

**RULE
OF LAW
PROGRAM**

**NIS Regional and
Trans-Caucasus Republics**

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Submitted to:
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International
Development

Submitted by:
ARD/Checchi Joint Venture
1819 L Street, NW, Suite 500
Washington, DC 20036
Phone: (202) 861-0351
Fax: (202) 861-0370

**FIFTEENTH QUARTERLY
PROGRESS REPORT
(June 1, 1997 - August 31, 1997)**

TABLE OF CONTENTS

Introduction

Central Asia **Tab I**

Transcaucasus **Tab II**

Other Activities **Tab III**

Financial Statement **Tab IV**

INTRODUCTION

On November 30, 1993, the Rule of Law Consortium, ARD/Checchi Joint Venture (ROLC), entered into a contract with the United States Agency for International Development (USAID) to provide professional services in support of the Rule of Law Program for the NIS Regional and the Transcaucasus Republics. The goal of the Rule of Law (ROL) program is to assist in the development of legal and political environments that facilitate the transition to democratic, market-based societies in the NIS region. The purpose of the program is to collaborate with public and private organizations in the NIS countries to develop or strengthen the laws, legal institutions and civic structures which support democratic, market-based societies.

The information in this (fifteenth) quarterly report covers the period from June 1, 1997 - August 31, 1997. Detailed information on all program activities under the Regional Contract is contained herein.

I. COMMERCIAL LAW TRAINING PROJECT IN KAZAKSTAN AND THE KYRGYZ REPUBLIC

A. OBJECTIVE

This project addresses the need for a legal environment that supports further privatization and the conduct of private enterprise in the Central Asia Republics of Kazakstan and the Kyrgyz Republic. In order to promote economic restructuring, the ROLC is working with the members of the judiciary and the legal profession in establishing training programs that will focus on interpreting and applying commercial law.

B. FIFTEENTH QUARTER TARGETS

Design and carry out the initial preparations for a proposed regional program on judicial reform and court administration for both Kazakstan and Kyrgyzstan

Finalize preparations for the third Phase 2 training activities for procurators on economic crime investigation and prosecution, which are to be held in both Kazakstan and Kyrgyzstan in the fall of 1997

Finalize preparations for the second Phase 2 training activities on economic crime adjudication, which are to be held in Kazakstan and Kyrgyzstan in the fall of 1997 for local judges 2 training

In Kazakstan, develop, plan and carry out concentrated seminars for attorneys and judges on commercial law adjudication

In Kyrgyzstan, continue to work with local partner institutions, the Court Department and the Lawyers Association, to develop a curriculum and schedule for concentrated seminars on commercial law topics for attorneys and judges

C. OUTPUTS AND ACHIEVEMENTS

During the reporting period of the Commercial Law Training Project, the ARD/Checchi Rule of Law Consortium (the "Consortium") met the programmatic objectives set forth in the quarterly work plan for this period. The Consortium continued to maintain the focus on economic crime issues in this quarter. The Consortium, working with the U.S. Department of Justice, worked on programs to train a cadre of trainers for procurators investigating and prosecuting economic crime. The

Consortium worked with the judiciaries in both countries to develop training programs on economic crime.

C.1 Programs During the Quarter

The Consortium continued to lay the foundation for intensive continuing legal education programs for attorneys and judges throughout both countries. The Consortium held several concentrated seminars throughout Kazakhstan devoted to commercial law issues. The Consortium developed a new initiative under its mandate to increase judicial professionalization. It developed a program on court administration and judicial reform.

During the reporting quarter, the Consortium implemented the following activities:

- **Judicial Professionalism:** The activities under judicial professionalism are comprised of three categories: increased capacity for judicial training; constitutional tribunals; program in judicial reform and court administration. The Consortium worked very closely with its counterparts in both countries to establish permanent judicial training capacity. The Consortium met with the constitutional tribunals in each country to design further activities, primarily in the area of constitutional jurisprudence in economic transition. Finally, the Consortium designed and scheduled the first in a series of activities in judicial reform and court administration.
- **Training Seminars on Economic Crime for Procurators and Judges.** The Consortium designed the next and last in the series of Phase 2 programs on economic crime with procurator/trainers. This cycle of Phase 2 programs, scheduled for the next quarter, will be devoted to, among other subjects, fraud in the privatization process. Similarly, the Consortium designed the last in the series of Phase 2 programs on economic crime for judges. This last program will be devoted to, among other topics, money-laundering, banking fraud, and tax fraud.
- **Continuing Legal Education for Attorneys and Judges:** The Consortium was involved in scheduling and designing the next series of attorney seminars on commercial law. These seminars are scheduled for next quarter. In Kazakhstan, the Consortium organized and conducted five regional seminars devoted to

commercial law subjects. Over 110 judges attended these seminars in all parts of the country. In addition to bankruptcy, land law and similar topics, the Consortium presented material on judicial ethics. In Kyrgyzstan, the Consortium worked on training materials on critical new legislation, including collateral and business organizations.

A detailed quarterly report that was submitted to USAID/Washington, USAID, Almaty, and USAID/Bishkek is enclosed as an attachment.

D. SIXTEENTH QUARTER TARGETS

In September carry out in Washington the first in the series of workshops for the Consortium's planned regional program on judicial reform and court administration

Carry out in Central Asia in November in-country follow-up activities for the first judicial administration workshop

Conduct the third Phase 2 training activities on economic crime investigation and prosecution, which will focus on public corruption and crimes associated with privatization (September and October).

In November carry out a trial advocacy workshop in Bishkek for training procurators from both Kyrgyzstan and Kazakstan.

Conduct the second Phase 2 training activities on economic crime adjudication in each of Kazakstan and Kyrgyzstan for local judges (September).

In Kyrgyzstan, hold concentrated seminars for lawyers on the respective topics of tax and collateral law; and for judges on collateral law.

Attachment I(a)

Kazakstan and Kyrgyz Republic
Commercial Law Training Project
ARD/Checchi Rule of Law Consortium (Regional Contract)

AID RULE OF LAW PROGRAM
CCN-C-00-4003-00

Seventh Quarterly Status Report
(June 1997 - August 1997)

Executive Summary

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The Consortium continued to lay the foundation for intensive continuing legal education programs for attorneys and judges throughout both countries. The Consortium held several concentrated seminars throughout Kazakstan devoted to commercial law issues. The Consortium developed a new initiative under its mandate to increase judicial professionalization. It developed a program on court administration and judicial reform.

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- **Judicial Professionalism:** The activities under judicial professionalism are comprised of three categories: increased capacity for judicial training; constitutional tribunals; program in judicial reform and court administration. The Consortium worked very closely with its counterparts in both countries to establish permanent judicial training capacity. The Consortium met with the constitutional tribunals in each country to design further activities, primarily in the area of constitutional jurisprudence in economic transition. Finally, the Consortium designed and scheduled the first in a series of activities in judicial reform and court administration.
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judges. This last program will be devoted to, among other topics, money-laundering, banking fraud, and tax fraud.

- Continuing Legal Education for Attorneys and Judges: The Consortium was involved in scheduling and designing the next series of attorney seminars on commercial law. These seminars are scheduled for next quarter. In Kazakstan, the Consortium organized and conducted five regional seminars devoted to commercial law subjects. Over 110 judges attended these seminars in all parts of the country. In addition to bankruptcy, land law and similar topics, the Consortium presented material on judicial ethics. In Kyrgyzstan, the Consortium worked on training materials on critical new legislation, including collateral and business organizations.

1 Judicial Professionalization

1.1 Increased Capacity for Judicial Training

Kazakstan

The Consortium continued ongoing discussions with the Union of Judges regarding future plans for judicial training in Kazakstan. Kazakstan is moving toward a merger of the training programs which have been developed by the Union with USAID-financing with the remnant training conducted by the Ministry of Justice. This plan reflects a new collaborative approach worked out between the Supreme Court and Chief Justice Narykpaev, and the Ministry of Justice and its new Vice-Minister, Elubaev, a former judge and a strong supporter of the Consortium's activities.

The Ministry and the Union are still considering the possibility of establishing a permanent judicial training facility when the capital moves to Akmola by the end of the year. The Union has also advised the Consortium during the reporting period of its desire for increased support in providing judges with access to legal information, and if funding becomes available, the Consortium may work on codification of court decisions.

Kyrgyzstan

The Consortium continued to work on increasing the capacity of local institutions to train their respective constituencies. The Consortium worked closely with the Higher Commercial Court and the Supreme Court. The newly-formed Court Department is building a new training hall and intends to develop and organize seminars and workshops for judges. The Consortium is working with the Court Department on developing its curriculum and on approaches to creating a continuing legal education program specifically aimed at the needs of sitting judges.

1.2 *Constitutional Tribunals*

Kazakstan

The Consortium represented by Scott Newton and Keith Rosten met with the Chair of the Constitutional Council to discuss further activities with the Council. As a result of further discussions, the Consortium is developing a plan to hold two workshops in Central Asia within the next year. The Consortium has been in contact with the Constitutional and Legislative Policy Institute ("COLPI") of Budapest, Hungary to determine whether the Consortium and COLPI will co-sponsor these workshops.

Kyrgyzstan

The Consortium represented by Brian Kemple and Keith Rosten met with the Chair of the Constitutional Court, who described the immediate impact on the Constitutional Court of the France Workshop organized by the Consortium for the constitutional tribunals of Kazakstan, the Kyrgyz Republic and Mongolia. The Chair also described the utility of having at least two workshops in Central Asia, to the extent that funding can be identified for these workshops.

1.3 *Program in Judicial Reform and Court Administration*

As reported previously, the Consortium developed a proposal for a regional program to address the urgent needs to promote the reform and modernization of judicial systems in the NIS. USAID has approved the first segment of the program, and the first workshop is scheduled to take place in Washington D.C. over the period September 6 - 16 with the Administrative Office of the United States Courts, the chief administrative arm of the Federal judicial system (the "AO").

Background

To date the Consortium in Kyrgyzstan and Kazakstan has directed its efforts primarily to raising the professional competency of the judiciaries. The judicial systems of these countries, however, suffer as well 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 are not commensurate with the larger role that the judicial system must play; and the judicial system will 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 are resolved.

The program will concentrate on two major areas: the functions of the agency responsible for court administration, and its role in establishing and maintaining an independent judiciary. Without an independent judiciary, the courts will lack the authority needed to decide cases fairly and divorced from the influence of the government. They will also lack the tools to lay the foundation for the smooth transition to a market economy and a country based on the rule of law. Consequently, this court administration program implicates considerations far beyond the

mundane questions of allocation of facilities and resources. It strikes at the very root of the independence of the judiciary, a necessary foundation for a market economy. The Consortium believes that this program can have a substantial impact on the way these court departments perform their functions, assisting them in defining their roles and responsibilities in their respective countries.

The Administrative Office of the US Courts

During the reporting period the Consortium continued to work closely with the AO in making preparations for first seminar. The AO performs many of the support functions for the federal court system in the United States. The AO prepares and submits the budget and legislative agenda for the courts to the Judicial Conference for transmittal to Congress. The AO monitors legislation that affects federal court operations and personnel, and also provides administrative assistance to the court of appeals, district, bankruptcy and magistrate judges, clerks of court, pretrial services officers, probation officers, court reporters, public defenders, and other court personnel. The AO performs audits; manages funds for the operations of the courts; compiles and publishes statistics on the volume and distribution of the business in the courts; and recommends plans and strategies to efficiently manage court business.

