
Aiding the Rule of Law Abroad: The Kyrgyz Republic as a Case Study

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"Ideas take root only if the soil of society has been prepared for them by circumstances." – RUSSELL KIRK¹

The Dordoi Bazaar lies north of the Kyrgyz capital city of Bishkek near the ancient Silk Road. Here, tradition blends with modernization. Vendors hawk their wares, mostly clothes and textiles, as they have for centuries throughout Central Asia. Only now products arrive from China by container rather than *caravanserai* and in increasing supply from Turkey, Thailand, and many other countries. Dordoi is a microcosm of globalization, a venue where the Soviet monopoly has given way to the world marketplace of goods—and dangers. It was there, on December 27, 2002, that al-Qaeda-linked Islamists set off a bomb, killing seven people and injuring 20.

This terrorist act reflects the trials and tribulations faced by the Kyrgyz Republic (Kyrgyzstan) as a whole as it tries to establish rule of law in the midst of so many social, economic, and political changes. Slightly more than 13 years have passed since the breakup of the Soviet Union. In its Central Asian territory, five independent nations—Turkmenistan, Uzbekistan, Kazakhstan, Kyrgyzstan, and Tajikistan—emerged, each with a different capacity for, and commitment to, the demands of contemporary sovereignty.

Kyrgyzstan—tiny, landlocked, and possessing few natural resources—initially positioned itself as the most progressive regional player, becoming the first of the 15 former Soviet republics to join the World Trade Organization (WTO), embracing the United Nations, and adopting numerous other measures to gain recognition as a new member of the free world. In response, international donors

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rushed in with development money and foreign aid.² Following the September 11 attacks on the United States, Kyrgyzstan reaffirmed its Western orientation, agreeing to the establishment of Ganci Air Force Base, from which coalition forces continue to stage raids on Taliban remnants in nearby Afghanistan.

More recently, however, Kyrgyzstan's "Island of Democracy" has regressed, curtailing freedom of the press and of assembly, exhibiting a gradual return to one-party rule, and in general casting off its earlier experiment with liberalization. Once presumed to be well along the path to peace and prosperity, it is now uncertain whether liberty, neo-Stalinism, or even Islamofascism will ultimately take root. Given Kyrgyzstan's location at a geographic and ethnic crossroads, however, it is clear that the answer will have long-term implications on regional stability.

Analysis of a decade of rule of law promotion in the Kyrgyz Republic and other Newly Independent States (NIS) reveals that a pragmatic re-conceptualization of donor activities is necessary to engender the rule of law in Kyrgyzstan and bolster democratic progress in the Central Asia region.

BACKGROUND

The history of Kyrgyzstan, insofar as it shapes current events, begins with the Soviet Union. Alexander the Great, Genghis Khan, Tamerlane, and Tsarist Russia all conquered this area, but none managed to politicize the nomadic Kyrgyz to the degree that the USSR did.³ Kyrgyzstan today openly struggles with vestiges of Moscow's policies of divide-and-conquer race relations and forced economic dependence, while Soviet institutional and intellectual deficiencies continue to shape Kyrgyz legal culture, both consciously and otherwise.⁴

Ethnic tensions are perhaps the most readily apparent Soviet legacy. Unlike the Baltic states, which existed as countries with defined territories prior to their incorporation in the USSR, there is no pre-Soviet analogy to the Kyrgyz Soviet Socialist Republic. Ethnic Kyrgyz, Uzbek, Tajik, and Kazakh groups did not fall neatly into the state boundaries drawn by Stalin to mark "their" republics. A glance at the map reveals the extent of this problem, particularly in the volatile Ferghana Valley, where Kyrgyzstan, Uzbekistan, and Tajikistan meet in discordance and where travel within the same country may require a visa if crossing through ethnic communities. As another vestige of Stalin-era politics, passports indicate not only citizenship (Kyrgyz) but also nationality (Kyrgyz, Russian, Tajik, Uzbek, etc.), further accentuating differences.

The end of Soviet subsidies also exposed the economic vulnerability of Central Asia, especially the successor states lacking petrol reserves. Of the former Soviet republics, Kyrgyzstan, with an estimated 2003 per-capita GDP of \$1,600, ranks ahead of only neighboring Tajikistan. Since 1998, the minimum monthly

wage has remained at 100 Kyrgyz som, or roughly \$2.38 at current exchange rates.⁵ According to CIA data, half the country lives below the poverty line.⁶ These figures reveal dire economic problems and may also explain the growing prevalence of the underground economy and illicit trade. Travel guides proclaim that, "In post-Soviet Central Asia, camel caravans of exotic silks and spices have been replaced, it seems, by Ladas [Russian-built cars] packed with opium. The Silk Road has become an opium highway."⁷ Analysts fear that, in addition to its other negative social effects, this drug trafficking finances narco-terrorism.

An asymmetrical constitutional order is one of the darkest and most pervasive features of Soviet rule. Many characterize the USSR as having exhibited rule *by* law rather than the rule *of* law. That is, the legal system served as an instrument to centralize power rather than to guard against abuse of power. There was little by way of proscription in the republic's Constitution, and articles purporting to grant rights were largely "ignored in practice from the time it was drawn up."⁸

On an even deeper level, the Soviet mentality continues to define people's relationship to the law. Some have recast the national slogan of "Kyrgyzstan—the state of human rights" as "Kyrgyzstan—the state of telephone rights": access to justice means knowing a well-placed official willing to make legal problems disappear with a phone call. Here, disposition of cases rests upon graft and status rather than fixed principles of law.

It is within this general climate that attempts to sow the rule of law are made. The chasm between rhetoric and reality only threatens to grow as Kyrgyzstan's post-independence volatilities and vulnerabilities come to a head. Though the Constitution proclaims that Kyrgyzstan is based on a rule-of-law government, this does not appear to be the case in practice.⁹ To assess the next steps in Kyrgyz rule of law promotion, it is thus helpful to evaluate whether rule of law truly does prevail in Kyrgyzstan, what barriers exist to its promotion, and how a rational, concerted effort on the part of the international community can aid the reform process.

WHAT IS AT STAKE?

Kyrgyzstan's geo-political state of affairs reads like an epic struggle. Usurpation of the constitutional order, ethnic unrest and possible war, and "the end of history" are all in play. These dimensions are by no means mutually exclusive: if not averted, the future could hold a combination of worst-case scenarios. Individually and collectively, they will determine whether the rule of law or "the rule of lawlessness" ultimately prevails.¹⁰

Constitutional Crisis and Civil War

The Kyrgyz Republic suffers from a cultural schism. Russified, northern urbanite Kyrgyz frequently cannot converse with their Kyrgyz—only speaking compatriots from the agrarian south. President Askar Akaev, educated in then—Leningrad, enjoys the backing of the progressive, secularized first group, while nationalist candidates draw support from the more traditional and Islamic latter group.

