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# BROTHERS IN LAW: STUMPING FOR THE RULE OF LAW IN THE FOOTSTEPS OF THE COMMISSARS

## *Introduction*

Over the past 13 years, I've had the incredible privilege and good fortune of traveling to more than 15 countries to carry out a total of 25 legal reform projects. These efforts have in most cases been directed and funded by either the U. S. Agency for International Development or the State Department, operating through an initiative of the American Bar Association. My work has taken me to urban centers and remote villages in the former Soviet Union and the Warsaw Pact countries of Eastern Europe, as well as parts of North Africa and the Middle East. My most recent assignment took me to Turkey to train 30 Iranian lawyers on law practice management, case preparation, and oral and written advocacy skills. The focus of this paper, though, will be on the former Communist countries of the U.S.S.R., Eastern Europe and the Balkans, which are in transition to (or, sadly, in some cases, from) market economies, fully participatory democracies, and the rule of law.

By way of background, I have been a business and tax lawyer with Barnes & Thornburg since 1972, and continue to be of counsel to the firm, but in 1998 I took a leave of absence to head up a commercial law reform program for a year in Russia. That and subsequent shorter-term projects have involved a wide range of activities, from drafting legislation to training lawyers and judges, building professional associations, conducting formal assessments of the host country's legal profession or judicial system, and generally helping to promote the rule of law.

## *The Rule of Law*

The rule of law has been defined in various ways, but my own description is "an environment in which a person's rights and obligations are clearly defined by written laws, and are enforced by a fair, impartial and predictable system of justice in accordance with due process of law." Perhaps John Adams said it best in the 1780 Massachusetts Bill of Rights when he called for "a government of laws, not of men."

Needless to say, there are many ingredients that go into this recipe, but two critical ones are lawyers and judges. These people must have and exercise fundamental rights and freedoms; be well-educated; follow clear, comprehensive and well-enforced ethical and other professional standards; have the resources and facilities they need to do their jobs; see that legal assistance if provided to the disadvantaged; and participate in independent and effective professional associations. My work over the past 13 years has concentrated largely on promoting these conditions for lawyers and judges. It goes without saying that

my piecemeal and part-time assistance toward this end is negligible compared to the contributions and accomplishments of many other individuals and organizations.

***Sources of Law***

Like countries and people, the legal systems of the countries where I've worked are the products of their histories and cultures. Perhaps the dominant influence in these regions is the continental civil law tradition. It was derived from ancient Roman sources, codified by Emperor Justinian 15 centuries ago, rewritten by Napoleon in 1804, and spread by French invasion and colonization. The civil law tradition, which despite its name also covers public law topics like criminal law, is quite different in many respects from the English common law tradition followed in the British Commonwealth and the United States (other than Louisiana). A comparison of the two is the subject of an entire law school course and beyond the scope of this paper, but certain features of the civil law tradition will emerge as I describe my observations.

Another strong influence was Communism itself, which was less a legal system than a political and economic doctrine. One of its characteristics was state ownership of property, along with centralized planning and control of all economic and commercial activity. Since the government and state-owned enterprises regulated all business transactions, there was little need for laws governing sales, contracts, property ownership and transfers, or private business enterprises, and thus for teaching these subjects in law schools. Several generations of lawyers and judges emerged with little or no knowledge of these legal topics or their practical application. Also under Communism, judicial decisions in political or other controversial cases were dictated by state officials, a phenomenon known as "telephone justice". Criminal defense lawyers played a passive and ineffectual role, and the system did not in practice observe the formal presumption of innocence. Two decades after the fall of Communism, these practices and deficiencies continue to affect the daily realities of the legal systems in most of these states.

Other historical influences include commercial practices developed by merchants and shippers and ecclesiastical law. Sharia law, which directly or indirectly controls divorce, inheritance and other issues in most Islamic countries, has so far not had an impact in the former Communist states, even those with overwhelming Muslim majorities such as Azerbaijan and Kosovo.