The AO is governed by the Judicial Conference, which is comprised of 27 federal judges at all three levels of the federal judiciary. To support the Judicial Conference, the AO supplies a professional secretariat, legal and statistical services, and conducts studies of court procedures. As the secretary to the Conference, the AO director furnishes the professional support to its committees. The AO also maintains liaison with various groups interested in court operations, including committees of Congress, executive branch agencies, state courts, and the public. The AO's headquarters are located in Washington, D.C.

The First Workshop

During the reporting period the Consortium, in close collaboration with its local partner institutions and the AO, finalized the curriculum and schedule for the September workshop and continued to gather background information from the local counterparts on a wide range of issues, so as to familiarize the instructors in advance with the situation of each country's judicial system and thereby facilitate effective collaboration. The Consortium also continued to work with other international donors to assure co-funding of this activity and to assure a broad range of views represented.

The first workshop will provide instruction on the administrative structure of the judicial system and on the budget process, as those issues relate to judicial independence. As currently planned, it will also acquaint the participants with issues surrounding court facilities and security. The first workshop will be devoted to following subjects:

- the organization of court administration functions in the US;
- the fundamentals of court budgeting at the national and regional levels;
- the political process involved in securing needed funds for the system;

- a case study on budget development, with a panel discussion and break-out working groups;
- the fundamentals of court financing and spending and budget controls at a national and regional level;
- special issues in court financing;
- presentations by each group on budgeting and finance;
- the US Marshals and their role in enforcing judicial decisions;
- special issues surrounding court security;
- issues relating to space and facilities for courtrooms and courthouses; and
- a case study on developing a court facility.

The workshop will include visits to the Supreme Court, the Superior Court of the District of Columbia, a state court and a new local courthouse, and will also include a reception with US officials..

Composition of Delegations and Multi-Donor Support of the First Workshop

The Consortium intends that the composition of the delegations will be at least one half judges. We believe this is important in order to foster links among judges and administrators; and to help the judges take a more active role in court administration matters and in policy-making for the judicial system and to work for judicial independence.

The Consortium plans for three Kazakstani officials (two judges and one official from the Ministry of Justice) and four Kyrgyzstani officials (two judges, an official from the Court Department and an the official in charge of judicial relations in the Office of Legal Counsel to the President) to take part in the first workshop, along with a delegation of judges and administrators from Mongolia.

The Centre for International Legal Cooperation associated with the University of Leyden, The Netherlands (the "Leyden Centre"), has pledged to support the program and will be sending an official from the Dutch Ministry of Justice to take part as an expert in the first workshop. The Soros Foundation's Constitutionalism and Legislative Policy Institute in Budapest ("COLPI") and the Open Society Institute/Mongolia will be funding the participation of the Mongolian delegation in the first workshop.

Subsequent Workshops

The program contemplates a total of three workshops to be held in the United States and Western Europe, with follow-up work in-country involving one or more members of the teaching faculty (1) to present a short workshop for other members of the participating local institutions along with the participants in the US workshop; and (2) to work with the participants on an individual level to assist them in implementing the recommendations discussed at workshop in the US/Western Europe. It is hoped and expected that, if this program is carried forward, one or both of the second and third workshops will be held in Europe, but with the continuing involvement of the AO. It is unlikely that there will be sufficient funding through the Consortium for this entire series of workshops.

While the program has not been fully finalized, it is expected that the second and third workshops, if held, will address the following subjects, subject to the ongoing input of the participating delegations: relations with the legislative branch and lobbying; long range planning and strategy; judicial resources; financial disclosure; automation and technology and legal information; court administration and case management; and judicial training.

Kazakstan

The Consortium secured the participation of a Kazakstani delegation in the upcoming Phase 1 September training in judicial administration, at USAID's request and after extensive consultation with local counterparts. Consortium determined that conditions are favorable for including a delegation of three Kazakstanis, two judges and one Ministry of Justice official, for the following reasons:

- Kazakstan is moving toward creation of a separate judicial administrative department, as Kyrgyzstan already has. This would mean transfer of court administrative responsibilities (and financing) from the Ministry of Justice to another entity, a development that deserves USG support because it will promote both greater efficiency and court autonomy.
- As things stand at present, the Ministry has administrative control over the oblast courts; however a good deal of operational and budgetary authority is delegated to the court chairs. The Supreme Court, like the US Supreme Court, is self-administering.
- Participation of a good delegation stands to strengthen the hand of those who want to modernize the court administration system
- With USAID approval, the delegation consists of one Supreme Court justice, one oblast court chief, and one ministry representative.

The Consortium met with Vice-Minister of Justice Elubaev and Supreme Court Justice Mami to provide orientation for the upcoming training. The chair of the Mangistau oblast court was selected to serve as the third member of the judicial administration delegation.

Kyrgyzstan

The program is a response to local judicial reform initiatives that, in the Consortium's view, create a rare opportunity to help shape the development of the judicial system: (1) the creation of a new Court Department that is not under the Ministry of Justice and that will be responsible for all judicial training, court administration and the execution of judgments; and (2) the President's call for the development of an overall Strategy and Plan for the judicial system of the Kyrgyz Republic, to be completed by the end of this year.

With USAID approval, the Consortium invited the following officials from Kyrgyzstan to the first workshop: Zhenish Dosmatov, Deputy Chairman of the Supreme Court; Daniar Narymbayev, Chairman of the Supreme Commercial Court; Sergei Vorontsov, Deputy Chairman of the Court

Department; and Marat Sultanov, Judicial Liaison in the Office of Legal Counsel to the President. The Consortium is very pleased with this group because they have all shown a readiness to cooperate constructively with the Consortium in connection with its work in Kyrgyzstan and because they represent the institutions that must take a leading role in any judicial reform effort.

Because the judicial system of Kyrgyzstan is very poorly funded and possesses virtually none of the equipment necessary for a judicial system to function in an efficient and modern fashion, the Consortium has requested and received AID approval for the purchase of a limited amount of equipment for the courts themselves (most likely the oblast courts) in order for the Court Department to begin to apply some of the information that they will receive from the workshops and to create the minimum technology base necessary to begin to modernize the operation of courts and to lay the foundation for a modern legal information system. The Consortium will make its decision concerning the allocation of the equipment in close coordination with other donors, such as UNHCR and the ABA/CEELI, who have shown an interest in providing some material assistance to the judicial system.

2 Training Seminars on Economic Crime for Procurators and Judges

2.1 *Prosecutorial Program*

During the reporting period the Consortium, together with their local counterparts, the General Procuracies of Kazakstan and Kyrgyzstan, planned the third Phase 2 training activities in each country for the trainers of local prosecutors on economic crime investigation and prosecution. They will be devoted to public corruption and crimes related to privatization.

The purpose of the Phase 2 training activities is to prepare local prosecutor-trainers to provide training in the investigation and prosecution of economic crime in the context of their own new applicable laws. The first Phase 2 training activity, which was held in both Kazakstan and Kyrgyzstan in March, was devoted to issues surrounding tax fraud investigation and prosecution. The second Phase 2 training activity was carried out in May and focussed on financial institution fraud and money laundering.

Kazakstan

The Consortium agreed with its local counterpart, the Training Institute of the General Procuracy, to reschedule the training seminar for late October. This was done to accommodate the Institute's intensive preparations for its first academic semester after reorganization. The Institute is in the process of recruiting and hiring new teaching staff over the course of the summer, whom the Consortium hopes to use as instructors in the Fall seminar.

Kyrgyzstan

The Consortium represented by Brian Kemple and Keith Rosten met with the Deputy Procurator General of the Republic, who had participated in Phase 1 training in the U.S. He described the successful Phase 2 programs, which had been planned during the Phase 1 training. The Consortium also met with the newly appointed head of the Procuracy program for continuing education. She identified some narrow areas in which a small amount of foreign assistance could have a substantial impact on the development of the training capacity of the procuracy. Many of her suggestions have been incorporated into the extended scope of work.

During the reporting period, the Consortium completed final preparations for its third of three training seminars on economic crime investigation and prosecution for a core group of from 25 to 30 Kyrgyzstani prosecutors. The general topic of this third seminar will be corruption and privatization, and it is scheduled to take place from September 1 through September 5. As currently planned, the seminar will feature instruction by Ralph Pierce, a recently retired prosecutor from the U.S. Department of Justice who took part in the Consortium's first such seminar this year on tax fraud prosecution, on the use of tax laws to prosecute crimes of corruption; by Boris Korobeinikov, formerly a Deputy Procurator General of the Russian Federation and currently a professor at the *Institut Molodyozhy* in Moscow, on issues surrounding the prosecution of crimes against commercial organizations; by a prosecutor from the national office of the General Procuracy on the subject of prosecutorial oversight in investigating corruption; by a prosecutor from the national office of the General Procuracy on the subject of prosecutorial oversight of the privatization process; by a justice of the Supreme Court on corrupt practices; by a prosecutor of the national office of the General Procuracy on corruption; by an official of the Ministry of State Security on corruption; and by an official of the State Property Fund on privatization. The seminar will also include round table discussions. Materials prepared by the lecturers will be distributed at the seminar, along with evaluation forms.

2.2 *Judicial Program on Economic Crime Adjudication*

During the reporting period the Consortium began preparations for the second and final set of Phase 2 seminars for judges hearing economic crime cases. These are scheduled for Almaty and Osh the third week of September. The Consortium agreed on preliminary schedules and teaching personnel with the chief Technical Advisor, the National Judicial College, and with its local counterparts in both countries. Three American judges are scheduled to lecture at these seminars on the topics of U.S. constitutional guarantees in criminal cases; money-laundering; banking fraud; tax and customs fraud; corrupt practices; and judicial ethics.

The seminars are expected to build on the successes of the first cycle of Phase 2 seminars in May, reaching out to different groups of judges in both countries who did not attend the May seminar. The curricula for the first Phase 2 seminars were devised with three goals in mind: (1) to enable the judges of Kazakstan and Kyrgyzstan to better understand their own new laws on modern forms of economic crime; (2) to raise the level of judicial professionalism by having U.S. judges

lecture on subjects such as judicial ethics and discuss their own judicial practice; (3) to lay the basis for the further development of an ongoing educational program for judges that uses practitioners as instructors by including local judges as lecturers and having them prepare written and other materials for training. Three American judges, a U.S. Federal Judge, a U.S. Federal Magistrate, and a Judge from the Indiana Court of Appeals, took a very active role in the seminars.

The curriculum of the second Phase 2 seminars is expected to consist of the following:

- **Training in core areas of economic adjudication.** Lectures by American judges on the following areas of economic crime adjudication: public integrity; money laundering; banking fraud and other kinds of fraud; tax fraud and customs violations; and constitutional guarantees in U.S. criminal procedure. Local judges and other specialists lectured on local law as relates to economic crime adjudication.
- **Training in judicial professionalism:** A lecture by an American judge on judicial ethics and discipline.

Kazakstan

The Consortium in collaboration with the Union of Judges selected local judge-instructors to participate in the September training. The Consortium and the Union agreed that 50 judges would attend the fall seminar, of whom 2/3 would be drawn from the ranks of oblast judges and the remaining one third from district courts, who are shouldering an increasing criminal caseload, including economic crime.