The October 2005 presidential election threatens to bring the crisis to a head. Akaev is currently serving his third term in office, made possible by a court ruling that adoption of a new Constitution during his first years as president waived the two-term constitutional limit.¹¹ Although he has promised to step down, some speculate that he will return to the Constitutional Court with the argument that the still newer Constitution of 2003 again resets the clock. It is very likely that the court would either again side with him or defer the matter to a national referendum rigged to guarantee his victory.¹² Another possibility involves President Akaev continuing to hold authority through a surrogate, most likely a hand-picked candidate backed by the well-funded Alga Kyrgyzstan Party, which his daughter controls. There is substantial anecdotal evidence of Alga Kyrgyzstan recruiting support through schools by informing administrators that they must either join the party (and demand the same of their subordinates) or risk being fired for non-compliance. Such undemocratic practices have heightened the importance of the next elections in the mind of the public. Any eventuality other than a peaceful transition of power through a free and fair election could trigger armed rebellion.

This specter is not without precedent in Central Asia. Civil war, also split along north-south lines, claimed 60,000 lives and displaced one million people in Tajikistan. In Kyrgyzstan itself, parliamentary Deputy Azimbek Beknazarov was jailed after calling for the impeachment of President Akaev in connection with an extralegal transfer of land to China.¹³ Following his arrest, police opened fire on demonstrators supporting Deputy Beknazarov in the southern region of Aksy, fatally wounding six. The Aksy shootings in turn sparked nationwide demonstrations that brought the government to the brink of collapse. If left unchecked by the rule of law, the government's undemocratic trend could escalate into a full-scale constitutional crisis and violent civil conflict.

Ethnic Tensions and Regional War

Kyrgyzstan has an estimated population of 5.07 million. The Kyrgyz, a Turkic-Mongolian race, comprise the majority. Other prominent groups include Slavs (who continue to emigrate in large numbers since independence), Uzbeks,

Tajiks, Uighurs (Turkic peoples based in the Xinjiang Province of China), Dungans (ethnic Chinese who converted to Islam), and Tatars. Collectively, the peoples who live in Kyrgyzstan are referred to as *Kyrgyzstany* (Kyrgyzstanies), though the term hardly denotes equality.

To the extent that the Soviet Union succeeded in creating a pluralistic society, it did so through coercive force, gerrymandered borders, and the resettlement of European Slavs. Predictably, the receding of Moscow's iron fist released latent tensions. A hierarchy relegating non-Kyrgyz ethnicities to second-class status has emerged in symbols, laws, and practices. The national flag depicts a yurt, the traditional Central Asian nomadic home, surrounded by 40 rays signifying the 40 Kyrgyz tribes. The preamble to the Constitution lists "the national revival of the Kyrgyz" first and foremost among its goals.¹⁴ Moreover, the Constitution requires that the president have a command of the Kyrgyz language,¹⁵ effectively barring racial minorities from the highest office. Informal practices, some of questionable legality, have also been targeted against minorities. Feliks Kulov, head of the Ar-Namys Party and the only Russian to express presidential ambitions, was imprisoned on corruption charges and thus disqualified from the race, revealing a more sinister barrier for minorities seeking elected office.

The growing division of Kyrgyzstan into "us" and "them" threatens not only national but also regional stability. Violent clashes between Kyrgyz and Uzbeks in the south claimed over 300 lives shortly before independence, border disputes continue to erupt today, and rumors abound of each side stockpiling weapons in advance of future attacks. More recently, tensions between the Kyrgyz and Uzbek states have also escalated due to a battle over resources, particularly after Uzbekistan closed gas lines to Kyrgyzstan for non-payment and Kyrgyzstan—the site of headwaters to major Central Asian rivers—threatened to retaliate by damming the flows to its desert neighbor. Incursions of terrorist groups based in Tajikistan also threaten to escalate into a trans-border war. Ignoring ethnic tensions in Kyrgyzstan can thus be done only at the risk of large-scale violent conflict in Central Asia.

Demise of Democracy

In the first years of independence, Kyrgyzstan seemed ready to throw off the Soviet yoke. Alone among the six predominantly Muslim successor states (the five Central Asian states and Azerbaijan), voters elected a scientist relatively unencumbered by Soviet baggage. President Akaev moved to privatize state assets, adopt a fiscal policy in line with World Bank recommendations, sign and accede to numerous human rights treaties, and join the WTO, UN, and Organization for Security and Cooperation in Europe (OSCE).

This brief flirtation with liberal democracy echoed the wisdom of the time.

Francis Fukuyama contemporaneously declared the final triumph of democratic capitalism: “As mankind approaches the end of the millennium,” he suggested, “the twin crises of authoritarianism and socialist central planning have left only one competitor standing in the ring as an ideology of potential universal validity: liberal democracy, the doctrine of individual freedom and popular sovereignty.”¹⁶

Several years later, however, the situation has changed dramatically. Kyrgyzstan is now backsliding away from democratization and the transition from statism to free-market capitalism. Regarding democratization, available indices reveal a disturbing, reactionary trend: Freedom House classifies the mass media as “not free,”¹⁷ giving the same designation to the country’s political system as a whole;¹⁸ the American Bar Association (ABA) assigns a “negative” rating to judicial independence;¹⁹ and Transparency International ranks Kyrgyzstan in 118th place—tied with Libya—in the fight against corruption.²⁰

Economic liberalization is likewise receding. Few cases better illustrate this economic reality than the Lenin Factory, which in Soviet times employed 15,000 workers. Privatization was done neither at a fair-market price nor at arm’s length. After purchasing the factory for pennies on the dollar, the new owners stripped all its assets. As a result, the plant is now a complex of nearly empty buildings. Production capacity is minimal and, by all accounts, the 300 remaining employees do not receive their modest salaries on time. One analyst recently concluded that, “Although life has left the old regime, the dead hand of its accumulated institutions, mindsets, and vested interests continues to weigh heavily upon the world.”²¹

Even more daunting is the possibility that the battle of ideas will take place not between communism and democratic capitalism, but between a failed hybrid of the two and Islamic fundamentalism. Among the organizations active in the region are *Hizb-ut tahrir al-Islami* (Party of Islamic Liberation) and the Islamic Movement of Uzbekistan (IMU). Officially *Hizb-ut tahrir* eschews violence, although its website contains—among other incendiary documents—a pamphlet entitled “The Inevitability of the Clash of Civilizations.”²² Uzbek President Islam Karimov blames *Hizb-ut tahrir* for the fatal July 30, 2004, homicide bombings on the U.S. and Israeli embassies and the Prosecutor General’s office in nearby Tashkent, as well as earlier and more devastating terrorist acts in Tashkent and Bukhara. In Kyrgyzstan, the IMU claimed responsibility for the attack on the Dordoi Bazaar and is responsible for a similar attack in Osh. These groups share the broad goal of establishing a Central Asia-wide caliphate operating under *shari’a* law.

Supremacy of the rule of law is the only means to managing Kyrgyzstan’s simmering constitutional crisis, ethnic tensions, and ideological battles and staving off the very real threat of violent conflict and political collapse.

WILL THE RULE OF LAW PREVAIL?

As a sick patient treasures good health, we often take the rule of law for granted, valuing it most in its absence. “Telephone rights,” kleptocracy, and rule *by* law are telling signs of an ailing body politic. Settling on a definition as to “what the essence of the rule of law actually *is*”²³ then becomes indispensable to identifying appropriate interventions.²⁴

The rule of law—or the supremacy of law in a Kyrgyz context—is commonly understood as “a government of laws and not of men.” As articulated by John Locke:

Freedom...under government is to have a standing rule to live by, common to every one of that society... a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man...²⁵

This formulation could hardly stand in starker contrast to the cult of personality that Central Asians have known for millennia, beginning with the rule of Alexander the Great—who was treated as a God—and culminating in the reign of Joseph Stalin.

