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Unmasking Central Asia's neoliberal judges

www.opendemocracy.net/od-russia/bali-har-sanghera/unmasking-central-asias-neoliberal-judges

Bali-har Sanghera

Despite claims of impartiality, judges in Central Asia often incorporate neoliberal economic and moral values into their judgements on illegal settlements.

Illegal settlements are often framed as existing on the margins of society, as a result of social desperation, poverty and lawlessness. But this understates their connection to the juridical system. Illegal settlements are shaped by social relationships of rights, responsibilities and power between the illegal settlers and the courts.



Drawing upon research and interviews with Supreme Court and city court judges in Kyrgyzstan and Kazakhstan, I argue that the courts are responsible for constructing a socio-spatial space in which many thousands of internal rural migrants struggle to live without proper access to shelter, education and medical care. Although the judges position themselves as impartial actors operating within the law and outside of the sphere of politics, they have played a key role in the neoliberalisation of Central Asian societies.

Property rights over human rights

Illegal settlements arise because many poor rural migrants are unable to find suitable cheap accommodation. The migrants often explain that the state has failed in its social obligation under the constitution to provide them with housing, and out of desperation, they are forced to erect adobe houses on derelict and unused land on the outskirts of the city.

But in so doing, the migrants breach landowners' property rights, resulting in protracted court cases in which both parties contest their claims to the land. The migrants argue that they have used the land productively for several years and have nowhere else to live, while the landowners (usually rich individuals and local authorities) claim that the property is already registered in their names, and has been earmarked for commercial use.

In some cases, the landowners state that the land plot is too dangerous for human habitation. Gulnur, a Supreme Court judge in Bishkek, sums up the dilemma facing the judges:

'The squatters have seized land plots belonging to others, whose private property rights have been violated. They have built a house and live there, they say that they have no place to live. In turn, the owners go to the courts and demand all the squatters be moved out and also talk about the violation of their rights and that they need their land back. Indeed, the courts are faced with a very difficult dilemma, and in this situation the courts can only deal with things in accordance with the law. The difficulty lies in the fact that whatever decision the courts make, it will be subject to criticism.'



Illegal settlements - such as these in Bishkek, Kyrgyzstan - arise because many poor rural migrants are unable to find suitable cheap accommodation.

Illegal settlements represent a conflict of rights and obligations between the property-owning class and the state on the one side, and poor rural migrants and homeless urban residents on the other side. Despite the rhetoric of impartiality, the judges are not neutral, and have sided with the rich property owners, maintaining that the law should always protect private property rights against illegal occupation.

As Aibek, a city court judge in Bishkek, explains: 'Everyone has the right for protection of his/her private property in a judicial order. If owners of these lands believe that their rights have been violated, if their lands have been illegally seized, they have the right to appeal to higher authorities, including judicial bodies. These are facts of unauthorised occupation... The right to private property has to be protected... The right to own – the right to defend... Judges always give a preference to private property.'

The judiciary values the money-making capacity of rich individuals and the state over the human dignity and lives of poor migrants.

The property-owning class has the right to appeal to the courts to defend themselves against the settlers' illegal actions. Although the judges acknowledge that internal migrants have constitutional rights (to land and housing), their claims are dismissed in favour of the owners' constitutional rights to have and protect their private property. In ordering a hierarchy of rights, the judges are no longer value-neutral. The judiciary values the money-making capacity of rich individuals and the state over the human dignity and lives of poor migrants.

The judges counter accusations of bias by constructing a dichotomy between the law and justice, where the rule of law is associated with facts, reason, impartiality and objectivity, and justice with values, emotions, politics and subjectivity.

Anara, a city court judge, states that the judges only make decisions on the basis of the law, not their subjective values: 'There's a difference between legality and justice... The rights of those who have come and seized the land end where the rights of private property of another person begin. When the court decides fairly, it makes a decision based on the law... The concept of justice is very subjective and relative. What's fair for one is not fair for another. That's why we have two sides in the court. In this situation, it's only possible to make a decision in accordance with the law.'

The judges caution against making decisions based on sympathy and justice, maintaining that if they are attentive to the facts of the case and apply the law accordingly, professionalism, impartiality and fairness will materialise.

But their rhetorical construction of the dichotomy between the law and justice is misleading, because underpinning their application of the law is a set of neoliberal values and beliefs that prioritise property rights and wealth.

