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# The Increased Use of "Reconciliation" in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?

Cynthia Alkon<sup>1</sup>

*"We have had great success with mediation. We have even had several women marry these men."*  
—*Lawyer in Kyrgyzstan discussing reconciliation of rape cases.*<sup>2</sup>

## I. INTRODUCTION

This statement sums up the challenges lawyers, courts, legislatures, and other policymakers face when discussing mediation, reconciliation, or the use of other process alternatives in criminal cases in Central Asia. First,

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1. Assistant Professor of Law at the Appalachian School of Law, previously Head of the Rule of Law Unit of the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR) from 2002-2006. The views expressed in this article are solely those of the author and do not necessarily represent the views of the OSCE. Special thanks to Mr. Dmitry Nurumov, OSCE/ODIHR Rule of Law Coordinator in Central Asia for his invaluable assistance in researching the Russian language sources including the applicable laws, for analyzing the available statistics, and for his thoughtful comments and suggestions regarding the text of this article in its various drafts. The clarity that exists in this article regarding the laws and practices of each country is due to Mr. Nurumov's attention to detail. Any mistakes are the responsibility of the author alone. Thank you also to Associate Professor Paula M. Young for her organizational advice, editing assistance and her contribution to the discussion found in section V of the article. She has allowed liberal use of the discussions found in her recent articles on mediator grievance systems and mediator ethics. Earlier versions of this article were delivered as papers at the International Society for the Reform of Criminal Law Conference on "Modernization of Criminal Justice Systems" on June 26-30, 2005, Edinburgh, Scotland and at the Law and Society Annual Meeting in Baltimore, MD in July 2006. Thank you also to the Appalachian School of Law for providing financial support towards the completion of this article.

2. A well-known woman lawyer, who will remain unnamed, made this statement during a conference on reform of the Criminal Code and Criminal Procedure Code in Kyrgyzstan in March 2004.

many people in the legal community of Central Asia have different understandings about the types of criminal cases appropriate for referral to alternative processes in lieu of criminal prosecution. Second, many people in the Central Asian legal community have attitudes about victims, defendants, and certain types of crimes that differ significantly from the attitudes held by the legal communities in other countries of the world. For instance, in Central Asia, prosecutors, judges, and other actors in the criminal justice system commonly understand sexual assault and rape as crimes of passion and love, not of violence.<sup>3</sup> In some parts of rural Central Asia it is not uncommon for men to kidnap women to force them into marriage.<sup>4</sup> These attitudes affect the types of cases referred to alternative processes and the inadequate safeguards in place to protect victims of crime, the rights of criminal defendants, and the integrity of these alternative processes.

In evaluating the increased use of alternatives to criminal proceedings throughout Central Asia, scholars and policymakers must understand the different perspectives and attitudes that criminal justice professionals hold towards both particular types of crime and the rights of victims and defendants, and how these perspectives influence their choice of when or how to use alternative processes. The international community must also clearly understand these differences before embarking on any assistance program to support or encourage the increased use of reconciliation or other processes, mistakenly placed in the category of restorative justice processes. However, with or without international assistance, legal professionals in Central Asia increasingly support and use alternative procedures, primarily “reconciliation,” in lieu of traditional criminal prosecutions.<sup>5</sup> In recent years Central Asian legislatures passed laws supporting the use of these alternative

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3. See, e.g., *Reconciled to Violence: State Failure to Stop Domestic Abuse and Abduction of Women in Kyrgyzstan*, 18 HUMAN RIGHTS WATCH 9 (2006), at 44-51 (detailing police attitudes in Kyrgyzstan towards domestic violence), and at 86-125 (citing attitudes towards bride-kidnapping including “tradition” and that the bride “consents” to the kidnapping and reporting experiences of kidnapped women), available at <http://hrw.org/reports/2006/kyrgyzstan0906/> (last visited Oct. 30, 2007).

4. See, e.g., Craig S. Smith, *Abduction, Often Violent, a Kyrgyz Wedding Rite*, N.Y. TIMES, Apr. 30, 2005, at A1. See also Cynthia Werner, *The Rise of Non-Consensual Bride Kidnapping in Post-Soviet Kazakhstan*, in THE TRANSFORMATION OF CENTRAL ASIA: STATES AND SOCIETIES FROM SOVIET RULE TO INDEPENDENCE 59-89 (Pauline Jones Luong ed., 2004).

5. See Jeffrey Thorn, *Restorative Justice in Central Asia: A Critical Analysis and Suggestions for the Future* (2004) (on file with author). The study was conducted under a Chayes Fellowship from Harvard Law School for the OSCE. See also *infra* Section VI.

procedures.<sup>6</sup> Many professionals within the criminal justice system, notably police officers and prosecutors, advocate the increased use of alternatives to prosecution.<sup>7</sup> Yet, the personal and institutional interests of criminal justice professionals in the use of reconciliation directly conflict with the needs and interests of crime victims and criminal defendants. From the perspective of western restorative justice experts,<sup>8</sup> the countries of Central Asia have turned the values of the restorative justice movement on their head reinforcing the weaknesses and abuses of the dysfunctional criminal systems in which the alternative process must operate.

## II. THIS ARTICLE

Reconciliation, defined in Section VI below, provides the most common alternative to criminal prosecutions in Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan.<sup>9</sup> This article attempts to define and describe the different

6. CRIMINAL CODE [C. CRIM.] art. 67 (Kaz.); Law Number 221, Nov. 14, 2003; CRIMINAL CODE [C. CRIM.] art. 66-1 (Uzb.); CRIMINAL CODE [C. CRIM.] art. 73 (Taj.) (Republic of Tajikistan Law, May 17, 2004, No. 35) and *infra* Section VI.

7. Thorn, *supra* note 5, at 1, 9-14; *see also infra* note 20.

8. It is not easy to find an appropriate term to describe restorative justice as practiced in a range of countries which are more than just "western" and which are oftentimes based on traditional practices and drawing from native communities in those countries. For simplicity of prose, this article will use the term "western" while recognizing that many of the practitioners of restorative justice are in countries of the former Eastern Bloc, such as Poland and the Czech Republic, and from countries in countries such as Canada and Australia, might prefer not being categorized as "western." Later in this article examples given are specifically from the United States.

9. Turkmenistan was not invited to participate in the Nov. 2004 Conference (*see* discussion regarding the Conference *infra* Section III and note 20). Turkmenistan is excluded from the analysis in this article due to the relative difficulty in gathering information in the country and due to the serious human rights situation in the country. *See, e.g.*, UNITED STATES DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005, <http://www.state.gov/g/drl/rls/hrrpt/2005/61681.htm> (last visited Feb. 22, 2007). Freedom House publishes an annual survey ranking countries according to their level of freedom and rates Turkmenistan as "not free" with political rights and civil liberties both getting the lowest number available: a "7" out of "7" representing the "least free." [www.freedomhouse.org/research/freeworld/2005countryratings/](http://www.freedomhouse.org/research/freeworld/2005countryratings/) (last visited on June 25, 2006). FREEDOM IN THE WORLD (Turkmenistan), <http://www.freedomhouse.org/template.cfm?page=22&year=2005&country=6852> (last visited June 25, 2006). *See also*, Amnesty International, *Turkmenistan: the Clampdown on Dissent and Religious Freedom Continues* May 2005 at 1, available at [http://web.amnesty.org/library/pdf/EUR610032005ENGLISH/\\$File/EUR6100305.pdf](http://web.amnesty.org/library/pdf/EUR610032005ENGLISH/$File/EUR6100305.pdf). For an analysis of the political succession in Turkmenistan following the December 21, 2006 death of President Saparamurad Niyazov, *see* JIM NICHOL, TURKMENISTAN'S POLITICAL SUCCESSION: DEVELOPMENTS AND IMPLICATIONS, CRS REPORT FOR CONGRESS ORDER CODE RS22572, (2007), available at <http://fpc.state.gov/documents/organization/80682.pdf>; Natalia Antelava *Leader's Death Leaves Uncertain Future*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia->

forms of reconciliation processes in these Central Asian countries. Section IV briefly examines the history, economies, governments, and legal systems including an outline of the criminal procedure of each country.

For comparative purposes, Section V briefly examines the development of alternatives to criminal prosecution (generally known as restorative justice) in western nations, by considering the proponents for change, the underlying core values and ethical guidelines, and the types of cases that are typically referred to restorative justice conferences.

Next this article, in Section VI, discusses reconciliation in each of the four Central Asian countries by examining who makes the decisions in each country to put a criminal case into reconciliation, what types of cases go to reconciliation, whether they go pre- or post-conviction, and why they go to reconciliation.

The article concludes, in Section VII, with an analysis of the problems the reconciliation process creates and the significant risks the process poses for vulnerable victims and for defendants with few human rights protections. Section VII will describe the selection and training of intermediaries,<sup>10</sup> how intermediaries conduct the reconciliation process and the presence or absence of guiding core values and ethical standards. This section also considers who may be present during the reconciliation and whether the

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pacific/6202215.stm. Turkmenistan's human rights record does not set it entirely apart in the region. Uzbekistan also suffers from serious human rights violations with conditions worsening following the May 2005 events in Andijon. See *infra* Section IV; The International Crisis Group, *Uzbekistan: the Andijon Uprising*, Asia Report No. 38 (May 25, 2005), <http://www.crisisgroup.org/home/index.cfm?id=3469&l=1> (last visited July 1, 2006); Report from the OSCE/ODIHR Trial Monitoring in Uzbekistan Sep./Oct. 2005, available at [www.osce.org/documents/odihr/2006/04/18767.en.pdf](http://www.osce.org/documents/odihr/2006/04/18767.en.pdf) (last visited June 25, 2006); C.J. Chivers & Ethan Wilensky-Lanford, *Video of Ill-fated Uzbek Rising Offers Haunting, Complex View*, N.Y. TIMES, June 22, 2006, at A1. Participants from Uzbekistan attended the Nov. 2004 Conference, *infra* note 20.

10. This article will use the term "intermediary" and not the terms "neutral" or "mediator." "Intermediary" is the literal translation into English from the Russian word *posrednik*, commonly used to refer to intermediaries in commercial transactions who receive payment depending on the final negotiated terms of the contract. *Posrednik* is also the most common Russian word used to translate from the English word "mediator" and indicates the difficulty presented by a language which does not have a commonly used word for mediator that means an impartial neutral third party with no interest in the case. Interview with Dmitry Nurumov, OSCE/ODIHR Rule of Law Coordinator in Central Asia, in Grundy, Va. (June 30, 2006). See also definitions in T. Efreanova, *Novyi tolkovo-slovoobrazovatel'nyi slovar' russkogo yazyka* [New Explanatory and Word-Formative Dictionary of the Russian language] 2001-2002, [http://slovari.gramota.ru/portal\\_sl.html#efr](http://slovari.gramota.ru/portal_sl.html#efr) and *Tolkovyi slovar' zhivogo vlekoruskogo yazyka V. Dalya On-line* [V. Dal' Russian Explanatory Dictionary].(1998), <http://vidahl.agava.ru/P170.HTM#31270>. This article explains, that one of the fundamental problems with current reconciliation practice in Central Asia is the role the intermediaries play and the fact that intermediaries usually have an interest in the outcome (most often that the parties reach agreement). See *infra*, Section VII. Intermediaries in reconciliation are therefore rarely "neutral" as is understood in western restorative justice terminology.

participants have control over the process design and outcome and whether the reconciliation is voluntary. Section VII also analyzes whether the reconciliation process protects the rights of defendants by ensuring that communications made in the reconciliation are confidential and precluded from admission into evidence in later proceedings. This section ends by examining the lack of safeguards to protect victims and defendants in reconciliation processes in Central Asia.

Finally, the article concludes that the international community and policymakers should not view the increased use of reconciliation in these four Central Asian countries as a sign of reform or improvement in the administration of the criminal justice systems in those countries. Instead, observers should exercise great caution when discussing the expanded use of reconciliation as an alternative to criminal prosecutions in Central Asia. In current practice, the use of reconciliation fails to protect victims, fails to protect defendants' rights, and provides additional opportunities for prosecutorial, judicial, and police corruption.

### III. THE DATA GATHERING PROCESS

Scholars, legal development workers, those in the international community, and the general public have an extraordinarily difficult time gathering information about how the legal systems work (or about virtually any other topic) in Central Asia.<sup>11</sup> These countries have no equivalent to a Freedom of Information Act.<sup>12</sup> The government closely guards the distribution of basic statistics (such as numbers of people executed), treating the data as a state secret.<sup>13</sup>

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11. See *infra* note 13 and 16 and Section VI (discussing the lack of available statistics on reconciliation of criminal cases in Central Asia). This example illustrates the difficulty in finding specific and reliable information about developments in Central Asia. Few international organizations or development agencies have sufficient resources to engage in extensive monitoring and instead monitor specific events, such as elections or the trials in Uzbekistan following the events in Andijon. See *supra* note 9.

12. See, e.g., Global Environmental Outlook 2000, Europe and Central Asia: Environmental Information and Education, <http://www.grida.no/geo2000/english/0177.htm> (access to environmental information and the absence of Freedom of Information Acts in Europe and Central Asia) (last visited October 30, 2007); OSCE Representative on Freedom of the Media, *The Media Situation in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan* (2002) (describing how each country restricts journalists' access to information), available at [http://foi.missouri.edu/internationalfoi/rep\\_media\\_ca\\_en.pdf](http://foi.missouri.edu/internationalfoi/rep_media_ca_en.pdf) (last visited October 30, 2007).

13. Uzbekistan still retains and uses the death penalty but does not release statistics on the number of people sentenced to death or executed. Human Rights Department of the Office for

Scholars, lawyers, and policymakers face significant challenges in gathering basic information about reconciliation of criminal cases in Central Asia.

Police officers, prosecutors, and courts in Central Asia typically use reconciliation as the alternative to criminal prosecution.<sup>14</sup> No one institution within the criminal justice system assumes responsibility for the regulation or supervision of reconciliations.<sup>15</sup> No one regularly assembles statistics relating specifically to the process.<sup>16</sup> No country has undertaken a comprehensive study of its reconciliation practices. Some data suggests, but none proves, that police, courts, and prosecutors are more frequently using reconciliation and using it in a greater variety of cases.<sup>17</sup> Discussions during the November 2004 Conference held by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (“OSCE/ODIHR”) clearly indicated that criminal justice professionals in all four countries perceive an increase in the number of cases disposed through reconciliation.<sup>18</sup>

This article relies on four main sources of information: (1) the laws of each country, including the constitutions and the criminal and criminal procedure codes; (2) information gleaned at a conference conducted by the OSCE/ODIHR in November 2004; (3) informal interviews conducted by

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Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE), *The Death Penalty in the OSCE Area* (2005), available at [www.osce.org/publications/odihr/2005/09/16245\\_451\\_en.pdf](http://www.osce.org/publications/odihr/2005/09/16245_451_en.pdf). The UN Human Rights Committee specifically commented on the failure to release this information calling on Uzbekistan to change its practice. Office of the High Commissioner for Human Rights, *Concluding Observations of the Human Rights Committee: Uzbekistan*, CCPR/CO/83/UZB, 26 April, 2005, ¶ 7, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.83.UZB.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.83.UZB.En?Opendocument). It is also not uncommon for one institution within a country to opt not to share information with other institutions. For example, the Prosecutor General’s office may not share information on the number of cases filed with the judiciary. This creates obvious problems in planning for court administration and case management.

14. See generally Thorn, *supra* note 5. See also *infra* Section VI.

15. See *infra* Section VI.

16. Although, as will be discussed in Section III.D, Kazakhstan compiled statistics on how many cases were reconciled as part of its general statistics of criminal cases filed and convictions. Uzbekistan also publicizes some limited statistics regarding the use of reconciliation. See *infra* Section VI.

17. See generally, Thorn, *supra* note 5. See also *infra* Section VI. .

18. The November 2004 Conference and the OSCE/ODIHR Study indicate a common perception among criminal justice professionals that reconciliation is a good way to handle cases. See *infra* notes 20, 27. In Kazakhstan, this shift in thinking seems to be part of an overall shift following the process of “humanization” of laws, with accompanying decreases in prison populations and increased use of alternative sentencing. See *infra* note 155. As Kazakhstan is the only country with statistics showing a clear increase in the number of cases reconciled, it seems that this favorable view of reconciliation contributes to the result of more cases going to reconciliation. See *infra* Section IV.

[Vol. 8: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

OSCE/ODIHR staff prior to and following the conference of legal professionals regarding the use and practice of reconciliation; and (4) statistics provided by the Prosecutor General of Kazakhstan in response to requests from the OSCE/ODIHR in 2004 and in 2006. What follows is not intended to be an exhaustive explanation of the reconciliation process, but an overview of the author's understanding of reconciliation practices in four Central Asian countries based on the available information. This article may encourage further study of current practices.

### *A. Central Asian Constitutions and Laws Governing Reconciliation*

The English-speaking researcher has fairly easy access to the constitutions of all four countries.<sup>19</sup> The Criminal Code and Criminal Procedure Codes are available for each country, although not always online and not always in English. The author arranged translations into English of relevant provisions of the Criminal Code and Criminal Procedure Codes of each country. This article discusses these sources of law in greater detail in Section VI below.

### *B. 2004 Central Asian Conference on Alternatives to Criminal Prosecution*

The OSCE/ODIHR organized a Central Asian conference on Alternatives to Criminal Prosecution in Central Asia in November 2004.<sup>20</sup>

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19. KAZ. CONST. available at <http://www.kazakhstanembassy.org.uk/cgi-bin/index/225>; TAJ. CONST., available at <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan003670.htm>; UZB. CONST., available at <http://www.uzbekconsul.org/uzbekistan/constitution.pdf>; KYRG. CONST., available at [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Foreigners\\_and\\_citizens/Nationality/Documents/National\\_legislation/Kyrgyzstan%20Constitution%20of%20the%20Kyrgyz%20Republic.asp](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Foreigners_and_citizens/Nationality/Documents/National_legislation/Kyrgyzstan%20Constitution%20of%20the%20Kyrgyz%20Republic.asp). Kyrgyzstan adopted a new constitution by referendum on October 21, 2007. The new constitution was not yet available in English on the internet at the time this article went to press. The Russian language version of the new constitution is on file with the author. In the past translation issues caused delays in publishing new versions of the constitution, see Abdumomum Mamaraimov, *Text of the New Kyrgyz Constitution is not Published Because of Translation Problems*, Ferghana.ru Information Agency, Nov. 24, 2006, available at <http://enews.ferghana.ru/article.php?id+1712> (last visited Nov. 3, 2007).

20. The full conference title was: *Alternatives to Criminal Prosecution and Protection of Human Rights in Central Asia*. The Conference was co-organized by the Supreme Court of the Republic of Kazakhstan, the Prosecutor General's Office of the Republic of Kazakhstan, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), and the OSCE Centre in Almaty. The conference was held on November 25-26, 2004 in Almaty, Kazakhstan and was possible due to funding provided by the government of the United Kingdom [hereinafter Nov. 2004 Conference].



Judges, prosecutors, police officers, and lawyers from all four Central Asian countries attended the conference.<sup>21</sup> The conference organizers hoped it would: (1) expand the discussion surrounding the use of reconciliation in Central Asia and (2) encourage greater restraint in expanding the use of reconciliation while local and international legal communities consider more fully the implications of using reconciliation.<sup>22</sup> The OSCE/ODIHR planned the conference after identifying reconciliation as a change in criminal law adopted in each of the four countries without sufficient scrutiny or policy debate internally or from the international community.<sup>23</sup>

The conference began with presentations from representatives regarding recent developments in reconciliation in their respective countries.<sup>24</sup> Experts from Poland, Austria, and Russia discussed current restorative justice practices in their countries.<sup>25</sup> Conference presenters also discussed current international standards, including the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters and Council of Europe Recommendation No. R (99) 19 of the Committee of Ministers to the Member States Concerning Mediation in Penal Matters.<sup>26</sup>

### C. *Informal Interviews of Central Asian Legal Professionals*

In preparation for this conference, the OSCE/ODIHR commissioned a study in the summer of 2004 on restorative justice in Central Asia.<sup>27</sup> The

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21. OSCE Press Release, OSCE/ODIHR Conference Discusses Alternative to Criminal Prosecution in Central Asia (Nov. 24, 2004), available at <http://www.osce.org/item/8760.html?print=1> (last visited Oct. 30, 2007); List of Participants (on file with author).

22. In the author's previous capacity she supervised the organization of the November 2004 Conference. These goals were not written or recorded anywhere.

23. Press Release, *supra* note 21.

24. Agenda, Conference on Alternatives to Criminal Prosecution and the Protection of Human Rights in Central Asia (on file with the OSCE/ODIHR, Warsaw, Poland).

25. *Id.*

26. *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UN ECOSOC RES. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000), available at <http://www.library.dal.ca/law/Guides/RestPathfinder/RestorativeDeclarationpdf.pdf>; *Recommendation No. R (99) 19 of the Committee of the Ministers to Member States Concerning Mediation in Penal Matters* (Adopted by the Committee of Ministers Sept. 15, 1999), 679th Meeting of the Ministers' Deputies, available at <http://www.legislationonline.org/legislation.php?tid=155&lid=5008&less=false>.

27. Thorn, *supra* note 5. This study was not, by any means, a comprehensive survey. However, Mr. Thorn's information gathering and analysis of current reconciliation practices in Central Asia showed they do not fit even a loose definition of restorative justice. At the time the study was commissioned in the summer of 2004, it was less clear how inapplicable this term was in connection with practices in Central Asia. See *infra* Section V of this article for additional information about restorative justice, and see Sections VI and VII on why it is not an applicable term in the context of current developments in Central Asia.

OSCE/ODIHR understood that the study would not result in a comprehensive survey but intended it to provide background information in advance of the November 2004 Conference for the participants themselves and to aid in identifying the most relevant topics for the conference.<sup>28</sup> The study relied on reviewing the existing laws and on a series of interviews with legal professionals in Kazakhstan and Kyrgyzstan.<sup>29</sup> This information appeared in a report and after the November 2004 Conference, the author and other OSCE/ODIHR staff members continued discussions with legal professionals about current reconciliation practices.<sup>30</sup> The author does not intend to imply that this informal informational gathering process conformed to empirical research standards.

#### *D. Statistics*

The OSCE/ODIHR requested that each country provide statistics at the 2004 Conference on the number of cases reconciled.<sup>31</sup> Only the Prosecutor General's Office of Kazakhstan came to the conference with statistics.<sup>32</sup> These statistics showed the number of criminal cases filed in the country and the number of cases reconciled.<sup>33</sup> In 2006, following a subsequent OSCE/ODIHR request, the Prosecutor General's Office of Kazakhstan again provided statistics.<sup>34</sup> The 2006 numbers differed from the earlier numbers.<sup>35</sup> However, both sets of statistics showed the increasing use of reconciliation in the country.<sup>36</sup> The discrepancies between the two sets of statistics point

28. This was not written or recorded anywhere but was the reason the author, in her previous capacity, requested Mr. Thorn conduct the study.

29. Thorn, *supra* note 5.

30. Due to the highly informal nature of these interviews over a two-year period, which should be more accurately termed "discussions," there are no written records and instead the author is left with a series of impressions.

31. The OSCE/ODIHR made these requests both orally and in invitation letters as part of the preparations for the conference. Interview with Mr. Dmitry Nurumov, Rule of Law Coordinator in Central Asia, OSCE/ODIHR in Grundy, Va. (June 30, 2006). Mr. Nurumov was responsible for organizing both the substantive and administrative details of the November 2004 Conference.

32. Statistics on file with the author. *See also infra* Section VI.D.

33. Statistics on file with the author. *See also infra* Section VI.D.

34. Statistics on file with the author. *See also infra* Section VI.D.

35. Statistics on file with the author. *See also infra* Section VI.D.

36. In Kazakhstan the figures have increased. In 2001 a total of 4615 cases registered closed due to reconciliation. In 2002 the figure was 6105. In 2003 the figure was 15,570. In 2004 figures for the first nine months show a total of 12,853 cases closed due to reconciliation. These figures were provided by the Prosecutor General's Office in Kazakhstan in preparation for the November

to the difficulty in obtaining accurate information in Central Asia, even when the appropriate government agency provides the information.<sup>37</sup> Again in 2006, the OSCE/ODIHR requested the Prosecutor General's Office in Kyrgyzstan to provide statistics, which it has not provided.<sup>38</sup> The OSCE/ODIHR also requested human rights organizations and academics to find statistics for Uzbekistan and Tajikistan.<sup>39</sup> These requests also produced nothing.<sup>40</sup>

#### IV. BACKGROUND ON CENTRAL ASIA

The Soviet Union once included all four countries analyzed in this article. All gained their independence at the same time.<sup>41</sup> Each country shares the Soviet history, as well as regional and cultural similarities.<sup>42</sup> Central Asian criminal justice systems reflect this common history and current practices still vary little from the Soviet models each country inherited at independence. This section will begin with background on each country and then move to a description of how the criminal justice systems work.