Kyrgyzstan

The Consortium held its first judicial seminar of economic crime adjudication in May of this year for approximately 50 judges and court department officials from the northern regions of the country. The seminar being planned for September will be held in the southern regional capital of Osh for an expected 35-40 judges and officials from the southern regions. As currently planned the seminar will include, in addition to the presentations by the American judges noted above, a presentation by a leading criminal law specialist on the new Criminal Code; a presentation by a judge of the Supreme Court on economic crimes under the new Criminal Code; a presentation by a judge of the Supreme Court on the newly revised Tax Code; presentations by two judges of the Supreme Court on new Code of Criminal Procedure that is being drafted; a presentation by a judge of the Supreme Court on crimes of corruption; a presentation by a judge of the Osh Oblast Court on crimes against property; and a presentation by an official of the Customs agency on current customs law. Materials prepared by the American and local judges will be distributed at the seminar, along with evaluation forms.

3 Continuing Legal Education for Attorneys and Judges

Kazakstan

Attorneys

In Kazakstan, the Consortium represented by Keith Rosten met with the rector of Adilet Law School. The Consortium represented by Scott Newton and Keith Rosten met with USAID to discuss the renewal of an agreement on continued collaboration with Adilet School. This memorandum when signed by USAID will govern further concentrated seminars on commercial law topics for practicing lawyers.

Judges

During the reporting period the Consortium developed the schedule and curricula for concentrated seminars for judges that were held in a total of six regional centers throughout the country in June, July, August and September: Karaganda, Pavlodar, Kostanai, Aktiubinsk, Taras and Almaty. The two-day seminars focused on issues in commercial adjudication, with particular emphasis on bankruptcy law, contract law, corporations, real property and banking, applying where possible recent judicial practice. The seminars also included lectures on judicial ethics. Lectures were delivered by members of the Union of Judges, the Constitutional Council and other Kazakstani courts and by specialists from IRIS.

In June, July, and August, the Consortium successfully conducted five of its planned round of six summer regional commercial law seminars for judges. These are the first commercial law seminars conducted in tandem with the Union of Judges, which has emerged as the Consortium's chief judicial training counterpart in all spheres.

The Karaganda seminar was held 21-22 July for judges of the economic and civil collegia of the Karaganda and Akmola oblast courts. A total of 28 judges attended: 17 judges attended from the Karaganda oblast, including 2 from Zhezkazgan which was recently merged into a united Karaganda oblast; 11 from the Akmola oblast court.

The Pavlodar seminar was held 24-25 July for judges of the economic and civil collegia of the Pavlodar and East-Kazakstan oblast courts. A total of 22 judges attended: 10 from the Pavlodar court and 12 from East Kazakstan, including 8 from Ust-Kamenogorsk and 4 from Semipalatinsk.

The Kostanai seminar was held 29-30 June for judges of the economic and civil collegia of the Kostanai and North-Kazakstan oblast courts. A total of 16 judges attended: 11 from the Kostanai oblast (9 from Kostanai, 2 from Arkalyk) and 5 from North Kazakstan (3 from Petropavlosk, 2 from Kokshetau).

The Aktiubinsk seminar was held 11-12 August for judges of the economic and civil collegia of the Aktiubinsk, West Kazakstan, Mangistau, and Atyrau oblast courts. A total of 26 judges

attended: 12 judges attended from the Aktiubinsk oblast; 7 from West Kazakstan oblast; 1 from Mangistau oblast, and 6 from Atyrau oblast..

The Taraz seminar was held 26-27 August for judges of the economic and civil collegia of the Zhambyl, South Kazakstan, and Kyzyl-Orda oblast courts. A total of 23 judges attended: 15 from the Zhambyl oblast court, 4 from South Kazakstan, and 4 from Kyzyl-Orda.

These seminars, in the summer series, focused on problems in bankruptcy adjudication and securities law. In Karaganda, Akmola, and Aktiubinsk, Supreme Court justices V.N. Bulovich and V.A. Gribanova lectured on securities law and bankruptcy, respectively. A.A. Rekin, secretary of the Union of Judges, lectured on the law on the judiciary and judicial status. In Taraz, Justice Adbraimov lectured on land law; Justice Tulebaev on Privatization, and Justice Baltybaev on commercial disputes. The seminars reflected close collaboration in planning and execution with IRIS. Two IRIS specialists conducted bankruptcy exercise for the judges, in conjunction with the presentation by Justice Gribanova. All lecturers had met the week prior to the seminars to discuss their general approach and to ensure complementary thematics. A video film of an NJC lecture on judicial ethics, taped at last years Phase 2 general seminar, was also screened.

At each of the seminars, Consortium received the full cooperation of the oblast court authorities, who provided the venue and assisted in the organization. The Karaganda court chair, Tusupbekov, is himself an alumnus of Phase 1 training at the NJC in Nevada, and was especially helpful in conducting the sessions and stimulating discussion.

Kyrgyzstan

Attorneys

In Kyrgyzstan the Consortium, after consultation with its counterpart institution, the Lawyers Association, and local and USAID experts, determined that the first three subjects for concentrated seminars for local practicing attorneys would be tax law and practice; collateral law; and bankruptcy. As with its program of concentrated seminars for judges, the approach of the Consortium in Kyrgyzstan as concerns its Phase 3 program of concentrated seminars for practicing lawyers is to work closely with its counterpart institution, in facilitating the conceptualizing of the curriculum, lecturers for each training module and overseeing the production of appropriate learning materials. The Consortium will then assist the Lawyers Association in taking the lead role in conducting the seminars, in order to help it develop its own institutional capacity.

During the reporting period the Consortium worked closely with local attorneys to finalize the curriculum for the two-day seminar on tax law and practice and has begun work on seminars on collateral law and bankruptcy. In close collaboration with IRIS and the Lawyers Association of Kyrgyzstan, the Consortium has commenced the preparation of materials for concentrated seminars for attorneys on the subjects of tax and collateral law, and will begin preparations for a seminar on bankruptcy as soon as that law is passed. Owing largely to delays relating to the

adoption of the new laws governing collateral and bankruptcy, the Consortium expects those seminars to be carried out no earlier than the Fall of this year.

Judges

In Kyrgyzstan the Consortium, in close consultation with IRIS, the courts and the Court Department is overseeing the preparation of training modules for additional Phase 3 concentrated seminars for judges. To date the Consortium has commenced the preparation of materials for judicial seminars on collateral law and on corporations and partnerships, as to which substantive new laws have recently been adopted. IRIS has put its staff attorneys, both U.S. and local personnel, at the disposal of the Consortium in connection with the Consortium's planned program of concentrated seminars and concrete collaborative work has begun. Adoption in Kyrgyzstan of a new bankruptcy law has encountered unexpected delays, but passage is expected to take place this Fall and when it does, the Consortium will immediately commence preparations for a comprehensive judicial seminar on bankruptcy. At present, concentrated seminars on the subjects of property law and contract law are also planned.

4. Coordination, Evaluation and Sustainability

The Consortium continued to meet and confer with other contractors in Kazakstan and Kyrgyzstan to discuss their respective projects and new developments in those countries, and to consult with them in carrying out the Consortium's tasks under its Scope of Work. In Kyrgyzstan, the Consortium's representative, Brian Kemple, attended the weekly meetings of USAID contractors working in the area of commercial reform. Brian Kemple has consulted extensively with IRIS to develop plans to elicit IRIS's technical assistance in the preparation of materials for the series of concentrated seminars on commercial law subjects for judges and attorneys that the Consortium wishes to carry out over the coming year. As noted above, in Kazakstan the Consortium consulted with IBTC in connection with its participation in judicial seminars in that country.

The Consortium submitted earlier this year its continuing evaluation of the program. The Consortium, represented by Keith Rosten, conducted a series of interviews in both countries with judges and lawyers to obtain what further information could be obtained that could gauge the impact of the program. The Consortium is working on a self-administered questionnaire and an analysis of survey information which the Consortium has been collecting to probe the issue of impact.

5. Deliverables

Task 1. Deliverables. (Judicial Professionalization)

Prepare Comprehensive Academic and Development Plan: The Consortium has been conducting ongoing discussions with counterparts in both countries. Owing to the uncertain state of affairs as concerns institutional responsibility for judicial training in Kazakstan, it remains unclear whether Consortium will be able to address this task in

Kazakstan within the remaining period of the scope of work. With the creation in Kyrgyzstan of the Court Department and the development of a close working relationship between the Court Department and the Consortium, there appear to be opportunities for fruitful collaboration in this area, which the Consortium is exploring.

Develop additional curricular materials: The Consortium is developing curricular materials relating to judicial professionalization within the context of the judicial program on economic crime adjudication in both Kazakstan and Kyrgyzstan, and in the program of concentrated seminars on commercial law subjects that the Consortium is advancing in Kyrgyzstan in close collaboration with the Court Department, the Supreme Court and the Higher Commercial Court. Materials on economic crime adjudication were prepared and distributed at the Consortium's Phase 1 seminar in February and at its Phase 2 seminars in May.

Make recommendations regarding material assistance purchases: The Consortium has developed a needs list in Kyrgyzstan for minor equipment purchases. The equipment will be purchased in future quarters. It is unlikely that there is sufficient funding for any further equipment purchases in either country.

Constitutional court assistance: Although this component was not included specifically in the required deliverables for the scope of work this year, the Consortium with funding from USAID/Washington, designed, organized and implemented a workshop for the majority of the members of the constitutional tribunals of Kazakstan and the Kyrgyz Republic.

Program on Judicial Reform and Court Administration: The Consortium is planning to hold the first training activity of this program in September in Washington, DC.

Task 2. Deliverables. (Training seminars for judges and procurators)

Conduct initial (Phase 1) training seminar:

The Phase 1 Procurator Training was successfully conducted in Washington in January.

The Phase 1 Judicial Training seminar was successfully conducted in Kyrgyzstan in February.

General (Phase 2) Seminars:

The first Phase 2 Procurator Training was successfully conducted in Bishkek and Almaty in March, and was devoted primarily to tax fraud issues.

The second Phase 2 Procurator Training was successfully conducted in Bishkek and Almaty during the week of May 26, and was devoted primarily to financial institution fraud.

The first Phase 2 Judicial Training in economic crime adjudication was successfully conducted in Bishkek and Almaty during the week of May 12.

Task 3. Deliverables. (Continuing Legal Education Training)

Conduct additional commercial law Phase 3 seminars for lawyers and judges:

Five regional seminars conducted in August in Karaganda, Pavlodar, and Kostanai in bankruptcy and securities law.

Task 4. Deliverables. (Coordination, Evaluation and Sustainability)

Coordinate with other contractors:

As reported above, the Consortium continued to meet and confer with other contractors in Kazakhstan and Kyrgyzstan to discuss their respective projects and new developments in those countries, and to consult with them in carrying out its tasks under the Scope of Work.

Evaluate results: Detailed questionnaires were distributed to all participants in the Phase 1 and Phase 2 economic crime adjudication judicial training seminars in February and May, respectively, and in the Phase 2 prosecutor training seminars in March and May. Evaluation of the data will be forthcoming in due course. In Kazakhstan, Consortium has conducted follow-up meetings with the Union of Judges and Supreme Court justices regarding developing means of tracking cases and accumulating statistical as well as anecdotal and self-reported evaluative information.

6 Expenses

The following table reflects the budget and actual expenses up through August 31, 1997. Many of the expenses, especially local expenses in Kazakhstan and Kyrgyzstan, have not yet been processed, but will be reflected in future reports.

