

**R E C O M M E N D A T I O N S**

**On the Reform of the Legal Profession in Kyrgyzstan**

**OPEN SOCIETY JUSTICE INITIATIVE  
2004**

## INTRODUCTION

The Open Society Justice Initiative (Justice Initiative) and the American Bar Association's Central and Eurasian Law Initiative (ABA/CEELI) agreed a joint project on monitoring and advancing the independence of the legal profession in Central Asia. The regional initiative is aimed at achieving the following objectives:

- Provide independent analysis of the status of legal profession in the Central Asia in accordance with international standards
- Develop recommendations on improving the status of lawyers in order to enable them to effectively protect human rights
- Build a constructive dialogue between the legal profession and the government to reach agreement over issues and reform priorities
- Consolidate and support lawyers in developing and implementing reform program aimed at greater independence of the legal profession.

The project has started in Kyrgyzstan in the spring of 2004. The process began with the implementation of ABA/CEELI's Legal Profession Reform Index (LPRI), as a means of assessing the state of the profession and establishing an empirical baseline for subsequent activities. Open Society Justice Initiative established an Advisory Committee of regional and international experts to develop the recommendations on the basis of LPRI and its own project research, consisting of individual interviews with a number of lawyers, prosecutors, judges, investigators and NGOs. The recommendations focus on priority issues identified by the national experts and highlighted by lawyers during the interview process.

The main goal of current recommendations is to present a set of guidelines based on norms of international and customary law to address topical issues of legal profession reform process in Kyrgyzstan, which is ultimately aimed at strengthening the role of lawyers in defending individual freedoms. The recommendations address a large spectrum of lawyers, although the main thrust of this document is directed at "advocates" or those with rights of access to the accused under Kyrgyzstan's criminal code and before the courts.

The document discusses specific issues of regulation and organization of legal profession, which Kyrgyz lawyers need to address in their quest to improve the quality of the assistance they deliver to their clients. Based on experience elsewhere, the authors recognize that improvement is more likely to be achieved by lawyers who are independent, competent and accountable. Independence is essential if lawyers are to avoid conflicts of interest and to exclude the danger of being subjected to external pressures – and, furthermore, that they are perceived to be so. The interests of the client must be paramount, subject only to the proper application of law. The need for competence in the practice of advocacy is self-explanatory but is of the utmost importance if litigation is to be decided truly on the merits of the case brought before the court. Accountability of the lawyer should reflect not only his or her obligations to the client but also his/her duty to the courts, other members of the profession and the effective administration of justice as a whole. Since members of the public in general and clients in particular are not equipped to identify lapses in these core values in all cases, it is important that the performance of lawyers is overseen by qualified legal professionals with the experience and skills to perform such duties.

The structure of recommendations is based on instructions of the Advisory Committee members and conclusions from the interview process. The first chapter discusses the main issues relating the organization and functioning of the professional organization in Kyrgyzstan, its functions and responsibilities to lawyers and public at large. It follows with the chapter on professional ethics and conduct, which highlights the core values of the profession according to international

standards and recommendations on the process of developing the ethical standards. The next chapter logically moves to discussing the process of ensuring that professional standards are upheld in the vigilant and accountable manner. The topical issue of professional qualification and training is addressed by the fourth chapter from the perspective of international experience in setting up continuous legal training and requirements for entry qualifications. The last chapter discusses some general issues of legal practice, which raise substantive debate among the lawyers in Kyrgyzstan.

The Advisory Committee that jointly devised the content and structure of recommendations, consists of the following members:

Abdurazok Alimardonov	OSI – Tajikistan Law Program Coordinator
David Morgan	International expert/researcher
Gulnar Baigazina	Lawyer, Almaty City Collegium of Lawyers
Henrikas Mickevicius	International expert
Ilhom Azizov	Lawyer, Tashkent City Branch of Association of Lawyers of Uzbekistan
Leonid Khvan	Lawyer, Tashkent City Branch of Association of Lawyers of Uzbekistan
Nazgul Yergalieva	Central Asia Coordinator, Open Society Justice Initiative
Nurlan Sadykov	Lawyer, Chairman of Board of the Association «Lawyers of Kyrgyzstan»
Saidarkram Kamilov	Lawyer, Tajikistan
Shamaral Maichiev	Lawyer, Board Member of the Association «Lawyers of Kyrgyzstan»

The project research aimed at exploring the status of the legal profession and its compliance with international standards, organized by Open Society Justice Initiative in July 2004 was conducted by David Morgan<sup>1</sup> to inform the Advisory Committee in developing these recommendations.

