

Access to justice and fair trial system in Azerbaijan

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I. Structural Challenges to the Reform of the Justice Sector in Azerbaijan

A. Independence of the Judiciary: The Judicial-Legal Council, Selection and Appointment and Disciplinary Accountability of Judges in Azerbaijan¹

1. Organization Of the Judiciary in Azerbaijan

1.1. General frameworks and recent developments

It is worth noting that with the recent constitutional referendum, which was held in 2016 in Azerbaijan a new Article 98-1 was added to the Constitution which strengthened the President's power over the appointment of judges to the two apex courts – the Constitutional Court and the Supreme Court - by awarding the President the right to dissolve Parliament in case his/her candidates' nomination to these Courts is rejected twice by the parliament.²

On April 3, 2019, the President of Azerbaijan signed the *Decree on Deepening of the Reforms in the Judicial-Legal System*.³ Alongside many other issues, the decree recommended to the judiciary (the Supreme Court and the Judicial-Legal Council) and instructed the Ministry of Justice to prepare drafts of normative legal acts on ensuring judicial independence, preventing interferences with the work of the judiciary, strengthening the social protection of judges, and establishing a hotline on judicial independence. Moreover, the acts were to increase transparency in the procedures to evaluate the level of professionalism of judges and court chairpersons, to ensure the disciplinary responsibility of judges and to conduct regular monitoring of courts' compliance.

Following the presidential decree, the Azerbaijani Parliament adopted several amendments to the *Law on Courts and Judges*. On 29 November 2019, a new Article 79-1 was added to the *Law of the Republic of Azerbaijan on Courts and Judges*.⁴ The amendment was related to strengthening the mechanism to ensure uniform judicial practice. Thus, the new amendment made the explanatory decisions of the Supreme Court binding for lower court instances. The amendments made to the *Law on Courts and Judges* of 12 July 2019⁵ were mainly aimed at improving the social security of judges, in particular, by increasing monthly salaries for judges, providing additional financial guarantees for the payment of expenses related to the performance of their duties, and awarding financial support during the vacation period. The amendment to the *Law on Courts and Judges* dated 09 July 2019⁶ was concerned with the separation of administrative-economic courts and the establishment of regional administrative and commercial courts, including the establishment of relevant collegiums in the higher courts. Although the recorded amendments and developments in the justice sector following the presidential decree in 2019 are noteworthy, available reports, including opinions from

¹ Authored by Emin Abbasov.

² The Constitution of the Republic of Azerbaijan, art 98-1.

³ <https://president.az/en/pages/view/azerbaijan/constitution> last accessed on 01 December 2022.

⁴ The Presidential *Decree on Deepening of the Reforms in the Judicial-Legal System*, 03 April 2019, <https://e-qanun.az/framework/41813> last accessed on 01 December 2022.

⁵ The Law on amending the *Law of the Republic of Azerbaijan on Courts and Judges*, 29 November 2019, <https://e-qanun.az/framework/43929> last accessed on 01 December 2022.

⁶ The Law on amending the *Law of the Republic of Azerbaijan on Courts and Judges*, 12 July 2019, <https://e-qanun.az/framework/42977> last accessed on 01 December 2022.

⁷ The Law on amending the *Law of the Republic of Azerbaijan on Courts and Judges*, 09 July 2019, <https://e-qanun.az/framework/42912> last accessed 1 December 2022.

CSOs and advocates, indicated the necessity of more in-depth reforms for safeguarding and strengthening judicial independence.

1.2. The Judicial Legal Council (JLC)

According to the Council of Europe, the independence of judges should be safeguarded by an impartial, independent and purely judicial entity, the judicial council.

“An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its [...] powers and autonomy.”⁷

The Judicial-Legal Council, within its authority, is responsible for the organization of the judicial system in Azerbaijan, including the selection of non-judge candidates for vacant judicial positions, the evaluation of the performance of judges, transferring judges, promotions and the handling of disciplinary issues.⁸ The Judicial-Legal Council consists of judges, as well as members of executive, legislative, and prosecutorial bodies and representatives of the Bar Association of the Republic of Azerbaijan. The JLC is presided over by the Minister of Justice which awards the government apparent control over the body, which has vast powers over the judiciary. It is worth noting that six out of the 15 members of the JLC are representing mostly the executive and legislature and only nine members stem from the judiciary, among which six are elected directly by the JLC itself from among the candidates proposed by the judges’ associations.

