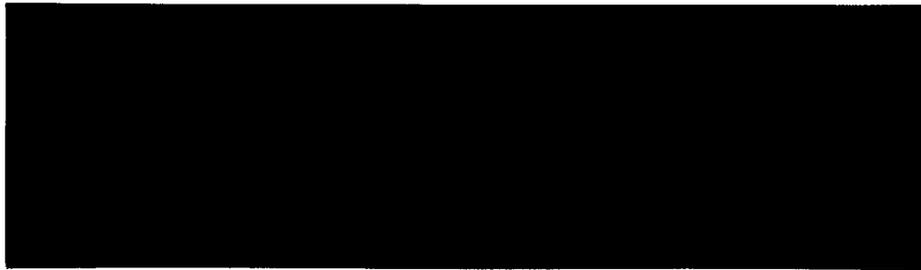


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**RULE
OF LAW
PROGRAM**

**NIS Regional and
Trans-Caucasus Republics**

Project No 110-0007-3-466-2107
Contract No CCN-0007-C-00-4003-00



**Submitted to
U.S. Agency for
International
Development**

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FINAL REPORT
(November 30, 1998)

FINAL REPORT REGIONAL CONTRACT

Introduction

The Regional Contract (the "Contract" or the "Regional Contract") between the ARD/Checchi Joint Venture (which became known as the Rule of Law Consortium, herein "ROLC") and USAID was signed November 30, 1993. The purpose of the Contract was to render professional services in support of the Rule of Law Program for the Newly Independent States ("NIS"), including but not limited to the TransCaucasus republics. The overall objective was to support the creation of stable legal and political conditions to facilitate the transition to democratic, market-based societies. Specifically, ROLC was to collaborate with public and private organizations in the NIS to develop or strengthen the laws, legal institutions and civic structures that support democratic, market oriented societies.

The Contract's scope of work had three primary objectives. The first objective was to frame legal substance, such as by improving the constitutions, laws and administrative regulations needed to protect individual rights within a market economy. The second objective was to strengthen legal institutions that formulate, implement, adjudicate and enforce the law. These included such institutions as courts, legislatures, executive branch agencies and law schools, among others. The last objective was to strengthen civil society by increasing the role and effectiveness of non-state actors, including civic organizations, political parties, trade unions and other NGOs. A subsidiary purpose of the final objective was to heighten public awareness and demand for participation in the legal system and legal reform.

The Report is divided into two major sections: description of the work implemented directly from the ROLC regional office (hereinafter the "Regional Office") located in Washington, DC, and a review of country-specific field programs and offices. Notwithstanding this division, there was much overlap between the field operations and Washington, and in fact a great deal of coordination in the development and implementation of activities.

The Report contains an executive summary which provides not only a brief resume of the activities carried out under the Contract, but also the impact of some of those activities on the laws, legal structures and civil societies in the countries covered by the Contract. Finally, there are two appendices the purpose of which is to provide additional detail and data.

I Executive Summary

The Regional Contract signed by ARD/Checchi in November 1993 was intended to support legal conditions necessary to assist the states that became independent after the disintegration of the Soviet Union in the transition to democratic, market-based societies. Activities were contemplated that assisted these NIS in framing legislation to support the development of a market economy and democratization, strengthen their core legal institutions and help develop civil society to augment the rule of law. Under the Contract, the ROLC established the Regional Office in Washington, DC, and this office carried out logistical, coordinating and program activities, as well as support for field operations in the region. Additionally, there were country-specific programs in Central Asia and the TransCaucasus administered through the Regional Contract.

The scope of work contained in the Contract provided for a rolling design. Although the general areas of activity (as described above) were identified in the scope of work, the scope of work also left considerable discretion to USAID officials and to the ROLC staff to respond to opportunities and constraints encountered during implementation. The programs which resulted from early assessment missions and from on-going relationships with the legal establishment in the country in question were a result of an emerging methodology of rule of law programming in the region, of the political opportunities for progress when and where they became apparent, and of the particular talents, skills and interests of the individuals engaged in the process--including local counterparts, USAID officials in Washington and the field and contract staff.

At the time the Contract was awarded, USAID had virtually no experience in the countries of the former Soviet Union. Moreover, there were no US organizations with significant experience in rule of law programming and the use of foreign assistance in that part of the world. The experience, particularly in the early stages, taught the players on the US side at least as much as their counterparts in the NIS. Since a principal goal of the Regional Contract was the development of methodology to approach the issue of how best to develop a legal infrastructure in post-Soviet countries, the discussion of impact and lessons learned in this Report will focus on substantive issues of rule of law programming.

The Regional Office played a pivotal role in the start-up and support of the ROLC's Rule of Law Russia and Slavic Contracts, and subsequently in the programs carried out in the TransCaucasus and Central Asia. Putting together the teams of US and national experts, organizing the "consortium" of US, European and local organizations, doing the assessments of the judicial sectors, working with USAID on the designs and then implementing the activities were critical benchmarks in the development of the rule of law in the NIS under the Contract. All procurement, travel arrangements for consultants and grant administration was done from the Regional Office in the beginning of the Contract term, and much of this backstopping continued through the life of the Contract.

An essential role of the Regional Office was to provide the link between USAID/Washington and ROLC's field operations. Advice with respect to policy and US objectives in various sub-regions was channeled through the Regional Office to ROLC's field offices, and conversely, the Regional Office shared information produced by the field with USAID and other agencies in Washington. This afforded a more coordinated approach to a highly political intervention in what were in 1993 relatively uncharted waters for USAID. ROLC's Washington staff, along with the considerable number of experts that ROLC engaged to work on legal reform in the NIS, were able to provide USAID officials with information and advice on the judicial sectors in the target countries.

The Regional Office also formed a data base of other donor supported programs implementing rule of law activities in the NIS, and disseminated this information for about two years on FedWorld through the Department of Commerce. This information assisted policy makers in their decisions with respect to various initiatives, in particular model code drafting.

The Regional Office provided important program design and support throughout the Contract, and after appraising the potential for reform in the region, centered on model code drafting as a prime objective to develop a legal framework in the various countries of the NIS. Since all of the countries in the NIS faced similar problems in making the transition to a market economy from the former Soviet system, it was decided to focus on a model civil code for adoption in countries of the region. ROLC helped coordinate other donors who worked with the Interparliamentary Assembly of the Commonwealth of Independent States to support working groups for the development of model codes. Once the model civil code was finished in 1996, ROLC was able to modify the design principles to help working groups adapt the codes to their own countries. Mindful of the important impact that communications across borders would have on the creation of such laws, ROLC provided electronic communications that linked drafters in the various countries with each other and with experts in the US and Western Europe. The Centre for International Legal Cooperation at Leiden, the Netherlands, (the Center for International Legal Cooperation) became a critical partner in the process, and continued providing technical assistance and training to the various working groups throughout the life of the contract.

ROLC organized and sponsored conferences, colloquia and seminars as a way of bringing together both US and foreign expertise on legal reform in the NIS. These tracked political and legal developments in the NIS and provided a platform for discussions among donors, NGOs and US government agencies involved in the reforms. They occasionally provided a forum for discussions among judges and other participants in the legal reform process, as for example conferences organized by ROLC and the Center for Democracy.

The US Government became increasingly concerned about the crime and corruption that quickly surfaced in the NIS. Clearly, organized crime was infiltrating the newly privatized structures as well as other institutions, including the judiciaries. In an effort to respond

quickly to this problem, ROLC developed strategies for the reform of the criminal justice sector and planned the development of organized crime centers in the NIS. Organized Crime Centers were established under the ROLC in the Russian Federation at various universities under the ROLC's Russia Contract.

The Contract through its Regional Office administered a small grants program to promote the growth of civil society in each of the target countries. The grant administrator also provided guidance on the design of the grants program in Russia and Ukraine, as well as the steps necessary for solicitation and award of the small grants. The Regional Contract directly funded grants for such organizations as Freedom House, the International Foreign Policy Association, the Social Science Research Council and the League of Women Voters Education Fund. ROLC made grants to US organizations who in turn financed local activities and as appropriate, provided funding directly to local counterpart organizations.

The ROLC published a Rule of Law newsletter to inform the legal community in the US, Europe and the NIS of developments in the legal reform sector. The newsletter treated a wide variety of topics relating to legal reform in the NIS, and became a respected source of information for other assistance providers and legal experts. Each newsletter was devoted to a separate topic, such as legal education in the NIS, constitutional tribunals, the procuracy and similar topics. The ROLC drew on diverse sources as authors, including academics and practitioners, from not only the US and NIS, but also from Western and Central Europe.

The Regional Contract through the Regional Office carried out field programs in the NIS, and established offices in Almaty and Bishkek. Two expatriate chiefs of party along with local staffs of professionals in both Kazakhstan and the Kyrgyz Republic conducted extensive training and institutional strengthening activities under the auspices of the Contract. The joint program was designed around a recognition that privatization and economic restructuring depended greatly on democratization and the rule of law, and resulted in close cooperation between USAID's Office for Market Transition in Almaty, the Office of Democracy and Governance in Washington and ROLC. The program was based on implementation of the new commercial laws that had been recently enacted in both countries. Thus, ROLC's major objective, with the support of USAID, was to provide training to legal professionals in the new commercial and civil laws necessary for a market economy to function, and at the same time to prepare modern programs of continuing legal education that would sustain that effort and assist in reforming the legal system necessary for a sustainable market economy.

As the program evolved, the training focused on commercial law training and then moved to treat economic crime issues for judges and procurators. During the final year, the program expanded in to a major program in court reform in which ROLC concentrated on the development of an independent judiciary and court administration and management. Partners in this effort included the Administrative Office of the US Courts, the Ministry of

Justice of the Netherlands as well as Dutch and US judges

The Regional Contract's participation in the TransCaucasus differed from that in Central Asia. USAID/Washington maintained primary control over the design and development of the programs in Armenia and Georgia, and ROLC did not operate field offices in either of those republics. At the request of USAID, ROLC utilized grants or subcontracts to procure equipment, other commodities, and some limited technical assistance.

ROLC carried out an assessment in Georgia early in the Contract term with the purpose of defining rule of law activities in that country. As a direct result of this exercise, ROLC provided support to the Georgian Constitutional Commission, the body that drafted the new Georgian Constitution, a Bill of Rights, and related legislation, all of which ROLC supported with advice and commentary. Another contribution made through the Regional Contract was establishing Internet Connectivity to the Georgian Parliament, and later to the Supreme and Constitutional Courts. The technological capacity provided to Georgia's core legal institutions through the equipment procured and training of its users has given both the Parliament and the courts a significant pool of research and communications that are assisting them in their modernization.

As in the other former Soviet Union republics, model code drafting was conducted for Georgia, with the result that Part I of the Georgian Civil Code was completed. The Center for International Legal Cooperation was enlisted as ROLC's partner in this endeavor as in the other NIS.

Armenia also received support through the Regional Contract under the direction of USAID/Washington. Attorney and judicial training programs were carried out through a grant made to the American University of Armenia ("AUA"). Additionally, a resource center was created at AUA for legal professionals.

As in the case of Georgia, USAID requested ROLC to purchase equipment for various Armenian institutions, including significant support for the new Constitutional Court of Armenia. Equipment was supplied to both the code drafting centers and the legislature of Armenia.

ROLC sponsored several Armenian civil code drafting meetings in conjunction with the Center for International Legal Cooperation. These meetings, along with European participation that was obtained by ROLC, resulted in model civil and criminal codes for Armenia. In addition, ROLC sponsored a conference for TransCaucasus Constitutional Court members that was co-financed by the Soros Foundation and the Council of Europe. ROLC also sponsored a case management workshop for court administrators with the Venice Commission. Judges from both Armenia and Georgia participated in the workshop.

In addition to its work with AUA, ROLC provided assistance to the Yerevan State University Law School in the form of library training, the procuring of equipment for the law library, and law school professor training that took place with the cosponsorship of the Constitutional and Legislative Policy Institute in Budapest

II Impact and Lessons Learned

Institutional reform, and particularly reform in the judicial sector, is often incremental and not subject to the same kinds of measurement or results calculations as would be a health or child survival project, for example. There are, however, various impacts that can be identified, and even though the Regional Contract did not have as part of its scope the collection of baseline data, identification of indicators or benchmarks, certain impacts can be fairly described as direct effects of the Contract's activities.

Impact

Develop Model Codes

The pre-existing Soviet legislation was utterly unsuited for the development of a market economy or the transition to a democracy. Each of the countries of the NIS needed quickly to adapt their legislation to the changing needs of their newly independent countries. But since the intellectual capital for this effort was concentrated in Moscow, this task was daunting. The ROLC worked with representatives from almost all of the former Soviet republics to develop a model civil code that each country could adapt or change to meet its needs. The ROLC worked closely with a Dutch organization, which was particularly appropriate since the Dutch have the most recent history in developing a modern civil code. As a result of these efforts, the ROLC worked on Parts I and II of a model civil code, which has been used as a basis for the individual civil codes in countries of the NIS. Without this effort, these countries may have, as the Dutch, worked to develop their own codes over the course of decades.

Invigorate Training Structures for Legal Professionals

The training structures in the NIS for legal professionals disintegrated with the break-up of the Soviet Union. Until the ROLC program was commenced, legal professionals received no comprehensive or sustained training whatever in Kazakhstan and Kyrgyzstan. The ROLC designed and developed training structures at both the national and regional levels in Kazakhstan and Kyrgyzstan. The ROLC also worked with a grantee to create similar training programs in Armenia. In each of these countries, the ROLC established separate training programs for judges and lawyers. In Kazakhstan and Kyrgyzstan, the ROLC also developed a program for procurators.

The focus of the training was on new and emerging areas of the law. In these training programs, the ROLC introduced various legal professionals to modern methods of training that involve the legal professionals as trainers. In Central Asia, because of the training module used and implemented in that region, many more judges, lawyers, procurators and court administrators have received training through the "training of trainers" approach than would have been the case under a more traditional model. Over 2,000 judges,

attorneys, court administrators and other officials in Central Asia received training under the Regional Contract

This new approach has led to increased activism on the part of these professionals to assume responsibility for their own destiny. The institutions through which ROLC provided the new training modules have become training centers, with the capacity to assess training needs, plan relevant training programs based on substantive code law of the country, and evaluate the impact of the training upon the institutions affected. The ROLC helped establish a modern, ongoing program of attorney training by private practitioners carried out under the auspices of local lawyers associations in Kazakhstan, Kyrgyzstan and Armenia.

The ROLC also served as the primary source of law texts and as the only source of training and reference materials available to judges, lawyers and prosecutors on law and practice in Kazakhstan and also in Kyrgyzstan. These materials became one means by which the new "reformers-trainers" could transform a system once wedded to authoritarianism into a modern, market-driven economy.

Judicial Reform Programs Produces Immediate Results

The ROLC introduced to those responsible for the development of the court system, including judges, officials from the executive branch, and parliamentarians, a range of issues that must be addressed for a modern judicial system. The ROLC innovated a series of high level policy workshops on judicial reform. Through these programs, the ROLC fostered increased activism of judges and judicial institutions in advocating for judicial reform and developing policies for the judicial system. These activities led to the Council of Judges becoming an active policy-making body in Kyrgyzstan, and the Union of Judges in Kazakhstan.

The ROLC educated Kyrgyzstan judges on budget practices and assisted them in inserting themselves more effectively into the formal budget process. This led to a 10-20% increase in the judicial budget allocations for 1998 and in 1999 to an increase of an additional 5% when at the same time all other government allocations were cut back.

Sustainable Links Established

The ROLC developed links between its counterparts and relevant institutions in the US and Western Europe. The ROLC developed links between the procuracies in these countries and the US Department of Justice and the US Department of Treasury. The ROLC developed links between the administration of the courts in these countries and the Administrative Office of the US Courts and the Judicial Conference of the US.

Developed Relations

The various conferences, seminars and workshops sponsored and in some cases designed by ROLC in coordination with USAID, brought together experts on Eastern European judicial development, providing essential forums for the planning of rule of law assistance to the NIS. The involvement of the Europeans, and in particular the Dutch through the Center for International Legal Cooperation, greatly advanced the development of model codes. Representatives of the NIS welcomed participation of Europeans brought in through ROLC, given the strong historic ties and the civil code traditions of most countries in the region. Indeed, the development of the model civil codes throughout the NIS with ROLC backing was made possible because of these strong partnerships.

Improved Communications

Certainly the considerable quantity of equipment delivered to the various institutions in the NIS under the Regional Contract have improved communications, opened avenues to European and US legal thought and jurisprudence, and generally provided technical support, particularly in the area of code drafting and modernization. In Georgia, for example, the Internet Connectivity activity for the Supreme and Constitutional Courts has greatly increased both the quality and sources of information for the justices, thereby permitting them to study comparative decisions, laws and normative acts in the process of doing their work. It has also opened up channels for the justices and parliamentarians to communicate internally as never before.

Civil Society

The grants made by ROLC provided a nascent NGO community in parts of the NIS the resources to expand their own agendas of civic activism. The partnering of US NGOs with newly activated indigenous groups that showed some commitment to the rule of law stimulated a series of activities, albeit on a small scale, that strengthened the civil society and raised public awareness of the importance of strong, independent courts and other judicial institutions. It also permitted US NGOs, such as Freedom House, to expand their activities, particularly in the area of human rights.

Lessons Learned

This report does not attempt a comprehensive treatment of the lessons learned resulting from the performance of the Contract by the ARD/Checchi Rule of Law Consortium, but a few lessons should be articulated. First, the Contract's inherent strength was its flexibility. It has been referred to as a "rolling" design, allowing ROLC and USAID to take maximum advantage of opportunities as they arose, and not predetermining specific directions or activities except in a general way. The significant work done out of the Regional Office in terms of advising USAID and creating a focal point for new developments in strategies, programs and partnerships in the rule of law was possible

largely because of the Contract's design. Likewise, the Contract's ability to respond to different USAID demands and management priorities in the TransCaucasus and Central Asia was due to the flexibility afforded through the Contract's scope of work.

ROLC's willingness to seek European partners and contacts, and USAID's strong support and participation in those endeavors, proved to be vitally important to the acceptance of assistance in the NIS and the development of programmatic activities that had impact. It cannot be overestimated how much this collaboration opened doors to legal institutions in the NIS that otherwise would have remained closed.

The capacity of ROLC to attract bright, Russian-speaking lawyers for its field offices, and to recruit outstanding local staffs, many of whom were also trained lawyers or administrators, was key to success of ROLC field programs. The commitment and excellent relationships developed by the ROLC's field offices, both with the USAID missions and their legal counterparts, provided the concomitant commitment of our partners to realize the ambitious reforms they had set out to achieve.

While the Contract's flexibility and broad scope was advantageous in certain respects, the lack of direction and competing interests were sometimes negative influences on the performance of the Contract activities. The US Government had never worked in the NIS in legal reform, and as the US bureaucracy organized itself to cope with the plethora of challenges, both political and developmental, there were the predictable tensions and pitfalls that one would expect in such a situation. The development context in the NIS was new, and political pressures in the US and in the NIS were intense both in terms of the nature of the assistance but also in the demand to obtain quick and tangible results. The US bureaucracy had no overarching vision for legal reform in the area, and agencies within the US Government were not always in agreement over what should be done. The US Congress was highly interested in monitoring the assistance and progress in the sector. Consequently, ROLC, as the prime implementor of the assistance to the rule of law in the NIS, was in an ambiguous position with respect to these various interests.

Within USAID itself, there were differences of opinion that reflected on the Contract's ability to carry out activities. The USAID field missions did not always see eye-to-eye with USAID/Washington, and in some cases did not communicate fully with the headquarters office. This led to faulty communications and misunderstandings. Certainly one lesson that everyone should have learned in this context is that when beginning a new venture such as assistance to the NIS, there needs to be clear guidance and policy articulated from the US Government, and then a reasonable management of the Contract to afford optimum performance. In fairness to USAID, many of the officers assigned to the NIS, both in Washington and in the field, were new to the region, were under enormous pressures from USAID to produce, and had no experience managing a Contract of this size or complexity. Many of them felt the heavy political demands that seemed to pervade assistance to the NIS (not just in the rule of law), and they were limited by these constraints.

Where USAID provided clear guidance and reasoned management but gave the ROLC the freedom to develop programs, coordinate with counterparts and other donors, and use our considerable resources to respond to the needs of legal reform, the Contract experienced its greatest successes. The field operations in Central Asia, and many of the activities carried out by the Regional Office, provide examples of this formula, and the results are positive. A partnership of trust was developed that permitted ROLC's consultants to use their expertise to maximum effect. This relationship was instrumental in supporting USAID's need to produce results and genuine reform.

III ROLC's Washington Office (Regional Office)

The Regional Office, Washington, DC office of the Regional Contract, was established in January of 1994. It was created to perform a number of activities that can be roughly divided into two main functions. The first role performed by the Regional Office was in the substantive area of developing a methodology for the use of US assistance in encouraging the development of rule of law in the emerging democracies of the former Soviet Union. This area comprised a number of activities designed to foster greater collaboration, coordination and exchange of knowledge and experience among all the participants--consultants, USAID officials and counterparts--in the technical aspects of legal reform, and/or to encourage the development of models and modules which could be applied in more than one country. In performing this function the Regional Contract designed discreet projects to correspond with the overall areas of emphasis of USAID rule of law programming in the NIS--legislative drafting, judicial reform, law schools, reform of the criminal justice system and support for the evolution of civil society. For purposes of this report, these are broken down into the following five activities:

- 1 model code drafting,
- 2 conferences, seminars and colloquia,
- 3 organized crime centers,
- 4 small grants program, and
- 5 Rule of Law newsletter

The second function of the Regional Contract was to assume a logistical, coordinating role. Because there were several different rule of law projects in the NIS besides the Regional Contract--in Russia (the Russia Contract awarded to ARD/Checchi), Ukraine, Belarus and Moldova (the Slavic Contract awarded to ARD/Checchi), Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan (the Central Asia Contract awarded to Chemonics, Inc)--and because oversight responsibility and COTR authority was split between Washington, DC and the various field missions, there was a large need for a central, coordinating unit. The Regional Office was tasked with performing this role, working closely with USAID/Washington staff. There were three main activities that fall under this category and are described in the section below:

- 1 serving as a focal point for communication between USAID/Washington and the ROLC project offices in the field,
- 2 providing logistical support for the Contract field offices and for USAID/Washington, and
- 3 serving as a repository of information about all donor activity in support of rule of law in the NIS, specifically by building a donor database

Because a chronological narrative of steps taken, problems encountered and results achieved can be found in the quarterly reports, the summary that follows will not attempt to repeat such detail, nor to adhere strictly to a sequential description. Rather, a brief

discussion of each of these issues--progress, problems, results--is provided for the purpose of highlighting lessons learned

Methodology for Development of Rule of Law

Model Code Drafting

All of the countries of the Newly Independent States faced the same problems and obstacles in regard to developing new legal codes--commercial, civil and criminal--to replace old Soviet law no longer suitable to the new conditions of democratic market economies. A complete lack of experience and knowledge of the kind of legislative framework required, coupled with an urgency of time, made this an important area for US assistance to make a substantive contribution during the transition. Each country was moving from the same Soviet structure to a similar market environment, yet each was a sovereign nation with its own specific concerns and requirements. Not surprisingly, Russia led the way in developing new codes, but it was not politically acceptable for the newly independent countries to simply adopt the Russian codes. Thus, the donor community, working in concert with the Inter-parliamentary Assembly of the Commonwealth of Independent States, chose to support working groups which would develop model codes, which could then be made available for use as a base, to be adapted as necessary by individual countries.

Cooperative efforts between top experts in the United States, Western Europe, and the Newly Independent States to develop a market-oriented model civil code and other model legislation provided a key legal element in the ongoing transformation of the former Soviet republics from command economies to free market economies. The ROLC effort with the working groups allowed concentration of resources for the development of one high quality and firmly market-oriented code. This would lead to unification of many areas of business legislation and to simplification and facilitation of trade and investment in the emerging market economies.

Moreover, the development of working relationships with the various delegates provided a cross-national perspective on different types of assistance needed by different republics. With this knowledge the ROLC was able to modify design principles to move ahead with drafting assistance to working groups in individual states. A successful model for institution building was developed and adapted to individual countries, which further contributed to the conceptualization of a consistent methodology for donor assisted transitional development in the NIS. To facilitate communication among the consultants, drafters and delegates to the working groups, the ROLC provided hardware and electronic communications capacity linking colleagues to each other within the NIS and with those in the United States and Western Europe.

By summer of 1995, the first five ROLC drafting sessions produced finished drafts of parts one and two of the model civil code, receiving the endorsement of the Inter-parliamentary

Assembly of the Commonwealth of Independent States. The ROLC worked closely with the Centre for International Legal Cooperation. The Center for International Legal Cooperation was an important partner in this effort for at least two reasons. First, the Netherlands was the country in Western Europe with the most contemporary civil code. The Dutch Civil Code went into force in the early 1990s, after decades of work and debate. The expertise that was developed in the Netherlands was fresh and impressive. The ROLC recruited US experts to fill in the holes on areas in which the model code working groups wanted to incorporate the US approach. Second, these workshops in the Netherlands were more convenient to the former Soviet Union. Bringing experts to the Netherlands for a few days proved more attractive and economical than bringing groups to the US. The New York University Law School, under a subcontract, provided bibliographic and technical assistance to persons and institutions engaged in the drafting of the model civil code as well.

Two seminars were held in which ten of the former Soviet republics attended. The Leiden conferences were marked by a growing interest in collective drafting efforts. Follow up discussions with individual delegations also laid the groundwork for expansion of legislative drafting and judicial training modules which could be tailored to specific country circumstances.

During 1995 the US State Department made a policy decision that the US would no longer provide any support to structures within the Commonwealth of Independent States ("CIS"). This led directly to the termination of ROLC's fruitful relationship with the Inter-parliamentary Assembly of the CIS, and thus to the important work on the development of model codes. In part this reflected sensitivity within the US foreign policy world of the implications of using newly enacted Russian legislation as a starting point for legal frameworks of the Newly Independent States. Thus, by February 1996, the initial work with the model civil code was completed, and the focus turned to the development of national codes in individual countries.

Judicial Training

The area of judicial training was a fundamental component of the ROLC's work under the Regional Contract. The ROLC monitored the implementation of the judicial training programs with the courts of general jurisdiction and commercial courts in Russia and Ukraine. After its initial successes in Russia and Ukraine, the ROLC, developed approaches for other countries under the Regional Contract. At one of the Leiden conferences, Keith Rosten, who was then still working with the courts in Russia met, along with David Bronheim, the Project Director at the time, with delegates from other countries. These discussions led to the launching of training programs in Kazakhstan and Kyrgyzstan, discussed in the section on Central Asia below.

Conferences, Seminars and Colloquia

Throughout the Contract period, and especially in the period immediately following start up and mobilization, the ROLC sponsored and/or hosted conferences, seminars and colloquia which tracked political and legal developments in the NIS on issues of legal reform, organized crime and the ongoing experience of multilateral donor assistance in facilitating the transition to rule of law in the NIS. These were successful and important because ROLC was able to make top experts in the field available to USAID, Department of State and other donor organizations. By bringing together experts who had conducted ROLC training programs on both national and regional scales, the ROLC was able to provide USAID and others with a cross-national perspective on critical elements of legal system reform throughout the NIS.

Organized Crime

From the outset it was recognized that the growing criminalization of society and economic activity in the NIS posed one of the most serious threats to establishment of the rule of law and the mechanisms of an open and transparent market. At the same time this was clearly seen to be one of the most problematic areas in which ROLC would operate, given the environment of corruption and the intense interest of US law enforcement agencies, particularly the Department of Justice. There was some territorial sensitivity among the various players. Thus, at the outset a cautious approach was taken, as the ROLC worked to facilitate the exchange of information between the many interested parties. The formation of working groups was encouraged, with the ROLC often taking the lead in organizing and sponsoring seminars during which different constituencies within the criminal justice community could begin to work together and agree upon, if not a methodology, at least a course of action. Early on in the Contract a number of steps were taken to establish working relations between key figures in the American criminal justice community and counterparts in the NIS. Throughout the Contract ROLC continued to supply USAID with important information on organized criminal activity and corruption in the NIS, as well as to respond to specific requests for information on specialized topics of interest to USAID and the United States Government concerning crime, organized crime, and reform of the criminal justice system in the NIS.

Small Grants Programs

All of the three USAID contracts awarded to ARD/Checchi for rule of law programs in the NIS recognized the need for programmatic initiatives designed to support and promote the evolution of civil society in the region as the underpinning for effective rule of law. Such programs generally involve a grass roots approach--that is, they are centered on ways to increase the participation of the citizenry in building the foundations of rule of law. This ranges from public education efforts, to support for free media to support for a wide range of local NGOs that can advocate for change and increase the demand from the population for a fairer, more transparent legal system.

Both USAID and the ROLC agreed that this type of work is often best done by US NGOs, PVOs, universities or other public interest groups that can build lasting partnerships and mentoring relationships with local organizations. Thus each ROLC Rule of Law contract provided for a small grants program through which a diverse range of organizations could receive funding. Because of the nascent state of almost all NGOs in the NIS, and because of the almost complete lack of mechanisms and previous experience with foreign assistance, it was decided that all grants would be made to US organizations. These groups would in turn finance local activities and as appropriate provide funding directly to local counterpart organizations.

The Regional Office played a key role in all three small grants' programs. For the Russia and Slavic Contracts the Regional Office provided consultations and guidance for the design of the programs. The office provided support with outreach, advertising and other necessary steps up to and including preparations for panel review, deliberation of applications and provision of recommendations to USAID for final evaluation and approval. Once grants were awarded the Regional Office continued to play a critical supporting role with regard to financial and administrative management, as described in section III above.

The Regional grants program was designed to support projects that were active in more than one former Soviet republic and/or that were designed to lead to the development of model programs and approaches with broad applicability throughout the region. In all eleven grants were awarded, totaling \$2,238,458. The most visible and important grants are described briefly below.

Freedom House This grant was designed to undertake a program of "Law in Action," encompassing a number of research, training and public education initiatives in cooperation with the Andrei Sakharov Center and other human rights organizations in Russia, Ukraine, Belarus, Armenia, Moldova and Kyrgyzstan. Achievements include a human rights photo exhibit dealing with the ethnic conflicts of the NIS, a Human Rights Advocates television series, and a series of brochures entitled "You and Your Rights." A human rights mission to Chechnya sponsored by Freedom House helped to forge working relationships between nascent NGOs and human rights organizations in Russia, as well as to create stronger ties with human rights organizations in the international community. Perhaps most importantly, Freedom House successfully mentored the Sakharov Foundation to become an efficient and savvy Russian non-profit organization, capable of managing its own affairs with future donors, public and private.

International Foreign Policy Association This grant included local partners at Moscow State University and Tbilisi Business School. It supported a cross-republic/cross-discipline alternative dispute resolution training program in Russia and Georgia. More than 130 Georgians and Russians were trained in ADR.

techniques. In their final report the IFPA gave documentary evidence of the sustainability of their activities under this grant. ADR training continued (by individuals trained under this program) with a specific focus on the attempt to de-escalate ethnic tensions in Georgia.

Social Science Research Council This grant worked with the Russian Science Foundation to support political science workshops in Russia and Ukraine. Two workshops successfully introduced Western scholarship and techniques in political science to a developing community of scholars in the NIS.

Network for East-West Women This grant was a partnership with the Moscow Center for Gender Studies to support the development of the NIS legal framework in Russia, Ukraine and Kyrgyzstan. A conference was sponsored in Saratov, a major training handbook was produced and translated, presentations were made before Duma committees and a gender curricula was developed for law school programs in Ukraine. Computer and modem donations and e-mail training were provided for the directors of the Russian Legal Committee and the Saratov Association of Women Lawyers.

League of Women Voters Education Fund This grant teamed with the Moscow Center for Gender Studies and the Ukrainian Center for Women's Studies to support a grassroots internship program for emerging women leaders in Russia and Ukraine. This program familiarized NIS women with issues related to local democratic governance.

The small grants program was wound down at the beginning of 1996, and by April of 1996 most of the grant administration was being handled by ROLC's field staff. The position of Grants Manager was discontinued. Attached at Appendix A is a list of all grants administered under the Regional Contract.

ROL Newsletter

In response to the Regional Contract's mandate to facilitate the development of a methodology on the use of US assistance to promote the evolution of rule of law in the NIS, it was decided in the first quarter of 1995 to publish a ROLC newsletter. The goal was to produce a periodical on legal reform issues reflecting the challenges faced not only by the legal practitioners and proponents of law reform in the NIS, but also the complexities faced by donors attempting to cooperate with the individuals and institutions engaged in the transition of the NIS to market-based societies. The Rule of Law newsletter provided a focal point for ideas on the direction, implications and consequences of law reform and the political and institutional developments in the NIS. Issues focused on legal education in the NIS, privatization, constitutional tribunals and the procuracy, among other subjects.

The newsletter was produced regularly through the period of the Contract. Eleven issues were published, some as long as 20-30 pages. Contributions and articles were submitted by a wide range of participants, including ROLC consultants and staff members, other individuals with a broad range of experience in legal reform in not only the NIS, but also Western and Central Europe, and host country nationals who were intimately involved with the process of legal reform in the region. The newsletter was widely distributed to US governmental agencies, to missions in the NIS, to US academic circles and NGOs, to European organizations and to the many actors involved in various aspects of post-Soviet affairs. Issues of the newsletter are attached as Appendix B.

Coordination, Communication and Logistics

Logistical Support for Field Offices

The Regional Office played a critical role in supporting the Russia and Slavic Contracts, as well as the field offices in Almaty, and Bishkek, and programs in Yerevan and Tbilisi. Regular fax and email communications were established with the field offices early on. Procurement for the field offices and later the program recipients was largely handled out of the Regional Office, as was all contracting and travel planning for US-based consultants. All logistics for the assessment teams, including those for Russia and Ukraine, were handled out of the Regional Office. The US-based staff traveled frequently to the field offices, providing logistic and programmatic support. The teams helped complete activity design documents and final drafts of the action plans for the Russia and Slavic Contracts, and held continuing discussions with both USAID and host country counterpart organizations concerning terms of assistance.

Most of the administration of the grants programs for all three programs was done in the US. This included advertising, evaluation, award and oversight, particularly financial management. Ongoing monitoring was largely performed in the field, where the activities took place, but the Regional Office held regular consultations with regional grants managers, which ranged from grants program development to advertising and application evaluation procedures.

The logistics function was critical to effective start-up in the field. The Regional Office performed this role at a time when there were very few systems in place and very little experience in traveling and setting up operations in the former Soviet Union. Certainly the ROLC became more efficient during the second year and beyond, during which time logistics rightfully dropped to a secondary function. Throughout the Contract, administrative support for a wide range of activities continued to be provided in Washington. In sum, while the logistics role became less visible it did not become less necessary. It was particularly important in the NIS to maintain strong logistical support for field staff who confronted problems not encountered in other developmental contexts.

Link between USAID/Washington and ROLC Field Offices

Throughout the Contract, and particularly during the early period, the Regional Office served as the link between USAID/Washington and ROLC field offices. Weekly meetings with the Washington, DC based COTRs were held, and regular written reports were disseminated. Quarterly reporting was also done out of the Regional Office, based on regular communication with staff in the field. This allowed field personnel to concentrate on program implementation with the benefit of information from both ROLC and USAID.

In addition, the Regional Office provided continuing support on developments in the NIS, including valuable information concerning the nature and types of criminal activity. In general, the Regional Office served as a communication center between USAID/Washington and the ROLC field offices, and the principal source for the dissemination of pertinent information and guidance for the successful management of rule of law activities in the NIS.

The various contracting mechanisms for rule of law programs in the NIS, coupled with the split responsibilities between USAID/Washington and the field missions, assured that effective coordination and communication would be an issue, and necessitated a focus on facilitation. The Regional Office was the natural place to house this function, given its direct communication with all but one of the rule of law field offices (the exception was Chemonics in Central Asia) and its location in Washington, DC. For the most part this was an effective solution to the problem, and the Regional Office was a vibrant hub for ROLC activity in the NIS. However, it became problematic in cases where roles were not clearly defined. While tensions between headquarters and the field are a normal part of development work, these were exacerbated, especially in the case of the Russia Contract, where USAID/Washington struggled with USAID/Moscow over programmatic control of the rule of law portfolio. This led to a situation of crossed alliances, where USAID/Washington enlisted the Regional Office to buttress its role, while ROLC personnel in Moscow answered to USAID/Moscow. The confusion and at times outright animosity that resulted benefited no one, certainly not the cause of developing rule of law in the Russian Federation. In time, as COTR authority was unambiguously transferred to Moscow, the situation resolved itself, but not before leaving a residue of distrust between the various players that was never fully to dissipate.

Development of Donor Database

The Regional Contract provided for the establishment of a donor database to house comprehensive information about all efforts to promote the development of rule of law in the NIS to better coordinate all activities and to avoid duplication of efforts, between USAID, other US Government and other donor supported programs. In April of 1994, the ROLC entered into a subcontract agreement with ASET Consultants, Inc., to gather information on rule of law activities in the NIS, including projects funded by the US Government, foreign governments and the NGO/PVO community. ASET, a Gray

Amendment firm with prior experience gathering information on Rule of Law programs in the NIS, had offices throughout the region, including Kiev and Moscow. The cost of setting up the database was shared by the Russia and Slavic Contracts. The US Department of Commerce's National Technical Information Service (NTIS) was contracted to house and electronically distribute the Rule of Law Donor Database through the Rule of Law-NIS Library of Files on FedWorld for a two year period.

By November of 1994 the ROLC had completed the most comprehensive survey of donor related assistance to the rule of law in the NIS to date, and made it widely available electronically. A series of procedures, including regular mailings and follow-up were put in place to assure regular updating to keep the database current. In the early period the existence of the database produced important results. Information received from the International Center for Legal Cooperation concerning commercial drafting efforts in the NIS created an opportunity for collective efforts in model code drafting, discussed in detail above. Monitoring of donor assistance also identified tax law as an important area for foreign assistance, and, finally, information supplied by other donors has allowed the ROLC to create relationships with other organizations, such as the Department of Justice's efforts to develop programming in response to organized crime.

Unfortunately, use of the database declined significantly after the first year, for a number of reasons. One of these was the failure of the donor community to provide information on their activities in a timely manner or to update information once it was uploaded. Second, the number of major donors identifying themselves as supporting rule of law activities was declining, while the number of NGOs supporting relatively small projects (under \$100,000) grew rapidly. The decision was made, with USAID's concurrence, to de-emphasize the donor database rather than to redirect the effort toward the very time consuming task of gathering information about the numerous NGO civil society projects.

At the same time, the need for the donor database as a coordinating mechanism for ROLC had been satisfied. During the first two years of the Contract, the ROLC became very knowledgeable about all the major donors and their activities in the region, and became active as a coordinator of these efforts. Thus the donor database was no longer needed. At the end of 1995, the ROLC recommended to USAID that this activity be discontinued.

IV Field Offices and Programs

The Regional Contract also developed programs to provide support in creating legal infrastructure in particular regions. The only area specifically contemplated in the Regional Contract for field activities was in the TransCaucasus, but as the success of the ROLC's programs became known, the USAID Mission in Almaty, Kazakhstan, tapped into the Contract to create a significant program to support training of legal professionals in commercial law. This section addresses the Central Asian field program first and then discusses the programs in the TransCaucasus.

Central Asia

The Office of Market Transition for the Central Asia republics programs designed a comprehensive commercial law program in the summer of 1995. One of the major components of the Commercial Law Program was training support for legal professionals.

The activities which the ROLC had undertaken in other NIS countries demonstrated the capacity to fill the particular needs of the program. The Mission therefore tapped the ROLC to develop and implement this substantial regional program in Central Asia on training of legal professionals in Kazakhstan and Kyrgyzstan. The program was commenced in late 1995.

The program was conceived to ensure that the new commercial legislation drafted with USAID assistance would be competently applied by core legal institutions. This program was a recognition that the goals for privatization and economic restructuring and those for democratization and the rule of law were complementary and mutually supportive. The mechanism to further both economic restructuring and democracy goals was to support and strengthen emerging legal institutions in Kazakhstan and Kyrgyzstan.

The resulting program was a cooperative effort between the Office for Market Transition in Almaty, and the Office of Democracy and Governance in Washington, DC. The ROLC's activities in Kazakhstan and Kyrgyzstan were conducted under the auspices of the Commercial Law Project of USAID in Almaty, Kazakhstan. This project addressed the need for a legal environment that supported further privatization and the conduct of private enterprise in Kazakhstan and Kyrgyzstan. When the program was commenced, new commercial and civil legislation that was essential for a transition to a market economy in Kazakhstan and Kyrgyzstan had already been adopted. Effective implementation of the new laws, however, required extensive additional effort. USAID acknowledged that the legal scaffolding for the new market order could only be as sound as its weakest joints--and those were the justice system professionals, especially judges. The best-crafted laws were empty words if they were not reliably, consistently, and fairly applied.

The new commercial laws provided for completely new forms of economic activity and

social relations and embodied principles consonant with a market economy that were strikingly different from socialist antecedents. Those laws could not be applied effectively unless and until the local judiciaries and professional bar understood them. At the same time, indigenous training programs in Kazakhstan and Kyrgyzstan had collapsed along with the Soviet Union. The ROLC's initial work was conceived and designed to address this urgent need to provide training to legal professionals in the new commercial and civil laws necessary for a market economy to function, and simultaneously to lay the ground for the local development of modern programs of continuing legal education that would sustain that effort and help create the kind of legal system that ultimately is necessary for a sustainable market economy.

Over the two years of its work under the Regional Contract in Central Asia, the ROLC developed and carried out a broad range of training programs for legal professionals. The ROLC developed and carried out its training programs to foster the development of local training capacity and thereby create the basis for self-sustaining programs and for ongoing institutional development generally. The training activities organized by the ROLC were planned and carried out under a model that contemplated three phases of training. Each of these three phases is described in more detail below.

Three Phase Program Design

Phase One Train the Trainers

In Phase 1, core groups of trainers for each professional group received instruction in the design and conduct of training programs from US training institutions, with special emphasis on the presentation of core commercial or economic crime subjects. The ROLC selected small groups, no more than five from each country, to bring to the United States for training. The purpose of this Phase was to 1) acquaint the participants with modern pedagogical methodology, 2) acquaint the participants with their counterparts in the US, 3) provide an overview of core legal subjects, 4) introduce new professional development topics to the participants (for judges, for example, these subjects included judicial ethics, the role of the judge in a democratic society, judicial administration, and similar profession-specific topics), 5) plan for follow-up activities.

The ROLC introduced various Phase 1 participants to their counterparts in the United States, either judges, attorneys or prosecutors. These were the people in whom the ROLC invested money, time and energy. These were the people who ran the programs when they returned.

Phase Two General In-Country Seminars

In Phase 2, the core trainers who had undergone training in Phase 1 conducted for their colleagues in-country general seminars in commercial legislation and professional practice or economic crime subjects, as applicable, with the support and participation of technical assistance providers from the US training institutions as well as elsewhere. These seminars generally went from 1-2 weeks in the capital cities of Kazakhstan and

Kyrgyzstan

The second phase of the program included US participation to provide discipline and support to local structures. The ROLC did not want to overwhelm the program with interpretations or translations of US laws and regulations, but strived to provide a backdrop or a setting for the local presentations. If the local component of presenters was approximately seventy percent, complemented by thirty percent of Western lecturers, judges or attorneys, the programs would not overwhelm the host country participants, and the ability of the audience to absorb the material was enhanced considerably.

By the time the program reached Phase 2, the number of people affected was much higher than in Phase 1. After the ROLC's first program in Kazakhstan, word got out about the effectiveness of the program, and for the second program participants traveled in from throughout the country on their own money to attend the seminar on commercial law for attorneys. As many as eighty people came to the seminar, almost half of them from a thousand to fifteen hundred miles away, because they had heard about the seminar. Their appetite for legal information was very great and the seminar filled a need. The ROLC demonstrated that, with our local counterparts, we could run a program that was viable and sustainable and that could provide important information. Even though there may be only fifty to seventy people at these seminars, the materials produced for the seminar were copied and distributed in their home regions.

Phase Three Concentrated Seminars

In Phase 3, the ROLC produced and held concentrated workshops for judges and attorneys devoted to emerging issues in commercial law that both provided a comprehensive grasp of the subject matter and made use of local instructors trained by the ROLC. The final phase was what were called concentrated seminars, because they were short, approximately 1-2 days for small audiences throughout the country. The ROLC relied primarily on local professionals to teach local law to local audiences. These seminars were organized quickly. In Kyrgyzstan, within sixty days after the enactment of Part I of the civil code, over one-third of all the Kyrgyzstan judges attended a seminar on the civil code.

Concentration of the First Year Target on Commercial Law Training for Judges, Attorneys and Other Legal Professionals

The first year of the Training Project was devoted to training judges, attorneys and other legal professionals to commence the process of developing a judiciary and bar competent for litigating and adjudicating commercial disputes. The ROLC trained a core set of judges from both Kazakhstan and Kyrgyzstan at the National Judicial College ("NJC") on core commercial topics and training methodology. Along with US judges and other US legal experts, these Kazakhstan and Kyrgyzstan judges are now training their colleagues.

During the first year of its work, the ROLC also worked closely with the Practicing Law

Institute ("PLI") in the US, developing and carrying out training programs for attorneys in commercial law, with an emphasis on training local trainers (Phase 1 training) and holding large and extensive model seminars that provide a general introduction to the myriad of new commercial and civil laws being adopted (Phase 2 training)

Concentration of the Second Year. Expansion of Program to Economic Crime Adjudication for Judges and Procurators

During the second year of its activity the ROLC expanded upon the base created during the first year of its work and, in close collaboration with local counterparts, oversaw the development of training programs consisting of concentrated seminars for judges and attorneys on commercial law subjects. The ROLC carried out a series of concentrated, intensive seminars devoted to concrete, specific areas of commercial and civil law with an emphasis on making the new laws work (Phase 3 training), and carrying them out in a manner that helped local counterparts institutionalize the training programs.

During the second year, the ROLC was given the additional task of developing and carrying out a similar program on economic crime matters with the local judiciaries and procuracies. Economic crime posed a threat to the privatization of state-owned assets and the transition to a market economy that was underway in Kazakhstan and Kyrgyzstan, if criminal elements were to play a major role in the emerging private sector, that would adversely affect the legitimacy of new states and governments and the operation, and public perception, of a market economy. The expanded focus of the Commercial Law Project was recognition of the fact that commercial law is comprised of two inextricably intertwined areas of the law -- civil legislation and criminal legislation, and that the development of a private sector depends on the legal infrastructure and enforcement mechanism for both aspects of commercial law.

During the second year, the ROLC developed and carried out (1) a training program in economic crime for core groups of local procurators who then served as trainers for their colleagues, and (2) a general training program for judges. The ROLC developed the program with the local procuracies and judiciaries, along with the United States Department of Justice ("the DOJ"), the American Prosecutors Research Institute ("APRI") and the NJC. The ROLC also facilitated the efforts of the DOJ to explore with the local procuracies independently the prospects for its own program of collaboration and training in Kazakhstan and Kyrgyzstan.

Concentration of the Third Year. Expansion of Program to Court Reform

As the program entered its third year, the program continued to concentrate its efforts on institutionalizing its commercial law training and training on economic crime for judges, attorneys, and procurators. The training activities highlighted serious structural deficiencies in the court system as a whole. A market economy can function only where

there is an independent, professional judiciary working in an efficiently managed judicial system. The ROLC's program in judicial reform and judicial administration was designed to address the structural impediments to the effective functioning of the judicial systems in Kazakhstan and Kyrgyzstan.

The judiciaries in these countries suffer from severe problems in management and administration that harken back to their Soviet past and to the stunted roles the courts played in the Soviet system. Current local administrative practices, experience and capabilities were not commensurate with the larger role that the judicial system must play in a democracy and a market economy, and the judicial system would not develop as a full-fledged, independent branch of government and fulfill the functions required for democracy and a market economy unless and until these problems were resolved.

This component of the judicial professionalization program concentrated on two major areas: (1) management and organizational aspects of effective judicial administration, and (2) their implication for fostering an independent judiciary. The ROLC used the program to educate the judges themselves about administrative issues and to spur them to take a more active role in running their judicial system and securing judicial independence. The program desegregated the functions of the judiciary into its constituent functions and created workshops centering on those functions. Three series of programs were planned. The first held in 1997 was devoted to budgeting and finance issues, as well as security, space and facilities. The second held in early 1998 was devoted to relations with other branches of government, long range planning and strategy, judicial resources, and media relations.

Each of these programs consisted of a workshop in the US or Europe, conducted by officials of the Administrative Office of the US Courts (the "AO"), and the Ministry of Justice of the Netherlands along with Dutch judges and US judges (under auspices of the International Committee of the Judicial Conference). Each workshop outside the country was followed by a workshop in-country to address specific, related local issues. The ROLC used these seminars to gather broad-based support from the parliament, the president's office, the ministries and the judiciary to plot a reform strategy for court administration and the judicial system.

The ROLC's Local Partner Institutions in Kazakhstan and the Kyrgyz Republic

Partners Institutions in Kazakhstan

Ministry of Justice. During the first year of the Training Project, the ROLC worked with the Ministry of Justice, primarily at the level of the First Deputy Minister. The Ministry had the authority for the administration of the courts, including training of judges at the oblast and the local levels. The Ministry authorized the release of judges from their duties to attend the training seminars. During the first year, the Ministry also provided limited financing to support regional concentrated seminars. The ROLC worked closely with the

Deputy Minister of Justice, until his departure in early 1998. At that time, the situation changed dramatically upon the revitalization of the Judicial Training Center (see below). Over 1997, the Union of Judges with the support of the Supreme Court, took the initiative in organizing and supporting judicial training financed by the ROLC. It struck a *modus vivendi* with the Ministry of Justice and played a leading role in training, a development which the ROLC welcomed.

Judicial Training Center The Judicial Training Center under the Ministry of Justice replaced the Kazakh State Law Institute, under the auspices of which the ROLC conducted training in its first year (1996). At the time that the funding under the Regional Contract was exhausted, the Training Center was expected to assume increasing responsibility for developing and conducting permanent training programs. It is expected that after the end of the Regional Contract, the Training Center will be funded partly with proceeds of a World Bank technical assistance loan.

Supreme Court The Supreme Court has been an institution in transition. In November 1995, the Supreme Court absorbed the commercial courts. Early in 1996, the Chair of the Supreme Court was removed from his position for allegedly accepting bribes. In mid-1996, the judges of the unified court system were required to undergo requalification to remain on the bench, and many of the judges were forced to step down from the bench. The chairs of the oblast courts were recently appointed (1996-97).

Despite these changes, the system of courts continued to function to interpret and apply the new laws. The Supreme Court sitting atop the judicial system was a major partner in the ROLC's activities. The Supreme Court in Kazakhstan is divided into five collegia. The three collegia which were targets of the ROLC's efforts were the Collegium for Civil Cases, the Collegium for Commercial Cases, and the Collegium for Criminal Cases.

During the last year of the program under the Regional Contract, the Supreme Court in conjunction with the Union of Judges showed great support for the ROLC's work and its collaboration with the Union of Judges. Judges from the Supreme Court were trainers at the general seminars in Almaty as well as the concentrated seminars in the regions.

Union of Judges The Union of Judges, which was formed in Fall 1996 with the help and support of ABA/CEELI, became a very active and engaged partner for the ROLC in its judicial training activities. The Union, which worked very closely with the Supreme Court (its President is the Chief Justice) played a direct role in organizing and facilitating the ROLC's judicial training activities and assisted the ROLC in a wide variety of ways.

Adilet Law School Adilet Law School was one of only a few accredited private law schools in Kazakhstan and established a reputation as simultaneously the most academically rigorous and the most progressive law school in the country. It specialized in the teaching of commercial law topics, and attracted the most highly qualified and brightest teaching talent in the country to its faculty. Adilet performed superlatively in the first cycle of

attorney training seminars and assumed the lion's share of curricular and logistic organization. Adilet demonstrated its firm commitment to continuing legal education for professionals and has made good its intention to create a training center for continuing legal education, to which the ROLC contributed seed funds for physical development of the training space. Adilet played a central role in molding the attorney training activity, in conjunction with the Association of Lawyers of the Business World (Commercial Lawyers' Association).

The ROLC tapped into Adilet's geographic capabilities to hold seminars outside of Almaty. Adilet's branches in Dzhambul and Akmol'a served as organizing sites for Phase 3 seminars held in the summer 1996. In December 1997, Adilet conducted the first in the new series of seminars (in this case, on natural resource exploitation) targeted on issues of particular concern to commercial practitioners.

General Procuracy The General Procuracy had responsibility for training procurators (prosecutors) in the supervision of investigation and prosecution of all types of crimes, including economic crimes. Uniquely among the successor procuracies in the NIS, the Kazakhstani Procuracy was relieved of its direct role in criminal investigations, which was transferred to the investigative agencies. The Procuracy enjoyed a unique status separate from the courts and the other law enforcement bodies and subordinate to the President alone. Although not quite as powerful as formerly, the Procuracy has continued to play the major role in the criminal justice system. Its support was essential in successfully countering the growth of economic crime. The economic crime program was successfully concluded with the General Procuracy. As funding expired for this program, the ROLC was able to work on a transition design to facilitate the Department of Justice assuming responsibility for training, with assistance as requested provided by the ROLC.

Partners in the Kyrgyz Republic

Supreme Court and Higher Commercial Court The court system in Kyrgyzstan differs from the Kazakhstani system in two significant ways. First, the judicial system has gained a measure of institutional independence, and is no longer controlled by the Ministry of Justice. Second, despite a proposal to unify the court systems, the courts have remained bifurcated, with the Higher Commercial Court exercising jurisdiction over commercial disputes between legal entities, and the Supreme Court exercising jurisdiction over all other commercial law matters (other than Constitutional questions). Judges in both systems adjudicate disputes involving commercial law issues. The ROLC worked closely with both Courts in order to reach the widest local professional audience. Aware of the sensitivities of each court system attempting to protect their independence, the ROLC proceeded cautiously, trying to work with both the Supreme Court and the Higher Commercial Court on judicial training activities. This approach has worked, and the heads of both courts supported the efforts to train the judges from both systems together.

Court Department A Court Department was established by Presidential decree toward the end of 1996. The Court Department became responsible for court administration,

judicial training and the execution of judgments. From the outset, the ROLC enjoyed good relations with the Court Department and worked with it closely in connection with all of the ROLC's subsequent judicial training activities in order to help the Court Department assume and carry out its own institutional responsibilities to modernize and professionalize the judicial system in Kyrgyzstan. As noted above, the ROLC developed a regional program to provide technical assistance in matters of judicial reform and administration.

Constitutional Court The ROLC worked closely with the Constitutional Court. The ROLC held two workshops for Constitutional Tribunals from Kazakhstan, Kyrgyzstan and Mongolia, and an observer from Uzbekistan. The major emphasis of the ROLC's efforts with the Constitutional Courts was in adjudicating cases, which implicate matters dealing with economics or the economy. Members of the Constitutional Court also took part in a variety of the ROLC's other training activities, and the ROLC expects that the close working relationship formed thus far will continue.

Lawyers Association The Lawyers Association of Kyrgyzstan was formed in 1995 and continued to be the most active professional organization for lawyers and judges in Kyrgyzstan through the entire program in Kyrgyzstan. Since its founding, it has taken initiative in advancing programs to support the emerging practice of law by private practitioners in Kyrgyzstan, to promote the involvement of lawyers in the preparation and review of new legislation, and to promote legal professionalism generally. It had an active membership of over 120 lawyers. The ROLC worked closely with the Association in developing and carrying out a program of concentrated seminars for Kyrgyzstan attorneys.

General Procuracy The General Procuracy has responsibility for training procurators (prosecutors) in the investigation and prosecution of all types of crimes, including economic crimes. As in Kazakhstan, the Procuracy enjoys a unique status, separate from the courts and the other law enforcement bodies. The National Procuracy of the Kyrgyz Republic was an active, supportive and enthusiastic partner of the ROLC, has taken affirmative steps to create and develop its own training center and CLE program and is continuing to look to the ROLC for assistance.

Summary of Programs

Judges Commercial law

During the Program, the ROLC designed and implemented two cycles of Phase 1 (train the trainers) program at the National Judicial College. These programs included 23 judges and two administrators. There was a follow-up to each of these programs, during which the NJC faculty returned to share the teaching burden with local faculty. The Kazakhstan programs attracted about 105 judges, the Kyrgyzstan programs attracted about 140 judges. Each country then sponsored a series of concentrated seminars. There were about 20 seminars in total for both countries, attracting roughly 245 judges in Kazakhstan,

and 270 in Kyrgyzstan

Judges Economic Crime

As discussed above, the program in the second year expanded to include training for judges in adjudicating cases dealing with economic crime. The ROLC organized a Phase 1 training program for both countries, but unlike all other Phase 1 training programs, because of funding constraints, the ROLC held this Phase 1 training program in Central Asia. Twenty participants from both countries took part. The ROLC then held two general seminars in both countries for a total of four seminars. There were approximately 80 judges in attendance at the seminars in Kazakhstan, and 80 judges, at the seminars in Kyrgyzstan. The ROLC also held a concentrated seminar devoted to economic crime adjudication in Kazakhstan, at which 120 judges attended. In Kyrgyzstan, the concentrated seminar on economic crime attracted 25 judges.

Court Administration and Reform

The Program was launched in the fall of 1997 with the Dutch Foreign Ministry through the Centre for International Legal Cooperation and the Soros Foundation's Constitutional and Legislative Policy Institute. High level delegations (12 total) from Kazakhstan, Kyrgyzstan and Mongolia attended the program at the Administrative Office of the US Courts in Washington, DC to focus on financing and budgeting of the courts, along with issues of security and facilities. The follow-up program in each country took place early in 1998, with about 20 people attending each seminar at which a US federal judge and the Assistant Director of the Administrative Office of the US Courts took part along with several local judges and officials. The final program before funding was exhausted was in Zutphen, the Netherlands at the Dutch Judicial Training Institute. Delegations from Kazakhstan, Kyrgyzstan and Mongolia actively participated, along with an observer from Georgia. The delegations concentrated primarily on issues of strategic planning to formulate blueprints for the development of their respective judicial systems.

Attorneys

The ROLC designed two cycles of Phase 1 programs and conducted these programs in cooperation with the Practicing Law Institute, the largest provider of continuing legal education in the United States. The ROLC selected delegations from both Kazakhstan and Kyrgyzstan for each program, and a total of 25 participants attended the 10 day programs. For Phase 2, members of the PLI faculty came to both countries to share the burden of training with their local colleagues. In Kazakhstan, 140 attorneys attended three programs, and most of the participants paid to attend. In Kyrgyzstan, 230 attorneys attended three programs. The ROLC held six concentrated seminars in Kazakhstan, attracting 190 attorneys to these programs throughout the country. In Kyrgyzstan, where there are fewer practicing attorneys outside the capital, the ROLC held three concentrated programs, at which 140 attorneys attended.

Procurators

The ROLC designed a Phase 1 program for trainers of procurators. Under this design, the

Department of Justice conducted the primary training on economic crime issues, and the American Prosecutors' Research Institute (APRI) conducted the training on teaching methodology and general subjects relevant to prosecutors. There were five participants from each country. The ROLC then worked with the general procuracies to design a program specifically for those most likely to be involved in training of prosecutors throughout the country. For most of the Phase 2 general seminars for trainers of procurators, the Department of Justice sent a representative. In Kazakhstan, the ROLC held four programs, at which 240 procurators attended. In Kyrgyzstan, the ROLC held four programs, at which 120 procurators participated and attended.

