

ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE
Office for Democratic Institutions and Human Rights



JUDICIAL INDEPENDENCE
IN EASTERN EUROPE, SOUTH CAUCASUS
AND CENTRAL ASIA
Challenges, Reforms and Way Forward

Expert meeting in Kyiv
23-25 June 2010

*Organized in cooperation with the Max Planck Institute for Comparative Public Law and
International Law*

MEETING REPORT

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1. Background

Judicial independence is an institutional requirement for all OSCE participating States. Only an independent judiciary can adjudicate cases in a just manner, respecting the rights of accused persons to a fair trial. Judicial independence is one of the hallmarks of a state that respects the principle of separation of powers, which is indispensable for a genuine democracy. The participating States most recently reaffirmed their commitment to judicial independence in the Helsinki Ministerial Council Decision no. 7/08 on *Further strengthening the rule of law in the OSCE area* (MC.DEC/7/08). The principle of judicial independence is at the forefront of the organization's rule of law-related commitments and has repeatedly been the focus of human dimension meetings, most recently the Human Dimension Seminar on Strengthening Judicial Independence and Public Access to Justice in May 2010.

In earlier documents, the participating States have acknowledged the significance of judicial independence for the full expression of the inherent dignity and of the equal and inalienable rights of all human beings (Copenhagen 1990); committed to respect the related international standards, and ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary; and recognized the importance of associations of judges for the promotion of judicial independence (Moscow 1991). In the Charter for European Security participating States agreed to promote the development of independent judicial systems (Istanbul 1999).

Discussions at the 2010 Human Dimension Seminar on Strengthening Judicial Independence and Public Access to Justice, as well as the 2009 Human Dimension Seminar on Strengthening the Rule of Law in the OSCE Area confirmed that judicial councils and judicial administration more generally, selection and appointment of judges, as well as accountability including discipline and removal of judges are crucial aspects of judicial independence that deserve more in-depth examination and further discussion. Recommendations made at the seminars called on the OSCE, its institutions and field operations, to continue facilitating exchanges of practices and contacts between the judiciaries of participating States.

2. Introduction and methodology

Balancing the independence of the judiciary with the need for democratic legitimacy in a society governed by the rule of law is a challenge for every participating State. The legacy of the Socialist legal tradition has shaped justice systems in a great number of OSCE participating States. After departure from the doctrine of “unity of state power”, these States in the past two decades have implemented numerous reforms, both legislative and institutional, which were intended to foster separation of powers and judicial independence. The time is now ripe for a fresh look at these efforts, to assess their success in establishing truly independent judiciaries, as well as identify remaining challenges in strengthening them. Therefore, ODIHR and the Max Planck Institute for Comparative Public Law and International Law (MPI) have undertaken an assessment of

the state of judicial independence across the OSCE region which provides the basis for developing an ODIHR strategy for this sector. The primary purpose of the project is to identify impediments and recognize good practices for the makeup of independent judiciaries in the participating States of the OSCE, and assist the States, with a predominant focus on Eastern Europe, South Caucasus and Central Asia, in adhering to their commitments.

For the assessment phase of the project, ODIHR designed a questionnaire on judicial independence and commissioned country reports from independent experts. The questionnaire benefitted from feedback by MPI and the Council of Europe Venice Commission and covers the most relevant aspects of judicial independence, as outlined in several international instruments. Special attention has been given, *inter alia*, to the administration of the judiciary including budget management, the role of judicial councils, selection and appointment of judges, tenure and promotion, remuneration, case assignment systems, disciplinary procedures, immunity, ethics and resources.

As second step in the assessment phase of the judicial independence project, the expert meeting in Kyiv was intended to result in concrete recommendations to the participating States on how to further strengthen judicial independence in the region. The comparative analysis of independent expert reports in the first step had led to the identification of sub-topics for the expert meeting, namely (1) Judicial Administration – judicial councils, judicial self-governing bodies and the role of court chairs; (2) Judicial Selection – criteria and procedures; and (3) Accountability *versus* Independence in Adjudication. These sub-topics were also subject to discussion at separate working sessions at the recent Human Dimension Seminar on Strengthening Judicial Independence and Public Access to Justice on 17-19 May 2010 in Warsaw.

The meeting was attended by 27 prominent scholars and senior practitioners from 19 participating States, in addition to experts from ODIHR, MPI and the Council of Europe including its Venice Commission. The OSCE field presences in Moldova, Ukraine and Skopje were also represented. The meeting aimed to serve as a platform for in-depth discussion of challenges in selected areas related to judicial independence, critical examination of the impact of past reforms, as well as identification of good practice examples from participating States.

3. Selected findings and recommendations

The meeting resulted in adoption of the “Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia”, a set of concrete and specific recommendations to the participating States for future reforms to strengthen judicial independence (Annex 1).

Regarding judicial administration, the experts concluded that the administration of courts and the judiciary shall enhance independent and impartial adjudication in line with due process rights and the rule of law. Judicial administration must never be used to influence adjudication as regards content of judicial decision-making. The process of judicial administration must be transparent. Concrete recommendations in relation to judicial

councils included, *inter alia*, that an all-encompassing authority and autonomy of a single such body is undesirable. Instead, one option would be to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority.

In particular, a separate expert commission should be established which is entrusted with the competence to conduct written and oral examinations in the process of judicial selection. In this case the competence of the judicial council should be restricted to verifying that the correct procedures have been followed. In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, judicial councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures. Disciplinary decisions shall be subject to appellate oversight by a competent court.

Regarding the composition of judicial councils, experts concluded that they should not be dominated by appellate court judges. It was recommended that where court chairs are appointed to the council, they must resign from their position as court chair. Prosecutors should be excluded where they do not belong to the same judicial corps as the judges. Neither the State President nor the Minister of Justice should preside over the council. The president of the judicial council should be elected from among its members. More specifically the expert meeting recommended that bodies deciding on cases of judicial discipline must not be controlled by the executive branch nor shall there be any political influence pertaining to discipline. Any kind of control by the executive branch over judicial councils or bodies entrusted with discipline is undesirable.

The expert meeting concluded that the role of court chairs should be limited to representative and court managerial functions. Court presidents must not interfere with the adjudication by other judges. Apart from their administrative functions, which require training in management capacities, they may only assume judicial functions which are equivalent to those exercised by other members of the court. Court presidents shall not be involved in judicial selection. Neither shall they have a say on remuneration, bonuses or privileges. The experts recommended that on a long term basis, bonuses and privileges should be abolished and salaries raised to an adequate level which satisfies the needs of judges for an appropriate standard of living and adequately reflect the responsibility of their profession. As long as bonuses and privileges exist, they should be awarded on the basis of predetermined criteria and a transparent procedure.

Administrative decisions which may affect substantive adjudication should not be within the exclusive competence of court presidents. Furthermore, it was recommended that court chairs should not have the power to either initiate or adopt a disciplinary measure. Regarding the appointment of court chairs, experts recommended as one option to have the judges of the particular court elect them. In case of executive appointment, the term should be short without possibility of renewal.

Regarding access to the judicial profession the expert meeting concluded that it should be open not only to young jurists with special training but also to jurists with significant experience in the legal profession (through mid-career entry into the judiciary). Where schools for judges are part of the selection procedure, they have to be independent from

the executive power. Training programmes should focus on what is needed in the judicial service and compensate for any shortcomings of university education. They should include aspects of ethics, communication skills, dispute settlement, management skills and legal drafting skills.