In its joint opinion, the Venice Commission and OSCE/ODIHR mentioned that “[g]iven their crucial role in appointing judges the composition of the Supreme Council [of the Judiciary], as well as their appointment or election, should be defined in the Constitution. Furthermore, it is worth recalling that, as per Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe, judges elected by their peers should make up not less than half the members of councils for the judiciary.”⁹

On 22 September 2022, the Committee of Ministers of the Council of Europe, in its 1443rd DH meeting, in the course of supervision of the execution of the judgments of the ECtHR in the Case *Mammadli v. Azerbaijan* (Application No. 47145/14),¹⁰ adopted a decision and encouraged the Azerbaijani authorities to continue their efforts in implementing the remaining relevant recommendations of the Group of States against Corruption (GRECO), in particular in relation to the composition of the Judicial-Legal Council and its role in

⁷ CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §48, <<https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e>> last accessed on 01 December 2022.

⁸ *Law on the Judicial-Legal Council*, Article 1, 28 December 2004, <https://e-ganun.az/framework/7303#_ednref30> last accessed 01 December 2022.

⁹ 7 CDL-PI(2015)001 CDL-AD(2005)003, p. 6, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, 5 March 2015, <<https://www.venice.coe.int/webforms/documents/?pdf=cdl-pi%282015%29001-e>> last accessed on 01 December 2022.

¹⁰ In accordance with Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, the Committee of Ministers supervises the execution of judgments of the European Court of Human Rights. This work is carried out mainly in four regular meetings (DH meetings) every year. The nine remaining applicants in the case *Mammadli v. Azerbaijan* (the former Ilgar Mammadov group) are human-rights defenders, civil society activists and a journalist. They were all the subject of arrests and detention in 2013-2016, which the European Court of Human Rights found to constitute a misuse of criminal law, intended to punish and silence these individuals.

safeguarding and strengthening judicial independence.¹¹

Another concerning matter is that the *Law on the Judicial-Legal Council* (Article 26) apparently empowers the JLC's Chairman, which is the Minister of Justice, with significant rights compared to its other members. Thus, the Chairman, who is also the Minister of Justice, has the authority to call for the meetings of the Council, to preside over such meetings, and bring the issues related to the JLC's powers to the meetings of the Council for consideration.

In 2020, GRECO's Fourth Round Addendum to the Second Compliance Report on Azerbaijan, which deals with corruption prevention in respect of members of parliament, judges, and prosecutors evaluated the state of the pending recommendations in regard to the composition of the JLC and the role of the judiciary within the JLC (v, vi)¹² and deplored the absence of any progress in the implementation of the present recommendations, concluding that recommendation (v) remained only partly implemented.¹³ In the *2008 Recommendation on the European Standards on the Independence of the Judiciary, Systematic Overview*, the Venice Commission confirmed that the Judicial Council should have a decisive role in judicial appointments in order to safeguard judicial independence and that its composition should reflect a substantial element or a majority of judicial members.¹⁴

1.3. Appointment and selection of judges

The Azerbaijani Constitution does not say much about the selection of the judiciary. In accordance with Part VI of Article 125 of the Constitution of the Republic of Azerbaijan, the judicial system and judicial proceedings shall be prescribed by law. The overall organisation of the judiciary, in particular issues pertaining to the nomination, selection, training, probation period, evaluation of judges' performance, disciplinary proceedings and termination of office regarding judges are regulated by the *Law on Courts and Judges*¹⁵ and the *Law on the Judicial- Legal Council*¹⁶ as well as other normative legal acts.¹⁷ These laws

¹¹ 1443rd meeting (DH), September 2022 - H46-3 Mammadli Group v. Azerbaijan (Application No. 47145/14), CM/Del/Dec(2022)1443/H46-3. 22 September 2022. <<https://hudoc.exec.coe.int/eng?i=004-50875>> last accessed on 01 December 2022.

