OSCE Human Dimension Seminar

STRENGTHENING JUDICIAL INDEPENDENCE AND PUBLIC ACCESS TO JUSTICE

CONSOLIDATED SUMMARY

Warsaw, 17-19 May 2010

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I. OVERVIEW

The Human Dimension Seminar on *Strengthening Judicial Independence and Public Access to Justice* (Warsaw 17-19 May 2010) provided a forum for representatives of the participating States of the Organization for Security and Co-operation in Europe (OSCE), experts, and civil society actors to address some of the key issues related to judicial independence and public access to justice, including: judicial administration with a special focus on judicial councils; selection of judges, criteria and procedure; accountability of judges; and public access to justice. Judicial independence and public access to justice are important requirements for the rule of law in the human dimension. Seminar participants shared their experiences, discussed many challenges, and proposed solutions to help address these challenges. The keynote speaker, introducers and moderators of the working group sessions made a particularly valuable contribution to the discussions.

Judicial independence is not new for the OSCE rule of law agenda. It was one of the topics addressed at the 2009 Human Dimension Seminar on Strengthening the Rule of Law in the OSCE Area with a Special Focus on the Effective Administration of Justice. Public access to justice has also received much attention in human dimension meetings. Nevertheless, many participants emphasized that achieving greater compliance with OSCE commitments both regarding judicial independence and public access to justice continues to require close attention. Moreover, representatives of civil society from various countries called for more rigorous efforts to implement these commitments.

Many speakers highlighted that judicial independence is a cornerstone of a democratic society. Participants discussed various models regarding competencies and compositions of judicial councils as well as criteria and procedures for the selection of judges, and debated their comparative advantages for an independent judiciary. Seminar discussions also highlighted the need to examine accountability mechanisms for judges carefully to ensure that they do not represent a threat to independent adjudication. Finally, the Seminar provided a framework for participating States and their experts to share and discuss practices in advancing public access to justice.

The Seminar was not mandated to produce a negotiated text. Main conclusions and recommendations of the Seminar are included in Section II of this Summary. Recommendations – put forward by delegations of OSCE participating States and Partners for Co-operation, international organizations, and NGOs – are wide-ranging and addressed to various actors including OSCE institutions and field operations, governments, courts and civil society. Seminar recommendations have no official status and are not based on consensus; however they should serve as useful indicators for the OSCE in setting priorities and planning its programmes aimed at strengthening the rule of law. Documents from the Seminar are available at: http://www.osce.org/conferences/hds_2010.html?page=documents.

II. CONCLUSIONS AND KEY RECOMMENDATIONS

The Human Dimension Seminar was chaired by Ambassador Janez Lenarčič, Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR). The Chairman addressed the opening and the closing plenary sessions (see Annex II), highlighting the importance of an independent judiciary for a functioning democracy and the rule of law. He expressed appreciation to all participants for their contributions to the Seminar, and thanked in particular the speakers from non-governmental organizations for their constructive interventions. The Chairman pointed out that there were no universal solutions to the issues discussed, and stressed the great value of exchanging experience. He recalled that the rationale of Human Dimension Seminars is facilitating such exchanges on particular human dimension issues between experts of the participating States. Therefore, he called on participating States to demonstrate their commitment to making future seminars a success by attending them and sending experts to participate. Moreover, he promised that ODIHR will continue providing assistance to the participating States in the areas discussed throughout the Seminar. The following conclusions and key recommendations emerged from the plenary and working group sessions.

Conclusions

Ensuring judicial independence is of paramount importance in the OSCE region. In many participating States, challenges remain to be overcome in order to realize the ideal and guarantees proclaimed in their constitutions, laws, and OSCE commitments.

Judicial administration is an important area where safeguards need to be put in place to ensure respect for the independence of the judiciary, especially by other branches of government. Judicial councils may be a valuable tool to protect judicial independence. However, their composition and competencies need to be examined carefully with a view to properly balancing the principles of judicial independence and democratic legitimacy and accountability. A strong role of court presidents in judicial administration tends to decrease judges' independence, and therefore deserves careful attention in any reform debate.

