

ATTACKS ON JUSTICE – KYRGYZSTAN

Highlights

The operation of Kyrgyzstan's judiciary has remained largely within the control of the executive. There is no effective separation of powers and the prerequisites for judicial independence are not entrenched in law. This has allowed the government to use court proceedings, including the institution of criminal libel actions, as a weapon against political opponents, human rights defenders and the independent media, with impunity. The Ministry of Justice has complete control over the licensing and discipline of lawyers and advocates, which compromises the profession's ability to perform its duties freely and diligently. Citizens do not enjoy effectively due process and fair trial rights. Domestic measures taken to combat terrorism also jeopardize these fundamental guarantees. A 2003 referendum approved constitutional amendments, which increase the powers of the President and weaken the Parliament and the Constitutional Court.

BACKGROUND

The government of Kyrgyzstan has moved in recent years in an authoritarian direction. During 2002, President Askar Akayev's government violently suppressed peaceful demonstrations, imprisoning political opponents and undermining media freedom. Prime Minister Kurmanbek Bakiyev resigned from his position as a result of protests in May 2002 after five people demonstrating against the arbitrary detention of an opposition politician were killed; earlier, 90 people – including 47 police officers – had been injured in a demonstration in March 2002. He was replaced by Nikolay Tanayev. An attempt by Parliament to introduce a bill giving amnesty to those responsible for the incident was defeated following domestic and international calls for accountability. Six police officers and local administrators were accused of abuse of power for their role in the incident and stood for trial in September 2002. After several delays, the case was remanded for further investigation (<http://asiapacific.amnesty.org/report2003/Kgz-summary-eng>).

In August 2002, the President established a Council for Constitutional Reforms comprised of government officials, parliamentarians, opposition figures and human rights defenders. This was replaced in January 2003 with a group of experts to expedite the drafting of amendments to the *Constitution* before the February 2003 constitutional referendum. Amendments to the [1993 Constitution](#) were passed which increased the personal powers of the President, giving him greater powers to dissolve Parliament, an almost absolute right of veto over legislative activity and affording him and his family lifetime immunity from prosecution for criminal offences after the expiry of his term of office in October 2005. Other important amendments include the replacement of a two-chamber parliament with a single chamber and the abolition of party-list voting for parliament. A linguistic change to Article 12 undermines the previously direct applicability in domestic law of ratified international treaties, including human rights treaties.

The rule of law has deteriorated during the period and there is little public confidence in the legal system. Under President Akayev, the judiciary's constitutional status as an independent arm of government has been eroded, and executive authorities have concentrated considerable political power in their hands, typically preventing the legislature and the judiciary from acting independently.

Human rights defenders have been subjected to harassment, surveillance and arbitrary arrest and detention. Criminal libel suits have also been used to silence independent journalists, human rights activists, lawyers and political dissidents. Freedom of expression is curtailed and journalists who are critical of the government are often punished. In January 2002, the government issued *Decree 20*, which restricted the operations of the independent press by requiring state registration and monitoring. The law was repealed in May 2002 following international and national pressure that included legal commentaries and concerted advocacy by the Association of Attorneys of Kyrgyzstan (AAK); nevertheless, the independent newspaper *Moya Stolitsa* was closed during the year (www.internews.kg/index.php?newlang=eng).

Parliamentary and presidential elections are due to be held in February 2005.

JUDICIARY

Judicial reforms

Steps towards judicial reform have been reported recently, including the streamlining of the court system, increasing court budgets and enhancing the professionalism of judges by requiring continuing education. In addition, a new process for the appointment of lower-court judges was introduced in 2003, which required candidates to pass a formal examination as a prerequisite to presidential nomination (<http://www.freedomhouse.org/template.cfm?page=47&nit=336&year=2004>).

These reforms have been welcomed as a means of introducing greater transparency and objectivity to the judicial system, although the perception remains that judges are selected on the basis of connections rather than merit and according to their loyalty to the existing regime, or that judicial positions are “bought” as, once appointed, judges will be able to solicit bribes from parties seeking favourable outcomes.