Category	Adjusted Budget Years 1 - 2	Expenses 11/95 - 8/97	Amount Remaining
Expatriate Staff Costs	539104	455890	73214
Local Staff Salaries and Benefits	171000	152886	18114
ST Specialist Costs	104200	54872	49328
In-Country Travel	51000	26614	24386
Equipment	85000	71191	13809
Training: Attorney Program	310000	207074	102926
Training: Judges Program	380000	204027	175973
Training: Procurators	150000	113327	36673
Training: Other Professionals	100000	0	100000
Expense Reimbursement	30000	30155	-155
Office Rent / Utilities / Supplies	95000	103465	-8465
Communications	40000	39167	833
Administration Charges	544487	476506	137980
TOTAL	2599791	1875173	724618

PERFORMANCE DATA RELATED TO
STRATEGIC OBJECTIVES FRAMEWORK

Applicable Strategic Objective: SO 1.3: "Accelerated Growth and Development of Private Enterprises"

IR 1.3.1 Operating Environment perceived to be more favorable for private sector growth

IR 1.3.1.1 Improved policies, laws and regulations in place to ensure competition and allow for easy market entry and exit

Relevant laws in which instruction was provided to legal professionals at training seminars of the Consortium seminars:

	In 1996	In 1997 (through August)	Total to Date
In Kazakhstan	21	12	33
In Kyrgyzstan	17	8	25

IR 1.3.1.2 Courts and Administrative agencies strengthened to enforce policies, laws and regulations

Number of judges trained at training seminars of the Consortium¹:

	In 1996	In 1997 (through August)	Total to Date
In Kazakhstan	167	171	338
In Kyrgyzstan	320	53	373

Number of prosecutor-trainers trained at training seminars of the Consortium:

	In 1996	In 1997 (through May)	Total to Date
In Kazakhstan	N/A	60	60
In Kyrgyzstan	N/A	62	62

¹ The number of judges trained may exceed the total number of judges in the country because of the attendance of a judge at multiple programs.

IR 1.3.2 Human Resources improved to function in a market economy

Number of lawyers trained at training seminars of the Consortium:

	In 1996	In 1997 (through March)	Total to Date
In Kazakstan	243	0	243
In Kyrgyzstan	220	7	227

II. TRANSCAUCASUS

A. OBJECTIVE

Design and implement a Rule of Law program that will promote an independent judiciary and sustainable development of democratic institution building in Armenia and Georgia.

B. FIFTEENTH QUARTER TARGETS

ARMENIA

Finalize planning for the Criminal Justice Sector Reform II drafting conferences that will take place June 10 - 20, 1997 in Yerevan.

Finalize Yerevan State University Library Training Activity that will take place in NY July 7 - August 1, 1997.

Commence preparations for the Yerevan State University Professor Law School training in Budapest that will take place July 21 - 30, 1997.

Begin planning workshop on Case Management for Constitutional Court Judges that will take place July 3 - 4, 1997 in Riga, Latvia.

On going procurement for the Constitutional Court, Ministry of Justice, Legislative Committee, and Yerevan State University.

AMERICAN UNIVERSITY OF ARMENIA (AUA)

Continue monitoring AUA grant and assist in program development.

GEORGIA

Continue monitoring PHFR and it's work with the Parliament Internet Connectivity project.

Finalize arrangements for Internet Connectivity for the Supreme and Constitutional Court of Georgia.

Begin planning workshop on Case Management for Constitutional Court Judges that will take place July 3 - 4, 1997 in Riga, Latvia.

C. OUTPUTS AND ACHIEVEMENTS

C.1 Criminal Justice Sector Reform II drafting conferences

The Criminal Justice Sector Reform II drafting conferences took place June 10 -20, 1997 in Yerevan. The Conferences were co-sponsored with the Council of Europe and the Centre took care of logistical arrangements. The ROLC DC office also performed administrative assistance. The conference consisted of four separate consecutive drafting conferences which discussed the Criminal Code, Criminal Procedures Code, Law on the Judiciary, and the Law on Procuracy. Professor Junker and Mr. Stewart attended as the US consultants.

C.2 Yerevan State University Library Training Activity

ROLC finalized the course curriculum, training related trips, and logistical details. Five legal specialists from YSU attended a four week independent study course at New York University from July 7 - August 1, 1997. It involved law library training and emphasized legal research techniques, electronic library methodologies, customization of systems for the drafting of textbooks, and the linkages of list-servs and other information sources. A representative of ROLC met the trainees in New York and helped in their orientation. They visited Washington and saw the library of Congress' Global Information Network, the Supreme Court and other sites.

C.3 YSU Professor Law School Training in Budapest

The ROLC cosponsored law school training in Budapest with The Constitutional and Legislative Policy Institute (COLPI). The conference took place July 21 - 30, 1997. The conference was attended by eight professors from YSU; the seminar introduced them to basic features of western legal education, including curriculum, teaching methods, basics of constitutional law, criminal law, civil law, commercial law ad professional training. Professor Bill Burnham attended as the US expert.

C.4 Procurement - Armenia

On-going activity per instructions from USAID/Yerevan. Several procurements were carried out on behalf of the Armenian Constitutional Court, Ministry of Justice, Legislative Committee and Yerevan State University.

C.5 American University of Armenia

On-going monitoring of the AUA grant and program assistance.

Legal Resource Center (LRC)- The LRC received more publications and is continuing to expand its collection. All publications are catalogued into the AUA libraries catalog. The LRC is visited frequently by professors, students, government officials, etc.

Judicial and Legal Training Programs- AUA organized two Phase II seminars on Armenian constitutional law which took place July 9 - 17, 1997 in Yerevan. One seminar was designed specifically for Armenian judges, while the other was for Armenian attorneys. The ROLC sent four judges (including a judge from the Federal Court of Appeals) to the seminars through a subcontract with the International Law Institute.

AUA also began preparations for Phase III condensed seminars. A total of five seminars are scheduled on Armenian commercial law in the regions of Armenia (Marzes) for a combined audience of judges, attorneys and other legal professional. AUA has been working with the Union of Political Scientists and Lawyers and the Armenia Judges Association in mobilizing attendance and publicizing the seminars.

C.6 Workshop on Case Management for Constitutional Court Judges - Armenia and Georgia

The ROLC co-sponsored a two day workshop with the Venice Commission for three Georgian and three Armenian judges from their respective Constitutional Courts to attend the conference in Riga, Latvia on July 3 - 4, 1997. Frank Lorson attended as the US expert.

C.7 Procurement - Georgia

On-going activity per instructions from the mission.

C.8 Parliamentary Human Rights Foundation (PHRF) - Georgia

In June, Jeff Steele traveled to Georgia to formally close-out the program and write a final evaluation analyses.

C.9 Expansion of Internet Connectivity Project in Georgia

A RFP was officially posted to expand internet connectivity to the Supreme and Constitutional Courts of Georgia. The winning subcontractor, APCO, has advised ROLC that it is unable to carry out the work due to the departure of a principal consultant. ROLC currently awaits advice from USAID/Armenia as to whether or not to enter negotiations with the second bidder, The National Academy of Public Administration.

D. SIXTEENTH QUARTER TARGETS

ARMENIA

On going procurement for the Constitutional Court and Yerevan State University.

AMERICAN UNIVERSITY OF ARMENIA (AUA)

Continue monitoring AUA grant and assist in program development.

GEORGIA

Finalize arrangements for Internet Connectivity for the Supreme and Constitutional Court of Georgia.

Attachment II(a)

STEWART CONSULTING
322 Woods End Road
Westfield, New Jersey 07090-2908
908-789-8853 • FAX 908-789-4912

July 6, 1997

Via Fax to REGINA DOBROV at 202-861-0370

Garber Davidson
Program Manager
ARD/Checchi Joint Venture
1101 17th Street, NW, Suite 808
Washington, DC 20036

Dear Mr. Davidson:

The following is a brief impression and assessment of the Council of Europe's consultation in Yerevan during the second and third weeks of June regarding the proposed criminal procedure code and law of the prosecutor's office for Armenia.

First, a few reflections about Yerevan itself may be useful for purposes of future planning. It is a much different setting than Leiden. The latter provides an excellent environment for thoughtful discussion and for the resolution of difficult issues. It removes those who must make such decisions from the incessant interruption of the office and the press of daily affairs. It provides a neutral ground where those who are otherwise on opposite sides of a particular issue have positive inducements to put aside their differences and find some common basis for agreement. In terms of pure creature comforts, Leiden is clean, comfortable, safe, and relatively visitor friendly.

Yerevan, on the other hand, is a less positive environment. One arrives after Midnight on a relic of an airplane, without water or toilet paper in the lavatory, with many seatbelts inoperative, and with seat-backs collapsing in mid-flight. The airport is dimly lit and devoid of the normal directional signs. The two hour ordeal of clearing customs and the baggage bureaucracy, with constant uncertainty over the prospect of recovering one's passport, is a disquieting experience — notwithstanding the very best efforts of the young representatives from the Ministry of Foreign Affairs and National Assembly who performed yeoman duty until the booking process at the hotel was finally completed around 3:00 AM. In daylight, the capitol and the countryside reflect the deleterious extent of Armenia's severe economic situation. Virtually everything — housing, vehicles, and the infrastructure — appears to be in a serious state of disrepair, if not advanced decay. Yet, while much of the housing in Yerevan superficially resembles that of the American inner-city, the streets are not littered with trash, there are no readily identifiable drug addicts or psychotic homeless, and there is no pervasive stench of human excrement. On the contrary, the people on the streets are well groomed and well behaved — motorists excepted. All public access areas are broom-swept shortly after dawn on a daily basis. Pedestrians can walk safely on any street, well into the night, without fear of being mugged — although one must be alert in the darkness without

much street lighting for uncovered and unmarked excavations and open manholes. The people on the street try to be helpful to strangers who cannot speak either of the two languages with which they are fluent. The merchants are accommodating and scrupulous about the change. And, as hosts, the Armenians are warm, gracious and attentive.

In many respects, then, Armenia is a land of sharp contrasts. The harsh, rocky terrain around Yerevan is much different than the lush green region just north of Lake Sevan. The countryside is rich in history and architectural accomplishment. But the many positive features tend to be overshadowed by those of a negative quality. For example, the Lake should attract visitors, but one of the prime areas which has a perfectly decent restaurant is devoid of a single restroom facility. The visitor is also struck with the vestiges of bureaucracy, in both the public and private sectors. The hotel staff ties itself in knots resolving the most trivial matter. The air traveler must secure a pre-flight ticket certification from the airline agency for reasons which defy explanation, and part of our group encountered a real nightmare when their tickets were not properly returned. Even a privatized, customer-oriented sightseeing tour agency got itself mired down in "problems" which should not have been such, yet required multiple visits to resolve.

Thus, Yerevan is a difficult setting in which to spend two weeks as a visitor. No matter how interesting the work and no matter how assiduously the truly wonderful representatives from the government labored to make everything right, the experience with the bureaucracy managed to daunt most of the visitors, until finally airborne, with the altogether disquieting and not improbable prospect of a last minute "problem", which could delay one's scheduled 5:00 AM departure until the next flight, some three or so days hence.

Another negative factor was the somewhat slower tempo in Yerevan from that in Leiden. Breakfast was simply not available until 8:00 AM, and no alternative was available outside of the hotel. The normal, conventional workday (even for money changers) begins at 10:00 AM. Lunch was routinely one hour and a half, ending around 3:30 PM; and the after-lunch session never extended much beyond 5:45 PM.

Also of significance was the fact that some individuals who appeared to be important to the process were absent during times when important issues were discussed — e.g., due process (human rights) and effective law enforcement considerations during the basic investigative period. The presentations by the various law experts and the discussions related thereto could not be repeated for the benefit of those who were absent. This, of course, is a function of important people being close to the office.