Merit-based, transparent and fair selection procedures are essential for the independence of the judiciary. Appointed judges should be professionals with the highest legal expertise and persons with great communication skills, high moral character and integrity, which is of crucial importance for their independence and impartial performance.

For greater legitimacy and public acceptance, the selecting authority also needs to pay attention to creating a diverse judiciary. Involvement of judicial academies and court trainee programmes in the selection procedure can contribute to evaluating the necessary skills and characteristics of judicial candidates.

It was concluded that the judiciary itself should have a significant role in the selection of its members. The role of the executive is often and should be limited to the formal appointment of judges. Strong influence of the executive and a general lack of transparency in the selection and appointment procedures decrease public trust in the judiciary.

Judicial independence and accountability are two sides of the same coin: a professional and impartial judiciary enjoys public trust and support. Accountability mechanisms are necessary, but need to be carefully examined for their potential interference with judicial independence. Any interference in judges' adjudication needs to be avoided. Any negative effects for the judge resulting from his or her interpreting and applying the law should be minimized. Any internal hierarchy or chain of command is prone to encroach on judges' independence.

Public access to justice should be considered in the full sense: access to information; transparency of the judicial system; physical access to courts; the absence of any hindrance, including economic ones such as unaffordable court fees; and finally, legal assistance for all.

Legal aid is of crucial importance for the realization of human rights: criminal legal aid for a fair trial, freedom from torture and arbitrary arrest; and civil legal aid for social empowerment and inclusion. Legal aid and more generally access to justice are of particular urgency for individuals belonging to vulnerable groups, such as victims of domestic and sexual violence.

Key recommendations

To the participating States

- Strengthen judicial self-governance; combat undue pressure from executive and legislative authorities on judicial councils and other bodies of self-governance;

- Examine composition and competencies of judicial councils carefully in order to strike a balance between democratic legitimacy and judicial independence;

- Introduce and/or apply existing case assignment systems that exclude opportunities for individual preferences and abuses, for example those based on alphabetical order or date of registration;

- Ban the practice of higher court judges' interference with judges of lower courts through advice and consultation;

- Introduce election of court chairs by the judges of the respective court instead of their appointment by executive authorities;

- Ensure that appointed judges are professionals with the highest legal expertise and persons with strong communication skills, high moral character and integrity; for merit-based recruitment and promotion,

apply both objective and subjective criteria; carefully examine subjective criteria (moral standards, attitudes, soft skills) to prevent discrimination and abuse;

- Adopt and apply in practice rules and laws pertaining to the selection of judges: the process should be fair, transparent and objective in order to guarantee the legitimacy and credibility of the judiciary;

- For greater legitimacy and public acceptance, ensure that the selecting authority pays attention to creating a diverse judiciary; strive towards achieving or maintaining gender balance in the judiciary, at all levels;

- Consider involving judicial academies in the selection procedure; and consider introducing trainee programs in courts for better evaluation of candidates for the bench;

- Fight corruption both in the judiciary and in judicial selection;

- In participating States that have not already introduced life-time appointment of judges: consider adopting it, in order to reduce the vulnerability to external pressure due to the uncertainty of tenure;

- Ensure that judges: are subject only to the law and not to executive or legislative authorities, nor to internal hierarchies or chain of command; and that they are free from internal or external pressure;

- Consider abolishing or limiting judges' accountability (criminal, civil and disciplinary) for their opinions expressed in the course of adjudication and their reasoned interpretation of the law, even if innovative;

- Reconsider the practice of or avoid taking into account the number of decisions overturned or modified at the higher instance in individual judges' performance evaluations;

- Reconsider or avoid involvement of higher level courts in performance evaluation and disciplinary matters regarding the lower level judges of their jurisdiction;

- Grant certain minimum judicial safeguards to the judges accused of offences in disciplinary procedure, including the right to be assisted by counsel, and the right to appeal;

- Encourage civil society groups to monitor judicial proceedings and judicial authorities to co-operate with such initiatives by providing unhindered access to public trials and hearings;

- Improve access to justice, particularly in under-developed, remote, and rural areas, by addressing questions related to transport, infrastructure, technologies, as well as courts' public relations;

- Fix the tariffs for state appointed lawyers based on the complexity of cases;

- Establish an efficient system for the publication of judicial decisions and ensure easy public access to them;

- Look into possible measures to increase the number of lawyers providing quality, free or reduced-charge legal services, for example by providing incentives; consider using non-lawyers for certain services;

- Consider introducing elements of mediation.