Since World War II, there has been increased globalization of legal activity, along with wide recognition of universal human rights and obligations and development of international bodies and standards. These forces have tended to narrow differences in legal principles and procedures among countries and regions. A series of United Nations resolutions and other international conventions and declarations have created some aspirational standards governing the legal profession and promoting the independence of the judiciary in all countries. When people like me try to bring the rule of law to emerging democracies, we start with the legal systems and traditions already in place and concentrate our efforts on refinements that will bring them up to these international standards. The key is to get them to the ultimate end points and not worry

about their starting points or the paths they take to get there. We do not try to transplant the U.S. model and practices onto countries having different legacies.

***General Observations***

As I relate some of my observations from my work in these countries, please keep in mind that, while there are many similarities among them, there are also significant differences. I will list features that are common to most of these countries but are not true of all, certainly not to the same extent. In addition, my observations are necessarily snapshots of what I saw when I did my research and paid my visits, and may no longer be valid as these countries have continued their transitions. Finally, I never got to work in the former Communist states that advanced quickly toward democracy and the rule of law, such as the Baltic States and certain Eastern European republics.

I should emphasize that, while some of these observations are negative, not all are within the control of these countries. There are also positive or neutral features which I've not highlighted, because they are relatively routine or unsurprising and because of time and space limitations.

- ***Court Structure***

There are ordinary courts of general jurisdiction, but there tend to be specialized courts (or at least chambers within ordinary courts) that hear commercial controversies between private parties or administrative disputes between private parties and government units or agencies. This separation often continues throughout the appellate process, leading to different supreme courts, supreme administrative courts and supreme commercial courts in some places. (As an aside, for various reasons these supreme courts often have far more judges than we're used to in the U.S.; Bulgaria had at one point 88 judges on its regular supreme court and 77 on its supreme administrative court.) More significantly, neither ordinary nor specialized courts have the power, even at their highest levels, to interpret the constitution or to determine the constitutionality of legislation. These issues (among others) are the province of a constitutional court in each country, which is technically not part of the judiciary. In most places, petitions to the constitutional court may be submitted only by certain bodies and groups, such as the government, the prosecutor general, one of the supreme courts, or a specified minimum number of legislators. Private parties and individual criminal defendants rarely have the right to challenge directly the constitutionality of a law that affects them, and must persuade one of the designated entities to bring their case. In many places, legislation is reviewed by the constitutional court before it is enacted to insure it conforms to the constitution. Members of the constitutional court are typically, though not always, judges or legal scholars appointed by a combination of the legislature and the executive to serve for finite terms of office such as five or ten years. The use of specialized and constitutional courts is a legacy of the civil law tradition and, specifically, the distrust of ordinary judges from the days of the French Revolution.

- ***Court Procedures***

The unusual features of court procedures in these countries are too numerous to mention here, but I will point out a few, which again are drawn from the civil law tradition. First, juries as we know them are rarely used in the former Communist states, as fact-finding and guilt or innocence determinations are normally made by a judge or a panel of judges. In a few places, the determinations in criminal cases may be made by a judge and two so-called lay assessors, but the judge has the dominant role and the lay assessors tend to defer to him. Second, the trial takes place in multiple stages, mostly in writing, over a period of weeks and months, rather than in a concentrated event typical of common law countries. Since there is no need to assemble a jury, it is unnecessary to try the whole case at once. Third, the judge normally asks the questions, including those of the parties and their lawyers, who submit theirs in advance to the judge. The system is more inquisitorial than adversarial. Fourth, while there has been some movement toward recording hearings, it is customary not to have a verbatim transcript of the proceedings. Instead, after each hearing the judge summarizes what happened in "minutes", and the parties are given a few days to offer their changes. Fifth, penalties in criminal convictions are firmly set by law, and the judge has little discretion to vary them. Equitable remedies in civil cases, such as requiring the losing party to carry out the terms of a contract rather than just pay money, are normally not available. There are also no punitive damages, something many American businesses would find attactive. Sixth, when a case is appealed to the next level, the appellate court does more than decide whether the law was properly applied below. It tries the case on a *de novo* basis, which is to say it starts all over again and decides the facts on its own. Indeed, it is often possible to introduce evidence to the appellate court that was not submitted at the first instance stage. After the appeal, the next level is called "cassation", which is limited to deciding whether the law was properly followed down below. Finally, the decision at each level is normally read aloud by the judge; where a panel of judges makes the decision, the presiding judge reads it without identifying the author or indicating what the vote was.

