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Leonid Golovko

The Space for Legal Reform in Central Asia: Between Political Limits and Theoretical Deformations

Introduction

Looking back on the past twenty years of legal reforms in five Central Asian states, assessing the evolution of the region's legal systems is by no means straightforward. On the one hand, the progress that has been made is evident, even taking into account the two-speed development that can be seen in the difference between, for example, Kazakhstan and Turkmenistan. Indeed, the new constitutional framework in all five countries, the new post-Soviet civil codes, the introduction of trial by jury in Kazakhstan and the recently adopted post-Soviet codes of criminal procedure in Tajikistan and Turkmenistan, the local versions of *habeas corpus* (judicial review of arrest) in Kazakhstan, Uzbekistan, Kyrgyzstan, and now in Tajikistan, the ratification of the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by Kazakhstan and Kyrgyzstan – the list is by no means exhaustive – all point to real achievements. On the other hand, many of the Central Asian legal reforms mentioned above seem to have arisen as a response to international pressure rather than as a product of real internal institutional normalization. One therefore has to draw a very clear distinction – in some instances at least – between the purely normative results of reforms and actual legal practice. For instance, for all the prominence given to Central Asia's adoption of *habeas corpus*, it remains entirely formal and inadequate, despite all the efforts of the international community and national human rights defenders.[1] In addition, even in normative terms, the recent legislative attacks on the independent professional bar association in Uzbekistan[2] and the new law on the state control of the internet in Kazakhstan seem to be regrettable steps towards authoritarianism, and away from the modern state under the rule of law. It is

1 For example, in some hundreds of monitored criminal cases in Kyrgyzstan, the suspect was ordered to be remanded in custody by judges in 59.8 per cent of cases. At the same time, the recently introduced Western-type alternatives to remand of bail and house arrest were ordered in 0.1 and 0.3 percent of cases, respectively (the rest of 39.8 percent corresponds to old "alternatives to pre-trial detention" of Soviet origin). See *Results of Trial Monitoring in the Kyrgyz Republic 2005-2006*, ODIHR/OSCE Centre in Bishkek, p. 21, at: http://www.osce.org/odihr/29615.

2 See Expert Working Group, Reform of the Bar in the Republic of Uzbekistan, in: *Compilation of Analytical Papers on Human Rights and Criminal Justice System of the Republic of Uzbekistan*, Legal Policy Research Centre, Almaty 2009, p. 91 (see also other articles contained therein).

thus important not to overemphasize the significance of Central Asian legal progress.

Looking forward to the coming decades, another question remains: What is the place of Central Asian countries in the legislative map of the world? Will these countries be able to join the club of so-called "civilized states", which requires them to have adequate modern legal systems, or will they remain in "eternal legal transition"? Does legal theory need to conceive of the "family" of transitional law countries *sui generis* and to place it alongside other legal families (common law, civil law, Muslim law, etc.)? These questions are not merely of academic interest. If it is clear that the real scope of all internationally supported Central Asian legal reform is to complete this "transitional period", one has to ask to what extent the obstacles that need to be overcome are "natural" political limits and to what extent theoretical deformations of Soviet origin also stand in the way. Without understanding the space for the hypothetical evolution of legal systems in Central Asia, it is impossible to trace an appropriate programme for subsequent steps. If this space is not expanded, all expectations concerning the successful end of the transitional legal era in Central Asia are naïve and illusory.

The Political Limits to Central Asian Legal Evolution

The Lack of Political Will to Establish Law-Based Instruments of Governance

There is a fundamental difference between Western law-oriented mechanisms of governance and Central Asia's more traditional perception of the role of law within the institutional structure of the state. The modern Western-type legal tradition is based on the principle that political and economic elites must of necessity be changeable and that only the law can guarantee that such change is peaceful and does not menace the stability of state and society. Elite changeability is, of course, not restricted to the most prominent example of changeability, that of free elections. It must be seen in the broader context of criminal law (especially in matters regarding economic crime and corruption), civil litigation, property rights, the principle of fair trials, etc. In other words, what needs to be stressed is that in Western-type states, not only are the elites changeable by peaceful means, but they are changeable only by means of legal instruments, and that this idea is simultaneously accepted by the ruling elites themselves and by society generally.