To the OSCE, its institutions and field operations

- Continue to perform its work in the area of promoting judicial independence, especially through training of judges, assisting judicial reforms and providing legislative support;

- Continue to provide a forum for participating States and their judiciaries to exchange practices and lessons learned in the field of judicial administration, selection of judges and their accountability;

- Bear in mind the 2008 Brasilia Regulations on Access to Justice for Vulnerable People in justice projects;

- Consider including mediation in their understanding and discussions of the overall concept of access to justice;

- Continue OSCE monitoring programmes for trials and other aspects of legal systems; ensure continuing exchange of good practices with regard to such programmes and the discussion of their results;

- Develop tools to improve the implementation of international standards and principles of judicial independence in domestic legal systems;

- Continue promoting the OSCE human dimension commitments in the area of rule of law.

III. AGENDA AND ORGANIZATIONAL ASPECTS

The Seminar on *Strengthening Judicial Independence and Public Access to Justice* was organized in Warsaw on 17-19 May 2010 by ODIHR in co-operation with the Kazakh Chairmanship of the OSCE in accordance with PC Decisions No. 932 of 26 March 2010 (PC.DEC/932) and No. 936 of 22 April 2010 (PC.DEC/936).

This was the 26th event in a series of specialized Human Dimension Seminars organized by the ODIHR further to the decisions of the CSCE Follow-up Meetings in Helsinki in 1992 and in Budapest in 1994. The previous Human

Dimension Seminars were devoted to: Tolerance (November 1992); Migration, including Refugees and Displaced Persons (April 1993); Case Studies on National Minorities Issues: Positive Results (May 1993); Free Media (November 1993); Migrant Workers (March 1994); Local Democracy (May 1994); Roma in the CSCE Region (September 1994); Building Blocks for Civic Society: Freedom of Association and NGOs (April 1995); Drafting of Human Rights Legislation (September 1995); Rule of Law (November /December 1995); Constitutional, Legal and Administrative Aspects of the Freedom of Religion (April 1996); Administration and Observation of Elections (April 1997); the Promotion of Women's Participation in Society (October 1997); Ombudsman and National Human Rights Protection Institutions (May 1998); Human Rights: the Role of Field Missions (April 1999); Children and Armed Conflict (May 2000); Election Processes (May 2001); Judicial Systems and Human Rights (April 2002); Participation of Women in Public and Economic Life (May 2003); Democratic Institutions and Democratic Governance (May 2004); Migration and Integration (May 2005); Upholding the Rule of Law in Criminal Justice Systems (May 2006); Effective Participation and Representation in Democratic Societies (May 2007); Constitutional Justice (May 2008); Strengthening the Rule of Law in the OSCE Area, with a special focus on the effective administration of justice (May 2009).

The Annotated Agenda of the Seminar is supplied in Annex I. The Seminar was opened on Monday 17 May 2010 at 10:00 and closed on Wednesday 19 May 2010 at 17:30. All plenary and working-group sessions were open to all participants. The closing plenary session in the afternoon of 19 May focused on practical recommendations emerging from the four working group sessions. The plenary and working group meetings took place in accordance with the Work Programme. Ambassador Janez Lenarčič, Director of ODIHR, chaired the plenary sessions. The Rules of Procedure of the OSCE and the modalities for OSCE meetings on human dimension issues (PC.DEC/476) were followed, *mutatis mutandis*, at the Seminar. Also, the guidelines for organizing OSCE meetings (PC.DEC/762) were taken into account. Discussions were interpreted into all six working languages of the OSCE.[1]

IV. PARTICIPATION

The Seminar was attended by 165 participants, among them 94 representatives of 37 OSCE participating States,[2] three participants of one Mediterranean Partner for Co-operation (Algeria), three participants of one Partner for Co-operation (Australia), and two representatives of two international organizations (Community of Democracies, Council of Europe).

