

Z C C —
democracy
in action

A n t A C —



**JUDICIAL GOVERNANCE
IN TRANSITIONAL DEMOCRACIES:
LESSONS LEARNT** —

Judicial Governance in Transitional Democracies: lessons learnt

Analytical Paper

Author: **Halyna Chyzhyk**, judicial reform expert at Anticorruption Action Centre, member of the Public Integrity Council (2016-2020)

Review by (while content is sole responsibility of the author):

Dr. Tilman Hoppe, LL.M., former judge (Germany), Co-Chair of the Selection Commission for the Chairperson of the National Corruption Prevention Agency (Ukraine)

Roman Kuybida, Deputy Chairman of the Centre of Political and Legal Reforms, PhD, member of the Public Integrity Council (2016-2020)

June 2021

CONTENTS

INTRODUCTION 4

THE ORIGIN OF “MAJORITY OF JUDGES ELECTED BY JUDGES” STANDARD 5

EASTERN PARTNERSHIP EXPERIENCE 8

ARMENIA 9

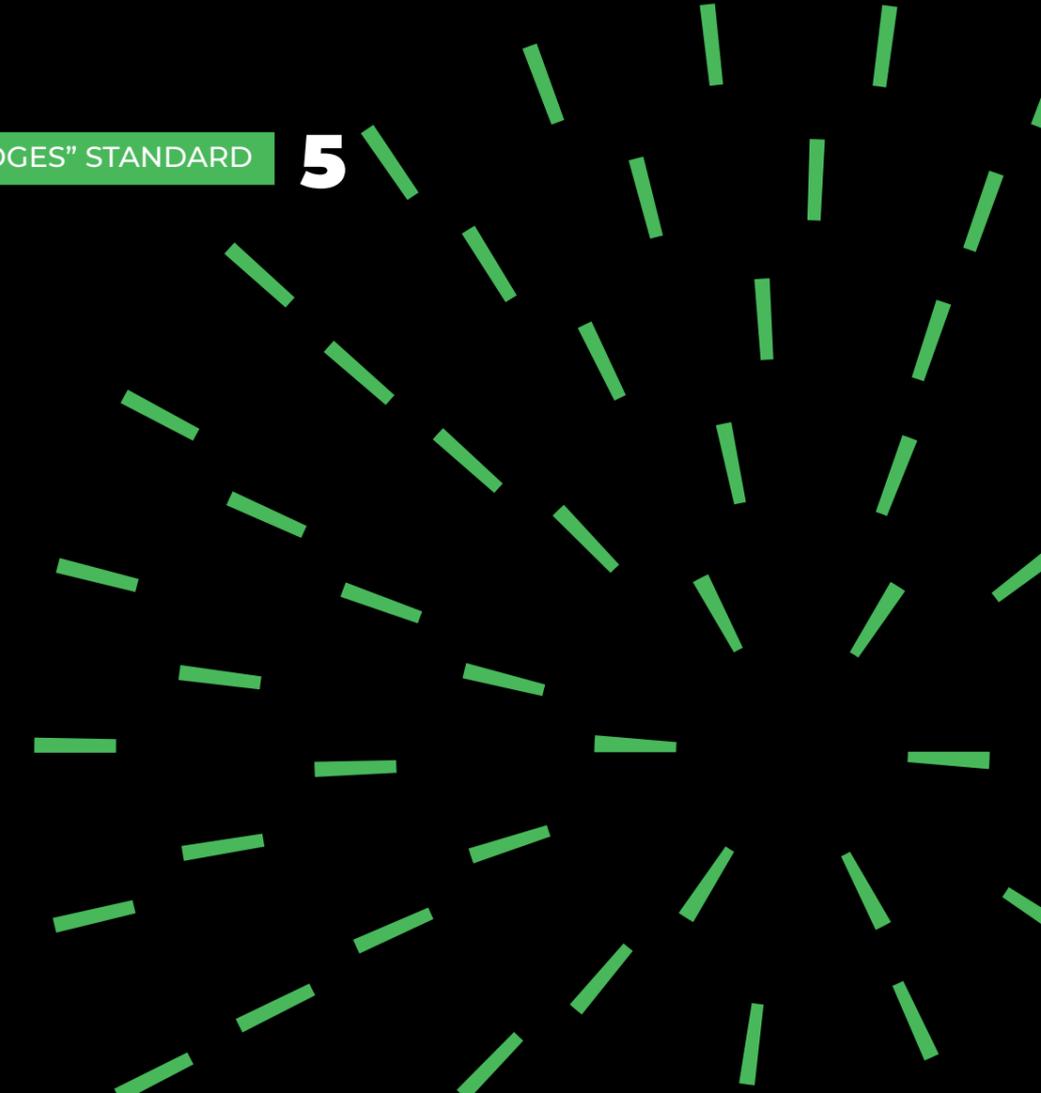
GEORGIA 10

MOLDOVA 11

UKRAINE 12

CONCLUSIONS 14

SOLUTIONS 16



INTRODUCTION

With the aim to ensure independence of the judiciary and to defend judges from undue influence by the government and politicians, European organizations developed a set of recommendations regarding the architecture of judicial governance.

Recommendations of the Committee of Ministers of the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights, Opinions of the Consultative Council of European Judges and the European Commission for Democracy through Law (Venice Commission) call for the establishment of a separate body: A judicial council, independent of legislative and executive powers to deal with the selection, recruitment, appointment, career or termination of office of a judge. Furthermore, the recommendations encourage that the council is composed by a “majority of judges”, which so far is believed to be the best guarantee of judicial independence.

This standard 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 system.

This research analyses the implementation of this standard “majority of judges elected by judges” in the Eastern Partnership countries, namely Armenia, Georgia, Moldova, and Ukraine, identifies similar obstacles these countries have been facing and searches for solutions to establish a fair and transparent judiciary in transitional democracies.

THE ORIGIN OF “MAJORITY OF JUDGES ELECTED BY JUDGES” STANDARD

