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Rule of Law and Judicial Independence in Eastern Europe, the South Caucasus, and Central Asia

Introduction

Adhering to the principle of judicial independence is at the forefront of the OSCE's rule-of-law-related commitments. The participating States reaffirmed it in the Helsinki Ministerial Council Decision on Further Strengthening the Rule of Law in the OSCE Area,¹ and it 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 acknowledged the significance of judicial independence for the full expression of the inherent dignity and rights of all human beings.² They committed themselves to respecting the related international standards, and ensuring that the independence of the judiciary is guaranteed by constitution or law and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary.³ Yet despite all these commitments and constitutional principles, the reality as regards judicial independence is far from satisfactory. Participating States in Eastern Europe, the South Caucasus, and Central Asia declare their support for judicial independence, but do not guarantee it in every regard. There are many legal and practical examples of insufficient respect for these principles.

The states of these regions do not need general advice expressed in constitutional terms. They need practical recommendations of what specifically should be done in order to guarantee judicial independence, and how this principle translates into everyday practice in terms of the separation of powers, the composition and working procedures of relevant institutions, the position of judge in a democratic state, rules on appointments, dismissals, removals, training, and so on. This advice should be tailor-made to the specific situation in those participating States, and should take into account the experiences of various other countries. Key here are practices in states whose

Note: The views expressed in this article do not necessarily reflect those of ODIHR.

- 1 Cf. Decision No. 7/08, Further Strengthening the Rule of Law in the OSCE Area, MC.DEC/7/08 of 5 December 2008, in: Organization for Security and Co-operation in Europe, *Sixteenth Meeting of the Ministerial Council, 4 and 5 December 2008*, Helsinki, 5 December 2008, pp. 20-22, here: p. 21, para. 4.
- 2 Cf. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, in: Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe, Analysis and Basic Documents, 1972-1993*, Dordrecht 1993, pp. 439-463, here: p. 442, para. 5.12.
- 3 Cf. Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991, in: *ibid.*, pp. 605-629, here: p. 613, para. 19.

efforts at transformation have succeeded, as their experience may provide an insight into the problems that typically arise for judicial systems in the process of transformation. It is to be hoped that recommendations of this kind may help participating States in these regions to gradually reform their justice systems, so that their respect for OSCE commitments in this area is no longer merely declaratory. A recent instrument adopted at an expert conference jointly hosted by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) and the Max Planck Institute for Comparative Public Law and International Law (MPI), the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, has great potential in this respect.⁴

The Current State of Rule of Law and Judicial Independence in Eastern Europe, the South Caucasus, and Central Asia

The OSCE participating States in Eastern Europe, the South Caucasus, and Central Asia are in a peculiar situation as regards guarantees of rule of law and judicial independence. On the surface, their constitutional laws largely meet international standards. Their constitutions were written with the participation of international organizations and were subject to review by bodies such as the Venice Commission of the Council of Europe (officially known as the European Commission for Democracy through Law). Furthermore, they are often framed to provide at least the appearance of respect for the standards the states have signed up to in the international arena.

However, legal and judicial practice in those states usually differs from the constitutional provisions significantly, for the following reasons:

- *Constitutional provisions typically leave room for interpretation.* This provides an opportunity for the other branches of government to shift the balance of power in their favour and to increase their control over the judiciary. In a system where the executive has the most important role in government, provisions granting certain powers over the judiciary to the executive authorities (or establishing the head of state as guardian of the constitution) are habitually interpreted as empowering state presidents or government authorities to control the judiciary.
- *The constitutional tradition in the countries of these regions is comparatively young.* In Western democracies, even if certain aspects of the

4 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*, at: <http://www.osce.org/odihr/73487>. The meeting report, including the adopted recommendations, can be found in: OSCE/ODIHR, *Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Challenges, Reforms and Way Forward*, Expert meeting in Kyiv, 23-25 June 2010, at: <http://www.osce.org/odihr/71178>.

behaviour of state organs and institutions are not regulated, they are influenced by the constitutional tradition that translates the principles of separation of powers and checks and balances into practice. For example, there might be no regulation stipulating that the government should not express any views on ongoing court proceedings. However, according to constitutional tradition, it is obvious that representatives of the executive should not make any such statements, as this may violate the principle of separation of powers and judicial independence. Constitutional tradition is the result of a long-term process of shaping behaviours and cannot be created all at once. In countries where the constitutional tradition is comparatively young, there is a greater need to specify the proper behaviour of state organs.

