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SELECTED ISSUES, CHALLENGES AND STRATEGIES

THE WORLD BANK FORUM ON LEGAL AND JUDICIAL REFORM IN EASTERN EUROPE AND THE FORMER SOVIET UNION
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 PREFACE BY

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VICE PRESIDENT AND GENERAL COUNSEL

THE WORLD BANK

The rule of law is essential to meaningful development. Nowhere has this been witnessed more vividly than in the transition economies of the Europe and Central Asia (ECA) region, including the former Soviet Union. A strong rule of law, buttressed by a well-functioning legal framework and judicial system, is essential for a successful transition from a centrally planned economy based on state-owned enterprises to a market economy based on freedom of choice. Without clear, enforceable property rights and rules, this transition will be difficult and capital flight inevitable. Only with the rule of law can economic growth be equitable; only with the rule of law can poverty reduction be sustainable. Promoting the rule of law is thus central to the World Bank’s mission of fighting poverty.

The historic city of St. Petersburg seemed a fitting backdrop for a historic forum to discuss the issues, challenges, and strategies relating to legal and judicial reform in the ECA region. On July 11-12, 2001, the World Bank Legal Vice Presidency convened a forum in St. Petersburg that brought together 125 leading judges, lawyers, law professors, and other experts from Europe, Central Asia, and the United States.

This report closely tracks the discussions at the ECA Forum. Written by one of the World Bank’s consultants on legal and judicial reform, Mark K. Dietrich, in close collaboration with
the ECA legal team, it reflects the concerns, priorities, and strategies that the panelists and participants at the ECA Forum discussed during the conference sessions. It is divided into sections on judicial independence and accountability, access to justice and public awareness, legal education, and administrative law reform. In addition, issues relating to the implementation of legal reform programs, the importance of European standards, and the need to combat corruption are discussed throughout the report. The report places these discussions in context by providing additional background and information regarding these subjects.

I would like to express my gratitude to Johannes Linn, Vice President for the Bank’s ECA Region, for lending his support to this program and for making the introductory comments, reproduced herein, that provided such an excellent framework for the discussions that followed. Furthermore, I appreciate the efforts of our legal team responsible for conceiving the conference and compiling the following report in an effort to share with a broader audience the concerns and ideas raised at the ECA Forum.¹

My gratitude goes also to our hosts in St. Petersburg; the panelists (whom we have sought to credit in the accompanying footnotes); and the other representatives of the donor community, including the Center for International Legal Cooperation (CILC), the Constitutional and Legal Policy Institute (COLPI), and the United States Agency for International Development (USAID), whose organizations funded the participation of many leaders from the region.²

² This report as well as other World Bank publications on legal and judicial reform, including the 2002 Initiatives in Legal and Judicial Reform and the 2000 Legal and Judicial Reform in Central Europe and the Former Soviet Union—Voices from Five Countries, can be found on the World Bank’s website at: http://www4.worldbank.org/legal/leglr/publications_ljr.html.
LEGAL AND JUDICIAL REFORM

IN EASTERN EUROPE AND THE FORMER SOVIET UNION:

REFLECTIONS FROM THE WORLD BANK ECA FORUM

I. OPENING COMMENTS BY JOHANNES LINN, VICE PRESIDENT, THE WORLD BANK

It is a great pleasure to address this special session on legal and judicial reform in the transition economies of the ECA Region. I would like to extend special thanks to our Russian hosts, to the participants from around the region, and the organizers from the Legal Vice Presidency of the World Bank.

I would like to address four questions:

Why have we convened a special session on ECA?
What have been the accomplishments so far in the area of legal and judicial reform?
How has the external donor community contributed to those accomplishments?
What are the principal challenges for the future?

A. THE IMPORTANCE OF LEGAL AND JUDICIAL REFORM IN THE ECA REGION

Why is this region having an “extra” session, when just this morning we completed a global conference on legal and judicial reform?
The reason is that the ECA region faces particularly difficult challenges in the area of legal and judicial reform. This December will mark the ten-year anniversary of the end of the Soviet Union. For a decade now, the countries of this region have struggled to emerge from centralized economies and non-democratic regimes to become democracies with free market economies. One of the biggest shifts in our understanding of transition over the course of this decade has been on the role of legal and judicial institutions. It is fair to say that, at the start of the transition, legal and judicial reform was not at the top of the agenda. Part of the reason was that the transition countries faced a number of critical tasks – like fighting runaway inflation, halting the initial decline in growth, and establishing some order in the fiscal system – that required immediate and urgent policy reforms. But it is also true that at the start of transition, there was a belief that the rapid development of private property ownership and the entry of new businesses and entrepreneurs would create the demand for the development and enforcement of a legal framework to protect property and contract rights. It was recognized early on that legal and judicial reform could not be imposed on these countries from above, or from the outside, but needed to develop endogenously as a result of the changing demands of citizens for stability, protection, and an environment conducive to investment and growth.

A decade later, we now have a much clearer understanding of the obstacles that have prevented the supply of legal and judicial reforms from meeting this new demand. While the supply of new laws has increased dramatically, we have seen that the capacity to enforce these laws, i.e., the extent of the establishment of a rule of law, has not met expectations in many countries. The sheer magnitude of the task of writing and approving new laws, reforming the selection and appointment of judges, refining legal and administrative procedures, and creating the mechanisms to enforce judicial decisions has overwhelmed many countries of the region still struggling with a substantial reform agenda. Corruption, though a symptom of an inadequate legal framework, must also be seen as a cause of the lack of strong progress in establishing the rule of law, as certain groups reap substantial gains from the uncertainty of poorly enforced property rights despite the costs to society at large.

2. Legal and Judicial Reform in Eastern Europe and the Former Soviet Union
It is quite clear now, a decade later, that the countries of the region need to focus much more effort, not only on ensuring the development of clear and comprehensive legislation, but also on strengthening the capacity, independence and accountability of the judicial system necessary to interpret and enforce the law. This is critical to lay the foundation for investment and growth in those transition countries that have been lagging behind. We have seen in many of the countries of Central Europe how the establishment of a rule of law can generate a virtuous circle in which the investment environment encourages entrepreneurship and the entry of new firms, which, in turn, helps the economy grow, creates jobs, and reduces the high levels of poverty and inequality that we have seen in countries further east.

Finally, strengthening the rule of law is necessary to protect the broad range of human rights that played such an important role in motivating the transition from communism in the first place. For this reason alone, legal and judicial reform deserves the prominent place it now holds on the transition agenda throughout the region.

We have, accordingly, convened this regional session in recognition of the vital importance of legal and judicial reform to the overall transition process. We have brought together leading reformers from across the region to examine the complex issues still confronting legal and judicial reform in ECA, and to develop plans and to identify priorities that will help us to overcome those challenges.

B. ACCOMPLISHMENTS SO FAR

Although the primary purpose of this meeting is to look to the challenges ahead, I would like to reflect for a moment on the advances that already have been made, and to remind ourselves of what the baseline for reform was in December 1991.

Two legal scholars recently remarked that the Soviet Union "treated law as simply one of a number of instruments of rule, and not even as the dominant one. Both political decisions and administrative regulations . . . took precedence over law, and even
the application of regulations often took an *ad hoc* form and was strongly influenced by personal relationships. Judges were dependent on local Communist Party bosses, who dictated decisions concerning politically sensitive cases to the courts. Fortunately, those days are largely behind us. The constitutions and laws of the countries represented here recognize that the future lies in a market economy governed by the rule of law. The fundamental remaining question is to what extent are those laws being enforced, and how are they being enforced.

The key to enforcement is, of course, the establishment of an independent and accountable judiciary. Many countries are making important advances in establishing an independent judiciary. For example, here in Russia, there has been progress, including the introduction of a new financing system for the judiciary, particularly, the federal funding for all courts of general jurisdiction; the establishment of judicial governing bodies such as the Congress of Judges and the Council of Judges, the Qualification Commission and the Judicial Department; and reforms of the civil and criminal procedure codes. All these have been significant steps in promoting truly independent and effective judiciary. Other countries have also taken key steps forward. The process of appointing judges in Georgia through the application of judicial qualification examinations set the standard for appointing judges throughout the region. Several countries, including Moldova, Romania, and Latvia, have established judicial training centers.

C. **CONTRIBUTIONS OF THE DONOR COMMUNITY**

Systemic legal and judicial reform requires fundamental reforms of key institutions—a process that takes time and requires considerable commitment from the countries themselves. But where there is commitment, donors can help, as they have in a number of countries.

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4. **LEGAL AND JUDICIAL REFORM IN EASTERN EUROPE AND THE FORMER SOVIET UNION**
For example, in Armenia and Georgia various donors are assisting their local counterparts in a comprehensive judicial reform process including the establishment of new court administration and modern case management systems, strengthening of the enforcement function, upgrading of the institutes responsible for judicial training, and carrying out a public information campaign concerning the new roles and responsibilities in the justice systems. In Albania and Georgia important assistance was provided for the difficult process of recertification of judges. The World Bank is also involved in assisting new judiciaries in Bulgaria, Kazakhstan, Croatia and may soon start activities in other countries.