The expert meeting concluded that the procedure and criteria for judicial selection must be clearly defined by law in order to ensure transparency in the selection process. The competition for a vacancy, as well as the terms and conditions, should be widely, publicly announced. If there are background checks, they should be handled with utmost care. The candidate has a right to be heard and should be granted a right to judicial review in case of refusal of the candidature on the basis of secret information. The decision to refuse a candidate on such grounds has to be reasoned.

Where the final appointment of a judge is with the State President, the expert group recommended that eventual discretionary powers related to the appointment of candidates should be limited to those nominated by the selection body. Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. Experts recommended to give the selection body the power to overrule a presidential veto by qualified majority vote.

Experts also concluded that it would be desirable if the composition of the judiciary reflects the composition of the population as a whole. Underrepresented groups should be encouraged to acquire the necessary qualifications for being a judge.

With a view to balancing judges' accountability with their independence in adjudication, the expert meeting concluded that disciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts, or to examples of judicial mistakes. The bodies that adjudicate cases of judicial discipline may not also initiate them or contain as members persons who can initiate them. Judges facing these bodies shall enjoy procedural safeguards, including the rights to present a defence and to appeal to a competent court. Transparency shall be the rule for disciplinary hearings of judges. Such hearings shall be open, unless the judge who is accused requests that they be closed. The decisions regarding judicial discipline shall provide reasons.

Experts recommended that judges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal). How a judge decides a case must never serve as the basis for a sanction. While a judicial council may play a role in specifying the criteria and the procedure, professional evaluations should be conducted at the local level. Assessments shall be conducted mainly by other judges. Court presidents should not have the exclusive competence to evaluate judges.

The group also adopted a recommendation that hearings shall be recorded by electronic devices providing full reproduction, as well as accurate trial records, as evidence of the conduct of judges in the courtroom. To enhance the professional and public accountability of judges, decisions shall be published in databases and on websites in ways that make them truly accessible and free of charge. Decisions must be indexed according to subject

matter, legal issues raised, and the names of the judges who wrote them. To facilitate public trust in the courts, authorities should encourage the access of journalists to the courts, and establish positions of press secretary or media officer. There shall be no barriers or obstacles to journalists attending trials, unless they are justifiable.

The expert meeting also concluded that the accusatory bias found in most countries of Eastern Europe, South Caucasus and Central Asia requires remedies. To diminish pressure on judges to avoid acquittals, there must be a change in the system of their professional evaluation where acquittals are now considered a black mark or failure. The number of acquittals should not be an indicator for the evaluation of judges. Furthermore, experts concluded that judges need to gain real discretion in reviewing requests for approval of pre-trial detention.

4. Summary of the discussions

Following the opening session with the Senior Project Officer, OSCE Project Co-ordinator in Ukraine, Rene Bebeau, the first plenary session began with short introductions presenting the research results regarding each of the three sub-topics of the meeting followed by a brief initial discussion. A representative of MPI presented on “Judicial Administration – judicial councils, judicial self-governing bodies and the role of court chairs”; two ODIHR Rule of Law staff talked about “Judicial selection – criteria and procedures” and introduced the sub-topic “Accountability *versus* Independence in Adjudication” respectively. The presentations were intended to prepare the ground for and at the same time focus the discussion in the working groups on the three sub-topics of judicial independence identified to be of continuing concern in the target region. They were also meant to inform all experts on the scope of discussions in the parallel sessions of the groups in order to enable cross-input from members of one working group to the discussion in another working group.

The largest amount of time was dedicated to the discussion and work in three groups. The groups were tasked to discuss remaining challenges regarding the specific aspect of judicial independence they were each dealing with, critically examine the impact of past reforms, as well as identify best practice examples from participating States. Experts were expected to identify concrete measures and practical tools to be recommended to the participating States for strengthening judicial independence in practice. At midway through the meeting, moderators gave a brief heads-up of the discussion in their respective working group to the plenary, in order to enable the above mentioned cross-input from all experts to each of the working groups. After another few hours of work in groups, moderators presented the final result of their respective group in the final plenary session.

Working Group 1 – Judicial administration

Moderator: Prof. Giuseppe Di Federico

The moderator gave an introduction to the topic, describing examples of judicial councils in western countries, their competences and composition, which was followed by a general discussion on judicial councils and court chairs in Central and Eastern Europe, South Caucasus and Central Asia. Experts deplored executive interferences in the work of judicial councils which sometimes result in tensions with the administration. Examples were also given for inappropriate influence by court chairs, both directly on judges and through the council, even if they do not have a formal role in the council or should not be members according to the law. Consequently, the group discussed suggestions how to limit the concentration of power in judicial councils, as well as court chairs.

Following a discussion on the competences of judicial councils, it was agreed that they should not be given the full responsibility on disciplinary proceedings; namely the right to initiate disciplinary proceedings and the right to decide on disciplinary proceedings should not be in one hand, and while councils could have the right to initiate disciplinary proceedings the power to decide should be given to another body, *or vice versa*.

The experts also raised concerns with regard to the councils' role in judges' selection and called for limiting the concentration of competences. The group agreed that there should be special selection commissions including lawyers and professors appointed by the council, to administer written and/or oral exams. While the judicial council should have the right to specify in detail the ways in which the candidates for the office of judge should be evaluated as well as the relevant criteria, the respective technical commissions should make the decision on who to appoint/recommend as final candidate(s). Judicial councils should only be in charge of controlling the regularity of proceedings.

Discussing the competence for judges' professional performance evaluation, experts raised reservations with respect to judicial councils' having a strong role in it. Various proposals were made as to what kind of body should conduct evaluations, e.g. that it should be a board or panel rather than an individual, at the local level rather than centralized, and that judge members should be elected by their fellow judges at the same court. Experts were critical of overly strong involvement of higher court judges in the evaluation. While some called for a role of court chairs in evaluation, others called for restricting it. Finally, it was agreed that they should not have the exclusive competence but otherwise be involved, since they have relevant information at their disposal concerning judges in their courts. It was also suggested to involve independent experts and lawyers in the process. The working group agreed that professional evaluation should be performed at the local level, that decisions should be taken by an independent body, and that the evaluation criteria should be due diligence, respect for the parties, and respect to the rules.

The working group then discussed judicial councils' budgetary competences. Various models suggested included affording an advisory role to the council, that it should give a reasoned proposal to the Parliament or as a minimum an opinion. While experts acknowledged the role of the executive, in particular the Ministry of Justice, in proposing the budget, they suggested that the councils should have more of a watchdog function.

Additionally, it was agreed that judicial councils should have a role in budgetary matters, and make requests to the government that financial needs of the judiciary are taken into account in Parliament.

Other issues of concern mentioned during the discussion included the problem that councils meet too rarely (and therewith giving room for other structures to fill gaps in judicial administration), their lack of crucial information, and the problem that members do not always serve on a full-time basis. Regarding the composition of councils, it was agreed that judicial representatives in the council should be elected by the judiciary.

Moreover the group touched upon the role of court chairs in judicial councils, which was a matter of concern for two reasons: Firstly, in many States the council has the competence to control court chairs. With court chairs sitting themselves on the council, it was deemed questionable that this control function can be assumed properly. Secondly, experts reported that in practice other judge members of the council feel intimidated by court chairs sitting on the council. Consequently, it was agreed that they should resign from their former function as court chair if elected to the council. Experts acknowledged that there are significant differences in the composition of councils in parliamentary systems and presidential systems. The group then discussed a proposal to exclude the Prosecutor's Office and Intelligence Service/law enforcement agencies from the councils. It was agreed that the Chief Prosecutor or a representative should be part of the council only if the prosecution belongs to the judiciary, but excluded if the prosecution belongs to executive, and that members of law enforcement agencies should generally be excluded. The group agreed that judicial councils should not be dominated by higher level judges, or by the executive and legislative branches of power. Experts did not come to a conclusion whether Bar members should be included in the councils. However, they agreed that law professors should be involved.

