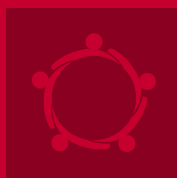




Recommendations on Judicial Independence and Accountability

(Warsaw Recommendations)

2023



OSCE
ODIHR

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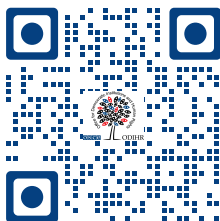
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Designed by Dejan Kuzmanovski



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Introduction

OSCE participating States have recognized the independence of judges and the impartial operation of the public judicial service as one of the elements of justice that is essential to the full expression of the inherent dignity and equal and inalienable rights of all human beings (Copenhagen 1990). They have further committed to ensuring that the independence of the judiciary is guaranteed in law and respected in practice (Moscow 1991). Finding and maintaining a balance between judicial independence and the accountability of judges is a dynamic process.

Since its publication in 2010, the *[Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#)*, developed by ODIHR together with the Max Planck Institute for Comparative and Public International Law (MPI), have served to articulate compliance with international standards and good practices for judicial system reforms across the OSCE region. They have been used extensively by national authorities, civil society, the OSCE and other international organizations.

In 2019, in response to numerous requests for guidance on issues related to judicial independence falling outside the geographic and thematic scope of the *Kyiv Recommendations*, ODIHR initiated a comprehensive consultative and expert-driven process to ensure that its recommendations on judicial independence respond effectively to current challenges. The inaugural meeting of a core group of experts convened in Warsaw, followed by extensive further assessment of the thematic areas in focus. The *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)* are the result of this review process.

Working and advisory groups, comprised of local and international experts from across the OSCE region, provided ODIHR with valuable guidance and feedback. From 2020 to 2022, ODIHR convened a series of ten regional workshops across the OSCE region to hear the views and perspectives of a wide range of experts. Over 250 rule of law specialists — including judges and members of judges' associations, judicial training bodies, legislative and executive authorities, lawyers, members of civil society organizations, academics, staff members of OSCE field offices, and staff members from regional and international organizations and scientific bodies — participated in ODIHR's review process at various points. A detailed picture of the practical and normative landscape of judicial independence and accountability in the OSCE region slowly emerged.

In line with the way they were developed, and in light of ODIHR's mandate to support participating

States in upholding their rule of law related commitments, the *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)* are intended to deliver a practical tool for stakeholders across the OSCE region who engage with justice systems at all contact points. Like the *Kyiv Recommendations*, the *Warsaw Recommendations* are non-exhaustive. The *Warsaw Recommendations* aim to supplement the *Kyiv Recommendations* by elaborating on certain, previously unaddressed issues and to respond to developments since 2010. The two documents should be read in tandem. For all matters not addressed in the *Warsaw Recommendations*, the *Kyiv Recommendations* remain applicable. In some places, the *Warsaw Recommendations (WR)* use the *Kyiv Recommendations (KR)* as starting or departure points. Where this is the case, references are given in parentheses in the text; for example, (See *KR 1*).

Part I

Judicial councils and self-governing bodies

Independence and impartiality of judicial councils and self-governing bodies

1. In light of their role in safeguarding the independence of the judiciary as a whole, judicial councils and self-governing bodies, where they are established, should themselves be independent and impartial.

Composition of judicial councils

2. Where a judicial council is established, it should be composed of a small majority of judge members elected by their peers. Judge members of judicial councils should represent the judiciary at large, including judges from first level courts. Judicial councils should not be dominated by judges from appellate or other courts of higher instances. Where the chairperson of a court is appointed to the judicial council, he or she must resign from his or her position as a court chairperson. To promote inclusiveness and transparency, judicial councils should have a pluralistic composition with a diverse representation of legal professionals, including law professors, representatives of the Bar, and experienced and respected members of civil society with a demonstrated long record of fostering judicial independence and accountability. To promote judicial independence, where prosecutors do not belong to the same judicial corps as judges, they should be excluded from judicial councils. *(See KR 7).*
3. There should be no members of the executive or legislative branches on judicial councils. Where such members are already in place, they should not have the right to vote or participate in decision-making processes concerning matters of judicial independence, including on the disciplinary accountability, evaluation, transfer, selection or appointment of judges. The rules regarding the composition of judicial councils and the selection and appointment of their members should be designed to ensure gender balance and diversity. *(See KR 7).*