Donors have also contributed to education and outreach efforts. For example, the European Union, Germany’s Gesellschaft für Technische Zusammenarbeit (GTZ), the USAID, the Canadian International Development Agency (CIDA), Department for International Development of the United Kingdom (DFID), and the Soros Foundation have provided crucial support in establishing judicial training centers around the region and in supporting associations of judges that are advocating for change. The American Bar Association’s Central and Eastern European Law Initiative (ABA-CEELI), the Ford Foundation, and the Soros Foundations have also led the way in introducing legal clinics that give law students an opportunity to obtain practical experience while at the same time providing needed services to their communities on issues ranging from small business development to obtaining unpaid salaries and other benefits for laid off workers. In Russia, the Russian Foundation for Legal Reform – funded through a World Bank loan – has been instrumental in developing textbooks and educating the public concerning the rule of law. The Foundation has also helped make the law more accessible, through its support of public interest law centers around the country.

So there is clearly a useful role that donors can play in supporting legal and judicial reform, but it is important that we carefully coordinate our assistance, pursue an appropriate division of labor, and remain modest in our expectations about how much can be achieved how quickly by outside advice and finance.
D. **FUTURE CHALLENGES**

The most important reason for our gathering today, however, is to identify and prioritize the challenges ahead.

I have already touched on what I believe to be the basic challenge. This is to convert the law from words on paper into a reality for the citizens of the region. There are four important priorities to make this happen.

First, we need to establish an independent, efficient and accountable judiciary. This requires having a well-trained, well-funded cadre of judges who decide cases not based on connections or pressures or payments, but according to the law and the facts before them. Such a judiciary must also be empowered to review the acts of the executive branch, through a process of administrative review. Justice must also be administered efficiently. In too many countries in this region, the adjudication of a simple civil matter can take several years. Court administration processes need to be modernized and clerks and other support staff better trained so that the judiciaries can more quickly dispense decisions. Finally, the judiciary must be accountable -- easy to say, difficult to achieve. Transparency, publicized opinions, clear standards and procedures, peer review and a vibrant free press and civil society are likely to be the key ingredients of judicial accountability.

Second, we need to make sure that the judicial system is accessible to all parts of society. A well-trained, independent judiciary is of little value if it is not accessible to all elements of society. We must work together to ensure that we do not create a system that serves elites only; access to justice, and educating the public about their rights, are rightly prioritized as key concerns.

Third, we need to ensure that the institutions that provide legal education support the vision we have for the legal and judicial system. Any changes that we make in our legal systems today will be undercut if law students are not trained in modern commercial law, in ethics, and in public service. Their education, moreover, must be practical. It is particularly important that the law is...
presented to students as something real, the application of which has real consequences, and not just as theory.

Finally, combating corruption is of vital importance. As already noted, it has marred the transition process overall, and we see the results in polls in which citizens express their distrust of the courts and of government agencies. Corruption in transition economies is a hugely complex issue, and numerous conferences have been convened and books written about it. I only want to remind us to bear this issue in mind while considering the other agenda items.

E. CONCLUSION

Let me conclude by pointing out that, as Chief Justice Arthur Vanderbilt of the New Jersey Supreme Court once said, law reform “is not for the short-winded.” As in other countries, law reform is a complex, long-term process. And we are in it, together, for the long haul.

This conference is a step in a process, and we hope to work with you and others in the donor community to convene sub-regional conferences in the coming months that will identify specific steps necessary to implement true legal and judicial reform throughout the region. We look forward to hearing your views on what steps we can take together to improve the judiciaries in the countries of the region, improve access to justice, and reform the legal education systems. We will be using the themes that emerge from this meeting to organize those conferences, and we will be following up with each of you soon to push ahead to the next round.

Although law reform is a long-term process, we need to move quickly. As a Kyrgyz law professor recently observed,
“People have a right to justice now.” Let us quickly and efficiently work together towards our goal of establishing states where the law is more than mere words on a page. It must become the true protection of fundamental human and economic rights. The establishment of those rights, we hope, will lead to prosperity and peace throughout this region and beyond. Thank you.


8. LEGAL AND JUDICIAL REFORM IN EASTERN EUROPE AND THE FORMER SOVIET UNION
II. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

A. INTRODUCTION

Reforming the judiciaries of the former communist countries of the ECA region has been an obvious priority since the historic events of 1989 and 1991. Each constitution of the new democracies recites, in one way or another, that judges are now "independent and subject only to the law." Those few words frame a conflict inherent to the role of the judiciary in any democracy: the judiciary should be independent, but also accountable. Establishing

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5 The panel on Judicial Independence and Accountability consisted of Charlotte Keijzer, Head of the Dutch Project for Strengthening the Judicial Organization, the Netherlands; Joel Martin, Executive Director, the CEELI Institute, Prague, the Czech Republic; and Henrikas Mickievicius, the Open Society Institute, Budapest, Hungary. Irina Kichigina, Senior Counsel, the World Bank, moderated.

6 Constitution of Romania, Art. 123(2) (1991); see also, e.g., Constitution of Georgia, Art. 84(1) ("A judge is independent in his activity and is subject only to the constitution and the law."); Constitution of Slovakia, Chapter 7, Art. 144 (Judges are "independent in making decisions and bound solely by the law."); Constitution of the Russian Federation, Art. 120 (1) ("Judges shall be independent and submit only to the constitution and the federal law.").
the appropriate levels of independence and accountability has been the fundamental challenge of judicial reform throughout the ECA region for the past 10 years.

During the communist era, the judiciaries of the region enjoyed little independence and were overly accountable to political forces. In important political cases, for example, the judiciary was obligated to follow the will of the communist party. The procuracy, representing the interests of the state and the party, largely dictated the results of criminal trials, and judges had little discretion to find the accused "not guilty." The means of control over the judiciary, moreover, were plentiful. Judges, proposed by the communist party, stood for uncontested elections for relatively short (e.g., five-year) terms. Failure to comply with instructions from the procuracy or the party could result in the loss of position, the transfer to another region, or a diminution of bureaucratic support.7

Recognizing the need for judges who would be better able to protect human and private property rights, the reformers in the emerging democracies have sought, with the support of the donor community, to increase the independence of their judiciaries. A significant problem that the donors and the reformers encountered, however, was that enhancing the power and independence of the judiciary was perceived (rightly) as a threat to the powers of other entrenched interests in the illegitimate business community, the procuracy, or even the presidency. In some cases, opposition to reform came from within the judiciary itself, as reforms could lead to the loss of power to presidents of courts and threaten profitable corrupt practices. In addition, many citizens of the ECA region have become more distrustful of their judiciaries, viewing them as corrupt and inefficient.8 Thus, there were (and there remain) both

7 For a more full description of the judiciary during the Soviet era, see Solomon and Foglesong, supra; see also "Voices," supra, pp. 28 - 36.

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political forces and public support for maintaining, or reintroducing, some of the old forms of holding the judiciary accountable.

Striking the right balance between judicial independence and accountability requires, as was discussed at the ECA Forum, a better understanding of what these two terms mean.9

B. JUDICIAL INDEPENDENCE

An important preliminary question is determining what judges are supposed to be independent from. On the most basic level, individual judges must be independent from the parties before them. Judges must be impartial, meaning they must not have an interest, financial, personal, or otherwise, in seeing that one side or the other (including the state) prevails in the matter that they are hearing. Judges, moreover, should decide matters according to the law and the facts, and not according to undue influences (such as bribes or threats) placed upon them by the parties.10

In addition to independence of individual judges, courts must enjoy structural independence. A key role of the judge in a democratic society is protecting individual and human rights, which often requires the judge to take decisions inimical to the legislative branch, the executive power, or even to the public. In this sense, judiciaries sometimes perform the vital task of acting as a counterweight to the majoritarian interests represented by the executive and the legislature. The judiciary, accordingly, must also be independent from the other branches of power, as well as, at least in some sense, from public pressure. An independent judiciary

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therefore requires not just the independence of the individual judge, but also the structural independence of the judiciary as a whole.\(^{11}\)

One challenge for those working on judicial reform in emerging democracies is identifying what steps need to be taken to improve judicial independence in order to allow judges to take impartial decisions. “Independence,” as used above, is a relational and somewhat subjective term, and we tend to know an independent judiciary only when we see it.\(^{12}\) It is, in a sense, tautologically self-defining: an independent judiciary is one that makes decisions independent of all influences other than the facts and the laws before it. Nevertheless, the European Court of Human Rights (ECHR) in Strasbourg, in interpreting and applying Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (guaranteeing citizens of Council of Europe (COE) states the right to a fair trial and the impartial administration of justice) has had to identify at least some indicia of an independent judiciary.\(^{13}\)

In determining whether a court is independent, the Strasbourg court tends to look at issues such as manner of judicial appointment, duration of tenure, and the existence of guarantees against outside pressure. In one case, the court held that the members of a tribunal are independent when they “are not subject to any authority, being answerable only to their own conscience.”\(^{14}\) In a more recent case, the Strasbourg court found that Romania had violated Article 6 because a judicial decision relating to the ownership of a house in Bucharest that had been enforced and rendered *res judicata* was overturned based on subsequent actions taken by the Prosecutor General and the Supreme Court. The

