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## The legal status of a judge in the Republic of Kazakhstan

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### Abstract

**Relevance.** The relevance of the study is based on the fact that the judiciary is an institutional element of the legal system that ensures the democratic development of the state towards economic, political and social renewal.

**Purpose.** The purpose of this study is to expose the mechanism of the judicial system and highlight the special features of the legal status of the judge and the major challenges that hinder the improvement of the legal position.

**Methodology.** Among the methodological approaches used in this investigation are formal legal, theoretical, legal hermeneutics, dogmatic, deduction, synthesis and others.

**Results.** The study examined the mechanism for the judicial system and its specific features, highlighting the role of this element of the legal system in the formation of public life; the concept of the legal status of judges and their rights and obligations were also analysed. Special attention has been given to the content of the employment contract with judges and their requirements, and the specifics of entering into an employment contract. The analysis reveals the special features and challenges in modifying and terminating a judge's mandate. The principle of judicial independence has been studied in detail, establishing its importance in ensuring a fair trial and creating the conditions for citizens to regain the trust of the authorities.

**Conclusions.** The practical relevance of the findings is in recommendations on how to address the challenges in improving the legal status of the judge, as this is an integral part of building a democratic state.

**Keywords:** judicial power; justice; legal status; powers; judicial reform.

### Introduction

The judiciary is one of the main pillars of the state and is a lever for the democratic development of the country on the way to political, social and economic modernisation. The principle of separation of powers and their interaction with each other is important to guarantee the democracy of the state mechanism [1]. The distinction between executive,

legislative and judicial powers serves as an axiom not only for decision-makers but also for the mass consciousness [2]. Initially, the foundations of Kazakhstan's judicial system, like all justice agencies, were formed in the early stages of Soviet rule. A.N. Sadykbekova [3] notes, that at that time, the basic principle of law was the principle of socialist legality, the basis of which was class ideology; the

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rules of criminal law, which in a democratic society should protect the interests of citizens, were then punitive in nature, directed towards the prosecution and represented the interests of the totalitarian state. Since then, the Constitution of the Republic of Kazakhstan [4] has been issued, which has played an important role in the establishment of the legal system and the development of democratic processes in society, but a large number of fundamental issues have remained unresolved.

Consequently, the Decree of the President of the Republic of Kazakhstan No. 1569 “On the state program of legal reform in the Republic of Kazakhstan” [5] was adopted as a legal act which defined the priorities for the development of the judicial system. The adoption of the Constitution of the Republic of Kazakhstan [6] was an important step in the implementation of the principle of the independence and autonomy of the judiciary, which provided the necessary guarantees for the independence of judges and strengthened their legal status and their role in the system for the protection of human rights and freedoms. The next important introduction to the system of jurisdiction in Kazakhstan was the Decree of the President of the Republic of Kazakhstan having the force of a constitutional law No. 2694 “On courts and the status of judges in the Republic of Kazakhstan” [7], which changed not only the functional nature of courts but also their social nature. With the adoption of this law, the role of the courts and judges in the development of democratisation processes has been significantly enhanced, the legal protection of judges has been considerably strengthened, and their social prestige and focus on the rule of law have been enhanced.

In the present context, it is worth mentioning the Decree of the President of the Republic of Kazakhstan No. 858 “On the Concept of the Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020” [8]. It showed the importance of judicial reform in the form of a step-by-step process to improve judicial proceedings at all stages, the need to strengthen the status of judges and to ensure openness and transparency of the judiciary. According to A.Zh. Toktombaeva and M. Shamshieva [9], even though compared to the post-Soviet space Kazakhstan has moved to the forefront of judicial reforms, a fully functioning judicial system has been established meeting the requirements of the rule of law in many ways and is capable of performing most functions, there are still some problematic aspects that relate to the legal status of judges in the Republic of Kazakhstan.

The purpose of this study is to expose the mechanism of the judicial system and highlight the special features of the legal status of the judge and the major challenges that hinder the improvement of the legal position.

## Materials and Methods

The study on the legal status of a judge was carried out through the use of various methodological approaches that reveal both theoretical and practical aspects of this segment. Using a theoretical approach, the report examines the functioning of the judiciary, highlighting its key features and its role in building a democratic state. The formal-legal approach allowed for a study of the legal position of judges, their rights, and obligations. By introducing the method of legal hermeneutics into the

work, the contract of employment for judges was analysed and the special features and requirements of judges were examined. A particular focus of the investigation has been the study of the features and challenges in changing and terminating the mandate of a judge, which has been realised through the use of a dogmatic approach. The method of logical analysis has been used to examine the legal framework that regulates the provisions on the legal status of a judge and allows for an analysis of its provisions. The functional approach made it possible to identify the issues that may be reflected in the legislative framework for securing the legal status of a judge and also to consider possible ways of addressing this problem.