Division of competences in judicial administration

4. Sometimes, in order to avoid excessive concentration of power in one judicial body and perceptions of corporatism, competences are divided among judicial self-governing bodies, and separate bodies are entrusted with specific tasks of judicial administration such as selection, promotion and training of judges, discipline, performance evaluation and budget. *(See KR 2)*. In these circumstances:
 - (a) All such bodies should be independent from the executive and legislative branches of government, as well as free from any undue external pressure. Their members should benefit from guarantees of independence similar to those of judges;
 - (b) Such bodies should not be used to subvert the independence of other judicial self-governing bodies;
 - (c) The composition of each body should reflect the exigencies of their function;
 - (d) The work of these bodies should be regulated by law rather than executive decree; and
 - (e) The efficiency and effectiveness of these bodies should be taken into due consideration and periodically reassessed.

Election of judge members to judicial councils and self-governing bodies

5. The procedure of peer election of judge members of judicial councils should be free from interference from the executive and legislative branches, or from the judicial authorities external to the judicial council. The results of the election should be considered binding on the executive, legislative and judicial authorities (without prejudice to the process of judicial review), and their involvement in the election procedure should not alter the will of the voters.

Election of non-judicial members to judicial councils and self-governing bodies

6. Non-judicial members of judicial councils should be nominated by entities that are autonomous from the executive, legislative or judicial branches, such as universities and Bar associations. Where such entities do not exist, or do not represent the interests of the category of non-judicial members being chosen for the judicial council, non-judicial members, such as people from civil society organizations, may be nominated by their peers. Non-judicial members should be elected with a qualified majority by a legislature, requiring a broad consensus in parliament. Unless compromise is reached, members should continue in their positions and anti-deadlock measures may be considered.

The integrity of members of judicial councils and self-governing bodies

7. The integrity of candidates for judicial councils and other self-governing bodies (both judicial and non-judicial members) may be assessed by bodies consisting of people of high moral standing, including international experts, through a procedure stipulated by law. *(See KR 22 for a description of the principles that should be applied if background checks are carried out in the context of assessment of the integrity of candidates for judicial councils.)* The decisions of such bodies should be subject to judicial review. Independent and impartial observation of the nomination and election of members of judicial councils can promote accountability and transparency.

Part II

Accountability of judicial councils and self-governing bodies

General principles of accountability

8. For the benefit of individuals, society entrusts judicial councils and other bodies with powers to self-govern the judiciary in order to facilitate and protect the independence of judges in deciding cases. Judicial councils and other self-governing bodies must account for their powers to society. As bodies entrusted with broad powers, they have a correspondingly high duty to account for them.
9. For the purpose of gaining and maintaining the trust of society, judicial councils and other self-governing bodies should develop a culture of accountability, meaning that they should account for their actions, even without a legal duty to do so. The core of this culture should be to account for their actions, unless there are legitimate reasons not to do so. The decision by a judicial council or other self-governing body not to account for something should be taken only in situations where this may jeopardize or be seen as jeopardizing judicial independence.

Accountability measures

10. Judicial councils and self-governing bodies should use a variety of instruments to ensure their accountability. They should make public as wide a range of information as possible, including their annual reports, reasoned published decisions, press contacts, council procedures, the level of remuneration and travel and other official expenses of council members, the assets of council members, and the availability and use of official resources such as vehicles and apartments belonging to the council. This information should be available in different and accessible formats, including for people with disabilities and in non-majority languages.

Communication with other state bodies and the public

11. Judicial councils should engage in regular dialogue with other state bodies, including with the executive and legislative branches, to ensure the effective functioning of judicial bodies. To enhance public confidence through increased scrutiny and accountability of their activities, judicial councils should also engage in frequent and regular dialogue with civil society, the media and the public at large, and should take measures such as introducing complaints procedures, carrying out user satisfaction surveys and outreach activities.