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2004 Conference and are on file with the author. See *infra* Section VI.D, noting that the statistics provided in 2006 were different in raw data but also reported an increase in numbers of cases going to reconciliation.

37. The differences in numbers could be due to one or more reasons including poor skills in gathering statistics, poor record keeping at the entry levels, or due to a decision to alter the statistics for political reasons. At this point there is insufficient information to draw any conclusion as to why the difference exists.

38. Interview with Dmitry Nurumov, *supra* note 31.

39. Due to the political situation in Uzbekistan, the OSCE decided not to request these numbers directly from the government. See *supra* note 9. See also *infra* Section IV. The OSCE/ODIHR did not request statistics directly from the government in Tajikistan due to previous experiences of government institutions not responding to requests for information. Interview with Dmitry Nurumov, *supra* note 31.

40. Interview with Dmitry Nurumov, *supra* note 31.

41. See, e.g., Archie Brown, *Reform, Coup and Collapse: The End of the Soviet State*, available at [http://www.bbc.co.uk/history/worldwars/coldwar/soviet\\_end\\_01.shtml](http://www.bbc.co.uk/history/worldwars/coldwar/soviet_end_01.shtml) (last visited Oct. 31, 2007). See generally, OLIVIER ROY, *THE NEW CENTRAL ASIA: THE CREATION OF NATIONS* (2000) (describing the common history, common experiences under the Soviet Union and independence of the Central Asian states).

42. See, e.g., ROY, *supra* note 41; MARTHA BRILL OLCOTT, *CENTRAL ASIA'S SECOND CHANCE* (2005).

### A. Kazakhstan

Of the four countries, Kazakhstan possesses the potentially strongest economy due to its large oil deposits.<sup>43</sup> Kazakhstan is nearly four times the size of the state of Texas, making it the largest country in Central Asia in terms of land mass.<sup>44</sup> Kazakhstan's population is over fifteen million people.<sup>45</sup> Sixty-eight percent of its population falls in the 15-64 age range.<sup>46</sup> Despite its strong natural resource base, nineteen percent of Kazakhstan's population lives under the poverty line.<sup>47</sup>

Kazakhstan came under Russian rule in the 18<sup>th</sup> century and became a Republic of the Soviet Union in 1936.<sup>48</sup> People tend to consider Kazakhstan the most "Russified" of the former Soviet states in Central Asia.<sup>49</sup> President Nursultan Nazarbayev, the president at the time of independence from the Soviet Union in 1991, leads the country.<sup>50</sup> President Nazarbayev held a place in the Soviet elite prior to Kazakhstan's independence.<sup>51</sup> His presidency is marked by corruption, human rights violations, and repeated elections that fail to meet international standards.<sup>52</sup> In the last election, President Nazarbayev "won" 91.15 percent of the vote.<sup>53</sup> As an authoritarian leader, President Nazarbayev provides little space for

43. See Ilan Greenberg, *Up, Up and Away: New Towers, and Ambitions to Match*, N.Y. TIMES, June 22, 2006, at A4 (describing the thriving economy in Kazakhstan and the impact in Almaty). See also CIA, *The World Factbook, Kazakhstan*, <https://www.cia.gov/cia/publications/factbook/geos/kz.html> (last visited Feb. 19, 2007) for basic statistic regarding Kazakhstan's economy.

44. CIA, *Kazakhstan supra* note 43.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Dave Bhavna, *Minorities and Participation in Public Life: Kazakhstan*, UNITED NATIONS OFF. OF THE COMMISSIONER FOR HUM. RTS., Oct. 2004, <http://www.ohchr.org/english/issues/minorities/docs/WP5.doc>.

50. See generally MARTHA BRILL OLCOTT, *KAZAKHSTAN: UNFULFILLED PROMISE* (2002) (giving a modern political history of Kazakhstan including analysis of the history of President Nazarbayev's rise to power and why he successfully retains it).

51. *Id.* at 24-30.

52. See, e.g., *Republic of Kazakhstan Presidential Election 4 Dec. 2005* (OSCE/ODIHR Election Observation Mission Final Report) (February 21, 2006) available at [http://www.osce.org/documents/odihr/2006/02/18133\\_en.pdf](http://www.osce.org/documents/odihr/2006/02/18133_en.pdf); U.S. DEPT. OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005, KAZAKHSTAN*, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61656.htm> (last visited June 15, 2006).

53. See *Republic of Kazakhstan Presidential Election, supra* note 52, at 33.

opposition political activities or the development of civil society.<sup>54</sup> In 1997, President Nazarbayev moved the capital from Almaty to Astana.<sup>55</sup> This move entailed substantial government spending to transform Astana from a sleepy provincial town into a capital.<sup>56</sup>

The country's legislature passes laws, but in practice the executive uses the legislative branch as a tool, effectively preventing the legislature from exercising independent lawmaking powers.<sup>57</sup> The judicial branch is also far from independent.<sup>58</sup>

### B. Kyrgyzstan

Kyrgyzstan's significantly smaller land mass does not share Kazakhstan's vast oil resources.<sup>59</sup> The smallest population of the four countries lives in a landlocked mountainous country, with over sixty-two percent of its five million inhabitants falling in the 15-64 age range.<sup>60</sup> Forty percent of its population lives below the poverty line.<sup>61</sup> Some estimate that approximately half a million citizens of Kyrgyzstan live abroad as labor migrants due to the levels of poverty at home.<sup>62</sup>

Kyrgyzstan was annexed by Russia in 1864, and joined the Soviet Union in 1924.<sup>63</sup> It gained independence from the Soviet Union in 1991.<sup>64</sup>

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54. Freedom House gives Kazakhstan a score of "6" in terms of political rights ("7" is the lowest possible score indicating the lowest level of political rights) and a score of "5" in terms of civil liberties. FREEDOM IN THE WORLD (Kazakhstan), <http://www.freedomhouse.org/template.cfm?page=22&year=2005&country=6764> (last visited on June 25, 2006).

55. See, e.g., Steven Lee Meyers, *Kazakhstan's Futuristic Capital, Complete With Pyramid*, N.Y. TIMES, Oct. 13, 2006, at A4; Embassy of Kazakhstan to the USA and Canada, *Astana: The New Capital of Kazakhstan*, <http://www.kazakhembus.com/Astana.html> (last visited October 31, 2007).

56. Meyers, *supra* note 55, at A4.

57. See, e.g., OLCOTT, *supra* note 50, at 87-127 (discussing President Nazarbayev's consolidation of power). A recent example of Presidential influence over the Parliament occurred in May, 2007, when the Parliament voted to exempt President Nazarbayev from the two-term limit in the Kazakhstan Constitution. C.J. Chivers, *Kazakhstan: President Voted in For Life, if He Likes*, N.Y. TIMES, May 19, 2007, at A4.

58. See CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, JUDICIAL REFORM INDEX FOR KAZAKHSTAN, 10 (American Bar Association Feb. 2004) available at [http://www.abanet.org/cceli/publications/jri/jri\\_kazakhstan.pdf](http://www.abanet.org/cceli/publications/jri/jri_kazakhstan.pdf).

59. CIA, *The World Factbook*, Kyrgyzstan, <https://www.cia.gov/library/publications/the-world-factbook/geos/kg.html> (last visited October 31, 2007).

60. *Id.*

61. *Id.*

62. UN Office for the Coordination of Humanitarian Affairs, *Central Asia: Special Report on Labour Migrants in Russia* (Mar. 17, 2004), IRINNews.org, [http://www.irinnews.org/report.asp?ReportID=40107&SelectRegion=Central\\_Asia&SelectCountry=CENTRAL\\_ASIA](http://www.irinnews.org/report.asp?ReportID=40107&SelectRegion=Central_Asia&SelectCountry=CENTRAL_ASIA).

63. CIA, *Kyrgyzstan*, *supra* note 59.

Kyrgyzstan also had a long-standing president, Askar Akayev, who came from the Soviet elite.<sup>65</sup> After contested parliamentary elections in February 2005, demonstrations began in the south of the country and moved to the capital of Bishkek.<sup>66</sup> Following violent demonstrations in Bishkek and the capture of the Presidential Palace by the demonstrators, President Akayev fled to Russia in March 2005.<sup>67</sup>

The country suffers from political instability that lingers after the elections in July 2005 and November 2005.<sup>68</sup> Unlike Kazakhstan, the Kyrgyzstan president does not exercise strong authoritarian leadership.<sup>69</sup> However, prosecutors and law enforcement officials exercise disproportionate power.<sup>70</sup> The current president, Kurmanbek Bakiev, "won" 89 percent of the vote in the last election.<sup>71</sup> The highly chaotic legislature exercises weak power.<sup>72</sup> The judiciary is not independent.<sup>73</sup>

64. *Id.*

65. See, e.g., BBC News, *Profile Askar Akayev*, Apr. 4, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4371819.stm>.

66. See, e.g., BBC News, *Kyrgyzstan's Friendly Revolution*, Mar. 26, 2005, available at [http://news.bbc.co.uk/2/hi/programmes/from\\_our\\_own\\_correspondent/4384499.stm](http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/4384499.stm).

67. See, e.g., BBC News, *Akayev Quits as Kyrgyz President*, Apr. 4, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4403591.stm>.

68. U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005 (Mar. 8, 2006), <http://www.state.gov/g/drl/rls/hrpt/2005/61657.htm>. The U.S. State Department noted a "considerable improvement" in the government's respect for human rights following the overthrow of the Akayev regime. *Id.*

69. Interview with Dmitry Nurumov, *supra* note 31. This was still true in the middle of 2006. However, indications were that President Kurmanbek Bakiev was moving to consolidate his power as the overall political environment in Kyrgyzstan stabilized. *Id.* For a more optimistic view of the revolution see Tom Wood, *Reflections on the Revolution in Kyrgyzstan*, 30 FLETCHER F. OF WORLD AFF. 43 (2006). In October 2007, a referendum approved a new constitution giving greater power to the President. See *supra* note 19; see also David L. Stern, *Kyrgyzstan Parliament Dissolved; Fraud Seen in Constitution Vote*, N.Y. TIMES, Oct. 23, 2007, at A5; Bruce Pannier, *Kyrgyzstan: Does New Constitution Strengthen Democracy—or President Bakiev?* RADIO FREE EUR./RADIO LIBERTY, Oct. 22, 2007, available at <http://www.rferl.org/featuresarticle/2007/10/01e577bc-95f1-44a4-b816-b8e16a48511b.html> (last visited Oct. 31, 2007).

70. See, e.g., CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, PROSECUTORIAL REFORM INDEX FOR KYRGYZSTAN, 4-5 (American Bar Association 2007), available at [http://www.abanet.org/rol/publications/kyrgyzstan\\_pri\\_10\\_2007.pdf](http://www.abanet.org/rol/publications/kyrgyzstan_pri_10_2007.pdf); International Crisis Group, *Central Asia: The Politics of Police Reform*, ASIA REPORT NO.42, Dec. 10, 2002, at 7-11 available at <http://www.crisisgroup.org/home/index.cfm?id=1444&l=1>.

71. BBC News, *Bakiev sworn in as Kyrgyz leader*, Aug. 14, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4150084.stm>.

72. Bruce Pannier, *Kyrgyzstan: Resignation Triggers Political Showdown*, RADIO FREE EUR./RADIO LIBERTY, <http://www.rferl.org/featuresarticle/2006/02/08F05824-4198-4A18-AFD8-732D77D0467A.html> (last visited June 29, 2006). The Parliament, the Zhogorky Kenesh, following

### C. Tajikistan

Tajikistan is also a smaller landlocked mountainous country with few natural resources.<sup>74</sup> Over fifty-seven percent of Tajikistan's population of seven million are between the ages of fifteen to sixty-four.<sup>75</sup> Over thirty-seven percent of Tajikistan's population is fourteen years old or younger.<sup>76</sup> Sixty-four percent of the population lives below the poverty line.<sup>77</sup> Some estimate that over 600,000 citizens of Tajikistan work as labor migrants in Russia.<sup>78</sup>

Russia ruled Tajikistan in the 1860s and 1870s and the Soviet Union claimed it in 1925.<sup>79</sup> Shortly after gaining independence from the Soviet Union in 1991, a civil war broke out lasting from 1992-1997.<sup>80</sup> The war killed between 60,000-100,000 people and displaced a tenth of the population.<sup>81</sup> The Islamic opposition and the government reached a peace agreement in 1997, but Tajikistan continues to suffer the political and economic consequences of the war.<sup>82</sup> Elections in 1994 brought the current authoritarian president, Emomali Rahmonov, to power.<sup>83</sup> During the last

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the events of February-March 2005 did gain power and exercised some independence in 2005. *Id.* However, in early 2006 the Speaker of the Parliament, Omurbek Tekebaev, resigned after calling President Bakiev a "dog." *Id.* Takebaev's resignation marked the beginning of the decline of the Parliament's new found independence. *Id.*

73. CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, JUDICIAL REFORM INDEX FOR KYRGYZSTAN 9 (2003), available at [http://www.abanet.org/ceeli/publications/jri/jri\\_kyrgyzstan.pdf](http://www.abanet.org/ceeli/publications/jri/jri_kyrgyzstan.pdf); see also The Special-Rapporteur, *Report of the Special Rapporteur on the Independence of Judges and Lawyers* 2, U.N. Doc E/CN.4/2006/52/Add.3 (Dec. 30, 2005) [hereinafter Mission to Kyrgyzstan].

74. CIA, The World Factbook, Tajikistan, <https://www.cia.gov/library/publications/the-world-factbook/geos/ti.html> (last visited Oct. 31, 2007).

75. *Id.*

76. *Id.*

77. *Id.*

78. UN Office for the Co-ordination of Humanitarian Affairs, *Central Asia: Special Report on Labour Migrants in Russia*, IRINNews.org, Mar. 17, 2004, [http://www.irinnews.org/report.asp?ReportID=40107&SelectRegion=Central\\_Asia&SelectCountry=CENTRAL\\_ASIA](http://www.irinnews.org/report.asp?ReportID=40107&SelectRegion=Central_Asia&SelectCountry=CENTRAL_ASIA). This does not include the numbers who may have migrated to countries other than Russia in search of jobs. *Id.* See also Ilan Greenberg, *Central Asians Chase Jobs, and Endure Exploitation*, N.Y. TIMES, May 15, 2007, at A4.

79. CIA, Tajikistan, *supra* note 74.

80. International Crisis Group, *Tajikistan: An Uncertain Peace*, ASIA REPORT NO. 30, at 7 (2001), available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400521\\_24122001.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400521_24122001.pdf).

81. *Id.*

82. *Id.* The war devastated the country economically. Tajikistan was one of the poorest republics in the USSR and had the lowest per capita GDP and highest population growth. *See id.*

83. *See, e.g.*, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005, Mar. 8, 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61679.htm>.

election, he "won" ninety-seven percent of the vote. The chaotic legislature exercises no independent power.<sup>84</sup> The judiciary is also not independent.<sup>85</sup>

Tajikistan shares a 1,300 kilometer boarder with Afghanistan.<sup>86</sup> The continuing problems in Afghanistan contribute to instability in Tajikistan, particularly in on-going trafficking of guns, drugs, and people.<sup>87</sup>

#### D. Uzbekistan

Uzbekistan's twenty-seven million citizens live in a landlocked country a little larger than California, making it the largest country in Central Asia in terms of population.<sup>88</sup> Uzbekistan shares with Tajikistan a relatively younger population, with 32.9 percent being fourteen years or younger.<sup>89</sup> Twenty-eight percent of the population of Uzbekistan lives below the poverty line.<sup>90</sup> Uzbekistan supplied a significant amount of cotton to the former Soviet Union by overusing agrochemicals and irrigation.<sup>91</sup> Those practices poisoned its land and contributed to the shrinking of the Aral Sea and many rivers.<sup>92</sup>

Uzbekistan fell under Russian rule in the late 19<sup>th</sup> century and became part of the Soviet Union in 1924.<sup>93</sup> Like Kazakhstan, one president, President Islam Karimov, led Uzbekistan since its independence from the

84. *Id.* The OSCE/ODIHR made repeated efforts in 2004-2005 to get the draft amendments to the Code of Criminal Procedure reviewed. These efforts were unsuccessful due to difficulty in identifying the most recent drafts and the stage of the legislative process. This lack of success seemed to be due to disorganization within the government, including the Parliament, and not to a decision or policy to not give this information to international organizations. Interview with Dmitry Nurumov, *supra* note 31.

85. The Special-Rapporteur, *Report of the Special Rapporteur on the Independence of Judges and Lawyers* 2, U.N. Doc E/CN.4/2006/52/Add.4 (Dec. 30, 2005) [hereinafter Mission to Tajikistan].

86. CIA, Tajikistan, *supra* note 74.

87. *Tajikistan: An Uncertain Peace*, *supra* note 80.

88. CIA, The World Factbook, Uzbekistan, <https://www.cia.gov/library/publications/the-world-factbook/geos/uz.html> (last visited Oct. 31, 2007). Uzbekistan is one of only two double landlocked countries in the world (Liechtenstein is the other). *Id.*

89. *Id.*

90. *Id.*

91. International Crisis Group, *The Curse of Cotton: Central Asia's Destructive Monoculture*, ASIA REPORT NO. 93, 28-30 (Feb. 28, 2005), available at [http://www.crisisgroup.org/library/documents/asia/central\\_asia/093\\_curse\\_of\\_cotton\\_central\\_asia\\_destructive\\_monoculture.pdf](http://www.crisisgroup.org/library/documents/asia/central_asia/093_curse_of_cotton_central_asia_destructive_monoculture.pdf).

92. *The Curse of Cotton*, *supra* note 91. See also CIA, Uzbekistan, *supra* note 88.

93. CIA, Uzbekistan, *supra* note 88.



Soviet Union in 1991.<sup>94</sup> President Karimov, an entrenched member of the Soviet elite, rose to power in 1990, prior to Uzbekistan's independence.<sup>95</sup> In the last presidential election, President Karimov "won" 91.9 percent of the vote.<sup>96</sup> As an authoritarian leader, President Karimov rules over a country with serious human rights violations and he keeps an almost pathological grip on all aspects of Uzbekistan society.<sup>97</sup> The legislature does not operate independently from the executive.<sup>98</sup> The judiciary is not independent.<sup>99</sup>

After September 11, 2001, Uzbekistan started to justify its repressive tactics against perceived Islamic militants under the guise of "fighting terrorism."<sup>100</sup> Until the end of 2005, an airbase in Uzbekistan partly supplied and supported the United States' operations in Afghanistan.<sup>101</sup>

In the spring of 2005, the government of Uzbekistan ended a demonstration in the southern city of Andijon by firing into a crowd and killing well over a hundred unarmed civilians.<sup>102</sup> The demonstration followed the trial of twenty-three local businessmen accused of "Islamic extremism" and acts against the state.<sup>103</sup> Many people in the businessmen's

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94. BBC News, Country Profile: Uzbekistan, Aug. 29, 2007, [http://news.bbc.co.uk/2/hi/asia-pacific/country\\_profiles/1238242.stm#leaders](http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1238242.stm#leaders) (last visited Nov. 2, 2007).

95. The Supreme Soviet, the Soviet parliament, elected Karimov to the position of president in 1990. *Id.* See also CIA, Uzbekistan, *supra* note 88.

96. BBC News, Uzbekistan, *supra* note 94.

97. U.N. Econ. & Soc. Council, Comm. On Human Rights, *Mission to Uzbekistan*, 11 U.N. Doc. E/CN.4/2003/68/Add.2 (Feb. 3, 2003). The UN Special Rapporteur reported that torture is "systematic" in Uzbekistan, meaning that if a person is arrested he or she is likely to be tortured. *Id.*

98. LIBRARY OF CONGRESS COUNTRY STUDIES, *Country Profile: Uzbekistan* 12-13, available at <http://lcweb2.loc.gov/frd/cs/profiles/Uzbekistan.pdf> (Feb. 2007) (last visited November 2, 2007).

99. See generally, CENTRAL EUROPEAN AND EURASIAN LAW INSTITUTE, JUDICIAL REFORM INDEX FOR UZBEKISTAN 10 (American Bar Association 2002), available at [http://www.abanet.org/ceeli/publications/jri/jri\\_uzbekistan.pdf](http://www.abanet.org/ceeli/publications/jri/jri_uzbekistan.pdf).

100. See generally, Martha Brill Olcott, *War on Terrorism in Central Asia and the Cause of Democratic Reform*, 11 DEMOCRATIZATSIYA: J. POST-SOVIET DEM 1 (2003), available at <http://www.demokratizatsiya.org/html.vol11.html>; Saule Mukhametrakhimova, *Dealing With Hizb-ut-Tahrir*, Institute for War and Peace Reporting, [http://www.iwpr.net/?p=rca&s=f&o=321670&apc\\_state=henpreca](http://www.iwpr.net/?p=rca&s=f&o=321670&apc_state=henpreca) (last visited June 30, 2006).

101. Robin Wright & Ann Scott Tyson, *U.S. Evicted From Air Base In Uzbekistan*, WASH. POST, July 30, 2005 at A01. After the United States' position following the events at Andijon the government of Uzbekistan ordered the base closed. *Id.*

102. The government acknowledged 169 people were killed. Non-governmental estimates placed the numbers at seven hundred to over a thousand people killed. See, e.g., *Uzbekistan: the Andijon Uprising*, *supra* note 9. The following account of the events in Andijon is pulled from several sources including the OSCE/ODIHR Trial Monitoring report, *supra* note 9, and *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 1.

103. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 1; OSCE/ODIHR Trial Monitoring Report, *supra* note 9, at 5-6; and BBC News, *How the Andijon Killings Unfolded*, May 17, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4550845.stm>.

community, however, viewed these men as local leaders engaged in charitable work, rather than Islamic extremists.<sup>104</sup> During the trial, people staged peaceful daily protests outside the court room.<sup>105</sup> The demonstrations grew each week that the trial continued.<sup>106</sup> As the demonstrations grew, so did tensions that exploded after the trial ended, but before the court announced the verdicts.<sup>107</sup> People feared that the court would convict all the men.<sup>108</sup> An armed crowd broke into the Andijon prison freeing up to five hundred prisoners.<sup>109</sup> The next day, a demonstration began in the town square lasting for nearly a day before security forces fired into the unarmed crowd of civilians.<sup>110</sup> Some refugees fled to Kyrgyzstan.<sup>111</sup>

After the events in Andijon the human rights situation deteriorated significantly in Uzbekistan. The government arrested hundreds (perhaps thousands) of people and put many on trial, all of whom the courts convicted and sentenced to time in prison.<sup>112</sup> The courts did not put on trial a single member of the security forces or the government for the events in Andijon, and Uzbekistan consistently refused to act on requests by the international community to have an independent investigation into the events.<sup>113</sup>

104. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 2-3; OSCE/ODIHR Trial Monitoring Report *supra* note 9, at 5-6.

105. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 2-3; OSCE/ODIHR Trial Monitoring Report *supra* note 9, at 5-6; and BBC News, *How the Andijon Killings Unfolded*, *supra* note 103.

106. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 2-3; OSCE/ODIHR Trial Monitoring Report *supra* note 9, at 5-6; and BBC News, *How the Andijon Killings Unfolded*, *supra* note 103.

107. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 2-3; OSCE/ODIHR Trial Monitoring Report *supra* note 9, at 5-6; and BBC News, *How the Andijon Killings Unfolded*, *supra* note 103.

108. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 2-3; OSCE/ODIHR Trial Monitoring Report *supra* note 9, at 5-6; and BBC News, *How the Andijon Killings Unfolded*, *supra* note 103.

109. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 2-3; OSCE/ODIHR Trial Monitoring Report *supra* note 9, at 5-6; and BBC News, *How the Andijon Killings Unfolded*, *supra* note 103.

110. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 2-3; OSCE/ODIHR Trial Monitoring Report *supra* note 9, at 5-6; and BBC News, *How the Andijon Killings Unfolded*, *supra* note 103.

111. *Uzbekistan: the Andijon Uprising*, *supra* note 9, at 2-3; OSCE/ODIHR Trial Monitoring Report *supra* note 9, at 5-6; and BBC News, *How the Andijon Killings Unfolded*, *supra* note 103.

112. Due to the lack of adherence to even minimal fair trial standards the author hesitates to call these proceedings "trials." See *Report from the OSCE/ODIHR Trial Monitoring in Uzbekistan*, *supra* note 9. See also, Gafurjan Yuldashev, *Andijan Activist Arrested as Uzbek Purge Continues*, Institute for War and Peace Reporting, June 23, 2006, available at [http://www.iwpr.net/?p=rca&s=f&o=321786&apc\\_state=henprca](http://www.iwpr.net/?p=rca&s=f&o=321786&apc_state=henprca) (last visited July 1, 2006). For an account of the increased repression by the Uzbekistan government, see, e.g., *Uzbekistan: Stop Arresting Defenders for Reporting on Andijan Massacre*, Human Rights First, [http://www.humanrightsfirst.org/defenders/hrd\\_uzbekistan/alert060105\\_andijan.htm](http://www.humanrightsfirst.org/defenders/hrd_uzbekistan/alert060105_andijan.htm) (last visited on Feb. 24, 2007).