Using the comparative legal method, the experience of advanced countries of the world in enshrining the legal status of judges in legal acts was analysed, which allowed for the identification of recommendations for their implementation in the legal experience. The study used the method of deduction to elaborate the definition of the legal status of a judge based on the specific features and inherent elements of the implementation of this activity; in turn, through the method of induction, these elements and features of the implementation of the legal status of a judge provided an opportunity to analyse the full functioning of the mechanism. The method of systems analysis made it possible to consider the functioning of all the characteristic elements of the object of study as a complete mechanism. Using the method of synthesis, the results of theoretical and practical parts were united, which made it possible to carry out a detailed analysis of the topic under study, while respecting all the features and necessary characteristics to obtain a detailed description of the functioning of the mechanism of the legal status of the judge, highlighting the inherent problems and possible solutions.

Thus, this study was conducted in several stages. The first stage involved the study of the theoretical aspect, which provided an opportunity to explore the concept of judicial status in general, consider its characteristics and identify its role in building a democratic independent state. The second stage provided a detailed analysis of the legal status of a judge, identifying its characteristic features; an important aspect of which was the review of the legislative framework that regulates the legal status of judges; a comparative legal analysis of countries on the regulation of the legal status of judges was carried out. The third stage was based on the identification of the main issues that may arise in the form of conflicts of regulatory norms in the current legislation, and the identification of possible solutions to these issues.

## Results

The state policy on the implementation of legal regulation of the status of judges in the Republic of Kazakhstan is enshrined not only in the Constitution of the Republic of Kazakhstan [4], but also in the Constitutional Law of the Republic of Kazakhstan No. 132-II “On the judicial system and the status of judges of the Republic of Kazakhstan” [10]. The provisions of this legal act have been amended more than 20 times by laws adopted by the highest bodies of the judiciary and acts of the judicial community. This regulation of various levels requires compliance with many factors; first of all, it is a clearly expressed state policy of legal regulation, compliance with special care in

coordinating the rule-making activities of subjects to ensure uniformity in the implementation of state policy of legal regulation and effective means of rapid response to the distortion of the will of the state in this area. According to the study of D. Epps and G. Sitaraman [2], non-compliance with one of these conditions leads to an imbalance in the legislation regulating the status of judges, an imbalance in the stability of the judiciary, a decrease in the level of guarantees of judges' rights and independence and, as a consequence, a decline in the level of guarantees of citizens' rights and freedoms to a fair trial by an independent court.

Dynamic changes concern the status of the citizen as it moves from a legal position through the selection and appointment procedure of the subject to the legal position of a judge [11]. C. Guarnieri and P. Pederzoli [12] highlight, that ensuring the coherence and continuity of state policy on the legal regulation of the status of the citizen at different stages of its dynamics is an important and serious scientific challenge. The public policy objectives of the legal regulation of the status of the judge at each stage of its dynamics are different [9]. For example, at the stage of selection and appointment of a citizen to the position of judge, when determining the grounds for eligibility for the examination and eligibility to compete for judicial office, the aim is to establish criteria for the selection of judicial candidates from among those citizens who are more professionally prepared to exercise judiciary powers [13]. Considering the stage of a citizen's public service as a judge from the moment of the citizen's appointment to the judicial office until the moment of resignation, the aim here is to reward judges for their quality and long service in the implementation of justice, increasing the level of professionalism and ensure the stability of the judiciary [14].

And in the stage of the honourable retirement of a judge and the retirement of a judge, the aim is to reward a judge who has retired for their long and qualitative work in administering justice, considering their previous activity [15]. On this basis, the core of this status is ensuring their independence as individuals. This overall strategic goal of public policy on the legal status of the judge integrates the tactical public policy goals of each stage of the status dynamics [16]. According to S.Zh. Suleimenova, S.S. Zhanilsinova [17], the status of a judge is an organisational and legal form to ensure the independence of a citizen who is vested with judicial powers to carry out the function of justice and is subject only to the rules regulated by the Constitution and laws of Kazakhstan. Overall, the concept of judicial status is a set of interrelated elements and principles on the basis of which the legislator forms the organisational and legal means to ensure judicial independence and includes the regulation of certain aspects. These areas include professional activity in the implementation of justice, issues related to the formation of the judicial corps, restriction of the civil rights of an acting judge, social and legal protection of an acting judge, social and legal support of a retired judge, the passage of public service of a judge in the judicial corps and the protection of a judge as a citizen with a special legal status from various encroachments on their independence [18].