The reality of politico-economic institutional organization in Central Asia is utterly opposed to this, based as it is on the contrary principle of elite *unchangeability*. Many modern legal instruments are therefore considered not only unnecessary, but even dangerous, especially when they are genuinely effective. In this sense, mechanisms for the rule of law and the unchangeabil-

ity of politico-economic elites are mutually exclusive notions, whose contradictory character (absolutely realized by the Central Asian ruling class) has proven to be a major obstacle to the effective implementation of Western-oriented legal reforms in the region. At the same time, however, from a geopolitical perspective, the international community chose to embrace the anti-law-based omnipotent power structures of post-Soviet Central Asia and rely on it as a pillar of regional stability and a starting point for future society. There is a fundamental Central Asian *dilemma*. What should be chosen: the more stable, at least in the short-term, unchangeability of ruling elites, or the law-based, but more unstable under local conditions, changeability of these elites by legal instruments? The response of the international community may be varied, but the reaction of the Central Asian elites themselves is clearer and more homogeneous. Consequently, the lack of local political will to establish law-based instruments of governance places so-called "natural" limits on positive and effective legal reform in Central Asian states.

Unwillingness to Enact Politically Sensitive Legal Reforms

It is vital to observe that the various legal reforms initiated in Central Asia by civil society or the international community are not all of the same kind as far as local elites are concerned. Some of them might be described as "politically sensitive", in that they potentially threaten the elite's unchangeability. Conversely, some of them might be described as "politically neutral" or "technical", in that they do not endanger the political and economical power of Central Asian elites.

The point of making this distinction is that only the politically neutral legal reforms may be accepted by local elites and, hence, successfully realized in Central Asian states. As far as politically sensitive legal reforms are concerned, the local elites are absolutely unwilling to focus on the possibility or means of their real implementation. On the contrary, they consider such reforms to be very dangerous for the reasons outlined above.

One strong example of this kind of politically sensitive legal reform is the creation of independent judicial power. It is clear that this reform must be regarded as a condition *sine qua non* for the realization of the principles of fair trials and the effective judicial review of arrest. It is also clear that in Central Asian political regimes there is and can be no political will for the establishment of an independent judiciary. This point is obvious not only to foreign observers and to civil society in Central Asia, but also to the Central Asian authorities themselves, which, if they have to choose between their power and independent courts, always opt for the inviolability and unchangeability of the former. In other words, under no conditions can a truly independent judiciary exist under current Central Asian political regimes. This amounts to an incompatibility *per se*, and therefore any hopes of establishing a Western-type independent judiciary in Central Asian countries are mere il-

lusions. This unwillingness to establish an independent judiciary is a very important example of the political limitations to legal reform in Central Asia, but it is not the only one.

The Institutional Vacuum at the Constitutional Level

The lack of real law-based institutional instruments is becoming increasingly dramatic in Central Asia. Despite their resistance to meaningful legal reform in politically sensitive domains, none of the Central Asian regimes openly proclaims its authoritarian nature or its reluctance to follow the fundamental principles of modern law, including the enshrinement of political pluralism at constitutional level. Post-Soviet Central Asian states can no longer openly declare themselves to be traditional oriental monarchies or hereditary regimes. They are not, therefore, able to use old institutional theories, particularly those with Western origins, such as the doctrines of sovereign immunity, absolute power, delegated justice, etc., as a basis for the official rejection of political pluralism and independent judicial systems. As things stand, it is impossible for them to establish an adequate theoretical basis for the creation of state institutions that would correspond with the political reality. There is, therefore, an inevitable contradiction between this reality and the current institutional system. This contradiction is also due to the fact that Central Asian states formally imitate (most often when pressured by the international community) the contemporary international and constitutional legal environment. They thus have to juggle between law and reality, or what could be called a "decorative constitutional framework" and a "shadow political regime".

