

# **KYRGYZSTAN: THE CHALLENGE OF JUDICIAL REFORM**

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## KYRGYZSTAN: THE CHALLENGE OF JUDICIAL REFORM

### EXECUTIVE SUMMARY AND RECOMMENDATIONS

Kyrgyzstan's judiciary is failing to act as a neutral arbiter of political disputes or as a fair channel for economic arbitration. It requires significant reform to gain the trust of the public and to assert its role as an independent branch of government. A failure to achieve reform would make it impossible to develop a pluralistic and stable political system over the long term and also undermine attempts to tackle widespread corruption and encourage development. Unless the government allows greater self-governance for lawyers and independence for judges, no amount of education or piecemeal reforms will create an effective system.

A politicised judiciary was at the heart of the instability that rocked Kyrgyzstan in 2005. The courts had been used extensively by former President Askar Akayev to suppress opposition and remove political challengers. Judges proved unable to resolve the political disputes and electoral malpractice that characterised the 2005 parliamentary elections. Popular protests against court decisions contributed to the subsequent rebellion that overthrew Akayev and threatened to destabilise the country. Despite rhetorical commitments to judicial independence, the new regime of President Kurmanbek Bakiyev has continued to use the courts for its own political ends. During parliamentary elections in 2007, the courts were again used to deregister unwanted opposition parties.

This politicisation stems in part from a Soviet legacy that has proved difficult to overcome. In the Soviet system, the judiciary was completely subordinate to the political regime and was also largely subservient to the prosecutor's office and the law enforcement agencies. Since independence, the judiciary has undergone constitutional and institutional reform, but much of the old ethos remains, particularly among the older generation of officials. Roughly 98 per cent of criminal cases result in convictions, for example, not least because of the respect judges instinctively give to any case brought by the prosecutor. Developing a judicial culture that values its independence highly remains a challenge.

The independence of the judiciary is also undermined by constitutional and institutional problems, which give

the presidential administration considerable control over the selection of judges and their promotion, for example, and by funding methods, which provide too much control to the department of courts, which is part of the justice ministry. Informal methods of control remain the most significant problem, with so-called "telephone justice" – where political figures call judges to pressure them to deliver particular verdicts – still widespread in political cases.

For ordinary people the greatest problem is the high level of corruption in the justice sector. Bribery has undermined public confidence and has also worked against attempts to improve the professionalism of lawyers. Many lawyers complain that their main role is not to represent clients vigorously but to facilitate this endemic corruption. Part of the problem is the very low level of state funding and poor salaries, which in effect force judges to take bribes. The government has very limited revenue, but the judiciary should at least have the same priority as the law enforcement agencies. More efficient budgetary processes and spending could also maximise the impact of available funds.

A lack of faith in the independence of judges, widespread corruption and the extremely slow speed of many legal processes have all fuelled public disaffection with the court system. Some people have turned elsewhere to resolve disputes, particularly in civil matters. Informal local leaders, many with criminal connections, are called upon to arbitrate in some disputes. Others seek satisfaction through informal use of religious codes, such as Sharia law, which is not recognised in the legal system.

Despite some positive moves from the government, including improvements in sentencing policy and the abolition of the death penalty, there has been too little reform. Restoring public faith is a key element in state-building and an important step in undermining support both for non-state criminal groups and religious extremist parties. Most of the initiative for reform will have to come from inside the justice sector. There is no incentive for the political establishment to increase the independence of the courts, but concerted efforts by lawyers, judges

and more enlightened political leaders can improve the situation slowly.

The international community can play a small but important role in this, but so far few international projects have made a real impact. A new U.S.-funded program has high aspirations but is unlikely to accomplish much unless it receives serious political support. The most important role for international counterparts is to assist in training and opening up Kyrgyz judges and other legal professionals to broader international practice and experience in achieving the rule of law.

## **RECOMMENDATIONS**

### **To the Government of Kyrgyzstan:**

1. Convene a working group of judges, lawyers, government officials and members of the public to draw up a new concept of judicial reform, which should address key issues of institutional reform, including how to give real substance to the rhetoric about judicial independence and seek in particular ways to:
  - (a) remove the department of courts from the jurisdiction of the justice ministry and establish it as an independent body, with the additional staff and financial support required;
  - (b) transfer the power to license lawyers from the justice ministry to a self-governing association;
  - (c) increase the representation of judges in the National Council for Judicial Affairs (NCJA) and end participation by members of the presidential administration and parliamentary deputies; and
  - (d) review procedures and criteria within the NCJA for selection of judges to ensure greater transparency and independence from political interference, including voting by secret ballot and wider media coverage of the process.
2. Introduce a more efficient system of financing for the judicial system, making full use of the new system of court budgets and ensuring that funds are received regularly and on time.
3. Proceed as soon as possible to start jury trials, on a pilot basis in urban areas.

### **To Judges and Lawyers:**

4. Participate fully in ongoing discussions on judicial reform and initiate new groups and organisations to campaign for more reform.
5. Seek better methods of self-governance including through the Council of Judges, improve internal disciplinary procedures and pursue cases against judges accused of corruption or other malpractice.
6. Support proposals for all judges to undergo additional training in the Judicial Training Centre (JTC) and request extra resources for the JTC.
7. Seek to limit the practice of political interference in judicial processes through collective discussion of such practices, maintaining a common position with regard to political interference, establishing an internal complaints mechanism for such incidents and informing the media and civil society of attempts at interference.

### **To the Prosecutor General:**

8. Strengthen the supervision of detainees to protect them from abuses, including by permitting access by lawyers, investigating fully allegations of torture and other ill-treatment and supervising thoroughly the conduct of officials in temporary detention facilities and investigative detention facilities.
9. Implement proposals for reform of the prosecutor's office, including better definition of its role and functions, an effective separation between its prosecutorial and supervisory responsibilities and stronger internal disciplinary procedures to tackle corrupt practice.

### **To International Organisations and Donors:**

10. Strengthen judicial reform programs that emphasise improved education and training, promotion of structural change and provide widespread access to knowledge of other legal cultures.
11. Ensure that reform plans will be sustainable given limited funding and Kyrgyzstan's legal culture.

**Bishkek/Brussels, 10 April 2008**

## KYRGYZSTAN: THE CHALLENGE OF JUDICIAL REFORM

### I. INTRODUCTION

An independent and trusted judiciary is essential if Kyrgyzstan is to build a viable state. Since independence in 1991, the judicial system has undergone many changes from the Soviet system, but it has failed as a guarantor of justice and a channel for peaceful resolution of disputes. As a result, it is fuelling tensions and increasing the potential for conflict.<sup>1</sup>

Judicial reform has been severely problematic in almost all post-Soviet countries. The Soviet system subordinated the judiciary to the ruling communist party. The legal system was designed as an instrument of state policy, not as a limitation on policymakers or a constitutional defence against the state. There were no jury trials or culture of legal advocacy. Defence lawyers were not permitted to mount any real defence against the state prosecution. Judges were significantly less important than officials from the *prokuratura* (the prosecutor's office<sup>2</sup>), which was responsible for many criminal investigations and had the power to arrest people and bring cases to court. It became notorious for its role in the Stalinist purges and the infamous show trials of the 1930s. Perhaps more than any other state institution, it has largely resisted reform until very recently.

Turning this Soviet system into a viable judiciary, which would guarantee human rights and be independent of the executive and legislative branches of government, was always going to be difficult. The Soviet legal culture retained a hold over many personnel in the courts; this made reform difficult but did at least provide some

continuity and assure that the courts did not simply collapse after 1991. However, overcoming that legacy is now the only way to implement new principles of justice and rule of law.

Some Central Asian states face even more difficult situations than Kyrgyzstan. In Turkmenistan and Uzbekistan the judiciary is arguably even worse than under Soviet rule, combining the darkest aspects of totalitarian rule with a near complete lack of qualified personnel. In slightly more liberal Tajikistan, the justice sector suffers from lack of personnel and funding and is also under heavy political control. In Kazakhstan there have been some positive reforms, and funding has improved significantly, but political control is paramount, and judicial independence remains a distant concept.

In each case, a failure to reform the judicial system has undermined rule of law. Politically, this has enabled authoritarianism to develop virtually unchecked, with almost no legal protection for ordinary citizens. It has allowed small elites to take over large swathes of the private sector through illegal property seizures and dubious privatisations and made doing business unattractive to foreign investors.

A failing judiciary has meant most ordinary citizens are denied justice when disputes pit them against the state. Lack of justice has been cited by some as a reason for the growth in support for Islamist ideas and groups in Central Asia and is often referred to by extremist groups such as Hizb ut-Tahrir in their propaganda.<sup>3</sup> A deeply flawed political trial of local business leaders sparked the Andijon uprising in 2005, after which hundreds were killed by Uzbek security forces.<sup>4</sup>

In Kyrgyzstan the failure of the courts to provide justice to the six victims of a police shooting in Aksy district in March 2001 has provoked unrest and confrontation ever since. A Supreme Court decision in 2004 to close the case was widely criticised as none of the perpetrators had been brought to justice. Victims' families complained of

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<sup>1</sup> For previous reports dealing with law-enforcement agencies and the penitentiary system, see Crisis Group Asia Reports N°42, *Central Asia: The Politics of Police Reform*, 10 December 2002; and N°118, *Kyrgyzstan's Prison System Nightmare*, 18 August 2006. For more on political and other developments under President Bakiyev, see Crisis Group Asia Report N°97, *Kyrgyzstan: After the Revolution*, 4 May 2005; Crisis Group Asia Report N°109, *Kyrgyzstan: A Faltering State*, 16 December 2005; and Crisis Group Asia Briefing N°55, *Kyrgyzstan on the Edge*, 9 November 2006.

<sup>2</sup> The *prokuratura* is also sometimes known in English as the "procuracy", but this report uses the former term throughout.

<sup>3</sup> See Crisis Group Asia Report N°58, *Radical Islam in Central Asia: Responding to Hizb ut-Tahrir*, 30 June 2003.

<sup>4</sup> See Crisis Group Asia Briefing N°38, *Uzbekistan: The Andijon Uprising*, 25 May 2005.

a political cover-up and remain dissatisfied with the progress made since the case was reopened in 2007.<sup>5</sup>

Lack of independent courts has also provoked serious political tensions, particularly during elections, when courts have been a fundamental part of the political process, and judges have been the targets of political pressure. The failure of the judiciary to provide any check on growing authoritarianism in the 1990s permitted former President Askar Akayev to gain overwhelming power. The ability of his family and political allies to win control over large parts of the business world was also the result of the lack of rule of law: there is simply no defence for business people threatened by the politically powerful.