- ***Legal Education***

We're familiar with the American process of becoming a lawyer, which consists of a four-year undergraduate education, followed by three years of legal education at an ABA-accredited law school, and then admission to the bar of one of the 50 states or the District of Columbia. Admission to the bar requires, among other things, successful completion of a comprehensive multi-day bar examination. In contrast, the countries where I have worked require only a four (sometimes five) year undergraduate program. Upon graduation, and occasionally after passing a fairly basic national exam, the student receives a diploma and becomes a lawyer, a *jurist* in the local parlance. At the tender age of 22 or so, lacking the broadening effect of a well-rounded education, the lawyer is entitled to represent clients for pay. Some law students go on to earn a master's in law before practicing, but this step is neither required nor common.

Aside from the shortened educational requirement, this system suffers from some operational flaws in practice:

1. A law school, or law faculty as it is called, is usually not separately accredited. Instead, the ministry of education accredits the university of which the law school is a part, and it's up to the university to establish and oversee the law school. The ministry of education or justice determines the basic curriculum and faculty credentials, but considerable latitude often exists. During the Communist era, the smaller countries might have only a single law school, part of the main state university at the capital. With the fall of Communism, there was a rapid proliferation of universities and law schools, many of them private and poorly capitalized. Young people saw the benefits of legal training, and educational entrepreneurs rushed to take advantage of this new market. Unsurprisingly, the consequences included a dilution in the merits of the faculty and student body at most law schools, a decline in the quality of the accreditation and oversight process, and the disruption caused by the inevitable closing of the financially shakiest schools. Since few law professors had the educational credentials required by the ministries, and most were underpaid to begin with, those that qualified began spreading their services among several schools, reducing their accessibility to students. The ultimate outcome was an overabundance of new lawyers, most of whom were poorly prepared, having few opportunities for employment.

2. In every country where I worked, lawyers, judges, students and sometimes even professors complained about the highly theoretical level of teaching, the prevalence of large classroom lectures without student interaction, and the lack of practical skill development in law schools. While some of these complaints could be directed at law schools anywhere, including the U.S., they seem to be more widespread and justified in these countries. The emphasis is on the philosophy and general principles of the law in each subject area, with little effort to apply them to realistic factual settings. Important practical topics such as legal research and writing, ethics, client development and relations, and oral and written advocacy are often ignored. There have been recent attempts to introduce practical skill development through optional legal clinics, moot court competitions and short mandatory internships, but the clinics and moot courts have limited space and the internships are poorly managed and unproductive.

Encouragingly, many of these countries are parties to the Bologna Declaration, which in 1999 created a process for upgrading and standardizing all higher education in Europe. Some of its components are already in place in several of the former Communist states.

- ***Division of the Legal Profession***

In the U.S., of course, there is a unified profession of lawyer, a status in common to all who have been admitted to the bar. Most lawyers start out practicing law in behalf of

multiple clients, either alone or as part of a law firm. Some may at some point seek election or appointment as judges or prosecutors or employment as in-house corporate or government counsel or law professors. They continue to be lawyers in their new capacities, and may switch back and forth from one category to another. In these other countries, however, again following civil law precedent, the profession is divided. Lawyers choose on graduation from law school whether to be practicing lawyers, judges, prosecutors or members of other divisions of the profession, and tend to stay in those capacities for their entire careers. While movement between categories is possible, it is unusual and often difficult. Other components of the legal profession include notaries and investigators. Notaries are essentially practicing lawyers who are limited in number and officially authorized to handle real estate transfers, mortgage loans and similar transactions; they are typically paid a percentage of the value of the transaction. Investigators conduct or supervise the compilation of evidence in a criminal case up to the point at which formal charges are filed; thereafter, the prosecutor takes over.

One of the consequences of the division of the legal profession is that there is very little collaboration in efforts to improve the profession as a whole. While there are voluntary unions of jurists in most countries that have representatives of each group, they tend to be small and ineffective. Instead, each sector clusters in its separate professional association, which focuses on the interests of that sector. There is really no entity that serves the entire profession, or feels a responsibility to improve legal education, reform laws in all areas (not just those directly affecting their work), and educate the public on their legal rights and obligations.