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13. The overall importance of European institutions in setting reform goals for countries in the ECA region was the subject of a separate plenary session at the ECA Forum. The panel on European Standards consisted of Judge Wilhelmina Thomassen of the ECHR, Strasbourg and Patrick Tituan of the Directorate-General of Legal Affairs, the COE. Hans-Jürgen Gruss, Chief Counsel, the World Bank, moderated.
Strasbourg court held, in essence, that these actions interfered with the right to the finality of judicial decisions.¹⁵

Some of the donor organizations have also sought to delineate the contours of an independent judiciary. One of the most recent such efforts, as described at the ECA Forum, is the Judicial Reform Index (JRI) of the ABA-CEELI. The JRI provides a template for judicial reform by listing 30 statements, based largely on the United Nations Basic Principles on the Independence of the Judiciary (1985) and the COE’s Recommendations on the Independence, Efficiency and Role of Judges (1994), that are descriptive of what an impartial, independent, accountable, and efficient judiciary should look like. According to the JRI, for example, judicial salaries must be “generally sufficient to attract and retain qualified judges, enabling them to support their families, and live in a reasonably secure environment without having to have recourse to other sources of income.” This factor relates to individual independence, in the hopes that judges who are well paid will be less likely to seek recourse to corrupt practices. Another statement also goes to the heart of protecting individual judges: “Sufficient resources are allocated to protect judges from threats such as harassment, assault and assassination.” Other elemental protections set forth in the JRI are:

“Judges have immunity for actions taken in their official capacity.”

“Senior level judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.”

“Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.”¹⁶


¹⁶ The JRI was presented at the ECA Forum by Joel Martin, Executive Director of the CEELI Institute in Prague. CEELI is currently applying the JRI, on a trial basis, in Bosnia and Herzegovina and Romania. Copies of the JRI template may be requested from CEELI, 740 15th Street, NW, Washington, DC 20005.
Recognizing that developing a more independent judiciary is also an important concern of the European Union (EU), the Soros-funded COLPI has recently issued a series of reports on judicial independence in those ECA countries seeking EU accession. These reports, as described at the ECA Forum, examine issues relating to political branch involvement in core judicial affairs, political commitment to judicial independence, the constitutional and legislative underpinnings of judicial independence, the administration of the court system, financial autonomy and level of funding, and issues relating to judicial appointment, tenure, and discipline.17

The discussions at the ECA Forum made clear that some important steps have been taken towards establishing greater judicial independence in countries represented. In many of the countries, for example, judges now have long tenure terms. Almost all the countries of the region have also created largely independent constitutional courts that have the jurisdiction to determine whether parliamentary acts comply with the constitution.18 Recognizing the role of the ministry of justice in controlling the judiciary during the communist era, some countries – including Russia and Georgia – have opted to establish departments responsible for court administration that report directly to the judiciary, similar to the Administrative Office of the United States Courts.19 Many countries, with significant donor support, have established judicial

17 COLPI’s approach was described at the ECA Forum by Henrikas Mickievicius of the Open Society Institute, Budapest. The COLPI country reports cover Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. Monitoring the EU Accession Process: Judicial Independence (Central European University Press, Budapest 2001).
18 For more on the role of constitutional courts and the question of judicial review, see A.E.D. Howard, “Judicial Independence in Post-Communist Central and Eastern Europe,” Critical Perspectives, supra, pp. 89 - 110.
19 The Georgian model was described at the ECA Forum by Lado Chanturia, Chairman of the Supreme Court of Georgia. For more on the Russian Judicial Department, see Solomon and Foglesong, supra, pp. 58 - 60.
training centers to retrain their judges. And many countries have revised their criminal procedure codes to transfer the power to issue arrest and search warrants from the procuracy to the judiciary. At least some courts in the region are exercising these rights and powers in an increasingly independent fashion.

C. **Judicial Accountability**

As one participant at the ECA Forum noted, judicial independence means responsibility, and responsibility entails an appropriate measure of accountability. The question is to whom or what should a judge be properly held accountable?

First, as is made clear from the constitutions throughout the region, it is essential that judges be accountable to the law itself. This means that they themselves follow and obey the law. Being a judge does not entitle one to speed down the highway in excess of the legal limit, or to accept bribes. This does not mean that judges should not have immunity for their official actions – they should not be held liable for their judicial decisions, even if unpopular; but when judges act beyond the law, they should be called to account.

Being accountable to the law also means that a judge must decide a case only by applying the law to the facts of that case, to the best of his or her ability. This requires the judge to write an opinion explaining why the case has been decided a certain way. For some cases, that is a relatively simple matter. For more difficult cases, and cases which have been in the public eye, it is particularly important for the judge to spell out his or her understanding of the

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20 Albania, Bulgaria, Macedonia, Romania, and Russia are among the countries that have established or re-invigorated such training centers.

21 Many countries have amended their criminal procedure codes in this way to comply with COE guidelines. Russia recently amended its criminal procedure code (in November 2001, but not effective until January 1, 2004) to empower judges, rather than prosecutors, to issue search and arrest warrants.


23 See p. 5, fn. 4, *supra*.

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facts, and how the law is being applied in that matter. The decision must then be made publicly available and subject to journalistic and academic scrutiny.\textsuperscript{24}

Judges are also accountable to their profession. The importance of the role of the judge in a democratic society cannot be understated, and the failure of one judge to behave properly reflects poorly on the reputation of the profession as a whole. Many independent judiciaries, therefore, have adopted codes of ethical conduct that are enforced through fair and transparent processes.\textsuperscript{25}

Next, judges should be accountable to the public they serve. This places judges in a somewhat delicate situation because, as discussed above, judges are charged with protecting individuals and minorities from the excesses of the majority. On the other hand, judges are responsible for resolving cases efficiently, and for not only acting fairly but also being perceived as acting fairly. Accordingly, judicial hearings must be heard in open court, before the public, and judges must treat the public with respect. In addition, data on judicial performance should be made public and judges should be required to issue income and asset declarations.\textsuperscript{26} A frequently heard complaint in the ECA region is that it takes too long to resolve cases; indeed, many of the cases that are brought to the ECHR relate to delays in the judicial system.\textsuperscript{27} Judges have a responsibility to their public to hear the cases before them in an

\textsuperscript{25} In the United States, the American Bar Association’s Model Code of Judicial Conduct provides the basic standards of conduct, covering matters such as \textit{ex parte} communications, conflicts of interest, and political activities. Some of the judges in the ECA region have created judicial associations that have adopted codes of conduct, as in, for example, Macedonia and Kazakhstan. These voluntary codes do not, however, have the force of law. Some laws on the courts and civil and criminal procedure codes, on the other hand, also provide some ethical guidelines. In Romania, for example, the Law on the Organization of the Judiciary (Arts. 110 – 122), the Criminal Procedure Code (Arts. 46 – 54), and the Civil Procedure Code (Arts. 24 – 36) all contain ethical guidelines for judges.
\textsuperscript{26} Hammergren, \textit{Guidelines, supra}, p. 151.
\textsuperscript{27} Comments at the ECA Forum of Judge Wilhelmina Thomassen of the ECHR in Strasbourg.
efficient and timely manner. Open access to the courts and efficiency of the system, moreover, are essential to building public confidence and stability in the court system.\footnote{The use of public opinion polling as a means of increasing judicial accountability is discussed at p. 16, \textit{infra}.}

Finally, judges are also responsible to the state. Again, this entails striking a delicate balance because judges must protect individuals from unfair treatment by the state, but at the same time judges must enforce the laws of the state (assuming they do not violate the constitution or other higher legal authority, such as international treaties). In other words, judges must ensure that the state is treated as fairly as any other party that comes before it.

As noted, judicial independence and accountability are abstract and relational terms, which come into sharper focus only when considered in specific situations. Participants in the ECA Forum pointed to the following flash points of conflict between the two concepts.

