

Date Printed: 11/03/2008

JTS Box Number: IFES_2
Tab Number: 11
Document Title: IFES Election Dispute Resolution:
Judicial Authority and Independence
Document Date: 2002
Document Country: Bulgaria
IFES ID: R01544



* 5 3 6 1 4 1 B 7 - E A D 9 - 4 9 1 2 - A A 7 0 - E B 9 1 F 8 D 4 B 0 C 8 *

IFES ELECTION DISPUTE RESOLUTION:
JUDICIAL AUTHORITY AND INDEPENDENCE
CONFERENCE

Conference Transcripts and Proceedings

Sofia, Bulgaria

25-27 April 2002

This publication and the events described within were made possible through support provided by the International Foundation for Election Systems (IFES) and United States Agency for International Development (USAID), under the terms of cooperative agreement No. EE-A-00-97-0034-00. The opinions expressed herein are those of the author and do not necessarily reflect the view of USAID.

**Library Copy:
For Display Only**



IFES ELECTION DISPUTE RESOLUTION: JUDICIAL AUTHORITY AND INDEPENDENCE CONFERENCE

Conference Transcripts and Proceedings of Conference held in Sofia,
Bulgaria on 25-27 April, 2002

Sponsored by

International Foundation for Election Systems



MAKING DEMOCRACY WORK

This publication and the events described within were made possible through support provided by the U.S. Agency for International Development (USAID) under the terms of the cooperative agreement EE-A-00-97-0034-00. The opinions expressed herein are those of the author and do not necessarily reflect the views of USAID.



IFES Election Dispute Resolution: Judicial Authority and Independence Conference

Editor's Notes

This report is based on recorded transcripts of the proceedings of the IFES Election Dispute Resolution: Judicial Authority and Independence Conference, which was conducted simultaneously in four languages: English, Russian, Bulgarian and Serbo-Croatian. There may be errors in the report that resulted from the process of transcribing and translating the presentations. We have made an effort to correct these errors, and we apologize for any inaccuracies that may remain. Finally, while the conference was organized by IFES with funding from USAID, the views expressed by the speakers are their own and do not necessarily represent the views of IFES or USAID.

The Editors

IFES ELECTION DISPUTE RESOLUTION: JUDICIAL AUTHORITY AND INDEPENDENCE CONFERENCE

Table of Contents

Executive Summary.....	1
<u>Day one transcription:</u>	
Opening Remarks:.....	3
<i>Deborah McFarland: Mission Director USAID/Bulgaria</i>	
<i>The Honorable Miglena Tacheva: Deputy Minister of Justice of Bulgaria</i>	
<i>The Honorable Nikolay Filchev: Prosecutor General of Bulgaria</i>	
<i>The Honorable Stefka Stoeva: Chair of the Department of Supreme Administrative Court of Bulgaria</i>	
Keynote Speaker:.....	6
<i>The Honorable Judge Bohdan Futey: The United States Court of Federal Claims:</i>	
<i>“The Role of an Independent Judiciary in Resolving Elections Dispute: A U.S. Perspective”</i>	
Panel Presentation: “Emerging Trends and Standards in Election Dispute Resolution”.....	11
<i>The Honorable Justice Vanya Puneva-Mihailova: Supreme Administrative Court of Bulgaria</i>	
<i>The Honorable Alvina Gyulumyan: Member of Constitutional Court of Armenia</i>	
<i>Mr. Patrick Titium: Legal Advice Department for the Council of Europe</i>	
Panel Presentation: “Key Institutional Challenges and Legal Issues Confronting Judiciaries in Emerging Democracies”.....	22
<i>Ms. Ewa Elias: OSCE Department of International Human Rights</i>	
<i>The Honorable Liliana Misevic: Municipal Court Justice of Nis, Serbia</i>	
<i>Mr. Valentin Georgiev: Secretary of the Central Election Commission of Bulgaria</i>	
<u>Day two transcription:</u>	
Presentation: International Practices in bringing election disputes to the judiciary.....	31
<i>Mr. Robert Dahl: IFES Elections Legal Advisor</i>	
Panel Presentation: “Judicial Conduct: Holding the Judiciary to Higher Standards of Accountability”.....	39
<i>Mr. Keith Henderson, IFES Senior Advisor, Rule of Law</i>	
<i>Mr. Victoria Airgood: ABA/CEELI</i>	
<i>Mr. Emilia Andeeva: Training Centre for Magistrates, Sofia</i>	
Discussion Groups	
Group 1: <i>Judicial Immunity</i>	48
Group 2: <i>Business Interests, Income and Asset Disclosure</i>	49
Concluding Remarks.....	51
Impact Summary.....	53
Recommendations/Next Steps:.....	54
Annexes.....	56

EXECUTIVE SUMMARY

In response to the need for establishing more transparent, efficient, and consistent procedures for resolving election disputes in the countries of the former Soviet Union and Central and Eastern Europe, IFES, with funding from the United States Agency for International Development (USAID), hosted a regional conference entitled "Election Dispute Resolution: Judicial Authority and Independence" on 26-27 April, 2002 in Sofia, Bulgaria.

Participants included Supreme Court and Constitutional Court justices from Albania, Armenia, Azerbaijan, Bosnia, Bulgaria, Croatia, Georgia, Latvia, Macedonia, Moldova, Montenegro, Poland, Romania, Serbia, Slovenia, and Ukraine. In addition to the participants, international experts on the rule of law and election dispute resolution were also included in order to share their knowledge and experiences. These experts represented governments, international organizations, and non-governmental organizations such as the United States Court of Federal Claims, the Organization for Security and Co-operation in Europe Department for International Human Rights (ODIHR), the Council of Europe, the American Bar Association Central and Eastern European Law Initiative (ABA/CEELI), and United States Agency for International Development.

Throughout the history of IFES activities, conferences have demonstrated that sharing information in this type of forum on topics which affect the entire region helps constituents to clearly define the problems faced and consider feasible suggestions for improving the situation. The conference in Sofia concentrated on giving judges a better understanding of their roles and responsibilities in the electoral process in the hopes that they would become more competent, confident, and impartial in considering cases. The conference provided guidelines for solving pre-election and election disputes based on international standards and election rules specific to cases that have come before the European Court of Human Rights. The focus of the conference was to provide a comparative analysis of the mechanisms of countries in transition and to consider how the judicial authority can improve the implementation of democratic rights and foster electoral independence.

In many of the countries of the former Soviet Union, and Central and Eastern Europe, the judiciary is in the process of establishing its credibility as an independent body. Election dispute resolution is a key area of conflict between the three branches of government. If courts succumb to political pressure, or influence of any kind, in electoral disputes, then their credibility and independence are likely to be undermined in other areas. Although judges may be primarily motivated by self interest when they yield to pressure, their lack of knowledge and understanding of how these issues are handled in other countries or of how they could or should be resolved in their own countries also contribute to their willingness to bow to pressure. Therefore, IFES hoped to create a forum where judges could exchange ideas and learn how similar issues are addressed in other countries.

The first day of the conference was moderated by Robert Dahl, IFES/Indonesia Legal Advisor, and former assistant to a member of the United States Federal Election Commission. The day was centered on the theme of Election Dispute Resolution. There were numerous panel presentations on international change and country-specific cases as well as ample time for questions and plenary discussion.

The second day of the conference, moderated by Keith Henderson, IFES Senior Rule of Law Advisor, addressed the issue of judicial independence and authority. An increase in participation and exchange of ideas was encouraged by the formation of two working groups, each addressing an issue relevant to judicial independence and authority. One working group, moderated by Victoria Airgood of ABA/CEELI discussed judicial immunity; and the second working group, moderated by Robert Dahl, discussed ethical

issues of business interests, income and asset disclosure. The second day also contained panel presentations on judicial conduct, ethics and standards and plenary discussion of the conference findings.

The overarching goal behind the Adjudication conference was to strengthen the rule of law in the electoral process and the development of democratic societies in the region through achievement of four objectives:

- Providing an opportunity for judges to exchange ideas and learn about international trends and various methods of resolving electoral disputes;
- Familiarizing judges with their role in the electoral process, particularly in regards to time constraints for consideration of election-related cases, so they are better prepared and more willing to meet their responsibilities;
- Identifying common legislative and procedural flaws that are perceived to hinder the efficient and fair resolution of election disputes; and
- Recommending general steps to take towards improving the transparency, efficiency, and consistency of procedures for resolving election disputes.

The following pages provide an overview of the conference findings as well as transcripts of the conference proceedings.

DAY ONE TRANSCRIPTION

OPENING REMARKS

The conference was opened by The Honorable Leon J. Weil who officially welcomed all of the eighty-three participants and introduced the distinguished members of the opening panel. Mr. Weil is the Secretary of the IFES/Washington Board of Directors and the former United States Ambassador to Nepal.

After thanking the hosts and members of the panel, Mr. Weil acknowledged the significance of the issue at hand and declared the ability to reach fair and impartial resolution of dispute as a key part of the conduct of free and fair elections, and that in turn it is a cornerstone of a healthy democracy. With that he introduced the members of the opening panel. The panel consisted of Deborah McFarland, Mission Director of USAID/Bulgaria; The Honorable Miglena Tacheva, Deputy Minister of Justice of Bulgaria; The Honorable Nikolay Filchev, Prosecutor General of Bulgaria; and The Honorable Stefka Stoeva, Chair of the Department of Supreme Administrative Court, Bulgaria.

Deborah McFarland ***Mission Director USAID/Bulgaria***

Good morning, Ladies and Gentlemen. On behalf of USAID, I am very glad to welcome you here today. It is a pleasure to see so many distinguished visitors to Sofia for this conference on election dispute resolution.

USAID strongly believes that impartial application of the rule of law is indispensable for building a democratic society based on the fundamental principles of justice and equality. In this regard, an independent judiciary empowered to check and balance the authority of the legislative and executive branches of government is a key characteristic of a functional democracy.

Another critical feature of a functioning democratic society is the existence of a free and transparent electoral process. For democracy to flourish, elections must reflect the will of the people. A fair and transparent election enables citizens to choose new representatives and national leaders and test the strength of existing democratic institutions and processes. Transitional democracies, however, often lack the institutional capacity to effectively support the management of the electoral process. In this regard, the judiciary has to play a very important role as the independent arbiter of last resort – to enforce laws fairly and effectively.

To assist in the process to institutionalizing the Rule of Law in Bulgaria, USAID has devoted efforts and resources in two major areas: improving the professionalism of the judiciary and modernizing court administration. USAID is particularly proud to have automated and reengineered eleven pilot courts in various regions in Bulgaria. Over the last two years, they have significantly improved their efficiency and quality of operation. Today, this successful model of court administration is ready to be replicated nationwide. USAID has always believed that in order to develop a knowledgeable and independent judiciary Bulgaria needs a specialized, sustainable training institution that provides new and continuing education to magistrates. For this reason, USAID helps to support the establishment and to increase the institutional capacity building of the magistrates' training center - the only entity in Bulgaria providing legal education to both new and sitting judges.

Today, the center has been operational for more than two years and, with USAID's assistance, has managed to develop a comprehensive curriculum in a broad cadre of judicial educators. In the near future

we expect this training center to evolve into the government's national institute of justice which will benefit from the high standards and experience gained at the magistrates' training center. In this regard, the specialized nature of this conference builds on the work already underway in Bulgaria. We have a long history of supporting both elections and judicial reform, and I look forward to hearing the results of your work here today learning of its applicability for Bulgaria. I wish you very successful deliberations. And with that regard it is my great pleasure and honor to introduce to you here today the Deputy Minister of Justice, Mrs. Tacheva, to welcome you here to this conference. She is a leader of the judicial reform movement in Bulgaria and a very visionary person.

***The Honorable Miglena Tacheva
Deputy Minister of Justice of Bulgaria***

Dear colleagues,

Let me personally, and on behalf of the Ministry of Justice, welcome you to our country. I am honored and pleased to be here and would first like to express my gratitude to the organizers, The International Foundation of Election Systems, for their decision to hold this international conference here, in Bulgaria, as well as for the selection of the topics and participants. The issue of dispute resolution related to elections, and the issue of the judicial independence, although not interrelated at a first glance, are actually two aspects of a same problem: the disputes, related to the legality of the elections in each country, should be heard and solved by independent judiciary. This will guarantee the impartiality and effectiveness of each judicial system, both in Europe and in the United States. It is an undisputed fact that the judicial authority deserves a due place in each democratic society; disputes that are not solved by political means are dependent on a solid judicial system.

The constitution of each democratic state propagates the principle of the division of powers, the rule of law in the constitutional state, and the democratic structuring of the state institutions. Along these lines, the Bulgarian Constitution also sets forth the principle of the judicial independence. Its independence, as well as its credibility, are important for the recognition of the judiciary as a guarantor of the rights and freedoms of our citizens. The judiciary is assigned with the task of equally and impartially applying the laws, acting in the meantime as a corrective of the other two authorities. The independence also finds an expression in that each judge should formulate their decision on the basis of the evidence available and their inner conviction. Any outside influence is inadmissible with respect to the resolution of any case, including the ones related to elections. The active and passive voting right is a major constitutional right of each Bulgarian individual, and the exercise of this right is a democratic act that expresses the will of the voters.

The violation of the voting rights and election results is unacceptable, and when such a violation has occurred, it should be imperative that an independent court review the respective case. The independence of the judiciary committed to making a decision about a specific case depends on the professional expertise of judges who are competent to hear and solve election disputes. The improvement of their professional qualification is a major objective of the Bulgarian Government now and it has underlined the strategy of the judicial system reform, as well as the Bulgarian Ministry of Justice' plan of action. Related to these issues are also the amendments of the Judicial Act, which are pending submission to Parliament for discussion. Also pending is the institutionalization of the Bulgarian School of Magistrates and its conversion into a public institute of justice.

The initial and constant training of magistrates is a guarantee for their independence and capability of making justified and impartial decisions. It aims not only to maintain the qualification in general and the ensure magistrates familiarization with the problems of civil and criminal law, but also to educate them on specific topics such as European Law *laquis communautaire*, human rights, children's rights, minority rights, election rights, and insolvency. Along this line of thought, I'd like to say that I share the opinion

of the organizers of the seminar, and I guess that of the participants, too, that specialized magistrate training in the sphere of election dispute resolution is a necessity to secure their independence and impartiality. The discussions of this conference target a number of interesting and significant issues, amongst which is the role of the independent judiciary in the resolution of election and intergovernmental disputes. It provides opportunity to see how the Western models of judiciary control over the election process work, to see the international standards and criteria of the Council of Europe with regard to the voting rights, as well as to provide you, the participants, representatives of various state institutions, with the chance to share with each other your opinions and expertise in this area.

Also of significance are discussions of conflict of interests, business interest, the asset disclosure by judges, judicial conduct and immunity. These topics are being discussed now in Bulgarian society and should soon find their reflection in the forthcoming judicial reform. Let me thank you for your attention and wish you a productive and pleasant work here at the seminar.

The Honorable Nikolay Filchev
Prosecutor General of Bulgaria

Dear colleagues,

By listening to the words of the ladies and gentlemen before me, I once again realize how true is the saying that, "After so many years, the words have remained the same." Let me also say a few words that will not differ significantly from what you have already heard. The existence of the constitutional state is unthinkable without a strong and independent judicial system. As we all know, the judiciary protects the rights of the citizens from the abuses of the criminal world and restricts executive authority excesses. In the times of the feudal society, the justice was a duty of the executive authority. Later in history, the great thinkers Locke and Montesquieu developed the idea of the division of powers as a means of limiting arbitrariness and corruption.

In my personal judgment, Justice throughout the world is now suffering a crisis. The judicial system is independent, but at the same time it experiences the influence of the other two authorities – the legislative and the executive. The legislative affects the judicial through the laws the parliament passes and the judicial power it has to apply; the executive, which has always tried to enlarge its opportunities to influence the judicial authority, either through establishing a dependant magistrate corps of judges, prosecutors, and investigators, or through the material conditions, which it creates for the work of the judiciary. The judicial power also experiences the influence of giant, powerful financial and economic groups, as well as of the media environment. Therefore, historically, the judicial authority has always been stuck between the law and politics. The question of the judicial independence, however, has one more aspect.

The independence of the judges should not be an aim in itself – this independence serves the interest of the society. It serves, actually, the Justice; thus the extreme independence of the judicial is a denial of the equitable justice. As Montesquieu teaches us, we not only need division of power, but cooperation and balance between them. Secondly, we need the magistrates to bear responsibility. We need correctives and the exact balance between the independence of the judicial system, the independence of the magistrates, on one hand, and on the other, their responsibility before the society. I wish you success in searching for those solutions.

The Honorable Stefka Stoeva
Chair of the Department of Supreme Administrative Court of Bulgaria

Dear ladies and gentlemen,

Let me, on behalf of the Supreme Administrative Court, welcome you to the opening of the conference and wish you successful and interesting work. You yourselves understand how difficult it is for me to speak after the Honorable Mr. Attorney General, on behalf of the Supreme Administrative Court Chairman, Vladislav Slavov, and in the presence of so many respected constitutional judges. In the last twelve years, the issues related to elections - parliament, presidential, and local - have become greatly important for our society. In relation to that, I'd like to stress that ever since it was created five years ago, the Supreme Administrative Court has played an exceptional role in this process. You surely remember the last elections of nearly a year ago in particular.

KEYNOTE SPEAKER

The Honorable Judge Bohdan Futey
The United States Court of Federal Claims

"The Role of an Independent Judiciary in Resolving Elections Dispute: A U.S. Perspective"

My name is Bohdan Futey and I have the distinct pleasure and honor to talk to you. I have also been working with IFES since 1993. My work has been primarily in Ukraine because I am of Ukrainian ancestry. I have enjoyed my time working in Ukraine with IFES as well as working in the countries of Latin America. I am honored and privileged to participate in this extremely important conference dealing with election dispute resolutions and judicial authority and independence. My comments will concentrate on the experience of my own country – the United States of America. I will discuss its constitution and statutes, the electoral process, and the adjudication of election disputes by its courts.

While I would like to comment on actual cases decided by our courts, please keep in mind that no one is suggesting that all countries should adopt the judicial practice of the United States. But I hope that the more than 200 years of experience of the United States courts can provide guidance for other countries. Our judicial system is a federal system comprised of federal and state courts. Nevertheless, the judicial system is unified under one Supreme Court. Our Constitution separates governmental authority among the legislative, executive, and judicial branches. This separation of powers doctrine generally holds that the legislative branch enacts laws, the executive branch enforces the laws, and the judicial branch interprets the laws and resolves disputes among these branches. This concept of checks and balances is viewed as fundamental to the protection of liberty.

The independence of the judiciary in the United States has been guaranteed by Article 3 of the Constitution. Section One states: "The judges, both of the Supreme Court and the inferior courts, shall hold their offices during good behavior, and shall, at stated times receive for their services a compensation, which shall not be diminished during their continuance in office." These protections of life tenure and non-reduction of salary are guaranteed by the Constitution so that the federal judges will not fear losing their positions or receiving salary cuts if they make a decision that is unpopular with the President or Congress. This protected freedom to make decisions that are politically and socially unpopular is one of the imperatives of our democracy. However there is one way a judge can be forcibly removed from office. Article 2 says that: "Federal judges may be removed from their positions against their will by impeachment and conviction for treason and bribery or other high crimes and misdemeanors. Impeachment is a constitutional process whereby the House of Representatives may charge high officials of the Government suspected of misconduct with malfeasance of office for a trial before the United States Senate." By the way, judges in the United States do not have immunity for violating criminal laws and

civil statutes. Although judges need to be independent, they are still accountable for their actions; judges are not independent from the Constitution, nor from the laws of the United States, nor from following case precedent - the United States is a country of precedent - and judges have responsibilities like filing financial disclosure reports and fulfilling other demands of the Government. Since 1803, the United States has developed the doctrine of judicial review or judicial supremacy. This means that Federal Courts not only interpret legislation but also determine its validity under the Constitution and in doing so sometimes renders statutes inoperative.

The prime example of this doctrine is the Supreme Court's decision in *Marbury v. Madison* in which the chief justice stated: "It is authentically the province and duty of the judicial department to say what the law is." Those who apply the rule to particular cases must of necessity expound and interpret that rule. If laws conflict with each other the courts must decide on the operation of each. Armed with the early assertion of authority the Supreme Court of the United States has held many federal and state statutes unconstitutional; it has also invalidated executive actions that violated the Constitution. Even more surprisingly than this power granted to the Supreme Court is the fact that lower courts also possess and exercise the same powers. Whenever a question arises in the United States Court System at any level as to the constitutionality of statutes or executive actions, that court is obligated to first determine the statute or action's constitutional validity in the course of deciding the case before it. Of course when a lower court decides a constitutional question, its decision is subject to an appellate review sometimes at more than one level. The ultimate arbiter is the Supreme Court of the United States. The normal pattern is for the constitutional question to be raised at the trial level in the context of the general controversy and then to be decided finally on appellate review of the trial court's decision. There is however a limit to judicial oversight. This limit is implicit within the assertion of authority found in *Marbury v. Madison* - namely that courts may rule only in particular cases or controversies and that the judiciary may act only when the subject is submitted in a case. Moreover, a case arises only when a party asserts his or her rights in a form prescribed by law.

A prime example of the case of controversy existed in a case by the name of *Texas v. Johnson*. We know it as the flag burning case. In an attempt to prevent breaches of the peace the State of Texas passed a law making it illegal to desecrate a venerated object. Before the law could be challenged however someone had to violate the statute. Mr. Johnson was convicted of burning a flag in public outside the 1984 Republican National Convention in Dallas, Texas. Mr. Johnson challenged the statute on first amendment grounds stating that the statute violated the freedom of speech. The Supreme Court determined that Johnson's conduct was expressive thereby permitting him to invoke the first amendment under the Constitution of the United States.

In addition, the areas of foreign policy, the operation of the military establishment, and political questions involving presidential powers are insulated from oversight by the judiciary. For example, the Supreme Court indicated that the Constitution might assign a particular issue to the executive branch. Another reason may be that the law does not provide adequate standards to guide the court's decision. Finally, the issue may require a policy decision that the court is simply not qualified to make. For instance it is widely acknowledged that military service is a unique calling and as a result the military has established its own disciplinary standards separate from civilian standards. So therefore, the judiciary is not completely in power to review military action. Nevertheless the judiciary does oversee some aspects of the military operations. For example courts can make sure that the military has adhered to its own standards. In addition the judiciary oversees the constitutional rights of military personnel.

Furthermore, courts are similarly ill equipped to oversee foreign policy since they lack factual evidence and applicable standards, both of which would be needed to rule on foreign policy matters. Also the judiciary would risk undermining its legitimacy should the other choose not to comply with the judicial decisions.

Courts generally avoid adjudication of issues considered to be political questions. They interpret the Constitution however to determine the basic standards and undertake to decide certain questions if the political branches are in disagreement. The political question consideration is now one of merits rather than a decision not to decide. An example of the current approach is illustrated in a case by the name of *Powell v. McCormack*. In *Powell*, the House of Representatives refused to admit a newly elected member based on his conduct in character. The court examined whether the Constitution gave the legislature the power to make such a decision. The court decided that the legislature had the power to consider a member's age, citizenship, and residency. The Constitution did not grant the legislature the power to consider the member's conduct and character. The court concluded that a political question doctrine did not bar judicial review over the legislature's action, and the court ordered that Mr. Powell be seated in the House of Representatives.

Federal courts have held the disputes arising from congressional ballot counting and seating of candidates as non-justiciable. The 1984 case *McEntire v McLaski*, in which, it should be noted, Mr. Dahl participated, involved the closest election in the history of the House of Representatives. On election night the count showed McLaski the winner by 72 votes. After the correction of the returns from one county, the count showed McEntire ahead by 34 votes. As a result both candidates sought a ballot recount under the state law. Afterwards the case was removed to the federal court asserting that federal law occupied the field and so only federal principle could be used to determine which balance to count in a federal election. The district court agreed and ultimately dismissed the proceedings. Between the time of the district court's decision and McEntire's appeal, the house recounted the votes and seated Mr. McLaski. The house determined that McLaski won by 4 votes. On appeal from the district court's decision, the United States' Court of Appeals for the seventh circuit determined that, pursuant to Article 1, Section 5, Clause 1 of the Constitution, the House of Representatives was the final judge and arbiter of the dispute and its decisions concerning which ballots to count and which candidate won was not reviewable by any court.

Federal courts have exercised jurisdiction over disputes in state elections where federal rights were implicated. Such were the circumstances in a case by the name of *Marx's v. Stenson*. It is a case that involved Mr. Stenson and Marx when they sought a vacant seat in the Pennsylvania State Senate. In a close race a large turnout of absentee votes won the elections for Stenson. Significantly, Stenson engaged in a fraudulent campaign that targeted minority voters, attempting to persuade them that state law permitted them to use absentee ballots to vote from their homes thereby eliminating their need to vote at the polls. Stenson's aids also engaged in document forgery and collusion with the County Board of Elections, which ultimately counted ballots and reported results. Marx along with eight named voters filed a suit in state court. After proceedings were held up in the state court, Marx filed a suit in the district court to hold up Stenson's occupation of the senate seat. The Federal District Court, finding voter fraud, entered a preliminary injunction and directed the board of elections to certify Marx as the winner. On appeal, the United States Court of Appeals for the third circuit affirmed the district court's order granting a preliminary injunction preventing Stenson from exercising any authority in office. The third circuit however vacated the district court's decision ordering Marx to be certified as the winner. Specifically, the third circuit held that the district court could not direct certification of a candidate unless it found, on the basis of the evidence, that the designated candidate would have won but for the wrongdoing. On remand, the district court determined that Marx would have won but for the absence of Stenson's offences and certified Marx as the election winner. Thus the standard set by the court is that the fraudulent votes must affect the result or outcome of the election. Authority for contesting elections and recounts and federal elections is provided by the Constitution of the United States and the federal contested elections act of 1969: Article 1, section 5, clause 1 of the Constitution provides: "Each house shall be the judge over the elections, returns and qualifications of its own members." Thus each house is not only the judge, but also

the final arbiter and its decisions are not reviewable by any court. The United States Supreme Court has consistently held that the question of title to a seat in the US congress is a non-justiciable question.

A contested election is a formal charge that the declared winner of an election is not entitled to be the winner. Contests have been filed based upon allegations of irregularities or fraud in an election: to set aside seats or results of elections. A recount involves a challenge to the validity of the vote count. In a recount, the challenger requests a second count of all or part of an election based on allegations that errors or misjudgment took place in the counting of ballots.

The Federal Contested Elections Act of 1969 provides the mechanism for challenging house elections. For example the act requires that: 1) The contestant file a notice of intention to contest the election; 2) The contestant notify the contestee; and 3) The contestee file an answer to the contestant. The Act also permits the contestee to raise a number of defenses on the notice of contest such as lack of standing of the contestant or failure of the notice to state grounds sufficient to change the results of the elections. The Act further permits the contestant and contestee to conduct an investigation and provides them the power to subpoena witnesses. Once received by the house, election contests are referred to the house administration committee, which hears and investigates the challenges. The committee then reports their findings to the house, which has established a basic standard to evaluate the validity of contest. For example, the contestant must demonstrate that the allegations, if true, would have altered the result of the election. These allegations must be supported with adequate evidence. States have the power, however, to enact mechanisms for contests and recounts. Although most laws governing elections of representatives in congress are state laws, the courts of a state have no direct power to judge the elections, returns, or qualifications of house members. Nevertheless, where the highest court of the state has interpreted the state law, the house has concluded that it should generally be governed by this interpretation, but does not consider itself bound by it. According to a study done in 1991 - these are the latest figures that we have so I apologize for not having more recent data - the Institute for Research and Public Safety of Indiana University reported that 163 cases growing out of contested elections had come before the senate as of that day. That report also indicates that there have been 603 contests brought to the House of Representatives for considerations. Of course, presidential elections have not been immune to recount and contest request either; throughout U.S. history at the presidential level, major disputes took place in 1801, 1825, 1876, and, as most of you are aware, recently in the year 2000. All of these disputes required the assistance of Congress or of the Supreme Court in order to be resolved.

Let me now address the election process for president in the United States and then I will talk specifically about the 2000 election. Contrary to what may people think, the individual citizens of the United States do not cast votes directly for the president. According to our Constitution citizens vote for electors - people who have obligated themselves to vote for a particular candidate. The number of electors in each state is equal to the state's number of senators and congressmen combined. There are a total of 538 electoral votes nationwide, which represents the 435 congressmen, 100 senators, and 3 electors for the District of Columbia. In order to win an election, therefore, a candidate must secure a majority of the electoral votes or 270 votes. The most recent dispute over the 2000 election was resolved by the Supreme Court of the United States. The election results were extremely close.

On election night Vice President Al Gore actually called then Governor George W. Bush and conceded the loss of the election. Before delivering a concession speech, however, Mr. Gore telephoned Mr. Bush again and retracted his concession because he believed that his team had uncovered some irregularities with the tabulation of votes in the state of Florida. Florida has a large population and therefore has 25 electoral votes. It became the deciding state in that election. On November 8, 2000, the day following the presidential election, the Florida division of elections reported that Mr. Bush had won the state's popular vote by a margin of less than one half of one percent. As a result under Florida state voting law, an automatic machine recount was conducted the result of which showed Mr. Bush winning, but by a

slightly narrower margin. Mr. Gore then sought manual recounts in four of Florida's counties. What followed was a series of disputes in Florida's state courts, which were eventually resolved by the US Supreme Court. Mr. Gore challenged the recounts results stating that the machine counting of the ballots did not detect valid votes for president. Florida employs several different voting systems and the decision on which system to use in a particular county is left to the government authorities on the county level. A brief explanation on how votes have been cast in the counties in question may be useful.

The voter used a stylus like a needle to punch a hole in the card next to the candidate's name. A machine counted the ballots by shooting a ray of light through the ballot. A vote was recorded automatically when the ray of light passes through the empty hole created by the punch. If the stylus did not actually punch through the ballot all the way, the machine would not detect the indentation as a vote. These were called the under votes. Many under votes consisted of a particular detached piece of paper called a chad that the voting machines may or may not register as a vote. In the case in which the punch cards were merely indented, but were not punched all the way through, the machine would not have picked up their vote and it also made it very difficult to determine during a manual recount whether it was intended a vote at all. Mr. Gore petitioned the Florida courts for manual recounts in certain counties in order to count these votes that may have not been detected by the machines. Ultimately on December 8, 2000 the Supreme Court of Florida held among other things that Mr. Gore had met his burden of proof in challenging the recounts in order that manual recounts should be held in one popular county and also stated that proper relief would require manual recounts in all Florida counties where so called under votes have not been subject to manual tabulation.