Additionally, under the general category of logistics, it should be noted that there were discrepancies with the initial translation of documents. The first draft of the criminal procedure code contained a smattering of provisions and terms which were puzzling. On the Monday just before the session was to commence, the AID people provided a different translation that they had just obtained. The latter was significantly better than the earlier version and resolved many of the troubling issues. This underscored the importance of having a good translation. Had we been

working from the earlier translation, time and energy would have been wasted in discussing what would ultimately have turned out to be translation problems.

One other point about basic conference logistics has to do with a roster. Unlike Leiden, there was no roster. There were name plates in front of the places for the various participants around the large conference table, but the members of the committee and their designees tended to move around, so that the name plates were not helpful. The Chairman and the Deputy Minister of Justice were mainstays, and the Chairman introduced everyone; but the lag in translation and some of surrounding noise made it difficult to get many of the introductions and to master the identities.

* * *

Overall, the substantive work of the conference was a positive experience. For one thing, the Armenians had drafted criminal procedure law and general principles of a criminal code which to the English reader appeared to be significantly better than the prior drafts from other jurisdictions. The provisions tended to follow in a logical progression and to be reasonably well integrated.

The most intense debate was about the role of public prosecutor and about the power of the police and the prosecutor to investigate and gather evidence. The Committee appears to have made a policy decision that the prosecutor will control the investigation. The police are to be subordinate. Beyond this, however, there was intense debate about the traditional oversight role of the public prosecutor. This role was a major feature of the Soviet system. The trend of the discussion appeared to be in the direction of narrowing the role of the prosecutor to that which is more in accord with practices in the Western legal systems — namely, to supervise the investigative process in order to protect basic rights, while ensuring competency in the investigation, to exercise professional responsibility over the charging function, and to be the advocate for the prosecution in the litigation stage; but not to be the ombudsman for helpless people, nor the general protector of state interests, nor the agency to prevent crime. Hence, it appeared that there will be major modifications to proposed Articles 7, 8 and 24 of the Law of the Procurator's Office.

The second and interrelated aspect of this debate in this area dealt with the power of the prosecutor and police to gather evidence. Here, the anomalies of the Soviet legacy appear to be most pronounced. On the one hand, the police appear to have no generalized power to detain briefly in what would be a functional equivalent to our Terry Stop nor to act decisively to search and seize when there are exigent circumstances. Indeed, one lawmaker complained early in the discussion that a police officer in Armenia would be powerless to detain a perpetrator whom he caught standing over a body with a smoking gun. The accuracy of this assertion is not altogether clear. Moreover, it is not clear that they want clarity or precision in this area of the law at this point in time. It may be that the polarization of opinion in the generic area of investigative powers is so great, that the debate itself would prove too divisive and disruptive were the issue to be forced at this stage of their evolution into the rule of law.

During the discussion on the law of the prosecutor's office, it was pointed out that part of the proposal in Article 5 contained a provision which would be absolutely unthinkable in the United States — namely, the criminalization of media “interference” in the exercise of the powers of the prosecutor's office. While the ensuing discussion indicated that the actual intent was to prevent “malevolent” interference, the committee recognized the potential problem in terms of a free press issue and perception in the world community. Hence, that provision is likely to be modified.

One area that was discussed at intervals through the two week period was that of appeals. Their draft appears to permit interlocutory appeals by the defendant, contrary to the situation in many jurisdictions. One serious problem for them revolves around Article 101 of their Constitution. This limits the means by which issues can be brought before the Constitutional Court. Thus, there is no mechanism by the defendant or the prosecution can, as a matter of right, have an issue decided by the Constitutional Court. This problem complicates the more general issue of the desirability or undesirability of having a relatively untrained judiciary, with no longstanding tradition of independence, deciding critical issues of constitutional law. My impression was that the Committee did not want that situation to occur — that is, the Committee would prefer that constitutional issues be decided by the Constitutional Court, not by trial judges. The problem is that the Constitution does not provide the mechanism for this. One suggestion was a provision of law whereby the Prosecutor General would be obliged to petition the President to seek review by the Constitution Court whenever there is such an issue in a criminal case. It would be within the power of Parliament to pass such a law, and there is no separation of powers problem since the president appoints the Prosecutor General.

Another area of interest involved the question of increasing the sentence or the severity of the crime on appeal. In Germany, the superior court in a de novo trial on appeal from a shoplifting conviction may determine on the facts that the defendant was guilty of robbery because he kicked the shopkeeper. Generally in Europe, there can be an enhancement of the sentence, unlike the situation in America. The Armenians appear to be leaning towards allowing aggravation where the prosecutor appeals, but not where the defendant appeals.

There was a good deal of discussion about the duties and qualifications of the defense attorney and the defense bar. A provision in the Criminal Procedure Code which gave the police a role in the dismissal of a defense attorney for cause was discussed because of its probable chilling effect. It appears that this provision will be removed.

Article 7 is a very important provision that will probably be modified. As presently drafted, any violation of criminal procedure would invalidate the conviction. The discussion pointed out that there were three issues intertwined. One involved the suppression of illegally obtained evidence, but with the possibility of prosecution based upon other, legally obtained evidence. The second issue was harmless error. And the third issue was error so egregious as to bar prosecution. The drafter will probably revise this article accordingly.

There was extended discussion of Article 6 which does not define “criminal procedure” although the term is used repeatedly in the other definitions. This will probably be remedied in

order to avoid confusion. It was also pointed out that the draft contains a problem in the definitions that could limit the power of the prosecutor to control the investigatory phase, contrary to the intent of the drafters.

Article 32 drew some criticism. It permits the prosecutor to dismiss a case when there is a "change of the situation". While the example given — namely, a juvenile charged with a minor offense who joins the army — is perfectly sound, the language is very broad and could result in abuse. Hence, the committee accepted the suggestion that the language be tightened up.

In the area of arrest, search and seizure, there was a good deal of discussion about the feasibility of permitting some degree of involvement by the suspect's attorney. The European experience was similar to that in America. The Committee seemed to be convinced that such evidence gathering matters should be conducted on an ex parte basis and that the notion of putting the defense attorney in a position of being honor bound not to disclose would be both unrealistic and very uncomfortable for the attorney in terms of client confidence.

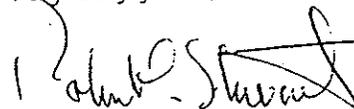
* * *

In conclusion, two points merit further comment. First, it was clear that the Armenians want the Council of Europe's seal of approval on their drafts. Whenever they sensed that a particular provision posed any genuine problem vis-a-vis the European Convention, they evinced a readiness to cut or correct, as needed. In this regard, the Chairman asked on several occasions if the experts could provide a section by section review in writing. This, however, would require additional budget.

Secondly, the conference was, in my view, longer than necessary. I think that the job could have been completed in five or six days. Since the Committee is discussing the possibility of a two-week follow-up session at Leiden, it might be useful to consider this point now, rather than later. In Yerevan, the Committee heard from a collection of experts, provided by the Council of Europe, who reviewed the systems in the UK, Germany, Holland, Norway, Portugal, France and America and provided a full and frank discussion about the positive and negative aspects of each. The experts provided the same sort of discussion with respect to the provisions in the Armenian drafts. Hence, what remains is the job of picking and choosing and making decisions. That should not take two weeks, especially in Leiden.

I hope that this provides a sufficient overview. Please feel free to contact me if you wish any additional clarification or if I have overlooked something.

Very truly yours,



Robert C. Stewart

Attachment II(b)

ARMENIAN LEGAL INFORMATION SPECIALISTS TRAINING
AT NYU LAW LIBRARY

July 7 - August 1, 1997

Goal: Provide training to five faculty members from the Yerevan University Law School (YSU) to enable them upon completion of the course (1) to become self-sufficient in legal research techniques; (2) to obtain legal references from the Internet in all formats; (3) to create an electronic library of foreign, comparative, and international law for YSU; (4) to customize individual expert systems to serve as a basis for drafting of textbooks; (5) to be able to link to list-servs and other information sources; and (6) to enable the trainees to access the holdings of NYU law library.

Program Overview: Five legal specialists from YSU (including a law librarian and faculty members), will attend an intensive four week specifically designed independent study course at NYU during the period of July 7 - 31, 1997. The course, specifically designed to meet the goal stated above, will be held for five hours daily. In addition, two trainees will attend the American Association of Law Libraries in Baltimore where they will be exposed to management, substantive law, and legal librarianship sessions. The entire group will visit Washington D.C. for two days for briefings from such organizations as the American Society of International Law, Association of American Law Schools, Commission of the European Union, GPO/National Archives Federal Register Project, Library of Congress Global Information Network, National Institute for Justice, and the Supreme Court Library.

Faculty: The faculty responsible for the course will include
M. Kathleen Price, Director of NYU Law Library and Professor of Law
Radu D. Popa, Associate Director for Research and Online Services
Leslie Rich, INTERNET Services Librarian
Mirela Roznovschi, International and Foreign Law Reference Librarian, manager of the International, Foreign and Comparative Law electronic library on the NYU School of Law home-page

Other faculty members and staff will be involved in training on per-need basis (e.g., Yevgeniy Ozadovski for his computer skills and knowledge of Russian).

Need for Program: Armenia is a new country torn by earthquake and war; historically it looked to Russia for legal models. For the rule of law to become an integral part of the Armenian society, the legal education provided by the YSU must be redesigned. In order to draft new textbooks and class curriculum, access to current legal information is vital. Currently, the country and YSU lacks adequate legal information and know-how on information access to support legal education activities. Access to legal information is crucial to supplement modest local libraries and to build up the law library at YSU. The

use of electronic means to obtain substantive legal information and expert counsel from other jurisdictions, as well as using the world's top research libraries' online catalogs and legal information will fill a legal information void that is now prevalent in Armenia. In order to have access to the magnitude of available legal information on-line as well as in hard format, it is crucial to train appropriate individuals in legal information research methodology and technique.

NYU: NYU is uniquely qualified to provide this type of training. NYU, the first self-proclaimed

Global Law School, has a comprehensive collection of foreign, international and comparative legal materials, electronic expertise of foreign language-trained staff, proven curricula for training interns and foreign law students, and experience in facilitating USAID/USIA rule of law projects. Its faculty, which monitors web-based sites throughout the Internet, is prepared to provide continuing electronic support to the trainees upon their return to Armenia. This has already been done with interns from India and Indonesia as well as with legal specialists from Russia and China. NYU Law Library has recently developed a comprehensive collection of electronic legal materials in the fields of international, foreign, and comparative law. This collection contains the most important sources needed in the legal process of the "evolving democracies", i.e., those countries, such Armenia, aiming to reshape their legal systems. Subsequently, the library developed a teaching strategy that provides students with the best strategy to find reliable sources, to evaluate them, and help build similar electronic libraries in foreign countries, customized to the need of each particular jurisdiction.

YSU Trainees: The following legal specialists were identified by Dean Gagik Ghazinian of the YSU to receive training:

Sergey Arakelian
Armen Haroutunian
Gevork Petrosian
Karen Gevorkian
Vahe Gevorkian

Daily Training Schedule: Everyday the schedule is 10:00 a.m. - 4:00 p.m., including one hour lunch-break. The daily schedule for the four week course is as follows:

Week One

7/7 Library tour.

Identifying sources of public and private international law.

Identifying primary and secondary sources for common law, civil law, and mixed legal systems

(analysis of the foreign and comparative law collections at NYU law library).

Modern codification trends.

General introduction to US legal system.

7/8

Introduction to e-mail services.

Introduction to the WWWeb. Internet as an information network.

General search strategies in the Internet.

Bookmarks, links, HTML training.

Legal applications in the Internet.