\section{FLASH POINTS}

\subsection{JUDICIAL COUNCILS}

Most of the emerging democracies in the ECA region have created judicial councils, charged with recommending appointments to, advancements within, and dismissals from the judiciary. These councils have varying memberships and functions, and may be subject to varying criticisms. Some variants comprise solely of judges, and the proposal to create a council in Lithuania, as reported at the ECA Forum, also envisions a judges-only organization.\footnote{The Russian Judicial Qualification Commissions are described in more detail in Solomon and Foglesong, \textit{supra}, pp. 55 – 58.} The creation of these judges-only councils were greeted with enthusiasm in the West because it meant that judges would assume greater control over the advancement, disciplining, and removal of their own. But the reaction of the citizens to these councils has been quite skeptical. In both Bulgaria and Russia, for example, citizens worry
that the judiciary is becoming a closed circle, where corrupt judges are protected, leading to a backlash against the judiciary.\footnote{Indeed Russia has recently taken some steps that could limit the powers of its Judicial Qualification Commissions. N. Yefimova, “Ten Years On, Legal System Revamped,” The Moscow Times (November 23, 2001).}

Participants at the ECA Forum suggested several means of maintaining independent judicial councils while enhancing appropriate judicial accountability. One important step is ensuring that these councils act on the basis of objectively identified minimum standards. The councils, for example, should administer some form of transparently applied examination in order to ensure that the judicial nominees are well qualified and are not being considered on the basis of cronyism. Such examinations should cover procedural, substantive, and ethical issues, and those taking the exam should have some prior notice of the issues to be covered. Similarly, judges who are proposed for promotion – in particular those who may be moving from a provisional judicial appointment to a lifetime appointment – should also be required to take an objective examination based on established standards. Other objective criteria for advancement, relating to efficiency and dereliction of duty, should also be considered in the advancement of judges. Again, both types of examinations should be administered under the eye of the press and the public.\footnote{Georgia’s experience with judicial qualification examinations was described at the ECA Forum by Lado Chanturia, Chairman of the Supreme Court of Georgia.}

The make-up of the councils is of vital concern, and it is questionable whether they should consist solely of judges. The newly created five-member judicial council in the Netherlands that is taking over management of the court system from the Ministry of Justice includes three former court presidents and two outsiders, including one financial – management expert. It is notable, however, that issues relating to the removal of judges will be heard by the Supreme Court, not by the council.\footnote{Comments of Charlotte Keijzer, Dutch Project for Strengthening the Judicial Organization, at the ECA Forum.} In contrast, in Guatemala, as one participant noted, a mixed panel of both judges and representatives of civil society hear disciplinary proceedings against
judges. It would seem that in emerging democracies, where transparency is a key to building public confidence, these councils should include representatives of the bar and of civil society. Of course, such councils will still be only as good as the people who serve on them, and they can be used to protect corrupt interests in any event. Participants at the ECA Forum also suggested that the method for selecting who will serve on these councils should also be divided amongst differing interests, including the executive, legislative, and judicial branches, as well as, potentially, the bar and civil society.

2. **MASS MEDIA**

The media obviously can play an important role in effectuating the accountability of the courts by reporting and commenting on important cases and the overall administration of justice. On the other hand, the press can also act as an impediment to judicial independence. Irresponsible or non-factual reporting for sensationalist or political reasons can do much damage not only to individual judges but also to the ideal of an independent judiciary. The ECHR has ruled that comments by journalists “may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice.” In the ECA region, the judiciary sees itself as being constantly and unfairly under attack by the press for releasing accused criminals and not acting in the public interest. The press, in their view, fails to present these issues from the perspective of the judge or to attempt to explain to the public the role of the judge in the matter at hand.

Judges, however, must recognize that they hold a place on the public stage and that a certain amount of criticism of their decisions is unavoidable. As one participant at the ECA Forum said, “being a judge is not for the thin-skinned.” Judges, moreover, need to better understand the press and the needs of the press. Many courts in the ECA region are just now opening press offices and

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33 *Worm v. Austria* (Application No. 22714/93, Judgment August 29, 1997, Reports 1997-V, p. 1552. The *Worm* case was described at the ECA Forum by Judge Wilhelmina Thomassen of the ECHR.

19. **LEGAL AND JUDICIAL REFORM IN EASTERN EUROPE AND THE FORMER SOVIET UNION**
hiring officers to handle media relations. The non-governmental judicial organizations in the region can also play an important part in educating their membership concerning press relations, as well as educating the public and the press concerning how and why the judiciary may be handling certain types of cases.

In short, journalists, not just judges, are accountable to the public, and those who cover the courts should be trained in the law and ethics as well as the judges who are hearing the cases. Only an objective and trained press can help the cause of increasing judicial accountability; in contrast, a politically motivated and uneducated press can constitute a serious threat to judicial independence.

3. **THE THREAT FROM WITHIN**

Most discussions of judicial independence concern threats from the other branches of power, or structural threats. As noted above, however, judges must also enjoy individual independence, and threats to that independence may come from within the judicial system itself. In this regard, increased accountability of the judiciary as a whole can serve to increase the independence of the judges who serve within it.

One important example of this concern relates to the method of assigning cases. In most courts in the ECA region, court presidents are responsible for assigning cases to judges or panels. This means that a corrupt court president can be persuaded to assign a case to himself or another corrupt judge. In the best of circumstances, where the court president assigns cases based on his knowledge of the expertise and caseloads of his colleagues, he is

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34 For more on this topic, see Shetreet, *Judicial Independence, Today*, supra, pp. 345 – 57.

35 The potential for corruption is also increased by the practice throughout the region of judges meeting with lawyers and clients on an *ex parte* basis. Such meetings may sometimes be necessary, especially when an individual is proceeding *pro se*, also common in the region, and needs special assistance from the court, but the opportunities for *ex parte* discussions should be minimized. Even if the judge is not corrupt, such meetings allow for others to believe that corruption is at play, thereby undermining the credibility of the judge and the judiciary.
spending precious judicial time on what is essentially an administrative task. There is little excuse for the judiciaries throughout the region not to adopt a more objective and chance-driven method for assigning cases. Doing so would enhance both the independence and the accountability of the courts at one stroke. On a broader issue, perhaps the ECA countries need to re-examine the role of court presidents generally, who can wield important managerial powers in terms of allocating scarce resources and recommending judges for advancement, and who are often subject to political manipulation because they can be removed by the ministries of justice or are overly reliant on local government officials for support. The countries should consider transferring some of the work of court presidents to professional court managers (as is being done in Russia), or changing the means of appointing judges and the tenure of service as presidents.\(^{36}\)

Another concern relates to the issue of higher courts issuing mandatory guidelines for the lower courts to follow. This practice, unfortunately, hearkens back to the communist era usage of administrative and judicial guidelines that carried greater weight than the relevant legislation. Although judicial guidelines may serve an important function in streamlining and harmonizing the law, the practice becomes problematic when such guidelines are mandatory. As one panelist at the ECA Forum emphasized, the independence of individual judges to apply the law to the facts as they best understand them should not be impinged by higher, unaccountable, judges who have little knowledge of the facts under consideration.\(^{37}\)

E. CONCLUSION

Balancing judicial independence and accountability cannot be done on mathematical terms: there is no single, correct answer. Indeed, the appropriate balance is likely to be shifting at any given

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36 Solomon and Foglesong, supra, p. 48.
37 Ironically, this practice has led to some salutary results. In Russia, for example, the Supreme Court issued an order to the lower courts that, because the Duma had not yet enacted a revised code of criminal procedure, the courts should apply constitutional safeguards directly in criminal cases. Solomon and Foglesong, supra, pp. 76–77.
time in the development of a nation’s democracy and judiciary. Judicial independence and accountability, moreover, are the flip sides of one coin, and one should not exist without the other. What is important, however, is for the country to be ever searching for the right balance, and finding new ways to strengthen the independence of its judiciary while ensuring that it is performing its duty of adjudicating disputes among citizens, and between citizens and the state, in a fair and responsible manner.
III. ACCESS TO JUSTICE AND PUBLIC AWARENESS

A. ACCESS TO JUSTICE

Having an independent and accountable judiciary has little meaning if it is not accessible to all members of society. The court system must not only serve the business community and other elites, it must also provide vital services to all members of society. This is particularly important in countries in transition where fundamental societal issues are being addressed, new rights are being granted, and new governments are seeking to establish their credibility. At a very minimum, the legal system must ensure that indigent parties are provided with adequate information and legal representation in criminal trials and, under certain circumstances, in civil cases.39

38 The panel on Access to Justice consisted of Borislav Petranov, Insights (London-based NGO); Avrom Sherr, Woolf Professor of Law at the Institute of Advanced Legal Studies, University of London; and Raimondas Sukys, Chairman, Committee on Legal Affairs of the Seimas of the Republic of Lithuania. Ahmed Jehani, Senior Counsel, the World Bank, moderated.

39 The COE has also recognized the importance of the access to justice. Article 6 of the European Convention on the Protection of Human Rights guarantees the right to a fair hearing, including the right to free representation to those who do not have the means to pay when such is required in the interest of justice. Although Article 6 focuses mainly on criminal procedure, the ECHR has held that the state also infringes on a person’s rights when legal assistance is not provided in some civil cases. Comments at the ECA Forum of Raimondas Sukys, Chairman, Committee...
More broadly, the access to justice also entails adequate physical infrastructure, physical and intellectual access to laws, court decisions and other relevant legal documents, adequate administrative services for the users of the judiciary, reasonable court fees and exemptions from fees for certain categories of parties or cases, timely dispensation of justice, special assistance to disadvantaged individuals or social groups, legal awareness programs, and an ongoing and transparent communication between the judiciary, the media and the public.

The panelists at the ECA Forum pointed out, however, that ensuring access to justice is both complex and expensive. Many countries, in both the common law and civil law traditions, have undertaken a variety of approaches to solving the problem of access to justice, yet all have encountered various difficulties and criticisms. The panelists, nevertheless, were able to articulate a number of questions to be addressed when developing a legal aid system. These considerations include: What should be the scope of the government’s responsibility – should it provide representation in both civil and criminal matters? Should it hire lawyers directly, or fund Non-Governmental Organizations (NGOs) or the bar to provide representation? What types of matters should not be included, and why? What sort of representation will be provided – in court, or just in office consultations, or will it vary depending on the type of matter? Who will determine who can have access to such state-supported representation? How will that be determined? How do you protect against abuse, and how long will the representation last? What are the limits?