The state policy on the legal regulation of selection and appointment to the position of a judge determines the

qualitative composition of the judicial corps. Therefore, the grounds for exercising the right to access the judicial profession in the Republic of Kazakhstan include the following criteria:

- citizenship of Kazakhstan;
- absence of citizenship of another state or a document granting permanent residence in another state;
- higher legal education;
- attainment of the age limit for holding judicial office;
- absence of charges or suspicion of a criminal offence;
- absence of medical contraindications according to the established list;
- absence of an expunged or unexpunged criminal record or termination of criminal prosecution on rehabilitative grounds;
- passing of polygraph examinations;
- level of professional knowledge confirmed by a qualification exam in a specialized master's program for the position of judge of the relevant court.
- absence of close kinship or property ties with the presidents of the court in which the position of judge is vacant [18].

It is important to mention that the judicial society is constantly faced with the consequences of spontaneous changes in the rules for the formation of the judiciary. Thus, for example, the amendments to the Constitutional Law of the Republic of Kazakhstan No. 132-II "On the judicial system and the status of judges of the Republic of Kazakhstan" [10] established an independent right of a citizen to take a qualified examination for the position of a judge if the required experience in the legal profession is available; in this case, the right of a citizen to take a judicial position based on experience in the legal profession is not identical.

The use of the concepts of "legal speciality" and "legal profession" in the legislation on the status of judges indicates their different substantive content, thereby introducing some uncertainty in the regulation of other relations that arise from the experience of a judge in the legal profession [9]. It is necessary to conduct studies on the motivation of applicants and to develop legal incentives for them with a view to organising an informed recruitment policy towards the range of persons who are capable of becoming worthy candidates to join the judiciary [19]. This status represents certain obligations and privileges enjoyed by a judge; first of all, they are holders of judicial power, who carry out the functions of justice and whose main task is to protect and ensure the legal rights and freedoms of citizens, as set out in Article 1(2) of the Constitutional Law of the Republic of Kazakhstan No. 132-II "On the judicial system and the status of judges of the Republic of Kazakhstan" [10]; they are citizens with a special legal status, who are limited in their civil rights; they also serve as a substitute for a public office of the Republic of Kazakhstan and a member of the judicial society.

## **Discussion**

As previously outlined, the fundamental principles that form the basis of the legal status of judges are formulated in constitutions and laws. Such principles are independence, irremovability and immunity of judges. The nature of all these principles is that, regardless of the legal system of the state, they act as both a guarantor of the rights

and obligations of the judge [3; 20]. To further analyse the status of the judge in international legal doctrine, it is necessary to examine international experience. In Germany, the judiciary is defined by the Constitution, the Judicial System Act, the Administrative Court Act, the Labour Court Act, the Financial Court Act, the Social Court Act and the Act on Strengthening the Independence of Judges and Courts. Judicial officers without a legal background are obliged to undergo training; they will have the status of a civil servant but will not have the special privileges enjoyed by specialised judges [21]. According to German law [22], a judge may be a person who has passed two state examinations, it is important to mention that the term of a judicial office is defined as temporary, lifelong or with probation.

An analysis of France's regulatory activity shows the Constitution has no chapter devoted to the judiciary; the Basic Law merely enshrines the principle of irremovability. The French Magistracy Law [23] and the French Law on the Superior Council of Magistracy [24] currently govern the legal status of judges in France. Among the main requirements for a candidate for a judicial position are general legal education, passing an entrance exam to attend the National School of Magistracy, where the candidate is obliged to undergo specialised training and pass state exams, after which they are eligible to take up a public judicial position. All judges are appointed by the President of France; a judge may only be dismissed by the Superior Council of the Judiciary in case of serious misconduct or illness. A judge may not be removed from their position, even in the case of promotion, without giving their own consent; it is also possible to resign after reaching the age of 65.

A special feature of the judicial system in the United States (US) is that each of the 50 states has its own constitution and its own specific arrangements. In terms of the general requirements for a judicial position, the candidate must have a legal education, experience in the legal field and ideal personal qualities. Appointments to the judiciary are made exclusively by the President with the consent of the Senate for an indefinite term, as enshrined in Article 2 of the Constitution of the United States [25-27]. However, the rules on appointment differ from state to state; for example, in most states, judges may be elected by the people, appointed by the governor, elected by the municipal council or by the legislative assembly. Indiana and Massachusetts have a mixed procedure for appointing judges; appointments are made by the governor with the approval of the local legislature or may be chosen by popular vote for terms of 6 to 15 years with the right to re-election [28]. US federal judges, on the other hand, are elected for life, but they are only eligible as long as their conduct remains impeccable [25]. The US experience is rather significant for its implementation in Kazakhstan, as the US judicial system is one of the most highly efficient; this, in turn, serves as one of the main guarantors through which the institution of judicial independence functions.