Limits of accountability

12. Judicial councils should not provide information about, or engage in dialogue on individual cases in a prejudicial manner. They should not provide information on, nor engage in dialogue about the performance of individual judges. Judicial councils should appear for dialogue before parliament or other bodies on a voluntary basis, and then only to consider matters of policy, legislation, types of cases, and other matters related to the functioning of the judiciary broadly, rather than with regard to individual cases or judges. Members of judicial councils should not be dismissed by the executive or legislature before the end of their terms unless found liable of serious disciplinary or criminal offences.

Role of judicial councils and self-governing bodies in selection of judges

13. To promote accountability and transparency, the selection bodies should be required by law to issue reasoned decisions. While the results of the selection process should be made public, the reasoning of selection decisions should remain confidential and not be published. Selection bodies should prepare a sufficient summary of their majority's justification, giving reasons for the ranking of candidates and the nomination for appointment in light of the pre-determined criteria. This document should be made available to the candidates upon request after the completion of the nomination process. Selection decisions should be subject to judicial review by an independent and impartial body. If judicial review is initiated by a candidate, an exception to the confidentiality rule may be envisaged. This could permit the court to access information about the evaluation of the candidate and the scores of the other candidates, while imposing an obligation on the parties to the proceedings to keep the information confidential. Judicial councils should develop clear ethical rules for the behaviour of their members regarding the selection and appointment of judges. The judicial council should develop objective criteria for discretionary appointments, particularly to senior positions, while adhering to the criteria and procedures for judicial selection set out above. (*For selection process in general, see KR 3, 4 and 21-23*).

Disciplinary proceedings for members of judicial councils

14. Disciplinary proceedings for members of judicial councils should be conducted by bodies that do not contain judicial council members. These bodies may be specially constituted by law, and their decisions should be reasoned and subject to judicial review. Members of judicial councils subject to disciplinary proceedings should have the same procedural guarantees as judges subject to such proceedings (*see WR 19 below*).

Functional immunity of members of judicial councils

15. Members of judicial councils should enjoy only functional immunity, including with respect to publicly expressed views, speeches and votes. Members of judicial councils who commit criminal offences in the normal course of their duties should not have immunity from criminal prosecution (*see WR 16 below*).

Part III

Disciplinary bodies and proceedings

Relationship between disciplinary proceedings and judicial immunity

16. Disciplinary proceedings are intended to hold judges accountable for their conduct, while judicial immunity serves to protect them from unwarranted prosecution for exercising their lawful judicial functions. Judges may incur criminal or civil liability like other individuals when not exercising judicial functions. Judges who commit a criminal offence in the exercise of their office should not have immunity from criminal prosecution.

Membership of bodies deciding on discipline

17. Bodies deciding on cases of judicial discipline should not be controlled by the executive branch, nor should there be any political influence pertaining to judicial discipline. Any kind of control by the executive branch over bodies entrusted with judicial discipline is to be avoided. Bodies competent to hear a disciplinary case and to take a decision on disciplinary measures should be independent and should not include serving members of the executive or legislature. Bodies that adjudicate cases of judicial discipline should not have members who have the legal competence to initiate those proceedings. Disciplinary bodies should be composed of a majority of judges, elected by their peers, and include members from outside the judicial profession, including experienced and respected members of civil society organizations with a demonstrated long-standing record of fostering judicial independence and accountability. (*See KR 9. See also KR 1, 25-26*). Judge members of disciplinary bodies should not participate in judicial selection or appointment nor perform other functions related to judicial administration. The rules regarding the composition of disciplinary bodies and the selection and appointment of their members should be designed to ensure gender balance and diversity.

Courts as disciplinary bodies

18. Among the different models of judicial disciplinary system, in some contexts, disciplinary proceedings against judges may be adjudicated in the first instance by courts.

