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## ОЦІНКА НЕЗАЛЕЖНОСТІ СУДОВОЇ СИСТЕМИ ГВАТЕМАЛИ

### JUDICIAL INDEPENDENCE ASSESSMENT IN GUATEMALA

**Анотація.** У статті висунуто пропозицію здійснити комплексну оцінку незалежності судової влади Гватемали. На основі аналізу різних джерел, серед яких законодавчі акти, наукові праці, звіти міжнародних, неурядових організацій, інформація із ЗМІ, автор з'ясував історичні, політичні та правові передумови, які вказують на актуальність та доцільність проведення зазначеної оцінки. Зокрема, до ключових чинників варто віднести: конфлікти всередині країни та довготривалу громадянську війну, які унеможливлювали планомірний розвиток демократичних інституцій; внутрішній (з боку колег) та зовнішній тиск на суддів (шляхом неправомірного втручання в їх діяльність зацікавленими суб'єктами, включаючи фізичне насильство і залякування); недостатнє фінансування судової системи та відсутність конкурентної заробітної плати, що не задовольняє потреби кваліфікованих фахівців та створює додаткові корупційні ризики; тиск на Конституційний суд Гватемали, який неодноразово вступав у конфронтацію з іншими гілками влади тощо. Беручи до уваги мету і завдання дослідження та враховуючи історичний, соціальний, економічний, політичний контекст, автор підкреслює необхідність виявлення значущих

елементів судової системи Гватемали (або несистемних утворень та факторів, що впливають або можуть вплинути на її незалежність), їх зміст (статично — відповідно до норм національного та міжнародного законодавства та динамічно — з урахуванням того, як функціонує судова система як така, а також у разі жорсткого тиску на судову гілку влади в цілому або на окремого суддю), а також здійснити аналіз усіх причинно-наслідкових зв'язків між елементами досліджуваного об'єкту.

Автором визначено певні обмеження дослідження, які можуть бути пов'язані з обмеженням доступу до інформації, поведінкою суб'єктів владних повноважень, юридичною силою остаточного висновку тощо. Також запропоновано детальний план процесу оцінювання, який включає в себе декілька етапів. За результатами комплексної оцінки передбачається отримати об'єктивний висновок про вади незалежності судової гілки влади Гватемали з подальшою підготовкою рекомендацій, які мають покращити судову систему досліджуваної держави та привести її у відповідність до загальновизнаних стандартів здійснення правосуддя.

**Ключові слова:** незалежність судової влади; втручання в діяльність суддів; оцінка незалежності; правосуддя Гватемали.

**Summary.** This paper provides a proposal of the comprehensive independence assessment of Guatemala's justice system. Analyzing the various sources (such as legislative acts of Guatemala; scientific papers; reports from international, non-governmental organizations, information from the media), the author determines historical, political, and legal background that make the independence assessment both important and urgent. Restrictions in access to information, government agencies' conduct, legal force of the final conclusion of the assessment and other limitations of the project are described. Also, the plan of the research implementation with detailed stages of the assessment process are determined. As a result of the complete assessment, it is expected to gain an objective conclusion about the flaws in

independence of Guatemala's judicial system with further preparation of a list of recommendations, which will improve current state of the research object according to generally accepted justice standards.

**Keywords:** justice sector assessment, judicial independence in Latin America, Guatemala's justice system, assessment of independence of judiciary.

**An overview of the research issue.** The pressing problem that it is proposed to assess is the level of independence of the judiciary in Guatemala. This is a Latin American country that tries yet again to build democratic institutes, to improve the investment climate and develop its economy. One of the instruments to achieve described aims is an independent justice system. Moreover, it is a strategic component not only for the functioning of the state (through the mechanism of checks and balances), but also an integral institutional element of the concept of the rule of law, without which it is difficult to imagine a modern state that respects and protects human rights. The independence of the court is a part of the right to a fair trial, which, in turn, is an integral part of the rule of law [12]. Thus, the level of independence of the court directly affects the level of ensuring the rule of law.