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<sup>1</sup> David Morgan is a practicing UK solicitor who served as the President of the Federation of European Bars in 2002/3. Currently, he is a co-Chairman of its committee on East European Bars and a member of its Deontology (Ethics) Commission. He is also its liaison officer with the International Criminal Court (ICC) and the International Criminal Bar (ICB).

## I. PROFESSIONAL ORGANIZATION

### CURRENT SITUATION

Law on Advocate Activity of 1999 declares the legal profession in Kyrgyzstan independent, and provides for voluntary membership in public associations and freedom to practice law independently or in association with other lawyers. The statute, however, fails to lay out a clear framework for regulation of the legal profession. Only admission to the profession and disciplinary sanctions are set to be regulated by the Ministry of Justice. As a result of legislative lapses, the legal profession is currently lacking any comprehensive regulatory mechanism, which would ensure accountability to the public and quality of services to the citizens in the consistent and transparent manner. The consequences of this arrangement are reflected in the public perception of the legal profession, which is critical of general quality of legal services, of restricted access to competent counsel, of corrupt practices among lawyers and lack of accountability for lawyers' misconduct.

### RECOMMENDATION

**The legal profession should seek to establish a unitary body to govern and represent the profession to guarantee high professional standards in serving the interest of justice and in defending individual freedoms. The state should provide by law the framework for the establishment of a unified professional organization of lawyers to regulate itself.**

### JUSTIFICATION

In general there are several institutional arrangement for regulating professions:

- regulation by the government
- self – regulation
- regulation by third parties

In practice there could be mixed models, which combine various principles of these arrangements designed to respond to social, economical and political circumstance of every territory. The most common methods of regulation are registration, certification and licensing:

*Registration*: does not require the applicant to demonstrate any special qualifications; the applicant simply registers their name and address. There is no assurance the registrant has met any standards, or continues to meet those standards once certified and there are no restrictions on who may practice.

*Certification*: typically requires the applicant to meet determined standards such as education, experience, training and passing an examination to practice in the specified profession. Because the right to practice can also be rescinded, certification typically includes a disciplinary process.

*Licensure*: the highest form of regulation; it encompasses all the requirements of certification and also the provision that it is illegal for non- licensed individuals to practice in the field.

With regards to legal profession, it is recognized that lawyer's obligations are of different nature to those of other professionals and derive directly from the rule of law and requirements of a proper functioning judicial system in a constitutional democracy. It is therefore, have been historically established that the legal profession is a self-regulating profession with freedom to form independent self-governing bodies.

In Western Europe – and indeed most developed countries – Bars and Law Societies have a dual role: one regulating the profession and the other representing it. The representational role usually relates to protecting the interests of the profession as a whole, but may sometimes

involve lobbying on behalf of a class of lawyers or defending an individual lawyer who is being subjected to undue pressure or abuse in the proper conduct of his profession. Bars and Law Societies will also comment on law reform and other matters, which may affect the rights of their members' clients or indeed the public generally.

The regulatory role, which was well described in a Government publication issued in Britain earlier this year as follows:-

“Five core functions of regulation are commonly recognised as:-

- (i) Entry standards and training: setting minimum standards of entry qualifications usually linked to educational achievement, for candidates wishing to become “qualified”. It also encompasses matters such as continuing professional development.
- (ii) Rule making: formulation of rules by which members are expected to work and to adhere.
- (iii) Monitoring and Enforcement: checking the way in which members carry out their work, in the light of the prescribed rules, and enforcing compliance if rules are broken.
- (iv) Complaints: systems for consumers to bring complaints about providers, who have served them poorly, focused on redress to the consumer.
- (v) Discipline: powers to discipline members where that person is, for example, professionally negligent, or in breach of the professional rules, focusing on action against that individual.”<sup>2</sup>

The professional organization with public function of regulation is usually characterized by following qualities: exclusivity, established by law, compulsory membership, power to enact mandatory rules, power delegated from public authorities. The self-regulation model, thus, promotes strong professional associations, which are in turn required to demonstrate awareness of public function and responsibilities for citizens. Within the exercise of their duties to the society the lawyers are bound *inter alia* by the general principal of independence.