Constitutional Tribunal

The ROLC planned with COLPI two workshops for members of the constitutional tribunals of Central Asia. Both Kazakhstan and Kyrgyzstan participated along with Mongolia. An observer, the head of the Constitutional Court of Uzbekistan, attended the second workshop. The first program was in France, and the second program was in Hungary. There were approximately 15 participants at each program.

TransCaucasus

The other arena for ROLC field operations was in the TransCaucasus republics. Unlike the situation in the Central Asian republics, however, where the USAID Mission in Almaty provided guidance and budgetary support for ROLC's programs and where ROLC established two field offices, the TransCaucasus program was managed out of USAID/Washington without any ROLC field presence. USAID maintained much greater control over the development of the program in the TransCaucasus and chose not to use the Regional Contract as a primary resource for either program design or delivery. As a consequence, the Regional Office filled a supporting role, procuring commodities and some technical assistance under the direction of USAID.

Georgia

In early 1994, the ROLC completed a preliminary assessment of Georgia to determine a strategy for technical assistance which would expedite the development of rule of law. In February 1995, a full-scale country assessment of Georgia was completed with the purpose of defining the ROLC's activities in Georgia. USAID decided to use the Regional Contract to support five major activities: assistance to the Georgian Parliament, assistance to the Supreme and Constitutional Court, technical support to the Georgian Constitutional Commission, civil code drafting, and criminal code drafting.

Georgian Constitutional Commission

During the early part of the Regional Contract, the ROLC provided extensive consultations and assistance to the Georgian Constitutional Commission in refining a compromise draft of the proposed Constitution, a separate Bill of Rights, and provisions for a Constitutional Court Act.

In 1995, President Shevardnadze offered a complete draft constitution for parliamentary consideration that incorporated many of the suggestions made by the ROLC. The Georgian Parliament approved the new draft constitution that included human rights provisions and some provisions for the establishment of a Constitutional Court, both of which were suggested by the ROLC. For the first time in its history, the Republic of Georgia adopted a constitution that offered human rights protections.

Georgian Parliament Internet Connectivity

In 1995, the ROLC completed an evaluation of the structure, operations and training needs of the Georgian Parliament. It was decided that the ROLC, through a grant to the Parliamentary Human Rights Foundation, would provide internet connections and training to the Georgian Parliament, Parliamentary Research Service, Tbilisi State University, Georgia Technical University, the Academy of Mathematics of the Academy of Arts, Tbilisi State University School of Law, the Executive Office of the Head of State, and the Georgian Ministry of Health. The US Embassy was also connected. Necessary computer and telecommunications equipment were purchased and installed. The official launch of the internet connection was on July 11, 1995. The internet connectivity was extended for a second year to continue to June 1997.

This project was designed to be self-sustaining after the two years of USAID funding. Since the Parliament's internet service began operating it has been used to provide a cost-effective and efficient means of communicating internationally. Extensive research has been conducted using the internet connection. This research has been used to assist the drafting of critical legislation including laws to combat organized crime and to encourage ethics in government. The internet has been used to research committee structures and procedures, as well as parliamentary protocol.

Internet Connectivity to the Georgia Supreme and Constitutional Courts

In 1997, the internet connectivity project was expanded to the Georgia Supreme and Constitutional Courts. The work was carried out by the Institute of Public Administration in Tbilisi under the general supervision of the National Academy of Public Administration, a ROLC subcontractor. All necessary equipment was procured and installed by mid-September 1998. Training was provided for all users and network administrators. In October 1998, a conference was held in Tbilisi to acquaint the key personnel of the courts, the State Chancellery, Ministries and Parliament with the capabilities of the system developed. Providing the internet connection to the Georgian Supreme and Constitutional Courts has improved communication and research capabilities in these courts.

Civil and Criminal Code Drafting

In continuation of the model code drafting activity, the ROLC sponsored several civil and criminal code drafting conferences for adoption of the model code to Georgia. In December 1996, a civil code drafting conference was held to finalize Part I of the

Georgian Civil Code In accordance with instructions from USAID, the ROLC did not sponsor a drafting meeting to finalize the draft of Part II of the Georgian Civil Code Civil and criminal code drafting assistance was resumed at a later date ROLC in cooperation with the Center for International Legal Cooperation at Leiden sponsored these civil and criminal code drafting conferences

Armenia

In May 1995 the ROLC completed an assessment of the prospects for US assistance to support the development of the rule of law in the Republic of Armenia Under the directions of USAID/Washington, the Contract's activities in Armenia consisted of the following

Grants for Judicial and Attorney Training

The ROLC awarded to Tara the first grant for Armenia to conduct a judicial conference The ROLC sent Justice Scalia of the US Supreme Court and Professor Robert Sharlet, who was then on the staff of the ROLC, to attend this conference, which took place in Yerevan in July 1995 This conference established a firm basis for future working relationships between the Armenian judiciary and its American counterparts

In July 1996, the ROLC awarded to the American University of Armenia Corporation, a California benefit corporation organized exclusively for educational and charitable purposes, a large grant to conduct a judicial and attorney training program

Although the program was modeled after the successful programs in Central Asia, the major difference was that instead of ROLC filling the role of implementing the program, the ROLC provided oversight and guidance to a grantee While this approach was not ideal for instituting substantial training programs, there was still significant work conducted under the grant The program conducted a Phase 1 (train the trainers) in the United States for both attorneys and judges There were then separate Phase 2 programs for judges and attorneys in Armenia conducted in cooperation with US lecturers AUA then organized five Phase 3 concentrated seminars throughout the country USAID was particularly complimentary of this regional outreach

Under the grant, AUA also subcontracted to prepare a compendium of commercial legislation, which has gone through one entire printing of several hundred copies A separate manual prepared on questions and answers related to specific commercial legislation was also well received AUA prepared three videos, which were shown at some of the Phase 3 seminars, and which provided a basis of discussion

The AUA grant also included the establishment of a legal resource center open to lawyers, judges, legislators and others The center is operating in AUA's building in Yerevan and provides databases on Russian, European and US commercial laws and commentary The center provides important tools in the understanding and application of commercial laws

Procurement

In response to a request from USAID, the ROLC procured computer and other electronic equipment for the Armenian Standing Committee on State and Legal Issues, the Armenian Center on Cooperation for Development of Legislation, the Armenian Legislative Committee, the Constitutional Court, the Ministry of Justice, and the Yerevan State University Law School. Office and computer equipment was procured for the Armenian Center on Cooperation for development of legislation. The equipment is used for drafting the Civil Code of Armenia. The Center agreed to draft the Armenian Civil Code based on the model civil code supported by the Regional Contract.

Computer equipment was also procured for the Armenian Standing Committee on State and Legal Issues to further the Legislative Process in Armenia. With this equipment, key legislators are now able to participate more effectively in the process of reviewing and enacting codes and legislation, and preparing constituencies for implementation and execution. The ROLC procured over \$210,000 of computer equipment and publications for the Constitutional Court of Armenia. This procurement has provided the Constitutional Court with important tools for use in modernizing the court and specifically for providing timely, consistent information to the individual justices.

Civil and Criminal Code Drafting

The ROLC and the Center for International Legal Cooperation sponsored several Armenian civil code drafting meetings (Civil Code Part I, Finalization of Civil Code Part I, Civil Code Part II) in Leiden, the Netherlands and in Yerevan. A team of Armenian civil code drafters, American experts, and Dutch experts attended these meetings. The Armenian criminal code drafting part I meeting took place in October 1996, sponsored and organized by the Center for International Legal Cooperation. The criminal code drafting part II took place in June 1997 under a subcontract with ROLC co-sponsored by the Council of Europe. Beginning in January 1997, as a subcontractor, the Center for International Legal Cooperation was made responsible for all drafting meetings.

Constitutional Court

The ROLC sponsored a conference for TransCaucasus Constitutional Court members in December 1996. The conference was co-financed with the Soros Foundation in Budapest and the human rights arm of the Council of Europe in Warsaw. Judges from Armenia and Georgia participated. The ROLC also sponsored a case management workshop with the Venice Commission of the Council of Europe for judges from Armenia and Georgia.

Law Schools

The ROLC worked closely with the Yerevan State University Law School ("YSU"). This included sponsoring a library training activity at New York University, procuring equipment for the Yerevan State University Law School library and sponsoring the YSU Law School professor training in Budapest. This training in Budapest was cosponsored by the Constitutional and Legislative Policy Institute.

APPENDICIES

APPENDIX A

GRANTS

AMERICAN UNIVERSITY OF ARMENIA

Project Title "Support of Continuing Legal Education Program and Resource Center in Armenia"

Grant \$339,117

Grant Period 10/18/96-10/31/98

The grant to the American University of Armenia Corporation included provision of training to Armenian professionals, including judges, lawyers and government officials to implement the anticipated new civil code. It also included provision of training in certain substantive areas of commercial law, and provision of audience-specific professional development training to improve the basis for judicial and legal practice, including training for such audiences as non-governmental organizations and the media. A legal resource center with access to European, Russian and US commercial and international laws was established at the American University of Armenia (AUA).

The training program was conducted in three phases. Phase 1 contemplated the involvement of judges and attorneys because it was believed that they represented the best basis for training their colleagues in phases 2 and 3. While judges, attorneys, and government officials constituted the crux of the intended audience during phases 2 and 3, a larger audience including non-governmental organizations and the media were targeted for some of the activities.

FREEDOM HOUSE I

Project Title "Law in Action Program"

Grant \$475,130

Grant Period 11/1/94-10/31/95

This program undertook several activities, including the renovation and equipping of the Andrei Sakharov Museum and Center in Moscow, and a number of research, training, and public education initiatives in cooperation with the Andrei Sakharov Center and other human rights organizations in Russia, Ukraine, Belarus, Armenia, Moldova, and Kyrgyzstan. These included the publication of a human rights directory, a 10-part TV series on human rights, and 5 training seminars for human rights monitoring councils.

FREEDOM HOUSE II

Project Title "Year Two Activities under the Law in Action Program"
Grant \$252,573
Grant Period 6/6/96-12/31/97

This grant was a follow on activity to the Freedom House I grant. It continued the work started in the earlier grant by a) providing advanced training in human rights monitoring and NGO management, b) acting as a coordinating body for national and regional human rights and pro-democracy NGO coalitions within the NIS, c) serving as a regional computer network and electronic bulletin board for human rights and pro-democracy NGOs within the NIS, and d) establishing strong links between the NIS human rights NGOs and their counterparts in the West, particularly regional institutions like the Organization on Security and Cooperation in Europe (OSCE), and international institutions such as the United Nations.

IRIS

Grant: \$327,074
Grant Period 5/24/95-12/31/96

The goal of this grant was to assist and train Russian law makers, judges, and legal practitioners at the federation level as they develop the components of a commercial law regime essential for Russia's transition to a market economy. Specifically, IRIS focused on examining implementing measures to develop a system of secured commercial lending, collaborating with the drafters of the Russian Civil Code, translating and disseminating the United States Uniform Commercial Code, sponsoring forums on the legal, institutional, and economic foundations of commercial law, and training judges in commercial law, market economics, civil procedure, and court administration.

LEAGUE OF WOMEN VOTERS EDUCATION FUND

Project Title "Strengthening Women's Rights in the NIS An Internship Program"
Grant \$106,400
Grant Period 3/1/95-1/31/96

ARD/Checchi provided funding to the League of Women Voters Education Fund (LWVEF) to provide practical training, technical assistance and subgrants to women's non-governmental organizations to further development in critical areas and ensure the sustained role of women in developing and monitoring the rule of law in Russia and Ukraine. LWVEF worked closely with the Moscow Center for Gender Studies and the Ukrainian Center for Women's Studies to a) sponsor women's initiatives conferences in Russia and Ukraine, b) provide an internship program for emerging women leaders from each country, c) provide seed grants and technical assistance to women's NGOs for

grassroots efforts to support the rule of law, d) send representatives from partner and subgrantee groups to the United Nations Fourth World Conference on the Status of Women and the parallel NGO Forum, and e) organize follow-up conferences to the United Nations Conference in Russia and Ukraine, and publish essays by project participants and a handbook on citizen democracy for use in the NIS

NETWORK FOR EAST-WEST WOMEN

Grant. **\$99,974**
Grant Period: **6/1/95-5/31/96**

The goal of this grant was to make use of local resources, electronic communications and related events for the purpose of nation-wide and regional outreach in Russia, Ukraine, and Kyrgyzstan, related to the legal status of women. This was accomplished through informational exchanges, legislative updates, national and regional dialogues, and strategy sessions. Accomplishments included the organization of a periodic meetings of women's rights lawyers from the region, researchers and activists to share information, and determine courses of action for the network, the translation into Russian and distribution region-wide of a 160 page training manual entitled "Our Human Rights," the training of trainers for workshops using this resource, presentations to Duma commissions on a variety of subjects related to the legal status of women, such as analyses of domestic violence legislation and a report on the UN Conference on Women in Beijing

SOCIAL SCIENCE RESEARCH COUNCIL

Project Title **"Political Science Workshops"**
Grant **\$100,000**
Grant Period **3/1/95-9/30/96**

This grant provided partial funding (in conjunction with the Ford Foundation and the John D. and Catherine T. MacArthur Foundation) to the Social Science Research Council and the Russian Science Foundation for two, two-week workshops on Post-Soviet politics. These workshops were held in Russia during the summer of 1995, and in Ukraine during the summer of 1996, and were designed to provide advanced training for political scientists from the NIS necessary for the development of civil society and the rule of law in the region

STATE OF THE WORLD FORUM (formerly IFPA)

Grant \$135,000
Grant Period 3/1/95-8/31/95

The goal of this grant was to design curricula in alternative dispute resolution, train trainers, and conduct alternative dispute resolution training for private citizens from Georgia and Russia, focusing particularly on the de-escalation of ethnic tensions. Over 200 persons participated in the ADR training, and 22 received further education under a "training of trainers" program. ADR training continued after the grant ended.

TARA

Project Title "1995 Armenian Judicial Conference"
Grant \$102,220
Grant Period 5/1/95-8/31/95

ARD/Checchi provided grant funding to Technical Assistance for the Republic of Armenia (TARA), who were partnered with the Irkutsk State University Faculty of Law and the Urals State Law Academy in the organization of the 1995 Armenian Judicial Conference. Specific activities included: a) collection of materials for use in the judicial training conference for Armenian judges, b) planning and implementation of the judicial training conference in Yerevan, Armenia between July 15 and 22, 1995. The conference focused on discussions among twelve US citizens (six of whom are prominent US judges) and approximately 130 Armenian judges, thirty of whom were justices of the Supreme Court of Armenia. In addition, officials from the Armenian Ministry of Justice were also represented, and c) evaluation of conference activity in order to determine the usefulness of subsequent training programs for Armenian judges and other legal personnel.

THE CENTER FOR DEMOCRACY I

Project Title "Courts of Ultimate Appeal Constitutional and Supreme Courts of Central and Eastern Europe and the Former Soviet Union"
Grant \$105,672
Grant Period. 10/23/95-12/31/95

This activity called for the Center for Democracy to: a) convene the third annual International Judicial Conference on "Courts of Ultimate Appeal Constitutional and Supreme Courts of Central and Eastern Europe and the Former Soviet Union" in Washington, DC, from November 13 through 15, 1995 at the National Archives, b) provide transportation, accommodations and meals for eighteen justices and one consultant from the NIS, c) prepare preliminary papers and other materials for distribution to NIS participants, d) develop a video of conference activities, and e)

evaluate conference activity in order to determine the usefulness of subsequent programs (including judicial training programs) for NIS judges and other legal personnel

THE CENTER FOR DEMOCRACY II

Project Title "Partial Funding of International Judicial Conference Program"
Grant \$195,298
Grant Period 9/4/96-12/31/96

ARD/Checchi provided partial funding to the Center for Democracy for the following activities a) convening of the fourth annual International Judicial Conference on "Courts of Ultimate Appeal Constitutional and Supreme Courts of Central and Eastern Europe and the Former Soviet Union" at the Federal Judicial Center in Washington DC from September 30 through October 2, 1996, b) provision of transportation, accommodations, and meals for twenty justices and one consultant from the NIS, c) preparation of preliminary papers and other materials for distribution to NIS participants, d) arrangement for translation and interpretation services, and e) evaluation of conference activity in order to determine the usefulness of subsequent programs (including judicial training programs) for NIS judges and other legal personnel

APPENDIX B

RULE OF LAW CONSORTIUM NEWSLETTER

ARD/CHECCHI JOINT VENTURE

NO 1

JUNE 1995

RULE OF LAW CONSORTIUM An Introduction

by David Bronheim, Esq
Project Manager
Rule of Law Consortium

This is the first issue of our Newsletter under the Regional Contract for the US Agency for International Development Rule of Law Program for the Newly Independent States (NIS) of the former Soviet Union. It has been edited by Robert Sharlet, Coordinator-Institution Building, Rule of Law Consortium, and Professor of Political Science at Union College.

His mandate was not an easy one. We were determined to produce a periodical of value to those working on Rule of Law relevant programs. Accordingly, after extensive consultation with our Board of Advisers, it was decided to publish articles written by colleagues who have been deeply involved in the momentous changes taking place in all aspects of the legal infrastructure in the countries of the former Soviet Union.

These articles reflect not merely the challenges faced by the legal practitioners and scholars in those countries, but, also, the peculiar complexities faced by foreign experts attempting to cooperate with those judges, procurators, legal educators and others.

The staff of the Regional Office has been directly involved in this task for almost two years. Their experience began with country assessments, continued through model project designs, and continues now as programs and projects move through implementation phases.

The assessment process, which lies at the heart of our work, received its major impetus from the work done for us by Professor David Trubek, Voss-Bascom Professor of Law and Dean of International Studies, University of Wisconsin-Madison, and his team. From that original work the conclusions were reached that an effective effort in dealing with the monumental

changes needed in the legal infrastructure, if democratic institutions and market economies were to grow, necessitated a full spectrum effort with all of the key institutions of the legal establishment.

Progress in any part of the system was likely to be greatest if supported by progress in the other interrelated parts. As a result, our efforts have had a multiple focus on the Courts, the Procuracy, Law Schools, the Bar, and the legislative process.

The second major conclusion growing out of the assessments, related to the analysis of how we might impact such an enormous endeavor with reasonable dispatch and longer term sustainable effect. From this, it was decided that given the limited amount of funds, people and time likely to be available from USAID for this program, the most significant results could be achieved by cooperating with those reformers who operated the key training institutions or reached the widest possible audience. Hence we developed the concept of cooperating with the apex bodies of key legal institutions in efforts to retrain the trainers -- those individuals whose task it was to train judges, procurators and law students.

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Next came the challenge of cooperating with the relevant institutions in the design and implementation of actual projects. Adding to the inherent substantive difficulty was the fact that there was a limited number of experts or institutions with experience in working on such programs in the NIS. Further complicating the task, the institutions in the NIS had no history working closely on programs of this nature with Americans and American institutions funded by the U S Government. Needless to say, it has been a mutual learning experience for technical assistance donors and recipients alike.

Implementation under the auspices of the Rule of Law Consortium is underway in Russia and Ukraine. Planning is in progress in Armenia. Judicial trainers both of the commercial courts and courts of general jurisdiction, procuratorial trainers and of course law faculty at seven post-Soviet law schools have begun interactive training programs with corresponding U S colleagues. A broad-gauge program with the Republic of Karelia of the Russian Federation is in process. Drafting groups for new legislation are in place in Ukraine.

It has been a unique historic challenge. It has taxed our intellectual abilities. Cooperation has been remarkable. Progress has been made on a broad front, much more lies ahead. This first Newsletter recounts our experience and our learning to date.

THE POLITICS OF LAW REFORM IN RUSSIA, UKRAINE AND THE NEWLY INDEPENDENT STATES

by Professor Robert Sharlet
Coordinator-Institution Building
Rule of Law Consortium

Law reform, long peripheral to elite concern in the Soviet period, moved centerstage with the breakup of the USSR in 1991. As with economic reform, Russia, of all the Newly Independent States (NIS), is furthest along in restructuring its legal system. The process of reforming the post-Soviet legal systems

in Russia, Ukraine and elsewhere, however, has not been easy. Law reform in the NIS has been fraught with "politics," with issues of political power transcending specific legal questions.

This is a positive development for the former Soviet Union. First, the shift from crypto-politics to open politics is ventilating heretofore closed societies. Conflict and dispute are now regarded as routine and healthy phenomena. Second, conflict over the structure of a constitution, the scope of a code, or the content of a law, are certainly preferable arenas of dispute to the streets or battlefields. And of course, executive-legislative differences, as well as partisan wrangling over pending legislation are normal political behavior for aspiring democratic polities and societies.

All change in the NIS, however, has not occurred through civil discourse. There have been lamentable lapses into violence between president and parliament in the First Russian Republic, between Georgians and Abkhazians, Georgians and South Ossetians, and Georgians and Georgians, between Armenians and Azeris, and, most recently, between Russians and Chechens, to mention several of the most salient martial conflicts. While the Russian-Chechen conflict still rages, most of the violent flareups in the NIS have been followed by periods of armed truce if not a return to civility.

Law reform, in effect, has become an arena of political struggle in Russia, Ukraine, Georgia, and Armenia in particular. Initial engagements occur over constitutional drafting. As judicial reform and recodification begin, contending power groups shift the conflict into those venues as well. Where statutes are debated over the shape or reshaping of institutions as well as the rules of the electoral game, there too one can detect the shadows of the political conflict.

Constitutional change The initial rite of passage for the post-Soviet states in transition from authoritarianism to democracy, has been the attempt to redefine themselves constitutionally. Russia completed its initial passage in December 1993, but not without

serious political conflict and ultimately violence. Other states still enroute to their constitutional futures include Ukraine, Armenia and Georgia. A common faultline running through most of the constitutional drafting efforts in the NIS, has been the political conflict between contending elites advocating either parliamentary or presidential models of governance. In Russia, the conflict was resolved in favor of a strong pro-presidential constitution. Judging by the current draft constitutions in Ukraine and Armenia, the new Russian Constitution may be influencing other successor states.

Judicial reform The process of judicial reform divides into two parts in Russia, Ukraine and a number of other states. Many of these states have or are introducing constitutional courts into their third branch of government. In addition, the regular judiciary or courts of general jurisdiction, and the commercial courts (formerly the Arbitration Boards), are targeted for restructuring and reform.

Russia and Kazakhstan presently have working constitutional courts while Ukraine, Georgia and Armenia have included constitutional courts in their current draft constitutions. Typically, the political issues relating to the creation of a constitutional court include the scope of its jurisdiction especially in relation to the other two power branches, the requirements for standing which revolve around the question of narrow or broad access, the method of judicial selection, and, finally, the familiar political process of actual nomination and appointment of justices.

Routinely, a constitutional court statute prohibits the court's consideration of "political issues." In fact, in a transitional state, these issues have proven difficult to avoid. Witness the downfall of the Constitutional Court of the First Russian Republic, the Kazakh court's collisions with both executive power, and, most recently, legislative authority, and currently the politically explosive petitions to the new Russian Constitutional Court to review Yeltsin's decrees on the "restoration of constitutional order" in the Republic of

Chechnya

The politics of ordinary judicial reform in the NIS are of a different order. The central question in Russia where the process is most advanced, is which executive branch institution will provide policy guidance -- the State Legal Administration (GPU), a relatively new agency within the Office of the President, or the Ministry of Justice which is answerable initially to the Government led by the Prime Minister.

The focus of Russian judicial reform funded by the Rule of Law Consortium, is the "training of the trainers" for judicial training. While the GPU and Justice Ministry jockey for position in the reform of the regular courts, the Supreme Commercial Court in Moscow, as the apex institution, has sole responsibility for training commercial court judges.

Similarly, in Ukraine the Rule of Law Consortium works directly with the Supreme Commercial Court in developing long-term training programs for the subordinate commercial courts. In contrast, for the ordinary courts, the Supreme Court of Ukraine and the Ministry of Justice have negotiated a division of labor for judicial training which heretofore was solely within ministerial purview.

Recodification and other aspects of law reform politics Other aspects of the politics of law in the NIS are being driven by two main consequences of the collapse of the Soviet system. The highly centralized state with its guiding institutions based in Moscow, is gone, leaving most of the countries of the NIS, other than Russia, bereft of necessary features of a free-standing legal establishment, such as legislative drafting expertise, in-service training schools for judges, procurators and investigators, and research and publishing facilities to support legal scholarship.

Along with the Soviet state, the all-union Communist Party which controlled and directed the state and all of its component institutions, has passed into history. The Communist Party of the past had

provided the otherwise shapeless Soviet bureaucracy with coherence and direction, discipline and focus, and the prioritization of the multitude of demands and tasks addressed and assigned to its line agencies. Absent the Party as an internal directive mechanism, the post-Soviet bureaucracies dissolved into their discrete organizational parts.

The politics of law therefore has become an integral subset of the problem of inventing or reinventing the state in diverse societies set adrift by the end of the USSR. This entails two essential political challenges for the policy managers of the legal system: (1) The need to create *de novo* the missing institutions necessary to make the legal system whole again, and (2) The necessity of renegotiating a post-reform division of labor among legal institutions presently engaged in turf wars over their status and functions in the new legal environment.

Instances of the politics of the missing institutions include the necessity of drafting vast amounts of new legislation in every one of the Newly Independent States. While Russia, which, for better and worse, inherited the Soviet central institutions, is blessed with numerous skilled legislative draftspersons, most of the other countries have relatively little capacity in this respect. One solution is the initiative of the Commonwealth of Independent States to create model codes and statutes which would then be available for the smaller states to adopt as national legislation. This avoids the politically sensitive problem of borrowing the more advanced Russian legislation.

In other areas, no solutions are yet in sight. For instance, Russia and Ukraine each have procuratorial training facilities inherited from the Soviet period, while the other states have no internal means to retrain and periodically upgrade their procurators, especially as new legislation begins to come on line.

As previously mentioned, turf battles between legal institutions are now common in the post-Soviet

period. The ministries of justice and judiciaries as well as the courts and the procuracies are engaged in quiet struggle. The judiciaries seek more autonomy if not independence from their erstwhile Soviet-period mentors, the ministries of Justice.

Judges also want more control of the court proceedings, in particular in criminal cases where traditionally the procurator dominated the courtroom. The introduction of adversarial proceedings as well as jury trials tend to weaken procuratorial dominance, but at the same time the judge is burdened with new courtroom managerial tasks for which he or she are not well prepared.

Collectively, the procuracies of the NIS, in turn, feel under siege, as constitutional drafters begin to circumscribe their heretofore hegemonic position in legal process, legislatures begin to trim their authority, and the judiciaries increasingly become more assertive on behalf of autonomy.

Even within the judicial branch of government, turf battles are being waged over the hierarchy of courts. While the new commercial courts and the regular court system are independent of each other in Russia, the issue remains fluid in Ukraine and Armenia.

As part of the constitutional deals over power-sharing presently being negotiated in Ukraine, the presidential faction is backing a proposal which would subsume the commercial courts under the Supreme Court. The Chairman of the Supreme Commercial Court in Kyiv has made a cogent case for the continued autonomy of his system, but does not appear to have the needed political support.

In Armenia, the draft Constitution proposes replacing the Supreme Court with a higher court of cassation, and introducing a constitutional court whose prospective relationship with the courts of general jurisdiction remains unclear. Conversely, in Georgia, constitutional proposals have been offered which would subsume the prospective constitutional court

under the Supreme Court

Conclusion Law reform in Russia, Ukraine and the NIS is inevitably tangled up with the broader political and economic reform processes. Thus law reform is being impacted by the politics of societies which went through abrupt decompression after the Soviet period, and are now moving at varying speeds through an uncharted transition process.

The politics of law in the NIS comes in many forms -- ideological divisions, electoral expediency, bureaucratic imperatives, and, sometimes, just simply personality differences between the major players who thinly disguise their personal ambitions in the language of legal policy. Thus, one should expect intense activity along the interface of politics and law in Russia and other successor states for some time to come.

The Rule of Law Consortium will continue to navigate a steady course in the NIS. This means keeping to the main channels and avoiding the turbulent turf battles at the peripheries. The objective remains to facilitate long-term, sustainable institutional development supportive of Rule of Law societies.

NEW CIVIL CODES IN THE NEWLY INDEPENDENT STATES

by Peter B. Maggs
Corman Professor of Law
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Consultant to the Rule of Law Consortium

The Newly Independent States (NIS) of the former USSR, are in the process of adopting new market-oriented civil codes to replace codes dating from the 1960s. In the European civil law tradition, the Civil Code sets out the basic principles of the law of property, corporations, and obligations (contracts, torts, and unjust enrichment). Obviously, Communist-era codes are totally unsuited to today's needs. Drafting new codes, however, is a daunting task.

After several years of work, Russia and Kazakhstan have adopted the first half of their new civil codes. Various other countries of the NIS are at work on new codes, but the work has gone slowly due to a shortage of civil law experts outside of Russia, the largest of the successor states.

A Civil Code is by its nature a single unified piece of legislation. However, it is also a very large piece of legislation, so large in fact that it would take a long time to draft an entire code, as well as a long time for a parliament to consider passage of the draft code.

Therefore, in order to maintain momentum in the drafting and legislative processes in the NIS, the Civil Code has been split into two parts, with Part I of about 200 pages in length being drafted first (and in some cases passed separately by parliament), while a second part of about equal length is drafted later. The place for the split between the two parts is arbitrary, being a convenient chapter break near the middle of the Civil Code.

With the support of the Rule of Law Consortium, and in cooperation with the Interparliamentary Assembly of the Commonwealth of Independent States, work was begun in the summer of 1994 on a Model Civil Code. Part I of this Code was completed in the fall of 1994 and was recommended to member states by the Interparliamentary Assembly as a basis for their own national legislation. The remainder of the Model Code II is expected to be completed by June 1995.

The Rule of Law Consortium has also created an electronic mail network linking civil legislation drafters throughout the NIS with one another, and with experts in Western Europe and the United States. This effort is integrated with bilateral work with Belarus, Russia, Kazakhstan, Kyrgyzstan, and Ukraine being conducted by the Centre for International Legal Cooperation at the University of Leiden in the Netherlands.

Completion of the Model Civil Code will

solve many of the technical drafting problems, but still leave key policy issues open. In nearly all of the Newly Independent States, the legal rules concerning private land ownership and the status of state enterprises are hotly debated. While most of the civil law experts working on drafting the Model Civil Code and preparing the individual country codes, favor full private land ownership and rapid privatization of state enterprises, political views in the various parliaments are not always as market-oriented.

Another major issue is that of subsidiary legislation. The Model Civil Code, the first parts of the Civil Codes of the Russian Federation and Kazakhstan, and the various draft codes all contain cross references to numerous other laws, such as "The Law on Joint Stock Companies," "The Law on Bank Deposits," and "The Copyright Law." None of the countries of the NIS has a full complement of this subsidiary legislation. Yet without this legislation, the Civil Code by itself is inadequate as a basis for the market economy.

Other potential issues involve the relation of civil legislation to regulatory legislation. For instance, should a law on joint stock companies allow corporate founders full discretion in allocating rights of different classes of shareholders or should it prescribe certain shareholder protection standards? There is a debate in many of the countries as to whether such standards belong in the corporation legislation or only in the enabling legislation for a commission to regulate publicly traded shares. Central bank authorities are bound to resist any curbs on their regulatory powers in the civil codes themselves, and in laws on banking.

In the case of intellectual property, the situation is complicated by the fact that most of the Newly Independent States have not adopted modernized patent, trademark, and copyright laws. A further difficulty is the fact that Russia inherited the former Soviet patent and trademark office, while the smaller countries of the NIS lack the resources to create patent offices capable of searching all of world technical literature. Moreover, even adoption of model

legislation would not solve the administrative enforcement problem of dealing with fly-by-night record and video pirates.

The problems discussed above will not be solved soon. Moreover, with the rapid pace of social and technical change in the modern world, continual modernization of legislation is necessary. For instance, in the United States, the National Council of Commissioners on Uniform State Laws and the American Law Institute, have had to rewrite much of the Uniform Commercial Code to reflect the fact that most financial transactions are concluded electronically rather than on paper.

The Rule of Law Consortium plans to continue its efforts in supporting the development of model civil legislation after the completion of the Model Civil Code, in order to help create an institutional structure that will provide a permanent basis for the creation and modernization of market-oriented legislation in the Newly Independent States.

THE COMMERCIAL JUDICIARY IN THE RUSSIAN FEDERATION

by Keith Rosten, Esq.
Deputy Chief of Party, Moscow
Rule of Law Consortium

The Supreme Commercial Court of the Russian Federation stands in the trenches in the battle for legal reform in Russia. As the economic and political climates shift from crisis to crisis, the new commercial court system has been a bastion of stability. Part I of the new Russian Civil Code, which came into effect on January 1, 1995, offers the commercial court system new challenges, and presents new opportunities.

Established only in 1991 in the waning days of the Soviet Union, the commercial courts (known also as arbitration courts) of the Russian Federation form a nascent institution. The commercial courts have jurisdiction over commercial disputes involving mostly

legal entities such as state enterprises, joint stock companies and partnerships. Individuals do not have the right to resort to the commercial courts unless they are a "registered entrepreneur."

Under the direction of the Chairman of the Court (the equivalent of Chief Justice), Veniamin Yakovlev, a former Minister of Justice of the Soviet Union, the commercial courts have emerged as an independent arbiter of commercial disputes.

Most of the commercial court judges are women. In Irkutsk, for example, 19 of the 23 judges are women. Most are young, under 45. And all are appointed for life. There has been little turnover in the ranks of the commercial courts, presently 1,600 strong in 83 districts, since the commercial court system was established.

In 1994 alone, the commercial courts decided over 210,000 lawsuits. Most were in the area of contract disputes over the purchase and sale of goods. Incredibly, in what may seem like lightning speed to litigators waiting years for the resolution of lawsuits in Los Angeles or New York, the commercial courts render their decisions and resolve appeals within 90 days of the filing of the action. The speed of adjudication helps mitigate to some extent the effect of Russia's high inflation on the value of the judgment obtained.

The courts of general jurisdiction in the Russian Federation, in contrast, fall far short of this efficiency. Also in contrast to the courts of general jurisdiction, the commercial courts are not the object of widespread public cynicism.

The commercial court system, however, has other problems and challenges. One seasoned civil law professor fled from the commercial court to which she was appointed for life after only a few months on the job. She candidly conceded that she was overwhelmed by the breadth of the cases. An English language newspaper published in Russia recently reported that the Moscow commercial court judge was so "confused

by the heap of documents brought to her attention that the young Russian lawyers burst out laughing."

Commercial court proceedings are run very informally, and some of the judges fail to take charge of their courtroom. According to this press report, one of the parties stated, "Our judges are not competent enough to deal with stock market disputes."

The Russian Federation welcomed the New Year of 1995 with a new Civil Code. The Code attempts to replace a patchwork of laws, decrees and other legislation. Although some of the Civil Code's new provisions are subject to severe criticism, as a whole the Code marks a watershed in the development of a new legal infrastructure in Russia since the end of the Soviet Union.

The new Civil Code draws Russia closer to the civil framework in Western Europe. In the words of Chief Justice Yakovlev, the Code is a major step forward in serving "the interests of those participants in economic relations, to protect their rights and interests."

The courts of general jurisdiction are also charged with interpreting and applying the new Civil Code, but the commercial courts will be the major battleground for commercial disputes. The challenge for commercial adjudication is daunting as the Code enacts new standards in vastly complex areas of the law ranging from security interests to property rights.

At a recent roundtable discussion, Chairman Yakovlev implored the judges of the commercial courts "on the one hand, to work and work on such complex acts, such as the Civil Code, and to effectuate its norms so that they do not remain just on paper, while on the other hand to the extent possible, facilitate the unerring interpretation of the norms of the Civil Code."

The greatest challenge to the commercial court is whether the business community will refer its disputes to the court for resolution. The number of cases filed during 1994 dropped by 20 percent

compared with the previous year, 1993. The decrease in the number of cases may be attributed to at least two factors. First, with inflation running at 10-20 percent monthly, the value of any judgement received is severely reduced. As one commercial court judge told me, "there will be no judicial reform until there is economic reform."

Second, the enforcement mechanisms are very weak. Many of the commercial court decisions are ignored. Collecting on a judgment is difficult. But as the economy stabilizes, and legislation is passed to enable litigants more readily to collect on judgments, the role of the commercial courts will increase.

Building a commercial court system in Russia is not a sport for the short-winded. It is a marathon fraught with numerous problems. If the results of the first mile are any indication, the prospects for an independent commercial court system in the Russian Federation are bright.

REFORMING LEGAL EDUCATION IN POST-SOVIET UKRAINE

by Michael Goldstein, Esq.
Chief of Party, Kyiv
Rule of Law Consortium

In the former Soviet universities, law schools were the step-children of higher education. Then, as now, universities were dominated by physicists and chemists who were inclined to put juridical faculties in what a natural scientist would consider their proper place -- last.

The humble position of law schools in the former Soviet Union, of course, had deeper roots -- neither the law nor lawyers were of any great importance in the Soviet scheme of things. Now, all of that is changing and dramatically.

In Ukraine, as in many of the other successor states, the demise of the Soviet Union, national independence, the advent of market relations, and,

perhaps most significantly, the beginning of the complex task of building an open society governed by the Rule of Law, have brought life and importance to the field of law, as well as money and prestige to lawyers.

The enormous economic, political, and social transformation taking place in Ukraine is moving law and lawyers from the margins to the epicenter of an emerging new order. The commercial sector needs lawyers to handle transactions, the state needs lawyers to legislate and administer a contemporary legal regime and, increasingly, citizens will need lawyers as well to represent their interests and protect their rights. Unlike so many other professionals in post-Soviet Ukraine, lawyers are in demand and have attractive options.

The growing role of lawyers means that Ukraine will need not only more lawyers, but better trained lawyers for the emerging legal environment. Therefore, Ukrainian law schools now face the challenge of re-constituting themselves to provide the country with the legal professionals and, more importantly, the legal culture that it so badly needs. Like Cinderella, Ukrainian law schools are abused step-children who have been invited to the ball and given the opportunity to rise to the occasion.

The tasks facing Ukrainian law schools fall into three basic categories: 1) The everyday tasks of managing an institution during a difficult transition period, 2) The ongoing professional tasks of training lawyers and participating in the legal affairs of society through scholarship, government service and the like, and 3) The conceptual task of re-thinking and re-making legal education in Ukraine so that law schools can perform their educational, scholarly, and civic functions in a way and at a level that meets the needs of the emerging new society.

The everyday tasks of the law schools include both problems and possibilities. Most of the problems come from being part of a bankrupt system of higher education that pays miserly salaries and cannot afford to maintain its physical infrastructure. Law schools face

the risk that continued low pay will result in the loss of their best teachers and scholars to commercial entities. While many law teachers have departed, most have stayed. However, law teachers have adapted to the financial crisis by putting most of their time and energy into moonlighting for the commercial sector while devoting considerably less effort to teaching and scholarship.

On the plus side, law has become very popular among students, who well understand the economic benefits of a legal education. As a result, competition to enter law schools is stiffening, with several students competing for each available place. In response, law schools have expanded their enrollment, supplementing traditionally free higher education with paid slots that can help meet law school expenses.

This, in turn, has raised the issue of law school autonomy within the university since university administrations are trying to coopt this tuition income from the law schools. In response, law schools in Ukraine are in the process of re-negotiating their relationships with their universities as well as re-constituting themselves as juridical persons with greater control over their own funds within the university structure. Law schools in Ukraine seem to be using their expertise and their popularity to stabilize themselves, but the immediate crisis is not over and long-term needs require better conditions.

More fundamental is the question of re-designing the whole scheme of legal education in Ukraine to meet the needs of a modern society. This requires redefining the mission of legal education and developing curricula, teaching methods, textbooks, legal scholarship, professional capacity, and public service functions capable of carrying out that mission.

Comprehensive re-orientation of legal education is an enormous task. Progressive legal educators in Ukraine continue to address the matter, but have not settled upon a precise re-formulation of the mission of legal education and scholarship in Ukraine. Nor have they defined the reforms needed to enable

law schools to meet the changing and expanding demands of an increasingly modern society.

Informal discussions with reform-minded law school teachers and administrators, however, reveal a growing consensus on a number of fundamental issues. The major areas of shared agreement are the following:

1) It is the responsibility of law schools to help advance the legal culture of Ukraine by

(a) training legal professionals to world standards,

(b) promoting and producing a dynamic flow of excellent legal scholarship, and

(c) serving as a resource for civic and social needs requiring legal expertise.

2) Law school education in Ukraine needs to move away from the Soviet model emphasizing the rote memorization of facts (mostly the norms of existing law), to an approach that develops the capacity to "think like lawyers." This became clear to concerned legal educators when the many recent changes in the law rendered huge parts, if not most, of former legal education irrelevant to current practice. Rapidly changing law is a fact of life in the modern world. Contemporary societies need lawyers trained to function in this environment.

3) Legal education that trains students to think like lawyers requires innovative teaching methods to supplement, if not replace, the almost exclusive reliance upon lecturing prevalent in Ukrainian law schools.

4) A new curriculum is needed with particular emphasis on commercial-business subjects and the protection of human rights.

5) A new generation of textbooks and materials must be produced not only because of changes in the law, but also to move away from the Soviet model of standardization and uniformity. Law

teachers should be able to choose texts from a variety of available materials, and to produce pedagogical materials themselves

6) Law schools should be available as resource centers for both the entire legal profession, and for society

For nearly a year the Rule of Law Consortium has been working closely with leading reform-minded law teachers and administrators in Ukraine to help advance the reform of legal education. We have jointly developed and started implementing a comprehensive program with each of the major law schools in Ukraine -- the Ukrainian Law Academy in Kharkiv, the Law Departments of Kyiv University and Lviv University, and the Law Institute of Odessa University. Subsequently, the Rule of Law Consortium will assist the developing law schools of Ukraine as well.

Each program includes development of a new curriculum, teaching methods, and course materials. As part of these programs, leading American legal educators and law school administrators have begun working with their corresponding peers in Ukrainian legal education. This U.S.-Ukraine collaboration will provide a basis for the Ukrainians to develop a modern, cutting edge approach to legal education that is appropriate for Ukrainian needs and conditions.

Finally, each law school is being provided with a mini-typography that will allow for the production of needed law texts. More importantly, this equipment will help institutionalize pluralism in Ukrainian legal education by decentralizing the publication process through devolving to law schools the capability of publishing diverse textbooks, legal periodicals and other materials on law.

As the law reform process in Ukraine moves forward, new directions in the reform of Ukrainian legal education will certainly emerge as well. Despite difficult conditions the process has started.

JUDICIAL CONFERENCE REPORT

by Scott Newton, Esq.
Program Attorney for Russia
Rule of Law Consortium

On April 27, 1995, the Rule of Law Consortium brought together United States judges, scholars, and government policy-makers for a day-long multi-disciplinary conference on the "The First Step to Judicial Independence in Russia, Ukraine and the Newly Independent States (NIS)". The conference served as an opportunity for the Consortium to marshal in one place for the first time the formidable corps of experts it has recruited to design and administer judicial development and institution-building programs in Russia and Ukraine.

The four conference panels allowed for a broad exchange of observations, insights, and experience. The conference as a whole demonstrated that over the relatively brief history of judicial assistance programs in the NIS, a significant store of wisdom has accumulated. We know a great deal more about this very distinct set of problems and how to meet them than we did when we started-- or than we thought we would know just 18 months later.

Thomas A. Dine, Assistant Administrator of the U.S. Agency for International Development (AID) and the senior AID official in charge of coordinating assistance programs for the region, led off with the keynote address. Dine used the occasion to warn against the danger posed by Congressional budget-cutting fever and isolationism for vitally important democratization assistance to Russia, Ukraine, and the other former Communist states. Concerning the Rule of Law Consortium's programs and the kindred programs under the Rule-of-Law umbrella, Dine stressed "There is no more important goal in our foreign assistance program to the former Soviet Union countries than to foster their transition from arbitrary rule to the true Rule of Law."

Professor David Trubek of the University of Wisconsin Law School, a pioneer in the field of

development assistance to foreign legal systems, with over three decades of experience, provided a broad analysis of the special challenges of building genuinely independent judiciaries in the NIS, and the attempts of foreign well-wishers to facilitate that process. Trubek identified a "hierarchy of transmissibility" in assistance efforts to foreign legal cultures. To wit, basic cultural assumptions and principles are less transmissible than practical skills. In this light, Trubek emphasized the importance of process and dialogue in devising sensible forms of assistance. "We can only talk about our own system, and as we talk we hope our interlocutors ask us questions. Then they can tell us, 'We don't want that,' or 'That sounds good.'"

Later panels took up such themes as management of the post-Soviet courtroom, the design of judicial training programs and the relationship of legal education to judicial training. Speakers and commentators included Justice John A. Dooley of the Supreme Court of Vermont, the mastermind of the Rule of Law Consortium's Karelia Regional Assistance program within the Russian Federation, Ohio Chief Justice Thomas J. Moyer and U.S. Court of Federal Claims Judge Bohdan A. Futey, both of whom are active in Consortium's Ukrainian programs, U.S. Court of Appeals Judge Randall R. Rader, Los Angeles Superior Court Judge Judith C. Chirlin, Judge V. Robert Payant, President of the National Judicial College, which is conducting the Consortium's comprehensive assistance program for the Russian Supreme Commercial Court, and Professor Peter B. Maggs, University of Illinois Russian law expert and inaugural-year Rule of Law Consortium Director of Legal Reform.

In attendance were representatives of many U.S. government agencies playing a role in the Russian assistance programs-- AID, the Departments of State, Justice and Commerce, and others, fellow Rule-of-Law assistance providers such as ABA/CEELI, Chemonics and IRIS, members of the practicing bar active in Russia, Ukraine, and elsewhere in the NIS, and other Rule of Law Consortium affiliates and subcontractors, such as the American Prosecutors Research Institute,

which is administering the Consortium's Russian Procuracy training programs and is planning a similar program in Ukraine.

The exchanges in and out of the sessions were lively. Speakers and discussants elaborated recurrent themes-- the need to tailor assistance to Russian and Ukrainian judges carefully, intelligently, and modestly, the psychological revolution required for judges to realize fully the promise of autonomy, the desirability of expanding and deepening the contacts and dialogue opened up by Rule of Law assistance programs.

David Bronheim, Esq., Project Director for the Rule of Law Consortium closed the conference with remarks on the tasks ahead, including dealing with the "politics of making a judicial system more autonomous and more independent." To this end, he posed the next generation of questions: "How do you get your budget? How do you lobby a legislature? How do you lobby an executive? How do you lobby the public? What does it take? How are judges taught that?"

The conference served to focus and clarify the developing thinking of the laborers in the vineyards of judicial assistance about a very knotty and complex set of problems. Just how do we go about trying to help bring about so elusive, multiply-determined, and culturally-embedded a concept as judicial independence in another society? In the wake of the Rule of Law Consortium's conference, we can give a somewhat more coherent and plausible response to that question.

The proceedings were videotaped and are being edited, and a transcript is in preparation.

RULE OF LAW CONSORTIUM SMALL GRANTS AWARDS

by Barry O'Connor
Grants Manager
Rule of Law Consortium

League of Women Voters Educational Fund, Moscow Center for Gender Studies, and the Ukrainian Center for Women's Studies *Grassroots Internship Program for Emerging Women Leaders in Russia and Ukraine* (\$100,000) A grant to provide Russian and Ukrainian women direct experience of American local government

NIS REGION AND THE TRANSCAUCASUS REPUBLICS

The Small Grants Programs provide support to U S and NIS private voluntary and non-governmental organizations for programs providing innovative approaches to legal problems and the development of civil society Grants range anywhere from \$5,000 to \$100,000 and must involve two or more countries within the NIS Region under the NIS Regional contract, and one or more countries under the other contracts The following grants have been made under the first round of activity under all three contracts (NOTE* Grants made under the Russian and Slavic Contracts will be further elaborated in the next issue of the Newsletter)

International Foreign Policy Association, Moscow State University and Tbilisi Business School *Cross Republic/Cross Discipline Alternative Dispute Resolution Training Program* in Georgia and Russia (\$135,000) A grant to develop training materials--and train Georgian and Russian participants--in ADR

Social Science Research Council and the Russian Science Foundation *Political Science Workshops* in Russia and Ukraine (\$100,000) A grant designed to enhance, in theory and practice, independent scholarship in the field of political science in the NIS

Network for East-West Women and the Moscow Center for Gender Studies *Developing the NIS Legal Network* in Russia, Ukraine and Kyrgyzstan (\$100,000) A grant to create local legal committees in Russia, Ukraine and Kyrgyzstan in order to advance legal reform on behalf of women

THE RUSSIAN FEDERATION*

Environmental Law Institute and ECOJURIS *Strengthening the Rule of Environmental Law* (\$96,526)

International Tax and Information Center and the Higher School of Economics *Russian Tax Law Reform Project* (\$100,000)

Center for War, Peace, and the News Media and Glasnost Defense Foundation *RAPIC Freedom of Information Program* (\$99,965)

Center for Public Representation and Public Advocates *Accessing the Law Through Public Advocacy A Citizen s Legal Center in Ekaterinburg* (\$77,713)

League of Women Voters Educational Fund and Moscow Center for Gender Studies *Strengthening Women s Rights in Russia* (\$100,000)

UKRAINE*

Ukrainian Legal Foundation and the American Bar Association (CEELI) *Ukrainian Bar Association Project* (\$100,000)

Ukrainian Congress Committee of America and the Ukrainian Legal Reform Task Force *Commercial Law Project for Ukraine* (\$100,000)

Environmental Law Institute and ECOPRAVO *Rule of Environmental Law Project* (\$64,196)

Global Jewish Assistance and Relief Network and GJARN/Ukraine *Ukraine ROL Project* (\$100,624)

U S -Ukraine Foundation and the Pylyp Orlyk Institute for Democracy *Advancing the Role of NGOs in a ROL Society* (\$93,950)

Internews and International Media Center *The Ukrainian "What If?" ROL TV Series* (\$25,000)

AMERICAN LEGAL CONSORTIUM PROGRAMS IN CENTRAL ASIA

by Malcolm Russell-Einhorn, Esq
Project Supervisor
Chemonics/American Legal Consortium*

Chemonics International Inc, operating in the region as the American Legal Consortium (ALC), is currently supporting nongovernmental organizations (NGOs) in its Rule of Law Project through a vigorous small grants program and related educational activities. Both are designed to strengthen understanding and use of the law in civil society.

Small Grants Program

ALC's small grants program seeks to award grants to deserving NGOs that evidence an interest in and commitment to strengthening legal institutions and processes in Central Asia and promoting democratic legal reforms. Employing grants mostly in the amount of \$15,000 - \$25,000, ALC has at this writing awarded 14 grants totalling some \$383,174, or roughly one-third of its \$1.3 million grants budget for the three-year (1993-96) base period of its USAID contract. In addition, 22 applications are currently under serious consideration. ALC expects to award another ten grants within the next two months, raising cumulative obligations to \$650,000 by mid-summer.

Geographically, eight of the current grantees hail from Kazakhstan, with three from Kyrgyzstan, and one each from Tajikistan and Uzbekistan. Four applications from Turkmenistan are in the pipeline. A

workshop for NGOs from Tajikistan organized by ALC at the end of May in Dushanbe is expected to result in the award of a half-dozen additional grants.

The work sought to be supported through the grants is equally varied. Several of the groups concern themselves with monitoring and disseminating information on the state of human rights and ethnic pluralism in the region, including the Almaty Helsinki Committee, the Kazakhstan/American Bureau on Human Rights and the Rule of Law, the Tajik Scouts Association, Fund "UKUK" in Kyrgyzstan, and the Center for Political Science in Uzbekistan. Principals from three grantee organizations -- the Almaty Helsinki Committee, the Kazakhstan/American Human Rights Bureau, and Legal Development of Kazakhstan -- have been named to serve as the only three NGO representatives on a Kazakhstan Government Human Rights Working Group that will be preparing the draft State Program on Human Rights.

Other entities, including Adilet Law School and the Club of International Lawyers in Kazakhstan, are specifically involved in promoting improved public understanding of law through the publicizing of important legal developments and publications of monographs, texts, and expert commentary. Adilet, the region's first private law school, is an innovative leader in developing a post-Soviet legal curriculum and self-publishing practical educational materials.

Still other NGOs, most notably Interlegal Kazakhstan and Center InterBilim in Kyrgyzstan, consider their chief mission to be the provision of organizational and legal services to other NGOs, activities that obviously leverage ALC grant funds well beyond their stated amount. With ALC's help, Interlegal has already organized two highly-acclaimed conferences of NGOs in Almaty that provided local NGOs with a wealth of organizational and legal information.

Other important grantee work to be funded by ALC embraces women's issues (through the Women's Resource Center in Tashkent, Uzbekistan and the

"LIANA" Women's Organization in Kazakhstan), consumer protection (the "Consumers' Advocate" organization in Akmola, Kazakhstan), and environmental affairs (the "Green Party" in Ust-Kamenogorsk, Kazakhstan)

Public Education & Information Programs

In addition to the grants program, ALC provides other assistance that supports the growth of a more vibrant NGO community in the region. ALC has played a major role in collecting and disseminating information on the legal status of NGOs under the legislation of the five countries in the region. For example, ALC is 1 distributing hundreds of so-called "Standard Charter Packages" to area NGOs to stimulate more aggressive and better-informed decision-making by NGOs about their own affairs, 2 establishing two Legal Information Resources Networks (LIRNs) in Dushanbe and Almaty, as service centers to give NGOs and other users unprecedented access to local and international legal materials in both print and electronic formats, 3 compiling and disseminating databases of reliable Central Asian legislation and court decisions, and 4 holding several conferences on human rights in Kazakhstan and participating in a successful UN-supported NGO conference in Tashkent in 1994. Later this year, ALC will work with Counterpart Consortium on a major conference in Kyrgyzstan in November, 1995 which specifically addresses the legal and organizational needs of NGOs in the region. Over 200 NGOs are expected to attend.

**Under the Regional Contract the Rule of Law Consortium has responsibility to liaise with American legal Consortium on its projects within NIS region*

RULE OF LAW DONOR DATA BASE

by Regina Dobrov, Esq
 Coordinator/Information Systems/Internship
 Rule of Law Consortium

One of the programs of the Regional Office under the The Rule of Law Consortium (ROLC) is the

Donor Database. The purpose of the database is to identify various organizations (NGOs, PVOs, Consulting Firms, US Government, non-US Government, etc) that are involved in the Rule of Law (ROL) activities in the NIS and to describe their programs. The database, a comprehensive, on-line resource, has been accessible electronically since September 1994.

In order to be as comprehensive as possible, the database uses a broad definition of the ROL which, among others, includes assistance for producing new laws and legislation dealing with social, economic, and political issues, and increasing the role and effectiveness of non-state actors in political and economic affairs in the NIS, including citizens awareness of, demand for, and participation in legal reform, legally oriented institutions and methods of legal recourse.

The database is updated regularly, whenever new information is obtained. If the readers are aware of any donors involved in the NIS ROL activities that are not listed, the ROLC would appreciate you contacting Regina Dobrov at (202) 861-0015 with that information.

The database is housed on the Department of Commerce's National Technical Information Service's electronic bulletin board, FedWorld. To access the database, dial (703) 321-3339, choose option "C" (Business, Trade & Investment Library), followed by option "D" (Rule of Law Donor Database). The Internet users can Telnet to *FedWorld.gov* and choose the options mentioned, or use *Anonymous ftp to ftp.FedWorld.gov*, then selecting ROL-NIS directory. The database operates at 14.4 baud rate and is in DOS WP 51 format.

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SPECIAL ISSUE ON JUDICIAL REFORM

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JUDICIAL REFORM IN THE NIS

An Introduction

by David Bronheim, Esq

Project Manager

Rule of Law Consortium

This, our second issue, under the NIS Regional Contract for the U S Agency for International Development Rule of Law Program, concentrates on judicial reform. From the outset of our program, it has been recognized that a Rule of Law society is crucially dependent on the quality of its judicial system, and that a market-oriented democracy requires such a system to be independent and efficient.

Once again we are indebted to Professor Sharlet for focusing and editing the Newsletter. His task is all the more impressive when the reader notes

from his essay on page 17 that he was, simultaneously, deeply involved in launching our program in Armenia.

In our first meetings in Russia and Ukraine it was impressed upon us that the highest priority in developing Rule of Law societies and their legal infrastructure was efficient and autonomous court systems. Our colleagues in those countries made clear to us that democracy, private property and a market oriented economy required no less.

They did not underestimate the size of the task before them. Judges had to be retrained in both process and substance. The media, the public, and politicians all had to be reoriented. Law Schools had to be enlisted in the job of adequately training the next generations of judges, procurators and the Bar. Procurators had to work constructively and supportively.

The challenge was impressive. This Newsletter contains the views of some of the eminent jurists meeting the challenge, and the reflections of some of the Americans cooperating with them.

Also, in our first issue, I wrote about the need to attack multiple objectives in a mutually reinforcing and coherent program. In Karelia, Russia, we have been able to cooperate in such a program in a single region. Two jurists share their experience with us in managing this cooperative effort.

We have been fortunate in being able to work with brilliant Russians and Ukrainians dedicated to judicial reform. Knowing that all else is dependent on their success, they are determined to move ahead. We, and our colleagues in USAID who work beside us, are privileged to be working with them.

**ON THE RESOLUTION OF
COMMERCIAL DISPUTES IN RUSSIA**

By Chief Justice V F Yakovlev

*Higher Commercial Court of the Russian Federation
Professor of Law*

A new system for resolving commercial disputes was created during the economic reforms in Russia and is currently in operation. New courts that specialize in resolving commercial disputes in particular have been established in place of former so-called State Arbitration Boards which resolved economic disputes principally between government enterprises.

The establishment of these new courts represented a return to an old tradition in Russia predating 1917. Commercial courts had existed in Russia in conjunction with courts of general jurisdiction. Essentially these courts have been revived, although they bear a somewhat different name. These courts are now called commercial courts, although essentially they are state courts designed for the resolution of commercial disputes.

The first level in this system is comprised of commercial courts of the regions (*oblast*), republics (*respublica*), and districts (*krai*) of Russia. There are 82 such courts. The second level includes 10 federal commercial courts which function as courts of cassation.

The Higher Commercial Court of the Russian Federation oversees the system of commercial courts. The Higher Court constitutes the supreme judicial authority of the commercial domain, assuring a uniformity of judicial practice through its interpretations.

The commercial courts handle civil and administrative proceedings. They resolve commercial disputes between entrepreneurial entities which are understood to refer to both legal entities as well as to individual citizen entrepreneurs. The commercial courts preside over administrative proceedings in the

entrepreneurial sector as well. They resolve disputes between entrepreneurs and government agencies, including entrepreneur's complaints against illegal decisions of government agencies which affect the rights and interests of entrepreneurs. Specifically, the commercial courts review disputes associated with the implementation of privatization as well as disputes between entrepreneurs and the tax authorities and others. Commercial courts also hear cases related to insolvency (bankruptcy), and the reorganization of businesses engaged in entrepreneurial activities.

The New Legislation on the Commercial Courts

New legislation on the commercial courts has been in effect in Russia since July 1, 1995, this includes the new Commercial Procedural Code of the Russian Federation. The new legislation also assigns to the commercial court jurisdiction over disputes involving foreign companies and foreign entrepreneurs. Judicial proceedings are also to be guided by new regulations. The principal element here is that the judicial process is based on an adversarial approach. The opportunities for a party to appeal judicial decisions have been expanded significantly. In connection with the appeal of an interested party, the legality of a decision may be reviewed either through an appellate hearing (on facts or on law), or through cassation (on law).