113. See *Uzbekistan, the Andijon Uprising*, *supra* note 9.

### E. Corruption

Corruption poses a serious problem throughout Central Asia. Corruption goes beyond an occasional need to pay a bribe and is woven into the fabric of society in each of the four countries.<sup>114</sup> No institution, part of government, or individual citizen escapes its impact. Corruption affects all areas of life in each of the four countries, including higher education, health care, and the legal system.<sup>115</sup> People expect payments of money for a range of services.<sup>116</sup> The average citizen in any of these four countries does not believe that the legal system operates based on “justice” or “fairness,” but rather sees the system operating based on power, influence, and payments.<sup>117</sup> Therefore, the average citizen of Central Asia views corruption as perhaps the single most effective dispute resolution tool at his or her disposal, assuming the average citizen has the resources to make the pay-offs.<sup>118</sup>

Transparency International publishes a Corruption Perceptions Index every year.<sup>119</sup> Under this rating system, a score of ten indicates a “highly

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114. See, e.g., Gerald Staberock, *A Rule of Law Agenda for Central Asia*, 2 ESSEX HUM. RTS. L. REV. 1, 12 (2004). See also *infra* notes 116-120.

115. See generally International Crisis Group, *Central Asia*, *supra* note 70 (describing serious levels of police corruption in Kyrgyzstan, Tajikistan and Uzbekistan). See also LIBRARY OF CONGRESS COUNTRY STUDIES, *Country Profile: Uzbekistan*, Health, §§ 5-8, and Internal Security, §§ 3-8, <http://lcweb2.loc.gov/frd/cs/uztoc.html> (last visited Nov. 2, 2007); LIBRARY OF CONGRESS COUNTRY STUDIES, *Country Profile: Tajikistan*, Internal Security, § 1 (described as “poor due to civil war and pervasive corruption”) at <http://lcweb2.loc.gov/frd/cs/tjtoc.html> (last visited Nov. 2, 2007).

116. This includes pay-offs to get health care, jobs and grades. “All businesses pay the security forces, the procuracy and the tax police, in one way or another.” International Crisis Group, *Central Asia*, *supra* note 70, at 9 (describing Kyrgyzstan). Police are routinely required to pay to get promotions into jobs that are more lucrative due to the expected bribes. International Crisis Group, *Central Asia*, *supra* note 70, at 8-10, 24-26 (describing Kyrgyzstan and Uzbekistan); LIBRARY OF CONGRESS COUNTRY STUDIES, *Country Profile: Uzbekistan*, Health, § 5-8, *supra* note 115.

117. For the results of a survey on attitudes towards corruption in Kazakhstan, see Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT’L ECON. L. 863, 915-45 (2001).

118. See, e.g., Zamira Eshanova, *Central Asia: Corruption a Common Feature of Every-Day Life*, RADIO FREE EUR./RADIO FREE LIBERTY, (July 17, 2002), <http://www.rferl.org/features/2002/07/17072002162933.asp>;

Roger Kangas, *Legal Reform in Central Asia: Battling the Influence of History*, in IN THE TRACKS OF TAMERLANE: CENTRAL ASIA’S PATH TO THE 21ST CENTURY 65, 82 (Daniel L. Burghart & Theresa Sabonis-Helf eds., 2005), available at <http://www.ndu.edu/ctnsp/tamerlane.htm> (stating that corruption undermines confidence in the legal system leading people to alternative forms of justice).

119. *Corruptions Perceptions Index 2007*, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2007](http://www.transparency.org/policy_research/surveys_indices/cpi/2007) (last viewed Oct. 31, 2007).

[Vol. 8: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

clean" country and a score of zero indicates a "highly corrupt" country.<sup>120</sup> Kazakhstan, Tajikistan and Kyrgyzstan earned a rating of 2.1.<sup>121</sup> Uzbekistan scored 1.7.<sup>122</sup> These scores placed all four countries firmly in the bottom of the list of all countries and indicate high levels of corruption.<sup>123</sup>

#### *F. How do the Criminal Justice Systems Work in Central Asia?*

The average person charged with a crime in Central Asia enters a world where rights are not respected, where confessions are expected, and where conviction is inevitable in the absence of adequate money or connections to secure release from both prison and further criminal prosecution.<sup>124</sup> The day-to-day practices in the criminal justice systems of Central Asia have changed little since the time when the Soviets ruled. The rights of the state still stand supreme over the rights of the individual.<sup>125</sup> Criminal procedure

120. Denmark, Finland and New Zealand earned the top scores of 9.4 in 2007. Myanmar and Somalia tied for last place with scores of 1.4. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. According to the UN Special Rapporteur on the Independence of Judges and Lawyers the conviction rate in criminal cases in Kazakhstan is ninety-nine percent. The Special-Rapporteur, *Report of the Special Rapporteur on the Independence of Judges and Lawyers* 15, U.N. Doc. E/CN.4/2005/60/Add.2 (Jan. 11, 2005) [hereinafter *Mission to Kazakhstan*]. The statistics provided by the Prosecutor General of Kazakhstan to the OSCE/ODIHR also give a conviction rate of ninety-nine percent in both 2005 and 2004 (statistics on file with author). The UN Special Rapporteur on the Question of Torture concluded there is widespread corruption and lack of respect for the presumption of innocence in the criminal justice system in Uzbekistan. *Mission to Uzbekistan*, *supra* note 97, at 20. Trial monitoring in Central Asia by international organizations tends to focus on high profile cases such as the report on the trials after the Andijon events. See, e.g., *Report from the OSCE/ODIHR Trial Monitoring in Uzbekistan*, *supra* note 9. One exception was a project by the OSCE/ODIHR in 2005-2006 monitoring trials in Kazakhstan. The monitors observed 730 court hearings and noted judges regularly failed to follow the law in routine criminal cases. OSCE/ODIHR, *Results of Trial Monitoring in the Republic of Kazakhstan* (2006), available at [http://www.osce.org/documents/cia/2007/02/23411\\_en.pdf](http://www.osce.org/documents/cia/2007/02/23411_en.pdf) (last visited Oct. 30, 2007).

125. For a summary of executive use of power at the expense of individual human rights see Michael Ochs, *Human Rights in Central Asia*, in *IN THE TRACKS OF TAMERLANE*, *supra* note 118, at 93. For general reports on human rights in each country see Human Rights Watch, <http://www.hrw.org/doc/?t=europe>; AMNESTY INTERNATIONAL REPORT 2007: THE STATE OF THE WORLD'S HUMAN RIGHTS, <http://www.amnesty.org/ailib/aireport/index.html>; U.S. DEPT. OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, available at <http://www.state.gov/g/drl/rls/hrrpt/>.

developed in the Soviet Union to meet the needs of the state.<sup>126</sup> Balancing the rights of the defendant with the rights of the state was absent in the formation of the procedure (although arguably not absent in rhetoric).<sup>127</sup> The concept that the rights of the state are supreme and that individual rights are not a priority remains a fundamental basis on which the criminal justice systems of each of the four Central Asian states is developing.<sup>128</sup> Reform, such as it has happened, has not been underpinned by increasing individual rights.<sup>129</sup> Different institutions competing for power, position, and influence drive reform within each country.<sup>130</sup> The strongest proponents for defendants' rights in western societies – such as defense attorneys or non-governmental organizations – have little voice in Central Asia and often lack awareness themselves of the possible mechanisms or reforms to protect individual rights, thus limiting the scope of their advocacy.<sup>131</sup>

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126. For general information about the criminal justice system under the Soviet Union, see, e.g., PETER H. SOLOMON JR., *SOVIET CRIMINAL JUSTICE UNDER STALIN* (1996), and *REFORMING JUSTICE IN RUSSIA 1864-1996: POWER, CULTURE, AND THE LIMITS OF LEGAL ORDER* (Peter H. Solomon, Jr. ed., 1997).

127. See, e.g., *REFORMING JUSTICE IN RUSSIA*, *supra* note 126.

128. See generally Gerald Staberock, *supra* note 114, (discussing Central Asian legal systems continuing Soviet legacy and failure to develop strong protections for individual rights). For a general discussion of legal reform in Central Asia, see Roger Kangas, *supra* note 118.

129. See Gerald Staberock, *supra* note 114. See generally *supra* note 125 (for more detailed information on current human rights practices in each state showing the regular violation of individual human rights in each of the four Central Asian countries discussed in this article).

130. One example of such reform accompanied by shifts in power is when Kazakhstan, Kyrgyzstan and Tajikistan transferred the administration of prisons from the Ministry of Interior to the Ministry of Justice. See, e.g., Penal Reform International, Central Asia, <http://www.penalreform.org/central-asia-2.html>. Transfer of the power to sanction arrest from the prosecutors to the judiciary (*habeas corpus*) represents a difficult and far ranging change and such a shift in power thus far has not occurred in any of the four countries. See, e.g., CODE OF CRIMINAL PROCEDURE [C. CRIM. P.] art. 150 (Kaz.); CODE OF CRIMINAL PROCEDURE [C. CRIM. P.] art. 243 (Uzb.); *infra* notes 155, 156.

131. This is a direct result of the lack of democratic development in each of the four countries. The governmental approach toward civil society development in each country can, at best, be described as not supportive. However, it is probably more accurately described in most, if not all four countries, as repressive and punitive. There are regular reports of NGOs being harassed, particularly if the NGO is viewed as a political "opposition" group. See, e.g., Michael Ochs, *supra* note 125. This harassment can include imprisonment and torture, as well as the "lighter" approach of tax inspections. See, e.g., U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2006, Uzbekistan, Freedom of Association, <http://www.state.gov/g/drl/rls/hrrpt/2006/78848.htm>. Freedom House gave all four countries a cumulative rating of "not free" with political rights rating at a low of "7" (with one being the highest, and seven the lowest) for Uzbekistan. Freedom House, Map of Freedom in the World 2005, <http://www.freedomhouse.org/template.cfm?page=363&year=2005> (last visited Sept. 25, 2007). Kazakhstan, Kyrgyzstan and Tajikistan all rate a "6" for political rights. *Id.* For an interesting analysis of NGO attitudes and development in Kyrgyzstan see Kelly M. McMann, *The Civil Realm in Kyrgyzstan: Soviet Economic Legacies and Activists Expectations*, in *THE TRANSFORMATION OF CENTRAL ASIA*, *supra* note 4, at 213-245.

The prosecutor is still all-powerful.<sup>132</sup> Judicial independence is still at best an aspiration, not a reality.<sup>133</sup> Defense attorneys cannot provide an active defense.<sup>134</sup> This limited role, when combined with high levels of institutional corruption, frequently turns defense attorneys into agents who facilitate resolution of a case by making pay-offs on behalf of the client to investigators, prosecutors, and judges.<sup>135</sup> The legal profession in all four countries operates without any ethical framework, as ethics codes are virtually non-existent and, where they do exist, are extremely weak and not regularly enforced.<sup>136</sup>

### 1. Basic Criminal Procedure

All four countries have similar criminal procedure rules derived from the Soviet Criminal Procedure Code.<sup>137</sup> The legislatures have amended the laws so that most systems, at least in name, have made the transition from inquisitorial to adversarial models.<sup>138</sup> After the police make an arrest, they

132. See, e.g., Mission to Tajikistan, *supra* note 85 (noting that the disproportionate power of the prosecutor prevents the development of a effective and independent judiciary); Mission to Kyrgyzstan, *supra* note 73 (noting the powers of the prosecution are a "special feature [that] can be observed throughout the whole of Central Asia and other CIS countries, and reflects the Soviet system of Prokuratura.").

133. For general information about the state of judicial reform in Central Asia see JUDICIAL REFORM INDEX FOR KAZAKHSTAN, *supra* note 58; JUDICIAL REFORM INDEX FOR UZBEKISTAN, *supra* note 99; JUDICIAL REFORM INDEX FOR KYRGYZSTAN, *supra* note 73.

134. For an excellent history and analysis of the role of defense lawyers in Russia see generally PAMELA A. JORDAN, DEFENDING RIGHTS IN RUSSIA: LAWYERS, THE STATE AND LEGAL REFORM IN THE POST-SOVIET ERA 136-174 (2005) (describing the limited role of defense lawyers at various stages of Russian history including a discussion of the post-Soviet era). The developments in each of the four Central Asian countries discussed in this article are different from the arguably more advanced developments in Russia. However, the historical foundations both in terms of law and practice are the same.

135. See, e.g., Mission to Kazakhstan, *supra* note 124 at 13-14; American Bar Association Central European and Eurasian Law Initiative, *Legal Profession Reform Index for Kyrgyzstan*, Oct. 2004, available at [https://www.abanet.org/ceeli/publications/lpri/lpri\\_kyrgyzstan.pdf](https://www.abanet.org/ceeli/publications/lpri/lpri_kyrgyzstan.pdf).

136. See generally *Judicial Reform Index for Kazakhstan*, *supra* note 58; *Judicial Reform Index for Uzbekistan*, *supra* note 99; *Judicial Reform Index for Kyrgyzstan*, *supra* note 74 and *Legal Profession Reform Index for Kyrgyzstan*, *supra* note 135.

137. What follows is a highly simplified view of criminal procedure intended to help the reader understand the basic process.

138. TAJ. CONST. art. 88; C. CRIM. P. (Uzb.), available at <http://www.unhcr.org/cgi-in/texis/vtx/rsd/rsddocview.pdf?tbl=RSDLEGAL&id=440d57c04> (in Russian); C. CRIM. P. art. 18 (Kyrg.), available at <http://www.legislationline.org/upload/legislations/f3/6d/0be0d6ce0d3adab5eda342f99b>

conduct the “investigative stage.”<sup>139</sup> Typically, this is the stage of the process when the police routinely obtain or extract confessions from the defendant.<sup>140</sup> All four criminal justice systems operate under the belief that the evidence is incomplete without a statement from a defendant.<sup>141</sup> That statement is usually a confession of guilt.<sup>142</sup>

After the investigative stage, the case goes to court for trial. A single judge or a panel of judges, depending on the seriousness of the case, tries criminal cases.<sup>143</sup> The laws do not exclude hearsay evidence, and victims often make the equivalent of “victim impact statements” during the trial, rather than at sentencing or after the conviction.<sup>144</sup> At the time the judge reads the verdict, he or she also pronounces the sentence, except for the rare instances when the court acquits the defendant.<sup>145</sup> The procedure does not

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8b.htm (in Russian); C. CRIM. P. art. 23 (Kaz.), available at <http://www.legislationline.org/upload/legislations/cc/5b/cc3bfb7e9dcd5a29274e0d22a96d.htm> (in Russian).

139. See C. CRIM. P. Ch. 24 (Kaz.), *supra* note 138; C. CRIM. P. Ch. 43 (Uzb), *supra* note 138.

140. Police officers are expected to “solve cases.” Failure to “solve” a case can result in reprimand, while success results in favorable evaluations, promotions and bonuses. Torture and ill treatment to extort confessions are commonplace in this environment. See *Mission to Kazakhstan*, *supra* note 124, at 14. See also, International Crisis Group, *Central Asia*, *supra* note 70, at 11 (“the system of measuring success solely according to statistics on crime detection ensures that there is intense pressure on police to solve crimes by any method.”).

141. Statements by the defendant are commonly the main evidence in a case. For a discussion of the widespread use of confessions and ill treatment and torture to get these statements see *Mission to Kazakhstan*, *supra* note 124 at 14-15; *Mission to Uzbekistan*, *supra* note 97 at 13. See also Frank Ledwidge & Lucas Oppenheim, *Preventing Torture: Reality and Perceptions*, 30 FLETCHER F. WORLD AFF. 165 (2006).

142. See International Crisis Group, *Central Asia*, *supra* note 70 at 24 (describing how police pressure to solve cases leads to brutality in extracting confessions). See also generally, Frank Ledwidge & Lucas Oppenheim, *Preventing Torture: Reality and Perceptions*, 30 FLETCHER F. WORLD AFF. 165 (2006) (discussing the pressure to solve cases as a reason law enforcement tortures suspects for confessions).

143. In 2005 Kazakhstan passed a “jury trial law” which came into force in January 2007 (on file with author). Under this law serious cases will be decided by nine lay-assessors sitting in joint deliberation with a judge. It is too early to evaluate how this new system is operating. For an analysis of the development and current state of the law regarding jury trials in Kazakhstan, see Nikolay P. Kovalev, *Lay Adjudication of Crimes in the Commonwealth of Independent States: An Independent or Impartial Jury or a “Court of Noddors”?* 11 COLUM. J. E. EUR. L. 123 at 136-149 (2006).

144. For extreme examples of this see generally, *Report from the OSCE/ODIHR Trial Monitoring in Uzbekistan*, *supra* note 9. For an explanation of witness participation in Russian criminal trials see Scott P. Boylan, *Coffee From a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution*, 4 U.C. DAVIS J. INT’L L. & POL’Y 103 at 114-117 (1998).

145. See Shahriyor Khodjaev, *Criminal Procedure Law*, in LAW AND LEGAL SYSTEM OF UZBEKISTAN 305 (Ilias Bantekas ed., 2005).

[Vol. 8: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

allow for a separate sentencing hearing.<sup>146</sup> No country has a system of plea bargaining.<sup>147</sup>

Judges most often impose imprisonment as the sentence.<sup>148</sup> Judges do not widely use alternative sentencing, even though the option exists in each country to varying degrees.<sup>149</sup> In all four countries, a judge will likely sentence a juvenile without family connections to prison if arrested for an offense.<sup>150</sup> Judges routinely sentence adult offenders to prison and, oftentimes, to significant prison terms even if the defendant has committed a relatively minor offense.<sup>151</sup>

146. *Id.* ("There is no separate sentencing hearing. Before reaching judicial deliberation the prosecution and defence are required to submit their suggestions on whether the crime actually took place, whether the action or inaction constitutes a crime and under what provision in the Criminal Code, whether the act was indeed committed by the defendant, whether the defendant is guilty of this crime, whether there are any mitigating or aggravating circumstances **and whether the defendant should be punished.**") (emphasis added).

147. Although Central Asian legal professionals discuss plea bargaining in the context of ongoing criminal procedure code reforms. See, e.g., Press Release, OSCE/ODIHR, OSCE's Human Rights Office Facilitates Discussion on International Trends and Local Perspectives in Criminal Justice in Central Asia (Aug. 7, 2006), at <http://www.osce.org/item/20078.html>.

148. In 2005 the reported prison population rates per 100,000 inhabitants in Kazakhstan was 364 (twentieth place in the world in terms of prison population), in Kyrgyzstan it was 296 (thirty-sixth place), in Uzbekistan it was 184 (sixty-sixth place) and in Tajikistan it was 164 (seventy-seventh place). International Centre for Prison Studies, <http://www.prisonstudies.org> (last visited June 30, 2006). See also, Roy Walmsley, *Global Incarceration and Prison Trends*, 3 F. ON CRIME & SOC'Y 1, 2, 69 (2003) (giving prison population rates by region, showing that Central Asia has the highest incarceration rates of any region in the world).

149. See *Tajikistan: Interview with OSCE on Human Rights*, IRINnews.org (2003), [http://www.irinnews.org/report.asp?ReportID=38333&SelectRegion=Central\\_Asia](http://www.irinnews.org/report.asp?ReportID=38333&SelectRegion=Central_Asia) (last visited June 30, 2006); Interview with Dmitry Nurumov, OSCE/ODIHR Rule of Law Coordinator for Central Asia, in Grundy, Va. (June 30, 2006) ("Despite increased options for alternatives to imprisonment under the law in each of the four countries of Central Asia under discussion here, these alternatives are rarely applied by judges, and even more rarely requested by prosecutors.").

150. The United Nations Children's Fund (UNICEF) reports increasing rates of juvenile detention in Kazakhstan although pre-trial detention statistics are not reported. See [http://ceecis.org/child\\_protection/kazak\\_juv.htm](http://ceecis.org/child_protection/kazak_juv.htm). UNICEF reports juvenile delinquency is "escalating" in Kyrgyzstan. See [http://ceecis.org/child\\_protection/kyrg\\_juv.htm](http://ceecis.org/child_protection/kyrg_juv.htm). The situation is similar in Tajikistan. See [http://ceecis.org/child\\_protection/tajik\\_juv.htm](http://ceecis.org/child_protection/tajik_juv.htm).

151. In Kazakhstan the prison rate has decreased since 2002 due to changes in the law, resulting in decreasing prison sentences and increased use of alternative sentencing. This has been commonly called the "Law on Humanization" which was adopted in December 2002 and changed a number of provisions in the Criminal, Criminal Procedure and Criminal Executive Codes of Kazakhstan. See U.S. DEPT. OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003, <http://www.state.gov/g/drl/rls/hrrpt/2003/27845.htm> (reporting a reduction in prison population from 65,000 to 49,300 in one year). Due to these changes Kazakhstan reduced its imprisonment



## 2. The Judiciary

The judicial branch of government in each country remains weak and lacks independence.<sup>152</sup> This situation reflects the historical development of the judiciary in the former Soviet Union. Under the Soviets, a judge simply agreed with whatever the prosecutor requested.<sup>153</sup> Judges traditionally relied on the state for not only salaries, but also for housing and a number of other benefits that served to reinforce their subservient and dependent role.<sup>154</sup> As discussed below, no country in Central Asia currently gives judges the ultimate decision about whether the defendant remains in jail pending trials.<sup>155</sup> The Supreme Court in Kazakhstan acts more independently and seems to be in the process of consolidating more power.<sup>156</sup>

## 3. Prosecutors

In each of the four countries, prosecutors exercise extraordinary power and remain the single most powerful institution within the criminal justice system.<sup>157</sup> In all four countries, the prosecutor has the power to decide if a

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rates, falling from fourth place to twentieth place in imprisonment rates worldwide. See, <http://www.prisonstudies.org> (last visited June 30, 2006).

152. See, e.g., JUDICIAL REFORM INDEX FOR KAZAKHSTAN, *supra* note 58; JUDICIAL REFORM INDEX FOR KYRGYZSTAN, *supra* note 73; Mission to Kyrgyzstan, *supra* note 73; COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005, *supra* note 83; JUDICIAL REFORM INDEX FOR UZBEKISTAN, *supra* note 99.

153. See, e.g., Lauren Chen, *Power Plays: Reallocating Power under the New Russian Federation Code of Criminal Procedure*, 30 N.C. J. INT'L L. & COM. REG. 429, 432-438 (“[S]oviet judges cooperated with the procurators to obtain convictions, assuming the role of assistant prosecutors rather than neutral arbiters of the law.”).

154. *Id.* at 436-437. Judges continued to speak about their dependence on the state for a variety of benefits during the author’s numerous meetings with judges throughout the former Soviet Union from 1998-2006.

155. The term used in Central Asia is the “power to sanction arrest.” A more familiar term to common law lawyers is *Habeas Corpus*. For an easily accessible history of habeas corpus see ACLU, *Habeas Corpus: The Great Writ*, available at <http://www.aclu.org/safefree/detention/habeastimeline.html> (last visited Nov. 2, 2007). In Central Asia, prosecutors retain the power to decide who stays in custody. C. CRIM. P. art. 150 (Kaz.); C. CRIM. P. art. 110 (Kyrg.); C. CRIM. P. art. 90 (Taj.); C. CRIM. P. art. 234 (Uzb.).

156. The Kazakhstan Supreme Court supports the transfer of the power to sanction arrest (habeas corpus) from prosecutors to the judiciary and actively advocates for changes in the law to consolidate and improve judicial power. See Press Release, OSCE, OSCE Conference to Promote Fair Trials in Kazakhstan (Nov. 28, 2003), <http://www.osce.org/item/7940.html> (last visited on June 22, 2006).

157. The UN Special Rapporteur on the question of torture concluded that prosecutors in Uzbekistan have “excessive powers” and this contributes to widespread abuses and that “torture or ill-treatment is systematic. . . .” *Mission to Uzbekistan*, *supra* note 97, at 20-21. See also *supra* note

suspect stays in custody while the police investigate the case or while the case is pending in court.<sup>158</sup> With extraordinarily high conviction rates,<sup>159</sup> the defendant's future largely rests on the prosecutor's decisions about what to charge and what to request at sentencing.

#### 4. Defense Lawyers

The criminal defense bar constitutes the weakest part of the criminal justice system in each country. Defense lawyers operate under constraints both in the law and in the surrounding legal cultures making it difficult for them to provide a good defense for their clients. The impediments in the law include difficult bar structures and code-based restrictions limiting what lawyers can do for their clients.<sup>160</sup> In the Soviet Union, defense lawyers practiced exclusively through the *Collegium of Advocates*.<sup>161</sup> The *Collegium of Advocates* collected fees and taxes and paid advocates.<sup>162</sup> Private legal practice did not exist.<sup>163</sup> The *Collegium of Advocates* determined which lawyers were assigned to what cases.<sup>164</sup>

In Kazakhstan, Uzbekistan and Tajikistan, the law still requires lawyers who handle criminal cases to work through a local *Collegium of Advocates*.<sup>165</sup> The one exception to this rule, Kyrgyzstan, has no unified bar

134. For an analysis of the extraordinary powers of prosecutors under the Soviet system and the legacy in Russia see Chen, *supra* note 153.

