



August 2023

From: Halyna Chyzyk, INJR member, Ukraine

To: The Group of Independent Lawyers and Democracy Index - Georgia

Re: Online Discussion: **"Independent judicial governance: in search of efficient solutions for transitional democracies"** (August 1, 2023)

Introduction

Aiming at securing judicial independence and defending judges from political interference European organizations established set of recommendations on judicial governance. The main recommendation suggests judges should govern themselves through an independent council with a substantial amount (in some documents - majority) of its members elected by judges. So far, it is believed that council composed of judges is the best guarantee of judicial independence.

This recommendation proved its efficiency in long-standing democracies, where justice systems matured over time, and serves as a safeguard from any undue political interference with courts. However, the implementation of this standard in Eastern Partnership countries which only started democratic transformation, has not led to the expected results. On the contrary, corrupt and politically dependent judges were strengthened and formed "clans" that received full control over the judicial system¹. As the Venice Commission admitted in one of its opinions, in some post-communist countries the standards on the judicial independence may result in a paradox: "bestowing the guarantees of independence" upon judges who are not yet independent and impartial in practice results in "corporatist attitudes which led to wide-spread corruption and lack of professionalism and efficiency"².

In particular, in the past decades Georgia, Moldova and Ukraine reformed its systems of appointing and disciplining of judges by establishing independent judicial councils with half/majority of its members elected by judges. Although such measures were welcomed by Western democracies and Venice Commission of the Council of Europe, it has not lead to increase of public trust in judiciary, improving the quality of justice and reducing the level of corruption in courts.

Judicial reform in Georgia, Moldova, and Ukraine designed to achieve European standards and compliance with Venice Commission opinions failed because it effectively granted judges

¹ 2021.uadial.org/wp-content/uploads/2021/06/Judicial-Governance-in-Transitional-Democracies.pdf

² CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, para. 8



sole control over that judicial reform. At the same time, no effective measures to ensure judicial accountability were introduced³.

Recommendations towards ensuring accountable and independent judicial governance in transitional democracies

In 2021 experts from Armenia, Bulgaria, Georgia, Moldova, Romania and Ukraine with the involvement of Dr David Kosar (Czech Republic) and Dr Tilman Hoppe (Germany) prepared Recommendations towards ensuring accountable and independent judicial governance in transitional democracies⁴ (herein after *the Recommendations*).

The document aims to introduce alternatives to “judges elected by judges” standard. It incorporates the successful solutions that have been implemented in some European countries Ukraine. The document **considers judicial independence and accountability as equally important** and suggests how to achieve it based on lessons learned from previous reform attempts.

Importantly, the Recommendations do not provide for any strict model allowing flexibility and takes into consideration the differences in local context of the countries. Therefore, the Recommendations suggest when deciding on a specific model of judicial governance, the **countries should take into consideration the history of judicial administration, judicial culture and relationship between judges as well as relationship between judges and political power.**

The document reinstates the importance of establishing an independent authority to govern judiciary, which should be free from undue influence from legislative and executive branches, as well as politicians, oligarchs and different groups of interests within the judicial system. However, recognizing the importance of involvement of **judges the document states that judges should not have exclusive rights or quotas for membership.**

Interestingly, the document suggests tacking into consideration the scope of tasks and local context, the membership in judicial council might not be limited to the legal professions only, and envision the involvement of persons with an expertise in human resources, psychology, management, media etc.

³ <https://drive.google.com/file/d/16KgIH967jo2rYcQUGFfdNXPIF382EiiY/view>

⁴ Recommendations were jointly prepared by experts of Protection of Rights without Borders, Law Protection and Development foundation (Armenia), Bulgarian Institute for Legal Initiatives (Bulgaria), Group of Independent Lawyers (Georgia), Legal Resources Centre from Moldova, Institute for European Policies (Moldova), Expert Forum (Romania), Anticorruption Action Center, Automaidan, DEJURE Foundation, Centre for Political and Legal Reforms (Ukraine). Available at <https://drive.google.com/file/d/1Jd9a3LiCn3bafOQPQyDQXoYrEo-1vJiv/view>



One of the core recommendations based on the experience of Ukraine and other countries suggests that the **members of the Council for Judiciary should undergo a public, transparent and fair selection procedure**. The panel assessing the integrity of the candidates applying for positions in the Council for the Judiciary should be composed of independent unbiased experts possessing outstanding professional and personal qualities and having impeccable reputation and trust of the society. In particular, **reputable civil society organizations with recognized experience in rule of law, human rights and anticorruption work** should be eligible to nominate members to the independent panel.