The Basic Principles on the Independence of the Judiciary¹ adopted by the United Nations in December 1985 is one of the first international documents that touches the issue of judicial independence. The Basic Principles declare “the duty of all governmental and other institutions to respect and observe the independence of the judiciary”. Although the document does not provide for specific regulations for judicial councils, it sets the general approach towards judicial selection, appointment, promotion, discipline and removal. In particular, the Basic Principles require that law should adequately secure conditions of service and tenure and contain safeguards against appointments or dismissals for improper motives.

The first document that mentions the composition of judicial councils is the *Recommendation No. R (94) 12 on the Independence, Efficiency and Role of Judges*² adopted by the Committee of Ministers of the Council of Europe in 1994. It suggests in Principle 12 c that

“the authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, **its members are selected by the judiciary** and that the authority decides itself on its procedural rules.”

According to the *Explanatory Memorandum to the Recommendation*, it lies with the member states to decide which is the appropriate body for monitoring judges’ activities, which is why the recommendation only requests the member states to “consider” setting up a special competent body. Thus, initially the idea of establishing a special body composed of the representatives of the judiciary was considered as one of the possible ways to ensure judicial independence, and only later it evolved into a standard.

The European Charter on the Statute for Judges³ adopted by the Department of Legal Affairs of the Council of Europe in 1998 defines at no. 1.3 a judicial council as

“an authority independent of the executive and legislative powers within which **at least one half of those who sit are judges elected by their peers** following methods guaranteeing the widest representation of the judiciary.”

Nevertheless, the *Explanatory Memorandum to the Charter* states that, given certain differences in the national systems, some countries would find it difficult to accept an independent body replacing the political body responsible for appointments, meaning that a judicial council was still considered only one of several possible options back then. Importantly, concerning the composition of the judicial

¹Available at: <https://bit.ly/2RXHFIX>

²Available at: <https://bit.ly/3p48NSR>

³Available at: <https://bit.ly/3vEYsPz>

council *the Explanatory Memorandum* stresses the Charter wants neither to allow judges to be in the minority in the independent body nor to require them to be in the majority. In view of the variety of policy concepts and debates in the European States, a reference to a minimum of 50% judges emerged to ensure a fairly high level of safeguards while respecting any other consideration prevailing in different national systems.