In the Federalist Papers, James Madison took Locke’s analysis a step further. “In framing a government which is to be administered by men over men,” he wrote, “the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control *itself*.”²⁶ In promoting rule of law, it is crucial to consider each of these components, as well as the intangible factors that buttress them.

Controlling the Governed

In the post-Soviet context, the criminal law system merits heightened scrutiny in regard to Madison’s first requirement. Under this precept of needing to provide law and order for the governed, the Kyrgyz government has established such wide-reaching measures that it actually violates the rule of law and takes on an air of authoritarianism.

Historically, the *prokuratura* (prosecutor’s office), which served as the “eye of the tsar” and later as the “eye of the communist party,” enjoyed virtually unlimited powers. Thus *prokurory*—rather than judges—approved search warrants, wiretaps, and other invasive measures.²⁷ This practice continues in Kyrgyzstan today in violation of both international law and the national Constitution, which states: “Justice shall be administered in the Kyrgyz Republic *only by courts*” (emphasis added).²⁸

The prescription of maintaining law and order is also suspect in relation to

free speech and assembly. The Kyrgyz Constitution provides that “no laws abridging the freedom of speech, or of the press shall be made,”²⁹ yet laws prohibiting libel, slander, insult, insult of a public official, and defilement of a state symbol or the state flag are liberally interpreted and punishable by imprisonment under the Kyrgyz Criminal Code.³⁰ These provisions have been used repeatedly to silence opposition newspapers.³¹ The Constitution also guarantees a “right to freedom of peaceful assembly...subject to prior notification....”³² However, a new draft law, which should have a lower status than the Constitution, would nonetheless override it in practice, interpreting “notification” to mean far more onerous prior “approval.”³³

Restraining Government Overreach

“Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go,” wrote Montesquieu. “To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.”³⁴ Checks and balances and a separation of powers are the most obvious mechanisms for balancing the authority of the executive, legislative, and judicial branches.

In these respects, constitutional provisions granting immunity to sitting and former presidents, allowing the president to dissolve the *Jogorku Kenesh* (literally Supreme Council, or Parliament) and the government and to dismiss the Prime Minister, and terminating the parliament for filing an unsuccessful case in the Constitutional Court are deeply troublesome.³⁵ This last rule creates a disincentive for parliamentary deputies to challenge a fourth term for President Akaev, should he try to remain in office. In total, according to the European Commission for Democracy through Law (the Venice Commission), “The presidential traits in the Constitution...remain very strong. In the light of European standards for a democratic constitutional state, they can even be deemed excessive.”³⁶ Further, in view of the Venice Commission:

The proposed Constitution allows too frequently, and without explicit limitations, one power to encroach upon competencies reserved for another power. This raises concerns in the light of the principle of the separation of powers mentioned in Article 7 of the Constitution. Indeed, a number of the proposed changes risk introducing a certain amount of competency-related uncertainty instead of precisely separating the competencies among the individual bodies.³⁷

A postscript on the March 2002 events in Aksy lends real-world strength to the Commission’s first warning. President Akaev, hoping to quell public anger following the fatal shootings, showed an initial willingness to yield authority to

the *Jogorku Kenesh* and the judiciary. Following the postponement of several referenda, voters chose to liberalize the Constitution in February of 2003. It appears that the opposition had already calmed by this point. Mindful of this development, the administration of the president, under the guise of submitting the final product to experts for mere cosmetic changes, offered a complete substitute. The legitimacy of the entire legal order today is therefore questionable.

The Venice Commission's second finding has particular relevance to the judiciary. As a matter of jurisprudence, "There is no liberty if the judiciary power be not separated from the legislative and executive."³⁸ For this reason, the independence of the courts receives added priority under international law.³⁹ Viewed in this light, the Constitutional Court's sanctioning a third presidential term, which some regard as a capitulation to the president, undermines prospects for restraining encroachments by the executive.

But the ultimate defect in the Kyrgyz Constitution lies in its increasingly subtle, unsound approach to protecting the individual. There are, as a matter of theory, three universal categories of laws: mandatory, enabling, and default. The first exists in positive and negative forms, thus compelling or prohibiting certain government actions. Enabling laws empower—but do not require—an agent (normally the government) to adopt a certain measure, sometimes from among a list of options. Lastly, default laws work in tandem with the other types of laws, specifying a result in the absence of a stated choice to the contrary.

As a matter of comparative law, the U.S. Constitution, and in particular the Bill of Rights, structurally limits state authority through firm negative mandatory laws.⁴⁰ In contrast, the Kyrgyz Constitution tends to enable government action. Against the long list of express powers, civil liberties hinge upon fragile default laws. The Kyrgyz Constitution provides that, "In realizing his rights and freedoms, a person may not violate the rights and freedoms of others."⁴¹ In effect, this condition permits parliament to legislate other liberties out of existence.

An analysis of the Kyrgyz Constitution, laws, and practices thus reveals that the current system fails both tests necessary for the rule of law: first, while the system does indeed enable the state to control the governed, it fails to do so in a democratic way; secondly, the current system does not require the government to constrain itself. To understand why Kyrgyzstan fails to meet these two requirements, it is necessary to evaluate what barriers exist to establishing the rule of law.

WHAT ARE THE BARRIERS TO SECURING RULE OF LAW?

A UN framework lists 12 requisites for securing the rule of law: (1) a viable constitution; (2) free and fair elections; (3) a just, comprehensive legal system; (4) effective institutions for safeguarding human rights; (5) an independent judiciary;

(6) adequate training for lawyers, judges, and law-enforcement officials; (7) a military subordinate to the constitutional order; (8) mechanisms for the resolution of conflicts; (9) incorporation of international human rights into municipal law; (10) a legally literate populace; (11) a flourishing civil society; and (12) a free mass media.⁴² These factors logically divide into structural and attitudinal categories, with legal literacy deserving special emphasis in the latter. Additionally, this section examines practices on the part of the international community that forestall the rule of law.

Structural Barriers

Many of these rule of law requisites have already been addressed above. Comments on the Constitution, the legal system, and prospects for a stolen election in 2005 address numbers 1, 2, and 3. ABA and Freedom House rankings directly relate to categories 4, 5, and 12. With the exception of civilian control over the military, which is not an imminent problem but would be sorely tested in the event of civil war, this section looks to the remaining considerations in the context of the most endemic problems.