The twists and turns that accompanied the passage of Kazakhstan's recent law "On the Leader of the Nation" provide an excellent illustration of the institutional vacuum one finds in Central Asia. This constitutional law, assigning the unusual, if hardly surprising status of "National Leader" to Kazakhstan's constitutionally powerful president, was first adopted by the parliament, but then rejected by the president himself, though he did not explicitly veto it. Subsequently, however, it was signed by the prime minister, the chairman of the Senate and the chairman of the Mazhilis, and officially published as law. What is the true meaning of this saga of national leadership? If it is the will of Kazakhstan's political elite to diminish the space between a Western-oriented constitutional framework and local institutional reality, this reform appears to be absolutely inadequate. Under these circumstances, it is natural to ask what may be next.

Furthermore, it is evident that the appropriate institutional framework at the constitutional level should be viewed as the only political alternative to various chaotic expressions of public anger and the only guarantee of the Central Asian states' step-by-step non-violent development. Recent events in Kyrgyzstan demonstrate how unsatisfactory the "decorative" constitutional framework is, even in the short-term. More generally speaking, chaos and

disorder become inevitable, sooner or later, in countries where elites cannot be changed using legal instruments – old or new – and where the only way to overcome political conflict is via public anger, police repression, or "shadow" mechanisms.

Willingness to Enact Politically Neutral Legal Reforms

As outlined above, the distinction between politically sensitive and politically neutral legal reforms seems fundamental to determining the political limits of positive legal evolution in Central Asia. Since politically neutral legal reforms pose no a priori danger for ruling elites, and are intended only to improve the governance of the societies they rule, they may be implemented in a genuinely effective and non-decorative manner. In fact, since the Central Asian governments inevitably need to find some means of maintaining the efficiency of criminal justice, civil justice, etc., they are ready to allow – or even embrace – some moderate rule-of-law mechanisms where such reforms do not have any important political overtones and where serious economic issues are not involved. In other words, if Central Asian authorities believe that a particular legal reform is merely technical, politically neutral, and beneficial to society, they may often agree to discuss, approve, or even initiate it.

Observation of political practice in Central Asia has shown time and again the admissibility of politically neutral and highly positive legal reforms, some of which have been mentioned above. Two further examples support this view. The first is the Western-supported reform of juvenile justice in Uzbekistan, which is, in general, "consistent with the ideas on the purpose of juvenile justice provided for in the Beijing Rules".[3] The second is Kazakhstan's draft law on civil and criminal mediation – a national version of modern alternative dispute resolution practice, recently produced as part of Kazakhstan's official ten-year legal strategy.

In Search of International Prestige

There is an additional key factor that contributes to the promotion of legal reforms and the expansion of the political space for positive legal evolution in Central Asian countries. The governments and political elites of the region absolutely need to enhance their prestige, image, and legitimacy before the international community, especially when one takes into account the recent independence of these states and their lack of institutional traditions. For instance, the desire for international prestige explains, at least in part, most of the positive legal reforms enacted in Kazakhstan during and immediately

3 Sergey Pashin, Expert Conclusion on the Draft Law of the Republic of Uzbekistan "On Juvenile Justice", in: *Compilation of Analytical Papers on Human Rights and Criminal Justice System of the Republic of Uzbekistan*, cited above (Note 2), p. 109.

prior to the country's OSCE presidency, in particular the laws on domestic violence and gender equality adopted with the support of the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) in December 2009.

Conversely, many legal notions, concepts, and institutions of Soviet origin are no longer sufficiently prestigious for Central Asian governments in the current international context, even though some of them were in fact imported by Soviet lawmakers from Western legal systems (often via pre-Soviet Russian law). Nevertheless, Central Asian political elites in search of international prestige openly demonstrate a will to decrease the number of Soviet-based legal institutions, which are unnecessary for them to retain political power and easy to remove.