The group also addressed the situation in countries where judicial councils in the strict sense do not exist. Experts described the competences and composition of qualification commissions or qualification *collegia*, and concluded that the measures agreed with regard to councils are also applicable in countries that have other bodies fulfilling partly the same or similar functions.

The working group then turned to discussing the appointment of court chairs and their role in administering the judiciary. It was concluded that their authority needs to be limited to representative functions and court management decisions, and that they should not be able to interfere with the judges' adjudication of cases. Experts further agreed that case assignment should not be the responsibility of court chairs. In this context experts suggested the introduction of a random system or establishment of an independent board made up of judges, which would assign cases following clear and objective criteria developed in advance.

Experts expressed concern regarding the role of court chairs in establishing or influencing the level of remuneration through promotion, awards, or bonuses. As long as bonuses exist, they should be based on predetermined clear criteria and a transparent procedure. More generally, the group agreed that court chairs must not misuse their competence to distribute facilities such as court rooms to exert influence.

With regard to disciplinary matters, experts concluded that court chairs should be entitled to file a complaint to the independent organ competent for the initiation of disciplinary proceedings as any other citizen, but that they should not be able to initiate proceedings.

Moreover the group discussed the appointment of court chairs. The experts concluded that they should be appointed for a fixed and limited term, and that reappointment should be possible only once. The working group agreed that vacancies should be published and all persons who have the necessary qualifications may submit an application. It was concluded that participating States may want to consider publishing lists of candidates. Experts suggested various options of who should appoint court chairs. The group agreed that they should be elected by their fellow judges. Another option would be to have court chairs appointed by the President, provided that the judicial council or qualification commission proposed the candidate according to its fair and transparent procedures. In case the President refuses to appoint the candidate, one option discussed and approved was the possibility according to which the advisory body (judicial council or qualification commission) could overrule a veto by the President and impose a rejected candidate by qualified majority vote. Furthermore it was concluded that the President should have to give reasons for rejecting a candidate.

Following a discussion on accountability of the council and transparency of its activities, the working group agreed that public access to its deliberations should be guaranteed, also in practice. Experts also recommended the publication of decisions of the judicial council on its website.

Working Group 2 – Judicial Selection: Criteria and Procedures

Moderator: Prof. Angelika Nußberger

The discussion began with comparing eligibility criteria in different jurisdictions. The moderator pointed out that they were largely similar and could be divided into positive ones, such as requirements of a certain educational level and professional experience, and negative ones or prohibitions – for example, the lack of a criminal record.

It was pointed out that knowledge of several languages or very well qualified court interpreters may be required in some countries, especially with ethnically diverse populations. In most countries the requirement is limited to the knowledge of official state language(s). One expert addressed also the criterion of citizenship, pointing out that it presents a problem in his country where judicial candidates are prohibited from holding dual citizenship.

On the criterion of minimal age, the experts gave examples of different age requirements for judicial candidates, starting from 23. One expert suggested that this bar should not be set too high because in his country this would prevent young talented lawyers, often with high-quality western education, from pursuing judicial careers. Another expert retorted that in his country the age limit of 27 is criticized as being too low and that young judges may not have sufficient maturity and life experience to act independently. In this connection, other experts confirmed that the career judiciary model is being criticized in a number of transition countries. Its critics maintain that it does not create a sufficiently solid basis for

an independent judiciary. The experts agreed that these criticisms have led to initiatives in some countries to modify their judicial recruitment systems to attract not only young candidates but also mid-career lawyers to become judges. They concluded that this should be regarded as a welcome development.

Legal degrees and the quality of legal education in the region were then discussed at some length. Several experts pointed out that many universities continue with highly theoretical legal education which does not provide future lawyers and judges with sufficient analytical skills. Some experts also expressed concerns about differences in the quality of education between public and private schools. Experts concluded that university curricula should give more attention to training analytical skills. To this end, universities should strive to incorporate in their studies such elements as case studies, law clinics, and moot courts. In countries where all judicial candidates graduate from judicial schools, it was emphasized that these should not only teach judges the necessary skills but also the prerequisite values and ethics for independent adjudication. One expert suggested that ODIHR should organize a human dimension event on legal education on the OSCE area.

One expert noted that in some countries there is a lack of clarity about the necessary educational qualifications for a judicial examination. This lack and the corresponding discretion authorities have in interpreting the legislative requirement may lead to discrimination against candidates from certain educational institutions.

The working group also discussed education in special schools for judges (magistrates). Several experts expressed concerns that access to such schools is insufficiently transparent and there is a perception that candidates are admitted on the basis of connections rather than merit. Experts agreed that access to judicial (magistrates) schools should not be a barrier to the judicial profession. It was suggested that a unified qualification examination for all judicial candidates regardless of their prior education may be a solution to this problem. One expert, however, noted that this approach may create disincentives for potential applicants to judicial schools.

Another participant challenged the judicial school model for selecting and educating future judges. In particular, he questioned the extent to which this model is capable of promoting openness and pluralism in the judiciary. He suggested that the judiciary should be open to different legal professions, especially lawyers (advocates) and academics. Several experts agreed and added that a special challenge for post-Soviet countries is to make the judicial career a “crown” of the legal profession, so that lawyers may become judges later in their career, and not the other way around. This may be achieved through creating different avenues of access to the judicial profession instead of monopolizing this access within judicial schools.

The discussion then moved to the procedure of selection and appointment. In this regard, experts first discussed a number of general principles that should be followed, including separation of powers, transparency, responsibility, and legitimacy. The working group then discussed the following key elements of the selection procedure.

First, competition for all judicial vacancies should be publicly announced. The vacancies should be widely published in public media. The vacancy announcements should clearly spell out the requirements for judicial candidates.

Second, an autonomous body in charge of selection should compile the list of applicants with basic information about them. This list should be publicly available; although one expert pointed out that the information to be disclosed should not breach the applicants' reasonable expectations of privacy. The working group agreed that the selecting body should be appointed for a short and limited term and include representatives from outside the judiciary, although judges should form a majority.

Third, rules for assessing candidates applied by the selecting body should exist and also be publicly available. These rules should provide for objective assessment of the applicants and guarantee proper evaluation of candidates from different backgrounds: graduates of judicial schools, as well as practicing lawyers and other legal professionals. The selecting body should make a final decision or recommend one candidate for appointment by the appointing authority (most commonly the president).

Finally, the working group discussed the involvement of political organs in the appointment of judges. It was debated whether the president should merely provide a stamp of approval or have an opportunity to reject appointment with a reasoned decision. The use of the legislature as appointing authority was questioned by the experts, who pointed out that the legislature takes a vote but cannot provide reasoning for its decision. The experts agreed that refusal to appoint may only be based on procedural grounds. One expert was of the opinion that the selecting body's decision should be binding and that the appointing authority should not have any power to veto the chosen candidate. All experts agreed that if the veto is applied by the appointing authority, the selecting body should re-examine its decision and have the option to override this veto by a qualified majority. This should be done within a short time-frame to avoid uncertainty for the candidates waiting for appointments.

Several experts raised concerns about the formal and informal vetting procedures and background checks which are carried out in some countries in relation to judicial candidates. It was suggested that the selecting body should request a standard check for a criminal record and any other disqualifying grounds from the police. The results from this check should be available to the applicant, who should be entitled to appeal them in court. No other background checks should be performed by any security services.