The Florida Supreme Court determined that a legal vote was one where there is a clear indication of the intent of the voter. This standard of what was a legal vote left much room for interpretation on the part of individual counties. During the manual recount election workers actually examined each ballot by hand. An attempt was made to discern whether a hole was punched next to a candidate's name. It is difficult to determine the will of the voter in a hand count of punch count ballots since chads or punch holes sometimes are loosened accidentally and do not actually reflect an actual vote. On December 9, 2000 Mr. Bush filed an emergency application for a stay of this mandate with the Supreme Court of the United States. The Supreme Court granted the application, treated it as a petition for certiorary, which is a review by the Supreme Court, and started the review. Mr. Bush's petition presented the following questions: Whether the Florida Supreme court established new standards for resolving presidential election contests, thereby violating the United States Constitution, and whether the use of the standard, less manual recounts violated the equal protection and due process clauses of the Constitution.

With respect to the equal protection question, the US Supreme Court found a violation of the equal protection clause because under the procedures outlined by the Florida Supreme Court there was a possibility that not every citizen could be assured that his or her vote had been treated with the same status or with equal care as the votes of other citizens. In its opinion the Supreme Court held that the Florida Supreme Court had ordered a statewide manual recount of votes with minimal procedural safeguards. The US Supreme Court stated that when a court orders a statewide remedy there must be at least some assurances that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

In coming to its conclusion the US Supreme Court emphasized the different standards that were being used in different counties to determine a legal vote. Some counties were using much less strict standards than other counties, and some counties were changing the standard for determining a legal vote in the middle of the recount. The United States Supreme Court determined that the recount process, as its features were above described, was inconsistent with the minimum procedure necessary to protect the fundamental rights of each voter in a special instance of the statewide recount. The contest provision as it

is mandated by the Florida Supreme Court is not well calculated to sustain the confidence that all citizens must have in the outcome of an election.

PANEL PRESENTATION: EMERGING TRENDS AND STANDARDS IN ELECTION DISPUTE RESOLUTION

The first panel consisted of The Honorable Justice Vanya Puneva-Mihailova, Supreme Administrative Court of Bulgaria; The Honorable Alvina Gyulumyan, Member of Constitutional Court of Armenia; and Patrick Titium, Legal Advice Department of the Council of Europe. The first panel was moderated by Robert Dahl who spoke of IFES's role in elections world wide, as well as his own experience with election dispute resolution. Mr. Dahl laid down the disclaimer that there are no set standards that exist for resolving election disputes, and there is very little comparative research regarding the types of systems that are used in various countries. Consequently, no one would leave the conference with a magic solution that could be immediately administered in one's own court. The fact that no standards exist and there are no right or wrong answers indicates that election dispute resolution is still an ongoing process, which indicates the importance of the conference.

The Honorable Justice Vanya Puneva-Mihailova Supreme Administrative Court of Bulgaria

"The Role of the Independent Judiciary in Resolving Election Disputes: The Bulgarian Experience"

Colleagues,

This presentation is intended to cover some major challenges and legal issues related to the judicial settlement of electoral disputes in new democracies. Elections are an important factor for the development of democracy and government. In the course of elections, citizens give their opinion on major issues of the government policy and on the activity of representative and other bodies. The social significance of elections increases along the lines of the main thrust of the development of modern societies and states, i.e. the strengthening of democracy. In addition to the political aspects, elections have their legal dimension. Elections are a set of statutory conditions and actions following a certain sequence prescribed by law in their preparation and conduct and in the reporting of the outcome. From the legal perspective, participation in elections is a major political right of all citizens capable of taking part in the elections. The legal characteristics of elections depend on the nature of the electoral legislation and the terms and conditions for free elections as provided for and guaranteed by the laws. Elections are held on the basis of the electoral law. The electoral legislation has been improving in accordance with the social development pattern for the last few years. The electoral law is the legal reflection of objective social processes aimed at democratization of the political system. A number of major tenets of the European electoral law have been included in the new laws of this country since 1990. This is not a mechanical transfer, as the transposition takes into consideration the conditions and trends of the current stage of development in this country. An essential feature of the new electoral laws is the opportunity for nomination of an unlimited number of candidates. This is a decisive feature of the process of democratizing electoral legislation. The law-maker has introduced more sophisticated forms of control. There exist greater checks and balances against possible infringement upon the citizens' electoral rights in all phases of the preparation and holding of elections. The existing electoral law defines the nature and scope of the subjective electoral rights of citizens by ensuring, to a greater extent, the principle of the rule of law and its consistent application in both the preparation and the holding of elections.

The continuous development and improvement of our society in the years of democratic changes call for frequent amendments to the electoral laws in order to continuously guarantee their legitimacy. Elections are held on the basis of the electoral law. Thus the holding of elections turns into a legal reality and initiates actions leading to the establishment of election authorities. Electoral relations emerge and

develop in the process of the preparation and holding of elections. The overall organization of elections, as stated earlier, builds on the procedural provisions of the electoral laws applied to ensure the enforcement of the substantive provisions of the electoral laws. The importance of electoral laws in modern society depends on the role of parliament and other elective bodies, as well as on the need for their establishment in accordance with the principles of political pluralism. The democratic nature of laws influences the nature of elective bodies, as well.

Electoral laws include two types of provisions, i.e. substantive and procedural ones. Procedural provisions prevail in quantitative terms. This is only natural, keeping in mind that elections are a process of establishment of representative bodies. Substantive provisions underlie the establishment of elective bodies, but they are applied through the procedural provisions that guide the election process. Election matters are regulated at two levels: constitutional and statutory. They have been covered in the provisions of the four Constitutions of Bulgaria which have existed at various points in time, as well as in the provisions of more than fifteen laws regulating them wholly or amending essential aspects of the preparation and holding of elections. At present, electoral laws represent the balance of social forces in a legal form. The adoption of new laws regulating the electoral process in the years of democracy has been necessitated by the changes in our social development and the striving for improvement of the electoral legislation.

The existing laws are as follows: the Presidential Elections Act of the Republic of Bulgaria; the Parliamentary Elections Act; the Local Elections Act; and the Public Referenda Act. The active electoral right of citizens is protected through administrative and judicial procedures regulated in each of them. This double protection is a guarantee against deficiencies and loopholes in the legal framework. It provides for effective and rapid protection of the electoral rights of citizens in conformity with the democratic development of the electoral system. A review of the electoral laws leads to the conclusion that the judicial control of Election Commissions varies in terms of its scope. The Parliamentary Elections Act provides for judicial control to be exercised by the Supreme Administrative Court in pursuance of Art. 23, paragraph 3 with regard to the decisions of the Central Electoral Commission and by Regional Courts under Art. 28, paragraph 8 and Art. 32, paragraph 4 with regard to errors and incompleteness or the refusals of local government administrations to delete or add names to voters lists. The lawfulness of the parliamentary elections may be contested before the Constitutional Court in pursuance of Art. 112 of the Act. The letter of Art. 23, paragraph 3 of the Parliamentary Elections Act shows that only those decisions of the Central Election Commission are subject to judicial control, for which such control is explicitly provided, rather than all its decisions. The provisions of the said Article give explicit enumeration of the decisions subject to appeal with the Supreme Administrative Court.

The lack of precision in the legal framework has led to different interpretations given by the Central Election Commission and the Supreme Administrative Court respectively. The judges support the opinion that the acts of the Central Election Commission concerning rights and obligations have the characteristics of individual administrative acts and, for this reason they are subject to appeal with the Supreme Administrative Court. The provisions of Art. 23, paragraph 3 of the Parliamentary Elections Act, define only the procedure applicable to the judicial control of some decisions of the Central Electoral Commission. However, they do not constitute an exception to the general rule of judicial control of administrative acts as enshrined in Art. 120 of the Bulgarian Constitution.

The Supreme Administrative Court, in its turn, has expressed this opinion in a series of judgments. There the Supreme Administrative Court makes a distinction between the acts generating or restricting rights and obligations, which are subject to judicial control, and the methodological guidance acts that should not be subject to judicial control. The opinion of the Constitutional Court to this effect is given in its Judgment No. 21 of 26 October 1995 on Constitutional Case No. 18 of 1995. It says that it is the legal effect rather than the type of administrative act that is more important, i.e. the way the act will affect

rights and interests. It is only the competent court that is able to assess the presence or absence of such effect.

In pursuance of Art. 23, paragraph 3 of the Parliamentary Elections Act, the judgments of the Supreme Administrative Court issued in this way is final, while the provisions of the second sentence of Art. 30 of the Supreme Administrative Court Act read that judgments on the reversal of an administrative act in an appeals procedure are binding on all. The failure of the election administration to fulfill the court judgments has led to the need for seizing the Constitutional Court. In Judgment No. 17 of 2 October 2001 on Constitutional Case No. 13 of 2001, the latter rules that the provisions of Art. 120 of the Constitution assign courts with the judicial control of administrative acts and actions. In this sense, the election administration is not ruled out of this control in a state where the rule of law prevails. Art. 4, paragraph 1 of the Constitution reads that judicial acts are binding on the parties and they are considered *res adjudicata*. The Constitutional Court has explicitly stated that the judgments of the Supreme Administrative Court, which reverse and declare null and void any acts of Regional Election Commissions or the Central Election Commission, are binding on these bodies, and, undoubtedly, they are enforceable. This difference of opinion illustrates the development of a democratic legal framework. It provides the opportunity for overcoming old stereotypes and mindsets through the interpretation of legal provisions, which also is a way to further develop and improve the democratic process.

In the context of the sharp political confrontation in this country, the unconditional compliance with the laws, and the rule of law they guarantee, ensures that no political force will be able to make use of loopholes in the legal framework. The Constitution of 1991 has increased the number of government authorities to be elected directly. Being the most democratic procedure, direct elections give the most uncontroversial legitimacy to elective bodies. The Local Elections Act regulates the organization and holding of elections for two types of local government bodies: municipal councils, which are institutional bodies; and mayors, who are single bodies. The judicial control under this Act has a somewhat different scope. The deficiencies of voters lists and the errors or omissions are subject to appeal with the Regional Courts, whose judgment is final under Art. 17. The decisions of the Central Election Commission concerning local elections are subject to appeal with the Supreme Administrative Court. The court has three days to rule and its judgment is announced and enforceable forthwith. The Supreme Administrative Court will hear appeals against all decisions of the Central Election Commission concerning local elections, which have been made in the course of the discharge of its duties under Art. 25 of the Local Elections Act, except for the decisions under Art. 25, paragraph 4 in conjunction with Art. 27, paragraph 2 of the Local Elections Act. In the latter cases, the Commission acts as a second-instance control with regard to the decisions of Municipal Election Commissions.

This opinion of the Supreme Administrative Court is given in its Ruling No. 6030 of 18 December 1998 on Administrative Case No. 5291 of 1998. The more precise wording of the law on the scope of judicial control has not led to any substantial diversion in its application and interpretation. A matter of interest is the delegation of rights to the local leaderships of political parties and coalitions. In its Ruling, the Supreme Administrative Court has expressed the opinion that, while exercising the delegated rights under Art. 35, paragraph 2 of the Local Elections Act, municipal or regional leaders of political parties and coalitions are entitled to perform only those actions for which they have been expressly authorized by the central leadership. In pursuance of Art. 35, paragraph 1 of the Local Elections Act, the right to nominate candidates for municipal councilors and mayors initially belongs to the central leadership of political parties and coalitions. They may delegate this right to their municipal and regional leaderships in accordance with the said provision. The outcome of local elections is also subject to judicial control, but, unlike the case of the Parliamentary Elections Act, the judicial control is exercised by a Regional Court or the Sofia City Court respectively under Art. 104 of the Local Elections Act. The law provides for cassation proceedings with the Supreme Administrative Court, which ensures the legitimacy and democratic nature of the process. In some provisions, the law-makers have used the words “contest the

legitimacy of the election”, while other provisions refer to “appeal against the decisions on the outcome of elections”. These phrases are used as synonyms but, in fact, they express different actions of certain entities and produce different legal effects. Contesting the legitimacy of the elections does not necessarily mean direct or indirect demand for cancellation of the outcome of the elections. It is possible to contest some minor actions that will not distort the election and will not lead to cancellation of the outcome.

In a number of judgments, the Supreme Administrative Court has had the opportunity to say that the outcome of elections can be appealed in the event of gross violation of the electoral laws. It is not any violation of the Local Elections Act that will lead to cancellation of the elections in a given community. This violation has to be essential. In its judgments, the Supreme Administrative Court has made a distinction between essential and non-essential violations, stating that essential violations are only those which, if they had not been committed, the outcome of the elections would have been different. This is the only condition for elections to be deemed distorted. The complicated voting procedure under the latest amendments to the Local Elections Act, which has introduced a new layout of the ballot paper, has generated different interpretations of the validity of the ballot paper itself. In its Judgment No. 236 of 20 January 2000, the Supreme Administrative Court ruled that the ballot paper would be invalid if there was no marking in the box in front of the name of the candidate. If this marking is there, any additional marking outside the box is allowed under Art. 90, paragraph 2 of the Local Elections Act. It is the marking at the designated place (the box) that makes the ballot paper valid. Thus the practices of the Supreme Administrative Court restrict the opportunities for venial misdemeanor to lead to contesting the legality of the elections and thus to cancel the outcome of the elections. The Presidential Elections Act, which has been applied for the first time with the adoption of the new Constitution, regulates the election of the President and the Vice President of the Republic.

A number of issues related to the presidential elections are tackled at the constitutional level, but there is judicial control as well. In the said Act, the law-maker has identified the Supreme Administrative Court as being the competent court to adjudicate on the decisions of the Central Election Commission. At the same time, the law explicitly provides for one-instance proceedings. The most heated debates focused on the judicial control provided to the Central Election Commission by which it can refuse to register candidates for presidential elections if they don't meet the requirement for Bulgarian citizenship by birth under Art. 93, paragraph 2 of the Constitution or the requirement for domicile in the country for the last five years. Two judgments of the Constitutional Court, which were adopted at different times and interpret different aspects of those provisions, have shed light on their content. Judgment No. 12 of 1996 reads that, within the meaning of the Constitution, a Bulgarian citizen by birth can only be a person who has acquired Bulgarian citizenship by origin or place of birth under the Bulgarian laws existing at the time of his or her birth. The other judgment of the Constitutional Court, i.e. Judgment No. 15 of 2001, states that domicile in the country also includes a stay abroad in cases and for periods in which the Bulgarian citizen's sojourn has been seconded by the Bulgarian government.

Undoubtedly, the Presidential Elections Act is a special law because it regulates specific relations. It provides for short time limits and one-instance appeal proceedings, as well as final judgment by the court due to the specific features of the election process and its short duration. Electoral laws are a major factor in modern political life and they are designed to ensure good conditions and order to the most adequate expression of the political will of voters. The judicial control they provide is the best evidence of the democratic development of our modern society, government, and legal system. Thank you.

***The Honorable Alvina Gyulumyan
Member of Constitutional Court of Armenia***

"Election Dispute Resolution in Armenia"

Dear friends,

Prior to reading this report, let me express my appreciation to the people who have organized this conference, invited us to get together at this important summit, and given us the opportunity to share our experience with colleagues from other countries.

Allow me to say a few words in praise of the excellent organization and work done at the representative office of the International Foundation for Election Systems (IFES) in my country. Every official involved in election processes knows and appreciates their work. Our cooperation is fairly successful and my attendance here comes as a result of this cooperation.

Every form of power contributes its share to defending human rights.

Judiciary power is considered their major defendant due to the commonly acknowledged efficiency of courts in defending human rights. It is also common knowledge that judicial defense of election rights in the former socialist countries, that is all countries currently in transition, was of a purely perfunctory nature and was restricted to correcting errors in electoral registers. Nowadays, however, every citizen is entitled to judicial defense of his/her constitutional and legal rights and freedoms, should such rights and freedoms be violated. Such judicial defense is also guaranteed to ensure citizens' rights to elect and be elected to representative government offices. It is indisputable that only an independent and impartial judiciary is capable of ensuring democratic and fair elections.

In the Republic of Armenia, three distinct institutions review conflicts arising during elections. These are the electoral commissions, in charge of monitoring the rulings of the local electoral commissions; civil courts; and the Constitutional Court. Unfortunately, civil courts and the Constitutional Court maintain neither institutional nor functional connection. While, in accordance with the law, all ordinances of the Constitutional Court are binding on all courts and all power authorities, it is doubtful whether rulings of civil courts are binding on the Constitutional Court, which, in practice, reviews the final election results. That is, it is disputable whether facts established by the civil courts, are necessarily accepted by the Constitutional Court, or, alternatively, the Constitutional Court is entitled to give its own assessment of such facts; whether the Constitutional Court should build its decision on these facts or may choose not to is a much-debated issue. Very often it provokes discussions within the Constitutional Court. We haven't reached a definitive conclusion, and, hopefully, our discussions here will enable me to inform my colleagues of your opinions. We could then arrive at some consensus.

On February 5, 1998, the National Assembly of the Republic of Armenia voted its approval for a new Election Code, thus virtually repealing three other laws: The National Assembly Representatives Election Act, The Presidential Elections Act, and The Local Authorities Elections Act. Why do I stress the date on which this code was voted? It happened on the eve of the 1998 Parliamentary elections.

This Code was far from perfect. It was widely debated whether the Code should be discussed at the Constitutional Court. Certain political powers insisted rather vocally on that. Finally the Constitutional Court did not have to handle the issue, which was fortunate since the elections were close at hand and such a debate would have involved the Court in the political strife. The Russian Constitutional Court is entitled to decide whether or not to review such debates. For instance, there was one case when the Constitutional Court was requested to determine the legal conformity of certain provisions of the Election

Code. The Constitutional Court refused to review the case and justified its refusal by pointing out that such review would interfere in the upcoming elections and might have certain political consequences.

Unfortunately, only a year before the next parliamentary and presidential elections in the Republic of Armenia, the need for a new election code has again come to the fore. The draft election code is not complete yet therefore I don't have it with me and cannot present it to you. I would have appreciated your opinion on some of its provisions.

Under Article 40 of the Election Code, decisions and actions made by the electoral commissions may be appealed before the Central Electoral Commission or at court, except for the decisions of the regional electoral commissions in charge of summarizing the election results. In other words, local courts are authorized to make decisions that become effective immediately and are not subject to further appeal. The only exceptions allowed are in decisions issued on court cases which concern false registration or persons running for presidency or a seat in the National Assembly who have not been allowed to register. Such decisions can be appealed both at the Appeal Court and the Cessation Court. Decisions made by the regional electoral commissions relating to parliamentary election results under the majority election system (with the exception of decisions relating to the final election results) are appealed at the Central Electoral Commission.

Article 153 of the Procedural Act of the Republic of Armenia, voted in January 1999, postulates that any citizen, party, or coalition of parties, who consider the decisions, actions, or the lack thereof issued or undertaken by a state authority, local government authority, officials, or electoral commission, as having violated their election rights, may request the assistance of the civil court. You may remember my remark at the opening of this report that judicial defense of election rights in the former socialist countries used to have a purely formal nature and was restricted to correcting errors in electoral registers. Nowadays, civil courts still review disputes arising from errors in electoral registers, but their approach is no longer formal and perfunctory, since experience proves that errors in electoral registers are rarely a coincidence. More often than not, such errors are intentional and the purpose behind them is to prevent some citizens from voting: usually it is that part of the electorate who would support candidates that are undesirable to those authorized to compile the electoral registers. We had a similar case: a local court was forced to review almost 800 cases within one single day to resolve the issue of voters that were left out of the electoral register for no obvious reason. The Constitutional Court issued its ruling on the results of the elections and acknowledged that significant violations had been committed when the electoral registers were compiled.

Finally, under Article 100 of the Constitution of the Republic of Armenia, all disputes relating to election results (with the exception of municipal elections) are resolved by the Constitutional Court. The Constitutional Court resolves disputes arising from results of presidential and parliamentary elections. The Constitutional Court is also in charge of resolving disputes which arise during elections when it is admitted that the person running for presidency has faced insurmountable impediments (while we believe that this is also a disputable issue, resulting from the election process). Similar regulation is to be found in the French Constitution. However, neither the French nor the Armenian Constitutional Courts have faced such a precedent so far, which explains our uncertainty with what the actual scope and impact of the regulation might be. We may only build theories and hope that no such issue will ever arise, as it will be an extremely complicated dispute to resolve.

There is a widely shared opinion that review and resolution by the Constitutional Court of disputes arising during elections does not correspond to its role as a judicial body of constitutional control and that participating in such disputes might involve the Court into political strife and damage its image. This opinion is shared by some of the members of the Armenian Constitutional Court. However, most of its members believe that resolving disputes with regard to referenda results, presidential election results, and

parliamentary election results is part and parcel of exercising the power of the people and protecting the constitutional rights of the citizens to participate in democratic elections, therefore, such disputes should be resolved by the constitutional judicial authority. Moreover, I believe that the Constitutional Court should review and resolve issues relating to the registration of candidates running for presidency since the requirements for such candidates are defined in Art. 50 of the Constitution of Armenia. Whenever a civil court is involved in disputes of this nature, it is actually performing constitutional control by resolving the issue of whether a candidate meets the requirements of the constitution. In Romania, for instance, such disputes are resolved by the Constitutional Court.

Nowadays, there are about 100 constitutional judicial bodies throughout the world. As much as 56 of these are competent to determine whether elections are carried out in conformity with the law or not. Of the over 30 different powers granted to the constitutional judicial bodies in the various countries, only the competence to determine the conformity of the law with the constitution has been invariably approved and instituted in all 100 countries. In France and Portugal, for instance, the constitutional courts monitor the entire election process. The constitutional courts in 18 other countries confirm the conformity of the election results (among these are countries in transition like Moldova, Romania, Kyrgyzstan, etc.) The constitutions of certain countries clearly define such competences, thus clarifying and defining the role of Constitutional Courts. For example, Article 189 of the Constitution of Georgia states that the Constitutional Court reviews disputes relating to the legal conformity of referenda and elections.

Constitutional courts involved in reviewing disputes which have arisen during elections will be able to avoid involvement in political strife and the danger of its image being damaged, provided that the judicial independence is guaranteed and the law strictly states the subject and peculiarities of such a review. Understandably, if judicial independence is not guaranteed and there are no clear legal definitions, there is always the potential danger of political partiality and threat to the authority and image of the judicial institution. Articles 57 and 58 of the Constitutional Court Act define peculiarities of reviewing and resolving such cases in our Constitutional Court. Whenever the Court is involved in resolving a dispute that has occurred during elections, it carries out a judicial function, which, in essence, is totally different from the controlling function over the legal content of the law. The first question resulting from such disputes regards which election results shall be accepted as true and fair. The Czech Republic will never be faced by such a question since its constitution clearly defines that the Constitutional Court makes the final decisions upon appeal of decisions for parliamentary elections.

Article 183 of the Election Code of the Republic of Armenia states that the Central Electoral Commission summarizes the presidential election results and makes one of the following decisions:

1. Confirms the results of the presidential election.
2. Institutes a second voting round.
3. Announces the elections void.
4. Acknowledges the elections as non-performing

According to Article 115 of the Parliamentary Elections Code under the proportional election system, the Central Electoral Commission makes one of the following decisions:

1. Confirms the election of MPs under the proportional election system.
2. Acknowledges the parliamentary elections under the proportional election system as void.

According to Article 116 relating to elections under the majority election system, the Central Electoral Commission makes one of the following decisions:

1. Confirms the election of MPs.
2. Acknowledges the elections void.
3. Acknowledges the Parliamentary elections as non-performing

We consider the above listed decisions of the Central Electoral Commission to be the factual results of the elections and are therefore subject to appeal at the Constitutional Court.

With regard to the extraordinary presidential elections in Armenia, another issue comes to the fore: is it possible to acknowledge election results as partially void, with regard to only one candidate? The Constitutional Court discussed a case filed by one of the presidential candidates who disputed the results of the extraordinary presidential elections. The candidate did not manage to win 5% of the electoral votes that would have entitled him to receive back the monetary deposit he had made prior to the elections. The Constitutional Court ruled that the legal provision based on which the candidate requested such acknowledgment of partially void elections was not subject to review since the existing legislation postulated that presidential election results may not be acknowledged partially void with regard to one of the candidates.

Our Bulgarian colleague shared his experience about severe violations of the election law. I fully agree that courts should review only severe violations of election rights that might have adverse impact on the election results.

However, it is my understanding that presidential and parliamentary elections, be it under the proportional or the majority election system, can be acknowledged partially void in a separate electoral region in the event that the election results in a region or a polling station could impact the total election results. While on other issues, only a restricted number of subjects are allowed to seek the assistance of the Constitutional Court (the president and one third of the MPs), the election results can be appealed at this Court by candidates running for presidency and parliamentary candidates. In other words, this is yet another peculiarity concerning the rights of the subjects.

Another instance of this peculiarity concerns a regulation I have already spoken about. The candidate running for presidency is not allowed to turn to the Constitutional Court on the issue of impediments that may have been insurmountable or eliminated. In the event that the current president is running for presidency at the next elections, unequal footing is created for the other candidates; nevertheless, it turns out that a candidate who is not currently the president is not entitled to turn to the Constitutional Court, and may not seek its assistance should insurmountable impediments occur during his/her election campaign. Meanwhile, the current president running for a new tenure is entitled to seek the assistance of the Constitutional Court.

There are other problems with the Constitutional Court Act that have arising in practice. When a case is filed appealing the election results, the role of the respondent could be undertaken by any state authority competent to summarize the election results. Every court proceeding is a kind of contest and in that particular case; if we have a plaintiff, we should be able to define who the respondent is. Thus some form of regulation was needed to define the respondent. In Armenia this regulation was enacted as late as December 9, 1997 through an amendment in the Constitutional Court Act. This amendment resulted from the review of a particular case. That is to say that both the initial Constitutional Court Act and the Election Act lacked provisions defining the identity of the respondent should election results come to be disputed. Candidates running for presidency, who were questioning the election results in 1996, insisted that the government should be the respondent on the grounds that the presence of representatives of various ministries at the polling stations in the course of the elections and when the election results were summarized had exerted an adverse impact on the democratic and fair election process.

However, the government cannot be a party to this court proceeding since it has no authority to summarize the presidential election results. Based on that, the Constitutional Court refused to make decision on the case. By virtue of an ordinance, the Court ruled that the Central Electoral Commission Act should act as a respondent. Later on this provision was integrated into the law. Shortly after our

Constitutional Court had commenced its activities, the respected US constitutional law professor Hermann Schwarz, speaking at an international conference compared our decision on the disputed presidential election results of 1996 with the well-known example of the *Marbury v. Madison* case of the US Superior Court because our ruling covered a number of theoretical issues. It was in this Ordinance that the Constitutional Court pointed out to the legislative power a number of deficiencies of the Election Code, e.g. the inefficiencies of the system in forming electoral commissions. Unfortunately, to this very day, such commissions are formed on partisan principles, meaning that commissions comprise representatives of various political parties. This leads to inefficiency and restricts objectivity, since one party may have more representatives than other parties and is thus able to dictate the rules. The Constitutional Court also stressed that the manner of voting for the military should be regulated. The latter issue was resolved in the new Election Code. The former issue, however, was only partially resolved, namely, electoral commissions now include representatives of the government along with party representatives.

Another peculiarity of disputes reviewed by the Constitutional Court is their subject matter. In the case of the presidential election results appeal, the Constitutional Court also took into account the violations committed during the preparation, execution, and summarizing of the election and decreed that investigation of actual occurrences is not within its competence. In other words, the Constitutional Court is not involved in investigating facts; facts should be presented to the Constitutional Court by the parties to the dispute. This issue was later included in Section III, Article 157 of the Constitutional Court Act. It states that investigation of actual occurrences relating to the case under consideration at the Constitutional Court is not among the activities of the Court. Later, in 1999, when election disputes were reviewed, the actual circumstances were investigated and established by civil courts prior to presenting cases at the Constitutional Court.

Finally, I would like to mention one other peculiarity of such cases. In acknowledgment that such disputes need to be settled quickly, the Code specifies the shortest possible terms within which cases are reviewed and resolved. The assistance of the Constitutional Court can be sought on election results disputes within seven days following the announcement of final results. However, this prerequisite does not suffice since the repealed legislation defines a seven days term for the Central Electoral Commission to summarize the election results. The new Election Code reduces this term to five days, however, according to Article 51 of the Constitution, a second election round may be carried out fourteen days following the first round. That is to say, a second election round may be carried out before such disputes are considered by the Court. These circumstances place the Constitutional Court in a rather awkward position. The issue cannot be resolved by the law. Therefore, it is necessary that the term defined by the Constitution is either changed or its applicability temporarily suspended until the dispute is resolved by the Court. This again requires that the Constitution is revised and amended. Currently, a constitutional reform process is under way in our country, and such amendments are being discussed by the National Assembly. If the MPs approve the draft of the constitutional amendment, it will be further voted at a referendum. If the referendum approves the amendment, second election rounds will be carried out based on rulings of the Constitutional Court. There are other approaches of solving this issue. The French Constitutional Court refuses to consider appeals questioning a first round election if such elections did not lead to the selection of one of the candidates. Yet a similar approach is hardly applicable to our countries, or to any of the other developing democracies, for that matter. It will result in unduly substantial expenditures to finance a second election round. Should the second round results be acknowledged void, it will be sure to impact adversely the stability of the country. The stability of the countries in transition is crucial and that leads me to believe that second election rounds, carried out on the basis of a court decision, is more appropriate and justifiable.

My time is up; however, I also wanted to mention that the Constitutional Court influences the election process not only by reviewing disputes. It has its share in reviewing disputes on the conformity of the

law to the Constitution. Quite recently, our court reviewed a case on the conformity between the Constitution and a couple of legal acts relating to the status of refugees. The ruling of the Constitutional Court virtually acknowledged the rights of refugees to vote at the local government elections. About 500,000 refugees reside in our country, in some municipalities they predominate. Therefore, if they are not allowed to vote at local elections, their rights to participate in the governing function will be violated. Following the ruling of the Constitutional Court, the relevant laws were voted.

I thank you for your attention. I hope for your participation in the discussions of the issues I just mentioned.

Mr. Patrick Titun

Legal Advice Department for the Council of Europe

“The Council of Europe and International Standards on Election Rights: European Court of Human Rights Election Dispute Cases”

Thank you very much. First of all I would like to thank IFES for inviting the Council of Europe to this very interesting and important conference and I would just like to tell you that I am French and as you certainly know elections are, from this week and for the next few days, a very important topic in my country. The last results of our presidential election have shown how important it is to go and vote; last Sunday a lot of people preferred to go to the countryside, as we say, and, probably, they were wrong. I hope next week they will go and vote to show how important is the participation of citizens in elections, whatever they are – election for president or for MPs or deputies.

I don't think it is necessary to present the Council of Europe. Most of you already know of our organization. We are, since the day before yesterday, forty-four member states, – no, forty-five member states as Bosnia and Herzegovina has joined the Council of Europe. So I should say we have almost reached forty-five member states. We are waiting for Serbia to join us and, maybe a bit later, the little state close to France, which is called Monaco, which will also be applying for membership.