*Opinion No.1 of the Consultative Council of European Judges (CCEJ)*⁴ adopted in 2001 repeats the wording of the European Charter stating at § 38 that in a judicial council “at least one half of those who sit are judges elected by their peers”. The CCEJ stresses this as particularly important for countries, which do not have long-entrenched democratic systems.

In its *Opinion No. 3*⁵ adopted in 2002 the CCJE only speaks of “substantial judicial representation [in the independent judicial body] chosen democratically by other judges” (§71), which is not necessarily majority or even only half. At the same time, the document suggests – in the context of disciplinary procedures – possible membership “of persons other than judges (thus averting the risk of corporatism), always provided that such other persons are not members of the legislature, government or administration”.

The *CCEJ Opinion No. 10*⁶ adopted in 2007 recommends (A.a.):

“in order to avoid the perception of self-interest, self-protection and cronyism and to reflect the different viewpoints within society, **the Council for the Judiciary should have a mixed composition with a substantial majority of judges**, even if certain specific tasks should be held in reserve to an all-judge panel. The Council for the Judiciary may also be exclusively composed of judges”.

The reference to “self-protection” and “cronyism” is crucially important for an independent and accountable judiciary, however this aspect is usually neglected when judicial councils are established.

In 2007 the Venice Commission adopted the Report on Judicial appointments⁷ which says: “A **substantial element or a majority** of the members of the judicial council should be elected by the Judiciary itself”. In 2010 the Venice Commission repeated this recommendation in the Report on the Independence of the Judicial System.⁸ The document states:

“In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers”.

The *Magna Carta*, a document setting fundamental principles, adopted by the CCEJ in 2010 imperatively states: A judicial council “**shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers**”. It is worth noting that the document does not contain any recommendations towards ensuring judicial integrity and accountability.

In 2010 the Committee of Ministers of the Council of Europe renewed the 1994 recommendations by adopting *Recommendation CM/Rec(2010)12*⁹ on independence, efficiency and responsibilities of judges. The document does not insist on a majority of judges (§ 27):

“**Not less than half the members of such councils should be judges** chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.”

The Explanatory Memorandum to the document acknowledges the existence of alternative approaches towards the authorities deciding on the selection, appointment, disciplinary cases and dismissal of judges, and states that all approaches are equally acceptable. Importantly, the Explanatory Memorandum stresses “the mere existence of a judicial council does not in itself guarantee” judicial independence (§ 36). It is necessary

“to regulate their composition, appointment of members, respect for pluralism, for example, to reach gender balance, transparency and reasoning of their decisions and to ensure that they are free from political or corporate influence.”

The *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, adopted by the OSCE Office for Democratic Institutions and Human Rights in 2010, suggest: “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.”

Finally, the *CCEJ Opinion No. 21* adopted in 2018 echoes previous recommendations regarding the majority of judges in judicial councils (§ 25):

“As to the selection, appointment and promotion of judges, the CCJE deems it very important that the process is based on objective findings as regards the legal and extra-legal skills of the candidates. The decisions should be merit-based and taken by essentially nonpolitical bodies **with at least a majority of persons drawn from the judiciary**”.

In a nutshell, the need to safeguard the independence of judiciary voiced in 1985 evolved to the idea of establishing a separate and independent authority – a judicial council. In the early 2000s the idea was shaped by recommendations towards the composition of the council envisioning initially at least half, and finally the majority of judicial members. The recommendation on establishing an independent judicial council to decide on judicial appointments, discipline and dismissal with the majority of its members being elected by judges became one of the most important European standards aimed at ensuring independence of judiciary.