¹² In Recommendation (v) GRECO recommended that i) the objectives of safeguarding and strengthening judicial independence be explicitly stipulated in the mandate of the JLC; and ii) the role of the judiciary within the JLC be reinforced, notably by providing for not less than half of its members to be composed of judges who are directly elected or appointed by their peers and by ensuring that the JLC president is elected from among the JLC members who are judges. In Recommendation (vi) GRECO recommended that judicial independence be further strengthened by i) increasing the role of the JLC in the appointment of all categories of judges and court presidents; and ii) substantially reducing the five-year probation period for judges and making permanent appointments to the post of a judge subject to clear, objective and transparent criteria.

¹³ GRECO's Fourth Round Addendum to the Second Compliance Report on Azerbaijan, which deals with corruption prevention in respect of members of parliament, judges, and prosecutors was adopted at its 86th Plenary Meeting on 29 October 2020. <<https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a28742>> last accessed on 01 December 2022.

¹⁴ CDL-JD(2008)002, European Standards On The Independence of The Judiciary, A Systematic Overview, 03 October 2008, para. 50. <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JD\(2008\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JD(2008)002-e)> last accessed on 01 December 2022.

¹⁵ The *Law of the Republic of Azerbaijan on Courts and Judges*, 10 June 1997, <<https://e-ganun.az/framework/3933>> last accessed on 01 December 2022.

¹⁶ The *Law of the Republic of Azerbaijan on the Judicial-Legal Council*, 28 December 2004, <<https://e-ganun.az/framework/7303>> last accessed on 01 December 2022.

¹⁷ The *Law of the Republic of Azerbaijan on the Constitutional Court*, 23 December 2003, <<https://e-ganun.az/framework/5404>> last accessed on 01 December 2022. The *Statute on the Election Committee of Judges* approved by the decision of 11 March 2005 of the JLC of the Republic of Azerbaijan, <<https://e-ganun.az/framework/17145>> last accessed on 01 December 2022.

specifically deal with the selection and career progression of judges and the evaluation of their performance.

1.3.1. Appointment

The Constitution of Azerbaijan envisages that judges of the Constitutional Court, the Supreme Court and the appellate courts are nominated by the President and appointed by Parliament¹⁸, while the chairs of the Supreme Court, the Nakchivan Autonomous Republic's (NAR) Supreme Court, as well as the appellate and grave crimes courts are appointed by the President on the proposal of the Judicial Legal-Council.¹⁹ All other judges, including court chairs, their deputies and presidents of court collegiums and appeal courts, are appointed by the President on the proposal of the JLC (in relation to the selection of candidates to the vacant judicial posts). The JLC's proposal or opinion on the appointments is not guaranteed at the level of the Constitution.

Besides, as noted above, based on the 2016 referendum a new constitutional provision – Article 98-1 – empowered the President to dissolve Parliament after a nomination by the President for the position of a judge to the Constitutional Court or the Supreme Court has been refused twice by the legislature. According to the Venice Commission's preliminary opinion in September 2016,²⁰ this provision represents a serious threat to the independence of the judiciary. The Commission further noted that “this new provision renders Parliament's power to block presidential nominations to the top judicial posts ineffective, since the risk of dissolution will deter Parliament from voting against the candidates proposed by the President. In essence, it would increase even more the dependence of the judiciary on the President.”²¹

1.3.2. Selection

The JLC controls the overall selection process of judges, and exercises power over the promotion and disciplinary proceedings for judges. Under the *Law on the JLC*, the latter forms the Judges Selection Committee (hereinafter JSC) consisting of 11 members, which is composed of judges, a JLC representative, representatives of the Ministry of Justice and the prosecutor's office, advocates and legal scholars (lawyers with a PhD degree) in order to conduct the selection of judge candidates for the judiciary.²² The JSC is not a purely judicial entity and consists of two Supreme Court judges, three appeal court judges, one the Nakhchivan Autonomous Republic's Supreme Court judge and one representative from the Ministry of Justice, the General Prosecutor's Office, the JLC staff, the bar association and a legal scholar. The selection procedure is a multi-staged process, which includes tests, written and oral examinations, a long-term training and a probation period in the courts. According to the legislation, judges' recruitment procedures consist of six stages: 1) a test; 2) a written exam; and 3) an oral exam. What follows after one year of training in the Justice Academy and practical training in courts is another 4) written exam; 5) oral exam; and finally 6) an interview with members of the JLC. There have been several reports during the consultations with CSOs and advocates that lawyer who reached the final stage of the selection process

¹⁸ The *Constitution of the Republic of Azerbaijan*, Article 130(2), 131(2), 132(2), <<https://www.e-ganun.az/framework/897>> last accessed on 01 December 2022.