- *Judicial independence is not rooted in the legal tradition and in how judges see themselves.* Even if a state enshrines the principle of judicial independence in its constitution and laws, regulation alone cannot suffice to establish a truly independent judiciary. The constitutional principles of Western democracies are based on a longstanding tradition and practice of judicial independence, inspired by philosophical theories developed far earlier than the constitutions themselves. In most countries in Eastern Europe, the South Caucasus, and Central Asia, the independence of the judiciary is still at one stage of development or another. Much of the legal culture of these countries is a legacy of the Soviet legal tradition with its doctrine of the “unity of state power” and an instrumental approach that “treated law as simply one of a number of instruments of rule, and not even as the dominant one”.⁵ In some of these countries, the judiciary was able to retain a certain level of independence even during the communist period,⁶ especially if judges’ decisions did not have any direct political relevance. In others, however, it was totally subservient to the executive. Judges in the region regarded themselves as public officials serving the respective government or ruling party – and frequently still do.⁷

Countries in Eastern Europe, the South Caucasus, and Central Asia display differing degrees of democratic transformation. Those that are members of

5 Peter H. Solomon/Todd S. Foglesong, *Court and Transition in Russia: The Challenge of Judicial Reform*, Boulder, Co., 2000, p. 4. For more on “instrumentalism”, see Kathryn Hendley, Are Russian Judges Still Soviet? In: *Post-Soviet Affairs* 4/2007, p. 240.

6 For an example, see Mark F. Brzezinski, The Emergence of Judicial Review in Eastern Europe: The Case of Poland, in: *The American Journal of Comparative Law* 2/1993, pp. 153-200. See also Maria Stanowska/Adam Strzembosz, *Sędziowie warszawscy w czasie próby 1981-1988* [Trying Times for Warsaw Judges 1981-1988], Warsaw 2005. This publication documents the varying approaches taken by judges who had to decide on politically relevant cases in difficult times. Examples given by the authors show that many judges tried to be independent in their adjudication, despite political pressure.

7 Cf. Taavi Annus/Margit Tavits, Judicial Behavior After a Change of Regime: The Effects of Judge and Defendant Characteristics, in: *Law and Society Review* 4/2004, pp. 711-736.

the Council of Europe are far more advanced in implementing the rule of law and judicial independence. To a certain extent, this is the result of jurisprudence of the European Court of Human Rights concerning Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and resulting reforms.⁸ The states of Central Asia, in contrast, have retained certain authoritarian features, with governments keeping and sometimes even increasing their control of the judiciary.⁹ Rule of law and judicial independence are features of a democratic state that cannot be achieved all at once. They are rather the fruits of a process by which states undertake steps aiming to increase the level of protection of those constitutional principles. In many post-communist states, this process started as early as 1989. Even in countries such as Poland, the Czech Republic, and Hungary, after almost 22 years of democratic transformation and a long process of European Union accession, there are still problematic issues that need to be addressed.¹⁰ Compared with what is left to do in other post-communist countries, however, these are matters of fine-tuning. These countries can therefore provide lessons learned on how to build judicial systems based on the rule of law and judicial independence in post-communist states.

Debates surrounding the process of transformation in post-communist states indicate that the rule of law and judicial independence are not achieved merely by enshrining general principles in constitutions, although it is important that the legal framework does include such principles as guiding values. Detailed regulations and established practices concerning judicial independence are equally important. These include rules and procedures for the administration of the judiciary and court management; methods of appointing judges, their removal from office, the terms of their training, and the evaluation of their professional performance, as well as rules and procedures regarding discipline, ethical standards, remuneration, and so on. Research into the state of judicial independence in the OSCE region indicates that the devil lies in these details. Whereas most countries formally proclaim the independence of the judiciary in their constitutions, other laws, by-laws, regulations, and established practices offer many avenues for the other branches of government to control and influence the judiciary. For example, while the constitution may entrust the power to appoint judges to judicial councils, in practice, “unwanted” candidates may be eliminated as a result of non-transparent

8 Related reforms have concerned matters such as the status of courts and judges, the length of proceedings, guarantees of impartiality, equality of arms, and effective criminal defence.