Under current law, commercial disputes can also be resolved by arbitration (by an arbitration tribunal). The assignment of disputes for resolution through arbitration is based on an agreement between the parties. Most commonly this procedure for resolution of disputes is employed in disputes that arise in connection with companies.

Russia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

THE CONCEPT OF JUDICIAL AND LEGAL REFORM IN UKRAINE

*By Chief Justice V F Boyko
Supreme Court of Ukraine*

The Declaration of Ukraine's State Sovereignty passed by the Supreme Rada on July 16, 1990 proclaims that Ukraine guarantees the supremacy of the Ukrainian Constitution and Laws on its territory, with state power being exercised in correspondence with the principle of its separation into the legislature, the executive and the judiciary. The creation of a democratic and law-governed society in Ukraine is impossible without reforming its judiciary and legal system. To fulfill this task the Supreme Rada adopted the Concept of Judicial-Legal Reform in Ukraine by passing a related Resolution on April 28, 1992. The Concept envisions that the major goal of the reform is to shape an independent judicial system, as well as creating new legislation and streamlining the forms of the administration of justice.

The following measures are to be taken toward the implementation of the above:

- To guarantee the independence of judicial bodies by effectively broadening their authority and precluding any influence on them by the legislature and the executive,
- To implement democratic ideas of justice developed by the world's leading scholars and practitioners,
- To formulate a system of legislation on the organization of courts which would ensure judges' independence under law,
- To develop a distinct definition of branch competence within the judiciary,
- To secure each citizen's right of access to courts that are competent, independent and impartial.

As for the cornerstone principles of the judicial-legal reform, the Concept has pinpointed the following:

- To develop a system of judicial process which would guarantee to the maximum the right of court protection, citizens' equality before the court and law, as well as provide conditions for real competitiveness and the implementation of the presumption of innocence,
- To radically reform substantive and procedural legislation,
- To verify the legitimacy and validity of court rulings through appellate and cassation procedures, and by examining newly revealed evidence.

The Supreme Rada has already adopted a number of important laws relevant to implementation of the above Concept, specifically: Laws of Ukraine "On the Status of Judges," "On the Institutions of Judicial Self-Governance," "On Qualification Commissions, the Qualification Attestation and Disciplinary Responsibility of Ukrainian Judges," "On Security Provisions for Persons Participating in Criminal Proceedings," and other normative acts that directly relate to the functioning of courts and law-enforcement institutions.

Substantial changes have been introduced into the Criminal, Civil, Criminal Procedural and Civil Procedural Codes. Thus, cases at the first instance level are to be tried by one judge in a bench trial, by a three judge collegium, or, in certain cases, by two judges and three people's assessors.

A mechanism for judicial control over investigative agencies' procedural activities which restrict citizens' rights, was established. The defendant's right to counsel was considerably broadened. A number of Criminal Code articles were decriminalized.

Authorized institutions are currently working on a new law "On The Judiciary " Drafts of the Criminal, Civil, Criminal Procedural, Civil Procedural, Commercial, Family and Labor Codes are also in process

Coming up with an appropriate structure for judicial bodies is of crucial importance for the formation of Ukraine's judiciary By and large the existing court setup has justified itself It comprises district (*rayon*)/city courts, regional (*oblast*) courts and the Supreme Court The District/City Court still remains the system's basic unit It is in charge of trying all the civil, criminal and administrative cases, except for those whose specificity pertains to others courts' jurisdictions The competence of the Regional Court needs to be limited to hearing first instance cases which entail capital punishment, as well as certain cases of significant public interest It is also entitled to be the appellate and cassation body for decisions taken by district /city courts

The Supreme Court will try first instance cases It will focus on supervising the performance of lower-level courts along with functioning as the appellate and cassation body vis-a-vis regional court rulings

Court jurors are to substitute for people's assessors in line with the above "pipeline" drafts It is envisioned that they will participate not only in innocent or guilty decision-making together with career judges, but will also be involved in deciding all the other sentence-related issues

A new scheme for appellate and cassation review, as well as view of newly revealed evidence, is to be introduced It needs to be harmonized with the related practices of democratic, law-governed states

A new subdivision of judges to handle an ever growing amount of administrative cases is being introduced at the level of district/city courts This is necessary due to the broadening jurisdiction for the specifically administrative cases Nearly all the actions

by officials, and by various agencies and organizations they represent, may be appealed in court, in the event that citizens' rights are violated

The formation of Ukraine's judiciary is deemed an indispensable element of the judicial reform This is being carried out through Qualification Commissions, primarily comprised of judges, whose task it is to secure the formation of a judicial corps capable of administering justice in a professional, conscientious and unbiased fashion The Qualification Commissions give examinations to candidates, draw conclusions and make recommendations concerning the possibility of appointing a candidate to one or another position, or, conversely, discharging him/her

On the basis of the Qualification Commission's decisions in accordance with the Constitutional Agreement between the Supreme Rada and the President of Ukraine, judges at all levels, except the Supreme Court, shall be appointed by the President upon receipt of a recommendation from the Minister of Justice prepared in consultation with the Supreme Court of Ukraine

The implementation of the above programs will protect the socio-economic, political and individual rights and freedoms of Ukrainian citizens, as well as the rights, and lawful interests of enterprises, institutions and organizations, irrespective of the type of property, against any encroachments under the existing democratic constitutional arrangement

Ukraine is determined to become a civilized, law-governed state

UKRAINE'S COMMERCIAL COURTS ACHIEVEMENTS AND PROSPECTS

*By Chief Justice D N Prityka
Higher Commercial Court of Ukraine*

Objective changes have been underway in Ukraine since 1991, which have impacted the country's economic system The emergence of new approaches

to running the economy, the development of new national legislation to regulate economic inter-entity relations, including enterprises with different types of property, set in motion the need for creating an institution, whose jurisdiction would encompass the protection of the rights and the legitimate interests of all those participating in the process

In this contexts, pursuant to Article 161 of the Ukrainian Constitution, the Supreme Rada adopted a law "On the Commercial Court" on June 4, 1991. The law laid the foundations for a new organizationally independent branch of the Ukrainian judiciary -- Ukraine's commercial court system

The next stage of the system's consolidation was heralded by passage of the laws of Ukraine "On the Status of Judges," "On the Institutions of Judicial Self-Governance," "On Qualification Commissions, the Qualification Attestation and Disciplinary Responsibility of Ukrainian Judges," and others. The development of the judiciary is currently gathering momentum, having been given impetus by the Constitutional Agreement between the President and the Supreme Rada, based the law "On State Power and Local Government "

Consistent with the Ukrainian Constitution, the Commercial Court is empowered to administer justice in the realm of commercial-economic relations, hence its three major tasks. To protect the rights and lawful interests of all those involved in commercial-economic relations, To promote the strengthening of the legitimacy of related transactions, and to submit legislative proposals aimed at streamlining the legal regulation of commercial-economic activities

During the brief period of its existence the Commercial Court has successfully completed the phase of organizational formation. A package of new laws regulating commercial dispute resolution and bankruptcy-related procedures, was passed. Currently, the commercial court system consists of two components. The Commercial Court of the Autonomous Republic of Crimea, regional (oblast)

Commercial Courts, the city Commercial Courts of Kyiv and Sevastopol on the one hand, and the Higher Commercial Court of Ukraine, on the other. A complement of 1,238 judges and court specialists ensure the system's smooth functioning

Over the four-year period 359,000 claims were filed and processed by the commercial courts. Property-related disputes, arising out of the non-fulfillment of commercial agreements constitute the great majority of the cases, as much as 93-95 percent each year

Consistent and steady legitimization of the administration of justice in the area of economic relations is definitely on the Higher Commercial Court's priority list. The mechanism of appellate review is especially relevant in this process. With this aim in mind and in pursuance of the Law of Ukraine "On the Commercial Court" and the Commercial Procedural Code, a system of agencies authorized to supervise and monitor the legality of decisions made by the Ukrainian Arbitration Courts was created. It envisions that the court has the right to use the mechanism of appellate review at its own initiative in order to check the legitimacy and validity of a ruling or approval, as well as to review certain cases, based upon a party's statement or the prosecutor's protest. Thus, eight of every 10 cases was reviewed in the period of time from 1991 to June 1995

From 1991 through 1995, the Higher Commercial Court drafted or took part in drafting 29 bills, including the Draft Commercial Code of Ukraine and the Draft Law "On the Commercial Court ". Prepared as a joint effort of both scholars and practitioners, the finishing touches are now being put on the Draft Commercial Code

The brisk development of Ukraine's legislation in the period, 1991-1995, and the emergence of new socio-legal relations which generated new categories of commercial disputes, logically precipitated the creation of a rapid-response system of judicial training. Based upon the Parliamentary Resolution of February 24,

1994 "On Provision for the Activity of Courts," a scientific-research and methodological center (commonly referred to as the Judicial Refresher Training Center), was launched and is now in operation at the Higher Commercial Court. Founded in close cooperation with the the U S Agency for International Development and the Rule of Law Consortium, the Center came to grips with a crucially important challenge: the improvement of the qualifications of judges and commercial court specialists.

Prospectively, the Center will be in a position to offer qualification upgrading to legal advisors who are engaged in the commercial domain. It is common knowledge that the training of cadres is extremely vital at the stage when a number of new legislative acts are being adopted. In the period from January to June, 1995, 88 commercial court judges successfully completed their refresher training courses at the Center. Another 19 judges made an internship trip to the USA in 1994, receiving their practical training mainly at the Ohio Supreme Court in Columbus, Ohio.

Presently, in line with a Presidential Decree, a new version of the Concept for Judicial-Legal Reform is being prepared, the key provisions of which are to be legitimized by a new Constitution of Ukraine. First and foremost this relates to the role played by the judiciary in the reform process.

An All-Ukrainian Scientific-Practical Seminar, held on May 23-25, 1995, was dedicated to the topic "Judicial-Legal Reform: The Administration of Justice in the Commercial Domain," the seminar was co-sponsored and by the Academy of Legal Sciences, the Higher Commercial Court and the National Law Academy of Ukraine. Both academics and practitioners repeatedly emphasized that the formation of Ukraine's judiciary must adhere to international principles and standards for the administration of justice, as stipulated by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Paris Charter for a New Europe, and the basic principles of judicial independence.

The very creation of a civil, democratic society and a law-governed state is dependent on the choice of the right option, when structuring the judicial branch of power, given that judiciary is the major prerequisite for success. In this regard it would be desirable to come up with an academically substantiated and practically tested draft of the judicial reform, which would maximally take into account Ukraine's current social, economic, political, legal and spiritual realities.

Proceeding from the system's future prospects, historical factors and present day transitional conditions, academics, practitioners and commercial court judges deem it expedient to adopt the following commercial court system:

- Commercial courts of the Autonomous Republic of Crimea, Ukrainian regions (oblasts), and the City of Kyiv and the City of Sevastopol to hear the majority of commercial disputes at the first instance level,
- Appellate Commercial Courts to be formed in areas, which encompass the territory of several regions (oblasts). No more than five of these courts need to be created, specifically in the western, southern, north central and eastern include sections of Ukraine. The jurisdiction of these courts would include deciding certain disputes at the first instance level, as well as appellate and cassation review,
- The Higher Commercial Court of Ukraine is seen as the cassation instance for appellate court-related cases. Its competence would also include analyzing court practice, developing guiding instructions and explanations, as well as drafting legislative proposals and submitting them to the Parliament, given the fact that the Constitution gives the Higher Commercial Court with the right of legislative initiative.

The proper regulation of the rapidly changing commercial-economic relations in Ukraine requires substantial and adequate innovations and alterations to the commercial legislation and commercial-procedural law

- Widening the circle of the subjects of entrepreneurial activity, which are entitled to apply to Commercial Courts for the protection of their violated rights and interests, for instance to provide individual entrepreneurs with this right,
- Abandoning pre-trial settlements of disputes or changing its procedure for certain categories of cases, drastically shortening claim consideration deadlines,
- Considerably simplifying the court procedure for certifying bankruptcies

Taking into consideration and implementing the aforementioned proposals, put forth by the leading legal scholars and practitioners, will undeniably help establish a new democratic and independent judiciary, whose motto is the realization of the Rule of Law in Ukraine

JUDICIAL EDUCATION IN A RUSSIAN REGIONAL REPUBLIC

A CASE STUDY OF KARELIA

By Justice John A. Dooley

Supreme Court of Vermont and

Judge Nellie Kabanen

Supreme Court of Republic of Karelia

In the last issue of the Newsletter, David Bronheim, Project Manager of the Rule of Law Consortium, explained that because of the limited resources available, the enormity of the task and the time constraints, the consortium has targeted the "apex bodies of key legal institutions" with the widest audience for judicial training. The one major exception, at least in Russia, has been the various

programs established between the Vermont Judiciary and Bar Association and the legal community of the Republic of Karelia, an Autonomous Republic within the Russian Federation. Included in the programs of the Vermont/Karelia Rule of Law Project has been a very active judicial education program, which has especially supported the introduction of criminal jury trials in Karelia.

Certain facts about the Russian legal system support the need for a local training effort of judges. The Russian legal system is very labor intensive, requiring over twice the number of judicial officers of a comparably-sized unit in the United States. Thus, Karelia, with approximately 850,000 residents has 131 authorized professional judges in the Peoples (trial) Courts, commercial courts, The Supreme Court (trial and appellate) and the Constitutional Court. By comparison, Vermont, with 600,000 residents has 30 authorized trial judges, five Supreme Court Justices and two United States District Judges.

Many Russian judges have not had the broad legal education available to their American counterparts. For example, only about half of the Karelia judges have had an on-campus legal education at a university law department. The remainder have learned law on the job (many formerly had roles within other parts of the legal system or as assistants in the courts), and through correspondence courses. The focus of the Rule of Law Consortium's efforts in assisting the national institutions of the Russian Federation in judicial education has been to train or retrain the judicial trainers. The enormous number of judicial officers to be trained, and the unmet training need, makes it unlikely that any effort seeking to train all Russian judges at the national level will succeed. Training may be designed nationally, but it must be delivered locally.

The local delivery systems are in need of attention if they are to become effective providers of high quality, relevant judicial education. In Karelia, for example, there have been only limited opportunities for training of judges once they have been appointed.

Although in theory, each new judge should have an opportunity to attend a national training program once appointed, and every three years thereafter, the supply of training events has not kept pace with the demand, thus many judges have never attended such a program. Local training has been limited. Most of the Karelian judges meet quarterly, in part for continuing judicial education. The education component of the meeting has usually been a lecture by one or more judges of the Supreme Court on changes in the law in a particular area.

There also needs to be attention to educational methodology. Almost all legal education in Russia has been by lecture. New methods of instruction have not reached the law schools or the limited judicial education programs.

The judicial education component of the Vermont/Karelia Rule of Law Project has sought to establish in Karelia a regional training program that meets the educational needs of each of the judges in Karelia, particularly in adapting to the changing legal environment in a progressive way. It is designed to draw on national resources where these are available and thus link to the national institutions and programs supported by the Rule of Law Consortium. The judicial education events are, however, designed locally to respond to expressed needs of the Karelian judiciary.

As we come to the close of our second year, we hope we are developing a model both of judicial education, and of Russian/American partnership in planning and delivery of that education. Our experience indicates that three attributes of the program are critical to its success.

Attributes of Success

The first attribute deals with the substance of the educational events. The initial efforts at American-assisted education, of Russian judges has usually stressed instruction in the central ingredients of the American legal system such as the centrality of the

Rule of Law, the independence and power of the judiciary and the role of judicial review of executive and legislative actions. These are important efforts, and often of high interest to Russian audiences, but of limited utility to judges in their day-to-day work. Many features of the American system although of intellectual interest, are not a usable model for the development of the Russian system.

Thus, the substance of judicial education efforts, even where assisted by Americans, should be on Russian law and legal practice, and on topics chosen by the judges themselves or their representatives. This does not mean that Americans have no role in Russian judicial education. In fact, many subjects benefit from a comparativist approach where Russian and American judges discuss their different approaches to common problems.

We stress that the major contribution of Americans is in demonstrating the need for, and results of judicial education. Our description of the state of judicial education in Karelia would have applied to Vermont as recently as a decade ago. Education was not then a priority in the Vermont judicial budget.

In the last decade, however, the Vermont judiciary has come to recognize the need for high quality and regular judicial education for professional development. All judges now go through a week-long annual "judicial college" as well as other high quality programs. Most judges go to at least one national training event during the year and the three northern New England states have combined efforts for an annual regional event for all judges. Both the in-state and regional programs use national presenters and a mix of instructional methods.

The American commitment to judicial education as a critical element of the professional development and renewal of judges as they face new challenges in their work, is relevant to the Russian situation. The American system is a usable model for Russian judges if we can impart why judicial education is important, how it can improve professional skills and

knowledge especially where significant legal and societal change is occurring, and what resources are needed to make it work

The American methodology and commitment can be demonstrated in the program designs or as a subject of instruction. The Vermont/Karelia project has done both with success. During May of 1995, American and Karelian judges and lawyers put on a program on jury trials and ethics. To present the evolving Russian law, we retained judges who have conducted jury trials in one of the designated experimental regions and Russian law professors who are experts in criminal procedure and ethics. The demonstration indicated that, as in the United States, national experts can be used to present high quality local programs. The event also included a panel on judicial education in Vermont to show how a training event like the one being held fit within a broader education program.

The second attribute is related to the first. Judicial education in the United States has benefited greatly from the introduction of methods of instruction other than the lecture by experts. Particularly important has been the development of an active role for participants whether in role-playing, collaborative decision-making or discussion of common problems. The Russian system can benefit greatly from these methods. Russian judges are ready for an active role in their education. They want to discuss difficult problems in areas like ethics, challenge presenters through aggressive questions, and try out new roles and responsibilities even in a practice session.

Our May program in Karelia relied primarily on role-playing to demonstrate criminal jury trial procedure and group-discussion to look at ethical and professional dilemmas. There was intense interest in the role-play and the strategic and tactical choices for the participants, as well as the skills necessary for management of a jury and the handling of advocates in an adversary environment. We presented hypothetical ethical problems and they produced a spirited discussion of how judges should conduct themselves.

These hypotheticals also produced the best discussion of alternative approaches in the American and Russian systems. The discussion encouraged the participants to think through difficult ethical problems and see the point of view of other system participants.

The third attribute is to link judicial education to the education of lawyers, as well as others within the legal system, and in isolation from undergraduate legal education. In the United States, there are sufficient resources to train judges independently in separately tailored programs. Few would expect that bar association continuing legal education programs would alone suffice as educational events for judges. The situation in Russia is different. However Russian judges and legal administrators come to view judicial education, there never will be adequate resources to train judges at the intensity that exists in the United States. Moreover, the large number of Russian judges makes the challenge of adequate judicial education even greater. Finally, the fundamental change that is occurring within the Russian legal system is facing judges and lawyers alike means that these professionals must relate to each other in new ways.

We believe these differences make much more appropriate combined education of judges and lawyers in common programs in Russia. Although we could argue this as a resource shortage necessity, we believe it makes methodological sense and works because of the open communication of lawyers and judges. For example, our May Karelia program used a jury trial role-play to train trial judges, procurators and defense lawyers. The role-play was interrupted periodically to allow the judges and lawyer groups to meet separately to discuss events going on in the role-play. For example, after the evidence presentation, the judges met to discuss how to construct a jury charge, while the procurators met to discuss prosecution closing argument and defense lawyers met to discuss defendant's closing argument. In this way, one event served as skills training for three separate types of legal professionals.

We see similar linkages to the law schools several of which are developing trial advocacy instruction with assistance from the Rule of Law Consortium. The cost of such program may become manageable if shared with the judiciary and lawyers.

American assistance to judicial education efforts in Russia faces the challenge of supporting positive change in a sustainable way with limited resources while demonstrating meaningful results. We agree with the Rule of Law Consortium's conclusion that the bulk of the assistance must be at the apex level to produce the greatest and long-lasting results. The Karelia program supplements the national effort to demonstrate how the Russian regions can progress and how regional judges can develop the professional skills for a greater role in the new Russian legal system.

**WORKING WITH RUSSIAN JUDGES
PRINCIPLES OF INTERNATIONAL
JUDICIAL TRAINING**

*by Judge V Robert Payant
President National Judicial College
Reno Nevada*

During its thirty-three year history, The National Judicial College (NJC) has provided training to more than 30,000 judges and court officials in a wide variety of resident and extension courses. More than 65,000 certificates of course completion have been issued. Judges attend the College, which is located on the campus of the University of Nevada in Reno, from every state and from many foreign nations. The College also conducts courses and seminars in other locations with average annual attendance now exceeding 3,500.

From its beginning, NJC has enrolled English-speaking judges in its regular courses. Most have been from the Commonwealth nations and include judges from Africa, India, Pakistan and Sri Lanka, and from Australia and New Zealand. These judges attend classes with American judges and participate fully in the regular courses offered.

In more recent years, with the use of interpreters and simultaneous translation equipment, judges from a wide variety of nations, particularly from Latin America, Asia, Eastern Europe, and from the former Soviet Union, have attended special courses prepared for the specific needs of judges in the developing democracies.

Beginning a few years ago, NJC has also developed courses in which its faculty has traveled abroad. During March 1995, 12 trial and appellate judges from the Russian Higher Commercial Court participated in an intensive one-week course at the NJC Reno campus. Selected as likely trainers for their colleagues, these judges were taught a combination curriculum of substantive legal matters along with lessons in adult education and communication techniques. The substantive matters included bankruptcy, enforcement of judgments, contracts, court management, and judicial ethics.

In May, an NJC faculty team composed primarily of active judges, conducted a one-week course in Moscow for 85 judges of the commercial court system on the same topics. Because the NJC faculty lived in the same quarters at the Academy of Economics as the Russian participants, classroom sessions between the Russian judges and the American faculty members were supplemented by after-class discussions on judicial independence, the inherent powers of courts, and ways to increase public respect and confidence in the Rule of Law.

Evaluations for both the "training the trainers" session in Reno and the seminar in Moscow received outstanding reviews from the Russian participants. The judges appreciated the written course materials and look forward to receiving the judicial notebook/training manual, which is currently being completed by the National Judicial College using Russian judges and lawyers as authors. NJC's contract with the Rule of Law Consortium provides for publication of 2,000 copies of the notebook/manual to be distributed this fall to all judges of the commercial courts.

Universals of Judging

A question frequently asked of American judges about National Judicial College courses has been, "What can be taught when the laws and

procedure between the various states are so different?" The questions have been even more pointed when we consider training of judges from a civil law rather than a common law tradition

National and international training programs, bringing together judges from various jurisdictions, is so valuable because the NJC teaches the art and science of judging--those attributes of good judges and good judicial decision-making which have a universal application

While it is true that some NJC courses do teach "black letter law," the approach is always to look at new trends in the law and the role of the judge in handling the new challenges or interpretation NJC faculty members take the position that judges know or can find the law, the purpose of College training is to assist judges in finding those methods which ensure that the legal system provides justice--the universal aspiration of human kind

What are these universal concepts of judging that we believe can bring together judges from Russia and the United States? First and foremost, the classes discuss the appropriate role of judges in a democratic nation The independent adjudicator and decision maker who builds public confidence is the ideal judge Understanding that judges should not be swayed by partisan objectives and must have the integrity to rule without bias or prejudice, fear, or favor, are concepts that can be taught

Another universal aspect of judging is understanding the leadership role that individual judges and associations of judges can appropriately undertake Judicial reform requires careful and thoughtful study, but also it often requires vigorous advocacy What judges may and should do on behalf of system

improvement is an important part of the curriculum

Management of the courts and the role that judges must play in their own courtroom such as bench skills including attentive listening, note-taking and effective communications--are judicial attributes which transcend territorial boundaries and are needed by judges everywhere

When the Rule of Law Consortium asked the National Judicial College to participate in training Russian commercial court judges consistent with the College's experience with judges from America and many other countries, several principles guided our approach

NJC's Approach to International Judicial Training

NJC believes that the optimum program will involve reciprocal visits of foreign judges to America, and American judicial faculty members travelling to foreign venues It is the College's hope that some foreign judges will be able to attend courses at the College's Reno campus where they will have an opportunity to interact with American judges in and out of classrooms The intangible values coming from such interchange actually provide the best way to learn about the independence of the American judiciary How to achieve and sustain judicial independence is of great interest to international visitors From this flows the principles which guide NJC in its programs for Russian judges

1 Since many of the judges who are selected for training in America will be expected to become judicial trainers for their colleagues in their own countries, the College structures the curriculum to incorporate the best adult continuing education techniques International participants are generally asked to make micro-presentations using the interactive classroom techniques that they have observed NJC faculty using This is important because the great bulk of the judiciary in Russia is not going to be trained in Reno, Nevada or in any other place in the United

States The majority of the training must obviously take place in Russia To this end, NJC believes that at least some of the training be in a situation where the foreign judges can, over a period of time, interact with American judges and observe and participate with them in an adult professional education program

2 The College also maintains the principle that a structured academic program is better than informal "seminars " While it is important to retain flexibility in scheduling, a carefully designed curriculum with set topics supported with scholarly research and written outlines and checklists have a real and continuing value The College has found that both American and foreign judges want a true academic program and are willing to read the assigned material and prepare themselves for classroom and discussion group exchanges

3 As part of its academic programs, the College does arrange visits to institutions, courts and correctional centers, but this done in the context of training and not as mere sight-seeing exercises Without careful and coordinated planning, particularly when an international program is conducted at several sites and by different organizations, the danger of redundancy is increased I remember one group of visitors who arrived at the NJC after visiting several courts and other institutions across the country When I handed the group leader a copy of the US Constitution, he remarked that it was the tenth copy he had received since arriving in America Obviously, that group did not need another commentary on the structure of the judiciary in the United States

4 Another principle is that since NJC trains individuals who are professionals and who are making significant decisions affecting the lives of individuals before the court, the training must be on a professional level, using techniques which draw from the experiences of the participants The use of Socratic dialogue, role-playing, and small group discussions combined with the appropriate use of audio-visual materials, do much to challenge and stimulate the adult learner

5 Another principle followed by NJC is that participant evaluation of the courses is vital if quality is to be maintained In addition to asking participants to note the quality of the instruction and the value of the material, participants are encouraged to comment on the curriculum and to suggest the addition or deletion of topics The evaluations are shared by NJC staff and faculty on a confidential basis Suggestions which appear to have considerable support by participants are often included in future programs

6 A final principle observed by the National Judicial College in its courses is that active judges are the best trainers for other judges This is not to say that law professors, practicing lawyers, and experts from other disciplines do not have a role to play in judicial education It is simply to suggest that experienced judges can develop a particular rapport with student judges It is important that judges selected for teaching assignments understand the methods of adult education Finally, other faculty members, such as physicians, psychologists, communication and computer experts, penologists and others provide an important supplement to the judge faculty

TRIAL ADVOCACY TRAINING AT RUSSIAN LAW SCHOOLS

*By Patrick Murphy, Esq
Deputy Director for Administration
Role of Law Consortium, Moscow*

As part of its curriculum development work with Russian law schools, the Rule of Law Consortium (ROLC) has introduced American trial advocacy teaching methodology at two Russian law schools

In the summer of 1994, Professors Kenneth Broun and Richard Rosen of University of North Carolina at Chapel Hill Law School, visited St Petersburg State University (SPSU) Law Faculty and Urals State Law Academy (USLA) in Yekaterinburg, with which the Rule of Law Consortium already had

working relationships. The SPSU Law Faculty has more than 2,500 students, 800 of them full-time. USLA has over 5,000 students in its full-time, part-time, and correspondence courses taken together.

Based upon assessments of the Russians' interest, the ROLC agreed to assist the law schools in the area of trial advocacy training.

Later in 1994, ROLC consultants, Professor Adrienne Fox of North Carolina State University Law School and Professor William Burnham of Wayne State University Law School, both of whom are experienced in National Institute of Trial Advocacy (NITA) teaching, held a planning meeting with members of the SPSU Criminal Procedure Department, Burnham also met with USLA faculty.

At these meetings, Burnham and Fox discussed and demonstrated NITA-style methodology and distributed NITA-supplied materials. SPSU faculty members Professors Natalya Sidorova and Julia Mercoulova and USLA faculty members Professors Irina Reshetnikova and Aleksei Proshlakov assumed responsibility for introducing the NITA-style course at their respective law schools. All four know English, Mercoulova and Proshlyakov also have experience as defense counsel (*advokaty*).

The four instructors began to develop NITA-style, case files and problems to use in the planned courses. The instructors from the two schools worked largely independently of each other.

At Russian law schools, courses in the duties and function of counsel have traditionally been part of the curriculum, and some role playing is done in these courses. Law students also participate in internships, both unpaid--typically four weeks, and paid--typically eight weeks (in which advanced-level students work in judicial, prosecutorial, or law enforcement offices).

Russian role-playing is generally used to demonstrate how something is done, and only the individuals in that demonstration participate. The

NITA methodology, by contrast, focuses on the experiential learning value of performing the role of lawyer, and gives all students the opportunity to play roles. Under the NITA approach, students 1) read and hear lectures on how to perform a task, 2) perform in a role-play exercise, 3) receive critiques of their performance from an instructor(s), 4) view their performance on videotape, and 5) have the opportunity in later sessions to implement what they learned from the critique and video review. In the NITA critique, teachers comment both on the student's live performance as well as during review of the videotape.

To further expose the Russians to NITA methodology, in March 1995 the four Russian faculty members attended NITA training programs held at Northwestern University Law School in Chicago and at Harvard Law School, and made visits to other American law schools. Burnham and Fox helped the visitors to assimilate the experience, and assisted them in further preparing the case files.

One of the two criminal case files used at SPSU was a NITA purse snatching case, adapted to the specifics of Russian criminal procedure. This case was used for the portion of the seminar devoted to specific skills. The second file was based on an actual Russian case of a drunken ship captain who wounded his wife during an argument. The students tried this case in its entirety. In Yekaterinburg, the specific skills portion of the course was also based upon a modified NITA case, while the "trial" was based on an actual Russian case in which a watchman stabbed and killed an intruder.

The Yekaterinburg class lasted six days (April 24-29, 1995), and the St. Petersburg class five (May 2-6, 1995). Video equipment given to the law schools by the ROLC was used. Enrollment was deliberately limited to approximately two dozen students at each school, although many more had wanted to participate. Burnham, who speaks fluent Russian and knows Russian courtroom procedures, advised at both courses and joined the Russian faculty in critiquing the students. In addition, specially invited prosecutors, lawyers, and judges also helped critique the sessions. The seminars started with case analysis and witness

examination, dealt with aspects of witness examination such as impeachment (cross-examination to expose biases), the role of experts, and ended with closing arguments. Although jury trials are not yet being held in either of the regions where the law schools are located, the courses were presented with an emphasis on the increasingly adversarial nature of Russian trials, and on how various tactics would fare with the expected future juries.

The level of preparation for the seminars by the Russian faculty and students was extraordinarily high. The students were extremely enthusiastic about this approach to legal education. The novelty of using video lent a compelling quality of immediacy. The individualized, one-on-one attention provided by the critiquers made an enormous impact on the students, perhaps because it so contrasts with the usual "straight lecture" method of Russian classrooms. A number of students at both schools said that the course had been the best part of their law school education. During a summation of the course at USLA, one student bluntly stated that these kinds of methods need to be used in the teaching of other courses as well. The statement registered with an assistant dean who was observing.

A working group at USLA is planning for the use of video, individualized critiques, case files for conducting mock trials, and other elements of NITA methodology in other subject areas besides the training of future criminal lawyers. A seminar which deals with lawyers' roles in both civil and criminal cases will use the NITA methodology, and faculty members believe it can be applied in the teaching of civil and criminal procedure and commercial law as well.

The ROLC trial advocacy program successfully exported a uniquely American active form of teaching, introduced it through Russian teachers, and laid the foundation both for its continued use in the training of trial attorneys, and its future application to other subjects.

JUDICIAL PROCESS AND UKRAINE'S COMMERCIAL COURTS

*By Robert Bayer, Esq
Deputy Chief of Party
Rule of Law Consortium Kyiv*

A primary goal of the Rule of Law Consortium is to assist in the creation of a truly independent judiciary in Ukraine. Americans generally think of an independent judiciary in terms of independence from control of, or domination by the executive and legislative bodies. Americans also tend to consider an equal voice in government as a hallmark of an independent judiciary, although this latter concept is not truly a necessary attribute of independence. The English courts, for example, do not have the power to declare an act of Parliament unconstitutional, but one would not conclude that they are therefore not independent.

Given Ukraine's history of more or less absolute autocracy pre-and post-1917, and the subordination of all law and legal structures to the Communist Party in both political and nonpolitical cases from the end of the Civil War to the fall of the USSR, the creation of a judiciary independent from the executive and legislative branches is a daunting task and, one that will take sometime to attain.

Although Ukrainian legislation speaks of the Higher Commercial Court and the Supreme Court and their subordinate bodies as being independent, legislation makes the judges and lower courts of both systems dependent upon executive and legislative authorities for the basic needs of housing for judges as well as premises for the lower courts. For example, local authorities are directed to allocate apartments to judges. Judges simply make too little money -- @\$15 per month for trial level judges -- to buy or rent on the emerging private market. Yet many local administrations simply have failed to carry out the assigned task of allocating apartments to judges. Some regional judges in Lviv, for example, have been without an apartment for three years or more. It is perhaps not coincidental that one of the general court

judges, who is married with a child and has not been allocated an apartment, has ruled against city authorities in various housing disputes

Local authorities are also charged with finding suitable premises for local courts. A presidential decree declared that the local administrations should "give priority" to the courts in allocating former Communist Party buildings. Appropriate space allocation followed in many places, but elsewhere courts were not suitably re-housed. As a result, in several regions both the general court and the commercial court have woefully inadequate facilities. In Lviv, for example, the regional commercial court and the regional general court are crowded together with four to five judges to a room in dilapidated buildings with leaking roofs.

The district (basic trial) courts of the general court system are almost everywhere in inadequate buildings. (The commercial court system does not have a district level, it functions only down to the regional level.) It seems too obvious for comment that a situation in which judges are dependent for their own personal well being, and the courts must rely upon executive and legislative officials who appear before them as parties for premises is not conducive to creating an independent judiciary.

This indirect power over the courts has at least two deleterious effects, even if it could be shown that no judge was ever influenced by the need to curry favor to obtain an apartment. First, private entrepreneurs who are very aware of the judges' dependence have more than once confided that they cannot get a fair decision from the judges when the opposing party is a local official or agency. Secondly, the failure of some regions to allocate housing is costing the courts talented people. Supreme Court officials have reported that several judges have refused a promotion because it would entail moving to another city where they would be dependent upon the local authorities to obtain an apartment.

Judicial Decision Making in the Commercial Courts

Although the problem of independence of the judiciary from executive and legislative authorities still exists and properly garners the lion's share of attention, there is also a problem of independence within the court system. Apropos, there is a problem of trial judges making their own, independent decisions on the cases before them. I will focus on the commercial court judges because, in my relatively brief stay in Ukraine, I have had a greater chance to observe them in several judicial seminars (held by the Higher Commercial Court), and to talk with them privately.

Trial court judges in the commercial court system routinely seek guidance from the Higher Commercial Court on pending cases. Normally, they simply telephone the senior court, and explain the facts and ask for assistance. Usually trial judges received letters in reply. They are not supposed to cite the letter in their decisions and the letters are not considered binding if the case is ultimately appealed and reviewed. Many of the trial judges, however, do cite the letter as the basis for their decision.

The trial court judges also have a second, although less frequently used method of passing a case on the verge of the final decision, up the line for assistance. The final day of judicial seminars are devoted to lower court judges discussing particular pending decisions and receiving guidance not simply from staff attorneys, but from the senior judges of the Higher Commercial Court, including deputy court chairmen. These sessions illustrate an intriguing paradox. The trial judges are supposed to describe the cases only in generalities, but are frequently chastised for not being specific enough in their descriptions for the panelists to give specific answers.

There appear to be five factors influencing trial court judges in their decision to go directly to the Higher Commercial Court for what is the *de facto* decision in the case.

(1) There is no tradition of an independent commercial trial court judge. Until the collapse of the Soviet Union, what is now the commercial court was a specialized administrative agency, the State Arbitration Service, subordinate to Gosplan, the state planning agency. The current leadership of the Higher Commercial Court has acknowledged that the work was not taken seriously, because decisions "only affected the USSR, Incorporated."

(2) Trial court judges lack access to controlling legislation and administrative regulations. In Soviet days, many of the laws and regulations simply were not published. Now, by statute, laws and regulations are not enforced until published, but the published material does not effectively get into the hands of the trial judges. Regional Commercial Courts receive a single copy of a new law or regulation and most have no capacity to duplicate and distribute it. Conscientious judges subscribe to the official legal gazette, and then clip and paste to obtain a copy of the text of current legislation. Some judges have books that have fold outs pasted upon foldouts upon foldouts. Such compilation of laws and regulations takes considerable time and dedication. Not every judge has -- nor should any judge be expected to have -- the qualities necessary to make such a "system" work. Some of the regions have one or two clerical employees to make one centralized copy for the entire region, but that compilation has to be shared by 10 to 15 judges.

(3) Not only is the controlling law hard to find, but especially in the commercial field a plethora of legislation has been adopted and regulations promulgated, much of which does not reflect model draftsmanship and much of which is simply contradicted by other regulations and laws.

(4) Commercial court trial judges work under very tight time constraints. They have 60 days from the filing of a complaint to render a decision. Given the case loads, each trial judge has to decide one

case per day just to stay on schedule. Obviously, one day per decision leaves little if any time to try to track down the controlling law, analyze the facts, reconcile contradictions in legislation and render the required written decision. To make matters worse, decisions are laboriously handwritten because the courts are desperately short of typewriters, let alone computers. (Several judges have commented that the only difference in their work and that of their nineteenth century predecessors is the use of a ballpoint instead of a quill pen.)

(5) The lack of ready access to controlling law and the lack of time to do their work are perhaps reason enough that the trial court judges seek guidance from the Higher Commercial Court on pending cases. But there seems to be one more important factor at work--the fear of mistakes. Errors by lower court judges are treated almost as sin rather than as a normal aspect of the limitations of judicial capability. At plenum sessions, the leadership of the Higher Commercial Court has criticized the "inadequate performance" of specific regional courts and complained that in only two of 28 regions were no cases reversed on appeal. A later check of the number of reversals against the number of cases showed an error rate of one or two percent for what were described as "the worst" regional courts. This unrealistic demand for perfection, coupled with what appears to be an intellectual tradition of not only correcting the mistake, but also attacking the person making it, instills great hesitation in the trial court judges to act truly independently and take upon themselves the risk of being mistaken. (Several trial court judges have said privately that they fear the humiliation of being singled out for making a mistake.) It is understandable that trial court judges try to protect themselves by seeking advice on pending cases directly from the Higher Commercial Court.

Conclusion

The Rule of Law Consortium is striving to help alleviate some of the problems effecting trial judge independence. The Consortium intends to transfer

high-speed, inexpensive duplicating equipment to the Higher Commercial Court (and to the Supreme Court as well), so that new laws, regulations and "guiding explanations" can be put into the hands of each trial judge within a week or two of adoption. A fairly comprehensive computer system so that each judge in the system will have access to computerized data bases of all Ukrainian laws and regulations. (We are also installing computers and data bases in the general court system, but the very size of the system with 4,500 judges makes it difficult to install computers below the regional level.)

However, until the current unrealistic expectation of virtually errorless decision making by the lower court changes, commercial trial court judges may continue to seek guidance from above which will affect the independence of their decisions.

LEGAL AND JUDICIAL REFORM IN ARMENIA

*by Professor Robert Sharlet
Coordinator-Institution Building
Rule of Law Consortium*

The Republic of Armenia, long besieged by war and blockade, has of late regained momentum in its post-Soviet transition. On July 5, 1995, the country's first post-Soviet parliamentary election took place accompanied by a public referendum on a new constitution. Armenia's post-Soviet Constitution won approval in the referendum process, and the pro-government coalition gained a majority of seats in the new parliament, although OSCE and other international monitoring organizations expressed concern about the fairness of the election.

Rule of Law Assessment

During spring 1995, Professor Herman Schwartz of American University Law School and I had made separate but complementary field trips to Armenia to carry out a Rule of Law assessment, and to design appropriate projects to be proposed to the U S

Agency for International Development (USAID). Subsequently, we returned together during the summer to continue the design phase in connection with the Armenian Judicial Conference sponsored by the Rule of Law Consortium (ROLC) under the auspices of USAID.

On these occasions, we met with an array of legal and political officials of the Republic of Armenia. Our purpose was to learn from them how they evaluated the Rule of Law needs of their society, and what they saw as the priority tasks in this area. Our interlocutors included the Chief Justice of the Supreme Court, the Minister and Deputy Minister of Justice, members of the Constitutional Commission, a Deputy Procurator General, the Dean of the Erevan State University Law School, the head of the principal drafting group for new legislation, the Senior Adviser to the President, the Deputy Chairman of the parliament and other senior and mid-level officials, including a number of judges.

The Existing Judicial System in Armenia

In our spring talks, after the imperative of completing the drafting of a new constitution for the impending July referendum, the priority Rule of Law issue for all of our Armenian colleagues was the need to develop an independent judiciary. There was no dissensus on this matter. The existing judicial structure inherited from the Soviet period had outlived its usefulness. This includes a two-tier system with a number of District (trial) Courts throughout the country and a Supreme Court in Erevan, the capital.

The District Courts are the courts of first instance and handle both civil and criminal matters. The Supreme Court is organized into criminal and civil benches and has original jurisdiction over selected unusual cases. Otherwise the Supreme Court primarily performs an appellate function as well as providing general guidance to the lower courts to ensure consistent application of the law throughout Armenia.

In addition, the existing judicial structure includes a Soviet-type State Arbitration Service. This is more in the nature of a set of administrative boards manned by a small number of jurists whose principal responsibility is to arbitrate contractual disputes between state enterprises. In meetings with the Chief Justice, a senior constitutional draftsman and the Head Arbitrator, we learned that the draft Constitution envisioned replacing the arbitration service with a commercial court system, similar to the ones with which ROLC works in Russia and Ukraine.

The Projected Court Structure

The new Constitution includes a tripartite judicial system for ordinary disputes, a set of specialized courts, and a constitutional court. The projected courts of general jurisdiction will comprise trial courts, intermediate appellate courts, an a high Court of Appeal, also described to us by some jurists as a court of cassation.

Specialized courts will deal with juvenile, administrative, military and economic issues. The latter will be included in the jurisdiction of the new commercial courts. Following practice elsewhere in the Newly Independent States, these courts will deal with lawsuits between private business entities.

The triad of new courts will be completed by a constitutional court composed of nine justices. In constitutional design, the new charter does not indicate the relationship between the ordinary courts and the constitutional court when constitutional issues are raised at a lower level. This is but one of problems which has been left to legislative articulation. All of the legal professionals we spoke with agreed that the new judicial structures will require manning by a considerably larger cadre of judges.

Constitutional Implementation and Law Reform

Implementation of the new Constitution will entail drafting and passage of some 50 statutes and new

codes. Of foremost interest both within and outside of Armenia is enabling legislation for the constitutionally mandated restructuring of the judiciary. This includes planned legislation on the Judicial Council, the new constitutional body charged with judicial selection and administration, on the status of judges, and on the Constitutional Court as well as a projected code on the structure of the judiciary.

Collectively, our interlocutors agreed that judicial reform was of great importance, but there was less unanimity on the priority tasks in this process. The various reasons we heard for the imperative of judicial reform in Armenia included the need: 1) To transcend the Soviet judicial legacy, 2) To provide for protection of human rights, in particular individual rights, and (3) To begin building the necessary legal infrastructure for housing a market economy.

However, depending upon the legal specialization of the person we were speaking with, there was less consensus on which tasks to address first. Nevertheless, an order of priority can be constructed from the different opinions we heard. These tasks are as follows:

1 To requalify the present corps of judges. The Deputy Minister of Justice advised us that a requalifying exam would be developed for the present sitting judges to determine who would be grandfathered into the new court structures.

2 To develop the legislation described above to implement the new constitutionally mandated judicial institutions. The senior professional overseeing the extensive legislative drafting program expressly invited the ROLC to provide US expertise in this area, especially on the antecedent judicial legislation.

3 To restaff the new structures and generally expand the judicial corps. Of necessity, this will be accomplished over a period of time.

4 Concomitantly with the three above.

tasks at various stages, to further develop and strengthen existing programs for in-service training and retraining of judges. Armenia has a sound framework which, however, suffers from shortages of funding and energy supplies in these difficult times of war and blockade. The senior judicial trainer in the Ministry of Justice advised us that ROLC assistance in expanding and modernizing the training program along the lines of our technical assistance to the Russian and Ukrainian judiciaries, would be most welcome.

The Armenian Judicial Conference

Within this context, the Rule of Law Consortium sponsored the 1995 Armenian Judicial Conference in Erevan from July 18-20th. Organized by Technical Assistance to the Republic of Armenia (TARA) and its affiliates, the conference brought together leading American judges and a majority of the Armenian judicial corps as well as senior procurators, Justice Ministry officials and members of the defense bar for a total of approximately 135 jurists.

The American delegation was led by Justice Antonin Scalia of the U.S. Supreme Court and included Justices Armand Arabian and Marvin Baxter of the California Supreme Court, Judge Paul Michel of the U.S. Court of Appeals for the Federal Circuit, Judge Dickran Tevrizian of the U.S. District Court for the Ninth Circuit, and Judge Eric Bruggink of the U.S. Court of Federal Claims.

Each day's session was organized into opening keynote addresses by American and Armenian jurists, followed by a moot court demonstration, four afternoon seminars on particular legal issues, and free-ranging small group discussions.

The first day keynote addresses were given by Justice Arabian of the California Supreme Court and Justice Alvina Giulumian of the Armenian Supreme Court on judicial independence and impartiality, and on the Armenian judiciary respectively. Additional remarks were offered by Judge Marat Katvalian,

chairman of a district court.

The moot court demonstration, a civil dispute set in California, opened with a recusal and pre-trial motions. Judge Bruggink presided and American attorneys Karen Lord, Esq. and Samuel Ericsson, Esq. represented plaintiff and defendant respectively. The proceedings were explained through periodic overvoice by Judge Michel.

The afternoon seminars conducted by combinations of judges, law professors and practicing attorneys, covered four topics: Commercial law, Court administration, Judicial ethics, and Constitutional rights.

The Commercial law seminar included brief presentations on contract law in the U.S., product quality remedies, and trademark and patent protection, followed by questions from the Armenian jurists in attendance.

The seminars on Court administration and Judicial ethics dealt respectively with docket management and the Federal Judicial Canon. On the latter topic, a lively discussion ensued on the grounds and procedures for removing judges from the bench in the American and Armenian judicial systems.

The seminar which drew the most attention focused on Constitutional rights and featured Justice Scalia along with Professor Herman Schwartz, an authority on comparative constitutional law. Emphasis was on individual rights and judicial protection, with Justice Scalia stressing the classic civil rights while Professor Schwartz included in his remarks economic rights as well.

The small group discussions closed the day's session and afforded Armenian jurists an opportunity to exchange experience with their American counterparts. These exchanges covered a wide gamut including issues of political parties and judicial selection, church and courts, judicial enforcement, courtroom security, judicial salaries and other matters.

The main keynote addresses occurred on the second day of the conference and were given by Justice Scalia and Chief Justice Taniel Parseghian of the Armenian Supreme Court. Their topic was constitutional interpretation in their respective countries. Justice Scalia underscored the role of the judiciary in the process of constitutional interpretation in the U.S., while Chief Justice Parseghian explicated the judicial sections of the new Armenian Constitution.

Moot court continued on the second day, moving into the trial phase. The participants acted out their roles well, holding the attention of the large audience.

The final day keynotes involved different theories and roles of the judiciary in the separation of powers in the United States and in Armenia. Justice Baxter of the California Supreme Court spoke for the American side, emphasizing judicial-legislative relations with a number of illustrations to leading California cases. In response to a question, he amplified to include a case of judicial-executive relations involving the constitutional right to a free, public education in California.

The Armenian keynoters were Justice Mher Khachaturian of the Supreme Court and Judge Slavik Sargsian, a district judge who often participates in Supreme Court plenums. Their emphasis was on the Judicial Council/judicial selection concept, and defendants' rights in the new Constitution.

In the closing session of the moot court trial, Justice Scalia appeared as an expert witness, the attorneys made closing summations, and Judge Bruggink found for the plaintiff.

Preceding the Judicial Conference, U.S. Ambassador Harry Gilmore hosted a reception/dinner in honor of Justice Scalia and his judicial brethren. Upon conclusion of the conference, President Levon

Ter-Petrossian invited Justice Scalia and colleagues to confer on prospective judicial reform in Armenia.

The principal organizers of the conference were Daniel Maljanian, Esq. and Nancy Najarian of TARA. Representing the Rule of Law Consortium were Professor Robert Sharlet and Professor Schwartz, a consultant to the Consortium.

Attending the conference on behalf of the U.S. Agency for International Development were Fred Winch, Mission Director for the Transcaucasus, and Keith Henderson, Esq., Senior Rule of Law Advisor for Technical Assistance to the Newly Independent States of the former USSR.

Conclusion

Legal and judicial reform is politically supported at the highest levels in Armenia. As I wrote at the outset, there is now every indication that the country long held back by the economic costs of war and blockade, has now resumed moving forward in the transition process from its Soviet authoritarian past.

SMALL GRANT AWARDS FOR RUSSIA, UKRAINE AND THE NIS FIRST CYCLE

by Barry O'Connor Ph.D.

Grants Manager

Rule of Law Consortium

The following small grant awards were made during the first cycle of completion under the NIS Regional, Ukraine and Russia ROL contracts. Awards were recently made under the second cycle of completion for the Slavic contract (Belarus, Moldova, Ukraine) as well and will be described in a forthcoming newsletter. Awards have not yet been announced for the second cycle of competition under the Russia ROL contract.

STRENGTHENING LEGAL SUBSTANCE

(Commercial law)

Ukrainian Congress Committee of America, New York, NY (Askold Lozynskyj, Project Director) with the Ukrainian Legal Reform Task Force (Iouri Demkiv) A grant to support Ukraine's ongoing and principal effort to reform "commercial law" via the inter-agency Legal Reform Task Force appointed by the President of Ukraine to coordinate legal aspects of economic reform. The program will survey and assess existing laws, legal reforms efforts, available resources, and standard legal terminology. Based on this analysis, working groups, under the direction of the Task Force, will prepare recommendations, formulate action plans, and set priorities for all elements of the evolving legal structure. The ultimate goal is to create and implement laws which will support economic reform in Ukraine. \$100,000 (107U)

(Environmental law)

Environmental Law Institute, Washington, D C (Jay Austin, Project Director) with EcoPravo (Boris Vasilkovsky) A grant to initiate and implement a four-part program on NGO cooperation on issues pertaining to law and the environment in Ukraine. The project is designed to 1) train Ukrainian judges, lawyers, and government officials, 2) compile and publish laws and legal analyses for an audience of citizen-groups, policymakers, and practicing lawyers, 3) assist the Ukrainian Government with law-drafting and implementation assistance for pending and future legislation, and 4) continue to provide legal consultation to individuals and citizen-groups. \$64,196 (111U)

Environmental Law Alliance Worldwide, Eugene, OR (Jennifer Gleason/Chris Wold, Project Directors) with EcoPravo (Svetlana Kravchenko) A grant to help Ukrainian public interest environmental lawyers, scientists, and concerned citizens develop and enforce sound environmental laws for Ukraine. This effort will be achieved by 1) using electronic mail to connect

Ukrainian environmentalists with environmental advocates worldwide, thus giving them access to legal and scientific information and expertise, 2) providing in-country training (and three months of intensive training in the U S) for EcoPravo staff (and other individuals selected by EcoPravo) in electronic communications for the purpose of sharing legal and scientific information, conferencing, etc , 3) providing hands-on technical support for incipient advocacy activity, and 4) enhancing EcoPravo's litigation efforts to promote democratic accountability through the implementation and enforcement of environmental laws in Ukraine. \$66,227 (220U)

Environmental Law Institute, Washington, D C (Jay Austin, Project Director) with EcoJuris (Vera Mischenko) A grant to assist in the development of environmental legislation in the Russian Duma. The project will assist the government of the Russian Federation, local governments, and other interested parties and citizen groups as well. This assistance will be implemented through 1) meetings and consultations with government officials and citizen groups based on the legislative drafting effort, 2) publication of environmental law and legal analysis of same, and 3) translation and dissemination of ELI working papers giving comparative perspectives on broad issues of environmental law. \$96,233 (RUS-021)

(Public Interest Law)

Center for Public Representation, Madison, WI (Michael Pritchard, Project Director) with Public Advocates (Sergei Belyaev) A grant to assist in the organizational development of the Russian partner's operations (i.e., recruiting and training staff) as a functional legal center. The center will provide legal information to individuals and groups on a range of civil legal problems including housing, property rights, protection of environmental quality, civil rights, etc. The primary goal of this collaboration is to assure delivery of high-quality legal services, fostering public awareness of the law and how to implement it, and

developing a model for public advocacy that is sustainable given Russian resources \$77,713 (RUS-008)

(Tax Law)

International Tax and Investment Center, Washington, D C (Daniel Witt, Project Director) *with* the Russian Higher School of Economics (Yaroslav Ivanovitch Kuzminov) and the All-Russia Association of Enterprises (Yuri Samochkin) A grant to assist Russian NGOs/PVOs and private citizens to organize to effectively influence the policy process in Russia for the pursuit of serious tax law reform This effort will be operationalized through working groups, monthly tax policy forums, public hearings and white papers designed to articulate and develop concrete tax law reform proposals which are designed to improve Russia's investment and savings climate for both business and individual citizens In addition, training programs, citizens' guides ("how-to" manuals), articles, and talking points will be developed to mobilize public support and advocacy for tax reform before the Russian Parliament \$100,000 (RUS-024)

STRENGTHENING LEGAL INSTITUTIONS

(Ukrainian Bar Association)

American Bar Association/Central and East European Law Initiative, Washington, D C (Timothy Stock, Project Director) *with* the Ukrainian Legal Foundation (Halyna Freeland) A grant to assist Ukrainian lawyers in establishing a professional bar association in Ukraine The program will consist of seminars--to be held throughout Ukraine--which will explain the structure and function of bar associations, and identify/recruit leading Ukrainian lawyers for internship programs abroad This effort will eventually culminate in a convention of some 5,000 Ukrainian lawyers and legal specialists for the purpose of formally creating a Ukrainian Bar Association \$100,000 (104U)

(Ukrainian Parliament)

U S Association of Former Members of Congress, Washington, D C (Cliff Downen, Project Director) *with* The Verkhovna Rada (Olexandre Lysiuk) A grant to permit recruitment of some 35 interns, from throughout Ukraine, to serve for one year with the Ukrainian Parliament (the Rada) The interns (who will be paid) will be students nearing completion of their course work in such relevant fields as law, economics and sociology They will be placed throughout the legislative and political structures of the Rada The 23 Commissions (standing committees) and 10 factions (political parties or groups) will be the principal recipients of their efforts Applications for recruitment will be sent to major law schools, universities, and other institutes of higher education In addition to alleviating serious staff deficiencies of the Rada, the program will also socialize a number of future leaders in government, business, law and the academy in the parliamentary process and democratic institutions \$99,546 (218U)*

(Law Libraries)

The Sabre Foundation, Cambridge, MA (Tania Vitvitsky, Project Director) *with* Sabre-Svitlo Foundation (Olha Isaievych) and the Ukrainian Legal Foundation (Halyna Freeland) A grant to assist in the development of the National Legal Library of Ukraine (as well as other such libraries) through several programmatic adaptations, including the introduction of the Library of Congress (LOC) and/or other western cataloguing systems in order to develop a computer catalogue of library holdings, coordination of U S efforts to solicit donations of books and legal materials for these libraries, development of an acquisition program, expansion of an existing computer network linking various law school libraries with one another, and, finally, development of internet-based information services between/among Ukrainian legal libraries and professions and their counterparts in the West \$95,972 (219U)

STRENGTHENING CIVIL SOCIETY

(NGO-formation)

(Alternative Dispute Resolution)

International Foreign Policy Association, San Francisco, CA (Amy Vossbrunck, Project Director) *with* Moscow State University (Vladimir Dobrenkov), the Tbilisi Business School (Simon Kadagidze), and the Georgian Management Training Program Alumni Association (George Bazgadze) A grant to support a program to develop training materials (in Russian and Georgian) and train participants in the techniques of Alternative Dispute Resolution Over a period of two months, ten Russians and ten Georgians will be trained to become trainers themselves in these techniques The training will emphasize constructive interaction between both government officials and small business entrepreneurs within/between the two Republics It will focus on issues of contention involving labor-management relations and commercial and contracting disputes \$135,000 (NIS-003)

(Political and Legal Studies)

Social Science Research Council, New York, NY (Susan Bronson, Project Director) *with* the Russian Science Foundation (Andrei Kortunov) A grant to support workshops--in Russia and Ukraine--in the theory and practice of *independent* scholarship in the field of political science Participants will be political scientists from the NIS, particularly junior scholars destined to become the next generation of educators and policymakers Topics covering law, politics, constitutionalism, the role of the judiciary, electoral law, etc, will be included among other subjects for discussion Trainers will include NIS-area specialists as well as subject specialists in regions other than the NIS Trainers with law and legal education expertise will also participate A fundamental goal of this effort is to train the participants to be trainers as well \$100,000 (NIS-006)

Global Jewish Assistance and Relief Network, Brooklyn, NY (Rabbi Eliezer Avtzon, Project Director) *with* GJARN-Kharkiv (Joel Levin) A grant to continue GJARN-Kharkiv's efforts to develop the leadership role of Ukrainian NGOs so that they can assume direct responsibility for advancing democratic principles through public policy programs, debate and advocacy This goal will be further served by increasing the management capabilities and productivity of Ukrainian NGOs through training and improved collaboration by A) establishing a "service center," B) creating a small grants program for Ukrainian NGOs, C) strengthening the development of NGO associations and collaboration \$100,624 (101U)

U S-Ukraine Foundation, Washington, D C (John Falconer, Project Director) *with* the Pylyp Orlyk Institute for Democracy (Markian Bilynskyj) A grant to help Ukrainian citizens' organizations become constructive and effective participants in the public policy process This task will be accomplished through interactive training workshops which are designed to provide training, information and guidance in the analysis of legislation and advocacy In addition, a series of roundtable meetings with parliamentary deputies will be held which will focus on such issues as NGOs and their contribution to changes in the legal structure which promote greater public participation of individuals and groups in the policy process \$95,270 (109U)

(Press & Mass Media)

Internews Network, Arcata, CA (Kim Spencer, Project Director) *with* the International Media Center (Mykola Kniazhytsky) A grant to improve international communication in Ukraine via independent media The project will produce a series of television programs for broadcast nationally on Ukrainian television The programs are designed to demonstrate, in dramatic fashion, how ordinary citizens can use their civil rights in day-to-day life \$25,000 (110U)

New York University Center for War, Peace, and the News Media, New York, NY (Robert Manoff, Project Director) *with* the Glasnost Defense Foundation, (Alekssei Simonov) A grant to develop and implement a comprehensive effort to promote freedom of information in Russia via the Russian-American Press and Information Center (RAPIC) This effort will be pursued through the establishment of a Standing Commission on Freedom of Information, which will work with all major Russian organizations to monitor adherence to existing legislation and educate government officials, judges, journalists, and citizens of their rights and duties under the Russian law which governs in this instance (i.e., the *Law on the Mass Media*, 1991) \$99,965 (RUS-040)

(Women & Human Rights)

Network for East-West Women, Washington, D C (Shana Penn, Project Director) *with* the Moscow Center for Gender Studies (Anastasia Posadskaya) A grant to develop a network of local legal committees in Russia, Ukraine and Kyrgyzstan for the purpose of increasing the capacity of local NGOs/PVOs to participate in the formation and enforcement of the rule of law at local, regional and national levels These committees will prepare assessments of the legal status of women in the provinces and regions of the three countries served Representatives of these committees will meet at a conference in Saratov to present and discuss their findings and prioritize their concerns In addition, the conference will provide workshops in such subjects as legal literacy, advocacy, human rights, and organizational development \$100,000 (NIS-012)

League of Women Voters Educational Fund, Washington, D C (Orna Tamches, Project Director) *with* the Moscow Center for Gender Studies (Valentina Konstantinova) and the Ukrainian Center for Women's Studies (Svetlana Kupryashkina) A grant to bring Ukrainian and Russian women to the United States through their Grassroots Internship Program for Emerging Women Leaders from Russia and Ukraine Ten (or more) women from each country will participate in intensive "democracy emersions" in a

variety of different communities throughout the United States in order for them to experience "hands-on" the role of citizens in local governance and democratic action in a rule of law setting \$100,000 (NIS-015)

League of Women Voters, Washington, D C (Orna Tamches, Project Director) *with* Moscow Center for Gender Studies (Valentina Konstantinova) A grant to hold a series of workshops throughout Russia focusing on the role of women and women's NGOs in legal reform efforts The workshops will offer hands-on experience in building effective citizen participation designed to address these efforts through mobilizing NGOs, fundraising, working with the media, building coalitions, and strengthening communication skills Training will introduce useful tactics/strategies, such as lobbying techniques, conflict management, stakeholder facilitation, and informal mediation Each workshop is designed to include approximately ten participants per facilitator and will include a Russian co-trainer In addition, sub-grants will be given to various NGOs to organize for the purpose of increasing their effectiveness in influencing the policymaking process Finally, training materials will be translated in Russian and distributed throughout Russia via the workshops and sub-grants programs \$100,000 (RUS-019)

* Final Approval Pending

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SPECIAL ISSUE ON LEGAL EDUCATION REFORM

Editor Professor Robert Sharlet

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REFORMING LEGAL EDUCATION IN THE NEWLY INDEPENDENT STATES

AN INTRODUCTION

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The fall of the Soviet Union created a crisis for legal education in the Newly Independent States (NIS). Under Communism, the law schools suffered from stringent ideological controls, but enjoyed reasonable financial support. Their main task was to prepare specialists in legal work in two areas: criminal law enforcement and operation of the planned economy.