As a result of all these problems, public faith and trust in the judiciary has declined markedly and has provoked conflicts both in and around courts and on a broader scale in society. In 2005 the Supreme Court was paralysed for several months by supporters of political figures seeking legal redress after losing parliamentary elections. During the same period, protestors repeatedly surrounded courts and threatened judges. These conflicts played a major part in the unrest and eventual change of regime in March 2005.

But nothing much changed. Courts are still unable to hand down independent decisions on political cases. In May 2007 a case was brought to disqualify Bernmet Akayeva, the daughter of the former president, from standing for election to parliament. During a session in Kemin, her frustrated supporters broke window bars, smashed furniture and forced their way into the court room. The judges had to be placed under police guard.<sup>6</sup> The tendency of courts to follow political orders prompts protestors to use violence. The chairperson of a court in Bishkek recalled an incident: "We were seized right in the courtroom, and there was nobody to defend us ... people sat on the judge's table and said 'we won't let you work, until you give us a decision in our favour'".<sup>7</sup> The courts were again overtly political in the December 2007 parliamentary elections, being used to disqualify candidates and opposition political parties.

There have been some initial judicial reforms, though these have been outstripped by the rhetoric of political leaders, who have all supported the principle of an independent judiciary while systematically undermining attempts to achieve it. The need for reform is now widely recognised by lawyers and bolstered by domestic expertise as well as a growing body of international research.<sup>8</sup> Legislative limitations in 2007 on the powers of the prosecutor's office, for example, were an important breakthrough, the result of a long campaign by lawyers and civil society. Nevertheless, there is continued evidence of political interference in the courts, and widespread reports of continued corruption in the justice sector.

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<sup>5</sup> Bruce Pannier, "Kyrgyzstan: New Aksy Probe Could Reach Current Circles", RFE/RL, 28 June 2007; according to Sartpai Djaichibekov, the lawyer of the Aksy victims: "President Bakiyev was in Aksy a year ago and promised that the guilty would be punished, and four criminal cases were opened. But the main guilty parties – the officials of the Akayev regime – have again been left to one side. Bakiyev himself is one of the guilty ones – he was prime minister then". Crisis Group telephone interview, March 2008.

<sup>6</sup> Crisis Group observation, Kemin, Chui province, May 2007.

<sup>7</sup> Crisis Group interview, Bishkek, October 2007.

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<sup>8</sup> For additional reading in English on reforms to the judiciary see "Judicial Reform Index for Kyrgyzstan", American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI), June 2003; "Legal Profession Reform Index for Kyrgyzstan", ABA/CEELI, October 2004; "Prosecutorial Reform Index for Kyrgyzstan", ABA/CEELI, March 2007; James A. Anderson, David S. Bernstein and Cheryl W. Gray, "Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future", The World Bank, 2005; Cynthia Guttman, "Kyrgyzstan: breaking out of the old shell", The UNESCO Courier, November 1999, pp. 21-23; and "Global Corruption Report: Corruption in Judicial Systems", Transparency International, 2007.

## II. KEY INSTITUTIONS

### A. THE COURTS

#### 1. The Constitutional Court

The 2007 constitution tinkered with some elements of the justice system but left the key components intact. As before, the apex of the system is the Constitutional Court, a nine-judge body that rules on the constitutionality of laws and other legal acts and interprets key clauses in the constitution.<sup>9</sup> It has frequently been controversial, such as when it ruled in 1998 that President Akayev was eligible to stand for a further term, though it appeared he had already completed the maximum two.

Such politically charged decisions have meant that the court has never served as a check on the executive branch's expansion of its powers. Importantly, it selects its own cases and does not hear applications from ordinary citizens about their fundamental rights. It has frequently proved susceptible to political pressure. Its ruling in September 2007 that constitutional amendments adopted by parliament the previous year were unconstitutional opened the way for the president to introduce his own draft constitution, which strengthened the presidency and weakened parliament. In the recent parliamentary elections, the court's chairperson, Cholpan Baekova, campaigned as the top candidate on the ruling Ak Zhol party's list.

#### 2. The Supreme Court

The Supreme Court is the highest judicial body concerned with criminal, civil, economic, administrative and other cases – the final court of appeal in the judicial system. It also has supervisory responsibility over the activities of local courts. When acting as the final court of appeal, it is often a key player in overtly political cases, particularly those in which electoral results or the rulings of the Central Electoral Committee (CEC) are challenged. Although it has 35 judges, the chairperson plays a key role in decision-making and is the de facto head of the judiciary. The appointment of the powerful chairperson is a strongly political one. Although in theory the chairperson has tenure until retirement age, in practice it is possible for strong political leaders, with parliamentary support, to remove an unwanted incumbent.

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<sup>9</sup> Constitution of the Kyrgyz Republic, Article 85, para. 3. All references to the constitution are to the 2007 version, unless otherwise stated.

Chairperson Kurmanbek Osmonov was dismissed in January 2008, after a letter from 50 judges was published demanding his resignation.<sup>10</sup> Osmonov claimed that some were pressured to sign by presidential officials and insisted he should have served out his term until 2014,<sup>11</sup> but the new parliament, completely controlled by the president, voted to remove him.<sup>12</sup>

#### 3. Other courts

There are 78 local courts (with 374 judges), one for each administrative district. The lowest level are in cities and districts (*rayon*); courts of second instance (appeals courts) are located at the province (*oblast*) level. A case in a court of first instance is usually heard by one judge without jury or lay assessors. A court of second instance has a three-judge panel. There is increasing support for some use of jury trials, which are authorised in the constitution and legislation but have not been implemented due to nervousness in political and judicial circles.

Other types of courts have gradually emerged, including several designed to examine economic disputes, although most of these now pass through the ordinary court system.<sup>13</sup> Military courts rule on criminal cases concerning military personnel.<sup>14</sup> There are also courts that are not included in the formal hierarchy of the judicial system but still administer justice. The courts of elders (*aksakals*) are a fairly recent reinvention of an older tradition. Although they have been widely accepted as a relatively

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<sup>10</sup> Extracts of the letter were published by AKI press, at <http://kg.akipress.org/news/50964>.

<sup>11</sup> Crisis Group observation, speech to parliament, 17 January 2008.

<sup>12</sup> There had apparently been previous attempts to get rid of Osmonov, but it had proved impossible to gain the necessary two-thirds vote in parliament. Analysts provided differing explanations as to why he was dismissed; some claimed his role in the 2005 elections, allegedly favouring President Akayev, had caused lingering resentment; others pointed to separate political and business disputes.

<sup>13</sup> A Court of Arbitration was founded in 1992, whose main function was to examine economic disputes. In 2003 it was merged into the Supreme Court, and jurisdiction over economic disputes was transferred to the inter-regional court on economic and administrative disputes.

<sup>14</sup> There is no mention of military courts in the constitution. In the constitutional law of 1999, "On the status of courts in the Kyrgyz Republic", military courts are included in the system of courts of general jurisdiction. There is some discussion of abolishing them. Erkin Alymbekov, vice speaker of parliament, noted that: "As military crimes are included ... in the Criminal Code ... alongside state or economic crimes ... [they] could be considered by local courts". Speech at parliamentary hearings, 31 January 2007. See "The Constitution and Questions of Judicial and Legal Reform in Kyrgyzstan. Materials from Parliamentary Hearings", Bishkek, 2007.

quick source of community justice for minor crimes, they have been criticised for reinforcing traditional male-dominated cultural norms and discriminating against women and young people.<sup>15</sup> In small villages they may also become the tools of local police and officials.

## B. GOVERNMENT BODIES

Government bodies have considerable influence over the judiciary. The key institutions are the justice ministry and the presidential administration. At least on paper, the ministry has no direct jurisdiction over the courts, except in administrative affairs. Financial and administrative issues are channelled through the department of courts, which distributes funding. It was formerly independent, although reporting directly to the presidency, and many now advocate a return to that status or its subordination to the Supreme Court. There are likewise moves to give more autonomy to the Judicial Training Centre, which is also under the ministry.

Despite its lack of formal jurisdiction, some judges complain of indirect interference from the ministry, while lawyers express fears that its power to license lawyers is misused. Judges complain less about interference from the legal department of the presidential administration, which is mostly concerned with presidential decrees and acts, though its officials also play a role in the selection of judges and other important legal matters and coordinate many international judicial projects. Much of the political influence of the presidential administration on the judiciary is exercised through informal channels rather than overt institutional pressure.

## C. THE PROSECUTOR'S OFFICE

The prosecutor's office is the most unreformed remnant of Soviet justice, and the one that most clearly distinguishes Kyrgyzstan's present judicial system from those in most democracies. It is an investigatory organ as well as a prosecuting body but also retains a supervisory

role over law enforcement and other justice agencies. It has long resisted reform but has been forced to give up some of its extensive powers. Notably it lost control over the prison system to the internal affairs ministry in 2002 and had to give up the right to issue arrest warrants to judges in October 2007. Nevertheless, it remains powerful, with considerable influence over the judiciary.

District offices of the prosecutor are still a world apart from Kyrgyz society, unwelcoming to the general public and much better kept than courts or police stations. Often with libraries, gardens and gymnasiums, they are quiet and orderly, without the latter's bustle and chaos. The walls and corridors are often lined with quotes from historical figures, such as Montaigne, Diderot and Rousseau, a leftover from high-minded Soviet rhetoric.

This slightly other-worldly approach to justice has some advantages, giving the prosecutor's office an esprit de corps sometimes lacking in other parts of the justice sector. It retains an institutional culture from Soviet times, when the prosecutor's office was the embodiment of the state. A caste of prosecutors emerged in the Soviet period which considered itself the elite of the justice sector, enjoyed considerable prestige and was usually much better educated and paid than, for example, most police.

While the prosecutor's office likes to claim that it attends to many complaints from ordinary citizens, in reality it is seen as difficult to access. Even lawyers complain that they are often unable to receive documents relating to investigations or court cases. It is also cautious about contact with the media, non-governmental organisations (NGOs) and international organisations.<sup>16</sup> In 2007 there were some attempts to open up contacts with civil society and the media, but only very cautiously and in very regulated ways.

Despite showing little public enthusiasm for reform, many officials are beginning to discuss the need for change. A middle-ranking official said, "we understand perfectly well our own problems; we suffer from them ourselves, and we want to make changes, but there's nobody even to discuss it with".<sup>17</sup> Some impetus for reform has come with the publication of research by the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI),<sup>18</sup> but there is a long way to go. While the police or the judiciary are used to admitting problems in public, prosecutors still tend to be defensive and reluctant to engage in self-criticism.

