The Road to Kyrgyzstan — *A Rough Ride*

Matilda Bogner

However large problems with the Australian legal system may seem, if problems that face countries like Kyrgyzstan are kept in mind, a sense of perspective will be maintained!

Kyrgyzstan is one of the five Central Asian new Independent States which came into being after the break up of the Soviet Union. It became independent in 1991 and lies to the west of China, south of Kazakhstan, east of Uzbekistan and north of Tajikistan. It has a population of 4.5 million. The largest minority groups are Russian (17.1%), Uzbek (13.8%), Ukrainian (1.8%) and Tajik (0.8%).[2] The country has received significant foreign support, particularly from the United States, due to its apparent commitment to principles of democracy. Serious problems exist with this commitment and many believe the level of freedom in the country has decreased over the past two years.

Freedom House, a US human rights organisation, in its annual survey of countries worldwide rated the country as being 'free' in 1995, but in 1997 rated it as only 'partly free'. The other Central Asian States of Kazakhstan, Tajikistan and Uzbekistan were all listed as 'not free' and Turkmenistan, considered by many to be a dictatorship, was listed in the 'worst of the worst' nations for its human rights and civil liberties standards.[3]

From an Australian perspective, or the perspective of any country with a strong tradition of the 'rule of law' and a stable political climate, it is interesting to look at how a new country, evolving from the Soviet system, tries to put into practice principles that we take for granted.

It should be kept in mind that enormous practical problems face the implementation of a fair judicial system in Kyrgyzstan. Whatever the legislation says, there is no guarantee it will be implemented. For example, the Constitution guarantees the right to free legal representation for those who cannot afford to pay a lawyer. No-one receives adequate legal aid. No system has been set up to provide it and this failure does not rate as an issue on the political agenda.

Generally there is very little faith in the criminal justice system here. From the police to the administering departments and the judiciary it is considered that bribes or political influence are a more reliable means of resolving a situation than insisting on legal rights. The thought of using the legal system to uphold one's rights is alien to most people. This is understandable given the lack of independence of the judiciary in Soviet times and the state of transition the country is currently undergoing. The 1997 annual report of Human Rights Watch stated:

> ... some people decided to pay a police officer or a procurator [prosecutor] to ensure favourable treatment, rather than to pay for a legal defence, in recognition of the fact that the police and the procurator wielded more power in criminal investigations and court proceedings than lawyers.[4]

Human Rights and the Criminal Code in Kyrgyzstan

In 1997 a new Criminal Code was enacted in Kyrgyzstan. In substance it is the first overhaul of criminal legislation since independence, the previous Criminal Code being little changed from the Soviet version. Several drafts were produced and critical comments were sought from human rights groups and advisory bodies such as the American Bar

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Association. Until the legislation was published, such groups did not know exactly what the legislation contained and whether recommendations to make the legislation more compatible with international legal standards had been adopted. The final document, published in October 1997, has made improvements both on the drafts and on the Soviet legislation. Unfortunately, it failed to make a complete break with the past and contains provisions which will concern those who value human rights.

The Code is very broad ranging and perhaps some of the problems associated with it are due to this. Many articles in the Code are not sufficiently defined to provide clear protection to potential victims or to provide clear proscriptions to those who may transgress its provisions. The Code tries, in 376 articles, to encompass the entire criminal law of the country, excluding criminal procedure. It includes principles of sentencing, available punishments, treatment of juveniles, incapacity due to mental illness, defences, all types of crimes from violent to ecological to corporate and many others.

Certain articles suffer particularly from broad drafting, leaving too much discretion to law enforcement officers and creating the potential for abuse.

An example of an overly broad, catch-all provision is article 353 entitled 'Arbitrariness'. This article proscribes the commitment of an act against the established order that is unwarranted and the legality of which is disputed by another person, the state, or a social enterprise or establishment. The act must cause harm to the state or to society's interests or to a citizen's rights and interests which are protected by law.

This article is so sweeping in its wording that it could conceivably be applied to any individual involved in a dispute with the state or some other established body. The terms used in the article such as 'established order', 'unwarranted', 'social enterprise or establishment', 'society's interests' and even 'a citizen's rights and interests' are left undefined and therefore wide open to interpretation. There is great potential for the partial implementation of such an article.