Also, the independence of the judiciary allows to make judicial decisions without regard to any influence or pressure on the court, but relying only on legislation (domestic and international). An independent court makes decisions regardless of: political forces and their influence; certain groups of business entities who would like to influence the court; interests of relatives and acquaintances who hope for having an impact on a particular case. Judicial independence excludes any outside influences.

Courts' independence attracts foreign investments because due to this hallmark of the judicial system it is always possible to protect individuals, business, and any rights from illegal encroachment.

Therefore, **the purpose of this paper** is to develop a plan of the complete assessment, due to which the level of independence of the judiciary in Guatemala will be determined. During the assessment process, it is planned to achieve the following

goals, to assess and analyze: (1) the level of independence of judges under Guatemalan and international law; (2) the level of financial independence of judges in Guatemala; (3) the conditions of independence of the court from political elites, legislative and executive branches of government; (4) the level of independence from any other entities that may attempt to pressure the court; (5) the mechanisms of counteracting pressure on the court, in case of attempts of such pressure; (6) the degree of public confidence in the court.

In the process of carrying out the assessment, we will rely on a set of variables that in one way or another will influence the court. These variables include: (1) annual funding of the court (the legislature annually adopts the amount of funding for the judiciary, which directly affects the level of financial independence of the court); (2) political elites (taking into account that the assessment is aimed at 5 years, it is possible to assess how the turnover of political elites influences the judiciary); (3) activities of supranational organizations in Guatemala (the activities of non-governmental organizations are aimed at improving the protection of human rights in Guatemala, including by enhancing the independence of the court).

The target audience for this assessment will be the judiciary in Guatemala. Also, in this paper we will assess persons who do not directly administer justice, but in one way or another contribute to the implementation of the court's functions, in particular: (1) assistants and secretaries of judges; (2) bodies of judicial self-government; (3) qualification and disciplinary judicial bodies.

Thus, in the process of research, we will study how, in accordance with the legislation, the independence of the judiciary is regulated; investigate how the independence of the judiciary is actually ensured; we will study whether and how corruption will affect the consideration of cases in courts; whether there were any cases of political influence on the court during the consideration of cases and what caused the possibility of such influence; we will assess the level of citizens' confidence in the court, whether the citizens of Guatemala feel protected in court, whether citizens believe that the court in Guatemala is independent.

As a result of the assessment, we expect to get an objective picture of the independence of the judiciary in Guatemala, highlight the factors that make the court vulnerable or one that can be pressured, and formulate recommendations to eliminate risk factors and improve the current state of Guatemala's justice system.

Thesis statement. Judicial independence in Guatemala is regulated by national and international legal acts. Although it is guaranteed normatively, the courts still remain dependent. There are external (oligarchic influence, insufficient funding and outer administrative influence) and internal (flaws in judicial structure) factors that make judicial functionality dependent.

**The analysis of recent publications and research.** The sources studied are selected in such a way as to define as clearly as possible the objective picture of the independence of the judiciary in Guatemala. At the same time, the sources of importance for this assessment can be divided into groups: (1) scientific papers that reveal the political and legal history of Guatemala, as well as the legal prerequisites of the research object; (2) reports from international, non-governmental organizations that conducted research and / or assessments of the judicial system, as well as its independence; (3) legislative acts of Guatemala; (4) information from the media, which reflect, to one degree or another, the current level of independence of the judiciary or the factors that affect it. Among these sources, the first two groups are central to this research.

Analyzing the sources in a chronological context, it should be noted that publications until 2010 are more comparative in nature and are aimed at highlighting general trends in the Latin region (geopolitical, political, sociological and historical context) [3; 4; 12; 13; 16]. This circumstance makes it possible to mediate analyze the premises of this study not only within the framework of Guatemala, but also take into account the geopolitical context, political and historical features of the functioning of the countries neighboring to Guatemala. Also the special usefulness of these publications, which reveal the historical political context of the subject of assessment. But here is also the weakness of such sources, since they do not highlight and do not

focus on the development of the judiciary. This complicates the ability to establish an objective situation with the independence of the judiciary.