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<sup>15</sup> There are no set requirements for a man (it is an exclusively male preserve) to become an *aksakal*; they are usually recognised as such by leading a distinguished life and achieving the respect of the local community. Although they remain outside the formal judicial structures, laws have been passed detailing the work of the courts of elders. See the Law of the Kyrgyz Republic, no. 158, "On *Aksakal* Courts", 30 June 2003. For more background, see Judith Beyer, "Imagining the state in rural Kyrgyzstan: How perceptions of the state create customary law in the Kyrgyz *aksakal* courts", Max Planck Institute for Social Anthropology working papers, no. 95, 2007, at [www.eth.mpg.de/pubs/wps/pdf/mpi-eth-working-paper-0095.pdf](http://www.eth.mpg.de/pubs/wps/pdf/mpi-eth-working-paper-0095.pdf).

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<sup>16</sup> See "Prosecutorial Reform Index for Kyrgyzstan", ABA/CEELI, March 2007, at [www.abanet.org/rol/publications/kyrgyzstan\\_pri\\_10\\_2007.pdf](http://www.abanet.org/rol/publications/kyrgyzstan_pri_10_2007.pdf), p.44.

<sup>17</sup> Crisis Group interview, Bishkek, October 2007.

<sup>18</sup> "Prosecutorial Reform Index for Kyrgyzstan", op. cit.



## D. THE BAR

The legal profession was always a weak link in the Soviet justice system. Today advocates and lawyers are much more active in pursuing judicial reforms than judges and prosecutors but have not yet developed a strong culture of independence and self-governance.

Since the early 1990s, lawyers have gradually improved their status in the courtroom. In theory at least, they now have enhanced rights to function as proper defence advocates, although acquittals remain extremely rare. One said, “an advocate has a different status now, but it remains fragile. The [authorities] may [refuse] to give a lawyer any access – he can even be thrown out of the prosecutor’s office...But advocates are now able to use their legal rights”.<sup>19</sup>

The April 2007 legal reforms improved the position of lawyers, at least on paper.<sup>20</sup> They no longer need the permission of investigators to talk with a client. However, they claim that little has changed in practice, particularly in the south, where several indicated that police impede their access to clients, citing procedural restrictions on transferring defendants from their cells.<sup>21</sup>

The defendant’s right of access to a lawyer is most often denied during initial interrogations in police stations. There are almost no cases of punishment for such denial, and lawyers will most often not want to damage relations with the police or the prosecutor by filing a complaint. Defendants themselves have little faith in their lawyers or in the judicial process in general, so also tend to urge their lawyers not to damage those relations.

Some lawyers do insist on rights, but they are often stymied by official indifference. The lawyer Nina Zotova constantly battles against such problems. “There are plenty of laws, but no rights”, she claimed. “I presented a protest to the judge to ensure that he would give me access to the defendant within the allotted time. I spoke to him about the constitution. And he said, ‘I couldn’t care less about the constitution’”.<sup>22</sup>

Half of the 1,600 people taken to court for serious crimes in 2007 did not have money for a lawyer, according to

an NGO.<sup>23</sup> Although there is a state-funded system for those who cannot afford one, it pays only 98 soms (\$3) per day.<sup>24</sup> As a result, the bar is increasingly split into two main groups: more or less professional lawyers, with a relatively strong knowledge of the law, who work for business clients and other well-off people; and a second group, many of whom are less qualified and tend to work for poorer clients. Many of the latter are often manipulated by the prosecutor’s office or even judges. Often termed “pocket” or “black” advocates, they are the object of many complaints. Apart from the involvement of lawyers in corruption, judges often complain about their poor preparation in court.<sup>25</sup>

The profession still lacks a real culture of legal ethics. Applicants are supposed to pass an examination to obtain a license, but several categories of entrants are exempt, including former members of the law enforcement agencies. Many lawyers question whether these exemptions should be allowed.<sup>26</sup>

Lawyers are also calling for other steps to improve their independence and develop self-governance. A primary aim is to transfer the licensing system from the justice ministry to a self-governing body of legal professionals. Most lawyers admitted that in most cases, the ministry did not interfere in their work, but there was fear of such interference, particularly among those engaged in political cases.<sup>27</sup> The president vetoed a law in 2006 that would have established a self-governing association, but many leading lawyers still support the concept, arguing that membership should be compulsory for all practicing lawyers, and that its decisions should be binding on them.<sup>28</sup> As with all self-governance initiatives, there are also cynics, who suggest such an organisation might “simply replace the justice ministry and ... control us in just the same way”.<sup>29</sup>

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<sup>19</sup> Crisis Group interview, Sergey Slesarev, Bishkek, October 2007.

<sup>20</sup> They have confirmed the rights of a defence lawyer to collect and present evidence, present applications to the court and be present at interrogations of the defendant and court hearings. Importantly, a lawyer has immunity while performing his or her duties. “Law on Advocacy”, 24 March 2004, Articles 12, 16, 17.

<sup>21</sup> Crisis Group interviews, lawyers, Osh, January 2008.

<sup>22</sup> Crisis Group interview, Bishkek, May 2007.

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<sup>23</sup> Jenish Toroev, head of the Human Rights Advocacy Centre, press conference, Akipress, November 2007.

<sup>24</sup> Jenish Toroev, head of the Human Rights Advocacy Centre, press conference, Akipress, November 2007.

<sup>25</sup> Crisis Group interview, Bishkek, November 2007.

<sup>26</sup> For details see, “Legal Profession Reform Index for Kyrgyzstan”, op. cit., pp. 23-26.

<sup>27</sup> Crisis Group interview, Tabyldy Omuraliyev, lawyer, Bishkek, November 2007.

<sup>28</sup> Crisis Group interview, Nurlan Sadykov, Bishkek, October 2007.

<sup>29</sup> Crisis Group interview, lawyer, Bishkek, November 2007.

### III. THE PROBLEMS OF THE JUDICIARY

The justice sector faces a broad range of problems in three key areas:

- ❑ lack of independence from political or other forms of interference;
- ❑ failure to develop a sustainable funding mechanism and combat corruption; and
- ❑ inadequate qualifications and training of judicial personnel.

#### A. ACHIEVING INDEPENDENCE

The primary problem is the inability to take judicial decisions without interference from other state institutions, including the presidential administration, the government, legislature and local government bodies. This pressure makes itself felt in several ways: direct political persuasion, the selection procedures for judges and job tenure.

##### 1. Political interference

Locals call it “telephone justice”, the calls to judges from government offices that have become almost everyday practice and are widely expected in any political case. A former high-ranking official, who ended up in the dock on a false charge, tried to monitor the political pressure on the judge in his case:

I asked my guys to check through the telephone exchange all the calls into the judge’s chambers during the period when he was making his decision in my case. He was called by the presidential administration, the general prosecutor’s office and the Supreme Court. He did not telephone anybody himself. I was at least glad about that.<sup>30</sup>

It is illegal for politicians, or anybody else, to put pressure on a judge, but everybody is aware that it happens. During a court session in May 2007 concerning electoral disputes in the Kemin district, ordinary people waiting in the courtroom were well aware of it. One said, “I feel sorry for the judge, he is stuck between us and the authorities. He is waiting for a phone call from the White House and so cannot make a decision”.<sup>31</sup>

The connivance of judges in this process is largely a result of their dependence on the political authorities, but at least in part it stems from a Soviet-era mindset, when a telephone call from the provincial communist party committee (*obkom*) was expected by judges. A leading judge exaggerated only slightly when he said, “it only takes one person to call from the judicial department of the presidential administration for judges to run to implement the command”.<sup>32</sup> In fact, not all judges are in a hurry to implement political orders, but many still find it difficult to resist such pressure. An expert said, “they have more opportunities to oppose such pressure from above; there are new laws; but some of our judges themselves have not yet accepted their own independence”.<sup>33</sup>

A former judge explained how it works:

Officials speak to you very politely, not rudely at all. But they let you know which decision is “in accordance with the law”...If it’s impossible to “help”, then I explain why I can’t do anything. It’s good if somebody understands that and does not call any more. But sometimes they call you into their office. Or even worse, they come round and insist that you adopt “the proper decision”.<sup>34</sup>

Courts have been used during every election to exclude unwanted candidates. During the run-up to the December 2007 parliamentary elections, opposition parties that were denied registration by the Central Electoral Commission (CEC) on dubious grounds went to the courts to try to get the decisions reversed. One such party was Rodina (Homeland), formed predominantly from ethnic Uzbeks. Its leader explained that “when they saw that we had a chance to [win enough votes to enter parliament], the CEC falsified our documents, to pretend that sixteen members of our party were not Kyrgyz citizens. The court of first instance accepted that the CEC was correct”.<sup>35</sup> The Supreme Court affirmed the lower court’s decision, leaving many party members

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reportedly playing computer games, still awaiting the telephone call from Bishkek. Crisis Group observation, Kemin, May 2007. Former Supreme Court Chairperson Kurmanbek Osmonov admitted that he had called the judge, but only to tell him to “make the decision yourself”, Crisis Group interview, Bishkek, September 2007. The Kyrgyz president’s office is also known as the White House.

<sup>32</sup> Crisis Group interview, Bishkek, September 2007.

<sup>33</sup> Crisis Group interview, Bishkek, October 2007.

<sup>34</sup> Crisis Group interview, former judge, Bishkek, November 2007.

<sup>35</sup> Crisis Group interview, Kadyrjan Batyrov, Rodina Party leader, Bishkek, November 2007.

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<sup>30</sup> Crisis Group interview, Bishkek, August 2007.

<sup>31</sup> Indeed, the people waited fourteen hours for the judge’s decision, before finally storming his chambers. He was

disillusioned with the whole political and judicial process. One said, “it’s useless trying to use Bakiyev’s courts”.<sup>36</sup>

Constant interference by the presidential administration is slowly corroding any remaining faith in the electoral system and the judiciary. The lack of justice in the system is seized on by groups such as Hizb ut-Tahrir,<sup>37</sup> which have always been sceptical of the democratic constitutional framework and support Sharia law and the creation of an international Islamic caliphate.

It is not only the presidential administration and the government that interfere in court cases. Judges are also likely to get “requests for assistance” from members of parliament. Indeed, judges suggest that deputies interfere far more often. A Supreme Court judge complained:

We get fed up with deputies asking for favours. They call, even if you don’t know them personally, or they send letters asking you to “objectively assess such and such a case”, although such letters are illegal. [But] maybe sometimes they are just pretending to do whatever they can for their constituents.<sup>38</sup>

Even representatives of civil society can hardly resist the temptation to “call a friend”. The chairperson of one court complained that “human rights activists came and stirred up a scandal, before the court case had even been completed. And I said to the judge myself: ‘for goodness’ sake, release the defendant on bail’”.<sup>39</sup> During the case in Kemin in May 2007, mentioned above, it was the NGO leaders who forced entry into the judge’s chambers and tried to persuade him to rule in their favour.