It should be noted, however, that the principle beneficiary of professional independence is not the Bar, lawyers, legal system but a community at large. Professional independence is not granted as a professional privilege, but is a condition for fulfilling a particular function or responsibility that of independently defending the rights of individual citizens.

In this context, the international standards go at length at stating the importance of an organized legal profession free to manage its own affairs for the protection of human rights and maintenance of the rule of law. (Attached are the UN Basic principles on the role of lawyers, Council of Europe Recommendations (2000) 21 on Freedom to exercise of the profession of a lawyer; CCBE Code of Conduct)

A profession controlled and regulated by a government ministry (in Kyrgyzstan, the Ministry of Justice) cannot said to be independent, however benign that administration may be. Nearly all those interviewed agreed that the long term aim must be for a single lawyers' organization which should be responsible for regulating the profession.

The objections to it arose mostly from distrust of those that might lead and control such an organization. For that reason, the conversion of the existing national body Union of Advocates into a new professional body would probably be unworkable, if only because of the

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<sup>2</sup> Consultation Paper on Review of the Regulatory Framework for Legal Services in England and Wales by Sir David Clementi, the Independent Reviewer (March 2004)

unrepresentative way it was established. It is vital that, for any such organization to command the respect essential to its success, that its formation, constitution and decision-making are truly transparent.

The proposal would be therefore that a new organization be formed with membership open to all advocates. It should be governed by a council committee chosen from within its ranks of practicing lawyers with constituencies to reflect the different regions and, more importantly, the different forms of practice. There should also be seats specifically reserved on the governing council for young lawyers (e.g. those advocates under 35 years of age) and any other special interest group deserving of representation.

The constitution should ensure proper rotation of office holders. In the United Kingdom, for instance, the President only holds office for one year and cannot return to office. It should be further protected by requiring that any change to the constitution must be clearly advertised well in advance of debate, and must be approved by 75% of the members voting in general assembly. Because the principal purpose of this body will be to regulate the profession, **membership should become mandatory**. The regulatory activities should, of course, be delegated to specialist committees comprising lawyers with relevant skills e.g. education, ethics, discipline etc. To ensure that powers are not abused there should be rights of appeal, preferably to the members in general assembly or, if impractical, to the courts by way of judicial review.

#### Subjects of regulation by professional organization.

What type of legal work should be regulated? What kind of lawyers should be required to be members of the professional organization and adhere to unified professional standards? How is the public/consumers will be affected by the monopoly of legal services only by members of lawyers' profession? These questions are highly debatable among the lawyers in Kyrgyzstan especially in the context of current reform efforts.

Different legal systems developed different approaches to what work should be reserved to lawyers and if all lawyers should be the members of one professional organization. For instance there are 3 systems in operation in Eastern Europe:

- a single body of lawyers with a monopoly: a lawyer must be registered with the Lawyers' Association to be able to present a party in court or give legal assistance
- lawyers are allowed to practice outside the organized Bars
- legal professionals who are not lawyers registered with the Bar are allowed to practice alongside with lawyers, in particular in the field of commercial law.

In determining the need for minimum standards of legal competence necessary to ensure effective protection of citizens' rights, it is relevant to consider a number of factors. Higher standards of competence and strict regulation must be in place where the stakes for the client are great, for example, personal liberty or property. Where the clients are sophisticated, for instances companies, business groups, licensing is not necessary and "jurists" could represent such clients. It should be provided that clients have sufficient redress under general law.

In Kyrgyzstan, the Civil Code allows for a non-lawyer to represent a party on the basis of power of attorney. Although judges and lawyers express concern over the competence of such representation, many interviewed do not support introducing strict regulation of this "institute of representation". The solution could be for Kyrgyzstan, which experiences a lack of qualified legal assistance, that de-regulation of some legal work is accompanied with introducing the certification scheme, which guarantees that minimum education and training standards have been met. The legislator could impose the requirement of certificates for certain categories of civil

cases, where the clients have considerable stakes in the outcome of the case and it involves complicated issues of law. The professional organization of lawyers or independent body could run the certification committee for non-lawyers to satisfy this requirement of courts.