However, bestowing the guarantees of independence to judges who are not yet independent and impartial in practice has resulted in “corporatist attitudes which led to wide-spread corruption and lack of professionalism and efficiency”,¹⁰ as proven by the experience of the Eastern Partnership countries.

⁴Available at: <https://bit.ly/34zFhuwe>

⁵Available at: <https://bit.ly/3p80W6Q>

⁶Available at: <https://bit.ly/3yNQPbv>

⁷CDL-AD(2007)028, Judicial Appointments, Report, para. 50, <https://bit.ly/3vEzmk0>

⁸CDL-AD(2010)004, Report On the Independence of the Judicial System, Part I: Independence of Judges, para. 32, <https://bit.ly/3fC4cUA>

⁹Available at: <https://bit.ly/34vmVuM>

¹⁰CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, para. 8.

EASTERN PARTNERSHIP EXPERIENCE

Given their Soviet past, Armenia, Georgia, Moldova and Ukraine share common problems. High-level corruption and political pressure negatively affect the judiciary, which are the least trusted institutions in these countries. At the same time, poor ethics, mutual cover ups and corporatism corrode the system. Influential networks of judges, referred to as “clans”, control and manage the judiciary from behind the scenes. 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 system.

This research analyses the implementation of this standard “majority of judges elected by judges” in the Eastern Partnership countries, namely Armenia, Georgia, Moldova, and Ukraine, identifies similar obstacles these countries have been facing and searches for solutions to establish a fair and transparent judiciary in transitional democracies.

ARMENIA

In Armenia, the judiciary is governed by the Supreme Judicial Council (SJC) composed of ten members of which five are judges elected by the General Assembly of Judges and five are non-judicial members elected by at least $\frac{3}{5}$ of the National Assembly of Lawyers.

The current composition of the SJC was established by Constitutional amendments of 2015 and the new Judicial Code of the Republic of Armenia, which entered into force in 2018.

The SJC selects judges and submits the recommendations on the appointment to the president and the parliament, brings judges to disciplinary responsibility and decides on the dismissal of a judge. It also decides on giving consent to initiating a criminal prosecution against a judge.

According to experts, there is at least lack of confidence towards the Council, both because of several controversial appointments of the members and especially the Chairman of the SJC. The SJC is the successor of the Council of Justice that was known for its extremely controversial activities, suppressing independence of judges, using disciplinary proceedings as a tool of pressure on them.¹¹ The SJC is also criticized for its non-transparent appointment practices. The majority of members of the SJC are not perceived as meeting integrity criteria.

According to the "Caucasus Barometer" (2017) survey, 59% of the surveyed Armenians completely or partially distrust the judicial system, 23% say they are neutral, and only 18% say they trust the Armenian judicial system.¹² According to the 2019 Caucasus Barometer, 48% of respondents do not trust the courts, and 61% believe the judicial system is biased against some or all citizens.¹³

¹¹Republic of Armenia Human Rights Defender, Extraordinary report, 2013, <https://bit.ly/3blUBic>

¹²Caucasus Barometer 2017 Armenia, <https://bit.ly/3boNeGK>

¹³Caucasus Barometer 2020 Armenia, <https://bit.ly/3w06nGX>

The Judiciary in Georgia is governed by the High Council of Justice (HCJ). The HCJ is composed of 15 members of which eight are judicial members elected by the Conference of Judges, five are non-judge members elected by the Parliament of Georgia and one is a non-judge member appointed by the President. The Head of the Supreme Court of Georgia is an ex officio member of the HCJ. The Parliament and the President appoint the members of the HCJ upon the proposals of civil society and academia.