However, despite this political will to abandon, at least in part, the Soviet legal heritage, the space for legal reforms in Central Asia is also limited theoretically because of some fundamental and not easily overcome theoretical deformations of Soviet origin. These deformations have proven to be another major obstacle to the effective implementation of legal reform in Central Asia.

The Theoretical Deformation of the Central Asian Legal Framework

The Typology Of Central Asian Legal Deformations at the Methodological Level

Adequately conceptualizing the object requiring reform has proven one of the more difficult tasks faced by the legal reformers in Central Asian states. In the absence of adequate conceptualization, it is absolutely impossible to determine the reform agenda and strategy appropriately and precisely for either the short or the long term.

If it is clear that reforms are required not just to eliminate some elementary shortcomings, but also to overcome certain deep deformations of the Central Asian legal framework, then it is also clear that such deformations are not homogeneous. In general, one can distinguish two major types of institutional and legal deformation at the theoretical level, which may a priori hamper the establishment of instruments pertaining to the rule of law, even where the political context is favourable. At the empirical level, these two types of deformation are easily recognized in each Central Asian country – from Kazakhstan to Turkmenistan. For the purpose of this analysis, it is possible to call them *simple* deformations and *complex* deformations.

From a methodological point of view, a simple deformation is characterized by the following major features:

a) it can be eliminated through a one-time normative interference, i.e. it would be enough to either amend a law or adopt a new law to do away with it;
b) it can be a necessary condition for the overcoming of the post-Soviet "transitional period", but is never a sufficient condition;
c) its presence and negative character are more or less obvious to any home-educated Central Asian lawyer or civil society activist, i.e. the criticism of this deformation is compatible with the local legal mentality and does not require any extraordinary intellectual efforts.

A complex deformation is identified by the opposite characteristics:

a) it cannot be eliminated through a one-time normative interference, including adoption of new legislation;
b) it is both necessary and sufficient for the normalization of the Central Asian legal framework, i.e. if it is overcome, the goal of transitional post-Soviet reforms will have been achieved;
c) it is not obvious to the overwhelming majority of Central Asian legal actors (regardless of their political views), who do not consider it as a deformation, but rather a norm, if not an international standard.

It is important to stress that almost every discourse in Central Asia related to legal reform is confined to discussing how to overcome simple deformations. As mentioned above, the fact that there have already been some positive results is beyond doubt. Other reforms might also be realized in the short term. But any changes in Central Asian legislation are likely to have only a modest effect if various complex deformations remain little changed. In this sense, the full-scale elimination of complex deformations has proven to be a far more difficult task – one that remains to be accomplished. It requires not only a long-term plan of legislative measures, but also long-lasting doctrinal and educational efforts. In other words, the emergence of a theoretically appropriate Central Asian legal doctrine seems to be no less important than various internationally supported legislative decisions. Otherwise, without proper theoretical preparation, a one-time normative measure that aims to remove a complex deformation will not be understood or will be distorted at either the law-enforcement or the judicial level. The theoretical basis is also vital to ensure the coherence of subsequent legislative steps. A complex deformation should therefore never be treated in the same way as a simple deformation.

What also needs to be noted is that complex theoretical deformations tend to be Soviet deformations, or can at least be explained by the Soviet past of the Central Asian states. This is why they are difficult to overcome psychologically. On the other hand, however, such deformations stemming from the Soviet past are more or less politically neutral for the Central Asian elites. This significantly simplifies the task of identifying and criticizing such elem-

ents, since the local authorities do not perceive such criticism as posing a danger to their power and legitimacy. On the contrary, the criticism of the Soviet theoretical legal heritage, which lacks international prestige, may even be approved by them precisely because of the current international context.

Analyzing the phenomenon of simple legal deformations in Central Asia in detail is beyond the scope of this article. To give a few examples, nonetheless, they include the very small number of alternatives to remand in custody in the new Criminal Procedure Code of Tajikistan and the absolutely unreasonable formal retention of the death penalty in Kazakhstan's Criminal Code.

Among the complex deformations, three fundamental theoretical issues of Soviet origin seem to pose major obstacles to the practical reform of the Central Asian legal framework in accordance with international norms, i.e. to the end of the post-Soviet transitional period.