It is argued that compulsory membership of a law society is necessary to protect consumers. A lawyer's membership allows the professional organization to demand adherence to the common rules of ethics. In Kyrgyzstan, a unitary authority is strongly recommended. What kind of lawyers (criminal, civil, in-house lawyers) should be required to join the professional organization will depend on what issues of law the public needs the highest protection due to lack of information and education that would require subsequent regulation.

In this case, the government could serve as the mediator among different groups of lawyers in resolving this dispute with the aim to ensure that citizens will be guaranteed qualified legal assistance from an independent and accountable legal profession. Even the CoE Recommendations recognize the "proper role of government to intervene in regulation of lawyers where necessary in order to safeguard the public interest".

## **II. PROFESSIONAL ETHICS AND CONDUCT**

### CURRENT SITUATION

Rules of Advocates Professional Ethics was unilaterally introduced by the Ministry of Justice, which approved them by Instruction 73 on 21 May 2003. It was the Ministry of Justice response to increasing complaints of general public over professional misconduct and lack of accountability of lawyers. Lawyers who are members of various public associations may be subject to the rules of ethics developed by their associations. There is no comprehensive code of ethics mandatory for all members of the legal profession. Lawyers mainly refer in their work to the provisions of the law on duties of lawyers, which reflect some basic principles of professional ethics, such as conflict of interest and client confidentiality.

### RECOMMENDATION

**The legal profession should seek to develop uniform code of professional ethics applicable for all members of the profession based on tradition, common values and internationally recognized standards of lawyers' ethics.**

### JUSTIFICATION

It is recognized that the ethical rules of the legal profession are designed to guarantee the performance of the functions of the lawyers. The Council of Europe Recommendations specifically states that the lawyers' organizations "should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly".<sup>3</sup> "In a democratic society, the profession of lawyers has to be regulated by its members, consequently, lawyers should respect the discipline of their own Law Society or Bar and the practice in accordance with the general principles governing the profession".<sup>4</sup>

The international organizations representing legal profession of many countries and most national bars recognize the following general principles governing the legal profession:

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<sup>3</sup> CoE Recommendation (2000)21

<sup>4</sup> Conclusions of the multicultural meeting "The Role and the responsibilities of the lawyers in a society in transition"

independence, trust and personal integrity, confidentiality, respect for ethical rules, avoidance of conflicts of interest, avoidance of activities incompatible with the independent discharge of their duties, protection of the client's interest and respect for the court. The specific duties of lawyers to adhere to these principles are directed towards:

- the client
- the courts
- the legal profession
- "the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in the face of the power of the state and other interests in society"<sup>5</sup>

The rules of each professional organization arise from its own tradition and legal system where they have developed. In the modern world of globalization, there has been a tendency, however, to establish common (regional) rules of ethics for promoting high quality legal services across borders. For instance, the CCBE Code of Conduct is recognized as rules governing the cross-border transactions in Europe. It could be said that the member delegations of the CCBE are in the gradual process of harmonizing their codes of conduct.

If only for this reason, the recommendations set out at the end of this Report include the preparation of a Code of Ethics, which should not only meet high standards but should also be one to which all advocates should be able to sign up to.

It was the agreement of the Advisory Committee that while the Recommendations document should not prescribe any certain rules on the legal profession in Kyrgyzstan, a basic guidelines on the process of developing the ethical standards would be appropriate and useful.

Main guidelines to setting professional standards

- The code language should be simple, concise and readily understood by all.

Professional code of conduct may be regarded as the substantive law of disciplinary proceedings since the violations of such a code may be prosecuted. Therefore these rules must be subject to the principles of criminal law, such as: certainty, proportionality, non-retroactivity. When stating main principles governing the legal profession in Kyrgyzstan such as *independence* it is important to clearly define these terms in relation to the bar association and individual lawyers. The rules of conduct should avoid vague statements, which could be used to harass or punish a lawyer who is vigorously standing up for the client's rights. For instance, the Ministry of Justice rules of ethics state that "it is unacceptable for lawyers to start an argument with the court or make tactless statements towards other participants of a hearing". "Tact and Respect" are a matter of personal and subjective taste. This statement may suggest that lawyers should adopt a totally supine attitude to the court, its officials and other parties, when the occasion may properly demand that the lawyers challenges a decision of the court or the comments of other parties to the proceedings.