The current composition of the HCJ was established by the legislative amendments of 2013 and a Constitutional amendment of 2017. In 2013, the most influential group of judges referred by NGOs as the “clan” managed to take all judicial positions in the HCJ by guaranteeing irremovability and promotion to judges.¹⁴ Moreover, according to experts the majority of members appointed by the Parliament of Georgia and President are affiliated to the clan because of the “deal” between the political party in power and the clan.¹⁵

The HCJ is systematically covering up the misconduct of judges who have good relations with the “clan”. The disciplinary system is practically ineffective, which is also demonstrated by statistics: from 2004 to 2012 209 of nearly 350 judges were brought to disciplinary responsibility, while from 2012 on only 10 were held accountable. The judiciary in Georgia is now considered as not accessible for outsiders, a person who wants to be appointed needs to reach a secret agreement with the “clan”. Judges, whose decisions had been severely criticized by the European Court of Human Rights, were reappointed. Corporate loyalty and the fulfillment of political orders is encouraged within the judiciary.

Only 10% respondents positively evaluated the performance of courts in Georgia according to results of the poll conducted by the National Democratic Institute in December 2019.¹⁶ This is almost the lowest level of support for any public sector in the country.

¹⁴2020 Country Report on Human Rights: Georgia, <https://bit.ly/33QtIVb>

¹⁵Kakha Thikarishvili, Evolution of clan based governance in Georgian judiciary since 2007, <https://bit.ly/3bllcLi>

¹⁶Public Opinion Survey, National Democratic Institute, December 2019, <https://bit.ly/2zoSSsB>

In Moldova the judiciary is governed by the Superior Council of Magistracy (SCM). It is the most powerful body within the judiciary that deals with promotion and dismissal of judges and takes decisions on lifting judges’ immunity. The SCM is composed of 15 members of which seven are judges elected by their peers representing all three jurisdiction levels, five are law professors elected by the Parliament; the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General are members of the Council ex officio.

The current composition of the SCM was established by legislative amendments of December 2020. These amendments were aimed at bringing more equal representation of Moldovan judiciary by increasing (as members) the number of district judges and reducing the number of judges of the Supreme Court. The number of lay members was increased from three to five, however due to the manner of their appointment, the political influence in the process cannot be excluded, and thus, the independence of these members is under question. In particular, in 2020 the ruling coalition within the Parliament appointed four new members of the SCM; the opposition was entirely excluded from the process.

During 2015-2020, the SCM received more than 7,500 complaints against judges; 250 disciplinary proceedings were opened, and, only in 49 cases disciplinary sanctions were imposed.¹⁷ This may be explained by the fact that judges are reluctant to bring their colleagues to disciplinary liability or allow prosecutors to investigate corrupt judges.¹⁸ On the contrary, there is a public perception in Moldova that the SCM, instead of playing its crucial role of defending the independence of the judiciary and of the individual judges it governs, has become an instrument of pressure on judges and a threat to their individual independence.¹⁹

With regards to selection and promotion of judges, experts identify the following shortcomings: the impractical organization of contests for each vacancy; the duplication of responsibilities among the entities involved in the selection process; and the insufficient reasoning of SCM decisions.

According to the Barometer of Public Opinion of February 2021, 67% of the Moldovan population does not trust the judicial system.²⁰ The Moldovan society perceives the national judiciary as politically dependent, severely affected by corruption and acting mainly in corporate interests.

¹⁷The Disciplinary Liability of Judges in the Republic of Moldova. The evaluation of Laws and Practices. Legal Resources Centre from Moldova, July 2020, page 75, <https://bit.ly/33NGQoe>

¹⁸Annual Report of the Judicial Inspection, 2018, page 47, <https://bit.ly/2ktK8Kq>

¹⁹"Only an empty shell".The undelivered promise of an independent judiciary in Moldova, 2019, page 15, <https://bit.ly/2VO-QJPI>

²⁰Institute for Public Policy, February 2021, page 92, <https://bit.ly/3ocy9gA>

UKRAINE

From 2010 to 2016, Ukraine has fully implemented the standard “majority of judges elected by their peers” by transferring the powers to appoint and dismiss judges from the government to judicial councils. There are two separate councils in Ukraine. The High Council of Justice (HCJ) is the constitutional body within the judiciary which deals with judicial appointments and dismissals, brings judges to disciplinary responsibility and decides on temporary suspension of a judge investigated by law enforcement. Although judges are appointed by the President, his role in the process is ceremonial while the actual decisions are taken by the HCJ.