Representation of minorities in the judiciary was also discussed by the working group. Several experts suggested that it would be desirable if the composition of the judiciary reflected the composition of the population as a whole. However, many experts did not feel that recommending quotas for minorities may be an appropriate solution. Instead, all experts agreed that underrepresented groups should be encouraged to acquire the necessary qualifications for becoming judges. In particular, it was suggested that promotion of university legal education for minorities would help increase the number of judges who belong to minorities.

Working Group 3 – Accountability
Moderator: Prof. Peter Solomon

Regarding discipline, the group discussed at length whether it would be appropriate to come up with or recommend a detailed and specific definition of disciplinary offences. Many experts pointed at broad and unclear provisions in their countries. They considered it necessary to reduce the scope of disciplinary laws, and thereby limit the discretion and subjectivity in their application. Some expressed hope that a more specific and detailed description of grounds for disciplinary proceedings would help prevent the abuse of disciplinary proceedings to get rid of unwanted judges. On the other hand, experts agreed that it was not appropriate in a number of legal cultures to define and enumerate the grounds for discipline in detail, because this may unduly limit the scope and exclude unforeseen circumstances that would merit disciplinary proceedings. The group therefore concluded that instead, the recommendations should define discipline more generally (serious violation, inexcusable, and bringing the judiciary into disrepute). It was also agreed to specify the elements that should not be handled in the framework of judges' discipline, namely all aspects related to the content of a judge's decision, divergence of opinion between judges at a lower and a higher court or alleged mistakes in applying the law, and criticism of the courts. In a number of the experts' countries, judges are influenced by the fear that their decision may be overturned. Some experts mentioned the fact that due to the absence of audio-recording of proceedings in many places, it was often impossible to prove or disprove charges or inappropriate behaviour of a judge during a hearing. As a consequence, a recommendation was phrased to call for complete recording of hearings.

The group then turned to discussing the composition and competences of bodies in charge of disciplinary proceedings. While it was acknowledged that the disciplinary competence lies with a judicial council in many countries, experts agreed that this practice bears many problems. Judicial councils are considered to be in charge first and foremost of judicial administration, and are often dominated by representatives of the executive, court chairs, and judges from higher instance courts. In the majority of countries discussed, a commission or board within the council has some competence over discipline, but often the council has to validate decisions of the commission, and the scope of this validation is not clear. Therefore, the group concluded that bodies dealing with discipline of judges should be separate and independent from the bodies in charge of judicial administration, and that it should be composed of at least 2/3 judges.

Discussing the role of court chairs in initiating discipline against judges, including for matters of work discipline, the group could not agree to exclude this possibility. Experts also raised the issue of *ex-parte* communications and related concerns for judicial independence, but the group did not conclude to craft a related recommendation. Moreover the working group talked about the fact that judges tend not to protest against interference, or bring it to public attention. In this regard, the group agreed that legal protection of judges needed to be enhanced. This part of the discussion resulted in recommendations in connection to judicial safeguards for judges during disciplinary proceedings. More specifically the group also agreed to recommend that as a rule, disciplinary hearings should be public.

Turning to the matter of holding judges accountable through a system of performance evaluation, the working group discussed different models and related concerns. Experts pointed out that performance evaluations can be a useful tool to hold judges accountable to professional and ethical standards, motivate them and stimulate their professional development. However where performance evaluation is in the hands of the respective court chairs alone, experts agreed that the individual judge's independence may be at risk. Another concern raised by experts from Eastern Europe is the use of statistical data or quantitative indicators to evaluate judges' performance. The group agreed that the quality of a judge's performance cannot be measured by counting the number of cases processed regardless of their complexity, or the number of judgments upheld at the higher instance. While it was acknowledged that statistics regarding case processing and reversal rate can be useful for purposes of judicial administration, management and budgeting, they should not be used to the detriment of the individual judge. The experts concluded that judges' performance evaluations should not relate to the so-called stability of judgment upon appeal, that they should be focused on skills and competencies, and that the evaluation procedure should contain clearly regulated criteria, be transparent and fair, with possibility of appeal by the relevant judge.

It was also agreed that retired judges could be involved in a body or panel that is performing the evaluations. The question whether public observers should be included was briefly discussed, without a conclusion. There were differences in opinion whether performance evaluations should influence promotion and ranking decisions. The group agreed however that "attestations", i.e. periodic exams that may lead to the dismissal of a judge with permanent tenure, are not appropriate. It was concluded that where such attestations are required, the system should be changed into a system of performance evaluations or a similar system instead. It was suggested that OSCE/ODIHR could assist in developing a set of criteria for evaluating judges.

On a more general note, the group discussed concerns related to criminal and disciplinary responsibility, as well as civil liability of judges for the content of their decisions. Consensus was reached that judges' wilful misapplication of the law or a gross inexcusable breach may be punishable. It was agreed however that those offences should be covered by disciplinary responsibility for serious professional misconduct or criminal responsibility for abusing a judge's position, and that special criminal or disciplinary offences regarding the content of the judge's decision are not necessary. Different interpretations of the law should never be a reason for dismissal of a judge.

Moreover, the working group addressed the issue of low rates of acquittal, an outcome expected of judges and for whose absence they are often held responsible. The experts reported that in some systems judges are held responsible for low acquittal rates directly because it is one criterion in their evaluations. In countries where this is not the case, experts explained how judges are held accountable for acquittal rates indirectly: acquittals have a high risk of being overturned upon appeal, and court chairs exercise pressure on judges to keep the number of acquittals low in order to avoid a high number of reversals of decisions taken at their courts. Consequently, the group formulated a recommendation to reduce the pressure on judges to avoid acquittals by, *inter alia*, reviewing the criteria for the evaluation of judges. Several experts expressed concern regarding the *prokurator's* power in some countries, and suggested that OSCE/ODIHR address this more generally.

The moderator then drew the group's attention to what he called "professional accountability". While bureaucratic accountability makes judges answerable to court chairs, higher court judges and bureaucratic structures and hence bears the risk of undue influence, professional accountability enables more appropriate control over judges. Under the so-called professional accountability, judges are mainly accountable to their peers, the wider legal community and the public. With this form of mild or benign pressure, judges do not worry about their careers but rather about their public reputation as a good judge and respect of the legal community. The group discussed what is necessary to foster professional accountability and elaborated a number of recommendations. Namely it was agreed that judges' specialized education should include training on what makes a good judge and how to reason a judgment. More specifically, experts suggested that OSCE/ODIHR may assist in developing such training curricula and hold a human dimension meeting on the topic of legal education. Furthermore the group concluded that publicity of hearings and transparency of decisions and media access are crucial for professional accountability because they enable scrutiny and critical discussion. In this context it was suggested that OSCE/ODIHR support participating States in making judgments available and searchable online and hence truly accessible to the public and legal and academic community.

The working group also addressed the significant role that judges' associations can play in upholding judges' professional accountability. In this regard experts concluded that OSCE/ODIHR could support the formation and activities of judges' associations, mainly through facilitating exchange of experiences within the OSCE region.

Finally, the group turned to discussing the phenomenon of higher courts' directives, resolutions or decisions that are afforded so-called precedential effect. It was acknowledged that a certain degree of uniformity of jurisprudence is desirable, and that the highest courts have a mandate in this regard. However the group agreed that such decisions may not be binding on judges of lower level courts.