An English experience demonstrates that there are professional justices of the peace, Crown Court judges and recorders; they are appointed by the Queen of England on the proposal of the Lord Chancellor. Anyone can become a justice of the peace in England, as the position does not

require any special legal training; if they wish, they can take a law course. The court employs a clerk, who is required to have a law degree and who advises the judge; this magistrate retires upon reaching the age of 70. Recorders are appointed from amongst barristers who have been in office for at least 10 years, for a term of up to 10 years. The requirements for becoming a barrister include a law degree, experience in the legal field and an apprenticeship with an experienced barrister and passing a state examination. Crown Court judges are appointed from amongst barristers serving for life and who have a minimum of 10 years' service; they retire upon reaching the age of 75 [29]. In Japan, the organisation of the judiciary is regulated by Chapter 6 of the Constitution of Japan [30]; the Basic Law also provides for the independence of the judiciary. The basic requirements for a judicial position include a law degree from a Japanese university, passing an examination by a special commission of the Ministry of Justice, and taking a course in justice at the Supreme Court, after which candidates must wait for an offer from the Supreme Court for a judge. Judges are appointed by the Cabinet of Ministers for a period of 10 years, reappointment is possible; upon reaching the age of 65 for women and 70 for men, the judge retires.

It is worth noting that the judicial systems of these countries are also characterised by the principle of incompatibility, which means that judges are not allowed to simultaneously hold other public offices [31; 32]. Comparing Kazakhstan's experience with the above-mentioned countries, it is inherent in the judicial system that strict and clear rules apply to the selection of candidates for judicial office, namely a qualifying examination, a medical examination, an internship in a court, a polygraph test; the candidate must reach the age of 30 years, have higher education in law, at least 5 years of experience as a law clerk and an impeccable reputation; it is also stipulated that the age limit for holding the position is 65 [10; 33]. In the current context, issues that relate to the organisation and implementation of the judiciary are gaining relevance. First, one should mention the issue of decent material and social security for judges and the rise in the pensions of retired judges. This problem has been brought to the attention of the Constitutional Council on a number of occasions. Thus, according to the Message of the Constitutional Council of the Republic of Kazakhstan No. 01-4/1 "On the state of constitutional legality in the Republic of Kazakhstan" [34] the constitutional requirement for the financing of courts and judges should in practice ensure the full and independent development of a judge, but at the moment this requirement is not fully implemented and leaves judges dependent on local executive authorities and contributes to corruption; this problem is still relevant today. That is, the issue further weakens the principle of independence and the social security of retired judges.

Besides, the requirements for candidates and the procedure for the formation of the judiciary are imperfect, resulting in the appointment of a group of persons whose professional and personal qualities do not correspond to the position they hold and the requirements of judicial ethics [17; 35; 36]. Particular attention should be paid to the issue of the development and implementation of objective

indicators to assess the judge's performance, which can be used to determine its efficiency and quality. In practice, the low rate is based on the number of judgments that have been overturned, irrespective of whether it was due to a procedural wrong or a miscarriage of justice [37]. At the same time, the Constitutional Law of the Republic of Kazakhstan No. 132-II "On the judicial system and the status of judges of the Republic of Kazakhstan" [10] does not distinguish between the grounds and reasons for disciplinary liability of judges. Therefore, the law should be amended and the practice of regulating these issues in bylaws should be eliminated, while representatives of society in the form of respected legal scholars and public figures should be included in specialised commissions to neutralise judicial corporatism and increase the effectiveness of social control. The rate of recruitment of representatives from law enforcement agencies to the judiciary has increased significantly over the recent past. Considering that all representatives from these bodies have in common the principle of obedience and one-man rule, law enforcement officers develop qualities that are inconsistent with the principle of independence as a result of a long period of public service, i.e., they adopt an inclination to follow orders and a tendency towards accusatory bias [38-40].

Another aspect of improving the status of judges is the right of superior courts to exercise judicial review, which is a powerful means of influencing judges and their independence. The powers of court presidents in their entirety may regulate such issues as the legal status of judges, career development, removal of a judge from office, prosecution, and others. The procedure for the appointment of court presidents and judicial corps results in the bureaucratisation of the system and also establishes a relationship of power and subordination between court presidents and judges [41; 42]. At the same time, the Constitution regulates the provision that a judge is a holder of judicial power, who is guaranteed independence and permanence in their legal status. In situations where the legal status of a judge depends on the will of the president of the court, the judge is in the position of an official whose activities depend on the instructions of the superiors; in other words, the principle of independence and permanence of the judge is undermined.