The ideological controls on Soviet legal education hindered active criticism of the poor human rights situation in law enforcement, and of the fundamental flaws in the economic system. However, professors were comparatively well paid, students received free tuition and some financial aid, and textbooks and library materials easily kept up to date with the stagnating legal system.

The Changing Universe of Legal Education the NIS

The situation in Soviet legal education began to change in the 1990's. Both ideological controls and state financing faded away. Demand for lawyers shifted from the state to the private sector with the advent of economic reforms leading to the development of a market economy. The rapid, revolutionary change

made existing law teaching materials and library holdings obsolete

The law schools began responding quickly to these changes. Freed from ideological constraints, the more progressive faculty moved to broaden coverage of human rights and market-oriented commercial law. With the decline in state support, law school deans turned to student tuition as a major source of revenue, while trying to retain tuition-free education for students who were intellectually capable but financially pressed. The new tuition revenues saved the law schools from disaster. Tuition-paying students in turn, expected and demanded curriculum reform.

Faculty salaries, however, fell sharply in comparison with those of practicing lawyers, leading a high percentage of faculty members to devote much or even most of their time to private law practice. By 1994, the old books had become useless, and only a small number of new texts were beginning to appear. Private enterprise led to the creation of excellent computerized legal databanks that could keep up with the rapidly changing legislation, but many schools could not afford to subscribe to them.

Rule of Law Consortium Law School Program

The Rule of Law Consortium's (ROLC) Law School program in Russia and Ukraine under the auspices of the United States Agency for International Development, was designed to assist the law schools in dealing with these multiple crises. Working with the Association of American Law Schools (AALS), the ROLC brought technical assistance to law school administrators and professors on problems of law school management and finance, as well as curricular reform. AALS experts suggested ways in which the law schools could organize on an equal and cooperative basis, to fill the vacuum left by central dictation of legal education curricula from Moscow under the Soviet regime.

ROLC helped law schools obtain and use legal databanks and desktop publishing to overcome the

textbook gap. The Consortium provided demonstrations of innovative teaching methods in areas such as trial practice, so as to help law students prepare for a legal system in which trials would be real contests, rather than predetermined by telephone calls from Communist Party headquarters.

With the relatively limited financing available, the Rule of Law Consortium could not pay for the huge changes needed by the law schools. Rather it set the more modest task of assisting the schools in steering a new course that would allow them to reach a position where they could supply the growing need of the new societies for lawyers capable of protecting individual rights and assisting business activity. The articles in this Special Issue on Legal Education Reform, give some idea of how the law schools in the Newly Independent States are moving on this new course.

Focus of the Legal Education Reform Issue

The special issue opens with comprehensive overviews of legal education in transition in Ukraine and in the Russian Federation, based on the experience of two of the most prominent law schools in the NIS -- respectively, Kyiv National University and St Petersburg State University. The emphasis in the opening two articles is on legal education reforms in support of training lawyers for a market economy.

Follow-on articles in the first section by other NIS legal educators, focus on other reforms designed to prepare law students for working in conditions of judicial independence in the courts, prosecutors' offices, and law enforcement agencies of Russia and Ukraine. The authors draw their examples from Urals State Legal Academy in Ekaterinburg, and Kyiv National University respectively.

In the next section, two articles by staff lawyers of the ROLC recount their previous experiences in teaching American law at law schools in the NIS, including a private law school in Kazakhstan and regional law schools in Ukraine and Russia.

The final section on legal education reform includes a series of articles, mainly by American law professors, who discuss their involvement in ROLC technical assistance on curricular and pedagogical reform in Ukrainian and Russian law schools. The initial article focuses on salient pedagogical issues being addressed at the leading law schools in Ukraine -- at universities Kyiv, Lviv, and Odessa, as well as the Kharkiv State Legal Academy. The last article in this section offers an informed perspective on the tasks and problems of curricular reform in Russian legal education.

Two special reports close out this issue -- one on emerging legal information networks in Kazakhstan and Tajikistan (which include five law schools in the two countries), and observations on judicial reform in Armenia by Justice Scalia of the U.S. Supreme Court based on his experience at a Rule of Law Consortium-sponsored conference in Erevan during the summer of 1995.

UKRAINIAN LEGAL EDUCATION TRAINING LAWYERS FOR A MARKET ECONOMY

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The continuing abandonment of administrative-command methods of economic management in Ukraine, and the growing strength of market principles within the economy are resulting in radical changes in the legal environment in which Ukrainian lawyers find they must operate. These processes have in turn required qualitative improvements in the legal education system in our country. Analysis of the current state of legal education in Ukraine gives rise to a number of

generalizations as to what degree such education is able to produce a new generation of lawyers capable of practicing in a market economy. In cases where necessary, these generalizations have been supported by examples from the Law Faculty of Kyiv National University (KNU).

1 Changes in the Legal Education System

At present, the transition to a three-level attorney training cycle is in full swing in the overwhelming majority of leading legal institutes and law faculties in Ukraine. The first level, which is a four-year training program, is used for bachelor-level education of lawyers to fill the practicing attorney ranks. Those who wish to continue their legal education and are inclined toward research may train for an additional year after which they are designated "specialists." Specialists must train for an additional two years to attain a masters degree in law. This level also provides the opportunity to teach at institutions of higher education.

It is still too early to discuss the effectiveness of the new legal education system and the degree to which it correlates with the stage of economic transition in Ukraine to a market system. Advantages may include accelerated training of practicing attorneys who will no longer study for five years but rather for a four-year term, as well as the fact that the new system makes possible the more systematic training of instructors for teaching at institutions of higher education through the MA law program.

2 Modernization of Curricula, Educational Programs and Training Methods

It seems that an element even more critical to training a new generation of lawyers involves revising the training process itself to include new content, without which it will be impossible to produce specialists capable of supporting Ukraine's transition to a democratic society that can survive in a market economy. The emphasis in the new curricula at law faculties has been on legal specialization due to the

sharp decrease in so-called social disciplines designed for ideological indoctrination. The number of seminar (practical) hours has also been significantly increased in response to a decrease in the amount of time devoted to lectures. New specialties have been introduced in law departments. For example, at the KNU Law Faculty these include Commercial Law, Customs Law, Legal Regulation of Foreign Economic Relations, and other course. This makes it possible, even at the present stage, to train specialists who meet the new requirements. An important step in this direction has been the incorporation into the curricula of new courses and electives designed not only to meet today's needs but also those of the future. These include, for example, Entrepreneurial Law, Taxation of Legal Entities and Citizens, the Special Aspects for Adjudicating Certain Types of Economic Disputes, Budgetary and Financial Authority, Customs Law, and Transportation Law.

Objective constraints on the further development of such positive changes today include a lack of specialists in the new legal sectors associated with market regulation because the old law schools never trained such specialists, a lack of books, texts and training materials due to a shortage of money for purchasing such supplies, and conceptual inertia among many of the old-generation teachers who comprise a significant sector in Ukrainian institutions of higher education.

New curricula designed for the new realities of the legal environment in Ukraine are under development in legal institutes and law faculties. Virtually all existing required and elective course syllabi have been revised and new syllabi have been developed recently at the Law Faculty of KNU. We believe that a significant deficiency in the current training programs, including the new training programs, is the lack of independent study courses. Moreover, students are not taught to think independently but rather attempts are made to tell the students how and what to think.

A more serious shortcoming is the near total absence of textbooks and training materials for both the new and the updated programs. The process of generating such books has obviously been delayed due to the nearly entire absence of any material incentives for such a crucial effort. The most noticeable shifts have been in modernizing legal teaching and studying methods. The traditional training methods involving lectures and seminars have largely become obsolete, which has been keenly evident to the generations of instructors and law students. Efforts to introduce new attorney training methods such as the Socratic method which is principally based on stimulating the creative ability of the instructor and independent efforts on the part of students, are lagging due to a lack of relevant experience as well as the proper facilities for introducing such methods.

3 The Impact of Practice on Legal Training

One of the serious problems encountered by legal training institutes in Ukraine is the loss of the most gifted instructors to new legal enterprises catering to entrepreneurs (principally private law firms), due to the low salaries in educational institutions. The lack of necessary staffing levels for instructors has made it necessary for legal training institutes to increasingly hire practicing attorneys from state institutions and private firms to offer elective courses on legal problems of market relations. Of course the materials in such courses represent the quintessence of the instructors' practical knowledge.

In addition, virtually all instructors who are able to, earn additional income by various means outside the educational institution. This has had somewhat paradoxical consequences. On the one hand, such instructors have ceased to improve their theoretical knowledge due to a lack of time and the extensive energy they devote to their other employment. Yet, their knowledge of existing realities has helped law students to obtain high quality practical instruction. Similar processes have been observed in the student environment. Those students with the requisite abilities and capacities have begun to work on

the outside at a variety of private companies, beginning in their third year of course work, which also helps them to accumulate practical knowledge and facilitates their adjustment to new market conditions

4 The Introduction of Market Principles into the Legal Education System

The realities of modern economic life in Ukraine have compelled increasing numbers of legal training institutions to learn to identify financial support for survival. The majority of legal institutes and law faculties today reserve a certain number of places (for example, the quota is 10 percent at the KNU Law Faculty), for which paying students are accepted. The tuition charge in this case is comparatively modest (\$4,000). However, the trend is clearly towards an increase in both the quota and the amount of tuition charged. This is possible because the demand for legal education has been rising each year.

It appears that those who are paid (the faculty) and those who pay tuition, have not yet realized the possible implications of a situation in which those who bear the cost of legal education may demand a better quality of education for their money, while those who teach law are also interested in the quality of legal education as a means of attracting more tuition-paying students.

5 The Development of an Organizational Infrastructure for Training Modern Lawyers and Facilitating Periodic Refresher Courses

We believe that two areas for development of such an infrastructure should be identified. On the one hand, there are increasing numbers of new legal training institutions and law faculties, both state-owned and private, with a clear predominance of specialties designed to train lawyers to operate under market conditions, for example, the Institute for Trial Attorneys of the Law Faculty of KNU. On the other hand, the number of professional bar associations in Ukraine is growing. The most influential organizations include the Union of Ukrainian Jurists, the Union of

Ukrainian Trial Lawyers and the Ukrainian Notary Board. The establishment of an Association of Ukrainian Lawyers as well as an Association of Ukrainian Law Schools is on the agenda.

6 The Opportunities for Cooperation with Foreign Legal Institutions

The lack of domestic expertise in training lawyers capable of effectively meeting the needs of a market economy, and the manifest shortage of information and material support for such programs, have created certain difficulties in establishing cooperation on equal terms and of equal value between Ukrainian and foreign partners engaged in legal education and its enhancement. At present and for the near future, such cooperation is -- and obviously for some time will continue to be -- imbalanced, in nature where the Ukrainian partners function principally as recipients of assistance provided in the following primary forms:

- Provision of monetary assistance for education and on-the-job training of students and instructors from Ukrainian legal educational institutions in the United States,

- Invitations to legal scholars and practicing attorneys from the U.S. to present lectures, conduct practical training sessions, update existing syllabi and develop new syllabi for courses and electives on legal regulation of market relations,

- Improve the physical plant facilities for the educational process by purchasing and installing modern equipment at legal training institutions,

- Expand the library resources of law faculties and institutes in Ukraine by acquiring literature needed to study the legal problems of market relations,

- Organization of symposia, conferences, and roundtable discussions on modern techniques of teaching legal disciplines,

-- Establishment of assistance programs for Ukrainian legal training institutions similar to the program implemented through the Rule of Law Consortium

It appears that the most effective form of cooperation is the latter since the implementation of "Rule of Law" programs will permit coordination of all other types of assistance and will allow for optimal incorporation of the partners' interests. Representatives from virtually all legal training institutions in Ukraine share this opinion.

RUSSIAN LEGAL EDUCATION TRAINING LAWYERS FOR A MARKET ECONOMY

*by Dr V F Popoidopulo, Chair
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The establishment of civil society and market relations in Russia have appreciably altered the role and position of lawyers in Russian society. The former system required activist attorneys to function as apologists for the system. There was little discussion of lawyers participating in the law making process. This was the prerogative of Communist Party appointed government officials, among whom there were few attorneys.

Lawyers have played an active role in the establishment of civil society and a market economy. They have become architects of the law as well as skilled defenders of the idea of civil society, a market economy and a law-governed state. The changing role of attorneys in society must be taken into account in training the new generation of attorneys, as well as in retraining and providing advanced training to personnel in the legal sector and preparing students for the new conditions.

The Legislative Basis of Legal Education

Legal education is a constituent element of the educational system in Russia and consequently must be consistent with two principles: 1) The general

requirements for professional higher education and 2) The special requirements for higher legal education.

As we know, the fundamental requirements on professional higher education are reflected in legislation on professional higher education which is currently undergoing rapid development. The Law of the Russian Federation "On Education", the Model Statute Governing the Establishment of an Educational Institution for Professional Higher Education, and on Higher Education Institutions of the Russian Federation, and the State Educational Standard for Professional Higher Education, as well as other legal and regulatory acts.

In spite of the fact that the laws on professional higher education were enacted several years ago, many provisions of the law have not yet gone into effect. Specifically, institutions of higher education, particularly legal training institutions, have not rushed forward to introduce the new three-level structure for professional higher education, the upper two levels of which are the BA and MA in law, fearing, obviously, a reduction in their teaching load with an adverse affect on the material well-being of professors.

No special requirements on legal higher education have been sent forth in any centralized, standardized regulatory act. In view of their academic freedom, institutions of higher education develop and adopt on their own their fundamental professional curricula as well as the techniques for their implementation based on the provisions of the State Educational Standard for Professional Higher Education.

Centralized regulatory acts may be adopted in certain of the more important areas. One example is Decree No 1473 of the President of the Russian Federation of July 7, 1994, which mandated the program "Establishment and Development of Private Law in Russia" one of whose purposes is the training of advanced specialists in the private law sector.

It is difficult to overestimate the significance of this program. As S S Alekseev, Director of the Program has accurately noted, the law in Russia was

-- until very recently and essentially remains -- a state-controlled legal system with an entirely public character based on the dominant interests and will of the all-powerful state. This produced a "leading" role of disciplines associated with public law in the legal educational system (in this case there was a sufficient number of training hours and larger instructor staffing levels, etc.) The graduates of legal institutions of higher education were principally employed by organizations under the Ministry of Internal Affairs and other law enforcement agencies.

Only recently has the situation begun to change. The administrative assignment of graduates was terminated, the demand for lawyers specializing in economics led to students' interest in private law disciplines and compelled the training boards of legal institutions of higher education to modify their treatment of these disciplines. At a slow yet consistent rate, classroom time is being redistributed in favor of private law disciplines while the number of hours are on the rise and new elective courses as well as departments (Entrepreneurial Law, Commercial Law, and others), are being introduced.

The Need for a Broad-Based Legal Education

What is the ideal for a lawyer, what kind of education does an attorney need to meet the needs of society? Other more specific issues are closely related to this question. What is the proper relation between general and specialized training, theoretical and practical education, compulsory and elective courses, and time spent on training and quality legal education?

In our view, legal education, to a greater extent than ever before, must be designed to prepare lawyers with a broad educational profile that will make it possible, without additional training, for the attorney to perform professionally in any field of law.

The transitional state of Russian society makes it necessary to impart to future lawyers a capacity for legal analysis, this approach should be based on historical, psychological, political science, economic, and other social sciences. In this critical period, a positivist and formalist legal philosophy based primarily on rote memorization of legislation,

and on legal dogma, is neither sufficient nor feasible since modern Russian law is variable, contradictory and flawed.

Under such conditions, it will be very important for future lawyers to grasp the general principles of legal regulation in civil society and a market economy. Training and guidance on the basis of these general principles serves two purposes: the acquisition of information and the key aspects of positive law, as well as the important socio-political and legal principles on which they were founded. Thorough knowledge of general legal principles will provide a solid foundation to support the lawyer's professional activities in the current environment, and will facilitate the successful mastery of specific legal knowledge in the future.

When an lawyer thinks independently and attempts to master a special procedure or employ a systematic approach to problems, that attorney becomes better trained for practice and more readily responsive to changes occurring in society.

A lawyer with a broad-based legal education that includes knowledge of general legal principles as well as methodology for legal regulation in a market economy, will be more able to effectively utilize such principles in drafting regulatory acts (legislative activity), applying such acts (implementation), and facilitating corresponding legal thinking on the part of other individuals (legal socialization).

Practical Training of Lawyers

It is no less difficult to find an optimal balance between theoretical and practical training in legal education. Obviously, there should never be a case where a law student studies one aspect in theory, but encounters something entirely different in practice. Well-ground specialized knowledge is expected of an "ideal" lawyer in practice and hence the curricula of law training programs should give a prominent place to practical knowledge in its active forms (cases, legal drafting, and so on), as well as special courses and seminars on important legal problems, and practical experience with legal institutions and law firms with the same specialties and interests as the students.

The new conditions have therefore forced a fundamental reconsideration of existing approaches to planning curricula and the entire training mechanism. If legal education in the past proceeded from a certain body of knowledge based on the science of law that an abstract jurist had to master, today's specialist must, above all, be equipped with the specific knowledge that will be needed in practice. It is necessary to train law students while resisting their tendency to overspecialize. In any case, specialization may begin at the second level of professional higher education.

This approach can be summarized as follows: After studying the major legal educational disciplines (civil law, criminal law, criminal procedure, etc.), and choosing a specialty, the student of law should have the opportunity to freely choose elective courses and seminars in accordance with his or her professional interests. For example, interrelated special courses and seminars should be offered to students electing commercial law, for example courses on Commercial Legislation, the Legal Status of Entrepreneurs, Commercial Paper, Business Contracts, and Competition Law.

Each of the elective courses (seminars) should be comprised of a series of lectures and practical sessions (eight to 10 hours) on each specific issue, knowledge of which is required by the corresponding specialist in this area of activity or for understanding of material for the next elective (seminar). The exact mix of electives may vary at the discretion of the student based on that student's professional aspirations. For example, a law student working under a training contract to a foreign trade company will try to take the electives relating to his future area of work, while another student may prefer to study everything relating to legal regulation of the securities market. Thus the demand for each corresponding specialist will be satisfied by the supply.

LEGAL EDUCATION REFORM AND JUDICIAL DEVELOPMENT IN RUSSIA

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One of the most important results of the introduction of democratic reforms in Russia during its transition stage, has been the establishment of the doctrine of Separation of Powers in the state-building process. This doctrine, which was developed in its time by such great thinkers as Locke, Montesquieu, and Rousseau, was first applied in practice in the United States of America. Other democratic states then began to employ this concept in establishing their own state systems. Russia during the Soviet period formally assigned to state institutions legislative, executive and judicial powers, but never embraced the principal idea behind the doctrine of Separation of Powers: the endowment of specific branches of government with broad definitive decision-making authority. Instead, all state and social institutions were controlled by the Communist Party apparatus which allowed not even the slightest deviation from its ideological concept of unified power concentrated in a single center.

The current Constitution of the Russian Federation incorporates the Separation of Powers as a fundamental principle of the constitutional structure. One aspect of the constitutional state is the judicial branch which requires special support and assistance. A truly independent and free thinking judiciary is just now beginning to take shape. In this connection, the role of legal education in training highly qualified personnel for the judiciary, the Procuracy and other law enforcement agencies, has grown immeasurably.

Primary Functions of Russian Legal Education

The following are among the primary functions of Russian legal education under modern conditions:

1 To instill a high level of professional training in specialists so they will be capable of responding easily to rapidly changing -- and a rapidly expanding body of -- modern law

2 To train specialized staff destined for employment in existing agencies currently in the reform stage, as well as new agencies established at the federal level, especially in the constituent republics and regions of the Russian Federation such as constitutional, regulatory, arbitration and military courts along with law enforcement, customs, the tax police and other agencies

3 To provide an environment for students in legal institutions of higher education where they have the opportunity to study both Russian and foreign law as well as the practice of foreign judicial and other law enforcement agencies

4 To utilize in the training process modern computer technology as well as photocopying and video equipment which will provide an opportunity to produce and circulate lectures, books, diagrams, issues, legal precedents, texts of legislation and other documents required in the training process

5 To give the professional training staff as well as students access to modern information systems (such as the Internet), and databases (including Westlaw and Lexis/Nexis), by providing state-of-the-art communications equipment

6 To educate a legal intelligentsia that will function to guarantee effective and reliable performance of judiciary, the Procuracy and other law enforcement agencies, and would help maintain judicial authority throughout Russia on the high level that is required, i e , on the same plane with the legislative and executive branches

The fulfillment of these functions represents the ideal outcome for legal education. However, Russian legal training institutions are at various stages on the road to this goal. The basic difficulties impeding consistent development of legal education on a level compatible with modern requirements, are economic in nature. Nonetheless, in spite of such

difficulties, Russian legal education is attempting to solve the intractable problems the system is facing at this trying time

Legal Education Reform at Urals State Legal Academy

The Urals State Legal Academy is the largest legal institution of higher education in Russia, having trained tens of thousands of specialists during its tenure. The Academy has not remained on the sidelines in dealing with the difficult aspects of modernizing education and training tomorrow's attorneys. The successful operation of the Academy is guaranteed by its well trained teaching and professorial staff together with its extensive expertise in educating employees in the law and longstanding and strong ties to the country's judicial, procuracy and other law enforcement agencies. The establishment of close and strong ties to the Rule of Law Consortium (ROLC) represents a new area of cooperation for institutions of higher education in recent years. The strategic goal of the ROLC -- to facilitate the establishment of a state based on the Rule of Law in Russia -- is fully understood and supported by our Academy. This understanding has served as the foundation for productive and creative cooperation between the teaching and professorial staff and the specialists and consultants of the ROLC in the Russian Federation.

The following are the main areas of activity identified and formulated in the course of this mutually advantageous relationship

First, the Rule of Law Consortium's assistance in providing U S laws and legal literature to the Academy which is necessary for comparative law research by the Academy's staff

Second, services provided by professional consultants from various law schools in America for meetings and seminars as well as lectures in important legal disciplines

Third, the organization of special working groups to draft new curricula and training materials with the active assistance of ROLC (at present,

working groups on economic, land and constitutional law are employed at the Academy, the purpose of such groups is to develop modern comparative law courses and training materials)

Fourth, computer, photocopy and video equipment as well as electronic mail capability to facilitate rapid execution of understandings outlined in the Agreement between the Rule of Law Consortium and Urals State Legal Academy have been supplied to the Academy

Fifth, the organization of a center to study the problems of dealing with crime to be comprised of the most experienced instructors and representatives from regional law enforcement agencies

Finally, sixth, sponsorship of specific training seminars within the Academy as well as other active student training techniques Specifically, a seminar entitled Trial Advocacy was held during a 10-day period in April 1995 and garnered enthusiastic responses from students and instructors

Further progress by Russia on the path of democratic reforms will, without a doubt, facilitate the development of experienced judicial, procuratorial and other law enforcement agencies The achievement of this goal will in no small measure depend on legal institutions of higher education and their readiness to effectively support the implementation of judicial reform as well as the establishment and development of the entire judicial system

LEGAL EDUCATION AND SPECIALIZED TRAINING FOR THE COURTS, THE PROCURACY, AND LAW ENFORCEMENT AGENCIES IN UKRAINE

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The training of highly skilled specialists represents an area of special interest in efforts associated with the establishment of a modern legal infrastructure in Ukraine Such specialists must be

capable of working effectively in a market economy by facilitating business initiatives, fair competition, the development of market relations and interest in worldwide economic integration Hence, current economic reform in Ukraine requires legal and judicial reforms, the establishment of new legal institutions to safeguard democracy, and a comprehensive conceptual revision of the entire legislative system and training of a new generation of lawyers with a profound understanding of the role of law in the market economy and the deregulation of existing legal and economic structures

In this connection, specialist training for personnel working in the courts, procurator offices, and law enforcement agencies requires fundamentally new approaches to the legal education system in place at Kyiv National University's Law Faculty, including its Department of Justice and Procuratorial Supervision The Department's teaching staff, which is comprised of four professors, all doctors of law, and six lecturers, have revised their syllabi and curricula in order to provide training for all undergraduate law students, including both full-time and nonresident students, for working in the courts, procurator offices, and for the investigative authorities

The Curriculum

Specifically, full-time students are assigned, as early as their freshman year, a required course of instruction entitled "The Judicial System in Ukraine " Elective courses entitled "The Legal Profession" and "Notarial Functions," are offered in the second year of study The required courses, "Civil Procedure in Ukraine" and "Criminal Procedure in Ukraine," are assigned in the third year of study The fourth year offers elective courses entitled "The Theory of Judicial Evidence," "Compilation of Procedural Documents in Civil Cases," "Compilation of Procedural Documents in Criminal Cases," and "Judicial Ethics and Rhetoric " The final fifth year of study includes the required course entitled "Procuratorial Supervision and the electives "Grounds for Overturning or Setting Aside a Judicial Ruling" and "Judicial Enforcement " The same courses and electives are available for those nonresident

undergraduate law students who study through a correspondence program

The Department's teaching staff are in charge of undergraduates' on-the-job training, including work in procurator offices for third-year students and court training for fourth-year students. In addition, members of the Department's staff supervise thesis projects on civil and criminal law, the judicial system, and on procuratorial supervision, undertaken by the 60 students who specialize in the judiciary, procuracy, and criminal investigation. Finally, a series of role-playing exercises involving business situations, has been developed to facilitate a better understanding of both the criminal and civil justice processes.

Post-Soviet Law Texts and Teaching Manuals

The following textbooks and manuals have been prepared

- Criminal Justice Process in Ukraine, Kyiv, 1992
- Comparative Judicial Law, Kyiv, 1993
- Civil Procedure, Kyiv, 1993
- Systematic Practice Commentary on the Criminal Code of Ukraine, Kyiv, 1995
- Criminal Justice Process in Ukraine Business-Related Role-Playing Exercises and Problems, Kyiv, 1992
- Legal Clinic Role-Playing Exercises Used in the Teaching Process, Kyiv, 1994
- Problems in Civil Procedure, Chernivtsi, 1995
- Compilation of Procedural Documents in Criminal Cases, Kyiv, 1992, 1993, 1995
- Compilation of Documents in Civil Cases, Kyiv, 1995

PRIVATE LEGAL EDUCATION IN KAZAKHSTAN

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Under the aegis of the Fulbright program, I was a Visiting Associate Professor at the Adilet Law School in Almaty, Kazakhstan during the academic year 1993-94. I was the first American to teach a course at the law school, not a difficult accomplishment since it was the school's first year of the existence. Even in its short life, Adilet has become a major training ground for attorneys and judges, preparing them for legal work in the emerging market economy of Kazakhstan.

The Founding of a Private Law School

Adilet was founded as an alternative to the Soviet-type system of law school education still in existence. Legal education in the Soviet era was highly centralized. There were few law schools in the entire country. Private law school education was as much anathema to the Soviet system, as was private ownership of land. But the fall of the Soviet Union brought changes and new challenges. To emphasize its major departure from the past, Adilet was originally known as the "Private Law School." It later changed its name to Adilet, which in the Kazakh language roughly means "justice."

Adilet was a product of the vision of its founders, most of whom had labored in anonymity in the Civil Law Department of the Kazakh State University Law Faculty. The founders included the most distinguished civil lawyers in Kazakhstan, including Iury Basin, Maidan Suleimenov, Anatoly Didenko, and others. They recruited and worked with the Rector of Adilet, the very capable Anatoly Matukhin. Civil law had not been the most popular field in the Soviet period. The best students were much more interested in criminal law in order to work in the Procuracy. The need to make the transition to a market economy thrust civil lawyers into the forefront of building a new legal infrastructure. They were tapped to write the laws, to

counsel domestic and foreign companies, and to prepare a new generation of law students to cope with the vast economic and political changes

In the wake of the breakup of the Soviet Union, the system of state law school education was not flexible enough to maintain pace with the new demands. New private law schools, some of which only consisted of a single room in a school or office building, sprung up to fill the void (and of course, in some case, to make money). (The Minister of Education has since closed almost all of the private law schools in Kazakhstan, except for Adilet.) The transition to a market economy created the prerequisites in which the founders could create a private law school like Adilet. Under the able leadership of Rector Matukhin, Adilet recruited faculty, established a curriculum heavy on commercial law, and enrolled its first class. Adilet enrolled 110 students in its first daytime 4-year program. Most of these students had just completed their high school education. It also established two correspondence courses, one for those already with a university degree, and one for those without any training after high school. Tuition is the equivalent of \$1,000 in tenge, the local currency. Most of the students have sponsors, for whom they will work after completion of their degree.

Adilet does not have separate departments. Students take many courses, concentrating on business and commercial law, but also a curriculum including Roman Law, Legal theory, Latin and Kazakh among others subjects. There are only a few full-time faculty members at Adilet depends on part-time instructors from other institutions. There is now also a steady stream of Western lawyers coming through Almaty, and Adilet is using this resource to sponsor lectures on a variety of legal topics.

Teaching American Law in Kazakhstan

The course I taught at Adilet Law School was a survey of American law. During this course we discussed the function of law in a democratic society. The course familiarized the students with the U.S. Constitution and the Rule of Law in the American system. We discussed the major institutions in a

democratic society and how the legal culture affects those institutions. Attention was also devoted to how these institutions emerged as a result of some of the events of the pre-independence era and how these events related to the current events in Kazakhstan. After reviewing each branch of government in the United States, we then discussed specific areas of U.S. law such as constitutional law, contracts and torts.

I tried to depart from Soviet pedagogy in which the teacher reads the lectures from prepared notes. Under the Soviet formalistic approach to education, students essentially take dictation, recording the words of the lecturer in their notebooks. There is virtually no exchange of information in this pedagogical approach. Since in recent years, there have been few written materials available (or possibly because no one wants to read them anyway), the students' notes form the basis for the examination at the end of the semester. The examination consists of the teacher asking the students questions and the students responding (essentially trying to repeat what the lecturer said during the semester). Breaking with this tradition, I allowed the students to ask questions during class, and, in turn, I asked the students questions. As the semester progressed, I urged more students to participate in the class. Although it was somewhat unwieldy with 110 students, the students were generally receptive to this approach, and many became active participants in classroom discussions.

I gave weekly lectures, each lasting two academic periods or 80 minutes. Attendance was usually very high, often 100 percent. There was no assigned reading since no course material was available in Russian, the language of instruction. The only requirement was to listen to the lectures, and to complete a 5-7 page, typed paper comparing an aspect of Kazakhstani and U.S. law. Some of these papers were excellent, while others of marginal quality. Apparently some students thought that I would not read the entire set of papers because some students handed in carbon copies of other students' work (photocopying machines are not widely available), while a few plagiarized outdated Soviet books on "bourgeois" law. The majority, however, presented their own work.

During the course I had several guest lecturers including the U S Ambassador, William Courtney, talk about various aspects of American law. The guest lecturers provided the students with different points of view and some variety, and were extremely effective. In addition, each lecturer established his or her own relationship with the Adilet which was beneficial to the young law school.

Private Legal Education and State Law Schools

Adilet has now overcome many of the difficulties of its first few years. The lack of textbooks was one of the more daunting challenges. To remedy this, Chemonics' American Legal Consortium has provided Adilet with reproduction equipment, which Adilet has used to reproduce its own teaching materials. The law school has created a computer center for its students. Yet, Adilet still needs such basic items as usable blackboards as well as chalk and erasers.

Despite the challenges, Adilet has survived, and has now enrolled its third class. It has shown that private legal education can make a substantial contribution to the building a legal infrastructure in the post-Soviet era. Without private legal education provided by Adilet, the quality of public legal education will continue to suffer. Public law schools will have no incentive do better unless they hear the menacing steps of private institutions over their shoulders.

Adilet stands as an example of the important role of private legal education in the post-Soviet era. Through selected areas of support and cooperation, Western organizations can have a major impact on the future of these institutions. The Rule of Law Consortium, under the new Commercial Law Training initiative in Kazakhstan, will tap Adilet's resources and contacts to help create the first full continuing legal education program for commercial lawyers in Kazakhstan. This program will be another building block in making Adilet a permanent feature of the legal education landscape in Kazakhstan.

PREPARING LAWYERS FOR A MARKET ECONOMY IN RUSSIA AND UKRAINE

by Former Visiting Professor of Law

Garland D Boyette

Staff Attorney

Rule of Law Consortium, Kyiv

[Garland D Boyette, who earned his law degree at the University of Texas, Austin in 1989, taught international trade law at the Law Faculty of Donetsk State University in Ukraine (1993-94), and at the Law Faculty of Nizhny Novgorod State University in the Russian Federation (Fall term, 1994). His observations below are drawn from these experiences.]

The collapse of the Soviet system has presented legal education in the Newly Independent States of the former Soviet Union with a myriad of challenges. Not only have law schools had to accommodate themselves to the new economic situation in terms of state funding of their activities, the introduction of radically new legislation and legal philosophies has posed the challenge of how to adapt to meet the needs of the new legal environment. This is particularly the case in the areas of commercial law, trade law, and other fields of law undergoing transformation as Ukraine, the Russian Federation, and the other post-Soviet states move ever so perceptibly toward a market economy. But as we shall see, the transition to a market economy not only poses challenges which must be overcome, but also presents opportunities for experimentation and innovation that would not usually be present under normal conditions.

The Challenges of Post-Soviet Legal Education

The initial challenge posed by the changed legal landscape was that of the immediate obsolescence of not only of basic ideas which had served as the basis for economic regulation for decades, the criminality of private property in various spheres comes to mind, but on a more practical level, the obsolescence of textbooks and other teaching materials as well as the inadequacy of the knowledge

of faculty members educated under the Soviet regime. As late as 1994, texts on the "Economic Law of Foreign Countries" were still being published for use by Ukrainian students in the courses on international trade law. These out-of-date texts consisted largely of trade regulations of the by then defunct USSR-led COMECON group of Soviet bloc states. Such materials are clearly inadequate to meet the needs of Ukrainian scholars and students of this important area of law.

The usefulness and wisdom of the approach of the Rule of Law Consortium in providing access to the latest commercial legislation through subscriptions to computerized legal data bases to law schools in Russia and Ukraine, which can be used to produce new teaching materials through desk-top publishing, is confirmed by my own teaching experience at the Faculty of Law of the University of Nizhny Novgorod. Through one of the commercial legal data bases in Russia, I was able to obtain the text of the US-Russia Treaty on Double Taxation that had come into force in January 1994. This text was subsequently distributed to approximately 150 students studying international trade law and international business transactions. Additional copies were placed in the Law Faculty library, and upon request, copies of the treaty were also made available to professors and students of financial law. Without the access by data base, not a single text of this important document would have been available to students and teachers of the Law Faculty.

In order to improve the knowledge of the teaching faculty in those subjects related to legal aspects of market reforms, there is a noticeable tendency at Russian and Ukrainian law faculties to seek to send promising young law teachers abroad for specialized training in commercial law fields. Ultimately, this approach will bear fruit in the creation of a core of specialists with greater familiarity with the necessary elements for the effective legal regulation of a market economy. But in the interim, law teachers will struggle to keep abreast of the fast changing legal environment.

A Changing Legal Profession

Soviet lawyers, although they included men and women of wit, intellectual subtlety, and rhetorical talent, did not enjoy the high fees, and thus the high status available to many American and European lawyers. The profession was highly regulated by the state, and the number of lawyers kept artificially low. The result of these policies are newly independent states with a severe dearth of lawyers with a knowledge of the economic and legal principles of a market economy. This situation is swiftly undergoing change, as ever increasing numbers of students, especially the brightest, are attracted to the comparatively high salaries that are now available to lawyers, particularly lawyers in the commercial field. A similar phenomenon is also occurring in the field of economics, as larger scores of students enter the Economics faculties.

The change in status, and also importantly in the allocation of resources among the various faculties, of these two disciplines has opened new possibilities for interdisciplinary studies in the field of law and economics, which would contribute greatly to the development of increased familiarity of market principles among Ukrainian and Russian jurists. It should come as no surprise that accommodation in terms of change in curriculum and attitude has tended to have been most persuasive in Economic faculties, thus producing interesting possibilities for American-style joint degree programs such as law/business administration and law/economics. There have been tentative steps taken by faculties in these two disciplines in both countries, and we should expect the realization of such programs.

Models for the Future

The challenging nature of legal education in the former Soviet Union has opened up possibilities for the reform not of the content of substantive courses, but also for the introduction of new philosophies and techniques of legal education. The

civil law tradition of Russian law and the civil law form of Soviet law, have made European models, especially German ones, of great interest to legal academics in Russia and Ukraine. But a more prudent course of development is emerging whereby some of the best elements of American and continental practice may be combined with indigenous traditions to create a mixed system of legal education. Such a system has successfully been used in Japan, in which the case method of instruction and the occasional recruitment of judges from the practicing Bar are employed.

The past few years have been ones of great change for legal education in Russia and Ukraine. These changes have without question presented our Russian and Ukrainian colleagues with challenges, and indeed hardships. But despite these hardships, legal educators in the Newly Independent States have quickly grasped that they have also been presented with a great opportunity to design a program of legal education, drawing on the best of various traditions, to produce legal practitioners of all types who are prepared to lead their countries forward on the path of legal and market reforms.

**LAW TEACHING AND SOCIAL CHANGE
IN UKRAINE**

*by Douglas M. Myers
Program Attorney for Ukraine
Rule of Law Consortium*

Ukrainian law schools have no exemption from the country's fitful struggles to accommodate the market forces unleashed by the collapse of Soviet command structures. Burgeoning enrollments, and a multiplicity of new, independent law schools competing with the established state institutions, bear witness that change is afoot. A rising generation of intelligent young Ukrainians is looking to legal education for

the training to function and prosper amidst a radically altered economic life.

The Soviet Legal Education Curriculum and the New Challenges

These young people will too often encounter educational institutions virtually unchanged from the Soviet era and characterized by a rigid curriculum dominated by legal philosophy, a plethora of mandatory requirements, and a general absence of elective courses. The keystone of instruction remains the lecture-course, usually read from a thick notebook. Student participation takes the form of recital of legal principles to be extracted and memorized from the lectures. Often, textbooks

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and printed course materials are lacking. The teacher is the authority, the students passive vessels.

The primacy of a philosophy-based, lecture-driven system of legal education is doubtless a vestige of the Soviet way: the adulation of theory, the importance of a correct philosophical basis for legal analysis, and the inculcation of approved values. From professional training informed by these premises, today's Ukrainian law students emerge into a legal economy that is active, problematic, and far removed from academic abstractions.

As commerce in Ukraine becomes both freer and more complex, lawyers become a necessary means by which private parties seek to protect and enforce their rights. But courts are often unreliable means for enforcement of legal obligations. Old legal structures such as state-run legal consultation offices are dying, private firms are struggling to make their way. Government service, formerly the highway of the ambitious to prestige and emolument, is now much less attractive in both respects.

Ukrainian commercial, banking, and legal institutions are all straining to meet the exigencies of rapid change. A premium is placed on flexibility and pragmatic adaptation. Of course, lawyers everywhere stumble, live by their wits, and learn from experience. But it profits them little if their legal education, with hindsight, is viewed as an impediment or even as a retrograde influence to be overcome.

The task of Ukrainian law schools is to equip their students to meet the challenges of a legal and market economy that will retain its markedly transitional and unsettled character for years to come. Basic, mandatory instruction, increasingly offered, in Commercial Law, Criminal Law, Civil Law and Procedure, serves that purpose. But a supplementary, compulsory

curricular diet of Logic, Roman Law, Legal Theory, Philosophy of Law, History of the State, and Political Economy, force-fed by a lecture system, does not fill the bill.

Agents of Change in Ukrainian Legal Education

Against this background, the Rule of Law Consortium (ROLC), with the financial support of the United States Agency for International Development, has since April, 1994 cooperated with Ukraine's leading law schools in Kyiv, Odessa, Kharkiv, and Lviv, to meet the demands of a rapidly changing legal environment. ROLC's program first furnished desk-top publishing capability at each cooperating law school to enable faculty members to publish their own scholarship, design curriculum, and generate course materials. Visits of law school professors from the United States identified areas where their experience might suggest specific changes in the course content of curricula. Dean Carl Monk, Executive-Director of the American Association of Law Schools (AALS), pursued these matters and outlined to Ukrainian law deans, to their enthusiastic approval, the rationale for and steps leading to the formation of a national association of Ukrainian law schools.

A high moment in the ROLC program was the participation of a delegation of eight Ukrainian law professors, two each from the four major law schools of Ukraine, at the AALS "Conference on New Ideas for Experienced Teachers: Excellence and Innovation in the Classroom" held June 3-7, 1995 in Minneapolis, Minnesota. In addition to attending the plenary sessions on such state-of-the-art themes for American law school professors as "Innovative Techniques in the Large Classroom," the Ukrainians watched demonstration sessions of Socratic and participatory teaching techniques. They then prepared their own lessons and

practiced the techniques among themselves, with the support of Dean Monk and other AALS staff

In the wake of the Minneapolis conference, ROLC, at the invitation of its Ukrainian colleagues, sponsored the visit of law school professors and administrators with special expertise in curriculum development for detailed discussions about appropriate areas for curricular flexibility, the role of electives, and the development of new courses. At the same time, a delegation of AALS professionals visited law schools in Ukraine to frame concrete steps for formation of a national association of law schools, including a statement of principles, by-laws, and a schedule for organization and convening of a charter session. One of the first tasks of the new association would be to provide a forum to encourage and discuss the advisability of fostering participatory teaching practices, such as the Socratic method, among others.

One Path to Preparing More Effective Lawyers

The author believes that the general introduction in post-Soviet law schools of the Socratic method would be an enormous stride toward preparing lawyers to work in a society where market conditions prevail. The Socratic method is based on the supposition that the law professor, although teaching from the vantage of vastly greater knowledge about the subject than that of the student, refrains from direct exposition of legal principles or doctrine. Learning is not imparted by the authority of the professor's declamation. Rather, the professor questions the students and elicits their response. In pure form, a semester may pass, and the professor may never utter a declarative sentence.

To posit learning as a dialogue between student and teacher is to speak volumes about the nature of education and the nature of law. Law becomes something more than the words of the

professor projected into space. The properly trained Socratic teacher must descend from the pedestal, encounter the student, guide by greater knowledge, but still submit to the tension, the equality of fair debate, and the process of give and take that lie at the heart of law itself. To know law, the student must apply it. To apply it, the student must define it in the given factual setting, defend one's definitions, justify the outcomes that follow, and vary one's reasoning according to particular changes in the underlying facts or legal principles.

The more it is practiced, the more the Socratic method acts as an antidote to the hegemony of a priori theoretical constructs that dominated public law and public life in Soviet times and that still suffuse legal education. The Socratic method does not stand Hegel on his head. Neither does it put him back on his feet. It undresses him. It exposes law to be not the inexorable derivative of an overarching theory but a flexible, evolving system of principled argumentation, often narrow, always concrete, and sometimes mistaken.

No legal axiom is as paradoxical or as provocative to today's post-Soviet law students as the bold assertion of Oliver Wendell Holmes, Jr. in The Common Law: "The life of the law is not logic but experience." The singular virtue of the Socratic method is that it makes the experience of legal reasoning and determining the law part of every student's daily personal experience.

Although the process of cooperative endeavor initiated by the ROLC with its Ukrainian colleagues has not yet considered in detail which course materials would best complement more open, participatory teaching practices, the author contends that under most circumstances, and certainly those obtaining in Ukraine, the student's encounter with law is strengthened by the case-method, that is, the study of written judicial opinions particularly

those of appellate courts. A judicial decision is more than a convenient unit of pedagogical instruction. It is a concrete instance of law in action.

Cases illustrate what is fact and what is law, and how fact and law interact. Cases cumulatively underscore the wide range of human interests and collisions that constitute the legal universe. Cases are windows into concepts hitherto unknown in Ukraine and still only nascent, but ultimately indispensable for a market economy: real estate, banking, commercial transactions, insurance, mortgages, security interests, and many more.

The case-method harmoniously complements the Socratic method: cases provide exactly the means to compare and contrast distinctions of fact, the role of precedent, the justice or injustice of given results, the perspicacity or tendentiousness of majority and dissenting opinions, that are the essence and the fruit of the Socratic dialogue.

A Case in Point

All this is not mere conjecture. The author has seen the Socratic method at work in post-Soviet law schools, and has seen it received with enthusiasm by students and with telling pedagogic results.

When working in Minsk, Belarus, in 1993-94, the author was asked to teach a course on the Law Faculty of the European Humanitarian University, a private educational institution. The course was to be an all-American affair: English language, American law, American materials, and American teaching methods. Frenzied appeals via fax and telephone to family and friends brought to Minsk a makeshift assortment of old legal casebooks and explanatory pamphlets on the American legal system. Slowly and haltingly a

course entitled "American Contract Law: An Introduction" took form: a seminar with an enrollment of 12 students. The class met twice a week in the evening for two-hour sessions.

The level of ability in English varied and was naturally enough the critical element in planning and gauging course progress. The class limbered up with American Bar Association materials that explained the operation and basic nomenclature of the system of trial in American courts. This was invaluable preparation for a course to be based on the case-method, where written appellate court decisions continuously invoked this terminology.

From the first weeks, precious class time was devoted to written vocabulary tests and to announced essay tests on the materials covered. There was no substitute for compelling the students frequently to write in English, the more the better. As the class moved into the analysis of decided cases, class participation improved, and students were again required to write: this time to prepare "briefs," which parsed the legal elements of each decision: the role of the parties, the underlying facts, the decision of the trial court, the arguments on appeal, the holding of the appellate court, the reasoning of the dissenting opinion, if any.

The method of class instruction was Socratic. The instructor refrained from rhetorical tours de force or from explication of the text of cases. Student participation was elicited by slow, patient questioning, which at first produced slow, laborious answers. But the case method helped itself. Such cases as *Lucy v. Zehmer*, where one party sought to avoid a signed contract for sale of a farm on grounds that it was written out on the back of a bill for a meal served in a bar, and was a joke and not binding in such an atmosphere, are naturals for a sparkling discussion.

Those students who hesitated in English were encouraged, not forced to participate. They came along by the force of example as they saw other students dive in, make mistakes, be contradicted by their fellows, occasionally exposed by the teacher for a shallow answer, give back, and survive to argue another day. Often the English language was the unsung hero, as students grappled with complex sentences or tangy American idioms. And the press of serious, sustained academic performance never faltered: briefs, quizzes, hypothetical questions for homework, occasional oral presentations or debate.

There were rough moments as well. In an early month the reluctance of students to submit written assignments once reached the stage of a de facto strike, even a revolt. The Socratic mantle was discarded and a heart-to-heart talk ensued between an instructor who wished for students to learn by engaging course materials, and highly motivated and hard-working students who felt their limits were being transcended. The instructor trimmed his sails, resumed the Socratic mantle, and the timeless dialogue continued.

When morale sagged, and the weight of hundreds of new concepts seemed too much, the students were always cheered to hear praise that they at their tender ages were working through the same materials as were their American colleagues who were five years older and possessed a four-year university degree, and all in a foreign language to boot. The highest compliment in the midst of a verbal duel or a dexterous manipulation of a recondite legal concept was to say, "Now you sound like a lawyer."

After a semester of seeing the young students go from strength to strength, become more facile with their English, learn to like the rough and tumble of argument, it was hard for the instructor simply to pack his briefcase and depart

in silence. Oral examinations were administered in the traditional local style, and written examinations in the style of American law schools. The last grades were issued, and a final evening of champagne, cake, and ripe reminiscence sealed bonds of friendship all around.

The Challenge of Reforming Legal Education Restated

To advance these proposals is not to gainsay the difficulties in their path. Professors must be interested or convinced in the utility of the new road. Those sympathetic or even enthusiastic must still be trained and acquire Socratic skills - not always a matter of mere volition. If the case-method is not adopted, the Socratic method must be applied to replace or supplement the expository material of lectures. If the case-method is to be employed, case materials, based on practice suitable for the prevailing legal environment, must be developed, and in view of the rate of change, at none too leisurely a pace.

But of this we can be sure: just as one drop of musk (to use the image of Osip Mandelstam) will fill an entire house, the advent of the Socratic method will resound widely among students and teachers, and among those law schools that as institutions encourage and sustain it. The use of case materials, even if temporarily borrowed from civil or common-law countries, will be of immediate benefit: it will support Socratic teaching and provide a paradigm for legal analysis and training. The author's experience in Minsk shows the potential dramatic effects: unenrolled students, professors, administrators, even government officials, formed a steady stream of visitors to the little seminar. It was a small sensation, pedagogic fresh air was wafted far and wide.

The Rule of Law Consortium fully appreciates that Ukraine is endowed with an abundance of serious, motivated, active, intelligent legal scholars and administrators committed to effective legal education on a par with prevailing international standards. ROLC's programs are intended to expose those scholars and administrators to methods, approaches, and opportunities which would appeal to their desire to find a better way for their students, their institutions, their careers, and their country. Whether it be teaching methods or a national association, ROLC strives to afford a maximum of resources and guidance, with the frank recognition that the process of realization is properly left in the hands of those colleagues and institutions with whom we are privileged to cooperate.

However, the Rule of Law cherishes open discussion. To the extent that the lecture system implicitly preserves the dead hand of the past, it should be replaced with methods of instruction which stimulate active, critical understanding of law as a system for the pragmatic regulation of social interests and conflicts. Important principles may and must be flexible. This is the teaching of accumulated legal experience. It is also good pedagogy. Students whose professional training imparts these perspectives and skills will be well-suited to function and thrive in a market economy where the unfailing law is constant renewal and change.

CURRICULAR AND PEDAGOGICAL REFORM IN UKRAINIAN LAW SCHOOLS

*by Carl Monk, Esq., Executive Director
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Consultant to the Rule of Law Consortium*

Training lawyers to represent clients in a market economy in Ukraine will require, among other things, a substantial commitment of

resources and talent to develop a legal education curriculum and pedagogy that will provide relevant and effective law teaching for future lawyers and government policy-makers. It will also require the scholarly contributions of Ukrainian law faculty.

In this context, "market economy" must be defined broadly. The market economy in the United States developed congruently with a political structure of checks and balances, and the individual liberties embodied in the Constitution and its Bill of Rights. Fortunately, the legal education curriculum in Ukraine already includes a significant part of what is necessary. Additions and refinements should be made through the type of consultation that is currently taking place under the auspices of the Rule of Law Consortium's Law School Reform project.

Pedagogical and Curricular Reform

The initial diagnostic visits to law schools in Ukraine included a mutual exchange of ideas about curricular development as well as pedagogy. Those visits also began to develop a vision and design for professional development programming for law professors in Ukraine. Discussion also focused on the role that a voluntary association of law schools could play in improving the quality of legal education.

Pedagogical developments that will help train future lawyers for a market economy include the development of more participatory methods of classroom instruction in which students and faculty are engaged in substantial interaction. This interactive style of teaching cannot occur without the parallel development of course materials that can excite the students' imaginations, and get them involved in case analysis and problem-solving. This will help develop a solid foundation for students to think imaginatively about creating a political environment and market economy that is responsive to the needs of the Ukrainian public.

A number of law faculty from the United States are already visiting Ukraine to assist with general curricular reform, with the emphasis on specific market-oriented subjects such as commercial law, corporations and others. American law professors are also teaching classes to Ukrainian law students.

Learning Innovative Teaching Methods

As part of the process of curricular and pedagogical reform, Ukrainian legal educators attended a 1995 conference in the United States organized by the Association of American Law Schools (AALS), and entitled "Conference on New Ideas for Experienced Teachers." The five-day conference exposed the visiting Ukrainian law faculty to innovative teaching techniques used in American law schools, and enabled our U.S. colleagues to learn more about Ukrainian legal education.

In 1996, a professional development program on different teaching methods will be presented in Ukraine. It is also anticipated that a group of Ukrainian legal educators will attend the AALS Annual Meeting where there will be approximately 75 panel discussions on various topics. This will provide our Ukrainian colleagues not only exposure to substantive developments in different areas of law in the United States, but will also give them an opportunity to review a variety of teaching methods.

A Law School Association in Ukraine

Once a Ukrainian Association of Law Schools is organized, it can be expected that the Association will, with some advice and consultation from American colleagues, be able to develop its own programs to assist in curricular and pedagogical development. American legal educators look forward to continuing to learn from our Ukrainian colleagues. The Association of American Law Schools stands ready to

continue to assist in the development of a legal education system in Ukraine that can prepare lawyers to participate in a democratic, free market economy.

PEDAGOGICAL REFORM AND CRIMINAL LAW TEACHING IN UKRAINE

by Professor Margaret Paris

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Consultant to the Rule of Law Consortium

On the occasion of my consulting trip to Kharkiv for the Rule of Law Consortium (ROLC), I was impressed by the eager attitude of the faculty and students at the Ukrainian State Law Academy. During my lectures and meetings at this law school (which is the largest of its kind in Ukraine with a focus on criminal law), faculty and students alike listened intently to my remarks about American criminal law and asked probing questions about law and legal education in the United States. The intensity of my audience came at first as a shock. I had been used to the casual attitude of American law students who take much for granted. I soon realized that the eagerness I saw in the lecture hall reflected the importance of ROLC's Law School Reform project.

The students were keenly aware that they would form the vanguard of a new breed of legal professionals who would become judges, lawyers, and law-makers in an age of judicial independence and a market-driven economy. The Ukraine State Law Academy's faculty recognized just as deeply their vital role in preparing these students for meeting the challenge. For both groups, the Law School Reform project provides an important vehicle through which they can determine the educational methods that best suit their needs, and the educational content that will best prepare students for their work in a new legal environment.

Pedagogical Methodology of Criminal Law Teaching

Throughout my exchanges with students and faculty, three topics recurred. The first involved *pedagogical method*. The traditional European method required students to master a large quantity of material. European law students memorize, among other things, the legal codes of their countries. The prevailing American method emphasizes analysis at the expense of memorization. When I teach criminal law, for example, I encourage my students to question the principles and logical reasoning that underlie the statutes and judicial decisions that they read, rather than to memorize the content of those materials. Because of these methodological differences, it has been often remarked that European lawyers enjoy a comprehensive knowledge of the laws of their countries, but that they sometimes react woodenly when confronted with changing conditions. On the other hand, American lawyers are recognized for their innovation and adeptness at shaping the law to new circumstances, but also for their surprising ignorance of legal principles outside of those with which they work on a daily basis.

Under the auspices of the Law School Reform project, I believe that Ukrainian students will have the best of both worlds. The students with whom I spoke excelled in their knowledge of Ukraine's criminal codes. The faculty, moreover, reviewed with interest American casebooks and teachers' manuals that stressed the "legal analysis" educational method. Together we discussed course content and syllabus preparation. I believe that as these faculty members prepare their students for legal careers in an environment of change and independence, they will successfully incorporate aspects of the "legal analysis" method into their existing educational tradition.

Criminal Law Topics of Interest

The second topic that hit "hot buttons" among my Ukrainian colleagues involved *educational content*. Specifically, faculty and students were keenly aware that organized criminal activity can have a profoundly negative influence on business climate. They were interested in learning how American criminal law had developed in order to thwart that kind of activity. I had brought with me various textbooks and course plans for use in courses on business crime and so-called "white collar crime." I had several exchanges with faculty about these courses and about the legal principles that had been useful in combatting organized crime in the United States.

Similarly, in the question and answer sessions that I held after my lectures, students asked probing questions about theories of liability that might be effective in detecting and deterring organized crime: tax laws, securities regulations, conspiracy and aiding and abetting theories, and others. At one point, we discussed a relative newcomer to the American scene -- criminal liability under the Racketeer Influenced and Corrupt Organizations Act, or "RICO." Armed with ideas about new theories of criminal liability, these students will be better equipped to help their country foster a stable business climate.

The third topic in which my Ukrainian colleagues demonstrated deep interest concerned police powers. The American judiciary has a long history of limiting police and military powers through its willingness to interpret and enforce broad constitutional rights against abuses. And, as demonstrated by the highly-publicized trials of the Los Angeles police officers who beat Rodney King, American prosecutors also have been instrumental in controlling the law enforcement community.

The newly-independent judiciary in Ukraine might find itself playing a similarly important role, as police and military personnel

respond to the inevitable challenges of Ukraine's changing economic environment. The topic of enforceable rights against abuses came up several times during my lectures, and students asked many questions in this area. I believe that the continued policy emphasis on Rule of Law development in Ukraine will reinforce the willingness of lawyers to pursue claims for redress against law enforcement abuses, and the willingness of judges to enforce such claims.

Armed with strong laws that command respect from all segments of society, Ukraine's new legal professionals will constitute an instrumental force in nation's on-going task of state-building.