In June 2002, the *Law on the People's Rights Defender* was adopted and as a result the first ombudsman was elected in November 2002. Reportedly the office of the ombudsman has been plagued not only by an absence of structures and systems to properly deal with complaints but also by apparent chronic budget shortages. By June 2003 the ombudsman had received some 800 complaints, mostly regarding the law enforcement agencies. International organizations were concerned about the ombudsman's lack of independence.

Independence

There is widespread mistrust in judges, as the public often perceives their rulings to be determined by bribes by one or other of the parties to a trial, or to be unfair and politically motivated

(<http://www.freedomhouse.org/template.cfm?page=47&nit=336&year=2004> – 2004 report on Kyrgyzstan).

The February 2003 Constitutional amendments strengthened the President's power to control the composition and conduct of the judiciary, undermining its impartiality and weakening the Constitutional Court, which is no longer able to “render decisions concerning the constitutionality of practices in the application of laws which affect the constitutional rights of citizens”, or to overturn judicial decisions, in particular those of the Supreme Court (see ‘Analysis of the Constitutional Amendments for the Kyrgyz Republic (July 2003)’, www.abanet.org/ceeli). While the Constitutional Court had the power to finally determine the constitutionality of legislation and official acts, it was rarely exercised, and the Court was only called upon to determine around 10 cases annually: now its powers have been severely curtailed and the Supreme Court has retaken most of the judicial power, including the oversight of human rights cases, previously held by the Constitutional Court.

Former Minister of Justice Kurmanbek Osmonov was recently appointed to the key position of chairman of the Supreme Court. This appointment raises concerns over the impartiality and independence of a court now headed by a former high-ranking and influential member of the executive.

Despite the state's responsibility under the *Constitutional Law on the Status of Judges*, resources devoted to judicial security are inadequate. The risk of attacks is said to be high and a number of judges have been harassed and assaulted inside their courtrooms and offices during the period.

a) Security of tenure

There is no constitutional guarantee of security of tenure for judges. According to the Constitution, the President has wide-ranging discretion to remove judges prior to the conclusion of their terms. These powers are particularly broad where lower-court judges are concerned, as the removal of Supreme Court and Constitutional Court judges must be approved by a vote of two-thirds of the entire Parliament, subject to the approval of the executive branch. While this power is not frequently used, there are reports during the period of forced resignations and the dismissal of one judge who refused to resign. Under Article 46 of the Constitution, judges of the Constitutional and Supreme Courts are nominated by the President, and their appointment is then confirmed by Parliament; Article 80 was amended in February 2003 to stipulate that candidates for the lower courts must also be put before Parliament by the President for approval. Terms of tenure for Supreme Court and Constitutional court judges were shortened from 15 to 10 years.

Mechanisms for judicial accountability are also controlled by the presidential administration, meaning that assessment of competence is largely dependent upon political affiliation and loyalty. While judges theoretically enjoy immunity for actions carried out in their official capacity, they commonly suffer reprisals if they render politically inconvenient decisions or refuse to co-operate with powerful interests.

Reportedly political affiliation and loyalty are considered to play a significant role in the selection and advancement of judges. In particular, the attestation process, which involves the regular examination of judges on their legal knowledge is susceptible to

political pressure and corruption, being used by the executive to maintain control over judges in office. This process has developed since the Constitutional amendment. (<http://www.abanet.org/rol/publications/kyrgyzstan-jri-2003.pdf>; http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=3860).

b) Corruption

Judicial salaries, determined at the discretion of the President, are extremely low for a living, making judges vulnerable to corruption during the appointment process and during their terms of office. In a survey published by the opposition newspaper *Moya Stolitsa* in November 2002, 66% of respondents claimed that the courts and judiciary were among the most corrupt institutions in the country. A 2002 World Bank survey indicated that almost one-third of business firms involved in court proceedings had provided an “unofficial payment”, usually in the form of money. Lawyers as well as defendants and petitioners are reported to routinely bribe judges and investigators to obtain favourable outcomes. Payments are most commonly made to ensure that a kindly disposed judge will accept a case, or in response to a direct request from court staff. (<http://www.freedomhouse.org/template.cfm?page=47&nit=336&year=2004>)

Although the government has formally launched a number of well-publicized campaigns against corruption, investigations and prosecutions have been arbitrary: members of opposition political parties, rather than offending officials, have usually been targeted.