The Seminar was also attended by 12 representatives from eleven OSCE field operations (Presence in Albania, Centre in Astana, Centre in Bishkek, Mission to Bosnia and Herzegovina, Mission in Kosovo, Mission to Moldova, Spillover

[1] According to paragraph IV.1(B)1. of the OSCE Rules of Procedure (MC.DOC/1/06), working languages of the OSCE are English, French, German, Italian, Russian, and Spanish.
[2] This number includes experts from Ministries of Justice, courts and judicial councils of the participating States.

Monitor Mission to Skopje, Office in Tajikistan, Project Co-ordinator in Uzbekistan, Office in Yerevan, and Office in Zagreb). 51 representatives of 38 NGOs[3] took part in the Seminar.

V. SUMMARY OF THE PROCEEDINGS

Ambassador Janez Lenarčič, Director of ODIHR, opened the Seminar. Welcoming remarks were made by **Ambassador-at-large Madina Jarbussinova** from the Ministry of Foreign Affairs of Kazakhstan, on behalf of the Kazakh OSCE Chairmanship, and **Mr. Jan Borkowski**, Secretary of State, Ministry of Foreign Affairs of Poland.

The keynote address was delivered by **Mr. Guy Canivet**, Member of the Constitutional Council of the French Republic. He stressed the importance of judicial independence for the functioning of a democracy, and highlighted the role of an independent judiciary for the realization of citizens' rights. Guy Canivet also recalled the important contribution of international organizations that assist governments in ensuring the exercise of rights and freedoms and meeting the needs of citizens. Governments need to put procedures in place and remove all obstacles to ensure fair and equitable access to justice, also for victims of crime. Lack of financial resources should not stand in the way of accessing justice for anyone, and governments need to help their citizens in this regard.

The keynote speaker emphasized that governments have the duty not only to refrain from influencing the judiciary, but also to ensure that guarantees are in place to protect the judiciary from any conflict of interests and external pressure. Neither executive nor legislative powers may instruct judges how to decide in a particular case. Sound systems of judicial selection should ensure the highest level of professionalism of judges, which in turn is a guarantee of their independence and neutrality.

Many countries have put in place judicial councils to uphold judicial independence; however, the independence of these councils needs to be examined. According to Mr. Canivet, non-respect for judicial independence is a daily phenomenon in many countries, where neither citizens nor judges have a sense of genuine independence. He pointed out that incidents which compromise judicial independence and integrity can damage the entire justice system.

After the opening plenary session of the Seminar, discussions took place in four consecutive working groups. The following reports are prepared on the basis of notes taken by ODIHR staff and presentations of the rapporteurs, who summarized the working group discussions at the closing plenary session. These reports cannot exhaustively convey the details of the working group discussions, but rather aim to identify their common salient points. The recommendations from working groups were not formally adopted by the

[3] This number includes political parties, newspapers and radio, universities, research or academic institutes, legal clinics and schools.

Seminar participants and do not necessarily reflect the views of any participating State.

Working Group I: Judicial Administration with a Special Focus on Judicial Councils

Moderator: Ms. Anja Seibert-Fohr, Head of Minerva Research Group, Max Planck Institute for Comparative Public Law and International Law

Introducer: Ms. Elizaveta Danielyan, Judge of Court of Cassation of Armenia

Rapporteur: Ms. Anna Esko, First Secretary, Permanent Mission of Finland to the OSCE

The first working session addressed questions relating to judicial councils and other bodies of judicial self-governance that are tasked to protect the independence of the judiciary. Participants discussed composition, competencies and the role of these bodies, as well as the role of the executive and legislative branches in judicial administration.