- ***Scope and Supervision of the Judiciary***

In these countries, judges, prosecutors and sometimes even investigators are all considered magistrates and part of the judiciary. As such, they all attend an initial judicial training program and participate in many of the same continuing legal education programs after attaining their positions. They are basically career civil servants whose appointment, assignment, transfer, promotion and discipline are all in the hands of a national entity bearing a title such as "supreme judicial council." The council is typically composed of a combination of *ex-officio* members (the presidents of the supreme courts, the prosecutor general and perhaps the minister of justice) and representatives of the judges, prosecutors and investigators elected for a term of years. Generally, judges have more representatives than prosecutors, who have more than investigators. In addition, judges and prosecutors usually have their offices close together in the courthouse and work together on court procedures and administrative matters. Symbolically, in the courtroom, the prosecutor wears a robe like that of a judge and occupies a table at the judge's level, which is above that of the defense lawyer.

This togetherness, in my opinion, is a structural deficiency that harms the neutrality and impartiality of the justice system in criminal cases. Shared training, experiences, offices and status can lead to shared attitudes, conversations, sympathies and conclusions. A single supreme judicial council for all components of the judiciary places prosecutors in a position of partially overseeing the careers of judges, a fact which can subtly influence

the outcomes of particular cases. A judge might find it difficult to rule against a prosecutor who (or whose boss) may someday have a role in his promotion or discipline. As mentioned earlier, guilt or innocence is usually determined by judges and not by juries. It is therefore not surprising that the conviction rate in these countries exceeds 98%. By contrast, in those few places where fact-finding and guilt determinations are assigned exclusively to juries, the conviction rate tends to run between 60% and 80%. Defenders of the status quo in these other countries point to the thoroughness and fairness of the pre-trial investigation and the objectivity of the prosecutor in deciding to try charges, but a 98% conviction rate suggests something more is involved.

On an encouraging note, there has been some movement toward dividing the supreme judicial council or its equivalent into separate councils for judges and prosecutors. Most of these countries have taken investigators out of the magistracy altogether and placed them under the ministry of the interior with the police.

- ***Practicing Lawyers***

Lawyers who counsel and represent multiple clients on a regular and independent basis are divided into two categories: advocates and non-advocate practicing lawyers. Advocates are officially recognized and regulated under a special law governing their profession. They must be members of a bar association, collegium or similar entity whose organization and activities are spelled out in the law. Advocates are entitled to engage in the full range of legal practice, including criminal defense. The law gives them specific rights such as access to detained clients and to information in the hands of government agencies or third parties, as well as protection of client confidences and communications. To become an advocate, one must first be a lawyer, then complete an apprenticeship with an experienced advocate for a period ranging from six months to two years, and then pass a bar examination administered by the bar association (or, in some cases, by the ministry of justice). Some countries allow law professors, judges and prosecutors with 10 or 15 years' experience to become advocates without undergoing an apprenticeship or passing the bar exam. Once admitted, the advocate must then meet whatever ongoing obligations are imposed by the law on advocacy or the bar association, including payment of dues and compliance with confidentiality and conflict of interest provisions. A common prohibition for advocates is engaging in "incompatible" activities, which often include being an employee (even as a lawyer for a law firm), a business entrepreneur, or a public official. The bar association has annual elections of officers and members of its principal bodies, which include a governing board or council, an admission and licensing committee, a disciplinary committee and an audit committee. The bar association usually enacts its own organizational charter, a code of ethics, and ordinances covering other matters within its purview. Advocates who fail to meet their obligations are subject to internal bar discipline, which can lead to reprimand, suspension or disbarment.