9 For an example, see Leonid Golovko, Prospects of Establishing Independent Judiciary in the Republic of Uzbekistan, in: *Compilation of Analytical Papers on Human Rights and Criminal Justice System of the Republic of Uzbekistan*, Legal Policy Research Centre, Almaty 2009, p. 4.

10 Several articles on transitional processes in new member states of the EU are contained in: Anja Seibert-Fohr (ed.), *Judicial Independence in Transition*, Berlin (forthcoming).

security screenings made by the security services or the police.¹¹ Another example concerns the allocation of cases to judges. If this is done randomly, the risk of political influence at this stage is small. But in some systems, the allocation of cases is performed by court presidents, who are appointed by the executive branch and are often susceptible to all kinds of influence.

One more example concerns the position of national schools of judiciary. When these are controlled by the executive, they may be used to influence the judicial branch, as they often have an important impact on the selection of judicial candidates and continuous judicial education. Judges may, for instance, not be taught subjects that could encourage them to criticize the executive, including courses on state responsibility. Finally, judges are subject to internal dependency, as their income and career paths may “depend on how their superiors regard their work, including how they decide particular cases”.¹² Thus judicial independence consists of numerous “small” principles and practices, which have to be implemented in each country. Any reforms seeking to bring about judicial independence should therefore take due respect of such sub-elements and be implemented gradually.

Efforts to Strengthen the Rule of Law and Judicial Independence

Assistance to countries in Eastern Europe, the South Caucasus, and Central Asia aimed at increasing respect for the rule of law and judicial independence follows two main paths or a combination thereof: *generally*, via the provision of standards, and *specifically*, by assessing the state of affairs in concerned judiciaries.

Standard Setting and Policy Advice in the Field of Judicial Independence

In contrast to general principles on judicial independence, guidance on the details that are crucial for the realization of judicial independence is rare, and there is no universal agreement about what it should entail.¹³ In November 2010, the Council of Europe adopted a revised and updated “Recommendation (2010)12 on judges: independence, efficiency and responsibilities”. This document takes into consideration the legal traditions and practices in all the Council of Europe’s highly diverse member states. Some of its content protects the *status quo* in particular countries. As argued above, states with

11 Cf. OSCE/ODIHR, *Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, cited above (Note 4), p.13.

12 Peter Solomon, *The Accountability of Judges in Post-communist States: From Bureaucratic to Professional Accountability*, in: Seibert-Fohr (ed.), cited above (Note 10); see also: OSCE/ODIHR, *Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, cited above (Note 4), p.14.

13 Examples include the European Charter on the Statute for Judges (1997), the Magna Carta of Judges (2010), and several specific opinions issued by the Consultative Council of European Judges.

younger constitutional traditions would profit from detailed regulations and safeguards in areas where such measures may not be necessary in more established democracies. Even though certain measures are needed to strengthen judicial independence in some countries, it would be unreasonable to expect member states to agree to adopt specific principles if they run counter to the needs of their own judiciaries. States in Eastern Europe, the South Caucasus, and Central Asia turn to international organizations and bilateral donors for help in their efforts to strengthen the independence of their judiciaries. Unfortunately, the assistance they receive all too often results in their copying aspects of other countries' judicial systems that are foreign to their own legal traditions and irresponsive to their specific needs.

Assessing Judiciaries and their Independence

The assessment of judiciaries is often merely one part of a bigger picture provided in country reports issued by institutions and international organizations such as the Council of Europe, the United Nations, the World Bank, and the European Bank for Reconstruction and Development, as well as by the European Union, the US Department of State, and others. Non-governmental "human-rights watchdogs" identify the shortcomings of justice systems in their reports from trials and on other aspects of human rights compliance. Finally, there are initiatives that come close to measuring judicial independence as such: They may be regional or global, undertaken by governmental or non-governmental organizations, and report in detail on the state of affairs in specific countries with regard to the following concepts or phenomena: rule of law,¹⁴ judicial independence,¹⁵ judicial accountability, integrity, and transparency,¹⁶ corruption in the judiciary,¹⁷ and capacity and performance of the

14 See, for example, Mark David Agrast/Juan Carlos Botero/Alejandro Ponce (for The World Justice Project), *Rule of Law Index 2010*, Washington, DC, 2010, at: <http://www.worldjusticeproject.org/rule-of-law-index>. See also the joint "Justice Indicators" project of the Altus Global Alliance, www.altus.org, which focuses more on criminal justice.