Activities on promoting the Recommendations taken so far

The Recommendations were first presented at Democracy In Action Conference that took place in June 2021 in Kyiv. The panel discussion brought together policy champions, Venice Commission members, experts and civil society advocates⁵. During the event, participants discussed the problems transitional democracies face when trying to establish independence of judicial system by following “judges elected by judges” standard and the importance of searching of the new solutions based on the experience and lessons learned from the countries overcoming similar difficulties and obstacles.

The next round of discussion followed in November 2021. This time the discussion was conducted online that helped to engage broader audience from different countries⁶. Ms Hanna Suchocka, the Honorary president of the Venice Commission of the Council of Europe welcomed the idea of the outside experts to the selection of the members of judicial councils in countries where judges are not independent which is the one of the main idea promoted by the Recommendations. Madam Suchocka mentioned the Venice Commission was one of the first European institutions that supported such an approach and *suggested it might be even necessary for the Venice Commission to prepare general opinion on the matter*.

Sir Anthony Hooper, retired judges of the Court of Appeal of England and Wales and the Chairperson of the Public Council of International Experts (2018-2020) *suggested two important steps that need to be taken by democracies in transition. (1) the reform of judicial councils aimed at ensuring the integrity of its members, and (2) reevaluation of senior judges who lack integrity*. He believes the involvement of international experts is a unique solution that helps to build public trust in the reform; therefore, he considers it as a template of judicial reform.

Ms Nino Bakakuri, Justice of the Supreme Court of Georgia and a member of the Consultative Council of European Judges (CCEJ) emphasized on the *importance of fair and*

⁵ Recording of the discussion available at: <https://www.youtube.com/watch?v=CJkIMGmi8Zl&t=543s>

⁶ Recording of the discussion available at: <https://www.youtube.com/watch?v=EAhd8yfJnq0&t=75s>



transparent selection of judicial councils members ensuring they meet professionalism and the integrity criteria. She also paid a great attention to accountability of judicial council.

Mr Pavol Zilincik, member of the Judicial Council of the Slovak Republic, highly assessed the Recommendations and welcomed the involvement of civil society and international experts to judicial reform. Mr Zilincik *emphasized on the importance of taking into consideration judicial culture and traditions, and paid special attention to the need of a methodology of assessing professional standards and ethics* of judicial councils` members.

Finally, Mr David Kosar, the Head of the Judicial Studies Institute (JUSTIN) noted innovative solutions introduced by the authors of the Recommendations and shared his suggestions. In particular, *Mr Kosar stressed that Recommendations should apply to bodies, which decide on selection, appointment, promotion and disciplining of judges.* Furthermore, Mr Kosar also paid attention to the court presidents stressing they should not be members of judicial councils because such membership helps them to concentrate too much power.

Main outputs of the discussion of August 1st, 2023

Online event "Independent judicial governance: in search of efficient solutions for transitional democracies" is a part of continuous efforts of judicial reformers in order to promote the ideas elaborated in the Recommendations. The event was aimed at discussing recent judicial reform developments in the region and how the successful solutions could cross the borders. Among the distinguished participants of the discussion were

- **Dr Tilman Hoppe**, a former judge from Germany and Co-Chair of the Selection Commission for the Chairperson of the NACP (Ukraine),
- **Ms Lavly Perling**, a former Prosecutor General from Estonia, member of the Ethics Council (Ukraine) and Judicial Vetting Commission (Moldova),
- **Nona Tsotsoria**, member of the Independent Evaluation Commission for the members of the self-administration bodies of judges and prosecutors (Moldova), former Judge of European Court of Human Rights,
- **Mr Taras Pashuk**, Legal Advisor at the Secretariat of the Venice Commission.