¹⁹ The Constitution of the Republic of Azerbaijan, Article 109(9) and Articles 93-3, 94 and 96 of the *Law on Courts and Judges*.

²⁰ CDL-PI(2016)010, Azerbaijan Preliminary Opinion on the draft modifications to the Constitution submitted to the referendum of 26 September 2016, <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2016\)010-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2016)010-e)> last accessed on 01 December 2022.

²¹ *Ibid*, para. 66

²² *Law on the Judicial Legal Council*, Article 14.1.

were not conferred as having passed the final stage, without plausible explanations given.²³

International standards suggest that if there are background checks, they should be handled with utmost care and with strict compliance to the rule of law. This can be done by making sure that the results from this check should be made available to the applicant, who should be entitled to appeal them in court. No other background checks should be performed by any security services. The decision to refuse a candidate based on background checks needs to be reasoned.²⁴

1.4. Disciplinary accountability

1.4.1. Evaluation of judges' performance

In accordance with Article 13 of the *Law on the JLC*, judges are subject to regular evaluation, which takes place every three and five years.²⁵ The rules and methodology of evaluating the performance of judges are determined by the JLC's Decision No. 2 of 06 March 2020 on the approval of the *Rules for evaluating the performance of judges* (hereinafter, "the Rules").²⁶ The Rules in its Article 2.6. empower the Ministry of Justice to prepare and submit the evaluative information on the activity of judges to the JLC for the performance evaluation which the latter should take into account in accordance with Article 13.3. of the *Law on the JLC*. Thereinafter, a wide variety of information is used for the purpose of drawing up opinions on the evaluation of judges' performance.

On February 29, 2020, the JLC adopted the *Rule for monitoring the activity of courts in the field of determining systematic deficiencies in the application of substantive and procedural legal norms by the courts*.²⁷ The JLC thereafter also amended the *Rules for evaluating the performance of judges* on 29 November 2020. With the amendments introduced to Article 3.7 of the Rules, the systematic deficiencies found in the application of substantive and procedural legal norms as a result of the monitoring of the courts' activities carried out by the Supreme Court will also constitute a binding ground for a repeated evaluation of judges' performance and removal from office.

Article 23 of the *Law of the Azerbaijan Republic on Courts and Judges* outlines the power of the Chairman of the district (city) court for managing the organization of court activity and the operation of court staff, including compliance with labor regulations and operational standards in the court. Furthermore, Article 13.2 of the *Law on the JLC* determines that performance of judges is evaluated on the basis of opinions given by the presidents of the courts where they operate. In its Opinion CDL-AD(2012)020-e on Hungary adopted on 15 October 2012, the Venice Commission noted that the system of supervision by the court

²³ Consultations with CSOs conducted in November 2022 (survey results).

²⁴ OSCE Office for Democratic Institutions and Max Planck Minerva Research Group on Judicial Independence, "Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia", Judicial Administration, Selection and Accountability, Kyiv, 23-25 June 2010, <<https://www.osce.org/files/f/documents/a/3/73487.pdf>> last accessed on 01 December 2022.

²⁵ The *Law on the JLC*, Article 13.1. The activity of judges appointed for a period of 3 years for the first time is evaluated by the Judicial-Legal Council at the end of that period (three years), and the activity of other judges not less than once in five years.

²⁶ Decision No. 2 of 06 March 2020 of the JLC on the approval of the *Rules for evaluating the performance of judges*, <<https://e-qanun.az/framework/44796>> last accessed on 01 December 2022.