Procedural guarantees in disciplinary proceedings

19. Bodies competent to hear a disciplinary case and to take a decision on disciplinary measures should provide procedural safeguards for judges who are subject to disciplinary proceedings. These should include the right to an impartial and independent tribunal, to be fully informed of the charges against them, and the right to be heard and to have a decision rendered within a reasonable time.
20. Further, bodies deciding on cases of judicial discipline should respect the principle of equality of arms, including giving the accused judge the right to representation, to be assisted by a lawyer of their choice, and the right to present a defence, including the right to access evidence. Transparency should be the rule for disciplinary hearings of judges. Hearings should be open, unless the accused judge requests that they be closed. Hearings should not be closed automatically upon the judge's request; rather, such requests should be duly considered on a case-by-case basis, whereby a competent court should decide whether the request is justified. (See KR 26).
21. During the investigation phase, the accused judge may only be suspended as a temporary measure and under exceptional circumstances, and with pay. All decisions on the temporary suspension of a judge during a disciplinary investigation must include a reasoned decision demonstrating the prejudicial impact on the administration of justice that would otherwise occur if the judge continued to serve.
22. Decisions in disciplinary proceedings should be well-reasoned and state the essential findings, evidence and legal reasoning. They may be appealed to a competent court, whose decision should be binding on judicial councils and bodies deciding on cases of judicial discipline. Final decisions on disciplinary measures should be published. (See KR 26). Where disciplinary proceedings against a judge are terminated by the body deciding on cases of judicial discipline, the competency to decide on that matter should not be extended to other bodies, including courts.

Initiating disciplinary proceedings

23. The members of bodies initiating disciplinary proceedings should not be the same as those that render a decision in such proceedings. To ensure an independent and objective review of the complaint, court chairpersons should not have the power either to initiate disciplinary proceedings or adopt a disciplinary measure. (*See KR 14*). However, court chairpersons may file a complaint to a body that is competent to receive complaints and conduct disciplinary investigations. Bodies initiating disciplinary proceedings should adopt a summary procedure to dismiss vexatious claims made against judges without prima facie evidence of a disciplinary offence.

Formulation of disciplinary offences

24. To promote the principle of foreseeability and to mitigate the risk of abuse and overreach in the application of grounds for disciplinary proceedings, acts or omissions that constitute disciplinary offences should be clearly defined by law. Disciplinary sanctions should be proportionate to the respective disciplinary offence.

Relationship between disciplinary offences and codes of ethics

25. The laws and by-laws defining disciplinary offences and sanctions pursuant to them should be clearly distinguished from codes of ethics. Despite interplay between them, ethical rules should not be used as grounds for disciplinary proceedings, and the bodies that oversee breaches of ethical norms should be separate from those competent to hear a disciplinary case.

Relationship between disciplinary proceedings and evaluation of judges

26. Disciplinary proceedings and periodic evaluations of judges should be subject to clearly differentiated procedures, conducted by separate bodies under well-defined standards promulgated by law. The periodic evaluation of judges should not be used to dismiss or otherwise sanction judges in a manner akin to disciplinary sanctions. Evaluations of judges may be used to help judges identify aspects of their work that they might wish to improve upon, and for purposes of possible promotion. (*See KR 28*).

Part IV

Freedom of expression and freedom of association of judges

Freedom of expression

27. Freedom of expression is an internationally guaranteed right of judges as individuals. This freedom may be circumscribed and subject to such restrictions as may be necessary to safeguard the honour and dignity of judicial office and the impartiality and independence of the judiciary, if the executive, legislative and/or judicial authorities are able to demonstrate that the restriction of this freedom is provided by law, has a legitimate aim, and is necessary and proportionate.
28. Judges should be able to exercise this freedom to contribute to public discourse on issues affecting the rule of law and enjoyment of human rights, including, but not limited to, debates on legislation, policies that may affect judicial self-governance, and topics that raise fundamental questions in a democratic society. Judges also have a duty to speak out in defence of the rule of law and judicial independence in situations where these values are threatened.
29. However, judges should show particular caution in the exercise of this right when using social media and dealing with the press, bearing in mind the aforementioned need to safeguard the honour and dignity of their office, as well as the need to abstain from comments which may prejudice the perception of judicial impartiality in the examination of cases in front of them.