Fair and free elections are not only a part of the case law of the Council of Europe and of the court of human rights, but they are also criteria to join the Council of Europe. They are essential to the system of government based on democracy and human rights which the Council of Europe requires of its member states as well as any state wishing to join the organization. Of course, individual rights, such as freedom of expression and association, are also needed to serve political purposes such as freedom and democracy. It is therefore an area where constitutional systems and individual rights meet. The right to free election is foreseen in Article 3 of the first protocol to the European Convention on Human Rights. And the wording of this article is the following: “The contracting parties undertake to hold free elections at reasonable intervals by a secret ballot under conditions which will ensure the free expression of the opinion of the peoples in the choice of the legislature.”

In the Greek case (*Peers v. Greece*, 1995), a rather old one already, the Commission on Human Rights says that Article 3 presupposes the existence of representative legislature elected at reasonable intervals as the basis of a democratic society. In the case of Mathieu-Mohin and Clerfayt against Belgium, the court stated that this is a characteristic principle of democracy. This opinion fixes the place of political democracy in its relationship with human rights. The ultimate objective is not democracy but a democratic society. In such a democratic society, the interests of all groups and people in the state should be represented. The language of Article 3 of the first protocol is rather different than that of other substantive articles in the convention, and its protocols are expressed as an obligation imposed on states rather as a right held by individuals. According to the court, the interstate coloring of this wording shows the desire to give greater solemnity to the commitment undertaken and means that the primary obligation

in this field is not one of abstention or non-interference, as with the majority of the civilian political rights, but one of active adoption by the state of positive measures to ensure democratic elections. First, Article 3 imposes an affirmative duty on the state to create an institutional infrastructure that ensures the implementation of certain rights. However, it does not actually assign rights to individuals as such. Nevertheless, individual applicants have repeatedly raised claims under Article 3. It seems that authorities in the court of human rights are realizing the weakness of the text and are confirming political rights by implication. As to the question of why there are individual rights in the Article 3 of the first protocol, the identification encounters a number of obstacles. The first uncertainty regards the protocol which attains the notion for a democratic election. Some states were doubtful about the inclusion of this provision in any form within the convention. None of them intended that the institutional version of democracy should be immune from the standard finally adopted. Anomalies such as heredity...a system where proportional representation methods of voting exists and a system with a different method of voting, were regarded as being compatible with what was agreed upon. In this respect, the court of Strasbourg held that Article 3 does not create any obligation to introduce a specific system as far as the duty to vote is concerned; such a duty to participate and to submit a ballot, which however may be blank, is considered to be compatible with Article 3.

Free elections do not mean elections where participation is voluntary but elections where the act of voting leaves the choice free. Then conflicts between the representatives of an assembly and its political effectiveness may be resolved in quite distinct ways. The choices made are reflected in the details as well as in the generalities of the electoral systems. Importantly, Article 3 of the first protocol leaves a generous margin of appreciation to a state in the relation to its electoral system at present. The Strasbourg court stands between two positions – they have established the right to intervene, but they have been most reluctant to exercise it in order to condemn national decisions. The states have adopted arrangements so different that decisions about one national electoral system may have little significance for another. *Mathieu-Mohin and Clerfayt versus Belgium* is a case in point. It arose out of the complex arrangements which regulate elections in Belgium. As some of you may know, Belgium is characterized by very delicate questions of the aspirations of the Flemish and Francophone communities. While the state is largely divided into Dutch and French language areas, the existence of a French speaking area of Brussels, in the Flemish region, has required special provisions to treat the population there fairly. The applicants in this case argue that the potential consequences of decisions at the national level, which included constitutional affairs, were so important that a representative was effectively compelled to associate himself with his language group in the assembly. The result was that there was no representation of the interests of the French speakers of that region in the regional council. In finding that there was no violation of the convention, the majority of the court endorsed the government's claim that to be allowed the choice at home was a concession.

Question and Answer Session

Question to Alvina Gyulumyan (Armenia):

My name is Adrian Vlad and I am a judge in the Romanian Supreme Court. Where I come from, the Constitutional Court is not incorporated in the judicial system. This is a consequence of the political algorithm in the Parliament under which it has been set up. Nevertheless, this court resolves election disputes related to Presidential elections. As far as I understood what our colleague from Armenia said, the Constitutional Court in her country resolves all election matter disputes. If the election system corresponds to our own, how does she assess the judicial independence within the context of election disputes resolution? We raised this question in our country, too, and it will probably be solved by amending the Constitution itself. This was what I wanted to ask our Armenian colleague.

Answer:

Thank you for your question. But it seems to me that the reason for your question is that I spoke too fast and the interpreters were unable to cover everything I said. The number of cases I mentioned were reviewed by a court of the first instance. I said there were about 800 cases that had to be reviewed within one single day. As far as the number of cases reviewed by the Constitutional Court compared to the civil courts is concerned: yes, of course the Constitutional Court reviewed a small share of all the cases. If I have to be precise, in the course of six years, the Constitutional Court reviewed fifteen dispute cases relating to election results and two cases on the conformity of the election law with the Constitution of the Republic. This was with regard to a repealed local government election law which gave rights to refugees to elect and be elected in the local government bodies. Unfortunately, I cannot point out the exact number of cases resolved by the civil courts. The figure I mentioned relates to one specific court only. Anyway, it means that the courts of first instance have reviewed and resolved a much greater number of cases than the Constitutional Court. Thank you.

**PANEL PRESENTATION: KEY INSTITUTIONAL CHALLENGES AND LEGAL ISSUES
CONFRONTING JUDICIARIES IN EMERGING DEMOCRACIES**

Ms. Ewa Eliaz

OSCE Department of International Human Rights

“Examination of Key Election Decisions During the 1990s: Resolving Election Disputes”

Thank you. I would like also to thank IFES for having invited OSCE ODIHR to participate in this very important and interesting exercise on the relationship between democracy, the rule of law, the judiciary, and the elections. IFES and OSCE ODIHR have worked closely on many occasions; sometimes we compete and sometimes we do not. Sometimes we like each other, sometimes we do not. But that is also the idea of a fruitful relationship, and that is what makes elections very important as well. When OSCE ODIHR was founded immediately after the fall of the Berlin wall and its one and only function was to monitor elections. Apart from the universal declaration of human rights, the international covenant on civil and political rights, Article 25, and the optional protocol to the Council of Europe Convention on European Human Rights, there were no standards regarding what actually constituted a fair and genuine election. We were all told in these documents that to have a fair and genuine election one needed to have a secret ballot, the election had to be periodic, it had to be equal, and it had to provide for direct or any other type of suffrage. But what precisely these words meant and how they were supposed to be put into practice was nowhere specified. And what was actually happening in terms of the laws and the cases that were going up before the Human Rights Committee as opposed to the Court on Human Rights were cases that questioned freedom of association - can a party run for an election? If so when and how? - and freedom of expression - what type of things can a party say? Can it engage in a hate speech or is that a violation of electoral rights?

Those were the types of issues that were being raised in 1990 at the very beginning. And one of the first things that OSCE ODIHR did was to produce standards in the form of commitments, not binding norms, that would look not just to the standards of what goes into a free and genuine election but into the how one gets there. What modalities does one have to create to have a free, fair, genuine and periodic election and how does one ensure that they continue. So the first document that was adopted, post to the Charter of Paris, the herald of new Europe, was the so called Copenhagen Document and articles. Paragraphs 7 or 9 of that document developed the practical modalities for what constitutes an election. Linked to those practical modalities was a broader definition of what the rule of law was. Heretofore, the rule of law had been conceived as a something almost ephemeral that was there to guarantee a fair trial. But the rule of law goes much further than guaranteeing a fair trial - it is the foundation on which a democratic society

must be built. So OSCE ODIHR developed commitments that, on the one hand looked to what constitutes the rule of law, what makes a good first step as state for a fair government, for a fair judiciary, for a fair legislature, and, at the same time, how does one create a representative government that will relate to that rule of law and give everybody an opportunity within that system.

As I said before OSCE ODIHR does not create norms or standards; what OSCE ODIHR does has no legally binding force. But what it has done has, in a way, created its uncustomary law; it has created a body of principles about the practicalities for elections. And I would like to look at those practicalities and the role of the judiciary within that context by looking at two cases that come from this region. One is a case that was recently decided by the constitutional court of Bosnia and Herzegovina, and another is the case that was decided by the Albanian constitutional court within the context of last year's Albanian elections.

The case that came before the Bosnia and Herzegovina constitutional court was brought by Izebegovich, then one of three presidents of Bosnia and Herzegovina, who claimed that the structures within the Federation of Bosnia and Herzegovina and the Republika Srpska were undemocratic because that they did not allow all of the peoples in Bosnia to be equally represented, nor did they guarantee each individual a right to vote equal with everybody else in the society. As many court cases do, the issue turned around a political issue. In the Republika Srpska, officials were using property claims to deny refugees settlement rights equal to those of other minority peoples, and although non-Serb members made up at least thirty percent of the country, within the Government of the Republika Srpska, there was not a single non-Serb constituent in the government. Similarly, there was very little representation in the parliament.

With regard to the Federation of Bosnia and Herzegovina, the constitution provided that two of its constituent peoples, and others, had the right to elect representatives to the house of representative. The house of representatives was to be elected according to a proportional formula, but the formula was such that it excluded the Serbian population of Bosnia and Herzegovina from being represented. What the constitutional court did was to void the paragraphs of the constitution that said that everybody must be represented and it looked to the case law of the Council of Europe, such as the cases that were cited this morning; it looked to the case law of Quebec with respect to the right of Quebec to secede from Canada; and it looked to a series of Swiss cases dealing with language and minority rights. Why do I raise those cases within the context of the judiciary? I raise them because the cases were also related to the representation of the judiciary in those particular areas. The court also said that, because of the way the constitution was structured, there was not an adequate representation of the various peoples in the judiciary. And to ensure a fair election one also had to have the machinery that would look to the interests and the needs of the peoples of Bosnia and Herzegovina. So we had the court coming forward, which is a very rare event, especially in the US. They said that the right to an election was not just an individual right but a collective right that has to be guaranteed to everyone in a society. It is a right that is exercised at once individually and collectively and must be guaranteed on both fronts. Even though this happened many years after ODIHR had started developing its principles and commitments, this decision, in many ways, is the precedent for the present commitments to fair elections that have been developed by ODIHR. They require that every single election be observed – internationally and domestically. They require that election results be re-tabulated and publicized and be made available to everybody, if need be in minority as well as majority languages. They required an adequate judicial review process which must be separate from the administrative review process. They required transparency. Within that context, ODIHR has developed a series of modalities to resolve a conflict within an election. The basic norms that are needed are, again, the basic norms of the rule of law - transparency, fair trial, equality, and accessibility. But these again are just words unless one creates a good code to ensure that they are executed. The thousand-dollar question—no the million dollar question—then is: what makes a good code?

ODIHR is in the process of trying to develop answers to this and other difficult questions: what does one need to have in a municipal election committee? What does one need to have in a polling committee? What does one need to have in a national and state committee? How should judges review given court cases? Practice has shown that, unfortunately, the training that judges have been given to date is such that it does not necessarily equip a judge to give legal reasoning for his or her decision. So when you have a case that goes from a polling committee regarding perhaps voter registration or candidate certification, it goes up to the municipal committee which is also peopled by judges as well as politicians and the judgment comes down to yes or no. It then goes to the provincial or the state election committee and the same thing happens – yes or no: yes you can be certified as a party or no you cannot. But the reasons for that are not given. And as long as those reasons are not given there is no transparency, there is no rule of law, there is no fair election, and then from that you go either to a constitutional court or you go to a state administrative court or a different structure. The problem becomes, as far as courts are concerned, what function are they actually exercising - are they exercising the function of a constitutional review, are they adjudicating the fairness of the different aspects of an election, are they looking to the administrative aspects of an election? And, most importantly, what needs to be done? A number of people from several countries have proposed the creation of a separate chamber within the appellate court system that will deal exclusively with election issues. This chamber will be competent both to decide on the constitutional law issues, i.e. whether or not particular aspects of an election law or administrative practice is in conformity with the constitution, and also to deal with the hard core realities of elections: how a ballot is created, how a ballot booth is set up, how do you ensure secrecy etc. These are issues that a judge does not necessarily deal with every single day. At some point, IFES may wish to follow up this seminar with one on judicial training in terms of how best to reason a case and how to establish a good system.

I said at the beginning that I would look at some of the Albanian constitutional court cases that resulted from last year's elections. I want to discuss these cases because they illustrate these questions: what role does the judiciary occupy? What institutions must they have as a back up, in order to ensure that election is free and genuine?

Under the Albanian case, there were five rounds of elections (two-rounds of elections held over five Sundays). Because no one candidate won 50% +1 of the vote, a second round of elections was required in several zones. Elections were held in particular zones because of irregularities observed by the CEC or decisions made by the Constitutional Court. A bipartisan parliamentary commission was established to investigate alleged irregularities observed in the OSCE ODIHR report from these last parliamentary elections. At the end of their commission on December 31, 2002, the Commission will submit proposals to the parliament for possible amendments to the election code.

Many questions arise from these events: What did the court do that was not in accordance with the modalities of OSCE commitments? What did the court do that was not in accordance with international standards to which Albania is a party? The aspect of the decisions that was most troubling was that none of the court's decisions were reasoned. It looked incredibly arbitrary in terms of which particular zones would be recounted, why they would be recounted, why certain election units within certain zones will be recounted, etc. And one of the most troubling decisions was with regard to the Deputy Prime Minister Legisi, who was a candidate in the area of Mirdita, which is in the heart of blood feud country in Albania. Minister Legisi was running on the socialist ticket in a very democratic party area, and in the first round of elections Minister Legisi received 39% of the vote, versus 21% of the vote. The chair of the constitutional court is also from Mirdita and from the same family. Thus it is not entirely surprising that, when the ballots were being recounted, ballots were very obviously being put aside and counted separately. Yet there was no transparency so that everybody could see how the ballots were being counted. Sufficed to say, it was declared that Mr. Legisi had won enough of a percentage to stand for the second round of the proportional votes. Miraculously, with the same candidates running, Minister Legisi received 70% of the vote, 29% went to the opposition, and other parties received 20% - thus more people

had cast ballots than there were within the election district. This case was then challenged by the chair of the Democratic Party, Mr. Berisha, who said, "How is it that you can have 110% voting and how is it that 110% secured the vote?" The court decided to look at the election law and alleged it was a problem with the very complicated mathematical formula used in the election law. Unfortunately, the court reasoned, there was no electricity, and the calculators were not working. Since the calculators were not working they used an abacus instead. Finally, the court decided that the ten percent extra was an oversight and that Minister Legisi - and again this was within the reasoning of the court - should be elected because, after all, he is from Merdita, and he is the deputy to the prime minister.

There was a series of decisions like this in terms of counting ballots, whether or not election committees were not properly constituted, and whether or not election committees or the judges on election committees could hear cases in which their families were involved. That prompted the Democratic Party to bring the case before the European Court of Human Rights. It is now pending before the European Court of Human Rights, and it will be interesting to see to what extent the optional protocol will be interpreted to look at the technicalities of the issues involved. ODIHR has been asked to write an *amicus curiae* brief in terms of what standards should be looked at and what standards a court should use. Because for a court to be fair in the election process, it does not suffice for a judge to be immune, it does not suffice for a judge to disclose his or her assets or interests and it does not suffice for a judge to be protected from threats. The bottom line is that the judge is the ultimate guarantor of a free and fair election, and it is the responsibility of the judge to be a fair judge and to judge elections fairly at whatever level they are. Thank you.

***The Honorable Liliana Misevic
Municipal Court Justice of Nis, Serbia***

Ladies and Gentlemen,

I feel truly honored to have the opportunity to participate in this summit. Being an acting judge, who participated in resolving court disputes provoked by election frauds in the 1996-1997 elections in Serbia, it is my intention to outline the manner of resolving the contradictions resulting from the elections and how they affected the authority and independence of the Serbian judicial system

I intend to broadly outline the impact exerted on the judicial system as a result of the Parliament's adoption of the so-called *lex specialis* on February 11, 1997. *Lex specialis* was better known as the Law on Announcing Preliminary Municipal Election Results as Final. These elections were cited in the OSCE report.

I will set forth the manner of resolving the disputes resulting from these elections by presenting the court ruling on the Nis elections. I participated in the court sessions as a chairperson of the judicial team. The ruling relates to confirming the municipal election results. The Chairperson of the Nis District Court acted as chairperson on the electoral commission, while the Secretary of the Municipal Council acted as its secretary. Both of them have excellent knowledge of election laws and election procedures, therefore, they were able to manipulate the election results to the benefit of their party. As municipal elections are conducted based on the majority election system principle, a minimum number of municipal counselors were elected at the first election round in November 1996 in Nis and most Serbian cities.

The fact that most councilors elected in the first round were nominated by the opposition was telling in itself. This served as a warning to the big shots that, later on, did not restrain their efforts to ensure that, at the second round, the majority of the elected would be candidates nominated by the party in power.

How that was accomplished in Nis is evident from Nis Municipal Court decision No.1905 dated December 15, 1996. The court on which I presided at that time adopted the decision. I will elaborate

further on the decision later on. The decision states that, to ensure the election victory of the ruling SPS – YUL Coalition (The Socialist Party of Serbia – the Yugoslav Left Coalition), the local electoral commission either tampered with the original election registers or instructed the precinct election boards to tamper with them.

However, the election violations did not end with the elections; the politically motivated tampering continued at the trials. There were instances in Nis of ballot stuffing, even theft of ballot boxes, which had their closing acts played out in court. Theft of ballot boxes, initiated by the local election bodies (the electoral commissions and the precinct election boards) in Nis, were brought to their successful end with the assistance of the judicial teams in the Nis Municipal Court and the Superior Court of Serbia.

Despite the fact that most of court rulings of the Nis Municipal Court were in favor of the party in power, it was the above mentioned ruling No1905 of December 15, 1996 issued by the Nis Municipal Court that played the decisive role for the victory of the Zajedno Coalition. It was based on this ruling that the Nis City Council was shown to have been composed prior to the adoption of the *lex specialis*.

After the first 1996 election round was over, it became evident that election results would be tampered with the help of the judiciary. Civil protests started all over Serbia. It was then that several renowned lawyers took a stand against the outrageous actions of some judges. The Executive Council of Lawyers in Serbia instituted a special committee to analyze the proceedings of the courts. On December 18, 1996, the committee announced its findings which stated that the court rulings on election theft were characterized by three specific types of gross violations.

1. The right of all parties to the dispute to participate in the court proceedings was violated, e.g., the Zajedno Coalition were never given the chance to reply to the complaints, filed by the SPS (The Socialist Party of Serbia)
2. The principle of justice was ignored, as the court did not review all available evidence.
3. The legal principle of fair jurisdiction was violated during the court proceedings.

Finally, the Union of Lawyers stated that such gross violations could not be justified by insufficient knowledge of the law, since the complaints were reviewed and decided on by the Superior Court. The only viable explanation left was that, after reviewing and ruling on the election results disputes, the judicial teams grossly violated the constitution, the legal conformity, as well as the judicial independence and impartiality principles. In other words, the ruling of the judges was politically biased, which, in itself, was a violation of the foundations of the Constitution. The principle of division of powers was grossly abused, thus undermining the confidence of the citizens in the law, the judiciary, and the jurisdiction system.

Several leading Serbian lawyers expressed their standing with regard to the election violations; among them is the renowned judge of the Serbian Constitutional Court Slobodan Vutevich. Their opinions were integrated into the Declaration issued by the participants of the Tenth Anniversary Conference of the lawyers from the so-called Kaopish School on December 17, 1996. The Declaration states: "The Kaopish School of Law hereby expresses its concern because we believe that the decision to annul the local election undermines the trust of the citizens in the courts, the judiciary, and the jurisdiction system." This citation clearly shows that certain judges have abused their positions as public officers in the 1996/1997 elections and have violated the independence of the judiciary, thus damaging the authority and the image of the profession.

The authority and image of the judicial system in Serbia was further aggravated by the so called *lex specialis*, contrived by Slobodan Milosevic and voted by the Parliament of Serbia at the recommendation of the government. It was no secret that the law was not in conformity with the constitution.

The Parliament of Serbia voted its approval for the law and, as the Constitutional Court judge Slobodan Vutevich put it, "the superior bodies of the executive power, in collaboration with an obedient Parliament not only violated the Constitution; they made fools of the obedient judges, ridiculing their mock constitutional independence."

As a result of the collaboration of judges in the election violations of the 1996/1997 and the adoption of the *lex specialis*, the authority and independence of the judicial system suffered the most severe blow in the history of the Serbian judicial system. The judicial system of Serbia has not yet recovered from this blow, dealt from within by the judges and from without by the highest-ranking representatives of the executive and the legislative powers, the government and the Parliament.

Even after the changes in 2000, the judicial system of Serbia seems to be haunted by this evil portent, as if these occurrences have cursed it and the system cannot gather its strength to expose those who misused their official positions, damaged its authority, and degraded the judicial system to the lowest possible level.

Back in 2001, there was this initiative to institute proceedings against judges involved in the election violations and the fraudulence of the election results. Serbian judges, headed by the Superior Court and the Union of Judges in Serbia, defended their colleagues under the pretext that the initiative was illegal.

That's how the Serbian judges did nothing to repent their sins; sins which damaged authority of the courts, while the Serbian people lost their faith in law and justice. As you might guess, today, judges that participated in the election violations still work in judicial offices all around Serbia. These judges collaborated with chairpersons of courts who were the supporters of the violations within the electoral commissions.

Nevertheless, many judges in Serbia still believe that our judicial system will summon its strength to overcome these unhappy events, to confess its sins, to fight for the restoration of the judicial dignity, and regain the trust of the citizens in the law and justice and the judiciary.

Valentin Georgiev
Secretary of the Central Election Commission of Bulgaria

I would also like to thank the organizers of this conference for inviting me to attend. Personally, I find it particularly useful and hope it is useful for the rest of the participants as well, because an experience shared among different countries and especially one shared by established democracies and established international organizations is quite valuable. This conference is also useful because it makes it possible for us to share our experiences as participants from countries making the same steps towards consolidation of democratic values: countries which are, so to speak, in the same boat; countries of the same region facing the same problems, not only in the process of asserting democratic values, but also in creating the essential economic and social conditions that will bring them closer to the established democracies. At the same time, in the course of this discussion, I notice that the problems in our countries and those of the more established democracies, if we can differentiate between the two groups of countries, are ultimately rather similar, which illustrates that we can actually proceed from the practice of the international organizations - the practice pointed out in the report by the Honorable US Supreme Court Justice, Mr. Futey. These years and years of practice have led to solutions which, I think, are rather useful for us.

I would like, however, to broaden the subject of the conference and to express my view on the problems that have been discussed. I have the feeling that this conference could cover yet another aspect which often seems to be overlooked. This is the legislative aspect of the process. It seems that looking at this aspect would be a prerequisite to tackling the problems arising from the application of legal standards by an administration like, say, the Central Election Commission or another authority charged with administering the electoral process and resolving the ensuing problems. I can confidently declare that, in its work, the Central Election Commission of the Republic of Bulgaria has always been guided by the principle of the rule of law. Likewise, this principle of the rule of law, along with the principle of independent decision-making on the basis of inner conviction, without outside interference, has been a guiding principle in the work of the Supreme Administrative Court of Bulgarian court as well.

This is all the more true of the work of the Constitutional Court. Do not misunderstand me: I am not here to applaud the performance of the Central Election Commission, whose Secretary I am, nor to sing praise to the Bulgarian judicial system. Things simply are that way. Nevertheless, a precedent in the last parliamentary elections proves that there is still room for improvement, not only in our own house, but also in the legislature. The honorable Supreme Court Judge Mrs. Puneva, mentioned this precedent in her report. Let me review it briefly: a decision of the Central Election Commission was revoked by the Supreme Administrative Court. On the same case, however, the Central Election Commission issued a supervening decision, and, meanwhile, the parliamentary elections were conducted. The case remained pending until it went before the Constitutional Court which rendered judgment nearly three or four months after the parliamentary elections had been conducted. This created the impression that there was tension between the administration and the court. But once the situation is analyzed, it turns out that it was actually a matter of the administration and the court having different interpretations of an issue. Ultimately, it is the decisions of the court that should be left uncommented upon by any self-respecting jurist. Nevertheless, the precedent is there and it merely proves that, *de facto*, the problem is not rooted in the desire of either the administration or the judiciary to dominate. The problem is simply due to bad legislation. In this specific case, the clause that gave rise to this controversy is indeed very badly phrased, which led to this situation. That it happened while the elections themselves were in progress, moreover, left an imprint (which, I hope, has already been forgotten) on the public mind: "yet again, something is not working properly; the administrative machine is not working properly; the judicial system is not working properly; both systems are not working properly." I give this example because, to my mind, it is indicative of the analysis I would like to make here of the Bulgarian legislative practice of drafting and adopting the electoral laws.

Bulgaria has three effective electoral laws: an Election of National Representatives Act, a Local Elections Act, and an Election of President and Vice President Act. Notably, in my country, (and I think this is also the case in quite a few countries of the region) it is an established practice for power-holders to start re-tailoring the relevant laws that will provide the framework of the electoral process - even going as far as writing an entirely new electoral law immediately before any parliamentary, presidential, or local elections - so that their party might win at the polls. This is done two or three months before the elections themselves. You can imagine that with all that rush, legislators work in a hurry and because, apart from everything else, they are strongly politicized, they start formulating bad clauses of the laws in that haste. Legislators thus precondition the bad work of the election administration and create conditions for the problems that, ultimately, will be settled by a court. At the same time, legislators also precondition a challenge for the court because the court itself, when it tries to make its decision, cannot find its way through the incoherent writing in the quick fashion demanded of the situation. I should say that the legislators also precondition a time limit for the Constitutional Court, which must express a view on the constitutionality or unconstitutionality of certain legal provisions in an electoral law. Incidentally, it is precisely this rush that prompts a logical reaction from the opposition. Once the amendments to the electoral law are adopted or a new electoral law is proposed, the opposition, whichever it is, inevitably

takes the opportunity to challenge some clauses of this law before the Constitutional Court. Meanwhile, the elections themselves begin, and the election administration itself, in this case the Central Election Commission, finds itself in a very peculiar position of not knowing whether a clause of the law is still standing, because its application could be discontinued by a Constitutional Court Judgment within a couple of weeks. This sometimes also hinders the work of the election administration or compels it to adopt a back-up option in handling certain matters in case a specific clause is declared unconstitutional. The election administration is thus stranded in an ambivalent situation, where it should react adequately to the process that might ensue from the Constitutional Court judgment. But even in the best-case scenario, when the opposition presumably does not challenge any clauses of the law before the Constitutional Court and the law remains the way it was passed, then, too, because of the rush to pass the law on the very eve of the elections so as to secure the most advantageous position for the ruling party, legislators hastily formulate a number of clauses which lead to the vicious circle I mentioned at the beginning. Thankfully, the tangle is ultimately unraveled by a Constitutional Court judgment. Still, in order to avoid such situations and lest the Constitutional Court be petitioned, politicians should do their job properly because they are the ones who frame the laws; thus, everything is in their hands. And yet, not a single member of the legislature has attended this conference. I am not blaming them or the organizers because the conference is, after all, about the judicial review of the decisions of the election administration and the judicial review of the electoral process in general. I am simply suggesting an enlargement of the discussion to that area as well.

What is the case in the other countries? I would be interested to find out the legislative reaction to such misguided decisions, which are identified in the course of their work. As I found from the report of the Honorable Supreme Court Justice, Mr. Futey, despite what happened during the 2001 presidential elections in the US, they are not at all planning to rush the matter of electoral system reform. Bulgaria and other countries in the region are apparently just the opposite. Once an error is detected, a decision to correct it is made immediately. But when is the error corrected? It is corrected only when the ruling party is interested in such a correction, and not when there is really enough time to consider things carefully.

Question and Answer Session

Question to Liljana Misevic: I would like to ask you something with regard to your comments on the judges who you say were involved in rigging the election results and who you think should be prosecuted. Here is my question: Do you really think that those judges, possessing the relevant evidence, could have made a different decision? Isn't it possible that they did not possess the evidence which would give them reason to make the decision that you consider to be right?

One more question: Who has the right, exactly who in Serbia is competent to raise the issue of judicial responsibility? I am asking this from the point of view of guaranteeing the independence of the court.

Answer: The opposition Zajedno Coalition submitted their evidence to me. The municipal electoral commission would not even present me with the original copy of the complaint. They refused to present the complaint when my team worked on the case; they refused to do so when other judicial teams investigated the case. That's why my colleagues and I had to build our case on the only available evidence submitted by the oppositional coalition. I can share my impressions of how the other judicial teams proceeded. For instance, I can cite the justification of a certain ruling. The complaint of the Zajedno Coalition stated that the minutes of one polling section are tampered with. In the justification of the court ruling, the judge points out that the court is not competent to establish the truthfulness of the statement to determine whether the minutes are fraudulent or not. This is only a small portion of the justification. Other judicial teams dismissed the complaint of the coalition because of its rashness. The justification of their ruling stated that they should wait for the decision of the local electoral commission

on the complaint. The local electoral commission is required to come up with a decision within 48 hours after the complaint is filed. The commission did not respond within the prescribed time schedule. It kept silent. What was the coalition expected to do but file with the courts after the prescribed term was over and no response came? However, the court dismissed such complaints as rash. Do you find my answer satisfactory?

As to the other question: in Serbia only chairpersons of courts and the Ministry of Justice are entitled to propose the removal of judges from office. Currently, we have a new Council of Qualifications at the Superior Court, which, I understand, was constituted couple of days ago. This Council will be entitled to submit such dismissal proposals with the Parliament. Thank you.

Question to Ms. Elias: Specializing on election matters is a very valuable initiative. But if we on the appellate court level decide all matters this will not spare us the surprises discussed by the Election Commission chairman. First, there is the stability of the election law. In this respect, judges have very different and often bitter experiences. Taking this opportunity, I would like you to answer the question posed by the mediator as to whether legislators, when drafting their laws, use the experience of the election commissions. Also, I ask whether the electoral law is adopted and prepared with enough time to spare before elections because, as you know, the different branches of government have many problems with efficiency thus need much time to look for solutions that would satisfy both political forces and voters.