5. Conclusion

During the final plenary session, the group of all experts had a discussion of the recommendations prepared in the three working groups and adopted them as the "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia" (Annex 1). To begin the next phase of the project, discussions with OSCE staff in field operations and independent experts will prepare the ground for pilot-projects in selected countries to begin implementing the recommendations.

Participating States are invited to review the ideas contained in the Kyiv Recommendations, identify areas where their practice already corresponds to what is recommended, and share relevant information with ODIHR. ODIHR will accordingly consider facilitating the exchange of expertise and technical assistance for the benefit of participating States that express the interest to further strengthen the independence of their judiciaries by implementing some of the measures recommended in the Kyiv Recommendations.

ANNEX 1 The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia



OSCE Office for Democratic Institutions
and Human Rights



Max Planck Minerva Research Group
on Judicial Independence

KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA

- Judicial Administration, Selection and Accountability -

Kyiv, 23-25 June 2010

Judicial independence is an indispensable element of the right to due process, the rule of law and democracy. In an effort to support countries in Eastern Europe, South Caucasus and Central Asia in strengthening judicial independence in line with these principles, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) together with the Max Planck Institute for Comparative Public Law and International Law (MPI), organized and hosted a regional expert meeting on Judicial Independence in Kyiv. The meeting was attended by approximately 40 independent experts, among them prominent scholars and senior practitioners from 19 OSCE participating States, and from the Council of Europe and its Venice Commission.

Following an in-depth research of legal systems and practices regarding judicial independence, ODIHR and MPI selected three themes that are of particular relevance for judicial independence: (1) Judicial Administration with a focus on judicial councils, judicial self-governing bodies and the role of court chairs; (2) Judicial Selection – criteria and procedures; and (3) Accountability of Judges and Judicial Independence in Adjudication. The meeting concluded with the adoption of a – non-exhaustive – set of recommendations (enclosed "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia"). The purpose of these recommendations is to further strengthen judicial independence in the region within the three selected topical areas.

Participating States are invited to review the ideas contained in the Kyiv Recommendations, identify areas where their practice already corresponds to what is recommended, and share relevant information with ODIHR. ODIHR will accordingly facilitate the exchange of expertise and provide technical assistance for the benefit of participating States that express the interest to further strengthen the independence of their judiciaries by implementing the measures contained in the Kyiv Recommendations.

Part I – Judicial Administration

1. The administration of courts and the judiciary shall enhance independent and impartial adjudication in line with due process rights and the rule of law. Judicial administration must never be used to influence the content of judicial decision making. The process of judicial administration must be transparent.

Judicial Councils, Qualification Commissions and Self-governing Bodies

Division of Competences in Judicial Administration

2. Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence. In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection (*see paras 3-4, 8*), promotion and training of judges, discipline (*see paras 5, 9, 14, 25-26*), professional evaluation (*see paras 27-28*) and budget (*see para 6*). A good option is to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree.

Judicial Selection

3. Unless there is another independent body entrusted with this task, a separate expert commission should be established to conduct written and oral examinations in the process of judicial selection (*see also para 8*). In this case the competence of the Judicial Council should be restricted to verifying that the correct procedures have been followed and to either appoint the candidates selected by the commission or recommend them to the appointing authority. (*For the recruitment process see paras 21-23.*)

4. Alternatively, Judicial Councils or Qualification Commissions or Qualification Collegia may be responsible directly for the selection and training of judges. In this case it is vital that these bodies are not under executive control and that they operate independently from regional governments (*for the composition see also para 8*).

Discipline

5. In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures. Disciplinary decisions shall be subject to appellate oversight by a competent court (*see also paras 9, 14, 25-26*).

Budgetary Advice

6. Without prejudice to existing responsibilities of the government for proposing the judicial budget and of parliament for adopting the budget, it would be advisable for a body representing the interests of the judiciary, such as a Judicial Council, to present to the government the budgetary needs of the justice system in order to facilitate informed decision making. This body should also be heard by parliament in the deliberations on the budget. Judicial Councils may play a role also in the distribution of the budget within the judiciary.

Composition of Judicial Councils

7. Where a Judicial Council is established, its judge members shall be elected by their peers and represent the judiciary at large, including judges from first level courts. Judicial Councils shall not be dominated by appellate court judges. Where the chairperson of a court is appointed to the Council, he or she must resign from his or her position as court chairperson. Apart from a substantial number of judicial members elected by the judges, the Judicial Council should comprise law professors and preferably a member of the bar, to promote greater inclusiveness and transparency. Prosecutors should be excluded where prosecutors do not belong to the same judicial corps as the judges. Other representatives of the law enforcement agencies should also be barred from participation. Neither the State President nor the Minister of Justice should preside over the Council. The president of the Judicial Council should be elected by majority vote from among its members. The work of the Judicial Council shall not be dominated by representatives of the executive and legislative branch.

Membership of Bodies Deciding on Judicial Selection

8. Members of special commissions for judicial selection (*see para 3*) should be appointed by the Judicial Council from the ranks of the legal profession, including members of the judiciary. Where Judicial Councils, Qualification Commissions or Qualification Collegia are responsible directly for judicial selection (*see para 4*), the members should be appointed to fixed terms of office. Apart from a substantial number of judicial members in this selection body, the inclusion of other professional groups is desirable (law professors, advocates) and should be decided on the basis of the relevant legal culture and experience. Its composition shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office (*see para 21*).

Membership of Bodies Deciding on Discipline

9. Bodies competent to hear a disciplinary case and to take a decision on disciplinary measures (*see para 5, b*) shall not exclusively be composed of judges, but require representation including members from outside the judicial profession. Judicial members during their time of office shall not perform other functions relating to judges or the judicial community, such as administration, budgeting, or judicial selection. Bodies deciding on cases of judicial discipline must not be controlled by the executive branch nor shall there be any political influence pertaining to discipline. Any kind of control by the executive branch over Judicial Councils or bodies entrusted with discipline is to be avoided. (*See also paras 5, 25-26.*)

Transparency of Judicial Administration

10. The Judicial Council shall meet regularly so that it can fulfil its tasks. Public access to the deliberations of the Judicial Council and publication of its decisions shall be guaranteed in law and in practice.

The Role of Court Chairpersons

11. The role of court chairpersons should be strictly limited in the following sense: they may only assume judicial functions which are equivalent to those exercised by other members of the court. Court chairpersons must not interfere with the adjudication by other judges and shall not be involved in judicial selection. Neither shall they have a say on remuneration (*see para 13 for bonuses and privileges*). They may have representative and administrative functions, including the control over non-judicial staff. Administrative functions require training in management capacities. Court chairpersons must not misuse their competence to distribute court facilities to exercise influence on the judges.

Case Assignment

12. Administrative decisions which may affect substantive adjudication should not be within the exclusive competence of court chairpersons. One example is case assignment, which should be either random or on the basis of predetermined, clear and objective criteria determined by a board of judges of the court. Once adopted, a distribution mechanism may not be interfered with.

Individual Bonuses and Privileges

13. On a long term basis, bonuses and privileges should be abolished and salaries raised to an adequate level which satisfy the needs of judges for an appropriate standard of living and adequately reflect the responsibility of their profession. As long as bonuses and privileges exist, they should be awarded on the basis of predetermined criteria and a transparent procedure. Court chairs shall not have a say on bonuses or privileges.

Limited Role in Disciplining Judges

14. Court chairpersons may file a complaint to the body which is competent to receive complaints and conduct disciplinary investigations (*see para 5, a*). In order to ensure an independent and objective review of the complaint, court chairpersons should not have the power to either initiate or adopt a disciplinary measure.