In April 2003, however, the National Council for Conscientious Management was established to ensure the accountability of officials at all levels.

c) Internal Independence

Close control is exercised by senior judges over lower-court judges: court presidents, it has been reported, instruct their inferiors on how specific cases should be decided. Several lawyers have claimed that judges have informally told them that they have been obliged to decide against their clients, for political reasons or because the judges would not pass their next attestation if they decided against the state. Other judges have reported that the Supreme Court had sent representatives to the lower courts to “inspect” their work. (<http://www.abanet.org/ceeli/publications/jri/home.html>)

d) Executive interferences

The procuracy (the prosecutor’s office) can influence the courts by placing complaining letters (*chastnoye predstavlenie*) in a judge’s file (which will be considered during the attestation process when the judge comes up for re-appointment) or by taking special appeals, or supervisions, to the higher courts.

“Telephone justice”, the practice whereby government officials and members of the local administration make calls to judges to dictate the outcome of particular cases, reportedly persists today. Judicial proceedings are used by the state as a means of suppressing dissent and criticism (see below). (<http://www.abanet.org/rol/publications/kyrgyzstan-jri-2003.pdf>).

As a consequence of the courts’ dependence upon the executive, few politically motivated cases are determined in accordance with domestic laws, constitutional provisions or international legal obligations.

Cases

In 2002 opposition member of Parliament **Azimbek Beknarazov** was tried on charges of exceeding his powers and organizing the arrest of an innocent person. His case relates to a 1995 murder case handled by him as the then Toktogul District prosecutor, in which he allegedly failed to file charges against the murder suspect and improperly detained relatives of the victim (<http://www.eurasianet.org/departments/rights/articles/eav010902.shtml>). The charges against Beknarazov appear to have been politically motivated and resulted from his public criticism of the government. While the court found Beknarazov guilty and handed down a suspended prison sentence, a government commission subsequently found that the charges against him could not be sustained, and that his arrest was illegal.

The May 2002 trial of **Felix Kulov**, another opponent of the government, underlines the court's reluctance to intervene where reportedly fabricated prosecutions are brought by the government for improper purposes. Kulov, considered to be a likely contender in the next presidential election, was sentenced to prison after being charged with "instigating a crime", "official forgery" and "misuse of official status" while serving as Minister of National Security. As Kulov held the military rank of general, charges were filed before the military court in Bishkek. The military judge originally assigned to the case, Ashimbek Uulu Nurlan, found that the charges were not proven and dismissed them. On appeal, Kulov was found guilty and sentenced to 10 years' imprisonment. The verdict was not delivered in open court, and the court building was protected by the military following its announcement.

The original judge who dismissed Kulov's case was first transferred to another court in a remote region and finally dismissed from office (see below).

e) Cases of harassment of judges

Ashimbek Uulu Nurlan, Deputy Judge of the Bishkek Military court, who in August 2000 acquitted Feliks Kulov, the prominent political opponent later sentenced to 10 years' imprisonment (see above), was transferred to the remote Batken Oblast Court as a regular judge under the pretext that his post in Bishkek would be abolished. However, soon after his transfer, the post was re-established. In addition, the pro-government newspaper *Slovo Kyrgyzstana* repeatedly accused him of receiving a bribe of one million US dollars. In the end, although his judicial appointment did not expire until 2007, he was forced to step down in May 2002 when the President signed a decree dismissing him from the position of military judge.

In 2004 at least seven judges from Sokuluk and other regions were reported to have been removed from their offices accused of disloyalty to the regime.