Answer: The proposal to create election chambers in appellate courts is one which is just being looked at. This idea is being considered to ensure some type of continuity with respect to the administration of elections and, as you so rightly said, so that judges do not receive extra payments as members of election commissions. One of the things that has been found when judges are members of election commissions - be it at the municipal or the national state level - is that they are sometimes, not always, nominated with the expectation that they will be able to earn extra money. In this way, they receive money for being a judge in the normal state of affairs, as well as for being a member of an election commission. So this proposal aims to create rules to keep judges independent in the sense that he or she does not sit on an election commission in order to get an extra salary. It also hopes to ensure that even very technical problems are resolved in a consistent legal manner so as to create a solid election law tradition on which elections can build. In his very interesting remarks this morning, what struck me most in terms of the difference between Judge Futey's statement and those of the Bulgarian and Armenian judges is that America has a two hundred year tradition; and each election builds on what was good in the past election. I hope that this is a political statement on my part. I hope that the new election law that is currently before both houses of Congress will build on the tradition and not on the past election, that it will look to the whole of the creation of election law and not in part. And this is one of the reasons why some people are looking at the possibility of creating a special chamber within the appellate court that would provide that continuity and safeguard the impartiality of judges when making decisions concerning elections. Thank you.

DAY TWO TRANSCRIPTION

Mr. Robert Dahl
IFES Elections Legal Advisor

"International Practices in Bringing Election Disputes to the Judiciary"

I told IFES that I would address the international practices for bringing election disputes to the judiciary, and I will address this specific topic first to give some general perspective. But I also want to focus on problems that often need to be solved within the election law, and the complaint procedures that signal these problems, so as to permit courts to properly function in adjudicating complaints and in resolving disputes that arise during elections.

In this way I will be speaking to the concerns raised by Mr. Valentin Georgiev yesterday. He discussed the inadequacies of drafting election laws, and placed responsibility on legislatures to create a complete framework for a fair, orderly, and efficient election system. Such a system must provide clear rules, procedures, and timetables that enable courts to do their job of judicial review of election activity and of the deposition of election related cases. Thus, my talk this morning is focused on those of you here today representing the judicial part of government: you have strong and legitimate interests in encouraging and assisting the legislature and other bodies to do a better job writing laws and implementing regulations. You should help them create a system within which you can do your work as judges.

We often use the term "complaint adjudication" in combination with the words "dispute resolution" to fully describe the institutions and procedures prescribed by law to review and resolve complaints and grievances during the election period. This process involves complaints about actions of election commissions or other governmental bodies, disputes between election participants such as political parties and candidates, and allegations of violations of election laws and regulations.

In a review of international practice, one finds many different models of institutions to lead the complaint adjudication process. As we discussed yesterday, every country has a unique political culture and circumstances and unique legal practices. No single approach or model works effectively everywhere. Some innovation and experimentation in handling election related disputes and complaints would be very welcome. In most advanced democracies, such as the United Kingdom, Germany, France and Italy, election related disputes and complaints are resolved through ordinary administrative and judicial bodies operating through special procedures set forth in election and administrative laws. In most new and emerging democracies, notably most countries of Eastern and Central Europe, election disputes are resolved through shared jurisdiction between ordinary courts and permanent or temporary election management bodies, which are the election commissions. Another model is the institution of an electoral court that is responsible for election related cases. This is typical in Central and South America but also used in Greece and in some of your countries.

Almost all democracies provide for some form of judicial review of election related cases, either through the normal hierarchy or via expedited review by higher courts. In countries with shared and joint jurisdictions between courts and election commissions, the complaint adjudication process -- often but not always -- first directs complaints and disputes arising from elections to election commissions or other administrative bodies, with recourse for appeals to higher level election commissions or courts. This may depend upon the type and seriousness of the disputes, grievances, or allegations, but that is often not clear from the law and implementing regulations. Depending upon the nature and location of alleged conduct, allegations of election law violations are often first reviewed by appropriate election commissions, and then referred to prosecutors and police, or, in some countries of this region, to the office of procurator, if a

factual or legal foundation for the allegations is first determined by the election commission. Sometimes, however, election commissions do not play an initial role in reviewing such allegations of criminal conduct, and criminal charges are brought directly to law enforcement bodies.

Now for a more general discussion of the problems facing election systems in getting cases first presented to courts for deposition. Election cases involve a difficult combination of two important elements. Number one is the substance itself – fundamental human rights of democratic participation. This, of course, involves seeking political office, supporting political parties and candidates, and voting. The second element is time constraints – most or all of election disputes and complaints need to be resolved within the compressed time schedule of the election process. Election Day itself looms as a deadline for some matters, and there is a need to validate election results as soon as possible. The old saying that ‘justice delayed is justice denied’ is especially true in the area of election complaint adjudication and dispute resolution.

Plus, of course, I should mention that there is a tendency for election management bodies and legislators that are drafting the election laws to view election complaints and disputes as a sign of systemic failure – as something to be avoided and discouraged – rather than recognizing such disputes and complaints to be a natural and inevitable consequence of competitive elections.

How then can the election law and procedures be improved to benefit this process of complaint adjudication and make your roles as judges better and perhaps easier? First, clarity in election laws and implementing regulations is essential. The law must identify and empower existing bodies, such as courts and election commissions, or new institutions, such as electoral courts, to quickly and properly handle these complaints and disputes. Confusing or conflicting jurisdictions among courts and administrative bodies, or between courts themselves, result in a duplication of complaints and often a dual appeals process. It is essential that the law be clear on jurisdiction, the appeals process, and on the finality of decision-making.

In addition to designating the appropriate institutions for complaint adjudication, the election laws must provide clear, speedy, and transparent procedures for complaints to be filed, investigated, and decided, or for disputes to be resolved. Rules must be clearly established for where, when, how, and in what form complaints or demands must be filed, including standards for sufficiency of evidence.

The law must also set forth standards for sorting the serious cases from the less serious cases, so that serious matters receive greater attention by election commissions and courts. Special procedures must be ready for complaints that arise near to or on Election Day, and the system must also provide a specific mechanism for challenges of election results.

The laws and regulations must not be ambiguous, inconsistent, or impractical deadlines for filing or resolving complaints or disputes. The problem of deadlines being ambiguous, inconsistent or impractical is a common one among both emerging democracies and established democracies.

Electoral infractions – the specific violations of law – must be clearly described and set forth in law, and, where possible, they should cross-reference the applicable criminal and administrative law if these are not contained in the election law itself. The type of administrative remedy or criminal sanction must also be specified. Administrative remedies include fines, money penalties, or electoral consequences, such as being denied access to the ballot or, in some cases, political parties being dissolved. It is very important that the election law identify these types of administrative remedies or criminal sanctions and that it provide a clear and graduated system of penalties that are fair and appropriate to the seriousness of the violation.

And finally, the law must also provide some advice and direction regarding prosecutorial discretion. I raise this not only because of the question of whether prosecutors should be entitled to decide, in their discretion, not to pursue cases, but also because of the other side of that dilemma, the very real problem of arbitrary interpretation and selective prosecution.

The second answer to the question of how to improve the professional situation of judges -- the first one being, as I have described, the clarity of the election law-- is to facilitate the proper assignment of jurisdiction, division of responsibility, and perhaps the channeling of cases by type and seriousness. What I am recommending is that, not only should the jurisdiction of courts and commissions be clear, but that they should be distinguished and tailored to permit different types of cases to be handled differently and efficiently. A case involving a complaint about someone posting posters in an inappropriate location should not be processed in the same way as a complaint about election officials engaging in election fraud. The level of seriousness makes a huge difference in how cases should be handled and how they should be channeled for purposes of appeal.

This probably means that election commissions should be given the first opportunity to separate cases by seriousness and substantive nature. Utilizing election management bodies -- election commissions -- more effectively in preliminary stages of complaint adjudication is beneficial for several reasons:

- If complaints are about actions or inactions of an election commission, such as denial of voter registration or denial of candidate certification by a regional election commission, it is appropriate to permit the election commission to reconsider its decision or correct mistakes. If not resolved, then it is also sensible to have complaints about administrative decisions reviewed by a higher election commission.
- Election commissions should have a practical understanding of and experience with the election law and implementing regulations. They have hopefully been trained to make these preliminary judgments and to provide the initial framework for reviewing legal issues. Courts and judges also can have their expertise, and judges can certainly read and apply the law; they are often needed to finally adjudicate the more difficult cases. But election management bodies are valuable to give perspective and to reduce the complaint caseload for courts.
- If the matter involves disputes between participants in the election, or allegations of violations of the election law or regulations, it is valuable to have an election commission immediately begin preparing a factual record and collecting evidence such as witness statements. Courts will inevitably be responsible for some fact finding, but, considering the constraints of time posed by the election process, it is better that courts do not have to start 'from scratch'; it is also better to preserve the freshness of witness statements and evidence.

Allowing election commissions a stronger preliminary role may serve to screen frivolous or insignificant matters and to quickly resolve pertinent election related cases. That could help prevent wasting the time of courts -- assuming that there is no automatic right of appeal for all matters under the law -- because courts may deny a full review and affirm the actions of election management bodies under certain circumstances.

My third suggestion for improving election laws to make your jobs easier, is to better prepare a factual record at the earlier stages. This, of course, relates to my previous point about the role of election commissions. Complaints and allegations arising from elections are often unsubstantiated or based on hearsay and rumor. Sometimes it is the collective weight of a lot of allegations that seem to cause the controversy in an election environment, rather than the substance of any one specific allegation or any

basis of proof or evidence. What are needed in this area are well-crafted and complete statements of facts and legal allegations.

The format and requirements of forms for election complaints should be clear and should be specified in the election law or at least in the implementing regulations that are developed by election management bodies. Perhaps an officially approved form that is made widely available would be a good basis for ensuring that complaints are better crafted and more complete in their statement of facts and legal allegations.

The law also should be clear about who can bring complaints. Not only how they bring them, where they bring them, or when they can bring them, but the law must also address the issue of standing – who is entitled to bring action. That may include specifying that only parties or candidates are entitled to bring complaints regarding some issues, and that complainants must have personal knowledge of the facts or a personal stake in the outcome.

The law or regulations should also contain a statement of the requirements for the nature and sufficiency of evidence. There should be a balance between making a complete factual record without being overly burdensome and unfair to the complainant. There should be a clear statement of facts and the nature of the dispute or allegations, and the law should require signed and sworn statements by witnesses. There should be tight but reasonable deadlines and time limits both for complainants and for the adjudicative bodies that deal with these cases.

And, finally, there should be transparency in the process by which these complaints are resolved. Moreover, the resolutions should be reasoned decisions by commissions and courts, particularly in areas such as the denial of voter registration or denial of candidacy that affect persons so deeply.

Before concluding I will also mention that there is an important role for civic education in assisting commissions and courts, improving the complaint process, and encouraging citizens to do a better job of focusing their complaints and stating their allegations. And, of course, there is also the need for judges and election officials to be trained in the election rules and procedures that pertain to complaints and disputes. So to conclude, I would say that all of our discussion about the role of the judiciary in election disputes could result in little improvement or progress if matters that come before you as judges are presented too late or with too little evidence in preparation; if too many matters of little consequence clog up courts; or if the respective jurisdiction of courts and commissions is confusing. Thus, the judiciary is unavoidably linked to election law reform. Because you have a strong interest in those aspects of election laws that affect your work as judges -- even if those questions are subject to political debate -- your legislatures and the political community in your country need your advice and your good judgment to improve the complaint adjudication system. Thank you.

Question and Answer Session

Question to Mr. Dahl: If we are talking about the election commission securing the evidence, how can one make sure that the evidence, once given, is actually secure and not tampered with?

Answer: This is difficult to answer in the context of criminal prosecution, which is more often directed to police or prosecutors to begin with, and is therefore a process which would be determined by the criminal law. But when election commissions are the designated point of entry for complaints, as they may be under the law and as I recommend they should be in most cases, the election commissions will have to be held responsible for performing that function as openly, honestly, and transparently as all their other obligations. I do understand a heightened concern about the security and reliability of evidence obtained by commissions in allegations of criminal conduct, and I suggest that very specific rules and procedures

be in place as a safeguard. Nevertheless, when it comes to the kinds of complaints or disputes that are more political in nature, perhaps between competing participants in the election, I think the election law should be sufficient or should be made sufficient to insure that election commissions meet their obligations, as they should in all of their functions.

Question to Mr. Dahl: My question relates to deadlines with respect to the elections, before which a case must be filed or a claim reviewed by the courts. In your experience, do you think these deadlines should be preclusive or instructive, i.e., if the claim is filed after the deadline, should it lead to preclusion of the opportunity for review of this claim, or should the deadline simply be instructive, thus allowing for deferral of the cases – this being especially important in relation to what you said, that the deferral of justice, i.e., of deferring a case, is actually a deprivation of the opportunity to give justice?

Answer: Certainly, in my opinion -- and I think in the opinion of other lawyers like me who work in the area of election law and in election related complaints -- the deadlines and timeframes in the election law should be clear and, in almost every case, decisive. To permit there to be wide discretion by courts or election commissions to vary time constraints would be unfair and likely undermine their legitimacy and the degree to which they are observed. I say almost all because I do not doubt there could be extraordinary circumstances where courts may grant relief to a party, a complainant, or someone with a problem based upon the timeframe having lapsed if they could show some extraordinarily unfair consequence, and their own actions were explainable or defensible because of some emergency or problem, such as perhaps not even discovering a particular situation. I can see where courts could, in an extraordinary case, grant relief that is outside the time frame. But I think in almost all cases the time frames and deadlines have to be observed very strictly, and, frankly, at that point the cause of justice would probably be served because it is unfair to the other participants in the election process for these matters to be delayed.

And in some ways, not to trivialize elections, but elections are sort of like sporting events, because they have a point at which the buzzer goes off, the bell rings, and the game is over; that is true certainly because of the absolute end of time with an Election Day but also with other phases of the election process. We have to be able to get on with it. There is a point at which candidates have to be certified and that is that. So the ballots can be prepared and the campaign can begin. The important thing is that time frames and deadlines are initially drawn up in a way that is reasonable and can be met by the people who have to operate under them; it is also important for the adjudicative bodies to do their job when complaints arise.

Question to Mr. Dahl: Can a conclusion be drawn about any interdependence between the election commission at the lowest level, on one hand, and the number of the disputes and claims filed, on the other? It is possible that there would be more or less disputes because the commission, at the lowest level of its formation, is comprised of people from a society where people very often know each other well.

And a second question. It relates to an issue which concerns us a lot: how, actually, does a particular violation later influence the elections, i.e., in what way does it form or modify the election process later on? Let me give you an example so as to clarify. When introducing them self to the voters, a candidate identifies their advantages and disadvantages, disclosing his/her past in the best way possible. However, when talking about their opponent, they draw them in only a negative light. After all, if these facts turn out to be untrue, the candidate can only promise not to say anything worse. How can the court determine how many of these untrue facts that the candidate presents are believed by voters and by what means should it review and investigate these facts to determine the positive or negative influence they might have later in the elections – including the final decision? If you have any specific expertise in this area, I would be grateful if you could share it with me. Thanks.

Answer: The first part of your question was regarding, I think I will be describing it correctly, the problem of lowest election commissions perhaps being too close to local political influence or being otherwise affected by a sense of local affiliation. I think I should have clarified in my remarks that when I talk about election commissions at a lower level being responsible for complaint adjudication at the preliminary stages, I really am not thinking about the very temporary bodies, such as polling site commissions, or even the next level up, which are often organized purely for purposes of either material distribution of ballots and other materials on the way down before the election, or vote tabulation coming up after the election.

I am thinking of the lowest level of the election commission that actually has administrative responsibility, which is most often the constituency level, particularly where there are single member districts or otherwise candidate districts as opposed to bigger constituencies. They will be affected somewhat by local considerations, but not as much as the absolute lowest levels of the commission, which I recognize could be a group of neighbors who are involved in either operating the polling site or, perhaps the next level up, for purposes of vote tabulation. But we have to hope that election commissions with actual administrative responsibility at local levels, as I say probably the constituency level, will be professional and honest and will perform their jobs effectively.

The second part of your question is very interesting because this question comes up a lot: I have often heard this type of question and this concern in my work the last twelve years in democratization programs. And, most recently, I know I heard it in a round table that IFES held in Russia about three years ago. I have to say that Americans are poorly equipped to answer this question because we do not view the give and take of political rhetoric as something that is normally a matter for the courts. And, frankly, our system has been criticized for election campaigns being too negative. We have a lot of political advertising, and much of it is negative, critical, or, at best, comparative in nature; our system is kind of free-wheeling. You know that American political campaigns are long and tough battles.

And so it is very, very rare that something said by a candidate during an election campaign about his opponent or even about himself is something that is itself justiciable. We do rely upon politics itself to serve as a constraint. I mean the voters are not stupid and they are not oblivious to the allegations that have been thrown back and forth; so if people go too far there is a backlash by voters. Certainly the media can also play a role in exposing candidates if they have exaggerated their own credentials or unfairly criticized their opponent. And at a further extreme, there is occasionally a genuine case of slander or libel that might emanate from a political campaign, and then that is handled by the judicial system, generally in a civil action, in the same way that other cases of slander or libel are handled. In slander or libel cases the legal standard is that the statement has to be reckless or knowingly untrue, as opposed to maybe just exaggeration or unfair. There is no question that these kinds of statements by candidates during a campaign can affect the election process, and I understand why you feel compelled to deal with these problems. I can only tell you that we have little experience with it because election commissions or courts do not get involved in sorting out false advertising, true or false allegations in election campaigns; we leave it to the political process to punish people through electoral defeat if they go too far.

Question to Mr. Dahl: In an election, how would you handle issues or complaints about the media exceeding proper limits of the freedom of expression? I am thinking of, for instance, racial hate speech, etc. What role would you see for media commissions within an election process, if any? Who is monitoring the fairness of campaign advertising etc., especially where you have state-owned media and state owned television?

Answer: I am aware of those kinds of commissions and that type of regulation in other countries, and I have observed how it operates. Again, Americans are not very well equipped to discuss this issue

because, while candidates or parties allege that certain media outlets are unfair or biased, it is unlikely there will be a legal remedy. There is almost never any legal recourse for even the most repetitive and relentless airing of criticism of candidates by news media outlets. Of course, we do have the legacy of equal time requirements for providing access for candidates to speak, and that is monitored, obviously, by the participants themselves. It is not unusual in the U.S., for example, for someone to call up stations and say I see that you allowed some particular candidate to be on your television interview program last week, I want to be on it also. And most stations preclude that possibility by always offering all candidates and all parties equal access. In the other countries that I have observed, I think they do have extensive regulation of the news media regarding coverage, but that is a difficult area of regulation which can be subject to considerable arbitrary actions that would be considered a restraint on free speech in the U.S.

Regarding racial hate speech, etc., and the content of the coverage itself, I think these are extremely difficult issues for bodies to decide and the standards have to be set up clearly. We do have experience in the US with hate speech prohibitions, and I think the election commissions or media commissions that I have observed in other countries have recognized that they have to exert their authority with very rigid, high standards, for fear of not dampening free speech or discouraging the free exchange of ideas. But I cannot say I have ever seen a very complete comparison of cases in this area.

Question to Mr. Dahl: I would like to ask you about your opinion about restrictions on election campaign fund expenditures with regard to political parties and candidates, as is the English experience for instance; and how should this be done and which should be the bodies involved? Should there be an independent body to do the supervision? Because in England, for example, this is done not through a specialized body, but through selected people identified by the respective candidate for the election position, where the results are reported and published afterwards. Do you think this is appropriate? Campaign fund expenditures constitute one of the major problems for the Central and Eastern European countries, and we need to find a good solution. Which, to you, is the best option specifically for those countries, having in mind your experience in Russia and other countries?

Answer: Well, the area of political finance regulation is actually what I have been most involved with in my career. The United States is one of the unusual cases: we have a separate administrative body, an independent agency, that is given exclusive jurisdiction, and its primary function is to issue regulations and to be the point of entry for disclosure reports and complaints regarding political finance regulation. We do not have spending limits in the US except in presidential campaigns, which are publicly funded or partially publicly funded.

My experience generally with political finance regulation, and spending limits in particular, is that most democracies have adopted some either rudimentary or maybe even quite elaborate systems for political finance regulation. Enforcement varies greatly, but in most places it is very poor and the rules are not followed or observed. They are even openly flouted. The newest reforms in the UK are fairly new and it remains to be seen how well they will be observed, but it is entirely possible that there will be cultural as well as, hopefully, administrative pressure to observe those rules. My most recent experience is in Indonesia, where there was a requirement for political parties competing in elections to file disclosure statements, which of course are essential for enforcing requirements such as spending limits. However, it was widely recognized in Indonesia that the disclosure statements of political parties were fundamentally inaccurate.

I think the same would be the conclusion of observers in my most recent experience in Russia during the State Duma elections of December 1999. Partly because of IFES's advice, they had developed a pretty extensive set of regulations and requirements for observing contribution and spending limits as well as requirements for submitting disclosure statements. I think that the general conclusion by observers, including news media who studied this issue, was that the reports just were not valid or accurate, and

there was enormous amount of political spending ‘off-the-books’ and not formally declared in the official statements. That is the fairly universal experience.

This is not to say that we should give up on fair, effective, reasonable regulation of political finance, but only that it ends up being one of the areas which I think is susceptible to evasion. Spending limits are probably the worst from an enforcement standpoint; it is easy to observe the activities of parties and candidates, but it is very difficult to know what kind of activity they are quietly sponsoring and cooperating with others to evade the actual spending limits themselves. And, frankly, you invite that sort of ‘off-the-books spending and working through a surrogate, through someone else, when spending limits are too low and when there is a general disregard for the rules themselves.

Question to Mr. Dahl: Illiya Pacholov, The Court of Appeals, Varna. One very short question: What is Mr. Dahl’s opinion of the “Day of Rethink” as it is known in the European election system, Bulgaria in particular. I raise the question by expressing my personal view that such a day should not exist, comparing it to a simple circumstance: a trader, for example, promotes and advertises a good, and then, just a day before the very presentation should take place, he makes a vacuum of twenty four hours and then says, “From tomorrow on my good is ready for the market.” Maybe this is not a very good comparison, but once again, I’d like to hear what you think of it.

Answer: I think in almost all the elections that I have observed, through my professional work, in the last twelve years, virtually all of them had this feature in the election law. From my very personal, selfish standpoint, I always liked the idea of the quiet day because it gave us time to get organized for our election observation the next day.

In the United States we do not have such a provision. We even have people standing at polling sites outside a specific designated distance requirement – a hundred feet or two hundred feet – and as you walk to the polls you are being handed leaflets at the very last moment by supporters of candidates and parties. Occasionally those are actually beneficial if you do not know much about some races, about some contest that may be further down the ballot. But, generally speaking, they do not have much impact on voters. Voters know for whom they are going to vote before they go to the voting place.

But I think this question of a ‘cool off day’ is truly a policy choice. I certainly do not view it as a question of deep principle or even a free speech question. Yes, obviously you are constraining the free speech of supporters of candidates and the candidates themselves by not permitting them to still campaign the day before the election. But I guess my personal opinion is that it does not offend me that there is such a practice. It is not followed in my own country, but I understand in many cases it was probably instituted out of a concern for security and for keeping things calm before the day of the elections, so as to permit the orderly implementation of the election. And I think that is a very legitimate interest.

PANEL PRESENTATION: JUDICIAL CONDUCT: HOLDING THE JUDICIARY TO HIGHER STANDARDS OF ACCOUNTABILITY

Keith Henderson

IFES Senior Advisor, Rule of Law

We will now move to the panel presentation on judicial conduct – holding the judiciary to higher standards of accountability. This is a very weighty and serious topic being debated around the world since passage of the Universal Declaration of Human Rights in 1948. I thought I might begin the discussion with a little humor, although I will warn you it is not my forte. This story relates to one of the most important and highly respected U.S. presidents – Abraham Lincoln. I am sure all of you have heard that he is deemed to be one of the most ethical leaders in the history of the United States. The story goes that, when Abraham Lincoln was appointed the Commissioner of Roads in his home state in Illinois, a local official approached him and asked him to build a road. Commissioner Lincoln properly responded, “I am sorry; I have no plans to build such a road. Our budget does not allow for this.” And the local official responded and said, “But I know that you are running for Congress and I am willing to make a political contribution to your campaign.” Commissioner Lincoln appropriately responded: “I am sorry, perhaps you did not hear me well: we have no money to build such a road, and I do not intend to do anything like this.” The local official came back a little later and said, “But I am willing to give you 20 dollars towards your election.” Commissioner Lincoln said, “No, I repeat my answer.” And the local official then said, “Well, I am willing to give you a hundred dollars.” Commissioner Lincoln responded the same way, “No.” And the story goes on and on, but, basically, the official kept offering him more and more money. Finally, Commissioner Lincoln grabbed the local official by his shirt collar and threw him out of his office door. Lincoln went out to make sure he had gone, and the local official responded, “Why did you do that?” And Commissioner Lincoln said, “Well, you are getting far too close to my price so I had to get rid of you before I was tempted to accept your offer!” Of course, he was not serious and said this with a laugh and a chuckle. The point is that he resisted temptation, in the form of political contribution, but that even he must have found it difficult to turn down once the price escalated beyond his wildest dreams.

This story illustrates the dilemma that I think all public officials find themselves in every country around the world, and it captures, in many respects, the topic of our panel discussion today. I wanted to draw your attention to the background working paper that is in your packet on ethics and conflict of interest rules. There are references to a number of international and regional instruments in this document that I think you may find useful. One is the UN Basic Principles on the Independence of the Judiciary, which was promulgated in 1985. This was a governmental instrument promulgated through consensus findings from countries around the world. The next two documents which I will refer you to were actually promulgated by non-governmental judicial organizations – a very important emerging institution that is beginning to promote reforms in more and more countries and regions.

An examination of these issues requires one to look at both the international official instruments as well as those developed by judges themselves. It is sometimes striking to see the similarities among the documents, but there are some differences, as we will discuss today. The first non-governmental instrument that you should take note of is the Universal Charter of Judges, promulgated by the International Judges Association in Rome, Italy (1999). Another document, the Bangalore Principles, is one that we are going to refer to quite extensively in the working group this afternoon; and it is often cited in this background paper. The Bangalore Principles were actually prepared under the auspices of the United Nations in cooperation with Transparency International. They were recently developed, primarily by judges representing many countries from around the world, and are still under review. They attempt to analyze all the existing codes and international instruments that we are going to be referring to here today. It is a very interesting comparative analysis and worth examining closely.

In addition, two other documents that might be relevant for you have been promulgated by the Council of Europe. The first one is the Universal Charter on the Statute of the Judge promulgated in 1998. The second document, or agreement, is the Global Framework Action Plan for Judges in Europe, promulgated in 2001. This latter instrument is an attempt to provide judges guidance and advisory opinions on these issues. This is a new instrument that you can utilize to actually seek advisory opinions.

IFES has attempted to analyze all these instruments from a comparative perspective. While our overall assessment leads us to conclude that there is still some debate about some of these principles, it also indicates what seems to be a pretty clear consensus on a number of key principles across regions. The short list of principles that I will summarize represents at least some of the global trends and kinds of activities that judges should be cognizant of and careful about engaging in. Admittedly, some of these instruments provide specific guidance with regard to these activities and some give only general advice which is subject to some interpretation.

In general, they relate in large part to the following set of issues:

- (i) political party membership;
- (ii) position of authority within a political party;
- (iii) political office within the executive branch;
- (iv) administrative office within the executive branch;
- (v) candidacy in a national, regional, or local election;
- (vi) elected office in parliament;
- (vii) elected office in regional representative entities;
- (viii) elected office in local government;
- (ix) business/financial activities;
- (x) the private practice of law, and
- (xi) prosecutorial and investigative functions.

I also wanted to reference a new global document that was mentioned on one page in your packet. It is a new publication entitled “Guidance for Promoting a Judicial Independence and Impartiality” which was recently completed by IFES in collaboration with USAID and can be downloaded from the web at www.ifes.org/rule_of_law/judicial_independence.pdf. This is the first publication of its kind; it represents research from twenty-three countries from around the world on a wide range of judicial independence issues – including the very issues that we will be discussing today. We are now in the process of organizing two and three-day conferences and workshops around the world where we will be rolling out all of the information in the Guide.

Let me note again that the Guide represents research from twenty-three countries from around the world, including eight countries in this region. We have country-specific information provided to us by experts from each of these countries. The country information clearly illustrates the kinds of common problems and differences that different countries and regions of the world are addressing with regard to judicial independence and judicial accountability. Part One of the Guide includes the consensus conclusions reached among all the Guide’s experts. The whole research project took about two years to complete, including two meetings with the experts themselves and a number of advisors. Needless to say it was a very interesting and very engaging exercise because, by vocation, lawyers love to debate every issue ad infinitum. During this process a number of thematic, country and regional papers were also commissioned that you will find towards the end of the Guide. We used a survey instrument for all of this country research in order to compare and analyze the cross-country data and survey responses. Let me also point out that many consensus principles were reached through this process. I will mention just a few of them.

Everyone agreed that the transparency of the appointment, promotion, disciplinary, and case assignment process was one of the most critical problems confronting judicial independence in their country. They noted that even though the law was often clear with regard to how judges should be appointed, in practice the legal process was not being followed. The same was true for the non-transparent operations of judicial councils. As you all know, many countries have judicial councils, and more and more countries, including many in Western Europe, have just adopted this concept. The principle idea behind judicial councils is to promote judicial independence. It is the judicial council that often handles the appointments and disciplinary processes in many countries. Our experts told us that even though sometimes the laws regarding how judicial councils should operate, who should sit on judicial councils, and how judicial councils procedures should be administered are unclear and vague, they often are not implemented fairly because the process is politicized.

All the judges and experts also agreed that security of tenure was one of the most important issues. Indeed, a number of judges and election officials stated they have an on-going fear of arbitrary remedial action by the executive branch or others. Other independence consensus issues related to the disciplinary process itself, as well as promotions. Emphasis here is on transparency, political evaluations, court administration, and issues such as the public and judge's right to know the law and the rules of the court. Budgetary autonomy is another key aspect of judicial independence and is the trend in most countries. Finally, enforcement was highlighted as one of the key issues confronting judges and the public. Basically, many of the laws were clear enough, but they were not being enforced fairly or effectively, and they did not have the money to enforce the decisions.

Now, back to the selection and appointment of judges. Globally, ten countries said that the process for selection and appointment was rather objective. Twelve countries said it was subjective or rather subjective. In Central and Eastern Europe – half of the countries responded rather objective, half of them said rather subjective. Georgia, Poland, and Romania responded that they thought their procedures were fairly objective, while Bulgaria, Slovakia, and Ukraine thought their procedures were fairly subjective.

Judicial Code of Ethics: Globally, the majority of countries, thirteen, have no code of ethics whatsoever, and, out of twenty-three, only three countries responded that they have an effective code of ethics. Six said they had an ineffective code of ethics, which means they have one, but it is not being enforced. Here you can see the same break-down for Central and Eastern Europe. One country responded they have an effective code of ethics, one responded it is ineffective, but the majority obviously do not have a code at all.