- The code should be written, reviewed, and edited by a multidisciplinary team of lawyers from various areas of legal practice and with participation of non-lawyers - representatives of legislature, courts and Ministry of Justice and civil society to ensure confidence of the public in the quality of professional standards and ability of the profession to effectively fulfil its function in the society.

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<sup>5</sup> CCBE Code of Conduct (Art.1.1)



In the atmosphere of low public image of legal profession in Kyrgyzstan, it would be useful to start the process of reforming the profession by setting standards in the transparent process open for participation of all those, for whom the lawyers have professional duties: the client, the courts, the legal profession and the public.

- The code should apply to all members of the legal profession and be global in scope.

The professional organization established by law and empowered with public prerogative of enacting mandatory rules should do so in view of its public function of serving the interests of justice and protecting rights of citizens and therefore, produce general norms that will guide the activities of not only a closed circle of its members but of all groups of lawyers. In this case, it is useful to look into the definition of a lawyers accepted by the CoE Recommendations (2000)<sup>21</sup>: “ a “lawyer” means a person qualified and authorized according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients legal matters”.

In certain jurisdiction, for instance, a Bar composed of practicing private lawyers could enact ethical rules and professional standards that are also applicable to those not eligible for membership (e.g. corporate lawyers).

In the situation of Kyrgyzstan, it is advisable that the professional organization will take the lead in setting standards for all those who practice law, regardless of their membership status.

- The code must be easily accessible and accompanied by information and training component.

To ensure respect and compliance to professional rules a special training courses and educational materials must be available for all. The information on the code and compliance mechanism must be easily accessible to general public via internet, or informational booklets at courts, law faculties, general libraries, etc.

The members of the professional association must have access to mechanism for obtaining guidance, consultations on professional ethics and for good faith reporting of suspected misconduct.

The issue of educational seminars during the initial process of introducing uniform rules of professional conduct are extremely important in Kyrgyzstan, where the notion of ethics and professional responsibility are considered by some as foreign concepts in theory and practice.<sup>6</sup> For instance, many interviewed confused ethics with legal obligations or even the requirements of procedural rules. Some obligations such as confidentiality or professional secrecy, avoidance of conflicts of interest were quoted as being legal requirement because it is laid down in the Law of Advocacy. However laws can change and one has to ask whether if the requirement were removed by subsequent legislation, would advocates be released from the obligation? Only few clearly perceived the obligation as being a permanent feature, hence the universally accepted international view that this is a matter of ethics, which connotes a moral element, rather than just a legal or procedural one.

- Enforcement and implementation mechanisms

The code of professional conduct must provide information on the mechanism of enforcing the professional standards and on sanctions to be imposed by professional or independent organizations in cases of non-respect by lawyers. It is important that the disciplinary proceedings fully comply with requirement of fair procedures guaranteeing a lawyer the right to a fair and public hearing. The next chapter of recommendations specifically deal with the issue of disciplinary proceedings and sanctions.

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<sup>6</sup> LPRI Kyrgyzstan, Factor 16

### III. DISCIPLINARY PROCEEDINGS AND SANCTIONS

#### CURRENT POSITION

At present, the powers to investigate and sanction the breaches of the Law on Advocates Activity and vested with the Ministry of Justice. The representatives of the legal profession could be involved in the process of conducting disciplinary proceedings but the ultimate decision making power on sanction lies with the Minister of Justice. Although members of various lawyer's associations could also be subjected to the disciplinary proceedings by their organizations, this mechanism is infrequently used and does not provide adequate protection of professional standards nor effective redress in cases of citizens complaints.

#### RECOMMENDATION

**Legal profession should seek to establish a mechanism of disciplinary proceedings and sanctions independent from the state and compatible with international requirements of fair procedure to ensure accountability of lawyers and their compliance with professional standards.**

#### JUSTIFICATION

There is a danger in vesting the ultimate authority of disciplining lawyers with the government agency, however benign the administration may be, without eventually eroding the principle of independence of lawyers. Such activities carried out by Government agencies may be abused for political ends. Just as judges should only be accountable to the senior judiciary if judicial independence and integrity is to be preserved, lawyers really should be accountable in respect of their conduct to their peers (i.e. fellow lawyers) rather than to civil servants or politicians.