158. See C. CRIM. P. art. 150(Kaz.); C. CRIM. P. art. 110 (Kyrg.); C. CRIM. P. art 90 (Taj.); C. CRIM P. art. 243 (Uzb.).

159. See *supra* note 124.

160. See *infra* note 168.

161. For a more detailed history of the *Collegium of Advocates* before and during the Soviet Union see JORDAN, *supra* note 134, at 1-69.

162. For a brief explanation of the structure of the *Collegium of Advocates* under the Soviet Union see *The Legal Profession Reform Index for Armenia* (American Bar Association Central European and Eurasian Law Initiative), Nov. 2003, available at [http://www.abanet.org/ceeli/publications/lpri/lpri\\_armenia.pdf](http://www.abanet.org/ceeli/publications/lpri/lpri_armenia.pdf); *The Legal Profession Reform Index for Azerbaijan* (American Bar Association Central European and Eurasian Law Initiative), Feb. 2005, available at [http://www.abanet.org/ceeli/publications/lpri/lpri\\_azerbaijan.pdf](http://www.abanet.org/ceeli/publications/lpri/lpri_azerbaijan.pdf) (last visited on June 30, 2006) (both state that "Under the communist system, no licensing system existed for advocates, rather they had to become members of the Collegium of Advocates, which was responsible for collecting fees and taxes and for paying advocates. Private legal practice, as it is known in the West, was largely non-existent.").

163. See Chen, *supra* note 153, at 437. See also *supra* note 161.

164. JORDAN, *supra* note 134, at 40.

165. For a summary comparing the legal structures of the bar in many countries previously part of the Soviet Union and former Soviet Bloc countries see JORDAN, *supra* note 134, at 128-131.

or required structures under which lawyers must operate.<sup>166</sup> This lack of structure creates a number of different and serious problems preventing competent representation of clients.<sup>167</sup> The criminal procedure codes in each of the four countries preclude defense lawyers from independently investigating a case on their client's behalf.<sup>168</sup>

## V. RESTORATIVE JUSTICE IN WESTERN COUNTRIES

### A. *Definition of Restorative Justice in Western Countries*

Scholars and practitioners use the term “restorative justice” most frequently to describe a range of alternatives to criminal prosecution.<sup>169</sup> This section will, by necessity, simply overview those alternatives<sup>170</sup> and provide a context for the discussions regarding reconciliation in Central Asia. Zehr, a leading scholar in the restorative justice field, defines restorative justice as “a process [that] involve[s], to the extent possible, those who have a stake in a specific offense and . . . collectively identif[ies] and address[es] harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>171</sup> Other authors define “restorative justice [as] seek[ing] to balance the concerns of the victim and the community with the need to re-integrate the offender into society. It seeks to assist the recovery of the

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166. See generally, *Legal Profession Reform Index for Kyrgyzstan*, *supra* note 135.

167. The lack of a formal structure creates particular concerns in providing competent assistance of counsel. *Id.*

168. Lawyers in Central Asia regularly discussed the fact that they cannot independently investigate cases during numerous conversations the author had with lawyers at meetings, training seminars, conferences and other events surrounding issues relating to the defense bar in Kazakhstan, Uzbekistan and Kyrgyzstan. In the context of Russian criminal procedure, see JORDAN, *supra* note 134, at 166-169.

169. Restorative justice can also refer to processes that are not intended to and do not supplant traditional criminal processes. Examples include post-conviction victim offender mediation where the goal is not to arrive at a settlement of the case, but rather to help the victims of often violent crimes achieve some sort of closure to the crime and to help in the rehabilitation process of the offender. This is the more common model for serious crimes in the United States. For a discussion of how to approach this type of mediation and a summary of research of the impact on victims and offenders see MARK UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH 255-67* (2001).

170. There are numerous resources regarding restorative justice. For a good general explanation see HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002); CRITICAL ISSUES IN RESTORATIVE JUSTICE (Howard Zehr & Barb Toews eds., 2004); UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION*, *supra* note 169; JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2002). For a law review article that gives a good overview of restorative justice, see Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2005).

171. HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 130 (1990).

victim and enable all parties with a stake in the justice process to participate fruitfully in it."<sup>172</sup> Restorative justice processes include victim offender mediation,<sup>173</sup> family group conferencing, peacemaking circles, community reparative boards, and victim impact panels.<sup>174</sup>

Austria, Australia, Belgium, Canada, New Zealand, the United Kingdom, and the majority of states in the United States widely use restorative justice in their criminal justice systems.<sup>175</sup> Parties in the United States most frequently use victim offender mediation, increasingly known as restorative justice conferencing.<sup>176</sup>

### *B. Development of Restorative Justice Programs in Western Countries*

The use and creation of restorative justice programs in Austria, Australia, Belgium, Canada, New Zealand, the United Kingdom, and the

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172. IVO AERTSEN ET. AL., *REBUILDING COMMUNITY CONNECTION: MEDIATION AND RESTORATIVE JUSTICE IN EUROPE* 14 (Council of Europe 2004).

173. More recently, the restorative justice field has begun to refer to this process as "restorative justice conferencing" to emphasize that not all the values or ethical guidelines applying to civil mediators apply to restorative justice facilitators or the conferences they conduct. Telephone Interview with Lawrie Parker, Executive Director of the Piedmont Dispute Resolution Center, in Warranton, Va. (June 28, 2006).

174. This is not a complete list of the large variety of practices that fall under the general heading of restorative justice. It is beyond the scope of this article to review the critiques of restorative justice practices and the restorative justice movement as a whole. See ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* (2004). For a review of Acorn's work see John Braithwaite, *Narrative and "Compulsory Compassion,"* 31 *LAW & SOC. INQUIRY* 425 (2006).

175. For a good overview of the state of victim offender mediation programs in Europe, see *VICTIM-OFFENDER MEDIATION IN EUROPE: MAKING RESTORATIVE JUSTICE WORK* (The European Forum for Victim-Offender Mediation and Restorative Justice ed., 2000). See also, *MAPPING RESTORATIVE JUSTICE: DEVELOPMENTS IN 25 EUROPEAN COUNTRIES* (David Miers & Jolien Willemssens eds., 2004). For an overview of the developments in the United Kingdom see *Restorative Justice: the Government's Strategy*, (Home Office report) (July 22, 2003), available at <http://www.homeoffice.gov.uk/documents/tj-strategy-consult.pdf?view=Binary>; *Restorative Justice: An Overview* (Home Office Report) (1999) available at <http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf>. For a listing of programs in the United States see *Directory of Victim Offender Mediation Programs in the United States*, Office for Victims of Crime (Apr. 2000) available at [http://www.ojp.gov/ovc/publications/infores/restorative\\_justice/restorative\\_justice\\_ascii\\_pdf/ncj176349.pdf](http://www.ojp.gov/ovc/publications/infores/restorative_justice/restorative_justice_ascii_pdf/ncj176349.pdf); for a summary of the state of legislation in the United States see Mark Umbreit, *Legislative Statutes on Victim Offender Mediation: A National Review*, University of Minnesota, 2001 available at: [http://rjp.umn.edu/img/assets/13522/Legislative\\_Statutes\\_VOM%20National\\_Review.pdf](http://rjp.umn.edu/img/assets/13522/Legislative_Statutes_VOM%20National_Review.pdf).

176. See, e.g., UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION*, *supra* note 169, at 111-131.

United States arose under similar sources of pressure for change. Lawyers were rarely the strongest proponents of change, especially prosecutors, in part due to a concern that the general public views advocating for restorative justice programs as being “soft on crime.”<sup>177</sup> Instead, non-governmental actors pushed for the development of restorative justice programs.<sup>178</sup> Many non-lawyer advocates for restorative justice see the involvement of criminal justice professionals as an impediment to the restorative process and view court-centered criminal justice processes with suspicion.<sup>179</sup> Proponents of restorative justice programs often refer to a restorative justice as a “movement,” indicating that they advocate a fundamental social change in criminal justice systems.<sup>180</sup> Criminal justice professionals later got involved and now often play a central role in the development and implementation of

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177. Umbreit et al., *Restorative Justice in the Twenty-First Century*, *supra* note 170, at 259-261.

178. *Id.* at 259. These activists were not traditionally viewed as professionals in the criminal justice system, although this is not universally true and “in practice a great deal of the initiative for restorative justice programs has come and continues to come from professionals within the criminal justice system.” Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice*, 38 *LAW & SOC’Y REV.* 139, 145 (2004).

179. An example of this is the argument of many restorative justice proponents that in traditional criminal justice systems the state has “stolen the conflict” from individuals. In 1977, Norwegian criminologist Niles Christie was the first to use this terminology in *Conflicts as Property*, 17 *BRITISH J. OF CRIMINOLOGY* 1-15 (1977). This concept of the state “owning the conflict” is used by many writing on restorative justice. See UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION*, *supra* note 169, at 254; HOWARD ZEHR, *CHANGING LENSES*, *supra* note 171, at 81 (describing the assumptions about crime and justice in American society). For a caution that restorative justice may be “putting too much responsibility onto victims and offenders, and their ‘communities of care’ for crime reduction. . .allowing the state to divest itself of its rightful responsibilities” see Barbara Hudson, *Victims and Offenders*, in *RESTORATIVE JUSTICE & CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 177, 190 (Andrew von Hirsch et al. eds., 2002).

180. See Umbreit et al., *Restorative Justice in the Twenty-First Century*, *supra* note 170, at 254 (“[restorative justice] is an important social reform movement that has been developing throughout the world over the past thirty years.”).

new restorative justice programs.<sup>181</sup> But they tend to follow and not lead the push for change.<sup>182</sup>

As discussed below, this pattern of development contrasts sharply with the development of "reconciliation" in Central Asia. Criminal justice professionals, notably prosecutors and police officers, are the leading proponents for the increased use of reconciliation in Central Asia.<sup>183</sup> Non-governmental actors are almost entirely absent in the discussion in Central Asia about the use or expanded use of reconciliation.<sup>184</sup>

### C. *Types of Cases Referred to Restorative Justice Processes*

In many, if not most, of the western countries that currently use an alternative to criminal prosecutions, prosecutors or courts most frequently refer juvenile cases to a restorative justice process.<sup>185</sup> Referrals may happen

181. This broad statement does not hold true for some individual countries with active restorative justice programs. Austria provides one contrary example, see Christa Pelikan, *Victim-Offender Mediation in Austria*, in VICTIM-OFFENDER MEDIATION IN EUROPE: MAKING RESTORATIVE JUSTICE WORK, *supra* note 175. Some restorative justice activists are concerned that the increasing involvement of criminal justice professionals in restorative justice processes will lead to the "McDonaldization of Mediation." For a full discussion of this and other concerns facing restorative justice practices in North America, see UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, *supra* note 169 at 291-302, and Carsten Erbe, *What is the Role of Professionals in Restorative Justice?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 293-98 (Howard Zehr & Barb Toews eds., 2004). For an analysis of the roles that professionals play in restorative justice in the context of two case studies, see Olsen & Dzur, *supra* note 178.

182. For a brief history of the development and institutionalization of restorative justice see Umbreit et al., *Restorative Justice in the Twenty-First Century*, *supra* note 170, at 259-263. For a history of restorative justice in Belgium, see Ivo Aertsen, *Victim-Offender Mediation in Belgium*, in VICTIM-OFFENDER MEDIATION IN EUROPE: MAKING RESTORATIVE JUSTICE WORK, *supra* note 175, at 153 ("A handful of small non-governmental organizations for juvenile assistance took the first initiatives."). Regarding Germany, see Britta Bannenberg, *Victim Offender Mediation in Germany*, in VICTIM-OFFENDER MEDIATION IN EUROPE: MAKING RESTORATIVE JUSTICE WORK, *supra* note 175. Regarding Poland, see Beata Czarnecka-Dzialuk & Dobrochna Wójcik, *Victim-Offender Mediation in Poland*, in VICTIM-OFFENDER MEDIATION IN EUROPE: MAKING RESTORATIVE JUSTICE WORK, *supra* note 175.

183. See *infra* Section VI.

184. For an interesting collection of essays looking at the role of civil society and the role of the state in the development of restorative justice programs in a variety of countries including Australia, the United Kingdom and South Africa, see RESTORATIVE JUSTICE AND CIVIL SOCIETY (Heather Strang & John Braithwaite eds., 2001).

185. For an overview of many early restorative justice programs involving juveniles, see Paul McCold, *Primary Restorative Justice Practices*, in RESTORATIVE JUSTICE FOR JUVENILES: CONFERENCE, MEDIATION & CIRCLES 41-54 (Allison Morris & Gabrielle Maxwell eds., 2001). In the United States, twenty-two states allow restorative justice only in juvenile cases with twenty-three

after a conviction as part of a suspended disposition.<sup>186</sup> In the United States, prosecutors and courts overwhelmingly oppose referring felony cases, especially those involving sex crimes, to restorative justice processes at any time prior to conviction and sentencing.<sup>187</sup> Lawrie Parker, the Executive Director of the Piedmont Dispute Resolution Center located in Virginia and

states allowing restorative justice in both juvenile and adult cases. Sandra O'Brien, *Restorative Juvenile Justice in the States: A National Assessment of Policy Development and Implementation*, 4, available at <http://www.fau.edu/barj/survey.pdf> (last visited on Feb. 22, 2007). For a discussion of some of the current restorative justice programs for juveniles around the world see Willie McCarney, *Responding to Juvenile Delinquency*, 3 J. CENTER FOR FAMILIES, CHILD. & CTS. 3 (2001). For a brief history of the early restorative justice programs in Europe (predominately juvenile) see AERTSEN ET AL., *supra* note 172, at 17-18.

186. Telephone Interview with Lawrie Parker, *supra* note 173.

187. Of the 302 victim offender programs responding to a 2000 US Department of Justice survey listing the types of cases they handle, only eleven percent reported handling sexual assault cases, while seventy-three percent reported handling misdemeanors and sixty-one percent handled juvenile cases. See Directory of Victim Offender Mediation Programs in the United States, *supra* note 175. From this information it is difficult to glean how many of the programs handling sexual assault cases handle them post-conviction as part of a rehabilitation program, the seriousness of the sexual assault, and/or what overall percentage of cases are misdemeanors or juvenile. Although from the reporting programs it is clear the numbers are significant. One of the first programs to use restorative justice in felony cases in the United States worked "primarily with cases that arose from felony arrests. . . set[ting] apart the Brooklyn Dispute Resolution Center from the growing number of mediation and conflict resolution programs being established throughout the country, nearly all of which would not even consider cases of felony arrests." MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 15 (1994). See also, Maureen E. Laffin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 586 (2004). However, many restorative justice proponents agree with ZEHR, *supra* note 175, at 11, stating that "experience has shown that restorative justice approaches may have the greatest impact in more serious cases." One practical reason for this is that cases need to be serious enough that the victim is motivated to participate. That motivation can be lacking in crimes with minimal harm. For arguments advocating the use of mediation in sexual assault cases, see Kerry M. Hodak, *Court Sanctioned Mediation in Cases of Acquaintance Rape: A beneficial Alternative to Traditional Prosecution*, 19 OHIO ST. J. ON DISP. RESOL. 1089 (2004). See also Deborah Gartzke Goolsby, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183 (1990); Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOT. L. REV. 265 (2001). One example of a post-conviction mediation program for rape cases is from Denmark. This program focuses on the victim and her recovery from the assault and not the offender. Karin Sten Madsen & Hanne Andersson, *The Challenges of Mediating Rape*, Workshop 17 of the European Forum for Victim Offender Mediation and Restorative Justice Proceedings conference "Restorative Justice in Europe: Where are we heading?" Budapest, Hungary (Oct. 14-16, 2004) (describing a rape mediation program in Denmark), available at <http://www.euforumj.org/readingroom/workshp17.pdf> (hand-out from the workshop on file with author). For a series of articles looking at restorative justice in sexual assault and family violence cases drawing examples and conclusions from the design and implementation of one restorative justice project, see Mary P. Koss et. al., *Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable*, 989 ANNALS N.Y. ACAD. SCI. 384 (2003), C. Quince Hopkins, et. al, *Applying Restorative Justice to On-Going Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUBL. L. REV. 289 (2004); C. Quince Hopkins & Mary Koss, *Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offences*, 11 VIOLENCE AGAINST WOMEN, 693 (May 2005).

a member of the Board of Directors of the Restorative Justice Association of Virginia, notes an increasing trend of courts referring felony cases to a restorative justice conference as an element of the criminal sentence.<sup>188</sup> She notes that judges will reduce a sentence or incarceration time, on a case-by-case basis, to create incentives for the defendants to agree to participate in the post-conviction restorative justice process.<sup>189</sup>

Parker's center has conducted between twenty and thirty restorative justice conferences each year since 1996.<sup>190</sup> About one half of the current referrals coming from courts to her center involve felony cases.<sup>191</sup> During that ten year period, the center has handled only one felony involving sexual assault.<sup>192</sup>

Another expert in the restorative justice field in the United States, Linda Harvey, reports that restorative justice conferences in most felony cases occur after conviction.<sup>193</sup> She has worked for the past three years with sexual abuse victims whose abusers were members of the clergy.<sup>194</sup> Despite her dedicated efforts to offer pre-conviction restorative justice conferencing to these parties, few victims have chosen to meet with their abusers.<sup>195</sup> Some victims have agreed to meet with representatives of the religious body involved in the case, provided that those representatives have sufficient settlement authority to pay monetary damages.<sup>196</sup> Only two Catholic dioceses – one in Milwaukee, Wisconsin and one in Albany, New York – agreed to the pre-conviction restorative justice process.<sup>197</sup> Lawyers for other religious bodies have expressed concern about the self-incrimination risks of

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188. Telephone interview with Lawrie Parker, *supra* note 173.

189. *Id.*

190. *Id.*

191. *Id.*

192. The case involved an assault against a woman's daughter by the woman's boyfriend. The restorative justice conference involved only the woman and the former boyfriend. The victim chose not to participate. *Id.*

193. Telephone Interview with Linda Harvey, Restorative Associates, in Lexington, Ky. (June 28, 2006).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*



making an apology or admitting guilt in the face-to-face conference at the pre-conviction stage of the proceedings.<sup>198</sup>

These practices contrast with developments in Central Asia where, with one exception (discussed in Section VII), legal professionals do not regularly refer juvenile cases to reconciliation.<sup>199</sup> Instead, more difficult or controversial cases, including violent crimes, go to reconciliation before conviction.<sup>200</sup> In sharp contrast to the safeguards provided in many western countries, prosecutors make no effort to ensure that crimes involving sexual offenses, including rape, receive careful screening that considers whether reconciliation provides sufficient safeguards for the victim.<sup>201</sup>

#### *D. Possible Outcomes of the Restorative Justice Conference*

As practiced in the United States, parties to a restorative justice conference have complete control over the agreed outcome of the process.<sup>202</sup> The parties can carefully construct outcomes that often do not involve monetary damages.<sup>203</sup> For example, the parties may agree that the defendant will provide specific services to the victim.<sup>204</sup> The parties may also agree that the defendant will do community service in a particular location which might be related to the crime (for example working in physical rehabilitation center with car accident victims in a case of driving under the influence of alcohol).<sup>205</sup> The outcome of a restorative justice conference ties closely to the goal of “repairing the harm.”<sup>206</sup>

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198. For an analysis of concerns about using ADR in these cases see Michelle Rosenblatt, *Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church*, 5 PEPP. DISP. RESOL. L. J. 115 (2005).

199. Kazakhstan provides the exception. See *infra* note 473.

200. See *infra* Sections VI and VII.

201. See *infra* Sections VI and VII.

202. See, e.g., UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION*, *supra* note 169, at 35-64 (describing the mediation process including a focus on party control).

203. Restorative justice literature provides numerous examples. See, e.g., UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION*, *supra* note 169, at 85-109.

204. One study described six categories of outcomes from restorative justice: apology, compensation (to the victim), reparation (to the victim's damaged property), community service, and offender oriented outcomes (substance abuse treatment, anger management, etc.). MAPPING RESTORATIVE JUSTICE, *supra* note 175, at 176, 179.

205. One example from New Zealand required the offender in a “dangerous driving causing death” case to make a donation to an education fund in memory of the victim and perform community service. JIM CONSEDINE, *RESTORATIVE JUSTICE: HEALING THE EFFECTS OF CRIME* 193 (1995).

206. See *infra* Section V.E.

[Vol. 8: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

This focus on outcome contrasts with practices in Central Asia, where parties in reconciliation agree to monetary payments and overlook more creative or far-reaching results.<sup>207</sup>

*E. Safeguards Created in the United States to Protect Victims of Crime, the Rights of Criminal Defendants, and the Integrity of the Restorative Justice Process*

1. Core Values of the Restorative Justice Process Used in the United States

Most of the restorative justice processes used in the United States share common values, terms, and concepts.<sup>208</sup> They appear repeatedly in the English language literature on restorative justice.<sup>209</sup> However, these core values fail to appear in any discussion of reconciliation in Central Asia serving as another important indication of how far removed current reconciliation practices in Central Asia are from restorative justice as conceived in western countries.<sup>210</sup>

*a. "Repairing the Harm"*

The restorative justice literature makes frequent reference to the concept of repairing the harm and the related concept of healing.<sup>211</sup> The literature discusses this value in the context of the victim, the offender, and the community at large.<sup>212</sup> In restorative justice theory, repairing the harm takes precedence over punishing the particular offender.<sup>213</sup>

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207. Thorn, *supra* note 5, at 10-14, and discussion *infra* Section VII.

208. See, e.g., UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, *supra* note 169, at xxviii-xxix.

209. See, e.g., sources cited *supra* note 170.

210. See *infra* Section VII.

211. See, e.g., ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE, *supra* note 170, at 28-32.

212. See, e.g., *id.* See also UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, *supra* note 169.

213. See, e.g., Olson & Dzur, *supra* note 178, at 141.

*b. "Victim Centered"*

The literature also frequently uses the term "victim centered," and its use indicates that the needs and concerns of the victim take priority over the needs and concerns of the defendant.<sup>214</sup> The process should consider how the neutral and other participants treat the victim before and during the restorative justice process, as well as recognize the needs of the victim for additional support and assistance afterwards.<sup>215</sup> This term also refers to a way that restorative justice distinguishes itself from court-centered processes, which many advocates for restorative justice view as being "offender-centered."<sup>216</sup> These advocates point out that court-centered processes focus on the defendant's rights and the outcomes the defendant faces (conviction, punishment and so on). Placing the victim at the center of the proceedings and minimizing the role of the state can make restorative justice appear more like a civil lawsuit involving two individuals. The traditional court-centered criminal process, in contrast, pits the state against one individual, with the victim reduced to playing a peripheral or often nearly invisible role.<sup>217</sup>

*c. "Re-victimization"*

Restorative justice also seeks to ensure that victims do not experience the process as victimizing or harming them further.<sup>218</sup> This goal ties closely to the value that the process be "victim centered."<sup>219</sup> The literature advises

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214. See, e.g., UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, *supra* note 169, at xxvii ("restorative justice is a victim-centered response to crime. . .") and at 21-34 (using the term "victim sensitive"); Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 668 (2005).

215. See, e.g., UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, *supra* note 169, at 21-34.

216. See, e.g., Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, 7 *DISP. RESOL. MAG.* 8 (2000).

217. For a discussion of the reduced role of the state in restorative justice proceedings see Olson & Dzur, *supra* note 178, at 141, and ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE, *supra* note 170, at 21-28. The level of victim satisfaction after participating in restorative justice processes is a continuing theme in the literature in this area. See, e.g., UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, *supra* note 169, and Leena Kurki, *Evaluating Restorative Justice Practices*, in *RESTORATIVE JUSTICE & CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS*, *supra* note 179, at 294-310.