On the other hand, the sources published after 2010 include more detailed studies of the judiciary, and also, to some extent, reflect the structural flaws of the judicial system that affect its independence from external influence (this, in particular, concerns the appointment of judges to office) [14]. At the same time, recent publications both in scientific journals and reports indicate the presence of systemic flaws in the independence of the judiciary, and also indicate that attempts to systematically change the independence of the judiciary began only in 2016, when a general movement against corruption began in Guatemala.

Recent publications in the media indicate a constitutional scandal that has erupted in the country [2; 14]. We talk about the opposition of the judges of the Constitutional Court of Guatemala to other branches of government (we mean the disagreement of judges of the constitutional jurisdiction with the appointment of judges to positions in local and appellate courts, as well as further pressure on the Constitutional Court of Guatemala from the Guatemala Senate), as well as the inadmissibility of pressure to the court in general and the court of constitutional jurisdiction in particular.

Also, recent publications only highlight the growing tension in the judicial system, which is (as expected) from both intra-judicial groups and from outside influence. There are frequent cases of interference in the activities of judges who do their job properly. Interferences were observed both from stakeholders outside the judiciary and from fellow judges. Also, cases of attacks on judges have increased in cases related to the activities of current politicians. In some sources, attention is paid to the financing of the judiciary, as well as an indication that judges in Guatemala cannot afford an adequate standard of living, which, at the same time, is an additional corruption risk.

A separate area for assessment in the studied sources is corruption in the judicial system of Guatemala, which points to a huge number of corruption-generating factors,

as well as a large number of fixing the facts of giving bribes to judges in certain cases. In our research, we use data on corruption only partially, in the context of establishing the fact that judges are dependent on the unlawful benefits they receive in certain cases.

With all this, not a single study comprehensively determines the level of independence of the judiciary in Guatemala, does not determine the independence of the courts through national and international legislative regulation, through the political, economic, social situation in the country. Moreover, the studied sources of information more ascertain individual problems than formulate strategic recommendations for their elimination.

Thus, the analyzed sources made it possible to formulate the normative, political, financial component of the functioning of the judicial system in Guatemala, as well as to emphasize the need for a comprehensive assessment of the independence of the judiciary in Guatemala and formulating recommendations for its improvement.

Background. Historical, political, and legal background of Guatemala makes this assessment necessary and urgent. “Guatemala, the most populous Central American country, with a population of 16.3 million, has been consolidating its transition to democracy since the 1980s. Guatemala has a long history of internal conflict, including a 36-year civil war (1960-1996) during which the Guatemalan military held power and over 200,000 people were killed or disappeared.” [14] This state has remained under the leadership of dictators and juntas for a long time, especially during 1970s and 1980s when the people of Guatemala were subjected to widespread human rights violations, inhuman treatment and torture. In this period The Historical Clarification Commission for Guatemala concluded: “The justice system, non-existent in large areas of the country before the armed confrontation, was further weakened when the judicial branch submitted to the requirements of the dominant national security model. The CEH concludes that, by tolerating or participating directly in impunity, which concealed the most fundamental violations of human rights, the judiciary became functionally inoperative with respect to its role of protecting the individual from the State, and lost all credibility as guarantor of an effective legal system. This allowed impunity to

become one of the most important mechanisms for generating and maintaining a climate of terror.” [4]

The situation began to change only in 1985, when the Constitution of Guatemala was adopted, and in 1986 the first democratic elections in Guatemala were held. This cumulatively influenced not only the political state in the country, but also made life easier for the citizens of Guatemala. At the same time, the adoption of the constitution only somewhat streamlined legal relations in the country, but did not create independent courts. Moreover, judges have just begun to point out that representatives more and more want to be able to influence the court and its decision-making. It is also noted that during this period the courts received such a low salary that it is difficult to attract real professionals to work in the courts. Guatemalan NGOs’ convinced the UN Rapporteur on the Independence of Judges and Lawyers in 1999 to visit Guatemala. United Nations Rapporteur Mr. Coomaraswamy noted in his report the systematic creation of pressure on judges through physical attacks, humiliation, intimidation and more [4].