Non-advocate practicing lawyers, in contrast, are completely unregulated, yet are allowed to practice law in all areas except criminal defense. They may advise clients on legal matters and represent them before courts and other bodies in civil, commercial and

usually administrative cases. No one knows who or how many they are, and they have no ethical or continuing education obligations. If they have any confidentiality and conflict of interest limitations, they might consist of a few general rules in the code of civil procedure which deals only with civil court proceedings. They are not subject to any discipline, short of criminal prosecution if their misconduct rises to the level of a crime. At the same time, these non-advocate lawyers do not enjoy the rights legally afforded to advocates in such areas as access to information and protection of client communications. Some non-advocate lawyers advertise heavily, and their actual and prospective clients do not necessarily realize that these lawyers are not advocates and lack the rights and duties assigned to advocates. Having said all this, however, I should acknowledge that some non-advocate practicing lawyers are reportedly quite competent, ethical and effective at what they do.

Even more troubling, many of these countries have the unsettling tradition of allowing so-called representatives to assist persons in civil cases, without specifying that they have legal educations or even any education at all. A few places even permit non-lawyers to represent defendants in criminal cases, at least where the representative is related to the defendant. These traditions obviously place clients at a disadvantage in relation to prosecutors or to other parties represented by trained lawyers, and diminish the importance and status of actual lawyers.

One point of emphasis for me over the years has been the enactment of laws restricting the practice of law in all areas to registered advocates and criminalizing unauthorized practice, but the only places I have anything at all to show for it are Bulgaria and Ukraine.

Incidentally, most advocates and non-advocate lawyers are sole practitioners. Very few law firms exist, and they seldom consist of more than a handful of lawyers.

- ***Differences in Regulation of Advocates***

While advocates are at least subject to some regulations, there are some inadequacies or at least surprises I've encountered in virtually all of the countries where I've worked. Codes of ethics were essentially unknown during the Communist years, so they have had to evolve over the past two decades. Despite the abundance of models from Western Europe and the United States, they still tend to be very short and consist of broad principles and other statements. They thus offer little guidance to address thorny practical issues that arise in everyday practice. Most are only two or three pages long, compared to the 75 or so pages of rules and commentary found in most American jurisdictions. The generality of ethical standards also makes it difficult in many circumstances to determine whether a violation has occurred and thus whether discipline is called for. Some codes of ethics appear more interested in protecting advocates from each other than in protecting clients, the courts and the general public. They usually contain flat prohibitions on virtually all advertising, on making negative comments about fellow advocates, and on stealing clients. Typical of European practice, contingent fees of the sort common in the U.S. are not allowed in these countries and advocates are often

astonished to learn that we permit them; I'm sure many non-lawyers in our country wish we had a prohibition like theirs.

Another difference is that continuing legal education, or CLE, is rarely mandated or offered in these countries. CLE is essential for developing practical skills and filling in other gaps and deficiencies in law school education. As laws are amended or new laws are adopted, as judicial precedents gain more influence even in civil law countries, as technology advances, and as globalization of laws and practices accelerates, CLE becomes even more imperative. Unfortunately, CLE is seldom required by the laws and bar ordinances that govern advocates and almost never accompanied by specific standards or minimum hours of participation. This is not surprising, as even in the U.S. it was unusual for states to set mandatory minimum CLE requirements until the 1970s. The more fundamental problem in these countries is that the value and importance of CLE are not acknowledged by most advocates. Very few programs are available to advocates even if they are interested, especially outside major cities, and these programs are usually offered by international organizations and sponsors. The subject matter often covers some part of the sponsor's agenda, such as human rights, gender equity or anti-corruption measures, which are important and beneficial but not terribly relevant to the day-to-day practices of most advocates. The idea of paying for CLE is even more alien to advocates, although I did have some success charging for commercial law workshops in Russia. Most advocates expect to attend the seminar free of charge, and even to receive reimbursement for the costs of their travel, meals and lodging. In Kosovo, I learned that many advocates refuse to attend these programs unless they are also compensated for their time away from billable client work. Some believe the government should pay for their CLE, or allow them to attend the programs taught to judges and prosecutors at the national judicial center. Of course, government support often leads to government control and loss of independence. Unless and until these attitudes change, CLE will not be a part of the professional lives of most advocates, and will certainly not be available on a self-sustaining basis. With mandatory CLE minimums and advocate-funded programs, there will be a decent market for these activities and their availability and relevance will expand. Of course, the bar will need to establish the standards and mechanisms to insure that seminar quality is high and participation hours are properly accounted for and enforced. As a side note, I have often suggested that introducing mandatory CLE might be more palatable if, instead of penalizing non-compliance, the bar were to reward compliance through special recognitions, designations and other incentives. So far, the response to my suggestions has been underwhelming.