218. See, e.g., UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, *supra* note 169, at 19-34.

219. See *id.*

[Vol. 8: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

practitioners how to make the process more sensitive to the victim's emotions and needs.<sup>220</sup>

*d. "Support Persons"*

Support persons exist both for the victim and the offender in western restorative justice process. No victim of crime should enter or participate in the restorative justice proceeding feeling isolated or without necessary emotional support.<sup>221</sup> Legal counsel, family, or friends may join in the process to give victims support and advice.<sup>222</sup> The offender can also bring his or her support system and the neutral will usually require such support for juvenile offenders.<sup>223</sup>

*e. "Preventing Recidivism"*

The literature also suggests that restorative justice processes prevent recidivism.<sup>224</sup> Advocates of restorative justice hope that it gives an offender

220. See *id.* See also *Restorative Justice Conferencing Training* (materials for training, on file with author).

221. See, e.g., UMBREIT, *supra* note 169, at 21, 32.

222. See, e.g., UMBREIT, *supra* note 169, at 32.

223. Family group conferencing (a common model for juvenile cases) includes a role for the members of the family of the offender. See McCarney, *supra* note 185, at 7; Mark Umbreit, *Family Group Conferencing: Implications for Crime Victims*, U.S. Department of Justice, at 5 (Apr. 2004), [http://www.ojp.usdoj.gov/ovc/publications/infores/restorative\\_justice/96523-family\\_group/welcome.html](http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/96523-family_group/welcome.html) (last visited Nov. 5, 2007) (discussing the important role of family for juvenile offenders). Telephone Interview with Lawrie Parker, *supra* note 173, includes information for mediators facing a situation in which the offender says he or she does not want a support person involved. An interesting study from 1990-1991, included data on offender's parents' involvement in the restorative justice process, both positive and negative. See UMBREIT, *VICTIM MEETS OFFENDER*, *supra* note 187, at 187-194.

224. See, e.g., UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION*, *supra* note 169, at 170-73, 190, 211-12; Aiden Wilcox et. al., *Two-year Re-sanctioning Study: a Comparison of Restorative and Traditional Cautions*, Home Office Online Report 57/04, available at <http://www.homeoffice.gov.uk/rds/pdfs04/rdsolr5704.pdf> (last visited Feb. 22, 2007); AERTSEN, *supra* note 172, at 38 (summarizing various studies of restorative justice programs around the world stating "a growing number of studies on victim-offender mediation and conferencing programmes demonstrate a modest, but positive effect on reducing re-offending"). For a summary of the early studies on restorative justice see UMBREIT, *VICTIM MEETS OFFENDER*, *supra* note 187 at 15-26, 114-118 (discussing recidivism). A recent study on recidivism in cases of driving under the influence of alcohol in Australia showed no reduction in recidivism although it did show a reduction in drinking and driving behaviors. Tom Tyler et al., *Reintegrative Shaming, Procedural Justice and Recidivism:*

the opportunity to understand the consequences of his or her actions, to hear and understand how the crime impacted the victim, and make an offender less likely to engage in crime in the future.<sup>225</sup>

As discussed below, none of these values, terms, or concepts play a role in the day-to-day practice of reconciliation in Central Asia.

## 2. Ethical Constraints on Neutrals Conducting the Restorative Justice Processes

Organizations focusing on restorative justice recognize the need to give guidance on the ethical issues inherent in the process.<sup>226</sup> The Restorative Justice Association of Virginia, for instance, adopted a “Code of Ethics for Restorative Justice Facilitators.”<sup>227</sup> The ten points of the code include: “[T]o be professional and proceed with dignity, honesty and courtesy in preparing clients for the conference/mediation; to be clear in understanding the limits of a facilitator; to be non-judgmental in the evaluation and process of bringing a case to conference; to be responsible for developing skills through additional training and continuing education; [and] to understand that Restorative Justice processes are not always appropriate for every case . . . .”<sup>228</sup>

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*The Engagement of Offenders' Psychological Mechanisms in the Canberra RIS Drinking-and-Driving Experiment*, 41, LAW & SOC'Y REV. 553 (2007).

225. See, e.g., Patricia Gray, *The Politics of Risk and Young Offenders' Experiences of Social Exclusion and Restorative Justice*, 45 BRIT. J. CRIMINOLOGY 938, at 13, 950 (2005) (“The research evidence cited in this article suggests that one of the most successful achievements of the programme was its ‘responsibilising’ effects on young offenders, because of the way in which it challenged their attitudes and moral reasoning, held them accountable for their crimes and confronted them with the consequences of their behavior on victims.”). However, most proponents of restorative justice point out that “[r]estorative justice is not primarily designed to reduce recidivism or repeating offenses.” ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE*, *supra* note 170; CRITICAL ISSUES IN RESTORATIVE JUSTICE, *supra* note 170, at 9.

226. See, e.g., *Victim Offender Mediation Association Recommended Ethical Guidelines*, <http://www.voma.org/docs/ethics.pdf> (last visited July 2, 2006); *Minnesota Restorative Services Coalition Recommended Ethical Guidelines for Restorative Practices*, <http://www.mnmrsc.org/guidelines.html> (last visited on July 2, 2006).

227. Restorative Justice Association of Virginia, *Code of Ethics for Restorative Justice Facilitators*, [http://rjav.org/index.php?option=com\\_content&task=view&id=8&Itemid=9](http://rjav.org/index.php?option=com_content&task=view&id=8&Itemid=9) (last visited on June 30, 2006).

228. *Id.*

### 3. Other Core Values and Ethical Constraints that May Apply to Restorative Justice Neutrals

Each restorative justice process may bring with it another set of fundamental values and ethical constraints. For instance, in victim-offender mediation or conferencing – if conducted by certified, registered, or rostered mediators – the core values of mediation would also apply.<sup>229</sup> Most scholars and practitioners agree that mediation relies on three core values: (1) the impartiality of the neutral, (2) party self-determination – both in the design of the process and in the outcome chosen, and (3) confidentiality of communications made in mediation to promote candor and trust.<sup>230</sup> Some jurisdictions also provide mandatory or aspirational standards of ethical conduct for mediators.<sup>231</sup> Typically, these standards serve “to guide the conduct of mediators [in all practice contexts]; to inform the mediating parties [about the process]; and to promote public confidence in mediation as a process for resolving disputes.”<sup>232</sup>

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229. In the United States, some state ethics codes provide that all professional ethics codes that apply to a particular neutral concurrently apply. FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS, 10.200–10.690, 10.650 (Fla. Sup. Ct. Standing Comm. on Mediation and Arbitration Rules 2000), [http://www.flcourts.org/gen\\_public/adr/certrules.shtml](http://www.flcourts.org/gen_public/adr/certrules.shtml) (“Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.”). See STANDARDS OF ETHICS AND PROF’L RESP. FOR CERTIFIED MEDIATORS (Jud. Council of Va. 2002), <http://www.courts.state.va.us/soe/soe.htm> (“These Standards are not intended to be exclusive and do not in any way limit the responsibilities the mediator may have under codes of ethics or professional responsibility promulgated by any other professions to which the mediator belongs or any other codes of ethics or professional responsibility to which the mediator subscribes, such as those promulgated by the Society of Professionals in Dispute Resolution or the Academy of Family Mediators.”) (last visited on Feb. 2, 2007).

230. See, e.g., JAMES ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 1, 193 (2001); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 26-28, 262 (3d ed. 2004).

231. Seventeen states in the United States have mandatory codes of ethics which apply to some mediators practicing within their states. These codes typically apply to mediators working in court-connected mediation programs. See Paula M. Young, *Take it or Leave it. Lump it or Grieve it: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 741 (2006) (listing states with mandatory codes and the citations to those codes).

232. See, e.g., *Model Standards of Conduct for Mediators*, (Am. Bar Ass’n, Am. Arb. Assn. & Assn. for Conflict Res.), preamble at 2 (Aug. 9, 2005), available at <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf> [hereinafter *2005 Model Standards*]. See generally Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR and AAA*

#### 4. Processes in the United States for Protecting the Rights of Defendants Participating in Restorative Justice Processes

Criminal defendants in the United States derive significant rights from the United States Constitution. The due process clause of the Fourteenth Amendment to the constitution provides: “No state . . . [shall deprive] any person of life, liberty, or property, without due process of law[.]”<sup>233</sup> Courts have interpreted the procedural due process doctrine arising under this constitutional amendment as limited to protecting individuals from an arbitrary and binding deprivation of rights by government entities.<sup>234</sup> In a criminal context, due process requires: (1) the prosecution to provide the defendant with formal notice of the charges; (2) the prosecution to show in a probable cause hearing before a neutral magistrate evidence that the defendant has committed a crime; (3) the court to appoint and pay for a lawyer for an indigent defendant; (4) the court to allow a defendant to call witnesses on his or her behalf and to cross-examine adverse witnesses; (5) an impartial jury to try the case; and (6) a lawyer to represent the defendant at trial if the defendant wishes.<sup>235</sup> Constitutional due process also protects a defendant from self-incrimination.<sup>236</sup>

A restorative justice conference that occurs post-conviction, and after the expiration of all deadlines for any possible appeals, would not interfere with these due process rights or protections.<sup>237</sup> However, pre-conviction conferencing could put a defendant’s due process rights in jeopardy, primarily the right against self-incrimination and the right to a lawyer. Without sufficient guarantees of confidentiality, pre-conviction conferencing could result in the admission of evidence at a later trial that a party or prosecutor obtained by the disclosures, apologies, or admissions of guilt made in the restorative justice conference.<sup>238</sup>

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*Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J.L. 195 (2002) (discussing the nine standards of conduct set out in the *2005 Model Standards*).

233. U.S. CONST. amend. XIV, § 1.

234. Nancy Welsh, *Disputant’s Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 188 (2002).

235. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 7–13 (3d ed. 2002).

236. *Id.*

237. For a more thorough discussion of due process concerns in restorative justice processes in the United States see Mary Ellen Reimund, *Restorative Justice on a Collision Course with the Constitution?* 3 APPALACHIAN J.L. 1 (2004).

238. For a good discussion of the serious issues surrounding the lack of confidentiality protections in restorative justice processes, particularly pre-conviction, see Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?* 2004 J. DISP. RESOL. 401.

Moreover, pre-conviction conferencing must also guarantee finality to the case when the parties freely enter an agreement and the defendant fully complies with the agreement.<sup>239</sup> The conferencing process, related court rules, and legislation would have to ensure that a defendant could not later be prosecuted for a crime already resolved to the satisfaction of the victim in the conferencing process.

## VI. RECONCILIATION IN CENTRAL ASIA:

The criminal procedure codes of the four Central Asian countries all allow the option of reconciliation in certain circumstances.<sup>240</sup> More recently, the legislatures have changed the laws to allow the expanded use of reconciliation.<sup>241</sup> Many professionals in the region's criminal justice systems accept and promote this change as progress, with little consideration of the types of cases and defendants for which these processes might be most valuable.<sup>242</sup> Instead, the discourse surrounding the use of reconciliation focuses on the statistics of numbers of cases reconciled.<sup>243</sup> In all four countries, parties use reconciliation exclusively as a pre-conviction process.<sup>244</sup> No one thinks to conduct "satisfaction level" surveys of victims, defendants, and others in the society.<sup>245</sup> In most discussions of reconciliation, the controlling interests are those of the state, as defined by prosecutors and the police.<sup>246</sup>

239. See, e.g., *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, *supra* note 26, at §3.

240. See C. CRIM. (Kaz.) art. 67; C. CRIM. art. 66 (Kyrg.); and C. CRIM. art. 73 (Taj.); C. CRIM. art. 66-1 (Uzb.) (amended Aug. 27, 2004).

241. See C. CRIM. art. 67 (Kaz.) (amended Dec. 2002); Law Number 221, Nov. 14, 2003, KYRG.; C. CRIM. art. 66-1 (Uzb.) (amended Aug. 27, 2004).

242. Thorn, *supra* note 5. The author also cites numerous discussions between the author and legal professionals in Central Asia between 2003-2006, including during the Nov. 2004 Conference, *supra* note 20.

243. Thorn *supra* note 5, and discussion *infra* this Section.

244. Thorn, *supra* note 5; C. CRIM. P. art. 269 and 391 (Kaz.); C. CRIM P. art. 26 (Kyrg.); C. CRIM art. 66-1 (Uzb.) (amended Aug. 27, 2004).

245. The participants in the Nov. 2004 Conference, *supra* note 20, did not suggest or discuss conducting opinion or satisfaction level surveys; see also Thorn, *supra* note 5, for a general discussion of legal professionals' attitudes towards reconciliation.

246. Thorn, *supra* note 5; Nov. 2004 Conference, *supra* note 20; numerous unrecorded conversations on reconciliation the author conducted with legal professionals in Central Asia between 2003-2006.



This section summarizes the limited data available on how the reconciliation process actually works in each of the four Central Asian countries studied. This section discusses who makes the decisions in each country to put a criminal case into reconciliation and what types of cases go to reconciliation. This section will also describe at what point in the criminal process each country will send a case to reconciliation. This section concludes that reconciliation in Central Asia shows little similarity to the restorative justice conferencing occurring in western countries. Central Asian reconciliation has virtually none of the values, standards, or safeguards that could guarantee a meaningful, safe, or fair process for the victim or the offender. To call it a restorative justice process is clearly inaccurate.

#### *A. Definition of “Reconciliation” and its Lack of “Core Values”*

“Reconciliation” describes a process by which the parties agree to a resolution of a criminal case.<sup>247</sup> Although sometimes referred to as mediation, reconciliation provides a process separate and distinct from western-style mediation.<sup>248</sup> Little control, oversight, or guidance applies to the process.<sup>249</sup> A neutral third party (a mediator) need not be involved in a reconciliation process.<sup>250</sup> Reconciliation conforms to no standardized process under existing law in any of the four Central Asian countries.<sup>251</sup> No clearly stated standards provide when a case is eligible for reconciliation (either pre- or post-conviction).<sup>252</sup>

No country in Central Asia defines in the law why reconciliation exists or what the criminal justice system hopes to achieve through its use.<sup>253</sup> No statements in the reconciliation laws suggest that the process exists to “repair the harm” or to give victims more of a role, or more satisfaction, during the

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247. See, e.g., C. CRIM. art. 67 (Kaz.); C. CRIM. art. 66 (Kyrg.); C. CRIM. art.73 (Taj.). See also Khodjaev, *supra* note 145, at 285 (describing reconciliation in Uzbekistan).

248. See *infra* this section.

249. As is discussed later in this section, the Uzbekistan Criminal Procedure Code is the only one to give any specific requirements, see *infra* this section, and those requirements leave much undefined including the role of the intermediary, if any, and any procedure the reconciliation process should follow.

250. The Criminal and Criminal Procedure Codes of all four countries do not specify that there should be a neutral third party or give a role to anyone other than the victim and offender in the reconciliation process. The exceptions are specific provisions relating to the *Mahalla* in Uzbekistan and the *Aksakal* in Kyrgyzstan. See discussion *infra* this section.

251. This statement reflects the author’s own conclusions, drawn from her study of this subject.

252. *Id.*

253. *Id.*

criminal justice process.<sup>254</sup> No statements in the laws suggest that reconciliation exists to reduce recidivism rates.<sup>255</sup>

### *B. Why do Cases go to Reconciliation?*

Both historically and in current practice, reconciliation does not promote "justice" for the victim or "make the victim whole."<sup>256</sup> It exists for a very practical reason: to stop a complaint from proceeding into the system.<sup>257</sup> Currently the institutions of the criminal justice system in all four Central Asian countries have very specific interests in how the system handles individual criminal cases. For prosecutors and police officers, promotions, bonuses, the reversal of demotions, and the withholding of pay raises and bonuses depend on the percentage of their cases that result in conviction.<sup>258</sup> As discussed in section IV, nearly 100 percent of cases result in a conviction.<sup>259</sup> Superiors tend to evaluate police and prosecutor job performance in these simple statistical terms.<sup>260</sup> A failure to convict or the dismissal of a case can carry direct personal consequences for the criminal justice professional involved.<sup>261</sup> Judges know that their job security depends on co-operation with all institutions in the executive branch and on high conviction rates.<sup>262</sup> Judges share an interest in bringing in "guilty" verdicts in cases.<sup>263</sup> In this environment, all players, except perhaps victims and defendants, benefit if the difficult cases never go to trial, where there is

254. *Id.*

255. *Id.*

256. *Id.*

257. See, e.g., *Uzbekistan from House to House: Abuses by Mahalla Committees* 15 HUMAN RIGHTS WATCH 1, 28 (2003), available at [www.hrw.org/reports/2003/uzbekistan/0903/uzbekistan0903.pdf](http://www.hrw.org/reports/2003/uzbekistan/0903/uzbekistan0903.pdf) (discussing *Mahalla* responses to domestic violence and stating "they interpret 'reconciliation' of family conflicts as the cessation of complaints, rather than an end to the violence. Their intervention, therefore, is often directed toward placating the abuser, rather than helping the victim.").

258. See International Crisis Group, *Central Asia*, *supra* note 70.

259. See *supra* note 124.

260. See, e.g., International Crisis Group, *Central Asia*, *supra* note 70, at 16-17; Ledwidge & Oppenheim, *supra* note 141, at 168.

261. See, e.g., International Crisis Group, *Central Asia*, *supra* note 70, at 16-17; Ledwidge & Oppenheim, *supra* note 141, at 168.

262. See, e.g., sources cited *supra* note 154.

263. For an explanation of the dynamics at play under the Soviet Union, which are still relevant in the context of Central Asian legal systems see Chen, *supra* note 153, at 432-338. See also sources cited *supra* note 154.

always a risk, however slight, of a “not guilty” verdict. A defense lawyer may actively support using reconciliation so that he can receive pay-offs from clients or so he can close a case with minimal effort or work.<sup>264</sup> Therefore, police, prosecutors, judges and defense lawyers support reconciliation, in large part, when questions exist about the sufficiency of evidence to convict, when they perceive the case as “difficult,” or when it offers an opportunity to engage in corrupt practices.

### *C. Central Asian Terminology for Crimes*

Many western readers will be unfamiliar with the terms used to describe crimes in Central Asia. After the collapse of the Soviet Union, as each of these countries drafted new criminal codes, many divided crimes into “private,” “public” and “private/public.”<sup>265</sup> The category determines the role of the victim and the prosecutor.<sup>266</sup>

If the criminal code defines a case as a “private” crime, the code does not obligate law enforcement to investigate, or the prosecutor to prosecute, the crime.<sup>267</sup> In practice, the individual victim must complete the investigation him or herself.<sup>268</sup> He or she must bring the case to court and meet the evidentiary burden required for a judge to file criminal charges.<sup>269</sup> After that point (essentially the arraignment), the victim may still have to

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264. Defense lawyers and other legal professionals mentioned these reasons numerous times during the November 2004 Conference and during informal discussions the author had with lawyers in Kazakhstan and Kyrgyzstan over a several year period. No written record exists of these discussions.

265. CRIMINAL PROCEDURE: TEXTBOOK FOR UNIVERSITIES 78-80 (V.P. Bozhiev ed., Spark 2000) (Russian language publication, relevant provisions translated into English by Dmitry Nurumov). The Russians borrowed this division from several European countries (Germany, Austria, and Italy) who started to use this categorization in the 19th century. *Id.* However, these divisions existed in practice in Russia starting as early as the 18th century. *Id.* During the Soviet rule, the division was formally rejected due to ideology. *Id.* However, in practice, this division existed as the codes contained a range of articles whose prosecution depended on a complaint from a victim. *Id.* Under Soviet criminal legislation if a victim reconciled with a defendant in cases requiring a victim complaint to prosecute, the court dismissed the case. *Id.* Under Soviet law the following crimes usually fell into this category: insult, libel, deliberate infliction of lesser bodily harm, and battery. *See generally* Kriminologicheskie osnovaniya prestuplenii chastnogo obvineniya [Criminological grounds of “private” prosecution crimes], KrasGU. 2002 (Russian language publication) <http://allpravo.ru/library/doc4204p0/instrum4205/item4208.html> (last visited on June 22, 2006). In the beginning of the 1990s reformers of the old Soviet legislation re-introduced the private, private/public and public prosecution division, often significantly expanding the scope of private prosecution to “humanize” and “liberalize” criminal legislation. *Id.*

266. *See, e.g.*, C. CRIM. P. art. 390-395 (Kaz.); C. CRIM. P. art. 26 and ch. 37 (Kyrg.).

267. C. CRIM. P. art. 392 (Kaz.).

268. *Id.*

269. *Id.*

conduct the entire prosecution of the case without any assistance from the state.<sup>270</sup> Traditionally, the criminal codes define "private" crimes as any acts involving the deliberate infliction of bodily harm, some sexual assault related crimes, battery (including domestic violence), libel, and a range of other acts.<sup>271</sup> The complaint of the victim starts the process, and the victim can dismiss the complaint at any time.<sup>272</sup> The criminal codes do not impose an obligatory role on the state to bring or dismiss the complaint.<sup>273</sup> However, in some instances, the prosecutor can decide to take over the prosecution of the case.<sup>274</sup>

In a "public" case, the criminal code makes the state entirely responsible for both the investigative stage and the trial stage.<sup>275</sup> The process limits the role of the victim to providing evidence and testimony but, unlike "private" crimes, the victim does not directly prosecute the case.<sup>276</sup> Examples of "public" crimes include murder, robbery, rape with aggravating circumstance, fraud, and extortion.<sup>277</sup>

In a "public-private" case, official criminal prosecution starts only after the victim files a complaint.<sup>278</sup> The state will then investigate and prosecute the case.<sup>279</sup> Unlike "private" crimes, the victim cannot withdraw the complaint and thereby dismiss the case.<sup>280</sup> The crimes falling under this category often include: rape without aggravating circumstances, sexual

270. C. CRIM. P. art. 393 (Kaz.). Pursuant to Kazakhstan's Code of Criminal Procedure, art. 392(6), "[t]he judge must render assistance to the parties in collecting evidence pursuant to their petition." This presupposes that the parties know about this provision and make the petition as there is no provision for the judge to do so without an affirmative request. *Id.* Kyrgyzstan has a similar provision: C. CRIM. P. art. 330(2) (Kyrg.).

271. *See* C. CRIM. P. art. 33 (Kaz.); C. CRIM. P. art. 26 (Kyrg.), and discussion *infra* this section.

272. *See* C. CRIM. P. art. 390, 32, 37 (Kaz.); C. CRIM. P. art. 26, 330 (4) (Kyrg.), and discussion *infra* this section.

273. *See* C. CRIM. P. art. 33, 37, 390 (Kaz.); C. CRIM. P. art. 329 (Kyrg.), and discussion *infra* this section.

274. This most commonly happens in cases where the victim is vulnerable, in cases of "social or public significance," or if the prosecutor is concerned that injustice will occur without prosecutorial intervention. *See, e.g.*, C. CRIM. P. art. 33 (Kaz.).

275. *See* C. CRIM. P. art. 32 (Kaz.).

276. *See* C. CRIM. P. art. 75 (Kaz.), and C. CRIM. P. art. 50 (Kyrg.) (detailing the rights of victims).

277. *See* C. CRIM. P. art. 35 (Kaz.).

278. *See* C. CRIM. P. art. 32(3) (Kaz.).

279. *See* C. CRIM. P. art. 33-35 (Kaz.).

280. *See* C. CRIM. P. art. 269 (Kaz.).

assault, battery involving medium and serious bodily harm, family related crimes, and some crimes against property.<sup>281</sup>

This division of crimes exists in Kazakhstan and Kyrgyzstan and to a limited extent in Tajikistan.<sup>282</sup> Uzbekistan treats two crimes as “public-private:” rape and sexual assault under certain specified circumstances.<sup>283</sup> In Kazakhstan, Kyrgyzstan and Tajikistan, whether a crime is defined as “private,” “public/private” or “public” determines whether the crime is eligible for reconciliation.<sup>284</sup>

The Soviet Criminal Code made a distinction between “serious” or “grave” crimes and less serious crimes.<sup>285</sup> These distinctions are similar to the distinction in the United States between felonies and misdemeanors.<sup>286</sup> The terms refer to the seriousness of both the crime and the potential sentence.<sup>287</sup> All four Central Asian countries continue to use this terminology to divide various types of crimes.<sup>288</sup> Kazakhstan, Kyrgyzstan, and Tajikistan use it to determine which crimes are eligible for reconciliation.<sup>289</sup>

Uzbekistan’s Criminal Procedure Code does not recognize the division between “public,” “private-public,” and “private” cases. In addition, Uzbekistan does not specify what categories of crimes the criminal justice system may send to reconciliation. Instead, it directly and specifically lists all the crimes that can be reconciled.<sup>290</sup>

The criminal procedure in three of the Central Asian countries also makes the distinction between dismissing a case on “rehabilitating” or “non-rehabilitating” grounds. In all four countries, if the judge dismisses the case on “rehabilitating grounds,” the defendant will not have a criminal record for that case and no official and lingering inference of guilt will exist.<sup>291</sup> Although the codes do not state this explicit result, in practice in Kazakhstan, Kyrgyzstan and Tajikistan, when a judge dismisses a case on

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281. See C. CRIM. P. art. 34 (Kaz.).

282. C. CRIM. P. art. 32-34 (Kaz.); C. CRIM. P. art. 26 (Kyrg.); C. CRIM. P. art. 5(8) and 104 (Taj.).

283. C. CRIM. art. 118, 119 (Uzb.).

284. See discussion *infra* this Section.

285. See UGOLOVNIY KODEKS [Criminal Code] RSFSR (1965), ch. 4, art. 24, Note II (listing “grave” crimes), translated in HAROLD J. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES (1966) at 154-155.