Corruption. Transparency International's ranking of Kyrgyzstan as 118th in the fight against corruption points to the Kyrgyz civil service as a mechanism for naked self-enrichment. According to anecdotal evidence, ministers pay \$50,000 for their appointments. They recoup this money by selling lower offices and accepting favors in exchange for political influence, and their subordinates in turn do the same down to the level of rank-and-file workers. Similarly, police, judges, and *prokurory* take bribes for declining prosecution of often trumped-up charges, and tax inspectors and customs officials skim money in exchange for lowering financial burdens.⁴³

The problem of corruption impacts not only the quality of daily life in Kyrgyzstan, but also the investment climate. Most immediately, to conduct business in the Kyrgyz Republic is to risk criminal liability under the U.S. Foreign Corrupt Practices Act⁴⁴ and the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁴⁵ PriceWaterhouseCoopers has not attempted to measure the cost in terms of deterred foreign direct investment (FDI) in Kyrgyzstan, although the estimate for Lithuania—which has a similar population—is \$768 million per year.⁴⁶ Further, Lithuania ranks 41st in good governance (i.e. the fight against corruption)—far ahead of Kyrgyzstan in 118th place. Even lowering the proposed benchmark figure to reflect Lithuania's advantage in European Union membership, the lost opportunities should remain much higher than the actual FDI attracted.⁴⁷

External and Internal Legal Contradictions. Revisiting the field of criminal justice, municipal law often collides with international treaty obligations and

norms, laws frequently undermine the Constitution, one code contradicts another, and even the Russian- and Kyrgyz-language versions of the Constitution differ materially. The International Covenant on Civil and Political Rights (ICCPR), the Kyrgyz Constitution, and the Kyrgyz Criminal Code all prohibit double jeopardy.⁴⁸ However, the Kyrgyz Criminal Procedural Code—the source of implementation for these other laws—allows the *prokuror* to resubmit a case when the evidence on hand does not support a finding of guilt.⁴⁹ Thus, in practice, a person can be tried repeatedly for the same criminal offense. The Russian-language Constitution bars persons convicted of “any crime” (i.e. felonies and misdemeanors) from running for parliament; the same provision in the Kyrgyz-language Constitution, bars persons convicted only of “intentional crimes” (i.e. felonies).⁵⁰ Deputy Beknazarov purports to have uncovered at least 15 major inconsistencies between these two official versions of the Constitution.

Budgeting Inadequacies. The failure to adequately budget for rule of law mandates is also widespread. The Constitution, for example, specifies that, “Legal assistance shall be provided for free....”⁵¹ However, the state budget for the current fiscal year allocates a mere 5,177,600 som, or about \$123,000, nationwide to legal defense for indigent persons.⁵² As a point of reference, this amount is approximately 1/58th of the money set aside for repaving streets in Bishkek alone. Corruption—which siphons money from the national treasury—and misplaced priorities are both factors in justice receiving short shrift, but there is also a tie-in to donor activity.

Bureaucratic Disorder. The treaty process provides an illustration of how bureaucratic disorder has undermined promotion of the rule of law. Treaties should be an important source for advancing the rule of law, yet this has not proved to be the case in practice. In the field of human rights, the Kyrgyz Republic had signed 22 conventions prior to submission of its first periodic report on ICCPR compliance.⁵³ The Kyrgyz Constitution, the Kyrgyz Law “On Normative Legal Acts of the Kyrgyz Republic,” and the Vienna Convention on the Law of Treaties (VCLT) all mandate compliance with the terms found in those treaties.⁵⁴

Again, however, a substantial gap emerges between theory and practice. A division within the prime minister’s administration is tasked with implementing treaty obligations, but it plays a minimal role in legislative drafting and deliberative processes. Likewise, there is a special Treaty Department underneath the Ministry of Foreign Affairs, which is responsible for reporting to oversight agencies such as the UN Human Rights Commission. Its head was alerted to the July 31 deadline for submission of the second periodic report on ICCPR compliance not by the government, but by foreign legal experts.

Lack of Transparency and Public Participation in Lawmaking. According to the Constitution, the right of legislative drafting belongs to “popular initiative” (meaning to voters who gather 30,000 signatures), the president, the

Jogorku Kenesh, and the government.⁵⁵ The first option has never been utilized, a fact that already speaks to the lack of public participation. Of the three other constitutional measures, only authorship by the president's administration automatically results in placement of a law online for commentary. A growing but still small percentage of the population has internet access, and even fewer legal professionals and laypersons can afford the two subscription law services. Public access to proposed laws is thus undermined.

Legislative activity usually begins with the formation of a working group.⁵⁶ Its composition might include representatives from the administrations of the president and prime minister, the Ministry of Justice (MOJ), the *prokuratura*, and academia. This process is described as open and transparent, despite the carefully controlled parameters. To the extent that there is a mechanism for public participation, it takes the form of a discretionary enabling rather than a mandatory law: the Kyrgyz Law "On Normative Legal Acts of the Kyrgyz Republic" reads that "Representatives of interested...organizations...*may* be attracted to the preparation of drafts" (emphasis added).⁵⁷ More broadly, civil society involvement is limited by the potentially all-encompassing language of a provision of the Constitution that outlaws groups that "jeopardize the constitutional system or state and national safety."⁵⁸ Leading members of the non-governmental organization (NGO) community have been threatened, beaten, raped, and jailed.⁵⁹ It comes as little surprise that lobbying is nearly unheard of in the Kyrgyz Republic.

Attitudinal Barriers

In *Development as Freedom*, Nobel Prize-winning economist Amartya Sen discusses the "agency role," meaning the awareness that "we act or refuse to act, and can choose to act one way rather than another."⁶⁰ Kyrgyzstan suffers from a fatalistic view that the system is broken beyond repair. Without a shift in thinking toward the agency role, both on the part of legal professionals and laypersons, prospects for true reform will remain illusory.

Revolution vs. Evolution. A revolutionary rather than evolutionary intellectual mindset predominates in Kyrgyzstan. "L'internationale," the Communist hymn adopted by Lenin's Bolshevik party, pledges that "We will destroy the old world...down to its foundation, and then we will build a new world."⁶¹ In Kyrgyzstan, it is premature to relegate this hymn to a historical footnote. Here again, instability in the legal order stems from the "dead hand" of Soviet ideology weighing on the present.

Within the American understanding, politics is "the art of the possible," and even the most egregious legal defects can be corrected.⁶² These views are not widely shared in the Kyrgyz Republic, which has subconsciously retained a belief in utopianism. Jean-Jacques Rousseau, who shaped the thinking of Karl Marx,

decreed that “man is naturally good and that it is by his institutions alone that men become evil.”⁶³ Perfection, in other words, is within reach, and the failure to achieve it in the legislative sphere is understood to mean that the law itself is fatally flawed.⁶⁴ Many statutes are earmarked for redrafting even before there is sufficient time for critical review. The end result is an ongoing process of leveling back to the foundation, creating a climate in which few laws reach the stage of implementation. Predictability therefore remains elusive in the Kyrgyz Republic.

Cynicism toward Rights and Remedies. The rule of law, where it has proven sustainable, draws support from fundamental, enduring values. Among them is the individual’s self-conceptualization as a juridical person. Legal literacy, the 10th factor listed in the UN rule of law framework, is of equal importance. Finally, as an additional step, a perception of the right to remedy is necessary, as aggrieved persons must be willing to seek redress in the event of breaches of rule of law.

Broadly speaking, Kyrgyzstanians continue to view civil liberties through the lens of Soviet positivism, which “den[ies] the truth of inner experience;” they perceive rights to exist only to the extent recognized by government.⁶⁵ Thus, whereas international law speaks to the “inherent dignity of the human person,”⁶⁶ the Kyrgyz Constitution describes only “human dignity”—a term subject to a much more narrow legal interpretation.⁶⁷ Many actions that in the West would be viewed as transgressions are thus defined in Kyrgyzstan as non-justiciable.