Once the parameters of a governmental program are determined, one must address implementation. How will the program be paid for? Will it be national or local in character, or a mix? Will there be additional taxes on the bar? Can savings be incurred by providing incentives for pro bono representation by members of the bar? What can be done to ensure that the level of professionalism will be appropriate? Programs using law students on Legal Affairs of the Seimas of the Republic of Lithuania; see also “Voices,” supra, pp. 22 – 24.

24. LEGAL AND JUDICIAL REFORM IN EASTERN EUROPE AND THE FORMER SOVIET UNION
and apprentice lawyers, for example, may be helpful, but there must be adequate supervision by fully qualified attorneys. Similarly, some work can be handled by paralegals and other non-lawyer professionals, but again ensuring the quality of the work is an important challenge.

The legal systems in the ECA countries continue to face serious challenges in all of these areas. In the civil arena, relatively high filing fees (including to pursue appeals) may prohibit plaintiffs from filing claims. Because the law does not always require individuals to be represented by attorneys in civil matters, those who pursue their own cases may not receive equal treatment compared to those who can afford to hire attorneys. Under the best of circumstances, a judge may provide special assistance to a pro se litigant, thereby adding to delay to the case and the system overall.

Some help is, of course, being provided. Most countries in the ECA region, for example, require the bar to maintain a list of lawyers whom the state will pay to represent criminal defendants, at least in some stages of the trial. As in the West, these attorneys are frequently underpaid and under-prepared. Many countries have created Offices of the Ombudsman where citizens can seek assistance in matters relating to the protection of human rights, but an ombudsman does not typically represent individual clients in court. Other help is being provided through law clinics and NGO supported consultation centers. Few countries, however, have established fully accessible legal representation bureaus to represent the interests of those who cannot afford representation in both civil and criminal cases.

Lithuania is one of the few countries in the ECA region to address the questions posed above, and is in the process of developing a nation-wide system of legal assistance.40

Prior to 2001, Lithuania lacked a broad mechanism for the provision of free legal assistance to those who could not afford to

40 The following is based on the comments of Raimondas Sukys, Chairman, Committee on Legal Affairs of the Seimas of the Republic of Lithuania, at the ECA Forum.
hire an attorney. Free legal assistance, paid for from the state budget, was provided to persons only in criminal cases and then only when the participation of a defense attorney was specifically required by the Criminal Procedure Code, such as during interrogation, preliminary investigation and court proceedings. The new Law on State Guaranteed Legal Assistance, effective January 1, 2001, ensures the provision of the assistance of legal counsel when individuals cannot afford to hire their own lawyer or when Lithuanian laws or international agreements require that persons be provided free legal counsel, irrespective of their financial abilities.

The new law conditions the provision of assistance on a person’s financial ability, based on a calculation of his income and ownership of property, ranging from 100% free representation for the most needy to 50% coverage for those who have a greater ability to pay. The law introduces three types of state-funded legal assistance: primary legal assistance, state legal assistance, and legal assistance funded by non-governmental organizations.

“Primary legal assistance” involves the provision of legal information by municipal executive bodies, consultations on legal matters, and drafting of legal documentation. Such legal assistance is provided only to the neediest category of citizens. In order to ensure the quality of the service, the law stipulates that only licensed attorneys or their assistants shall provide these services.

“State legal assistance” involves the services of an attorney in court proceedings. Legal defense and representation in court are undertaken for the protection of the rights and interests of suspects, accused persons, defendants and convicted persons or their representatives in criminal, civil and administrative cases. Since the Law on State Guaranteed Legal Assistance came into effect, free legal assistance is being provided not only to the above-listed categories of persons but also to victims and civil plaintiffs in criminal cases, to plaintiffs, defendants and third persons having independent claims in civil cases, and to claimants in administrative proceedings. The decision as to whether to provide state legal assistance is made by the interrogator, prosecutor, or judge in charge of the case. Defense attorneys or their assistants are then appointed to provide the representation and are paid from the state budget.
Lithuania’s economic situation, however, does not enable it to fund a large amount of primary and state legal assistance. The law, therefore, allows for the third method of providing representation, funded by private initiatives. A variety of organizations, most prominently the Open Society Institute (OSI), have established law clinics, legal assistance centers and public attorney offices in Lithuania’s largest cities (Vilnius, Kaunas, and Šiauliai) to provide consultation and representation to citizens in a variety of civil and criminal matters.

B. **Public Awareness**

Increasing public knowledge and understanding of the law is another key component of legal and judicial reform. On the most basic level, public education is necessary so that citizens become aware of and seek to enforce their rights. Public education, in other words, is a prerequisite for holding governmental bodies accountable, and as such is an essential underpinning to a successful democracy.

Public education, the panelists noted, can and should take place on many levels. Education concerning the legal system and the fundamentals of democracy must begin early, in grade school and high school. Course materials should cover issues regarding national and local government structures, but also international obligations such as the European Convention on the Protection of Human Rights and more fundamental matters such as ethics and public participation. They should also include site visits to courts and legislatures, and include the participation of civil society. As was reported at the ECA Forum, the donor community has supported some efforts in this area, for example in the writing of new textbooks and through “Street Law” programs (through which

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41 The panel on Public Awareness consisted of Ljudmilla Maikova, Head of the Commission on Relations with the Media and Civil Society of the Council of Judges, Russian Federation; Jose Juan Toharia, Chairman of the Sociology Department of the Universidad Autonoma de Madrid, Spain; and Santiago Zorzopulos, the World Bank Business Ethics and Integrity Office. Jose-Manuel Bassat, Communications Officer, the World Bank, moderated.

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law students and young lawyers visit high schools and talk to students about the law and justice system). These efforts have been, however, largely *ad hoc*. The leadership of the legal reform and civil society movements should work more closely with the donor community and the host governments to take a more holistic approach to revising textbooks and providing courses — in the early education years — on the fundamentals of a democratic society.

But public education also involves training adults concerning new laws and the methods at their disposal (e.g., through ombudsman’s offices) to enforce them. This means that the ombudsman’s offices, the courts, the bar, and other organizations need to prepare materials and public service announcements that will make their offices more accessible and understandable to the layman. Again, as noted at the ECA Forum, donor community support in this area has been largely *ad hoc*: some institutions in some countries have developed informational materials, but not all of them, and there have been few public service announcements aired over the broadcast media.

Public education is also vital to the process of revising the legislative framework in countries in transition. The substantive issues should be debated in the press and the media as well as in the parliament when a new law is being considered. Likewise, the government enforcement bodies should advertise new laws that have broad impact on the public or which include public enforcement mechanisms. This form of public education, done correctly, can aid both the transparency of the drafting process and the ultimate enforcement of the law itself.

Obviously, the media plays a vital role in educating the public on all these issues. Both the reformers and the donor community have paid insufficient attention to educating journalists concerning the public service they provide in reporting on the justice system. Likewise, institutions such as the courts and the ombudsman’s offices have not done enough to improve their
relations with the press or to use the media as a way to educate the public concerning the role they play in a democratic society.\textsuperscript{42}

Finally, as noted above, public opinion should be considered as a means of holding government officials accountable. One panelist in particular advocated the use of public opinion polling as one means of increasing judicial accountability. He cautioned, however, that polls only measure "public opinion," which "does not provide 'truths' nor 'solutions:' it just expresses basic social reactions, feelings and attitudes." The data gathered, nevertheless, can serve some useful functions. First, in the case of positive results, the backing provided by public opinion "represents an important protective shield against potential external threats;" it can, in other words, help to protect the independence of the judiciary. Second, if the results show a poor public opinion that runs counter to the experts' view of how the system operates, that will indicate a need for the system to adopt a better informational or public relations policy. Third, opinion data "may be instrumental in fostering debates around sensitive matters. They can fuel social momentum that might result in an increased legitimacy and social support of reform policies." Finally, the polling data provides a means of auditing the performance of the court system.

\textsuperscript{42} This only now is beginning to change. The commercial court system (arbitrazh courts) in Russia have hired two press secretaries. Comments of Ljudmilla Maikova, Head of the Commission on Relations with the Media and Civil Society of the Council of Judges, Russian Federation.

29. \textit{LEGAL AND JUDICIAL REFORM IN EASTERN EUROPE AND THE FORMER SOVIET UNION}
IV. LEGAL EDUCATION

A. INTRODUCTION

Both the donor community and the reformers throughout the ECA region have long recognized the need for legal education reform. The problems inherited from the communist era, such as antiquated teaching methodology and a curriculum were compounded by new problems associated with the collapse of the old regimes. These included: the sudden establishment of substandard, poorly-regulated law schools; a lack of computers and other equipment, and an overall dismal physical infrastructure of the law schools; curricula that failed to adequately address important emerging topics, such as commercial law, ethics, and international standards; and a dearth of professors and textbooks to cover those topics.