286. See, e.g., MODEL PENAL CODE, §1.04(2) and §1.04 (4)(5) (proposed official draft 1962).

287. See, e.g., C. CRIM. art. 10 (Kaz.).

288. See, e.g., C. CRIM. art. 10 (Kaz.) and C. CRIM. art. 18 (Taj.).

289. See discussion *infra* this section.

290. C. CRIM. art. 66(1) (Uzb.).

291. See, e.g., C. CRIM. P. art. 38 (Kaz.).

"non-rehabilitating grounds" an inference of guilt remains.<sup>292</sup> This inference exists even when the judge dismisses the case without any evidentiary findings and regardless of when, in the criminal proceedings, the dismissal occurs.<sup>293</sup> As a result, the defendant's record will reflect the existence of the case.<sup>294</sup> In official terms, the defendant remains under a cloud of suspicion.<sup>295</sup>

#### *D. Reconciliation in Kazakhstan.*

##### 1. Who Starts the Reconciliation Process?

Under the law, no one specific institution has the authority to start the reconciliation process.<sup>296</sup> In practice, the parties themselves, investigators, defense lawyers, prosecutors or judges may start the process.<sup>297</sup> Kazakhstan's Criminal Procedure Code requires the judge in all "private" cases to explain to the parties the possibility of using reconciliation in the case.<sup>298</sup> This discussion should take place before the case begins and again at the start of the trial.<sup>299</sup>

##### 2. Source of the Legal Authority for Reconciliation

In December 2002, Kazakhstan's legislature revised the Criminal Code, expanding the types of cases eligible to go to reconciliation.<sup>300</sup> Under the

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292. Under C. CRIM P. art. 84 (Uzb.), cases can be dismissed "without deciding the issue of culpability." This is different from dismissal on "non-rehabilitating grounds" in the other three countries since the code in Uzbekistan specifically states that no decision of guilt has been made. *Id.* However, under Chapter 62 of the C. CRIM P. (Uzb.), the defendant must admit guilt as part of the reconciliation. *Id.* This admission of guilt is required for the case to be dismissed under reconciliation. The author was unable to determine how this works in practice with article 84 of the Uzbekistan Criminal Code and whether dismissal under reconciliation carries, in practice, an inference of guilt.

293. See C. CRIM P. art. 38 (Kaz.).

294. See C. CRIM P. art. 38-39 (Kaz.).

295. Interview with Dmitry Nurumov, *supra* note 10; see generally C. CRIM P. art. 38 and 39 (Kaz.). Prosecutors can re-open cases, so the lack of finality poses possible problems or at least the fear of possible problems for defendants. See C. CRIM P. art. 51, 271-72 (Kaz.).

296. See C. CRIM P. art. 38 (Kaz.).

297. *Id.*

298. C. CRIM P. art. 391 (Kaz.).

299. C. CRIM P. art. 391, 393 (Kaz.).

300. C. CRIM. art. 67 (Kaz.).

Criminal Code, the cases eligible for reconciliation include: all “private” crimes, plus “public/private” and “public” crimes that are of minimum to medium severity.<sup>301</sup> Crimes of medium severity shall be eligible for reconciliation if the defendant is a first time offender.<sup>302</sup> If the defendant has a prior criminal record and the crime is of medium severity, then the prosecutor may approve reconciliation as an option.<sup>303</sup> In all minimum crimes, and in all “private” cases, the defendant’s prior convictions do not affect eligibility for reconciliation.<sup>304</sup>

Under the Criminal Code of Kazakhstan, “private” crimes include: trespass, battery, infliction of bodily harm with lesser injuries, forced sex,<sup>305</sup> violation of constitutional rights, libel, insult, and the violations of the right to privacy.<sup>306</sup> A “minimal” crime is one that is “deliberate” and punishable by less than two years in prison, or a “reckless” crime punishable by less than five years in prison.<sup>307</sup> These crimes include: illegal entry into the home of another,<sup>308</sup> assault,<sup>309</sup> and infection with venereal disease.<sup>310</sup> “Public/Private” crimes include: assault with serious injuries and without aggravating circumstances, rape without aggravating circumstances, performing an illegal abortion and various economic crimes.<sup>311</sup> “Public” crimes eligible for reconciliation include larceny and torture.<sup>312</sup>

The criminal code defines “medium” crimes as “deliberate” crimes punished by two to five years imprisonment.<sup>313</sup> Examples of crimes under this category include: hooliganism,<sup>314</sup> theft,<sup>315</sup> rape without aggravating circumstances,<sup>316</sup> and sexual assault.<sup>317</sup>

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301. *Id.*

302. *Id.*

303. *Id.* See also C. CRIM. P. art. 38 (Kaz.).

304. C. CRIM. art. 67 (Kaz.). See also C. CRIM. P. art. 32-34 (Kaz.) for further definitions regarding public/private crimes.

305. Under the criminal code this is not defined as rape but is a lesser offense. C. CRIM. art. 123 (Kaz.).

306. C. CRIM. P. art. 33 (Kaz.).

307. C. CRIM. art. 10 (Kaz.).

308. C. CRIM. art. 145 (Kaz.).

309. C. CRIM. art. 106 (Kaz.).

310. C. CRIM. art. 115 (Kaz.).

311. C. CRIM. P. art. 34 (Kaz.).

312. *Id.*

313. C. CRIM. art. 10 (Kaz.).

314. C. CRIM. P. art. 257 (Kaz.).

315. C. CRIM. P. art. 175 (Kaz.).

316. C. CRIM. P. art. 120 (Kaz.) (stating that aggravating circumstances include gang rape, a victim who is a minor, and injury).

317. C. CRIM. P. art. 121 (Kaz.).

Under the law in Kazakhstan, even when parties reconcile a case and the court dismisses the charges, the court may still not "discharge [the defendant] from criminal responsibility."<sup>318</sup> Therefore, the defendant's record will still reflect the charges, even in the absence of a plea of guilty or a finding of guilt by the court.<sup>319</sup> The cases that fall into this category include medium crimes when the defendant is not a first-time offender, as well as cases defined as "public/private" and "public" that the parties reconcile.<sup>320</sup> If the parties agree to a reconciliation in either a "lesser" or "medium" "private" crime not involving death or serious bodily harm, the defendant's record will reflect a "discharge from criminal responsibility."<sup>321</sup> The problem arises with cases involving "public/private" and "public" crimes, when the judge and the prosecutor have discretion to "discharge [the defendant] from criminal liability."<sup>322</sup> Surprisingly, if the judge and prosecutor do not agree to discharge, the case can proceed in court despite the reconciliation agreement.<sup>323</sup> In these cases, the reconciliation carries no finality and raises risks of self-incrimination in light of the insufficient guarantees of confidentiality surrounding the reconciliation process and the communications made in the process.<sup>324</sup>

In Kazakhstan, if the court agrees to dismiss the case due to the reconciliation the dismissal will be under "non-rehabilitating" grounds.<sup>325</sup> Although the parties have reconciled the case pre-conviction, the defendant's record still reflects the charges.<sup>326</sup>

### 3. What Types of Cases go to Reconciliation?

From 2000 to 2005, Kazakhstan courts most often dismissed reconciled cases involving offenses of larceny, robbery, fraud, rape, and reckless driving.<sup>327</sup> Courts also dismissed in smaller numbers cases reconciled

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318. C. CRIM. P. art. 38 (Kaz.).

319. C. CRIM. P. art. 269-70, 307 (Kaz.).

320. C. CRIM. art. 67 (Kaz.); C. CRIM. P. art. 38 (Kaz.).

321. C. CRIM. art. 67(2) (Kaz.).

322. C. CRIM. P. art. 38 (Kaz.).

323. *Id.*

324. C. CRIM. art. 67(2) (Kaz.).

325. C. CRIM. P. C. art. 38 (Kaz.).

326. C. CRIM. P. art. 307 (Kaz.).

327. Statistics given by the Prosecutor General of Kazakhstan to the OSCE/ODIHR. On file with author.



involving torture, bribery, extortion, illegal enterprise, abuse of official powers, and tax evasion.<sup>328</sup>

As shown in Chart A, the overall percentage of cases going to reconciliation, after the prosecutor filed charges, increased substantially after the legislature changed the law in 2002.<sup>329</sup> In 2003, the total number of cases dismissed due to reconciliation jumped to twenty-two percent of all cases filed in court from just eight percent the year before.<sup>330</sup>

**Chart A:**<sup>331</sup>

<b>Year</b>	<b>Percentage of Cases Resolved by Reconciliation after Charges Filed in Court</b>
2000	5%
2001	6%
2002	8%
2003	22%
2004	25%
2005	22%

As mentioned above, criminal legislation in Kazakhstan provides for reconciliation in all “private” prosecution cases.<sup>332</sup> Kazakhstan also permits reconciliation of “public/private” and “public” cases of lesser gravity or those in which the defendant committed a first-time offence of medium gravity.<sup>333</sup> Finally, the new law permits reconciliation of medium gravity offences, when the investigator, prosecutor or the court has discretion to discharge the defendant from criminal responsibility.<sup>334</sup> Thus, the law theoretically permits the reconciliation of a wide variety of cases.

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328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* Percentages calculated from the raw statistics.

332. C. CRIM. P. art. 38 (Kaz.).

333. *Id.*

334. *Id.*

#### 4. When in the Criminal Process do Cases go to Reconciliation?

Under the law, cases can go to reconciliation at any point before the court retires to deliberate a verdict.<sup>335</sup> Cases do not go to reconciliation after conviction.<sup>336</sup> In a "private" case, the law obliges the judge to inform the parties about the option of reconciliation before the case begins and also requires the judge to "take steps to bring about reconciliation of the parties."<sup>337</sup> In other cases, reconciliation most often occurs during the investigative stage.<sup>338</sup> If the parties reach reconciliation at this stage, the investigator can either send the case to the prosecutor or the court for dismissal.<sup>339</sup> For cases reconciled later in the process, the victim will notify the court of the reconciliation and request termination of the case.<sup>340</sup> The court then decides whether to dismiss the case, to find the defendant guilty, or to accept the reconciliation.<sup>341</sup>

#### *E. Reconciliation in Kyrgyzstan*

##### 1. Who Starts the Reconciliation Process?

Under the law of Kyrgyzstan, no one specific institution has the authority to start the reconciliation process.<sup>342</sup> In practice, the parties, investigators, defense lawyers, prosecutors, or judges may start the

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335. See C. CRIM. P. art. 269 and 391 (Kaz.).

336. See C. CRIM. P. art. 269 and 391 (Kaz.).

337. See C. CRIM. P. art. 391 (Kaz.).

338. C. CRIM. P. art. 269 (Kaz.).

339. Under the usual process, the victim writes a letter to the investigatory agency stating that s/he requests termination of the case and that they have no further claims against the defendant. Interview with Dmitry Nurumov, *supra* note 31.

340. C. CRIM. P. art. 38 (Kaz.). However, the code does not go into much specificity on this point. *Id.*

341. C. CRIM. P. art. 391, 393 (Kaz.). The Criminal Procedure Code is vague on this point, and seems to imply that the court does not need to hear any evidence to make a finding of guilt. Also the defendant is not entering a plea of guilty (since the procedure code does not allow for guilty pleas). Thus, in essence, the court can find a defendant guilty in the absence of any evidence other than the reconciliation agreement. This seems like a violation of the Constitution, specifically article 77(3)(1).

342. See C. CRIM. P. art. 29, 281 (Kyrg.).

process.<sup>343</sup> As in Kazakhstan, the judge should explain to the parties that the option of reconciliation exists in “private” cases.<sup>344</sup>

## 2. Source of the Legal Authority for Reconciliation

Kyrgyzstan’s Criminal Code allows reconciliation in all “private” crimes, including battery, deliberate lesser bodily harm, libel, insult, discrimination, and violation of the right to privacy.<sup>345</sup> In 2003, the legislature expanded the list of “private” crimes.<sup>346</sup> It included crimes that would not seem to fit under this category, including offenses such as voter bribery.<sup>347</sup> For all other first time offenses of a minimal crime, the judge, prosecutor, or investigator may end the case by sending it to reconciliation.<sup>348</sup> As discussed below, laws also empower courts of elders (*Aksakals*) to hear cases, although the laws do not make clear whether *Aksakals* may hear criminal cases.<sup>349</sup> In addition, the Kyrgyzstan Criminal Procedure Code does not explain whether and how judges, prosecutors, and investigators may refer cases to *Aksakal* courts.

## 3. What Cases go to Reconciliation?

Unlike Kazakhstan, no public information exists showing the types of cases referred to reconciliation.<sup>350</sup>

## 4. When in the Criminal Process do Cases go to Reconciliation?

As in Kazakhstan, cases can go to reconciliation at any point before the court retires to deliberate a verdict or before conviction.<sup>351</sup> Also, as in Kazakhstan, the judge must explain the option of reconciliation to the parties before a “private” case begins.<sup>352</sup> In a “private” case, parties who have

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343. Lawyers and law enforcement all spoke about the lack of any single referral point when discussing reconciliation with the author. See also Interview with Dmitry Nurumov, *supra* note 10.

344. C. CRIM. P. art. 281 and 330(4) (Kyrg.).

345. C. CRIM. P. art. 330(4) (Kyrg.).

346. Law Number 221, Nov. 14, 2003 (Kyrg.).

347. *Id.*

348. These include any intentional crime punishable by up to two years in prison, or a reckless crime punishable by up to five years. C. CRIM. art. 10 (Kyrg.).

349. Law Number 221, Nov. 14, 2003 (Kyrg.).

350. As one of the countries participating in the November 2004 Conference, the OSCE/ODIHR requested Kyrgyzstan provide data on the use of reconciliation. The OSCE/ODIHR did not receive any information. See *supra* note 32 and accompanying text.

351. See C. CRIM. P. art. 26, 29, 330 (Kyrg.).

352. C. CRIM. P. art. 330 (4) (Kyrg.).

reconciled the case submit an application to the court for the judge to dismiss the case.<sup>353</sup> This procedure is similar to the procedure used in Kazakhstan, although Kyrgyzstan's law less clearly delineates it than the law of Kazakhstan.

After the parties agree to reconciliation in "private-public" or "public" cases, the victim applies to the court or the prosecutor for dismissal of the case.<sup>354</sup> The investigator can dismiss the case, but only with the consent of the prosecutor.<sup>355</sup> In March 2004, the Kyrgyzstan legislature amended the law to require a written petition from the victim stating the name of the defendant, the apology, the compensation paid and/or agreed upon, and completion of work or the services agreed to be completed by the defendant.<sup>356</sup>

In Kyrgyzstan, the criminal justice system considers a case dismissed due to reconciliation as dismissed on "non-rehabilitative grounds."<sup>357</sup> The case, therefore, remains on the defendant's record.<sup>358</sup>

##### 5. Aksakal Courts, an Alternative to the Criminal Process Specific to Kyrgyzstan

The Kyrgyzstan Constitution includes a provision allowing for the creation of "courts of elders."<sup>359</sup> The Constitution does not expressly indicate that these courts may handle only civil matters. Instead, it provides that "[c]itizens in the Kyrgyz Republic are entitled to establish Aksakal Courts. Procedure for the establishment of Aksakal Courts, their power and

353. *Id.*

354. C. CRIM. P. art. 29 (2) (Kyrg.).

355. C. CRIM. P. art. 29 (Kyrg.) (amended Mar. 24, 2004, No. 47).

356. *Id.*

357. *See* C. CRIM. P. art. 28 and 225 (Kyrg.) (cases dismissed under article 28 of the code are rehabilitative, and reconciliation is not listed under that article).

358. C. CRIM. P. art. 226 (Kyrg.) and interview with Dmitry Nurumov, *supra* note 10.

359. KYRG. CONST. art. 39 (2). Kyrgyzstan adopted a new constitution by referendum on October 21, 2007. Observers criticized the referendum for failing to comply with international standards including "credible reports about ballot stuffing and overstated data on the number of votes." *US Embassy Shares OSCE Concern Over Irregularities in Kyrgyz Referendum*, ITAR-TASS, Oct. 25, 2007 available at [http://www.eurasianet.org/posts/102507us\\_pr.shtml](http://www.eurasianet.org/posts/102507us_pr.shtml) (last visited Oct. 26, 2007). *See also*, Stern, *supra* note 69; Pannier *supra* note 69.

activities shall be determined by law.”<sup>360</sup> Under the law “on *Aksakal* Courts,” which the legislature passed in 2002 and amended in 2003, these courts should “defend violated rights, strengthen law and order and form greater respect for the law, morals, history and traditions of the Kyrgyz Republic.”<sup>361</sup> This law also gives courts or investigators, with the agreement of the prosecutor, the power to refer closed criminal cases to *Aksakal* Courts.<sup>362</sup> The Constitution recognizes that parties may appeal “the decision of courts of elders . . . [to] the corresponding courts of the districts and cities of the Kyrgyz Republic.”<sup>363</sup>

People typically use *Aksakal* Courts for dispute resolution in smaller cities and rural areas in Kyrgyzstan.<sup>364</sup> The head of a police station in a rural area stated: “[I]n cases such as petty theft and conflict between neighbors[,] we usually prefer to hand them over to the Courts of *Aksakals* so the police

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360. KYRG. CONST. art. 39(2). (Vasily Vashchanka, trans.). The previous text of the constitution provided a little more definition stating: “when the sides agree to submit their cases to them for review, [in] property and domestic conflicts and other cases anticipated by law with the objective of reconciling the sides and rendering a just decision that is not contrary to the law.” KYRG. CONST. art. 85(2).

361. Law About *Aksakal* Courts (2002), art. 3 (Kyrg). The Law on *Aksakals* was adopted on June 4, 2002, to implement the constitutional provision which came into effect in 1999. KYRG. CONST. art. 85. The 2007 Constitution, under the language in article 39(2), seems to keep in force this existing law. The *Aksakals* in Kyrgyzstan are a traditional dispute resolution body. There is no clear history of the development of *Aksakal* Courts, but there are reports of their existence prior to the USSR and it seems that the *Aksakal* Courts formally ceased to exist by the 1930s and that they did not reappear until after Kyrgyzstan became independent from the USSR. For a brief summary of the history of *Aksakals*, see Kelley E. Cormier, *Grievance Practices in Post-Soviet Kyrgyz Agriculture*, 32 LAW & SOC. INQUIRY, 435 at 448 (2007).

362. Law About *Aksakal* Courts (2002), art. 4 (KYRG). However, there is no provision in the Criminal Procedure Code allowing for these referrals or giving greater definition to how or when such referrals should take place. There are obviously serious concerns if cases with insufficient evidence are referred to *Aksakal* courts to ensure that “something is done” with the cases rather than a simple dismissal.

363. KYRG. CONST. art. 85(3). It is unknown if any cases were appealed, but this provision suggests the *Aksakals* are not informal dispute resolution bodies, but part of the formal legal process. *Id.* The new constitution does not contain this provision. See *supra* note 19.

364. The literal translation is “white beards.” As the name suggests, women are not commonly on the *Aksakals*, although, as one court told the author during a meeting in 2003 in the city of Osh, Kyrgyzstan, “[W]e have women to deal with women’s matters, but they are not on the *Aksakal* court.” The conversation left it unclear as to what a “women’s matter” might be. See also Kelley E. Cormier, *supra* note 361, at 448; Renee Giovarelli & Cholpon Akmatova, *Local Institutions that Enforce Customary Law in the Kyrgyz Republic, and Their Impact on Women’s Rights, Agriculture & Rural Development* e-paper, The World Bank, at 16-17, available at [http://lnweb18.worldbank.org/ESSD/ardext.nsf/22ByDocName/LocalInstitutionsthatenforceCustomaryLawintheKyrgyzRepublicandtheirImpactonWomensRights/\\$FILE/Kyrgyz\\_local.pdf](http://lnweb18.worldbank.org/ESSD/ardext.nsf/22ByDocName/LocalInstitutionsthatenforceCustomaryLawintheKyrgyzRepublicandtheirImpactonWomensRights/$FILE/Kyrgyz_local.pdf) (noting that in the rare cases when women are on the *Aksakal* court the numbers of cases brought by women to the *Aksakal* increases).

will then have more time for consideration of serious cases."<sup>365</sup> The available data does not reveal how many criminal cases, as compared to civil disputes, the *Aksakal* Courts resolve.<sup>366</sup> The data also does not reveal how many cases parties take to the *Aksakal* Courts that could be classified as criminal in nature, such as domestic violence and sexual assault.<sup>367</sup> It is clear, though, that people are taking criminal matters to the *Aksakal* Courts for resolution and that the *Aksakal* Courts are another possible intermediary for reconciliation.<sup>368</sup>

### F. Reconciliation in Tajikistan

#### 1. Who Starts the Reconciliation Process?

As in Kazakhstan and Kyrgyzstan, the parties, investigators, prosecutors, and judges may start the reconciliation process.<sup>369</sup> Although Tajikistan's law does not expressly grant power to refer cases to reconciliation or provide a process or structure for conducting reconciliation, in practice, a number of informal organizations play a role in dispute

365. Batyr Mamyrkulov, *V sud edut odni stariki* [Only Old People Go to Court] IZVESTIYA NEWSPAPER, <http://www.izvestia.kz/news.php?date=18-11-04&number=7> (in Russian) (Dmitry Nurumov, trans.) (last visited Nov. 5, 2007).

366. *Aksakals* reportedly resolve a full range of disputes including criminal cases, property cases and other community disputes. See, e.g., Renee Giovarelli & Cholpon Akmatova, *supra* note 364, at 6-8. The government of Kyrgyzstan seems to acknowledge the lack of information regarding what the *Aksakal* courts are doing with criminal cases when they suggested conducting an analysis of the *Aksakal* courts in their proposal to the United States government through the Millennium Challenge Account. GOVERNMENT OF THE KYRGYZ REPUBLIC, MILLENNIUM CHALLENGE ACCOUNT THRESHOLD PLAN, SUBMITTED TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA, May 15, 2006, at 19, available at [http://kyrgyz.usembassy.gov/uploads/images/RRkyivSY3KhlBeygqlaW3w/MCA\\_Gov.pdf](http://kyrgyz.usembassy.gov/uploads/images/RRkyivSY3KhlBeygqlaW3w/MCA_Gov.pdf) (last visited Nov. 2, 2007).

367. Although it is clear that police routinely refer domestic violence and other cases that could be prosecuted in the criminal justice system to the *Aksakals*, see *Reconciled to Violence*, *supra* note 3, at 63-73.

368. One source reports a total of 1,055 *Aksakal* courts in 2002. S. Murzaev Zh. Baltagulov, *Politicheskoe-administrativnye otnosheniya na mestom urovne v stranah chentra'noi azii* [Political and Administrative Relations on a Local Level in Countries of Central Asia] Forum po fiskal'noj Decentralizacii v Central'noj Azii [Forum on Fiscal Decentralization in Central Asia], (Local Government and Public Services Reform Initiative), 2002 (Russian language) (Dmitry Nurumov trans.). On file with author. See also Giovarelli & Akmatova, *supra* note 364, and *Reconciled to Violence*, *supra* note 3.

369. See C. CRIM. P. art. 104 (Taj.).

resolution.<sup>370</sup> These organizations may conduct reconciliation of criminal matters.<sup>371</sup> The study commissioned by the OSCE/ODIHR found *Mahallas* (defined below) “are still generally noted to hold only informal roles . . . local government officials rarely delegate authority to them.”<sup>372</sup>

## 2. Source of the Legal Authority for Reconciliation

The Criminal Procedure Code of Tajikistan also makes only certain offenses eligible for reconciliation.<sup>373</sup> Unlike Kazakhstan and Kyrgyzstan, Tajikistan does not specifically distinguish between “public” and “private” crimes in determining eligibility for reconciliation.<sup>374</sup> Tajikistan does, however, consider the seriousness of the offense.<sup>375</sup> In practice, Tajikistan still makes a kind of “public/private” distinction, as the complaint of the victim triggers prosecutorial action only in “public and “public/private” crimes.<sup>376</sup> The court may only dismiss “private” crimes when the victim agrees to withdraw the complaint upon reconciliation with the offender.<sup>377</sup> Under the Tajikistan Criminal Code, parties may reconcile minimal or medium crimes and, as in Kazakhstan and Kyrgyzstan, the prosecutor can choose not to prosecute the complaint.<sup>378</sup> Under the Criminal Code, parties may reconcile all “lesser” and “medium” crimes.<sup>379</sup> However, the Criminal Procedure Code specifically excludes two crimes from eligibility for reconciliation: rape and “violating [an] author’s rights.”<sup>380</sup>

The Tajikistan Criminal Procedure Code does not describe the procedure of reconciliation in detail.<sup>381</sup> If the victim confirms the reconciliation, either orally or in a written application to the court, then the court may dismiss the case.<sup>382</sup> Article 73 of the Criminal Procedure Code provides an alternative procedure.<sup>383</sup> Under this article, for reconciliations

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370. Thorn, *supra* note 5, at 9, 13.

