ANNEXURE A

CODE OF JUDICIAL CONDUCT

THE BANGALORE DRAFT

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Explanatory Note

At its first meeting held in Vienna in April 2000, the Judicial Group on Strengthening Judicial Integrity recognized the need for a code against which the conduct of judicial officers may be measured. Accordingly, the Judicial Group requested that codes of judicial conduct which had been adopted in some jurisdictions be analyzed, and a report be prepared concerning: (a) the core considerations which recur in such codes; and (b) the optional or additional considerations which occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.

In preparing a draft code of judicial conduct in accordance with the directions set out above, reference was made to several existing codes and international instruments including, in particular, the following:

(a) Restatement of Values of Judicial Life adopted by the Chief Justices Conference of India, 1999.
(b) Code of Conduct for the Judges of the Supreme Court of Bangladesh, prescribed by the Supreme Judicial Council in the exercise of power under Article 96(4)(a) of the Constitution of the People's Republic of Bangladesh, May 2000.
(c) The Judges' Code of Ethics of Malaysia, prescribed by the Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, in the exercise of powers conferred by Article 125(3A) of the Federal Constitution of Malaysia, 1994.
(d) The Code of Judicial Conduct of the Philippines, September 1989.
(e) The Canons of Judicial Ethics of the Philippines, proposed by the Philippines Bar Association, approved by the Judges of First Instance of Manila, and adopted for the guidance of and observance by the judges under the administrative supervision of the Supreme Court, including municipal judges and city judges.
(f) Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan.
(g) Yandina Statement: Principles of Independence of the Judiciary in Solomon Islands, November 2000.
(h) Code of Conduct for Judicial Officers of the Federal Republic of Nigeria.
(i) Code of Conduct for Judicial Officers of Tanzania, adopted by the Judges and Magistrates Conference, 1984.

(j) Code of Conduct for Judicial Officers of Kenya, July 1999.

(k) Code of Conduct for Judges, Magistrates and Other Judicial Officers of Uganda, adopted by the Judges of the Supreme Court and the High Court, July 1989.

(l) The Judicial (Code of Conduct) Act, enacted by the Parliament of Zambia, December 1999.

(m) Guidelines for Judges of South Africa, issued by the Chief Justice, the President of the Constitutional Court, and the Presidents of High Courts, the Labour Appeal Court, and the Land Claims Court, March 2000.

(n) The European Charter on the Statute for Judges, Council of Europe, July 1998.

(o) Ethical Principles for Judges, drafted with the cooperation of the Canadian Judges Conference and endorsed by the Canadian Judicial Council, 1998.

(p) The Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association, August 1972.

(q) The Code of Conduct of the Judicial Conference of the United States.

(r) The Canons of Judicial Conduct for the Commonwealth of Virginia, adopted and promulgated by the Supreme Court of Virginia, 1998.

(s) The Iowa Code of Judicial Conduct.

(t) Draft Principles on the Independence of the Judiciary ("Siracusa Principles"), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers, 1981.

(u) Minimum Standards of Judicial Independence adopted by the International Bar Association, 1982.

(v) United Nations Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly, 1985.

(w) Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") prepared by Mr L.V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, 1989.

(x) The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, adopted by the 6th Conference of Chief Justices, August 1997.

(y) The Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, 1998.

(z) The Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, adopted by the expert group convened by the Centre for the Independence of Judges and Lawyers, February 2000.

At its second meeting held in Bangalore in February 2001, the Judicial Group, proceeding by way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the code set out in this document: the Bangalore Draft. The Judicial Group recognized, however, that since the draft Code had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly authenticated draft international code of judicial conduct.

In deciding to publish the Bangalore Draft, the Judicial Group agreed that the judicial duty is to conform to any code of conduct which, by law or practice, is already in force in a judge's jurisdiction. The development and existence of an international code does not relieve a judge of his or her duty under municipal law to comply with a code of conduct currently in operation in that judge's jurisdiction. The Bangalore Draft is designed:

- to spread the example of codes of judicial conduct to those jurisdictions which do not yet have them;
- to encourage deliberation amongst judges and others concerning the terms of the code and the improvement of codes of judicial conduct already in force; and
- to develop the broad principles appropriate to an international code of judicial conduct drawing on the best practice and precedents in many jurisdictions of the world.

Preamble

WHEREAS the *Universal Declaration of Human Rights* recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the *International Covenant on Civil and Political Rights* guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS an independent judiciary is likewise essential if the courts are to fulfil their roles as guardians of the rule of law and thereby to assure good governance.

WHEREAS the real source of judicial power is public acceptance of the moral authority and integrity of the judiciary.

AND WHEREAS consistently with the *United Nations Basic Principles on the Independence of the Judiciary*, it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

The following principles and rules are intended to establish standards for ethical conduct of judges. They are principles and rules of reason to be applied in the light of all relevant circumstances and consistently with the requirements of judicial independence and the law. They are designed to provide guidance to judges and to afford a structure for regulating judicial conduct. They are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

The values which this Code upholds are:

- Propriety
- Independence
- Integrity
- Impartiality
- Equality
- Competence and diligence
- Accountability

I

Value:
PROPRIETY

Principle:
Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Code

1.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities[1].

1.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office[2].

1.3. A judge shall avoid close personal association with individual members of the legal profession, particularly those who practise in the judge's court, where such association might reasonably give rise to the suspicion or appearance of favouritism or partiality[3].

1.4 Save in exceptional circumstances or out of necessity, a judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case[4].

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1 cf ABA Code, Bangladesh, Beijing Principles, Pakistan, Philippines, Solomon Islands.

2 cf Bangladesh, India, Philippines.

3 cf Bangladesh, India, Kenya.

4 cf Bangladesh, India.

1.5 A judge shall avoid the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession in circumstances that might reasonably give rise to the suspicion or appearance of impropriety on the part of the judge[5].

1.6 A judge shall refrain from conduct such as membership of groups or organisations or participation in public discussion which, in the mind of a reasonable, fair-minded and informed person, might undermine confidence in the judge's impartiality with respect to any issue that may come before the courts[6].

1.7 A judge shall, upon appointment, cease all partisan political activity or involvement. A judge shall refrain from conduct that, in the mind of a reasonable fair-minded and informed person, might give rise to the appearance that the judge is engaged in political activity[7].

1.8 A judge shall refrain from:

1.8.1 Membership of political parties;
1.8.2 Political fund-raising;
1.8.3 Attendance at political gatherings and political fund-raising events;
1.8.4 Contributing to political parties or campaigns; and
1.8.5 Taking part publicly in controversial discussions of a partisan political character[8].

1.9 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge[9].

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5 cf India.

6 cf ABA Code, Canada, European Charter, South Africa.

7 cf Canada, Virginia.

8 cf Canada, Bangladesh, India, Pakistan, Philippines, Uganda, Virginia, Zambia.

9 cf ABA Code, Iowa, Tanzania, Texas, Virginia, Washington.

1.10 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties[10].

1.11 A judge shall not testify voluntarily as a character witness, except that a judge may testify as a witness in a criminal proceeding if the judge or a member of the judge's family is a victim of the offence or if the defendant is a member of the judge's family or in like exceptional circumstances[11].

1.12 Subject to the proper performance of judicial duties, a judge may engage in activities such as:

1.12.1 The judge may write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice and related matters;

1.12.2 The judge may appear at a public hearing before an official body concerned with matters relating to the law, the legal system and the administration of justice or related matters; and

1.12.3 The judge may serve as a member of an official body devoted to the improvement of the law, the legal system, the administration of justice or related matters[12].

1.13 A judge may speak publicly on non-legal subjects and engage in historical, educational, cultural, sporting or like social and

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[10] Cf ABA Code, Bangladesh, Iowa, Pakistan, Philippines, South Africa, Tanzania, Virginia, Zambia.

[11] cf ABA Code, Iowa, Zambia.

[12] cf ABA Code, Bangladesh, Kenya, Philippines, Zambia.

recreational activities, if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties in accordance with this Code[13].

1.14 A judge may participate in civic and charitable activities that do not reflect adversely on the judge's impartiality or interfere with the performance of judicial duties. A judge should not be involved in fund-raising or membership solicitation[14].

1.15 A judge shall not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person connected with a member of the judge's family and then only if such service will not interfere with the proper performance of judicial duties[15].

1.16 Save for holding and managing appropriate personal or family investments, a judge shall refrain from being engaged in other financial or business dealings as these may interfere with the proper performance of judicial duties or reflect adversely on the judge's impartiality[16].

1.16 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties[17].

1.17 A judge shall not practise law whilst the holder of judicial office[18].

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13 cf ABA Code, European Charter, Iowa, Tanzania, Virginia, USA.

14 cf ABA Code, Bangladesh, Iowa, Kenya, Philippines, Uganda.

15 cf ABA Code, Iowa, Kenya, Nigeria, Philippines, Tanzania, Virginia, Zambia.

16 cf ABA Code, Bangladesh, Iowa, Nigeria, Philippines, Uganda, Virginia, Zambia.

17 cf ABA Code, European Charter, Iowa, Philippines, South Africa, Virginia, Zambia.

18 cf ABA Code, Iowa, Kenya, Malaysia, Nigeria, Philippines, South Africa, Tanzania, Uganda, Virginia, Zambia.

1.18 Except as consistent with, or as provided by, constitutional or other law, a judge shall not accept appointment to a government commission, committee or to a position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, the administration of justice or related matters. However, a judge may represent the judge's country or the state on ceremonial occasions or in connection with historical, educational, cultural, sporting or like activities[19].

1.19 A judge may form or join associations of judges or participate in other organisations representing the interests of judges to promote professional training and to protect judicial independence[20].

1.20 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties[21].

1.21 Subject to law and to any legal requirements of public disclosure, a judge may receive a small token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality[22].

1.22 A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if such payments do not give the appearance of influencing the

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19 cf ABA Code, Iowa, Pakistan.

20 cf Beijing Principles, European Charter, Nigeria, Singhvi Declaration, Siracusa Principles, South Africa, UN Basic Principles.

21 Bangladesh, India, Iowa, Kenya, Nigeria, Pakistan, Philippines, Uganda, Virginia, Zambia.

22 cf ABA Code, India, Iowa, Nigeria, Virginia.

judge in the performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(a) Such compensation and reimbursement shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activities; and

(b) Reimbursement shall be limited to the actual cost of travel and accommodation reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation[23].

1.23 A judge shall make such financial disclosures and pay all such taxes as are required by law[24].

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[23] cf ABA Code, Iowa, Virginia, USA, Zambia.

[24] cf ABA Code, Bangladesh, Philippines.

II

Value

INDEPENDENCE

Principle:

An independent judiciary is indispensable to impartial justice under law. A judge should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Code

2.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason[25].

2.2 A judge shall reject any attempt to influence his or her decision in any matter before the judge for decision where such attempt arises outside the proper performance of judicial duties[26].

2.3 In performing judicial duties, a judge shall, within the judge's own court, be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently[27].

2.4 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary[28].

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[25] cf Beijing Principles, Singhvi Declaration, Siracusa Principles, Solomon Islands, South Africa, UN Basic Principles.

[26] cf Beijing Principles, Canada, Philippines.

[27] cf Singhvi Declaration.

[28] cf Canada, Iowa, Virginia.

2.5 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence which is fundamental to the maintenance of judicial independence[29].

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[29] cf Canada.

III

Value
INTEGRITY

Principle:
Integrity is essential to the proper discharge of the judicial office.

Code:

3.1 A judge shall ensure that his or her conduct is above reproach in the view of reasonable, fair-minded and informed persons[30].

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done[31].

3.3 A judge, in addition to observing personally the standards of this Code, shall encourage and support their observance by others[32].

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30 cf Canada, Philippines, Uganda.

31 cf Bangladesh, India, Philippines.

32 cf Canada.

IV

Value
IMPARTIALITY

Principle

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the making of a decision itself but also to the process by which the decision is made.

Code

4.1 A judge shall perform his or her judicial duties without favour, bias or prejudice[33].

4.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary[34].

4.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases[35].

4.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue[36].

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33 cf ABA Code.