Finally, one of the issues we are trying to highlight today concerns the relevance of international instruments and decisions. Here we can see that in Bulgaria, Georgia, Poland, and Slovakia the experts that we consulted believed that international instruments and decisions by courts were having a positive impact on judicial independence, and two countries from this region responded they were not having very much impact. Globally, twelve countries noted that they were having little impact. But this trend is changing, as we now see more countries joining international organizations and signing international treaties for the first time.

Last, let me again note that there are specific references in this guide to the issues that we are talking about today and you can download this guide off of the IFES website www.ifes.org under the “Rule of Law” section. It is now available in [English](#) and [Spanish](#).

Now, I would like to welcome our panelists to discuss some of these issues and to talk a little bit about what they are doing. The first is Victoria Airgood, a legal specialist and ABA/CEELI representative here in Bulgaria. Victoria has been in Bulgaria for about a year and a half and has done extensive work on a

broad range of topics, including helping to draft a code of ethics. We also have with us today Emilia Andeeva from the Bulgarian Training Centre for Magistrates. She is working on a judicial training program with the magistrate school and is going to tell us a little bit about the progress made under their program. We have already heard that it may be a good model for some of you to think about with regard to your own training institutes. So Victoria, the floor is yours.

Victoria Airgood
ABA/CEELI

Thank you very much Keith. Good morning. First I would like to thank Keith and the organizers of this conference, the International Foundation for Election Systems, for inviting ABA/CEELI to participate on this panel concerning judicial ethics. I am honored to discuss this topic with you. My remarks will only be designed to open up the issues to you and not to go into any great detail. The reason for this being that in the afternoon, following this panel presentation, there will be workshops, and each of the workshops will be going into these issues in detail. But I hope my presentation will open up these issues to you and to address them from the framework of the American model of judicial ethics codes and judicial ethics review commissions. This is a very different model and a very different approach than what I have observed in Central and Eastern Europe; it is good to keep that difference in mind as one tries to understand and discuss these principles.

By a way of short introduction, ABA/CEELI, if you are not aware, is a public service project of the American Bar Association. This project has been active in Central and Eastern Europe and the former Soviet Union since 1989. There are offices in twenty-four countries in the region, and ABA/CEELI has been working in Bulgaria since 1991 on various rule of law and commercial law development projects. As Keith mentioned, ABA/CEELI's judicial reform project includes expert and technical assistance who are developing an ethics code that has been worked on by the Bulgarian Judges Association. We also provide assistance to the Ministry of Justice on several topics within what is currently known as the strategy for judicial reform, which currently includes developing a code of conduct for all magistrates and a means of enforcement.

Over the last two years, ABA/CEELI, with USAID funding, and in co-operation with an organization by the name of East-West Management Institute, has provided technical and expert assistance to the Bulgarian Judges Association working group, which has tried to develop a proposed code of ethics for judges. This proposed code of ethics has undergone analysis by both American and European experts. I mention this because their analysis can bring interesting issues for consideration. East-West Management Institute also brought in the services of Judge Stephen Plotkin from the United States. Judge Plotkin has analyzed the enforcement method that is now in place in the operation of the Supreme Judicial Council in Bulgaria, and his analysis has presented some interesting insights and issues for discussion.

Before making my substantive comments, I would like to add a note of clarification – I am going to talk about a judicial code of ethics. In Bulgaria, as in many countries, the judiciary or magistrate also includes investigators and prosecutors. I want to clarify that my remarks are not intended to refer to a code of ethics for prosecutors or investigators. ABA/CEELI and I personally, believe that both prosecutors and investigators should be held to the highest standards as well and should be voluntarily subject to a code of ethics. However, today my remarks will not address either of those professions. Substantively, I would like to present only four distinct but interrelated points concerning codes of judicial conduct and enforcement.

First, the topic of this panel was originally entitled "Should judges be held to a higher standard?" and I think we all, in considering our presentations, looked at each other and said, "Well of course judges should be held to a higher standard." Now the topic title has been somewhat modified, but let me

reiterate the original title and say that it is universally recognized that judges must be held to a higher standard. This is the foundation of rule of law, it is the foundation of judicial independence, and Keith has mentioned to you the several international conventions that state these principles. As stated in the Bangalore Principles, the basic goals or principles of a judicial code of conduct are propriety, independence, integrity, impartiality, equality, competence, diligence, and accountability.

The second point that I would like to make is that a code of conduct for judges should not be confused with a criminal code; neither should it be confused with a code that is merely for internal disciplinary purposes. The purpose of a judicial code of conduct is to lay the foundation for an independent and strong judiciary. Such a code is first and foremost a protection and support for judges. It is also the means of establishing public confidence and trust in the judiciary; these are indispensable to judicial independence. A judicial code of conduct serves these purposes in many ways – for instance, by clearly defining acceptable and unacceptable conduct, by enhancing the public perception of the judiciary, and by deterring unwanted approaches to judges that seek to undermine their independence.

In his analysis Judge Plotkin listed several purposes of judicial conduct commissions in the United States, and I think it is valuable to consider Judge Plotkin's words. These purposes are: to enforce reasonable standards of judicial conduct on and off the bench; to assist the judicial branch in maintaining the necessary balance between independence and accountability; to reassure the public that the judiciary neither permits nor condones misconduct; to provide a forum for citizen and litigate complaints against judges; to educate the public about proper and improper judicial conduct; and, finally, to protect judges from false, unfounded, and/or inaccurate accusations that could damage their reputation. Now it is valuable to consider those purposes of judicial conduct commissions because, in making the comparison to bodies such as the Supreme Judicial Council, which handles disciplinary complaints against judges, one can see the very wide difference between viewpoints of the region here and those of the United States on the purpose of such disciplinary proceedings.

My third point is that any code of conduct for judges must contain a means of effective, efficient, and impartial enforcement. The means of enforcement should be in the hands of the judiciary itself. In other words the enforcement of a code for conduct for judges should be the responsibility of judges in conjunction with other members of the legal profession and citizens. In the United States, and typically elsewhere, this responsibility is carried out under the direction of the Chief Judge within the judicial system. Following this model, in the Bulgarian context, presumably, an enforcement body would be formed under the auspices of the Supreme Judicial Council. As mentioned above, the enforcement of a code of conduct for judges must be entirely distinct and separate from any criminal investigation or prosecution of the same conduct. Enforcement must be flexible so as to be a means of reaching the goals, as I have described them, of having a judicial code of conduct. Therefore enforcement must allow confidential screening of complaints before a decision is made as to whether there are grounds to pursue proceedings and confidential resolution of complaints within a certain level of seriousness. Enforcement should also provide for a range of moderated penalties that are commensurate with the prescribed conduct that is discovered. Enforcement of a code of conduct is not equivalent to a means of punishment. It is a means of self-correction, an indication of the professionalism and character of judges, and a means of protection of the judicial system.

Finally, I would like to say a few words about where Bulgaria stands on these issues, and I must say I feel entirely awkward about making these remarks. This is not because ABA/CEELI and I have not been working with the judicial system; I personally have been doing that for about a year and a half now, and ABA/CEELI has been here since 1989. Nevertheless, I am obviously not a Bulgarian; I am not an insider to that system, and so I make my remarks with all due respect to the Bulgarian judicial system and the Bulgarian Judges Association. Simply to state the context that exists here, the Bulgarian Judges Association, which has approximately five hundred members, adopted a code of judicial conduct for its

members in 1998. Its provisions contain some, but not all, of the internationally recognized principles of a judicial code of conduct, but it has no enforcement mechanism. Instead adherence to the code is to be a matter of personal conviction and responsibility among the members of the Bulgarian Judges Association.

Second, as I mentioned at the beginning, over the last two years, the Bulgarian Judges Association, through a working group of its members, has drafted a second code of conduct which reflects these internationally recognized principles to a greater degree. This was an intensely active working group who thoroughly discussed the many goals and principle of a code of conduct for judges and strove to tailor the draft code to how such goals and principles can be applied in the Bulgarian context. This draft code can become -- and we hope it does become -- the foundation from which a comprehensive code of conduct with enforcement provisions can be developed.

Thirdly, as I mentioned previously, under the strategy for judicial reform currently being implemented by the Ministry of Justice and the Supreme Judicial Council, my understanding is that a working group has been planned which will be formed with the purpose of drafting a code of conduct that includes an enforcement mechanism.

Finally, I would like to also mention some observations that were made by Judge Plotkin concerning the current method of disciplinary action against judges under the Bulgarian Judicial Systems Act. This may or may not be similar to the judicial systems act in your countries. Under Judge Plotkin's analysis of the Bulgarian model as compared to other models, the provisions concerning grounds for discipline, the right to cancel, and the investigation of disciplinary charges are considerably vaguer than those stated in international conventions or under the American model. The conclusion was that they, therefore, do not give an adequate basis for effective and impartial enforcement. I mention this because I think it is very valuable to understand that the goal of a judicial code of conduct is the enhancement of the judicial system, not simply the ability to discipline individual judges. It is extraordinarily important for the principles in that code to be as clear and detailed as they can be, and that the methods of investigation and discipline also be detailed, transparent, and clear to those people that are subject to them.

In closing, I would like to emphasize that an independent and strong judiciary is indispensable, as we have all been discussing, to the rule of law and a functioning democracy. It is beyond question that the adoption and enforcement of a code of conduct for judges would be a giant step toward strengthening Bulgaria's judicial system and it is hoped that the judiciary will, in the very near future, undertake the work to adopt a code of conduct and a method of enforcement that will allow Bulgaria to achieve these goals. Thank you very much.

Emilia Andeeva
Training Centre for Magistrates, Sofia

I would also like to thank the organizers of this forum for inviting the Center for Training of Magistrates to participate, share opinions, and tell how it develops its activities – in particular, the training of judicial ethics. Also, on behalf of our Director, Mr. Dragomir Yordanov, I'd like express his apology for not being able to be with us today. I have personally been dealing with European Law/*Aquis Communautaire* and even teach the *Aquis* currently. I am not here, however, in this capacity, but rather as a representative of the Center for Training of Magistrates.

I'd like to say a few words about it for those of you who are not familiar with its activity. The Center for Training of Magistrates was established in 1999 under the initiative of the Ministry of Justice, the Union of Judges in Bulgaria, and the Alliance for Legal Cooperation, which are also its co-founders. Actually, through this Center, the representatives of the three authorities – judicial, executive, and legislative, combine their efforts to build a national institution of judicial training. In short, the educational activity

aims at the development and training of magistrates. The third element is training in the field of the *acquis communautaire*, which started with projects in the framework of the Matra pre-accession program started by the Dutch Government in June 2000.

Now, I would like to briefly outline the training with regard to court ethics. I intend to cover two aspects of this issue: one, its place in the training program and its role in general, and, two, training as an activity. I must mention that training in court ethics in Bulgaria is part and parcel of the orientation training of young judges. Generally, this training consists of two modules (civil and criminal) and is given in the form of five-day seminars in small groups. The orientation training of judges is conducted at three levels. Its duration is considerable and each orientation at the first level ends with a half-day discussion on court ethics. What are the topics of these discussions? They focus on the status of Bulgaria magistrates, their responsibilities in society, their line of conduct in and outside the court room, and, in general, issues that illuminate the need for judges to possess a greater awareness of their professional and public behavior. I daresay that these discussions are an important element of the training of young judges. They are the general conclusion of the process of their official professional training. Therefore, the discussions are moderated by judges from the Supreme Court of Cassation, who have much experience and great authority in society. In addition, the President of the Supreme Court of Cassation often takes part in these discussions and talks to young colleagues. In fact, the objective is to instill court ethics in the minds of young judges not to simply present it as a routine academic subject. For this reason, it is important to note that court ethics is not confined to these half-day discussions; rather, it permeates the whole orientation training program. Issues related to court ethics often occur in the discussion of other topics, which highlights the role and importance of court judgments on human behavior. The idea is to make young judges understand that their judgments exert an impact on society and social processes.

Court ethics are also an important element of the final three-day seminar, which is usually held at least once a year at the end of the third and last level of the orientation training. American and French speakers take part in this seminar. I will tell you some more details of this program, but here I must emphasize the importance of the foreign participation because it gives perspective to the national system. It becomes clear that there exist systems of different historical traditions which are nevertheless very similar to our system in conceptual terms. The message of this seminar is that there must be rules of conduct, and that the prestige of the judiciary must be enhanced as well, for this also promotes the independence of the judiciary.

Another aspect of the training in court ethics that I wish to dwell upon is training as an activity. The training in court ethics is organized within the framework of the project for the development of the judiciary jointly run by USAID and the Center for Training of Magistrates. The specific goal of this activity is to encourage debate on these matters, to develop ethical standards, and, thus, to generate public support for the development of a code of conduct in Bulgaria. A code of conduct has already been drafted by a group of Bulgarian judges assigned by Judge Kapka Kostova in her capacity as Chairperson of the Union of Judges in Bulgaria. ABA/CEELI also provides assistance to the project for judiciary development and to the drafting group. In fact, the most difficult part of the work is still ahead of us because now the results have to be disseminated and accepted positively by judges the representatives of other legal professions across the country. It is only after this acceptance that the code of conduct can be introduced in practice. Now, I would like to go back to the training in court ethics which occurs during the final seminar at the third level of the orientation training program and say a few words on how it is conducted.

There are mainly brief keynote speeches, which are often delivered by US speakers. One of the experts appearing most frequently at such training seminars is the US Judge Steve Plotkin, whom Ms. Airgood referred to as well. The topics that draw the most attention from the audience are the behavior in the

court room, the unilateral relationships with the parties, public and political activities and the abuse of power, the unbiased and fair stance of judges, their independence, etc.

I mentioned that lectures are only a brief part of the agenda. The emphasis is placed on discussions. For this purpose, there are break-out sessions with the participation of foreign experts. The results of the break-out sessions are reported in the general discussion and then they are summarized. The cases discussed are hypothetical and foreign experts attend different sessions in the course of discussions in order to achieve better interaction and dialogue. I would like to mention also the participation of Bulgarian experts as moderators in these discussions. These are Judge Boika Popova and Judge Elena Velichkova from the Supreme Court of Cassation. This is what I wished to tell you about the aspects of training, the way it is conducted, and its rationale. I also wanted to highlight its practical thrust, which is very important. Undoubtedly, this training is taking place during a transition period when the rules of conduct have not been specified yet. Therefore, I believe that once they become clearer and turn into specific standards, the training will become more practice-oriented and more efficient. Thank you for your attention.

Question and Answer Session

Keith Henderson: Thank you very much. You can see there is a lot underway in Bulgaria in this area. I have followed developments here for some time, and I know that a lot of very valuable training materials have been developed in a wide range of areas; I would encourage you to try to obtain some of this information from the training center. I think it represents not only the Bulgarian experience, but the experience of many countries in the region. So I would like to open for questions by asking a question. But first, I would like to ask both of you to elaborate just a little bit on whether you think there is a consensus emerging among Bulgarians as to the best way to enforce some kind of judicial code of ethics. I know that this discussion is underway and a number of meetings have already occurred; still, it would be particularly instructive to some of the countries here who are in a similar state of transition economically, legally, and politically to know what the current thinking is on this particular issue. And, as I mentioned, this enforcement issue is one that is still being debated in many countries around the world. Either of you?

Answer: In my opinion, the issue is debatable. Of course, there are always two perspectives on the same issue. In this case I hope that most of the Bulgarian magistrates have come to agree to the need for a Code of Conduct. In fact, the idea of the training in court ethics is to impress this need, but this is currently done mainly among our young colleagues. Of course, there are some disputable aspects. For example, the training in court ethics often touches upon the need for penalties and the mechanisms for imposing such penalties. Is it necessary to have them in the code of conduct and should we apply them when the code of conduct is violated? I believe that more of our colleagues can join this discussion even now. This issue is yet to be decided. Besides, we have to see the amendments to the Judiciary Act with regard to sanction mechanisms and penalties for breach in discipline. This is my opinion.

Answer: My only comment is that it is my understanding that at this point in time there really is no consensus as Emilia has described. It is a matter for serious and concerned debate among the members of the judiciary, and there is a great deal of hesitance among the judiciary to take on what could be a means of interfering with their independence rather than fostering it. So I think the issue requires, and is undergoing, a lot of discussion in Bulgaria. The form that an eventual enforcement mechanism for a code of ethics will take is very much undecided. It think it is completely undecided here whether the enforcement of a Code of Ethics will be done through the same mechanism as is now in place within the Supreme Judicial Council, where the Minister of Justice, the Chief Prosecutor, and various heads of courts can bring disciplinary charges against a judge. That is an internal disciplinary system. Now, whether a Code of Conduct for Judges will be enforced through the same system, I think, is very much an

open question, and it is one that Bulgarian jurists are very concerned with right now and are dedicating their energy and time to resolving.

Keith Henderson: Thank you. I know that this is a very complex issue, particularly in transition countries where the potential for abuse of judges is still very high. What we learn through our global consensus findings, from research around the world, is that these human rights abuse issues must be seriously considered and debated within the context of transition countries. But there also seems to be a consensus among these legal professionals that disciplinary procedures should not be left entirely up to existing judicial structures alone. In place of these judicial structures, they recommend special commissions, including esteemed members of the legal profession and, perhaps, even lay people, to help oversee the integrity of the disciplinary process and to convince the public that the judges are serious about self discipline. These global consensus issues are, in fact, the kinds of issues being discussed and debated in Bulgaria.

I think the other important consensus finding in our guide was that the process by which these codes or principles are developed is just as important as the product itself; and it is a truism, as you all know, with respect to the drafting of all laws and regulations, that it is critically important that the judges themselves and the public support whatever rules and procedures are developed. Thus this consensus building process becomes even more important. And in this process, I think, the public and NGOs have a role to play. This was one of the interesting findings that came out of our research.

We have just a few minutes for any other questions and then we want to take a break and move right into our workshops. Apologies that we are running late, but, again, I think all of us will be happy to take questions from you after the formal ending of this panel; However, if there are one or two questions now we will be happy to try and answer them.

Question to Emilia: In your statement you mention about some materials information resources issued by your training center. Do you have a web site? Could we download some of your materials? It will be useful for our judges?

Answer: In fact, we do not have a site. It is being developed, and, unfortunately, I cannot give you any positive information about it. I wish I could say yes. I could not quite understand your question about the materials. Did you ask about the materials we use? In fact, in view of the presence of foreign colleagues and guests, I have unfortunately already disseminated the limited number of brochures we had in order to illustrate in greater detail what we do and how we do it. I think some of the materials may also be available on the East-West Management Institute web site. That may be the best place to obtain materials off the web. They are trying very hard to put up as many of these materials as possible.

DISCUSSION GROUPS

In order to increase participation and include all of the participants, the second day included two working groups which dealt with prevalent, regional issues that all of the participants deal with: judicial immunity and business income and asset disclosure. The participants were asked to indicate which issue they were more interested in, and the groups were divided based on their preference.

Group One: Judicial Immunity chaired by *Victoria Airgood*

The purpose of this group was to develop certain questions and recommendations which should be considered regionally on the issue of judicial immunity. However, in order to make recommendations, the group had to clearly define what everyone understood judicial immunity to mean: specifically, immunity from what?

Ms. Airgood gave general examples of the types of crimes which Judges could be immune from:

- Grave Criminal Acts such as murder, robbery of large sums of money, or other crimes that occur outside of the judicial function;
- Minor Criminal Acts such as driving violations, which also occur outside of the judicial function;
- Grave Criminal Acts which occur within the judicial function;
- Minor Criminal Acts which occur within the judicial function;
- Violation of Civil Acts which could lead to a civil lawsuit;
- Ethical Lapses; and
- Unpopular Decisions (i.e. decisions which are unpopular to the public, or superiors)

The underlying question of the discussion was whether or not judges should be held to the same standards as normal citizens if so, then how is a judge indicted; and if not, then why not? Also the credibility of the judiciary as an institution was often debated.

Judge Bohdan Futey of the United States Court of Federal Claims stated that, in order for the courts to become credible, three characteristics must exist: judicial independence, judicial immunity, and accountability. Only after all three of these are established will the judiciary be recognized as a stable framework where disputes can be resolved. Judge Futey then defined judicial independence as the lack of influence by pressures from the outside world, which will allow the judge to make the most appropriate decision. It is not independence from the Constitution; nor, in the US, is it independence from previous court cases, as these must both be taken into consideration when a judge makes his final decision.

Judicial immunity was defined as immunity only when dealing with decision making or rendering judgments or opinions. This allows the judges to make unpopular decisions without fear of reprisal from either the public or the government. An integral part of judicial immunity in this sense, is the establishment of an appellate court through which complaints can be channeled. Judge Futey stated that in the United States, judges do not have immunity from criminal or civil violations.

The third aspect, accountability, is a result of mechanisms which are put in place to ensure that judges are not engaging in any criminal acts such as bribery. As an example, Judge Futey described the financial disclosure practices that judges from the US must engage in -- such as the various forms that must be filled out annually in order to account for all of the judge's expenditures. As the judges comply with all of these requests, and no record of criminal activity is found, credibility is established.

In a number of the participating countries, judges are immune from facing the same charges that a civilian would face, or if they are held accountable, then it is only after a long and lengthy political process. In

Romania, for example, a judge can not be prosecuted without the consent of the Minister of Justice, which is, in itself, a form of executive interference in the judicial branch. In other countries, Croatia for example, a judge may be prosecuted only after he is removed from office. In Croatia, if it is determined that a crime was committed while the judge was performing his/her official duties, then the judge can not be held liable, but if it is determined that the judge committed the crime outside the precincts of his/her official duties, then the judge may be prosecuted.

The participants from Moldova and Azerbaijan attempted to clarify why judges should receive such special treatment and remain immune to certain prosecutions. The Moldovan participant emphasized that when judges are indicted on criminal charges, then the credibility of the judiciary as an institution is challenged, and, in cases where not much trust is placed in the judges to begin with, fraudulent accusations can become rampant. The stigma that courts are still a place of punishment and not resolution still exists and must be overcome in order to make any significant progress. The judge from Azerbaijan confirmed the stigma by stating that, during the Soviet era, only communist party members were allowed to become judges. Therefore the people, still believing this is the case, look to undermine the authority of judges by accusing them of bribery and other crimes. In situations like this, where the judges are protected behind either immunity, or a lengthy accusation process, the credibility of the judiciary is preserved.

Group 2: Business Interests, Income and Asset Disclosure *chaired by Bob Dahl*

Bob Dahl began by identifying the six major aspects of any law that deals with disclosure of business interests, income and asset disclosure. These questions or issues that must be addressed were:

- Who should be required to disclose? Should it be limited to only the upper echelon of judges, or should disclosure go all the way down the system?
- What will be disclosed?
- How extensive are the requirements for disclosure?
- Where or to whom should this information be disclosed?
- What body will be responsible for receiving these reports?
- By what entity will these rules be enforced?

Throughout the course of the discussion all of the participants decided to explain the situation in their respective countries. There were as many varying degrees of disclosure as there were countries participating. From Moldova and Albania, where no such laws existed, to Georgia, where all judges are required by law to submit asset statements on a yearly basis. In Moldova the laws regarding disclosure are being formed and their representative eagerly asked questions and requested copies of other countries' laws in order to bring them back to Moldova.

The questions of what and to whom the information should be disclosed also produced a wide range of responses. In some of the countries like Romania, judges are allowed to hold another job as well, such as teaching at a university. In this case, only the income which is produced by their position as a judge has to be accounted for; the details of the other income may remain private. In Macedonia, judges are not allowed to be employed elsewhere, but they are also not required to disclose any of their assets since all of their money comes from the government. In Romania, judges are obligated to complete a statement of asset disclosure when first appointed to office and after their six-year tenure is complete. The disclosure forms are sealed in an envelope and presented to the Chairperson of the Superior Chamber of Justice, and only if a suspicion of impropriety arises after the judge has left office will that envelope be opened. In Georgia, all of the judges are required to disclose all of their information, and it is open to public review.

There was no clear answer as to who should enforce any penalties in the case of a judge being convicted of a violation. In some cases parliament was responsible for monitoring the judges; in other cases it was

the Minister of Justice or the Superior Court. However, every participant stated that there have been few to no instances of a judge receiving a penalty or being removed from office as a result of misconduct. Whether this is a result of non-corrupt judges or flawed investigative practices, is debatable.

Some of the participants disagreed fundamentally with the principle of asset disclosure. The Romanian participants stated that this information should not be made available to the public and should only be viewed by select authorities within the government. Moreover, this information should only be used when a judge's credibility is in question or when a judge is suspected of having committed a crime. A common sentiment, reiterated by Bob Dahl at the close of the session, was that asset disclosure could be seen as an infringement on judge's privacy and personal freedom. If this were the case then countries would be inclined to have less disclosure in order to prevent potential judges from being deterred from serving. However, with the amount of corruption that is undoubtedly going on, the system of disclosure has to be strengthened. The concept of disclosure is fairly new, only ten years old, and therefore is not that common within the region. Until the courts are established as credible institutions, the participating countries should favor more disclosure.

However, from the observations, the group identified several weaknesses in the systems. One was that there was a general lack of clarity regarding the extent or type of disclosure; for instance, there was law that required assets be disclosed, but it did not identify to what extent. There also seemed to be little investigation about the face value of the documents they were submitting, nor was there clarity about what prompted a review of the documents that were presented. There seemed to be few instances where actual sanctions were taken, and there was little guidance about the correlation of the level of penalty vis-à-vis the type of violation being considered. Another weakness was that the most of the process was performed internally: it was conducted by the judiciary, received by the judiciary, maintained by the judiciary, and reviewed by the judiciary, so there was very little outside review of the process.

However, one of the most interesting and encouraging things that the group discovered was that countries were continuing to rediscover and review the laws because they understood that an independent judiciary demonstrates integrity. Therefore they are looking to expand and clarify the points made in the discussion, and they were communicating with each other, requesting copies of and sharing laws so they can learn from other models and strengthen their own disclosure systems.

The general conclusion was that we need to make decisions in favor of disclosure and integrity, particularly during government transition and democratic growth when we desperately to find ways to lessen corruption and increase confidence.

CONCLUDING REMARKS

Ventsislav Karadjov

I shall allow myself to make the concluding remarks in Bulgarian. First, I would like to thank IFES for assigning to me this task of exceptional responsibility -- to conclude the results of this seminar. I believe this seminar provoked a great interest in Bulgaria, and not only because of its international participation, but also due to the selection of the topics by the organizers. The proof of this is the interest that not only the professional society showed, i.e. the Bulgarian judges, but the executive authorities, too. The presence of the Deputy Minister of Justice speaks for itself.

I think we managed to gather together Bulgarian representatives of all levels, who are responsible for the judicial system and the reform it is undergoing, as well as donor representatives, which, in countries like Bulgaria, of course, play an important role for carrying out successful reforms. It became clear from the comments made that the resolution of election problems depends entirely on the judicial system, and, with that in mind, this system should be independent and objective. For this reason, we should develop the appropriate mechanisms for building and securing this independence, and not just point out principles. Unfortunately, the judicial system in the region is still in transition. It is still weak compared to other democracies and the other two authorities, the executive and legislative, in the countries in transition.

The principle of differentiating the authorities should be well monitored in each of the countries in transition. The interference of the executive authorities in the work of the judicial branch is inappropriate, and the topic of corruption is still one of the major problems to be overcome by the transitional democracies -- especially by the countries represented here. The speeches delivered here highlighted the successes reached by our Western European colleagues, as well as by those in the neighborhood. It became clear through them that the road to the judicial independence is a difficult one, but one that must be traveled if the democracies in the region are to turn into typical democratic states.

When we considered the acting models of the courts in the US, Bulgaria, Armenia, and the Western Europe, it became clear that we needed a particular minimum of judicial independence standards from the point of view of the European integration of those democracies. Those principles that should be monitored by the transitional democracies and their systems can be found in various international documents, as well as in various governmental instruments and such created by the NGOs. Many of these principles are incorporated in the constitutions, under the common law, or in the codes of judicial ethics. And I think our role here is to try to practically implement those principles. They were actually part of the objectives of this conference.

We discussed thoroughly, in two exceptionally interesting workshops, the main challenges that lie before the judges and the judicial systems of these transitional democracies. The problems the workshops dealt with were intriguing and can become subjects of later conferences in the regions -- and not only in the region, but in Europe as a whole. Talking about election disputes settlement, I must once again stress that the court should be the final level of dispute settlement related to elections, not election committees, and I believe that this can be one of the seminar's main conclusions.

In this context, I would like to highlight the statement made by Dr. Ewa Eliaz in which she presented her excellent idea for establishing special departments to the courts of appeal for election disputes settlement. This idea will surely help confirm the leading role of court in election disputes settlement, as well as helping to differentiate the roles of the election committees and courts.

I would like to also point out the IFES's great contribution for the modeling of this topic and to, once again, draw your attention to the exceptional manual it created, which investigates the legal systems of more than twenty-six countries. I believe this manual will not only provide more information to all the colleagues present here, but it can also serve as a model for further training – like the one that the magistrates school in Bulgaria provides.

The Honorable Leon Weil

Ladies and Gentlemen, for two days, nearly a hundred people from nineteen countries, representing governments, international organizations, and NGOs have met and discussed approaches to strengthening the role of the judiciary in a resolution of election disputes. At the conclusion of these proceedings, allow me to begin by thanking you, the speakers and participants, again for your participation in the conference. The effort you made and the time you took to come to Sofia to involve yourselves in this important program is a true show of resolve. It is an expression of the fact that our countries are increasingly aware of the necessity of an independent judiciary in resolving electoral disputes. Thank You.

IMPACT SUMMARY

Throughout the region of Central and Eastern Europe, the issues of judicial independence and authority are in desperate need of improvement, especially in the context of adjudicating election disputes. IFES's goal was to open the lines of communication between judges with similar experiences and similar problems, but from different countries, in the hopes that they would communicate and share ideas about how to improve the current regional situation. IFES did just that. The speakers represented a variety of international organizations as well as countries, and they offered valuable insights into the issues at hand. When encouraged to participate in the discussion groups, the participants were eager to explain the particular problems that they encounter and to offer their experiences and suggestions to the participants from other countries.

Since the concept of judicial reform is fairly new in the region, most countries are in the "information gathering" stage. This stage is arguably one of the most important because the more different ideas and experiences each country is exposed to, the better system they will be able to develop for their own country. By holding conferences such as this and by facilitating regional discussions, IFES is increasing the chances that these countries will eventually form credible and completely independent judiciaries. This conference also served as a reminder to the participating countries that there are organizations like IFES, ABA/CEELI, USAID, ODIHR, and the Council of Europe, who have the desire and the capabilities to assist them countries financially and with training in order to help them through this difficult beginning phase. The two groups, international organizations and regional judges, were able to work together and make the conference a success; if they continue cooperating and communicating, then the same success will take place in the region through judicial reform.