371. *Id.*

372. *Id.* at 9.

373. C. CRIM. art. 73 (Taj.).

374. *Id.*

375. *Id.*; C. CRIM. art. 18. (Taj.).

376. C. CRIM. P. art. 5(8) (Taj.).

377. C. CRIM. P. art. 104 (Taj.) (listing five crimes which fit the definition of “private” including deliberate infliction of bodily harm without serious harm, battery, torture [non-state], liable, and insult).

378. C. CRIM. art. 73 (Taj.); C. CRIM. P. art. 5.3 (Taj.).

379. C. CRIM. art. 73 (Taj.).

380. *See, e.g.*, C. CRIM. P. art. 104 (Taj.).

381. *See* C. CRIM. P. art. 5.3, 104, 105, 209, 261 (Taj.).

382. *See* C. CRIM. P. art. 261 (Taj.).

383. C. CRIM. art. 73 (Taj.).

[Vol. 8: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

of "public" or "public/private" offences of "lesser" or "medium" seriousness, the investigator drafts a "reasoned statement for dismissal of the case" which he or she presents to the court.<sup>384</sup> The victim can also appeal to the prosecutor for the dismissal, which the court must confirm.<sup>385</sup> In court, the judge can decide to dismiss the case based on the reconciliation agreement.<sup>386</sup> The judge can also decide not to accept the agreement so it would proceed through the criminal process.<sup>387</sup>

### 3. What Cases go to Reconciliation?

As in Kyrgyzstan, no public information exists showing the types of cases referred to reconciliation.<sup>388</sup>

### 4. When do Cases go to Reconciliation?

As in Kazakhstan and Kyrgyzstan, cases go to reconciliation pre-conviction.<sup>389</sup> However, Tajikistan's law also allows parties to reconcile cases after a law enforcement agency records a complaint, but prior to charges being filed.<sup>390</sup> Unlike Kazakhstan and Kyrgyzstan, this timing for the reconciliation of cases prevents any formal entries on the offender's record.<sup>391</sup>

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384. *Id.*

385. C. CRIM. P. art. 210 (Taj.).

386. *See* C. CRIM. P. art. 261 (Taj.).

387. *Id.*

388. As one of the countries participating in the November 2004 Conference, the OSCE/ODIHR requested Tajikistan provide data on the use of reconciliation. The OSCE/ODIHR did not receive any information. *See supra* notes 31 and 39 and accompanying text.

389. C. CRIM. P. art. 104 (Taj.).

390. C. CRIM. P. art. 5.3 (Taj.) (limiting this provision to first time offenders and lesser crimes).

391. It is unclear how this provision is applied in practice.



### *G. Reconciliation in Uzbekistan*

#### 1. Who Starts the Reconciliation Process?

In Uzbekistan, as in the other three countries, the law does not specify an institution that can start the reconciliation process.<sup>392</sup> The parties, the investigator, the prosecutor, or the judge may start reconciliation.<sup>393</sup>

#### 2. Source of the Legal Authority for Reconciliation

Uzbekistan's Criminal Code allows reconciliation in thirty-one specifically listed offenses.<sup>394</sup> Uzbekistan is the one country that does not make a distinction between "public" and "private" criminal cases.<sup>395</sup> In the specifically listed offenses, parties may reconcile a case only if: (1) the defendant is a first-time offender, (2) the defendant has not committed a crime in aggravated circumstances, (3) the defendant admits guilt, and (4) the defendant compensates the victim or victims.<sup>396</sup> Uzbekistan is the only country of the four to specifically provide for alternatives to criminal prosecution for juveniles.<sup>397</sup> These alternatives, however, do not involve reconciliation as defined here.<sup>398</sup>

#### 3. What Cases go to Reconciliation?

The Uzbekistan Embassy in Moscow reported on its website that from August 2001 to September 2003 parties reconciled 13,520 cases, thereby

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392. See C. CRIM. P. art. 583 (amended Aug. 29, 2001) and art. 584 (Uzb.).

393. See C. CRIM. P. art. 583 (amended Aug. 29, 2001) and art. 584 (Uzb.).

394. C. CRIM. art. 61.6. (Uzb.) (amended Aug. 27, 2004).

395. *Id.*

396. C. CRIM. P. ch. 62 (Uzb.). Included under this section are crimes in the Criminal Code such as Intentional Infliction of Medium Bodily Injury, C. CRIM. art. 105 (Uzb.); Fraud, C. CRIM. art. 168 (Uzb.); Theft, C. CRIM. art. 169 (Uzb.); and Assault, C. CRIM. art. 110 (Uzb.).

397. Under section 6 of the Uzbekistan Criminal Code and chapter 60 of the Uzbekistan Criminal Procedure Code, juvenile cases should be conducted differently and fall under different provisions, theoretically providing greater safeguards.

398. Under the Criminal Code, first-time juvenile offenders who commit a crime of "minor social danger" can transfer to a "commission on juvenile affairs." C. CRIM. P. § 6, ch. 16, art. 90 (Uzb.). In this situation, the prosecution will not try the case and the defendant will avoid a criminal conviction. *Id.* If the juvenile is not a first-time offender, but the crime "doesn't pose a danger," the court may substitute for the criminal penalties that a court might otherwise impose, such as an apology, reparation, or an agreement to attend an educational colony (a low security incarceration facility). See C. CRIM. P. § 6 (Uzb.); see also C. CRIM. P. ch. 60 (Uzb.).

relieving the defendants from criminal responsibility.<sup>399</sup> This source does not state how many total criminal cases prosecutors filed, how many cases parties reconciled each year, or what kinds of cases parties reconciled.<sup>400</sup> The author found no other statistics regarding reconciliation of cases in Uzbekistan. The information clearly discloses, however, that parties in Uzbekistan are reconciling criminal cases.

#### 4. When do Cases go to Reconciliation?

Uzbekistan is the only country of the four analyzed to give any detail in the description of the process of reconciliation. As with the other three countries, reconciliation remains a pre-conviction process.<sup>401</sup> Under the Criminal Procedure Code, reconciliation can happen at any time before the court begins deliberation if the victim requests the process.<sup>402</sup> Under Article 84 of the Criminal Procedure Code, a reconciliation can result in the dismissal of a case.<sup>403</sup> Typically, the victim submits an application to the prosecutor or the investigator requesting dismissal of the proceedings because the accused has made amends for the damage.<sup>404</sup> When an investigator receives the application, he or she should issue a statement forwarding the request to the court.<sup>405</sup> The court, with the consent of a prosecutor, will consent to the dismissal within three days after issuance of the investigator's statement.<sup>406</sup>

The court must establish seven factors to find the reconciliation admissible: (1) the voluntary nature of the reconciliation by both parties, (2) the reasons for reconciliation, (3) the voluntary nature of the confession of guilt by the defendant,<sup>407</sup> (4) whether the defendant realized the consequences of the act and whether he has taken measures to repair the damage caused, (5) that each party is acting freely and without pressure in

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399. Consulate General of Uzbekistan, *available at* [http://www.uzbekconsul.org/ru/news/sudebno-pravovaya\\_reforma.pdf](http://www.uzbekconsul.org/ru/news/sudebno-pravovaya_reforma.pdf) (in Russian) (last visited on July 2, 2006).

400. *Id.*

401. C. CRIM. P. art. 583 (Uzb.) (amended Aug. 29, 2001).

402. *Id.*

403. C. CRIM. P. art. 84 (Uzb.).

404. C. CRIM. P. art. 583 (Uzb.) (amended Aug. 29, 2001).

405. C. CRIM. P. art. 584 (Uzb.).

406. *Id.*

407. Despite the fact that the code specifically states that a case dismissed due to reconciliation is dismissed "without deciding the issue of culpability." C. CRIM. P. art. 84 (Uzb.).

agreeing to the reconciliation, (6) a statement of the compensation for the damage caused, and (7) consent of the defendant or their legal representative to the reconciliation.<sup>408</sup> The court can then hear the opinion of the prosecutor and the defense lawyer regarding the reconciliation agreement. The court records its findings, subject to complaints by both parties.<sup>409</sup> If the court does not find that the process met all seven factors, the court can remand the case for pre-trial investigation.<sup>410</sup> Remand can also happen if the court finds the defendant committed a grave crime.<sup>411</sup>

In addition, after a reconciliation, the court or prosecutor should not reopen the matter.<sup>412</sup> As noted above, the court may instead remand the case for investigation if the reconciliation process does not meet the seven-factor test.<sup>413</sup> The Criminal Procedure Code fails to set rules governing the confidentiality of the reconciliation proceedings or statements made during the course of the proceedings. This oversight raises concerns about self-incrimination given the power of the court to find that the reconciliation failed the seven-factor test and the court's power to remand the case for investigation.

## 5. Mahallas and their Role in Reconciliation in Uzbekistan

In Uzbekistan, two broad categories of intermediaries exist: (1) a legal professional such as a police officer, prosecutor, or lawyer, or (2) a *Mahalla*, which is a local self-government entity.<sup>414</sup> This section discusses this second category of intermediary. The *Mahalla* existed before the creation of the Soviet Union.<sup>415</sup> Human rights organizations criticize the *Mahallas* as

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408. C. CRIM. P. art. 585 (Uzb.) (describing the "proceedings of conciliation").

409. Law on the Organs of Self Governance of Citizens art. 12, Apr. 14, 1999, No. 7568-I, Republic of Uzbekistan. Under article 585 of the Uzbekistan Criminal Procedure Code, a reconciliation procedure can only be finalized in court. C. CRIM. P. art. 585 (Uzb.).

410. C. CRIM. P. art. 585 (Uzb.).

411. *Id.*

412. *Id.*

413. C. CRIM. P. art. 583 (Uzb.) (amended Aug. 29, 2001).

414. For a description of the varied role of the Mahalla see Sievers, *Uzbekistan's Mahalla: From Soviet to Absolutist Residential Community Associations*, 2 CHI-KENT J. INT'L & COMP. L. 91 (2002) (tracing the history of the Mahalla from the medieval period through the Soviet period and into post-Soviet Uzbekistan).

415. Kuatbay Bektermirov & Eduard Rahimov, *Local Government in Uzbekistan*, in THE CAUCASUS AND CENTRAL ASIA 477-48 (Igor Munteanu & Victor Popa eds., 2001) available at <http://lgi.osi.hu/publications/2001/84/Ch9-Uzbekistan.pdf>; full book available for download at [http://lgi.osi.hu/publications\\_datashet.php?id=84](http://lgi.osi.hu/publications_datashet.php?id=84) (last visited on Feb. 25, 2007). For a history in the pre-Soviet period see Sievers, *supra* note 414, at 103-111. For an explanation of the *Mahalla* structure and

governmental entities that operate without respect for basic human rights.<sup>416</sup> Critics view the *Mahallas* as another tool used by the government in Uzbekistan to control its citizens.<sup>417</sup>

Human rights organizations express concerns about how *Mahallas* operate in Uzbekistan.<sup>418</sup> The *Mahallas* not only function as dispute resolution bodies, but also exercise a number of state powers and responsibilities.<sup>419</sup> Human rights organizations criticize *Mahallas* for the role they have played in assisting the government to crack down against perceived religious fundamentalists or against persons who present political opposition to the current government.<sup>420</sup>

In practice, the *Mahallas* do not act independently from the central government.<sup>421</sup> Their authority to act as intermediaries in reconciliation cases seems to come from the Constitution of Uzbekistan, which states that "local agencies of power [must] ensur[e] the legality, legal order, and security of citizens."<sup>422</sup> This provision empowers *Mahallas* to act under the law "on Organs of the Self-Rule of Citizens" passed by the legislature in April 1999.<sup>423</sup> Little information exists on how *Mahallas* handle criminal cases when the victim does not report the offense to the police or when

work in connection with local government see *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257, at 6-10.

416. See, e.g., *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257, at 2-3.

417. See, e.g., *Domestic Violence in Uzbekistan*, Minnesota Advocates for Human Rights (Dec. 2000) available at <http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/Uzbekreport.pdf>; *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257.

418. See generally *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257; *Sacrificing Women to Save the Family? Domestic Violence in Uzbekistan*, Human Rights Watch Report, Vol. 13, No. 4 (D) (July, 2001), <http://www.hrw.org/reports/2001/uzbekistan/> (last visited Mar. 16, 2005).

419. Under article twelve of the Law on the Organs of Self Governance of Citizens, *supra* note 409, these powers and responsibilities include "promoting employment of citizens; controlling the use of land; helping citizens maintain dwellings. . ." and a range of responsibilities dealing with maintaining buildings, parks, roads, bridges, "cost effective use of fuel, electricity, heat and water . . ." For a description of the social service functions of *Mahallas*, see Marianne Kamp, *Between Women and the State: Mahalla Committees and Social Welfare in Uzbekistan*, THE TRANSFORMATION OF CENTRAL ASIA, *supra* note 4, at 38-44.

420. See *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257, at 9-23.

421. *Id.* at 7-8.

422. UZB. CONST. art. 100.

423. Law on the Organs of Self Governance of Citizens, *supra* note 419.

persons refer cases to the *Mahallas* for reconciliation.<sup>424</sup> Clearly, however, in any case involving sexual assault or violence against women, the average *Mahalla* lacks an empathetic understanding about these crimes, what motivates them, as well as the need and obligation to protect victims.<sup>425</sup> People view the *Mahalla*, rather than the courts, as the venue for family conflicts, regardless of the level of violence involved in the conflict.<sup>426</sup> In many cases, the police will refer a woman to the *Mahalla* before agreeing to take an official complaint.<sup>427</sup> The *Mahalla* will routinely attempt to reconcile these cases prior to the time a prosecutor will file a criminal case.<sup>428</sup> If the parties cannot reconcile the case, prosecutors will consult the *Mahalla* in preparing the prosecution, as will judges in determining the sentence.<sup>429</sup> Accordingly, no confidentiality applies to this reconciliation process.<sup>430</sup>

Uzbekistan law does not require that domestic violence cases go first to the *Mahallas* or that the parties attempt reconciliation before criminal prosecution. Yet, this practice has grown, effectively reducing the number of domestic violence cases victims and prosecutors bring to court.<sup>431</sup> The *Mahalla*, whatever their value in handling neighborhood matters, have “no authority to punish perpetrators for their actions and thus ha[ve] little power of deterrence” against abusers.<sup>432</sup>

## VII. PROBLEMS WITH THE RECONCILIATION PROCESS IN CENTRAL ASIA.

The current practices in the reconciliation process in Central Asia raise a number of concerns. One concern arises in connection with who makes the decision that a case should go to reconciliation rather than to a formal court

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424. Human Rights Watch and the Minnesota Advocates for Human Rights are the only two international human rights organizations who have, to date, conducted any studies regarding the *Mahalla's* resolution of criminal cases, and both focused on domestic violence cases. See *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257, and *Sacrificing Women to Save the Family? Domestic Violence in Uzbekistan*, *supra* note 418.

425. See generally *Sacrificing Women to Save the Family*, *supra* note 418; *Domestic Violence in Uzbekistan*, *supra* note 417.

426. Although men have been prosecuted for driving their wives to suicide, these cases, if brought, are not referred for reconciliation. See *Sacrificing Women to Save the Family*, *supra* note 418, at 40-42. See also Sievers, *supra* note 414, at 136 (“...Uzbekistanis recoil at adversarial dispute resolution. Uzbekistanis rarely turn to the courts for assistance in resolving disputes.”). *Id.*

427. *Domestic Violence in Uzbekistan*, *supra* note 417, at 37.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 38.

prosecution. Another concern regards the types of cases going to reconciliation. Serious concerns exist about how reconciliations are conducted and the impact this process has on the overall administration of justice. Concerns also exist about how the process treats victims and their role in relation to reconciliation. A "victim-centered approach" is neither a reality nor a stated goal of the process.<sup>433</sup> That core value is also not a part of the discussion surrounding criminal justice reform in any of the four Central Asian Countries.<sup>434</sup> Finally, serious concerns exist about whether the rights of defendants are respected under current practices.

During the November 2004 OSCE/ODIHR Conference, participants spent virtually no time discussing what is best for the victim and showed little awareness that crime victims should have a voice in developing criminal justice policy.<sup>435</sup> Civil society in Central Asia, thus far, has virtually no groups actively advocating on behalf of crime victims.<sup>436</sup> And, because of the grave concerns surrounding the rights of the accused in criminal cases, the discussion from civil society has understandably centered on the rights of defendants.<sup>437</sup> This focus again shows that the advocates for the increased use of restorative justice are judges, prosecutors, and police, not civil society or academics. Observers could easily view this state-motivated use of reconciliation as an extension of the dynamics at play in other areas of political development in Central Asia. Governments in the region actively discourage or repress democratic development by keeping a tight grip on all aspects of political life and by preventing civil society from developing into a meaningful player in shaping policy reform.<sup>438</sup>

### *A. No Reliable Definition or Description of the Process*

The laws of all four Central Asian states fail to clearly define reconciliation or identify the nature of the process. The laws simply seem to

433. See Thorn, *supra* note 5.

434. Although the criminal procedure codes delineate the rights and obligations of victims, these provisions do not represent a victim centered approach. See C. CRIM. P. art. 75 (Kaz.); C. CRIM. P. art. 50 (Kyrg.); C. CRIM. P. art. 55 (Uzb.).

435. Nov. 2004 Conference, *supra* note 20.

436. For information on the general weakness of civil society in Central Asia see *supra* note 131.

437. For a brief description of the role of human rights organizations in Central Asia see Scott Horton & Alla Kazakina, *The Legal Regulation of NGOs—Central Asia at a Crossroads*, at 4, available at <http://www.eurasianet.org/resource/regional/cenasngo.html>. See also *supra* note 131.

438. See discussion *supra* note 131.

suggest that the process commences when the parties agree to it.<sup>439</sup> There is also no definition of whether the process should be conducted with or without lawyers or with or without a third party (an intermediary). None of the codes state that reconciliation proceedings are confidential or give any definition of what information coming out of the reconciliation process may or may not be used as evidence in the event the parties fail to reach an agreement.<sup>440</sup>

*B. Who Advocates for the use of Reconciliation and Decides when Cases go to Reconciliation?*

Unlike in western countries, where mediation of criminal cases is more widely used, in Central Asia civil society and those outside the system are not the prime forces behind the development of alternatives to prosecution.<sup>441</sup> No discussion occurs about increasing victim satisfaction with the criminal justice system.<sup>442</sup> Instead, the main proponents of increased use of alternatives to criminal prosecution are those institutions, police and prosecutors, who form the bedrock of the criminal justice system.<sup>443</sup> Those institutions do not suggest alternatives to create real change in how society deals with crime. Instead, these institutions suggest the use of alternatives to make jobs easier for the professionals in the system.<sup>444</sup>

In practice, investigators are most likely to “send” a case to reconciliation.<sup>445</sup> This practice raises a number of issues. As discussed below, this practice reflects the day-to-day concerns of the particular

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439. See *supra* Section VI.

440. *Id.*

441. See discussion *supra* notes 131 and 133.

442. See generally Thorn, *supra* note 5; Nov. 2004 Conference, *supra* note 20; and countless conversations and events regarding criminal justice reform in Central Asia in which the author participated from 2002-2006.

443. See generally Thorn, *supra* note 5; Nov. 2004 Conference, *supra* note 20.

444. Legislators in Central Asia generally do not propose legislation in response to pressure from their constituencies, and legislation is rarely the result of lobbying by civil society. See generally Kyle W. Davis, *Purging the System: Recent Judicial Reforms in Kazakhstan*, 8 U. C. DAVIS J. INT'L L. & POL'Y 255 (describing legislative reform in Kazakhstan led by presidential direction and without civil society input). The legislative processes in each of the four Central Asia countries discussed here are notoriously lacking in transparency and openness. See generally *supra* note 84. To get a copy of a draft law, prior to its adoption, can often be extraordinarily difficult, and the average citizen or NGO rarely has access to drafts that are in-the-making. See, e.g., Gerald Staberock, *supra* note 114, at 9-10.

445. This article does not use the term “referral” due to the reality in Central Asia that the process is far too *ad hoc* and without definition to state that cases are “referred” to reconciliation as they are, for example, in the United States.

[Vol. 8: 1, 2007]

investigator, not overall criminal policy objectives. Without clear guidelines about what types of cases should and should not go to reconciliation, investigators are much more prone to send cases to reconciliation for reasons other than the substance of the case itself. The OSCE/ODIHR study, which interviewed lawyers and judges in Kazakhstan and Kyrgyzstan, found that most interviewees thought that investigators would send cases to reconciliation if they had a direct (and corrupt) monetary interest in the reconciliation or an interest in ending a difficult investigation.<sup>446</sup>

Corruption may also affect the decision to seek reconciliation of cases. In the OSCE/ODIHR study, many interviewees believed that defendants commonly make payments to the investigator to ensure cases go to reconciliation rather than to prosecution in court.<sup>447</sup> Whether defendants actually make these payments, in some respects, is not as important as the perception of professionals within the system that this type of corruption is endemic to the reconciliation process. These professionals show no confidence that parties use the process fairly and objectively. This skepticism affects the credibility of the outcomes of reconciliation. It may also affect the finality of reconciled agreements when skeptical judges may be inclined to overturn the agreement and refer it for criminal prosecution or investigation. This lack of finality, in turn, contributes to further potential corruption in countries, like Kazakhstan, where the investigator and courts still have discretion to continue the prosecution after reconciliation. These decision-makers can become additional sources of "extortion."<sup>448</sup>

Reducing caseloads and decreasing the responsibility of the system's professionals for outcomes serve as the prime motivators behind the increased use of alternatives to criminal prosecution in Central Asia.<sup>449</sup> Winning convictions, or more importantly avoiding the risk of losing convictions, explains the excessive reliance on confessions in the system. In addition, police reluctantly register crimes that may be difficult to solve, because registering an offense means someone must solve it.<sup>450</sup> As noted

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446. Thom, *supra* note 5, at 12.

447. *Id.*

448. *Id.*

449. *Id.* See also the Nov. 2004 Conference *supra* note 20.

450. Throughout the years the author heard numerous stories of police refusing to register cases when people came in with a complaint. There can be multiple reasons for this, including that the case may be difficult to solve. Another common reason is that the particular police officer does not recognize the offense itself as a crime. This is a common problem in cases of domestic violence. A



above, the failure to solve every case registered carries serious repercussions for the professionals handling that case.<sup>451</sup>

While the desire to decrease caseloads and decrease potential responsibility for outcomes are powerful motivators for change in the system, they do not necessarily lead to a nuanced or sophisticated approach in policy decisions. In the context of Central Asia, where the laws do not strongly protect individual rights and where the administration of justice is riddled with serious problems, reconciliation motivated by institutional concerns will not reflect values familiar to the restorative justice community in western countries.<sup>452</sup>

### *C. What Cases are Referred to Reconciliation?*

Currently, as long as the crime fits into the general category of crimes eligible for reconciliation, it is up to the discretion of the prosecutor or the investigator whether the case goes to reconciliation.<sup>453</sup> In practice, even in crimes categorized as privately prosecuted, reconciliation does not appear to happen in the absence of state involvement.<sup>454</sup>

From the information the OSCE/ODIHR gathered, it seems a significant number of cases going to reconciliation are crimes of violence.<sup>455</sup> With a few notable exceptions, professionals in the system do not think that specific types of crimes or categories of defendants, such as non-violent cases and juvenile cases, are the most appropriate cases for reconciliation.<sup>456</sup>

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third, equally common reason is if the police officer thinks that the case does not seem serious enough to warrant creating additional work (such as a small property offenses).

451. See *supra* note 140.

452. See *supra* Section V.

453. See *supra* Section VII.

454. Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

455. According to the statistics provided by Kazakhstan in 2005 the following cases were reconciled: 136 rape cases, 743 robbery cases, and two torture cases. Statistics on file with the author. In 2003, 220 rape cases were reconciled. Statistics on file with the author. It is difficult to clearly define how many crimes of violence were reconciled since some crimes under the Kazakhstan Criminal Code could be listed and charged only as property crimes, while under the same section it is possible that violence was used, such as a burglary. The statistics, therefore, provide only an indication and not a complete picture of the number of crimes with violence that reconciled. It is also possible that some sexual assault cases were charged as simple assault, and then reconciled, making it difficult to gather a full picture of the number of sexual assault cases going to reconciliation.

456. Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006. See also *infra* note 473 (referring to juvenile justice project in Kazakhstan).