LEGAL PROFESSION

Independence

Pursuant to Article 7 of the *Law on Advocacy*, only persons who are licensed may practise as advocates. Licences are issued by a state agency authorized by the government, and the *Regulation on the Qualification Commission at the Ministry of*

Justice requires applicants to pass an examination. The statute also empowers the government to suspend or invalidate a licence and vests disciplinary power over advocates in the Deputy Minister of Justice.

The promulgation of Ministry of Justice ***Instruction No. 73 on Professional Ethics Rules for Advocates*** in **May 2003** has raised concern among many advocates, some of whom characterize it as an attempt on the part of government authorities to erode the independence of the *advocatura*, or defence bar. Advocates have reacted to it with considerable concern, worried over the Ministry of Justice (MOJ)'s broad authority to revoke advocates' licences, given there is no clear definition of what would constitute behaviour that would trigger disciplinary action and licence revocation. They have contested its constitutionality, as well as the MOJ's competence to impose disciplinary standards on advocates.

Repeated calls for suspension of *Instruction No. 73* have been rejected by the MOJ. A meeting in October 2003 brought together government representatives, prosecutors, judges, academics, independent advocates and members of the AAK (the Association of Attorneys of Kyrgyzstan), the Union of Advocates and the Lawyers of Osh Oblast (POLO) to discuss the effect of *Instruction No. 73* on advocate independence. A draft version of a new ***Law on Advocate Activity*** has been developed: a working group presented to the MOJ in **January 2004** a "Concept on the Bar" that will inform discussions, it is hoped, on the final version of the new law. The working group endorsed the idea of a unified structure through the creation of a national association of advocates, in cooperation with the AAK and the Union of Advocates. Among other activities, the association would take the lead in regulating admission into the profession and the development and enforcement of an ethics code for advocates.

If adopted, the ***Draft Law on Advocate Activity*** would lessen the role of the state by establishing a disciplinary commission, elected from the membership of a so-called chamber of advocates, with responsibility for considering and deciding complaints in relation to the conduct of advocates. This body would also be able to impose disciplinary sanctions short of disbarment on advocates. Decisions to revoke an advocate's licence would be taken by the chamber's Qualification Board according to articles 31 and 32 of the draft law. Similarly, the Working Group on the Bar recommends that *advocatura* bodies should take the leading role in the development and enforcement of ethical conduct by advocates. (<http://www.abanet.org/rol/publications/kyrgyzstan-lpri-2004.pdf>)

Following an oral agreement between the MOJ and the *advocatura*'s leadership, it has been reported that *Instruction No. 73* will only be enforced against those advocates who are not affiliated with a public association that has its own internal rules on professional conduct.

While disciplinary decisions are subject to judicial review, the partisan nature of the courts means that there is no effective appeal mechanism. In practice, then, the government is able to control a lawyer's ability to work in his or her chosen profession, which has severe implications for the profession's independence. This is in violation of Articles 27 and 28 of the *UN Basic Principles on the Role of Lawyers* (http://www.unhcr.ch/html/menu3/b/h_comp44.htm), which require that any

disciplinary proceedings against lawyers must be conducted by a fair and impartial body.

Lawyers are often identified with the causes of their clients, and those who represent human rights activists and political opponents of the regime frequently suffer reprisals.

Professional education and training

Since the collapse of the former Soviet Union, there has been a significant increase in the number of law schools in Kyrgyzstan. International actors have noted that to date standards of legal education and training in the country may be deteriorating as a consequence of a failure to scrutinize these institutions and ensure that they are providing an adequate level of training to those seeking to enter the legal profession or the judiciary.

A number of activities aimed at reforming the legal profession in Kyrgyzstan have been undertaken by international agencies to encourage advocates to conduct themselves independently and to exercise their professional freedom of speech in faithfully representing their clients. In August 2003, the ICJ held an initial training seminar concerning the International Covenant on Civil and Political Rights (ICCPR) for lawyers in Kyrgyzstan, conducted jointly with the Kyrgyz Youth Human Rights Group, the OSCE Office for Democratic Institutions and Human Rights and the Soros Foundation Kyrgyzstan. The seminar was designed to assist advocates in applying the ICCPR to human-rights-related cases in Kyrgyzstan and in bringing complaints to the United Nations Human Rights Committee. While Kyrgyzstan is a state party to the ICCPR and recognized the jurisdiction of the UN Human Rights Committee in 1994, no cases have been registered so far despite the substantial and systemic shortcomings of its legal system. (http://www.icj.org/news.php3?id_article=3055&lang=en).