Not surprisingly, Supreme Court judges experience much more direct political interference by the presidential administration or parliamentary deputies than members of the lower bench. One said, “when I worked as a district judge, I was really independent. I took a decision and did not worry much about whether it would be appealed or reviewed”. He claimed he experiences much greater pressure in his present post but said that politicians tend to target mainly the chairperson of the court.<sup>40</sup>

Judges do not usually face physical threats or repression if they oppose political pressure, but they may later find their careers blocked and eventually may lose their seats

on the bench.<sup>41</sup> It is this control over appointments that gives muscle to the political pressure, and why the appointments process is always so controversial.

## 2. Selection of judges

Although the president has the final say in approving judicial candidates, the shortlist is prepared by the National Council for Judicial Affairs (NCJA).<sup>42</sup> The process is fairly straightforward: a competition for vacancies is advertised in the media, information about all candidates is published in the newspapers and readers are asked to submit any complaints to the NCJA. Candidates undergo a qualifying exam – a computerised test of 150 questions – after which the 16-member NCJA interviews and votes on the candidates.<sup>43</sup> Two thirds of the members of the NCJA need to support each recommended candidate. In practice, the whole procedure is accompanied by informal lobbying by political patrons or other supporters of candidates. There is plenty of scope for political interference.

Competition is often intense, with sometimes twenty to 25 candidates for each post.<sup>44</sup> Many view a judgeship as the pinnacle of a legal career, and the post has become popular with ex-police officers and ex-prosecutors. But there are also less pure motives, notably the opportunity for illegal earnings from bribery or corruption.

Despite widespread criticism of the appointments procedure, there is no agreement on how to improve it. In 2006 a scheme was introduced under which candidates for local courts had to undergo hearings in parliament before being appointed by the president. The aim was to permit more public scrutiny of the process. About 80 candidates went through this procedure in December 2006, but it did not meet the expectations of reformers. Reports suggest that corrupt deputies demanded bribes from candidates, while others settled scores with judges who had crossed them in some way in the past. According to one source, some deputies even demanded signed notes from judges promising assistance if the deputy requested help.<sup>45</sup>

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<sup>36</sup> Crisis Group interview, Osh, January 2008.

<sup>37</sup> On Hizb ut-Tahrir, see Crisis Group Report, *Radical Islam in Central Asia*, op. cit.

<sup>38</sup> Crisis Group interview, Bishkek, November 2007.

<sup>39</sup> Crisis Group interview, Bishkek, October 2007.

<sup>40</sup> Crisis Group interview, Supreme Court judge, Bishkek, November 2007.

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<sup>41</sup> This was the opinion of almost everybody interviewed by Crisis Group.

<sup>42</sup> For more on the NCJA, including its composition, see Section IV B (2) below.

<sup>43</sup> Some criticise the test as not sufficiently testing of analytical skills. Nevertheless, many candidates still fail, because of lack of experience. According to Janyl Aliyeva, chairperson of the NCJA, a new test will be introduced within the next two years, Crisis Group interview, Bishkek, November 2007.

<sup>44</sup> Crisis Group interview, Iman Kochkorbayev, chairperson of the department of courts, Bishkek, October 2007.

<sup>45</sup> Crisis Group interview, judge, Bishkek, October 2007.

Parliament lost its role in appointing local court judges in the 2007 constitution, which returned full authority to the president. This was an unfortunate step back to more control from the presidential administration. It would have been preferable to explore alternative procedures. Even without a constitutional amendment, improvements can be made to the examination, for example, and to the transparency and objectivity of NCJA decisions.

One key change in the 2007 constitution was the granting of guaranteed tenure until retirement age to local court judges after a five-year probationary period. Previously, they were required to go through reappointment procedures every seven years.<sup>46</sup> This should lessen pressure on judges but may make their initial selection even more politicised. Supreme and Constitutional Court judges are confirmed by parliament on the recommendation of the president and also remain in post until they reach retirement age.<sup>47</sup>

### 3. Disciplining judges

In practice, of course, there are ways to get rid of those who are dishonest or corrupt. A complaint usually goes first to the Qualification Collegium, a body composed of eight judges and one representative of the presidential administration. If it is deemed to have merit, that body can recommend discipline or dismissal.<sup>48</sup> The NCJA has the power to dismiss an ordinary judge. A judge of the Constitutional or Supreme Court can only be dismissed on the president's proposal and with the agreement of two thirds of parliament. In practice there are relatively few dismissals. Three judges were so dealt with in 2005-2007,<sup>49</sup> while the chairperson of the Supreme Court, Kurmanbek Osmonov, was removed in January 2008.<sup>50</sup> The small number of dismissals may suggest some restraint by the political powers that be – or conversely that for the most part judges do not strongly oppose political instructions.

Perhaps more significantly, the relatively few disciplinary actions suggest a culture of impunity. A member of the NCJA said, "it is difficult to prove that a judge takes bribes. There was only one case in my memory".<sup>51</sup>

This makes it more difficult for advocates of judicial self-governance. "Judges are good at defending themselves, but they are not good at punishing themselves", a leading lawyer insisted.<sup>52</sup> Others suggest there is already a certain amount of internal policing already occurring, pointing to the more than 30 candidates turned down by the NCJA in 2007 as a sign of the judiciary's willingness to police its own ranks.

The other problem with existing disciplinary procedures is that criteria for deselecting working judges, or for refusing them promotion, are frequently arbitrary, or at least imprecise. They include: the number of complaints from the public or the prosecutor's office; the number of cases in which the judge's decision has been overturned on appeal; and the number of disciplinary punishments. In theory, these are all potentially indicative, but they are not necessarily easy to interpret. The percentage of successful appeals, for example, may be misleading. Many of these tend to be appeals undertaken by the prosecutor's office to obtain a stiffer sentence. If an appeals court imposes such a sentence, it is regarded as a "minus" for the local judge and often carries with it a suspicion that the original decision was influenced by corruption.

A system in which the judge who is regarded as most successful is the one who hands down the harshest sentences and largely agrees with the demands of the prosecutor's office reflects deeply ingrained practice from the Soviet period but is not necessarily conducive to justice. A young judge commented:

This way of assessing the quality of judges' work is a useful way of holding judges within the limits of the present system. If this criterion was abolished, judges would gain real independence. But in reality this will not happen soon – you have to change the way people think.<sup>53</sup>

## B. CORRUPTION AND FUNDING

### 1. Court corruption

In many ways, the judge has become just another political "resource" in a corrupt state system. Just as all politicians and informal leaders have their own journalist, their own police officer and their own network of government officials, so they also have their own judges, who are willing to provide favourable decisions.

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<sup>46</sup> Constitution of the Kyrgyz Republic (2007), Article 83, pt. 6.

<sup>47</sup> Ibid, Article 83, pt. 5.

<sup>48</sup> Though there has been no official announcement on the subject, senior judiciary officials believe the Collegium will soon be abolished. Eg: "The Collegium still exists for the time being, but not for long", Crisis Group interview, Nizamedin Azimjanov, Supreme Court Justice, 8 April 2008.

<sup>49</sup> Crisis Group interview, Ulan Arayev, technical secretary NCJA, Bishkek, November 2007.

<sup>50</sup> For further details on this case, see fn. 12.

<sup>51</sup> Crisis Group interview, Bishkek, November 2007.

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<sup>52</sup> Crisis Group interview, Gulnara Iskakova, Bishkek, October 2007.

<sup>53</sup> Crisis Group interview, Bishkek, November 2007.

Corrupt judges allow politicians to assert a legal basis for their machinations, including removal of opponents from power without resorting to violence. Buying a judge can wrap the most blatant business dealing in a veneer of legality. For those accused of crimes, buying a judge is the simplest way to avoid a prison term or loss of property. As noted above, the number of not guilty verdicts pronounced by a judge can be considered an indicator not of excessive leniency, but of excessive corruption. "If a judge is producing 40 per cent not guilty verdicts, that means his pockets are already bulging [with bribes]", said a leading justice official.<sup>54</sup> Sentences involving alternative forms of punishment, including non-custodial punishment, are widely regarded as almost always associated with bribery of the judge. As one judge said, "if someone's released from the courthouse, that means [the judge] took money".<sup>55</sup> Some judges are now so concerned to avoid the impression they may be taking bribes that they will try to avoid not guilty verdicts all together, creating another distortion in the system.

A lawyer in Osh asserted: "Not a single court case is decided in Osh without money. We, the lawyers, have turned into middlemen: we only take bribes to the judges from our clients".<sup>56</sup> A lawyer from Bishkek added:

The judicial machine has turned into a business machine. People are afraid to go to court without money. Everybody knows that the judiciary is corrupt and they do not want to take a risk – it's better to make sure. It's almost impossible to expect a legal decision. If both sides don't have any money, then you just might get a judge who will produce a legal decision, and that's only if he can be bothered.<sup>57</sup>

If both sides pay money, then a kind of competition begins, in which the law and the pleadings of the prosecutor and defence have almost no part. "Judges who have received money from both sides begin to 'play games' [with both sides]: for example, in property cases, they may agree not to take away a land title from one side, but in reality they still transfer it to the other side".<sup>58</sup>

In most cases, it appears that judges act with the connivance of other law enforcement or justice officials. The mother of a defendant claimed that "the prosecutor himself took money from me to pass it on to judges in Bishkek. He said that I need 90,000 soms [\$2,600] for

three judges".<sup>59</sup> In another case, a human rights activist recalled seeing a busload of traders from the bazaar outside a court in Bishkek. They had all been detained by the police for not having the right documents to work in the capital. The police were taking them to the court to frighten them into paying bribes.<sup>60</sup>

A specialist breed of "fixers" gets involved in difficult cases, particularly at the Supreme Court level. They accompany their clients from the first court case through the appeals process. A fixer alleged that some Supreme Court judges even ask him from time to time to "deliver" a case, so they can earn some money.<sup>61</sup>

In September 2007 Erkin Alymbekov, the former vice speaker, claimed in parliament that three judges in a Supreme Court case had each demanded \$10,000 from a defendant.<sup>62</sup> He repeated the figures in an interview and asserted that "we have to achieve the institutional independence of the courts and normal financing. If a judge has a full stomach, and there are free media outlets which will publish his [picture] if he breaks the law, then he will think ten times before making a corrupt decision".<sup>63</sup>

There is little doubt that extremely large bribes have been paid to some leading judges, but the corruption schemes often involve other members of the political elite in a more complex network of influence. This is corruption at a different level from the small bribes given to ordinary judges in criminal cases, much of which is a result of very low salaries and the overall poor financing of the judicial system.

## 2. Budgets

Kyrgyzstan is a poor country, which faces serious problems funding its health, education and welfare systems and a growing security budget in addition to the justice sector. However, even within this difficult economic context, the judiciary fares poorly: it receives less than 50 per cent of the funds budgeted for it. Much of the money arrives very late, and it is poorly allocated.<sup>64</sup> According to officials, the system needs 280-300 million

<sup>54</sup> Crisis Group interview, Bishkek, May 2007.