Therefore, these types of cases are not routinely referred.<sup>457</sup> As stated above, the increased use of reconciliation does not reflect pressure and concern from civil society, victims' rights groups, or academics who are interested in finding better ways of dealing with crime in society to reduce criminal behavior and better address victims' needs. Rather, Central Asian countries increasingly use reconciliation to reduce caseloads and handle cases "better" from the perspective of investigators, prosecutors, and courts.<sup>458</sup> Thus, more complicated or difficult cases find their way to reconciliation, a less onerous process than criminal investigation and trial.<sup>459</sup>

Sexual assault and domestic violence, therefore, feature heavily in discussions of the kinds of cases that could be or should be brought to reconciliation.<sup>460</sup> Even though victims do not commonly report the crimes,<sup>461</sup> when they do, professionals in the system hesitate to treat these crimes in the same way they treat any other crime.<sup>462</sup> These professionals commonly believe that raped women either "asked for it" or simply fabricated the crime.<sup>463</sup>

The average investigator or prosecutor in Central Asia does not recognize domestic violence as a crime, and certainly not as a serious

457. See generally statistics from Kazakhstan, *supra* note 331 and Section VI.

458. Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006. See also statistics from Kazakhstan, *supra* note 327 and Section VI.

459. See discussion *supra* Sections IV.F., VI.

460. In the many meetings and conferences the author attended when reconciliation or mediation of criminal cases were mentioned it was invariably in the context of a discussion about sexual assault cases.

461. See, e.g., *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257, at 2; *Domestic Violence in Uzbekistan*, *supra* note 417, at 38 ("Rape is an underreported crime in Uzbekistan, due in part to cultural norms that place high value on women's sexual purity."); *Domestic Violence in Uzbekistan*, *supra* note 417, at 23-26 (explaining why many women in Uzbekistan may not report domestic violence); *Uzbekistan: Sacrificing Women to Save the Family?* *supra* note 418, at 14 (stating "all evidence suggests that domestic violence is a markedly under-reported crime. Of the twenty women victims of domestic violence interviewed by Human Rights Watch, only six had gone to the police . . . none of the cases resulted in criminal charges being filed").

462. See generally *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257; *Domestic Violence in Uzbekistan*, *supra* note 431; *Uzbekistan: Sacrificing Women to Save the Family?* *supra* note 418; *Reconciled to Violence*, *supra* note 3.

463. These are such common attitudes throughout the former Soviet Union that it would be impossible to footnote each time the author heard them stated. One instance was when a defense attorney from Kazakhstan, a former police officer, said during the November 2004 Conference that "women bring it on" when they are raped.

crime.<sup>464</sup> Sexual assault cases also suffer from a lack of understanding and recognition of their seriousness.<sup>465</sup> As stated above, criminal justice professionals in Central Asia often view sexual assault as a crime of passion and love, not a crime of violence and power.<sup>466</sup> An investigator may not express outrage when a victim agrees to marry her assailant.<sup>467</sup> Instead, the investigator may likely assume the assailant simply got carried away expressing his love for the victim.<sup>468</sup> He may also assume she brought the attack on herself by her behavior.<sup>469</sup> Just as investigators have no specific mediation training, they also receive no training about the psychology of rape or domestic violence.<sup>470</sup> This lack of awareness makes it very easy for the victim to face re-victimization. Missing in the reconciliation process is the idea that the intermediary needs to be conscious of disabling power imbalances and should prevent, by terminating the process, severely lopsided or damaging agreements.<sup>471</sup>

In practice, Central Asian countries do not appear to widely use reconciliation in the types of cases where alternative proceedings are most commonly used in western countries, such as in juvenile cases.<sup>472</sup> Only the Juvenile Justice Project in Kazakhstan, operated with assistance from the Open Society Institute of the Soros Foundation, focused on these types of cases.<sup>473</sup> This project reported relatively high uses of reconciliation and

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464. See, e.g., *Reconciled to Violence*, *supra* note 3, at 23-26 and 44-47.

465. *Id.* See also *supra* note 463.

466. See, e.g., *Reconciled to Violence*, *supra* note 3, at 44-51.

467. The quote at the beginning of this article expresses this attitude, held by many throughout the legal system. See *supra* notes 2 and 4.

468. See, e.g., Werner, *supra* note 4, at 84-88 (discussing reasons for increasing bride kidnapping in Kazakhstan) ("When it comes to bride kidnapping, [men] believe that the state does not regard this as an important issue.").

469. See *supra* note 463.

470. See generally *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257; *Domestic Violence in Uzbekistan*, *supra* note 431; *Uzbekistan: Sacrificing Women to Save the Family?* *supra* note 418; *Reconciled to Violence*, *supra* note 3.

471. The western literature regarding mediation of rape or domestic violence operates under the assumption that these crimes are understood to be crimes of violence and that the mediator will be sensitive to the particular trauma suffered by victims in these types of crimes to insure no further harm is done. See, e.g., *The Challenges of Mediating Rape*, *supra* note 187; Hodak, *supra* note 187; Goolsby, *supra* note 187; Chanda, *supra* note 187. See also Mary P. Koss et. al., *supra* note 187; C. Quince Hopkins, et. al, *supra* note 187; C. Quince Hopkins & Mary Koss, *supra* note 187.

472. See *supra* Section VII.

473. This Soros Justice Initiative project is an example of what could be possible with a concentration of resources and high quality personnel. Through this project all the judges, prosecutors, defense attorneys, police and social workers dealing with juvenile criminal cases in two district courts in Almaty City and Almaty regions were trained in issues specific to working with juveniles and discussed better ways of handling specific cases. See [http://www.justiceinitiative.org/activities/ncjr/ptd/kazakhstan\\_jj](http://www.justiceinitiative.org/activities/ncjr/ptd/kazakhstan_jj) (last visited Nov. 5, 2007). In these

other alternatives to court proceedings and correspondingly lower rates of imprisonment than is the norm in juvenile cases in Kazakhstan.<sup>474</sup> Yet, unlike western countries, anecdotal evidence suggests that criminal justice professionals commonly refer rape and sexual assault cases to reconciliation.<sup>475</sup> However, the lack of statistics makes this referral picture murky.<sup>476</sup>

*D. Applicable Ethics Standards or Safeguards Designed to Protect the Rights of the Defendant and the Victim*

No applicable ethics standards regarding the use of reconciliation exist in any of the four Central Asian countries.<sup>477</sup> As discussed above, the legal profession itself is bound by few codes of ethics and ethical guidelines.<sup>478</sup> No set of guidelines advises how to treat victims or defendants, how the intermediary should behave, and when it is or is not appropriate to bring a case to reconciliation.

No law in any of the four countries protects the rights of the defendant during a reconciliation process.<sup>479</sup> The laws do not guarantee confidentiality of communications made in the process. No law protects the defendant against self incrimination during the reconciliation process. As stated earlier, designers of the criminal justice systems in the four Central Asian countries have not focused on the rights of the defendant.<sup>480</sup> If the parties do not reach an agreement in reconciliation or the reconciliation does not terminate the criminal prosecution, no law or ethical prescription prevents the use of any statements made by the defendant during the reconciliation

courts only two percent of cases resulted in sentences of imprisonment, and ninety-eight percent of cases were handled through alternatives to court proceedings, alternatives to imprisonment, or were closed. Statistics provided by Open Society Institute, Kazakhstan (on file with author).

474. *Id.*

475. *See supra* note 467; Nov. 2004 Conference, *supra* note 20.

476. *See* discussion *supra* Section VI for general statistics from Kazakhstan. As stated earlier, Kazakhstan is the only country to provide these statistics. *Id.* Included in these statistics are the numbers of rape cases dismissed under reconciliation. *See supra* note 455. Also as noted in Section III, the statistics given in 2006 and those from 2004 are different. *See supra* note 35 and accompanying text. According to the statistics presented in 2004, there were: 52 cases in 2001, 50 cases in 2002, 97 cases in 2003, and 94 cases in the first nine months of 2004. Statistics on file with the author.

477. *See supra* Section IV.

478. *Id.*

479. *See supra* Section VII.

480. *See supra* Section IV.

discussions. Investigators can be present during the reconciliation discussions even if they are not acting as intermediary.<sup>481</sup> In the absence of strict rules of confidentiality, the defendant is unlikely to make admissions or apologies that might lead to the type of “healing” contemplated in western restorative justice conferencing. Moreover, there is no reason to think that the investigator would not use the defendant’s statements to assemble proof of the crime in later court proceedings.

No country guarantees the defendant the right to have a lawyer, or any other support person, present during the reconciliation processes. No laws, rules, or ethical guidelines establish the role of a lawyer during those proceedings. Further, no laws, rules, or ethical guidelines qualify or disqualify the defendant as competent to participate in a reconciliation proceeding. Nothing protects the defendant’s right to agree to, opt out of, or terminate the reconciliation process.<sup>482</sup> While it seems clear that the defendant must agree to the final terms of the reconciliation, it is not clear he or she is making that decision based on informed consent.<sup>483</sup> Many defendants may think they do not have the right to refuse the terms offered, especially if the case is then dismissed. Because access to lawyers is an acute problem throughout Central Asia, many defendants go to reconciliation proceedings without adequate legal advice and without understanding their rights either in the reconciliation proceedings or in the formal criminal proceedings.<sup>484</sup>

Just as no safeguards exist to protect the defendant, no safeguards exist in any of the four countries to protect the victim. The intermediary does not receive the pre-proceeding recommendations or written material, needed to determine how best to handle the victim, particularly in cases involving violence or sexual assault. Intermediaries also have no training or materials on how best to handle vulnerable victims, such as victims of abuse. Law enforcement officers in Central Asia do not receive training in domestic

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481. None of the four countries define the reconciliation process with any specificity. *See supra* Section VI. That lack of definition combined with the traditional role of investigators means that, in practice, investigators can be present during the reconciliation. Central Asian legal professionals frequently referred to informal reports indicating the presence of investigators during reconciliations. Nov. 2004 Conference, *supra* note 20 and numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

482. Uzbekistan does provide these protections under law, although it is unclear how this works in practice. *See* discussion Section VI; C. CRIM. P. ch. 62 (Uzb.).

483. Due to serious issues surrounding access to counsel and restrictions on defense lawyers throughout Central Asia, it is unlikely that defendants in reconciliation proceedings are receiving better legal assistance than those going through the traditional criminal justice system. *See* discussion *supra* Section IV.F.4.

484. *Id.*

violence or sexual assault cases as part of their standard training.<sup>485</sup> The same is true for prosecutors and defense lawyers.<sup>486</sup> The intermediary also operates in a vacuum of information about how to handle special kinds of cases. In Uzbekistan where, as stated above, *Mahallas* "reconcile" cases of domestic violence, the intermediary commonly directs a woman to change her behavior or endure the abuse.<sup>487</sup> Austria, in sharp contrast, may refer domestic violence cases to mediation, but always with the clear understanding that the abuser, not the victim, is responsible for the abuse and for changing his or her behavior.<sup>488</sup>

### *E. Intermediary Selection, Impartiality, and Training*

No law prescribes who might act as an intermediary in reconciliation proceedings. No law, rule, or ethical guideline requires any special training or certification for intermediaries. None of the four countries have any rules, regulations or standards (in law or practice) governing the impartiality of the intermediary.<sup>489</sup> In the absence of any training for the role of reconciliation intermediaries or ethical guidelines, investigators playing that

485. For an analysis of the many challenges that police face in Central Asia, including lack of training see *Central Asia: The Politics of Police Reform*, *supra* note 70. For an example of training of police see Press Release, OSCE/ODIHR: ODIHR helps train police and change attitudes to combat domestic violence, Oct. 19, 2007, available at [http://www.osce.org/odihr/item\\_2\\_27\\_443.html](http://www.osce.org/odihr/item_2_27_443.html) (last visited Nov. 8, 2007).

486. For a general discussion of prosecutorial training in Kyrgyzstan, see *Prosecutorial Reform Index for Kyrgyzstan*, *supra* note 70, at 10-12. Prosecutors generally receive training through national prosecutor training centers. *Id.* The quality of the training is variable and depending on the country, the center may receive international assistance (as in Kyrgyzstan). *Id.* Defense lawyers have fewer resources and few training programs devoted to generally improving their skills, much less specific issues such as domestic violence or sexual assault. For a general discussion of lawyer education and training, see *Legal Profession Reform Index for Kyrgyzstan*, *supra* note 135, at 14-22, 39-41.

487. *Domestic Violence in Uzbekistan*, *supra* note 417, at 38.

488. See *Victim Offender Mediation in Cases of Domestic Violence*, Workshop 17 of the European Forum for Victim Offender Mediation and Restorative Justice Proceedings, from the conference, "Restorative Justice in Europe: Where are we heading?" Budapest, Hungary, Oct. 14-16, 2004, available at <http://www.euforumrj.org/readingroom/workshop17.pdf>.

489. The lack of training is not unique to intermediaries. However, this situation is exacerbated by the fact that no state recognizes or formalizes the position of intermediary. The *Aksakals* in Kyrgyzstan and the *Mahallas* in Uzbekistan present exceptions. However, neither *Aksakals* nor *Mahallas* received extensive training. See, e.g., *Reconciled to Violence*, *supra* note 3, at 66-70 (providing examples illustrating *Aksakals* attitudes towards domestic violence indicating the lack of training).

role often enter into the task with the view that they should control the result to ensure the “right” thing happens.<sup>490</sup>

In two countries, Kyrgyzstan and Uzbekistan, alternatives to the court process can also happen through the semi-formal structures of the Courts of Elders (*Aksakals*) and the *Mahallas*.<sup>491</sup> Parties may also use intermediaries drawn from the legal profession or proceed without an intermediary.<sup>492</sup>

Police investigators, lawyers, *Mahallas*, or Courts of Elders serve as the intermediary in reconciliation proceedings. All four groups share a lack of mediation training and lack a set of core values safeguarding the victim, the defendant, and the integrity of the process. These groups share, however, the common goal of reaching an agreement during all reconciliations.<sup>493</sup>

#### *F. How does the Intermediary Conduct the Reconciliation?*

As discussed above, the reconciliation process itself is vaguely defined in all four countries in Central Asia. No rules or standards exist describing how the intermediary or parties should conduct the reconciliation. Unlike in western victim-offender conferencing practice, intermediaries do not spend extensive amounts of time (or usually any time at all) preparing the victim and the offender for the reconciliation.<sup>494</sup> The intermediary may conduct separate meetings with each party, but he or she would use the meetings to establish a monetary settlement range.<sup>495</sup> Because reconciliation in Central Asia does not focus on the emotional and psychological needs of the parties and because the process typically results in a payment, the intermediary

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490. During the November 2004 Conference, discussion surrounding the role of the mediator focused on the idea that the mediator should “control the outcome.” Many conference participants made statements to the effect that if the mediator does not control the outcome, then he is failing to do his job because “someone has to make sure the right thing happens.” The idea that the victim and the offender could jointly arrive at the “right” outcome without the process being controlled or directed by the mediator was not generally accepted by the participants. Nov. 2004 Conference, *supra* note 20.

491. See *supra* Section VI.E.4. and VI.G.4.

492. See Section VI.

493. Nov. 2004 Conference, *supra* note 20. See discussion regarding reconciliations by *Aksakals* in Kyrgyzstan, *Reconciled to Violence*, *supra* note 3, at 66-70, regarding *Mahallas* in Uzbekistan in *Uzbekistan from House to House: Abuses by Mahalla Committees*, *supra* note 257, and *Sacrificing Women to Save the Family?* *supra* note 418. See also *Domestic Violence in Uzbekistan* *supra* note 417.

494. Not a single participant at the November 2004 Conference raised the issue of intermediary preparation. Nov. 2004 Conference, *supra* note 20. Intermediaries receive no training and thus far none of the four countries recognizes intermediaries as a separate profession in need of regulation or support. See *supra* note 489; see generally Section VI.

495. See Thorn, *supra* note 5; Nov. 2004 Conference, *supra* note 20.

likely asks the parties only two questions: "How much do you want?" and "How much can you pay?"<sup>496</sup>

Intermediaries have no concept that the intermediary may adopt different "styles" of interventions and behavior when conducting the reconciliation.<sup>497</sup> The reconciliation does not necessarily happen with both parties meeting face-to-face.<sup>498</sup> An intermediary may conduct "shuttle diplomacy" by going back-and-forth between each party with the goal of getting a written agreement.<sup>499</sup> This style reinforces the perception that reconciliation is merely a negotiation over money.

### 1. Support of Party Self-Determination, Informed Decision-Making, and the Right of the Party to "Opt-out"

Nothing requires the intermediary to conduct the reconciliation in a way that supports party self-determination or ensures informed decision making. These concepts find no expression in the criminal procedure practice in Central Asia. Lawyers rarely see their role as an advisor to help their client make an informed decision about how to handle the case.<sup>500</sup> In some ways, this constrained role simply reflects the lack of options available to defendants in these systems.<sup>501</sup> Unless the parties reconcile a case or the judge or prosecutor dismisses the case for some other reason prior to trial, the defendant can expect the judge to convict him or her and impose the sentence requested by the prosecutor.<sup>502</sup>

The intermediary does not generally see his role as informing the defendant or the victim about available options or possible outcomes.<sup>503</sup> Nor

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496. See Thorn, *supra* note 5; Nov. 2004 Conference, *supra* note 20.

497. See, e.g., Paula Young, *The "Who" of Mediation, Part I: A New Look at Mediator Styles?* ST. LOUIS LAW. (Oct. 2004), available at <http://mediate.com/articles/young15.cfm>.

498. See generally *supra* Section VI (discussing the few regulations surrounding reconciliation in each country).

499. *Id.*

500. See *supra* Section IV.F.4.

501. See *supra* Section IV.F.

502. See *supra* note 124, and discussion *supra* Section IV.F.

503. See Thorn, *supra* note 5; Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.



will the intermediary ensure that the victim's wishes are paramount in the process of reconciliation.<sup>504</sup>

The intermediary also does not see reconciliation as a process "driven" or "controlled" by the parties. The concept of "self-determination" and allowing the parties to decide the outcome flies in the face of common cultural understandings of the individual, particularly when compared to "experts" such as police officers who view themselves as having superior knowledge and, therefore, more insight and ability to ensure that the "right" thing happens at the end of the reconciliation.<sup>505</sup>

No one understands the concept that either the victim or the defendant can "opt-out" of the reconciliation.<sup>506</sup> The conceptual starting point for the intermediary is to think that if the case *can* go to reconciliation then both parties should be grateful for the referral and should reach the "right" conclusion (one directed by the intermediary).<sup>507</sup> Often cases go to reconciliation when the investigator (who is frequently the intermediary) thinks that the victim will not want to proceed with the prosecution or will not be a reliable witness.<sup>508</sup> Intermediary-Investigators frequently hold this perception in domestic violence and sexual assault cases.<sup>509</sup> The intermediary-investigator will be concerned if either party "opts out" of the reconciliation.<sup>510</sup> If either party opts-out, the case will go forward in court and may not result in a conviction, which would create an unacceptable outcome for the average intermediary.<sup>511</sup>

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504. See Thorn, *supra* note 5; Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

505. See *supra* note 490. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

506. Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

507. Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

508. Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

509. Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

510. Nov. 2004 Conference, *supra* note 20. The author also bases this statement on numerous informal conversations between the author and legal professionals in Central Asia regarding the use of reconciliation between 2003-2006.

511. See *supra* Section IV.

## 2. Presence of Counsel or Support Persons

As noted above, no country in Central Asia requires or specifically allows for the presence of lawyers or support persons during the reconciliation process.<sup>512</sup> Therefore, in practice, the intermediary decides who can attend, and he may or may not allow the presence of support persons and other people aside from the victim and the defendant.<sup>513</sup> Uzbekistan does require the presence of the prosecutor, defense lawyer, and the victim during the subsequent court hearings after the parties reach a reconciliation agreement and before the court agrees to accept it.<sup>514</sup>

## 3. Typical Outcomes of Reconciliation

As stated above, criminal justice professionals in Central Asia see reconciliation as a means to a financial end. Prosecutors and courts consider cases "reconciled" if the victim agrees to a monetary pay-off. Parties do not typically talk about other non-monetary concerns (such as an apology, community service of some type, or specific performance of a repair of property). When most of the population of these countries lives in or near poverty,<sup>515</sup> "apologies are worth nothing next to money."<sup>516</sup> Lawyers surveyed by the OSCE/ODIHR found reconciliation "centered on the victims' desires for material benefit and the defendants' desire to escape judgment."<sup>517</sup>

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512. See *supra* Section IV.

513. See *supra* Section IV

514. C. CRIM. P. ch. 62 (Uzb.).

515. See CIA, Kazakhstan, *supra* note 43. See also *supra* notes 59, 74 and 88; United Nations Development Program, *Human Development Report 2006*, at 284-285, <http://hdr.undp.org/en/media/hdr06-complete.pdf> (last visited Nov. 5, 2007). In development terms all three countries rate in the "medium" category. *Id.* Kazakhstan rates 79th in the world out of a total of 177 countries. The ratings drop for Kyrgyzstan rating at 110th, Uzbekistan at 113th and Tajikistan at 122nd. *Id.* Tajikistan ranks lowest for countries in the former Soviet Union. UNDP includes Gross Domestic Product and other factors such as literacy and life expectancy in calculating the Human Development Index. *Id.*

516. Thorn, *supra* note 5, at 11.

517. *Id.* (referring to interviews in Kazakhstan). In addition, from informal discussions the author had with legal professionals from the other three Central Asian countries, it is clear that this perception is not unique to lawyers from Kazakhstan.

With the exception of the occasional story about parties to a rape case agreeing to marry, no stories and no reports exist of parties agreeing to any outcome other than money.<sup>518</sup>

## VIII. CONCLUSION

The international community, scholars, and criminal justice professionals cannot assume the increased use in Central Asia of alternatives to criminal court proceedings, especially reconciliation, signals reform or represents a more enlightened approach to criminal justice policy in the region. While undoubtedly examples exist of good practices where the use of reconciliation helped the victim, prevented the offender from going to prison, and aided in rehabilitation to prevent future offending, these examples do not appear to represent the trend in Central Asia. Instead, the desire of criminal justice professionals to decrease their caseloads, particularly of difficult cases not likely to result in a conviction or of cases perceived as not worthy of public prosecution, such as domestic violence and sexual assault cases, motivates the greater use of reconciliation. Therefore, those analyzing reconciliation, for financial assistance or other reasons, must consider its impact on the rights of defendants, the protection of victims, the limited outcomes of the process, and reconciliation's place in systems operating on pay-offs and other forms of corruption.

Defendants' rights, as discussed earlier, remain acutely disregarded in the day-to-day practice of criminal law throughout Central Asia. Legislatures have increased the types of cases eligible for reconciliation without sufficiently analyzing what types of defendants, such as juveniles, might benefit greatly from this alternative process. Criminal justice professionals and legislative bodies in Central Asia have not discussed the diversion of juvenile cases to alternative processes, even though western countries often started their restorative justice alternatives there. The criminal defendants' rights need further consideration, including the right to counsel and confidentiality of the reconciliation proceedings. Due to this disregard, international organizations must take care to express concerns about defendants' rights if they choose to provide assistance to these programs in any of the four countries.

Victims' rights also require heightened focus. When an intermediary simply wants to end the case through reconciliation, other considerations, including victim protection, welfare, or satisfaction, naturally receive lower priority. Cases involving domestic violence and sexual assault, in a region

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518. See generally Thom, *supra* note 5; see also Nov. 2004 Conference, *supra* note 20.

with a poor record of protecting women, only highlight the risk of using this process indiscriminately. Intermediaries should at least have training on issues such as sexual assault and domestic violence to begin to address concerns about victims' rights. Surveys of victims, looking particularly at how they perceive their treatment when cases go to reconciliation, would also increase understanding of the victims' perspective and promote that perspective in criminal policy development. Legislatures and courts should simply preclude reconciliation in certain types of cases. Until the criminal justice system better protects victims of domestic violence and sexual assault, and until criminal justice professionals understand and take these crimes more seriously, these cases should not go to reconciliation.

The criminal justice systems of each country reflect the corruption endemic to the region. In this environment, almost any change to the system offers new opportunities for corrupt practices. A process that gives the investigator the power to divert the case to reconciliation or gives the prosecutor or judge the opportunity to review, open, or remand the case after the parties reach a reconciliation agreement (as in Kazakhstan) raises concerns about corruption. Use of a truly neutral third party as the facilitator, someone other than the investigator with the authority to dismiss the case, could reduce pay-offs to the investigator. Of course, creating new professions within the criminal justice system does create the possibility of new and additional parties expecting bribes.

Any international aid provider that wants to work in this area needs to understand the context in which Central Asian countries are developing alternatives to criminal proceedings. However, providers cannot discount this trend, ignore it, or condemn it. Instead international aid providers, while acting with great caution to avoid encouraging the uncritical spread of alternatives to criminal proceedings in Central Asia, should also, as appropriate, assist in developing a deeper understanding of the issues involved in using these alternative processes. Currently, all four countries need to adopt practices that protect defendants, victims, and the integrity of the process. Western restorative justice values and practices may offer some practical solutions for some of the problems appearing in Central Asian reconciliations.

Within the context of current practices in the criminal justice systems of Central Asia, reconciliation does not offer a panacea or quick fix to serious structural problems, entrenched attitudes about certain crimes, or corrupt practices. Those working for criminal justice reform in Central Asia must encourage greater discourse surrounding these issues to ensure that

developing practices represent true reform rather than merely new examples of bad practices.