34 cf Canada, European Charter.

35 cf Canada.

36 cf ABA Code, Bangladesh, Iowa, Nigeria, Philippines, South Africa, Tanzania, Uganda, Virginia, Zambia.

4.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which a reasonable, fair-minded and informed person might believe that the judge is unable to decide the matter impartially[37].

4.6 A judge shall disqualify himself or herself in any proceedings in which there might be a reasonable perception of a lack of impartiality of the judge including, but not limited to, instances where:

4.6.1 The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

4.6.2 The judge previously served as a lawyer or was a material witness in the matter in controversy;

4.6.3 The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy[38].

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family[39].

4.8 A judge who would otherwise be disqualified on the foregoing grounds may, instead of withdrawing from the proceedings, disclose on the record the basis of such disqualification. If, based on such disclosure, the parties, independently of the judge's participation, agree in writing or on the record, that the judge may

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37 cf ABA Code, Bangladesh, Canada.

38 cf ABA Code, Bangladesh, European Charter, India, Iowa, Kenya, Nigeria, Philippines, Siracusa Principles, Uganda, USA, Virginia, Zambia.

39 cf ABA Code, Iowa, Nigeria, Tanzania, Virginia.

participate, or continue to participate, in the proceedings, the judge may do so[40].

4.9 Disqualification of a judge is not required if necessity obliges the judge to decide the matter in controversy including where no other judge may lawfully do so or where, because of urgent circumstances, failure of the judge to participate might lead to a serious miscarriage of justice. In such cases of necessity, the judge shall still be obliged to disclose to the parties in a timely way any cause of disqualification and ensure that such disclosure is included in the record[41].

4.10 Save for the foregoing, a judge has a duty to perform the functions of the judicial office and litigants do not have a right to choose a judge.

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40 cf ABA Code, Iowa, Nigeria, Philippines, Tanzania, Virginia, Zambia.

41 cf Canada.

V

Value
EQUALITY

Principle:
Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Code

5.1 A judge shall strive to be aware of, and to understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds")[42]

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds[43].

5.3 A judge shall carry out his or her duties with appropriate consideration for all persons (for example, parties, witnesses, lawyers, court staff and judicial colleagues) without unjust differentiation on any irrelevant ground, immaterial to the proper performance of such duties[44].

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter which is before the judge, on any irrelevant ground[45].

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42 cf Canada.

43 cf ABA Code, Iowa, South Africa, Virginia, Zambia.

44 cf Canada.

45 ABA Code, Iowa, Virginia, Zambia.

5.5 A judge shall require lawyers in proceedings before a court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds. This requirement does not preclude legitimate advocacy where any such grounds are legally relevant to an issue in the proceedings[46].

5.6 A judge shall not be a member of, nor associated with, any society or organisation that practises unjust discrimination on the basis of any irrelevant ground[47].

5.7 Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not engage in independent, personal investigation of the facts of a case.

5.8 Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not, in the absence of the other parties to the proceedings, communicate with any party to proceedings in the judge's court concerning such proceedings[48].

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46 cf ABA Code, Canada, Zambia.

47 cf ABA Code, Bagladesh, Canada, Iowa, Nigeria, South Africa, Uganda, Virginia, USA.

48 cf ABA Code, Nigeria, Philippines, Tanzania, Virginia, Zambia.

VI

Value

COMPETENCE AND DILIGENCE

Principle

Competence and diligence are prerequisites to the due performance of judicial office.

Code

6.1 The judicial duties of a judge take precedence over all other activities[49].

6.2 A judge shall devote his or her professional activity to judicial duties. Such duties are broadly defined and include not only the performance of judicial duties in court and the making of decisions but other tasks relevant to the court's operations or to the judicial office[50].

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties[51].

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms and, within any applicable limits of constitutional or other law, shall conform to such norms as far as is feasible[52].

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49 cf ABA Code, Bangladesh, Iowa, South Africa, Virginia.

50 cf Canada.

51 cf ABA Code, Bangladesh, Canada, European Charter, Malaysia, Philippines, South Africa, Tanzania.

52 cf Bangalore Principles, Beijing Principles, European Charter, Iowa, Nigeria, Tanzania, Virginia.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness[53].

6.6 A judge shall maintain order and decorum in all proceedings in which the judge is involved. He or she shall be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control[54].

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties[55].

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53 cf ABA Code, Bangladesh, Canada, Kenya, Nigeria, Philippines, South Africa, Uganda.

54 cf ABA Code, Bangladesh, Canada, Kenya, Nigeria, Philipines, Tanzania, Virginia.

55 cf Canada.

VII

Value

IMPLEMENTATION AND ACCOUNTABILITY

Principle

Implementing these principles and ensuring the compliance of judges with them are essential to the effective achievement of the objectives of this Code.

Code

7.1 Institutions and procedures for the implementation of this Code shall provide a publicly credible means of considering and determining complaints against judges without eroding the essential principle of judicial independence.

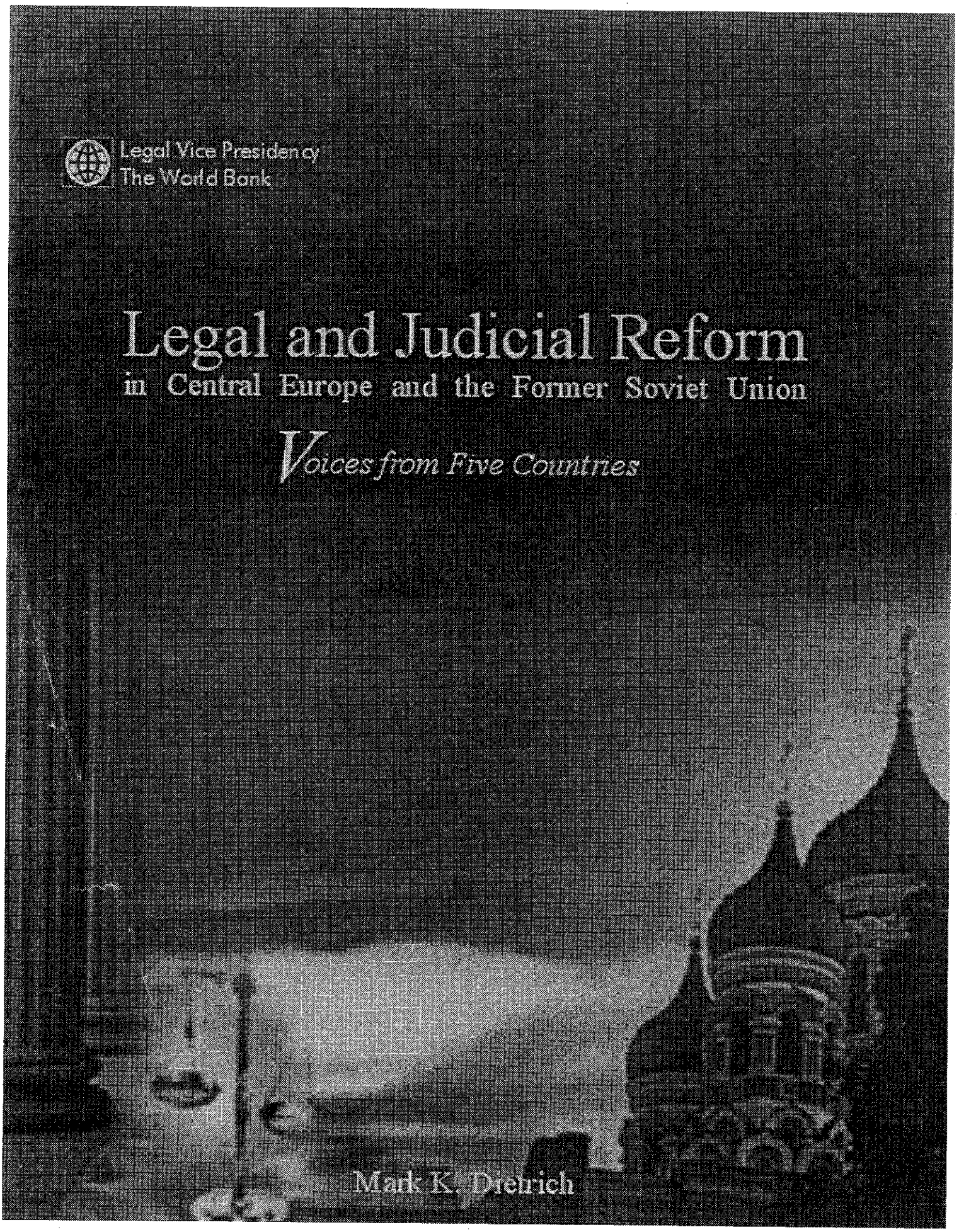
7.2 By the nature of the judicial office judges are not, except in accordance with law, accountable to any organ or entity of the state for their judicial decisions but they are accountable for their conduct to institutions that are established to implement this Code.

7.3 The institutions and procedures established to implement this Code shall be transparent so as to strengthen public confidence in the judiciary and thereby to reinforce judicial independence.

7.4 Ordinarily, except in serious cases that may warrant removal of the judge from office, proceedings established to implement this Code shall be conducted in confidence.

7.5 The implementation of this Code shall take into account the legitimate needs of a judge, by reason of the nature of the judicial office, to be afforded protection from vexatious or unsubstantiated accusations and due process of law in the resolution of complaints against the judge.

7.6 The judiciary and any institution established to implement this Code shall promote awareness of these principles and of the provisions of the Code.


Legal Vice Presidency
The World Bank
Legal and Judicial Reform
in Central Europe and the Former Soviet Union
Voices from Five Countries
Mark K. Dietrich

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The World Bank Missions in each of the five countries provided tremendous support, as did the interpreters, drivers and others who helped to make my visits to their countries as productive as they were.

Finally, I must express my gratitude to the many busy judges, lawyers, professors, and program directors I interviewed and who are working so hard to improve the justice systems in their countries. They were more than generous with their time and their ideas, and I hope that the report reflects at least somewhat the commitment and energy they bring to their work.

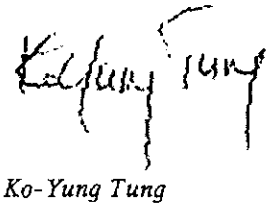
Mark K. Dietrich

Foreword

The last decade has witnessed an enormous, even revolutionary, transformation in the countries of Central Europe and the former Soviet Union. Critical to the success of this transformation are legal, institutional, and regulatory reforms as the foundations of a market economy and a more open and just society. While changes in their legal and justice systems have been momentous, the process of legal reform has varied from country to country and has been fraught with obstacles, both foreseen and unforeseen. We have a lot to learn from their first-hand experiences.

The World Bank—together with many other multilateral, bilateral, and private organizations—has been deeply involved in working with these countries to reform and establish their new legal infrastructure. Mark K. Dietrich has been on the front line of this process—first as a regional director of The American Bar Association's Central and East European Law Initiative (CEELI), and then as a World Bank consultant. When he was asked to distill this experience—and the lessons that can be drawn from it—he turned to the men and women who have struggled to make legal reform work on the ground in the transition countries. In the pages that follow, you will hear the voices of the judges, lawyers, legislators, business people, and development assistance officials who are working day by day to bring legal reform to five key transition countries.

Mark Dietrich's report is an important first step in a dialogue that will bring legal reform stakeholders in the transition countries together to share their successes—and their setbacks—as they learn from one another the most effective ways to move forward. These voices and the dialogue should provide invaluable input at a conference the World Bank Legal Vice Presidency will convene in the spring of 2001 to formulate an action agenda for legal and judicial reform in this region. To invigorate that dialogue, we have established an e-mail address—FRosenthal@worldbank.org—for comments on this paper and the issues it raises. The participation of all will be essential to the success of this most important task, that of establishing an effective and fair legal and judicial system to serve the peoples of this region.



Ko-Yung Tung
Vice President and General Counsel

Introduction

More than 10 years have passed since the heady days of 1989 when the countries of Central Europe, followed by those in the former Soviet Union, began the transition from Communist rule toward free-market democracy. These years have seen remarkable changes in these countries, with many advances forward, and not a few steps back. They have seen civil war, the accumulation of great wealth in the hands of a few, and the expansion of crippling poverty. Despite many newfound freedoms, for most countries in the region the transition to peaceful and prosperous democracies remains incomplete.