The HCJ consists of 21 members, of which 10 are judges elected by the all-Ukrainian congress of judges, the Parliament, president, all-Ukrainian congress of attorneys, prosecutors, and law universities appoint two members each. The head of the Supreme Court is an HCJ member ex officio. Thus, the majority of the HCJ members are judges elected by their peers.

Another judicial governing body is the High Qualification Commission of Judges (HQCJ). It conducts the selection and evaluation of judges. Although the HQCJ only recommends to the HCJ to appoint a candidate upon the results of the competition or dismiss a judge who failed qualification assessment it is not subordinated to the HCJ and acts independently.

The HQCJ consists of 16 members. Until 2019 eight members were judges elected by their peers, and the other members were appointed by the congress of attorneys, law universities, the head of the State Judicial Administration (separate body which deals with courts logistics) and the Ombudsperson accordingly. In 2019 the law was amended to ensure an open and transparent competition for the HQCJ with the involvement of independent international experts in the selection panel. In October 2020, the Venice Commission suggested to amend the law by a provision envisioning at least half of judicial members in the HQCJ. As of May 2021, the relevant amendment goes through the second reading in the Parliament, while the establishment of the HQCJ is pending.

In practice, concentration of powers in the hands of judges did not help to ensure judicial independence and public confidence in the judiciary. De facto, the judiciary in Ukraine is governed by “clans” somehow related to politicians and oligarchs. For instance, in 2018, and later in 2021 the Congress of Judges appointed to the HCJ candidates which were pre-approved by “clans”. The HCJ has systematically failed to take action against dishonest judges and allowed

them to avoid disciplinary responsibility, and instead has put pressure on independent judges and promoted judges with questionable reputation. Moreover, some of the HCJ members themselves lack integrity. In 2019 Ukrainian NGOs launched a web-site “Failures of the HCJ”; it is updated on a regular basis.²¹

In 2017-2019 the HQCJ, which was controlled by the presidential administration and clans, greenlighted dishonest and unprofessional candidates for the Supreme Court. Also, the qualification assessment of judges, which was aimed at cleansing the system from tainted and incompetent judges, failed as the HQCJ, which was in charge of the process, was majorly composed of the representatives of the same system that had to be cleaned.

According to the poll conducted in March 2021, the level of trust in the judiciary is 12,4%.²² The judiciary remains the least trusted institution in Ukraine with only the Russian media having a lower level of support.

²¹The collections of the High Council of Justice wrongdoings is available at: <https://bit.ly/2XSxcPt>

²²Public Opinion Survey, March 2021, Razumkov Center Research. Available at: <https://bit.ly/3w4c6eL>

CONCLUSIONS

The following quote encapsulates the problem in the Eastern Partnership region:

“[P]arts of the political class united to obstruct improved governance and progress towards rule of law [and] [...] control of law enforcement bodies and the judiciary was vital to their grip on power. [...] The Council of Europe and other international partners mistakenly treated the judiciary [...] as if it had emerged from a western rather than a Soviet culture. By recommending measures to strengthen judicial independence, their advice gave the old judicial corporations greater influence and reinforced their resistance to cultural change. This is a revealing example of how western principles applied with the best of intentions to post-Soviet environments can produce results diametrically opposed to those intended”.²³

Judicial reforms in Armenia, Georgia, Moldova, and Ukraine designed to achieve European standards failed, because it effectively granted judges sole and somewhat untouchable control over that judicial reform. At the same time, no effective measures to ensure judicial accountability were introduced. Dishonest judges started (ab)using European standards as a pretext and shield against any reasonable attempts aimed at ensuring the integrity and accountability of the judiciary.

Although the Venice Commission in its recent opinions admits a risk of corporatism, it is still reluctant to support the idea of depriving judges to some extent of their absolute control over the judiciary.