CURRICULAR REFORM AND COMMERCIAL LAW TEACHING IN RUSSIA

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Certain sectors of the Russian economy are acquiring a market orientation at an astonishing pace. One of the extremely important policy issues confronting the Russian government is how to foster and to maintain open markets in those areas of the economy where privatization and liberalization from government controls have been most successful. The first part of the new Russian Civil Code sets forth basic principles of business organizations and commercial transactions. A body of competition law has been enacted and the infrastructure to enforce this law is in place. There is increasing interest in international trade law, and in integration of Russia into the world trading community. It is essential that the institutions of Russian higher education and the law faculties in particular, create curricula that will generate sophisticated

and highly trained specialists both to assist government in maintaining open markets and in building on the legal foundation that has been established, and to advise private enterprise and entrepreneurs on how to take full advantage, within the established legal framework, of the opportunities in Russian markets.

Russian and American Legal Education Compared

In advising Russian educational institutions and law faculties on curricular revision, it is important to keep in mind that the Russian system of higher education is structured very differently from that of the United States. This is particularly the case in legal education. As in most European countries, the study of law in Russia is most commonly undertaken as an undergraduate. The basic program is typically three or four years with increasing but still limited opportunities for post-graduate legal training. A large number of students choose to study law as undergraduates, but do not engage in the formal practice of law after graduation. The curriculum in most law programs is prescribed and, until recently, there has been little opportunity to venture beyond required courses. Moreover, cross disciplinary training is not a common feature in Russian law programs.

It has been essential to the success of our economy that we have had an adequate (some would say excessive) number of legal professionals to staff sophisticated government regulatory programs, and to advise in the establishment and management of business enterprises. As our economy and the rules governing it have become more complex, the capability of these legal professionals, in areas other than law, e.g. in the fields of economics, finance, accounting, tax planning and political science, has become almost as important as their background in law. For many years, our law students have self-selected to specialize in these

fields based upon their interest and upon their prior training and experience. The structure of our system of higher education which requires at least a Bachelor's Degree prior to matriculating in a law school ensures prior training in at least one field. Many of our law schools have revised their course offerings to ensure that students wishing to attain some degree of competence in law and economics, or law and finance, for example, have the opportunity to do so. Cross-disciplinary study is becoming increasingly common in U S law schools.

A Gradual Approach to Curricular Reform

Given the important differences between the Russian and the U S legal educational systems, attempts simply to import U S law courses, teaching approaches and general curricular structure are unlikely to be successful. Exposing Russian law faculty and administrators to our approaches and assisting them in modifying and integrating those aspects of our system which they find useful into their own evolving system of legal education, is likely to be a much more successful strategy.

The Russian law faculty colleagues with whom I have discussed the question of change in Russian legal education acknowledge that their system must evolve and respond to the need to train a new type of legal specialist to support Russia's transition to be a true market economy. They recognize that a somewhat more pragmatic approach which places more emphasis on developing competencies and rather less on doctrinal purity is appropriate and necessary. They recognize the usefulness of some degree of cross-disciplinary training. However, most are not prepared for the radical restructuring of legal education in Russia nor would they support it. They expect that the change that occurs will be incremental and will come in the context of their existing educational system.

If Russian legal education is to meet the challenges posed by the rapid transformation of the Russian economy, significant changes in Russian law programs must occur. A strategy of assistance to Russian law faculty and law programs based upon understanding and respect for the existing system is the strategy most likely to be effective in facilitating these changes.

REMARKS OF JUSTICE SCALIA ON JUDICIAL REFORM IN ARMENIA

[In July 1995 the Rule of Law Consortium sponsored the Armenian Judicial Conference in Erevan Armenia. Justice Antonin Scalia of the U S Supreme Court led a delegation of American judges, federal and state, to the Judicial Conference. A report on the conference appeared in the previous Rule of Law Consortium Newsletter No 2-3. Subsequently, Justice Scalia was honored by the Armenian Assembly of America in Washington DC on October 5, 1995. The following are excerpts from Justice Scalia's remarks on that occasion.]

"[T]he real reason I came here is to share with this group the results of our trip to Armenia. You have heard something about the organization of that conference.

Let me tell you what I think was accomplished by it. I frankly am either skeptical about or uncertain about the concrete substantive things you can teach to another legal culture and persuade them to adopt. One thing I know you can do, however, is that you can buttress the self-respect of the judiciary in another culture and you can get the members of that government who are not in the judiciary to think more of that branch of government by simply going there and treating them as the dignified and important people that they are.

That is a value that I think we've always achieved by having American judges, especially American judges from state and federal supreme courts and from federal courts, in a way, do homage to the judges of Armenia and of the other emerging new democracies. I would rate that as certainly one of the most important things to come out of the conference.

The second thing [of importance] in my estimation, is the establishment of personal friendships and relationships with the judiciary in another country. I think it's very important for executive leaders of countries to know one another. We [judges also] are in the same business. We struggle with the same problems. I think we can support one another and learn from one another, but only if we know one another. I'm happy to say, Chief Justice [Tariel] Parseghian was here in this country about three years ago. When he was here he invited me to go to Armenia and I said I'd be happy to go.

In addition to the three-day conference, we met personally with the Chief Justice Parseghian, and other justices of his court, including a woman justice who was one of the presenters at the conference, and I think one of the most impressive justices, Alvina Gulumian.

We also met with many of the lower court judges, and these meetings [were] not just formal meetings. Where the rubber meets the road is the trial court judges. And unless you can get good people down there and change their hearts, you can have the best people in the world in the upper courts and it's not going to make any difference. I am happy to tell you that from what we were able to observe and hear, the Armenian government realizes that

Not our entire group, but just the judges in the group had a private session with President Ter-Petrosian. And it was a pretty long session. It must have been at least half an hour. I was surprised at how much time he gave us. I have to tell you I was enormously impressed with his forthrightness and with his -- he's not a lawyer,

he's a linguist, professor of linguistics and a historian -- I was amazed at his grasp of the practical problems in the legal community.

[H]e said, We have a wonderful new Constitution now and it has wonderful new provisions about human rights. But frankly, it's something on a piece of paper, unless you have the judges who can make those guarantees live.

I think people are very much aware of the difficulties, the enormous difficulty for all of the emerging democracies to jumpstart a new democracy without a corps of judges. You have to derive them from somewhere. I am happy to say that from what I saw, Parseghian, the Chief Justice, is a man of great diplomacy and geniality. I think he's very popular, from what I could observe, among the lower court judges. He does believe enormously in the new system, in the Rule of Law, in human rights, and I think he will pull them along to the greatest degree possible. I am very, very hopeful about the situation."

STRENGTHENING LEGAL INFORMATION NETWORKS IN CENTRAL ASIA

by Malcolm Russell-Einhorn Esq
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In moving their societies toward a more democratic, market-oriented future, Central Asian legal reformers have had to confront not only the dearth of practical information about law and democracy, but also Communism's legacy of secrecy and information-hoarding that was sustained by some of the very institutions most important to the sharing and dissemination of knowledge. To meet the needs of reformers -- particularly in the non-governmental organization (NGO) community -- the American Legal Consortium (ALC) is working under its U.S. Agency for International Development Rule of Law contract with a number of key institutions in

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Kazakhstan and Tajikistan, including the leading law schools of both countries

The purpose is to inculcate a service orientation among the staffs of these institutions, and to increase their capacity to provide reliable information on local and foreign law, the democratization process, and human rights. Helping to create a new legal information "culture" constitutes one of the most cost-effective ways to leverage scarce technical assistance funds and place important new tools into the hands of local legal professionals. ALC's efforts to strengthen legal information resources networks in Central Asia place heavy emphasis on user orientation and utility, and are targeted particularly at the NGO community.

Creating Institutional Linkages

In Kazakhstan and Tajikistan, ALC is seeking to link together -- organizationally and electronically -- some of the leading centers of legal information so as to create a network whose sum is greater than the whole of its parts. By enabling these institutions to share still-scarce information resources from Central Asia and abroad, ALC and local professionals are making a concerted effort to break down the compartmentalized barriers that, to date, have prevented information access even to members of the two countries' political elites.

In Tajikistan, the three partner institutions comprising the network include the Law Faculty of the Tajikistan State University, Ferdowsi State (National) Library, and the Institute of Philosophy and Law of the Tajik Academy of Sciences. In Kazakhstan, the network will consist of the three Law Faculties of Kazakh State University, Karaganda State University and the private Adilet Law School, the Academy of Sciences Institute of State and Law, and the Ministry of Justice's State Juridical Institute. A number of factors influenced the participation of these institutions including their existing resources, the attitude of

their leadership, the nature of their user constituencies, and their geographic location.

In each country, ALC and its local partners have designated a "hub" to serve as a training and demonstration center that will permit partner staff to become acquainted with a wide variety of new information resources and to learn how best to structure research inquiries seeking access to such data. When equipment procurement is complete and ALC has helped collect a wide range of purchased and donated texts and information, each center will possess computer, fax, email, photocopying and desktop publishing capabilities, as well as a representative or illustrative collection of modern Russian, Kazakh/Tajik, and foreign-language legal information resources in printed and electronic formats.

In Tajikistan, the Dushanbe network's hub, known locally as the "Law and Democracy Center", is located within the National Library. The Center's officially opened on May 27, 1995. The Center's holdings and capabilities will soon become the most complete in the country. The hub may also attain early status as the definitive repository of legislation and court decisions.

In Kazakhstan, the corresponding Almaty hub will be located within the prestigious Academy of Sciences. Each network will be initially managed by ALC's Legal Information Resources Specialist Joseph Luke, a Russian-speaking American lawyer and law librarian, working in close collaboration with local teams of professional librarians whose services are being donated by the hub facilities and partner institutions. Network policies and procedures will be guided by local Advisory Committees, comprised of the leadership of the hub and partner institutions, joined by representatives of NGOs and other key user groups.

Providing Greater Access to Legal Information

The foremost objective of ALC's assistance to the two networks is to facilitate their ability to collect, maintain, and disseminate relevant, locally-appropriate legal information (electronic as well as print) from the Central Asian Republics, Russia and the Commonwealth of Independent States (CIS), Europe, Asia, the United States, and multilateral organizations, and to make such information as widely available as possible among their existing and potential user populations

As of summer 1995, these facilities are almost entirely bereft of modern, post-Soviet publications or databases dealing with the range of new legal subjects integral to democratic, market-oriented societies. It is not uncommon to find only a dozen or so books in these institutions devoted to post-Soviet, Russian language law texts or foreign publications on legal topics. At the same time, most of these institutions have no computer equipment or databases by which to access the increasingly rich universe of Russian- and English-language electronic information that is being generated from a variety of sources. At present, virtually the only reliable, albeit often incomplete, source of such information is a handful of foreign law firms and a small community of government legal advisers.

Because the potential supply of such information is practically limitless -- and therefore prohibitively expensive -- ALC has determined to focus its assistance efforts on providing a representative sampling of such information and materials at each of the two demonstration centers, and on training relevant staff from the partner institutions at those sites. Materials will consist of a variety of Russian language texts and periodicals, many drawn from the increasingly vibrant private publishing sector in Russia, as well as databases that include legal information from the CIS and abroad. Supplementing these materials will be e-mail and Internet connections to facilitate on-line research including a connection to Columbia Law Library, which is assisting ALC's subcontractor Metametrics in establishing the networks. Partner institution staff

will receive training in information acquisition and storage, the structuring of legal research, and general user support.

The thrust of ALC's efforts is therefore to "jumpstart" the process of acquisition and use of new legal information in the network, and to give the partner institutions the tools to chart a long-term development strategy relying on their own resources, the local private sector, and the broader international donor community. As part of this process, the two "hubs" will be encouraged to leverage their holdings of critical electronic and print information by making it available to the partner institutions through email and a rudimentary interlibrary loan system, respectively. Partner institution staff will in turn create their own acquisition strategy based on the training and exposure they have received at the demonstration centers and the particular needs of their user constituencies. This process should be aided by the emergence of an increasingly effective private sector that will generate legal publishing companies and database providers with products and services at a more affordable level.

Developing a Service Orientation

In order to carry out these functions capably and overcome certain tendencies of the past, partner institution staff will need to develop an entire new range of skills emphasizing user support and a spirit of professionalism and openness. For most of these institutions, such an orientation remains quite foreign despite their best intentions. Legal information constitutes a valuable commodity to be hoarded, not widely shared, and many potential users, even within these institutions, have never interacted with library staff. An important precondition to staff training is an understanding of the nature and needs of all relevant potential user groups, and a commitment to establishing lateral relationships and linkages with other institutions (in contrast to the compartmentalized vertical relationships that characterized the Soviet period).

The staff training itself -- to be conducted at the demonstration institution "hubs" -- will range from organizational development and strategic planning to computer training, and the structuring of legal research requests. Training designed to foster a client- or demand-driven orientation will link together all technical instruction. Metametrics will take the lead in carrying out this training, supported by Columbia Law School. Much of the training will likely take place with the participation of the different institutions' staff simultaneously. Not only will this prove cost-effective for ALC, but it will assist in solidifying peer relationships among the participants and generating ideas about complementarity and comparative advantage among the institutions. Again, the beneficiaries of such leveraging and synergy will be the institutions' user populations and the general public.

Outreach to Law Faculties, Legal Professionals and the NGO Community

With information on law and democratization still scarce within the region, legal professionals and NGOs -- two vital communities within a functioning civil society -- remain deprived of an important resource for their ongoing work and growth. To derive even greater impact from its investment in this initiative, ALC seeks to work with its partner institutions to extend a special invitation to these groups to understand and make use of the new services available through the strengthened information resource networks.

To make this vision a reality, ALC is working with the partner institutions to create integrated outreach plans to educate these significant user communities about their holdings and services. A particularly important aspect of this activity concerns desktop publishing capability. ALC hopes to supply each partner institution with modest equipment that will allow the staff to create newsletters and pamphlets describing specific resources, at the same time, such equipment can also be used to develop

specialty publications and bibliographies and fill vital gaps in the local publishing landscape. This will prove particularly useful to the many law faculties among the network's partner institutions, who could effectively supplement their teaching curriculum with additional materials drawn from sources outside the region.

Outreach to the NGO community has already begun in a significant way in Tajikistan. Shortly after the opening of the Dushanbe Center, dozen of NGO representatives were given orientations and briefings will continue to be held on a regular basis on the capabilities of the Center.

Network Sustainability

ALC and its partner institutions are committed to ensuring that these legal information resource networks are locally sustainable services. Network planners are accordingly developing practical strategies for income generation and cost recovery and moving towards early implementation of those strategies. A fall workshop for network advisory committees and librarians focused on financial management and sustainability. Tested U S and other third-country library income-generation techniques will be examined for Central Asian adaptability.

Cost recovery will commence early in network operations, well before ALC's project completion. Modest user fees for network services will be assessed, both to gauge user receptivity and optimal rate structures and to begin accumulating reserve funds for materials replenishment, equipment supplies and repairs.

Following initial procurement of network computer and copying equipment using ALC project funds, recurring costs are anticipated to be modest, not exceeding \$20,000 annually for each entire network (i.e., hub facilities + partner institutions). To supplement user fees in covering these costs, additional revenue sources will be explored and developed, such as solicitation of corporate gifts and donations from the local

business community (particularly in Kazakhstan) and the pursuit of grants from other donor organizations, including major foundations ALC is prepared to work closely with the partner institutions to develop budget and narrative program descriptions as "persuasive documents" capable of securing significant external funding

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SPECIAL ISSUE ON LEGAL EDUCATION REFORM II: EDUCATING FUTURE JUDGES AND PROSECUTORS

Editor Robert Sharlet

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NOTE In the Special Issue on Legal Education Reform I (Fall 1995), the name of the author of "Russian Legal Education Training Lawyers for a Market Economy" was inadvertently mis-transcribed. It is Dr. V. F. Popondopulo.

REFORMING LEGAL EDUCATION IN THE NEWLY INDEPENDENT STATES INTRODUCTION TO PART II

by Peter B. Maggs

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There have been two major changes in the education of future judges and prosecutors in the post-Soviet period: (1) the removal of the role of the Communist Party in the training process, and (2) the reform of the legislation upon which this training is based.

Under the Communist system, there were multiple Party controls for the training of future judges and prosecutors. Since, with rare exceptions, only Party members could be judges and prosecutors, law students wishing to work as judges or prosecutors had to be members in good standing of the Komsomol [Communist youth organization] or the Party. The Party also had a veto on the choice of law professors, and through its bureaucrats and censors controlled the law school curriculum and the content of legal textbooks. This control included particularly harsh censorship of any discussion of the civil liberties available in free societies such as the United States. All of these negative features of the Communist system disappeared rapidly after the fall of the Soviet Union.

Training Prosecutors and Judges in the Post-Soviet Period

Training of future prosecutors and judges placed and still places heavy emphasis upon criminal and criminal procedures codes and upon the interpretation of these codes by the courts and legal scholars. Under Communism, both codes were seriously flawed. The Criminal Codes made it a crime to exercise such basic human rights as the right to criticize the government, organize a political party, change one's residence, or travel abroad. The Criminal Procedure Code, until the last days of the Soviet regime, severely limited the right to counsel, and had no provision for jury trials. In many of the Newly Independent States, the Criminal and Criminal Procedure codes have been amended to remove their most objectionable features.

The result of these fundamental changes has been to create a need and desire for substantial reform of legal education. Law professors and deans want to introduce new teaching materials reflecting law reform and taking advantage of the new freedom to write, teach, and criticize the government. Law students, no longer selected for Party loyalty, are extremely eager to learn about how criminal law systems work abroad, and to get the practical training they need to work in a court system that is becoming more adversarial in the wake of the abolition of Party controls.

Unfortunately, the financial ability to change has lagged behind the desire to change. New textbooks, new teaching methods, and access to information from abroad are expensive. Economic reform has reduced the government funds available to law schools. Unlike the law schools training business lawyers, which can charge high tuition, law schools primarily training civil servants cannot charge high tuition to students entering low paid careers.

The Rule of Law Consortium and Legal Education Reform

The Rule of Law Consortium (ROLC) has attempted to focus its assistance on providing some of the resources needed to let law schools in the Newly Independent States (NIS) carry out the reforms that they are eager to bring about. This has involved the ROLC working with seven law schools in the NIS, three in Russia and four in Ukraine. In the previous issue (Part I, Fall 1995), the emphasis was on training lawyers for a market economy. This issue concentrates on "Educating Future Judges and Prosecutors."

As before, we have asked NIS legal educators with whom the ROLC is working, to discuss their perceptions of the general task of legal education reform as well as the specific experience of their respective institutions. Thus, this issue contains five contributions by Russian and Ukrainian law professors along with a commentary by an American law professor, and a survey of the changing legal information networks in Central Asia.

The first two articles provide comprehensive overviews of legal education reforms in Russia and Ukraine as they bear on the process of judicial reform, particularly the training of legal personnel for service in the administration of justice. Examples are drawn, respectively, from the Urals State Legal Academy in Russia, and the Law Faculty of Lviv State University in Ukraine.

Follow-on articles by Ukrainian specialists from the National Judicial Academy and Kyiv National University focus more specifically on curricular issues relevant to educating judges, prosecutors and other law enforcement personnel. This emphasis also includes discussion of internships and continuing legal education, as well as the new post-Soviet interest in human rights courses, and international legal education.

The issue concludes with two special reports, one by a University of Oregon law professor who has advised on criminal law educational reform in Ukraine,

and the other on USAID work on legal information reform in Kazakstan and Tajikistan, including at several of the premier law schools in those countries

LEGAL EDUCATION AND JUDICIAL REFORM IN RUSSIA

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One of the most important results of the introduction of democratic reforms in Russia during its transition stage, has been the establishment of the doctrine of Separation of Powers in the state-building process. This doctrine, which was developed in its time by such great thinkers as Locke, Montesquieu, and Rousseau, was first applied in practice in the United States of America. Other democratic states then began to employ this concept in establishing their own state systems. Russia during the Soviet period formally assigned to state institutions legislative, executive and judicial powers, but never embraced the principal idea behind the doctrine of Separation of Powers: the endowment of specific branches of government with broad definitive decision-making authority. Instead, all state and social institutions were controlled by the Communist Party apparatus which allowed not even the slightest deviation from its ideological concept of unified power concentrated in a single center.

The current Constitution of the Russian Federation incorporates the Separation of Powers as a fundamental principle of the constitutional structure. One aspect of the constitutional state is the judicial branch which requires special support and assistance. A truly independent and free thinking judiciary is just now beginning to take shape. In this connection, the role of legal education in training highly qualified personnel for the judiciary, the Procuracy and other law enforcement agencies, has grown immeasurably.

Primary Functions of Russian Legal Education

The following are among the primary functions of Russian legal education under modern conditions:

1 To instill a high level of professionalism in specialists so they will be capable of responding easily to rapidly changing -- and a rapidly expanding body of -- modern law

2 To train specialized staff destined for employment in existing agencies currently in the reform stage, as well as new agencies established at the federal level, especially in the constituent republics and regions of the Russian Federation, such as constitutional, commercial and military courts along with law enforcement, customs, the tax police and other agencies

3 To provide an environment for students in legal institutions of higher education where they have the opportunity to study both Russian and foreign law, as well as the practice of foreign judicial and other law enforcement agencies

4 To utilize in the training process modern computer technology as well as photocopying and video equipment, which will provide an opportunity to produce and circulate lectures, books, diagrams, issues, legal precedents, texts of legislation and other documents required in the training process

5 To give the professional training staff as well as students access to modern information systems (such as the Internet), and databases (including Westlaw and Lexis/Nexis), by providing state-of-the-art communications equipment

6 To educate a legal intelligentsia that will function to guarantee effective and reliable performance of the judiciary, the Procuracy and other law enforcement agencies, and will help maintain judicial authority throughout Russia on the high level

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that is required, i.e., on the same plane with the legislative and executive branches

The fulfillment of these functions represents the ideal outcome of legal education. However, Russian legal training institutions are at various stages on the road to this goal. The basic difficulties impeding consistent development of legal education on a level compatible with modern requirements are economic in nature. Nonetheless, in spite of such difficulties, Russian legal education is attempting to solve the intractable problems facing the system at this trying time.

Legal Education Reform at Urals State Legal Academy

The Urals State Legal Academy is the largest legal institution of higher education in Russia, having trained tens of thousands of specialists during its tenure. The Academy has not remained on the sidelines in dealing with the difficult aspects of modernizing education and training tomorrow's attorneys. The successful operation of the Academy is guaranteed by its well-trained teaching and professorial staff together with its extensive expertise in educating legal personnel, and its longstanding and strong ties to the country's judiciary, procuracy and other law enforcement agencies. The establishment of close and strong ties to the Rule of Law Consortium (ROLC) represents a new area of cooperation for institutions of higher education in recent years. The strategic goal of the ROLC -- to facilitate the establishment of a state based on the Rule of Law in Russia -- is fully understood and supported by our Academy. This understanding has served as the foundation for productive and creative cooperation between the teaching and professorial staff and the specialists and consultants of the ROLC in the Russian Federation.

The following are the main areas of activity identified and formulated in the course of this mutually advantageous relationship:

First, the Rule of Law Consortium's assistance in providing U.S. laws and legal literature to the Academy which is necessary for comparative law research by the Academy's staff.

Second, services provided by professional consultants from various law schools in America for meetings and seminars as well as lectures in important legal disciplines.

Third, the organization of special working groups to draft new curricula and training materials with the active assistance of ROLC (at present, working groups on economic, land and constitutional law are employed at the Academy, the purpose of such groups is to develop modern comparative law courses and training materials).

Fourth, computer, photocopying and video equipment as well as electronic mail capability to facilitate rapid execution of understandings outlined in the Agreement between the Rule of Law Consortium and Urals State Legal Academy, have been supplied to the Academy.

Fifth, the organization of a center to study the problems of dealing with crime to be comprised of the most experienced instructors and representatives from regional law enforcement agencies.

Finally, sixth, sponsorship of specific training seminars within the Academy as well as other active student training techniques. Specifically, a seminar entitled Trial Advocacy was held during a 10-day period in April 1995 and garnered enthusiastic responses from students and instructors.

Further progress by Russia on the path of democratic reforms will, without a doubt, facilitate the development of experienced judicial, procuratorial and other law enforcement agencies. The achievement of this goal will in no small measure depend on legal institutions of higher education and their readiness to effectively support the implementation of judicial

reform as well as the establishment and development of the entire judicial system

the Law on Certification and Oversight of the Judges of Ukraine of February 2, 1994

LEGAL EDUCATION AND TRAINING FOR FUTURE JUDGES AND PROSECUTORS IN UKRAINE

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The political and legal documents essential for building the Ukrainian state -- the Declaration of State Sovereignty of Ukraine of July 16, 1990, and the Act on Establishing an Independent Ukraine of August 24, 1991 -- originated from the idea of making Ukraine a state based on the Rule of Law. Over the last five years, this democratic idea has been implemented in reality and institutionalized in newly created federal bodies. To wit a more precise definition of the legal and structural status of the legislative power vested in the Supreme Council of Ukraine (the Parliament) and the representative bodies in the regions, the new structure of the executive branch, headed by the President of Ukraine and the Cabinet of Ministers, has been established, and the first stage of Judicial System reform has been completed, in which the main objective was to create a judicial system which is independent in its day-to-day operation.

Profile of the Ukrainian Judicial System

The Ukrainian community now realizes that only a strong and independent judicial system can guarantee freedom, human rights, and harmony in society. To this end, during the period 1991-1994 the Supreme Council of Ukraine adopted several laws intended to reinforce the independence of the judicial system. These laws included the new version of the Law on the Judicial System of Ukraine of April 20, 1994, the Law on the Status of Judges of December 15, 1992 with subsequent amendments, the Law on Self-Governance of the Judiciary of February 4, 1994, and

In addition, certain amendments and addenda were incorporated in other substantive as well as procedural statutes, which make it possible to free the courts from a number of functions that are not appropriate in a state based on the Rule of Law in order to consolidate the adversarial nature of proceedings, and strengthen procedural guarantees regarding the rights and lawful interests of parties in litigation.

The network of the courts of general jurisdiction was extended considerably, and the number of judges increased. In early 1995, the system of courts of general jurisdiction in Ukraine comprised 730 district and municipal courts (courts having original jurisdiction within the system of general courts), 26 regional courts and equivalent courts, the Supreme Court of the Autonomous Republic of Crimea, the Interregional Court, and the Supreme Court of Ukraine. For the time being, the system of general courts has about 4,500 judges. In the last three years alone, the number of judges in district (municipal) and regional courts has doubled from 2,242 to 4,460.

A similar trend is under way in the commercial court system. The Ukrainian Procuracy, the system of defense attorneys, and the notary public system have also undergone considerable reform.

The Legal Educational Model For Future Judges and Prosecutors

The system for professional legal education currently in effect in Ukraine is generally focused on training attorneys-at-law for a broad spectrum of applications -- attorneys who would be able to perform professional duties in any office of the judiciary without additional specialized education. Thus, higher legal education, in fact, serves to train future judges and prosecutors, defense attorneys, legal counsel of companies and institutions of all forms of ownership, public notaries, and others. It is intended to provide a fundamental understanding of the judiciary in its

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entirety, based on knowledge derived from different branches of law

Unlike many other countries of continental Europe (e.g., France), Ukraine does not have specialized educational institutions for the training of judges or prosecutors. Graduates of any state university law school can fill these positions, provided that they have met the requirements set forth in the Law on the Status of a Judge and the Law on the Procuracy with respect to professional education, citizenship, age, experience as an attorney-at-law, ethical qualities, and vocational skills.

The existing model of training attorneys-at-law for new judicial positions consists of two stages. The first stage takes a protracted period of time (generally, at least five years of full-time study, or six years of evening classes or correspondence school), and requires study of both legal and general subjects (philosophy, economic theory, political science, etc.) at a state legal educational establishment, principally a university law school or the National Judicial Academy in Kharkiv.

It should also be mentioned that in early 1995, 64 higher and secondary level educational institutions were training attorneys in Ukraine, including 47 state and 17 private schools, with a total of 7,310 first-year students (6,510 in state schools, and 1,800 elsewhere). In the last several years, law schools have been established at the following universities: Volynsk (in the city of Lutsk), Dnepropetrovsk (in Dnepropetrovsk), Uzhgorod (in Uzhgorod), Zapolatsk (in Ivano-Frankivsk), and Chernivetsk (in Chernivtsi).

This model culminates in state certification (subject to passing final exams and the defense of a written thesis), which bestows the title of attorney-at-law. This title is required before advancing to the next step, which is application for a judicial position or a position in a prosecutor's office (prosecutor, deputy prosecutor, prosecutor's clerk or investigator) -- and compliance with the practical experience requirements for an attorney-at-law.

At least two years of suitable experience is required to fill a judicial position at the first level of the judicial system (district or municipal courts). In order to hold a judicial post in a court of higher jurisdiction, apart from the above-mentioned qualifications, experience as a judge in a court of lower jurisdiction is required pursuant to current law.

Additionally, a candidate for a judicial office must pass a qualification exam given by the Judges Qualification Commission (for judges of commercial and military courts, by their respective commissions), and must then be recommended for a judicial position. The qualification exam consists of a written essay prepared by the examinee, verbal questioning on civil, criminal, procedural and other areas of law, and the drafting of procedural documents (judgments, sentences, opinions, and decisions).

Depending on the results of the qualification exam, the Judges Qualification Commission may declare an examinee acceptable, certify the candidate as suitable for a judicial office, and recommend him/her to the President of Ukraine for appointment thereto. Both the level of professional knowledge and the ethical and personal qualities of the candidate are taken into consideration.

Regarding employment in a prosecutor's office, under the Law on the Procuracy of November 6, 1991 (as amended and revised), for a prosecutor to be appointed he/she must be a citizen of Ukraine with an appropriate legal education and suitable ethical and personal qualities. Those candidates who do not possess legal experience (generally, graduates of universities or academies), must complete an internship in a prosecutor's office for up to a year, and then must undergo the certification procedure, that is, candidates must pass an exam prepared by the appropriate commission.

Basic Characteristics of Ukrainian Legal Education

The primary method in use for training attorneys in universities consists of a basic period and a specialized period of education -- advanced study of courses specific to certain types of judicial procedures. The basic period of study generally takes six or seven semesters (seven or eight semesters for correspondence courses or evening classes), requiring attendance at lectures given by professors and assistant professors, independent study projects, discussion of doctrine and practice at workshops and seminars, and writing and defending theses and dissertations. It includes the study of the history, philosophy, economics, and sociology, as well as various areas of the law (constitutional, civil, labor, criminal, procedural, and other branches).

The specialization period comprises the last three to four semesters, when the student specializes in the area of law that he/she desires: legal consulting for a particular type of company or institution, employment with administrative agencies, judicial or prosecutorial office, a defense attorney practice, criminal investigation, and others.

This type of specialization requires taking certain seminars, attendance at special workshops, and the acquisition of practical skills that must be mastered for their future work as a specialized attorney-at-law, as a legal consultant for a company or an institution, as a defense attorney, an investigator, a prosecutor, or a judge. In fact, it is usually through such specialization that future judges and prosecutors are trained.

The requirements of universities and the National Judicial Academy with respect to the content and quality of education and students' performance largely determine the level of professional preparedness of their alumni who subsequently desire to practice law as judges or prosecutors. These state law schools act as a sort of "check-point" enroute to obtaining a position as a prosecutor or judge.

Continuing Legal Education for Judges and Prosecutors

When a judicial or prosecutorial position is filled, continuing legal education is required to enhance the judge's or prosecutor's qualifications. This is accomplished in two parallel ways: (1) participation in one or two-day seminars at which experts present lectures on issues of great interest regarding the law, judicial practice, and prosecution with follow-on discussion, and (2) internship (for up to three months) in courts or prosecutor's offices of a higher jurisdiction, or full-time study at professional institutions (courses, institutes). As a rule, this type of continuing legal education is required for judges and prosecutors every five years.

Prospects for the Future

Law schools in Ukraine, as well as most of the society's legal institutions, are in the process of reform. Speaking on August 3, 1995 at the Second Conference of Ukrainian Judges, Leonid Kuchma, President of Ukraine, expressed his opinion regarding the need to prepare a federal training program for attorneys, who in early 1995 comprised about 100,000 of the 52 million people in Ukraine. This program is now under development.

In this regard, a discussion is underway in legal academic circles regarding the model or standard for a law school education. Notwithstanding some differences in opinion on this subject, the consensus expressed is that a law school graduate should defend human rights. The law does not exist for its own sake, but rather for the sake of human beings, even though it may restrict his/her actions to some extent.

Therefore, during the process of attorney training, it is necessary not only to provide information on existing legislation, but also to teach the citizen's basic, inalienable rights. It is necessary to teach first an understanding of the law and how to assess a legal situation properly, and to stand not only as an executor

of law but also a creator of law, a defender of basic rights against totalitarianism and authoritarianism

The deep economic and social crisis in Ukraine had an adverse impact on the existing system of higher education in general and on law schools in particular, which directly resulted in acute shortages of materials and supplies, as well as in a shortage of qualified legal teaching personnel. However, this situation is prompting all law schools and legal experts to join in the efforts to develop the nation's judicial training system.

It would appear that the time has come to create in Ukraine an association of law schools and (following the example of the United States and other countries), to empower them to discuss and solve their many problems, thereby helping to establish a high level of education for attorneys and to build Ukraine as a state based on the Rule of Law.

LEGAL EDUCATION AND SPECIALIZED TRAINING FOR THE COURTS, THE PROCURACY, AND LAW ENFORCEMENT AGENCIES IN UKRAINE

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The training of highly skilled specialists represents an area of special interest in efforts associated with the establishment of a modern legal infrastructure in Ukraine. Such specialists must be capable of working effectively in a market economy by facilitating business initiatives, fair competition, the development of market relations and interest in worldwide economic integration. Hence, current economic reform in Ukraine requires legal and judicial reforms, the establishment of new legal institutions to safeguard democracy, a comprehensive conceptual revision of the entire legislative system, and the training of a new generation of lawyers with a profound understanding of the role of law in a market economy

and the deregulation of existing legal and economic structures

In this connection, specialist training for personnel working in the courts, prosecutor's offices, and law enforcement agencies requires fundamentally new approaches to the legal education system in place at Kyiv National University's Law Faculty, including its Department of Justice and Procuratorial Supervision. The Department's teaching staff, which is comprised of four professors, all doctors of law, and six lecturers, have revised their syllabi and curricula in order to provide training for all undergraduate law students, including both full-time and nonresident students, for working in the courts, prosecutor's offices, and for the investigative authorities.

The Curriculum

Specifically, full-time students are assigned, as early as their freshman year, a required course of instruction entitled *The Judicial System in Ukraine*. Elective courses entitled *The Legal Profession and Notarial Functions*, are offered in the second year of study. The required courses, *Civil Procedure in Ukraine* and *Criminal Procedure in Ukraine*, are required in the third year of study. The fourth year offers elective courses entitled *The Theory of Judicial Evidence*, *Compilation of Procedural Documents in Civil Cases*, *Compilation of Procedural Documents in Criminal Cases*, and *Judicial Ethics and Rhetoric*. The final fifth year of study includes the required course entitled *Procuratorial Supervision* and the electives *Grounds for Overturning or Setting Aside a Judicial Ruling*, and *Judicial Enforcement*. The same courses and electives are available for those nonresident undergraduate law students who study through a correspondence program.

The Department's teaching staff are in charge of undergraduates' on-the-job training, including work in prosecutor's offices for third-year students and court training for fourth-year students. In addition, members of the Department's staff supervise thesis projects on civil and criminal law, the judicial system, and on procuratorial supervision, undertaken by the 60

students who specialize in the judiciary, procuracy, and criminal investigation. Finally, a series of role-playing exercises involving business situations, has been developed to facilitate a better understanding of both the criminal and civil justice processes.

Post-Soviet Law Texts and Teaching Manuals

The following textbooks and manuals have been prepared:

- * Criminal Justice Process in Ukraine, Kyiv, 1992
 - * Comparative Judicial Law, Kyiv, 1993
 - * Civil Procedure, Kyiv, 1993
 - * Systematic Practice Commentary on the Criminal Code of Ukraine, Kyiv, 1995
 - * Criminal Justice Process in Ukraine Business-Related Role-Playing Exercises and Problems, Kyiv, 1992
 - * Legal Clinic Role-Playing Exercises Used in the Teaching Process, Kyiv, 1994
 - * Problems in Civil Procedure, Chernivtsi, 1995
 - * Compilation of Procedural Documents in Criminal Cases, Kyiv, 1992, 1993, 1995
 - * Compilation of Documents in Civil Cases, Kyiv, 1995
-

EDUCATING FUTURE PROSECUTORS IN UKRAINE

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Pursuant to the Constitution of Ukraine and the Law of Ukraine "On the Procuracy," prosecutor's offices have general oversight over the following areas:

- * Compliance by local legislative and executive authorities with the law governing and controlling agencies, legal entities, public associations, and officials, as well as compliance with legal acts enacted thereby,
- * Compliance with the law by authorities involved in law enforcement activities, interrogation and preliminary (pre-trial) investigation,
- * Compliance with the law in jail and detention facilities and penitentiaries, and in execution of punishment and other measures of a coercive nature imposed by the court,
- * Compliance with the law by the military authorities, military units and agencies

Procuracies participate in court proceedings enforcing state prosecution in criminal cases. When stipulated by criminal procedural law, the procuracy performs criminal investigations.

Specialized Legal Education for Prosecutors

Any citizen of Ukraine having higher legal education qualifies for the procuracy. Procuracy personnel are trained only by state educational institutions (among others, by the Yaroslav Mudry National Judicial Academy in Kharkiv, and by the law faculties of Kyiv National University and Lviv State University).

Some educational institutions include special procuracy training institutes. For example, according to the Order of the President of Ukraine dated February 10, 1995, a Procuracy Training Institute was established within the National Judicial Academy. Procuracy staff actively participate in selection of candidates for enrollment. Competition among candidates is one of the most strenuous in the country. Almost half of the candidates are distinguished by the medals for their achievement in the public and vocational schools, high schools, secondary schools, and colleges.

In the five year program, students submit to an exam for a bachelor's degree upon completion of the fourth year of study. The specialization period is the fourth and fifth years of study during which the students are instructed in special and advanced courses, as well as through on-site training which is conducted in various areas of the procuracy's activity under supervision of an assistant procurator and investigator.

During the final year of study, training is conducted in the office where the student is assigned to work upon graduation after having passed the state exams for certification as a "specialist." Training for specialization is conducted in compliance with the "Qualification Requirements for Legal Specialists" as developed by the National Judicial Academy with the participation of personnel of the procuracy. This document establishes the requirements for knowledge, skills, and abilities, as well as for the psychological and moral qualities of law school graduates.

Placement and Continuing Legal Education for Prosecutors

Graduates of legal education institutions are eligible for full-time positions as assistant procurators or procuracy investigators only after completing a one-year internship in a corresponding position and contingent upon a positive evaluation of work done as an intern.

In order to maintain their specialist certification in the future, procuracy personnel are required to improve their professional skills periodically through various means, specifically by study at the Institute for Professional Advancement of the Prosecutor General's Office of Ukraine, or through an internship in a Procuracy office of a higher jurisdiction.

INDIVIDUAL RIGHTS AND INTERNATIONAL LAW IN UKRAINIAN LEGAL EDUCATION REFORM

*by Professor V V Komarov
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A movement for the creation of a new judicial system is under way in Ukraine. Until recently, the idea that society could be governed by the Rule of Law has been a purely academic concept. The issue of rights-bearing individuals being the basis of a law-abiding state also remains within the boundaries of theoretical doctrine. That society should be governed by the Rule of Law is a trend which began to emerge when Ukraine acquired its independence. Thus, the Rule of Law has become the paradigm which is reshaping higher legal education.

The Rule of Law forms the basis for interpreting the law and determines both the content of a modern legal education as well as the methods for teaching law. In general, such a standard facilitates the improvement of legal education. The emerging legal education system fulfills the needs of society and its citizens through its conformity to international practice, and by making accessible to all areas of the legal profession an ample supply of highly qualified and ethical legal specialists.

Individual Rights in Legal Education Reform

One important problem in legal education is determining its content. This problem becomes acute at

a time when the transition to a market economy requires development of new state and political institutions. These circumstances require development of an appropriate specialist training system.

In our view, in order to resolve this issue, we need to reject two unrealistic objectives. First, we should not attempt to train any specialist "for the rest of his or her life." Secondly, the idea of a "narrow specialization" is no less utopian. Our approach should comply not only with the principles of European jurisprudence, but also with the global trends in higher education.

It should be noted, in particular, that a legal education system is always based on social scientific concepts. Unfortunately, there is a significant gap between the level of development in our social science tradition and that of our legal education. It is necessary to integrate the theory of law into the educational system. The basis of a legal education should incorporate achievements of both world civilization and our national culture. Our system of preferences as well as the objectives of our legal education system must be changed.

As we gradually achieve a law-based statehood, the primary focus and key reference point of our education must become the autonomous subject as the basis of law. The idea of the natural rights of individuals must permeate the entire legal education system.

In reforming legal education, special attention should also be paid to training civil law specialists. Our social scientific and legal education has been predominantly oriented towards public law, the legal education system has been oriented towards training specialists for public office. New directions in the development of private law require radical changes in education curricula.

Training Specialists in International Law

The issue of training in international law is especially critical in Ukrainian legal education. This training should include international exchanges in which people representing different legal education systems can share their knowledge, as well as discuss comparative studies of these systems, and specific examples of international cooperation.

The most promising approach, however, would be to establish international legal education programs, the legal diplomas from which would be recognized and accepted throughout most of the world. The necessity for such an approach is dictated by the need to facilitate economic integration between countries, the globalization of the world economy, market evolution, as well as facilitating discussion of problems universal to human civilization which can be solved only by cooperative effort. Apropos, it may be possible to draw on legal education programs for the European Community (EC), and for East-West integration which is under way in Europe. One of today's emerging opportunities is to train legal specialists according to separate curricular modules within the framework of the EC programs (such as TEMPUS and others).

A challenge, however, arises in establishing a comprehensive, international, multi-module program for basic legal education. In this regard, several issues must be addressed, including training orientations and curricula, schedules and organization, information and financial support, or, in other words, creating an open forum for legal education. The above issues have already been addressed in negotiations between the National Judicial Academy of Ukraine and the American Association of Law Schools (AALS).

Finally, an additional issue of international legal education which needs to be addressed is the creation of an independent, international accreditation authority which would be able to eliminate the influence of such factors as prejudice, political motives,

and other negative factors which regularly arise in the evaluation of legal education credentials

PEDAGOGICAL REFORM AND CRIMINAL LAW TEACHING IN UKRAINE

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On the occasion of my consulting trip to Kharkiv for the Rule of Law Consortium (ROLC), I was impressed by the eager attitude of the faculty and students at the Ukrainian State Law Academy. During my lectures and meetings at this law school (which is the largest of its kind in Ukraine with a focus on criminal law), faculty and students alike listened intently to my remarks about American criminal law and asked probing questions about law and legal education in the United States. The intensity of my audience came at first as a shock. I had been used to the casual attitude of American law students who take much for granted. I soon realized that the eagerness I saw in the lecture hall reflected the importance of ROLC's Law School Reform project.

The students were keenly aware that they would form the vanguard of a new breed of legal professionals who would become judges, lawyers, and law-makers in an age of judicial independence and a market-driven economy. The Ukraine State Law Academy's faculty recognized just as deeply their vital role in preparing these students for meeting the challenge. For both groups, the Law School Reform project provides an important vehicle through which they can determine the educational methods that best suit their needs, and the educational content that will best prepare students for their work in a new legal environment.

Pedagogical Methodology of Criminal Law Teaching

Throughout my exchanges with students and faculty, three topics recurred. The first involved *pedagogical method*. The traditional European method required students to master a large quantity of material. European law students memorize, among other things, the legal codes of their countries. The prevailing American method emphasizes analysis at the expense of memorization. When I teach criminal law, for example, I encourage my students to question the principles and logical reasoning that underlie the statutes and judicial decisions that they read, rather than to memorize the content of those materials. Because of these methodological differences, it has been often remarked that European lawyers enjoy a comprehensive knowledge of the laws of their countries, but that they sometimes react woodenly when confronted with changing conditions. On the other hand, American lawyers are recognized for their innovation and adeptness at shaping the law to new circumstances, but also for their surprising ignorance of legal principles outside of those with which they work on a daily basis.

Under the auspices of the Law School Reform project, I believe that Ukrainian students will have the best of both worlds. The students with whom I spoke excelled in their knowledge of Ukraine's criminal codes. The faculty, moreover, reviewed with interest American casebooks and teachers' manuals that stressed the "legal analysis" educational method. Together we discussed course content and syllabus preparation. I believe that as these faculty members prepare their students for legal careers in an environment of change and independence, they will successfully incorporate aspects of the "legal analysis" method into their existing educational tradition.

Criminal Law Topics of Interest

The second topic that hit "hot buttons" among my Ukrainian colleagues involved *educational content*. Specifically, faculty and students were keenly aware

that organized criminal activity can have a profoundly negative influence on business climate. They were interested in learning how American criminal law had developed in order to thwart that kind of activity. I had brought with me various textbooks and course plans for use in courses on business crime and so-called "white collar crime." I had several exchanges with faculty about these courses and about the legal principles that had been useful in combatting organized crime in the United States.

Similarly, in the question and answer sessions that I held after my lectures, students asked probing questions about theories of liability that might be effective in detecting and deterring organized crime: tax laws, securities regulations, conspiracy and aiding and abetting theories, and others. At one point, we discussed a relative newcomer to the American scene -- criminal liability under the Racketeer Influenced and Corrupt Organizations Act, or "RICO." Armed with ideas about new theories of criminal liability, these students will be better equipped to help their country foster a stable business climate.

The third topic in which my Ukrainian colleagues demonstrated deep interest concerned *police powers*. The American judiciary has a long history of limiting police and military powers through its willingness to interpret and enforce broad constitutional rights against abuses. And, as demonstrated by the highly-publicized trials of the Los Angeles police officers who beat Rodney King, American prosecutors also have been instrumental in controlling the law enforcement community.

The newly-independent judiciary in Ukraine might find itself playing a similarly important role, as police and military personnel respond to the inevitable challenges of Ukraine's changing economic environment. The topic of enforceable rights against abuses came up several times during my lectures, and students asked many questions in this area. I believe that the continued policy emphasis on Rule of Law development in Ukraine will reinforce the willingness of lawyers to pursue claims for redress against law

enforcement abuses, and the willingness of judges to enforce such claims.

Armed with strong laws that command respect from all segments of society, Ukraine's new legal professionals will constitute an instrumental force in nation's on-going task of state-building.

STRENGTHENING LEGAL INFORMATION NETWORKS IN CENTRAL ASIA

by Malcolm Russell-Einhorn, Esq

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In moving their societies toward a more democratic, market-oriented future, Central Asian legal reformers have had to confront not only the dearth of practical information about law and democracy, but also Communism's legacy of secrecy and information-hoarding that was sustained by some of the very institutions most important to the sharing and dissemination of knowledge. To meet the needs of reformers -- particularly in the non-governmental organization (NGO) community -- the American Legal Consortium (ALC) is working under its U.S. Agency for International Development Rule of Law contract with a number of key institutions in Kazakhstan and Tajikistan, including the leading law schools of both countries.

The purpose is to inculcate a service orientation among the staffs of these institutions, and to increase their capacity to provide reliable information on local and foreign law, the democratization process, and human rights. Helping to create a new legal information "culture" constitutes one of the most cost-effective ways to leverage scarce technical assistance funds and place important new tools into the hands of local legal professionals. ALC's efforts to strengthen legal information resources networks in Central Asia place heavy emphasis on user orientation and utility, and are targeted particularly at the NGO community.

Creating Institutional Linkages

In Kazakstan and Tajikistan, ALC is seeking to link together -- organizationally and electronically -- some of the leading centers of legal information so as to create a network whose sum is greater than the whole of its parts. By enabling these institutions to share still-scarce information resources from Central Asia and abroad, ALC and local professionals are making a concerted effort to break down the compartmentalized barriers that, to date, have prevented information access even to members of the two countries' political elites.

In Tajikistan, the three partner institutions comprising the network include the Law Faculty of the Tajikistan State University, Ferdowsi State (National) Library, and the Institute of Philosophy and Law of the Tajik Academy of Sciences. In Kazakstan, the network will consist of the three Law Faculties of Kazak State University, Karaganda State University and the private Adilet Law School, the Academy of Sciences Institute of State and Law, and the Ministry of Justice's State Juridical Institute. A number of factors influenced the participation of these institutions, including their existing resources, the attitude of their leadership, the nature of their user constituencies, and their geographic location.

In each country, ALC and its local partners have designated a "hub" to serve as a training and demonstration center that will permit partner staff to become acquainted with a wide variety of new information resources and to learn how best to structure research inquiries seeking access to such data. When equipment procurement is complete and ALC has helped collect a wide range of purchased and donated texts and information, each center will possess computer, fax, email, photocopying and desktop publishing capabilities, as well as a representative or illustrative collection of modern Russian, Kazak/Tajik, and foreign-language legal information resources in printed and electronic formats.

In Tajikistan, the Dushanbe network's hub, known locally as the "Law and Democracy Center," is located within the National Library. The Center officially opened on May 27, 1995. The Center's holdings and capabilities will soon become the most complete in the country. The hub may also attain early status as the definitive repository of legislation and court decisions.

In Kazakstan, the corresponding Almaty hub will be located within the prestigious Academy of Sciences. Each network will be initially managed by ALC's Legal Information Resources Specialist Joseph Luke, a Russian-speaking American lawyer and law librarian, working in close collaboration with local teams of professional librarians whose services are being donated by the hub facilities and partner institutions. Network policies and procedures will be guided by local Advisory Committees, comprised of the leadership of the hub and partner institutions, joined by representatives of NGOs and other key user groups.

Providing Greater Access to Legal Information

The foremost objective of ALC's assistance to the two networks is to facilitate their ability to collect, maintain, and disseminate relevant, locally-appropriate legal information (electronic as well as print) from the Central Asian Republics, Russia and the Commonwealth of Independent States (CIS), Europe, Asia, the United States, and multilateral organizations, and to make such information as widely available as possible among their existing and potential user populations.

As of summer 1995, these facilities are almost entirely bereft of modern, post-Soviet publications or databases dealing with the range of new legal subjects integral to democratic, market-oriented societies. It is not uncommon to find only dozens or so books in these institutions devoted to post-Soviet, Russian language law texts or foreign publications on legal topics. At the same time, most of these institutions have no computer equipment or databases by which to access the increasingly rich universe of Russian- and English-

language electronic information that is being generated from a variety of sources. At present, virtually the only reliable, albeit often incomplete, source of such information is a handful of foreign law firms and a small community of government legal advisers.

Because the potential supply of such information is practically limitless -- and therefore prohibitively expensive -- ALC has determined to focus its assistance efforts on providing a representative sampling of such information and materials at each of the two demonstration centers, and on training relevant staff from the partner institutions at those sites. Materials will consist of a variety of Russian language texts and periodicals, many drawn from the increasingly vibrant private publishing sector in Russia, as well as databases that include legal information from the CIS and abroad. Supplementing these materials will be e-mail and Internet connections to facilitate on-line research, including a connection to Columbia Law Library, which is assisting ALC's subcontractor Metametrics in establishing the networks. Partner institution staff will receive training in information acquisition and storage, the structuring of legal research, and general user support.

The thrust of ALC's efforts is therefore to "jumpstart" the process of acquisition and use of new legal information in the network, and to give the partner institutions the tools to chart a long-term development strategy relying on their own resources, the local private sector, and the broader international donor community. As part of this process, the two "hubs" will be encouraged to leverage their holdings of critical electronic and print information by making it available to the partner institutions through email and a rudimentary interlibrary loan system, respectively. Partner institution staff will in turn create their own acquisition strategy based on the training and exposure they have received at the demonstration centers and the particular needs of their user constituencies. This process should be aided by the emergence of an increasingly effective private sector that will generate legal publishing companies and database providers with products and services at a more affordable level.

Developing a Service Orientation

In order to carry out these functions capably and overcome certain tendencies of the past, partner institution staff will need to develop an entire new range of skills emphasizing user support and a spirit of professionalism and openness. For most of these institutions, such an orientation remains quite foreign despite their best intentions. Legal information constitutes a valuable commodity to be hoarded, not widely shared, and many potential users, even within these institutions, have never interacted with library staff. An important precondition to staff training is an understanding of the nature and needs of all relevant potential user groups, and a commitment to establishing lateral relationships and linkages with other institutions (in contrast to the compartmentalized vertical relationships that characterized the Soviet period).

The staff training itself -- to be conducted at the demonstration institution "hubs" -- will range from organizational development and strategic planning to computer training, and the structuring of legal research requests. Training designed to foster a client- or demand-driven orientation will link together all technical instruction. Metametrics will take the lead in carrying out this training, supported by Columbia Law School. Much of the training will likely take place with the participation of the different institutions' staff simultaneously. Not only will this prove cost-effective for ALC, but it will assist in solidifying peer relationships among the participants and generating ideas about complementarity and comparative advantage among the institutions. Again, the beneficiaries of such leveraging and synergy will be the institutions' user populations and the general public.

Outreach to Law Faculties, Legal Professionals and the NGO Community

With information on law and democratization still scarce within the region, legal professionals and NGOs -- two vital communities within a functioning civil society -- remain deprived of an important resource for their ongoing work and growth. To derive

even greater impact from its investment in this initiative, ALC seeks to work with its partner institutions to extend a special invitation to these groups to understand and make use of the new services available through the strengthened information resource networks

To make this vision a reality, ALC is working with the partner institutions to create integrated outreach plans to educate these significant user communities about their holdings and services. A particularly important aspect of this activity concerns desktop publishing capability. ALC hopes to supply each partner institution with modest equipment that will allow the staff to create newsletters and pamphlets describing specific resources, at the same time, such equipment can also be used to develop specialty publications and bibliographies and fill vital gaps in the local publishing landscape. This will prove particularly useful to the many law faculties among the network's partner institutions, who could effectively supplement their teaching curriculum with additional materials drawn from sources outside the region.

Outreach to the NGO community has already begun in a significant way in Tajikistan. Shortly after the opening of the Dushanbe Center, dozens of NGO representatives were given orientations and briefings will continue to be held on a regular basis on the capabilities of the Center.

Network Sustainability

ALC and its partner institutions are committed to ensuring that these legal information resource networks are locally sustainable services. Network planners are accordingly developing practical strategies for income generation and cost recovery and moving towards early implementation of those strategies. A workshop for network advisory committees and librarians focused on financial management and sustainability. Tested US and other third-country library income-generation techniques will be examined for Central Asian adaptability.

Cost recovery will commence early in network operations, well before ALC's project completion. Modest user fees for network services will be assessed, both to gauge user receptivity and optimal rate structures and to begin accumulating reserve funds for materials replenishment, equipment supplies and repairs.

Following initial procurement of network computer and copying equipment using ALC project funds, recurring costs are anticipated to be modest, not exceeding \$20,000 annually for each entire network (i.e., hub facilities + partner institutions). To supplement user fees in covering these costs, additional revenue sources will be explored and developed, such as solicitation of corporate gifts and donations from the local business community (particularly in Kazakstan), and the pursuit of grants from other donor organizations, including major foundations. ALC is prepared to work closely with the partner institutions to develop budget and narrative program descriptions as "persuasive documents" capable of securing significant external funding.

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SPECIAL ISSUE ON PROCURACY REFORM IN THE NEWLY INDEPENDENT STATES

Editor Robert Sharlet

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REFORMING THE PROCURACY IN THE POST-SOVIET ERA

AN INTRODUCTION

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This issue of the Newsletter is devoted to the institution of the Procuracy in the Newly Independent States (NIS) In particular, it addresses the emerging role of the post-Soviet procurator in Russia and Ukraine, and the training of procurators in those countries

The Procuracy Before Legal Reform

As the Soviet Union disintegrated, the major institutions of government had to be re-engineered. The Communist Party of the Soviet Union withered away, while the Communist Party of the Russian Federation subsequently has remade itself into a formidable political power in an emerging democracy. The court systems in the countries of the former Soviet Union similarly began to remake themselves. The arbitrage system for resolving disputes between enterprises in the Soviet period, has been replaced in the Russian Federation by the arbitration court system (otherwise known as the commercial court system)

Each country in the post-Soviet era, has tried to find its own way in legal development. In Ukraine and Kazakhstan, for example, the new post-Soviet constitutions eliminated the arbitration courts, while, conversely, the Russian Federation has maintained and strengthened this institution.

The Procuracy in the NIS is undergoing similar fundamental changes. In the days of the Soviet Union, the Procuracy was powerful and prestigious. Unlike its approximate American counterparts, such as U.S. attorneys and district attorneys, the Procuracy not only prosecuted cases, but also wielded considerable influence over judges. The Procuracy executed Communist Party directives. Procurators conducted criminal investigations, and supervised the proper conduct of criminal and civil court cases. They also oversaw the prison system.

Under its power of "general supervision," the Procuracy supervised the proper implementation of law by the government. Given these wide ranging powers, it is understandable that the top law school graduates aspired to the procuratorial ranks, and procurators enjoyed a status at the pinnacle of the legal profession.

New Constitutions and Laws Re-define the Role of Procuracy

The institution of the Procuracy came under heavy attack in the early post-Soviet era, as law enforcement agencies, the Procuracy and the Ministry of Justice, struggled for power and authority in the newly emerging political and legal systems of the NIS. The new status of procurators in the NIS is defined in the recently-adopted constitutions, and in the laws on the Procuracy.

The new law on the Procuracy in Russia, while introducing changes, still retains many of the traditional powers of the Procuracy. In contrast, Kazakhstan eliminated the investigative function of the Procuracy. The Kazakstan Procuracy continues to represent the interests of the government in court, and to exercise supervision over the application of laws and

decrees as well as the legality of search and investigation. Although the Kazakstan procurator continues to exercise "higher supervision" over the legality of the investigative process, the responsibility and procedure for criminal investigations is carried out by special agencies separate from the Procuracy and the court. These investigative bodies have been established by presidential decree. Similarly, in Armenia, the constitution sharply curtailed the powers of the Procuracy.

The Procuracy is an institution in transition in all of the countries of the former Soviet Union. Personnel has changed dramatically, some on their own volition and others involuntarily. For example, Aleksei Ilyushenko, Acting Procurator General of the Russian Federation from 1994-95, did not gain full appointment to the office for lack of sufficient support in the Federation Council, the upper house of the Russian parliament, which enjoys the power of advise and consent on the Office of Procurator General. Ilyushenko was later dismissed from the Procuracy by President Boris Yeltsin, and was subsequently arrested earlier this year for abuse of office and bribe-taking. The Procurator General of Kazakhstan, in contrast, was recently appointed Chief Justice of the Kazakstan Supreme Court.

The Reform of Procurator Training in Russia and Ukraine

The remuneration, if not the prestige, of the defense bar in relation to the Procuracy has been reversed over the past five years. The defense bar, which was once the backwater of the Soviet legal profession, has fared much better in the new legal environment of the NIS. Adversarial proceedings generally, as well as jury trials in some regions of Russia, have put a premium on skilled defense attorneys. In addition, as criminals have found lucrative new opportunities in the emerging market economies, they have also sought and paid well for expert legal advice by private defense counsel when apprehended by the police.

In the Soviet era, one institute in Moscow provided the training for all high-level procurators from throughout the Soviet Union and other socialist countries. High-level procurators would come to Moscow once every five years. With the demise of the Soviet Union, systematic training programs ceased. The institute in Moscow continued to provide training for Russian procurators, but the system of training procurators from other former republics lapsed. In most of the other countries of the NIS, efforts at procurator training and upgrading have been modest at best, due to lack of experience and resources.