Legal and judicial reform is a vital part of the overall transition because it provides the structural framework for economic and other reforms. A viable legal system is also needed to attract investment, combat corruption, and protect basic human rights.

This paper examines legal reform—defined as changes to the legislative frameworks, the judiciaries, bars, and legal education systems—in five transition countries in the region selected for their geographic, historical, and experiential diversity: Georgia, Kyrgyzstan, Poland, Romania, and Russia. The sections on lessons learned and future priorities rely as much as possible on the voices of those on the front lines of legal reform to tell their own stories, either through direct quotes or as summaries, of the past successes—and failures—of this ongoing process. Listening to these voices can help us chart a course forward that will enable the transition countries and the donor community to do a better job in the future.

The report is based on interviews with more than 200 people representing the judiciaries, bars, legislatures, justice ministries, and state prosecutorial bodies (procuracies) of the five countries, as well as journalists and representatives of the academic, business, NGO, and donor communities. Stakeholders and donor representatives were asked, between September 1999 and June 2000, what successes and failures they have seen, how the donor community has contributed to—or hindered—the process, and what challenges legal reform still faces in their countries.

The Transition Path: From Party Rule to Rule of Law

The goal of legal and judicial reform in these countries is to transform the legal systems from mechanisms for autocratic rule and a Communist economy to the bases for the rule of law and free market economies.

Many of the countries in the region were autocratic even before the introduction of Communism. Kyrgyzstan, for example, never knew any form of democracy (or independence) before 1991. Poland, on the other extreme, had substantial inter-war experience with democracy, and some of the laws and traditions from that period survived the Communist era.

Communism reinforced the region's autocratic traditions, and additionally removed almost all private property rights. The law became a tool for reaching a predetermined societal end: Communist utopia. As the Communist Party provided the path toward that end, the law became subservient to the needs of the party. The law limited only individual rights, not state power. In addition, the system was used to protect the privileges of the party *nomenklatura* at the expense of ordinary citizens. Those citizens became increasingly skeptical about the law and the organizations charged with enforcing it.

Thus, the legal systems inherited by the "new democracies" that emerged in 1989-91 were marked by strong state power, with the procuracy at the apex, and judiciaries that lacked independence from the state. The Communist Party dictated important decisions to judges, often through surreptitious telephone calls (hence the term "telephone justice"). Lawyers were not advocates for their clients, but cogs in a system designed to support the Party's goals and interests—or those of the *nomenklatura*. The system lacked the legislative, procedural, and institutional tools needed to protect individual and human rights. The legislative framework was not geared toward private commerce, and judges and lawyers had little knowledge of, or experience in, free market concepts.

Legal reform seeks to supplant this autocratic and state-centered system with a rule of law that:

- *Operates objectively.* The law is interpreted and enforced by lawyers, judges, prosecutors, and other officials in an ethical and fair manner, without special preferences and privileges.
- *Is administered based on knowledge of the law.* Those charged with interpreting and enforcing the legislative framework know what the law is, and understand its underlying principles.
- *Is accessible.* Individuals have meaningful access to the legal system. This means that they know what their rights are, can obtain representation, and filing fees are affordable.
- *Is reasonably efficient.*

- *Is transparent.* Citizens affected by legislation have an opportunity to comment on it as it is drafted. Likewise, judicial decisions are justified and explained and subject to press and academic scrutiny.
- *Is predictable.* Legislation is drafted in a reasonably clear manner, so that outcomes are predictable and undue discretion is not left in the hands of public officials.
- *Is enforceable.* Judicial and administrative decisions, rendered fairly, are enforced.
- *Protects private property rights.*
- *Protects individual and human rights.*
- *Protects legitimate state interests,* e.g., by prosecuting those charged with clearly defined criminal acts.

Clearly, this transition calls for a tremendous shift in how laws are drafted, the way lawyers, judges, and prosecutors use the law, and how the public views the law and the institutions associated with it. Ten years, moreover, is not a very long time given the enormity of the task and the long shadow of the region's history. There have been, nevertheless, some important successes.

One fundamental achievement has been drafting and adopting constitutions and supporting legislation that recognize individual rights, protect private property, and place some limits on the power of the state. Despite problems with inconsistency and enforcement, the legislative frameworks now in place generally provide viable bases for developing democracies and free market economies throughout the region.

Another important change is the evolution of judiciaries that exercise increasing degrees of independence. Each of the five countries has taken at least some of the supervisory and investigative powers that the procuracy previously wielded, such as to commence investigations or issue search warrants, and vested them in the judiciary. The countries are also taking steps to set up independent institutions to support their judiciaries. Russia, Georgia, and Kyrgyzstan have moved administration of the judiciary from their ministries of justice to independent judicial departments. Each of the five has established, or is creating, a judicial training center.

It is also important to note that the practice of law in each country has been privatized, with the concomitant result that lawyers now act more independently of the state, and are learning and practicing business law.

External assistance programs have made some important contributions to this process. Most fundamentally, they have helped to provide the basic information (including differing models and options) that led to the creation of these constitutions and laws. The German Gesellschaft fur Technische Zusammenarbeit (GTZ), for example, provided important help and information to legislative drafters in Georgia, even during that country's civil war. The United States Agency for International Development (USAID) and the Canadian International Development Agency (CIDA) have made important contributions to the legislative framework in Russia. Each country reported substantial contributions by the donor community in this area, though not without criticisms about poor coordination and other issues.

The donor community has followed up on this drafting assistance with extensive training programs for judges and lawyers across the region. The American Bar Association's Central and East

European Law Initiative (CEELI), funded largely by USAID, has been particularly active. The donors, moreover, have sought to institutionalize this training by providing financial support for judicial and other training institutions.

The donors have also played a vital role by strengthening non-governmental organizations committed to building the rule of law throughout the region. Iustitia, the Polish association of judges, with support from USAID and others, has conducted training programs for judges and campaigned for parliamentary and public support for the judiciary in Poland. The Georgian Young Lawyers Association, with broad-based donor support, has engaged in public outreach and education campaigns, maintains what may be the best law library in Tbilisi, and has lobbied in Parliament on laws of importance to the legal profession.

Finally, and perhaps most importantly, the donor countries have contributed to the reform process by establishing goals for the transition countries. Membership in the Council of Europe and the EU has served as an important "carrot" for many countries in the region, particularly for those in Central Europe.

But transition has seen some negative trends as well. Corruption has grown exponentially across the region, and public skepticism about the rule of law is growing. Overstressed court systems often slow litigation to a crawl, and the poor lack full access to the legal system. These negative trends present imposing challenges for the future. Looking to the lessons of the past decade should help guide the countries—and donors—as they design and implement programs intended to meet these challenges.

Lessons From the First 10 Years

Legal and judicial reform is a political process that requires commitment and leadership from the host country

Successful legal reform is a political process that requires the desire for change on the part of the political leadership and the population more broadly. The leaders of the country must support legal reform, and demonstrate their commitment to it by allocating the necessary resources. Reforms, moreover, need to be based on public debate and dialogue if they are to have the understanding and support of a country's citizenry.

The political will necessary to accomplish legal reform has been demonstrated to a large extent in Georgia. Recognizing the need to replace its Communist era judiciary with better prepared and more independent judges, leaders in the Georgian Parliament pushed through parliament--and then convinced President Eduard Shevardnadze to sign--a comprehensive law on judicial reform, centered on judicial qualification examinations. Those who passed the exam would be placed in a pool for appointment to the bench by the president, and those appointed would receive increased salaries. The promise of improved salaries made the idea of joining the judiciary more palatable, and increased the size and quality of the candidate pool. The law calling for the examinations was widely debated in Parliament and the public, and the process and its results were followed closely by the press. Upon passage of the law, President Shevardnadze appointed a strong cadre of reform-minded individuals to implement the reforms, and adequate funding was allocated. The government also took a strong hand, through a specially created Council of Justice, in coordinating donor support for the project, and in legal reform overall.

"Judges are not asking us for money to consider cases anymore."

--A Georgian lawyer

The judicial qualification examinations resulted in the appointment of a largely new judiciary in Georgia, with important changes being reported by judges and lawyers. Lawyers reported that incidents of corruption and governmental interference have decreased. "Judges are not asking us for money to consider cases anymore," one lawyer said. One judge, who had also served in the earlier judiciary, reported that the exercise of undue influence from the administration "no longer happens." Judges are now taking previously unheard of steps to assert their independence and authority. One lawyer reported that his client had been detained for three months, despite the lack of any evidence against him. A year had passed between the time of the crime (a car theft) and the arrest--which was made, apparently, simply to "close the book" on the case. The

old judge had refused to dismiss the case, explaining to the lawyer that even if his client were innocent, releasing him would embarrass the prosecutor and the investigator. The newly appointed judge, however, ordered that the defendant be released immediately because of the lack of evidence.

"Before, you could go there in the middle of the day and not be able to find a judge. Now, everyone is there, working."

—A lawyer in Tbilisi

Changes are also being felt in the commercial sphere. One lawyer reported that she had represented the plaintiff in a simple commercial case that had languished in court for over two years. A newly appointed judge made a decision at the first hearing, without requiring or requesting an extra "fee." Another lawyer said that before, if she went to court with a claim for 10,000 lari, the judge would say, "I'm getting paid 24 lari, why should I try your case?" But now, she said, "The new judges are working three or four times more than normal. More people are going to court. Before, you could go there in the middle of the day and not be able to find a judge. Now, everyone is there, working. And the results are better."

The ultimate success of these reforms, however, has recently been thrown into jeopardy because the government has not consistently provided the funds to pay judges the higher salaries promised them. The economic situation (or weakening political leadership) is, thus, undercutting these very positive steps forward.

Indeed, leadership also requires perseverance, lest early victories be eroded away. Russia's 1993 Constitution mandated jury trials for serious crimes, and legal reform and bolstering the judiciary were clear priorities in the early post-Soviet years, with the Legal Office of the President charged with implementing reforms. By 1995 jury trials had been re-introduced (jury trials had been used in Russia between 1864 and 1917) into 9 of Russia's 89 regions, but political leadership began to wane, and no funding was provided to introduce them in other regions. Without continuing leadership from the top, press reports that jury trials were resulting in the release of criminals led to a loss of public support, and elements of the judiciary and the procuracy voiced their opposition. The government, moreover, claimed that they were an "expensive luxury" that Russia could not now afford. Jury trials were not extended to any additional regions after 1995, and legal reform overall became less of a priority.

"I guess I am ready to pay 5 lari per day for independence and stability."

—A Georgian law professor

The story of the jury trials in Russia illustrates another aspect of the political nature of reform, which is that some elements of the legal system may resist reform, or contribute to the fragility of advances made. The procuracy has not been perceived as supportive of law reform because it

generally has had the most to lose, since it was at the apex of the old system and reform has tended to shift powers from the procuracy to the judiciary, ombudsmen, and other agencies. All countries reviewed, in response to protests by the procuracy and supported by a public perception that serious crime is on the rise, have seen movements to restore some of the procuracy's powers.

Law reform, moreover, is not always at the top of each country's agenda, and must compete with other priorities. In Georgia, as in other countries, the desire for stability in a newly independent country may supersede the reform movement. One law professor told how he had arbitrarily been pulled over by a traffic policeman and "fined" 5 lari. Although he protested, he ultimately paid this small amount, saying, "I guess I am ready to pay 5 lari per day for independence and stability."

"The international legal community was speaking the same language we were. This possibility to communicate ideas and views was more important even than the financial assistance."

—A young reformer in Georgia

This, in turn, means that the donor community's impact on the process is largely limited, and that expectations must be realistic. The donor community must, moreover, be cognizant of the political climate, and develop programs accordingly. If political support exists for legal reform, more structural work, from rebuilding courthouses to revising constitutions, can be undertaken. If not, a grassroots approach may be more appropriate. Political leadership supporting reform has been largely absent in many countries, leaving donors with the diplomatically difficult task of identifying and nurturing reformers for the future, trying to create demand for reform by supporting NGOs, and using international covenants and standards to convince countries to change.