In many provisions of the Code proscribed activities include those which breach the 'rights', 'freedoms' or 'interests' of a 'citizen', 'the state', 'organisations' or 'society'. Although the intention behind such provisions may be the protection of people's rights, it is their breadth, combined with their undefined nature, which leaves them open to arbitrary application.

Other articles, although not creating catch-all provisions, suffer from a lack of definition in the terms employed. This leads to a lack of certainty and therefore a weakening of the rule of law and the potential for partial or arbitrary interpretation. Examples of this are 'Leaving a Person in Danger', 'Perverse Acts', 'Banditry', 'Organisation of a Criminal Society', 'Pornography' and 'Concealment of a Crime'. These articles leave completely undefined complex terms, on which the defendant's liberty may depend, such as 'serious consequences', 'perverse act', 'a resistant group', 'criminal group', 'pornography' and 'concealment'.

Under Article 8 of the Code a crime is defined as a socially dangerous, blameworthy and punishable act. Excluded from criminality are acts which, although fulfilling all the elements of a crime under an article of the Code, do not present a significant danger to society. Thus, it follows that social danger is the defining principle of criminality.

Under such a definition the concept of *mens rea,* the mental element of a crime, is not included. Crimes under the Code can only be committed intentionally or negligently (Article 22). Article 24 defines negligent crimes as ones which are committed:

- thoughtlessly, that is when a person saw the possibility of social harm as a consequence of their actions, but thoughtlessly hoped they would be prevented; or
- carelessly, that is when the person did not foresee the consequences of their actions but should have and could have foreseen them.

Article 24(1) could be defined as wilful blindness, and deals with criminal culpability. Article 24(2) not only covers recklessness, but also seems to cover situations in which any criminal mental element is absent. In essence, it seems to cover matters covered by the law of tort in the Australian jurisdiction, that is to say it covers situations where there is no criminal mental element, but where some level of legal responsibility exists.

Another result of the definition of a crime under the Code is that a person can be freed from criminal responsibility if it is deemed the act committed has lost its socially dangerous character due to a change in circumstances, or the person who committed the act has stopped being a social danger (Article 65). Such a provision could easily be used to grant impunity to favoured individuals and has the potential to undermine the application of rule of law principles.

The Criminal Code and international standards of human rights

The new Criminal Code has put into national law many rights guaranteed under international law, specifically under those instruments signed by the Kyrgyz Republic, and guaranteed under Section 2 of the Constitution of the Kyrgyz Republic. The legislation includes:

- a person is innocent until proven guilty;
- no-one is to be held criminally responsible more than once for the one crime;
- acts are only subject to the law at the time that they were committed;
- punishment does not have the aim of causing physical suffering or humiliation to a person's dignity;
- the crime of torture;
- crimes of interfering with the integrity of the voting process;
- crimes of interfering with the workings of the criminal justice system;
- the right against self-incrimination;
- the crime of genocide.

Kyrgyzstan has ratified the major international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. Under Article 16 of the Constitution, international instruments ratified by Kyrgyzstan and international customary law relating to human rights are recognised.

The death penalty

Kyrgyzstan has not signed the Second Optional Protocol to the ICCPR 'Aiming at the Abolition of the Death Penalty' and retains the death penalty as a form of punishment. Under the new Code the death penalty applies to various offences: aggravated murder, rape of a child, attempted murder of certain categories of officials, and genocide. The death penalty cannot be applied to juveniles or women.

The legislation sets up a system of presidential pardon to commute the death penalty to a 30-year prison sentence. Although the new Code has reduced the number and type of offences attracting the death penalty, the reduction in the number of people executed seems unlikely due to a general trend of harsher sentencing since independence. '[B]etween 1987 and 1991, an average of eight death sentences were passed annually'.[5] As of 17 October 1997, 26 people were executed during the year as a result of a sentence of the death penalty and no-one was granted a presidential pardon.[6]

Freedom of expression

The Kyrgyz Constitution guarantees the right to freedom of expression and yet Kyrgyzstan is the only ex-Soviet State to have sentenced a journalist to a period of imprisonment for slander.[7] Ryspek Omurzakov was sentenced this year for writing an article about the poor living quarters at a state-owned factory. He was sentenced under the previous Code, but criminal slander and insult provisions remain and similar prosecutions would be possible under the new legislation.