15 See, for example, American Bar Association Rule of Law Initiative, *Judicial Reform Index*, at: http://apps.americanbar.org/rol/publications/judicial_reform_index.shtml; and Linn Hammergren (for Transparency International), *Diagnosing judicial performance: toward a tool to help guide judicial reform programs*, working draft, particularly pp. 21-22, at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/hammergrenJudicialPerf.pdf>. See also *ibid.*, Annex V, (for: USAID/ENI), Checklist for Eastern Europe and the Former Soviet Union, sections 1 to 3; Keith Henderson/Violaine Autheman (for International Foundation for Electoral Systems), *Global Best Practices: A model state of the judiciary report. A strategic tool for promoting, monitoring and reporting on judicial integrity reforms*, 2004 (revised), at: <http://www.ifes.org/Content/Publications/White-Papers/2004/Global-Best-Practices-A-Model-State-of-the-Judiciary-Report-A-Strategic-Tool-for-Promoting-Monit.aspx>.

16 See, for example, Hammergren, cited above (Note 15), pp. 19-20 and 22.

17 See, for example, Transparency International, *Combating Corruption in judicial systems. Advocacy Toolkit*, Berlin [no date], at: http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judiciary_Advocacy_ToolKit.pdf.

judiciary.¹⁸ However, the definitions of these notions are not clear-cut, while at the same time they are inherently interrelated, or indeed overlapping. As a result, even if these initiatives address judicial independence specifically, they generally place it in a broader reference base for monitoring,¹⁹ and they often lack more specific observations concerning, for example, institutional guarantees of judicial independence. This is even more evident in the case of assessments that focus on the domestic legal conditions for doing business, which tend to stress issues such as the enforcement of contracts.²⁰

OSCE Activities Related to Judicial Independence

Discussions at the OSCE Human Dimension Seminar on Strengthening Judicial Independence and Public Access to Justice in May 2010 and the 2009 Human Dimension Seminar on Strengthening the Rule of Law in the OSCE Area concluded that further in-depth examination and discussion was needed in these areas.²¹ Recommendations made at the seminars called on the OSCE, its institutions, and field operations to continue facilitating exchanges of practices.²² In accordance with their respective mandates, OSCE field operations conduct a plethora of activities that promote judicial independence in their host countries (through trial monitoring, legislative and institutional justice-reform assistance, judicial-training assistance, etc.). Significantly, some field operations perform what can be called “justice (system/sector) monitoring”. This includes looking into judicial administrations, judicial councils, the hiring and firing of judges, court relations with the media, and so on, and suggesting appropriate policy reform measures.

ODIHR began co-operating with the Max Planck Institute for Comparative Public Law and International Law in 2009 to further develop its capacity to assist participating States in strengthening judicial independence, and to

18 See, for example, various works by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe; and Open Society Institute, *Monitoring the EU accession process: judicial capacity*, [no place] 2002, at http://www.soros.org/resources/articles_publications/publications/judcap_20030101.

19 Besides the examples already quoted, see Martina Huber (for the Netherlands Institute of International Relations “Clingendael”), *Monitoring the rule of law. Consolidated framework and report*, The Hague 2002, at: http://www.clingendael.nl/publications/2002/20020700_cru_paper_huber.pdf, pp. 10ff, and Bertelsmann Stiftung, *Transformation Index*, <http://www.bertelsmann-transformation-index.de/en/bti> (see criterion “Rule of Law”, which addresses the sub-issues “Separation of powers” and “Independent judiciary”).

20 See, for example, the World Bank Doing Business database, at: www.doingbusiness.org/data/exploretopics/enforcing-contracts.

21 In response to OSCE Ministerial Council Decision No. 17/05 on Strengthening the Effectiveness of the OSCE, ODIHR called for supplementary commitments on the separation of powers including judicial independence; see OSCE, ODIHR, *Common Responsibility, Commitments and Implementation*, Warsaw, 10 November 2006, paras 83-85.