One needs to take a step backward to remind oneself of the idea of establishing a judicial council and ensuring it is majorly composed of judges elected by their peers: To defend the independence of the judiciary which is an essential element of the right to a fair trial. However, the independence of the judiciary is not an objective in itself, it is crucial for ensuring justice and protection of human rights of citizens. Thus, if society suffers from systemic injustice, new approaches to ensuring the rule of law must be sought.

Judicial independence is doubtlessly important, but should follow the cleansing of the judiciary of tainted judges first. The problem is, that the experience of Ukraine, Georgia, Moldova and Armenia demonstrates inefficiency of the existing model on ensuring judicial independence for transitional democracies which have not managed to build independent judiciaries yet. M. Bobek and D. Kosar conclude that the “judges elected by judges” standard “shields the judiciary from external influence, but it pays little attention to the improper pressure on individual judg-

es”²⁴ exercised by judicial “clans”, or senior judges and court presidents who still “breathe the Soviet system”.

Therefore, ensuring accountability of the judiciary is no less important than guaranteeing its independence.

The recommendation to establish a separate judicial council and ensure the majority of its members are judges elected by their peers was designed to protect the independence of judiciary – and everything should serve only this objective. The experience of transitional democracies proves that dishonest judges and not society benefit if judges are allowed to control themselves, and thus to “wall themselves into a fortress”²⁵ against meaningful reforms.

Importantly, European standards should provide for more adaptability when it comes to judicial governance in transitional democracies. On the one hand, the recommendations tolerate diversity of judicial governance models across Europe and seem to be quite flexible on the number of judicial members in judicial councils. On the other hand, the CCEJ effectively promotes the “majority of judges elected by judges” standard. At the same time, it is important to keep in mind that the CCEJ is a body composed of judges exclusively, thus the ideas promoted by them should not be considered as an “all-purpose” European standard.

²³Bertelsmann, Why Is Progress Towards Rule of Law So Challenging?, 2021, page 36, <https://bit.ly/3vEd1TE>

²⁴Michal Bobek, David Kosař. Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe, 2013, page 14, <https://bit.ly/3hq0uyL>

²⁵Cristina Tarna, Reforming reluctant judiciaries, in: Tilman Hoppe, The Road to Judicial Integrity, 2018, page 22, http://tilman-hoppe.de/GIZ_Bangalore_Principles_merged.pdf

SOLUTIONS

How to ensure justice in a system where judges are dependent and controlled by politicians, oligarchs and “clans”? The solution could be in the involvement of independent experts outside the system in cleansing the judiciary of tainted judges. For instance, Ukraine had a successful experience with the involvement of civil society and international experts in the vetting of judges and judicial candidates.

In particular, in 2016 under legislative amendments the Public Integrity Council (PIC), a civic body tasked with the assessing of judges` integrity, was created in Ukraine. The PIC consists of 20 experts representing Ukrainian well-reputable non-governmental organizations. During the past four years, members of the PIC assessed thousands of judges and judicial candidates and showed up numerous cases of dishonest judicial behavior.²⁶ In 2018, Ukraine engaged international experts to the selection of judges of the High Anticorruption Court. The law envisioned the establishment of the Public Council of International Experts (PCIE). The members of the PCIE were nominated by international organizations dealing with corruption prevention and counteraction. During selection of the judges for the High Anticorruption Court, the PCIE vetted 85% of questionable candidates.

Crucially no candidate could move forward to the next stage of the competition without the positive votes of half members of the PCIE. Crucial for the success of the work of the PCIE was also the adoption of the reasonable doubt standard²⁷ – no candidate could progress if there was a reasonable doubt about his or her integrity or practical skills.

However, an important lesson should be drawn from this Ukrainian experience: External actors would be effective only in case they play a crucial role (as was recommended by the Venice Commission in its opinion the draft law on the Anticorruption Court in 2017).²⁸ In case the outsiders are advising only, they will be used as a window-dressing for the judicial clans.