<sup>55</sup> Crisis Group interview, city court judge, Bishkek, October 2007.

<sup>56</sup> Crisis Group interview, September 2007.

<sup>57</sup> Crisis Group interview, lawyers, Bishkek, September 2007.

<sup>58</sup> Crisis Group interview, lawyer, Bishkek, October 2007.

<sup>59</sup> Crisis Group interview, Bishkek, November 2007.

<sup>60</sup> Crisis Group interview, Tolekan Izmailova, Bishkek, November 2007.

<sup>61</sup> Crisis Group interview, Bishkek, November 2007.

<sup>62</sup> Crisis Group observation, parliament, September 2007.

<sup>63</sup> Crisis Group interview, November 2007, Bishkek.

<sup>64</sup> In 2006 the judicial system received 41.7 per cent of the funds allotted in the budget passed by parliament; in 2007 disbursement improved slightly, to 50 per cent, Crisis Group interview, Iman Kochkorbayev, chairperson, department of courts, Bishkek, October 2007.

soms (\$8-8.6 million) to function properly but receives only about 170 million (\$5 million).<sup>65</sup>

The monthly salaries of judges were extremely low until 2008, between \$100 and \$200. In January 2008 the salaries of all state employees, including judges and court officials, were raised as much as 300 per cent. However, even these salaries are hardly commensurate with the status of judges. Supreme Court judges receive about 22,000 som (\$610) per month.<sup>66</sup> Judges and other officials at local courts receive considerably less. A provincial court judge's salary is 17,000 som (\$470), that of a district court judge 15,000 som (\$420). The salaries of experts and employees of the department of courts are even lower: the chief specialist receives 4,700 som (\$130).<sup>67</sup>

Other funding is even more meagre. Some courts, particularly in Bishkek, may get additional money from the city or local authorities but not in most poorer areas. In any case, funds are frequently delayed, often paid very late in the year. Expenses are not paid for many months: travelling costs for judges for 2006, amounting to almost one million som (\$28,500), had still not been reimbursed in late 2007.<sup>68</sup>

Vehicles – primarily used for delivering court decisions – are in short supply and often badly maintained. Bishkek City Court delivers 300 pieces of correspondence per day with only three cars. Of the 82 vehicles in the department of courts, 30 are not serviceable and 21 need a major overhaul.<sup>69</sup> Judges sometimes pay for such repairs themselves. One said she paid the court driver an extra salary, because his official wage was only 1,450 som (\$40).<sup>70</sup> A judge pointed out the disparity with other areas of government: “Look, how many cars does parliament or the presidential administration have? What kind are they? It is obvious that [their cars] weren't made in 1976. Where is the equality of different branches of government?”<sup>71</sup>

There are too few courtrooms. It has become usual practice to hold sessions in cramped judges' chambers.<sup>72</sup>

In Bishkek City Court, 27 judges huddle together in four small chambers. “Defendants can see what I write during the court session”, complained a judge.<sup>73</sup> Local authorities are usually responsible for finding buildings for the courts and help to finance their upkeep. But they are often short of funds, and this relationship also leaves local judges in a dependent position with regard to local politicians.

“We do not even have enough robes for judges”, a court chairperson claimed, “and we still write by hand. We have to buy our own paper and ink”.<sup>74</sup> Court buildings are not guarded during the day, and night guards receive only \$10 per month.<sup>75</sup> Cleaners get even less, around \$8, and judges often have to organise volunteers to clean up, or even wash the walls and windows themselves. The chairperson of one court concluded:

There is a lot of work, the conditions are terrible, and the courts have lost their reputation. We are dependent on everybody. The justice ministry does not give us any money. The Supreme Court forces us to adopt “political decisions”. Anybody can shout at you and get the sentence they want. But they should be addressing us as “Your Honour”.<sup>76</sup>

Lack of money and poor accommodation have a corrosive effect on morale and affect the prestige of judges. However, limited funding also hinders the technical capacity of the courts to carry out their business: for example, proceedings are summarised, not recorded in full, making them difficult to use in appeals.

There are several reasons for the lack of funds. The first, of course, is the country's poverty. However, judicial staff feel the justice sector does not get its fair share of what is available. Some, like the head of management in the courts department, blame the justice ministry: “After the transfer of the courts department to the justice ministry the funding has become worse. We have become a subordinate structure of a ministry. Courts should

<sup>65</sup> Crisis Group interview, Tokon Kasymov, judicial department, Bishkek, February 2008.

<sup>66</sup> Data provided by Jekshen Jandrallyev, supervisor, Supreme Court staff, Crisis Group interview, Bishkek, March 2008.

<sup>67</sup> All information on salary scales from the department of courts, Bishkek, March 2008.

<sup>68</sup> Crisis Group interview, Tokon Kasymov, judicial department, Bishkek, November 2007.

<sup>69</sup> Ibid.

<sup>70</sup> Crisis Group interview, Bishkek, March 2008.

<sup>71</sup> Crisis Group interview, Bishkek, October 2007.

<sup>72</sup> In 2005-2006 half of all sessions reportedly took place in judges' chambers, “Results of Trial Monitoring in the Kyrgyz Republic”, Organization for Security and Co-operation in

Europe (OSCE), Office of Democratic Institutions and Human Rights (ODIHR), Bishkek, 2007, p. 41, diagram 2.2.5.

<sup>73</sup> Crisis Group interview, Bishkek, November 2007.

<sup>74</sup> Crisis Group interview, judge, Bishkek, November 2007.

<sup>75</sup> A new law has been prepared which would introduce a system of court bailiffs. They would carry out security functions around court buildings and also guard participants in the proceedings, as well as ensure the appearance of possibly unwilling witnesses or others in court. They would likewise ensure the security of judges, a serious issue in the judicial sector after a series of incidents in 2005 in which protestors often invaded courts and threatened judges.

<sup>76</sup> Crisis Group interview, Bishkek, November 2007.

receive funding directly from the budget without [going through] a ministry”.<sup>77</sup>

Another problem is delivery of funds. The 2007 national budget was approved only in May, after which the courts received money irregularly throughout the year. This is not unique to the judicial sector: other government institutions suffer equally. Some of the budgetary processes are beginning to change. In 2008 the judicial system will draw up its own draft budget and lobby for its place in the national budget to be approved by parliament. In theory, this should give courts more independence, but disbursement of the funds is still likely to be influenced heavily by the ministry.

There are no easy solutions to the financing problems. Better budget formulation is a useful start, but some judges advocate more radical moves, suggesting that courts should retain part of the state taxes and duties that are paid in court.<sup>78</sup> These monies, however, are government income and help finance the overall budget. While such a reform might provide some short-term relief, controlling them could lead courts into a conflict of interest.

### C. QUALITY OF TRAINING

Kyrgyzstan has many able judges and legal professionals, but many observers have expressed concern at the declining quality of legal education in some schools and inadequate training to handle increasingly complex criminal and civil cases. While training is vital to produce a new generation of competent justice officials, it will not do so unless it takes place in the broader context of judicial reform. Indeed, training in the absence of structural reforms could be counterproductive. Kazakh human rights activist Evgenii Zhovtis pointed out: “If training proceeds parallel with reforms – that is one thing. If there is no political will, no reforms and you teach people how to act correctly in an incorrect environment – that is something different: they quickly become cynics”.<sup>79</sup> Training is closely linked to the political context in which it takes place, and the results with respect to law enforcement and justice officials are frequently very hard to evaluate.

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<sup>77</sup> Crisis Group interview, Tokon Kasymov, department of courts, November 2007, Bishkek.

<sup>78</sup> “If the courts were permitted to keep 20-30 per cent of state duties in their fund, they could resolve problems with transport, communications and other necessities”, Crisis Group interview, Kurmanbek Osmonov, former chairperson of the Supreme Court, Bishkek, September 2007.

<sup>79</sup> Crisis Group interview, Yevgeny Zhovtis, head of the Kazakhstan Bureau for Human Rights, July 2006.

While there is some cynicism about international programs, there is widespread acceptance that judges need better preparation and that training should be compulsory for all. At present, this is not the case, but it is particularly important given the influx of new personnel onto the bench from other branches of the justice sector – the police, the prosecutor’s office, the bar and also from academia. According to the head of the Judicial Training Centre (JTC), Dilyara Mulyukayeva, 40 per cent of candidates now come from the prosecutor’s office.<sup>80</sup> This has important consequences for judicial behaviour. The former head of the Constitutional Court, Cholpon Baekova, explained that “when personnel from other law enforcement agencies become judges, they judge just as they worked before: if a judge used to be a prosecutor, he judges like a prosecutor, accusing [all the time]; if he comes from the police, then he can’t judge at all”.<sup>81</sup>

It is not surprising that many of the judges who emerge from the NCJA process are far from adequately prepared for their new positions and frequently must be recalled. An official commented:

A judge passed the NCJA procedures with excellent marks, and he has an excellent CV. But he could not even write a court decision. He did not understand that he had to pronounce the sentence of the court in a predetermined time period: instead of ten days he gave out sentences after 40 days. We had to dismiss him after several months.<sup>82</sup>

The JTC is woefully underfunded. The ministry pays only low salaries for a few staff and some limited funds for lessons. Teachers – usually highly qualified judges – receive around 38 soms (\$1) for 80 minutes of instruction. There are no other specialised trainers, and, importantly, no personnel other than judges receive any training. Assistants of judges, bailiffs and technical staff all need training but are not included in present programs.

International organisations have often run programs in the JTC, but some officials complain that their priorities do not always meet the requirements of local personnel. “We conducted seminars with prosecutors on the international norms of legislation in several countries. But it seemed as if prosecutors did not need this; it did not offer them anything useful”, said a person involved in training.<sup>83</sup> The head of the JTC complained that “some

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<sup>80</sup> Crisis Group interview, September 2007.

<sup>81</sup> Crisis Group interview, September 2007.

<sup>82</sup> Crisis Group interview, member of the NCJA, Bishkek, November 2007.

<sup>83</sup> Crisis Group interview, Bishkek, October 2007.

international organisations never ask us what themes we are interested in, and what judges really need”.<sup>84</sup> A few judges have participated in international study visits and found them useful, but it can be difficult to transfer foreign experience back into the domestic context.<sup>85</sup>

Judges are most likely to take part in exchanges and study tours in countries of the Commonwealth of Independent States (CIS), particularly Russia, and frequently retain a Soviet-era perception of Russian judicial process. They sometimes tend to merely repeat the Russian experience at home. As Kyrgyzstan’s contacts have widened, judges may now also be familiar with the experience of European countries or the U.S., although many still have a rather remote conception of the justice system in other countries.