Prior to the imposition of any discipline, it is important that any alleged breach, whether of law, rules or professional code, should be investigated properly and fairly. To achieve widespread respect, it must be seen to be rigorous and fair. To protect the individual lawyer from any misuse of power, he/she should have the right to appeal against any sanction imposed to the courts. Moreover, the CoE Recommendation (2000)<sup>21</sup> requires the same standards of fair trial of Article 6 of the ECHR be applied to the disciplinary hearings against lawyers. In particular, the lawyers's rights include:

- right to a fair and public hearing within a reasonable time by the independent and impartial tribunal established by law;
- right to be informed promptly of the charge and of the nature of the evidence against him;
- right to have adequate time to prepare their defense
- right to defend themselves in person or through a lawyer of their choice;
- right to be present through the hearing.

In addition, the principle of proportionality must be respected when determining sanctions for disciplinary offenses.

If the investigation shows a prima facie case, it may be necessary to hold some form of disciplinary or judicial hearing to decide whether the advocate is guilty of misconduct or not, and that decision should be made by different individuals from those who investigated the complaints, who may well "prosecute" the case.

If the allegations of misconduct against the lawyer are found to be proved, and he/she should, of course, be given every opportunity to rebut them, the committee or panel tasked with punishing him/her should have a variety of sanctions available to it to reflect the varying degrees of gravity. Whatever the findings, they should be publicised once made.

There is a danger that investigation and discipline carried out within the profession will be seen by the public as a whitewash. In some countries, independent complaints systems were established outside of the professional association. Another alternative has been to establish a non-statutory “arms-length” scheme which are funded by the legal profession, but established as a separate entity from the professional association.

In Kyrgyzstan, it should, of course, be the Advocates' professional body that investigates and disciplines its members. To avoid the accusation that such activity is self-serving, it may be advisable to include in any such investigative or disciplinary committee lay (i.e. non-lawyer) representatives, such as senior personnel from human rights NGO's.

It is advisable to set an effective complaint procedures for citizens to promote the confidence of the public in the self-regulatory system. The procedure should be easily accessible and well publicized. There should be an annual report to deliver a degree of public accountability and published targets for acknowledging and responding to complaints.

#### **IV. PROFESSIONAL TRAINING AND QUALIFICATION PROCESS**

##### **Qualification process**

###### **CURRENT POSITION:**

The Qualification commission set up by the Ministry of Justice administers the oral qualification examination necessary to receive the license to practice advocate activity. The qualification process is seen by lawyers and the public as lacking objective criteria and not adequate to insure rigorous selection of competent future professionals. Although, the applicants are required have a law degree and a one-year legal apprenticeship by law as in many countries, in practice these requirements do not guarantee competency. Difficulties of young graduates to arrange apprenticeship with a practicing lawyer combined with low standards of general legal education led to decrease in professional qualifications of newly admitted advocates. In addition, the privilege access to the profession of former parliamentarians, judges, prosecutors, police and national security officers, state employees of presentational administration and the prime minister offices with a law decree and five years of experience in these capacities is seen to further diminish the professional standards among the advocates. As far as post-qualification training is concerned, this seems to be almost non-existent and is left to individual initiatives.

###### **RECOMMENDATION**

**The legal profession should seek to gain the decisive role in determining the standards and administering the process of admission into the profession. The professional association of lawyers should be responsible for setting the requirement of continues legal education as means of upholding the high quality standards of legal services through a comprehensive mechanism of professional training.**

###### **JUSTIFICATION**

It is usual that in most countries the requirements to practice law are generally prescribed by law; that both public authorities and professional organizations participate in their enforcement; and that additional mechanisms of control are put in place in order to guarantee the integrity and objectiveness of the process. Some of the criteria for admission to the Bar are strictly objective:

- level of legal studies
- professional training
- examination result

- absence of any convictions or dis-barnment

But there are also subjective criteria such as high moral standards and equivalent professional experience in addition to lawyers training. In this regard, it is extremely important that only the future lawyer's peers possibly with the participation of a judge be responsible for assessing these subjective criteria. It is generally recognized that the Minister for Justice should have the authority to impose a massive influx of people into the Bar from outside the profession.

In the process of regulating the professions, in some countries there are provisions, which sometimes referred to as "grandfather clauses" that exempt existing practitioners from the qualification requirements applied to the new entrants, generally specifying different and lower standards. These provisions usually exist in countries with high education standards across the board accompanied by effective continuing professional education programs.