The donor community played "an important role, especially in helping to change the mentality, or at least offering the possibility for us to know about other types of systems. This made us raise questions about our own system, and to seek solutions."

—A Romanian judge

The donor community has had some success in helping to foster political support for reform. Many Georgians (particularly those in the NGO community) felt that the most important contribution donors have made to legal reform was "moral support." This support had two differing but complementary dimensions. The first was having foreign experts on the ground to whom the Georgian lawyers could turn for advice and encouragement. The second was providing "political cover" and pressure on the government to sustain reforms through conditions set forth in government-to-government memoranda of understanding. Both types of support were critical.

"We had to justify everything, every reform," one young reformer said. "There was simply no foundation for such reforms in Georgia. But the international legal community was speaking the same language we were. This possibility to communicate ideas and views was more important even than the financial assistance." Another young lawyer said, "We learned more from working with foreign experts than we did by taking money and spending it." Yet another observer said, "It was this moral support that enabled the Chairman of the Parliament to be so daring" in his legislative agenda.

This message was echoed in other countries. In Poland, one NGO leader noted that "foreign initiatives were helpful in citizen education, in other words not only in helping to change the law and the economy, but also in changing the mentality." One young judge in Romania commented that the donor community had played "an important role, especially in helping to change the mentality, or at least offering the possibility for us to know about other types of systems. This made us raise questions about our own system, and to seek solutions."

One of the other lessons from Romania, however, is that the donor community is often ill equipped to move quickly to take advantage of political openings. The 1996 elections there resulted in the appointment of a reform minded minister of justice who lobbied for additional funds for the judiciary, resuscitated a flagging training center for judges and prosecutors, and more actively sought the support of the donor organizations for his reformist agenda. Although the donor community recognized the new opportunities, it took until 1999—to the dismay and consternation of Romanian reformers—before some important donor-supported programs began being put into place. The donor organizations should examine their own processes, and develop mechanisms that provide more rapid responses to evolving needs and political openings.

Legal reform must enjoy local ownership and produce tangible results

Political leadership must be based on understanding and support from the population at large, developed through public debate. The reforms in Georgia were debated in Parliament and in recent elections. Strengthening the judiciary continues to be a part of Poland's national political debate. It may be easier to find grassroots support for reform in countries with a shorter experience with totalitarianism, such as Poland where the population has a memory of democracy and a free market economy that is largely lacking in Kyrgyzstan and other former Soviet countries.

Donor organizations need to find issues that host country partners are willing to support. "We get a very different reaction if it is something the Russians are requesting or if it is something we are pushing."

—A foreign program director in Moscow

Successful programs must walk a line between being wholly "demand driven" and acting as catalysts for change. One foreign program director in Moscow emphasized that it was important

to find issues that his organization's Russian partners were willing to support: "There needs to be a confluence of interests." Another program administrator said that he gets "a very different reaction if it is something the Russians are requesting or if it is something we are pushing." Donors must consult closely with the supposed beneficiaries in the design and implementation of their projects. One World Bank-supported program on judicial reform in Russia has failed to live up to expectations at least in part because Russian judges were not closely involved in its planning and execution. One Russian official, emphasizing the need for consultation and careful planning, quoted the Russian proverb that, "It is better to measure seven times and cut only once."

"At first we were excited about the foreign presence in training programs. It was great. But not any more. We still need training, but with fewer foreigners."

–A Russian lawyer

The donor organizations also need to be careful not to "oversell" their own priorities. Many in the region feel that some organizations, whether they are associations of young lawyers or legal aid clinics, were created not because the founders saw a real need, but because they saw an opportunity to obtain funding–and jobs. The expertise that they have developed is not in law reform, but in writing proposals and reports resonant with positive results. Such programs are unlikely to result in sustainable changes.

Successful donor programs, in any event, must reflect and be sensitive to local needs and conditions. This was a topic on which the donor community received considerable criticism. Georgian lawyers complained that experts sometimes flew into Tbilisi for a day or two, read a speech that they wrote in Paris or Milan and that failed to address the Georgian context, and then left. They gave the impression that they were more interested in receiving their paychecks than in helping the country. Americans who went to Georgia were criticized for insufficiently understanding the differences between the common and civil law systems.

"At first we were excited about the foreign presence in training programs. It was great," one Russian lawyer said. "But not any more. We still need training, but with fewer foreigners." Another Russian said, "Americans give presentations on American law. Maybe this was necessary at the beginning, but it should not be a main line of pursuit today. Conferences in Russia should be concerning problems that Russia is facing, not on federal law in the U.S." One foreign program director in Russia bluntly admitted that there was a problem with people from her country "coming in and not knowing enough. It is a complicated place and they blunder around. They need to be better informed."

"Our work must show to the people that change has taken place–by deeds, not words."

–A Georgian judge

Ten years into the process of reform, there are any number of local and foreign experts knowledgeable about the region. It may also be worthwhile, keeping in mind local concerns, to use East/East partnerships to implement programs.

Many emphasized that legal reform programs must result in some real and demonstrable benefit to the citizenry. Reform cannot remain only on paper—it must be real, enforceable, and supported by both the people and the government. "Our work must show to the people that change has taken place—by deeds, not words," a Georgian judge said. The judicial qualification examinations there provide an example of tangible results. As with the example of the jury trials in Russia, this will frequently require political and financial commitment to sustain reforms.

"Our funder is basically interested in numbers—how many people did we train—not in the depth of the training."

—A program implementer in Romania

Donor programs that include an appropriate mix of seminars, overseas experience, and equipment provision, and that are designed and implemented in close coordination with local partners, are most likely to provide the sustainable and tangible results that the host countries require. But many jurists in the region question the utility of some aspects of donor programs. A senior Russian judge said, "When foreign colleagues come, the first question is how can we help you? My question is will it be help or cooperation? Help means constructing a building, buying a computer, tangible stuff. Cooperation means seminars, trips abroad, exchange of expertise. The World Bank can provide money for cooperation—consultants, research, publishing monographs, conferences. But we need more help than cooperation. We would like to reorient the funds to the help section."

"I am convinced that when our judges [who had been on a study tour in England] saw how justice works in a democracy, they changed inside."

—A Russian professor

Indeed, the donor community sometimes places too great an emphasis on training programs that do not have any real impact. One high level official reported that every group that comes to Georgia urges, "Training, training, training!" It reminded him, he said, of Lenin's exhortation to "Learn, learn, learn!" One program implementer in Romania was quite candid in admitting that, "Training programs are successful only to a limited extent—you can get people interested and develop some contacts, but you cannot cover issues in the necessary depth. And our funder is basically interested in numbers—how many people did we train—not in the depth of the training." According to one Russian official, two workshops that he had recently attended were useful. One, with the Council of Europe, was on the European Convention on Human Rights, with specialists from Russia and Europe. The other, with EU/TACIS (Technical Assistance to the

Commonwealth of Independent States) on copyright, "resulted in specific proposals for the civil code. There was a link between Russian and international norms, with concrete results."

Some also criticize donor supported study tours, feeling they emphasize "tours" more than "study." One Russian participant in a U.S. study tour estimated that only 4 or 5 of 14 participants actually used of the information disseminated. Another well traveled Russian said, "Study tours are a nice thing. Some take it seriously, most take it as fun. But it should be like recruiting a person into your faith." Indeed, many participants report that these trips have a significant impact on their lives. One Russian professor said, "I am convinced that when our judges [who had been on a study tour in England] saw how justice works in a democracy, they changed inside." Another Russian lawyer said, "I changed my attitude after the trip to the U.S. We need to throw away our suspicion of foreigners." Yet another lawyer said that his trip to the United States had "been the basis for enormous personal growth." After that trip, and a law practice management program in London for three months, he returned to create a private law firm in St. Petersburg based on "international standards." One Georgian judge who had been to the United States for three weeks reported that he returned "convinced that the judiciary really is one of the pillars of democracy." One foreign practitioner in Russia went further: "A lot of progress that is being made here is because of young lawyers going to the U.S. through Muskie Fellowships and the like. An all out effort should be made to get people trained outside their countries."

"After 10 years we have many experts trained in these fields. So we do not need as many experts from the outside, but we do need to use our local expertise."

—Romania's Minister of Justice

Romanian beneficiaries, however, were frustrated that they were able to see and learn so much from experts who visited or when they went on overseas training trips, but lacked the raw materials (computers and other equipment) and money to be able to implement changes upon their return. Programs, they thought, could be improved by teaming training with more funding to implement suggested changes. The Minister of Justice proposed that a new strategy be developed for donor assistance. "After 10 years," he said, "We have many experts trained in these fields. So we do not need as many experts from the outside, but we do need to use our local expertise. And we also need more equipment, more resources."

Legal reform should be pervasive and inclusive

Another important lesson, underscoring the need for grassroots support, is that legal reform must be pervasive and inclusive. It must cut across all sectors of society, from the man on the street to the policeman, the law student, the prosecutor, the judge, and the politician.

Reformers in several countries complained that the donor community works too often with the central government, and not enough with NGOs, businesses, and local governments. All of these groups need to be included in planning and implementing reform programs if the core problems are to be identified and realistic solutions developed.

Many law reform programs focus only on the judiciary. But the police, with whom the public comes in more frequent contact, have generally not been touched by legal reform programs. Likewise, the procuracy, which continues to play an important role in each country, frequently is omitted from law reform programs. One foreign NGO officer noted that no effort had been made to train the procuracy or the police on the new criminal code in Georgia. Similarly, there was no training after Georgia signed the International Covenant on Civil and Political Rights. One judge told a July 1999 World Bank survey on Georgia's legal system that judicial reform is a mere island, surrounded by a swamp, into which it will "sink" unless the other parts of the legal system are also reformed.

"No amount of shouting from the outside is going to force anybody to change. Nor can you just demand reform."

–A Georgian NGO leader

Working with the much larger procuracy and police institutions will be even more challenging than working with the judiciary because reform will require them to surrender many of their traditional powers. Reforming the procuracy will, thus, require greater political will and leadership on the part of host countries. The donor organizations, moreover, will need to develop new and more careful approaches. "No amount of shouting from the outside is going to force anybody to change. Nor can you just demand reform," said one Georgian NGO leader. "You need a strategy where the procurator general is on board, and you need to harness the support and skills of reform minded prosecutors. Also, the prosecutors will need to see some benefits, such as infrastructure support and increased salaries."

Law reform also has not focused on practicing lawyers, other than some efforts to develop private associations and continuing legal education programs. More needs to be done to encourage and help lawyers to represent poorer elements of society so that the public will have a greater and more meaningful access to justice. It is the lawyers, moreover, who will bring the cases and file the appeals that ultimately will lead to improved enforcement of the legislative framework. Reform of the legal profession should not forget notaries, who are particularly important for land and mortgage registration but are frequently omitted from law reform programs.

Finally, it is increasingly recognized that the public needs to be included in reforms. If laws are to be enforced, the public must know that they exist, and how to use them. On a fundamental level, for example, the public does not always recognize the need for transactions to be protected by written contract. One Romanian told of a friend, who had almost purchased an apartment in Bucharest, without signing a contract, only to find that the owner had already sold it—23 times! Another lawyer in Romania was trying to conduct a "due diligence" review of a company that was to be sold. The manager did not understand the process, did not feel that his company should be subject to such review, and had the lawyer escorted off the premises and locked out.

The World Bank recently supported a well received program in Russia to develop public education television and radio commercials on the rights and obligations of citizens. The same

program also developed an award-winning series of textbooks on civic rights for use in Russian high schools.

The media, which should play an important role in public education about the law, suffers from a lack of legal literacy. The World Bank program in Russia, accordingly, trained journalists in legal issues of most interest to their readership, such as property ownership, tax law, and divorce.

The fact that law reform is so all encompassing means that the donor community must work in concert to determine which issues each organization is best equipped to address. Clearly, no one organization will be able to cover all the needs. Host countries that have exhibited the political will can and should take the lead in cutting the Gordian knot of donor coordination.