The most ominous of the provisions which limit the right to free expression is Article 342: 'Insult of a representative of power'. It proscribes the public insult of a representative of power in relation to their performance of official duties or in connection with their performance. The maximum penalty is imprisonment for a period of six months. This provision is not limited to false or defamatory material and no guidelines are given as to whether insult is to be determined objectively or subjectively.

Kyrgyzstan is a signatory to the ICCPR which provides that freedom of expression can only be limited for certain necessary purposes provided by law. The article prohibiting insult of a representative of power does not comply with this provision of the ICCPR.

The Code also creates the offences of slander, insult, insult of a participant of a judicial examination, dissemination of individual or family secrets of another, public call for a violent seizure of power and desecration of the state coat of arms or the state flag. The penalties range from fines to a maximum of five years imprisonment.

Freedom of thought, conscience and religion

Article 18 of the ICCPR grants everyone the right to freedom of thought, conscience and religion. The only limitations this right can be subject to are those prescribed by law and which are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The Kyrgyz Constitution guarantees everyone in the Republic the right to freedom of creed and intellectual and religious liberty. It also recognises the validity of international human rights agreements to which the Kyrgyz Republic is a party, including, therefore, Article 18 of the ICCPR.

Article 146 of the Code seeks to protect the carrying out of religious activities by making punishable any hindering of them, although Articles 147 and 259 restrict the types of religious organisations and activities permissible, proscribing activities which cause harm to the health of citizens, infringe on the rights of citizens or induce citizens to refuse to participate in social activities or citizens' obligations. The penalties under these articles range between two and five years imprisonment.

Terms such as 'infringe the rights of citizens', 'social activities' and 'citizen's obligations' are too broad and vague to fit the requirements of Article 18 of the ICCPR and could operate to totally suppress the activities of unpopular religious groups.

The contradictory right to peaceful assembly and association

Article 148 seeks to protect the right to free association, making it illegal to hinder participation in meetings, demonstrations and other like activities.

In contrast, Article 233 proscribes the organisation of, or participation in, mass disorder which is accompanied by force, pogroms, fire, destruction of property or the use of firearms. The question of the necessary intention of the defendant under this article is unclear. It would seem by the use of the words 'accompanied by' that a defendant could be found guilty under this article, if he or she organised or participated peacefully in a demonstration that became violent (beyond that person's control). The penalties proscribed under this article are significant, ranging from three to ten years imprisonment.

Such a broad sweeping provision does not accord to Article 21 of the ICCPR which protects the right to peaceful assembly.

Women

Several articles in the Code seek to protect women from discrimination. It should be recognised such provisions are probably of little practical help to women in a country with major economic problems and a tradition of sexual inequality.

Article 144 seeks to protect women from unfair dismissal or lowering of wages due to pregnancy or the care of young children. Articles 154 and 155 are particularly relevant provisions in this country which has a strong and continuing tradition of kidnapping brides for marriage. They proscribe marriage with a person under marital age and the coercion of a woman or child into marriage. Article 260 seeks to protect women from forced prostitution.

Children

Section V of the Code establishes a separate regime for handling children who are dealt with under the penal system, as required under the Convention on the Rights of the Child (CROC, Article 40). Of concern is the failure of the Code to implement the principle that the best interests of the child must be a primary consideration in all actions concerning a child, and specifically in the punishment of a child (Article 3 CROC). The Code also fails to emphasise the aim of reform and reintegration into society of the child and the principle that custodial sentences should only be used as a last resort and for the shortest appropriate time (Articles 40 and 37, CROC). There is also no article in the Code which establishes alternatives to judicial proceedings for children alleged to have committed a crime or accused of committing a crime.

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Cause for concern

In a decision which may not have filled the Victorian Government with delight, Mr Brian Barrow, Deputy Chief Magistrate, has recommended that an Aboriginal man not serve any of his nine-month jail sentence in a private prison. Mr Barrow also suggested that the man should have access to a Koori education organisation and receive drug counselling. This was the second time that Mr Barrow has made such a recommendation. The private system has been hailed by the Government as well run and efficient but there is considerable cause for concern. In just over 19 weeks there have been five deaths in the private prison system. ● **MC**

Western Australia

Confusion grows over abortion laws

The circumstances under which a woman may seek a lawful termination of pregnancy in Western Australia have been thrown into question with Western Australian Police charging two medical practitioners with attempting to procure abortion in contravention of s.199 of the WA Criminal Code. The charges, which were authorised by the Director of Public Prosecutions (DPP), reflect an extremely literal interpretation of the Criminal Code.