The donor community has largely hesitated to address these issues because of the tremendous and long-term challenges inherent in changing the system. As in other countries, the academic

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43 The panel on Legal Education consisted of Nikolai Kropachev, Dean of the St. Petersburg Law Faculty, St. Petersburg State University, the Russian Federation; William Loris, Director-General, the International Development Law Institute (IDLI), Rome, Italy; Michael Maya, Director, NIS Programs, ABA-CEELI, Washington, D.C.; and Zaza Namoradze, Deputy Director, COLPI, Budapest, Hungary. Ian Newport, Senior Policy Advisor, Dewey Ballantine, LLP, Washington, D.C., moderated.

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communities in the ECA region are often conservative and resistant to reform. On the other hand, as the panelists at the ECA Forum made clear, some important advances have also been made. Faculty exchanges, largely funded by the donor organizations, have led to the upgrading of teaching skills and materials. Several law schools, such as St. Petersburg State, have allocated funds to improving their infrastructure, modernizing their libraries, and constructing computer centers. Many law faculties, including the state schools in Bucharest and Warsaw, offer programs taught in cooperation with prestigious law schools in the West. While commercial law topics and international standards may not always receive the emphasis they should, they are now at least somewhat covered in the curricula. In terms of teaching methodology, many schools now offer clinical programs, discussed in detail below.

Unfortunately, in many countries, the problems still outweigh the advances. The law faculties attract bright young students and have many excellent professors, and so the potential for excellence (complying with the tradition of many of these schools) is there. The need to address the problems, moreover, cannot be understated: the sustainability of legal and judicial reform is dependent on educating the future lawyers and judges of the region.\footnote{The importance of legal education reform was emphasized at the ECA Forum by, amongst others, Jan van Olden, Director, CILC, Leiden, the Netherlands; see also “Voices,” supra, pp. 24 – 28.} The following highlights the primary areas of current concern, as articulated at the ECA Forum.

\section*{B. \textbf{Current Issues}}

\subsection*{1. Accreditation Standards\footnote{This section is largely based on comments made at the ECA Forum by Michael Maya, NIS Director, CEELI.}}

The past 10 years have seen a tremendous increase in the number of students who are interested in studying law. In a sense, this is a very positive development: some of the most capable students, throughout the region, who might in the past have pursued careers in engineering, for example, are now interested in law and
justice. Of course, many of these students, as in the West, are attracted to the law more for economic reasons than for any other, but this increased interest in the legal profession nevertheless bodes well for the future.

The negative side of this increased interest, however, has been the proliferation of substandard law schools to accommodate the increased demand for a legal education. Ukraine, for example, went from having six law faculties in 1990 to over 175 by 1998. Georgia now has over 200 law faculties, even though its population is $\frac{1}{10}$ of Ukraine's. The United States, by comparison, has fewer than 200 accredited law schools even though its population is roughly 275 million. Many of these new schools are private institutions with no real space, no library, and only a few, part-time professors. Others are affiliated with state institutions that did not previously offer law courses and which are also very small and staffed only with part-time faculty, but which were opened in order to gain income through tuition fees that new students were willing to pay for a law degree.\(^4\)

Market forces will, eventually, address the problem: there are simply too many law schools for too few students. The better law schools will ultimately weed out the lesser law schools. That, however, will take time, and in the meanwhile innumerable poorly trained lawyers will be free to represent an unknowing public.\(^5\) Moreover, the quality of schools can wax and wane over the years, unless they are held to at least some minimal standards. In the United States, the Department of Education has charged the American Bar Association (ABA) with accrediting American law schools (including any overseas programs they might offer), and the ABA has issued a series of minimal standards that a new law school must meet. Each existing law school must undergo an extensive

\(^4\) A related problem, noted by participants at the ECA Forum, is the establishment – without accreditation review – of branches of Russian law schools in other countries.

\(^5\) The implementation of objective and transparent means for the licensing of lawyers would also help to protect the public. It would also force the schools to improve if they are to continue to attract tuition paying students: one of the factors students in the United States consider in selecting a law school is the percentage of graduates that pass the bar examination.
ABA review every seven years to ensure that it is continuing to meet those standards; failure to pass that review can result in the loss of ABA accreditation, followed by a loss in enrollment and tuition.

The key, of course, is establishing fair and objective measures for accreditation. Reportedly, decisions today concerning accreditation in the region are often made according to contacts and fees rather than to objective standards. These standards should cover issues such as the quality of the library collection, student access to computer and other equipment, the quality of the professors (established by observing teaching skills, reviewing publications, and interviewing students and peers), quality of the school's physical plant, and the subject matters offered in the curriculum. By developing fair but rigorous accreditation standards, substandard schools will be prevented from opening up in the first instance, and some existing law faculties will be forced to shut down. This would be a healthy development, since every citizen should be able to trust that his or her lawyer graduated from a school that meets certain minimum standards.

2. **ADMISSIONS AND GRADING STANDARDS**

Corruption is an insidious problem throughout the state structures of the ECA region. It is of particular concern within the context of legal education, where students as young as 17 years old are exposed to a culture of corruption at the outset of their legal careers. If a student learns that the way to obtain favorable results in law school is by paying for them, one has to believe that these habits will stay with them upon graduation. The problem is real: a young and very capable CEELI staff member in Central Asia, for example, had to quit law school because she did not have enough money to pay bribes in order to sit for exams and to obtain passing grades. Admission decisions to the best law schools may also be made based on corruption and contacts rather than on objective criteria. Determining which students will be required to pay tuition or not at the state supported schools is also an area of abuse.

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48 This section is largely based on comments made at the ECA Forum by Michael Maya, NIS Director, CEELI.

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Typically, each school has its own criteria and examination process for admissions, but the administration has much discretion in deciding the issues of admission and fee payment, in a process where transparency and accountability are lacking.

One way to address the problem of corruption in the admissions process is the development of a standardized admission examination akin to the uniform, multiple-choice examination all law students must take before applying to American law schools. A prospective student's score on this exam is only one of several factors considered by admissions departments in these schools, but it is an objective and often highly accurate predictor of a student's success in law school.

As for addressing the issue of corruption in grading, here too at least partial reliance on objective, multiple-choice examinations, administered blindly, might also be useful. Administering at least some examinations in this way would not necessarily require abandoning the tradition of oral examinations, but would enhance the objectivity of the process and help to combat the problem of corruption in grading.

3. **CLINICAL LEGAL EDUCATION**

The primary complaint concerning the law school curriculum in the ECA region relates to teaching methodology: it is too theoretical and provides students with little opportunity to understand the real world application of the law. The practice in the ECA region, existing since before the communist period, has been for the professor to stand before a large lecture hall, read his notes summarizing the contents of the applicable code, and then entertain questions in a subsequent seminar.

Some schools are addressing this concern by adopting, with funding from a variety of donors, clinical legal education programs. The term "clinical legal education" encompasses a variety of practical teaching methodologies, including allowing students (with

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49 This section is based largely on the comments made at the ECA Forum by Zaza Namoradze, Deputy Director, COLPI.
professorial supervision) to represent clients in real cases, placing students in internships, and using role playing exercises in the classroom. It is a pedagogical methodology that emphasizes practice over theory, uses real-life scenarios for developing important lawyering skills, and improves the understanding of legal doctrines by testing them in practice and reflecting on them afterwards in a classroom setting.

Clinical programs were first introduced into the ECA region in about 1997, and have proven to be immensely popular. An estimated 75 university-based clinics have been established in more than two dozen countries in the region. A typical clinic in the region is a semester-long in-house and university accredited elective course for third or fourth year students who provide free legal counseling to a selected group of people (indigent criminal defendants, refugees, or pensioners, etc.) with some limited supervision by a professor or lawyer. There are numerous clinics in which students also appear in court either independently (depending on the legislation of a given country) or with an attorney. Students undergo special preparation before they meet real clients, covering issues such as the substantive law that will be applied, interviewing and counseling techniques, and ethics and professional responsibility (each clinic typically has an ethics code that must be signed by each student). Students have an opportunity to develop essential skills such as legal reasoning, problem-solving, legal writing, interviewing, decision-making, counseling, negotiation, etc. Moreover, they learn how the law, the courts, and the state agencies really work, and what is expected from them as attorneys.

Clinical legal education programs bring two other important benefits, in addition to the pedagogical ones described above, to the region. First, they provide assistance to individuals who would not otherwise have access to legal representation. Law clinics have provided consultations to thousands of people across the region on matters that are of utmost importance to the common citizen regarding pension rights, employment rights, and family law. While

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50 One of important ancillary benefits of clinical legal education programs has been the introduction of the formal teaching of ethics and professional responsibility in some law faculties.

35. LEGAL AND JUDICIAL REFORM IN EASTERN EUROPE AND THE FORMER SOVIET UNION
clinics cannot answer entirely the problem of access to justice in post-communist societies, they clearly have an important role to play. Second, working in a clinic inculcates in young law students a social responsibility that they might not otherwise develop. It is realistic to think that the ideal of public service, in a region lacking the tradition of pro bono representation, will not be abandoned after graduation. In addition, an integral part of clinical legal education is training the students to be true advocates, and to see the law and the courts as avenues for societal change. Law students who have made a difference in their societies by compelling the enforcement of environmental or domestic violence laws will emerge from those experiences as agents for further change and development in their countries. 