For the first time, a regional conference was organized and focused on international lessons learned and international law, legal trends, and European case precedents, judicial ethics and standards related to key election dispute resolution issues. The Practical Background and Lessons Learned Papers, designed to guide reformers with concrete case studies, research and organizational contacts and references, was provided and discussed in detail with all participants. In this regard, participants from the countries attending now know their international/European obligations (COE/OSCE/EU Accession) and have been introduced to international best practices in this field.

The conference also focused on the important role the courts have played in the region in resolving key election disputes regarding constitutional and legal issues over the past decade. It also highlighted the role of all players in the election dispute resolution process, including the role of prosecutors in many civil code countries.

In conclusion, the conference also succeeded in linking the fair and effective resolution of election disputes issue with judicial independence issues, noting that, without an independent judiciary and the right of judicial review of CEC decisions, important election dispute issues may not be resolved fairly and legally, and public confidence and trust in the electoral process might be lost.

RECOMMENDATIONS/NEXT STEPS:

Election Law and Regulation

- More Comparative research from the region needs to be undertaken, including the development, dissemination and discussion of Western laws and mechanisms used to resolve election complaints and disputes.
- Judicial experts and civil society should encourage legislatures to recognize the importance of election dispute resolution and should assist legislators in developing more comprehensive, consistent and internationally acceptable election laws.
- Election laws and implementing regulations needs to be improved in several areas, including:
 - ◊ Clearly defining jurisdiction, authority, and responsibility of courts, election commissions, and other state bodies in receiving, investigating, and adjudicating election-related complaints and disputes.
 - ◊ Clearly specifying key procedural aspects of resolving complaints and disputes arising from elections, including who may bring actions, when, how, in what form and under what standards of evidence.
 - ◊ Clearly identifying rules, timetables, and standards for courts and election commissions to resolve election-related complaints and disputes.
- Regulation and public disclosure of financial activity of political parties and candidates should be recognized as an important aspect of transparency, rule of law, and dispute resolution in election process.
- More clarity and specificity in election laws and implementing regulations is needed.
- Judges and election officials should be provided information and training regarding rules and procedures for resolving complaints and disputes arising from elections, including availability of alternative dispute resolution.
- Training magistrates on the laws and standards needed to resolve election disputes will promote their independence and capacity to make informed and impartial decisions based upon the rule of law.
- Targeted training on formulating and writing judicial justification and reasoning.
- Publication of higher court decisions and reasoning to include use of web site, where available.
- Regional organizations like ODIHR and the Council of Europe should be active participants in training courses, workshops and conferences, as well as the law drafting process.
- There is a need to address holistic approaches and the non-participatory aspects of the election law and sub-regulations drafting process in many countries.
- The oversight role of the courts and ability of the judicial system to resolve election disputes needs to be addressed by the Executive and Parliaments as well as the judiciary itself.
- Countries in transition need to harmonize legislation with international standards.
- More research and policy analysis needs to be given to the issue of campaign finance reform.
- Guidelines for election officials and judges in the form of manuals that are Web accessible pages are needed throughout the region.
- There is widespread support for a proposal made by ODIHR to create election chambers in appellate courts in order to ensure some type of continuity with respect to the administration of elections; this will provide continuity and will safeguard the impartiality of judges when making decisions concerning elections.

Judicial Independence

- Financial independence of judges should be emphasized so that they do not have to depend on the incumbent Executive or Parliament to protect or advance their career or influence the decision making process in election disputes
- Financial independence of the judiciary should be made a priority to enhance the diminished political influence and dependency from the executive or legislative branches.
- Judges selected to serve on election commissions or resolve election dispute cases should be appointed through a transparent, non-political process, and should adhere to a clear and defined set of selection qualifications.
- More country and regional Judicial Independence workshops need to be organized to identify barriers and solutions.
- More participatory approaches to advocacy for reform need to be implemented on targeted issues throughout the region.
- Political corruption stemming from the executive branch and to some degree within the judiciary itself needs to be addressed before the courts can be relied upon to resolve disputes fairly and effectively.

Networking

- In-country and regional sustainable training institutions that provide new and continuing education to magistrates needs additional support.
- Follow-on seminars on common election and judicial dispute resolution issues that are confronting countries throughout the region need support.
- More regional conferences on targeted topics with strategic participants in the elections process are needed. This will give participants the opportunity to discuss national issues they deal with in an international context and to share lessons learned and best practices with their counterparts and international organizations.
- More emphasis needs to be placed on access to information issues, including the use of technology and methodologies to report on and monitor progress.
- More emphasis needs to be placed on workshops and issue oriented events with limited and strategic participation, and should include a wider range of officials and civil society.
- Foster exchange programs where judges can observe more advanced models of dispute resolution and relationships, communication and collaborations can flourish.

ANNEXES

1. Agenda	i-iii
2. Speaker Biographies	iv-v
3. Participant List	vi-x
4. Topical Materials	
a. Code of Judicial Conduct The Bangalore Draft (draft ethics principles)...	xi-xxii
b. Council of Europe Committee of Ministers, Recommendation No. R (94) 12 – On the Independence, Efficiency, and Role of Judges.....	xxiii-xxvii
c. Emerging Lessons from Reform Efforts in Eastern Europe and Eurasia...	xxviii-xxlviii
d. Highlights from the USAID/IFES Global Judicial Independence Guide...	xlix-liii
e. Judicial Independence Standards and Principles	liv-lvii
f. Basic Principles on the Independence of the Judiciary.....	lviii-lx
g. Universal Charter of the Judge (UN Judicial Independence Principles).....	lxi-lxiii
5. Internet Resources	lxiv-lxv

Annex 1:



**ELECTION DISPUTE RESOLUTION
JUDICIAL AUTHORITY AND INDEPENDENCE**

**Hotel Rodina
Sofia, Bulgaria
25-27 April 2002**

Conference Schedule

Thursday, April 25

19:00 Registration Opens

20:00 Reception, Panorama Restaurant, Hotel Rodina

Friday, April 26

9:00 Registration

10:00-10:30 *Official Welcome to the Conference and Bulgaria*

The Honorable Leon J. Weil, IFES Board of Directors

Deborah McFarland, Mission Director USAID/Bulgaria

The Honorable Miglena Tacheva, Deputy Minister of Justice of Bulgaria

The Honorable Nikolay Filchev; Prosecutor General of Bulgaria

The Honorable Stefka Stoeva, Chair of the Department of Supreme Administrative Court of Bulgaria

10:30-10:50 *Keynote Speaker: The Role of an Independent Judiciary in Resolving Elections Dispute: A U.S. Perspective*

The Honorable Bohdan Futey, U.S. Court of Federal Claims

10:50-12:20 *Panel Presentation: Emerging Trends and Standards in Election Dispute Resolution.*

Moderator: Bob Dahl, IFES Election Legal Advisor

The Honorable Justice Vanya Puneva-Mihailova, Supreme Administrative Court of Bulgaria

The Honorable Alvina Gyulumyan, Member of Constitutional Court of Armenia

Mr. Patrick Titium, Legal Advice Department for the Council of Europe

12:20-13:00 Questions and Plenary Discussion

13:15-14:30	Lunch
14:30-16:00	<i>Key Institutional Challenges and Legal Issues Confronting Judiciaries in Emerging Democracies</i> Ms. Ewa Eliaz, OSCE Department of International Human Rights The Honorable Liliana Misevic, Municipal Court Justice of Nis, Serbia Mr. Valentin Georgiev, Secretary of the Central Election Commission of Bulgaria
17:30	Sightseeing Tour of Sofia – Meet in Hotel Lobby
20:00	Dinner

Saturday, April 27

- 10:00-10:20 *International Practices in Bringing Election Disputes to the Judiciary*
Robert Dahl, IFES Elections Legal Advisor
- 10:20-10:40 Questions and Plenary Discussion
- 10:40-11:20 *Panel Presentation: Judicial Conduct: Holding the Judiciary to Higher Standards of Accountability*
Moderator: Keith Henderson, IFES Rule of Law Advisor
- Victoria Airgood: ABA/CEELI
- Emilia Andeeva: Training Centre for Magistrates, Sofia
- 12:00-14:00 *Discussion Groups – Priority Issues and Recommendations*
Group 1: Business Interests/Income and Assets Disclosure
Group 2: Judicial Immunity
- 14:00-15:30 Lunch
- 15:30-17:00 *Presentation of Findings from Working Groups and Participants Discussion*
Moderators: Keith Henderson and Robert Dahl
- 17:00-17:15 Coffee Break
- 17:15-17:30 *Presentation of Conference Findings*
Ventsislav Karadjov, Executive Director, Transparency International Bulgaria
- 17:30 *Closing Remarks*
The Honorable Svetla Petkova, Deputy Chair of the Supreme Administrative Court, Bulgaria
- The Honorable Leon J. Weil, IFES Board of Directors
- 19:30 Dinner

Annex 2:

SPEAKER BIOGRAPHIES

Victoria J. Airgood, Legal Specialist for Alternative Dispute Resolution, American Bar Association Central and East European Law Initiative (ABA/CEELI)

Prior to serving for ABA/CEELI in her current capacity, Ms. Victoria Airgood served as ABA/CEELI's Liaison to Bulgaria for Rule of Law and Commercial Law development. Before working with ABA/CEELI, Ms. Airgood practiced law as a commercial litigation attorney for 16 years. During this time, Ms. Airgood served as an arbitrator and mediator for the Superior Court of New Jersey and on the Jury Issues Subcommittee of the Federal Court's Third Circuit Talk Force for Equal Treatment in the Courts, Commission on Race and Ethnicity. She became an accredited mediator for business and commercial disputes through the New Jersey Association of Professional Mediators, having received her training through the Institute for Dispute Resolution affiliated with Seton Hall University.

Robert Dahl, IFES/Indonesia Legal Advisor

Mr. Robert Dahl is an attorney practicing in the field of campaign finance regulation, ethics, and election law. He has served as a legal consultant to IFES since 1993, and has worked in IFES democratic development programs in Russia, Eastern Europe, Central Asia, and Indonesia. He is President of the Fair Government Foundation, a research and education foundation promoting freedom of speech and political action. Mr. Dahl previously served as an executive assistant to a member of the Federal Election Commission from 1985-1991. He received his law degree from the University of Chicago in 1980. Dahl has focused upon electoral law and election reform in Indonesia and has formed working relations with election officials, Parliament Members, Supreme Court Justices, and NGO Activists.

Dr. Nikolay Filchev, Prosecutor General of the Republic of Bulgaria; Professor of Criminal Law, Sofia, Bulgaria

Dr. Nikola Filchev was appointed as Prosecutor General in 1999. Before assuming the office, he served as Deputy Minister of Justice and Legal Eurointegration. Dr. Filchev has served as a judge in the Supreme Court of the Republic of Bulgaria. He has chaired the Scientific Council of the Institute of Legal Sciences of the Bulgarian Academy of Sciences and has been Deputy Chairman of the Specialized Scientific Council of Legal Sciences at the Supreme Certifying Commission. Dr. Filchev is the author of more than 50 publications. He received his education in law at Sofia University.

Judge Bohdan Futey, Judge, United States Court of Federal Claims

Judge Bohdan Futey was nominated judge of the United States Court of Federal Claims in January 1987. He formerly served as Chairman of the Foreign Claims Settlement Commission of the United States, and is currently an advisor to IFES. Judge Futey is an expert on both American and Ukrainian Law and has written for such publications as the Wall Street Journal and the East European Constitutional Review.

Alvina Gyulumyan, Member Constitutional Court of the Republic of Armenia; President of Armenian Judges Society

Judge Alvina Gyulumyan is one of nine judges on Armenia's Constitutional Court, and the only woman serving in that capacity. Judge Gyulumyan has been a jurist since 1978 and a member of the Constitutional Court since 1996. Her experiences in this complex arena, especially in the

context of adopting of democratic values and structures, and adapting to European norms, provide an interesting “insider’s view” of the complexities of jurisprudence.

Keith Henderson, Senior Rule of Law Advisor and Research Fellow, IFES; Adjunct Professor of Law, American University Washington College of Law

Prior to joining IFES, Mr. Keith Henderson served as Senior Rule of Law and Anti-Corruption Advisor for the United States Agency for International Development (USAID) and as Associate Council in the White House. He serves on several international commissions and working groups. Mr. Henderson has worked extensively throughout the countries of the former Soviet Union and Central and Eastern Europe.

Ventsislav Karadjov, Executive Director, Transparency International (TI) Bulgaria

In addition to his current position as Executive Director for TI Bulgaria, Mr. Ventsislav Kardjov also serves as an expert to the Intergovernmental Working Group on Accession of the Republic of Bulgaria to the European Union. Prior to joining TI, he was a Judge Assistant in Sofia District Court. Previously, Mr. Kardjov worked at an international law firm on both criminal and civil law cases in Sofia.

The Honorable Miglena Tacheva, Deputy Minister of Justice of the Republic of Bulgaria

Prior to her appointment, Deputy Minister Miglena Tacheva was chair of the Varna Regional Court from 1998 – 2001. She initiated the legal and administrative reforms in the Varna Court system and is now introducing those reforms on a national level with the new Changes of the Judicial Power Act in Bulgaria. Since 1992, she has devoted herself to public profit activities supporting the judicial reforms to the independence and the training of judges and public prosecutors. The Deputy Minister received her education at Sofia University, the U.S. National Center for Judges, and the U.S. National Center for Federal Judges. She has also done post-graduate work in Greece and Great Britain.

Patrick Titium, Legal Advisor to the Council of Europe

Prior to his career as a legal advisor to the Council of Europe, Mr. Patrick Titium held a position in the French Government as an Agent before the European Court and the European Commission of Human Rights. He was formerly the Vice-Chair of the Council of Europe Committee for the Development of Human Rights, and was a member of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights. Mr. Titium has also worked in constructing the report of the European Convention on Human Rights.

The Honorable Leon J. Weil, Secretary of the IFES Board of Directors

The Honorable Leon Weil serves as an investment executive and International Consultant, and is the former Ambassador to the Kingdom of Nepal. Ambassador Weil has served as a consultant to a number of international organizations, including the United Nations Development Program, the Financial Services Volunteer Corp, and IFES. He has held positions with the American Stock Exchange, the New York Stock Exchange, and the Securities Industry Association. Ambassador Weil is a former advisor to the UNDP on programs and policies relating to the promotion of the development of the private sector in developing countries. He was sent to India to conduct a retrospective study of the 1989 Indian General election, and he observed parliamentary election in Nepal in 1991.



MAKING DEMOCRACY WORK

Participant List
Election Dispute Resolution: Judicial
Authority and Independence Conference
26-27 April, 2002
Sofia, Bulgaria

Bashkim Caka

Justice of the Supreme Court
Albania

Sokel Lenaj

Director of Judicial Directory
Central Election Commission
Albania

Alvina Gyulumyan

Constitutional Court Member
Armenia

Aleksey Sukoyan

Justice of the Court of First Instance
Armenia

Rafael Sergeyeovich Gvaladze

Judge of the Constitutional Court
Azerbaijan

Charles Lasham

Project Manager
IFES/Azerbaijan

Rafiq Ugus Mammadov

Justice of the Supreme Court
Azerbaijan

Jasminka Putica

Justice of the Supreme Court
Bosnia

Sadudin Kratovic

President of the Supreme Court
Bosnia

Violeta Boyadjieva

Deputy President
Varna Court of Appeals
Bulgaria

Ilia Pachalov

Judge
Varna Court of Appeals
Bulgaria

Dushana Zdrakova

President
Varna District Court
Bulgaria

Dora Chineva

Deputy President
Burgas Court of Appeals
Bulgaria

Mila Geogieva

Prosecutor
Burgas Court of Appeals
Bulgaria

Sara Stoeva

Judge
District Court of Veliko Tarnovo
Bulgaria

Ivanka Vachkova
Judge
District Court of Veliko Tarnovo
Bulgaria

Teodora Vassileva
President
Silistra District Court
Bulgaria

Todor Todorov
Deputy President
Silistra District Court
Bulgaria

Canka Minkova
Judge
District Court of Gabrovo
Bulgaria

Snezhana Boneva
Judge
District Court of Gabrovo
Bulgaria

Aneta Petkova
Judge
District Court of Vidin
Bulgaria

Nelly Docheva
Judge
District Court of Vidin
Bulgaria

Svetla Petkova
Deputy President
Supreme Administrative Court
Bulgaria

Stefka Stoeva
Head of Department
Supreme Administrative Court
Bulgaria

Alexander Elenkov
Judge
Supreme Administrative Court
Bulgaria

Mariana Mihailova
Judge
Supreme Administrative Court
Bulgaria

Vesselina Teneva
Judge
Supreme Administrative Court
Bulgaria

Fani Naidenova
Judge
Supreme Administrative Court
Bulgaria

Hristo Danov
President
Constitutional Court
Bulgaria

Ludmil Neikov
Judge
Constitutional Court
Bulgaria

Roumen Iankov
Judge
Constitutional Court
Bulgaria

Zhivan Belchev
Judge
Constitutional Court
Bulgaria

Lubka Ilieva
Supreme Court of Cassation
Bulgaria

Mariana Ilieva
Union of Jurists
Bulgaria

Valentin Georgiev
Election Commission
Bulgaria

Sevinch Solakova
Election Commission
Bulgaria

Dimitar Dimitrov
Election Commission
Bulgaria

Petio Slavov
Election Commission
Bulgaria

Plamen Kirov
Judicial and Legal Advisor of the President
of the Republic of Bulgaria
Bulgaria

Onik Karapdrian
The World Bank
Bulgaria

Milena Daurianova
European Union Delegation of the
European Commission to Bulgaria
Bulgaria

Vanya Puneva
Supreme Administrative Court
Bulgaria

Josif Geron
Deputy Chairman
Union of Jurists
Bulgaria

Nikolay Filchev
Prosecutor General
Bulgaria

Luckan Petrov
Supreme Prosecution
Bulgaria

Stefka Stoeva
Supreme Administrative Court
Bulgaria

Victoria Airgood
ABA/CEELI
Bulgaria

Dragomir Jordanov
Executive Director
Training Center for Magistrates
Bulgaria

Emilia Andeeva
Program Coordinator
Training Center for Magistrates
Bulgaria

Ventsislav Karadjov
Executive Director
Transparency International
Bulgaria

Helena Zudenigo
Supreme Court
Croatia

Stanko Hautz
Judge of the Superior Court
State Election Commission
Croatia

Boris Guttmann
Judge of the Superior Court
State Election Commission
Croatia

Patrick Titium
Legal Advisor
Council of Europe
France

Nana Klarjeishvili
Judge in Administrative Chamber
Supreme Court
Georgia

Badri Metreveli
Deputy Chair of the Supreme Court
Georgia

Vlora Istogu
National Legal Adviser
Organization for Security and Cooperation
in Europe
Kosovo

Juris Jelagins
Judge
Constitutional Court
Latvia

Daniel Blessington
Program Manager
IFES/Macedonia

Dragan Tumanovski
Justice of the Supreme Court
Macedonia

Faton Pacuku
Justice of the Supreme Court
Macedonia

Mihail Plamadeala
Judge
Supreme Court of Justice
Moldova

Anastasia Pascari
Judge
Supreme Court of Justice
Moldova

Bozidar Martinovic
Judge
Constitutional Court
Montenegro

Ewa Eliaz
Senior Legal Adviser
ODIHR
Poland

Zbigniew Szonert
Justice of the Supreme Administrative
Court
National Election Commission
Poland

Tadeusz Zyznowski
Justice of the Supreme Court
National Election Commission
Poland

Emanuel Albu
Judge
Supreme Court of Justice
Romania

Vlad Ion Adrian
Judge
Supreme Court of Justice
Romania

Melikhova Galina Mikhailovna
Judge
Pskov Regional Court
Russia

Ljiljana Misevic
Judge
Municipal Court of Nis
Serbia

Ales Zalar
President of District Court of Ljubljana
Slovenia

Mykola Baliuk
Justice of the Supreme Court
Ukraine

Anatoliy Didkivsky
Justice of the Supreme Court
Ukraine

Oleksander Piskun
Democracy Project Management Specialist
USAID
Ukraine

Judge Bohdan Futey

Judge
U.S. Court of Federal Claims
United States

The Honorable Leon J. Weil

Secretary of the IFES Board
IFES
United States

Robert Dahl

Legal Advisor
IFES
United States

Keith Henderson

Senior Advisor on Rule of Law
IFES
United States

Victor Perea

Deputy Director for Europe and Eurasia
IFES
United States

Dana Beegun

Program Officer for Europe and Eurasia
IFES
United States

Keenan Howell

Press Officer
IFES
United States

Michael Kanaley

Program Assistant for Europe and Eurasia
IFES
United States

**CODE OF JUDICIAL CONDUCT
THE BANGALORE DRAFT**

United Nations and Transparency International

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 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 recognize 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.

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

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

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[1].

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[2].

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[3].

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[4].

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[5].

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[6].

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[7].

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[8].

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[9].

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[10].

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.

1.13 A judge may speak publicly on non-legal subjects and engage in historical, educational, cultural, sporting or like social and 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[11].

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[12].

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[13].

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[14].

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[15].

1.17 A judge shall not practise law whilst the holder of judicial office[16].

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[17].

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[18].

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.

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[19].

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 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[20].

1.23 A judge shall make such financial disclosures and pay all such taxes as are required by law[21].

II. Independence: 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.

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[22].

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[23].

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[24].

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[25].

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[26].

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

3.1 A judge shall ensure that his or her conduct is above reproach in the view of reasonable, fair-minded and informed persons[27].

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[28].

3.3 A judge, in addition to observing personally the standards of this Code, shall encourage and support their observance by others[29].

IV. Impartiality: 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.

4.1 A judge shall perform his or her judicial duties without favour, bias or prejudice[30].

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[31].

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[32].

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[33].

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[34].

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[35].

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[36].

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 participate, or continue to participate, in the proceedings, the judge may do so[37].

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[38]. 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.

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.

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

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")[39].

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[40].

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[41].

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.

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[42].

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[43].

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[44].

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

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

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.

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[47].

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[48].

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness[49].

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[50].

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties[51]. Implementing these principles and ensuring the compliance of judges with them are essential to the effective achievement of the objectives of this Code.

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

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.

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION No. R (94) 12
**OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
ON THE INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES**
*(Adopted by the Committee of Ministers on 13 October 1994
at the 518th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law";

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Noting the essential role of judges and other persons exercising judicial functions in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the independence of judges in order to strengthen the Rule of Law in democratic states;

Aware of the need to reinforce the position and powers of judges in order to achieve an efficient and fair legal system;

Conscious of the desirability of ensuring the proper exercise of judicial responsibilities which are a collection of judicial duties and powers aimed at protecting the interests of all persons,

Recommends that governments of member states adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary as a whole and strengthen their independence and efficiency, by implementing, in particular, the following principles:

Scope of the recommendation

1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters.
2. With respect to lay judges and other persons exercising judicial functions, the principles laid down in this recommendation apply except where it is clear from the context that they only apply to professional judges, such as regarding the principles concerning the remuneration and career of judges.

Principle I - General principles on the independence of judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges.
2. In particular, the following measures should be taken:
 - a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law. Subject to the legal traditions of each state, such rules may provide, for instance, the following:
 - i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law;
 - ii. the terms of office of judges and their remuneration should be guaranteed by law;
 - iii. no organ other than the courts themselves should decide on its own competence, as defined by law;
 - iv. with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively.
 - b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.
 - c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

 - i. a special independent and competent body to give the government advice which it follows in practice; or
 - ii. the right for an individual to appeal against a decision to an independent authority; or
 - iii. the authority which makes the decision safeguards against undue or improper influences.
 - d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.
 - e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made

by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

3. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

Principle II - The authority of judges

1. All persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge.

2. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court.

Principle III - Proper working conditions

1. Proper conditions should be provided to enable judges to work efficiently and, in particular, by:

a. recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts;

b. ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities;

c. providing a clear career structure in order to recruit and retain able judges;

d. providing adequate support staff and equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay;

e. taking appropriate measures to assign non-judicial tasks to other persons, in conformity with Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts.

2. All necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.

Principle IV – Associations

Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests.

Principle V - Judicial responsibilities

1. In proceedings, judges have the duty to protect the rights and freedoms of all persons.
2. Judges have the duty and should be given the power to exercise their judicial responsibilities to ensure that the law is properly applied and cases are dealt with fairly, efficiently and speedily.
3. Judges should in particular have the following responsibilities:
 - a. to act independently in all cases and free from any outside influence;
 - b. to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention;
 - c. to withdraw from a case or decline to act where there are valid reasons, and not otherwise. Such reasons should be defined by law and may, for instance, relate to serious health problems, conflicts of interest or the interests of justice;
 - d. where necessary, to explain in an impartial manner procedural matters to parties;
 - e. where appropriate, to encourage the parties to reach a friendly settlement;
 - f. except where the law or established practice otherwise provides, to give clear and complete reasons for their judgments, using language which is readily understandable;
 - g. to undergo any necessary training in order to carry out their duties in an efficient and proper manner.

Principle VI - Failure to carry out responsibilities and disciplinary offences

1. Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance:
 - a. withdrawal of cases from the judge;
 - b. moving the judge to other judicial tasks within the court;
 - c. economic sanctions such as a reduction in salary for a temporary period;
 - d. suspension.
2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.
3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any

disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges.

**Emerging Lessons from Reform Efforts in
Eastern Europe and Eurasia**

Edwin Rekosh¹

Introduction and Background

This article will assess efforts to strengthen the independence of the judiciary in eight countries of Eastern Europe in order to offer some lessons learned. The countries are: Bulgaria, Georgia, Hungary, Poland, Romania, Russia, Slovakia and Ukraine.

Although somewhat crude, a number of generalizations can be made at the outset regarding contextual differences in history, politics and legal culture among the countries studied, that affect their potential for judicial independence. Three of the countries – Russia, Ukraine and Georgia – were once part of the Soviet Union. The creation of a socialist legal system in the Soviet Union influenced counterpart legal systems in the former Warsaw Pact countries significantly, but the resulting hybrids nonetheless constituted less radical departures from European liberalism. Furthermore, liberal institutions were more highly developed in some countries than in others prior to the ascendance of state socialism. The degree to which liberal traditions were either retained or rejected in each country is significant because it corresponds to the readiness of political and professional elites to embrace changes that bring about the restoration or creation of liberal institutions, such as an independent judiciary. These differences are far more telling than the shared rhetorical consensus among donors and target country elites.

¹ The author is the Executive Director of the Public Interest Law Initiative in Transitional Societies (PILI) at Columbia Law School, which advances human rights principles through assisting the development of a public interest law infrastructure in Central and Eastern Europe, Russia and Central Asia. The paper is based on the author's own research and experiences, as well as upon excellent country studies, prepared in response to an IFES/USAID questionnaire, by the following experts: Yonko Grozev, Legal Director, and Boyko Boev, Legal Consultant, Bulgarian Helsinki Committee (Bulgaria); Gia Kavtaradze, Secretary of the Council of Justice (Georgia); Karoly Bard, Research Director, COLPI and former director of the Human Rights Office of Hungary's Foreign Ministry (Hungary); Monica Macovei, human rights lawyer, President, Romanian Helsinki Committee (Romania); Jan Hrubala, human rights lawyer, former judge and leader of the Association of Judges (Slovakia); Ewa Letowska, Judge of the Supreme Administrative Court and first Polish Ombudsman (Poland); Maureen Fitzmahan, a professor of law at Concordia International University in Tallinn, Estonia (Ukraine); and Todd Foglesong, professor of political science at University of Utah (Russia). In the body of this chapter, each of these country studies will be cited as "[author] report," except in the case of Russia, for which the author relied on Peter H. Solomon, Jr. and Todd S. Foglesong, Courts in Transition in Russia: The Challenge of Judicial Reform (Boulder: Westview Press 2000), and which will be cited as "Solomon and Foglesong." The author thanks Columbia law students Philip Webb, for his able research assistance, and Natalya Scimeca, for her unstinting editorial assistance.

Furthermore, despite the common Soviet legal system, there are important differences that distinguish Georgia from Russia and Ukraine. Perhaps because intellectual and professional elites in Georgia feel stronger ties to European traditions, or perhaps because of the relative ease of carrying out successful reforms in a small country, judicial reform has been much easier to achieve in that country than in Russia and Ukraine.

Among the former Warsaw Pact countries, Hungary and Poland have the strongest liberal traditions. Although Bulgaria, Romania and Slovakia can also show strong support among intellectual and professional elites for the development of liberal institutions such as an independent judiciary, Hungary and Poland have legal cultures that are significantly more conducive to reform.

The civil law tradition

Despite these differences, there are a significant number of factors that are shared to varying degrees by each of the countries studied. For instance, each country's legal system is based on civil law rather than common law. Moreover, most of the countries had substantial experience with continental-style civil law systems prior to adopting the socialist legal system. As a result, standards of judicial practice prevalent in common law countries – even some viewed by Anglo-American lawyers as inherent to judicial independence – do not necessarily pertain. For example, the law-making function of the judge is significantly less important in civil law systems since precedent plays a less formal role than in common law systems. Consequently, judges in civil law systems are more likely in their rulings to defer to legislative or executive authority and less likely to go beyond the application of positive law. Moreover, judicial reasoning is often considered to be no more than the simple application of logic since the judge's role, theoretically, is to deductively apply legislated rules rather than interpret and develop rules inductively from particular cases. One result is less written justification for judicial decisions and hence less transparency than in common law systems.

Additionally, prosecutors in civil law countries enjoy a status similar to judges. In France and Italy, for example, judges and prosecutors both belong to the professional category of "magistrates." Likewise, Bulgaria and Romania have adopted a magistrature system in which both judges and prosecutors are considered part of the judicial branch. One explanation for this classification can be found in the theoretical differences underlying the inquisitorial approach (civil law) and adversarial approach (common law) to truth seeking. In the functioning of an inquisitorial system, there is less need for a separation between the judicial and prosecutorial functions.

Legacies of the socialist law tradition

The civil law variant currently found in Eastern Europe is heavily influenced by the socialist law tradition, which distorts some of the typical features of civil law systems in ways that inhibit judicial independence. In the socialist legal system, the state was arguably based on law, but laws and other norms did not have democratic legitimacy since they were elaborated by a single-party state. Moreover, law was only one of numerous instruments of state control, and it was not the most important one. (Solomon and Foglesong, p. 4) Lastly, because of the lack of separation of

powers, there was little need for judges to be independent decision-makers. On the contrary, loyalty was valued far more highly than independence.

The Procuracy

The procuracy (prokuratura) – a more extensive and powerful institution than a prosecutor’s office – was the principle legal arm of the communist state, and judges were effectively subordinated to procurators. Indeed, the procurator was responsible not only for conducting the prosecution, but also for monitoring the “legality of the proceedings.” (Solomon and Foglesong, p. 6).