In accordance with article 203 of the Constitution of Guatemala and other laws, there is a judicial system in the country, to which the full judicial power belongs. According to articles 203, 214 of this document, judicial system of Guatemala consists of Supreme Court of Justice [9] and the other tribunals [8]. The Constitutional Court of Guatemala stands apart in this judicial system. The work of the Court directly affects the political elite and is constantly attacked by those dissatisfied with its activities.

Unfortunately, the previous head of state did not express or demonstrate support for the judiciary. During the military conflict on the territory of Guatemala, the de facto head of state, the general Rios Montt, assigned a formal role rather than a great importance for resolving disputes in the country for the judiciary [16]. Democratically elected “President Jimmy Morales is being investigated for corruption and has survived three efforts to remove his immunity from prosecution. Morales took office in January 2016, having campaigned on an anti-corruption platform. The previous president and



vice president had resigned and been arrested after being implicated in a large-scale corruption scandal.” [4]

Guatemala scored 46<sup>th</sup> in Judicial independence, Fairness and Citizen Access to Justice Rate with the worst result in 2010 [7]. In the future, international commissions, non-governmental organizations continue to testify to the lack of improvement in the situation not only with the independence of the courts, but with the judiciary in general. Unfortunately, the judiciary continues to be perceived as a subject on whom it is possible to pressurize and thereby directly control the result of considering a particular dispute.

Since 2016, with the support of foreign and international actors, the anti-corruption movement has intensified. This, in turn, intensified opposition on the part of politicians and economic officials, who were satisfied with the old order. So, in April 2019 Judge of Guatemalan Constitutional Court Gloria Porras had a meeting with lawyers, advocates, academics, and journalists who said about Guatemalan justice: “Justice doesn't have a political party. If the court doesn't uphold the rights of all under our system, then we have undermined the constitution and justice fails.” [5]

Now we can observe the scandal associated with the Constitutional Court of Guatemala, or rather with the pressure on its independence from the Guatemalan Congress. It is about the fact that Congress wanted to approve several persons in local and appellate courts as judges, which was not approved by the Constitutional Court of Guatemala. That caused a lot of criticism of judges of constitutional jurisprudence and, in fact, of their independence [6].

Thus, not only the historical context, but the current situation in the judicial system makes it necessary to assess the independence of the judiciary, as well as formulate recommendations for strengthening it.

When performing this research, I would like to choose a complex set of methods (based on the complexity of the object under study) and apply qualitative, quantitative, and multi-method approaches for the selected topic. Each method will be implemented in a specific plan, taking into account the complexity and versatility of the research

object. The quantitative method will focus primarily on the number of: (1) judges and courts in the country; (2) administrative and criminal cases, which are investigated on the fact of pressure on judges; (3) appeals of judges to law enforcement agencies or to judicial self-government bodies on the fact of pressure on judges; (4) administrative and criminal cases on the fact that judges received unlawful benefits; (5) funds allocated annually for the maintenance of the judiciary; (6) salary levels of workers in the judiciary, etc.

The qualitative method will be used to research: (1) normative regulation of judicial independence; (2) assessment of ways of influencing judges; (3) assessment of mechanisms and ways of counteracting pressure on judges by the judges themselves; (4) assessment of mechanisms for holding judges who have received undue benefits to account; (5) study of the factors that contribute to the existence of mechanisms of pressure on judges, etc.

We will use multi-method approaches when: (1) examine the trust of Guatemalan citizens to the judiciary; (2) assess the factors affecting the independence of the court; (3) study the mechanisms of counteracting pressure in court, etc.