- ***Economic Problems***

Almost by definition, the economies have struggled severely in virtually all the countries where I've worked. In the former Communist states, of course, economic problems played a major role in the fall of Communism in the first place, and the resulting influx of competing products and loss of markets made things even worse. There was no Marshall Plan to cushion the fall of these economies, and in some countries (notably Russia) much of the wealth ended up in the hands of a relatively small number of oligarchs. Some of these states have since benefited from rising prices of natural resources or from

refocusing their efforts on tourism or technology, but most continue to be in bad shape with high unemployment, low standards of living, widespread poverty, and little hope for future improvement.

These problems naturally impact the legal system in many ways. Tax revenues are low, so salaries of law professors, judges and prosecutors are inadequate and sometimes paid in arrears. Courthouses, lawyer offices and other facilities are often substandard, and computerization has been slow to take hold despite considerable international contributions. People and businesses cannot pay much if anything for legal services, so most advocates and other lawyers are poorly compensated and lack the equipment, legal research materials and other resources they need to practice effectively. In Russia, advocates in some of the provincial cities did not even have access to current laws. The economy makes it both more difficult and more imperative for continuing legal education to be provided. Associations of advocates and judges cannot charge the dues they need to provide vital services and programs. In Bulgaria, so many advocates could not pay even the dues they were charged that nonpayment was by far the most common reason for disciplinary actions.

- ***Perceptions of Corruption***

Transparency International (TI) is a Berlin-based nongovernmental organization that ranks countries around the world based on the public perception of corruption there. When I was in one former Soviet republic 11 years ago, TI had recently released its annual survey showing that republic as the 5th most corrupt country in the world. The local joke was that they were really *the* most corrupt, but they paid somebody off.

Corruption, which TI defines as the abuse of power for private gain, is a problem throughout the world, and the U.S is not exempt. Still, it seems to be especially prevalent in the former Communist states, in particular the former Soviet Union. TI's most recent report ranking 178 countries placed Russia 24th from the bottom, and listed some other former Soviet republics even lower.

Corruption in these countries pervades all of society, not merely the justice system. Political leaders at all levels siphon off funds for themselves and their families. The concept of a public servant, who takes office to improve the lives of others, seems to be alien to these countries. I've been told repeatedly of doctors who insist on under-the-table payments before treating patients, of teachers who take bribes to give good grades to students, of school administrators who expect money to admit applicants, and of government clerks who demand payments to act on or expedite registrations and permits. Some bureaucratic positions are reportedly considered so lucrative that applicants are expected to pay large sums to gain employment.

Within the justice system, there are reports of judges who rule in favor of the highest bidder, prosecutors and investigators who drop charges in exchange for payments, and court clerks who expedite or delay cases for bribes. Lawyers, including advocates, are often perceived as intermediaries who pass bribes on to the judge or prosecutor to obtain

the desired outcome for their clients. In two countries, I was told of advocates who allegedly tell clients they need extra payments to bribe the judge, but keep the payments for themselves. If the client wins the case, he believes the bribe succeeded; if he loses, he is hardly in a position to press charges against the lawyer or judge, having tried to bribe a public official.

It is difficult to know how accurate these perceptions and allegations are and how widespread the problem is, since all parties to a bribe have an incentive to keep it hidden. Arrests are extremely rare, suggesting either that actual corruption is rare or, more likely, that it law enforcement is reluctant to take aggressive steps to eradicate it. Lawyers and judges generally concede that corruption takes place, but blame it on a handful of bad apples, especially those in other components of the justice system. Members of the public tend to view it as much more widespread, with some claiming over half of lawyers and judges are involved. Even mere perceptions of corruption are troubling, since they undermine respect for the justice system and ultimately for the rule of law. They can also lead to the reality of corruption, in that people who believe it is widespread will think they have to offer bribes to succeed, and will thus tempt officials who might not otherwise have demanded them.