Limited Term of Office

15. Court chairpersons should be appointed for a limited number of years with the option of only one renewal. In case of executive appointment, the term should be short without possibility of renewal.

Transparent and Independent Selection of Court Chairpersons

16. The selection of court chairpersons should be transparent. Vacancies for the post of court chairpersons shall be published. All judges with the necessary seniority/experience may apply. The body competent to select may interview the candidates. A good option is to have the judges of the particular court elect the court chairperson. In case of executive appointment, an advisory body - such as a Judicial Council or Qualification Commission (*see para 4*) - taking also into consideration views from the local bench, should be entitled to make a recommendation which the executive may only reject by reasoned decision. In this case the advisory body may recommend a different candidate. Additionally, in order to protect against excessive executive influence, the advisory body should be able to override the executive veto by qualified majority vote.

Part II – Judicial Selection and Training

Diversity of Access to Judicial Profession

17. Access to the judicial profession should be given not only to young jurists with special training but also to jurists with significant experience working in the legal profession (that is, through mid-career entry into the judiciary). The degree to which experience gained in the relevant profession can qualify candidates for judicial posts must be carefully assessed.

Improvement of Legal Education

18. Access to the judicial profession should be limited to those candidates with a higher law degree. In the university curriculum more attention should be given to the training of analytical skills. Elements such as case studies, practical experience, law clinics and moot courts should be integrated. The same level of education should be guaranteed in State and private universities, including distant learning programmes. External evaluation of the university curricula may positively contribute to their improvement.

Improvement of Special Training of Judges

19. Where schools for judges are part of the selection procedures, they have to be independent from the executive power. Training programmes should focus on what is needed in the judicial service and complement university education. They should include aspects of ethics, communication skills, the ability to settle disputes, management skills and legal drafting skills. Where a Judicial Council exists, it may adopt recommendations for the legal education of judges. This includes the specification of relevant skills and advice on the continuing education of judges.

20. Special training as referred to in para 19 should also be provided for representatives of other legal professions joining the judiciary.

Recruitment Process

21. In order to ensure transparency in the selection process, the procedure and criteria for judicial selection must be clearly defined by law. The vacancy note, as well as the terms and conditions, should be publicly announced and widely disseminated. A list of all candidates applying (or at least a short list) should be publicly available. The selection body should be independent, representative

and responsible towards the public (*see paras 3-4*). It should conduct an interview at least with the candidates who have reached the final round, provided that both the topic of the interview and its weight in the process of selection is predetermined.

22. If there are background checks, they should be handled with utmost care and strictly on the basis of the rule of law. The selecting authority can request a standard check for a criminal record and any other disqualifying grounds from the police. The results from this check should be made available to the applicant, who should be entitled to appeal them in court. No other background checks should be performed by any security services. The decision to refuse a candidate based on background checks needs to be reasoned.

23. Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, Qualification Commission or Expert Commission; *see paras 3-4*). Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law.

Representation of Minorities within the Judiciary

24. Generally it would be desirable that the composition of the judiciary reflects the composition of the population as a whole. In order to increase the representation of minorities in the judiciary, underrepresented groups should be encouraged to acquire the necessary qualifications for being a judge. Nobody must be excluded because they are a member of a certain minority group.

Part III – Accountability of Judges and Judicial Independence in Adjudication

Disciplinary Proceedings

25. Disciplinary proceedings against judges shall deal with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute. Disciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts.

Independent Body Deciding on Discipline

26. There shall be a special independent body (court, commission or council) to adjudicate cases of judicial discipline (*see para 9*). The bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them. These bodies shall provide the accused judge with procedural safeguards, including the right to present a defence and also the right to appeal to a competent court. Transparency shall be the rule for disciplinary hearings of judges. Such hearings shall be open, unless the judge who is accused requests that they be closed. In this case a court shall decide whether the request is justified. The decisions regarding judicial discipline shall provide reasons. Final decisions on disciplinary measures shall be published.

Professional Evaluation of Judges

27. Where professional evaluations of judges are performed, they must not be used to harm independent adjudication. The evaluation of judges' performance shall be primarily qualitative and focus upon their skills, including professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal competence (ability to cope with the work load, ability to decide, openness to new technologies), social competence (ability to mediate, respect for the parties) and, for possible promotion to an administrative position, competence to lead. These same skills should be cultivated in judicial training programmes, as well as on the job.

28. Judges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal). How a judge decides a case must never serve as the basis for a sanction. Statistics on the efficiency of court operations shall be used mainly for administrative purposes and serve as only one of the factors in the evaluation of judges. Evaluations of judges may be used to help judges identify aspects of their work on which they might want to improve and for purposes of possible promotion. Periodic exams for judges (attestations) that may lead to dismissal or other sanctions are not appropriate for judges with life tenure.

29. The criteria for professional evaluation should be clearly spelled out, transparent and uniform. Basic criteria should be provided for in the law. The precise criteria used in periodic evaluations shall be set out further in regulations, along with the timing and mechanisms of performing evaluations.

Independent Evaluations

30. While a Judicial Council may play a role in specifying the criteria and the procedure, professional evaluations should be conducted at the local level. Evaluations shall be conducted mainly by other judges. Court chairpersons should not have the exclusive competence to evaluate judges, but their role should be complemented by a group of judges from the same and other courts. That group should consider also the opinions of outsiders who regularly deal with the judge (such as lawyers) and law professors, with respect to the diligence, respect for the parties and rules of procedure by a judge.

31. Evaluations should include review of the judge's written decisions and observation of how he or she conducts trials. Evaluations shall be transparent. Judges should be heard and informed about the outcome of the evaluation, with opportunities for review on appeal.

Professional Accountability through Transparency

32. Transparency shall be the rule for trials. To provide evidence of the conduct of judges in the courtroom, as well as accurate trial records, hearings shall be recorded by electronic devices providing full reproduction. Written protocols and stenographic reports are insufficient. To enhance the professional and public accountability of judges, decisions shall be published in databases and on websites in ways that make them truly accessible and free of charge. Decisions must be indexed according to subject matter, legal issues raised, and the names of the judges who wrote them. Decisions of bodies deciding on discipline shall also be published (*see also para 26*).

33. To facilitate public trust in the courts, authorities should encourage the access of journalists to the courts, and establish positions of press secretary or media officer. There shall be no barriers or obstacles to journalists attending trials.

Independent Criminal Adjudication

34. The accusatory bias of justice systems in most countries of Eastern Europe, South Caucasus and Central Asia requires remedies. Acquittals are still considered a black mark or failure. To diminish pressure on judges to avoid acquittals, a change in the system of their professional evaluation (and if appropriate, considering changes in the assessment of prosecutors and investigators as well) is strongly recommended. The number of acquittals should never be an indicator for the evaluation of judges. Judges need to gain real discretion in reviewing requests for approval of pre-trial detention. Appellate review of acquittals shall be limited to the most exceptional circumstances.

Internal Independence

35. The issuing by high courts of directives, explanations, or resolutions shall be discouraged, but as long as they exist, they must not be binding on lower court judges. Otherwise, they represent infringements of the individual independence of judges. In addition, exemplary decisions of high courts and decisions specifically designated as precedents by these courts shall have the status of recommendations and not be binding on lower court judges in other cases. They must not be used in order to restrict the freedom of lower courts in their decision-making and responsibility. Uniformity of interpretation of the law shall be encouraged through studies of judicial practice that also have no binding force.