7/9

Overview of international organizations and international jurisprudence.

Analysis of specific publications by international organizations and courts in both paper and electronic format.

Internet applications on international organizations and jurisprudence (how to select the best sources, how to create the links).

7/10

Legal sources from foreign jurisdictions (review of resources in paper and electronic).

Gateways to foreign jurisdictions legal materials in the Internet (free vs. commercial).

Evaluation of criteria for foreign jurisdictions sites (authority, reliability, currency).

7/11

Accessing electronic tools: online catalogs from major libraries around the world, secondary legal literature.

Indexes, abstracts, full text sources.

Basic principles for building a home page.

Week Two

7/14

Open panel and review of the first week teaching (evaluation of trainees on an individual basis).

Profiling the trainees (i.e., finding out their interest and strength in a particular area of law).

Each trainee starts working independently (with appropriate professional support) on the topic of his profile, using the knowledge acquired so far. Assignments will gradually increase in difficulty as new information is incorporated.

7/15

Review of work. Discussion of specific search strategies. Evaluation of several Internet engines.

Trainees start building, according to their profile, a topical "electronic library" that eventually would be saved in their bookmarks. The process will imply usage of new acquired concepts, evaluation criteria, skill in selecting the best sites, etc.

7/16-7/17

Trainees will continue to work on their assignments under professional supervision. They will also have Westlaw and Lexis training, exposure to other online catalogs, index to legal and foreign legal periodicals, CD-ROMs, through the NYU catalog (JULIUS).

7/18

Review and open discussion of assignments. Trainees will have to start working on a new assignment: creation of an overall electronic library for the YSU school of law home page.

7/19-7/23

Sergey Arakelian (who is supposed to become the law librarian at YSU, according to Dean Ghazinian) will attend the American Association of Law Libraries Annual Convention in Baltimore. Armen Haroutunian, Vice-Dean of the YSU Law Faculty, will also attend the Convention, focusing especially on programs related to library management issues. Both Kathie Price and Radu D. Popa will attend the Convention.

Week Three

7/21

Independent work on the assignments for the three remaining trainees. Introduction to computer support matters (according to Radu Popa's recommendation, the trainees are supposed to receive basic training in computer "troubleshooting").

Computer training will include presentation of DOS and windows systems, general hardware and software features, how to interpret and solve error messages, how to upgrade memory, how to install new software, how to connect modems, word processing systems, etc.

7/22-7/23

Trainees will continue to work on their assignments and receive computer training. In the afternoon the three trainees will leave for Washington D.C. Sergey and Armen will join them there, coming from Baltimore. Trainees will be accompanied by Yevgheniy Ozadovski, Library Assistant for Computer Services.

7/24-7/25

Trainees will join Kathie Price, former Law Librarian of Congress, in Washington D.C. Working visits are scheduled to the Library of Congress (emphasis on the GLIN project, meetings with subjects specialists), the Government Printing Office (GPO), the US National Archives, the Commission of the European Union, the American Society of International Law, Association of American Schools, etc.

Week Four

7/28

Open panel: review and discussion of the assignments. Trainers and trainees will select together the best features of each assignment and create the "virtual electronic law library" of YSU.

Introduction to Internet specialized library/legal information discussion groups (e.g., INT-LAW, LAW-LIB).

7/29-8/1

The last four days will be use for the following goals:

Making sure that all the trainees have reached approximately the same level of knowledge and computer ability.

Individual work with those identified as being somewhat "behind".

Gathering materials to take home, both in electronic and paper format (this materials should be instrumental in their research and teaching projects).

Visit a law firm and its library.

Tour of the United Nations premises, including the library.

Sergey will receive special training in specific library topics, such as cataloging, collection development principles, general library matters.

Armen will receive special training in management and collection development decision making strategies.

Intensive material reproduction is expected for these last days of training.

Attachment II(c)

42

*Workshop for young professors of law from
Yerevan State University
July 21-31, 1997, Budapest, Hungary*

Saturday, July 19

Arrival and registration of participants

Sunday, July 20

Free program

Monday, July 21

9:00-12:00 William Burnham (Wayne State University)

"Introduction into the American Legal System"

10:20-10:40 Break

12:00-13:00 Lunch

13:00-14:00 *CEU and library tour*

14:00-17:00 Gabor Halmai (COLPI)

"Freedom of speech"

15:20-15:40 Break

18:30 Lunch for the participants

Tuesday, July 22

9:00-12:00 William Burnham (Wayne State University)

"Introduction into the American Legal System"

10:20-10:40 Break

12:00-14:00 Lunch

14:00-17:00 Gabor Halmai (COLPI)

"Right for private life"

15:20-15:40 Break

Wednesday, July 23

9:00-12:00 William Burnham (Wayne State University)

"Introduction into the American Legal System"

10:20-10:40 Break

12:00-14:00 Lunch

14:00-17:00 Victor Mavi (Hungarian Academy of Sciences)

"European Convent of Human Rights, Article 5 "Defending personal inviolability"

15:20-15:40 Break

Thursday, July 24

9:00-12:00 William Burnham (Wayne State University)

"Introduction into the American Legal System"

10:20-10:40 Break

12:00-14:00 Lunch

14:00-17:00 Victor Mavi (Hungarian Academy of Sciences)

"European Convent of Human Rights, Article 6 "Law for just consideration in civil and criminal cases"

15:20-15:40 Break

Friday, July 25

9:00-12:00 William Burnham (Wayne State University)

"Introduction into the American Legal System"

10:20-10:40 Break

12:00-14:00 Lunch

14:00-17:00 Individual work in the CEU library

Saturday, July 26

Free program.

Sunday, July 27

10:00-13:00 Budapest tour.

Monday, July 28

9:00-12:00 Attila Harmati (Law School , Budapest)

"Basic principles of transition to the market economy"

10:20-10:40 Break

12:00- 14:00 Lunch

14:00-17:00 Andras Sajo (Central European University)

"Legal argumentation in defending human rights"

15:20-15:40 Break

Tuesday, July 29

9:00-12:00 Attila Harmati (Law School , Budapest)

"Basic principles of transition to the market economy"

10:20-10:40 Break

12:00- 14:00 Lunch

14:00-17:00 Andras Sajo (Central European University)

"Legal argumentation in defending human rights"

Wednesday, July 30

9:00-12:00 Attila Harmati (Law School, Budapest)

"Individual consultations on basic principles of Commercial Law"

10:20-10:40 Break

12:00-14:00 Lunch

85

14:00-17:00 Ficzere Lajos (Dean of the Law Faculty of State University, Budapest)

"Structural changes, problems and prospects in Hungarian Legal Education"

15:20-15:40 Break

Thursday, July 31

9:00-17:00 *Individual work in CEU library*

18:00 Farewell party

Attachment II(d)

American University of Armenia
300 Lakeside Drive, 13th Floor
Oakland, CA 94612
Phone: (510) 987-9452 / Fax: (510) 208-3576

Grant Award for Support of Continuing
Legal Education Program & Resource Center in Armenia

Contract No. CCN-0007-C-00-4003-00
Grant Award Date - October 18, 1996
Project Completion Date - September 30, 1998

Quarterly Program Performance Report
No. 4

Period Covered: From July 1, 1997 to September 30, 1997

Date of this report: October 10, 1997

Amount received to date: \$ 197,368.00

PROGRESS NARRATIVE:

During this reporting period, the work on the Legal Resource Center progressed normally, with more acquisitions, cataloguing and increase in the use of library materials.

On the Judicial and Legal Training Programs, AUA completed the Phase II seminars and began Phase III, the final phase of this program. Since Phase I ended in late May, it was important to follow through with Phase II seminars while Phase I participants were still motivated and energetic from their US trip. Further, with Yerevan's hot summer weather and the traditional vacation period from late July to September for most judges and Yerevanites, it was imperative to complete Phase II before late July. Phase III, scheduled to begin in the fall, was planned as a series of five condensed one-day seminars in the outlying regions (marzes) of Armenia. AUA completed the preparatory work for this phase, and successfully completed the first of five Phase III seminars during this reporting period.

LEGAL RESOURCE CENTER (LRC)

Collection and cataloging. The collection in the LRC now numbers over 330 items, including donations, catalogued into the AUA libraries online catalog. The explicit cataloging of most items, including relevant United Nations material, dictionaries, and any pamphlets

48

of lasting value has been a top priority in order to make known the collection. The common cataloguing with the AUA main library has facilitated the cross referencing of LRC material for users of the main library who are now coming to the LRC more frequently. Russian material (to date, approximately 2 dozen books) has been catalogued using a standard transliteration scheme. Because loose-leaves have been among the reference materials used, strict attention is paid to the updating of these volumes. Armenian laws including the official bulletin and decree publications, as well as the law journal of Yerevan State University are maintained, but not cataloged at this time. English translations of Armenian laws are being collected as well.

Collection development. Approximately 100 titles are presently being acquired through the AUA California office; additionally 50 Russian language titles are being ordered locally; Armenian language publications are acquired as they become available. Letters have been sent to international organizations to request catalogs and free publications. Among the resulting receipts are publications from the World Trade Organization. After the fall quarter it is anticipated that professor recommendations and use patterns will dictate additional selections. At that time, additional serials will be identified, especially after WESTLAW is operational and an assessment can be made of the use of full text journal articles online (due to a technical problem WESTLAW access has not yet been established.) In addition, communication with other local sources of legal material has been initiated and lists of some of those collections are available at the LRC.

LRC usage. As our collection is expanding and our presence more established at AUA and in Yerevan, the LRC is visited more frequently by users on a daily basis. During the reporting period the visitors included professors from Yerevan State University, Armenian government officials from the Ministries of Foreign Affairs, Trade & Industry, and Environment, LL.M. and other AUA programs (faculty and students), independent researchers, and participants in the ARD/Checchi Legal and Judicial Training Programs. Faculty in the AUA Law Department and the AUA English program have requested assistance with research questions and have borrowed materials. In some cases the librarian has followed up with additional references to previous patrons when new material has arrived or after additional searches have been performed on the Internet. During the fall quarter, the LL.M. faculty member teaching International Banking Law, incorporated use of LRC materials in class assignments. Another faculty member contributed international commercial law research materials organized into study binders for the LRC.

JUDICIAL AND LEGAL TRAINING PROGRAMS

Program Phase II

Continued Phase II Preparation

During this reporting period, AUA organized two sets of seminars, from July 9 through 17, on Armenian commercial law. Of these two seminars, one was designed specifically for Armenian judges, while the other was for Armenian attorneys.

In preparing for this Program Phase II, AUA set out to: a) develop seminar agendas and related written material, b) secure Armenian experts to lecture, c) prepare for the participation of US experts, d) organize lecture hall space, refreshments, snacks and other arrangements, e) publicize the seminars and send personal invitations to key people in the Armenian legal community, and f) to work with the Ministry of Justice to the extent possible to have the Ministry's approval for the participation of the Armenian judges in this program.

Phase II Seminars

After discussions with Phase I participants, ARD/Checchi and others, it was decided that each set of seminars would be approximately 48 hours in length. Due to their heavy work schedules, the majority of practicing attorneys contacted could not be absent from work for a full-day seminar. They preferred to have the seminars either in the evenings (e.g. from 6-8pm over 8 weeks) or in the afternoons (e.g. 1pm-7pm over a few days). Therefore, the attorneys' seminar was scheduled from 1pm to 7pm over seven days, July 7 through 9, July 14 through 16, and July 19.