The Rule of Law Consortium (ROLC) has worked closely with the Institute of Advanced Training for Supervisory Personnel of the Russian Federation Procuracy in Moscow, and its Ukrainian counterpart, the Institute of Advanced Study of the General Procuracy of Ukraine in Kharkiv, for the past two years, assisting the development of training programs specifically addressed to the role of the procurator in an emerging democratic polity and a growing market economy. The ROLC, under the direction of the U S Agency for International Development, has coordinated its training programs with the Department of Justice, other interested U S agencies, and non-governmental organizations.

Focus of the Special Issue

We are privileged to carry in this Special Issue on the Procuracy, articles by the heads of the above Russian and Ukrainian procurator training institutes, as well as commentaries by two leading American specialists on the Procuracy, both of whom have served as consultants to the Rule of Law Consortium.

In the opening article, Professor Korobemikov, until recently director of the Moscow institute and now the Chair of the Criminal Law Department of the Law Faculty of the Youth Institute, offers the reader a broad and informed view of the changing Russian Procuracy, the role of the Moscow institute in the reform process, and the comparative experience of Russian and American prosecutor

trainers in the course of their collaboration under the auspices of a ROLC project funded by the U S Agency for International Development.

In a companion article, Rector Pinaev of the Ukrainian institute, reviews the history of the Procuracy in Imperial Russia, the USSR, and, since 1991, in independent Ukraine. He concludes by briefly surveying the range of expert opinion on the future of the Procuracy in Ukraine.

Professor John Jay Douglas, Dean Emeritus of the National College of District Attorneys, next comments on his experience as a ROLC consultant to the procuracy training institutes of Russia and Ukraine. In particular, he analyzes the comparative roles and functions of the post-Soviet procurator in the NIS, and American federal and state prosecutors, including their respective "continuing legal education" programs. Professor Douglas concludes that the on-going professional contacts between Russian and Ukrainian procurators and American prosecutors, can be beneficial to all concerned with continuing legal education of prosecutorial personnel.

Finally, Professor Gordon Smith of the University of South Carolina, an internationally known specialist on the Procuracy, provides an informative commentary on the changes wrought by the new Law on the Russian Procuracy of 1995. He concludes that the Russian Procuracy, although changed, has institutionally survived the early years of political and legal reform in Russia, a time during which it was often the target of scorn and criticism for the predominant and essentially coercive role it had played in the former Soviet legal system.

**THE RUSSIAN PROCURACY'S NEW TASKS
AND WAYS OF ACCOMPLISHING THEM**

*by Professor B V Korobeinikov, Ph D
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The political, economic and social processes of restructuring state and society have greatly heightened interest among scholars and jurists in problems associated with the state mechanism, the interaction of its components, and the place and role of the individual institutions of the governmental system of the Russian Federation (RF) All of this applies in full measure to the Procuracy The political reorganization of the state machinery of Russia has substantially altered, and continues to alter the scope of the activities, functions and powers of the Procuracy

The New Law on the Procuracy

These issues have become especially urgent in connection with the adoption of the new federal law on the Russian Federation Procuracy of November 25, 1995 The new law, which codified the constitutional principles governing the establishment and operation of the Procuracy as a unified, federal and centralized system of agencies exercising oversight of the enforcement of the laws in effect on the territory of the RF, has confronted prosecutors with a number of new tasks These include ensuring the supremacy of the law, uniform standards of legality, and the top-priority protection of human and civil rights and liberties, as well as the legally protected interests of society and the state

Efforts to accomplish the Procuracy's new tasks such as oversight of the observance of human and civil rights and liberties by the legislative and executive authorities of the constituent members of the RF, by local governments, and by the management of private companies, are of especially great importance The problem is that the restructuring process has been marked by the emergence of new and by no means

sufficiently regulated legal relations associated with the constituent members of the RF, the new local government institutions which replaced the local soviets, and the commercial structures created by the market economy

**Role of the Institute of Advanced Training for
Supervisory Personnel**

Accomplishing the tasks posed for the Procuracy by the new federal law has necessitated a restructuring of the agencies of the Procuracy, more precise definitions of the functions and powers of prosecutors, and new methods for exercising prosecutorial oversight As a result, Russian scholars and jurists specializing in prosecutorial oversight have increasingly turned their attention to the organizational and operational experience of prosecuting bodies in other countries, especially those that are far advanced in the development of democracy and market relations Among these countries, the organization and functioning of prosecuting bodies in the United States has attracted the attention of scholars and prosecutors

Unfortunately, the sparse and far from complete literature on the subject has not permitted scholars to answer many questions of interest to them In this connection, the Institute of Advanced Training for Supervisory Personnel of the RF Procuracy has established contacts with researchers at the American Prosecutors Research Institute (in conjunction with the National College of District Attorneys), contacts that, in our view, have made it possible to remedy these shortcomings to a certain extent

Reciprocal contacts in the form of seminars conducted in the United States and in Russia by staff members of aforementioned institute, have enabled instructors of the Institute of Advanced Training for Supervisory Personnel and its regional training centers, as well as prosecutors, to become familiar with

- 1 Current American legislation on prosecuting agencies,
- 2 The structure and basic organizational principles of the prosecutorial system in the United States,
- 3 The jurisdiction of American district attorneys in criminal investigation and their interaction with other law-enforcement agencies in this process,
- 4 The jurisdiction of prosecutors participating in the hearing of criminal and civil cases and the procedures governing their activities,
- 5 The interaction between prosecutors and the legislative and executive branches of government in the United States, and
- 6 The system, forms and methods of prosecutor training

Comparative Russian and American Experience

The study of the above issues has made it possible to become familiar with the content of the relevant sections of the U S Constitution, the U S criminal, civil and procedural codes and other federal laws, as well as with the basic forms of relevant American legislation. The importance of this cooperation between the institutes is primarily that it has facilitated from the very outset an understanding of the legal basis of prosecuting bodies in the United States, without knowledge of which it is impossible to understand subsequent, more specific matters, such as the structure of the system of prosecution in the United States. The study has revealed substantive differences in the organizational principles of the two national systems of prosecution (a) a system of federal and state prosecutorial organizations in the United States in contrast to a strictly centralized system of prosecutorial organization in the RF, (b) a system of appointed and elected prosecutors in the United States in contrast to a system of exclusively appointed prosecutors in the RF, and (c) a uniformity of jurisdiction in the United States (except where military matters are concerned), in contrast to a rather extensively specialized system of jurisdiction in the RF.

The comparative analysis of the materials obtained has revealed a direct, causal relationship between the economic and political system of a state and the principles governing the organization of its system of prosecution. This insight allows one to forecast the potential development and structure of the RF Procuracy in accordance with the social, political and economic reform processes that are taking place in our country.

The study of the interaction between U S prosecutors and investigative agencies has been of great importance. The crime situation in the RF, a situation that has been substantially exacerbated amid the breakdown of governmental oversight systems and the transition to market relations, has prompted Russian scholars and jurists to mount a persistent search for new, effective forms and techniques of combating crime. In the course of this inquiry, it is natural that attention turned to the experience of combating crime in the United States, a country with a highly developed market economy. The comparative analysis of these materials has made it possible to graphically identify differences in the jurisdictions, functions and powers of U S and RF prosecutors who perform the same kinds of work. This makes it possible to identify and evaluate more effective forms of interaction between prosecutors and investigative agencies in the two countries, and to use this experience, insofar as possible, in the drafting of legal acts, as well as in theoretical and practical work.

The study of the prosecutor's role in civil and criminal procedure has been of considerable interest to Russian scholars and jurists. Implementation of the concept of judicial reform has led to the emergence of new forms of legal procedure in the RF, above all trials by jury. The new legal procedure has significantly altered the position, role, rights and responsibilities of the prosecutor in the courtroom. A whole series of complex and often controversial issues has arisen in this connection. Comparison of the functions, rights and responsibilities of prosecutors in U S and RF courts has made it possible, if not to resolve these questions, then at least to identify ways of doing so.

based on the study of the powers and operational procedures of US prosecutors with extensive experience in trials conducted on the adversarial principle

The reciprocal seminars have also devoted considerable attention to the interaction between prosecutors and the legislative and executive branches of government, as well as with the news media. The relationship between the prosecutor and the legislative and executive branches of government is of fundamental importance for any aspect of a prosecutor's duties. This problem is especially urgent for modern-day Russia as it undergoes a new stage of development and the process of state-building. The scope and nature of the relationship between the Procuracy and the authorities define the nature of the activities of prosecutors and their powers, rights and duties.

In this regard, the study of the nature and substance of these relationships in the United States has been of great interest to all Russian scholars and jurists who deal with efforts to solve this problem at both the central and local government level. Thus, information on the extent of legislative regulation of relations between the authorities and prosecutors in the United States is of great significance in drafting legislation on the RF Procuracy, not only at the federal level, but at the level of the federation's constituent members as well.

Prosecutor Training

Russian and American scholars have assigned a special place in their collaboration to the system, forms, methods and techniques of prosecutor training, and to efforts to assess the effectiveness of this training. The RF Procuracy and prosecuting bodies in the United States have both gained considerable experience in the organization, methodologies and tactics of prosecutor training, and therefore, the study and exchange of this information will undoubtedly be useful in improving each of these systems of prosecution.

In conclusion, then, it can be said that the professional contacts between scholars of the institutes of the prosecuting agencies of the United States and the RF Procuracy, have been unquestionably beneficial to both sides, and that the results of this collaboration will be used to carry out theoretical and practical tasks in improving the work of prosecutors in both countries.

THE PROCURACY OF UKRAINE

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The prototype for the Procuracy of Russia (Ukraine was part of Russia from January 1654 through August 1991), was the Office of Public Prosecutor in France, which has hitherto been the original model for the Office of Public Prosecutor in Western countries.

History of the Procuracy in Russia and the USSR

Peter I instituted the Office of the Procuracy in Russia when he established by decree on March 2, 1711, a fiscal office based on the example of corresponding government agencies in Germany. This office was entrusted with "secretly overseeing all cases, finding out about unfair trials, treasury collections, etc." The fiscal office turned out to be rather ineffective, therefore, in 1722, Peter I reorganized it into a Procuracy based on the French model. In his Decree "On the Office of Prosecutor-General" he stated, "This office is our observer and attorney in state cases." The Procuracy is obliged to implement the laws in force, to make perpetrators answer for their crimes, and to protect the innocent.

As the history of the Russian Empire progressed, the role of the Procuracy first diminished (during the reigns of Anna Ivanovna and Paul I), and then expanded (during the reigns of Elizabeth Petrovna, Catherine II, Alexander II and subsequent Russian tsars). By the beginning of the twentieth century, it was the only strictly centralized state structure --

assuring the subordination of lower-level prosecutors to higher ones, the procurators' professional immunity of position, their independence from local authorities, and their broad powers enabling them to supervise law enforcement

After the 1917 Bolshevik Revolution, the Procuracy in Russia was eliminated, and oversight of legal process was transferred to a worker-peasant authority, the People's Commissariat of Justice, the People's Commissariat of State Control and several other government agencies

On May 26, 1922, a Decree of the All-Russian Central Executive Committee established the "Regulation on Prosecutorial Oversight," and from that time the Soviet Procuracy was maintained as a centralized and all-powerful government agency, independent of local authorities. It was entrusted with oversight of the legality of activities of all state agencies, economic institutions, officials and citizens, as well as with court prosecution and oversight of appropriate procedures for detention, arrest and custody. The Procuracy then functioned as a department of the Soviet Russian People's Commissariat of Justice

On June 24, 1929, the USSR Central Executive Committee (Tsik) and the Council of People's Commissars (SNK) adopted the "Statute on the USSR Supreme Court and the USSR Supreme Court Procuracy," under which the Procuracy became a structural component of the Supreme Court. However, later on December 17, 1933, the Tsik and SNK adopted the "Statute on the USSR Procuracy," according to which the Procuracy became an independent state agency. These regulations defined what have since become the traditional spheres of prosecutorial oversight -- general supervision, supervision of the proper and uniform enforcement of laws by judicial agencies, supervision of the enforcement of laws by agencies charged with preliminary and general investigation, and supervision of the legality of actions of governmental agencies, the police, and penal institutions

In subsequent years, the USSR Supreme Soviet passed the "Statute on Prosecutorial Oversight in the USSR" (May 24, 1955), a law "On the Procuracy of the USSR" (November 30, 1979), and other normative acts, which specified the Procuracy's activities and more clearly formulated its tasks, functions, principles of organization and activity, as well as assurances of the independence of procurators

Creation of the Procuracy of Independent Ukraine

On August 24, 1991, Ukraine declared its independence, and on November 5, 1991, the Ukrainian Supreme Soviet passed a Law of Ukraine "On the Procuracy," as well as resolutions "On Confirmation of the Structure of the General Procuracy of Ukraine," the "Regulation on the Hierarchy of Procuracy Staff" and the "Disciplinary Rules of the Procuracy of Ukraine." According to existing legislation, the Procuracy is a unified centralized system with strict subordination of lower-ranking prosecutors to higher-ranking ones. The General Prosecutor of Ukraine heads the Procuracy. He is appointed to a five-year term by the Supreme Council of Ukraine, to which he is accountable

The system of prosecutorial agencies includes the General Procuracy of Ukraine, the Procuracies of the Autonomous Republic of Crimea, the regions (oblasts), the cities of Kyiv and Sevastopol (at the oblast level), municipal, district, and other procuracies at equivalent levels, as well as military procuracies. They are headed by procurators appointed by the General Prosecutor for a term of five years. As a general rule, deputies, senior assistants, procurators' assistants, investigators for especially important cases, senior investigators, and investigators, are considered part of the staff of procuracies at all levels. The General Prosecutor determines the staff size of the procuracy. Payroll and other benefits for procuracy staff come out of the state budget pursuant to a centralized procedure which assures the independence of the procurators from local authorities

The Procuracy is the supreme authority over proper compliance with the laws by the Cabinet of Ministers of Ukraine, its ministries, state committees, other agencies of state and economic administration and control, the government of the Autonomous Republic of Crimea, local councils of people's deputies, their executive and administrative agencies, military units, political parties, public organizations, associations, enterprises, institutions and organizations -- irrespective of the type of property ownership, chain of command or affiliation, or whether officials or citizens are involved. In addition, the Procuracy investigates acts indicative of crime (along with the Ministry of Internal Affairs and the Security Service of Ukraine), and participates in examining in the courts criminal and civil cases, as well as cases concerning administrative violations of the law, economic disputes, and arbitration proceedings. The Office of Public Prosecutor also participates with state authorities in developing measures for the prevention of crime and other violations, as well as for improving and interpreting legislation.

A procurator's demands, pursuant to existing legislation, are obligatory for all agencies, enterprises, institutions and organizations, officials, and citizens, and are to be implemented immediately, during a period of time established by law or a period determined by the prosecutor.

Future of the Procuracy in Ukraine

Even so brief a survey of the 285-year development of the Procuracy of Ukraine permits us to conclude that there is clear continuity, consistent with the culture and outlook of the people of Ukraine, in the legal basis of its operation, in its purposes, primary functions, and principles of operation. Nevertheless, disputes regarding the place of the procurator in the system of government are ongoing among scholars and jurists in Ukraine. Opinions on the future of the Procuracy have been expressed concerning such issues as (a) The need to retain only its function of prosecution, (b) To include the procuracy in the

executive branch, or (c) To include it as part of the judicial branch.

Nonetheless, despite the diversity of views, predominant opinion is that the Procuracy must remain an independent agency, holding supreme authority over the observance and proper application of laws by all government agencies, enterprises, institutions, organizations, officials, and citizens.

THE TRAINING OF PROCURATORS AND PROSECUTORS IN RUSSIA, UKRAINE AND THE UNITED STATES

by Professor John Jay Douglass

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Responsibility for the prosecution of crime in Russia and in the Ukraine is placed on the Procuracy much as it devolves on the prosecutor in America. It would be incorrect, however, to believe that the Procuracy of these two nations and the American prosecutor are so much the same that the identical training and education program for one can be transferred to the other. Nonetheless, in reviewing the educational and training needs as well as the practices of the Russian and Ukrainian procuracies there is much to be learned from the American training programs. Likewise, both local and federal prosecutors in the United States can benefit by observing the methods and procedures used by the Procuracy in Russia and Ukraine.

Independence

The Procuracy does not have the independence of local prosecutors in the United States, instead, it is a much more hierarchical system somewhat like the U.S. federal system, but far more akin to the system of most civil law countries. The Procuracy, also following the system of most of world, is more likely to have career personnel. Procurators usually come to the profession directly out of law school and remain until retirement. Although there is

a growing tendency to establish prosecutorial careers in the United States, political realities are not as likely to guarantee prosecution as a life calling

Investigators

A second major difference which weighs on prosecutorial or procuracy training is the inclusion within the Procuracy of the investigator. This is the individual who prepares and develops the file for the case. This file may, in fact, be the entire presentation of the case before the court. It is important to know that those who investigate and prepare the file are law graduates just as are others in the Procuracy. The investigator comes into the Procuracy out of law school and may change over to prosecution in the course of his or her career. From an American perception, the investigative responsibility should not have the importance that it has within the Procuracy. Further the investigator in America does not have the professional standing which the investigator enjoys in Russia and Ukraine.

Criminal Justice System

There are a number of other variations from the American prosecutorial system. Under former Soviet practices there was little independence of the judiciary in Russia and Ukraine. This is now changing. The third leg of the American system, the defense bar, has not had the significance or importance in Russia and Ukraine which it has in the Western world. The relations of others in the criminal justice system with the Procuracy are significantly different from the relations of these agencies with the American prosecutor.

General Supervision

What is to many observers the most interesting and unique aspect of the Russian and Ukrainian procuracies is an additional responsibility really unknown and little understood outside the former Communist world. This is the authority or responsibility entitled "General Supervision." Under

this authority, the Procuracy is responsible for overseeing all legal procedures of the government, with jurisdiction to make corrections. General supervision includes the review of all judicial decisions at every level, both civil and criminal, as well as review of administrative determinations of government agencies. The significance of this responsibility can hardly be underrated, but it is little understood in American legal circles.

Continuing Legal Education

The Procuracy has had a long tradition of "continuing legal education" for its personnel. In-office training and education is routine. A major institute for the training of senior Russian procurators is located in Moscow, and there are branch schools or institutes throughout the federation. A separate training institute for investigators is located in St. Petersburg. The training institute for the Procuracy in Ukraine is in Kharkiv, and serves all in the Procuracy including the investigators. These institutes have permanent directors and full time faculty, and the facilities include lecture halls and seminar rooms. The institutes are complete with the capability of housing and feeding students.

In contrast, few comparable permanent installations are available for American prosecutors. The U.S. Department of Justice is only now beginning the construction of such a school in Columbia, South Carolina. Training institutes in the United States do not have full time faculty other than course administrators, but instead rely upon faculty selected for each course, usually from the ranks of prosecutors. A further distinction is in the length and breadth of courses offered. In the United States, few courses are of over two weeks duration, most are from two to five days in length and devoted to a single subject. By contrast, the training courses for the Procuracy are usually from two to four weeks, and the curriculum will cover a broad area of interest.

In the United States much of the instruction relates to trial advocacy and procedure. This results

from the adversarial nature of the court system in America. The differing demands of the inquisitorial system of Ukraine and Russia and the lesser significance of the judiciary and defense bar, reduces both the interest and need for such training. Clearly, this may change in the days ahead with the increasing independence of the judiciary and growth of the defense bar. If the present experiment in the use of jury trials now underway in Russia should be broadened and accepted, there should be a rapid growth in trial advocacy instruction. Should this occur, the Procuracy may well wish to emulate some of the advocacy skills training efforts of American prosecutor schools.

The educational methodologies used are not so dissimilar. The Procuracy institutes are more apt to use a straight lecture scheme as contrasted to the seminar and discussion techniques used in the United States, but the seminar style is also used extensively. Lack of printing facilities does not allow the institutes to provide to each student the written materials which are considered essential to any American continuing legal education program. The Russians and Ukrainians are clearly more academic in their approach, and students are called upon to do more research and writing. In this regard, they are much closer to the American military legal schools. Both in American prosecutor training programs and the Procuracy programs, there is a similar use of audio-visual devices, although some of the computer and video equipment now in use in Russia and Ukraine is in need of updating as the computer science field progresses so quickly.

Dissemination of Legal Materials

The hierarchical nature of the Procuracy permits efficient dissemination of information. This would be even more effective if computerization were more available in procurator offices throughout Russia and Ukraine. In these days of very rapid changes in the law and new legislation, improvement in dissemination of new developments should be pushed as rapidly as possible.

The current exchanges and visits should be valuable to American prosecutor training directors as well as to the procurator training administrators. Fundamentally, all are on the same sheet of music and only need to read it together for the ability to pick up the best from the each other.

CHANGES IN THE LAW ON THE RUSSIAN PROCURACY

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After a year of intense discussion and debate behind the scenes, the State Duma of the Russian parliament, on October 18, 1995, passed a federal law "On the Inclusion of Changes and Additions to the Law on the Procuracy of the Russian Federation." President Boris Yeltsin signed the law on November 25. The law as amended retains many of the Procuracy's wide-ranging powers and even expands its jurisdiction in coordinating the fight against crime.

Background and Legislative History

For the past several years the Procuracy has found itself in the midst of a high-level political squabble between President Yeltsin and the State Duma. At a lower, but no less important level, the Procuracy is also at the heart of the debate surrounding legal reform in Russia. Many legal reformers wish to strengthen the role of courts in the legal system, and therefore see the dominant position of the Procuracy as a major impediment to judicial independence. Legal reformers tend to view the Procuracy as a retrograde institution of coercion with deep roots in the Stalinist system.

In late 1994, discussion resumed over a new draft law on the Procuracy circulated in the Russian parliament. That draft, which was worked out in the President's office with considerable input from the Procuracy, not surprisingly retained the institution's

broad powers, and even strengthened the Procuracy by requiring it to enforce presidential decrees as well as notify the President of actions by governing bodies that contradict the constitution or laws of the Russian Federation

An alternative draft federal law written by two senior scholars associated with the Institute of State and Law of the Russian Academy of Sciences, V M Savitskii and A M Larin, was circulated in early 1995. On March 13, their draft was sent to the Committee on Legislation and Legal Reform of the State Duma for comments and revisions before being presented to the Duma in April. Reacting to the surge in violent crime, and in particular the murder of a prominent journalist, the authors proposed refocusing the Procuracy on combating crime. The Procuracy would retain responsibility for guidance (rukovodstvo) of investigators, but would not conduct investigations except in a few specified types of cases. The principal function of the procurator would be to prosecute criminal cases in court. The Savitskii-Larin draft would also severely restrict the Procuracy's powers of general supervision.

Recent Changes

In its final form, the new law incorporated many of the provisions suggested in the Larin-Savitskii draft. Procurators are assigned the responsibility for coordinating the activities of the agencies of internal affairs, security services, tax police, customs service and other organizations in the fight against crime (Art 8). Some procurators resisted this widening of the Procuracy's mandate for two reasons. First, procurators tend to view supervision (nadzor) as an unofficial "fourth branch" of government, separate from the executive, legislature, and the judiciary. With these changes, the Procuracy takes on a decidedly executive function -- coordinating the fight against crime. Second, procurators fear that the fight against crime will prove to be too great for the Procuracy's dwindling resources, and that its failure to stamp out crime will inevitably subject the institution to continuous criticism from deputies in the Duma.

Procuratorial Supervision

The largest section of the amended law concerns "Procuratorial Supervision." This section, for the first time, is divided into two headings: "Chapter 1 Supervision over the Implementation of Laws," and "Chapter 2 Supervision over the Observance of the Rights and Freedoms of People and Citizens." Boris Zolotukhin, Vice-Chair of the Russia's Choice faction in the Duma and a noted legal reformer, was instrumental in promoting this dichotomization. The two chapters make a clear distinction between procuratorial powers. The first chapter concerns the traditional role of the Procuracy in supervising the full implementation of all laws issued by governing bodies and institutions (but not oversight of the legality of those laws). Several deputies argued strongly that the responsibility for judging the legality of laws and other normative acts should rest only with the courts. It is noteworthy that presidential decrees are not included among normative acts subject to procuratorial supervision or enforcement. This had been a much debated provision and one that President Yeltsin, reportedly, badly wanted, but it was roundly criticized in the Duma debate. The revised law also prohibits procurators from protesting illegal activities of commercial establishments and private enterprises. Instead, procurators must pursue suspected violations in court.

The second chapter concerns the powers of the Procuracy in supervising the observance of citizens' rights and freedoms that may be impinged by actions of governmental bodies, public officials, or commercial organizations. In these cases the Procuracy can either issue protests or take cases to the courts.

Other Changes

During the Duma debate it was proposed that the Procuracy report to the Ministry of Justice. This provision was strongly opposed by the Procuracy and was dropped.

In contrast to the previous Law on the Procuracy, the present amendments strip the Procuracy of its right of legislative initiative. Article 9 states that procurators merely have the right to submit suggestions concerning the improvement of laws and other normative acts. The Procuracy also lost standing to take issues to the Constitutional Court except were they relate to violations of the constitutional rights and freedoms of citizens (Art 35, para 6).

One of the persistent points of friction over the Procuracy's powers was its long-standing role in general supervision. The current document empowers the procurators to receive complaints and appeals of citizens (Art 10), however, actions by the Procuracy concerning a citizen's grievance in no way limits that citizen from pursuing the complaint in court. Article 23 states that procurators may issue protests against illegal normative acts of organizations or officials, or pursue action in a court of general jurisdiction, or in the commercial court, when those acts violate the rights and freedoms of citizens. This will not placate those regional and local officials who chafed whenever a procurator would declare one of their normative acts to be illegal.

The Future of the Russian Procuracy

In other important areas, the powers of the Procuracy remain virtually unchanged: the power to supervise criminal investigations and places of detention, the right to participate in civil cases, and the right to appeal criminal decisions of the court. It is, perhaps, encouraging that the Duma deputies decided not to dismantle the Procuracy entirely, since it is one of the few tools in the hands of the government for fighting an unprecedented explosion in criminal activity.

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SPECIAL ISSUE ON CONSTITUTIONAL TRIBUNALS IN THE NEWLY INDEPENDENT STATES

Editor Robert Sharlet

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THE NEW WAVE OF CONSTITUTIONAL TRIBUNALS IN THE NIS AN INTRODUCTION

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Co-Editor Special Issue on Constitutional Tribunals*

This issue of the Newsletter is devoted to the new constitutional tribunals in the Newly Independent States (NIS). Constitutional tribunals have played a major role in the democracies of Western Europe, exercising broad powers of judicial review. They have played a significant role in the system of checks and balances with other branches of government as well as in the areas of economic development and human rights.

Brief History of Constitutional Tribunals

The first constitutional courts in Europe were established in Austria and Czechoslovakia in 1920, but both were abolished on the eve of World War II. After the war, West European countries adopted this model of judicial review. The German Constitutional Court was established in 1951, and the Constitutional Council of France was established in 1958.

Constitutional tribunals have since proliferated throughout the world, from Turkey and Columbia, to South Korea and South Africa. Following the Western European example, countries of the NIS have also created their own constitutional tribunals. Due to their heightened role in the post-Soviet era, these nascent institutions have been the subject of considerable attention.

The 1997 Paris Workshop on Constitutional Tribunals

The ARD/Checchi Rule of Law Consortium worked with the Institute for Constitutional and Legislative Policy (COLPI) based in Budapest, Hungary, and the Institute of Comparative Research on Institutions and Law of Paris, France to conduct a workshop for members of the constitutional tribunals of Kazakhstan, the Kyrgyz Republic and Mongolia. The workshop focused on the issues directly relevant to the development of these constitutional tribunals, including the independence of constitutional tribunals, procedural issues facing constitutional tribunals, and substantive issues, primarily in the areas of economic transition and human rights, confronting constitutional tribunals.

These constitutional tribunals have a diverse range of powers and jurisdiction, nevertheless, they share many of the same challenges. Each constitutional tribunal is playing an important role in breaking with the tradition of Soviet-period jurisprudence. Each has a role in subjecting other branches of government to judicial scrutiny, and in nurturing a healthy separation of powers.

The jurisdiction of each constitutional tribunal is limited. Some permit citizen petitions, others do not. Some hear abstract questions, others require an actual controversy. All accept only a small percentage of cases brought before them. It is incumbent on each tribunal to determine which cases to accept for review and which ones to decline.

Each of the three countries at the workshop was represented by a five-member delegation, representing a majority of the members of each constitutional tribunal. In addition to the 15

participants, there were ten commentators to discuss different approaches for addressing various challenges facing constitutional tribunals. These commentators hailed from diverse legal traditions. Members of the constitutional tribunals from Russia, Poland and France attended the workshop. There were also representatives from Germany, Hungary and the United States. The United States was ably represented by the Honorable Patricia M. Wald, United States Circuit Judge for the District of Columbia Circuit. Professor Herman Schwartz of American University Law School moderated the sessions.

Lessons Learned

The workshop was particularly effective because it allowed participants to reflect upon the emergence and rise to prominence of various constitutional tribunals. The role of the U.S. Supreme Court as an equal member of the triumvirate of government power was developed only many years after the Court was created. Justice Gadis Gadzhiev of the Russian Constitutional Court related the factors that have enhanced the Russian Court's independence, despite resistance from the State Duma and the Federation Council, the lower and upper houses respectively of the Russian Federal Assembly.

Judge Alain Lancelot of the Constitutional Council of France recounted how judicial review of the constitutionality of acts of parliament in France was a novelty, originally designed in 1958 as a means of upholding the power of the executive (under President Charles de Gaulle) against that of the legislature. It was not foreseen that France's Constitutional Council, like constitutional courts elsewhere, would come to occupy the prominent place it now has in France's institutional structure, and in the protection of fundamental freedoms. The French experience of the Constitutional Council gradually emerging as a guarantor for assuring compliance with fundamental rights was instructive for all of the participants, and especially for those from the Constitutional Council of Kazakhstan, whose jurisdiction and powers are severely limited.

The workshop was a significant milestone in the development of these institutions. The participants and the commentators prepared papers on the three areas addressed at the workshop. We have selected several of these papers for this Newsletter.

The Path to Judicial Independence

Part One of the Newsletter on The Path to Judicial Independence and the special issue as a whole, are framed by United States Circuit Judge Patricia Wald's comprehensive keynote article on the conditions of judicial independence in the U.S. Judge Wald's article covers a broad spectrum of conditions from personnel selection to factors of legal and media culture to the hazards of courts becoming entangled in politics.

The three articles following Judge Wald's article include contributions by members of the constitutional tribunals of Mongolia, Kyrgyzstan, and Kazakhstan on their respective tribunals' status in relation to the central and fundamental question of judicial independence. In Mongolia, while the Constitution of 1992 provides certain structural safeguards for the independence of the Constitutional Court, Justice Janlavyn Byambajav points out that the short duration of appointments (six years), and the public's distrust of courts in general from past experience, are matters of concern.

Conditions for judicial independence are more promising in Kyrgyzstan, according to Chief Justice Cholpon Bayekova in her article. Constitutional Court justices are appointed for terms of 15 years, the Court enjoys wide authority including offering judicial findings on proposed constitutional amendments, and its decisions are final and binding on all citizens and institutions.

The situation in Kazakhstan is quite different. After independence, a Constitutional Court was established in 1992 and incorporated a year later into the first post-Soviet Kazak Constitution. In the new Constitution adopted in 1995, however, the Court was transformed into a Constitutional Council with reduced authority and jurisdiction. For instance, as Judge Vladimir Mamonov writes, presidential

decrees are not subject to judicial review by the Constitutional Council.

Procedural Issues of Constitutional Adjudication

This section of the Newsletter is comprised of three articles representing the Russian, Kyrgyz, and Kazak experience with certain procedural issues of constitutional adjudication. The Russian Federation after a shaky start is now developing a durable process of constitutional adjudication as reflected in Justice Gadziev's article. The first Russian Constitutional Court was created in 1991, but ran afoul of politics in 1993 and was suspended. The current Court, established by a new statute of 1994, has revised rules of standing which favor access for individual citizens over petitions from political institutions.

Rounding out this procedural section, Justice Sakan Satybekov offers a very clear guide to the fact finding procedure of the Kyrgyz Constitutional Court, while Chairman Yuri Kim outlines the Kazakhstan Constitutional Council's relations with the media, and the manner in which the Council and the media work together to acquaint the public with the norms and values of a rule of law state.

Human Rights Before Constitutional Tribunals

Finally, the special issue of the Newsletter concludes with two articles on substantive issues of constitutional adjudication, namely problems of economic transition and human rights. Judge Lech Garlicki of the Polish Constitutional Tribunal discusses several cases concerning economic freedom and its limits as well as problems of pension and social security rights during Poland's present transition from a planned to a market economy. In the last article, Chief Justice Galdandgun Sovd of the Mongolian Constitutional Court closes out the special issue by describing several cases of individual rights defended by his Court, including one on church-state relations and another in which a citizen successfully challenged the General Prosecutor over a due process violation.

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THE PATH TO JUDICIAL INDEPENDENCE

**JUDICIAL INDEPENDENCE -
THREATS AND SAFEGUARDS**

by Patricia M Wald

*United States Circuit Judge,
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**Why Is an Independent Judiciary Essential
to the Rule of Law?**

Although the precise requirements for judicial independence may vary somewhat among countries, the reality of that independence is essential to the judiciary's performance of its key function of assuring that the rule of law prevails. For unless there is access by citizens to independent courts, officials of the other Executive and Legislative branches will be free to ignore the law and dictates of the Constitution, with only political pressures to restrain them. Those officials may also, in a variety of situations that are too commonplace to rise to the level of high press visibility or political controversy, enact or apply laws arbitrarily or discriminatorily, or adopt unreasonable interpretations of those laws or the Constitution itself.

If the only recourse against such lawless acts is periodic public elections, which inevitably focus on larger issues and involve tradeoffs of all kinds between political interests, the public will become cynical, and feel disempowered to control their own lives and fortunes. Without the courts to assure that human rights -- especially those of minorities or unpopular groups -- are enforced, parts of the Constitution will be reduced to pieces of paper. For in the case of minorities and unpopular groups, the political process, which rules by majority, offers them no protection.

The courts, in interpreting and applying the Constitution, are the only safe haven for individuals and minorities when the political majority seeks to persecute them. In the United States in the 20th Century, the Supreme Court, as well as lower federal courts, have been prime movers in declaring the

rights of African Americans, women, and gay people, to equal treatment under the law. They have also upheld the rights of the press against protests of the Executive, and the rights of individuals to voice their viewpoints in public discourse, no matter how unpleasant or repulsive to listeners.

The courts also provide stability to trade and commerce by assuring parties, native or foreign, that they will receive impartial judgments in their contracts and commercial dealings. None of these vital functions can be performed in a democracy unless the judges who decide the cases are perceived by the parties, the press, and the public as truly independent and not beholden to any other branch of government or political party. Judges who are seen as agents or functionaries of the state, as happened in fascist and many socialist countries in this century, are scorned by history as well as their peers in other countries, and render the rule of law impossible to achieve.

**What are the Essential Elements of an
Independent Judiciary?**

Judicial independence can survive in a variety of governmental models, in civil as well as common law regimes, and in the final analysis depends largely on the conscience and courage of the judges themselves. There are, however, several institutional safeguards that can appreciably enhance the likelihood that the judiciary will be able to maintain its independence of the other branches and political majorities. They include

A Selection and Removal of Judges

Judges should be as insulated from political pressure as possible. We Americans know that we have not ourselves achieved this pinnacle entirely because appointing authorities are naturally going to want allies, be they the Executive or Legislative branch, in the judiciary. It is important, however, that no one branch of the government has a monopoly on the selection or removal of judges. Thus, our separation of powers system has the President nominating judges, but the Congress confirming them, and our Constitution guarantees life tenure and removal only

by impeachment at the hands of Congress (Some of our states, unfortunately, still elect judges, but few political scientists or even political leaders try to justify it, and the trend is going the other way) •••

Although a few of our Senate confirmations of Justices have been searing and opposition has been politically based, on the whole, the opportunity for public open debate on the judges' qualifications has probably served to insure that few really unqualified individuals or persons of questionable background come onto the bench. Many other countries, however, do manage to maintain independent judiciaries with appointments in the hands of the Executive only. But again it is even more essential in such a selection mode to develop a tradition of picking men and women of excellence and proven ability. The candidate must herself feel that she is being invested into a high prestige position in which her primary obligation is to defend the Constitution and insure the rights of citizens, not as an adjunct to facilitate the national program of the Executive or Legislature.

Once on the bench it is even more important that judges do not fear retaliation by removal or transfer or in assignment of cases if they do not please their appointers. The U.S. Constitution specifies the only way -- impeachment -- for removal of a judge from office, a subsidiary law permits judicial councils to impose lesser penalties for judicial misconduct, such as reprimands, suspension of dockets, or referrals to medical treatment. Even this lesser punishment is imposed by fellow judges, not the Executive. Although life tenure may not be necessary to judicial independence, strict procedures for removal and a term of a substantial number of years (10-15) may well be.

B Guarantees Against Retaliation Apart from Removal

An independent judge must be free from coercion in making decisions. Apart from removal, that means that he cannot be made to fear for his or his family's personal safety, or be threatened with reduction of his salary or forfeiture of his working place. The U.S.

Constitution guarantees that a judge's salary cannot be diminished while he is in office, while such an absolute guarantee may not be necessary to judicial independence, we know that in some countries banishment to poorer working quarters or salary cuts have followed Executive or Legislative displeasure with judges' decisions, and even threats to the safety of judges have occurred. While it is difficult to legislate against such abuses, these happenings stress the essentiality to an independent judiciary of developing a culture in the country and especially the press that will not stand for such attempts at coercing judges.

The judiciary needs to have its own constituencies in the country -- primarily the legal profession and its own associations -- that will expose and oppose coercive tactics and enlist the press on their side. Judges certainly need civil and perhaps criminal immunity for their actions as judges, but they also need control over their own dockets and assignment of cases to protect against the Executive using assignment or transfer powers to get "safe" judges on important cases.

Ultimately, as an institution, the judiciary needs ample budget authority so it is not a supplicant of the Executive for its every need -- it took over a century to attain this right in the United States, but the judiciary's own budget authority and its own Administrative Office, which sees to its needs, play an important role in its independence from the other branches •••

C Important Powers of Governance Must be Invested in the Judiciary

If an independent judiciary is truly to be a vital force in the governance of a country, it must be accorded the power to make important decisions in governance. It matters little if a judiciary is independent if its power is relegated to small private disputes. Thus, the dimensions of the power given to the judiciary by the Constitution and by laws will play a large role in its perception by the people, and in its ability to insure a rule of law. A high court whose constitutional decisions may be overturned by

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the legislature will not be fully independent in perception or in reality

Courts in the judicial system must be invested with authority to declare the acts of the Executive or the enactments of the Legislature in violation of the Constitution. This power is one to be used sparingly, but one whose existence has a profound deterrent effect on the political branches, and ultimately insures that those branches cannot impugn by act or law the independence of the judiciary itself. The courts must have the ultimate authority to interpret and apply the Constitution itself as its guardian. There must also be a willingness on the part of the other branches, and of citizens generally, to enforce and abide by the rulings of the court •••

The most essential powers a judiciary needs are the power to declare laws and official acts unconstitutional, the power to umpire disputes between the central and local governments, the power to decide disputes between the other branches of government when they reach impasse, and finally the power to enforce, at the behest of citizens, constitutional rights and guarantees

Threats to Judicial Independence

Although history shows us that authoritarian regimes to succeed must take over the judiciary, as well as other branches, it also tells us that in too many cases judges have let themselves be coopted by political tyrants and have cooperated in their own demise. Thus the greatest threat to judicial independence, quite apart from power-hungry executives and legislators, is the refusal of the judges themselves to act independently or to protest incursions on their constitutionally granted powers. To be perceived as independent by the public, they must assume that mantle themselves and act independently, even though in embryonic democracies that entails risk to themselves individually and to the judiciary institutionally

In the United States, it was Chief Justice John Marshall in the early 1800s who, to the amazement of many, declared the Supreme Court as the final arbiter of constitutional meaning, and as having the

“implied” power to declare acts of the other two branches in violation of the Constitution. So the greatest threat to judicial independence may be judges who do not take that concept seriously and insist on adherence to the laws and the Constitution in the face of great political pressure. That said, several other threats should be mentioned

A Public and Press Perception

As mentioned previously, to retain their independence judges need the support of the people and the press. To get that support they must be perceived as able, independent, and as behaving in a highly ethical manner above suspicion, corruption or favoritism. If they come to be perceived as “in the pocket” of either the government or some political faction, they will not gain such support. At the same time they need to be seen as not too insulated from the cares of ordinary citizens, but sensitive to their problems and needs. This is no easy balance to find and even now in the United States from time to time, the President or members of the Legislature will engage in “judge bashing” or complain that judges are ruling on the basis of their personal preferences or political philosophies rather than the law. On the whole, however, judges are held in high repute, these episodes are brief, and the judges are defended publicly by their own leaders and by the bar •••

B Inability to Manage Their Work

For the “least dangerous branch” -- the judiciary -- to claim and defend its independence, it must be able to perform its important functions efficiently. This is to a great degree a function of having the resources -- access to the laws being interpreted, secretarial assistance, a proper filing and transmission system, and an expeditious way of transmitting opinions up and down the judicial hierarchy. Litigants must be able to get their cases heard and decided within a reasonable time (six months to a year). A starved judiciary cannot turn out an excellent work product, and its reputation will deteriorate. In this rapidly changing world, judges also need the capacity to keep up with legal and interdisciplinary

developments through training opportunities after they are on the bench

Lastly, they must resist being overwhelmed with more cases than they can handle well, especially in the higher courts, either some jurisdiction should be discretionary (virtually the entire Supreme Court docket is selected by the Court which takes only 80-90 cases a year from 5,000 applications), or they should develop two dockets -- one in which cases can be decided summarily on the basis of the documents, and the other after argument for more difficult cases

A behind-in-their-work and fatigue-ridden court is not likely to do good work or command the respect of the populace

C Entanglement with Politics

Ironically the most important cases, calling for the greatest degree of independence, are those involving national policies with great social, economic, or political importance. In the United States they may end up with a court ordering the Legislature to appropriate money to improve prisons or schools, or ordering the Chief Executive to turn over all tapes of his Presidential conversations, or authorizing the press to publish papers the government has argued will endanger national security. Although judges are inevitably appointed in a political context, they must approach such tasks in a nonpolitical way and convince the country that their decisions are based on law, not political or personal preference. Once their decisions are made, the press is all too likely to put a political label on them anyway. Too many such encounters can envelop a court in a political mantle which hurts their independent stance in the eyes of the citizenry. On the other hand, critical constitutional rights are often involved and must be given their due.

Courts in some countries, including the United States, have come up with a "political question" doctrine which allows them to decline to decide a case where (1) its resolution has been committed by the Constitution to another branch, i.e., the manner in which the houses of Congress carry on their business, or (2) there are not manageable standards by which a

court can resolve the dispute, or (3) any decision is likely to divide the country and bring the courts into disrepute or make it seem the country is speaking abroad with two voices. The "political question" doctrine has always bothered scholars because it seems to collide with Chief Justice Marshall's mandate that the duty of the court is to say what the law is. Yet, it does provide a kind of safety valve for a court besieged with controversial questions of political import which the political branches could better settle themselves • • •

D Emergency Exceptions and Special Courts

In some countries' constitutions there are "emergency exceptions" to constitutional guarantees which effectively remove the power of the judiciary to monitor them. In many countries in the past decades such "emergency" decrees have been renewed regularly until the rights themselves disappear. The U.S. Constitution provides for the suspension of the writ of habeas corpus -- "bring the body to court" -- only in cases of "rebellion or invasion where public safety requires it." In fact such a suspension has only been exercised once -- during the Civil War, and then the Supreme Court struck down the exercise as not in conformity with the Constitution. The day after Pearl Harbor, President Franklin Roosevelt imposed martial law on Hawaii, but two civilians tried thereafter by a military court had their convictions reversed by the Court. There is equal danger in the use of "special courts" to try highly-placed officials or to try certain grievous crimes against the nation. In this highly charged area, the dangers of violating constitutional rights is greatest. One of the risks to an independent judiciary is its displacement by other special courts or emergency decrees suspending ordinary rights and judicial processes.

THE CONSTITUTIONAL COURT OF MONGOLIA GUARANTEES OF ITS JUDICIAL INDEPENDENCE

by J. Byambajav

Justice of the Constitutional Court of Mongolia

Background

Today, Mongolia is undergoing a historically crucial period of democratic developments, reform and transition. We adopted our new Constitution in 1992. Mongolia had had no Constitutional Court until then. There were three levels of criminal and civil courts with the Supreme Court as one of them.

Bearing in mind the need for an independent body obliged to exert supervision over the implementation of the Constitution, Section 1 of Article 64 of the Constitution provides that "The Constitutional Court (Tsets) shall be an organ exercising supreme supervision over the implementation of the Constitution, making judgments on the violation of its provisions, and resolving constitutional disputes. It shall be the guarantee for the strict observance of the Constitution." Five years have elapsed since the establishment of the Constitutional Court (Tsets) in 1992, which represented the institutional implementation of this constitutional provision.

Despite economic hurdles on the road of transition, Mongolia has taken step by step a number of important measures aimed at reforming the activity and system of judiciary, in particular at ensuring its independence. A number of laws have been adopted as well. However, due to the fact that some laws necessary for the Constitutional Court are still under the consideration by Parliament, one has to recognize that the Constitutional Court is lagging behind the courts dealing with criminal and civil cases. As provided for in the Constitution, the Constitutional Court or Tsets and its members in the execution of their duties, are subject only to the law, and are independent of any organization, officials or any other individual. These rights should be provided for by the Constitution and other laws under the Constitution. The Law on the Constitutional Court of Mongolia adopted in 1992 regulates the

domain of the Tsets, and represents an important legal guarantee for its independent activity as well.

Appointment of Justices to the Court and Immunity from Prosecution

The Constitutional Court of Mongolia consists of nine justices. Parliament, the President and the Supreme Court nominate three members each, and Parliament (State Great Khural) appoints each for a term of six years. The six year term is an issue to be questioned in the future. There is a need to focus more on the selection, training and retraining of the justices of the Constitutional Court. Our successors should be in preparation today.

The Constitutional Court and its members do not represent any organizations, officials or groups, moreover, the law strictly prohibits interference or influence on their activity by any organizations, officials or individuals.

The independence of the justices of the Constitutional Court will greatly depend upon how the procedures of his or her nomination, resignation, removal and transfer to other work are specified and implemented.

The State Great Khural may decide on the removal of a justice of the Constitutional Court before his or her term of office expires if the Constitutional Tsets decides to withdraw the individual from office, provided a court finds that the justice committed a crime or a serious violation of judicial ethics, as well as upon the initiative by the nominating bodies for the same reason.

It is prohibited by law to relieve a member of the Tsets, remove him or her from office and transfer to other work other than on the basis of the expression of his or her own desire or because of health problems. These circumstances facilitate dealing with such issues without any outside pressure.

As provided by Article 5 of the Law on the Constitutional Court, "A member of the Tsets cannot be arrested, detained or put into custody, indicted for criminal charges or subjected to administrative

charges by a court, except when he is arrested while committing a crime or if the facts of a crime are obvious, and his dwelling, office and body shall not be searched or seized and his documents and personal belongings shall not be confiscated without the permission of the Tssets "

Budget of the Constitutional Court

Another basic precondition for the independence of the Constitutional Court is its budget and the remuneration of the justices As provided for in the Law on the Constitutional Court, the State Great Khural of Mongolia determines the budget, remuneration fund and salary of the justices on the basis of a proposal by the Chairman of the Tssets The Constitutional Court is entitled to determine the expenditure of its budget

Despite such positive measures, we are also experiencing a budget deficit like other organizations and officials in this period of economic difficulties in our country The rights of the justices of the Constitutional Court are restricted by law to the extent that they cannot engage in administrative, political and commercial activities, or work as a trade union leader, and their principal income is limited to their salary I do not think that this is wrong However, given this fact there should be greater concern for the issues of their economic security, pension and welfare So far, little has been done in this respect

The Tssets has a small support staff The Chairman of the Tssets determines the size of the staff within the budget approved by the State Great Khural

Procedure for Finding Acts and Declaring Laws Unconstitutional

The Tssets receives applications from citizens, organizations and officials, who have the right to submit applications by law, and considers all disputes, except those prohibited by law, at its open session The Tssets then renders a judgment on whether the Constitution was violated and gives recommendations to the organizations and officials on the elimination of the violations if necessary If the judgment submitted to Parliament is rejected, the

grounds for rejection will be considered by a session of no fewer than seven justices of the Constitutional Court At this session, a resolution shall be adopted which will become effective upon adoption

According to the law, the Tssets makes a decision by simple majority or unanimously Votes are taken in the consultation room and the tally of affirmative or negative votes cast by the justices is not made public

Threats to the Independence of the Constitutional Court

Although there are a number of rules and regulations concerning the independence of the Tssets, we cannot say that we have completely succeeded at ensuring the independence of the judicial branch Today, not every provision of a law is implemented in reality

As a result, there are threats and actions against the independence of the judiciary It is groundless to think that no efforts are made to persuade members of the Constitutional Court and other judges with generous benefits and compensation given their insufficient remuneration and welfare guarantees as civil servants In addition to this, such a situation forces those, who share this concern with me, to be suspicious with or without cause, thus eroding their confidence Therefore, the social conditions of the justices of the Constitutional Court and other judges demand new ways of solution

Due to the old stereotype of courts and judges, there is a mistrust of the Tssets and other courts among certain parts of the population which believe that they represent certain organizations or groups There is a tendency by some groups to exert psychological pressure on the members of the Constitutional Court and other judges by launching propoganda through the mass media in order to manipulate public opinion during courts' review of disputes with an aim of achieving judgments in their favor

Selection of the right person to be appointed a justice or a judge is another important issue People anxious for rewards and career are unlikely to fairly decide a case In other words, the ultimate pressure for

judicial independence should come from us, the judges

THE CONSTITUTIONAL COURT OF THE KYRGYZ REPUBLIC

by Cholpon Bayekova

Chief Justice of the Constitutional Court of the Kyrgyz Republic

The Constitution of the Kyrgyz Republic

The Constitution of the Kyrgyz Republic is the fundamental law of the state, guaranteeing its constitutional order, the rights and freedoms of citizens, and the free and democratic development of society. The Constitutional Court of the Kyrgyz Republic is charged with safeguarding the Constitution.

When Kyrgyzstan, on December 14, 1990, introduced amendments to its Constitution and reorganized its government and state apparatus, it was the first of all the former Soviet republics to do so. In addition to other changes, the Committee for Constitutional Supervision was abolished and the Constitutional Court of the Kyrgyz Republic was established.

The old judicial system and law enforcement apparatus, however, continued to function. The Jogorku Kenesh (Parliament) of the Republic created the Constitutional Commission headed by the President Askar Akaev in order to draft a Constitution for the sovereign Kyrgyz Republic.

A draft Constitution was submitted to Parliament that envisaged a unified judicial system under the authority of the Supreme Court. The Court was to have authority over constitutional questions through a Constitutional Chamber, which was to be a part of the Supreme Court. In addition, the draft contemplated the creation of a Commercial Collegium within the Supreme Court that would hear economic disputes. However, during parliamentary debates, Parliament rejected that plan, and the Constitution adopted on May 5, 1993 provides for a judicial system composed of a Constitutional Court,

a Supreme Court and a High Commercial Court, as well as courts of general jurisdiction.

The Court System in the Kyrgyz Republic

The Constitution delineates the respective jurisdictions of the highest courts, assigning to the Constitutional Court the highest judicial authority for protecting the Constitution, and to the Supreme Court the highest judicial authority over matters of civil, criminal and administrative law. The High Commercial Court shall hear disputes of a commercial character arising between juridical entities.

Justices of the Constitutional Court shall be appointed for 15 years by both houses of Parliament upon nomination by the President, while judges of the Supreme Court and the Supreme Commercial Court shall be appointed for 10 years by the Assembly of People's Representatives (the upper house of Parliament). The procedure for appointing justices to the Constitutional Court is more complex than for the Supreme and the High Commercial Courts. Judges of the lower courts are appointed by the President initially for three years, and for subsequent terms of seven years.

Jurisdiction of the Constitutional Court

In December 1993, the Parliament passed the laws "On the Constitutional Court of the Kyrgyz Republic," and "On the Procedure of the Constitutional Court of the Kyrgyz Republic," thus creating the legal basis for the Constitutional Court.

In accordance with Article 82 of the Constitution, the Constitutional Court shall be the highest judicial authority for protecting the Constitution.

The powers of the Constitutional Court are

- 1 To declare unconstitutional laws and other legal acts that contradict the Constitution,
- 2 To hear disputes related to the application and interpretation of the Constitution,
- 3 To issue findings concerning the legitimacy of Presidential elections,

- 4 To issue findings concerning the dismissal of the President, as well as of the justices of the Constitutional, Supreme and High Commercial Courts,
- 5 To approve criminal proceedings instituted against judges of the lowest courts,
- 6 To issue findings on amendments and revisions to the Constitution,
- 7 To overturn decisions by local governments that contravene the Constitution,
- 8 To hear cases relating to the constitutional rights of citizens

Courts, among others, may apply to the Constitutional Court on the foregoing matters (cf Section 5 of Article 14 of the Law On the Procedure of the Constitutional Court of the Kyrgyz Republic) Courts can apply to the Constitutional Court in the form of a submission regarding a constitutional law

Effect of a Decision of the Court

A decision of the Constitutional Court of the Kyrgyz Republic is final and is not subject to appeal Decisions and orders of the Constitutional Court are binding on all state agencies, legal entities, public servants and citizens to whom they are addressed

In the event that the Constitutional Court determines that a law or regulation is unconstitutional, that law or regulation becomes null and void throughout the territory of the Kyrgyz Republic, as do all other laws or regulations that are based on that law or regulation

Separation of Powers

It should be recognized first and foremost that the Constitution clearly provides that authority on constitutional questions is to be a component of the more general judicial powers that are exercised by the Constitutional Court, the Supreme Court and the High Commercial Court This presumes a real separation of powers into three branches, where courts act as a check on and a counterbalance to the executive and legislative branches, thus creating the basis for the real protection of citizens' rights and freedoms in building a rule of law state

THE ROLE OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKSTAN IN ENFORCING THE PRINCIPLE OF SEPARATION OF POWERS

by V V Mamonov

Member of the Constitutional Council of the Republic of Kazakstan

Background

Kazakstan recently celebrated the fifth anniversary of its state independence Historically, it is but a split second, a tiny speck of time, which is too short a period of time for creating a fundamentally new model of society It is common knowledge that social processes evolve slowly A change in the social and political system and in social and personal values could take decades, if not hundreds of years At the same time, these last five years have been much more eventful than had been decades of the previous "measured" life

The unprecedented fast pace of life along with a drastic change in social guidelines, have resulted in a multitude of various, if not opposing, opinions on the state of things in the Republic Primarily, the negative opinions are a result of a prolonged economic crisis which the country is going through, as well as the decline in living standards and the quality of life of most groups of the society Another factor is the absence of "tangible" progress and the resulting frustrations

At the same time, it is worth mentioning the fact that the current situation in the Republic is not at all the result of economic and political decisions taken in recent years, despite their definite impact The current situation is a consequence of the collapse of a social system, the disintegration of the USSR, and the result of all subsequent events related to the emergence of statehood and new state policy After the disintegration of the USSR, we had to start building our statehood on the basis of the old legal system which was outdated and could not, therefore, serve as a basis for creating a state

In this connection, we took some unprecedented steps to shape the first generation of independent

legislative acts, imperfect as they were, and to adopt the first Constitution of a sovereign Kazakstan on January 28, 1993

However, as time passed it was becoming obvious that the governmental system we created was inadequate for resolving the multitude of questions and problems that constantly arose in all areas of day-to-day life. It finally became clear that the state system was built on the basis of intractable conflict between the new Presidential form of governance and the old system of Soviets which brought all its previous faults into the new state.

All our previous experience burdened by Marxist ideology evoked a strong lack of confidence in the Constitution, the law and the system of justice. The state was proclaimed a tool of oppression and the Constitution -- a false regulator of relations in society, while the law was viewed as serving the interests of the ruling class.

This was not only a Kazakstan problem. In one way or another, all the countries of the Commonwealth of Independent States encountered it, with each state trying to resolve it by its own means. We succeeded in resolving the problem peacefully by holding a popular referendum on the adoption of the new Constitution on August 30, 1995. By doing this, we created a stable system of state authority characterized by continuity, and capable of regulating and directing the social development of our country. In his address to the people of Kazakstan in October 1996, President Nursultan Nazarbayev stated that "the Constitution provides for the necessary arrangements to overcome social contradictions, to build compromise in society and to ensure constructive cooperation between and among the branches of state authority. At the same time, these arrangements need to be confirmed in our legislation."

It is necessary to overcome the differences between the political, legislative and governmental systems of Kazakstan, and the international practice of governmental and legislative regulation, given the

fact there are common rules for the functioning of state and legislative structures and arrangements.

At the same time, irrespective of these common rules, any country which is trying to make a transition to the standards accepted in a rule of law state in the post-totalitarian period, will undoubtedly develop its own model of legislative development based on the Constitution and the specific characteristics of the given country.

Constitutional Power as an Independent Branch of State Power

It can be stated that with the adoption of the new Constitution we broke away from the kingdom of legislative darkness and embarked on the road leading to the light of legislative culture. A reflection of this breakthrough is the profound renewal of our legislation (the Civil Code, the Tax Code, laws on the use of land, mortgages, oil, etc.), the unification of the courts, the establishment of separate investigative bodies, and accreditation of judges, and the creation of a law university, a legal publishing house, and a legal newspaper as well as the emergence of private law schools. Among changes in the area of law one can also mention a gradual change in the thinking of the people and in their relations with each other. Actually, one could describe the current situation in Kazakstan as an attempt to restore the rule of law.

One should note, that a Constitution as an important element cannot exist without other relevant factors such as legislative, political and social systems. In this connection, the Constitution envisages an arrangement for interaction of different branches of authority, which is fundamentally different from the traditional technical separation of powers. The Constitution of the Republic of Kazakstan provides for the functioning of independent branches of authority in the form of the constitutional authority and the presidential authority. It is clear that these are not analogous to the legislative, executive and judicial branches of authority.