Section 199 of the Criminal Code makes it a crime, punishable by up to 14 years imprisonment, for a person to *unlawfully* use force (or any other means) with the intent to procure the miscarriage of a woman. Section 200 makes it a crime punishable by up to seven years imprisonment for any woman to permit such force or other means to be applied to herself with the intent to procure a miscarriage. 'Unlawful' is not defined in the Code, nor have the Western Australian courts interpreted it. Courts with similar statutory provisions in other jurisdictions have, however, agreed that an abortion is not 'unlawful' if the accused:

> honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted. [*R v Davidson* [1969] VR 667 at 672]

(Adopted by K v T [1983] 1 Qld R 396; R v Bayliss and Cullen, (1986) 9 Qld Lawyer 8; R v Wald (1971) 3 NSWDCR 25; K v Minister for Youth and Community Services [1982] 1 NSWLR 311.)

This test, known as the *Davidson* test, reflects the standard for a lawful abortion throughout Australia and the UK. Accordingly, it is unlikely that Western Australian courts would depart significantly from this standard if tested. It is therefore puzzling that the DPP announced in February that all abortions in Western Australia are unlawful except for the preservation of the mother's life, that is, to save the mother from imminent death. Section 259 of the Code eliminates criminal responsibility for a surgical operation on an unborn child performed in good faith and with responsible care and skill, for the preservation of the mother's life. It effectively permits termination of pregnancy for the purpose of preservation of the mother's life. However, this is not the only instance of a 'lawful' abortion. The DPP's interpretation excludes the possibility of lawful termination of pregnancy where a foetus is defective, or where the mother was the victim of a sexual assault. If the WA courts agree with this view, abortion laws in WA would be among the most restrictive in the world, resembling those in countries such as the United Arab Emirates, Cambodia, Yemen and Afghanistan.

To the contrary, Western Australia's Attorney-General Peter Foss has declared that the *Davidson* test has been and will continue to be used to determine whether prosecutions pursuant to s.199 should proceed. The legal authority of such a declaration is questionable. However, it highlights the enormous gap between abortion practices and abortion law in Australia. Despite the fact that the *Davidson* test makes abortion on demand unlawful in Australia, abortion on demand has been the practice for years in this State and others (see 'The Inadequacies of Australian Abortion Law', (1991) 5 *Aust J of Fam Law* 37 at 48). With this renewed threat of prosecution, however, abortion on demand will almost certainly become a thing of the past in Western Australia.

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Conclusion

Although there are many areas of concern under the Code, its real test will be its implementation through the court system. As outlined above, many articles leave a lot of room for interpretation. If these articles are used arbitrarily to punish those who are unpopular for reasons beyond criminal activity, then the Code will have failed to help the progress towards a society which values the protections provided by a strong philosophy of respect for the rule of law. If such articles are interpreted narrowly, in the spirit of protection for all those who are involved in the criminal justice system, both victims and defendants alike, then this new Code could play a part in the process of implementing a just legal process.

References

1. Matilda Bogner is from Adelaide where she worked for the Legal Services Commission while studying Russian. After completing her studies (and a lot of letter writing) she organised a position in Bishkek, the capital of Kyrgyzstan in Central Asia. She wrote this article after finishing a detailed critical analysis of the new Criminal Code of Kyrgyzstan for the Kyrgyz-American Bureau for Human Rights and Rule of Law.
2. Annual Report of the International Helsinki Federation for Human Rights, 1997, (prepared by Paula Tscherne-Lempiainen, edited by Ursula Lindenberg), p.161.
3. Freedom House has a three rating system of 'free', 'partly free' and 'not free'. This information was taken from an article by Foley, K.P., '1997 In Review: Freedom House Sees Human Rights Gains', Radio Free Europe, Radio Liberty, 12-19-97, internet site: <http://www.rferl.org/nca/features/1997/12/F.RU.971218125402.html>
4. Annual Report of the International Helsinki Federation for Human Rights, above, p.157.
5. Annual Report of the International Helsinki Federation for Human Rights, above, p.158.
6. This information was obtained by the Kyrgyz-American Bureau for Human Rights and Rule of Law from the Kyrgyz Supreme Court.
7. Index on Censorship, Vol. 26, No. 6 November/December 1997, issue 179, p.115.