Beyond the bribery aspect of corruption, there is other improper influence in judicial proceedings. The old Communist practice of telephone justice in political and other high-profile cases continues to occur in some places, and simple bias or prejudice can arise for a variety of reasons. Some judicial codes of ethics do not forbid *ex parte* communications, conversations between a judge and a party or his lawyer about a pending case without the knowledge or presence of the other party or lawyer. Even where prohibited, these communications are believed to be fairly common, especially between judges and prosecutors.

Numerous international organizations and programs are devoted to reducing corruption in these countries, but so far they have had little impact. Paying decent salaries to public officials would probably help, or would at least take away the excuse that they take bribes only to feed their families. There will need to be a lot of highly publicized arrests, convictions and prison terms, as well as a fundamental change in societal values and cultures, to make a significant dent in this problem.

- ***Rights and Freedoms of Lawyers and Judges***

Advocates in most of these countries usually have on paper many of the legal rights and freedoms espoused by the United Nations Basic Principles on the Role of Lawyers and other international standards. In practice, the government seems more or less willing to allow them to exercise these rights when it doesn't especially matter. But when the case involves political opposition, protests, election irregularities, organized crime, or major businesses, the government takes a much greater interest in the outcome and sometimes infringes on the rights of advocates. Violations often include denying or delaying the advocate's access to meet privately with his detained client, attempting to record or eavesdrop on their conversations, or preventing the advocate from obtaining documents

and other evidence necessary to represent his client. In more extreme situations, the government or prosecutor will try to intimidate the advocate, threatening prosecution or even bodily harm unless the advocate withdraws from the case or represents his client less zealously. In Moldova, for example, where advocates had built a strong record of success bringing claims against the government to the European Court of Human Rights, the prosecutor general sent a letter to all advocates decrying the bad reputation they were giving the country and threatening to bring charges of criminal defamation against such advocates in the event of future claims. The resulting uproar was apparently sufficient to keep the prosecutor general from following through, but he remained in office and never withdrew his threat.

Even in ordinary cases, there may be local rules and practices that conflict with the legal rights of advocates, especially the right to meet with detained clients immediately. In some places, such meetings may take place only during normal business hours, so it a suspect is arrested on a Friday evening the advocate cannot see him until the following Monday. Before he is allowed to meet with his client, the advocate may also be required to obtain the permission of the police commissioner, or produce legally unnecessary documentation, or turn in cell phones or other possessions. The meeting itself may be held in a room where guards or investigators are present or nearby, or it may be necessary to speak loudly through a glass window to converse with the client. Many advocates are convinced that their discussions with detained clients are routinely recorded by law enforcement.

In the case of judges, the principal concern tends to be their independence: their ability to weigh and decide cases without the interference or influence of other officials. Sometimes the concern is structural, where as noted earlier the judge's career is in the hands of a council in which the minister of justice or prosecutors are represented. Other times, a judge may receive unsought or inappropriate input from his superior (the court president) or from a government representative. In a few places, judges were reluctant even to meet with me without the prior permission of court president or minister of justice, which says something about their independence.

***Conclusions***

Overall, despite these and other issues, my sense is that most of the former Communist states are truly emerging democracies, making progress toward international standards in most areas. Russia is a clear exception (I call it a "submerging" democracy), where conditions have deteriorated in the 12 years since I completed my year of service there. In Russia, judges in high-profile cases appear to be improperly influenced and selective prosecution of political opponents occurs. The government has taken control of television media and major business enterprises, and journalists for opposition newspapers have been intimidated and even assassinated.

In other places, though, most signs are encouraging, and improvements are evident if slow in coming. A good example is Bulgaria, where I've made six visits working with either the advocacy or the judiciary. The legislative changes I recommended in 2001

were largely enacted, but not until 2004, and then implementation took another two or three years. Ultimately, conditions improved, and in 2007 Bulgaria joined the European Union.

There is reason to hope that, with continued international support and internal motivation, as well as economic development, the legal systems of most of these countries will be reasonably close to international standards in all areas in the next generation or two. We need to remember that conditions in the U.S. are not perfect, and we've had some 235 years, compared to their 20, to get where we are.