Despite the many benefits of clinical legal education programs, they have been – and in some areas, continue to be – met with opposition. This is not unexpected: clinical programs were also opposed by law schools in America when they were first introduced some twenty years ago. As in the United States, the traditional law school faculties and administrations in the ECA region do not view clinical programs as a part of true academia. Many schools in the region, accordingly, refuse to grant academic credit to students for working at the clinics, many of which are housed at NGOs rather than at the law schools. The administrations should recognize, however, that almost all accredited law schools in the United States now have clinical programs, and many students select their law school based on the size and quality of those programs. The fact that students continue to work at them despite the lack of credit should be seen as a sign of their permanence and popularity.

One inescapable problem is that law clinics are expensive. Ideally, there should be one professor/supervisor for every 10 – 15 students. In civil law countries, where law students are much younger than their counterparts in the United States, it may be even more important to maintain a high level of lawyer supervision. For the short-term, continued donor support is necessary, but at some

51 A third, hidden benefit is that some professors are using more interactive techniques, such as problem solving or Socratic style case studies, in the non-clinical courses.

36. LEGAL AND JUDICIAL REFORM IN EASTERN EUROPE AND THE FORMER SOVIET UNION
future point the law schools themselves, in the face of demand by tuition paying students, will need to allocate sufficient resources to the clinics.

A third challenge relates to the opposition to clinics by the established bar in some countries, which believe that the clinics are diverting potential clients away from them. Again, clinics in the United States initially met this same sort of resistance. The concern turned out to be misplaced: the clinics could handle only a limited number of clients, and those clients that it represented would not have been able to pay for representation in any event. Indeed, the clinics must ensure that they represent only the truly needy. But the organized bars should work with, not against, the clinics. Students who have worked at the clinics will, ultimately, be better lawyers, a result that the bar should embrace. The clinics and the bar need to engage in a meaningful dialogue that would lead to a mutually beneficial accord. One area of potential overlap and joint interest would be for the clinics and the bar to devise a formula to enhance the utility of the usual one or two year probationary period that law graduates must undergo before being fully licensed to practice law.  

V. Administrative Justice

A. Introduction

Administrative law reform was not a high priority in the early post-communist years in the ECA region: other topics, also important but also more glamorous, such as constitution writing, criminal law reform, judicial reform, and commercial code drafting, captured the attention of both the reformers and the donor community. Administrative law reform was perhaps a tertiary goal, largely because neither the reformers nor the donors always understood what the other was talking about. In the ECA countries, lawyers viewed administrative law through a communist prism, where it was largely a subsection of the criminal law, and the administrative codes were a means to punish citizens for lesser, "administrative" violations, akin to misdemeanors. In the West, on the other hand, administrative codes define how the state agencies should interact with the citizens, and cover rights that lawyers and citizens frequently take for granted. Neither side

53 The panel on Administrative Justice consisted of Jacek Chlebny, Judge, Naczelný Sąd Administracyjny w Łodzi, Poland; Howard N. Fenton III, Professor of Law, Ohio Northern University Pettit College of Law, the United States; Michiel Scheltma, Professor of Law, Chairman of the Scientific Counsel of Government Policy, former Commissioner of the New Dutch Administrative Code, the Netherlands. Matthias Meyer, Executive Director, the World Bank, moderated.

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saw administrative law as an issue that needed to be addressed immediately.54

But administrative law reform is an essential component of legal reform in countries in transition. One American law professor has defined administrative law as "the legal doctrines - a complex mixture of constitutional, statutory, regulatory, and 'common law' principles - that govern the structure, decision processes, and behavior of administrative agencies."55 In other words, administrative law provides the rules that delineate the relationship between the citizen and the state agencies. This is a particularly important topic in the ECA region because of the size and responsibilities placed on state agencies as a legacy of the communist era. Indeed, citizens in the region interact more often with state agencies in order to obtain housing permits, social security benefits, or business licenses, than with judges, prosecutors, judicial administrators, and the other usual targets of legal reform programs. Moreover, the citizens' interactions with the state agencies have historically been far from positive. During the late communist period (and continuing today, at least throughout much of the region), obtaining permissions or results from state agencies relied more on nepotism, favor-swapping, and petty corruption than on the objective application of uniform rules. One of the most pervasive problems has been "administrative silence," where the agency simply fails to respond to a request until the requisite personal contact is made or a bribe is paid. The failure of the agencies to change their standards of behavior contributes significantly to the corruption and loss of faith in state agencies that threaten the process of overall reform – on both economic and human rights terms – throughout the region.

54 In the intervening years, of course, most (but not all) countries in Central Europe have at least modernized their administrative codes, but implementation and public awareness of the shift in meaning in those codes still lag. Many of the former Soviet countries have also re-written their administrative codes (e.g., Georgia and Russia), but many have not (e.g., Armenia and Ukraine), and again implementation and public education are still needed even where the codes have passed.

As the panelists at the ECA Forum underscored, administrative law reform requires surmounting some imposing challenges. First, lawmakers, judges, civil servants, and the public must make a 180 degree shift in their understanding of the meaning of administrative law so that they see it as a means of holding the state more accountable to the citizen and not the other way around. In addition, the bureaucrats who previously used their positions of power over the citizen to extract bribes and favors, under a new administrative regime, would need to act fairly or be subject – presumably – to sanctions by review boards or the courts, or to public condemnation. Administrative law reform, accordingly, entails removing powers and prerogatives from governmental bodies and interests, and so will be opposed by those interests.\(^{56}\) Third, because administrative code reform can potentially affect all state agencies, it is very difficult to implement. Despite these challenges and because of its importance to legal and judicial reform, the ECA Forum included a full plenary session on administrative justice. The following summarizes the panel’s views regarding the key issues relating to administrative law reform.

**B. KEY ISSUES**

1. **SCOPE**

   The first fundamental question is determining what the scope of the administrative code will be. Will the code cover all agencies in a country? If so, will it cover every aspect of all sectors of administrative law, such as tax, housing, the environment, and social security? If certain aspects are to be omitted, why?

   On a related matter, it is imperative that drafters carefully consider the impact administrative law reform will have on other laws. Holland, which recently revised its administrative code, concurrently looked at all other relevant existing legislation, and all

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\(^{56}\) As Professor Fenton pointed out, efforts at reform in Ukraine and Armenia began and effectively ended with drafting an administrative law concept paper, which was useful for identifying key issues but also enabled opponents to derail the process by getting bogged down in overly theoretical issues.

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inconsistent provisions were revoked at the same time that the new administrative law went into effect. 57

2. **ADMINISTRATIVE PROCEDURES**

It is elemental that administrative agencies operate under clear rules of procedure that will ensure the impartiality of the decision-maker, the equal treatment of all applicants, and the ultimate reasonableness of the decision. These procedural rules should cover matters such as the time in which the agency must respond to an application, whether the applicant has a right to a hearing on his request and how to hold such a hearing, and the need for an explanation of the decision. Although one judge from the ECA region questioned the need for administrative law reform because her laws already required administrative officials to be “fair and impartial,” clear procedures are nonetheless needed to assure the fairness, and the perception of fairness, that goes to the heart of administrative law reform. 58

The law must also address how and when administrative decisions may be reviewed by the administration itself. Here again the law must make clear how and where an applicant may file his appeal, what the time limits are, and what rules will govern the appeal process. 59

Finally, the law should include means for ensuring the transparency of government actions. Something akin to the United

57 Holland undertook administrative law reform for some of the same reasons as the ECA countries: the code was overly complex and focused too much on the obligations rather than the rights of citizens. Holland’s reform process took 11 years, involved the full participation of administrators, judges, law professors, and the bar. The draft law, which drew on the experience of other nations and was especially mindful of EU regulations and decisions, was published and subject to public and parliamentary debate before it was finally enacted. Comments of Michiel Scheltema, former Commissioner the New Dutch Administrative Code, at the ECA Forum.

58 Comments of Professor Howard Fenton III at the ECA Forum.

59 Comments of Michiel Scheltema, former Commissioner the New Dutch Administrative Code, at the ECA Forum.

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States Freedom of Information Act, which ensures access to government information, should be included in the law. In addition, the law should include procedures for ensuring that people who are to be affected by agency action receive notice of that action, and are given an opportunity to voice their opinions concerning it.60

3. **Judicial Review of Administrative Decisions**61

Administrative law reform is unlikely to succeed unless it includes a provision for the review of administrative decisions by an independent and impartial judiciary. This requirement entails addressing several subsidiary questions.

First, what will the jurisdiction of the court be? Will it be empowered to review all administrative decisions? Should there be exclusions based on the national interest, or should such cases simply be handled in camera? Will a review within the agency be required before the citizen may bring the matter to court? In Poland, for example, governmental agencies internally reviewed 300,000 decisions last year, of which 60,000 (or only 20%) were challenged in court. The number of challenges in court would be much higher without the internal review.