As a legacy of the procuracy’s former power and importance, the post-socialist reformed procuracy continues to employ many of the most capable and influential legal professionals. Accordingly, it has engaged in a great deal of political obstruction to reform, since changes intended to strengthen the judiciary and improve its independence have often been perceived by procurators as threatening their power and prestige.

Methods and Patterns of Judicial Reasoning

According to Ewa Letowska, a Polish legal scholar, judge on the Supreme Administrative Court and first ombudsman of Poland, “the courts [under socialist law] were not only bound by the statute but also by every normative act. . . . The system of law was not a system of statutes only, but one of acts created by the administration, too. The courts asserted they were not allowed to exercise control over the executive even if it issued unconstitutional law.” (Letowska report). Consistent with this approach, judicial reasoning in post-socialist countries, compared with other civil law countries, tends to be even more reliant on strict interpretation of positive law and less willing to address inconsistent, illogical or unconstitutional outcomes produced by literal application of the law. As Jan Hrubala, a former judge in Slovakia, wrote: “In spite of the democratic changes in the society, certain representatives of the judicial profession continue to behave as if the judges were no more than civil servants whose obligation is to fulfill the will of the current power holders and to accept without reservation the decisions of state administration officials.” (Hrubala report).

Low Status of Judges

Because of their relatively unimportant role in the socialist legal system, judges held a low status in society. They were considered civil servants, performing an almost clerical function. One indication of their low status is that the majority of judges in the Soviet Union were not privileged enough to have their own apartments (Solomon and Foglesong, p. 7). Similarly, most observers consider the fact that a large majority of judges in socialist legal systems were women as further evidence of this low status rather than a sign of gender equality. Although the status of judges has improved considerably in the last ten years, for the most part, they do not yet enjoy a status comparable to their Western counterparts. Many of the individuals who became judges when it was a low status profession continue in their positions, doing little to enhance the public perception of overall judicial competence. Especially in Ukraine and Russia, many judges continue to work in dilapidated courtrooms and offices. Judges in each of the countries studied,

including the most prosperous (such as Poland), suffer from grossly inadequate resources and working conditions – signs that they and their functions continue to be underappreciated.

Executive Interference and Telephone Justice

Interference in individual judicial decision-making was so common under socialist law, especially in the Soviet Union, that the term “telephone justice” was widely used to refer to the particular phenomenon of judges deciding cases based on instructions received by telephone from a government official. The jurisdictional competence of courts was narrowly circumscribed under socialist law, and even on those matters brought before them, judges generally deferred to procurators. As a result, executive authorities controlled many judicial functions.

This has led to a continuing tendency for the executive to intervene in judicial decision-making. In Poland, for example, the leader of the then ruling Solidarity political party recently conducted “disciplinary conversations” with Constitutional Tribunal judges who had issued decisions contrary to the interests of his party. (*Gazeta Wyborcza*, June 3-4, 2000). Moreover, former Polish President Lech Walesa once phoned the President of the Supreme Administrative Court to demand assurances about a particular case’s outcome, prompting the judge’s resignation. (Letowska report). In Romania, executive interference seems to have had tangible effects. The Supreme Court overruled its own jurisprudence concerning nationalized property in 1994, following public criticism by the ex-communist Romanian President and an extraordinary appeal by the General Prosecutor. The Supreme Court reversed itself a second time in 1996, reverting to the earlier jurisprudence after an anti-communist government was elected for the first time. (Macovei report)

Executive influence is exercised in other ways as well. In many Eastern European countries, the judicial council – which oversees the appointment, promotion and disciplining of judges – is itself effectively controlled by the executive through the appointment of members to the council. In Bulgaria, members of the Supreme Judicial Council are meant to serve five-year terms. Since the Council was established in 1991, however, only one Council has served its full term in office, as two out of three attempts by the government to end the Council members’ terms in office and hold early reelections have succeeded. The Bulgarian Constitutional Court upheld the constitutionality of these actions in 1991 and 1999, when the majority of the Court had been appointed by the party seeking early reelections, but found a 1994 attempt to be unconstitutional, when the majority of the Court had been appointed by what was then an opposition party. (Grosev and Boev report).

The composition of judicial councils is also affected by other sorts of more subtle executive influence. Several countries allow prosecutors and/or other executive officials, such as the Justice Minister, to sit on or appoint representatives to the Council. In some countries such as Slovakia, the presidents of courts hold positions in state administration as well as judicial positions, creating potential conflicts of interest.

Centralized Control

Another product of the socialist legal system is a strong ethic of centralized control that continues to impact judicial independence. In Ukraine, for example, the legal system still provides an avenue for (prosecutors) to “protest” *pomylka* (mistakes) committed by courts, and for higher courts to routinely subject lower court decisions to cassation, or *de novo* review of facts and law. Although these procedures do not per se violate principles of judicial independence, they do substantially inhibit the development of an independent judiciary when implemented by individuals and institutions steeped in the tradition of strong, centralized control. According to one Ukrainian lawyer, Serhei Safulko, “the judge lies ‘between two fires,’ between what he believes is good law and the orders handed down from the high courts.” Moreover, to some extent, according to Safulko, the hierarchical control is self-imposed:

In most cases when there is no pressure from the outside, judges perform their professional duties impartially. However, judges, especially in district (city) courts, will often consult judges of higher courts, in particular the oblast courts. They ask these judges['] advice on how to rule correctly in this or that case and almost always follow the advice they get, even if it is wrong. (Fitzmahan report).

Additionally, in Ukraine, the Soviet practice of discussing data about the “stability of sentences” (or the extent to which appeals are successful) at judicial conferences continues to operate as a means of controlling individual independence (Fitzmahan report). While Ukraine appears to have much stronger traces of centralized control than the other countries studied, the related practice of awarding judicial promotions primarily based on the rarity of successful appeals to a judge’s decisions continues in many of the other countries as well.

Recent Reform Efforts

Selection and Appointment of Judges

In Eastern Europe a judicial council typically nominates candidate judges for appointment by the President or, in some cases, by the Justice Minister. The principal means of reform in the selection and appointment of judges has been to insulate this process, to varying degrees, from the executive. Yet, among the countries studied, only Hungary has achieved what appears to be a complete insulation of the appointment process from executive influence. In Hungary, the presidents of regional courts evaluate applications to judicial posts and ultimately appoint judges. Regional self-governing judicial councils may offer only non-binding opinions on candidates. The only exception to this process for the ordinary courts is that the President of the Supreme Court is elected by a two-thirds vote of Parliament upon the nomination of the President of the Republic. (Bard report).

Poland utilizes a less elaborate form of transparency and safeguard against cronyism in the selection of judges. Candidates for judicial posts are announced by the general assembly of the respective court, and a candidate-judge may not be selected for any given post unless there are at least two candidates. Yet, the system is not flawless, as personal connections can be instrumental in the earlier stages of a judicial career – completion of a judicial apprenticeship is required to

serve as a judge in Poland, and applicants for apprenticeships who have family contacts in the judicial profession are unofficially favored. (Letowska report).

The current system in Slovakia, as of this writing, is somewhat exceptional. A Council of Judges created in 1995 has solely advisory responsibilities, and judges are currently appointed in Slovakia by the parliament upon the nomination of the government. However, the Slovak government, following an election victory by pro-democratic forces, has prepared a judicial reform package that, at the time of writing, would recreate the (or create a new) judicial council, to be named the High Council of Justice. The High Council of Justice would recommend candidates to be formally nominated by the President of Slovakia, who was chosen above the Justice Minister and Prime Minister to carry out this function because the President is directly elected and has been widely perceived as a neutral political figure in Slovakia, who lacks close ties to political parties. (Hrubala report).

Several states have yet to initiate significant reform in this area. In Russia and Ukraine bureaucratic procedures continue to create many opportunities for executive interference. In those countries, Judicial Qualification Commissions screen candidates at the local level, examining their educational qualifications. Russia follows an elaborate and perhaps overly bureaucratized procedure. The Judicial Qualification Commissions, which are composed solely of judges, recommend local candidates for appointment by the regional legislatures. The regional legislatures, in turn, forward approved candidates to the Supreme Court, which makes recommendations for nomination by the President of the Russian Federation. (Solomon and Foglesong).

Ukraine uses a similar procedure, in which Judicial Qualification Commissions include law professors, representatives of local departments of the Justice Ministry, local officials, and judges. In addition to Judicial Qualification Commissions, local court presidents and Justice Ministry officials interview the candidates, and the head of the regional department of the Justice Ministry recommends candidates to the Minister of Justice. The Minister of Justice may return a candidate's application to the region, effectively ending the candidacy, or may recommend the candidate for appointment by the High Council of Justice. (Fitzmahan report).

The processes in Russia and Ukraine have been criticized for being politicized and opaque. The Ukrainian system is particularly problematic since the Judicial Qualification Commissions include local executive authorities, and the Justice Ministry has several opportunities to vet candidates before the High Council's formal approval process begins. (Fitzmahan report).

Georgia's Written Exam for Judicial Appointments

Another critical reform to the judicial selection process that aims to improve the independence of the judiciary is to employ objective merit-based criteria and to publicize the selection procedure in order to enhance public confidence in the judiciary. A remarkable example of reform that was supported by foreign donors is the written examination-based selection process instituted in Georgia through a 1997 Law on the Courts of General Jurisdiction, which applies to all sitting judges, as well as new appointees. (For a description of the positive impact this process has had on judicial independence in Georgia, see Mark K. Dietrich, Legal and Judicial Reform in Central

Europe and the Former Soviet Union – Voices from Five Countries (Washington, DC: World Bank 2000), pp. 7-8, hereinafter “Dietrich paper.”) The Supreme Court of Georgia administered the judicial qualification exam for the first time in 1998, and it has been offered five additional times between 1998 and September 2000.

The structure of the examination process resulted from collaboration between the California State Bar and the Georgian Council of Judges. With USAID support, ABA CEELI arranged for a bar examination expert from California to travel to Georgia to work with Lado Chanturia, the President of the Georgian Supreme Court, in order to create an objective examination-based selection procedure which would be fairly administered and perceived as unbiased by both examinees and the general public. (Dietrich paper).

First, the Council of Judges appoints the members of an examination commission to administer the exam in a manner that guarantees the confidentiality of test-takers’ identities. The exam, which tests for substantive knowledge of Georgian law, is conducted in two parts: a computer-graded, multiple-choice portion consisting of 100 questions with a mandatory pass rate of 75 percent; and an essay portion administered the following week. The first examination was printed in California and placed on a Lufthansa plane in San Francisco under the observation of the German Consul-General to the United States. The German Ambassador to Georgia met the plane in Tblisi and transported the examinations in his limousine to the German embassy, where they were held until the examination day. CEELI and the Council of Justice had mobilized international observers to monitor the examinees for cheating on the examination day. Immediately after the examination, the answers were projected onto a screen, and the examinees – who had retained carbon copies of their answer sheets – could compare their answers to the correct ones. The pass rate for the first exam was only forty-seven out of a total of several hundred examinees, and none of the sitting judges in the group passed. (Dietrich paper.)

Following the examination, successful examinees were invited to apply to the Council of Justice for existing vacancies. After Council members interviewed each candidate, the Council voted on whether he or she should be nominated for the President’s final approval. (Dietrich paper).

The entire examination procedure was widely covered by the Georgian media, which were also invited to observe the examination itself. The process was widely regarded as fair and transparent, even by those who failed the exam, and the public was pleasantly surprised to learn that many well-connected individuals failed. Yet, the Constitutional Court subsequently held that sitting judges who had failed the exam were nonetheless entitled to serve the remainder of their ten-year terms, although this issue remains a subject of intense public debate.

The Judicial Career Path

The judicial career starts at an early age in Eastern Europe, as it generally does in continental Europe. Young law graduates may begin a judicial career immediately after finishing their undergraduate legal education, receiving a judicial appointment after a one- to several-year apprenticeship. However, because of the historically low status of judges, the best young law graduates in Eastern Europe have tended to be attracted to other legal careers, such as working for the state as a public prosecutor or engaging in the newly-lucrative private practice of law.

This has changed somewhat in recent years, as judicial salaries have increased and the market for private attorneys has tightened. The increased independence of judges has also made the position more attractive. According to an informal survey in Bulgaria, the main motivations for law graduates to seek judgeships were: affinity for the legal profession; the independent status of judge; and opportunities for professional development. Yet, even in countries where this is true, such as Bulgaria, the judicial career is still often seen as a stepping stone – a good way to spend several years learning the practice of law and making contacts in order to transition into a more lucrative position as a private attorney or other legal professional. (Grosev and Boev report).

In other countries such as Ukraine, where starting salaries for judges are disproportionately low and there is little judicial independence, law students continue to consider a judgeship “the lowest position available in the legal profession.” (Fitzmahan report). Even in Hungary, where salaries are competitive for entry-level judgeships and judicial prestige has increased, raises throughout the judicial career come slowly, and there is a high drop-off rate among the most competent judges, who easily find lucrative jobs in private practice. (Bard report).

Raising Salaries

One simple reform that can have a direct effect on the attractiveness of a judgeship, at least in the early stages of a legal career, is to raise salaries. In Romania, in 1997 approximately one-third of the 3600 judgeships were vacant. Salaries have increased significantly since then, and applications to a newly established mandatory nine-month training program at the National Institute of Magistrates have risen to 4,000 applications for 120 places (Macovei). Where the turnover rate will stabilize, however, remains to be seen. It may well be that higher salaries are attracting ambitious young law graduates, as in Bulgaria, who nevertheless see the judgeship as a stepping stone rather than a permanent career. Slovakia’s newly proposed Constitutional amendment, which would raise the minimum age for post-apprentice judges from 25 to 30, may be one way to break that pattern.

Making Pension Plans More Attractive

Another approach for both attracting and retaining high-caliber judges, which appears to have borne fruit in Poland, is to devote significant resources to pension plans for judges. Salaries for judges in Poland have risen significantly, and judges are paid slightly more than prosecutors of equivalent rank, but one of the strongest incentives to serve as a judge is that they qualify for a pension higher than any other legal professional: 75 percent of their last salary. (Letowska report). As a result, judgeships probably attract individuals who value long-term job stability over immediate financial gain, presumably reducing the stepping stone syndrome. (See Richard E. Messick, Public Sector Group, World Bank, “Donor Sponsored Support for Judicial Reform: A Critical Appraisal” (May 1998), unpublished paper, available electronically or in hard copy from IFES or remessick@worldbank.org.) Similarly, the new reform package in Slovakia would include pensions reaching as high as ten times a judge’s last salary.

Reforming the Promotion System within the Judicial System

As with the selection process, the executive appears to have an inordinate degree of control over the promotion of judges in some of the countries studied. In Ukraine, for example, promotions

are based on evaluations conducted by the Ministry of Justice –taking into account primarily the number and kinds of cases the judge has heard and the number that have been over-turned – although the promotions themselves are decided by the Judicial Qualification Commissions. In Russia, the evaluations of Judicial Qualification Commissions are presented to regional legislatures for decision. The resulting politicization of the process is evidenced by Deputies who have “assumed the right to criticize judges’ actions and dictate results in particular cases.” (Solomon and Foglesong, p. 8).

In some countries, executive control over the promotion process is more subtle. In Romania, for example, judges are evaluated by the presidents of their courts, and promotions are approved by the Higher Council of Magistrates, but the Ministry of Justice retains a role in proposing the promotions to the Higher Council. The Justice Ministry in Bulgaria may also express its opinion about judicial promotions to the Supreme Judicial Council.

One general problem with the promotion systems used in Eastern Europe is that they are based on few objective criteria and appear to rely mostly on personal and political connections. (Grosev and Boev report). In countries where judicial reform is progressing well, however, this may be changing. The reform package in Slovakia would require that each judicial post be advertised publicly, as is the practice in Poland, and would also create a system of mandatory evaluation every five years, based on explicitly defined criteria. Hungary has already adopted a system of regular evaluation based on criteria elaborated by the National Council of Justice (the Hungarian equivalent of a judicial council), according to a 1997 Law on the Status and Remuneration of Judges. After a first evaluation at the time of appointment to an indefinite term, judges must undergo two more evaluations during the following six years. (Bard report).

Disciplinary Action for Judicial Misbehavior

The possibility of removing judges from office varies significantly from country to country. In some countries, ordinary judges are initially appointed to a probationary term of three to five years before becoming eligible for an indefinite term (Bulgaria, Hungary, Russia, Slovakia, Ukraine). A proposed Slovak constitutional amendment, however, would eliminate the probationary period for judges, rendering all judges irremovable. This already applies in Romania and Poland. In Georgia, all judges are appointed to renewable ten-year terms, which was the practice in Russia between 1989 and 1992. In many cases, judges appointed to higher courts are subject to definite terms, as is the case with the Romanian Supreme Court, the Polish, Russian and Ukrainian Constitutional Courts.

Judges in most of the countries are subject to criminal prosecution, with minor limitations. The Supreme Judicial Council can lift the criminal immunity enjoyed by Bulgarian judges if the Council is satisfied that there is sufficient evidence of a serious, deliberate offense. (Grosev and Boev report). In an effort to crack down on corruption, the Ukraine Parliament amended the Law on the Status of Judges in Fall 1999, removing barriers to the prosecution of judges for criminal acts. (Fitzmahan report.)

In most of the countries, non-criminal discipline is administered by the judicial council, or in Russia and Ukraine by the Judicial Qualification Commissions. The proceedings can usually be

initiated by the Ministry of Justice or a president of a court. Especially in Romania, critics target the dominant role of the executive branch in the process. The High Council of Magistrates, one third of whose members are prosecutors, conducts disciplinary hearings upon the proposal of the Ministry of Justice, and administers disciplinary sanctions to judges. In contrast, prosecutors are subject only to hierarchical discipline within the procuracy. (Macovei report). The procedure in Bulgaria is similar in that non-criminal disciplinary hearings are also administered by the judicial council, where disciplinary action was recently taken against a judge who had failed to write a single decision in two years. (Grosev and Boev report).

In Slovakia, disciplinary hearings are initiated by the presidents of the courts and conducted by panels of judges appointed by the presidents of the courts. A disciplinary panel can propose removing a judge because of an intentional crime or “serious failure,” subject to the approval of the Parliament. But relying on judges to discipline their colleagues has proved problematic. For example, in one recent incident in which a notoriously corrupt Slovak judge was arrested and later convicted of bribing a Czech judge in a transnational case, the majority of his colleagues signed a “social guarantee” submitted in the Czech criminal proceeding, attesting to the corrupt judge’s good reputation. (Hrubala report). Undoubtedly, it would have proved fruitless to rely on the President of the relevant court to convene a disciplinary panel in this case. He was present at the same restaurant (in the Czech Republic) where the bribe negotiation had been recorded on “a wire,” although he sat at a distance and was not convicted in the Czech criminal proceeding. This is an especially flagrant example – known in concrete detail only because of the unusual circumstances leading a Czech judge to cooperate in the criminal prosecution – but critics argue that it exemplifies a pervasive practice. (Hrubala report).

The proposed reform package in Slovakia would shift authority to approve a judge’s removal from Parliament to the President of the Republic, the elected officer perceived as least beholden to partisan politics. It would also shift the selection of disciplinary panel members to a High Council of Justice, which will be created by the new reforms.

Georgia is also taking steps to reform its system, having recently established a new disciplinary procedure in a law adopted in February 2000. According to this procedure, the Council of Justice – the governing body for the judiciary – initiates disciplinary proceedings based on citizen complaints, as well as proposals by court presidents and the Council of Justice itself. Although only four out of twelve members of the Council of Justice are necessarily judges, disciplinary sanctions may be appealed to the Conference of Judges, a wholly self-governing body of judges. Providing a mechanism for citizens to address complaints directly to the Council of Justice is a particularly innovative reform.

The Problem of Corruption

Corruption is widespread in the societies of Eastern Europe and can certainly be found in the judiciary as well. According to the Anti-Corruption Action Plan of Coalition 2000, an NGO in Bulgaria: “[the Bulgarian judicial branch] receives a low mark on trust both from the public at large and from other state institutions. It is popularly believed to be slow, inefficient, and corrupt.” (Grosev and Boev report). According to Jan Hrubala: “Some people [in Slovakia] think that if you or your attorney don’t have any friend at the court, you cannot win the case.”

Although corruption may be less pervasive among judges than among prosecutors and investigators (Grosev and Boev report), a recent opinion poll found that members of the judiciary and the health profession were the most corrupt elements of Slovak society. (Hrubala report). According to former prosecutor Monica Macovei, corruption in the Romanian judiciary is notorious as well, but appears to be especially prevalent among the lower courts because there is little opportunity in the Romanian appeals process to contest the facts that were established in there. As a result, a corrupt outcome at the first instance based on falsified facts is unlikely to be over-turned on appeal. (Macovei report).

Yet, Ewa Lentowska argues that the public perception of corruption is exaggerated with respect to judges, except perhaps regarding a narrow subset of cases concerning commercial matters of substantial monetary value. She claims that corrupt clerks and dishonest lawyers have an equal interest in promoting the idea that judges are corrupt. (Letowska report). This appears plausible since there is little opportunity for individuals to bribe a judge directly; in most cases, lawyers are likely to be intermediaries. There are also substantial opportunities (and sometimes a requirement) for individuals and lawyers to bribe clerks for the purpose of calendaring and file access. Indeed, among the most pervasive areas of corruption in Poland are matters where only court clerks - not judges - are involved, such as registration of companies or land. (Letowska report).

Corruption has a negative impact on judicial independence in two, contradictory ways. First, a climate of corruption creates a multitude of channels for improper influence on judicial decision-making. At the same time, disciplinary mechanisms intended to curb corruption can be potentially misused for political purposes.

Efforts to Reduce Judicial Corruption

A number of efforts have been made to minimize corruption among judges. By far the most often voiced suggestion has been to increase judicial salaries; indeed, fighting corruption has been a principal justification for substantial salary increases throughout the region, though Russia and Ukraine may be exceptions. As previously discussed, the salary increases have helped enhance the attractiveness of a judgeship, and they have perhaps reduced the plausibility of self-serving justifications for corrupt behavior, although there is little solid evidence as to whether the raises have been effective in actually curbing corruption. The reform is based on the premise that many judges accept bribes because they cannot afford to maintain a decent standard of living; it may well be the case, however, that judges continue to accept bribes in order to improve their standard of living even once their basic needs are satisfied.

In Georgia, salaries have been increased and a new procedure for ensuring the selection of competent judges based on objective criteria has been adopted (as discussed above). As part of a comprehensive reform meant, in part, to weed out judicial corruption, the Council of Justice has also adopted a code of judicial conduct, which is not legally binding, but is subject to disciplinary responsibility. As mentioned previously, Georgia adopted a law on disciplinary responsibility in February 2000, providing a procedure for citizens to make complaints about the ethical conduct of judges, including corrupt practices, directly to the Council of Justice.

In some states, such as Bulgaria and Slovakia, non-governmental Judicial Associations have adopted voluntary codes of judicial conduct, which has received a great deal of support from USAID through ABA CEELI. A new code, to include the establishment of a disciplinary commission, is currently being drafted in Bulgaria. (Grosev and Boev report). A draft judicial ethics code is pending in the Ukrainian parliament as well.

If Slovakia is representative, judges are divided over the need for ethical codes. Some feel that the drafting of an ethical code is an important step toward improving the unsatisfactory state of judicial ethics. Others feel there is no need for a special code of judicial ethics since the general, informal ethical norms in society also apply to them. Still others think that existing procedural guarantees and laws are sufficient. And yet another group regards the mere discussion of judicial ethics as inherently threatening to their effectiveness as judges, apparently favoring the corruption endemic to the status quo. (Hrubala report).

Some voices in the region, such as Coalition 2000 in Bulgaria, have called for the more progressive step of establishing an independent commission to investigate corruption. Yet, the creation of the National Council for Action against Corruption and Organized Crime in Romania in 1997 and the creation of special agencies within the Romanian General Prosecutor's office and the General Police Inspectorate in 1998 are perceived to have had little effect. (Macovei report).

There have been criminal prosecutions of judges in the region for corruption, although the number appears to be quite low. In June 2000, the Romanian Ministry of Justice requested the investigation and prosecution of six judges, and the General Prosecutor approved initiation of three of them. In 1999, 21 judges and prosecutors in total were investigated, resulting in the prosecution of four judges and two prosecutors. (Macovei report). Meanwhile, in Bulgaria, roughly six investigators and prosecutors have been prosecuted, but no judges. (Grosev and Boev report). Lastly, although there have not been any prosecutions for corruption to date, Ukraine adopted a law in 1999 lifting the criminal immunity of judges in order to fight corruption.

Even before legal professionals enter their careers, the effects of corruption can already be felt. Universities throughout the region too often thrive on corrupt practices such as accepting bribes for admissions and grades, and other forms of influence peddling, a phenomenon that receives scant attention by international donors. One important way to fight the persistent culture of corruption is to address it at this stage – where it can permanently affect future lawyers and judges during the formative years of their professional values. Clinical legal education programs, discussed in more detail later, are providing an important counterweight to complacency toward corruption in higher legal education.

Assignment of Cases

The predominant practice in Eastern Europe is for court presidents to have sole discretion in assigning cases to the judges on their court. This tends to affect judges' impartiality in a number of important ways: providing avenues for corruption; providing greater opportunities for executive interference; and reinforcing the ethic of strong hierarchical control. As a result, executive authorities interested in influencing political cases as well as individuals seeking

pecuniary advantage may efficiently achieve their intended results on an on-going basis by establishing informal relationships with relevant court presidents. A cooperative court president has the unrestricted authority to assign any particular case to a politically compliant or corrupt judge. Indeed in Bulgaria, high profile, political cases are often retained by the president of the court to be decided himself, or assigned to the vice president. (Grosev and Boev report).

In Poland, court presidents use a random method to assign cases, but the system is not well known, resulting in significant public suspicion about corruption in the assignment process. (Letowska report). Meanwhile, in Slovakia, there is no systematic method for assigning cases, although some court presidents do use random methods. However, several court presidents in Slovakia have assigned cases involving highly politicized prosecutions for defamation of state officials repeatedly to the same judges, raising suspicions about independence. (Hrubala report).

Budgetary Issues

Underfunding

The judiciary in Eastern Europe is chronically underfunded. In Poland, one of the more prosperous countries studied, only about two-thirds of the amount requested by court presidents is actually provided in the budget. Moreover, the financial fortunes of the judiciary vary to some degree with the political winds. In Bulgaria, where prior judicial reforms appear to be coming under increased political pressure, the 2000 budget for the judiciary declined by twenty-seven percent compared to 1999, while funds for most governmental departments stayed the same or increased. (Grosev and Boev report.) The chronic shortfall in funding for Bulgarian courts – which covers important court administration expenses such as heating, equipment and support staff – is generally made up from the income generated by court fees, though this creates strong disincentives for appointing expert witnesses or counsel for indigent defendants, since they are also paid out of court fees. (Grosev and Boev report).

The comments of Jan Hrubala, a former Slovakian judge, are representative: “Judges often work in substandard offices, poorly and inadequately equipped, in dilapidated buildings with falling plaster, and do not have adequate access to professional literature. . . . Certain courts are almost unable to function because of staffing problems.” (Hrubala report). According to a study of Polish courts undertaken by the Helsinki Foundation for Human Rights, a Warsaw-based NGO, only 36% of judges have their own offices, with the remainder sharing space with up to 6 others; 60% of judges have no computer; 38% share a computer with at least a dozen others; 50% of courts have no library and an additional 20% have libraries identified as inadequate. (L. Bojarski and J. Swaton, Monitoring of the Material Conditions of District Courts, (Warsaw: Helsinki Foundation for Human Rights 1999), on file with author, hereinafter “Bojarski and Swaton”). One of the most significant problems in infrastructure is the lack of qualified secretarial assistance. Judges throughout the region spend an extremely large portion of their time on clerical matters, which interferes with the general efficiency of the courts and prevents judges from spending adequate time to ensure the quality of their decision-making.

Judicial Discretion over Budgets

Equally important as the amount of financial resources available to the judiciary is the degree of control over formulating the budget and spending it.

In Russia and Ukraine, control of the judiciary through financial levers, especially at the local level, is much more pronounced than in the other countries. In Russia, for example, funds allocated to courts in the state budget have often failed to materialize. As a result, Russian courts have looked to local governments, and sometimes private sources, to fill the gaps, yielding opportunities for the exercise of inappropriate influence. (Solomon and Foglesong, pp. 37-39).

A similar situation exists in Ukraine. In a 1999 newspaper article, Vitaliy Boyko, the President of the Supreme Court of Ukraine, wrote:

Miserable financial conditions from the state budget compel chief judges of the courts and other judges to search for additional “sources” of financing both from the budgets of local governments and from outside sponsors. The courts seek help for such basics as electricity, heating, telephones, the repair of buildings, etc. And when disputes arise between citizens and local bodies of power – the dissatisfied party understandably will have doubts about the impartiality of the court and the legality of the final court decision. The public will have these doubts even if the court’s decision is true and based on good law. (Holos Ukrainy, November 24, 1999)

A draft law to reform the Ukrainian judicial system would create a State Court Administration under the auspices of the Congress of Judges to administer the judicial budget, however, the law is tied up in political deadlock. (Fitzmahan report). A similar initiative in Russia, to lay budgetary and administrative authority over the courts in a Judicial Department of the Supreme Court is part of the new moderate reform agenda. (Solomon and Foglesong).

In many of the countries in the region, the Ministry of Justice controls the budget for the courts, providing opportunities for inappropriate external control of the judiciary. In Hungary, however, a 1997 judicial reform created the National Council of Justice as the supreme representative of the judicial power and also vested it with responsibility for drafting and supervising the portion of the state budget concerning court administration. The Council – two-thirds comprised of judges – submits a budget for court administration each year to the government. The government may make adjustments, but when it presents the state budget to Parliament, it must indicate clearly the Council’s original proposal and give reasons for any deviation. (Bard report).

In Bulgaria, the Supreme Judicial Council prepares and controls the budget, which is submitted to the parliament by the Council of Ministers (i.e., the cabinet). Additionally, the Justice Ministry can make reasoned proposals and objections. (Grosev and Boev report.)

In Georgia, control over the budget for court administration resides in the Logistics Department of the Supreme Court. First, a draft budget is prepared with the input of court presidents and then presented to the Council of Justice for approval. Once approved, the President submits it to Parliament together with the overall state budget. The housing of the Logistics Department in the Supreme Court has been criticized for distorting the relationship between the Supreme Court and lower courts. As a result, the entire department likely will be transferred to either the Council of Justice (elected or appointed by the judiciary, the President and the Parliament in equal thirds) or

the Conference of Judges (a self-governing entity elected from among judges). (Kavtaradze report).