Legal reform requires building sustainable institutions that form the basis of a functioning legal system

The legal system in any country is only as good as the institutions on which it is based. Legal reform programs that do not enhance the capacity of these institutions will ultimately be wasteful. Programs should enhance the capacity and build the sustainability of the institutions that form the basis for functioning legal systems. It may be more useful, for example, to support institutes that help to draft legislation than to work on specific pieces of legislation. Similarly, it does not help to draft a law on securities regulation if the agency charged with implementing the law is not adequately funded and staffed. A recent evaluation by EU/Phare on its training of judges in Romania found that "more investment in developing training capacities in Romania would ... have been a more appropriate way of providing assistance in this area" than stand alone training. A senior official with USAID in Moscow emphasized that, "We look for a Russian partner who is likely to continue the work after we leave."

Sometimes, support more of an institutional than of a legal nature may be required. Legal NGOs and associations, for example, often require training on recruiting members and raising funds, rather than on substantive issues.

"Assistance should be conditioned on involving the state budget as well, or else people will not be responsible enough,"

—A Russian professor

Sustainable legal reform frequently means that the hosting government will ultimately absorb the costs of the reform, which underscores the need for political leadership and grassroots support and ownership. "Assistance should be conditioned on involving the state budget as well, or else people will not be responsible enough," one Russian professor said. Donors should early on look for matching support from host governments for activities that the country itself will eventually need to fund. It is clearly the role of the government, for example, to train its judiciary—although the judiciary itself should control content and methodology, etc. Judicial training centers in some countries, such as in Latvia and Lithuania, however, started out as NGOs to more readily attract donor support. Once that outside funding ran out they had trouble attract-

ing local or government support, putting their sustainability in doubt. The newly revived school for magistrates in Romania, on the other hand, enjoys both government and donor support. The government and the donor organizations will need to plan carefully for a gradual transition in that support to come entirely from the Romanian government.

Legal reform is a long-term process

The final, and perhaps most frequently cited, lesson is that legal reform is a long-term process. Ten years have passed, and reforms throughout the region remain incomplete. This should not be surprising: legal reforms within donor countries likewise take many years to design, implement, and fund.

"We should not have to wait 200 years [for democracy]. People have a right to justice now."

—A Kyrgyz law professor

The long-term nature of law reform presents problems for citizens of the transition countries who are suffering under the imperfections of their current systems and for donor organizations that are frequently under pressure to show quick results. These pressures were expressed in Kyrgyzstan, where a judge, defending his actions in fining and threatening to close an opposition newspaper, explained that, "We do not have 200 years experience with democracy." But another Kyrgyz, a law professor, argued, "We should not have to wait 200 years. People have a right to justice now."

Interviewees made clear that the international community, both through the programs it provides and by establishing criteria for administering justice, plays an important role as a catalyst for change. The long-term nature of legal reform, however, means that the donor-funded organizations must maintain their presence on the ground to understand and track the political situation, develop partnerships, and design appropriate programs. Some stakeholders in the region, however, feel that there is too much contractor turnover or that some contractors are more interested in making their own contacts and developing their own businesses. One Georgian said, "Often we feel that the donor activity is more of a competition for influence than an effort to understand local needs." Donors may want to consider retaining their implementing contractors for longer periods, but including more conditions and means for cancelling contracts for clear failure to perform. Imposing strict conflict of interest guidelines may also be appropriate.

In addition to maintaining a long-term presence in the country, the donor organizations must be more patient, and be willing to focus on institutions, such as law schools, that will form the longer-term basis for a society based on the rule of law.

Priorities for the Future

Streamline the legislative framework

Much of the legal reform work in the region over the past decade has focused on drafting new laws deemed essential to creating democracies and free market economies. Many experts feel that this has been a largely successful effort. "We don't need many new laws," one Russian lawyer said. "You can argue about the details, but generally, they are not bad." Foreign advisors are credited with providing important and useful advice in this process. A Ministry of Justice official in Georgia reported that he could not recall one important piece of legislation that had been introduced without foreign consultation.

"If after you issue a very good law, the regulations that follow depart from the law, what is the point?"

–A Romanian law professor

But many of these laws have been drafted as "stand alone" legislation, with little attention to how they will work within the overall legal framework. This has led to inconsistencies with other newly created laws, and with laws remaining from the Communist period, and sometimes even before. Legislatures also try to devise quick fixes that lead to more inconsistencies, sometimes even within the laws themselves. The rapid changeover of governments, with differing priorities and approaches, compounds this problem. Many lawyers and entrepreneurs also believe that there are simply too many laws and regulations, requiring, for example, businesses to obtain licenses from a multitude of government entities. Finally, regulations issued by implementing agencies sometimes conflict with underlying legislation. One Romanian professor asked, "If after you issue a very good law, the regulations that follow depart from the law, what is the point?"

"Laws are being revised frequently, and under time pressure. This affects the quality of the laws–they can be ambiguous, and open to various interpretations."

–A Polish lawyer

The confusing nature of the legislative framework has a negative impact on its implementation because judges and other officials often cannot be sure of what the law is. "One of the biggest problems for lawyers and the business community is the rapid process and pace of legislative changes," a Polish practitioner said. "Laws are being revised frequently, and under time pressure.

This affects the quality of the laws—they can be ambiguous, and open to various interpretations. Also, the advisors working on the laws forget their interconnection with other laws, and so there are inconsistencies, and you cannot predict how that can be solved in interpretation because different agencies and different courts will interpret them in different ways."

"The bureaucracy has killed medium-sized businesses."

—A Romanian lawyer

The confusing and burdensome legislative and regulatory framework also dissuades investors and is particularly damaging to small and medium enterprises. "The bureaucracy has killed medium-sized businesses," one Romanian lawyer said. Officials at the Romanian Development Agency noted that "you cannot develop a fiscal plan when the legislation changes every six months." Large companies can afford to hire lawyers and accountants to provide them guidance—or pay bribes—but small businesses and individuals cannot always afford those luxuries. "There is simply no way to comply with all the laws," one Romanian businessman said.

"The legislative framework is basically okay, but there's still too much paper," a Polish businessman said. "We have to file a tax return every month. This can be a huge issue for a small business that is just starting up. This means that you are sometimes paying taxes before you get paid by your customer. Add to that the fact that there is no tax relief on bad debt, and you can have a very difficult situation."

"Corruption equals Discretion plus Monopoly minus Accountability (C = D + M – A)."

—An American prosecutor working in the region.

Confusing and conflicting laws and regulations also provide a fertile ground for corruption. An American prosecutor used the following formula to explain why corruption has flourished in the region. "Corruption," he said, "equals Discretion plus Monopoly minus Accountability (C = D + M – A)." Confusing laws and regulations enhance the discretionary power of monopolistic public officials who are not held accountable for their actions. Some critics even believe that regulations are intentionally drafted in a confusing manner to provide officials with more discretion. Laws and regulations should be drafted clearly and simply, so that they lessen opportunities for corruption rather than increase them.

The donor community has made some important positive contributions in the area of legislative drafting, but has also sometimes exacerbated problems by giving inconsistent and contradictory advice. Foreign experts are not always of one opinion on tax and other economic issues. In Romania, consultants working for the World Bank reportedly advised those drafting a law on collateral that secured creditors should be exempt from bankruptcy procedures. USAID advisors working on the bankruptcy law disagreed, and so the provision was removed from that law—but remained in the law on collateral, causing widespread confusion in the business community and inconsistent decisions from the judiciary.

"It is more important that the government act consistently than for it to try to comply with each recommendation made by each outside consultant. And donors should respect such decisions."

–A former Romanian official

A former high-level official in Romania noted that there is nothing wrong with obtaining differing advice, but that it is up to the host government to formulate and implement its own consistent policy. "It is more important that the government act consistently than for it to try to comply with each recommendation made by each outside consultant," he said, "and donors should respect such decisions."

"We cannot be told to do this or that. We cannot just copy laws from the West."

–A senior Georgian official

Donor organizations must also exercise caution because legislative drafting programs can be particularly intrusive. "We cannot be told to do this or that. We cannot just copy laws from the West," one senior Georgian official said. Another lawyer was more gentle in his criticism, saying only that the outside experts "generally do not do enough contextual work and research. Some aid agencies drew criticism, moreover, for relying too much on expensive consultants who were insufficiently familiar with local conditions. One organization uses volunteers in the United States and Western Europe to comment on draft legislation from countries around the region, but that program is criticized for the lack of information given to the commentators on which to base their assessments. "You need to have the Russian and foreign advisors working together," one lawyer in Moscow said.

CIDA's legislative drafting program in Russia provides a more positive example. The McGill University Institute of Comparative Law, working in partnership with the Russian Research Center for Private Law in the Office of the President, maintains an office in Moscow whose primary function is to develop research mandates on specific pieces of legislation. The Moscow office, in coordination with Russian experts, drafts memoranda outlining the issues to be addressed, experts in Canada structured as specialized research teams then respond, the Russians comment on that response, and a final paper results. The McGill program also has worked closely with the Leiden University Faculty of Law Institute of East European Law and Russian Studies. Together, the McGill and Leiden programs provided technical assistance on the Russian Civil Code, and are credited with having made significant contributions to this important legislation.

To the extent additional legislative drafting is required, programs should emphasize fundamental laws that protect basic property and individual rights, and those required for compliance with international standards provided by Council of Europe, EU, and others. Harmonization with EU law will be particularly important for Central European countries, and the donor community will need to make a strong effort to coordinate its advice to facilitate that process.

The goals are less clear in the former Soviet Union, but the effort should be to draw up legislation that protects basic property rights, and levels the playing field for citizens and private businesses in their conflicts with the state. Defining and limiting state power continues to be a fundamental issue in many of the former Soviet states.

"The problem is not just that the laws change ... It is that the government never explains itself. If you want people to endure hardship, you have to involve them in the decision making process."

—A Romanian businessman

Programs to assist legislative drafting should also focus on enhancing the transparency of the process. Too often programs are defined by an end result—a draft law—rather than by a process, such as how a concept or proposal is transformed into a law. Some programs have supported public hearings and trained lawyers in legislative drafting skills, but these have generally been short term, and serious problems persist.

In Romania there is little consultation with those who are most likely to be affected by new laws—there is no opportunity for true constituency input. "The securities commission sometimes just issues a regulation," said one lawyer, "without any publicity or publication beforehand. The process is un-transparent, and the result is usually a regulation that conflicts with another regulation." One businessman said, "The problem is not just that the laws change, or that the IMF imposes certain requirements. It is that the government never explains itself. If you want people to endure hardship, you have to involve them in the decision making process." A law professor, looking to the future, noted that it will be important "to have a dialogue in the process of EU accession. People don't know what they are getting into, they just think there will be a lot of funds available, and are hopeful that the EU will be more understanding than the IMF."

"There is no legislative process at all. We need to introduce the idea of a public comment period."

—A foreign program director in Kyrgyzstan

The idea of requiring public comment periods, as well as parliamentary and ministerial hearings, should certainly be supported. Legislative drafters in ministries, institutes, and parliaments should, also, be encouraged to seek input from a broad variety of groups that will be affected by a law or asked to implement it. "We should use practitioners and judges, not just academics, to comment on draft legislation," a Russian lawyer said. "There is no legislative process at all. We need to introduce the idea of a public comment period," a foreign program director in Kyrgyzstan said.

The donor community could do more to support institutions, such as legislative councils or think tanks, tasked with harmonizing a country's laws with international standards, or studying inconsistencies and lack of clarity in the law. With an eye to enforcement, donor programs to

assist in legislative and regulatory drafting should be accompanied by public education and judicial training components.

Emphasize enforcement

Many of the basic laws are already in place throughout the region. The problem is that the laws, even if they are well drafted, are not being enforced correctly, fairly, or evenly. "The law is not what is on the paper, it is what the bureaucrat says," said one Russian lawyer. "Under the Soviet regime we had wonderfully drafted laws," a Georgian NGO leader added. "But they meant nothing in reality. Now people are seeing the same thing with these new laws. Parliament acts every day, but it has no real impact on their lives." In Kyrgyzstan, one long-term program director said, "We started out with drafting laws, saw them passed quickly, and now we watch as they are not implemented."