The experience of NGOs and international organisations has demonstrated that simply retraining former Soviet judges does not result in rapid quality improvement. Former public prosecutors and police investigators who have become judges seem even more resistant to training programs. The JTC needs to be able to develop independently a proper curriculum for enhanced judicial training based on the real needs of judges. Most importantly, the rules should change to ensure that all new judges receive specialised training. The justice ministry needs to seek ways to support the JTC with a proper budget and stable funding.

## IV. REFORMING THE SYSTEM

Reform should be concentrated in two major areas. Since much of the working of the judicial system is codified in the constitution, judicial reform also requires constitutional reform, which is a complex and politically charged process. The second area, slightly easier to address, is institutional reform.

### A. CONSTITUTIONAL REFORM

Constitutional reform has been one of the country’s key challenges since the overthrow of President Akayev in March 2005. The new regime was under constant pressure to change the fundamental law so as to reduce the extensive powers of the presidency, with regard to parliament and central and local government, but also to the judicial system. The relationship between the executive branch and the judiciary has been not just a subject for constitutional experts and lawyers, but also a major political issue between President Bakiyev and the opposition.

This dispute has been reflected in political events: there have been three new constitutions since March 2005. The first was adopted in November 2006, under pressure from mass opposition demonstrations, but was quickly replaced by a December version, under pressure from the presidential administration. Both were passed with little regard for legal procedure, which led to a Constitutional Court judgment in September 2007 rejecting both and in effect returning the country to the 2003 constitution.

President Bakiyev admitted in September 2007: “If we speak completely honestly and openly, the constitution of the country has become a victim of the political struggle ... Both the November and December constitutions were adopted with procedural malpractice... We have to accept our fault today”.<sup>86</sup> He then published his own draft constitution, which was adopted in a hurried referendum the next month. Opposition parties and independent observers claimed the result was falsified.

This constitution markedly increased the powers of the president with regard to the judiciary, particularly over appointments of judges to local courts and the chairpersons and deputy chairpersons of courts. Although all these appointments are made formally following recommendations by the NCJA, the composition of that organ and the procedure for the selection of candidates suggest the process is not sufficiently independent. As described

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<sup>84</sup> Crisis Group interview, Bishkek, September 2007.

<sup>85</sup> One of the recent participants in a trip to the U.S. said, “judges started to believe that it is possible to deliver fair justice in practice, that every day it is possible to receive all the changes in law in the past week, and that money from the justice department can actually reach judges”, Crisis Group interview, Dilyara Mulyukbayeva, Bishkek, September 2007.

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<sup>86</sup> President Bakiyev, “To the People of Kyrgyzstan”, speech, Bishkek, 19 September 2007.



above, procedures for dismissing judges and bringing criminal cases against them also require presidential action, although parliament is involved as well. Selections, short-listing, appointments and dismissals all are subject to the oversight of the presidential administration. As a result, the judicial system is largely dependent on that power centre. Again as noted, parliament has lost appointment responsibilities it shared under earlier constitutions.

The October 2007 constitution is unlikely to be amended again soon, unless there is renewed political upheaval. In any case, even positive constitutional changes will not have a beneficial impact on the judicial service unless there is a transformation in institutions and in the culture of the judiciary. Although it is still important for the judicial community to discuss alternative constitutional formulations, in the short term the more pressing requirements are for changes in institutional areas and the further development of a culture of judicial self-governance.

## B. INSTITUTIONAL REFORM

There are several areas in need, but purely administrative reform is not the only answer to most of the judiciary's problems. In many cases, changing the organisational hierarchy, for example, only changes the nature of judges' dependence. Nevertheless there are some important problems in the present institutional set-up that need review.

### 1. Department of courts

This department began life as a simple administrative body that provided a wide range of services for courts: buying furniture, paying for repairs and other matters such as collecting statistical information.<sup>87</sup> What seem on the surface routine tasks permit it to exercise considerable power over courts and judges through control of funds. In 2001 the department, which had been semi-autonomous, was transferred to the justice ministry, and many judges, particularly those on the Supreme Court, argue that it has now become just another lever of executive control. Kurmanbek Osmonov, the former chairperson of the Supreme Court, claimed that:

The department of courts has significant powers, we are directly dependent on them... Whether I can repaint the building, for example, depends on them, or for every minor detail of anything

technical, I have to go to them and bow down and ask them. It is direct dependence!<sup>88</sup>

Supreme Court Judge Larisa Gutnichenko spoke even more sharply:

The department of courts has been transformed from an organ that used to serve us into the exact opposite. Every chairman of a court is dependent: he asks the department of courts for chairs and for vacation, and if a judge criticises the department of courts, he won't receive chairs, and he won't receive vacation either. We wanted to do something positive, but instead have created a problem, a source of discord between the justice ministry and the Supreme Court.<sup>89</sup>

The department is also responsible for carrying out court decisions. Every year it receives 70,000 of these, but officials admit that only 45 per cent are implemented in practice:

Judges order the confiscation of property, but debtors often don't have any property. These are poor people, or those who have had time to re-register their property in other people's names, and at the moment of implementation of the court decision possess no property. That is the main reason for the non-implementation of court decisions.<sup>90</sup>

There are other problems with executing court decisions. The police are not always available to guarantee security for court bailiffs, who have been attacked and threatened by the subjects of court decisions. In July 2007 a bailiff in Osh died when a woman set him alight with petrol after he attempted to expel her from her home in accordance with a decision. In another case, a bailiff had his fingers cut off with an axe.<sup>91</sup>

For this often dangerous work, bailiffs are paid less than 3,920 som (\$110) per month. They have no vehicles and mostly have to use public transport. Some do not even have a telephone. Although they work for the justice ministry, in most cases they have to find a room in the local court. Often they have to pay some of their expenses out of their own pocket. In recent years, changes to their bonuses and premiums even seem to have worsened their situation. Almost inevitably, the system is plagued with corruption.

<sup>87</sup> Under the new constitution, local courts can form their own budgets; the department of courts will be engaged in this procedure, Constitution of the Kyrgyz Republic, Article 87, para. 2.

<sup>88</sup> Crisis Group interview, Bishkek, September 2007.

<sup>89</sup> Crisis Group interview, Larisa Gutnichenko, September 2007.

<sup>90</sup> Crisis Group interview, Iman Kochkorbayev, chairperson, department of courts, Bishkek, October 2007.

<sup>91</sup> Ibid.

The problems with the department of courts have led to talk of its transfer to the Supreme Court or establishment as some kind of autonomous structure outside the existing system. Its chairperson does not favour change:

Why would judges themselves manage the implementation of court decisions? They are already overworked. If the department is answerable to the Supreme Court, the chairman of the court will decide issues around judge's vacations, who will get a government car or not get one, which local court can be repaired and which not – so this will also be a lever of influence on judges. At the moment we do judicial statistics, but if judges do this, they may misuse these powers and falsify statistics in their own favour.<sup>92</sup>

Marat Kayipov, the justice minister, is also opposed to a change, particularly in relation to implementation of court decisions.<sup>93</sup> He argued: "I will not give up the implementation of court decisions. I carry out the sentence of the court in criminal cases. Judges are not capable of implementing court decisions in criminal cases and civil cases".<sup>94</sup>

Some are not convinced by the arguments from ministry officials. A head of department explained: "The White House [presidential administration] wants to influence the process of implementing court decisions, especially if it concerns, for example, a large bazaar or a factory. It is clear the authorities have their own interests".<sup>95</sup>

Donors are applying pressure for a change in the status of the department of courts. In particular, it is a condition of U.S. Millennium Challenge Corporation funding that it be transferred to the responsibility of the new Council of Judges envisaged by the 2007 constitution,<sup>96</sup> but the government objects. Whatever the real reasons for resistance to these reforms, in the long term it seems inevitable that implementation of court decisions will have to shift to judicial structures. The present system is not working, impinges on judicial independence and lessens the responsibility of judges for their decisions.

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<sup>92</sup> Ibid.

<sup>93</sup> In the Soviet period, implementation of judicial decisions was a function of the courts themselves, and the institution of court bailiffs was an important part of the court system. A case was not considered closed until a judge had confirmed that his or her decision was implemented.

<sup>94</sup> Crisis Group interview, Marat Kayipov, justice minister, Bishkek, September 2007.

<sup>95</sup> Crisis Group interview, Bishkek, November 2007.

<sup>96</sup> Kyrgyzstan Millennium Challenge Account Threshold Country Plan, Component 1, Measure 2.

## 2. National Council for Judicial Affairs

Initial reforms in the 1990s tried to increase self-governance by judges, with a Council of Judges developing a role in appointing and dismissing judges. In 2002, however, this body was abolished, having, according to some versions, irritated the government with its efforts to establish its independence. Instead, in 2004, the NCJA was established. Now the main body involved in appointing and dismissing judges, it has sixteen members, representing the judiciary, government, parliament and civil society. According to the lawyer Nurlan Sadykov, the "parity of representation of judges, the government, parliament and the civil sector does not allow the president to appoint judges on his own".<sup>97</sup>

In practice, however, the presidential administration has much more control than the numbers alone would suggest. The president can veto a decision of the NCJA regarding selection or dismissal of a judge. Cholpon Baekova, one of the initiators of the NCJA, is critical of what it has become: "The NCJA has turned into a state organ for the selection of judges".<sup>98</sup> Judges themselves are only one quarter of the membership, and the chairmen of the Constitutional Court and the Supreme Court are not included.

Views differ on the composition. Perhaps not surprisingly, judges believe there are too few judges; government ministers tend to support the status quo. A Supreme Court judge claimed:

International practice suggests that one half of such a body should be composed of judges. But now the NCJA has turned into a "collective farm meeting". The chairman of the Supreme Court could at least be part of the composition. The Supreme Court knows about the quality of the judges' work, so why should he have nothing to do with the selection of judges?<sup>99</sup>

Kayipov, the justice minister, believes that "judges should not take part in the selection of judges".<sup>100</sup>

Clearly, the present NCJA does not provide much independence to the appointment process. However, other approaches – including judges managing their own appointments process – may not be a panacea, given the high level of corruption in the system. Probably the best

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<sup>97</sup> Crisis Group interview, Nurlan Sadykov, Bishkek, October 2007.

<sup>98</sup> Crisis Group interview, Cholpon Bayekova, Bishkek, September 2007.

<sup>99</sup> Crisis Group interview, September 2007.

<sup>100</sup> Crisis Group interview, Marat Kayipov, justice minister, Bishkek, September 2007.

idea is to gradually increase the number of judges on the NCJA, initially to 50 per cent, and eventually to two thirds. Executive and legislative branch involvement should be minimised or done away with, while NGO sector involvement should be retained. Whether the chairpersons of the Supreme Court and the Constitutional Court should have a role depends as much on personal qualities as institutional necessities.