The Deformation between Public Law and Private Law

After the collapse of the Soviet Union, all the independent states of Central Asia faced an immense task in leaving behind the centralized communist economy and creating a democratic free-market system built on a modern legal framework. The new Central Asian civil codes that were adopted in the 1990s are considered a decisive step toward a modern, free-market society. But even if this is true, it is also important not to overemphasize the significance of these civil-law oriented legal reforms, because of certain institutional mistakes that resulted from the insufficient integration of Soviet and later post-Soviet legal doctrine from the international intellectual and legal environment. These mistakes led to the problems that remain unsolved today and increasingly deform the Central Asian legal and doctrinal framework.

One vital aspect of developing the Central Asian market economy was recognizing the state (*res publica*) and all its elements, such as ministries, public agencies, cities, municipalities, etc., as subjects of private law. This approach reflects a Soviet doctrine developed by some pre-Soviet-educated professors of law with the aim of retaining certain private-law concepts within the completely public-oriented Soviet economic and legal framework. Hence, according to Soviet "civil-law doctrine", the state participates in legal relations either vertically, when it realizes its power, or horizontally, when it acts on an equal basis with other participants, particularly natural or juridical persons. In the former case, the relations are not considered matters of civil law, in the latter, they become "civil-law-regulated". From a technical perspective, this concept contributed to maintaining civil-law terminology, for example, in relations between Soviet state enterprises or in Soviet state-oriented labour law. More generally, it saved the idea of "Soviet civil law" as such.

Instead of starting anew in the post-Soviet context, the Soviet-educated drafters of the new post-Soviet civil codes, particularly in Central Asia, chose to embrace the *horizontal relations theor*y of state participation in civil-law relations and to rely on it as a pillar of the free-market economy. Soviet civil law was merely redesignated "post-Soviet private law", by which means the state became a normal participant in the domain of private law.

Should one be surprised that the state, officially allowed to enter the market as a "subject of private law", rapidly forced out other actors and started dominating economic life in all the countries of Central Asia? A further, more technical, but no less important point is that the absolutely necessary distinctions between public property and private property, between public-law and private-law legal persons, and between public-law and private-law contracts do not exist at all in the Central Asian legal framework. In fact, given the institutional mistake, they cannot exist there. Consequently, the boundary between the private and public domains in the Central Asian states is becoming increasingly blurred, if not disappearing completely. If the fundamental deformation between public law and private law is not overcome, therefore, it is hard to be optimistic about the legal future of Central Asia. For example, the provision of Kazakhstan's official ten-year legal strategy, which proposes granting some kinds of non-commercial organizations the legal status of joint-stock companies, is a typical demonstration of how confusions continue to arise in this domain.

The Deformation between Administrative Law and Criminal Law

The core of another fundamental theoretical deformation is the understanding of *administrative responsibility* in Central Asian legal doctrine. In the mainstream legal tradition, administrative responsibility implies the responsibility of the public administration with respect to private persons, i.e. *the responsibility of the state towards the individual*. By contrast, the Central Asian doctrine stems from the Soviet understanding of law, which was very far from the idea of the state under the rule of law, rejecting the possibility of the state's responsibility to its citizens. In this situation, the Soviet doctrine started giving "administrative responsibility" another – and totally contrary – meaning entirely. Administrative responsibility was perceived not as the responsibility of the public administration towards citizens, but rather as the responsibility of citizens towards the public administration, i.e., *the responsibility of the individual towards the state* for so-called "minor offences". In order to legitimize this approach and to elevate this conception of administrative responsibility to the ultimate good, the "administrative responsibility of an individual" was presented as a means of "decriminalizing" criminal offences. In other words, an individual had only to face a mild administrative responsibility in lieu of a grave criminal responsibility. This was supposed to demonstrate the liberalism of Soviet legal policy. As a result, a sort of *paral-*

lel criminal law emerged and became increasingly sophisticated: a law of administrative offences, which was, at the conceptual level, completely separate from criminal doctrine and was perceived as the core of Soviet administrative law.