As a rule, constitutional authority is not regarded as an independent branch, but rather viewed as a manifestation of the people's sovereignty -- directly

(through a referendum) or indirectly (through the operation of the judicial branch) The 1995 Constitution (see Section VI), however, vested the Constitutional Council with the function of providing official interpretations of constitutional norms, as well as performing certain actions the essence of which is constitutional supervision (control) Therefore, constitutional power in Kazakhstan can be looked upon as an independent branch of state power Together with the presidential authority, it is part of the unified system of state power, as well as a component of the checks and balances system, and a most important mechanism of the interaction between branches of power themselves This concept is embodied in the provisions of the Constitution itself

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The constitutional power has authority over the judicial branch as well Although it does not review court rulings in terms of their compliance with the Constitution, it can review the constitutionality of normative acts

Therefore, I believe it is not correct to describe the division of power as three branches of the same tree, primarily because the constitutional and judicial branches are independent The former leans upon the idea of legality and the spirit of the Constitution, while the latter also addresses the spirit of the Fundamental Law through the interpretation of the letter of the Constitution Thus, the Fundamental Law contains a mechanism which allows it to translate into life the principles and norms of law, the rule of law state Given today's circumstances, it has been so far the only real instrument of restructuring the society

Four Models of Bodies Carrying Out the Protection of the Constitution

International practice offers different ways to approach the question of who must be responsible for constitutional monitoring (supervision) There are four types of models of the bodies which are obligated to protect the Constitution Some states (the United States, Japan, etc) make it incumbent on all the courts to monitor the compliance of laws with the Constitution In a second group of countries

(Guinea, Cameroon, etc), only the Supreme Court is empowered to monitor the laws for compliance with the Constitution In a third group of countries (Germany, Russia, Austria, etc), a special body has been established -- the Constitutional Court which is distinct from other judicial bodies Finally, there are countries where constitutional supervision is carried out by special non-judicial bodies (France, Algeria, etc)

In the beginning, the Republic of Kazakhstan chose the third model -- the Constitutional Court which was created in July 1992 with a relevant law being adopted the same year Later, when the 1993 Constitution was adopted, it was included in the unified system of justice of the Republic Then, when a new Constitution was adopted in 1995, the fourth model was chosen - the Constitutional Council On December 29, 1995, the President of Kazakhstan issued a decree which has the force of a constitutional law "On the Constitutional Council of the Republic of Kazakhstan" In accordance with the new Constitution and the above-mentioned presidential decree, the Constitutional Council is responsible for ensuring the primacy of the Constitution in the system of legislative and regulatory acts Most of the authority of the Kazakhstan Constitutional Council, as set forth in Article 72 of the Constitution of Kazakhstan, is aimed specifically at ensuring the primacy of the Constitution in the system of current legal acts in the country • • •

According to Section 1 of Article 74 of the Constitution, if a law or an international treaty is deemed to be in conflict with the Constitution of the Republic of Kazakhstan, it cannot be signed or, accordingly, ratified and put into effect Section 2 of the same article stipulates that "laws and other regulations deemed to be infringing upon constitutional human and civil rights and freedoms shall be annulled and not applied"

It is true, however, that when the Constitutional Council reviews petitions under paragraphs 1-3, Section 1 of Article 72 of the Constitution, it will first have to determine whether the contested act

(with the exception of laws) complies with the constitutional norms. This is sometimes quite a complicated task. The constitutionality of action or inaction of state bodies or officials shall not be reviewed by the Constitutional Council, which is different from the old constitutional regulation. This function will rest with the courts of general jurisdiction according to Sections 1 and 2 of Article 13 of the Constitution, anyone has the right to be considered as a legal subject and to defend his rights and freedoms by all available lawful means, including necessary defense.

Everyone has the right to a defense of his rights and freedoms in court. We have to point out, however, a certain lapse in the above-mentioned Article 72 which relates to ensuring the primacy of the Constitution in the current system of the laws of Kazakhstan. This lapse consists of the fact that the Constitutional Council has no right to review the compliance with the Constitution of presidential decrees having the force of a law in cases envisaged by Section 2 of Article 61 of the Constitution, as well as laws in the situation described in paragraph 4, Article 53 of the Constitution. We will have to face these problems fairly soon. In view of the fact that the process of introducing amendments to the Constitution is quite complicated, and amending constitutional laws is not much easier, the Constitutional Council will probably have to develop adequate concepts in this area.

As yet, it remains unclear who shall review the compliance of ordinary laws with constitutional laws. This was not envisaged by either the Constitution or the Presidential Decree "On the Constitutional Council". Yet, constitutional laws also regulate constitutional matters and in a certain sense are part of the Constitution. It is possible that the Constitutional Council will have to use the experience of the French Constitutional Council which in the mid-1960s found a solution to the same problem by declaring itself competent to review the compliance of ordinary laws with organic laws which in France are the equivalent of our constitutional laws. The Constitutional Council assumed that responsibility although the French Constitution did

not provide for this right to resolve matters relating to compliance of ordinary laws with organic (constitutional) laws.

Constitutional Council Ensures Implementation of the Separation of Powers

The Constitutional Council ensures the implementation of the separation of powers with the help of the following mechanisms: a) by carrying out its review function, b) by submitting to the President of the Republic regular information about its activity which usually contains not only the results of the work done by the Constitutional Council, but also specific proposals aimed at improving the operation of state bodies and institutions, and c) by submitting an annual report to the Parliament.

PROCEDURAL ISSUES OF CONSTITUTIONAL ADJUDICATION

CASE MANAGEMENT IN THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

by G A Gadzhnev

Justice of the Constitutional Court of the Russian Federation

Jurisdiction of the Court

Whether or not a specific case falls within the purview of the Russian Constitutional Court is primarily determined by the nature of the legal relationship between the parties to the dispute which caused the case to be presented to the Constitutional Court. This relationship must have the characteristics of a constitutional issue. The Constitutional Court cannot examine every dispute resulting from a constitutional legal relationship since the Law on the Constitutional Court (of 1994) establishes that the Constitutional Court shall only examine questions of law, i.e., only questions of law fall within the purview of the Constitutional Court.

While engaged in constitutional court proceedings, the Constitutional Court shall refrain from establishing and examining facts in any cases where this task falls within the authority of other courts or

other bodies. Therefore, this provision of the Law restricts the authority of the Constitutional Court by the authority of all other courts or bodies.

Requirements for the Court to Review a Case

For the Constitutional Court to be able to examine a request for review, the person making the request should satisfy a number of requirements envisaged in the Constitution of the Russian Federation and in the Law on the Constitutional Court. The following are some of these requirements: (a) the request should be duly filled out, (b) the request should fall within the authority of the Constitutional Court, (c) the request should have an appropriate petitioner, and (d) the request should be admissible for proceedings.

Authority of the Courts

The requirement that a case must fall within the authority of the Court enables the Court to draw a line between the cases that *do* fall within its authority from the ones that can be examined by other bodies (for example, legislative bodies). In its rejection ruling dated June 15, 1995, it was determined that if legislation involves restricting human rights and freedoms and if the disputed question is not in essence related to constitutional questions, then the Constitutional Court shall not examine this question since it is the prerogative of legislative bodies to deal with such questions. Similarly, a judgment dated June 16, 1995, states that the Constitutional Court shall not have the authority to examine questions related to a request to provide an official interpretation of the Constitution in such detail that it would actually require the Constitutional Court to develop new legislative norms.

Admissibility

The interpretation of norms related to "admissibility," as established in the Constitution and in the Law on the Constitutional Court, is very important for determining the specific cases the Constitutional Court has to deal with. An analysis of the work conducted by the Constitutional Court in 1995-1997 shows that the Court has created certain obstacles for the so-called political bodies by interpreting the Law on the Constitutional Court in a particular way. However, with respect to the

constitutional complaints of citizens, the Court restricts its discretionary authority related to admitting complaints for review. Thus, the Constitutional Court has made it absolutely clear that it prefers to review complaints submitted by individuals as opposed to complaints presented by political bodies.

Several examples can be cited to corroborate this conclusion. Thus, in response to requests of political bodies to provide official interpretations of certain clauses of the Constitution, the Constitutional Court developed a system of admissibility rules. In the case of a request submitted by the President and the Federation Council (or Senate) regarding the interpretation of Article 96 of the Constitution which contains provisions related to establishing the Senate (the question was whether the people should elect Senate members or whether the Senate should be formed on the basis of the *ex officio* principle), the Constitutional Court issued a ruling in which it declined to examine the question. In the same ruling, the Constitutional Court put forward the rule of subsidiary relationship, which means that the Constitutional Court shall only provide abstract interpretation of the Constitution if it is impossible to understand the meaning of a constitutional norm within the specific context shaping this norm.

The Constitutional Court also developed the rule of admissibility from Article 36 of the Law on the Constitutional Court which includes a provision "on newly discovered uncertainty whether or not a law conforms to the Constitution of Russia." In its ruling dated December 28, 1995, the Constitutional Court stated that when trying to determine whether or not to admit the request of a state body for review, it shall be obligated to ensure that there is indeed an ambiguity in the provisions of the legislative act under dispute or whether this only appears to be the case with references to a relevant article of the Constitution thereby being unfounded and arbitrary.

Figuratively speaking, with regard to the rules of admissibility, the Constitutional Court establishes a "narrow-gauge net" for political bodies, while

allowing a "broad-gauge net" for requests by individuals

In the cases where private entities (both citizens and legal entities) file a request to the Constitutional Court, it should be kept in mind that, unlike the situation with regard to political bodies, Article 46 of the Russian Constitution extends the right of court protection to them

The Constitutional Court interprets the Constitution and the Law on the Constitutional Court in a way that ensures that private entities will be provided with the most favorable conditions in the course of examining constitutional complaints

A Fundamental Procedural Split

The Constitutional Court clarified in great detail the concept of "the law that was applied or the law to be applied" in Article 125 of Section 4 of the Constitution and Article 97 of the Law on the Constitutional Court. This question was specifically discussed at the plenary session of the Constitutional Court on February 19, 1996. The justices were sharply divided on the question

Some tended to think that a citizen's complaint to the Constitutional Court should be permitted if the law was applied by any authorized body (among such legislative acts are a directive on laying off an employee, a refusal to register an individual at the location of his residence, an order decommissioning an individual from military service, etc.). In other words, these particular justices, the author of this article included, hold that the application of laws means that laws are applied by different enforcement bodies

The second school of thought maintains that the Constitutional Court should only accept a complaint for review if the relevant act was appealed in a general court of law which, for this purpose, should be viewed as an enforcement body in the strict sense of the term

FACT FINDING IN THE CONSTITUTIONAL COURT OF THE KYRGYZ REPUBLIC

By S S Satybekov

Justice of the Constitutional Court of the Kyrgyz Republic

After the Kyrgyz Republic gained sovereignty and independence as a result of the disintegration of the former Soviet Union, it became obvious that the task of building a rule of law state required the supremacy of the fundamental law, including the establishment of a body that would act as a guarantor of the Constitution and its provisions. The Constitutional Court of the Kyrgyz Republic was created exactly for this purpose

Independence of the Court and the Finding of Facts

The Constitutional Court of the Kyrgyz Republic as a special supreme judicial body entrusted with the protection of the Constitution, functions independently. It executes judicial authority on the basis of the Constitutional Court proceedings

Such a status of the Constitutional Court is required for effective protection of the foundations of the constitutional system, and constitutional human rights and freedoms, as well as for upholding the supremacy and direct authority of the Constitution. According to Article 2 of the Law "On the Procedure of the Constitutional Court in the Kyrgyz Republic," "The following goals are established for constitutional court proceedings: a comprehensive, thorough and objective consideration of cases related to the protection of the Constitution of the Kyrgyz Republic in order to establish the supremacy of the Constitution of the Kyrgyz Republic and ensure constitutional legality."

These goals can only be met by establishing the material facts for each case under consideration. It is exactly for this reason that the Law on the Constitutional Court Procedure states that

- The decisions of the Constitutional Court shall be legal and justified. Decisions can only be justified if they contain all relevant facts related

to the case which were established in court sessions, and if the conclusions are substantiated with sufficient proof,

- Each party should be obliged to provide evidence, and to prove the facts that are the basis for its demands and disagreement,
- The petitioning party should provide the facts which are the basis of its demands at the time of presenting its petition, as well as proof substantiating the facts,
- Parties shall present specific justification of their positions in relation to the constitutionality of a legislative act or the conduct of an official,
- A copy of the text of the legislative act which is being contested in terms of its constitutionality shall be provided by the interested party,
- The justices shall have the right to demand the necessary materials related to the case or other information, as well as to question the parties and officials, determine the scope of witnesses, specialists and experts, and to take other measures in order to arrive at a justified decision on the case, which can only occur if the Court establishes the facts

The procedure for considering cases in Court and resolving questions by the Court were also determined with this goal in mind

Though it is mandatory to establish legally essential facts for each case in any event, the questions falling within the scope of authority of the Court may be different depending on the manner of substantiation, the subject, and the content of the cases •••

The specific type of cases may determine the nature of factual evidence required. This requires a differentiated approach to establishing facts depending on the characteristics of each case in order to determine the truth and make a justified decision

Constitutional Court sessions are a distinct type of court proceedings. While they function much like civil, criminal, arbitration and administrative proceedings, the Constitutional Court session includes a number of specific features related to the content of the proceedings concerning the criteria for examining legislative acts and other materials necessary for establishing facts

The Constitutional Court has a specific jurisdiction. It may only determine the "constitutionality" of legislative acts, i.e., ensure their conformity with the Constitution, and examine questions of law, whereas the courts of general jurisdiction apply law to resolve the essence of a dispute

Complete Record Necessary to Determine Cases
For the Constitutional Court to be effective in establishing facts, the following factors should be borne in mind

- The factual and evidentiary materials should be complete and comprehensive at the time when the subjects submit their case to the Court, in accordance with the law,
- The case should be duly prepared for court proceedings in which the justices will act as fact-finders to establish the nature of conflict of law, clarify the facts, and determine the required evidence which would prove the existence or non-existence of these facts,
- All the questions raised during the Court session should be thoroughly investigated in strict accordance with the law and the circumstances of specific cases

Process of Establishing Facts

The process of establishing facts is carried out by a group of at least seven justices of the Constitutional Court. If required, scholars and practitioners may be asked to participate in Constitutional Court proceedings as specialists and experts in order to assist the Court with invaluable assistance in establishing the required facts

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**MEDIA AND PUBLIC RELATIONS OF THE
CONSTITUTIONAL COUNCIL
OF KAZAKSTAN**

by Yuru Kim

*Chairman of the Constitutional Council of the
Republic of Kazakstan*

Media and Public Relations

The adoption of the new Constitution and the renovation of the entire system of law brought to life a type of organizational activities which can be called the basic legal education of the public and the introduction of law into societal relationships. The ideas and principles embodied in the Constitution will not be embraced automatically. For the Constitution to be able to demonstrate its profound depth and content, we need to constantly work to explain in detail its major provisions. Knowledge of the provisions of the Constitution and its fulfillment in everyday life by all citizens is a major step towards the creation of a rule of law state. In this connection, the media and public relations of the Constitutional Council assume a major importance.

These activities are carried out in several areas. However, the main area of activity for the Constitutional Council is the explanation and clarification of the provisions of the Constitution. Along with this obligation, especially during the first stage of activities of the Constitutional Council as the state body responsible for the primacy of the Constitution of the Republic throughout its territory, considerable effort is being made to explain and clarify the authority of the Constitutional Council and its role in providing constitutional law and order in the Republic.

The first press conference held by the Constitutional Council in July, 1996 attracted a number of media representatives. The major issue which the representatives of the radio and television networks and the press raised was the question of the activities of the Constitutional Council in the area of protecting human rights and freedoms in general and the individual rights and freedoms of citizens. It was the Constitutional Council's first opportunity to explain the nature of its authority. In the first year since the

establishment of the Constitutional Council, the media have raised this question many times. The media are likely to raise not only issues of authority, but also the question of the Constitutional Council's role in ensuring constitutional law and order.

The development of a civil society and of the statehood of Kazakstan is an impossible task without a good understanding by citizens and civil servants at all levels of the polity of the requirements of the law, and the necessity to fulfill the law. Therefore, at this point the Constitutional Council regards this as the major task in its media and public relations activities.

Principles Guiding Communications

In communicating with the press and the public, the Constitutional Council proceeds from an approach which does not view the state as being superior to the interests of the citizens and their needs, but rather accepts a certain balance of interests without elevating state concerns above the interests of the citizens.

The development of a democratic society first and foremost means that the authorities shall be accessible to the public. The Constitution of the Republic of Kazakstan envisions and guarantees the power of the people and their human and civil rights and freedoms. In this connection, information about law will help overcome the low level of "legal culture" in the society, a contempt for law that has dominated society for many decades, as well as help overcome the negative perception of the law which has emerged in our time.

The legal acts which regulate the activities of the Constitutional Council do not encompass a mechanism underpinning the relations of the Constitutional Council of the Republic with the media and the public. At this point, the press is the instrument through which these relations are carried out. That is why working with the press gives the Constitutional Council an opportunity to shape the legal views of citizens. Publication of relevant materials in the press help the Constitutional Council guide the legal education of the public and ensure feedback.

Access to Information from the Constitutional Council

The hallmark of a democratic society is openness and easy access to information. In Section 2 of Article 20 of the Constitution of the Republic of Kazakhstan, it is established that everyone shall have the right to obtain and distribute information by means of any method not prohibited by law. Information is an important means of maintaining communication with the public, society as a whole, and the political and legal institutions of the state. Article 23 of the Law of the Republic of Kazakhstan "On the Press and Other Mass Media" established that the citizens shall have the right to promptly obtain through the media reliable information about the activities of state bodies, public associations, political parties and government officials.

Commenting on Pending Cases

Decisions taken by the Constitutional Council must be published in the press. From time to time, these decisions will be forwarded to relevant state bodies and officials in accordance with the procedure set forth in the Rules of Procedure of the Constitutional Council. On numerous occasions, the views of the Constitutional Council with regard to current developments in the Republic have been published by the press. The question then arises about the possibility of a member of the Constitutional Council commenting, in the press or other media, about a case accepted for constitutional consideration at the time that it is under review.

In Section 3 of Article 11 of the Decree of the President of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" (which has the status of a constitutional law), it is stated that no one shall have the right to seek, and neither the Chairman nor the Constitutional Council members shall have the right to offer, except at a meeting of the Constitutional Council, any advice or consultation with regard to questions that are the subject of review by the Constitutional Council, before a final decision is taken on these questions. Given this rule, it would be unreasonable to accuse the Constitutional Council of being too secretive. The public is always aware of activities of the

Constitutional Council. Also, before a final decision is reached by the Constitutional Council, the questions before the Council have usually been widely discussed in the media •••

Forms of Communications

In communicating with the public, the Constitutional Council uses different methods. If one were to analyze all the publications of the Constitutional Council's members and its staff, one could identify as the main subjects (a) providing information, (b) clarifying provisions of the Constitution, and (c) discussing specific problems. On numerous occasions, the press has carried interviews with the Constitutional Council members •••

The Chairman and the Constitutional Council members may engage in teaching, research or other creative activities (Section 4 of Article 71 of the Constitution). Their activities in providing the public with the knowledge of law will be judged a success when the population brought up on ideas of a post-communist society has embraced the law. More importantly, success will only be achieved if the state does its utmost to help educate the young generation of the country about their rights and how to seek the fulfillment of these rights in all areas of life. Indeed, without knowing their rights and without seeking their fulfillment, the young generation of Kazakhstan will not succeed in building a true rule of law state.

In order to raise legal awareness, to provide information on the law and to strengthen the constitutional legality in the country, the Chairman and other Constitutional Council members have spoken on numerous occasions before undergraduate law students and practicing lawyers, as well as at scholarly conferences where they discussed questions about providing a social safety net in Kazakhstan.

Address to Parliament

In terms of the Constitutional Council's communications with the public, particular stress should be laid on its address to the Parliament of the Republic of Kazakhstan. The Constitutional Council is authorized to forward an annual message on the state of constitutional legality in the Republic to the

Parliament, which has acquired the status of a legitimate democratic popular assembly. This special document is a kind of collective report to the supreme representative body of the Republic of Kazakhstan entrusted with law-making functions.

HUMAN RIGHTS BEFORE CONSTITUTIONAL TRIBUNALS

THE POLISH CONSTITUTIONAL TRIBUNAL AND THE MARKET ECONOMY IN THE TRANSITIONAL PERIOD

by Lech Garlicki

Member of the Polish Constitutional Tribunal

Economic Cases Represent Majority of Cases Before Tribunal

It is obvious that the transformation of the communist economy to a market economy requires almost total modification of the legal system, and that, inescapably, also involves the Constitutional Tribunal. Nor should we forget that these changes, while taking place in an orderly fashion, are nonetheless revolutionary, which implies among other things, the necessity for settling accounts of a burdened past with a negative balance. Finally, let us remember that economic changes entail serious social costs: unemployment, crises of public finances, and reduction of the government's potential to grant social security and welfare benefits. All this gives rise to all kinds of tensions, political and social, which often take a litigious form before the Constitutional Tribunal of Poland.

Cases concerned with social and economic regulations are most frequently referred to the Polish Constitutional Tribunal, while those having to do with individual freedoms or "classic" politics remain decidedly in the background. From all the rich judicial practice of the Tribunal, I have chosen several examples concerning economic freedom, privatization and nationalization, as well as legislation relevant to social security and welfare benefits.

As a point of departure, in regard to social or

economic matters, the judicial precedents of the Polish Tribunal take the position that responsibility for the choice of good solutions is incumbent upon Parliament, and that the judicial branch should not intervene except in cases of flagrant violation of the Constitution. ●●●

Cases where social or economic rulings are declared unconstitutional by reason of the solutions they offer are rare. On the other hand, the Tribunal appears to be consistent in requiring that the standards of good legislation be respected in the implementation of these rules.

Therefore, laws becoming operative with retroactive applicability without allowing the intended recipients a reasonable time to adjust to the new provisions are almost always declared unconstitutional. The Tribunal deems that the new rulings should not surprise those for whom they were intended, which is particularly important for economic activity (Decision of 18 October 1994, K 2/94).

Economic Freedoms

At the present time, the principle of economic freedom is guaranteed by Article 6 of the Constitutional Provisions of 1992. Elsewhere, it is specified that this freedom "may not be limited except by means of the law." In other words, the Constitution does not grant absolute freedom to the free economy. Originally, the Constitutional Tribunal adopted a formal criterion in stating that Article 6 merely implied that a provision on interfering in economic freedom should be included in the laws. ●●●

Little by little, however, the Tribunal began to discover other effects of Article 6 and to recognize that even though restrictions on freedom of economic activity might be provided for by parliamentary law, it still was necessary for these restrictions to be based on "rational considerations" (Decision of 17 December 1991, U 2/91). Further, such restrictions should be of a "character which is justified in substance" (Decision of 20 August 1992, K 4/92), and they should not undermine the "essential substance" of this freedom (Interpretation of 2 June

1993, W 17/ 92)

In 1995, these rather general statements were reconnected with the principle of proportionality which the Tribunal "relocated" in the general clause on the "Democratic State Ruled by Law" (Article 1 of the Constitutional Provisions) Restrictions on economic freedom should therefore be "commensurate" with the goal envisaged by the legislator (Decision of 4 April, K 10/ 94), and are admissible only as an "essential measure" (Decision of 26 April 1994, K 11 / 94) •••

Privatization

The problems inherent in the transformation of property are expressed in former communist countries by the legal provisions having to do with reprivatization (restitution to former owners of properties from whom the State had taken them away), privatization (a change of ownership, or the transfer of State-owned properties to private owners), and nationalization (the forced transfer of private property to the State) In Poland, laws on reprivatization have not yet been adopted Also, the Constitutional Tribunal has not familiarized itself in depth with these questions

In dealing with the question of privatization (Decision of 3 September 1996, K 10/ 96), the Tribunal states that neither the Constitution nor any legal transaction imposes on the State the obligation of general privatization, intended as a change of ownership of properties by the government to the benefit of private individuals It is up to Parliament to make decisions on this matter, and to choose one of the possible alternatives of general privatization But, if parliament rules that it is necessary to proceed to general privatization, and if it has chosen an alternative, this procedure must legally comply with all constitutional standards, values and principles

Therefore, it is necessary to respect the principle of equal protection under the law If parliament decides that one of the forms of privatization consists in the transfer of vouchers to all citizens, it is unacceptable to exclude the homeless from this process (Decision of 3 September 1996) It is also necessary to respect

the principle of separation of powers, which states that the current implementation of privatization should be a function of the Government and of the various ministries The Tribunal, however, declared unconstitutional those provisions of the law which gave the Parliament the right to authorize the privatization of special categories of properties (Decision of 22 November 1995, K 19/ 95) The new law on privatization was rescinded

In regard to nationalization, it might seem that it would not be acceptable in a market economy However, we must not forget the different situations inherited from the communist era which, for various reasons, must be "readjusted" by the democratic legislator In Poland, that clearly concerns properties left by the Communist Party (which was dissolved, let us not forget, at the beginning of 1990)

A year later, the law nationalizing the properties of the former Communist Party went into effect, declaring at the same time null and void all the transactions occurring after August 1989 which might have had as their objective the lessening of the Party's patrimony This law was contested before the Constitutional Tribunal which found it in conformity with the Constitution (Decision of 25 February 1992, K 3/ 91), a decision based on, among others, the principle of social justice This principle permits special dispensations on the general constitutional rules on protection of property (and, among other things, outlaws expropriation without compensation), and also supports the rule of non-retroactivity

Social Benefits

One of the most important problems of the change-over is the restructuring of welfare benefits, which were highly developed under the preceding government Given the present general financial crisis, the reduction of these benefits is indicated, which in practice means "savings" made by readjusting pensions in keeping with inflation It is the same with the evolution of the ruling on remuneration of employees in the area known as budgetary, for example, the public health service, teachers, etc

The position of the Constitutional Tribunal is particularly complex, because in Poland, the former constitutional provisions on social welfare remain in force. These were very generous, but they were created at a time when constitutional norms were not taken seriously. Applied in totality in our times, they would unbalance the budget, and the Tribunal cannot ignore this danger in its legal decision-making. Since the trade unions are powerful, almost every ruling in regard to social benefits is challenged before the Tribunal. These matters represent the most politically important sector of jurisprudence.

In a general way, the Tribunal considers that Parliament has freedom of choice on the most significant rules regarding salary, annuities and retirement pensions. It is not incumbent upon the Tribunal to evaluate in depth the proposed solutions, any more than the legislators answer to the electorate on the appropriateness of their choice (Decisions of 20 November 1995, K 23/95, and of 16 July 1996, K 8/96). However, this reservation on the part of the Tribunal creates doubts and controversies among the justices. Certain ones among them consider and discuss in their dissenting opinions that the phrase "Poland puts principles of social justice into action" (Article 1 of the Constitutional Provisions), permits checking on the social welfare regulations. From this point of view, in a case where new legislation unjustly treats certain social groups, for example those entitled to various pensions, the law could be declared unconstitutional.

However, I emphasize once again that the majority of judges are inclined to give the legislator a great deal of freedom in determining the content of the new social welfare rulings. But at the same time, in order to act in some way as a counterbalance to this position, the Tribunal attaches great importance to the principles of good legislation, flowing from the constitutional clause proclaiming "a democratic state ruled by law". Also, it may be inadmissible for the new rules to be enforced retroactively. In emphasizing this argument, the Tribunal declared, in its Decision of 11 February 1992, K 14/91, the unconstitutionality of the retirement pension reform of 1991, the pensioners are still waiting for the

payments which are due them. Also inadmissible is the implementation of new regulations without a period of practical adjustment, and therefore without an appropriate *vacatio legis* (legal term meaning exemption from the law) •••

The judicial practice of the Polish Constitutional Tribunal has therefore formulated numerous tests and criteria which the new legislative rules should take into consideration in regard to social matters. They are not applied in a very dynamic way, but several decisions declaring the unconstitutionality of legislation of intense political interest can be noted.

THE CONSTITUTIONAL COURT (TSETS) AND HUMAN RIGHTS

by Galdandgun Sovd

Chief Justice of the Mongolian Constitutional Court

Adoption of the Constitution in Mongolia

Although Mongolia has a more than two millennium history of statehood, the issues of the Constitutional Court and human rights have been formulated only in the new Constitution of Mongolia adopted as recently as 1992. Due to the medieval form of state structure which lasted until 1921, there had been no constitution in the country.

The people's revolution of 1921, liberating Mongolia from the invasion of the Chinese military and the White Russians, resulted in the restoration of national sovereignty. The nation adopted for the first time in its history a Constitution in 1924. The republican form of a state was introduced. Since that time, Mongolia has adopted successor constitutions in 1940 and 1960. Those were socialist-type constitutions dictated by the international communist organization, the Comintern, and modeled on the USSR.

There is no need to explain the reason why there was no place for a constitutional court or human rights in the legislation of the medieval period or in the era of the communist experiment.

Role of the Constitutional Court of Mongolia in Protecting Human Rights

As provided in Article 64 of the Constitution of 1992, the Constitutional Court of Mongolia is the body which exercises the supreme supervision over implementation of the Constitution, makes decisions on constitutional disputes, and serves as the guarantor of strict observance of the Constitution

Articles 14 through 19 of Chapter Two of the Constitution legitimized human rights and freedoms. Therefore, one of the basic functions of the supreme supervision of the Constitutional Court of Mongolia is the issue of human rights and freedoms •••

Additional important and wide-ranging issues that link the activity of the Constitutional Court with human rights are the provisions of Article 10, Sections 1 and 2, which state that Mongolia shall adhere to the universally recognized norms and principles of international law and fulfill in good faith its obligations under international treaties to which it is a party. Section 3 of the same Article states "the international treaties to which Mongolia is a party shall become effective as domestic legislation upon the entry into force of the laws on their ratification or accession."

Mongolia has ratified the international covenants on economic, social and cultural rights, as well as on civil and political rights approved by UN, and their facultative protocols as well as many other documents on human rights.

The legal basis for ensuring human rights by the Constitutional Court of Mongolia is the Constitution, in particular the above mentioned provisions which define the subjects of its activities in the field of human rights.

Jurisdiction to Consider Human Rights Questions

The next point is the determination of the sphere of human rights or how and from whom human rights shall be protected by the Constitutional Court.

The response to this question leads back to the provisions of the Constitution defining the jurisdiction and subjects of the Constitutional Court.

Article 66, Section 2 of the Constitution defines disputes under the jurisdiction of the Constitutional Court as a breach of the Constitution by acts of higher state organs as well as contravention of the Constitution by senior state officials.

Other Institutions Protecting Human Rights

Violations of human rights by the aforementioned acts and officials should be supervised and decided by the relevant government institutions within their powers as vested by law. Thus, the Constitutional Court (Tsets) of Mongolia is not the only body obliged to protect human rights.

The General Prosecutor, Parliament, the Government, the ordinary courts and the prosecutor's offices review and decide upon violations of human rights by all bodies and officials under their jurisdictions.

The Constitutional Court of Mongolia exercises its supreme supervision over the implementation of the Constitution by the two procedures of making judgments and decisions on constitutional disputes. The same procedures are also applied to the adjudicative process of disputes pertaining to human rights violations.

The reason for describing the Constitutional Court's activity as supreme supervisor over the implementation of the Constitution is that the subjects of its supervision are not subject to the jurisdiction of any other independent professional control body of the state, on one hand, while the decisions of the Tsets are issued as final decisions, on the other hand.

Disputes on Constitutional Interpretation

However, the Constitutional Court of Mongolia does not issue the final decision initially. Having considered the constitutionality of laws and other acts under its jurisdiction, the Court first gives its judgment on the violation of the Constitution, which is submitted to the State Great Khural (Parliament).

considers the judgment at its session, either accepting or rejecting it

If the ruling of the Constitutional Court that provisions of laws and other acts have breached the Constitution is rejected by parliament, the disputes concerned are reconsidered and decided finally by the Constitutional Court. If the State Great Khural accepts the judgment of the Constitutional Court, the Parliament then makes a decision to nullify and change the provisions of the laws and acts concerned. If the judgment is rejected, the State Great Khural must issue a resolution indicating the grounds for its rejection.

In a case of reconsidering a judgment of the Constitutional Court rejected by the State Great Khural, the Tssets studies the grounds for the rejection. Should the State Great Khural succeed in proving its grounds for the rejection of the judgment, the Constitutional Court must nullify the relevant provisions of its judgment, if the grounds for the rejection are not proved, the Constitutional Tssets makes a decision to nullify the provisions of the laws and other acts breaching the Constitution. Such a decision is a final one, and there is no possibility of appeal, thus making the decision effective upon its issuance.

The State Great Khural does not consider the validity of a Constitutional Court's ruling on a breach of the Constitution by officials under the jurisdiction of the Constitutional Court. It only has to consider and make a decision with regard to those officials referred to in the judgment who contravened the Constitution.

The Constitutional Court of Mongolia does not make a final decision in the first instance on violations of the Constitution by laws and other acts. Its decisions are first forwarded to the State Great Khural for consideration and this constitutes the specific relationship between the Constitutional Court and Parliament, since the latter has the power to invalidate laws issued by itself as well as the acts of the other bodies and officials. Furthermore, it is an

expression of mutual respect between the highest state institutions.

On the other hand, disputes on whether the laws and acts are in conformity with the Constitution are very complicated. Therefore, there is need for a thorough and repeated consideration before making a final decision.

Examples

Following are some examples of decisions made by the Constitutional Court on human rights issues during the five years of its existence.

1 The Constitutional Court invalidated several provisions of the General Law on Taxation adopted by the State Great Khural in 1992, including the Section 1 of Article 28 of the law which says "The General Board of Taxation and the General Department of Police with the consent of the General Prosecutor shall determine the rules for using special means of self-defense by tax inspectors," defining it as a breach of Section 13 of Article 16 of the Constitution.

2 In 1994, the Constitutional Court considered whether some provisions of the Law on State and Church were in violation of the Constitution, and its assessment was that several sections of the law did contravene Section 3, Article 10, Section 2, Article 14, and Section 15, Article 16 of the Constitution. The State Great Khural invalidated the offending parts of the law.

3 The Constitutional Court of Mongolia considered a case filed by a citizen "B" against the General Prosecutor for breach of the Constitution by failing to resolve and respond to the petition addressed to him. Its decision ruled that the General Prosecutor violated Section 12 of Article 16 and Section 1 of Article 56 of the Constitution of Mongolia.

To describe the case briefly, "A," an assistant prosecutor of the Office of the General Prosecutor, indicted "B" on the criminal charge of abuse of his official position, and conducted an investigation

Citizen "B" protested the latter act, claiming that according to Article 56 of the Constitution a prosecutor is obliged to supervise the investigation, but not to investigate independently. Therefore, he filed for review of the actions of the prosecutor in the investigation conducted on the basis of a false accusation.

The General Prosecutor reviewed the petition and instructed assistant prosecutor "A," who undertook the investigation, to attach the petition to the file of the case. He failed to give any response to "B." As mentioned above, state organs and officials are obliged to resolve petitions and claims of citizens according to the law, as provided for in Section 12 of Article 16 of the Constitution of Mongolia.

This provision of the Constitution is specified in detail in Article 28 of the Law on the Office of the Prosecutor of Mongolia as "if the organizations, officials and citizens do not agree with the decision of a prosecutor, they may submit claims to the prosecutor of a higher instance within seven days. The prosecutor of higher instance shall resolve the claim and provide a written response within 14 days of its receipt. The claim on the prosecutor's decision cannot be transferred to the person who made the initial decision on the matter concerned."

Access

There is ample opportunity for the Constitutional Court to receive information while conducting its activity on human rights issues. Any citizen legally residing on the territory of Mongolia enjoys the right to submit petitions and claims to the Constitutional Court. In other words, any citizen of Mongolia, foreign national, or stateless person is entitled to this right. Apart from citizens, the State Great Khural, the President, the Prime Minister, the Supreme Court, and the General Prosecutor have the right to address and make requests to the Constitutional Court concerning violations of the Constitution.

Constitutional Court as Protector of Human Rights

Human rights are guaranteed by the Constitution of Mongolia, by laws enacted in accordance with it, and

by international treaties. Therefore, certain restrictions on human rights can be made only by law dictated by the interests of national security and public safety, the human rights and freedoms of others, public health concerns, and by ethical considerations. But there are rights that cannot be restricted in any situation.

The fundamental rights of the citizens of Mongolia which may be enjoyed by foreign nationals and stateless people, residing on the territory of Mongolia, may be restricted by law in order to protect the population, national security, and public order as provided for in Section 5 of Article 18 of the Constitution. Reference is only to those rights other than inalienable human rights, prescribed in the international treaties to which Mongolia is a party. Section 2 of Article 19 of the Constitution states that "human rights and freedoms, provided by the Constitution and other laws may be restricted only by law in case of a state of emergency or martial law. These laws shall not impinge on the provisions of the law prohibiting torture, inhuman and cruel treatment, as well as the right to life, their conscience and freedom of religion."

Human rights issues cannot be implemented on their own by mere declarations in the law. A variety of mechanisms are needed to ensure their implementation. One of the most powerful of these mechanisms, without doubt, is the Constitutional Court (Tsets) of Mongolia.

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SPECIAL ISSUE ON SUSTAINABLE LEGAL REFORM IN THE NEWLY INDEPENDENT STATES

Editor Robert Sharlet

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SECURING THE PEACE AN INTRODUCTION TO FIVE YEARS OF RULE OF LAW ASSISTANCE TO THE NEWLY INDEPENDENT STATES

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on Sustainable Legal Reform

Since the abrupt breakup of the Soviet Union in late 1991, the 12 successor states, dubbed the Newly Independent States (NIS), have embarked on an arduous journey of reform and modernization, including law reform. The goal of NIS legal reform has been to move the individual societies in the direction of the Rule of Law. Understandably, progress has differed in the various countries.

The United States, the Council of Europe, the European Union, and individual West European countries came forward very early to offer assistance to the NIS in their legal transitions. The donors gave generously of their time, expertise and, of course, money, but in the rush to be of help to the post-Soviet states, coordination among the various Western assistance programs was initially neglected.

One recalls a U S Rule of Law delegation arriving in a NIS capital in the wake of a similar French group and just ahead of a Dutch team, all on their separate trajectories

The Rule of Law Consortium (ROLC) initiated the first U S effort to bridge the coordination gap in 1994 by implementing joint programs with the Centre for International Legal Cooperation in the Netherlands. By 1996, David Bronheim, then Project Manager of the ROLC along with Geraldine Donnelly, the Director of the Office for Democracy and Governance in the Bureau of Europe and the NIS of the U S Agency for International Development (USAID), recognized the need to bring together American and European donors on the cusp of the next stage of technical assistance and law reform in the NIS

The intention was to create a forum to review both success and setbacks on the road to the Rule of Law in the NIS, to assess the future needs of the West's NIS partners, and to explore lessons learned, especially in the area of improving U S -European cooperation for the next generation of Rule of Law assistance projects in the NIS. For this purpose, an international conference entitled "*Sustainable Legal Reform in the NIS*," was convened in Washington, D C during the summer of 1996 under the auspices of USAID. The conference brought together representatives of the U S government and its donor community, their counterparts in Europe and Canada, and representatives of the World Bank

This issue of the Newsletter is offered as a reflection of what was learned at that important conference for the tasks of ongoing technical assistance to the NIS by the West. We have tried to select a representative sample of the conference presentations. Because of space considerations, we have had to excerpt from the selected transcripts of what was said

Keynote Themes of Conference

Ambassador Richard Morningstar opened the conference, offering the U S government's view of future challenges facing the West in the NIS. He underscored that the success of NIS law reform

represented a vital U S national interest, but that budgetary reductions in foreign aid would require greater efficiency and effectiveness in the delivery of the international donor community's rule of law assistance to the NIS. Thomas Dine of USAID observed that the West had done well during the past five years of technical assistance. Nevertheless, he argued that it could do better in the next five years by encouraging more decentralization in the NIS legal systems, and by the U S and European donors "putting our minds together" in the common effort

Legal Reform and the Democratic Process in the NIS

Professor Peter Maggs highlighted the respective competencies of Europeans and Americans: the Europeans have far more knowledge and experience in continental legal models which the NIS find most applicable, while the Americans can offer a number of successful private solutions to the task of reconfiguring legal institutions in the successor countries where the legacy of a top-heavy state remains a problem. Keith Rosten of the ROLC emphasized the nexus between legal and economic reform in the NIS. He discussed the need to be aware of and show respect for the histories of the host countries in the process of transferring Western legal ideas. Charles Cadwell representing IRIS, shifted attention to the limited resources available in the West for the immense tasks of legal reform in the NIS. He recommended giving priority to building "intellectual capacity" among NIS elites for thinking about how legal institutions interact in the reform process

Two Europeans contributed to the conference, sharing their views on areas of cooperation in the donor community to facilitate the legal reform process in the NIS. Hans Herrfeld of the German Foundation for International Legal Cooperation, pointed out that the legal standards of the Council of Europe and the European Union are driving legislative development in the NIS, but the need for Western assistance in implementing the new legislation offers considerable opportunities for European-American cooperation. Jan van Olden of the Dutch Centre for International Legal Cooperation

offered a model for strengthening cooperation within the Western donor community

Hard Choices and the Next Steps in Sustaining Legal Reform in the NIS

Professor Robert Sharlet assessed the tasks for the next stage of Western assistance programs in the NIS. He stressed the need for better West-West cooperation and more effective West-East collaboration in advancing sustainable legal reform in the NIS. In concluding the conference, Geraldine Donnelly of USAID returned to the opening keynote theme, reiterating that "sustainable legal reform in the former Soviet Union is in our U.S. national interest."

Perspective on the Future

The success of future U.S. programs will be judged on their ability to leverage scarce resources in those areas in which the United States has a comparative advantage. The 1996 conference, presented in this issue of the Newsletter, was a forum in which representatives of the international donor community on legal reform in the NIS could evaluate their experience and gain perspective on the difficult process of assisting those countries in their quest for democratization, the rule of law, and a successful transition to a market economy.

LEGAL REFORM POLICY AND STRATEGY

FUTURE CHALLENGES OF THE INTERNATIONAL DONOR COMMUNITY IN THE NEWLY INDEPENDENT STATES

*by Ambassador Richard Morningstar
Special Advisor to the President and Secretary of State on Assistance to the Newly Independent States
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Washington, D.C.*

There are not many activities that are funded by the U.S. government that are more in our national interest than our Rule of Law Program and our support for legal reform in the former Soviet Union. For these countries to become viable democracies, they must make the transition from arbitrary rule to

the rule of law. We provide assistance to help make this transition because it is in our national interest to do so. Simply stated, our security and our prosperity will be enhanced if reform continues in the Newly Independent States (NIS), if legal systems develop, and if all of this fosters a democratic market society that respects the rights of others. When I say it is in our national interest, it is simple. How many wars have we fought with democracies? •••

This conference is particularly timely because our assistance program in the NIS is under constant review, and is in very rapid transition. Our assistance program to the NIS was not envisioned as a permanent feature of our foreign policy, but was to be a quick start and a quick phase-down with a finite life expectancy. This was the approach, and I am going to do every thing I can over the next several months and years, however long I am here, to try and change that approach, because it has to be an ongoing process. We have to resist the need to be instantly gratified, and get frustrated if we are not instantly gratified, and realize that this is a generational process and that we have to be there for the long haul.

The phase-down of our program has been exacerbated by cuts in our appropriations over the last couple of years which have required us to focus our efforts, to compress our timetables and forced us to try and do a lot more with less, and to put a lot of emphasis on efficiency and effectiveness. We have responded to these budgetary reductions with a number of cost-saving initiatives and efficiency measures. We are determined to work closely with our donors to enhance our effectiveness and to contribute to theirs. •••

We cannot afford to have walls between our various programs. We have responded to the rapidly changing political situations in the NIS countries themselves. For example, in the case of Russia, our approach will be significantly different than it was four years ago. Aside from the special requirements of programs dealing with criminal justice and the criminal justice system, we are de-emphasizing our already small technical assistance programs to the

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central government. We are placing a renewed and additional emphasis on partnerships, on training, and on locally-related activities and community-based exchanges •••

We also now have the benefit of our experience over the past several years, and of being able to build on the lessons we have already learned. The Department of Justice and our other law enforcement agencies have important roles to play whenever we are working in the economic reform area. As a lawyer, I am conscious of the need to have comprehensive law reform that deals adequately with both the criminal and the civil sides of a market economy. I hope that this conference will help us move forward in developing programs in cooperation with other donors for this purpose.

The World Bank and Russian Legal Reform

Another important development is the World Bank's proposed \$58 million loan to the Russian Federation for legal reform. The World Bank is also beginning discussions with the government of Ukraine with respect to a similar kind of loan. This loan will have significant implications for our Rule of Law Program. We have always had three main thrusts to our program: first, developing new legal codes and other regulatory procedures, second, designing and strengthening the legal institutions that are needed for a law-based society, and third, strengthening the sinews of civil society by promoting the development of bar associations, and legal advocacy by NGOs. With this loan, we will be able to lower our profile in the first two areas, while redoubling efforts in the third area.

Support for the court system, legislative drafting and legal education are all envisaged under the World Bank loan. It will give the Russians the resources needed to develop their own solutions to the infrastructure problems in their judiciary, and in their legal system. Our task will be to focus on the third area, *i.e.*, working in local communities, working with NGOs, and working in various training programs. Our tasks are to ensure that our programs enable the World Bank to move ahead rapidly in the design and implementation of its loans with no

interruption of vital assistance, to make certain that we do not duplicate any work by the Bank, and, finally and very importantly, to remain engaged with our European colleagues in supporting the legal structure necessary to ensure the success of the Bank's work.

We have already begun planning the post-World Bank phase of our Rule of Law Program in Russia, and as mentioned before, we will fill in the gaps. We will work on reforms in the criminal justice system, support for NGOs, and in areas that go beyond the scope of the Bank's loans, but we have to get that loan up and running. Also, in connection with a major effort with NGOs, and because of the relevance of the European Convention on Human Rights, we plan to work closely with European national and institutional donors •••

Criminal Justice Reform

One of the consequences of Russia's free-wheeling economy and the lack of a strong judiciary has been the rapid rise of crime and corruption. For nearly two years now, we have had in place a two-pronged program of cooperation with the Russians, and also in other countries as well. On the one hand, training to give the NIS law enforcement agencies the tools to cope with modern economic crime such as money-laundering, and on the other, technical assistance to provide the procuracies with the types of legislation needed to prosecute organized crime. Again, this needs to be carefully coordinated. It does not do much good to have a law enforcement program with respect to money-laundering, or securities violations if there is not a legal code that provides for actions to be taken by law enforcement officials.

We are mindful of the need to keep human rights concerns paramount in our Rule of Law Program. The FBI and other U.S. law enforcement agencies always include a civil rights component in their training curricula, and emphasize the need to prosecute crime within the context of the rule of law. We are also helping human rights groups, such as the Sakharov Center in Moscow, to develop their institutional capacity. The American Bar Association's CEELI program has done outstanding

work in training judges and defense attorneys, and in helping fledgling bar associations organize themselves

U S - European Cooperation

I understand also that the Rule of Law Consortium has already cooperated with European legal institutions in developing rule of law programs in the NIS. I know that we are cooperating with the Centre for International Legal Cooperation in the Netherlands, and that this joint effort has been especially effective, and has borne fruit particularly in the area of legislative drafting

The NIS legal systems with their civil law tradition more closely mirror the West European model. We have to recognize this fact, and that we have much to gain by expanding cooperation with our European colleagues. We look forward to doing that. That generally is a brief overview of some of today's challenges and opportunities. I also want to emphasize the both President Clinton and Vice President Gore have a profound understanding of this issue, and are both specifically concerned about the need to work in the area of legal reform, and to help fight crime in the NIS •••

LAW REFORM AND THE U S AGENCY FOR INTERNATIONAL DEVELOPMENT'S STRATEGIC OPTIONS

*by Thomas A Dine
former Assistant Administrator
U S Agency for International Development
Washington, D C*

This conference is an opportunity to begin questioning where we have been, what we have actually accomplished, and what are the new refinements necessary in our Rule of Law Program. We have made good beginnings as Europeans and as Americans. Together we help our reformer friends. I am thinking most specifically of Russia, but you can think of the other countries where there are reformers in leadership positions. We have helped the reformers to disassemble, to dismantle the old institutions. I think the old attitudes are holding on in

too many places, but those old attitudes need to be overcome and dismantled as well. We have helped to frame the context of new laws, new codes, and new regulations. We have helped to strengthen legal institutions, but not enough. We have helped to strengthen civil society, and we know, all of us, that that is an area that will require much more work for the next five decades.

Besides making good beginnings, we have also learned. One thing we have learned and do not know enough about, either as lawyers or non-lawyers, is that much more work must be done in a civil code system than in a common law system. For Americans, that is particularly hard to swallow. We have also spent a lot of money. We have achievements that all of us can claim. We and you together have had an impact. I think we have to document that impact in a much more scientific or sophisticated way.

Now the question comes to my mind, "Has the money been well spent?" Probably yes in a lot of areas, but not well enough. Too much probably has been spent on common law. Too much has been spent on legal drafting. Not enough has been spent with our European allies. Not enough has been spent on criminal justice reform, on human rights, and on organized crime. All of these areas require more attention if we are to help rectify the situation, and underpin the political and economic transformation that is historically taking place before our very eyes.

Finally, I do not think we have spent enough focus and enough time on helping ministries of justice let go of power, of decentralizing. In my view of the next ten years, I do not want to see ministries of justice strengthened. I do not want to see replicas of the past maintained. I say that as someone who is experienced in seeing the old guard hold on in ministries of health and ministries of agriculture throughout the former Soviet Union, and I think in the ministries of justice as well. So I throw out these ideas as an attempt to stimulate this conference, stimulate you, the participants, in what we are trying to do.

**Questions for the Next Five Years
of NIS Law Reform**

Are there obstacles that we do not recognize, and therefore we should be paying attention to? I think this conference perhaps could help begin to present an itemized list of such obstacles. Are we, the American government side, maybe even the European governmental side -- certainly those we have asked to implement policy -- are we all adequately staffed? Do we need more money to do what needs to be done? Frankly, democratic governance activities have been a stepchild in terms of just the volume of money allocated for this part of our work in the whole transformation area.

How are we going to know what our European allies are doing and what we could be doing with them and vice versa that will produce a synergy? The only way we will learn, it seems to me, is to try. I think in some countries we have worked together, and in other countries we have totally avoided each other. We should end that era, and we should begin the era of putting proceeds together and putting our minds together, and working more closely together with the reformers in the variety of countries where we work.

Has our work helped countries, particularly in Central Europe, because I know it is going on there, but perhaps in the former Soviet Union as well, has our work helped governments prepare themselves for membership in the European Union (EU)? Right now four countries have applied, have presented their white papers to the European Union's leadership: Poland, Hungary, Slovakia and the Czech Republic. These white papers include thousands of pages of how they uphold the rule of law or perhaps do not uphold the rule of law. We need to be working toward that goal, it seems to me, because the EU goal in itself is the greatest incentive of all that any of us have been able to create.

Does our work on human rights adequately reflect the European Convention on Human Rights? I do not think we have a good answer right now. Have we balanced our efforts with non-governmental organizations and vital governmental institutions? At this time of shrinking resources and of rising

political questions and internal scrutiny, it is timely to ask as many questions as possible about our work and whether we are worthy of the task we have assigned ourselves •••

I hope we can find some answers to these questions, or at least begin to find an outline. I know that if we can hold the political support in this country, that is the legislative and executive branches, for the work we are doing, over the next five years I think we will be able to show much more change and much more impact than we have in the first five years.

**LEGAL REFORM AND
THE DEMOCRATIC PROCESS**

**AMERICAN AND EUROPEAN EXPERIENCE
IN NIS LAW REFORM**

*by Peter B. Maggs
Corman Professor of Law
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Rule of Law Consortium Consultant*

It is not always clear that you need exactly the same solution in America, in Europe, and in Russia. We should look at the background of each country. Working with the Dutch was a very important lesson for me and other Americans in humility. When we get into the technical aspects of civil code drafting, and the practical aspects of civil code implementation, there is just no one in the United States who is the equivalent of, for instance, Justice Snyders of the Dutch Supreme Court with whom we had the privilege of working closely in many aspects of our collaboration with the Centre for International Legal Cooperation of the Netherlands.

Long-Standing Legal Traditions in the NIS
Americans need to learn a lot of humility for a couple of reasons. One, we are dealing with Europeans who know certain subjects much better than we ever will. Two, when we deal with our counterparts in Russia, Ukraine, or other NIS countries, we are often dealing with highly cultured, highly educated people. We are not going into some Third World country where there has never been a tradition of legal education. There

is a tradition of legal education in the NIS going back maybe not as far as in Western Europe, but certainly going back a century or a century and a half in many of these countries

We should also add that Americans are sometimes somewhat provincial. I think sometimes we realize this -- that maybe there is no point in financing big efforts to teach people over there how we conduct real estate transactions using medieval English legal institutions. Though from time to time I have seen such efforts undertaken, maybe they show our sophistication in looking at the historical rather than the immediately practical aspects of legal reform. We should avoid provincialism.

We need some knowledge of the history of the region in which we work. One American prosecutor said, "You know the trouble with the Russians is they've adopted this European idea of defining crimes precisely in their criminal code. We've got a much better way in the United States. We have these real vague things like 'insider trading' and 'RICO', and we can get almost anybody that we know is a bad guy, we can think up something to get them for, we should teach the Russians how to do this." Some others present suggested the Russians had a recent experience with that sort of justice, and maybe the European model of a criminal code was more appropriate than the American model.

Possible American Solutions to NIS Law Reform
While we should realize that we are provincials, we should not get too far down on the scale of humility. We have some inventions that have spread, first to Europe, and now further, such as anti-trust legislation. Maybe we do know something such as the use of economic analysis to improve and analyze legal institutions. Perhaps we should concentrate our efforts in areas where we have much to offer.

Then, there are certain areas where I think there is a difference. In many aspects of its legal institutions, the U.S. places more emphasis on the private and less on the public. We should at least examine, when trying to help countries which have suffered from a gross excess of emphasis on the public role of

government, those institutions which have tended to be private in the United States, but public in Europe. Several come to mind:

- Most American law schools are private and thereby have considerable freedom to experiment in curriculum. The setting of curriculum standards is private by the American Bar Association, not by the government.
- Publication of official legal documents has tended to be largely private in the United States, and has given us the best or the most expensive set of legal publications in the world.
- The work with land records has been largely privatized by land title and title insurance companies in the United States, and I think we should at least look at this experience of privatization before jumping to the conclusion that it should be public.

Before essentially supporting expansion of the public sector in East Central Europe and the Newly Independent States, I think we should at least take a look at the U.S. tradition of shrinking the public sector in these areas and how it can be aided. I particularly think there will be an important role here for American assistance, because to the extent that European and World Bank money tends to be channeled to governments, the governments are, given human nature or the nature of politics, less likely to use that money to dismantle themselves. I would hope that we in the United States could look for channels where money can be directed to non-governmental organizations, or to help finance privatization of governmental organizations.

**LEGAL REFORM AND MARKET DEVELOPMENT
IN THE NIS***by Keith A Rosten**Senior Legal Reform Specialist**Rule of Law Consortium**Washington, D C*

Whether we are trying to achieve the goal of democracy or a market economy, there are three anchors in democratic development: legal reform, economic reform, and political reform. Legal reform stands as the gatekeeper. It is the one issue that ties the strategy for reform together. Without law reform there is no engine to drive a market economy. Legal reform should keep pace with political and economic development. It is not the speed at which the economic reform goes forward, but it is the pace at which the legal reforms move forward in tandem with political and economic development that will determine the success of the transition to a market economy and a rule of law society.

We should keep in mind that the goals for privatization and economic restructuring and those for democratization and the rule of law are mutually supportive, not mutually exclusive. Democracy and a market economy gain strength from each other, and when we design our programs, we try to ensure that both goals are achieved. We spend too little time talking about the interrelationship between legal reform, politics and economic structure.

When implementing legal reform programs, we have tried to bring into play the wealth of knowledge that we have in the U S, and leverage off of those areas in which we have a comparative advantage. Our legal system endures because it reflects the society in which we operate. Similarly, the legal reforms that we have assisted to promote democratization in the former Soviet Union, as well as a market economy, depend on the peculiarities, the culture and the historical background of each of the countries in which we work. The programs that we have designed try to address the major issues which are of most interest to our local counterparts. We view things from an American standpoint, or an European

standpoint. The people who actually have to interpret the issues will be those in the host countries.

Major Issues of NIS Law Reform

There are three major issues that I think we need to be concerned about. The first issue is the drafting and enactment of legislation. I think that this is the only issue where the approaches to democracy and privatization may diverge. There certainly is a major difference in views as to whether or not we are more interested in the process by which legislation is enacted, or in the integrity, the substance of the legislation. I think when we design programs, it should be very clear what the goals of those programs are. Are we interested in the process, or are we interested in the ultimate outcomes?

The next issue is the interpretation and application of legislation. We are very concerned about how cases are decided from Vladivostok to Moscow. We want to give Russian and Ukrainian judges as well as Kazakstani and Kyrgyzstani judges, the tools with which to interpret cases so that they will come to similar conclusions. This promotes both a market economy as well as democratization, and, in the process, the courts are viewed as independent arbiters of justice.

Finally, we are interested in the implementation of legislation. If there is legislation that is not subject to judicial interpretation, there will not be a democratic society. No one will go to the courts, and by the same token, if those decisions of the judges are not adhered to, then the process will break down. We need to focus our attention on how judicial decisions will be implemented. From the outset of our programs, we have always included a component on the execution of judicial decisions, because the Russian, Ukrainian, Kazakstani, and Kyrgyzstani judges were keenly interested in that issue. The American judges assisting us were very surprised that implementation would be of any interest at all to a judge in the NIS. It turned out that this was probably the issue that they could learn most about, *i.e.*, how judicial decisions are implemented in this country.

After developing an overall strategy for the major components of legal reform, we should determine on which institutions the programs will be targeted. There are various interested core institutions, including the media, the private bar, the judiciary, and the legislative and executive branches. Which of these institutions are we going to work with in drafting and enacting legislation? We may be working with the Russian Private Law Center in terms of drafting, but the Private Law Center will not be involved in actually enacting the legislation. We should not forget other relevant institutions. In Kazakstan, there are probably six or seven different institutions that are involved with drafting new legislation.

There are new institutions in each of these countries involved in drafting legislation, but just because one institution is primarily responsible does not mean that we should neglect the others. Similarly in the interpretation and implementation of legislation, there will be many institutions that are involved as policymakers and implementers, and we should determine which institutions we will work with on certain issues.

Program Design for NIS Law Reform

The last issue I want to address is designing programs, and particularly what I have called the three pyramid approach to program design. The first pyramid is inverted so that over time the amount of dollars spent per person or trainee declines. The second pyramid measures the impact as the number of people trained over time increases. The last pyramid is an inverted pyramid and emphasizes an exit strategy so that the foreign component of any program declines over time.

A Phase One Personnel

To follow these principles, we have designed a three phase approach to programs. First, we identify small working groups. We identify the people that we may want to bring to the United States for training in pedagogical methodology. We may discuss with them core commercial law subjects. We introduce them to their counterparts in the United States, either

judges or attorneys. These are the NIS people in whom we will invest our money, for better or worse. These are the people who will run the programs when they return. They will provide the intellectual muscle to promote these programs. The time and energy invested in choosing this cadre of people is probably the most critical phase of the program. The impact at this phase is not large. The number of people reached is confined to a small group of people.

B Phase Two Impact

The second phase of the program involves bringing to the host countries Americans and West Europeans to provide discipline and support to local structures. These structures are local so we do not want to overwhelm the program with interpretations or translations of U.S. laws and regulations, but we can provide a backdrop or a setting for the local presentations. If the local component of presenters is approximately seventy percent, complemented by thirty percent of Western lecturers, judges or attorneys, we do not overwhelm the host country participants, and the ability of the audience to absorb the material is enhanced considerably.

By the time the program reaches Phase Two, the number of people affected is much higher than in Phase One. After our first program in Kazakstan, word got out about the effectiveness of the program, and for the second program we had people flying in from throughout the country on their own money to attend the seminar on commercial law for attorneys. As many as eighty people came to the seminar, almost half of them from a thousand to fifteen hundred miles away, because they had heard about the seminar. Their appetite for legal information was very great and the seminar filled a need. We showed that, with our local counterparts, we could run a program that was viable and sustainable and that could provide important information.