While voting should be made secret, the overall procedure should become more transparent and predictable. The president's right to veto NCJA decisions ought to be scrapped. For now, however, the cynicism of a young judge about the entire process is characteristic: "This is a nicely set-up scheme. But in reality, it is the interventions by high level patrons and money – that is what is really decisive in appointing judges".<sup>101</sup>

### C. JUDICIAL SELF-GOVERNANCE

As long as appointments remain so dependent on political leaders, a truly autonomous judicial system seems remote. However, some steps have been taken towards more self-governance for judges, at least in theory. A constitutional basis for this emerged for the first time in Article 91 of the 2007 constitution, which outlines a Congress of Judges and a Council of Judges. In theory, these bodies would decide issues of internal regulation, internal budget formation, defence of the rights of judges and disciplinary procedures. An implementing law is expected in 2008, but there are some concerns that it may create too much potential for the presidential administration to control these organs. It is also not clear that they will be given sufficient capacity to carry out all the tasks for which they are to be responsible, such as budget formulation.

Some experts consider these limited proposals far from adequate. Reformist lawyer Nurlan Sydykov favours complete autonomy for the judicial system. He suggested that the department of courts should be answerable to the Council of Judges, as in effect its executive arm:

Judicial reform has been very superficial. Everybody talks about the independence of judges, about judges' salaries, about periods of tenure as judges, but nobody talks about the autonomous functioning of the judicial system.<sup>102</sup>

Opponents of increased self-governance are more sceptical about the potential for judges to achieve a level of independence without worse corruption. However, on the basis of the new constitution, another

law received presidential approval in March 2008. The law is intended to provide a wide degree of self-governance, including assurances that the department of courts reports to the Council of Judges and that the Judicial Training Centre is subordinated to the Council.

A self-governance system will need to reform the way disciplinary cases are handled. At present, court chairpersons have excessive powers in this area, something that could be largely taken over by the Council of Judges. Court chairpersons also have the power to distribute cases as they see fit, which can also be used to manipulate judges. Most administrative duties of court chairpersons could be taken over by specialised technical managers, and cases could be assigned randomly. A new judicial self-governance system should be more democratic and less hierarchical. Ordinary judges complain that the office of the Supreme Court chairperson tends to interfere in their court processes. Judges need to be protected not only from government interference but also from that of their own colleagues.

### D. REFORMS IN THE PROSECUTOR'S OFFICE

While major early reforms are unlikely in the judiciary, there is at least an ongoing discussion. In the prosecutor's office that discussion has hardly begun. Many of its functions – including supervision, investigation and prosecution – are still formally similar to those during the Soviet era.

#### 1. Supervisory functions

One of the key functions of the prosecutor is to supervise investigations in the pre-trial period and ensure that the rights of the accused are not abused. In theory, the prosecutor should investigate any abuses reported against defendants. In practice, few have time for this. An expert, Abdykerim Ashirov, noted that:

The prosecutor used to visit the IVS (temporary detention facility) from time to time<sup>103</sup> and made notes in the visitors' book. Now you never see the prosecutor in the IVS. Prosecutors do not stop torture by investigators. Investigators and prosecutors have an effective private agreement: the prosecutor, who has issued the arrest warrant,

<sup>101</sup> Crisis Group interview, Bishkek, November 2007.

<sup>102</sup> Crisis Group interview, Bishkek, October 2007.

<sup>103</sup> IVS is the acronym for *izoliator vremennogo soderzhanii* (temporary detention facility). Suspects are detained in the IVS until a prosecutor decides whether to pursue the case. The IVS is usually in the basement of a regional police office. Conditions are much worse than in prisons, and the rights of prisoners are violated much more often than in prisons. See Crisis Group Report, *Kyrgyzstan's Prison System Nightmare*, op. cit.

wants to confirm the accusation and turns a blind eye to the complaints of torture by those under investigation.<sup>104</sup>

His allegations are confirmed by statistics that show not a single charge was brought in 2005-2006 under Article 305-1 of the criminal code, which outlaws torture. There is some hope that after the transfer of the right to issue arrest warrants from the prosecutor to the judge, prosecutors will pay more attention to abuses of those charged with crimes. Human rights groups and the national ombudsperson do some monitoring in IVS and other places of detention, but this is not adequate in the absence of the prosecutor's office, which has much greater powers to prevent and stop torture and other abuses.<sup>105</sup>

The supervisory area is where some of the greatest changes in the prosecutor's role could come. However, supervision is the least prestigious of the prosecutor's tasks, offering no potential for additional income. It can also bring a prosecutor into conflict with law enforcement agencies, whereas in many other areas, a close-knit network among police, prosecutor and judges facilitates corruption.

## 2. The prosecutor's role in the court process.

Although there have been changes to the formal status of prosecutors, they remain more influential than other players in the courtroom. Certainly the prosecutor has considerably more power than the defence counsel in an arena that is largely intended to prove criminal charges. Roughly 98 per cent of court cases result in a guilty verdict, something that the prosecutor's office views as a sign of efficiency.<sup>106</sup> Despite the fact that most charges are based on poor investigation, they are rarely questioned by judges, who tend to favour guilty verdicts, overtly support the prosecution in their statements during the court process and have even reportedly made threats and unfounded accusations against the accused.<sup>107</sup> A judge said, with some despair:

If they acted according to the law, then every second case should lead to an acquittal: investigations are carried out badly, and we make up evidence. But if we acquit somebody, they accuse us of doing it for a reward. All acquittals – 100 per cent – are reversed by the prosecutor's office.<sup>108</sup>

In most cases, the judge and the prosecutor run the trial and decide the sentence together. Crisis Group was told of a process that took place in the judge's room: "When the judge announced that the court was retiring for a meeting, it meant we [the defendant and his lawyer] had to leave the room. The judge remained in his room with the prosecutor".<sup>109</sup> The implication was that the judge and prosecutor consulted to decide the case between themselves. A prosecutor and a judge may also maintain close contacts outside the court. "We laugh when they tell us that in Western countries there is a strict limitation on this, and that if a judge is found in a bar with a prosecutor, it might be very damaging for his career", a lawyer said.<sup>110</sup> There are psychological elements to this close support for the prosecutor. A lawyer said, "when the judge sees the eleven volumes of a criminal case which the prosecutor has studied before launching his case, the judge naturally takes his side, particularly if the lawyers have prepared the defence badly".<sup>111</sup>

Despite these close relationships, the influence of the prosecutor on the court has diminished markedly since Soviet times. The prosecutor has also been drawn into the corrupt network of politics and business, however. A lawyer claimed: "They put pressure on the prosecutor 'from above' as well. The prosecutor, like the police and the judiciary, works on a business basis: a decision in exchange for money".<sup>112</sup>

## 3. The prosecutor as investigator

The prosecutor is responsible for investigating specific categories of crime, including those involving constitutional rights, crimes against police or other law enforcement agents and crimes carried out by officials or involving extortion or other economic crimes. There is some overlap with the police, who have the primary responsibility for criminal investigation. Some experts have suggested the prosecutor's investigation role should be transferred to an investigating judge or the police. The prosecutor's office would then solely be responsible for conducting the prosecution in court. A former parliamentary committee

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<sup>104</sup> Crisis Group interview, Abdykerim Ashirov, secretary of the working group on the project "Conceptions of Judicial Reform", Bishkek, October 2007.

<sup>105</sup> Judges pay little attention to allegations of torture. Reportedly, in 60 per cent of cases judges did not take any actions in response to such complaints by defendants, "Results of Trial Monitoring", op. cit., p. 76, diagram 2.6.3. The monitoring, conducted in 2005-2006, covered 1,134 court cases.

<sup>106</sup> In 2005, 11,460 people were convicted and 214 acquitted. In 2006, the figures were 11,401 and 211 respectively. In the first nine months of 2007, there were 8,242 convictions and 173 acquittals. Crisis Group interview, Lyubov Ivashchenko, department of courts, Bishkek, November 2007.

<sup>107</sup> "Results of Trial Monitoring", op. cit., pp. 35, 58.

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<sup>108</sup> Crisis Group interview, Bishkek, November 2007.

<sup>109</sup> Crisis Group interview, Bishkek, October 2007.

<sup>110</sup> Crisis Group interview, Bishkek, October 2007.

<sup>111</sup> Crisis Group interview, lawyer, Bishkek, October 2007.

<sup>112</sup> Crisis Group interview, Bishkek, October 2007.

headed by Alisher Sabirov considered a single investigation committee to be formed from all law enforcement agencies, under the interior ministry.

That might improve coordination among the eight bodies that do criminal investigations.<sup>113</sup> There is considerable overlap among these, particularly in economic crimes, where six of the eight claim responsibility, and in crimes involving state officials (five of the eight). Still, the police investigate 80-85 per cent of all registered crimes, which is why most reform proposals suggest that a single investigation department should be formed under the interior ministry, which would take on the investigative functions of all other bodies. If this were done, the prosecutor's office would lose considerably more influence, retaining only its supervisory function and its court role. This might also improve judicial independence, but it will be resisted, not only by the prosecutor's office but also by other agencies that wish to retain an investigatory capacity. It is unlikely to happen in the foreseeable future, but the tendency to limit the prosecutor in both investigations and court proceedings is clear.<sup>114</sup> The prosecutor's office also needs to become more accessible for citizens' complaints and the media.

## V. INTERNATIONAL SUPPORT FOR JUDICIAL REFORM

A variety of international programs have been initiated in support of judicial reform that have at least contributed to broadening the range of views and information within the judiciary, even if most have not had an extensive or lasting impact on the justice system. There is still interest in providing more funding for projects in this area and scope to affect the reform process. Clearly, nothing can replace political will for moving reforms, but there are many areas where international involvement can make a difference.

### A. MILLENNIUM CHALLENGE CORPORATION (MCC)

One of the most ambitious projects is the Threshold Program of the U.S. Millennium Challenge Corporation (MCC), approved in August 2007, which has allocated approximately \$16 million to tackle corruption and strengthen the rule of law. This broad-ranging grant focuses on three components: the effectiveness of the judiciary; fighting corruption in law enforcement agencies; and more effective criminal prosecutions.

Justice ministry officials have already expressed scepticism that the program will make any difference, fearing that much of the funding will go to foreign consultants.<sup>115</sup> The overall project will be managed by the U.S. Agency for International Development (USAID), which will focus on the effectiveness of the judiciary system and contract with implementing partners to administer training programs and reform projects aimed at judges. Programs to support and train the courts of elders may prove controversial, given the criticisms of those courts. The U.S. Department of Justice will implement the components dealing with corruption in law enforcement bodies and reforms of the prosecutor's office.<sup>116</sup>

The project is designed to last two years, a short time in which to implement real reforms. In many cases MCC

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<sup>113</sup> Including the internal affairs ministry, the state committee for national security, the financial police, the customs inspectorate, the border guards service and the drug control agency, in addition to organs of state security and bodies in the criminal executive system of the justice ministry.