Freedom of association

30. Freedom of association is an internationally guaranteed right of judges as individuals. This right may be used by judges, without any distinction whatsoever, to form and join associations of judges and other organizations, including trades unions, to promote their interests and the principles of judicial independence and accountability. Judges may also exercise this right to form and join civil society and non-profit organizations such as charities, provided their objectives are not of a political nature. However, this right may be circumscribed and subject to such restrictions as may be necessary where forming or joining an association would conflict with the public duties and/or jeopardize the impartiality of judges or the appearance thereof. A mandatory requirement that judges disclose their membership in associations and making this information public, may unduly curtail judges' rights to freedom of association.

Part V

Judicial tenure and the transfer of judges within or between courts

Judicial tenure and limited terms

31. Security of tenure for judges is a key precondition of judicial independence. With the possible exception of fixed term appointments for judges of constitutional courts and equivalent bodies, judges should not be appointed to limited terms, as this endangers their independence and impartiality. First-time judges should preferably not be appointed to probationary terms, except in extraordinary circumstances, and then only for a short, non-extendable period.

Transfers, security of tenure and irremovability of judges

32. The irremovability of judges is an essential aspect of their independence. Judges must not be under the threat of transfer from one court or tribunal to another, as this may be used to exercise pressure on them and to attack their independence. Judges should be transferred within or between courts only with their own freely given consent, except in exceptional circumstances. A perceived or actual lack of fairness and transparency in practices related to judicial transfers may weaken the internal independence of judges and may undermine the guarantees of their security of tenure and irremovability.

Transfers and reorganization of courts

33. A transfer of judges or other equivalent measures may, in principle, be justified in exceptional cases of legitimate institutional reorganization, generally resulting in the closure of a court or its reduction in competence or territorial jurisdiction to such an extent that the employment of a judge is no longer possible or justifiable. Such court restructuring should be initiated by the decision or recommendation of an independent judicial body. In the extraordinary cases where a court is abolished or substantially restructured, all existing members of that court should, in principle, be reappointed to the replacement court (if applicable), or appointed to another judicial office of equivalent status and tenure. Where this does not exist, the judge concerned should be given full compensation for the loss of office. In addition, in such cases, appointment to another post shall be subject to appeal before a court and/or other independent authority, which will evaluate the legitimacy of the transfer. The transfer of judges in the context of reorganization of courts should not serve as a mechanism for executive or legislative interference in the independence of the judiciary. Judicial transfers made in the context of court reorganization should respect the general principles of consent, fairness and transparency (*see WR 35 below*) to the greatest degree possible.

Transfers and disciplinary sanctions

34. As a general rule, transfers should not be used as a method of formal or informal disciplinary sanction. In jurisdictions where the possibility of judicial transfer as a form of disciplinary sanction exists, the law should clearly specify under which circumstances and according to what procedures it may be applied, and these should be in the context of ordinary disciplinary proceedings. The conditions and procedures for judicial transfer should be regulated in primary law to safeguard against the use of judicial transfer as a form of hidden or informal sanction.

Fairness and transparency in judicial transfers

35. Judges should be transferred within or between courts only with their own freely given consent, with the exception of temporary secondments, which should only be used in exceptional circumstances. To prevent the perception of nepotism, corruption or other undue influence, transfers of judges within or between courts should be carried out through an application process in which the criteria for transfer are explicitly set out, and where the body responsible for deciding on transfers gives clear and legally grounded reasoning for the transfer or denial thereof. This includes transfers of judges for the purposes of human resources management. Lateral transfer vacancies should always be made public. Transfers for purposes of career advancement and/or promotion should be carried out according to regular proceedings established for this purpose. The law should explicitly foresee the right to a full judicial review of the procedure and substance of all decisions on judicial transfer. Detachments or secondments of judges to other courts or institutions should be for a fixed and limited time; no longer than six months.