To implement the methods, it is necessary to start with a doctrinal study of justice in the country under exploration and understand how the judicial system functions as it is built in accordance with the current legislation. The assessment will use a comparative study at different levels and approaches, which will allow comparing the functioning of the judicial system and its independence not only in Guatemala, but also pay attention to how the independence of the judiciary is ensured in neighboring countries, which will highlight general trends and patterns. Also, a method will be used in the process of which the study of the independence of the judiciary will take place in the light of a specific case, which can occur both in the aspect of the development of a specific situation, or in the body of judicial self-government, or in the consideration of another case. The strength of the used methods is the clarification of the objectively existing justice in the country. At the same time, taking into account the political nature

of the country, we will not be able to establish or assess the objective influence of hidden factors on justice, which are not caused only by law.

To collect data, a set of measures will be used to form an objective map of the independence of the court, and more specifically: (1) analysis of available documents and materials from the global network; (2) study of normative materials, judicial and disciplinary practice; (3) work with archival materials; (4) questioning of judges, employees of the judicial system, users of the judicial system; (5) monitoring of open court hearings.

Research questions. To conduct an assessment, we need to answer the following questions:

1. Is the judiciary in Guatemala independent?
2. Is the judiciary in Guatemala independent in accordance with national legislation?
3. Is the judiciary in Guatemala internally and externally independent?
4. Is the judiciary in Guatemala independent from other branches of government?
5. Is the judiciary in Guatemala independent from the influence of citizens of Guatemala and economic entities?
6. Does Guatemala have mechanisms and institutions to resist pressure on judges?
7. Is there adequate funding for the judiciary to deliver justice and ensure the economic independence of judges and court officials?
8. Does the institutional system have flaws that affect the independence of the judiciary?
9. What factors make the judiciary and individual judges vulnerable to external or internal pressure?
10. Is Corruption widespread in Guatemala's Judicial System?
11. Do Guatemalans trust the Judiciary?
12. Do Guatemalans feel protected through going to court?

13. Can Guatemalan citizens apply to law enforcement or qualification authorities with a statement about pressure on a judge?

**Presentation of the material.** Basing on the set goal of assessment, striving to fulfill the assigned tasks, and also taking into account the political, economic, social and historical context, it is necessary to perform the following actions. First, it is necessary to develop a plan for the application of the mentioned methods and approaches in the context of identifying significant elements of the judicial system (or non-systemic formations and factors that influence or may affect the independence of the judicial system), their descriptions (statically—in accordance with the norms of national and international legislation and dynamically—taking into account how the judicial system functions in itself, as well as in the event of fierce pressure on the judicial system as a whole, or on an individual judge), as well as an analysis of all causal relationships between the elements of the analyzed judicial system of Guatemala.

The construction of the plan is carried out on the basis of the analysis of the collected data from the global network, from judicial and other materials, from archival documents, from the results of questionnaires and interviews, analysis of court cases, as well as materials from the media.

During the assessment of the independence of the judiciary in Guatemala, all interested persons will be identified who, in one way or another, will influence the effectiveness of the work of the judiciary, consideration of cases in courts, consideration of administrative and criminal cases (based on the results of citizens 'and judges' applications in connection with pressure against them), as well as during the consideration of complaints against the judges themselves. Next, we will analyze the functioning of the judicial system in the context of the influence of such persons on the independence of the judiciary, using induction, deduction, content analysis, etc.

In the process of applying the comparative method, it will be established which institutional flaws are in the system in comparison with neighboring countries (it is possible to identify systemic vulnerabilities). In the process of applying the method, it

is possible both to identify flaws in the judicial system, and to establish the patterns of its functioning, as well as to identify factors that affect its dependence.

As a result of a comprehensive assessment of the judiciary, it is expected to identify the flaws in the judicial system that make it dependent, identify inconsistencies or gaps in legislation, as well as formulate recommendations aimed at eliminating factors that affect the dependence of the judiciary in Guatemala.

Limitations of the study. The proposed assessment of the independence of the judiciary in Guatemala has its own framework and limitations, which, first of all, are conditioned by the object of the study, the aim and goals.

During the assessment, only the content related to the research object is a subject to research. This concerns the study of national and international legislation (there will be no research and assessment of legislation that is not related to ensuring the independence of the judiciary). This concerns the collection of evidence from various sources. However, we reserve the right to further research any open data that may be useful in the context of the research. The team's authority to conduct the assessment is consistent with the authority given to us by the client.