In Poland, while the budget for most of the ordinary courts is controlled by the Ministry of Justice, the Supreme Court, Supreme Administrative Court and the Constitutional Tribunal, each propose their own budgets directly to the Ministry of Finance and the Parliament, bypassing the Ministry of Justice. This change resulted from a 1997 campaign for the autonomy of court administration, which was otherwise unsuccessful. (Letowska report). Likewise, in Slovakia, only the Constitutional Court has control over its own budget, and the current judicial reform package would extend similar budgetary control only to the Supreme Court.

The greatest consequence for judicial independence probably comes from control over benefits that directly impact judges' lives, such as housing. Privileges such as housing were a commonly-used instrument of social control during the communist period. In Russia, Ukraine and Romania, housing and other benefits are still subject to the whims of local government. In addition, executive authorities in many countries may unduly influence the courts by exerting control over matters that directly impact working conditions, such as court maintenance and the hiring of assistants.

Training

Many observers believe that Eastern European judges have insufficient knowledge and inadequate training to carry out their duties effectively and with confidence. Many judges retain old habits that interfere with the development of an independent judiciary, such as social conformity or expecting directives from above. Additionally, they often have difficulty reasoning from the higher principles that are contained in constitutions and international treaties, and they are largely unaware of basic ethical concepts and how to apply them in practice. In Poland, for example, judges did not think it improper for a judge's spouse to be a bankruptcy trustee in the same district in which the judge worked, resulting in the National Council of the Judiciary passing a resolution to that effect. (Letowska report).

There are various options for improving the training that Eastern European and Eurasian judges receive. One expert has suggested that Ukrainian judges would benefit greatly from more exposure to Western colleagues, whether through informal training or otherwise. (Fitzmahan report). That may indeed be an important element in building judges' self-esteem and confidence, and elevating the status of judges, as well as providing the moral support of an international peer group.

A number of countries in the region, such as Bulgaria and Georgia, have established Judicial Training Centers. These Centers perform a necessary function by educating judges in substantive areas of the law that are undergoing rapid change in Eastern Europe. However, the extent to which such training can influence the kind of behavior and attitudes that fundamentally impede judicial independence is less clear. Such initiatives can probably have the greatest impact on judicial independence when they focus on ethical training or on applying the constitution or international human rights treaties within domestic law. Training in ethics can help buttress efforts to reduce corruption. The application of constitutional and international human rights

principles can provide a counterweight to executive demands for legal interpretations favoring excessive governmental discretion. Generally, with respect to these areas, an undergraduate law degree does not provide sufficient knowledge and training.

In Romania, a National Institute of Magistrates, modeled after the French *Ecole de Magistrature*, was established in the early 1990s with the strong support of USAID through ABA CEELI. Participation was voluntary, and it suffered from lack of interest by judges; it had virtually ceased to exist by 1996 when its founder became Minister of Justice. Revived shortly thereafter, its fortunes have been reversed, with a Justice Ministry decision in early 2000 requiring that candidates for judgeships complete a nine-month training at the Institute. As mentioned previously, at the time of writing, there were 4,000 applications for 120 spaces. Georgia intends to follow a similar path, transforming its judicial training center into a School for Magistrates, which will administer a mandatory training program for judicial candidates. Based on a belief that the most effective teachers for judges are their senior colleagues, Georgia also intends to conduct a “training-the-trainers” program for judges. (Kavtaradze report).

In the long run, however, the most effective way to improve judges’ capacity for independence is to reform university-level legal education. The highly theoretical and didactic style of teaching law in the region does little to develop the legal reasoning and critical thinking abilities of judges. Moreover, the most critical stage in the development of a lawyer’s or judge’s professional values is during and immediately following university education. Law schools need to teach ethics to future legal professionals, but ethics is most effectively taught on the basis of concrete examples drawn from real world experience. Clinical legal education – in which students provide legal services to underrepresented clients under the close supervision of qualified attorneys and professors – offers the advantage of injecting the facts and circumstances of actual cases from the real world into law school teaching. Within clinical programs, well-trained teachers not only improve students’ practical skills and reasoning abilities, but they can also help produce ethical lawyers and judges.

A number of donors have been instrumental in helping to launch a clinical legal education movement in Europe and Eurasia. The Soros network of foundations has been especially active, currently supporting clinical programs at more than 60 universities throughout the region. Each clinical program typically includes several sections, or classes, on topics ranging from criminal and civil law to political asylum, not-for-profit law and domestic violence. Soros support ranges from approximately \$15,000 to \$30,000 per year, with an average of 40 to 50 students participating in each program per year. The students – many of whom will begin a judicial career directly after graduation – undergo what is likely to be the most transformative experience they have in law school, at a cost that roughly amounts to a modest \$500 per student.

Extent of Judicial Review

In general, judicial review supports the independence of the judiciary because it empowers courts to critically assess executive and legislative action on the basis of constitutional or international human rights principles. The legal systems in Eastern Europe have widely adopted judicial review of legislation, and to a lesser extent, of executive regulations and actions. Each of the countries studied here has established a Constitutional Court, generally following the French and

German models. Their competence varies considerably. The Hungarian Constitutional Court can invalidate any law, based on complaints made by any individual about that law's conflict with the Constitution, or upon its own initiative. Other constitutional courts engage in judicial review only upon a complaint lodged by the President or Prime Minister, by a portion of the Parliament, or by the ordinary courts.

Additionally, some countries, such as Poland, have provided mechanisms for extensive review of administrative decisions through a Supreme Administrative Court. Review of administrative decisions and actions is also provided by the institution of the Ombudsman, which was especially well received in Poland, but has been established in many other countries in the region as well. Hungary has established several subject-specific Ombudsmen, known as Commissioners, including a Commissioner for Data Protection and Freedom of Information who, among other things, takes action on complaints regarding refusals by the state administration to provide information.

International law provides an additional level of judicial review. Most, if not all, of the countries in the region are monist systems, in which international human rights treaties are self-executing and do not require implementing legislation. Moreover, many of the constitutions explicitly recognize international human rights treaties as part of the domestic law of the country and further give priority to the treaties in cases of conflict with other laws. (See, eg, the Romanian Constitution, articles 11 and 20). Lastly, the European Court of Human Rights in Strasbourg provides ultimate judicial review for matters falling within the scope of the European Convention on Human Rights and Fundamental Freedoms.

Judicial review has a particularly direct bearing on the independence of the judiciary in Poland. Articles 178 and 179 of the 1997 Constitution contains concrete guarantees for judicial independence. Article 179 guarantees irremovability, and Article 178 provides that:

- (1) Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.
- (2) Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.
- (3) A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges. (Polish Constitution, Adopted by National Assembly on 2 April 1997, confirmed by Referendum in October 1997.)

Furthermore, the Constitutional Tribunal has competence to decide whether these conditions are met in practice, upon request of the National Council of the Judiciary. Indeed, independence of the judiciary has been the subject of several Constitutional Tribunal decisions in Poland. A 1993 decision attacked the Act on the Structure of the Law Courts, objecting to the excessively intrusive role of the Justice Ministry in appointing and dismissing court presidents as well as the vagueness of disqualification criteria and the lack of procedural guarantees or involvement of disciplinary courts. A 1994 decision stressed that financial security of judges is an important factor in strengthening judicial independence. (Letowska report).

Procedural Transparency and Public Access to the Judicial Process

Greater transparency is critical for securing judicial independence in Eastern Europe. Transparency is an effective means for creating accountability without reinforcing opportunities for executive interference from outside the judiciary or strong hierarchical control within the judiciary. Moreover, transparency fosters greater public confidence in the judiciary, setting up a virtuous circle of positive reinforcement.

Several of the reforms described earlier have included measures to improve transparency. For example, the newly established judicial qualification examination in Georgia is a model of how transparency in the selection of judges can ensure fairness and build public confidence in the judiciary. In other countries, vacant judicial posts have been advertised and individual candidacies have been publicized. Where random methods of assigning cases are used, such as in Poland, greater transparency regarding case assignments might help improve public perceptions about corruption and fairness in the judicial system.

One area that is particularly problematic involves the practice surrounding the publishing of the written justifications for judicial decisions and even the final decisions themselves. In Ukraine, for example, both judgments and transcripts of proceedings are written by hand, and they are available only to the litigating parties. Indeed, the 1992 Law on the Status of Judges requires the “confidentiality of the judicial decision-making process.” It also protects the “secrecy of court decisions and prohibition to disseminate them” and further states: “a judge is not required to give any explanations concerning the essence of cases he or she has considered or is considering now, as well as to make them available for anybody to view, except in cases and in order envisaged by the law.” (Law of Ukraine on the Status of Judges (*Zakon Ukrainy, Pro Status Suddiv*), arts. 11, 12, Verkhovna Rada Decree no. 2863-12, December 15, 1992; *Holos Ukrainy*, February 10, 1992, p. 3; amended February 2, 1993, as translated in Fitzmahan report.)

Other countries are somewhat more transparent regarding judicial decision-making. In Bulgaria, for example, judicial decisions are not confidential, but only excerpts of some opinions are published in the official bulletin. In Slovakia, written opinions are required in every case, but when published, the names of the judges are omitted.

In Poland, published opinions include the judges’ names. Every opinion of the Polish Constitutional Tribunal and the Administrative Division (but not the Civil and Criminal Divisions) of the Supreme Court is published, as well as some courts of appeals opinions. Dissenting opinions are not published, although the names of dissenting judges are included. One Slovak expert has asserted that published opinions at higher instances and for the most significant cases are important and, furthermore, that judges should be obligated to explain why their outcomes differs from those of other judges in similar cases. Yet, judges tend not to justify their decisions, even if they appear to contradict a Supreme Court ruling intended to harmonize the law. (Hrubala report).

Unlike high court decisions, regional and district court opinions are not published. Written judgments are issued in Polish courts of first instance only when one of the parties announces the intention of appealing, or when there is a dissent. Generally, no reasoning is recorded in writing,

and it would probably not be feasible to do so due to backlogs. (Letowska report). This is supported by Jan Hrubala's observation, that the Slovak requirement that opinions be written in even minor cases is a primary cause for large backlogs in the Slovak courts. (Hrubala report). According to Ewa Letowska, Polish courts of appeals do not, in any case, assess the reasoning of lower courts. They operate deductively, and since the common assumption is that there is only one way to interpret the law, appeals court judges would consider the first instance judge to have been either correct or incorrect. (Letowska report).

Civil Society – Supporters and Watchdogs

Non-governmental Judicial Associations

One helpful civil society-based approach to fostering an independent judiciary is the creation of voluntary, membership-led, non-governmental judicial associations. USAID has enthusiastically supported the creation of such associations through the activities of ABA CEELI, and strong non-governmental judicial associations already exist in Bulgaria, Georgia, Poland and Slovakia. There are also a large number of professional associations that include judges as well as other legal professionals. Yet, in Russia and Ukraine, the interests of judges are represented by corporate bodies that are not voluntary and do not have independent legal personalities.

Slovak judges established one of the region's first Judicial Associations, with the support of CEELI, and it has been a brave voice for independence of the judiciary during times when Slovak politics have been dominated by anti-democratic forces. (Hrubala report). A judicial association was founded in Bulgaria in 1997, again with assistance from CEELI, and its activities have included adopting a voluntary judicial code of conduct, establishing a judicial training center, and submitting amicus-style briefs to the Constitutional Court regarding cases interpreting independence of the judiciary and the code of criminal procedure. (Grosev and Boev report). In Poland, the voluntary association of judges, Iustitia, cooperates with media by freely providing information through interviews and press conferences, educates judges and builds public awareness of problems of the judiciary. For example, Iustitia took a public stand in 1998 when the Under-Secretary of the Ministry of Justice stated that "judges are to execute acts, not to criticize them." (Letowska report). The resulting public debate largely strengthened awareness of the potential menaces to independence of the judiciary.

Other External Actors

Judicial Associations can function as advocates for an independent judiciary especially by educating the public about judicial issues. This can be accomplished partly through the media, which play an especially important role as liaison between the judiciary and the public. With Georgia's new judicial qualification examination discussed earlier, the media brought the details of the process to the attention of the public, which ultimately helped cultivate public support for the judiciary. The media can also compensate for deficiencies in official transparency, such as in Slovakia, where the media sometimes publish the names of judges who are not cited in the officially published opinions. (Hrubala report). Investigative journalism can also be extremely effective – especially in curbing corruption – although an important obstacle to this strategy is the widespread availability and use of criminal sanctions for defamation of state officials. The resulting suits have generally ended with acquittal in Poland (Letowska report), but they

frequently result in criminal penalties in some of the other countries, such as Romania. (Macovei report).

Moreover, the media must be well-educated in order to ensure that their coverage of issues concerning judicial independence is used constructively to bring about reform, rather than merely promoting populist rhetoric about the courts being responsible for rising criminality. In educating the media, however, there are a number of obstacles. Journalists lack knowledge and understanding of the law and do not appear to be interested in acquiring it. Furthermore, judges are unprepared to work with the media and seem unwilling to assist the media in presenting judicial information objectively and truthfully. (Hrubala report).

To some extent private attorneys can also hold judges accountable when judicial independence is threatened by corruption or inappropriate procedures, though they themselves tend to have a vested interest in maintaining lack of transparency and the kind of informal practices that foster corruption. Human rights advocates often note that their presence in a courtroom appears to have a mitigating effect on judges who might otherwise bow to executive pressure. NGOs could enhance that effect by gathering examples of both bad and good practices and disseminating them among the public.

Moreover, NGOs can play an important role in both holding courts accountable and advocating on behalf of the judiciary. The court monitoring project of the Helsinki Foundation for Human Rights, the results of which were described earlier, is a good example. (See Bojarski and Swaton.)

General Recommendations

From a comparative assessment of reformed in the area of independence of the judiciary undertaken in Europe and Eurasia as well as an analysis of continuing problems, a number of general recommendations can be made.

“Less Traveling, More Learning”

In some countries, such as Ukraine, it is important for judges to have more exposure to western colleagues in order to provide moral support and improve self-esteem, which are necessary for independence. However, training should probably be more focused on areas that are directly relevant, including constitutional law and reasoning, international law, court management, and ethics, in order to ensure that the training correlates with improved independence. Ideally, judges should be trained by more senior judges, and “training-the-trainers” programs should therefore be supported.

Addressing Reform from the Bottom Up

Top-down institutional reform is subject to inconsistent progress and long delays due to political blockages. As a result, a significant portion of foreign donor assistance to support institutional reform bears only meager results. More donor assistance should be devoted to civil society actors, who have clearer and stronger political will. Donors can support the development of court watchdog groups and programs and their efforts to increase the effectiveness of judicial

associations. NGOs that rely on litigation strategies to achieve their social objectives should also be supported as a means of building pressure for reform. In general, donors should use their funding to support the institutional reform objectives of civil society actors.

Focusing on Small-Scale Institutional Reforms

A complementary donor strategy, as another alternative to a comprehensive top-down institutional reform, would be to support small-scale institutional reforms devoted to enhancing transparency – thus facilitating the activity of court watchdog groups and programs and improving public confidence in the judiciary. Examples include: the development of explicit, publicly disseminated objective standards for the appointment and promotion of judges; increased publication and distribution of judicial opinions; greater transparency with respect to case assignments, calendaring and filing practices; an annually updated register of magistrates' income and property. Strategies as simple as providing modern equipment for transcribing court proceedings can have a major impact.

Informed, Educated Media

Media can play both a constructive and a destructive role in the effort to improve judicial independence. Investigative journalists can help uncover corruption and other improper influences on judicial decision-making. At the same time, media can contribute to an erosion of public confidence by perpetuating stereotypes of an ineffectual judiciary. Foreign donors can have an impact on the role of the media by ensuring they are properly trained in coverage of legal matters and sensitized to the importance of judicial independence.

Fighting Corruption

A key strategy for fighting corruption would be to streamline the administration of courts, especially at the local level. Long delays, lack of transparency, and disorganized filing systems provide enormous opportunities for corruption. At the same time, encouraging the development of disciplinary boards which adjudicate citizen complaints about unethical behavior combined with encouraging a few prosecutions or disciplinary decisions of high level judges could have a tangible effect on curbing corruption. Finally, in order to help reduce the overall culture of corruption, it is important to address the corruption often endemic to the educational system itself, where it easily infects the values of future legal professionals. The creation of clinical legal education programs and other public interest projects can provide a counterweight to the self-interested and corrupt behavior that is too frequently the norm in university life.

Reforming Legal Education

Supporting the reform of university-level legal education will be the strongest guarantee of an independent judiciary in the long term. Training opportunities that occur later in life are no substitute for a solid educational foundation acquired during formal legal studies. In particular, law graduates should be better trained in legal reasoning and critical thinking skills. More developed clinical legal education programs hold the promise of enhancing the effectiveness of current teaching methods as well as introducing important ethical dimensions of legal practice into the classroom.

HIGHLIGHTS FROM THE USAID/IFES GLOBAL JUDICIAL INDEPENDENCE GUIDE *

This report is the product of a multi-year USAID grant to The International Foundation for Election Systems designed to assist the Global Democracy and Governance Office in the collaborative development of a judicial independence guidebook. The final product is the first global guide designed to help identify, organize and assess the panoply of issues related most directly to judicial independence, as opposed to those related to broader judicial reforms. For purposes of this report, USAID uses the generally recognized global definition of judicial independence, namely, that both the institution of the judiciary and the judges themselves must have an enabling environment that promotes fair and impartial decision-making based upon the rule of law.

The Guide

We hope that the Guide will serve as a catalyst for further research, debate and integrated programming. Its two primary purposes are:

- to promote understanding of the issues surrounding judicial independence and
- to assist USAID and other donors, in collaboration with their local counterparts, to strategically design and implement programs that effectively strengthen judicial independence.

While USAID and others have been working on a variety of judicial reform programs for over two decades, too little reflection upon this experience has been undertaken and shared across borders. Likewise, no one has attempted to organize and research judicial independence issues within a regional or global context. Now judicial independence is viewed by many as key to sustainable reform, combating corruption and addressing and preventing human rights abuses. These developments, coupled with historic regional and global democratic and economic trends, are placing increased demands upon the judiciary and the

legal system in general, including more institutional transparency and accountability.

The intellectual basis for the content of the Guide includes commissioned research papers and surveys from 26 selected countries from all regions of the world as well as an analysis of this information by judicial reform experts.** USAID and IFES partnered on this project in an effort to facilitate and synthesize this novel global discussion and are now in the process of developing a follow-on program to build-upon and disseminate this information to as wide an audience as possible.

The Guide is divided into three main components:

- Part I addresses the main processes and institutional arrangements that affect judicial independence and discusses many of the findings and conclusions from previous reform efforts around the world.
- Part II includes six regional and country studies that outline the cultural, economic, social and political historical and contemporary issues that must be addressed on a case-by-case basis. The three

regional papers relating to Latin America, Central and Eastern Europe, and Anglophone Africa begin with a discussion of the most important circumstances that influence judicial reform efforts in the region and highlights information from the 26 country papers and surveys. The papers on France and Italy are included to provide a point of comparison and historic departure, since many of the countries follow the civil code model of the Napoleonic Code. The paper on the United States is intended to expand our knowledge of judicial development in our own country, and, together with the paper on Anglophone Africa, to focus attention on the common law tradition.

- Part III is composed of several papers written by rule of law experts on specific themes relevant to judicial independence, some of which has been incorporated into the comparative analysis in Part I.

Some of the highlighted issues in this Guide include:

- Building broad coalitions to support judicial independence reforms.
- Reducing internal and external judicial interference and corruption.
- Enhancing judicial independence through capacity building and training.
- Increasing judicial independence through more transparency and accountability.

The Guide is currently available on the Internet at http://www.ifes.org/rule_of_law/judicial_independence.pdf

IFES

1101 15th Street, NW

Third Floor

Washington, DC 20005

202-828-8507, Telephone

202-452-0804, Fax

www.ifes.org

- Increasing societal respect for an independent judiciary.
- The role of and issues related to civil society and the media in promoting judicial independence.
- The role of and issues related to Judicial Council in promoting judicial independence.
- The role of and issues related to the budget, salaries, tenure and nominations, qualifications, selection, promotion and disciplinary processes in promoting judicial independence.

We would welcome your comments or participation in this on-going project. For further information please contact Keith Henderson at khenderson@ifes.org or Gail Lecce at glecce@usaid.gov.

*****Country Papers: France, Italy, United States; Regional Papers: Africa, Eastern Europe and Eurasia, Latin America; Thematic Papers: "Civil Society Contributions to Judicial Independence", "Judicial Independence and Judicial Accountability: the Shifting Balance in Reform Goals", "The Context for Judicial Independence Programs: Improving Diagnostics, Developing Enabling Environments, and Building Economic Constituencies for Reform", "The Role of Court Administration in Strengthening Judicial Independence and Impartiality"; Country Surveys: Kenya, Malawi, Nigeria, Uganda, Zambia, Zimbabwe, Egypt, Philippines, Bulgaria, Georgia, Poland, Romania, Slovakia, Ukraine, Argentina, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Panama, Paraguay***

Annex 4e:

Judicial Independence Standards and Principles

A number of international and regional human rights instruments mandate “an independent, impartial and competent judiciary”. Various guidelines have been set forth internationally in documents drafted by experts, such as the UN Basic Principles on the Independence of the Judiciary. While these documents are not binding on member states, they evidence high-level support for the principle of judicial independence.²

The following are many of the documents and guidelines, governmental and non-governmental, that promote the principle of judicial independence in every region of the world.

I. International Conventions

A. Universal Declaration of Human Rights

Universal Declaration of Human Rights, Article 10, 12/10/1948, United Nations, G.A. res. 217A(III)

B. International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights, Article 14(1), 12/16/1966, United Nations, GA resolution 2200A(XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force on March 23, 1976

II. International Guidelines and Principles

A. Amnesty International Fair Trials Manual (1999)³

First published December 1998, AI Index: POL 30/02/98

B. Lawyers Committee for Human Rights Fair Trial Guide⁴

What is a Fair Trial? A Basic Guide to Legal Standards and Practice, Lawyers Committee for Human Rights, March 2000

C. UN Basic Principles on the Independence of the Judiciary (1985)

Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53 (1985)

² Additionally, there is some case law available. The UN Human Rights Committee, the Inter-American Human Rights Commission and Court, the European Human Rights Court and the African Human Rights Commission have had to interpret, respectively, article 14(1) of the International Covenant on Civil and Political Rights, articles 8(1) and 27(2) of the American Convention on Human Rights, article 6(1) of the European Convention on Human Rights and articles 7(1) and 26 of the African Charter of Human Rights.

³ <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>

⁴ <http://www.lchr.org/pubs/fairtrial.htm>

D. Procedures for the Effective Implementation of the UN Basic Principles on the Independence of the Judiciary (1989)

Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, Committee on Crime Prevention and Control, 10th Session, Vienna, Austria, 1988, ECOSOC resolution 1989/60, 05/24/1989

E. Basic Principles on the Role of Lawyers (1990)

Basic Principles on the Role of Lawyers, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990

F. Guidelines on the Role of Prosecutors (1990)

Guidelines on the Role of Prosecutors, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990

G. Draft Body of Principles on the Right to a Fair Trial and a Remedy (1994)

Draft Body of Principles on the Right to a Fair Trial and a Remedy, Annex II, in “The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening”, Final Report, Commission of Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 1994

H. Universal Charter of the Judge

Universal Charter of the Judge, General Council of the International Association of Judges, Taipei, Taiwan, 11/17/1999

III. UN Special Rapporteur on the Independence of the Judges and Lawyers

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur on the Independence of Judges and Lawyers in 1994.⁵ His mandate includes investigatory, advisory, legislative and promotional activities pertaining to issues of judicial independence.

IV. Regional Conventions

Africa

A. African Charter on Human and People’s Rights

African Charter on Human and People’s Rights, Article 26, 06/27/1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21, 1986

Americas

B. American Declaration of the Rights and Duties of Man

⁵ The current Special Rapporteur is Mr. Dato’ Param Cumaraswamy.

American Declaration of the Rights and Duties of Man, Article XXVI, 1948, OAS res. XXX, Ninth International Conference of American States, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)

C. American Convention on Human Rights

American Convention on Human Rights, Articles 8(1) and 27(2), 11/22/1969, OAS Treaty Series No.36, 1144 U.N.T.S. 123, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), entered into force on July 18, 1978

Europe

D. European Convention for the Protection of Human Rights and Fundamental Freedoms

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1), 11/04/1950, Council of Europe, European Treaty Series no.5

V. Regional Guidelines and Principles

Asia and the Pacific

A. Statement of Principles of the Independence of the Judiciary “Tokyo Principles”

Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 07/17-18-1982, Tokyo, Japan, LAWASIA Human Rights Standing Committee

B. Revised Statement of Principles of the Independence of the Judiciary

Revised Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 09/13-15/1993, Colombo, Sri Lanka, 5th Conference of the Chief Justices of Asia and the Pacific

C. Statement of Principles of the Independence of the Judiciary “Beijing Statement”

Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 08/19/1995, Beijing, China, 6th Conference of the Chief Justices of Asia and the Pacific

Commonwealth (the United Kingdom and the former British colonies)

D. Latimer House Guidelines for the Commonwealth

Latimer House Guidelines for the Commonwealth, Joint Colloquium on “Parliamentary Supremacy and Judicial Independence...towards a Commonwealth Model”, Latimer House, United Kingdom, June 15th-19th, 1998

Europe

E. Judges’ Charter in Europe

Judges’ Charter in Europe, 03/20/1993, European Association of Judges

F. Recommendation no.R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges

Recommendation no.R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 10/13/1993, 518th Meeting of the Ministers' Deputies, Council of Europe

G. European Charter on the Status of Judges

European Charter on the Status of Judges, 07/08-10/1998, Council of Europe, Strasbourg, France

Middle East

H. Recommendations of the First Arab Conference on Justice "Beirut Declaration"

Recommendations of the First Arab Conference on Justice, "Beirut Declaration", 06/14-16/1999, Conference on "The Judiciary in the Arab Region and the Challenges of the 21st Century", Beirut, Lebanon

Latin America

I. "Caracas Declaration"

Caracas Declaration, 03/04-06/1998, Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, Caracas, Venezuela

Annex 4f:

Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be

no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

© Copyright 1997 - 2000

**Office of the United Nations High Commissioner for Human Rights
Geneva, Switzerland**

Annex 4g:

The Universal Charter of the Judge

Preamble

Judges from around the world have worked on the drafting of this Charter. The present Charter is the result of their work and has been approved by the member associations of the International Association of Judges as general minimal norms.

Member associations have been invited to register their reservations on the text in Annex A.

Art. 1 - Independence

Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.

Art. 2 - Status

Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.

Art. 3 - Submission to the law

In the performance of the judicial duties the judge is subject only to the law and must consider only the law.

Art. 4 - Personal autonomy

No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts.

Art. 5 - Impartiality and restraint

In the performance of the judicial duties the judge must be impartial and must so be seen.

The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved.

Art. 6 - Efficiency

The judge must diligently and efficiently perform his or her duties without any undue delays.

Art. 7 - Outside activity

The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge.

The judge must not be subject to outside appointments without his or her consent.

Art. 8 - Security of office

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

Any change to the judicial obligatory retirement age must not have retroactive effect.

Art. 9 - Appointment

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation.

Art. 10 - Civil and penal responsibility

Civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.

Art. 11 - Administration and disciplinary action

The administration of the judiciary and disciplinary action towards judges must be organized in such a way, that it does not compromise the judges genuine independence, and that attention is only paid to considerations both objective and relevant.

Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation.

Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.

Art. 12 - Associations

The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.

Art. 13 - Remuneration and retirement

The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges work and must not be reduced during his or her judicial service.

The judge has a right to retirement with an annuity or pension in accordance with his or her professional category.

After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge.

Art. 14 - Support

The other powers of the State must provide the judiciary with the means necessary to equip itself properly to perform its function. The judiciary must have the opportunity to take part in or to be heard on decisions taken in respect to this matter.

Art. 15 - Public prosecution

In countries where members of the public prosecution are judges, the above principles apply mutatis mutandis to these judges.

(The text of the Charter has been unanimously approved by the Central Council of the International Association of Judges on November 17, 1999)

Annex 5:

INTERNET RESOURCES

United Nations

www.un.org

www.un.org/rights/dpi1837e.htm - United Nations background note, Independence of the Judiciary: A Human Rights Priority

www.undp.org – UN Development Program

www.unhchr.ch/hchr_un.htm - UN High Commissioner for Human Rights

www.unhchr.ch/html/menu2/7/b/mijl.htm - UN Special Rapporteur on the Independence of Judges and Lawyers

Council of Europe

www.coe.int

cm.coe.int/ta/rec/1994/94r12.htm – Recommendation on the Independence, Efficiency and Role of Judges (Committee of Ministers)

www.echr.coe.int – European Court of Human Rights

<http://curia.eu.int/en/txts/acting/statut.htm> - Statute of the European Court of Justice

European Union

www.europa.eu.int

www.eumap.org – EU Accession Monitoring Program – *Monitoring the EU Accession Process: Judicial Independence*, Open Society Institute/EU Accession Monitoring Program

Organization for Security and Cooperation in Europe

www.osce.org

www.osce.org/odihr/

USAID

www.usaid.gov

www.usaid.gov/democracy - Democracy and Governance

IFES/AEOBiH

www.ifes.org

http://www.ifes.org/rule_of_law/judicial_independence.pdf - Guidance for Promoting Judicial Independence and Impartiality

www.ifesalbania.org – IFES Albania

www.ifes.ltd.uk – IFES Ltd, London

www.aeobih.com.ba – Association of Election Officials in Bosnia and Herzegovina

International Bar Association

www.ibanet.org

www.ibanet.org/humri/index.asp - Human Rights Institute

World Bank

www.worldbank.org

www.worldbank.org/publicsector/legal - Legal Institutions of the Market Economy

www.worldbank.org/publicsector/legal/judicialindependence.htm - Judicial Independence
www.worldbank.org/wbi/ - World Bank Institute

American Bar Association

www.abanet.org/ceeli - Central and Eastern European Law Initiative

National Center for State Courts

www.ncsc.dni.us – “Call to Action, Statement of the National Summit on Improving Judicial Selection” 2000

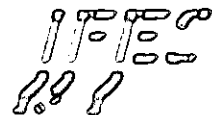
International Association of Judges

<http://www.iaj-uim.org/ENG/01/1980.html> - First Study Commission, Meeting in Tunis 24-25 October 1980

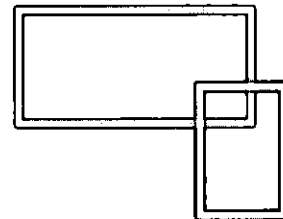
NGOs

www.ewmi.org – East-West Management Institute

www.transparency.org -Transparency International



MAKING DEMOCRACY WORK



**INTERNATIONAL
FOUNDATION
FOR ELECTION SYSTEMS**
1101 15th Street, NW
Third Floor
Washington, DC 20005

202.628.6507, Telephone
202.452.0804, Fax
www.ifes.org

USAID