> *"The law is not what is on the paper, it is what the bureaucrat says."*
>
> *–A Russian lawyer*

The failure to enforce the legislative framework contributes to confusion and adds to disincentives to invest and the climate of corruption. Solutions must begin by making the public aware of new laws that endow them with new rights, or that limit government and bureaucratic power. The mass media must advise the public of its rights, and how to enforce them. The danger, of course, is in raising unrealistic expectations.

Enhancing the public's role means that it must also have access to organizations that will help it enforce the law. To further this goal, donor organizations should support public interest law firms, ombudsman's offices, etc. Regulatory agencies must also be clearly charged with enforcing the law through criminal prosecutions and civil claims. Lawyers for such organizations must receive the financial and educational support that will enable them to do their jobs. Law enforcement also requires training for police, prosecutors, and other officials.

> *"We have well written laws, but we cannot enforce them. To do that, you must go to court. But our courts are very corrupt. To win a case, you need political or family influence, or a bribe."*
>
> *–A Kyrgyz lawyer*

Ultimately, however, the judiciary is responsible for interpreting and enforcing the law. "It's not really the laws that need to be changed, but you need enforcement. And for that you need to build the integrity of the courts, not just their expertise," an American lawyer in Russia said. "You need to get honest, informed judges out into the regions." A Kyrgyz lawyer reported, "We have well written laws, but we cannot enforce them. To do that, you must go to court. But our courts are very corrupt. To win a case, you need political or family influence, or a bribe."

Judges, assuming that they have made their determinations based on the facts and appropriate application of the law, need greater power to enforce their decisions. In Russia, for example, if the local or federal executive authorities fail to take an interest in a judicial decision, it may well go unenforced. "Many decisions in favor of ordinary citizens stay on paper," one government lawyer said. A senior judge in Georgia called the execution of judgments the "Achilles heel" of the judicial system, noting that 11,000 court decisions were unexecuted in 1999. A Polish official said the country was "very weak" in enforcing payment of debts, which he saw as a vestige from the Communist era when debtors received more protection than creditors. A foreign lawyer in Warsaw reported that of the 100 or so collection cases he had been involved in, none had been successful: the court bailiff always reported back that the defendant had no assets. There were also reports that bailiffs can be "influenced" by debtors not to pursue them too assiduously. "Bailiffs have poor knowledge of their rights. They don't know what to do if the door is closed on their face," a Kyrgyz lawyer said. Each of these countries is in the process of creating new judicial enforcement or bailiff services, but they have not been fully staffed, funded, or trained.

The donor community can have a broad role in addressing the enforcement issue: support for public education campaigns, public interest law firms and public information centers; training for judges, lawyers, prosecutors, and police; and support for institutions charged with enforcing regulations and the bailiff organizations that enforce judicial decisions. Educating the public and training judges and other officials should take place either during or shortly after the drafting of important legislation, to build on enthusiasm and counter creeping skepticism.

Make the system more accessible

Enforcing the law requires use of the law. That means that the public must have meaningful access to the legal system. The first step in that process is letting the public know what the law is. The second is having lawyers and legal services to advise the public and represent indigents.

Providing resources so that the public, in particular the poor, have access to the legal system is a problem that the donor countries themselves have not fully resolved. During the Communist era in the region, the procuracy provided some services that gave citizens recourse. Now that role is being removed, but insufficient steps are being taken to fill the gap.

While a person can represent himself, "his voice may not be properly heard."

—A young Romanian lawyer

Poland's Ministry of Justice, as in most countries in the region, maintains a list of lawyers it pays to represent indigent plaintiffs (at $10 a case) but this is mostly for criminal matters. In civil cases throughout the region plaintiffs are usually not required to be represented by counsel, and some judges report that they do more to "help" these individuals. One NGO leader in Romania, however, reported seeing an elderly person being thrown out of court by the judge and told not to come back until she had a lawyer. Another young lawyer said that, while a person can represent himself, "his voice may not be properly heard."

There is no *pro bono* tradition in the region, and most lawyers are caught up in the day-to-day business of finding paying clients and putting food on their tables. Other, albeit imperfect, tools for providing access to justice in the West include contingency fee arrangements and class action lawsuits, but the countries in the region have neither traditions nor legislation that enable the use of such methods.

Some help is being provided, with varying degrees of support from the donor community, by legal clinics, consultation bureaus, ombudsman's offices, and advocacy NGOs. Regional and neighborhood consultation bureaus have had some success, perhaps due in part to their being based in Communist traditions. The Russian Foundation for Legal Reform supports a number of bureaus based in libraries and other locations in several cities; citizens and lawyers can use library facilities to educate themselves and obtain advice from young lawyers or law students. CEELI, Soros, and the Swiss Association for International Cooperation are supporting similar offices in Kyrgyzstan. Consultation bureaus usually do not, however, offer in-court representation. Ombudsman offices also follow up on citizen complaints, but do not generally bring court actions.

Some NGOs represent clients in court, gratis, or for small fees. Most work in conjunction with law school clinics to pursue civil, immigration, and environmental cases in court, with some success. One notable long-term example is the Environmental Public Advocacy Center, with offices in Ukraine, Armenia, and other countries, supported by USAID, which trains the public, engages in legislative advocacy, and pursues litigation on environmental issues.

Another impediment to access to justice, in particular for the poor, is the high level of court filing fees. In Georgia, for example, after paying filing, appellate, and enforcement fees, a plaintiff may wind up having posted almost 12 percent of his claim. A winning plaintiff is repaid this amount on collection from the defendant, but may lose all the money if he fails to prevail or collect. One senior judge said that up to 75 percent of litigants cannot afford these charges, but judges "cannot always help them [by granting waivers] because the system relies on these fees." In Poland, which has a similar structure, one observer reported that courts are unwilling to waive fees because that would result in "cutting off their own funding." These courts should not be forced to choose between fund-raising for themselves and refusing access to justice. Moreover, the potential for abuse seems high because most waivers are granted in ex parte communications between litigants and judges.

"Access to justice is very difficult—the bar is a gentleman's club."

—A Polish NGO leader

A final barrier to justice is the closed nature of the bar in some countries. In Poland, several lawyers and law students reported that the final examination to be admitted to the bar, administered orally, may consist of any number of questions on non-legal topics, making it impossible to prepare for and easy to be administered subjectively. "Access to justice is very difficult—the bar is a gentleman's club," a Polish NGO leader said. The process is "not very fair because it all depends on what questions you get, and that depends on who you are," a student added. Others

reported that a law school graduate must either be related to or a family friend of a lawyer to win one of the coveted apprenticeships. Considering the growing need for lawyers, it is important for the bar to adopt more transparent and fair means for obtaining licenses, and allow the market to control the numbers of persons who receive them.

The donor community can help address these issues by supporting public education programs, funding agencies offering low-cost legal representation to the poor, advising on improving the transparency of licensing procedures for lawyers, and advocating for the restructuring of court filing fees.

Emphasize legal education reform

Legal reform is a long-term development process. It requires home-grown solutions with grassroots support, implemented by indigenous leadership. Thus, it is vital to address the legal education systems in the region. The donor community has been largely hesitant to do so, fearing that it will not be able to show short-term results, and because the leadership in the law schools in the region has been largely conservative. "We cannot do everything, and we want to put our money where we will see a change," a USAID official in Tbilisi said. Ten years later, however, law school conservatism is showing signs of erosion, and so it may be time to revisit the issue of legal education reform, which will require addressing several important issues.

Accreditation. The explosion of interest in the law, and the belief that a law degree will lead to a high-paying job, has led to an enormous number of law schools springing up across the region without proper accreditation. Kyrgyzstan, for example, which had one law school in 1991, has over 20 today. Over 240 law schools are reported to have been established in Georgia over the past several years, some of them including little more than one or two professors, and with no library or materials. As one observer noted, they are more like language institutes than law schools.

"Although there are a lot of lawyers in the country now, it is still hard to find professional ones."

–A Kyrgyz lawyer

The post-Communist years have also seen a large increase in the number of institutions professing to provide legal education in Russia. Many of these schools are, in fact, fishery or shipbuilding institutes that have added legal training to their curricula to attract tuition-paying students. Private law schools have likewise flourished. Obtaining accreditation for such institutes seems not to present a major obstacle, as filing fees or contacts are reported to play a greater role in determining whether to accredit a school than the quality of teachers or library facilities.

This large number of law schools may be something that the market ultimately will address, but only if graduates are required to pass licensing exams. Many countries (including Georgia, Russia, and Kyrgyzstan), however, have no formal mechanism in place for the licensing of all lawyers, so that law school graduates can hold themselves out as practitioners in some fields without having established a baseline of competence. It will take a long time for the market to

correct this—while thousands of poorly trained law students are unleashed on an unknowing and unsophisticated public. "Although there are a lot of lawyers in the country now, it is still hard to find professional ones," a Kyrgyz lawyer said.

Corruption. Corruption is a serious problem in some law schools in the region. Today, many students gain entry to the more prestigious state law faculties not on merit, but by paying bribes. Once admitted, they often do not attend classes but rely on bribery or contacts to obtain good grades. One lawyer in Georgia teaching an international business law course said he did not know why he bothered. Only five out of the 60 students regularly show up for classes, and at the end of the semester he receives a list with "recommended" grades—based on nepotism and contacts.

Corruption in the law schools introduces a culture of corruption into the legal system from the very beginning and undercuts any advances made in other areas of law reform. One dean in Poland, who instructed that his discretionary powers over admission and grading be removed, set an example for combating corruption in the system that other deans should be encouraged to follow. The schools, with technical and material support from the donor community, need also to introduce objective standards for admission, determining who must pay tuition, and grading.

"The training is recitation back and not analysis."

—A Romanian professor

Teaching Methodology. Teaching methodologies in all countries need to be modernized. The most common complaint throughout the region is that teaching is too theoretical: professors lecture, students take notes, and then play back the lecture materials to the professors during seminar sessions. "The training is recitation back and not analysis," a Romanian professor noted. Another Romanian said that legal education is "based too much on rote memorization." Although most countries in the region require law graduates to engage in some form of apprenticeship before being permitted to practice, many criticize those apprenticeships for not providing any real training, or for being essentially "no show" jobs.

Some schools and donor organizations are seeking to address this problem by introducing "clinical" or "practice-based" teaching methodologies. The term "clinical legal education" encompasses a broad variety of teaching methodologies, from allowing students (with professorial supervision) to represent clients in real cases, placing them in internship programs, and role-playing in the classroom. Clinical teaching is important because it provides real life experience to law students, encourages critical thinking, and offers needed legal services to the community.

Such programs are beginning to bear fruit in a number of countries, most notably at Jagiellonian University in Poland. The process of introducing clinical legal education in Poland began in late 1996 with a conference in Krakow funded by CEELI, the Organization for Security and Cooperation in Europe, and the U.S. Consul's Office. The Ford Foundation subsequently provided substantial funding to train and pay local law professors, obtain equipment, and develop a partnership with clinical law professors from Catholic University in Washington, D.C. Jagiellonian's clinical program is divided into four specialized sections for human rights and refugee law, labor law, criminal law, and civil law (mostly alimony, landlord-tenant, and inher-

itance cases). Only 8 to 15 students are allowed in each clinic, and one law professor, one practitioner, and an assistant provide supervision, training, and support. The university provides each clinic with its own office, and the students receive a large number of credits for their work.

The assistance provided is generally in-office consultations, and helping clients draft court pleadings. As in other countries, there is less of an opportunity for students to appear in court because of their youth (law is an undergraduate degree) and because of the lack of student practice rules. Nevertheless, the Polish law students do sometimes appear in court, either acting as court appointed guardians, or on behalf of NGOs, which do not need to be represented by licensed attorneys.

There is no doubt that the law students value the training they receive at the clinics. One student said that it was particularly interesting "to see how the judges are writing their opinions. It is very different from what we are told about in the books. And it is very different to have a real case to defend." Another student said that although some teachers use problems in class, the clinics are better because the real life situations "are much more complicated than anything anyone can just think up, and they cut across all branches of the law." They also said that the clinics were different from the apprenticeships, because at the clinic they do "real lawyer's work but at the apprenticeship, at least in the beginning, you are just addressing envelopes for the lawyers." Another law student said that the clinical education should be expanded because "it teaches us *responsibility.*"

"To see how the judges are writing their opinions...is very different from what we are told about in the books. And it is very different to have a real case to defend."