Central Asian lawyers were trained – naturally for reasons beyond their control – on the basis of this concept of administrative responsibility, which is a far cry from international standards. As a result, the Central Asian legal doctrine fully inherited this Soviet approach, which continues to affect the development of post-Soviet legislation, as well as judicial and legal practice in all the countries of Central Asia.

This Soviet-based theoretical deformation has two extremely negative consequences for the development of Central Asian legal systems:

1) It impedes the development of true administrative justice and hence of modern administrative law, placing a priori limits on the concept of the responsibility of the state towards the individual, something that does not comply with contemporary legal values.
2) It enables the growth of "parallel" criminal law (masked state repression), which is incompatible with full respect for human rights.

In more concrete terms, as well as being theoretically inadequate and dangerous in terms of human rights, the concepts of *administrative detention* and *administrative arrest* inherited from Soviet law by Kazakhstan's and Tajikistan's current codes of administrative offences, and Uzbekistan's and Kyrgyzstan's codes of administrative responsibility, are direct outcomes of the deformation in Central Asia between criminal law and administrative law. Indeed, it is clear that the deprivation of liberty should be viewed exclusively as criminal punishment. Likewise, detention (the short deprivation of liberty by the police) may only be used in the case of actions considered a *crime* by the state. Finally, the concept of administrative responsibility may only be applied to the responsibility of the public administration towards private persons. If these concepts are not clarified, the prospects for the positive legal evolution of Central Asian states will be very limited.

The Deformation between Police and Judicial Functions

The third fundamental deformation of the Central Asian legal framework is also inherited from Soviet law. The Soviet legal system, which did not acknowledge the separation of powers or the principle of checks and balances, entirely conflated police and judicial activities at the conceptual level. In effect, many prosecutorial and judicial functions were delegated to the police, especially at the pre-trial stage of criminal procedure. The police provided an official legal assessment of the facts of the case, made definitive decisions on criminal proceedings and even some *res judicata* decisions, applied proced-

ural constraints, etc. After having vested the police with improper functions, Soviet law replaced the institutional distinction between the police, the prosecution, and the court with a pseudo-procedural bureaucratic differentiation of different types of "investigators" and "inquirers", "heads of investigation units", and "inquiry bodies", "operational and investigative services", "investigation bodies", etc., and a completely artificial and absolutely formal distinction between "procedural" and "non-procedural" activities, rejecting a clear one based on constitutional principles. In other words, the institutional border was drawn in the wrong place. As a result, quasi-liberal Soviet attempts to legalize so-called "non-procedural activities" in the 1980s led to the emergence of a special "parallel" phenomenon – "field operations and search activities" regulated by a non-codified autonomous law. These operations and activities started to "surround" the allegedly refined procedural activities, officially emerging only after a special police *quasi-res judicata* decision on the "initiation of a criminal case".

Nevertheless, this severely deformed institutional framework, based on the formal distinction between "procedural" activities regulated by the Criminal Procedure Code and non-procedural field operations and search activities regulated by autonomous law was copied by all the countries of Central Asia. Local lawyers, politicians, and other decision-makers view it as absolutely normal, if not technically neutral, and pseudo-universal, at least for civil-law countries. It was therefore retained in all Central Asian post-Soviet codes of criminal procedure, including the new codes adopted by Tajikistan and Turkmenistan in 2009. Consequently, the Soviet-based institutional deformation between police and judicial functions is now an important feature of Central Asian criminal justice systems.

Unless this deformation is overcome and police and judicial functions rebalanced at a fundamental (conceptual) level, all efforts at legal reform in Central Asia will either be purely decorative or will actually exacerbate current deficiencies, which may lead to a full-scale legal crisis. In other words, the reform most urgently needed is the removal of this historical deformation at the theoretical level. Otherwise, all efforts to "normalize" Central Asia's legal systems, in order to overcome their protracted "transition state", are misplaced and futile.