Judges preferred half-day seminars on Thursdays, and full days on Friday-Saturday. Therefore, lectures were scheduled from 2 to 6 pm on Thursdays, and 10-5pm Fridays and Saturdays. The judges' seminar lasted six days, July 10 through 12, July 17 through 19.

The seminars consisted of nine individual thematic sessions, including sessions on Armenia's draft civil code, real property law, the law on obligations (contracts), secured transactions, business organizations, international business transactions, foreign investment and bankruptcy. Each thematic session had a chair, who introduced the other speakers and moderated the question and answer period during the round table discussions that ensued each session.

The judges' seminar included segments of specific interest to judges, such as judicial ethics and enforcement of judgments. The attorneys' seminars similarly included sessions of particular interest to attorneys, such as the future of Armenian bar associations and private law practice issues.

For the first day of the attorneys' seminar, special guests were invited to give opening remarks. These guests included the U.S. Ambassador to Armenia, the Dean of the Law Faculty of Yerevan State University, USAID Representative, and the Chairman of the Banking Lawyers Association. Similarly for the first day of the judges' seminar, the US Ambassador, USAID Representative, and the Chairperson of Armenian Judges Association were invited.

All of the nineteen judges and lawyers who participated in the Phase I program in Washington D.C., attended the seminars. Except for three of them who could not give a presentation due to various professional reasons, all gave a presentation during the seminars. Other legal experts in Armenia were also invited to give presentations on relevant areas of commercial law. These additional invited lecturers included the following:

Speaker	Lecture Topic
Armenian Bar Associations (4)	Various
Haik Garabetyan	Registration of Immovable Property
Nicolai Hagopyan	Armenian Tax Legislation
Isabella Detry	International Taxation
Digran Mgouchyan	Draft Civil Code
Arman Mgrdoumyan	Draft Civil Code
Armen Nadiryan	Armenian Customs Legislation
Vladimir Nazaryan	Draft Civil Code
Anna Tarasova	Business Organizations

Participation of American lecturers

The International Law Institute (ILI) was responsible for the selection of Western experts who would participate in the Phase II seminars in Yerevan. ILI selected the following four lecturers:

Samuel Goekjian, an attorney from the U.S. practicing international business law
 Van Krikorian, an attorney from the U.S. practicing international business law
 Judge Randall Rader, US Federal Court of Appeals Judge
 Allan Shinn, Director of Legal Studies, International Law Institute

AUA coordinated with ILI and the U.S. experts the topics that were covered by the American speakers in these seminars. AUA adjusted the seminar schedules to suit the travel schedules and lecture topics of the US experts. Each US expert was asked to lecture or participate in round table discussions for a total of four to five hours throughout the seminars.

This kind of coordination was very useful in bridging the interests of local attorneys and judges and the knowledge of visiting experts. For future similar programs, AUA would recommend to expand the preparatory coordination both in terms of subject matter and scope of coverage and to carry direct contacts between the visiting speakers and the local project coordinators at the earliest preparatory stages so that the educational impact is maximized. As Armenian laws are available more and more in English translation, it would be most useful if visiting experts were well familiarized with them so that local law could be

51

more integrated in the lectures and thus the teaching about U.S. or western practices could be made more directly applicable to the local audiences in a context that relies on examples from Armenian law.

Given the development of U.S. legal practice and experience in commercial law matters, American law gives a useful framework for giving Armenian lawyers the implementation context of some of their recently adopted laws. However, since Armenia has a civil law system that is more akin to European legal systems, as opposed to the US common law system, Armenian lawyers and judges who participated in Phase I expressed a preference and an ease for either European or Russian legal experts. For future programs, AUA would recommend that there be such experts in addition to the Americans.

Distribution of Material

During the seminar, AUA copied and distributed written materials for the participants. Since the most important piece of legislation in Armenia today is the draft civil code, AUA prepared and distributed over 170 copies of the draft civil codes to participants. Various speakers also provided lecture outlines and articles which were distributed at the beginning of their lecture.

Logistical Arrangements

* Publicity. Since all Armenian lawyers were invited to the Phase II seminars, the lawyers' seminars were advertised daily in the two most-read newspapers in Yerevan over a two week period prior to and during the seminars. The seminars were also announced on a popular television program on legal issues. Finally, personal invitations in excess of 150 were hand delivered to ministries, prominent lawyers and law professors.

Since the newly-formed Armenian Judges Association partnered with AUA in organizing the Judges' Seminar, every Armenian judge received a personal invitation signed by both the president of the Armenian Judges Association and by the AUA Project Director. Over 160 personal invitations were delivered by AUA, with some assistance from the Ministry of Justice. As an incentive for judges to attend the seminar, travel and lodging financial assistance was provided for judges driving long distances, i.e. at least over one hour drive from Yerevan. This financial assistance was intended as a minimum per diem amount based on a daily flat rate depending on the distance from Yerevan. The per diem amounts were distributed to the judges at the end of the seminars.

* Coordination. During the course of the seminars, AUA coordinated all the organizational aspects, ranging from the registration of participants, to the distribution of materials, managing the food and beverages and providing various supportive tasks for lecturers, and other administrative aspects necessary for the smooth flow of the seminars.

The AUA Project Manager was assisted by three staff members hired especially for the administrative support for the seminars. These staff members were law students or young lawyers.

* Cost Sharing. As part of its cost sharing under the grant, AUA provided the lecture hall and premises for the seminars. The lecture hall included simultaneous interpretation equipment.

* Visiting Lecturers' Arrangements. In addition to arranging the standard logistics for the US experts, such as airport pick-up and hotel reservations, AUA provided Armenian attorneys to assist the visiting lecturers in basic orientation to Yerevan, sightseeing trips and excursions to Garni-Geghard, Lake Sevan, Dzeedzernagaberd, Khor Virap, Echmiadzin as well as other museums and sights of Yerevan. Given the presence of a Federal Court of Appeals Judge among the American lecturers, AUA made special arrangements for the group for meetings with the Armenian Supreme Court Chairman, a Constitutional Court Member and the US Ambassador to Armenia.

The Ministry of Justice

Judges in Armenia are still officially considered as the employees of the Ministry of Justice. Most judges will not participate in professional activities during normal working hours unless such activities are officially sanctioned by the Ministry of Justice. AUA informed the Minister of Justice in writing about the July seminars, and requested his support to affirmatively encourage judges to attend these seminars. Given the Minister's lack of enthusiasm for this program in the past, AUA also informed the USAID Chief of Mission and requested her assistance in persuading the Minister to support the seminars.

While the Minister of Justice refused to provide an official written release for the judges to participate in the seminars, he orally promised not to hinder the judges who wished to attend provided they could schedule their cases such that they could leave work early to attend the seminars. Since the Armenian Judges Association worked in partnership with AUA in publicizing these seminars, their involvement encouraged some additional participation by their members. The individual invitations also served to inform every judge in Armenia.

Therefore the judges participation in this program was wholly voluntary and independent from the Ministry of Justice since they were under no obligation to be there. In this sense, they were unusual and novel in Armenia and were similar to continuing professional education programs elsewhere. It is unfortunate however that the lack of support demonstrated by the Minister from the very beginning of this program created an environment among the judicial community that could have had a chilling effect on those who otherwise would have felt more comfortable to participate and had shown such interest.

Attendance, Evaluations and Conclusions

* The Attorneys' Seminars. The total attendance of the attorneys' seminar was over 150, with the daily average attendance, being approximately 50. Attendance was taken at the first coffee break (between 3pm and 4pm). The daily attendance figures are as follows:

Monday July 7:	85
Tuesday July 8:	55
Wednesday July 9:	50
Monday July 14:	45
Tuesday July 15:	45
Wednesday July 16:	42

The ages of attendees ranged from 25 through 58. However, many included young law graduates. Very few attorneys attended the entire seminar and consequently the audience differed from day to day.

AUA developed and administered a 145 question evaluation form. Evaluations were conducted on the last day of the seminar. Only those attorneys who attended the entire seminar completed the evaluation. A total of 25 evaluations were collected. Fifteen of the respondents were male, ten were female. Many of the lawyers came from civil law practices while some had a mixed practice including criminal law. The large majority of the respondents felt that the content and organization of the seminars were good or excellent. Each lecturer was evaluated for his or her effectiveness. Overall, the seminars were very well received with many respondents requesting that such seminars continue to be organized in the near future.

* Judges' Seminars. The total attendance of the seminar was over 100 judges, with the daily average attendance, approximately 35. Attendants were asked to register daily and the figures are as follows:

Thursday July 10:	55
Friday July 11:	45
Saturday July 12:	46
Thursday July 17:	45
Friday July 18:	45
Saturday July 19:	75

AUA developed and administered an evaluation form for the judges which was similar to the one used for the attorneys. A total of 32 evaluations were collected from those judges who attended the entire seminar. Responses were more or less similar to those of the attorneys' seminar. Most respondents requested that similar seminars continue to be organized in the near future. Going forward from this model, the Armenian Judges Association is currently working on organizing similar seminars.

54

Program Phase III

Phase III Preparation

During this reporting period AUA began the preliminary organization for the Phase III condensed seminars on Armenian commercial law in the regions of Armenia (Marzes) for a combined audience of judges, attorneys and other legal professionals. In these preparatory organizational steps, AUA has been working with the Union of Political Scientists and Lawyers and the Armenian Judges Association in mobilizing attendance and publicizing the seminars.

As part of Program Phase III, AUA intended to complete the production and publication of written materials including, a) the collection of Phase II Articles, b) the publication of a Question and Answer book on Armenian Commercial Law, c) the publication of a collection of Armenian Commercial Legislation, and d) the completion of educational videotapes on various aspects of Armenian commercial law. During this reporting period, these three different publications on Armenian commercial law, each with a distinct function, were completed. The educational videotapes were also produced.

* Collection of Phase II Articles. AUA solicited articles from all Phase II lecturers. AUA received over 35 articles, 27 of which AUA reviewed, edited and published as one collection of approximately 190 pages. This bound collection will be distributed free of charge, to all the participants of Phase II and Phase III seminars. We have made 200 copies and 50 copies have been distributed as of the date of this report.

* Question and Answer Book on Armenian Commercial Law. This book is currently being published and will be distributed for free at all subsequent Phase III seminars. Its function is to explain to both lawyers and people involved in legislative matters, the fundamentals of the most important issues pertaining to Armenian commercial law. It will be about 170 pages and 900 copies will be published.

* Selected Armenian Commercial Legislation. A book of selected Armenian commercial legislation has been published (500 copies) and will be distributed free of charge to all Phase III participants. The book (over 300 pages) includes the text of the following Armenian legislation (in Armenian):

1. Armenian Law on Collateral
2. Law on Joint Stock Companies
3. Law on Enterprises and Entrepreneurial Activity
4. Law on Immovable Property
5. Law on the Bankruptcy of Enterprises
6. Law on Bankruptcy of Banks

* Educational Videotapes on Collateral Law, Bankruptcy and the Draft Civil Code. The Union of Political Scientists and Lawyers were subcontracted to produce three separate videotapes on collateral law, bankruptcy law and the draft civil code. These tapes will be shown during Phase III seminars in order to stimulate discussion and provide variety during the seminar.

First Seminar in the Syunik Marz

On September 28, 1997, AUA implemented its first Phase III seminar in the Syunik Marz. The seminar was organized for Saturday 11am to 4pm at the marzbedaran (administrative center) in the city of Kapan (8 hours by car from Yerevan). The President of the Armenian Judges Association was the main speaker and she spoke for almost two hours on real property, the draft civil code and the official judicial reform program and its impact on Armenian judges. Over 30 people attended and most requested that similar seminars be organized in the future.