Even though there may be only fifty to seventy people at these seminars, the materials produced for the seminar will be copied and distributed in their home regions. In Russia, we developed teaching materials for commercial court judges, and then

ensured that those teaching materials reached every single commercial court judge, the nearly eighteen hundred judges in the system

C Phase Three Exit Strategy

The final phase is what we have called concentrated seminars, where we rely primarily on local professionals to teach local law to local audiences. The ability of Americans to keep abreast of legal developments in our own country is difficult enough, keeping abreast of legal developments in places like Kazakstan, Kyrgyzstan, Moscow, and Ukraine, is very limited. These seminars can be organized very quickly. In Kyrgyzstan, Brian Kemple, who heads the Rule of Law Consortium office, saw an opportunity to offer a substantial amount of training on Part I of the Civil Code in Kyrgyzstan. Within sixty days, over one-third of all the Kyrgyzstan judges attended a seminar on the Civil Code.

Finally, we need to have an exit strategy. In the first phase of the program, there will be a large foreign component. By the second phase there will be about a twenty to forty percent foreign component, but by the end of the program when concentrated seminars are held, they will run on the abilities of the locals to help themselves. Then we exit, that's the end of the program. A good development project is designed to ensure that by the end of the program we are no longer needed.

COMMERCIAL/CIVIL LAW AND COMMON/CRIMINAL LAW LINKAGES

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I would like to make a couple of comments about the commercial law/civil law, and common law/criminal law intersections. I am not sure these are all on the same plane, except to say that in our experience the common law/civil law distinction is important, but overblown. The intellectual problems that we are dealing with in the countries in which we are

working are in many respects more fundamental, more basic than the difference between those two legal traditions. The ideas about the intersection of the law and economic activity require understanding by a group of people in these countries, and, frankly, whether it is a civil law or a common law tradition, the ideas that need communicating are much more basic. There has been some talk already about the problem of corruption and the institutional failures that lead to it, but I think that corruption is in some respect a measure of a variety of rule of law failures, which also suggest a variety of approaches to solving problems.

Characteristics of the Transition to the Rule of Law

I would like to turn to some lessons learned. There are lessons about the transition itself that have been the subject of many conferences and lots of discussion. There are lessons about assistance and how we contribute to the transition underway, and then there are lessons about interacting with other donors and with our own domestic political processes that are probably also worth talking about. I want to focus on lessons about dealing with how we deliver the assistance. That is a fairly narrow topic, but it is one that I think is at the heart of our challenge. In doing so, let me mention a couple of characteristics of the transition itself that I think affect how we do our jobs.

One is that the preexisting understandings and expectations of our counterparts in these countries cannot be underestimated, and that the old political structures may have disappeared, but the old relationships and the old ways of doing things have not. This makes itself known in both large and small fashions, but the new nomenclature of the government or of the governmental process does not create new transactions.

The second characteristic is that, in the same way that economic rights and processes have not been well developed post-change, political processes, the mechanisms of debate, are also not well developed -- so the policy process itself is confused. The allocation of authority between the center and the

regions, within the executive branch, and between the branches is an incredible impediment to clear policymaking. It leads to policy entrepreneurs in confusion as to who is in charge.

Lessons of the Legal Reform Process in the NIS

There are three lessons that I think interact dramatically with each other and you may conclude at the end they are all the same lesson. One is the observation that the rule of law consists of a variety of institutions working together: the court, the laws, implementation agencies, the understanding of the bar and the broader public. This, to my mind, leads us pretty quickly to the conclusion that there is no single silver bullet, there is no single measure, there is no single USAID or World Bank or other program or project that will establish the rule of law.

Given the lack of resources that we all have in comparison to the demand, leads me to suggest that the main thing we can do is to build the intellectual capacity or what I call "idea leaders." This suggests to me that we ought to be dealing with elites, not trying to educate broad millions of people. I say elites in the plural, not an elite, not just the sitting government, but the "idea elite," people who are going to multiply an understanding of the importance and the processes of the rule of law.

The example I use of this is a project outside the formal NIS, the project we have in Mongolia, where, rather than work on an individual law, for five years we have been running workshops for "idea elites," officials, judges, the press, and leaders of political parties and think tanks. Both the current prime minister and the former prime minister have done their tour in our boot camp in the basement of a building in College Park, Maryland: not learning about how to draft a company law, not learning how to draft a constitution, but instead, building a framework for thinking about how these institutions interact and how political processes work during the transition.

The scale of this challenge cannot be underestimated. We have done some work with the drafters of regional constitutions in Russia. The size of the

challenge they have, and we who would help them have, is staggering. This is a group of people with very important responsibilities in terms of establishing the allocation of power between the regions and the center. Thinking about the allocation of authority within the regions includes the questions: what is the role of the courts, and should the regional courts have authority independent of the central government? These are some very important issues that affect commercial relationships and transactions. Yet, this group of people has essentially no economic background, no experience or exposure to ideas about federalism, and as far as I can tell, very little attention has been given to that set of problems. If we focus on ideas and concepts with a key group of people, the results will be there, but it is difficult to design them in advance.

This leads me to my second lesson, which is that organizing ourselves into boxes -- a democracy box, a commercial law box, a privatization box -- has very real costs, not just in terms of bureaucratic coordination and competition, but also in terms of objectives as well. If we focus only on commercial law reform, then we will ignore a whole set of governance institutions that affect the sustainability of those reforms in very important ways.

We have a project which involves working on commercial law in Kazakhstan. We need to be realistic about how successful that will be, absent political reforms that give people confidence that the commercial rules in effect today will be in effect tomorrow. I think there is a tendency when we put ourselves in boxes to lose sight of the larger context or to inflate expectations based on our activity within one of those boxes. I do not have any particular suggestions on how to overcome the box problem other than to say that in Central Asia, the USAID Mission has been very effective at having contractors and other donors work together in a way that is unlike a lot of other places, despite the fact of very real domestic political complications that affect this effort.

Finally, the third lesson I want to mention very quickly is the importance of avoiding becoming

monopolized by counterparts. If the success of the rule of law and market democracies is built on competition among branches and levels of government, then we ought not to let one ministry, or one group, be our sole counterpart. People lose their jobs, ministries lose their authority, and the ministries themselves have narrow perspectives or may only have partial implementation responsibility. A more fundamental reason to avoid being co-opted is that it leads us directly into the old political process, an undemocratic political process that will avoid focusing on implementation, and involving people who are going to be the consumers of the ultimate policy.

There is a whole series of other lessons that also deserve further attention such as the interaction of commercial law reforms with the broader governance reforms, and the trade-offs of working with various parts of the private sector. Are we working with established special interests, or are we in fact developing a new civil society? We need to figure out who are the constituencies, is our constituency privatized firms, many of whom are shells of old misinvested assets, or do we focus on a constituency that is new, *i.e.*, small firms? Finally, there are a series of questions about whether to sequence our assistance, or opportunistically take our issues where we find them.

To conclude, we are not going to hit home runs with any of our work in this area, instead we should focus on our many, many small successes as markers of progress.

EUROPEAN LEGAL CULTURE AND NIS LEGAL DEVELOPMENT

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One might ask if there is such a thing as a European legal culture. As oftentimes with cultures, it may be easier to answer that question from outside than from within. So perhaps it is easier from the American

point of view to identify something called the "European legal culture." In general, most of the European countries can be considered civil law countries, however, there are quite a few differences between European countries or groups of countries. I would in the end consider the Russian legal system to be somewhat related to European legal culture, but certainly not part of what we consider continental European law.

Russian Legal History and Contemporary Law Reform

The question is how does legal reform in the NIS or the development of the legal systems in the NIS fit into this picture? If you look at the countries of Central and Eastern Europe, it is much more obvious from our point of view to say that yes, they are part of the continental European structures and the continental European legal family. But in the NIS, or in Russia to be more specific, the situation is a little different. Russian law has always been an independent body of law, not only during the period after the Bolshevik Revolution, but even before. There have been centuries of influence with Russian scholars going to West Europe and learning Western European legal concepts. Russian law, however, has always remained as a separate body of law.

Since the first codifications of Russian law, which were finalized in 1832, there have been attempts to include parts of West European law into the Russian code. Tsar Nicholas I at the time resisted the tendency. The specific suggestion had been to adopt the French Civil Code, or a translation of the French Civil Code, perhaps as the civil law of the Russian Empire. But the Tsar did not want that and instead pursued a different route which was to view codification of law as actually more a complex collection of laws and provisions which were developed over time in the Russian Empire.

In 1922, when the first socialist civil code was developed in Russia, the drafters at that time drew on German and Swiss models. The code developed at that time still very much relied on Russian civil law traditions. Therefore, many of the elements that we find not only in the 1922 Soviet Russian Civil Code,

but also in the 1964 RSFSR Civil Code, the newer socialist civil code, can be traced back to the history of Russia

Today the new Russian Civil Code is the primary example of Russia being considered a civil law country. One can again see that there are certain influences from Western concepts. We all had worked in some way on the Russian Civil Code, and of course we all recognize certain elements that are similar to our own law. But on the other hand, one also has to realize that a lot of the structure and elements of the contemporary Russian Civil Code again have various similarities with the old Russian civil codes. This makes sense, since not everything in the old Russian civil law was bad. Of course they got rid of many of the socialist elements. They introduced the principle of freedom of contract and basically allowed for private ownership, even though the chapter on ownership of land has not yet been adopted. However, even though they eliminated many of the socialist elements, you can still see a clear line from Russian legal traditions to today's Civil Code.

Ukrainian Law Reform and European Legal Standards

If you look at Ukraine, the situation is a bit different. In Ukraine, or at least the part of Ukraine up to the Dnieper River that was for a long time under Polish and Lithuanian influence, the legal system that developed at that time was very much influenced by German law which, via Poland, had come all the way to Kyiv.

Work on a Ukrainian civil code has already confronted us with more of the hard facts of being part of the European legal family. Specifically when we talked about company law and when we discussed intellectual property law, the Ukrainian drafters were already looking at the appropriate directives of the European Union (EU) on company law and on certain aspects of intellectual property law, because they wanted their own law to be compatible with EU regulations. If you want to know whether one can say that Russia or Ukraine are part of the European legal culture, the question is not only about the fact

that they have a civil code or some kind of a codification of civil law. It will also be important to observe what function the civil code will have in real life.

In coming to the more difficult factors of the Council of Europe (CE) parameters and the European Union parameters, I think the fact that Ukraine has become a member of the Council of Europe is probably the major issue, the major determinant in the further development of Ukrainian law. Ukraine applied to become a member of the Council of Europe in 1992, and was accepted in November 1994. Ukraine has signed a number of conventions of the Council of Europe.

This agenda suggests a completely new body of law that Ukraine will have to develop or where they will have to adjust existing laws, in order to live up to European standards. This movement toward legal reform has now become a clear element of Ukrainian politics. In this way, Ukraine will again be returning to Europe and becoming part of the European legal culture.

A totally different question then, will be that of Ukraine's relationship to the European Union. In 1994, Ukraine, as well as Russia, signed a so-called "Partnership and Cooperation Agreement" with the European Union. They also signed an interim agreement which only deals with those areas of law where the European Union itself can enter into international treaties without the member states being parties to the treaties. Therefore, it is a little early to say what effect these Partnership and Cooperation Agreements will have on further legal development in Ukraine and Russia. But if one reads the Partnership and Cooperation Agreement, it will be seen that reference is made to the need for adapting the law of Ukraine, as well as the law of Russia, to the legal standards of the European Union in order to help those countries in their economic relationships with the European Union.

Therefore, I believe that even if Ukraine does not have a real chance of becoming a member of the European Union, it is quite likely that at a certain

point in the next several years, these Partnership and Cooperation Agreements and all the EU regulations that go along with them, will also have an important impact on legal reform in the NIS

Multilateral Cooperation in NIS Law Reform

Turning to the topic of this conference, the question arises, what can the United States do? If one looks at the large body of laws that the Conventions of the Council of Europe produce and the even larger body of directives of the European Union, it is obvious that all those NIS countries which share a European perspective of some kind will always be looking at the legal standards set by the Council of Europe and the European Union. However, legal reform in those countries of course cannot be based only on changing the laws, because that is a fairly easy task. The much more enormous task is to ensure that these reforms are really implemented.

I think that implementation of legal reforms is an area where we still have a lot of opportunities for international cooperation. Europe and America need to reach out to all the courts, judges, and notaries, and basically to all people in the NIS, in order to help them make that change in their perspective about the legal system. Such a shift in perspective will be made not only by changing laws, but also by making changes in the legal awareness of the people. I think in this area we have a lot of possibilities for multilateral cooperation.

DUTCH-AMERICAN COLLABORATION IN NIS LAW REFORM

by Jan van Olden

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One of the aims of this conference is to explore ways in which we can improve our efforts to contribute to the process of legal reform in the countries of the former Soviet Union, and, to be more precise, to find ways to make it a joint effort.

Dutch - U S Cooperation on NIS Civil Law Reform

Our first programs with the NIS countries actually focused entirely on civil code development in Russia, Belarus, Kazakstan, and Ukraine. These four programs then developed into a kind of joint effort with the Commonwealth of Independent States as a whole working on a model civil code and later on model criminal and criminal procedural codes, which could be used by each of the member states individually for their national legislation. That program was carried out with the support of and very close cooperation with the Rule of Law Consortium.

It was not by accident that the focus was on the civil code. One of the reasons is of course that the Dutch had a comparative advantage because the Netherlands adopted a new Civil Code in 1992 after forty years of hard work. I think no country in the world can ever afford any longer to make such an effort, but it provides a position from which others can profit and benefit from the work and the research which underlay the outcome.

I think the Netherlands and Quebec are the only countries which adopted new civil codes after World War II. That fact in particular made the Dutch a very effective partner for the NIS countries who are seeking partners from whom they can get the state of the art. Apparently we seem to be such an attractive partner, but there is also another deeper reason. It is that the civil code can be considered the centerpiece of legislation, as well as the centerpiece of the process of reforming the legal system.

The basic premise of a civil code is that it is a complete and all encompassing legal system which regulates all forms of economic and civil activity. But in the context of the transition in these countries of the NIS, economic activities are especially relevant and find their basis in the civil code. Codes like the Russian or the Dutch one are based on what is called the "Pandect System" which is a kind of pyramidal structure in which the basic provisions for these civil relations are at the top, and the more specific regulations are in the lower parts or the later chapters of the civil code. This structure makes the

civil code less accessible to the non-specialist. The thrust is to avoid uncertainty and unpredictability, which are contrary to what we are trying to achieve.

I fully support the idea that legal transplants are something with which you have to be very careful. That is a caveat or sort of warning, not only for countries outside the European continent, but also inside the European context. Transplants from Dutch legislation, even from the civil code, to the Russian legislation do not work. We do not believe in it. It is for this reason also that we have to consider the legal context in which the Russian Civil Code project was developing. The suggestion that part of that Russian code was just copied from the Dutch code is far from reality. The NIS countries want to write and will write their own legal histories.

Another aspect of our work is that we do not strive for a perfect outcome. The time pressure under which the draft is produced is part of reality and to strive for perfection might even be counterproductive. The Royal Dutch Commissioner, Justice Snyders, used to quote one of the drafters of the French Civil Code who had introduced the draft code to the National Assembly in Paris almost 200 years ago, and had to admit, as he presented the draft, that even a completely new civil code, "necessarily leaves a thousand unexpected questions unanswered."

Comprehensive Law Reform in the NIS

We now come logically to the second stage of this work. I think this stage involves what I might call the "comprehensive nature of legal reform." You start with something and then come to another phase which you cannot simply leave and neglect, because that will do harm to your work. When you make rules, the question automatically arises, "Who is going to apply the rules?" How do you prepare the actors -- the judges, the lawyers and the procurators and the citizens -- to apply these rules? Also, I think that new forms of economic activity as a result of the economic reforms in these countries, lead to new types of crime with which you have to cope. Criminal law has to be reformed. Procurators will have to be retrained. New books have to be

produced. The result is a whole chain of interrelated issues which you often have to work on at the same time, not in a logical order, chronologically or in step-by-step approaches, but simultaneously.

Legal reform includes more than just civil and commercial law. Looking back over the four years that we have been working in this field, we can see that in addition to the reform of the civil and commercial law, the reform of the criminal justice system and human rights now receive more and more attention. Why is that so? I think that the initial enthusiasm about privatization and the prospect of developing a market economy has been replaced by a concern about capitalism and exploitation in these countries, and the contrasts and conflicts between emerging and neglected classes. Increasing crime rates, and fast growing organized crime activities call out for a new approach. If we do nothing about these new phenomena and developments, they will destroy much of our results, if not the aspirations which we had at the beginning.

Against this background we have also been involved in some joint initiatives with support of the Rule of Law Consortium on developing this project of criminal law reform in Russia. We are also working together on a project which is based on the comprehensive model which I previously mentioned. Actually, we undertook this with the expectation that the U.S. government would follow, and we certainly maintain the hope that such an initiative will occur in a constructive and timely fashion.

Future European - American Collaboration

I would like to come back to the point where I began, *i.e.*, how to make legal reform a joint effort. We, Europeans and Americans, have worked in parallel tracks, have cooperated infrequently, and have even competed with each other, but this now has changed. I think the experience we have had with the Rule of Law Consortium, and this conference itself, indicates that there is a willingness to share our experiences, not only our past experiences, but also to look ahead and see what we are willing to contribute and where we are willing to coordinate with each other in the future.

I agree that in the area of legislation, the countries of the NIS will look to European Union (EU) legislation and EU regulations. That is their standard, that is the model. However, when one looks at EU legislation, there is the factor that the European community is bigger than just a continent and that common law influences are very clearly visible there as well. Some of the EU regulations also bear the evidence of that influence. In the EU, there is also a definite harmonizing effect between continental and common law systems.

In certain aspects the Europeans tend to take things for granted because in all the European countries things are organized that way. It is sometimes surprising for us to hear Americans questioning that, but that is the point where creative work begins when you are astonished by comments and begin to rethink what you have taken for granted. I think that the coordinated and joint efforts when Europeans and American question each other, including frequently provocative questions, represent a very good start and opportunity for us to cooperate.

NEXT STEPS AND HARD CHOICES IN NIS LAW REFORM

VARIABLES OF LEGAL TRANSFORMATION IN THE NEWLY INDEPENDENT STATES

by Robert Sharlet

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To begin, let me quote the two leadoff speakers at this conference. As Ambassador Morningstar commented, we in the West "are not going to make *the* difference, but I think we can make *some* difference" in NIS law reform, and as Tom Dine pointed out, we have, these past several years had an impact and the time is at hand, "to document our impact in a more systematic way." I have therefore taken as my theme the questions, "Where have we been, and where are we going?"

First, where have we been? Let me lay out three points. Obviously the breakup of the Soviet Union in 1991 is our first point, the breakup of a highly centralized, top-heavy, single-party dominant system. What did this mean? It meant three things: systemic breakdown, the emergence of soft states, and lastly, missing or marooned legal institutions. Systemic breakdown meant that absent the Communist Party, the governmental system came apart. The process had already started during the late Perestroika era under Gorbachev when the economy was collapsing and the political system was in disarray. The process of political and socio-economic breakdown accelerated after 1991. The result has been the emergence of twelve very soft states, to use Gunnar Myrdal's concept for states in which institutions are very weak, to wit, the extractive, regulative, administrative, and adjudicative powers are deficient.

Finally on this first point, we have witnessed a situation of missing or marooned legal institutions in various countries of the NIS. Moscow in the USSR was the center of the Soviet legal system, which included all legislative drafting, judicial training, and for the most part, in-service procuratorial training. Russia basically retained all these institutions in Moscow, while most of the other states, with the partial exception of Ukraine, had neither facilities for upgrading judges, for upgrading procurators, or very much in the way of skilled expertise for drafting the twenty or more new codes required as well as the numerous statutes necessary for legal reform.

The second point in retracing the recent past was that the legal systems of the post-Soviet successor states went into a kind of centrifugal motion. The collapse of the Communist Party particularly affected the legal systems of the NIS. The Party had tightly controlled the Soviet legal system by means of both Party and professional discipline. Nearly all the procurators and judges were Party members as well as jurists, and were thus subject to the two lines of discipline. With the Party as the glue that kept the legal system together gone, the post-Soviet legal systems flew apart with legal institutional elites each trying to stake out increased jurisdictional claims, usually at the expense of other elites.

Initially in the first phase of political reform in these new states, the Procuracy suffered a decline. The Procuracy had been king of the Soviet courtroom as well as watchdog of the administrative system. It came under siege from political and legal reformers in a number of the new states. The Justice Ministry tended to increase its stature, especially given the enormous new legislative drafting tasks at hand and the increasing autonomy of the Government or the cabinet. The judiciary, crucial to the reform process, ended up in the middle, trying to gain more freedom of action, if not autonomy, but still caught between the procurator in the courtroom, to whom Soviet judges traditionally showed deference, and the Ministry of Justice above, reluctant to yield its customary control over judicial budgets, dockets and assignments.

The final point of the recent past which stands as background for our work and our future prognostications, is, and I think we must remind ourselves of this when we are critical of the pace of change in the NIS, that the transition is still very young in all of these countries. Above all, we should remember that the transition is a process, not a series of discrete events. We, in turn, and our NIS partners know little about this process because it is an unprecedented process of simultaneous political and economic reform. There is no theoretical literature on this two-fold transition.

A characteristic of the transition in all these countries has been the enormous velocity of change. For instance, the rush to privatize, especially in Russia, quickly outstripped the capacity of the slowly reforming legal system to regulate the new private economy. In response, we in the Western assistance community have not always in the past coordinated our law reform efforts between governments or even within governments. Collectively, however, the impact of our efforts in the NIS has been positive, but we can do better and we will. However, we can only assist our friends in the NIS. Ultimately the task of building modern legal systems is theirs.

Politics as the Critical Variable

Let me turn to what I believe is the critical variable in the ongoing legal transformation process in which we are participating. Neither economic reform nor legal reform in any of these countries is an autonomous self-contained process primarily amenable to technical manipulation. On the contrary, both economic and legal reforms are driven first and foremost by politics. The primacy of politics must not be forgotten. As the World Bank recently recognized for NIS economic reforms, as quoted in the *Economist* "It's the polity, stupid."

We in the international rule of law community need to remember that no matter how technically skilled we may be, political direction within the NIS is determinative for legal reform. Politics or political will, therefore, is the essential impetus for legal transformation.

Another aspect of the primacy of politics is the role of individuals in this process. Personal relationships and networks are increasingly important in the West-East assistance process. In effect, a number of the people with whom we work, the prominent ones, are figuratively carrying their institutions on their backs or in their briefcases. These people are the agents of change in their own legal institutions, as well as in the legal process as a whole in their countries. Why are they carrying these institutions on their backs or in their briefcases? Because these institutions in the new environment are still very weakly rooted. These people are indispensable to Western efforts to be of assistance. They are the key players.

The Next Tasks For Sustainable Legal Transformation

Now where are we going? What are the tasks for the NIS political and legal elites? What are their priorities and strategic choices in legal reform, and in reform in general? Foremost is the continuing task of state-building. Not much has been heard at this conference about the state. The very phrase "the state" has taken on a pejorative connotation since the end of the Soviet Union because of the bloated, dominant Soviet state. However, economic and legal reforms are interdependent and hence discussion has

turned to rebuilding the extractive, regulative, administrative, and adjudicative capacities of the state in the NIS. Sure, the public sector has to shrink, and it is shrinking, but not to the point of the "withering away" of the state. There has to be a viable state if economic and legal reform are to thrive.

What are the tasks for West-East collaboration in support of sustainable legal reform in the NIS? Among these tasks we and our NIS partners must try to manage better is reception of legal ideas on the NIS end, and the engineering of legal transplants from our end. On one hand, the NIS elites need to temper the notion that law alone will be a panacea for the problems of transition, while on the other hand, the West in supplying the legal transplants needs to bear in mind a Russian colleague's caveat, "We cannot merely copy your laws, because we have our own history, traditions, and lawyers."

Another task before the West is the need for better coordination of donors, resources, and efforts. The Rule of Law Consortium pioneered the collaboration with the Centre for International Legal Cooperation in Leiden. One immediate consequence of this productive conference will be better, more efficient, integrated and cost-effective donor cooperation within the U.S. government and the donor community on our side, and between the United States and our European and supra-national partners abroad. As the West constructively engages the successors to our former great adversary, we must work together better.

Seedtime for the Rule of Law in the NIS

To conclude, this is basically seedtime for the Rule of Law in the Newly Independent States. Ultimately, success will be determined by the political will and technical skills of the NIS political and legal elites in cultivating, nurturing and growing these seeds into sustainable perennials. As Jan van Olden put it very eloquently, "The NIS countries will write their own legal histories."

SUSTAINING LEGAL REFORM

CLOSING THOUGHTS

by *Geraldine M. Donnelly*
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We started this conference with Ambassador Morningstar's observation that sustainable legal reform in the former Soviet Union is in our U.S. national interest. It seems to me that we at USAID are oftentimes guilty of thinking entirely too technocratically and too apolitically, and that one of the first things we need to look at, whether it is Kazakhstan or any country that we happen to be working in, is where our U.S. national interests coincide with those of individuals in power in those countries. That is not to say that you decide at that point that you are never going to do anything in countries with less than auspicious conditions. It is to say that you go in with your eyes wide open, and recognize, for instance, that it is going to be a long, hard road to promote democracy per se in certain countries. It may be that the best way to promote democracy in those places is to use the Trojan Horse of commercial law reform, since it is really in people's longer term economic interest to see that happen. In the process, you can point those countries in the direction of judicial independence, transparency, and accountability.

In closing this conference on 'Sustainable Legal Reform in the NIS,' I think it is important that we remember that we are not always providing this money for purely moral reasons. We may in fact, have some mixed motives as a government, but it seems to me the taxpayers from whom the United States, the Dutch, or the Germans raise the money that is going into these programs, have a very clear interest in how their money is spent, and, in our case that the money is spent in the U.S. national interest. One hopes that over the longer term our national interests coincide with our moral concerns. In the long run, I think most of us, at least in the United States, are naive enough to think so.

**AFTERWORD LESSONS APPLIED SINCE
THE 1996 CONFERENCE**
by Keith A Rosten and Robert Sharlet
Co-Editors

Since the conference on "*Sustainable Legal Reform in the NIS*," the Rule of Law Consortium (ROLC) has sought to apply lessons learned from that international gathering. At home, the ROLC has striven to strengthen cooperation within the U S donor community by actively identifying resources within the U S government that could be brought to bear on the challenges facing the emerging Rule of Law societies in the NIS. The ROLC has worked with the U S Department of Justice on developing a training capacity for NIS procurators on economic crime, including tax evasion, financial institution fraud, and money laundering. In addition, the ROLC has cooperated with the Federal Judicial Center and the Administrative Office of the United States Courts on judicial reform in Russia and other countries of the NIS.

Abroad, the ROLC has collaborated with multiple donors during the year since the conference. European partners have included the Institute for Constitutional and Legislative Policy (COLPI) based in Budapest, Hungary and funded by the Soros Foundation, the Council of Europe, the Paris-based Institute of Comparative Research on Institutions and Law, and, on a continuing basis, the Centre for International Legal Cooperation of the Netherlands.

As an example of a program applying the lessons of the 1996 Conference, the ROLC worked with its Dutch colleagues on an activity in the Kyrgyz Republic. This activity was part of the ROLC's ongoing judicial reform program in the country, which is designed in part to create local capacity for organizing and conducting judicial training seminars. With the assistance of the Centre for International Legal Cooperation, the ROLC designed and implemented this judicial training activity for judges in Osh, in the southern part of the Kyrgyz Republic. The teaching faculty for the program included American and Dutch jurists as well as local Kyrgyz

judges and experts who took responsibility for sessions on local commercial law.

In addition, a delegation of Mongolian judges sponsored by the Dutch Embassy in Beijing, China, participated in the Osh seminar. The ROLC and the Dutch Centre for International Legal Cooperation continue to work together to assure that the lessons of the Osh seminar will nurture the cause of judicial reform in the NIS.

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SPECIAL ISSUE ON PRIVATIZATION IN THE NEWLY INDEPENDENT STATES

Editors Robert Sharlet
Keith A Rosten

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THE POLITICS AND LAW OF PRIVATIZATION IN THE NIS AN INTRODUCTION

by Robert Sharlet

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Co-Editor, Special Issue on Privatization in the NIS

It is my sad duty to inform the readers of this Newsletter that David Bronheim, the founding director of the Rule of Law Consortium, died in a road accident late last year while engaged in legal reform work in the Republic of Georgia. Following this Introduction, the editors offer a memorial note on his distinguished career as one of the preeminent architects of Western rule of law assistance to the successor states of the former Soviet Union

This issue is devoted to privatization in the Newly - Independent States (NIS) The process of privatizing state property in the former centrally planned economies is an on-going task of enormous complexity Privatization as public policy flows from antecedent political and legal reforms, becoming both an impetus to and a product of economic reform in the NIS

The purpose of this special issue is to present an array of articles on salient legal and political aspects of privatization in Russia, Ukraine, and several other post-Soviet states Coverage focuses on finding the necessary political consensus to carry out privatization, codifying the new civil and criminal codes to support a market economy, and developing

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the various judicial processes needed to adjudicate disputes arising from the privatization process

In the first article, Peter Maggs refers to the "politics of privatization." While his contribution concentrates primarily on the drafting and codifying of new civil codes and subsidiary legislation in Russia, Georgia,

and Armenia, he also points out that the Russian State Duma refused to enact the chapter of the Civil Code on private land ownership because of political resistance to privatization of land. The second article on "The Politics and Law of Privatization in Ukraine," describes even more vividly how political conflict between parliament (continued next page)

IN MEMORIAM -- DAVID BRONHEIM, 1932 - 1997

David Bronheim, the founding director of the Rule of Law Consortium, was a person of unique talents and qualities. After a remarkable tenure with the Alliance for Progress followed later by service as a senior official of the U.S. Agency for International Development (USAID), David could easily have rested on his laurels. Instead, he rose to the greatest challenge of his public life, participating in the effort of providing Western assistance to the successors of our erstwhile great adversary, the former Soviet Union, on the road to developing rule of law societies. As Vice President Gore wrote on the occasion of David's death, David was "an American pioneer."

In 1993, when the ARD/Checchi Joint Venture was selected by USAID to carry out U.S.-assisted law reform throughout most of the former USSR, rule of law reform in the post-Soviet states was still an untested idea. There were no manuals, textbooks or case studies for guidance on how to transform Soviet legal institutions and the law itself, into a democratic legal process supportive of a humane society and market economy. Rising to this challenge, David, through a combination of vision, charisma and his considerable gifts as an intellectual activist, created and built the Rule of Law Consortium into a powerful engine for providing U.S. law reform assistance to the Newly Independent States of the former Soviet Union.

David's vision encompassed the grand sweep of systemic reform, including the myriad connections between parts of the legal system on the one hand,

and the political and economic systems on the other. His charisma attracted a talented group of people, and served him well in negotiations with Russians, Ukrainians, Georgians, Armenians and others. Ideas, projects, and action plans comprising a vast blueprint for democratic legal change in the Newly Independent States flowed from his capacious mind. All of these facets of his professional persona were fused together by David's exceptionally keen sense of how to get things done in the real world.

Getting things done in the realm of rule of law reform in the Newly Independent States meant promoting judicial, procuratorial, and legal educational reforms. These activities brought David into close relationship with U.S., European, and post-Soviet government officials, jurists and academics here and abroad, and, of course, lawyers of the former Soviet system as well as young legal reformers. Forging these disparate groups into working alliances required surgeon-like precision in presiding over complex and delicate negotiations, as well as the marshaling skills of a general leading a multinational force into battle.

David was well endowed with the negotiation and leadership skills which helped the Rule of Law Consortium, its affiliates and associates, and its post-Soviet partners, lay the long term foundations for constructing rule of law systems in the Newly Independent States. At the height of his powers and the top of his form at the time of his death, David Bronheim will be missed but not forgotten by those who had the privilege of working with him.

The Editors

and the president over the pace, scope and direction of privatization of state property in general, has retarded the necessary development of the requisite legal infrastructure. Two other articles address issues of constitutional and commercial adjudication of privatization disputes. Judge Garlicki of the Polish Constitutional Tribunal underscores the fact that the initial decision to privatize state property and the question of what form it will take, rests clearly with the political authorities. Once privatization is undertaken, however, it then becomes the responsibility of the judicial branch to ensure that the process is carried out in compliance with the constitution and the relevant laws of the state. In this connection, Keith Rosten in the following article describes the evolution of the Russian commercial court system, and its vital role "on the front lines of the privatization process."

Finally, John Quigley outlines key provisions of Russia's new Criminal Code designed to afford criminal law protection to the newly privatized economy, while Judge Iulina of the Kyrgyz Supreme Court discusses the problems of judicial practice and enforcement in the case law on new types of economic and white collar crime in an emerging market economy.

**POLITICS AND THE LAW OF
PRIVATIZATION**

**CIVIL LAW REFORM AND PRIVATIZATION IN THE
NEWLY INDEPENDENT STATES**

*by Peter B. Maggs
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The purpose of civil law reform in the Newly Independent States is to provide a legal environment for their post-privatization market economies. The key element of civil law reform has been the preparation of new civil codes. These codes provide comprehensive rules protecting property and contract rights, but are virtually silent on privatization. Rather the codes provide the rules by which private

enterprises (and the remaining state enterprises and institutions), will interact. Unlike privatization legislation, which is meant to govern a temporary process, the new civil legislation, particularly the civil codes, is expected to stay in force well into the twenty-first century.

It was urgent to have new, high quality civil legislation in place by the time the privatization process had created a significant private sector in the economy. Foreign assistance from the United States, the Netherlands, Germany, and other countries, was directed at speeding the process, and improving the product of the civil legislation effort.

This assistance provided basic drafting infrastructure, including computers for word processing, and e-mail for distributing drafts and receiving comments. It underwrote the cost of drafting meetings, and paid for foreign (and in some cases also local) legal consultants. Drafting civil legislation in the smaller post-Soviet states presented a particular problem because of their lack of civil law specialists.

The ARD/Checchi Rule of Law Consortium supported a number of meetings bringing together civil law experts from most of the Newly Independent States for joint drafting efforts. These joint efforts resulted in the preparation of a "Model Civil Code," and also had considerable influence on the development of the second part and the draft third part of the Russian Civil Code. The Model Code and Russian Code in turn have heavily influenced the drafting of civil codes in almost all the Newly Independent States.

Because a civil code alone cannot regulate all the areas of civil law in detail, each code envisions the passage of a dozen or more additional pieces of legislation, for instance a law on joint stock companies, a mortgage law, and a land law. Foreign assistance has also been directed at speeding and improving the preparation of the drafts of these key laws.

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The civil legislation drafting process has reflected the politics of privatization. In Russia, for instance, the State Duma refused to enact the chapter of the code dealing with private land ownership, because of resistance in the Duma to privatization of land. In Armenia, in contrast, the draft code contains detailed provisions both on land ownership and land mortgage, because of the more favorable attitude toward privatization there.

The Russian Code and most of the other codes retain a number of provisions designed to regulate the state sector of the economy that will continue after privatization. Again there is a contrast between the Russian Code, which gives a special position to state enterprises and the Armenian code, which requires them to be organized as ordinary joint stock companies.

The passage of new civil legislation does not automatically provide a good legal environment for privatized enterprises. Equally important is the preparation of the judicial system and the bar to operate in the new environment. To minimize the burden of transition, all of the Newly Independent States except Georgia have chosen to draft legislation using terminology and concepts that had survived from the Soviet period. Foreign assistance has helped in retraining of judges to apply the new law, as well as reorientation of law schools to teach the new law.

The ultimate success of the reform efforts by the Newly Independent States will not be decided by the privatization process, which merely will determine the initial asset-holders, but rather by the civil law reform process, which will determine if the nascent market economy can reach a healthy maturity.

THE POLITICS AND LAW OF PRIVATIZATION IN UKRAINE

*by Mykhailo Kukhar and Olga Lehn, Specialists
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The privatization process in Ukraine began in 1992 and its development has been constantly accompanied by several negative factors. One of these was and remains the absence and slowness of the creation of the appropriate legislative basis for privatization. For example, the parliament has been unable to adopt a law on the State Property Fund (SPF) due to its inability to find common language with the President of Ukraine on the issue of whether the Cabinet of Ministers or the parliament itself should have jurisdiction over the SPF.

Several times since 1995, the SPF leadership has pointed out the need for foreign investors' participation in the privatization of large Ukrainian enterprises. However, the unrestricted sale of stakes in large enterprises still remains in doubt in 1998 because of parliament's categorical opposition to the draft Law on International Tenders as a guideline for privatization of state assets.

Another significant factor having a negative effect on privatization is the absence, to date, of a depository system that could enable the ownership rights of foreign investors to be taken into consideration. The Law on the Depository System adopted by parliament authorizes creation of a depository in the course of 1998. The state budget has allocated funds for this purpose, although specialists estimate that more than six times the amount budgeted is required to set up a depository.

A third factor slowing the privatization process in Ukraine is that since the process began in 1992, the state has consistently failed to privatize the number of facilities earmarked for privatization each year. For example, 450 out of the 1,890 enterprises designated for privatization in 1997 should have been privatized in 1996.

Privatization Certificates

According to information provided by the Ukrainian State Property Fund, about 15 million property privatization certificates have yet to be invested, including the approximately six million that Ukrainian citizens have yet to be issued. Since beginning their operations in Ukraine, investment funds and companies have accumulated 16.1 million privatization certificates, and have invested 12 million certificates in enterprises undergoing privatization.

Nominally, privatization certificates are registered securities not subject to resale. Nonetheless, the existing system of registering the rights of stockholders in privatized enterprises has allowed privatization certificates to be purchased on the black market, and subsequently used to acquire stakes in attractive enterprises. The market value of a property privatization certificate is the equivalent of 12 to 15 U.S. dollars.

The Political Struggle between President and Parliament to Control Privatization

The privatization process has also been slowed by a pitched battle between the president and parliament. On May 21, 1997, the Ukrainian parliament issued a decree suspending approval of privatization plans for state enterprises whose privatization is subject to Cabinet of Ministers' approval. The suspension was to remain in force pending appointment of the chairman of the State Property Fund, and adoption of a state privatization program.

On June 3, parliament adopted a law approving the 1997 State Privatization Program. If parliament had failed to adopt the privatization program before June 6, the version previously approved by a May 6 presidential decree would have gone into effect. The Constitution stipulates that until June 28, 1999, the president has the right to enact decrees regulating economic issues not yet subject to regulation by current laws. Such presidential decrees are to be issued simultaneously with the submission to parliament of the relevant draft laws. Parliament may reject a submitted draft law within 30 days of its submission.

In November 1997, parliament passed a resolution declaring invalid all normative acts adopted by the State Property Fund since March when Volodymyr Lanovyč became its acting chairman. According to the resolution, the president is to submit his candidate for the post of SPF chairman for parliamentary approval. Approval of a new SPF chairman will effectively legitimize the November resolution annulling all the Fund's decisions taken under Acting Chairman Lanovyč. Since President Leonid Kuchma appointed Lanovyč the Acting Chairman of the SPF, parliament has persistently adopted resolutions pronouncing his decisions illegal.

The conflict between the president and parliament has continued into 1998. The president vetoed the Law on the State Property Fund for the second time on January 4, 1998. Among other things, the president opposed the parliament's decision to assume jurisdiction over the SPF. According to the president, the SPF should be under the Cabinet of Ministers' jurisdiction, but accountable to parliament. The president argued that the Constitution stipulates that the Cabinet of Ministers is the only government institution empowered to manage state assets.

Protection of Stockholders' Rights during Privatization

All ordinary registered stocks should have equal values and entitle their holders to equal rights. A stockholder may transfer voting rights to another natural or legal person by proxy.

To protect shareholders' rights, state privatization agencies may not do the following before implementation of a privatization plan:

- Transfer assets included in a joint-stock company's authorized fund if the value of the assets is greater than 10 percent of the company's total assets. In that case, the assets are to be alienated at prices no lower than their market prices,

- Adopt decisions on supplementary issuance of stock,
- Change the nominal value or quantity of shares (except in cases of distribution of stock at the end of an auction),
- Decline to re-register shares in the name of their new holder

The minimum number of shares required to obtain voting rights at stockholders' meetings may not be determined before completion of the sale of stock

ADJUDICATING PRIVATIZATION DISPUTES

THE POLISH CONSTITUTIONAL TRIBUNAL AND PRIVATIZATION LAWS

by Lech Garlicki

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The Polish Constitutional Tribunal has considered privatization problems several times. The Tribunal has ruled on three major questions, namely the general character of privatization, the principle of equality, and the principle of the distribution of power

General Character of Privatization

Related to the general character of privatization is the Constitutional Tribunal's decision in 1996, in which the Tribunal held that there exists no "right to privatization." Neither the Constitution, nor any other act of law obligates the state to engage in granting property to all the people in the country, a process which would be viewed as giving the state property to the people. A decision to initiate this process as well as the choice of an option for completing total privatization shall rest with the authority of the parliament. At the same time the Tribunal re-stated its position underscored in its earlier decisions that "It is not for the Constitutional Tribunal to decide whether the decision was right or wrong. It is the parliament which must make

appropriate decisions for which it shall be responsible before its electorate."

Therefore, the decision whether to conduct privatization and what form it will take shall be the authority of the government. However, if the parliament thought it necessary to conduct total privatization and decided on the way to do it, the legal form of this process should be in compliance with all the norms, principles and constitutional values. Making sure that such compliance is, indeed, enforced shall be the authority of the Tribunal.

Nor can privatization be conducted at the expense of the rights of other people. In its Decision of May 15, 1996 (W 2/96), the Constitutional Tribunal noted that the value of a privatized enterprise cannot be determined in a manner which would infringe on the rights of persons.

Principle of Equality

The Constitutional Tribunal also considered complaints about the privatization legislation violating the principle of equality of citizens. For instance, the Law of 1993 provided the right to obtain (purchase) privatization certificates to all Polish citizens who reached the age of 18, and have permanent registration at the place of their residence. Age and registration requirements were called into question by the Ombudsman as provisions violating the principle of equality.

In its decision dated September 3, 1996 (K 10/96), the Tribunal partially shared the opinion of the Ombudsman. The requirement for a person to be at least 18 years old was not found to be in violation of the principle of equality. Establishment of a different legal status for certain citizens is allowed if it is based on rational arguments. The limitation of the right to obtain a privatization certificate to citizens of age who contributed to the growth of the state property being privatized can be considered as a rational decision.

However, denying homeless persons the right to obtain privatization certificates runs counter to the constitutional principle of equality. Such denial is not based on any rational argument. The law does not require that a citizen should have a permanent place of residence while homelessness exists as a social reality. Therefore, the requirement based on this criterion has a discriminatory nature, for if the legislature has opted for the rule of general distribution of certificates, the principle of equality has to be observed.

Regarding the privatization conducted on the basis of the Law of 1990, the principle of equality was raised here in relation to the preferential treatment in the distribution of certificates accorded by the Law to the workers of an enterprise. Along with the workers of an enterprise, this preferential treatment also extended to "the producers of agricultural production associated with the enterprise on a permanent basis." A question arose as to whether this privilege can be enjoyed only by individual producers or does it also extend to legal persons (cooperatives, companies, and state legal persons) which produce agricultural production and are associated with the enterprise.

In its Decision of March 8, 1995 (W 13/94), the Constitutional Tribunal made a ruling that only natural persons can have the right to preferred stock. Obtaining stock on a preferential basis has an exclusive character and access to it should be interpreted narrowly. Preferences in privatization are meant to assist those workers who need to find their place in new economic conditions, and not to reward legal persons.

Principle of Separation of Powers

The problem of separation of powers came up in connection with the Law on Commercialization and Privatization of State Enterprises. Its 1995 version said, *inter alia*, that decisions to privatize were to be taken by the Council of Ministers or relevant ministers, but privatization of certain sectors of national economy (for instance the liquor industry, the oil and gas sector, banks and insurance companies, sea and river ports, airports, and coal

and lignite mines), required approval of the parliament in the form of a resolution. The President of the Republic of Poland challenged this provision, indicating that the principle of separation of powers does not provide the basis for the parliament to take such specific decisions.

In its decision of September 22, 1995 (K 19/95), the Constitutional Tribunal supported the latter argument. In doing so, reference was made to the German concept of "the main sphere" of different powers. The principle of separation of powers does not exclude a certain jurisdictional overlap between the legislative and executive branches. However, the authority to make executive decisions cannot be entirely taken away from the government not only because they are "the essence of its competence," but also because doing so dilutes responsibility for such decisions. The decision of the Constitutional Tribunal was taken as a measure of preventive supervision as a result of which the parliament adopted an amended new version of the Law without the provisions challenged.

RUSSIAN COMMERCIAL COURTS AND PRIVATIZATION

by Keith A. Rosten
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The largest ever transfer of public assets to private hands was accomplished in the wake of the fall of the Soviet Union. As much as 82 percent of all enterprises in Russia no longer belong to the state. The privatization process on this grand scale unleashed a whole series of legal problems unknown in the Soviet era.

The Russian Supreme Commercial Court, also known as the Higher Arbitration Court, was a relic of the old state arbitration system, in which state enterprises resolved their disputes in proceedings without rigid procedural rules. Only six months before the formal dissolution of the USSR, the commercial courts were created, and their status was

later enshrined in the Russian Constitution of 1993. Under the leadership of the Chair of the Supreme Commercial Court, Veniamin Yakovlev, a former Minister of Justice of the USSR, the commercial courts have emerged as the major forum for commercial disputes in the Russian Federation. Their jurisdiction is defined by the status of the parties. If all parties are legal entities, such as joint stock companies or partnerships, the dispute will be heard in one of the commercial courts.

The commercial courts have been on the front lines of the privatization process. They have heard a variety of disputes, which have fundamentally affected the success of the privatization process, and, possibly even more importantly, the perception of the fairness of the process. In the waning days of the Soviet Union, in July 1991, just as the commercial courts were created, the Russian Federation launched its ambitious plan for the privatization of state and municipal enterprises. The status of property was still very much in dispute, especially considering the distinction between forms of "economic control" recognized in Russian property law and Western principles of "ownership." The State Committee for the Administration of State Property, which organized privatization, and the Russian Fund for Federal Property, which sold the property, were charged with the transfer of massive state assets to private hands.

State enterprises filed actions against the State Committee in the commercial courts, arguing over the authority of the State Committee to dispose of state property. The Supreme Commercial Court held that the State Committee could only exercise those rights that the state itself possessed. This holding has led to further actions probing the extent of state authority.

Some of the lower commercial courts were criticized for refusing jurisdiction in privatization cases, particularly in the more difficult or complex cases. Some judges were notorious for trying to find lack of jurisdiction for cases they could not understand. But the Supreme Commercial Court has fought for an expansive role, using both its power of legislative

initiative, and its holdings in various cases. For example, one company filed an action to rule that the privatization of the Archangelsk Amalgamation "Rosoptprodorg" was void, but the lower commercial court held that it did not have jurisdiction over the matter because the privatization plan did not constitute a governmental act violating the legal rights and interests of the plaintiff.

By its decision of August 15, 1995, the Supreme Commercial Court rejected this narrow view of commercial court jurisdiction. The Court held that the approval of the privatization plan constituted a governmental act by the State Committee for the Administration of Property. The inclusion of facilities in the newly privatized entity's balance sheets directly affected the interests of the plaintiff. The Supreme Commercial Court ordered the lower commercial court to hear the merits of the action.

Under the government's privatization plan, smaller enterprises (fewer than 200 workers, and capital on January 1, 1992 of less than one million rubles), were subject to sale at auction. The largest enterprises (more than 1000 workers, and capital of more than 50 million rubles), were privatized through the creation of joint stock companies and the sale of shares. Those enterprises that fell in between could be privatized through either of these methods.

It was not surprising that prospective purchasers, with billions of dollars of assets at stake, would play fast and loose with the rules. Few of the violations, however, ever ended up in the commercial courts, especially in the first few years of the privatization program. The frequency of these cases has increased in recent years. The commercial courts have been particularly receptive to adjudicating clear violations of the privatization laws. For example, the commercial courts have routinely ordered the return of property purchased at auction in instances when the winning bidder has failed to come up with the money in a timely manner.

But absent a clear violation, commercial courts have seemed to grant a presumption of validity to privatization. For example, the Cheliabinsk

Procurator filed an action to find that the privatization of a store known as "Biriuz" was void, because it was in violation of the State Plan on Privatization. The lower commercial court agreed, holding that a small store of only twenty workers was supposed to be privatized through an auction, rather than the alternative procedure of creating a joint stock company

The Supreme Commercial Court reversed this decision, finding that the store acquired the status of a state enterprise only on September 20, 1992, and therefore the number of workers on January 1, 1992 did not control the method of privatization. The Court also noted that the privatization of the store "factually has been completed, the shares having been purchased by privatization checks, which have now expired."

The most difficult cases to unwind have been those determining who is the proper owner of privatized enterprises. For example, the May 28, 1996 decision of the Supreme Commercial Court in which the Court had to determine whether the plaintiff, a joint stock company, could recover space occupied by the defendant partnership. The Supreme Commercial Court affirmed the decision of the trial court, which had held that the plaintiff was not the proper owner of the space. The plaintiff had acquired the property through a transaction four years earlier. This transaction, the Court held, was void. It was in violation of the law on property of the RSFSR, and the law on privatization of state and municipal enterprises. The plaintiff simply had purchased the property from an entity which did not have the right to sell it.

The commercial courts have recently shown much more inclination to unwind these transactions. For example, last year, a lower commercial court held that 41 percent of the share in a large chemicals plant must be returned to the government because the bank had failed to meet the investment conditions stipulated in the tender. Some may argue that the commercial courts' failure to ratify these decisions creates uncertainty in an emerging market economy. Requiring companies to comply with

procedures, rules and regulations, however, is a cornerstone of our own U.S. market. The rules apply equally to multinational software companies, and to small snack shops. That is a tradition that the commercial courts in Russia seem on a course to create.

CRIMINAL LAW AND THE MARKET ECONOMY

RUSSIAN CRIMINAL LAW AND THE PROTECTION OF THE MARKET ECONOMY

*by John Qungley
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The Russian Federation Criminal Code adopted in 1996 which came into force on January 1, 1997, replaces the 1960 penal code of the former Soviet Russian republic. The 1996 code criminalizes a variety of acts deemed detrimental to the functioning of a private economy. The new code reflects the economic transformation of the 1990s, it was drafted with a view to promoting market relations by penalizing conduct that inhibits market activity.

Criminal Law and the Shift from a State-Run to a Market Economy

As an additional reflection of the shift to market relations, the 1996 Criminal Code omits those features of the 1960 penal code that were designed to protect the state-run economy. In relation to theft crimes, the 1960 code contained two separate chapters, one for crimes affecting personally owned property, and another for crimes affecting state or collectively owned property. Penalties in the latter chapter were substantially higher, including capital punishment for large-scale theft from the state. In the 1996 code, one finds a single chapter on theft offenses, with no distinction in penalty between state-owned and personally owned property.

Another notable omission from the 1996 code is the offense found in the 1960 code labeled "speculation," which forbade purchasing items with

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a view to re-selling them at a profit. Also omitted are offenses aimed at prohibiting fraud against the state economy using state-owned equipment to do private business, and reporting production data falsely to make it appear that a state plan had been fulfilled.

Criminal Law Protection of the Newly Privatized Economy

The 1996 Criminal Code adds an array of offenses aimed at protecting the newly privatized economy. These offenses are found chiefly in a chapter titled "Offenses in the Sphere of Economic Activity."

Taken together, these offenses prohibit the principal types of activity that might inhibit the functioning of a market economy. One offense is registration of illegal land deals, an offense designed to protect the integrity of the system of land registration, and hence private ownership of land. Forcing a person to enter into a contract, or to refrain from entering into a contract, is an offense.

The system of licensing to engage in certain occupations is enforced by making it an offense to engage in a licensed occupation without an appropriate license, and by making it an offense for an official to refuse, without proper basis, to register a person who applies for a license. Business-related fraud is targeted by the enactment of provisions prohibiting the establishment of a phony business with the aim of gaining credit or avoiding taxes, or obtaining credit by knowingly presenting false information to prove creditworthiness. One far-reaching provision makes it an offense to fail to pay an obligation following a court decree ordering payment; the failure to pay, however, is an offense only if the amount is substantial.

Anti-competitive pricing or other acts restricting access to a market is criminalized in an offense labeled "monopolistic activities and limitation of competition."

An offense of false advertising would seem to have potentially broad application. It makes it an offense to use knowingly false information regarding a product or services. Potential liability is limited, however, by a requirement that it be proven that the

person acted out of a motive of greed, and that the harm caused by the false advertising was substantial.

Still another provision with potentially broad application is an offense of disclosure of commercial secrets, although the scope of liability is limited by a requirement that the information be gained by theft of documents, by bribery or threats, or by other unlawful means. The provision thus would not seem to apply to a former employee who takes information in his head and gives it to a new employer.

The Russian Criminal Code and Financial Crimes

Fraud in issuance of securities is made an offense, in particular putting knowingly false information in a prospectus, but an offense is committed only if substantial harm is caused. Several acts relating to bankruptcy are offenses. Concealing assets upon bankruptcy to keep them from creditors is an offense. An offense called "deliberate bankruptcy" forbids one to worsen one's financial situation in order to secure personal gain. An offense called "fictitious bankruptcy" makes it an offense to declare bankruptcy when the person or organization is not in fact bankrupt, but where the declaration is made to get creditors to agree to postpone debts. Nonpayment of taxes is made an offense.

Other Crimes and the Future of Russian Criminal Jurisprudence

A separate chapter is devoted to what are termed "ecological crimes," including the offenses of pollution of water, the air, and land.

The 1996 Russian Criminal Code criminalizes many acts criminalized in the penal codes of countries with market economies. The wording of the offenses in the 1996 code is typically quite brief. The meaning will be clear only after the courts develop a body of interpretive decisions.

JUDICIAL PRACTICE IN THE KYRGYZ REPUBLIC IN CASES OF ECONOMIC CRIME

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The adjudication of criminal cases in the Kyrgyz Republic has become complex. The number of serious offenses has grown considerably, and the growth of economic crimes evokes particular concern. In spite of the new economic relationships and the introduction of new forms of property, the fundamental nature of economic crime has not changed.

Previously, economic crime appeared in such traditional forms as theft, abuse of authority, bribery and others. Now, new forms of economic crime have arisen such as tax evasion, forgery of currency documents (counterfeiting notes), use of accounting records to hide illegal currency operations, hiding and falsification of balances (connected as a rule with documentary forgery), and other forms of essentially white collar crime.

New methods of committing certain kinds of crime have appeared. Frequently, the criminal and his criminal acts are masked and concealed under a myriad of legal structures. As a result, prosecutors and investigators, unable to delve deeply into the nature of these legal relationships, consider these activities outside their criminal law jurisdiction. Based on this conclusion and without any substantiation whatsoever, they decline to prosecute. This relates both to cases of theft, as well as to economic crimes and malfeasance in office.

A study of specific cases has shown that in judicial and investigative actions in cases of this type, mistakes are being made resulting in shortcomings which to a certain degree weaken the effectiveness of the struggle against these forms of economic crime. The deterrent effect and educational purpose of judicial proceedings is also diminished.

Tax Evasion

Judicial practice has shown that the application of tax evasion statutes has caused difficulty for investigators from the Tax Police as well as for judges, due to flaws in this legislation, the absence of judicial rulings on the application of the legislation, and the lack of learned legal commentary on the relevant statutes.

The Kyrgyz Criminal Code proscribes concealment and understatement of profits, income or other objects of tax liability when the acts committed involve large amounts of money. According to this article of the code, the amount of money involved in the act is determined by the amount of the concealed profit or income and other objects of tax liability. In contrast, in the criminal codes of Russia and Ukraine, the amount of money involved is determined by the amount of unpaid tax.

In various cases, investigators from the Kyrgyz Tax Police have incorrectly arrived at the amount of money involved in a tax evasion case on the basis of the concealed or underpaid tax. That is how the tax evasion cases are prepared.

Receiving and Giving Bribes

Receiving a bribe is the most serious kind of criminal malfeasance in office. It undermines the authority of the state apparatus, and promotes the perception that there is opportunity to obtain what is wanted through bribery of officials. Often, it is combined with other crimes, in particular, theft of government or public property, but generally with other kinds of economic crimes as well.

Practice in these cases suggests that the indicia of receiving or extorting a bribe is not always understood properly by individual judges. In accordance with the decree of November 1, 1995 of the Plenum of the Supreme Court of the Kyrgyz Republic, extortion is defined as a demand by an official for a bribe under threat of action which may cause harm to the legal interests of the bribe giver, or as an intentional decision on the part of the latter in instances in which he is required to give a bribe with

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the goal of averting harmful consequences for his legally protected interests

The courts must be guided by this explanation of the decree in resolving the question of the presence or absence of qualifying indicia of receiving or extorting a bribe. However, few judges understand these indicia.

Misappropriation of State or Public Property
 Misappropriation of state or public property manifests itself in various forms by theft, robbery, fraud, appropriation, embezzlement, or abuse of one's official position. One need not speak of the gravity of these forms of crimes. All of them undermine the economic basis of the state.

In past years, the convictions for these crimes has grown -- but not significantly. The misappropriation of state or public property by responsible individuals, and the abuse of one's official position cause particular alarm.

In recent times, the misappropriation of financial credits illegally received from banks has been committed frequently. Misappropriation of credits promotes the extension of credits, absent control by the Ministry of Privatization, to various associations and firms which are frequently created for the sole purpose of obtaining credits by any means. The credits are given in large sums and for a particular purpose, but the use and expenditure of these credits is unsupervised. As a result, these credits are used according to the individual discretion of officials, and misappropriated.

Misappropriation facilitates the inefficient and uncontrolled creation of all kinds of companies, which as shown by several cases, are created only to receive credit from a bank. Such firms in essence are not engaged in the principal forms of activity stipulated in their charters. Their activity usually begins and ends with the receipt and misappropriation of credits.

The misappropriation of credit engenders indifference by officials to their responsibilities, or the abuse of authority by officials who approve and extend credits. In credit departments of banks, security guarantees are not verified, and occasionally prepared only as a formality without secured property as collateral. Frequently, the secured property is neither described nor subject to evaluation, or its value is overstated. When the question then arises of the reimbursement of the appropriated credits, it turns out that the secured property is not available, and if it is, it is often worthless or its value does not correspond to its valuation stipulated in the guarantee. In these situations, reimbursement of the credit is not possible.

It follows that one should note that bank employees who have illegally extended credit, not without receipt of "compensation," are rarely brought to justice.

As indicated above, new ways to commit various forms of crime have arisen. Frequently the criminal operates behind an official facade, and his criminal activity is concealed under various legal relationships.

There are various opinions about the actions of officials who have received credits, and used them for purposes other than that for which they were granted. Some consider that the credits can be used by an economic subject or legal person at its discretion, and if the credit is not returned or spent, then the relationship is regulated by civil law. Others look at these actions as generating criminal consequences.

For a resolution of these issues, an individual approach is necessary. If the credits are received in large sums by means of falsified documents, without secured guarantees or secured property, and then misappropriated and expended -- do these circumstances implicate only the question of civil liability?

Conclusion

A summary of judicial practice on economic crime shows that for a successful struggle against these forms of crime, it is necessary to develop corresponding methods of control. This requires above all a careful study of the modus operandi for the commission of economic crimes. In turn, these economic or white collar crimes need to be correctly classified in terms of the reasons for and methods by which they were committed. This will shed light on the origins of the new forms of white collar crime from which preventive measures for the detection of these acts and subsequent review of these cases by the courts can be arrived at.

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