—A Polish law student

Based on Jagiellonian's example, six other schools in Poland, including Warsaw State, have some form of clinical program. Clinical programs exist at several state and private law faculties in Russia, most notably at Karelia State and St. Petersburg State. The program at St. Petersburg involves 30 to 40 students each year, supervised by 7 to 10 professors. The students, after being trained, provide advice on employment law, social law, property ownership, and family law. Similar programs are also being introduced in Romania and Kyrgyzstan.

Despite their growing popularity, clinical programs face real challenges. They are expensive because students need careful training and close supervision by professors and practitioners. One clinic in Romania, for example, has only three professors to supervise 100 students (clinical professors say the ideal ratio is 1 to 10). The most frequent complaint from professors is that they lack sufficient time to teach their regular courses, supervise clinical programs, and hold down jobs practicing law, which they need to do to feed their families. They feel that they do not receive sufficient support from the law schools, which require that they maintain their other teaching schedules, or from the legal community, which perceives the clinics as a threat to practitioners. The lack of support from law faculties is particularly troubling. Most law faculties (apparently

because of restrictions imposed by ministries of education) do not provide academic credit to students for their work at the clinics, and the clinics are typically housed at NGOs rather than at the law schools. The Article 42 Foundation, a Georgian NGO, runs a "clinic" where law students advise detainees of their rights, but the program does not receive support from the university and students do not receive academic credit for their work.

The administration at St. Petersburg State indicated that it wanted to cut back on lecture hours to allow for more practical training, but felt constrained by Russian Ministry of Education rules. Another professor, however, said that the problem was not with the ministry, but rather with the quality of the professors, because it is easier to repeat the same thing year after year rather than to prepare exercises or Socratic dialogues. "We tried to introduce Socratic and other methods in our school, but we failed," an administrator at a private faculty admitted. Finally, law students, unlike in the United States where clinical education had its start, are undergraduates, and it may prove more challenging to introduce clinical methods to such young students. One professor said that in high school "they are taught by absolutely traditional methods. Just write the lecture and memorize it. No one teaches them to think and to do—only to memorize and repeat." It is difficult to get them to learn by an entirely new approach when they enter law school.

Clinical programs will need to be carefully designed to overcome these problems. But the idea of introducing practice-based training, critical thinking, and community service into the law school curricula is a worthy goal, and the challenges are being overcome in Poland. One of the apparent reasons for the success of clinics in Poland is somewhat surprising. A Polish magazine had recently rated the law schools in Poland, based partly on the availability of clinical and international programs. Schools that included such programs ranked higher, and other schools are starting to respond to competition and public pressure. One observer also noted that the changes may be coming to the law schools because the incoming generation of administrators and faculty has had more extensive training in the West, particularly in the United States where clinical programs form a fundamental part of legal education.

Another reason for the success of clinics in Poland is that the universities, although funded by the state, are largely autonomous. Each faculty votes on what courses to offer, including clinical programs. This stands in contrast to the schools in the former Soviet Union where the ministries of education still maintain strict control over the courses offered for academic credit.

The clinical programs in Poland still face some challenges. Support from Ford and Soros will not last forever, and it is unclear—despite the support granted so far—whether the universities will take on the expense of the law clinics absent outside funding. The clinics at Jagiellonian already receive some funds from UNHCR and from the city administration, but it will ultimately be up to the law faculties themselves whether they will make a long-term commitment to practical legal training.

Miscellaneous Needs. The law faculties in the region face a number of other needs. In many schools, commercial law topics do not receive sufficient coverage, and are not always inserted into curricula in a logical manner. In Romania, for example, bankruptcy does not merit its own course and securities law is included in a course on banking law. In Kyrgyzstan, bankruptcy is covered in two or three hours of a commercial law course.

The quality of textbooks and training materials is also a problem in some countries. In Georgia, professors are still using Soviet era books, which do not cover vital topics such as bankruptcy, commercial law, competition law, and EU law. Polish professors also complained of a lack of time to write, study, and reflect. Clearly, professors across the region are pressed for time because of their need to hold several jobs at once. This means that they can provide less time to their students, develop fewer quality textbooks, and generally cannot act as independent observers and critics of the legal system. More should be done to provide grants to professors so that they can pursue these important activities.

The physical plants in most law schools are sadly deteriorated, especially the libraries, which have few computers and mostly Communist era books. The library at the law faculty at St. Petersburg State stands out as a stark exception to this rule. Its administration has allocated significant funding to rebuilding its library, including developing an impressive computer center. The donor community could do much to hasten the modernization of these schools by offering matching funding to support repair of law schools buildings and construction of computer laboratories and libraries. This may also provide an incentive to allow reform to progress in other areas, such as with the curriculum.

"These students are tired of playing cards in the law school garden."

–A Georgian lawyer

Working on legal education reform has proved challenging in the past, largely because of the conservative nature of the universities and ministries of education, as well as the tight schedules of the leading professors. Despite these challenges, however, there is a baseline from which to work. Several lawyers in Romania, for example, emphasized that many talented professors, experts in their fields, are teaching in the law faculties, and that they are graduating some very good young lawyers. One Western lawyer reported that the top students at Bucharest University receive "outstanding theoretical training" but require more practical experience. And there is a hunger for change. "These students are tired of playing cards in the law school garden," a Georgian lawyer said.

Continue to emphasize judicial reform

Reforming the judiciary continues to be a vital need, especially if the problem of enforcement is to be truly addressed. Building strong and independent judiciaries is additionally important in this region because the central state powers have traditionally operated without substantial judicial checks. Enhancing the power of the judiciary to protect individuals from the excesses of the majority–and to limit state power–continues to be one of the foremost needs in the region.

"Most judges are from the Soviet system, and are used to protecting the interests of the state," one Russian government official said. "It is difficult for them, in a case in the *arbitrazh* courts involving a state-owned entity, to treat private litigants in an unbiase d manner. And in general jurisdiction courts, the judges perceive the courts as an element of the law enforcement body."

A law professor echoed this comment: "The thinking pattern of judges is still to protect the interests of the state rather than of the individual." The same is true in Kyrgyzstan, where judges are generally perceived to lack independence from the state, and in important cases are said to make their decisions based on directives from the executive branch.

"The thinking pattern of judges is still to protect the interests of the state rather than of the individual."

—A Russian law professor

In each country judges continue to face imposing barriers to judicial independence, including insufficient salaries, lack of training and information, and poor support and work conditions.

Resources. The courts are not allocated sufficient physical resources and support staff. "Buildings can tell history," a Russian law professor said. "In the past, the most beautiful buildings were the courts. In the 1930s, the most solid buildings were of the secret police. In the 1950s the best buildings housed the party committees." Today, the courthouses in Russia are in disrepair, and are being disconnected from water, electricity, and other supplies. One judge in Moscow embarrassedly confessed that he could not offer an unbroken chair. A lawyer advised that, "Pens, chairs, and computers are what the judges in the regions want." Judges frequently go months without pay. One official estimated that every fourth judge in Russia does not live in suitable housing conditions.

"Pens, chairs, and computers are what the judges in the regions want."

—A Russian lawyer

This means that many of the judges are turning to local authorities, rather than to the federal government, for support. Judges are reportedly hesitant, therefore, to reach decisions that run counter to the interests of the local government—or persons or entities closely connected to it—for fear that they will lose their apartments or other "perks" the local government is providing. Similarly, deciding a case contrary to the views of the president of a court risks the loss of office space and other support and an increase in caseload. All of this, one Russian official noted, "can raise doubts about independence."

The new Supreme Court building in Poland, however, tells a different story. There, each judge has a modern, new, fully equipped and computerized office. But the lower courts, in particular outside of Warsaw, still have many needs, detailed in a 1998 report by the Helsinki Foundation. That report found that most lower courts lacked paper to write on, guards and security equipment, copies of statutes, and bathrooms and waiting areas for litigants. "If the judiciary really is the third branch of government, let's treat it as such," one Helsinki representative said. In Kyrgyzstan, where conditions are worse, a law professor said, "We should not be trying to save money on justice."

"We should not be trying to save money on justice."

–A Kyrgyz law professor

Overcrowding is also a problem. The Romanian regional appellate court in Brasov, for example, has five judges working in one office, with little space for secretaries or clerks. The courts in Bucharest are similarly cramped. There are no workplaces for lawyers, who can be seen recruiting clients at a desk in the hall. The docket rooms were packed with mobs of citizens and lawyers trying to obtain their files. Although some courtrooms in Romania have been refurbished, the atmosphere and conditions are not conducive to dispensing justice or developing respect for the rule of law.

There is also a shortage of computer equipment throughout the region. The Helsinki report in Poland found that 60 percent of judges had no access to computers, and "38 percent share the PC with over a dozen or even several dozen others." The Sector 3 lower court in Bucharest has 40 judges and 7 computers, while the Sector 6 court, where 30 judges work, has two computers. The lack of computer equipment, in addition to other inefficiencies, means that judges cannot track the evolving legislative framework on the computer databases that are commercially available in each of the countries reviewed.

Judges also have insufficient support staff–clerks, researchers, bailiffs, and security personnel. Georgian judges complained that the clerical staff is left over from the old period, and is not sufficiently trained to handle the greater caseload, or to deal with questions from lawyers and the public. "We would like to see more young faces among the staff–people with a new mentality," one judge said. Because clerks are incapable of responding to most questions posed by litigants, judges find that they cannot avoid *ex parte* consultations, despite the obvious ethical problems. A government official in Poland said that there were, on average, 1.5 clerks per judge whereas there should be three. One judge in Warsaw estimated that due to the low salary for clerks, turnover is about 50 percent a year. He also complained of the lack of training and education for support staff.

Judges in Poland, which has seen recent violent attacks on the judiciary, were particularly concerned for their personal safety. Security for the judiciary throughout the region will become even more important if it is expected to take on anti-corruption cases.

Judges across the region are generally underpaid. A typical judicial salary in Russia is about $140 per month; in Kyrgyzstan, $30. This increases the temptations of corruption, and gives judges little incentive to work harder to increase productivity. Some countries, most notably Georgia and Romania, have elected to increase judicial salaries, although finding the money to consistently pay them has been a problem, particularly in Georgia.

The low salaries make it difficult for the judiciaries to hire and retain the best and the brightest. During the Communist era, many of the top law school graduates joined the procuracy. Today, they are going into private practice. In addition, many experienced judges in the region are leaving the bench for more remunerative private practices, contributing to the lack of experience and overall youth of the judiciaries.

"Judges have no feeling that they are important, or that they have any real power."

–A senior judge in Poland

In many countries, large numbers of judges are women. On the surface, this may seem admirable. One of the vestiges from the Communist period, however, is that being a judge is frequently perceived as unimportant, part-time work and, therefore, somehow more appropriate for a woman. According to this tradition, the procuracy is a male preserve, and the judiciary–except for leadership positions–is largely relegated to women. Unfortunately, the feminization of the judiciary does not reflect the advancement of women in the region but rather the low status of the judiciary. One observer in Poland estimated that 80 percent of the judges were women, because "it is okay for them to get a low salary." The problem of sexism throughout the legal profession is an issue that the countries and the donors need to be aware of and address.

The result of the low salaries and poor working conditions is that the social status and morale of judges are quite low. One senior judge in Poland lamented, "Judges have no feeling that they are important, or that they have any real power." It will ultimately be up to the countries themselves to allocate the buildings, money, and staff that will enhance the credibility of the judiciary. Donor organizations can offer some support (the World Bank, for example, is lending money to Georgia to rebuild some courthouses), but caution must be exercised to ensure that the governments follow up on this funding and continue to support these institutions after the donor programs end. It is also important to be aware of how such equipment might be used. One Russian lawyer warned, "If you give the judges equipment such as computers, they will just write bad decisions, against human rights. We should see what they are going to do with these materials first."