<sup>114</sup> According to a former prosecutor and former judge, "earlier [the prosecutor] checked the decision of the judge and wrote a protest [if he disagreed], which was always upheld. Now not every statement of the prosecutor is recognised as correct. Now judges are not afraid of prosecutors, although they are anxious that a complaint against a judge will go to other bodies and will be considered in making an appointment to a new post", Crisis Group interview, Ulugbek Azimov, Bishkek, November 2007.

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<sup>115</sup> Crisis Group interviews, justice ministry, Bishkek, September 2007.

<sup>116</sup> Funding will be applied to training prosecutors in such areas as "improving witness and victim protection, combating money laundering and terrorist financing, and targeting corruption". The grant will also support "procuracy institutional reform by promoting continuing legal education, ethics, and public education". The International Criminal Investigative Training Assistance Program will provide assistance to the internal affairs ministry. Crisis Group interview, Bishkek, October 2007.

proposals will come up against strong political opposition. Kyrgyzstan's desire to qualify for the significant aid available in stage two of the MCC program will be balanced by the desire of the leadership to retain control over all branches of government, including the judiciary. Moreover, in general, the country's appetite for Western programs with prescriptive plans, largely conducted by outside consultants, has diminished markedly. Legislators, the legal profession and civil society already have good reform proposals. The problem is a lack of political will to implement them.

## B. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE)

The OSCE was one of the pioneers of judicial reform in Kyrgyzstan and currently conducts two projects in Talas and Naryn *oblasts*, which give free legal aid to people in temporary detention facilities (IVS). They work with Public Foundation "Legal Aid", an NGO that provides legal consultation on criminal and civil cases and pays for defence lawyers at all stages of a criminal prosecution. The OSCE projects also offer advice to IVS personnel. As Legal Aid spends many hours at the IVS, it conducts some monitoring functions, although this is not its main task.<sup>117</sup>

The OSCE field office in Osh runs similar programs. In Batken province it works with the Human Rights Advocacy and Democracy Centre to provide free legal aid. The current project focuses mostly on civil cases.<sup>118</sup> In Jalal-Abad and Osh provinces two implementing partners, "Solomon's Ray" and "Our Right", give free legal help to detainees in the IVS and in the prison in Jalal-Abad city. The Human Rights and Advocacy Centre in Osh city offers free legal consultation and representation primarily on criminal cases to vulnerable persons.

The Osh office has funded research on the work of courts of elders and given follow-up training. The information received from the research was used in legislative drafting.<sup>119</sup> The hope is that funding these

programs will help to protect human rights and resolve conflicts in rural areas, where access to courts is limited or avoided. Other projects include support for a training centre for prosecutors and dissemination of Supreme Court news.

## C. SOROS FOUNDATION

The Soros Foundation has been closely involved with a number of projects aimed at improving the legal system's compliance with international standards, particularly focusing on humanising criminal legislation. It achieved at least a partial result in the laws of May-June 2007 which abolished the death penalty and reduced terms for other crimes.<sup>120</sup> It has also been working on a project to introduce jury trials, including contributing to a draft bill. As noted, discussion of jury trials has been gaining support for several years.

## D. DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT (GTZ)

GTZ has been one of the leading international supporters of judicial reform. Its current program, "Legal Reform and Reform of the Judiciary in Central Asia", includes several aid and training projects directed at members of the judiciary.<sup>121</sup> It works closely with the Judicial Training Centre and the Supreme Court, organised training sessions for all newly appointed judges in 2007, which will continue in 2008, and has started a program to train bailiffs. It works with "JurInfo", a legal clinic, to make television programs based on real trials, which depict an entire litigation process and include expert commentary. This is a useful way to develop more discussion about the justice system and improve the legal culture.

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<sup>117</sup> OSCE also has a project which runs in parallel and provides free legal aid to low-income people. It is conducted by the NGO Council of Unity. OSCE also has projects aimed at providing free legal aid in Chüi, Ysyk-Köl and Naryn which are parts of other programs.

<sup>118</sup> In the future it hopes to examine more criminal cases in conjunction with its mandate, Crisis Group interview, November 2007.

<sup>119</sup> These laws included "About the Ombudsman (*Akyikatchy*) of the Kyrgyz Republic", "About the Courts of Elders", "About Social and Legal Protection from Violence in the Family" and "About the Basis of State Guarantees of Gender Equality

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Maintenance". See Dzhengish Toroev, "Sudy aksakalov v Kyrgyzstane" ["*Aksakal Courts in Kyrgyzstan*"], *Yurist*, no. 1, 2005, at [www.zakon.kz/magazine/archive/2005\\_01\\_12.asp](http://www.zakon.kz/magazine/archive/2005_01_12.asp).

<sup>120</sup> In 1998 a moratorium was imposed on use of the death penalty, and in 2004 amendments limited the range of crimes for which the death penalty could be applied. "Appeal by the Human Rights Centre 'Citizens against Corruption' and partners network 'People Changing the World' (Kyrgyzstan) to the participants of the Supplementary Human Dimension Meeting: Promotion and Protection of Human Rights", 12 July 2007, at [www.osce.org/documents/odhr/2007/07/25565\\_en.pdf](http://www.osce.org/documents/odhr/2007/07/25565_en.pdf).

<sup>121</sup> The project is scheduled to finish in 2011.

## VI. CONCLUSION

Kyrgyzstan took some bold first steps towards judicial reform in the 1990s, but gradually its leadership, increasingly afraid of the political consequences, resumed Soviet-era practices of political interference and executive control. As a result, the court system has lost its reputation for fairness and justice and is widely mistrusted by the population. It has played a consistently negative role in political and electoral disputes, failing to act either as a check on growing authoritarianism or as a neutral arbiter of political disputes. The inability to establish real rule of law in the economy has dissuaded investors, both foreign and domestic.

Despite some progress in greater humanisation of sentencing and some positive elements in recent constitutional changes (such as increased tenure for judges), President Bakiyev has demonstrated the same fear of an independent judiciary as his predecessor. Constitutional changes have increased the president's power to appoint and dismiss judges and court chairpersons. The apparently independent National Council for Judicial Affairs (NCJA) is indirectly controlled by the presidential administration. Overall, constitutional changes have diminished rather than affirmed judicial independence. Many officials, in both the justice sector and the government and administration, understand the need for rule of law and an effective judiciary, not least to allow the growth of a more sustainable economy. However, the present system is very convenient for many officials, for both assertion of political control and personal enrichment.

Many judges desire a more independent approach but are restrained by their dependence on the political authorities for career advancement. Government control over the department of courts also creates a strong material dependency for courts and judges. The reliance of many courts on local authorities for funds creates another network of dependence. Achieving a more efficient funding system and reducing the courts' everyday reliance on the executive branch is not difficult to achieve institutionally and would cost little in the budget. It would, however, undermine some existing corruption networks and deprive the government of a lever of control over the judiciary.

Once a new system is in place, the budget needs to allow a gradual increase in money. Particular priority should be given to judges' salaries, one of the main causes of the system's endemic corruption. At the same time, judges need to develop more stringent internal ethics codes and procedures.

A new impulse for judicial reform may come through emerging self-governance institutions. In the past, such initiatives have too often proved ineffective and become simply another source of corruption and pressure on judges. A reformed system needs to emphasise transparency and guard against introducing new judicial hierarchies.

Lawyers and prosecutors have also become part of a corrupted system. Some lawyers, at least, have fought to reform the system, but they also lack strict ethics codes and are often implicated in corrupt schemes. Indeed, conspiracies between judge, prosecutor, police investigator and defence attorney have become common practice. The prosecutor's office in particular needs reform. This remnant of the Soviet legal system should be much more involved in protecting the rights of detainees. Overall, it requires a fundamental reconfiguration to streamline its multiple (and sometimes contradictory) functions. Initiating reform must involve relatively open discussion, including with senior members of the prosecutor's office, which will be difficult unless they are permitted to interact more freely with civil society and the media.

While there has been significant discussion of many of the intricacies of institutional and constitutional reform, some experts seem to have lost sight of the fundamental injustice that regularly results from the judiciary's work. As already noted, only 2 per cent of defendants are found not guilty; the majority of those convicted receive a custodial sentence. There is still minimal judicial criticism of police investigations (despite their low quality) or of confessions, which are often extracted by torture. Continuing stress is required on human rights and increased efforts to monitor and report on court cases and the judicial system. Funding for reforms should not ignore NGOs involved in human rights and should support in particular those that are campaigning for serious strategic reform.

In a country desperate for foreign investment, improving the effectiveness of courts should be a priority. For reasons of internal stability, also, rapid improvement is a necessity. The increasing willingness of some sectors of the population to seek rough and ready justice through informal leaders or to support Sharia law suggests that some are disillusioned with the secular justice system. In a time of political turmoil, the political elite also need neutral arbiters of disputes. The present use of courts by all political forces to fight their battles is ultimately corrosive.

President Bakiyev has pointed to the need to satisfy investors: "The state should give a signal to society, to business and to foreign investors that in Kyrgyzstan human rights and property rights are guaranteed, and the supremacy of the rule of law is assured. That is why

today we are in desperate need of judicial reform".<sup>122</sup> But such rhetoric has not yet produced any results that improve the low level of investment or provide greater protection to domestic entrepreneurs. Indeed, the political changes introduced by President Bakiyev have tended to limit the freedom of both the legislature and the judiciary and to recentralise power in the presidential administration. This approach is always tempting for leaders confronted with the often chaotic reality of Kyrgyz society, but in the long run it is counterproductive.

As with Kyrgyzstan's political progress, judicial reform has proceeded in fits and starts, with many reversals. At the same time, there are now significant voices inside the judiciary and the wider justice sector who wish real changes, not just more rhetoric. If they are given the chance to push for greater reform and are supported by the international community, there may yet be positive changes that would regain for the judicial system some of the popular trust that has been lost.

**Bishkek/Brussels, 10 April 2008**

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<sup>122</sup> Bakiyev, speech, op. cit.



APPENDIX A

MAP OF KYRGYZSTAN



## APPENDIX B

### ABOUT THE INTERNATIONAL CRISIS GROUP

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The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with some 140 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international decision-takers. Crisis Group also publishes *CrisisWatch*, a twelve-page monthly bulletin, providing a succinct regular update on the state of play in all the most significant situations of conflict or potential conflict around the world.

Crisis Group's reports and briefing papers are distributed widely by email and printed copy to officials in foreign ministries and international organisations and made available simultaneously on the website, [www.crisisgroup.org](http://www.crisisgroup.org). Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring the reports and recommendations to the attention of senior policy-makers around the world. Crisis Group is co-chaired by the former European Commissioner for External Relations Christopher Patten and former U.S. Ambassador Thomas Pickering. Its President and Chief Executive since January 2000 has been former Australian Foreign Minister Gareth Evans.

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