There has been no single, comprehensive initiative gauging Kyrgyzstanians’ knowledge of their rights. However, in relation to the Ombudsman, who is charged with protecting human rights,⁶⁸ the UN Development Programme found that only 23 percent of those surveyed were aware of the function of the office.⁶⁹ Prior comments on the lack of transparency further highlight the absence of a rights-based culture.

Quantifying the recourse to judicial remedies—or the lack thereof—proves an easier task. The Constitution provides that, “Human rights and freedoms shall be in *direct effect* in the Kyrgyz Republic” (emphasis added).⁷⁰ The doctrine of direct effect comes from *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.⁷¹ In this decision, the European Court of Justice ruled that individuals may sue in national courts for enforcement of internationally granted treaty-based rights. Theoretically then, Kyrgyzstanians have an immediate avenue for invalidating double jeopardy, prosecutorial authority over sanctions, and the host of other domestic practices that collide with Kyrgyzstan’s international treaty obligations. However, not one person has explored this possibility. On average, the Constitution Court hears only 10 cases a year.

Experience again demonstrates that rights not exercised are rights soon lost. In place of vigorous champions of civil liberties, we find the *chyornaya advokatura* (defense bar), which is made up of defense attorneys who pressure their clients into seeking leniency in exchange for a guilty plea.⁷² Similarly,

according to judges, over 70 percent of defendants do not challenge the bases of conviction on appeal, but merely request lighter punishment.

Lack of an Underlying Legal Culture. Alexis de Tocqueville wrote that, "Laws are always unsteady when unsupported by mores."⁷³ Systems of justice ultimately rise or fall based not on positive (i.e. written) law, but on the underlying culture, sometimes referred to as the "unwritten constitution."⁷⁴ Within the Kyrgyz context, the continuing downward pull of Soviet myths and misperceptions must be countered as a first step to securing a true law-based state.

Examination of the word "justice," so fundamental to the rule of law, reveals how brick-and-mortar institutions first arise out of conceptions. The Russian language contains two translations for the word justice: *yustitsiya* (a strictly legal idea) and *spravedlivost'* (a higher, philosophical notion). It is to the second, more ambitious understanding of justice that the U.S. Department of Justice aspires. The Kyrgyz counterpart, however, is rendered as *Ministerstvo Yustitsii*, belying a system built on efficiency rather than fairness.⁷⁵

Actual MOJ practice also demonstrates how the underlying culture, when in conflict with the positive law, reduces it to a dead letter. The Kyrgyz Constitution stipulates that "The Kyrgyz Republic...shall in no way militarize public life."⁷⁶ Yet MOJ officials wear army uniforms, perpetuating the Soviet approach to law and order as a non-civilian function. For the rule of law to successfully take root, reforms will need to reorient the underlying legal culture toward a broader conception of democratic justice.

Deficiencies in International Assistance

The time is ripe for reassessing international assistance in rule of law promotion. Roughly a decade has now passed since foreign organizations began the attempt to foster law-based states in Central Asia, affording the opportunity for critical evaluation aided by the benefit of hindsight. The identification of areas in need of improvement does not suggest that current programming is deficient as a whole; in fact, the vast majority of current rule of law initiatives are well-intentioned, and good practices emerge as well as bad. Rather, the following observations are offered in the hope of helping the rule of law take hold abroad.

Killing Them with Kindness. The law of unintended consequences comes to bear on rule of law initiatives. Returning to the example of access to justice for indigent persons, various international organizations have founded legal clinics throughout Kyrgyzstan. Similarly, when the Ombudsman threatened to close his office for insufficient state financing, the donor community raised supplemental funds to keep the office open. In the short-term, these efforts are commendable and serve clear humanitarian aims.

In the long run, however, they remove pressure for the government to ade-

quately provide for the same services in the national budget, which in turn hurts rather than helps local capacity. Donor activities should instead be structured to gain government “buy in,” securing local ownership over the reform process. Rather than merely supplanting Moscow as a source of subsidies, international groups can negotiate shared contributions that diminish to zero outside funding over a period of years.

Lack of Coordination. The United States Agency for International Development (USAID) recently offered the Supreme Court a grant to implement a searchable, publicly assessable database of court decisions. The World Bank approached the Court with a similar but unconditional proposal. Predictably, the Court accepted money from the Bank, with the result that it will have a purely internal cataloguing system that is not available to the public. Furthermore, the Bank’s grant included funds allocated for software programming that a USAID-sponsored program had already completed for another project.

There have been attempts to promote improved coordination, such as the launch of the website www.donors.kg. However, it covers only activities at the highest level (e.g. the World Bank vis-à-vis the UN) and omits the work of implementers on the ground (e.g. Chemonics International) that are charged with executing donor strategies. There is no general information clearinghouse for rule of law programming.

Lack of a Big Picture. Over-compartmentalization is a variation on the coordination problem. At a basic level, there is an occasional institutional bias against linking commercial to non-commercial activities. USAID, for example, operates two main divisions in Kyrgyzstan: Democracy and Media (DM), which finances such groups as the ABA under the slogan “Promoting the Rule of Law,” and Enterprise and Finance (EF). DM and EF implementers attend separate partners meetings and, as a result, contact between the two sides takes place on a mostly *ad hoc* basis. Yet rule of law work should not be put only in the category of democratization. As former U.S. Ambassador to Turkmenistan Stephen R. Mann noted, the three requirements for attracting foreign direct investment are “the rule of law, the rule of law, and the rule of law.” Additionally, the private sector provides a last hope for groups barred from government, a largely overlooked but critical point.⁷⁷

Even within the DM side, however, implementers do not necessarily view themselves as being part of a joint effort. In surveying their activities for an OSCE-commissioned project, it was not uncommon to elicit responses such as ‘We are not involved with the rule of law; we deal with elections (or with the mass media, good governance, and so forth).’ Yet the constitutional order may collapse without a smooth, fair transition of power, and the other areas—while not primarily the domain of attorneys—are also vital to attaining a law-based state.

Ineffective Marketing. In the Kyrgyz Republic, the pressure points are

nearly always financial—even in areas that at first seem only tangentially connected to economics. For example, Kyrgyz prison sentences remain harsh in comparison to Western standards, partly reinforced by the opportunity for graft in negotiating lower sentences, with economic considerations thus undermining progressive rule of law reforms.⁷⁸ The Criminal Code, for example, authorizes three years' deprivation of freedom for operating an unlicensed business—as a first offense.⁷⁹ Yet criticizing the government based on appeals to fairness is unlikely to result in mitigation, due to both a lingering Soviet perception of human rights as a Western fiction and opposition from entrenched interests that block reform—namely the police, *prokurory*, and judges who are better positioned for graft in an environment of draconian penalties.

However, an argument grounded in cost savings (or in other words, prison reform as a *means* to an end) will resonate locally. In his opening remarks at a conference on criminal law, former Minister of Justice Kurmanbek Osmonov discussed incarceration almost exclusively in relation to the enormous drain on the national treasury.⁸⁰ Working with the government on a budgetary level might not only achieve humanization, but also allow softer punishments to be packaged together with other needed measures, such as increased funding for indigent defendants or the introduction of trials by jury. It is hardly surprising that the government casts the rule of law first and foremost as a precondition to attracting foreign direct investment.⁸¹

Lack of an End Game. Implementers—most of whom have no money to dole out to the government—wield only the limited influence of moral suasion. In the end, only the large donors—the World Bank, International Monetary Fund (IMF), European Bank for Reconstruction and Development (EBRD), and Asian Development Bank (ADB)—hold the power of the purse. Collectively, they possess the ability to affect true liberalization.