Transfers and the role of court presidents

36. While court presidents should have the flexibility to transfer judges internally to another judicial office of equivalent status and with equivalent tenure, they must do so lawfully, fairly and transparently. Any such transfer should only be made with the full written consent of the judge being transferred. (See *WR 35 above*).

Transfers and the role of judicial councils

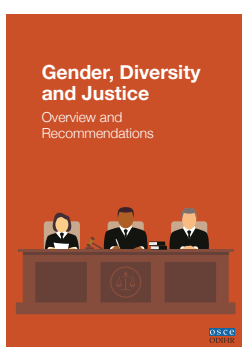
37. There should be clear rules and procedures set out for any role for judicial councils or other self-governing bodies with regard to the issue of transfer of judges. (See *Parts I and II above*).

Transfers and evaluation of performance of judges

38. Performance evaluation may be used as an objective tool as part of a competitive process for lateral or hierarchical judicial transfers.

Part VI

Equality, diversity and non-discrimination



Please see the ODIHR publication [Gender, Diversity and Justice: Overview and Recommendations](#) for a comprehensive analysis of the challenges and good practices related to an inclusive judiciary.

The representation of men, women and minorities in the judiciary

39. Judicial councils, other self-governing bodies (including selection and recruitment boards) and higher instance courts should have a gender-balanced composition with an adequate representation of minorities. (See *WR 2 and WR 17 above*).
40. Executive, legislative and judicial authorities should adopt measures to ensure gender parity in judicial self-governing bodies and in senior positions in the judiciary. They should consider adopting similar measures to ensure the adequate representation of minorities. (See *KR 24*). These authorities should adopt further indicators and guidelines for measuring gender equality and the adequate representation of minorities in the judiciary beyond representation in these positions. These may include the representation of women and minorities in judicial schools and academies, the rate of promotions of women and minorities to senior positions upon taking parental leave, and policies to ensure that equal weight is accorded to the career experience in areas of law stereotypically seen as 'female', such as family law and social welfare law. These indicators should be qualitative and quantitative, and should focus on de facto, as well as de jure equality of opportunity and output.

Policies to advance gender equality in the judiciary

41. Judicial councils and other self-governing bodies should proactively advance gender equality in the context of their functions and in the judiciary at large. Measures may include periodic gender-mapping exercises and the adoption of gender-mainstreaming plans, training for judges and judicial staff to raise awareness of gender equality and to ensure they treat female judges equally, and training in countering sexual harassment for judges and judicial staff. Further, judicial councils and other self-governing bodies should develop promotion criteria and procedures that provide female candidates with an equal opportunity, and that mitigate the conscious or unconscious biases of decision-makers. This should also include ensuring that human resources management within the judiciary is gender- and diversity-sensitive, *inter alia* by reviewing human resource policies and access to social benefits in light of gender and diversity considerations and by promoting better work-family balance for justice sector professionals, in particular, by bridging the gender gap in access to parental leave. Judicial councils and other self-governing bodies should ensure that effective disciplinary policies and procedures are in place and contain provisions that prohibit discrimination or harassment on the basis of sex, sexual orientation, gender identity or other grounds, as well as bullying and sexual or other forms of misconduct. The provisions and procedures should include an effective complaint mechanism and cover all employees of the judicial system, guaranteeing safety, confidentiality and expediency of the complaint process along with a well-defined and independent investigation process.

Equality and non-discrimination

42. Direct discrimination (unjustified differential treatment) and indirect discrimination (seemingly neutral rules, regulations or procedures that cause unjustified differential treatment) in the process of judicial self-administration, selection, appointment, transfer and discipline must be forbidden by law and effective mechanisms should be in place to ensure an adequate response to instances of discrimination in practice. More specifically, discrimination by association (when someone is treated differently based on association with a certain background or personal characteristic) in the process of judicial self-administration, selection, appointment, transfer and discipline should be forbidden. Active steps should be taken to exclude unconscious bias and stereotyping, including based on gender, disability or other personal characteristics or background, from decisions in the process of judicial self-administration, selection, appointment, transfer and discipline.