In its recent opinion on the draft law on the new procedure for the selection of the HCJ members the Venice Commission welcomes the involvement of international experts into the selection of HCJ members in Ukraine. Importantly, the Venice Commission suggests international experts should have a prevailing vote in the process.²⁹ Thus, the Venice Commission has demonstrated the openness for new innovative solutions to tackle the problems of corporatism and cronyism.

Interestingly, since 2008 the number of non-judicial members in the French High

Judicial Council is higher than judicial members.³⁰ Judicial councils of Lithuania and the Netherlands is also good example of the involvement of non-judicial members to judicial governance.³¹

Furthermore, the European Court of Human Rights has approved that an independent body on which not one single serving judge was a member could vet and remove judges from the judiciary:³²

“As regards the non-representation of serving judges in the IQC [Independent Qualification Commission], the Court has indeed pointed to the need for substantial representation of judges within the relevant disciplinary body [...]. In the Court’s view, the fact that members of the IQC did not come from amongst serving professional judges was consistent with the spirit and goal of the vetting process, namely to avoid any individual conflicts of interest and ensure public confidence in the process.”

In transitional democracies the engagement of unbiased experts outside the system to judicial governance and vetting of judges

will help to prevent self-interest, counter illegitimate self-protection and change negative public perception of judicial corporatism. The level and format of such involvement might differ from country to country given the political circumstances and peculiarities of countries.

In a nutshell, transitional democracies should be relieved (at least temporary) from the obligation to follow to “majority of judges elected by judges” standard. European organizations should support the involvement of independent and unbiased experts outside the system into judicial governance. Importantly, judges should not have exclusive rights or quotas for membership, at least for transition period. Furthermore, members of judicial council should be appointed upon the results of transparent and fair selection procedure. The involvement of international experts and civil society into the process of selection of judicial council members is crucially important.

²⁶Public Integrity Council: Society`s first experience in selection and evaluation of judges (2016-2018). Available at: <https://bit.ly/2xF8isd>

²⁷For the respective ECtHR decision, see Tilman Hoppe, Money Talks, 2021, <https://verfassungsblog.de/money-talks>

²⁸For the respective ECtHR decision, see Tilman Hoppe, Money Talks, 2021, <https://verfassungsblog.de/money-talks>

²⁹CDL-PI(2021)004, Urgent Joint Opinion of the Venice Commission and the Directorate General on Human Rights and the Rule of Law of the Council of Europe on the Draft Law on Amendments to Certain Legislative Act Concerning the Procedure for Electing (Appointing) Members of the High Council of Justice (HCJ) and the Activities of Disciplinary Inspectors of the HCJ, para. 51

³⁰Standards VI: Non-judicial Members in Judicial Governance, ENCJ Report 2015-2016, page 17, <https://bit.ly/3vEGJrG>

³¹Civil society involvement into judicial governance bodies (in Ukrainian), <https://bit.ly/3fCiepe>

³²XHOXHAJ v. ALBANIA, 15227/19, § 299-300, <http://hudoc.echr.coe.int/fre?i=001-208053>

ACKNOWLEDGMENTS

The author would like to thank Genya Petrosyan (Law Protection and Development foundation, Armenia), Araks Melkonyan (Protection of Rights without Borders, Armenia), Kakha Tsikarishvili (Group of Independent Lawyers, Georgia), Ilie Chirtoacă (Legal Resources Centre from Moldova), Iulian Rusu (Institute for European Policies, Moldova) for their contribution and expertise.

The author would also like to thank Dr. Tilman Hoppe and Roman Kuybida for the review, their insightful suggestions and careful reading of the paper.

The author also wishes to acknowledge the help provided by Olena Halushka and Tetiana Shevchuk (Anticorruption Action Centre).



USAID
FROM THE AMERICAN PEOPLE

This publication is made possible by the support of the American People through the United States Agency for International Development (USAID) under the New Justice Program. The content is the responsibility of the author and does not necessarily reflect the views of USAID or the United States Government.