ANNEX 2

Annotated agenda

I. Introduction

Judicial independence is an institutional requirement for all OSCE participating States. Only an independent judiciary can adjudicate cases in a just manner, respecting the rights of accused persons to a fair trial. Judicial independence is one of the hallmarks of a state that respects the principle of separation of powers, which is indispensable for a genuine democracy. The participating States most recently reaffirmed their commitment to judicial independence in the Helsinki Ministerial Council Decision no. 7/08 on *Further strengthening the rule of law in the OSCE area* (MC.DEC/7/08). The principle of judicial independence is at the forefront of the organization's rule of law-related commitments and has repeatedly been the focus of human dimension meetings, most recently the Human Dimension Seminar on Strengthening the Rule of Law in the OSCE Area in 2009.

In earlier documents, the participating States have acknowledged the significance of judicial independence for the full expression of the inherent dignity and of the equal and inalienable rights of all human beings (Copenhagen1990); committed to respect the related international standards, and ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary; and recognized the importance of associations of judges for the promotion of judicial independence (Moscow 1991). In the Charter for European Security participating States agreed to promote the development of independent judicial systems (Istanbul 1999).

Balancing the independence of the judiciary with the need for democratic legitimacy in a society governed by the rule of law is a challenge for every participating State. The legacy of the Socialist legal tradition has shaped justice systems in a great number of OSCE participating States. After departure from the doctrine of “unity of state power”, these States in the past two decades have implemented numerous reforms, both legislative and institutional, which were intended to foster separation of powers and judicial independence. The time is now ripe for a fresh look at these efforts, to assess their success in establishing truly independent judiciaries, as well as identify remaining challenges in strengthening them. Therefore, ODIHR and the Max Planck Institute for Comparative Public Law and International Law (MPI) have undertaken an assessment of the state of judicial independence across the OSCE region which provides the basis for developing an ODIHR strategy for this sector. The primary purpose of the project is to identify impediments and recognize good practices for the makeup of independent judiciaries in the participating States of the OSCE, and assist the States, with a predominant focus on current and former members of the Commonwealth of Independent States (CIS), in adhering to their commitments. This approach is expected to result in practical and relevant recommendations to strengthen judicial independence.

For the research phase of the project, ODIHR designed a questionnaire on judicial independence for the experts. The questionnaire benefitted from feedback by MPI and the Council of Europe's Venice Commission and covers the most relevant aspects of judicial independence, as outlined in several international instruments. Special attention has been given, *inter alia*, to the administration of the judiciary including budget management, the role of judicial councils, selection and appointment of judges, tenure and promotion, remuneration, case assignment systems, disciplinary procedures, immunity, ethics and resources.

Discussions at the 2009 Human Dimension Seminar on Strengthening the Rule of Law in the OSCE Area confirmed that judicial councils and judicial administration more generally, selection and appointment of judges, as well as accountability including discipline and removal of judges are crucial aspects of judicial independence that deserve more in-depth examination and further discussion. A recommendation made at this Seminar called on the OSCE, its institutions and field operations to continue facilitating exchanges of practices and contacts between the judiciaries of participating States. **The expert meeting in Kiev therefore will concentrate on these aspects of judicial independence and will consider in detail judicial administration with a special focus on judicial councils and the role of court presidents, criteria and procedure for the selection of judges, and the question how to properly balance the accountability of judges while maintaining independence in adjudication. It is intended to provide recommendations for future reforms and for assistance by the OSCE in this field, particularly in Eastern Europe, the South Caucasus and Central Asia.**

II. Aims

In Helsinki in 2008, the Ministerial Council encouraged "participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law, *inter alia* in the area of independence of the judiciary."

More specifically, in the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (Moscow 1991), participating States committed themselves, for the promotion of the independence of the judiciary, to

(20.2) - promote and facilitate dialogue, exchanges and co-operation among national associations and other groups interested in ensuring respect for the independence of the judiciary and the protection of lawyers;

(20.3) - co-operate among themselves through, *inter alia*, dialogue, contacts and exchanges in order to identify where problem areas exist concerning the protection of the independence of judges and legal practitioners and to develop ways and means to address and resolve such problems;

(20.4) - co-operate on an ongoing basis in such areas as the education and training of judges and legal practitioners, as well as the preparation and enactment of legislation intended to strengthen respect for their independence and the impartial operation of the public judicial service.

In line with these goals, the expert meeting in Kiev aims to serve as a platform for in-depth discussion of remaining challenges in selected areas related to judicial independence, critical examination of the impact of past reforms, as well as identification of best practice examples from participating States on the issues related to judicial independence. Discussions are expected to lead to the identification of concrete measures and practical tools to be recommended to ODIHR and the participating States for strengthening judicial independence in practice. The discussions will be structured in three parallel Working Groups as outlined in the Work Plan below.

III. Organization

The expert meeting is held at the Radisson Hotel in Kiev, from Wednesday 23 16:00h to Friday 25 June 14:00h. The three working group sessions are held in parallel.

IV. Work plan

23 June 2010, Wednesday

16:00-16:30h

Welcome and Introduction

Welcome and opening by Rene Bebeau, Senior Project Officer, OSCE Project Co-ordinator in Ukraine

Introduction of the project and expectations: Carsten Weber, ODIHR Chief of Rule of Law Unit and Dr. Anja Seibert-Fohr, Head of Minerva Research Group on Judicial Independence at the Max-Planck Institute for Comparative Public Law and International Law in Heidelberg (Germany)

Tour de table (brief introduction)

16:30-18:00h

Plenary session (Moderator: Denis Petit, ODIHR Acting Head of Democratization Department)

Presentation of the results of the project's research phase by Lydia F. Müller (MPI), Vasily Vashchanka and Eva Katinka Schmidt (ODIHR) followed by plenary discussion

Day 2 – 24 June (Thursday)

9:00-9:30h

Plenary session cont.

Continuation and wrap-up of plenary discussion in preparation for work in groups

9:30-11:00h

Session in three parallel working groups

The three parallel working groups are tasked to discuss remaining challenges in their specific area of judicial independence, critically examine the impact of past reforms, as well as identify best practice examples from participating States. The groups are expected to identify concrete measures and practical tools to be recommended to ODIHR and the participating States for strengthening judicial independence in practice. These measures and tools will be presented and discussed in the plenary session.

- Working Group I: Judicial Administration
 - 1. Judicial Councils and Judicial Self-governing Bodies and
 - 2. Role of Court Presidents

Moderator: Prof. Giuseppe Di Federico

Judicial Councils and bodies of judicial self-governance are in many participating States tasked to protect the independence of the judiciary, and play a vital role in judicial administration. The composition of these bodies, their appointment, status and competencies differ from country to country. Risks which have to be mitigated in these systems judicial administration are on the one hand undue influence over the judiciary and threats to internal independence and the danger of insufficient accountability and allegations of judicial corporatism on the other.

Judicial councils often share competencies for judicial administration with the executive. What should be the respective role of judicial councils and the executive in judicial administration? What is the role of judicial self-governance bodies, especially where judicial councils are primarily composed by members appointed by the executive and not considered part of the judiciary? In many participating States, judicial councils have the mandate to protect the independence of the judiciary. What are the powers and mechanisms necessary for this task? Are judicial councils willing and able to protect judges from improper influences in individual cases?

How are the members of judicial councils appointed and dismissed? In some countries judicial councils consist primarily of judges, while in other countries the three branches of power are represented equally, or the executive plays the strongest role. Should the composition of the judicial council or other bodies ensure a balance of the need for independence with the requirements of democratic accountability? If so how?