In the course of the assessment, only open information is collected, which is available for review on electronic resources in the global network, or in open archival documents, or information obtained from questionnaires and / or interviews, or from the media. Information of a personal nature or information relating to state or other secrets is not subject to collection, except for the transfer of such data by the competent authorities in the manner prescribed by law.

The evaluation is carried out on an equal footing, that is, all judges who affect the independence of the judiciary in Guatemala will be examined and evaluated, except for situations where it is prohibited by law (such as interference with privacy, professional and other activities). The assessment team neither conduct any formal investigation in accordance with Guatemalan law, nor override the powers of law enforcement, the court or any other authority in Guatemala.

The conclusion drawn from the assessment of the judiciary in Guatemala is neither binding nor official in the sense of its origin from one of the Guatemalan authorities. Physical, psychological or any other influence on the members of the assessment team is not allowed.

During making the assessment, the team may face restrictions on access to open data, government agencies, and communication with Guatemalan citizens, which (depending on the situation) may make it impossible to complete the assessment of the independence of the judiciary in Guatemala. In this case, it is the responsibility of the competent authorities (the client) to ensure adequate access to the data, either to public authorities or to communication with citizens. Otherwise, the assessment team may refuse to conduct the assessment.

Research implementation. In order to form the most embarrassing picture of the independence of the judiciary in Guatemala, the study will take two years. To evaluate the study, a team will be formed, which will include 7 people (program manager, three analysts, three persons who will provide technical support). The approximate cost of the project will be \$150,000.

The program implementation consists of several stages. In the first phase, communication will be established with high-level government authorities and with local authorities in Guatemala. Also at this level, it will be defined the stakeholders.

The second stage of this assessment will begin with collecting data from all open sources: the global network, any open official documents, the media. At this stage, contact methods of collecting information will be initiated: questioning, interviewing judges, court workers and other persons, which allows to form an objective picture of the independence of the judiciary. Then the collection of data will be carried out during visits to open court sessions with aim to monitor it, familiarization with open materials of court cases.

The next step at this stage will be to conduct a survey among people who have used, use or plan to use the services of the judicial system in order to determine their

confidence in the courts, as well as to determine how much they feel protected by going to court.

It is planned to overcome the expected difficulties in obtaining data, processing them, and smooth functioning of the assessment team from external factors by attracting the client's resources (including ensuring security for members of the assessment team in cases of a corresponding threat). Funding for the assessment comes from international donors. If it is necessary to attract additional funds, it is envisaged to appeal to donors with appropriate applications.

After the collection of the all data an analysis of the gained information will be made in order to describe a holistic picture of the independence of the judiciary in Guatemala, determine the degree of independence of the judicial system, outline the systemic flaws in the judicial system that make it vulnerable, as well as to formulate specific recommendations directed to improve the situation with the independence of the judiciary in the country. During the data evaluation, logical, economic, sociological, statistical data processing methods will be used to formulate valid data.

The results of the assessment of the independence of the judiciary in Guatemala will be reflected in a special report with its further presentation at the highest level to the President and Government of Guatemala. It is planned to issue 500 copies of the report, which will be distributed between the authorities and other interested structures, and will also be brought to the knowledge of international organizations. The electronic version of the report can be found on the website of assessment organization.

**Conclusion and proposal.** Thus, it is proposed to conduct a comprehensive assessment of the independence of the judiciary in Guatemala, which will be based on the study of open data, and may testify in one way or another about the level of independence of the judiciary, as well as sociological research that will allow not only to form objective conclusions about the flaws in independence of the judiciary, but will ultimately lead to definitive recommendations for improving the judiciary in Guatemala. After the assessment, we will have data on: the current level of independence of the judiciary in Guatemala; the faults (institutional) and factors

(political, financial, social) that make the judiciary dependent in Guatemala; as well as a list of recommendations that will correct certain flaws and improve the judicial system in Guatemala in accordance with generally accepted international standards.

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