Second, what type of court will review the case? Will a separate administrative court be organized, or will a separate section within another court be organized, or will some court of general jurisdiction be empowered to review administrative decisions? Will the court have a trial section and an appellate section? In Poland, there is only one level of administrative court, a system that is criticized on the grounds that it cannot hear all the cases efficiently, leading to delays. Having a two-tiered system, on the other hand, is more expensive.

Third, issues relating to standing need to be addressed. Can a litigant bring a case in the public interest? If so, it is important to ensure that a true public interest is being affected. On a related

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60 Comments of Professor Howard Fenton III at the ECA Forum.
61 The following is based largely on the comments of Judge Jacek Chlebny of Poland at the ECA Forum.

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matter, what deference, if any, should be given to the government decision?

Fourth, and most importantly, how will judicial decisions be enforced? In Poland, the administrative court cannot impose its decision directly on the agency. If the citizen wins in court, the agency must then take a decision consistent with the court opinion. But what happens if the agency does not take a new decision, or if the administration just ignores the decision of the court? The party may appeal to the court, and the judge can impose a fine on the agency or the ministry (under the labor laws the agency can then obtain a refund from the worker who did not comply with the court's decision). Or the party may seek damages from the agency, but that would need to be enforced by a civil court judge.

The system in Poland, as in other countries such as Bosnia and Herzegovina, has been criticized because the citizen must return to the agency, which can take time, and gives the agency an opportunity to respond (or not) in an evasive manner, forcing the citizen to again seek recourse in the courts. In Yugoslavia, if the agency does not implement the decision of the court, then the court can replace the role of the agency, while in Holland the court can take the decision instead of the agency, but only if there is only one decision that is legally acceptable.

4. IMPLEMENTATION

Implementation of administrative law reform programs is particularly challenging because of the broad nature of the topic. Civil servants, judges, and the public all need to be educated. In Holland, special attention was paid to how the law was introduced, with training courses for judges, and pilot programs, etc. The Dutch also provided for regular evaluation after the introduction to see how the new rules were working in practice and identify what additional amendments to the law were needed.62

62 Comments of Michiel Scheltema, former Commissioner the New Dutch Administrative Code, at the ECA Forum.

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As noted above, one of the essential goals of administrative law reform is to increase the accountability of the state agencies. In addition to being held accountable to an independent judiciary, the agencies will also be held accountable to the public through the efforts of an independent media. As one of the panelists at the ECA Forum said, when he was making administrative decisions with the United States government, he and his team would always ask themselves, “How will this decision look on the front page of The Washington Post?” Training of journalists and increasing public awareness of the new administrative law framework should, accordingly, be included in any such reform program.63

63 Comments of Professor Howard Fenton III at the ECA Forum.

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VI. CONCLUSION: POLITICAL WILL AND OTHER LIMITING FACTORS

Participants at the ECA Forum made a number of observations relating to the methodology for implementing legal and judicial reform programs that are of particular relevance to those in the donor community. These comments are summarized below.

1. UNDERSTAND THE BASELINE

Several participants noted that too often foreigners seek to implement reform programs without fully understanding the system that currently exists, and how it developed. Before implementing a program, donors need to work closely with their host country counterparts to conduct empirical research to understand what is in place and to build from that. Legal reform programs, in other words, need to start with what exists on the ground.64 As one participant noted, “It is better to listen to [our local partners] than to export legal concepts. The concept of listening and understanding should be both extended and deepened. We need to better understand local cultures and conditions in order to prevent westerners from thinking that the post-Soviet legal world is a tabula rasa on to which anything – from jury trials to mediation to quick liquidation of

64 Comments of Cheryl Gray, Acting Vice-President, Poverty Reduction and Economic Management Network, The World Bank, at the ECA Forum.

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enterprises to changing the procuracy to reorienting legal education – can be appended. 65

2.  "POLITICAL WILL"

Reforming the legal system of any country is an enormously complicated task. Legal systems are not autonomous, but a part of an overall political and governmental system. 66 As such, many (but not all) legal reform movements require political support. Reform of the judiciary or the procuracy, for example, will not happen without significant governmental and political support, as well as the support of at least key members of those institutions themselves. On the other hand, more grassroots type programs, such developing and supporting legal NGOs that work on human rights or environmental or family-related issues may have at least some success even without political or governmental support. "Political will," moreover, is not a static concept. Political support for reform is likely to rise and ebb over the long period that it takes to implement programs, and frequently because of issues outside of the control of the donor community and the reformers themselves. In addition, the government and the political leaderships are not, as one ECA Forum participant noted, "a monolithic entity, but consist of factions with specific political interests. Support of one faction often brings automatically the obstruction of the other . . . The reality is that one has to fight for most projects." Legal reform, in other words, is by its very nature a political process, likely to have both supporters and opponents in the host country. 67

What does all this mean for the donors?

65 Comments of Rolf Knieper, Professor of Law, University of Bremen, at the ECA Forum.

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First, that they must be flexible and responsive to the changing political winds in the design and implementation of their programs. Lack of clear political domestic support for legal reform does not mean that the donor community should not fund any programs, but those programs that it does support should be perhaps of a limited and grassroots nature. Then, when a political opportunity presents itself, the donor community must be able to move quickly to take advantage of that opportunity.

Second, the donor organizations must understand the political situation on the ground, select their partners wisely, and not alienate the perceived opponents.

By seeking to include both reformers and apparent opponents in the design and implementation of reform programs, the donor community can help to build the necessary political will by identifying common interests and forging alliances and facilitating compromises. Having the right institutional and individual partners will help bridge the inevitable difficult periods when overall political will is on the wane. As one of the ECA Forum participants said, “The long-term engagement of institutions and people are indispensable to creating mutual trust and thereby political commitment.” It is thus essential for the donor organizations to maintain a credible long-term presence on the ground, and that the partnership that emerges be seen as technical rather than political in nature.

Third, reform programs must be true joint ventures. They must be designed and implemented with strong host country participation. Larger programs especially must also be joint ventures in the financial sense of the term: the host countries must be willing

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68 The donor community was instrumental, for example, in bringing the opposing forces together that resulted in a new constitution in Albania. See S. Carlson, “Politics, Public Participation, and the 1998 Albanian Constitution,” *Ost Europa Recht* (December 6, 1999).

69 Comments of Rolf Knieper, Professor of Law, University of Bremen, at the ECA Forum.
to contribute something from their own budget, or allocate a building, or provide some other tangible support.\textsuperscript{70}

Fourth, use the political levers that exist. As noted above, the COE and the ECHR in Strasbourg may be useful in persuading governments and parliaments that change is necessary.\textsuperscript{71}

Fifth, reform programs must result in something that will make the stakeholders happy. Success brings political support.\textsuperscript{72}

3. \textit{Understand the Limitations}

As has already been stated, legal reform is a long-term process, and neither the donors nor the reformers in each country should have unrealistic expectations. As one participant at the ECA Forum said, "It is easier to pronounce the principles of democracy and rule of law than to introduce them into the lifeblood of the nation."\textsuperscript{73} When the Dutch government launched its East European bilateral aid program in 1991, it was emphasized that it was a temporary program that would probably be dismantled in five or ten years. Last year, however, the Dutch government concluded that it had been too optimistic, and decided to enlarge rather than close down the program. "Quick results," concluded one of the ECA

\textsuperscript{70} Although the judicial training centers that have been created throughout the region signify an important positive development, at a May 2000 conference of these centers and their international donors in Chisinau, Moldova, both the directors and the donors complained that the average contribution of the governments to these centers amounted to only 5%. Comments of Jan van Olden, Director, CILC, Leiden; see also “Voices,” supra, pp. 10 – 16.

\textsuperscript{71} Comments of Jan van Olden, Director, CILC, Leiden, at the ECA Forum.

\textsuperscript{72} Comments of Jan van Olden, Director, CILC, Leiden, at the ECA Forum; see also “Voices,” supra, pp. 10 – 16.

\textsuperscript{73} Comments of Lado Chanturia, Chairman, Supreme Court, Republic of Georgia, at the ECA Forum.
Forum speakers, "do not exist in legal reform: an institutional reform project should have a scope of at least three to five years."74

Finally, legal reform programs should be comprehensive and broad based, but the financial realities will require making resource decisions and identifying priorities.75 Similarly, the host countries may only be able to absorb a limited number of programs. This means that the donor organizations and their partners must coordinate closely, identify the most suitable targets for reform, and work to consolidate gains and to ensure sustainability. This does not mean that the donors should emphasize short-term results or address the easier topics. Jan van Olden of Holland summarized this concern at the ECA Forum: "Legislation and training are the easy things, as David Bronheim used to say: everybody can do that and donors love it because it looks so impressive. But the real stuff is institutional development. We want courts to operate better, judges to give more and better judgments, public prosecutors to play a very different role from their traditional one, law faculties and training institutes to renew the content and the format of their training, etc. That requires more than just better laws or training. It requires a long term effort, based on a thorough appreciation of the actual situation, and serious commitments from both donors and recipient parties."76

74 Comments of Jan van Olden, Director, CILC, Leiden, at the ECA Forum; see also "Voices," supra, p. 16.
76 Comments of Jan van Olden, Director, CILC, Leiden, at the ECA Forum.