



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 and guidance 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.