Perhaps a more important role for the donor organizations is to lobby the governments involved on behalf of the judiciaries, to convince them that an independent judiciary will do more to encourage investment in a country than will tax holidays or other special incentives.

Judges "have poor knowledge of legislation, especially regarding banking, securities, and international legal norms–even if Russia has acceded to them."

–A Russian lawyer

Training and Information. Judges continue to need additional training and information. The Chief Judge of the Supreme *Arbitrazh* Court in Russia cited additional training as one of the top needs for his judges. One Russian lawyer said that the judges "have poor knowledge of legislation, especially regarding banking, securities, and international legal norms–even if Russia has acceded to them."

Georgian judges likewise stated that they need training on the substance of newly enacted revisions to the civil and criminal codes. They also recognized that they need to learn more about

new areas of commercial law, such as bankruptcy and competition law. One Georgian lawyer trying a commercial dispute outside Tbilisi told how a judge had not seen the recently revised civil code, and based his decision, wrongly, on the old one. The judge, moreover, had been too proud, stubborn, or mistrustful to review a proffered photocopy of the revised code. Numerous other anecdotes were told of judges, particularly in regions outside the capital, not having copies of legislation. Where they do have copies, they have had to purchase the materials with their own funds. As one judge said, "This is expensive, but we need the information."

The biggest problem for the courts is "tracking the changes in the law—no one helps. New regulations come out, but the judges do not even have the text of the law."

—A Polish judge

Poland faces similar problems. A senior judge there indicated that the biggest problem for the courts is "tracking the changes in the law—no one helps. New regulations come out, but the judges do not even have the text of the law." This judge went on to note that new laws are initially implemented and interpreted at the lowest levels of the courts, where the judges are least prepared to handle them. One Polish lawyer noted that junior judges are appointed without practical experience, after only law school and an apprenticeship, and so they "do not understand the underlying business considerations." Other practitioners echoed this complaint. "Sometimes things are too complicated for the judges," one said. "They are very young, and receive a very good theoretical education, but they do not understand how business works."

In addition, there is little opportunity for the lower court judges to study the decisions of the higher courts. Although there is no reliance on "precedent" as in common law countries, almost all Romanian judges cited the need for greater access to what they called "jurisprudence"— decisions from higher courts that would not, perhaps, be binding but could provide guidance, as well as greater uniformity and predictability to case outcomes. Judges also bemoaned the lack of commentary on legislation.

"Training programs need to focus on the essence of being a judge: independence. They must be able to resist the pressures against them. They also need practical training, because then it will remain within them as a lesson—like a vaccination."

—A Russian lawyer

Each of the countries either has created, or is creating, a judicial training center. These centers have enjoyed the support of the donor community, and it will be important that this support continue—keeping in mind that the governments themselves will ultimately need to bear responsibility for maintaining these institutions.

Judicial training should include skills training: how to write opinions, interacting with the public and the press, and judicial independence. "Training programs need to focus on the essence of being a judge: independence," one experienced Russian lawyer said. "They must be able to resist the pressures against them. They also need practical training, because then it will remain within them as a lesson—like a vaccination."

Court Administration. Inefficient court administration and increasing caseloads are slowing the judicial process. All countries are reporting steadily growing caseloads and increases in the length of time needed to resolve them. The *arbitrazh* court system in Russia, for example, reports a 20 to 25 percent increase in the number of cases heard each year, largely disputes between entrepreneurs and the state over taxes and customs duties. The increasing caseload, combined with antiquated court administration techniques, is causing a logjam in the system.

"In Warsaw in the most simple case, without any evidentiary proceedings, it will take two to three years to get a judgment. And you may have to wait 9 to 15 months from the date you file the complaint until the first hearing. There are just too many cases and too few judges."

—A Polish lawyer

One business advisor in Poland lamented the fact that a minor credit collection case, especially if it involves a foreign company against a small company, "can drag on forever." A lawyer reported, "In Warsaw, in the most simple case, without any evidentiary proceedings, it will take two to three years to get a judgment. And you may have to wait 9 to 15 months from the date you file the complaint until the first hearing. There are just too many cases and too few judges." He went on to say that by using the most rudimentary delaying tactics—the defense lawyer claiming sickness on hearing dates—a case can take up to five years. One government official said that the inability of courts to try cases quickly enough has lead to a "crisis in the judiciary. We need to simplify procedures and put a greater emphasis on mediation."

A Romanian lawyer told how a bank bankruptcy case took over three years to resolve—while depositor savings were almost entirely depleted by inflation. These cases give meaning to the saying, "Justice delayed is justice denied." This is also true for the poor and the elderly who may be seeking, for example, to recover land or homes lost during the Communist period. Some of these cases last as long as five years in Romania.

Basic court administration issues include judges spending too much time on administrative matters that could be better left to support staff, a lack of judicial power to enforce orders and discipline delinquent lawyers and litigants, a lack of computerized case-tracking systems, and the failure to use forms that would expedite filing and hearings.

The donor community has made some important positive contributions in this area. CEELI's reports on court administration in Romania, Poland, and other countries, do a good job of identifying problems and recommending solutions, but come without funding to implement changes.

The World Bank has made some loans to address court administration problems. Other programs support the introduction of alternative dispute resolution mechanisms, which unfortunately have been met with skepticism by the judges, lawyers, and the public.

Corruption. Judicial independence needs to be balanced with judicial accountability. Judges not only need to enhance their independence through better support and training, but also by acting more ethically.

Corruption within the judiciary was recognized as problem in all five countries. The problem was deemed most severe in Kyrgyzstsan, but also serious in Russia and Romania, while there were hopes for improvement in Georgia following the administration of the judicial qualification examinations.

If judges are getting paid $30 per month,
"They are just like hungry policemen lurking on the road."

–A Kyrgyz judge

Even in Poland, where corruption in the judiciary was not considered as pandemic as in other countries, problems remain. It was reported that registering a company (a judicial function there) typically takes three to four weeks, but that there were certain lawyers, with good contacts with certain judges, who could conclude a registration in two to three days. One observer noted that, "The judge and the law firm share the extra income from this." Another lawyer said that the courts have three months to decide on whether to accept the filing of a new company, and will take all of that time, but that filing can also be done in two to three days: "That, however, requires an envelope." The price for an accelerated filing is reportedly $1,500 to $2,000.

"We need to work to assure the independence of the courts from local, national, and other authorities. We also need to overcome the closed nature of the judiciary. The procedures for the conducting of cases need to be more open–the judges do not always allow the press to review their decisions. We need to have better accessibility of the courts to the public."

–A Russian official

The problem is deeply rooted. One Georgian judge explained, "The Soviet system required that all judges be members of the Communist Party. And another member of the Party was always in the court, observing. If you accept that form of influence, it is easy to accept other forms." That same judge later noted that due to Georgia's small size and clannishness, another problem is "not just bribes, but close links. How do you fight that kind of influence, when a friend comes to seek a favor?"

The low salaries of judges, moreover, makes it is difficult for them to refuse bribes. One judge in Kyrgyzstan noted that, if judges are getting paid $30 per month, "They are just like the hungry policeman lurking on the road."

"Having the ability to discipline corrupt judges without the interference of the executive branch is a key next step to developing an independent judiciary," a foreign observer in Georgia noted. And corruption should be less prevalent in the judiciary than in other parts of the government because of "built-in mechanisms for anti-corruption, such as publicity of procedures, the requirement for providing grounds for decisions, and the possibility of appeal," a Russian lawyer noted. Despite these safeguards against corruption, others pointed to insufficient transparency in the judicial process and very brief and unhelpful descriptions of the reasoning behind decisions. One lawyer said that she had never "received a good reasoning in a civil case" and in a criminal case, "they just quote the criminal code." One Russian official said, "We need to work to assure the independence of the courts from local, national, and other authorities. We also need to overcome the closed nature of the judiciary. The procedures for the conducting of cases need to be more open–the judges do not always allow the press to review their decisions. We need to have better accessibility of the courts to the public."

Judges should be trained and encouraged to write more reasoned opinions, which should then be published and subject to public and academic scrutiny. Donor support to the judicial training centers and law schools can help address this problem.

"When you put food into a bird's cage, the bird will eat–even if the cage is made of gold."

–A Romanian judge

The basic problem, however, is the poverty of the judges, which is something that only the countries themselves can address. Indeed, some steps have been taken. Georgia has administered judicial qualification examinations and raised judicial salaries – but is now having problems paying them. Romania's Justice Ministry also obtained approval for increased salaries for judges. A new judge is paid about $150 a month, and the most senior judges about $450. These are among the highest salaries paid by the state (when first introduced, in 1997, some judicial salaries were higher than the president's). But higher salaries provide no guarantee that a judge will not succumb to temptation. "When you put food into a bird's cage, the bird will eat–even if the cage is made of gold," a Romanian judge said.

Ironically, lifetime appointment, which is often cited as another precondition to judicial independence, is seen in Russia as a means for enabling judicial corruption. Since Russian judges have this protection, and can be removed only by the Judicial Qualification Collegium (composed entirely of judges), they are viewed as being insulated from corruption charges. One lawyer felt that the Qualification Collegium acted like a clan, working to protect the reputation of the courts by covering up. She had launched numerous complaints against one judge claiming a variety of improprieties (a case being decided without opposing counsel present, a complaint being decided

where the date of the decision predated the date of the complaint) but felt that the judge was protected by the president of the court, who swayed the opinion of the Collegium. While ideally the judiciary should be self-policing, it may make sense to include representatives of the bar, the procuracy, and the public on judicial review boards.

Combat Administrative Corruption

The problem of corruption, of course, is not limited to the judiciary. Corruption was cited as a significant problem in the ministries, agencies, and legislatures of each of the countries visited. Many noted that foreign investors participate as well, by willingly paying bribes. Finally, the public views corruption as acceptable. "The atmosphere and feeling is that corruption is not a bad thing," an NGO leader in Poland noted. "People do not see the connection between street level corruption and a corrupt politician." Others saw corruption as simply a part of life. "The only entrepreneurship that is being developed here is criminal," a Kyrgyz lawyer said. "If you are a businessman and want to comply with the law, you will not survive." One businessman in Romania said, "Corruption has become a way of life, more than before. And either your business has to play the game, or it dies." An NGO leader added that, "the poor economy and the huge bureaucracy provide a ripe environment for corruption—it is everywhere."

"Corruption has become a way of life, more than before. And either your business has to play the game, or it dies."

—A Romanian businessman

Corruption damages society by discouraging investment and fostering a two-tier system of those who can and those who cannot afford to pay, undercutting the very basis of democracy. It is, however, hard to combat, largely because it is rooted in poverty. A clerk who is making $25 to $30 a month simply cannot give up any excess income that comes his or her way. In addition, corruption is, at least superficially, efficient: the payment typically results in the services bargained for. "If you give me a pair of Nike sweatpants, you'll get your order in three weeks, not three months," was one example provided in Romania. And corruption, which was prevalent even before the fall of Communism, is becoming more and more a part of the tradition in the region.

The countries themselves, however, do have some ideas on what must be done to fight corruption. The Justice Minister in Romania, for example, proposed the following: "First, reduce the bureaucracy. And reduce the number of authorizations needed to run a business. Second, develop legislation that can be used against corruption and prosecute economic crimes. Third, improve transparency in lobbying and government activities. And also we need to recognize that poverty itself is the main source of the problem." A high level official in Poland said, "You need to have clear rules for decision making by the administration: public officials in Poland have too much discretion. Fighting corruption just by using a penal code will not work. You need to reduce the possibility for corruption, with a clear set of rules, and then teach the public what those rules are."

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Of course, money is also needed. Ministerial officials cannot be expected to refuse bribes when they cannot live on their salaries. And that requires improvement of the overall economic situation.

The donor community has a role to play. It can help streamline the legislative framework, and train judges, lawyers, and prosecutors. A new program supported by the Ford and Soros Foundations in Poland, called simply "Against Corruption," will seek to change social attitudes through public education and support for independent journalists. It will also review legislation to identify sections of laws where a decision may be made by one person empowered with discretionary authority. The success of this program should be monitored to determine whether it should be replicated in other countries.