Avoiding ideology and justice

In going to the courts, the settlers are initially hopeful that they will receive a fair hearing. Although the judges formally feign impartiality, in practice, they have already formed an opinion that land seizures are unlawful.

Nurbek, a Supreme Court judge in Astana, notes that the judiciary is tough on the settlers and poor groups, whose social rights are secondary to others' property rights: 'The judges must be impartial. I think that the opportunities for the judges to help poor groups are very limited. The judges just apply the existing law. The law can be unsympathetic or even severe on poor groups, but the judges will apply it.'

Judges counter accusations of being unsympathetic and uncaring, by claiming that they are being professional. They also distance themselves from any moral criticisms and consequences of their decisions by passing the responsibility of protecting poor people's social rights to local authorities and social services. Temirbek, a city court judge in Bishkek explains: 'The problem of new [illegal] settlements doesn't relate to the courts. We solve the contention between the two parties on the basis of the existing law in an established process... This issue of new settlements is not a legal question, it's a socio-political question. It must be resolved by the local authorities.'

Aida, a Supreme Court judge in Astana holds a similar view: 'I'm a professional and I must make a decision on the basis of the law... W

e can collaborate with the social services. They can have feelings for the poor, but I'm a judge. I have some feelings, but I must make a decision on the basis of the legislation... A judge is not an NGO.'



Illegal settlements in Bishkek, Kyrgyzstan.

In drawing a strong occupational boundary around their work, the judges argue there is a lack of

personal discretion and autonomy in interpreting and applying the law. To veer from the judicial orthodoxy is seen to be political, ideological and subjective. The judges are careful to present themselves as professional and to avoid political overtones, in case they are admonished by their peers, government ministers and politicians, and possibly lose their job. Last summer, [a Kyrgyz Supreme Court judge was removed from office after criticising her government's plan to collect citizens' biometric data, claiming it would infringe their human rights.](#)

But in practice, the judges are always (fallibly) engaged in ideological struggles in the juridical field. For instance, they evoke the neoliberal discourse of the underserving poor, arguing that the settlers have forfeited their rights to land because of their dishonesty and harm to others, especially law-abiding citizens, who had been waiting to be allocated land and housing by local authorities. This is evident in the remarks made by judges such as Gulnar: 'The fact is that when the lands were seized, the squatters committed a lot of abuse. For instance, when they seized the land plots, they were re-sold to others. And then those people who are law-abiding, stood in line, and they're still poor, they didn't get anything because they're law-abiding.'

The judges attempt to justify their lack of compassion towards the settlers. But their representation of the settlers as heartless and wily is structurally motivated by the need to suppress poor groups' claims for state resources and support, and to shore up the rich property-owning class. The reality is that many settlers had become weary of waiting and no longer believed local officials' promises of apartments, especially when major new housing projects consisted of only luxury apartments.

Under neoliberalism, pity and charity begin to displace social justice. In contrast to the lack of compassion towards the settlers, the neoliberalising judges donate to their chosen charities and NGOs, which are deemed to be deserving of support. 'It depends on the quality of the person,'

Ivan, a Supreme Court judge in Astana, tells me. 'Of course, some judges are arrogant... I always think that I must behave in a humane way... My wife is engaged in charity work... In the past, I saw people who didn't have enough products, food and clothes, and I would then donate things to them.'

The compassion of the judges is privatised and individualised, becoming a matter of personal choice and moral conscience. The judges doubly disadvantage the settlers, viewing them too poor and undeserving to receive either justice or charity. [Unable to claim their rights or to receive compassion, it is little wonder that internal migrants, the wretched of the earth, resort to violence against the city.](#)

De-politicising corruption and state capture

Not everyone is equal before the law, because poor groups cannot bribe judges to get a favourable outcome. In several cases, the settlers allege that judges told them to pay a huge bribe, but were unable to raise the amount required. The judges admit that bribery is pervasive in the judicial system, though deflect criticisms by stating that corruption is widespread in society: 'I always say that the judicial system is a part of society, it can't exist separately. It doesn't exist in a vacuum... The way society is, is the way the judicial system is. Yes, we have corruption in Kyrgyzstan, corruption is everywhere. Corruption exists in the court system, we can't deny it,' Gulnar tells me.