The latent corruption and the susceptibility of judges to corruption play an important role in assessing the effectiveness of legal status. Overall, cronyism, corporate interests, and widespread corruption among civil servants are difficult to avoid during the transition from an authoritarian to a democratic political regime and from a centrally planned economy to a market economy, which affects the organisation and efficiency of the judicial machinery in a negative way and exceeds imaginable limits. An important issue worth mentioning is the activity of court apparatuses and other services that ensure judicial activity; in the present time, their efficiency requires improvement to ensure that the legal status of the judge is fully realised. Having analysed the current legislation that regulates the provisions on the legal status of a judge, it can be argued that in modern conditions it is necessary to develop a theoretical basis for the definition of the status

of a judge, in particular, in retirement, including the principles that will ensure the implementation of state policy on the legal regulation of this status, considering all aggregates of real legal relations on the implementation of judicial powers, including professional activity and membership in the judicial society.

## **Conclusions**

Conducted study on the legal status of judges of the Republic of Kazakhstan revealed that today judges are subject to fairly strict and clear requirements, however, there are a number of controversial aspects that may cause conflicts; therefore, these aspects have been analysed quite extensively and solutions to these issues have been proposed. The status of a judge is an organisational and legal form, the function of which is to ensure the independence of the citizen, who is vested with judicial powers to exercise the function of justice and is subject only to the rules that are governed by the Constitution and the laws of the Republic of Kazakhstan. The concept of judicial status is a set of interrelated elements and principles from which the legislator forms the organisational and legal means of ensuring judicial independence and which includes the regulation of certain aspects. These areas include professional activity in the implementation of justice, issues related to the formation of the judicial corps, restriction of the civil rights of an acting judge, social and legal protection of an acting judge, social and legal support of a retired judge, the passage of public service of a judge in the judicial corps and the protection of a judge as a citizen with a special legal status from various encroachments on their independence.

The grounds for exercising the right to access the judicial profession in the Republic of Kazakhstan are the citizenship of Kazakhstan, the absence of citizenship of an other state or another document that grants a citizen the right to reside permanently on the territory of an other state, higher legal education, attainment of the age limit for holding judicial office, the absence of charges or suspicion of a criminal offence, the absence of medical contraindications according to the established list, absence of expunged or unexpunged criminal record or termination of criminal prosecution on rehabilitative grounds, passing of polygraph examinations, level of professional knowledge confirmed by a qualification exam in a specialised master's programme for the position of judge of the relevant court, the absence of close kinship or property with the presidents of the court in which the position of judge is vacant. The study also analysed the international experience, thus allowing to define certain recommendations to be implemented in the judicial experience; this is an objective for future study into improving the efficiency of the functioning of the judicial system of Kazakhstan.

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## **Conflict of Interest**

None.

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## **Правовий статус судді в Республіці Казахстан**

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### **Анотація**

**Актуальність.** Актуальність дослідження обґрунтовується тим, що судова влада є інституційним елементом правової системи, який забезпечує демократичний розвиток держави в напрямку економічного, політичного та соціального оновлення.

**Мета.** Метою даного дослідження є розкриття механізму судової системи та висвітлення особливостей правового статусу судді та основних проблем, які перешкоджають покращенню правового становища.

**Методологія.** Серед методологічних підходів, використаних у цьому дослідженні, формально-правовий, теоретичний, юридична герменевтика, догматичний, дедукція, синтез та інші.

**Результати.** У дослідженні розглянуто механізм функціонування судової системи та її особливості, висвітлено роль цього елемента правової системи у формуванні суспільного життя; також проаналізовано поняття правового статусу суддів та їх прав і обов'язків. Особливу увагу приділено змісту трудового договору із суддями та їх вимогам, особливостям укладення трудового договору. Аналіз розкриває особливості та проблеми зміни та припинення повноважень судді. Детально досліджено принцип незалежності суду, встановлено його важливість у забезпеченні справедливого суду та створенні умов для відновлення довіри громадян до влади.

**Висновки.** Практичне значення отриманих результатів полягає у рекомендаціях щодо вирішення проблем у покращенні правового статусу судді, оскільки це є невід'ємною складовою розбудови демократичної держави.

**Ключові слова:** судова влада; справедливість; правовий статус; повноваження; судова реформа.