But they are largely unwilling to push through cardinal change. As one commentator explains:

Through all their transformations and ideological opportunism, [the World Bank and IMF] have remained unswervingly faithful to one guiding principle: Keep finding reasons to lend money. Supporting market-oriented reform is the current reason of choice, but it is a means to an end. The end is bureaucratic self-preservation.⁸²

In some cases, donor reports sugarcoat the human rights abuses that occur in Kyrgyzstan in order to create a stronger rationale for ongoing cooperation.⁸³

Government officials are acutely aware of—and exploit—the reality that regressive measures seldom result in financial penalties. In theory, they should: the World Bank operates on the principle of conditionality, meaning that it may demand reform in exchange for loans. Unless and until this mechanism is made

to work more effectively, however, the money spent in the Kyrgyz Republic on rule of law programs will yield little return.

Preempting a possible objection, there is nothing coercive in this proposal. Kyrgyzstan has already consented to be bound by an array of human rights treaties. Accordingly, it is under a pre-existing obligation to honor the terms thereof.⁸⁴ At base, then, this proposal simply involves removing existing impunity for non-compliance.

RECOMMENDATIONS

This final section opts for a holistic approach to achieve enhanced rule of law programming. Since many individual improvements—such as strengthening the defense bar, working with the mass media, and developing civil society—are already under way, these recommendations instead propose a loose format for promoting greater synergy among the donors and implementers.

Regular Rule of Law Partners Meetings

The UN rule of law framework provides an umbrella under which diverse, specialized groups can gather. Additionally, Thomas Carothers of the Carnegie Endowment for International Peace outlines three common rule of law approaches:

- (1) the subject-matter model, which concentrates on reform in a discrete area (e.g., civil or commercial law);
- (2) the institution model, which in the local context might mean strengthening the drafting capacity of the *Jogorku Kenesh* or conducting trainings for judges; and
- (3) the government model, which strives to promote state compliance with the law (e.g., adherence to the Constitution of the Kyrgyz Republic or international standards).⁸⁵

Making these two organizational frameworks widely available would allow rule of law players to pull their activities into an integrated whole. Periodic exchanges of information would also allow patterns to emerge and call attention to areas not currently covered, such as criminal law, which several organizations currently address in piecemeal fashion but which none focus on as a core subject area. It might turn out, for example, that the government blocks democratization efforts but is receptive to economic reforms. This information would help donors to allocate funding, or, in an extreme instance, could be communicated to embassies in order to bring appropriate diplomatic pressure on the local government.

Central Asia/NIS-wide Rule of Law Conference

Unlike most conferences, which attract government officials, civil society, and local professionals, the donor community; and its implementers themselves should comprise the target audience. Ideally, the event would serve as a forum to explore prospects for using the financial leverage of its constituent groups. To this end, the Millennium Challenge Account, which conditions certain types of American foreign aid on progress in 16 separate areas, might serve as a model.⁸⁶ Additionally, participants should develop a common listing of best practices specific to Central Asia or the NIS; discuss creation of a centralized, accessible database of findings; and undertake to improve outbound orientation sessions and other trainings for their employees working in fields related to the rule of law.

Rule of Law Index

This proposal has its genesis in the UN framework, for which measurements in only three of the 12 categories are readily available. A more comprehensive index would serve as a useful snapshot for interested parties, chiefly human rights groups, potential investors, and the diplomatic corps. Annual updates would point to trends, either positive or negative. In principle, the capacity to fill the remaining gaps already exists, and the idea therefore involves harnessing available energy more than finding new contributors. Proprietary issues (i.e. ownership over the index) would require resolution, but this challenge should prove surmountable if backed by political will.

Emphasis on the Unwritten Constitution

“It follows that when...manners and customs are to be changed, it ought not to be done by laws,” Montesquieu wrote. “This would have too much the air of tyranny: it would be better to change them by introducing other manners and customs.”⁸⁷ The instance of bride kidnapping, which according to some estimates accounts for half of all marriages in rural provinces⁸⁸ despite its status as a criminal offense,⁸⁹ validates this claim, serving as yet another example that the rule of law does not spring only from the legal system.

There must be an organic basis for the development of culture. Out of the best practices for reforming the unwritten constitution, one can cite the Civic Education Course (CEC) administered by the International Foundation for Election Systems (IFES). The CEC initiated a textbook on public participation in government, which will be placed in classrooms nationwide. IFES has also prepared instructors to present this topic through train-the-trainers events. This general approach receives support in international standards. “National Institutions

for the Promotion and Protection of Human Rights” calls for the “formulation of programmes for the teaching of, and research into, human rights...in schools [and] universities” where they reach impressionable minds.⁹⁰

Kyrgyzstanians must reject outmoded ways of thinking and in their place internalize new ethics—a decidedly challenging transformation to undergo. Among them are the agency approach, meaning that they are autonomous actors and not mere subjects of government, an understanding of justice in the aspirational sense of the word, a belief in inalienable human dignity, and a willingness to stand up for their rights. Intelligently designed outreach efforts may, over a period of several generations, prepare the soil of society for lasting democracy and open markets; freedom may yet take root in the Kyrgyz Republic if the donor community works in partnership with existing progressive elements to cultivate these values throughout the country.

CONCLUSION

While the Kyrgyz Republic, like all nations, has a unique history and culture, attempts to aid the rule of law here also reinforce the transcendence of certain principles. Foremost among them is the undesirability of leaving hollow institutions of liberalism instead of deep-seeded reforms. Samuel Huntington cautioned against such purely superficial change in his book *The Clash of Civilizations*:

Somewhere in the Middle East a half-dozen young men could well be dressed in jeans, drinking Coke, listening to rap, and, between their bows to Mecca, putting together a bomb to blow up an American airliner... Only naive arrogance can lead Westerners to assume that non-Westerners will become ‘Westernized’ by acquiring Western goods.⁹¹

The terrorist bombing in the Dordoi Bazaar, where foreign merchandise flows into the country in bulk, reminds us in the starkest terms that this warning applies equally well to Central Asia. How the donor community reacts to this observation will, to a large extent, determine the free world’s interaction with the region for a long time to come. ■

NOTES

- 1 Russell Kirk, *Rights and Duties Rights and Duties: Reflections on our Conservative Constitution* 5 (Dallas: Spence Pub, 1998), 107.
- 2 Principally, these donors included the UN, the World Bank Group, the International Monetary Fund, the European Bank for Reconstruction and Development, the Asian Development Bank, the Organization for Security and Co-operation in Europe, the United States, Japan, Switzerland, the European Union and several of its individual member nations, and the Soros Foundation.
- 3 For an overview of the various conquests, see Peter Hopkirk, *The Great Game: The Struggle for Empire in Central Asia* (New York: Kodansha America, 1994).

