



## **United States Mission to the OSCE**

### **Session 4**

### **Rule of Law:**

## **Legislative transparency, Independence of the judiciary, Right to a fair trial**

As prepared for delivery by Ambassador David Johnson  
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Mr./Madam Moderator,

The rule of law underpins all of our human dimension commitments. Today, we will focus on certain elements of rule of law—legislative transparency, independence of the judiciary and the right to a fair trial. But, I think it is useful to pause for a moment to consider what we mean when we talk about rule of law. In a speech a few years ago while acknowledging the risks of “formulating something too insufficient for the great purpose behind the phrase,” U.S. Supreme Court Justice Anthony Kennedy, set out a working definition of the rule of law. According to Justice Kennedy, there are three main components:

First: “The law is superior to, and thus binds, the government and all its officials.”

Second: “The law must respect and preserve the dignity, equality, and human rights of all persons. To those ends, the law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.”

And, third: “The law must devise and maintain systems to advise all persons of their right, and it must empower them to fulfill just expectations and seek redress of grievances without fear or penalty and retaliation.”

Where these conditions exist people thrive and economies flourish. Where they do not societies and individuals pay a high price. Where even one of these components is missing, rule of law does not genuinely exist. Consider the words of the former Chief Justice of South Africa, Arthur Chaskalson: “The apartheid government, its officers and agency were accountable in accordance with the laws; the laws were clear, publicized and stable, and were upheld by law enforcement officials and judges, what was missing was the substantive component of the rule of law. The process by which laws were made was not fair...and the laws themselves were not fair.”

As I read this description, I cannot but think of the situation in the United States prior to the passage of civil rights legislation in the 1960s. Based on our own experience and history, we are cognizant that the struggle to ensure a genuine state of rule of law is never ending, and requires

constant vigilance. It requires, among other things, an engaged citizenry, strong civil society and free media. That is why the presence here in Warsaw of so many non-governmental organizations is of such importance. For it is often the courageous work of NGOs that makes us aware of the consequences of a failure to uphold any element of rule of law and that helps us guide us toward remedies and progress.

In Russia, the tragic deaths in custody of Sergei Magnitsky and Vera Trifonova are solemn reminders of the human cost of a deficient, poorly functioning and corrupt criminal justice system—a system in which officials have remained above the law, not accountable before it. Ms. Trifonova was arrested and allegedly denied medical attention for diabetes in an attempt to force her to confess to charges of fraud. She subsequently died in prison. Mr. Magnitsky, an attorney arrested on tax evasion charges and who died of medical neglect in pretrial detention, is widely believed to have been imprisoned as retribution for his claim that government officials stole over \$200 million in a tax fraud scheme involving the company he represented. The same officials he accused of corruption were responsible for his arrest. Withering publicity and international outrage have only now begun to pierce the atmosphere of impunity that surrounds corrupt officials and stifles the rule of law in this tragic case. The intentional denial of medical care is also a form of intimidation, with the apparent goal of securing coerced confessions.

The second trial, verdict, and sentence against former Yukos executives Mikhail Khodorkovsky and Platon Lebedev also evoke serious concerns about the right to a fair trial and the independence of the judiciary in the Russian Federation. We are troubled by the allegations of serious due process violations, and concerned about the rule of law being overshadowed by political considerations.

The United States is very concerned about the poor conduct of trials as well as continuing police abuse in the wake of the June 2010 violence in southern Kyrgyzstan. Trials and arrests in connection with the violence have not been conducted fairly. As many as 91 percent of those prosecuted for crimes related to the June events have been ethnic Uzbeks, despite the fact that ethnic Uzbeks were the overwhelming majority of the victims. Few ethnic Kyrgyz have been investigated or prosecuted. Many prosecutions have been based on confessions allegedly extracted under torture. Defendants' allegations of torture are rarely investigated or are simply dismissed, and trials have proceeded in spite of these claims. Moreover, defendants and their lawyers have been physically attacked during the trials, often in the courtroom itself and in front of judges and police, with little effort by authorities to intervene. The murder conviction of Azimjon Askarov is the most widely known of these cases, but it is far from isolated. Dozens of cases have been documented in which ethnic Uzbeks convicted of crimes related to the June violence did not receive trials that would be considered fair and impartial by international standards. Askarov's Supreme Court appeal has been on hold since February 2011 with no explanation or timeframe for resolution by the court.

The August 2011 death of Osmonjon Khalmurzaev following his detention and beating by police in Bazar Korgon near Jalalabad is another disturbing example of these abuses. The police practice of arbitrary arrests and detention for the purpose of extorting bribes has continued since June 2010 and needs to end. Khalmurzaev was arrested at his home on August 7 by police

claiming he was connected to the June 2010 violence. No warrant was shown for his arrest. Later that day he called his wife saying he was being severely beaten by three police officers who demanded money for his release. Upon receipt of some money, the police released Khalmurzaev, who fell into a coma the following day. He died on August 9, apparently of internal bleeding; autopsy results are pending. The government has opened an investigation into the death and removed four police officers from their posts. While this case has come to light because of Khalmurzaev's death, many other cases do not become public as victims are afraid that reporting the abuse could lead to more police outrages. We further call on the government to ensure that all cases and trials are conducted fairly according to international standards, with safety ensured for all participants.

In Kazakhstan, arrests may be used for political purposes, and trials may be unfairly conducted. For example Natalya Sokolova, the lawyer for the striking oil workers, was sentenced in August to six years in jail for "igniting social unrest," an excessive sentence that would appear to be punishment for her assistance to the labor union. We continue to be concerned that Kazakhstani human rights activist Evgeny Zhovtis remains in prison following flawed investigative and judicial proceedings. For example, defense evidence was not allowed to be presented, and defense witnesses were not allowed to testify.