New illegal settlements being built in Bishkek, Kyrgyzstan.

Gulnur aims to shift the responsibility for corruption on to 'society', but this mis-characterises the nature of bribery in the judicial system, because it fails to identify the real cause of the problem.

Whereas poor groups have the means to pay small bribes to low grade civil servants, bribing judges requires large sums that only affluent groups can afford. By deliberately mis-identifying judicial corruption as a societal problem, the judges try to neutralise and de-politicise bribes. More importantly, the deliberate mis-recognition allows the judiciary to bend to the will of the rich property-owning class, who can afford to pay large bribes.

Not everyone is equal before the law, because poor groups cannot bribe judges to get a favourable outcome.

In reality, the judicial system does not reflect the way society is, but how rich elites can exert power and influence over the courts. [The judicial system also lacks relative autonomy from the executive and legislative branches of the state, leading some human rights and legal NGOs to criticise the judiciary for being under the control of the government and Parliament.](#)

Parliament consists of many deputies with links to construction and property development, and in some cases, the settlers occupied land plots belonging to deputies, or wealthy families with ties to deputies. The ability to make fair judicial judgements on illegal settlements is partly constrained, because the judges risk being publicly admonished and dismissed from office should they ignore deputies' interests. The legislative and judicial capture by rich elites is a form of legal corruption.

The judges try to counter accusations of state capture and corruption by rhetorically pointing to the formal structure of state power. '

According to the Constitution, the power belongs to people,' Temirbek, from Bishkek, says. 'People delegate their power to their representatives, who are deputies. Therefore, the deputies being in Parliament adopt laws and in this way people delegate their power to the government. So when deputies make laws and the president signs them, we're obliged to follow them, because it's the will of the people expressed through their representatives. Therefore, I believe that any law adopted in this country has to be exercised and respected by all citizens. And it will be fair.'

Temirbek argues that the judiciary enacts the will of the people, not the rich. The deliberate mis-

recognition of the nature of state power is a rhetorical strategy deployed to neutralise popular criticisms and to normalise elite corruption.

When the judges are forced to admit that deputies have conflicts of interests, they use another rhetorical strategy to counter criticisms of unjust structures, as Gulnar demonstrates: ‘

A person who has reached a certain level of material wealth goes into politics in order to protect his business. It's everywhere, not just in our country. You will not find anywhere a poor deputy... And of course, a person who is in Parliament will lobby for certain laws. I think it's natural. Of course, they say that they are society's representatives. In order to be elected next time, they will do something for community, but they will also not forget their own interests.’

[Gulnar attempts to de-politicise lobbying and other forms of rent-seeking activities, stating that they occur everywhere and are ‘natural’.](#) Rent-seeking is seen as firmly embedded in the affairs of the state, a form of legalised corruption, which no longer becomes a normative question of ethical behaviour, but rather a social fact, an unalterable state of affairs, common to all democracies, great and small, old and new.

Unmasking the judges

Judges de-politicise and privatise the lives of internal migrants and illegal settlers. They impose their way of naming and ordering persons and things into a neoliberalising moral vision of society that normalises ‘law and order’ discourses that de-politicise internal migrants’ needs by prioritising private property rights over human rights.

Although the judges feign impartiality by formally separating politics from the judiciary, the interpretation of the law is never a solitary act of a judge, but is a product of ideological struggles in the juridical field that involves competing groups, including legal professionals, state officials, business elites and human rights activists.

The juridical language of impartiality attempts to neutralise conflicts in the courtrooms, shifting the political and moral responsibility of justice and care for internal migrants to local authorities, social services and charities. But the judges commit bad faith, deliberately mis-recognising and denying the economic and the political with the aim to disguise the neoliberal values embedded in their legal judgements on illegal settlements. The rhetoric of judicial professionalism and neutrality not only masks the ideological bias towards the rich property-owning class, but also normalises the judicial capture and corruption by rich elites.

Judges have ‘world-making’ powers, naming and titling objects in cases of private property ownership, and instituting and absolving rights and obligations in cases of state administrative affairs. But they operate in a juridical field dominated by the state, rich elites and rentiers. Thus, their legal judgements and rent-seeking activities correspond with pre-existing social and political structures. Ultimately, the battle for human rights takes place not in the courtroom, but on the streets!

All interviewee's names in this article have been anonymised.

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