22 Cf. *OSCE Human Dimension Seminar on Strengthening Judicial Independence and Public Access to Justice*, 17-19 May 2010, Consolidated Summary, pp. 4, 7, at: <http://www.osce.org/odihr/70836>; *OSCE Human Dimension Seminar on Strengthening the Rule of Law in the OSCE Area*, pp. 4-6, at: <http://www.osce.org/odihr/38480>.

assess the need for such assistance in the OSCE region. In-depth research and consultations involving independent experts from academia and judicial practice as well as the participating States led to adoption of the “Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia” by experts at a regional meeting in June 2010.²³ These expert recommendations are a list of practical policy suggestions drawing upon academic insight and the experience of former judges and court chairs from the concerned regions. They are unique because they take into account the various laws, practices, and problems that exist in the regions concerned, together with the experiences and lessons learned of countries that have already undertaken the long process of transforming their judiciaries. In addition, the document is fairly balanced. It does not favour judicial independence as an absolute value in itself, as is sometimes put forward by judicial interest groups, but takes into consideration the interests and needs of government in a democratic state, particularly the need for all power to be democratically legitimized. The *Kyiv Recommendations* specify in concrete terms what states could do in order to secure proper respect for judicial independence. Considering the proposed measures may assist them in identifying specific reforms that could be undertaken in order to meet high standards of judicial independence.

Summary of the Kyiv Recommendations

The *Kyiv Recommendations* approach the overall topic of judicial independence from three angles: Part I – *Judicial Administration* – focuses on judicial councils, qualification collegia, and self-governing bodies, as well as the role of court chairs; part II – *Judicial Selection and Training* – looks at access to the profession of judge, the training and education of judges, and the recruitment process; and finally part III – *Accountability of Judges and Judicial Independence in Adjudication* – addresses questions related to discipline, professional evaluation, transparency, and independence within the judicial hierarchy.²⁴

The recommendations related to judicial administration (part I) reflect the fine line between governmental control and democratic legitimization of the judiciary. While governmental control of the judiciary via administrative means should be avoided, it is necessary to ensure that the courts have a minimum of democratic legitimacy by involving government and parliament of-

23 OSCE/ODIHR, *Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, cited above (Note 4).

24 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 these are crucial aspects of judicial independence that deserve more in-depth examination and further discussion. Consolidated summaries are available at: <http://www.osce.org/odihr/70836> and <http://www.osce.org/odihr/38480>.

ficials in the judicial administration. The policy suggestions therefore aim, on the one hand, to prevent the government or presidential administration from exercising an excessively strong influence over matters of judicial administration; and, on the other, to avoid the concentration of powers in the hands of a single corporate body. Consequently, the recommendations address how competencies should be divided among various bodies or commissions with different compositions, commensurate with the degree of desired or acceptable government and other non-judicial involvement.²⁵

The role of court chairs deserves considerable attention, especially in the post-Soviet area. In some participating States, they have the power to supervise the activities of judges within a given court or even to control the content of their decisions. This may be the result of explicit legal provisions or stem implicitly from certain practices.²⁶ In many countries, however, the law stipulates that they should have only a managing role *vis-à-vis* court support staff. The recommendations related to the role of court chairs therefore attempt to reduce their *de jure* and *de facto* competencies. This should protect judges from court chairs trying to bring them into line with government or business interests. Finally, the recommendations suggest that bonuses and privileges should be abolished, because they risk making judges dependent on court chairs and/or the authorities that grant these benefits.²⁷

The *Kyiv Recommendations* related to the theme of judicial selection and training (part II)²⁸ call on governments in the regions in question to ensure diversity of access to the judicial profession, and to attract individuals from other legal professions as well as minorities. Some of the policy suggestions address the quality and independence of legal education and judges' training. In order to facilitate selection according to merit, the recommendations also suggest the use of clear selection criteria and transparent procedures. Finally, the document recommends limiting the discretion of heads of states and executives to appoint candidates.

The recommendations in part III seek to find a balance between the need to hold judges accountable under the law and the need for judicial independence. The latter is particularly crucial in the process of adjudication, i.e. the core of the judge's profession.²⁹ In other words, procedures for disciplining judges should not be used to influence their decision making.³⁰ Clearly judges are not above the law and must be held accountable when they abuse

25 Cf. *Kyiv Recommendations*, cited above (Note 4), paras 2-5, 7-9.

26 Cf., for example, Olga Schwartz/Elga Sykiainen, *Judicial Independence in the Russian Federation*, and Alexander Vashkevich, *Judicial Independence in the Republic of Belarus*, both in: Seibert-Fohr (ed.), cited above (Note 10).

27 Cf. *Kyiv Recommendations*, cited above (Note 4), paras 11-14.

28 Cf. *ibid.*, paras 17-24.

29 Cf. Venice Commission, *Opinion on the law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia adopted by the Venice Commission at its 70th Plenary Session*, Venice, March 2007, para. 18.