In Belarus, the government routinely denies citizens due process and the country's judiciary has no independence from the Lukashenka regime. The convictions of more than 40 presidential candidates, democratic opposition leaders and pro-democracy protestors in connection with the December 19, 2010, presidential elections failed to meet even the most minimal standards required of a fair and independent judiciary. We consider all those convicted and jailed to be political prisoners, and we have and will continue to call for their immediate and unconditional release. We are also concerned about the government's disbarment of at least six lawyers who represented some of the defendants, including Tamara Sidarenka, who represented two former presidential candidates at their trials earlier this year.

While progress has been made in developing democracy and reform in Ukraine, we are concerned about several recent developments. The misuse of criminal investigations and legal proceedings to put pressure on opposition politicians via targeted prosecutions, including the arrest and arbitrary detention of former Prime Minister Yuliya Tymoshenko, former Interior Minister Yuri Lutsenko and former acting Defense Minister Valeriy Ivashchenko, as well as lesser known civil society activists, has demonstrated the further deterioration of the independence of the judiciary and the rule of law in Ukraine.

In Azerbaijan, we are concerned about the appearance of political motivation in the detentions of 16 opposition leaders and two youth activists. Opposition youth activist Jabbar Savalanli, who was convicted on May 4 and sentenced to two and a half years in prison on alleged drug possession charges, was detained shortly after making online comments calling for pro-democracy protests. Procedural irregularities, combined with the timing and circumstances surrounding Mr. Savalanli's arrest, raise concerns that Mr. Savalanli was targeted on the basis of his political activities. Bakhtiyar Hajiyev, a youth activist and candidate in the November 2010 parliamentary elections, was sentenced to 2 years in jail on May 18, 2011, allegedly for evading

military service. The timing of Mr. Hajiyeu's arrest, which immediately followed his efforts to organize pro-democracy protests earlier this year in Azerbaijan, raises questions about authorities' use of the judicial system to punish dissent. On August 11, Azerbaijani authorities demolished the building owned by human rights activist Leyla Yunos, which housed the Institute for Peace and Democracy and two other NGOs, as well as Ms. Yunos' residence. The authorities conducted this demolition despite a court injunction prohibiting such action, thus raising concerns about the government's respect for rule of law. Such lack of respect for the judiciary, the timing of the demolition—within 48 hours of the publication of an article in the New York Times citing Ms. Yunos on the broad problem of private property demolitions—and subsequent reports of intimidation of some of Ms. Yunos's colleagues, also raise concerns that this case is politically motivated.

We are concerned that the arrests and trials of individuals charged with belonging to certain groups banned in Uzbekistan are not conducted in accordance with international obligations. In particular, prosecutions are often based merely on printed material. There are frequently reports that the courts allow admissions of guilt allegedly made under duress or as the result of torture, and that defendants do not have access to qualified defense attorneys.

While it is unfortunately denied a seat at this table, the United States holds Kosovo accountable to OSCE norms. Kosovo lacks a fully independent judiciary in practice and the courts do not consistently afford due process at trial. Corruption is pervasive among public officials, negatively impacting legislative transparency. Corruption and outside influence seriously impede judicial independence. Outside influences include political pressures from parties and other branches of the government, family, and friendship ties, as well as outright bribes. Further, the existence of Serbian Government funded-parallel structures in northern Kosovo continue to block the restoration of a fully functioning, multi-ethnic judiciary, resulting in prolonged detentions, indefinitely delayed trials and a lack of due process.

In Albania, political pressure, intimidation, widespread corruption, and limited resources have also sometimes prevented the judiciary from functioning independently and efficiently. The politicization of appointments to the High and Constitutional Courts threaten to undermine the independence and integrity of these courts, and police officers are known to mistreat detainees.

Here, I would like to note that problems in the judicial sector are widespread across the former East Bloc and Soviet Union. It has been a more stubborn challenge than most had imagined to solidify the deep and fundamental changes needed to bring judiciaries in the region fully in line with democratic practices. Polls indicate that in many OSCE countries, including some of those that have navigated democratic transitions most successfully, citizens have lost faith in corrupt, inefficient and unaccountable judiciaries. Corruption and cronyism among judiciaries affect not only the citizenry of a given country, but also the security and prosperity of all who are linked through commerce and shared borders. It is a disincentive to investment and a drain on development. Examples abound of governments, individual judges and NGOs that are working to ensure that the judiciary in their country is both independent and accountable. We should support these efforts, and consider ways in which we can build further on ODIHR's excellent

work in this field, for instance in promoting the consideration by participating States of the “Kyiv Recommendations on Judicial Independence.”

The focus of the Parliamentary Assembly of the Council of Europe (PACE) on witness protection in the Western Balkans also warrants our attention here. Witness testimony is indispensable everywhere for justice to prevail and, where conflict has divided society, for reconciliation to take place. The PACE report of Mr. Jean-Charles Gardetto notes progress in this area but identifies a continuing need for significant improvement due to threats, intimidation and even murder of witnesses that deter others, without adequate protection, from coming forward. This creates an environment of impunity throughout the Balkans. The United States would like to stress to all parties the importance of witness protection in the EULEX investigation into organized crime and organ trafficking that allegedly took place in Kosovo and Albania in 1999.

Thank you, Mr./Madam Moderator.