Halyna Chyzhyk, an expert from Ukraine, moderated the discussion. Ms Chyzhyk also made a brief presentation of the Recommendations to the participants.

In his intervention, **Dr Hoppe** admitted an important shift in the position of European institutions, namely the European Court of Human Rights and the Venice Commission, concerning the approaches towards judicial governance in countries with different history and political systems. In particular, these organizations recognize that the same solutions work differently in countries with different political cultures; the solutions that successfully work for Germany and Sweden would not work for Georgia, Moldova and Ukraine, for instance.



Dr Hoppe paid attention to successful reform developments in Moldova and Ukraine and suggested to elaborate it in the Recommendations. In Dr Hoppe`s opinion, the establishment of the High Anti-Corruption Court in Ukraine and the authority of the Independent Evaluation Commission to analyze forensic reports on judicial candidates in Moldova are the game changers, therefore it should be recommended to other countries as working solutions.

Importantly, Dr Hoppe suggested the **Venice Commission could play an outstanding role in describing and incorporating successful solutions and shaping the models of judicial governance architecture and functioning for countries that struggle to build independent and accountable judiciaries.**

Ms Lavly Perling shared her experience working as a member of the Ethics Council, a special independent body established for the integrity assessment of the candidates to the highest judicial governance body in Ukraine – the High Council of Justice. The Ethics Council itself embodies the Recommendations on selecting the members of judicial council through an open transparent procedure. Importantly, the body is composed of three Ukrainian judges and three international experts.

Ms Perling reflected on her experience being an outside experts working with the representatives of the system that aimed to be reformed. She stressed on the importance of the political will to conduct a genuine reform and the need to establish effective cooperation with all the stakeholders responsible for the implementation of the reform. Importantly, Ms Perling **stressed on the advantages of involving outside experts to the selection of judicial governance members.**

Ms Nona Tsotsoria also stressed on the importance of having outside experts (foreign professionals and civil society experts) involved. She described in much detail the work of the Independent Evaluation Commission for the members of the self-administration bodies of judges and prosecutors that had been established in Moldova in 2022. Ms Tsotsotia is convinced **the participation of the international experts was crucial for successful outcomes of the reform.** Furthermore, based on her experience she believes that it is more important to make sure the experts involved in selection procedures are independent and decent professionals rather than focusing on filling quotas and ensuring judicial representation on the selection panels.

Ms Tsotsoria believes that Moldovan experience is unique in scope of the powers of Independent Evaluation Commission and **echoes the idea expressed by Dr Hoppe that this experience has to be elaborated in the Recommendations.**

Mr Taras Pashuk shared his constructive feedback on the Recommendations. In particular, Mr Pashuk admitted the importance of the Recommendation #1 that states that integrity and accountability are essential parts of judicial independence. He noted that the question of judicial liability always goes hand in hand with judicial independence.



Mr Pashuk noted that many of the Recommendations are similar to the ideas and conclusions expressed by the Venice Commission in its numerous opinions. He also stressed on the importance of judicial independence and the need to put safeguards in place to defend judges from undue political influences.

Importantly, Mr Pashuk shared that the Venice Commission is not working on a new opinion that will address judicial independence issue and expressed the readiness of the Commission to cooperate with the International Network of Judicial Reformers on the matter.

In a nutshell, all the participants of the discussion recognize the importance of finding and promoting effective solutions for ensuring judicial independence and accountability. They welcome the efforts of the creators of the Recommendations and support further development of the document with the aim of elaborating successful experiences of different reforms and shaping the models.

Next steps

Undoubtedly, the event of August 1st stresses the importance of further development and promotion of the Recommendations. The following measures are recommended:

- 1) Conducting a series of discussions within the framework of the International Network of Judicial Reformers with the involvement of all interested parties to highlight and describe positive solutions and elements of successful judicial reforms,
- 2) Amending the Recommendations with the new chapters elaborating successful solutions and model for reforms of judicial governance,
- 3) Communicating with the Venice Commission Secretariat in order to exchange ideas and opinions, promoting Recommendations and contributing the Commission's opinions, and
- 4) Expanding the list of experts and organizations involved in development of promotion of the Recommendations, building partnerships and establishing cooperation with experts, organizations and institutions.