Cases

In July 2003, the Centre for the Independence of Judges and Lawyers (CIJL/ICJ) intervened in the case of **Gulguna Kaisarova**, a member of the **Kyrgyz Bar** who faced civil and criminal charges for having allegedly insulted a public official during cross-examination (http://www.icj.org/news.php3?id_article=2979&lang=en). The proceedings appear to have been based on an altered court record, which changed Ms Kaisarova's original court record into an accusation. Although the Supreme Court confirmed that the record had been amended in February 2003, the case continued. The CIJL noted that under Article 20 of *UN Basic Principles on the Role of Lawyers*, "lawyers shall enjoy immunity for statements made in good faith in the context of legal proceedings", and observed that this immunity was preserved by Article 16 of the *Kyrgyz Law Concerning a Lawyer's Activities*.

The CIJL expressed concern that the Department of Justice had notified Ms Kaisarova in May 2003 of a hearing to revoke her licence to practice law on the basis of the criminal and civil charges against her. Under Kyrgyz law, should the criminal libel charge against Ms Kaisarova be proven, she would automatically lose her licence. Moreover, the CIJL noted that the Department's action was contrary to the Order of the Department of Justice's six-month statute of limitations, as more than a year and a half had elapsed between the alleged events and the initiation of the proceedings. Eventually, as a result of international attention, Ms Kaisarova was not sentenced.

ACCESS TO JUSTICE

Accused persons have the right to legal representation, which must be provided at state expense if necessary. In **May 2003**, the government approved an order enabling lawyers to be paid out of state funds when they defend people who have been accused of criminal offences. A decision regarding the eligibility of the accused to receive legal aid is made by the presiding judge or inspector. However, if a guilty verdict is reached in proceedings, the accused may be required to repay for the cost of his or her defence.

A few attorneys do receive state payments, although for many it is unclear how to apply for such funds. On 3 October 2003, only 17,600 Som (about US\$419) had been disbursed from the 5 million Som (about US\$119,047) allocated by the law to the national budget for “legal aid”.

In **April 2002** a report was issued by a parliamentary commission following an investigation into the treatment of citizens’ constitutional rights by government agencies. The commission noted that laws and constitutional rights were extensively violated in all spheres of public administration, particularly in court proceedings brought by the state prosecution service. One in every 15 cases coming before the courts was based on insufficient evidence and over the preceding 18 months the courts had acquitted 478 people on the basis that the alleged crime had not occurred. A further 1,773 criminal cases had been terminated without any judgment being issued due to a lack of evidence. The commission concluded that the inadequate operation of the courts was a major factor in wrongful convictions and, in a number of cases, resulted in innocent people being sentenced to death. The report also revealed a lack of respect for due process rights, detailing cases of detention without due cause, as well as cases of torture and ill-treatment in custody. Arbitrary arrest and detention is prohibited by the Constitution. In **November 2003**, amendments to the Criminal Code criminalized torture, adopting a definition of torture close to that given in the *UN Convention against Torture* ratified by Kyrgyzstan.

Reportedly law enforcement officials frequently use the increased threat of terrorism as an excuse for arbitrary arrest and detention (<http://www.freedomhouse.org/template.cfm?page=47&nit=336&year=2004>). The nature of these strategies gives rise to serious human rights concerns.

LEGAL REFORMS DURING THE PERIOD

June 2002: *Law on the People’s Rights Defender* adopted, creating the Office of the Ombudsman.

February 2003: *Constitution* amended.

May 2003: *Instruction No. 73*, on Professional Ethics Rules for Advocates, adopted.

November 2003: *Criminal Code* amended, criminalizing torture.

January 2004: draft version of a new *Law on Advocate Activity* being developed.