²⁷ The *Rule for monitoring the activity of courts in the field of determining systematic deficiencies in the application of substantive and procedural legal norms by the courts* adopted by the JLC on 29 February 2020, <<https://e-ganun.az/framework/44776>> last accessed on 01 December 2022.

presidents might have a chilling effect on the independence of the individual judge (paragraph 73, CDL-AD(2012)001) and that a uniform procedure may only be acceptable if it does not have a negative influence on the career of the judges (paragraph 74, CDL-AD(2012)001).²⁸

1.4.2. Disciplinary proceedings

Judges are subject to disciplinary action based on grounds listed in the *Law of the Republic of Azerbaijan on Courts and Judges*. According to the Law, the disciplinary proceedings against judges by the JLC may be initiated only on the basis of the petition of the persons referred to in the Law. According to the report released by the JLC, since 2005, disciplinary proceedings have been conducted for more than 230 judges and more than 100 judges have been dismissed in Azerbaijan since 2005.²⁹ Available reports indicate that in 2017 only, more than 170 judges had their performance evaluated (after their probation period ended) and about 20 judges and seven court presidents had been dismissed due to gross violations. Furthermore, six court presidents and eight appeal court judges were demoted.³⁰

In the presence of the reasons given in the law and the grounds for disciplinary proceedings in accordance with the *Law on Courts and Judges*, competent persons are obliged to apply to the JLC for commencement of disciplinary proceedings.

It should be noted that there is limited information on the fairness of the processes related to the disciplinary proceedings for judges, including the efficacy of the mechanisms for appealing decisions of the JLC in relation to disciplinary matters. Hence, more transparency and data is necessary for examining the fairness and efficacy of the disciplinary processes in Azerbaijan.

It should be noted that the JLC is headed by a Chairman, who was elected in 2005 and who serves at the same time as the Minister of Justice. The term of office of the JLC members is five years according to the law. The chairperson of the JLC, which is the Minister of Justice, also exercises exclusive powers in disciplinary proceedings. Thus, according to Article 21.2 of the *Law on the JLC*, the chairman appoints a reporter from among the judges of the JLC on the issue leading to the initiation of disciplinary proceedings. Also, according to Article 10.1 of this Law, the term of office of a JLC member can be terminated earlier based on the request of the chairperson of the JLC or the body that appointed (elected) him/her. According to the Venice Commission, “[a]lthough the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...] Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the

²⁸ CDL-AD(2012)020, the Venice Commission, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§ 50-53, 15 October 2012, <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e)> last accessed on 01 December 2022.

²⁹ Media: Məhkəmələrin 7 hakimi cəzalandırıldı - ADLAR. 9 Oktyabr 2018 (Media: 7 judges of the courts were punished - NAMES. 9 October 2018,) <<http://modern.az/az/news/179743#gsc.tab=0>> last accessed on 01 December 2022.

³⁰ Media: Rüşvətخور məhkəmə hakimləri cəzalandırılıb. 28 fevral 2018 (Media: Corrupt court judges were punished. 28 February 2018), <<https://sputnik.az/life/20180228/414237512/mehkeme-hakimlari-cezalandirilib.html>> last accessed on 01 December 2022.

council's decisions, for example, the ones relating to disciplinary measures.”³¹

Conclusion

The summary of the soft-law tools, such as opinions, recommendations, and reports of international standard-setting bodies on the independence of the judiciary, recognize that no unique system of organization of the judiciary exists in practice. Different models may operate in certain jurisdictions but cannot always work optimally under specific environments with different legal cultures and traditions.³²

However, guiding principles concerning the composition and operation of high judicial councils, appointment, selection, and accountability of the judiciary could help design better legislative and policy frameworks capable of minimizing any influences and/or pressures that negatively impact the independence of the judiciary. In-depth political and legal reforms are necessary to ensure the independence of the judiciary by creating a system providing adequate safeguards for judicial independence. Genuine reforms necessarily require direct and open consultations with civil society, including close cooperation with international standard-setting and authoritative bodies.

Establishing structural independence of the judiciary in compliance with the standards of GRECO, the Committee of Ministers of the Council of Europe, the Venice Commission, and ECHR thereby requires comprehensive general measures addressing the country's challenges, including those related to the protection of fundamental human rights and freedoms.

³¹ CDL-PI(2019)008, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, 5.2.3 Representation of the executive in the Council; ex officio members, 11 December 2019, <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2019\)008-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)008-e)> last accessed on 01 December 2022.