The remaining four seminars will be completed in the next reporting period and an assessment of Phase III presented at that point.

AMOUNT REQUESTED WITH THIS REPORT:

We are not submitting a request for payment with this quarter's reports. We will submit such a request in the following six week period.

Enclosures: A copy of all publications will be given to the USAID office in Yerevan and will be sent shortly to ARD/Checchi in Washington.

Attachment II(e)

**Workshop on the functioning of the
Constitutional Court of the Republic of Latvia
Riga, House of Journalists
3-4 July 1997**

Thursday, 3 July 1997

**Morning session, presided by Mr Aivars Endziņš,
Judge, Acting Chairman, Constitutional Court, Riga, Latvia**

- 10.00 Opening speeches
 Mr Aivars Endziņš, Judge, Acting Chairman, Constitutional Court, Riga,
 Latvia
 Mr. Gianni Buquicchio, Secretary of the Venice Commission
- 10.30 **The Constitutional complaint in Europe and the World**
 Mr Arne Mavčič, Constitutional Court, Ljubljana, Slovenia
- 11.00 Discussion
- 11.20 Coffee break
- 11.40 **The constitutional complaint: A model for Latvia ?**
 Mr Romāns Apītis, Judge, Constitutional Court, Riga, Latvia
- 12.10 Discussion (including Georgian and Armenian perspective)
- 13.00 Lunch

**Afternoon session, presided by Mr Kęstutis LAPINSKAS,
Judge, Constitutional Court, Vilnius, Lithuania**

- 14.30 **Suitable rights for constitutional complaint**
 Mr Jan Klučka, Judge, Constitutional Court, Košice, Slovakia
- 15.00 Discussion
- 15.30 Coffee break
- 15.50 **The constitutional complaint: avoiding excessive case-load**
 Ms Carola von Paczensky, Judge, Administrative Court, Hamburg, Legal
 Clerk, Constitutional Court, Karlsruhe, Germany
- 16.10 Discussion

SB

Friday, 4 July 1997

Morning session presided by Mr. Andrejs Lapse,
Judge, Constitutional Court,
President of the Latvian Association of Judges, Riga, Latvia

- 10.00 **Establishing procedures and practice: Latvian requirements**
Mr. Aivars Endziņš, Judge, Acting Chairman, Constitutional Court, Riga,
Latvia
- 10.30 Discussion (including Georgian and Armenian perspective)
- 11.00 **The "life cycle" of a case before the Constitutional Court**
Ms Britta Wagner, Secretary General, Constitutional Court, Vienna, Austria
- 11.30 Discussion
- 11.50 Coffee break
- 12.10 **The role of documentation and international comparative studies**
Ms Halina Plak, Head of the Library and Documentation Centre, Constitutional
Tribunal, Warszawa, Poland
- 12.40 Discussion
- 13.00 Lunch

Afternoon session presided by Mr Jan Klučka,
Judge, Constitutional Court, Košice, Slovakia

- 14.30 **The effects of decisions by the Constitutional Court**
Mr Kęstutis Lapinskas, Judge, Constitutional Court, Vilnius, Lithuania
- 15.00 Discussion
- 15.20 Coffee break
- 15.40 **General discussion**
- 16.30 **Closure**
Mr Aivars Endziņš, Judge, Acting Chairman, Constitutional Court, Riga,
Latvia
Mr. Gianni Buquicchio, Secretary of the Venice Commission

III. OTHER ACTIVITIES

NEWSLETTER

A. OBJECTIVE

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 Newly Independent States to market-based societies grounded in the Rule of Law. The ROL Newsletter provides a focal point for projectile thinking on the direction, implications, and consequences of law reform and political/institutional development in the Newly Independent States.

B. FIFTEENTH QUARTER TARGETS

Finalize Spring 1997 issue of the newsletter and prepare for mailing.

Identify and contact contributors for the Summer 1997 issue of the newsletter.

Collect articles from contributors and translate when applicable.

C. ACHIEVEMENTS AND OUTPUTS

Finalized Spring 1997 issue of the newsletter and distributed it.

Identified and contacted contributors for the Summer 1997 issue of the newsletter.

Collected articles from contributors and translated when applicable.

D. SIXTEENTH QUARTER TARGETS

Finalize and distribute Summer 1997 issue of the newsletter.

FREEDOM HOUSE

A. OBJECTIVE

To promote and strengthen the relationship between an independent judiciary and free press in the NIS.

B. FIFTEENTH QUARTER TARGETS

On-going monitoring of the project.

C. ACHIEVEMENTS AND OUTPUTS

Freedom House completed the text and lesson plan per their contractual agreement.

D. SIXTEENTH QUARTER TARGETS

Project completed.

Attachment III(a)

RULE OF LAW CONSORTIUM NEWSLETTER

ARD/CHECCHI JOINT VENTURE

under auspices of

United States Agency for International Development

NO. 8

SPRING 1997

SPECIAL ISSUE ON CONSTITUTIONAL TRIBUNALS IN THE NEWLY INDEPENDENT STATES

Editor: Robert Sharlet

TABLE OF CONTENTS

Introduction

A New Wave of Constitutional Tribunals in
the NIS 1

Path to Judicial Independence

Judicial Independence - Threats and
Safeguards..... 4
The Constitutional Court of Mongolia..... 8
The Constitutional Court of the Kyrgyz Republic... 10
The Role of the Constitutional Council of the
Republic of Kazakstan..... 11

Procedural Issues of Constitutional Adjudication

Case Management in the Constitutional Court of
the Russian Federation..... 14
Fact Finding in the Constitutional Court of the
Kyrgyz Republic..... 16
Media and Public Relations of the Constitutional
Council of Kazakstan..... 18

Human Rights before Constitutional Tribunals

The Polish Constitutional Tribunal and the Market
Economy..... 20
The Constitutional Court (TSETS) and Human
Rights..... 22

THE NEW WAVE OF CONSTITUTIONAL TRIBUNALS IN THE NIS: AN INTRODUCTION

by Keith A. Rosten, Esq.

Senior Legal Reform Specialist

Rule of Law Consortium

Co-Editor, Special Issue on Constitutional Tribunals

Robert Sharlet

Chauncey Winters Professor of Political Science

Union College

Schenectady, New York

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 Kazakstan, 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 Kazakstan, 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 Kazakstan 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 Kazakstan 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 Yurii Kim outlines the Kazakstani 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 Galdandgiin 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.

THE PATH TO JUDICIAL INDEPENDENCE**JUDICIAL INDEPENDENCE -
THREATS AND SAFEGUARDS**

*by Patricia M. Wald
United States Circuit Judge,
District of Columbia Circuit
Court of Appeals*

**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

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 (Tssets) 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 (Tssets) 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 Tssets 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 Tssets, 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 Tssets 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 Tssets, 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 Tssets 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 propaganda 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 Kazakstani 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 Kazakstan 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 Kazakstan 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 Kazakstan issued a decree which has the force of a constitutional law "On the Constitutional Council of the Republic of Kazakstan." 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 Kazakstan Constitutional Council, as set forth in Article 72 of the Constitution of Kazakstan, 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 Kazakstan, 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. Gadzhiev

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.

**MEDIA AND PUBLIC RELATIONS OF THE
CONSTITUTIONAL COUNCIL
OF KAZAKSTAN**

by Yurii 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 Kazakstan 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 Galdandgiin 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 Tsets 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 Tsets 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.

General Information

Editor: Professor Robert Sharlet
 c/o Rule of Law Consortium
 ARD/Checchi Joint Venture
 1101 17th Street, N.W. Suite 800
 Washington, D.C. 20036

Phone: 202-861-0351
 Fax: 202-861-0370

87

ARE CCH E IT V E R E
SUMMARY FINANCIAL ANALYSIS

REPORT DATE: 9/30/97
QUARTER ENDING: 8/31/97

CLIENT: USAID
PRIME CONTRACT ID: CCN-0007-C-00-4003-00
CONTRACT NAME: NIS RULE OF LAW - REGIONAL
PERIOD OF PERFORMANCE: 11/30/93 to 11/30/98

EST. TOTAL VALUE(BASE): \$12,680,087
EST. TOTAL VALUE(WITH OPTIONS): \$12,680,087
FUNDED VALUE: \$12,666,613

	PROJECTED			PROJECTED			
	EXPENDITURES QTR ENDED 31-Aug-97	INCURRED QTR ENDED 31-Aug-97	VARIANCES QTR ENDED 31-Aug-97	EXPENDITURES QTR ENDED 30-Nov-97	ITEMIZED BUDGET	TOTAL CONTRACT INCURRED TO DATE	REMAINING BALANCE
SALARIES	\$120,000.00	\$108,475.95	\$11,524.05	\$140,000.00	\$2,102,500.00	\$1,751,072.51	\$351,427.49
SUBCONTRACTS	\$150,000.00	\$183,460.67	(\$33,460.67)	\$150,000.00	\$2,239,000.00	\$1,978,279.07	\$260,720.93
TRAVEL & TRANSP	\$100,000.00	\$73,783.78	\$26,216.22	\$85,000.00	\$834,191.00	\$588,215.80	\$245,975.20
EQUIPMENT	\$10,000.00	\$51,936.28	(\$41,936.28)	\$40,000.00	\$255,000.00	\$142,279.20	\$112,720.80
ALLOWANCES	\$10,000.00	\$0.00	\$10,000.00	\$10,000.00	\$74,000.00	\$37,991.07	\$36,008.93
TRAINING	\$50,000.00	\$41,429.02	\$8,570.98	\$50,000.00	\$500,000.00	\$360,176.23	\$139,823.77
GRANTS PROGRAM	\$200,000.00	\$56,379.05	\$143,620.95	\$100,000.00	\$2,222,000.00	\$2,046,589.87	\$175,410.13
OTHER DIRECT COSTS	\$175,000.00	\$149,521.94	\$25,478.06	\$150,000.00	\$1,635,000.00	\$1,387,547.60	\$247,452.40
TOTAL OTHER DIR. COST	\$695,000.00	\$556,510.74	\$138,489.26	\$585,000.00	\$7,759,191.00	\$6,541,078.84	\$1,218,112.16
FRINGE BENEFITS	\$12,000.00	\$3,923.51	\$8,076.49	\$5,000.00	\$148,904.00	\$133,703.44	\$15,200.56
OVERHEAD	\$95,000.00	\$79,209.79	\$15,790.21	\$80,000.00	\$1,498,529.00	\$1,207,503.98	\$291,025.02
MAT HANDLING	\$5,000.00	\$5,822.21	(\$822.21)	\$5,000.00	\$140,314.00	\$127,414.40	\$12,899.60
GENERAL & ADMIN	\$35,000.00	\$21,705.15	\$13,294.85	\$25,000.00	\$301,801.00	\$266,609.88	\$35,191.12
TOTAL INDIRECT EXP.	\$147,000.00	\$110,660.66	\$36,339.34	\$115,000.00	\$2,089,548.00	\$1,735,231.70	\$354,316.30
TOTAL CONTRACT COSTS	\$962,000.00	\$775,647.35	\$186,352.65	\$840,000.00	\$11,951,239.00	\$10,027,383.05	\$1,923,855.95
FIXED FEE	\$60,000.00	\$48,370.79	\$11,629.21	\$52,000.00	\$728,848.00	\$628,379.55	\$100,468.45
TOTAL	\$1,022,000.00	\$824,018.14	\$197,981.86	\$892,000.00	\$12,680,087.00	\$10,655,762.60	\$2,024,324.40
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