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- 4 In fact, the common invocation of “national and ethnic features,” offered to obstruct liberalization, is generally a veiled reference to learned Soviet behavior.
- 5 This minimum monthly wage is set by Article 215 of the Kyrgyz Labor Code and Presidential Decree No. 339 of December 24, 1997.
- 6 See CIA World Factbook, <<http://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html>> (accessed October 13, 2004).
- 7 Lonely Planet, *Central Asia* (Oakland: Lonely Planet Publications, 2000), 547.
- 8 Kirk, *Rights and Duties Rights and Duties*. One might cite Article 72 of the Constitution of the Union of Soviet Socialist Republics (October 7, 1977), which guaranteed the right of secession to all republics. When the Baltic States invoked this provision circa 1990, however, it became clear that it was never intended to be exercised.
- 9 Article 1 of the Kyrgyz Constitution proclaims that the state “is formed on the basis of a legal and secular government.” Interestingly, the government-commissioned English version aspires to something higher. It reads that “The Kyrgyz Republic...shall be founded as a rule-of-law and secular state.”
- 10 The wording comes from chapter 8 of Brink Lindsey, *Against the Dead Hand: The Uncertain Struggle for Global Capitalism* (Indianapolis: John Wiley & Sons, Inc., 2002).
- 11 Decision of the Constitutional Court of the Kyrgyz Republic of July 13, 1998. This presidential term limit is found in Article 43 (2) of the current constitution, but was also present in prior language of the constitution.
- 12 Similar machinations have already proven effective in Kazakhstan and Uzbekistan.
- 13 Article 65 (6) of the Constitution (2003) and Article 1 of The Law of the Kyrgyz Republic, “On Normative Legal Acts of the Kyrgyz Republic” (1996) condition changes to national borders on a two-thirds vote in the Jogorku Kenesh (Parliament; literally, Supreme Council), yet the cession was effected without any parliamentary involvement.
- 14 The official, government-commissioned translation renders the original into English as “the national revival of the Kyrgyz nation,” a misrepresentation that seems to have escaped the attention of the international community.
- 15 This presidential requirement is found in Article 43(3) of the 2003 Constitution. Furthermore, Article 5(1) designates Kyrgyz as the “state language,” and Article 5(2) designates it as an “official” language. Although on its face this provision does not place Kyrgyz ahead of Russian, the preference is clear in practice.
- 16 Francis Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1993), 42. In my estimation, Fukuyama misuses the word “ideology,” which in its proper sense refers to abstract thought not grounded in practice. In contrast, democracy and free markets have withstood the test of time.
- 17 Freedom House, *Freedom of the Press 2004* (New York; Washington: Rowman & Littlefield Publishers, Inc., 2004), 15. The survey rates Kyrgyzstan at 71 points on a 100-point scale, 100 being the worst, which puts the country in 156th place globally.
- 18 Freedom House, “Global Freedom Gains Amid Terror and Uncertainty,” *Freedom in the World 2004* (New York; Washington: Rowman & Littlefield Publishers, Inc., 2004), 3-13. For the years 1992-1993, Kyrgyzstan received scores of four for political rights and two for civil liberties-with one being the best on a seven-point scale-and an overall designation of “partially free.” In 2003, the corresponding ratings fell to six and five.
- 19 American Bar Association /Central European and Eurasian Law Initiative, “Judicial Reform Index,” March 2004.
- 20 See Transparency International, *Corruption Perceptions Index 2003*, <<http://www.transparency.org/surveys/index.html>> (accessed October 12, 2004). Kyrgyzstan received 2.1 out of a possible 10 points, with 10 being the best. As a point of comparison, Finland, the top country in the survey, earned 9.7.
- 21 Lindsey, *Against the Dead Hand*, 3.
- 22 See <<http://www.hizb-ut-tahrir.org/english>> (accessed October 12, 2004).
- 23 See Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Number 34 (Washington: Carnegie Endowment for International Peace Rule of Law Series, January 2003), 3.
- 24 It should give us pause that the rule of law is not an area of specialization in Western legal systems. Unlike, for example, human rights law, tax law, and elections law, which jurists may study and practice, there is no such preparation for the rule of law per se. Yet attorneys are dispatched abroad to promote this area, frequently overseeing budgets in the hundreds of thousands of dollars!
- 25 John Locke, *The Second Treatise of Government and A Letter Concerning Toleration* (Mineola: Dover Publications, 2002), 11.
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- 26 James Madison, "Federalist No. 51," in Bruce Frohnen, ed., *The American Republic: Primary Sources* (Indianapolis: Liberty Fund, 2002), 262.
- 27 Recognition for this point is due to Stephen R. Thaman, Professor of Law at St. Louis University.
- 28 Regarding international law, Article 9 (3) of the International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976), envisions judicial oversight of sanctions; the Kyrgyz Republic acceded to this convention on October 7, 1994. Regarding domestic law, Article 79 (1) of the Kyrgyz Constitution explicitly states that justice shall be administered only by the courts.
- 29 Article 65 of the Kyrgyz Constitution. Article 36 (1) also provides that "mass media shall be unrestricted."
- 30 See Articles 127, 128, 342, and 352 of the Kyrgyz Criminal Code.
- 31 See International Federation for Human Rights, *Kyrgyzstan Situation Report* (March 2003), <<http://www.fidh.org/IMG/pdf/kg1703a.pdf>> (accessed October 12, 2004).
- 32 Article 16(4) of the Kyrgyz Constitution.
- 33 Article 12 functions as a supremacy clause, specifying, "The Constitution shall have ultimate legal force and direct application in the Kyrgyz Republic." Articles 1 and 6 of the Law of the Kyrgyz Republic \AE On Normative Legal Acts of the Kyrgyz Republic reinforce the hierarchy.
- 34 Montesquieu, *The Spirit of Laws* 1 (5) (Amherst: Prometheus Books, 2002), 150.
- 35 Articles 49 (1) and 53 (2) of the Kyrgyz Constitution grant immunity to presidents. Article 46 (4) allows the president to dissolve the Jogorku Kenesh and the Government, as well as to dismiss the Prime Minister. Article 63 (2) provides an additional avenue for dissolving the parliament. Article 51 (3) terminates the parliament for filing an unsuccessful case in the Constitutional Court.
- 36 *Opinion of the Draft Amendments to the Constitution of Kyrgyzstan*, Opinion No 229/2002, adopted at the 53rd Plenary Session (Venice, December 13-14, 2002), para. 27, <<http://www.venice.coe.int>> (accessed October 12, 2004). Kyrgyzstan has observer status at the Council of Europe, under which the Venice Commission functions.
- 37 *Ibid.*, para. 48.
- 38 Montesquieu, *The Spirit of Laws* 1 (11) (Amherst: Prometheus Books, 2002), 152.
- 39 See *Basic Principles on the Independence of the Judiciary*, U.N. G.A. Res. 40/32 (November 29, 1985).
- 40 Consider, for example, the compelling choice of wording in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble...." (emphasis added).
- 41 See Article 16 (21) of the Kyrgyz Constitution.