As far as applicability of such provisions for the legal profession, it is important to consider the special advocacy skills and knowledge of professional ethics of lawyers, which should be a subject of qualification examination required from all aspiring advocates. In Kyrgyzstan, therefore, while the legal experience requirement may be lifted for the former employees of state agencies, parliament and judiciary, the requirement of qualification examination should be set as standards for all alike.

In this regards, it is important that the qualification examination and process satisfy the requirements of objectivity and fairness. The decision of the qualification commission should be the subject to review by an independent and impartial judicial authority.

The competence of advocates, would almost certainly be improved by more vocational training to prepare newcomers for the practicalities of advocacy. No doubt, in a perfect world, matters would be further improved by a two year apprenticeship, rather than just one, but this may cause financial hardship. However, those charged with implementing reforms may wish to consider other alternatives, such as a year's service under the tutelage of a judge or other court official as they do in Turkey.

## **V. SOME ISSUES OF INDEPENDENT EXERCISE OF LAWYER'S PROFESSION**

### *Issues of legal aid*

Kyrgyzstan, with its population of roughly 5 million people has a legal aid budget of 5 million som, which is roughly 2 cents per capita. The rules of payment on legal aid cases endorsed by the Ministry of Justice established the tariff of 125 som per day, which is compounded by the delays in administering the payments, brings mostly low caliber of lawyers to legal aid services. The research organized by Soros Foundation Kyrgyzstan on legal aid needs in the country further highlight such problems as low quality of legal aid services and absence of advocates in remote and economically undeveloped regions that result in violations of basic defendants' rights in criminal proceedings; arbitrary distribution of cases, giving rise to corrupt practices; lack of systematic and comprehensive data gathering to assess the demand for legal aid, etc.

In this situation, the government could stimulate the growth of advocates community and availability of legal services especially in remote areas, by increasing the tariffs on legal aid cases and establishing an efficient system of legal aid administration. The Advisory Committee welcomes the efforts by the government to reform the legal aid system, expressed in the recently developed concept paper on the improvement of the state guaranteed legal aid system.

### *Taxation*

The issue of taxation of advocate activity is a subject of heated debate among the lawyers and government officials. The lawyers complain on the excessive tax burden and complicated system of taxation. The criminal lawyers whose primary income is derived from ex-officio work are dissatisfied with the level of payment for legal aid cases by the government, which under the current tax regime, serves as major disincentive for lawyers being involved in legal aid scheme. While the issues of taxation lay outside the scope of this paper, the Advisory committee agreed that a simple tax administration system should be put in place with regards to lawyers income so as to minimize the possibility of abuse by tax administrative authorities in the exercise of lawyer's profession.

### *Status of advocate activity*

The question of how the status of lawyer and legal practice should be considered in the framework of tax and labor law gave rise to the on-going debate and division among the legal community in Kyrgyzstan on whether the advocate activity is a commercial or non-commercial activity. This debate is of course to be resolved by the legal profession of Kyrgyzstan itself. In this process, it would be useful for different camps to look into the experience of other countries in addressing this important conceptual challenge of the modern legal profession.

The issues of commercialism versus ethics, instrument of justice concept versus service provider concept, business or profession – are widely discussed among lawyers in the regional and global context. In western countries, the legal profession became the subject of criticism for excessive commercialization when the profit and shareholder values gradually erode the core values of the legal profession. In Europe for instance, the legal profession is being attack by regional and national competition authorities for the size of legal fees on grounds of competition law. The high fees in the market of legal services made it very difficult to attract lawyers to participate in the sustainable legal aid schemes. As a result, the governments are taking steps of involving non-lawyers or para-legals in providing basic legal services or removing existing monopolies of lawyers.

In the related legal systems of other CIS countries, the majority of legal societies declared the advocates profession as one having the public function of serving the interest of justice and protecting the rights of individuals.

Whether the advocate activity is to be considered the exercise of liberal profession or a business activity should be discussed from the point of view of consequences for the public and individuals who are the beneficiaries of legal services. If it is the exercise of liberal profession then according to the definition by the European Secretariat of the Liberal Professions, it is characterized by “competence, public interest, provision of individual service, confidence, independence and professional ethics”. If it is the business activity, then it falls in the realm of state regulation, being the subject of competition laws and regulatory mechanism applied for businesses.