Court presidents regularly play a crucial role in the administration of their respective courts. In some countries, court presidents are selected by the executive and have an important role in selecting judges, evaluating them for promotion purposes or before permanent appointment, and disciplining them. Sometimes, the assignment of cases to judges is entirely in their hands, *de facto* or even *de jure*. When does their influence jeopardize the independence of judges? What models of random cases assignment can serve as best practices to prevent undue influence in case assignment?

Task: Discuss challenges and agree on main ones (5-6), achievements (3-5) and develop recommendations, propose catalogue of tools and measures to strengthen

judicial independence (5-10), either to be implemented by ODIHR with (all or selected) participating States, or only the latter.

- Working Group II: Judicial Selection (criteria and procedures)
Moderator: Prof. Angelika Nußberger

A competent and independent judiciary requires merit-based selection and appointment procedures. Objective criteria should enable the selection of the most qualified candidates for the judicial profession. Subjective criteria which are in the hands of the selecting authority give room for arbitrary decisions, they bear the risk of undue executive influence to block politically unwanted candidates, and have the potential of undermining public trust in judicial independence. Which criteria guarantee a merit-based selection, while ensuring the identification of candidates with the appropriate character and values to maintain independence? How can a representative and pluralistic composition of the judiciary be ensured?

Written examinations and personal interviews are widely used to assess candidates' knowledge, skills and character. How are these components weighted to ensure the most effective testing of future judges? What elements should guarantee the fairness and transparency of evaluation systems for candidates and the public?

Executive authorities in many participating States are involved in the appointment of judges, even when the selection and nomination is left entirely to the judiciary. In most countries, the discretion of the appointing authority is limited. During the Human Dimension Seminar 2009 it was suggested that executive and legislative branches of government should be limited to confirming the nominations made by an independent body. What is the role of executive and legislature in selecting and appointing judges? When does the involvement of executive authorities in the actual selection or their discretion in appointments become an obstacle for the actual or perceived independence of the judiciary?

Task: Discuss challenges and agree on main ones (5-6), achievements (3-5) and develop recommendations, propose catalogue of tools and measures to strengthen judicial independence (5-10), either to be implemented by ODIHR with (all or selected) participating States, or only the latter.

- Working Group III: Accountability vs. Independence in Adjudication
Moderator: Prof. Peter Solomon

Accountability of judges is often seen as a threat to their independence so that the need for judicial independence reduces the scope of holding judges accountable as compared to other public officials. However, to maintain professionalism and integrity and thus to ensure that the rule of law is upheld, judges should be held accountable for abusive conduct in disciplinary proceedings. Only a professional and ethical judiciary can win public trust, be independent and strong enough to withstand attempts of undue influence. Therefore, it is necessary to find the right balance between independence and accountability of judges. There is a need to identify adequate means of accountability which ensure professionalism without jeopardizing substantive judicial independence.

For this purpose it is mandatory to first identify disciplinary and removal procedures and sanctions posing a threat to judicial independence and ask then for alternative means of accountability. While judges enjoy a certain degree of immunity from criminal prosecution in most participating States, there are specific offences related to adjudication of cases. Criminal and disciplinary offences in several participating States relate to “wrong application of the law” or similar, and are sometimes related to the reversal of the relevant judgments on appeal. When does criminal prosecution and the threat of regress compromise judicial independence inadequately? Which practices effectively balance accountability with the need for independence in adjudication?

Apart from disciplinary and criminal measures it is also necessary to consider other means of oversight relevant to judges’ accountability, such as performance evaluations. In several participating States, the number of reversed judgments plays a role for evaluating judges’ professional performance, and consequently for their career and financial status, sometimes even their tenure. Is this an adequate means to ensure professionalism? How can the need for accountability and independence be balanced in this regard? What is necessary to ensure that a skill based assessment of judges does not jeopardize substantive independence? How could managerial evaluations be introduced which do not compromise the rule of law?

Those participating States which do not provide for a career judiciary within a hierarchical structure have developed different means to prevent abuse of power and ensure efficiency such as specialized training for judges and a stronger role of the legal profession in ensuring professionalism. Which lessons can be learned from such countries which have put a greater emphasis on alternative means of accountability that focus on the transparency of judicial activities?

Task: Discuss challenges and agree on main ones (5-6), achievements (3-5) and develop recommendations, propose catalogue of tools and measures to strengthen judicial independence (5-10), either to be implemented by ODIHR with (all or selected) participating States, or only the latter.

11:00-11:30h

Coffee break

11:30-13:00h

Session in three parallel working groups (cont.)

13:00-14:00h

Lunch

14:00-15:00h

Plenary session 2 (Moderator: Carsten Weber)

Short heads-up in plenary on the work in the three groups (Moderators)

Approx. 10 minutes report and 10 minutes discussion on the topics of each of the three working groups

15:00-16:00h

Session in three parallel working groups (cont.)

Continue discussion taking into account additional issues raised in the plenary discussion

16:00-16:30h

Coffee break

16:30-18:00

Session in three parallel working groups (cont.)

20:00h

Reception

Day 3 - 25 June (Friday)

9:00-10:00h

Final session in three parallel working groups to finalize results

10:00-10:30h

Coffee break

10:30-12:45h

Plenary session 3 (Moderator: Dr. Anja Seibert-Fohr)

Moderators present results of working groups (15 minutes followed by 30 minutes discussion each)

Moderators present the outcome of their working groups naming challenges, recommended reforms, best practices and tools. Measures, tools and recommendations prepared by the working groups are then discussed in the plenary.

The plenary of experts adopts agreed recommendations as prepared by WGs and discussed in the plenary (Kiev Document).

12:45-13:00h

Closing (Dr. Anja Seibert-Fohr and Carsten Weber)

13:00h

Lunch and departure

ANNEX 3

List of Participants

ABDURAKHMONOV Vatanzhon (Tajikistan)
ALARCON JIMENEZ Oscar (Council of Europe)
BODNAR Adam (Poland)
BOKHASHVILI Irene (Georgia)
DI FEDERICO Giuseppe (Italy)
DÜRR Schnutz (Council of Europe Venice Commission)
FLECK Zoltán (Hungary)
GRIBINCEA Vladislav (Moldova)
HRIPTIEVSCHI Nadejda (Moldova)
KACHKEEV Maksat (Kyrgyzstan)
KHVAN Leonid (Uzbekistan)
KIENER Regina (Switzerland)
KOLIUSHKO Ihor (Ukraine)
KONONOV Anatoly (Russian Federation)
KRÜSI Melanie (Switzerland)
KÜHN Zdeněk (Czech Republic)
KUYBIDA Roman (Ukraine)
LALIASHVILI Tamara (Georgia)
LIGI Timo (Estonia)
MALESHIN Dmitry (Russian Federation)
MÎTCU Dinu (OSCE Moldova)
MORSHCHAKOVA Tamara (Russian Federation)
MÜLLER Lydia F. (Max Planck Institute)
MURADJAN Grigor (Armenia)
NURUMOV Dmitry (ODIHR)
NUSSBERGER Angelika (Germany)
PETIT Denis (ODIHR)
ROMER Maria Teresa (Poland)
SCHMIDT Eva Katinka (ODIHR)
SEIBERT-FOHR Anja (Max Planck Institute)
SOLOMON Peter H., Jr. (Canada)
SULEYMENOVA Gulnara (Kazakhstan)
SYROYID Oksana (OSCE Ukraine)
TAMM Rita (OSCE Moldova)
TILNEY Lisa (OSCE Skopje)
TURENNE Sophie (United Kingdom)
VASHCHANKA Vasily (ODIHR)
VASHKEVICH Alexander (Belarus)
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