- 42 U.N. G.A. Doc. A/49/512 (annex).
- 43 Freedom House recently investigated the custodial death of Ulugbek Kadyrov, who declined to pay a bribe in return for release from criminal prosecution. Forensic experts concluded that he was systematically and fatally beaten by guards, likely in retaliation.
- 44 Section 78dd-2(a)(1)(A)(i) reads: "It shall be unlawful for any domestic concern...or for any officer, director, employee, or agent...thereof...to give...anything of value to...any foreign official for purposes of...influencing any act or decision of such foreign official in his official capacity...."
- 45 Adopted November 21, 1997 (entered into force February 15, 1999), <www.oecd.org> (accessed October 12, 2004). This document is closely modeled after the FCPA.
- 46 See The Opacity Index, <<http://www.opacity-index.com>> (accessed October 12, 2004).
- 47 According to the UN, the figure reached only \$83 million in 1997. See United Nations Conference on Trade and Development, *1998 World Investment Report*.
- 48 Article 14 (7) of the ICCPR, Article 85 (8) of the Constitution, and Article 3 (3) of the Criminal Code all prohibit double jeopardy.
- 49 See Article 34 (11) of the Criminal Procedural Code.
- 50 See Article 56 (2) of the Constitution.
- 51 See Article 40 of the Constitution.
- 52 See Line Item 2-01-13, Law \AE On the Republican budget for the year 2003, Law No 32 of 24 January 2003.
- 53 *First Periodic Report of the Kyrgyz Republic to the Human Rights Commission*, U.N. Doc. HRI/CORE/1/Add. 101, February 4, 1999.
- 54 Articles 9 (4), 12 (3), and 16 (1) of the Kyrgyz Constitution; Article 8 of the Law of the Kyrgyz Republic \AE On Normative Legal Acts of the Kyrgyz Republic; and Articles 26 and 27 of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27 (entered into force January 27, 1980), all mandate this compliance. The Kyrgyz Republic ratified the VCLT without reservation on May 11, 1999.
- 55 See Article 64 of the Constitution.
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- 56 See Article 27, Law of the Kyrgyz Republic *Æ* On Normative Legal Acts of the Kyrgyz Republic *Ø*.
- 57 See Article 27 of the Law of the Kyrgyz Republic *Æ* On Normative Legal Acts of the Kyrgyz Republic *Ø*.
- 58 See Article 8 (4) of the Constitution.
- 59 Edil Baisolov, head of the Coalition for Democracy and Civil Society, was put in a military prison and forced to undergo medical tests; four policemen gang raped a female coworker. Natalya Ablova, director of the Bureau on Human Rights and Rule of Law, received an anonymous phone call warning that her house would be bombed. For more detailed reports on these and other cases of harassment, see International Federation for Human Rights, *Kyrgyzstan Situation Report*.
- 60 Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000), 190.
- 61 I am translating from the Russian version; words differ considerably in the English variant.
- 62 The Thirteenth, Fourteenth, and Fifteenth Amendments, for example, outlaw slavery, and the Nineteenth extends the right of suffrage to women.
- 63 Jean-Jacques Rousseau, *On the Social Contract* (Indianapolis: Hackett Publishing Company, 1987), 5.
- 64 Russell Kirk has written convincingly on the phenomenon of “perpetual revolution.” See Russell Kirk, *The Politics of Prudence* (Wilmington: Intercollegiate Studies Institute, 1993).
- 65 Wilhelm Roepke, *The Moral Foundations of Civil Society* (Somerset: Transaction Publishers, 2002), 56.
- 66 See Principle 1(a)(VII) of the *Helsinki Final Act*, August 1, 1975 (emphasis added). The Kyrgyz Republic signed the Act on July 8, 1992. Similar language is found in the American Declaration of Independence.
- 67 Article 15 (1) of the Constitution.
- 68 Article 40 (2), Constitution of the Kyrgyz Republic; Law On the Ombudsman (Akyikatchy) of the Kyrgyz Republic Law _ 136 of July 31, 2002.
- 69 This statistic appears in a draft letter written by Ombudsman Tursunbai Bakir-uluu, on file with the author.
- 70 See Article 15 (4) of the Constitution. Credit for this observation goes to David Greer at ARD/Czechia.
- 71 European Court of Justice, Case 26/62, 1963 ECR 1.
- 72 Sergei A. Pashin, Presentation at the ABA/CEELI Round Table, *Independence of Advocates and their Professional Freedom of Speech*, October 30, 2003, Hotel Pinara, Bishkek, Kyrgyz Republic.
- 73 Alexis de Tocqueville, *Democracy In America*, J. P. Mayer ed., (New York: Doubleday, 1969 [1835-1840]), 274.
- 74 See Kirk, *Rights and Duties*.
- 75 The jury trial, a cumbersome institution from the standpoint of judicial economy, is nonetheless considered indispensable to the discovery of truth in the United States. It has never existed in the Kyrgyz Republic. As a result, the country has an extremely low one percent acquittal rate. United Nations Office on Drugs and Crime, Centre for International Crime Prevention, *Questionnaire for the Seventh United Nations Survey on Crime Trends and Operations of Criminal Justice Systems, covering the period 1998-2000*, <http://www.unodc.org/unodc/crime_cicp_survey_seventh.html> (accessed October 12, 2004), 240-241. In the Russian Federation, which recently reintroduced trial by jury, the figure is identical for bench trials, but 16 percent when peers are the finders of fact. See <<http://countrystudies.us/russia/74.htm>>.
- 76 See Article 9 of the Kyrgyz Constitution.
- 77 See Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1982), 21: “No one who buys bread knows whether the wheat from which it is made was grown by a Communist or a Republican...or, for that matter, by a Negro or a white....the groups in our society that have the most at stake in the preservation of strengthening of competitive capitalism are those minority groups which can most easily become the object of the distrust and enmity of the majority....”
- 78 See Professor Monika Platek’s expert assessment of the Criminal Code, found in OSCE/ODIHR, Analysis of the Draft Laws of the Kyrgyz Republic “On the Entry of Amendments into the Criminal Procedural Code of the Kyrgyz Republic” and “On the Entry of Amendments into the Criminal Code of the Kyrgyz Republic”, April 20, 2004, 111-130.
- 79 See Article 180 of the Criminal Code.
- 80 OSCE/ODIHR, *Criminal Justice Reform: Problems, Priorities, and Perspectives for the Kyrgyz Republic*, January 22-24, 2004, Hotel Pinara, Bishkek, Kyrgyzstan.
- 81 See *The Comprehensive Development Framework* (2001-2010), Pt. 4.3.
- 82 Lindsey, *Against the Dead Hand*, 263-64.
- 83 See Human Rights Watch, *Human Rights Watch Submission to the EBRD* (June 23, 2004), <<http://www.hrw.org/english/docs/2004/06/23/kyrgyz8692.htm>> (accessed October 12, 2004). This document notes that the EBRD praised the growth of civil society in its 2002 Country Report.
- 84 Article 26 of the VCLT, *supra*, provides that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

85 Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* 77 (2) (March-April 1998): 95-107.

86 See < <http://www.mca.gov> >.

87 Montesquieu, *The Spirit of Laws* 1 (5), 298.

88 The women's rights NGO "Bakubat," located in Naryn, offers a figure of 30-50 percent.

89 Article 155, Criminal Code of the Kyrgyz Republic.

90 Article 3(f), Annex to United Nations General Assembly Resolution 48/134 (December 20, 1993)

91 Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1998), 58.