30 Cf. ODIHR, *Judicial Independence in Eastern Europe, South Caucasus and Central Asia* cited above (Note 4), p. 13.

or distort it, but their legitimate interpretation and application of the law in individual cases should not be punished. The document also stresses that the professional evaluation of judges should not harm the independence of their adjudication.³¹ This is often the case when references to indicators of adjudication or low justice performances appear to reward judges for convictions and decisions that are not appealed or not overturned upon appeal.³² Such practices run the risk of encouraging judges to consult with higher-instance judges prior to taking decisions in order to ensure that their judgments are not overturned, or to side with the prosecution authorities rather than adjudicating impartially.³³ None of this is acceptable for an independent and impartial judge.

The recommendations also refer to transparency as a means of making judges accountable to society without subjecting them to the control of the government.³⁴ Transparency can also contribute to enhancing public trust in the judiciary and its independence. Finally, the *Kyiv Recommendations* also suggest that the issuing of directives, explanations, or resolutions by high courts should be discouraged, or should not be binding on lower court judges. Although exceptions may be necessary in some circumstances, as a rule, legislative functions should be left to elected parliaments.³⁵

Kyiv Recommendations – Becoming a Primary Instrument for Promoting Judicial Independence

As has been pointed out elsewhere in this paper, judicial independence is one of those areas that can still be considered to lack sufficiently detailed, internationally recognized rules, especially in terms of institutional safeguards for independence. When states identify a need for guidelines in areas that require special knowledge and understanding, such as judicial independence, they sometimes resort to soft-law approaches: “Some of the forms of ‘soft law’ [...] are potentially law-making in much the same way that multilateral treaties are potentially law-making. [...] In appropriate cases such instruments

31 Cf. *Kyiv Recommendations*, cited above (Note 4), paras 25-31, 34.

32 See, for example, *Constitutional Law of the Republic of Kazakhstan on the Judicial System and Status of Judges*, Article 16 para. 9-1, and Article 22-1 para. 7-1, at: <http://www.legislationline.org/documents/action/popup/id/4991>.

33 Cf., for example, Schwartz/Sykiainen and Vashkevich, cited above (Note 26).

34 On the accountability of judges to society, see Solomon, cited above (Note 12), p. 15.

35 “The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary [...] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment [...]” Alexander Hamilton, in: *The Federalist*, No. 78, June 14, 1788, p. 514, citation after: Amy J. Weisman, Separation of Powers in Post-Communist Government: A Constitutional Case Study of the Russian Federation, in: *American University International Law Review* 4/1995, p. 1367 (special formatting omitted).

may be evidence of existing law, or formative of the *opinio juris* or State practice that generates new customary law. Widespread acceptance of soft law instruments will tend to legitimize conduct, and make the legality of opposing positions harder to sustain. They may additionally acquire binding legal character as elements of a treaty-based regulatory regime, or constitute a ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’, or influence the development and application of treaties or general international law.’³⁶ If the participating States were to endorse the document, thereby turning it explicitly into soft law, this would confirm their commitment to the principle of judicial independence and increase the profile of the recommendations.³⁷

ODIHR should therefore place special emphasis on raising awareness of the *Kyiv Recommendations* within participating States. Stakeholders in this case would include domestic actors, such as judges, judicial associations, judicial councils, governmental authorities involved in judicial administration, schools for judges, relevant NGOs, and the media. One of the best methods of securing awareness of the *Kyiv Recommendations* is to translate them into local languages.³⁸ The document should be a point of reference for any judicial reform affecting judicial independence. It could also be referred to by stakeholders in situations where the rule of law and judicial independence are threatened. It would be useful for participating States themselves to examine the relevance of each of the recommendations in the context of their judiciaries. By supplying examples of practices that are in line with the recommendations, they could contribute to drawing up a “register of good practices”.

The *Kyiv Recommendations* should also be promoted among other international organizations that possess bodies that deal with the judiciary, but have not created their own tools in this specific field. These include, in particular, the European Commission for the Efficiency of Justice (CEPEJ) and the Venice Commission. The latter has already referred to the recommendations on several occasions.³⁹ One might also consider the potential impact of

36 Alan Boyle, Soft law in international law-making, in: Malcolm Evans (ed.), *International Law*, Oxford 2006, pp. 142-143 (footnotes omitted).

