analogous statistics on delays in civil cases (where judges have two months to hear a case) also show a decrease, from 4,596 in 2002 to 2,051 in 2003. The greatest numbers of delays in criminal cases were recorded in Almaty (which accounted for a quarter of all delays in the country) and Mangistau oblasts, while the greatest numbers of delays in civil cases were recorded in Kostanai (which accounted for a third of all delays in the country), Mangistau, Atyrau, and Aktope oblasts. For administrative cases, the consideration was delayed in 480 cases, which is a fourfold decrease from 2002; Kostanai oblast accounted for 328 (68%) of these delays. "Efficiency of the Judiciary," *Yuridicheskaya Gazeta*, Feb. 11, 2004.

Statistics obtained from the Supreme Court show the longer-term trend among first instance filings:

#### Rayon Courts: Case Flow

Year	Civil Cases		Criminal Cases	
	Cases Filed	Cases Resolved	Cases Filed	Cases Resolved
1999	229,028	214,777	81,697	75,064
2000	334,371	305,009	91,641	85,196
2001	427,698	393,976	89,370	83,611
2002	405,251	366,853	84,764	79,160
2003	402,946	356,886	77,190	73,141

#### Oblast Courts: First Instance Case Flow

Year	Civil Cases		Criminal Cases	
	Cases Filed	Cases Resolved	Cases Filed	Cases Resolved
1999	596	505	1,356	1,196
2000	2,609	1,480	1,275	1,159
2001	8,869	6,209	1,139	1,051
2002	2,997	2,125	1,004	921
2003	1,607	925	830	754

These statistics tend to confirm the reports that most courts are handling their caseloads in a relatively timely manner, although they also reflect a high number of civil complaints being filed. The managers of the court system will need to monitor this trend to ensure that sufficient resources are allocated to the resolution of civil disputes.

According to the Ombudsman, only 3% of the 1,200 complaints he received related to court delays or the failure of judges to act on cases.

The Court Administration Committee reported that each judge hears on average 56 cases per month, while the ideal targeted quota is 22 cases per month. The Committee therefore believes that more judges are needed. The average caseload of judges in economic courts is 16.6 cases per month, while the average caseload for judges in administrative courts reaches 220 cases per month. "Interview with Vladimir Borisov, Chairman of the Court Administration Committee," *Yuridicheskaya Gazeta*, Feb. 6, 2004. These numbers seem to correspond to those reported by the judges during the interviews. Thus, a judge in the Almaty Economic Court reported that he heard 3-4 cases per day, and that he currently had 27 cases on his docket. He said he hears about 15 cases per month, and is able to keep up with his caseload. In the Mangistau Oblast Court, civil judges hear about 30 cases per month, criminal judges 15 cases per month, and supervisory judges about 20 cases per month. They reportedly feel that they are able to manage their current caseload.

The Almaty Administrative Court was the one court where a judge expressed serious concerns over the court's caseload. In that court, which hears mostly challenges to tax police and traffic police fines, each judge was reported to hear over 100 cases per month. Even though these may be relatively minor matters, the caseload here is worth monitoring, particularly since it is a new and experimental court.

## Factor 28: Case Filing and Tracking Systems

*The judicial system maintains a case filing and tracking system that ensures cases are heard in a reasonably efficient manner.*

<b>Conclusion</b>	<b>Correlation: Neutral</b>
Courts generally use an antiquated manual system for filing and tracking cases, but most judges reported that it was sufficient for the current caseload.	

### Analysis/Background:

Most courts use a manual method for case filing and tracking, although the Court Administration Committee of the Supreme Court indicated that it had developed a computerized program, which was being used in a few courts. However, other judges interviewed mentioned that, while they are aware of the Supreme Court's plans to set up a specialized computer network that would unite all courts in the country, no steps have been taken so far in this direction. Chairs of the courts maintain records concerning the length of time cases have been pending and remind judges about any delays. This system seems to be working, but a computerized system would certainly be more efficient and might become necessary as the caseload grows.

## Factor 29: Computers and Office Equipment

*The judicial system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.*

<b>Conclusion</b>	<b>Correlation: Positive</b>
Kazakhstan has done a good job of providing judges and support staff with computers and other necessary equipment.	

### Analysis/Background:

The Court Administration Committee of the Supreme Court is responsible for supplying the courts with computers and other equipment. It reported that last year it provided 5,000 computers and printers to the system that already had 1,300 computers and printers. The Committee also purchased 300 scanners for the judiciary and installed modem connection in 17 oblast courts and 165 rayon courts. "Interview with Vladimir Borisov, Chairman of the Court Administration Committee," *Yuridicheskaya Gazeta*, Feb. 6, 2004. Each judge, each secretary, and each clerk's office is provided with a computer. Each oblast court has a risograph for the publication of court documents. Judges generally did not complain about the lack of computers and office equipment.

The Court Administration Committee also reported that all local courts are furnished with telephones, fax machines, modems, and other office equipment, while the clerical offices have sufficient supplies of stationery, blank forms, furniture, and other necessary items. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004.

### Factor 30: Distribution and Indexing of Current Law

***A system exists whereby all judges receive current domestic laws and jurisprudence in a timely manner, and there is a nationally recognized system for identifying and organizing changes in the law.***

<b><u>Conclusion</u></b>	<b><u>Correlation: Positive</u></b>
All judges have access to hard copies of the laws and receive updates in a timely fashion. Most courts now have some form of access to one of the electronic legislation databases, and it is expected that all courts will have such access soon.	

#### Analysis/Background:

The Court Administration Committee of the Supreme Court is charged with providing copies of the law to the courts, and it has taken this job seriously. Last year, for example, it provided hard copies of all legislation to all judges. Some judges complained that this was not particularly useful because the legislation changes so rapidly that the books quickly went out of date. There is a department in each court that cuts and pastes changes from the laws (published in the official gazette) into the books. Other judges said that they had not received all the materials from the Court Administration Committee and that they had to buy books on their own. Few general commentaries on legislation are available.

The Committee is also trying to provide all courts with electronic legislation databases. All oblast courts had access to such databases, and in 2003, 200 out of 306 rayon courts had such access. To date, the legislation database “Zakon” has been installed on 271 court computer workstations, including in 17 oblast courts, 167 rayon courts, 16 economic courts, and 2 administrative courts. The databases were installed primarily at the codification units of the courts, and an additional 106 databases are required to cover the remaining courts. The Court Administration Committee has applied to the Ministry of Justice to fund the installation of 3,249 databases, but so far these requests remain unanswered. “Interview with Vladimir Borisov, Chairman of the Court Administration Committee,” *Yuridicheskaya Gazeta*, Feb. 6, 2004. Judges also reported that they use their own money to obtain access to legislation databases, but the Committee stated that it is planning on providing access to the remaining courts this year. It should be noted that the database being used was developed by the Ministry of Justice, which some observers said was not as easy to use as some of the privately available databases.