37 Compare the example of the UN-promoted Guiding Principles on Internal Displacement in, for example: Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, 26 February 1999, paras 8-10.

38 This is already being undertaken by ODIHR and a number of OSCE field operations, which have co-ordinated the translation of the *Kyiv Recommendations* into eight languages (Albanian, Armenian, Azeri, Bosnian, Georgian, Romanian, Russian, Ukrainian). All translations are available at: <http://www.osce.org/odihr/66395>. Translation into Polish and Croatian/Serbian is under way.

39 See, e.g., OSCE Office for Democratic Institutions and Human Rights/European Commission for Democracy through Law (Venice Commission), *Joint Opinion on the Constitutional Law on the Judicial System and the Status of Judges of Kazakhstan*, adopted on 17-18 June 2011, CDL-AD(2011)012, at: [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)012-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)012-e.pdf). This opinion was requested by the Chairman of the Supreme Court of Kazakhstan following an event on judicial independence, which was co-sponsored by the

the *Kyiv Recommendations* on the future jurisprudence of the European Court of Human Rights, especially in setting precedent judgments on the basis of Article 6 of the Convention. In this way, the soft-law character of the *Kyiv Recommendations* would move closer to becoming hard-law, at least with respect to certain principles.

Another idea is to consider the *Kyiv Recommendations* as an assessment tool for the use of OSCE field operations, as well as domestic and international NGOs, that prepare reports to international bodies or directly address situations where the independence of the judiciary is at stake. International monitoring bodies, which have limited access to information about practices in concerned countries, tend to make rather general observations and recommendations (see above). The *Kyiv Recommendations* differ from all the other tools and studies mentioned above by dint of their focus *on* and *within* the topic of judicial independence. They are not an assessment tool *strictu sensu*, as there is no measurability component included in them. However, they have the potential to be transformed into one. This would require further standardization of certain recommendations and the development of a methodology for assessment. In this regard, their area of applicability may even become wider than the countries of Eastern Europe, the South Caucasus, and Central Asia. If translated into an assessment tool, the recommendations could become a premier instrument for strengthening the rule of law and judicial independence in the OSCE region. A tool of this kind would be useful in assessing the degree of independence of the judiciary and could even include a benchmark mechanism. It should be publicly accessible, and any NGO active in a given state should be able to use it and then present results of its research to relevant national authorities and international bodies.

The *Kyiv Recommendations* concentrated on three major groups of topics: justice administration; judicial selection and training; and accountability of judges and independence in adjudication. They were not exhaustive. Additional topics could be covered in the process of preparing a second (updated and improved) edition, e.g. the influence of other members of legal profession on judicial independence – particularly the prosecution service – and the relationship between the judiciary and the media. “*Kyiv Recommendations*” may come to stand for a continuous process, as the recommendations themselves may be updated, improved, and expanded in various directions. The process of updating could be based around expert meetings held regularly every two or three years (as is already the case with the OSCE ODIHR Guidelines on the Freedom of Assembly,⁴⁰ which are revised to reflect new cases and developments in the field).

OSCE Centre in Astana, and forwarded for consideration to the legislative working group that is preparing amendments to the relevant law.

40 See ODIHR/Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, second edition, Warsaw 2010, <http://www.osce.org/odihhr/73405>.

Conclusion

Judicial independence in the OSCE participating States of Eastern Europe, the South Caucasus, and Central Asia is at various stages of development. Although it is enshrined in constitutional documents, guaranteeing it requires a series of reforms – both to specific judiciary-related laws and in practice. The role of the international community is to support reforms in this area. However, this should not stop with suggestions regarding the wording of constitutional principles. The international community should encourage participating States to recognize that judicial independence is shaped by day-to-day practice and continual reforms. It should also provide guidance based on international expertise and the experience of Western democracies and states that have successfully undergone transformation. With the help of such guidance, expressed in specific and tailor-made terms, it might be easier for participating States to undertake reforms to strengthen judicial independence.

The *Kyiv Recommendations* serve just this purpose. Their prospects depend very much upon how they are put into practice by the participating States and efforts by the international community to promote their implementation (including the OSCE itself). If the initial phase of promoting the *Kyiv Recommendations* succeeds, they have a chance to become a unique international instrument with respect to promoting the rule of law and judicial independence.