As a starting point, the moderator stressed the importance of guaranteeing judicial independence throughout the OSCE region. Recalling the extensive experience with establishing judicial councils throughout the region, she encouraged participants to take stock of the respective reforms in their countries, and examine their effects on judicial independence. In addition to composition and competencies of judicial councils, the moderator also called on participants to address in their contributions the role of court presidents in judicial administration.

The introducer described judicial reforms related to the administration of justice in her country. The main purpose had been to ensure judicial independence and reduce corruption. The introducer described the three-tier court structure and drew attention to the establishment of a judicial college. She noted the role of the judicial college in the recruitment of judges and suggested that appointment procedures had become more transparent and merits-based in her country with the help of the judicial college. The introducer further highlighted how the Council of Justice and its special committees are responsible for judicial self-government, for example the disciplining of judges. She also described the Council of Court Chairmen which has significant competencies in the area of judicial administration.

In the ensuing discussion several delegations of participating States presented the models of judicial administration in their respective countries as well as the legislation in place for ensuring judicial independence. A number of speakers drew attention to the changes in the status and structure of the judicial council in their countries – from a consultative body attached to and chaired by the Head of State towards a self-governing, autonomous body.

Regarding the composition of the council, participants discussed whether it should include the Minister of Justice, and whether non-governmental members should be involved, e.g. from civil society and the Bar. With the exception of one speaker, there was agreement among speakers that councils should not consist exclusively of judges, because this would bear the risk of corporatism. It was acknowledged that there is a fine line between the desire for democratic control and legitimacy of the judiciary and the need for judicial independence. The recommendations of the Council of Europe's Venice Commission and Consultative Council of European Judges were mentioned as guidelines for appointing members other than judges or lawyers to judicial councils.

One speaker pointed at attempts from executive and legislative authorities to apply undue pressure over the judicial council, which should be repelled. Another speaker commented that one should differentiate between the administration or management of the judiciary on the one hand, and judges' adjudication on the other. Independence of the judiciary was mainly needed in the latter, he argued. According to his view and with regard to the management of justice, there is no need for a strict separation between different branches of authority in the state, but rather a system of checks and balances.

Case assignment was mentioned as an issue of concern. Even where random computer-based case assignment systems were introduced, they are not always used, and the distribution of cases is left to the discretion of the court chair - a practice which at least theoretically provides court chairs with the possibility to influence the outcome of a case. Although not connected to the topic of judicial administration, one speaker argued that a low number of acquittals, as can be seen throughout the territory of the former Soviet Union, was a sign of undue pressure from executive authorities.

Obstacles to judicial independence mentioned during the discussion include political influence, corruption, pressure from the media, insufficient budget and executive influence by controlling the budgeting process. A number of NGO representatives referred to shortcomings and challenges in some OSCE participating States regarding the rule of law in general and the independence, transparency and accountability of the judiciary in particular. One speaker asserted that several countries in the OSCE region have totalitarian regimes which by their political nature could not benefit from independent justice and judicial systems.

The discussion revealed that while not all countries have judicial councils, those that do have opted for different practical solutions. Emphasis was made on the role played by the European Network of Councils for the Judiciary in establishing a dialogue and sharing best practices among such bodies.

In her final remarks, the moderator stated that judicial councils may be a valuable tool in safeguarding judicial independence. However, there is no standard model that would fit for all. Issues deserving attention include the competencies and the composition of such councils. To consider these aspects

with a view to ensuring judicial independence can be seen as the main recommendation of the discussion.

Specific recommendations included:

To the participating States

- Strengthen judicial self-governance;
- Combat undue pressure from executive and legislative authorities on judicial councils;
- Examine composition and competencies of judicial councils carefully in order to strike a balance between democratic legitimacy and judicial independence;
- Introduce and/or operate case assignment systems that exclude opportunities for individual preferences and abuses, for example those based on alphabetical order or date of registration;
- Ban the practice of higher court judges' interference with judges of lower courts through advice and consultation;
- Introduce election of court chairs by the judges of the respective court instead of their appointment by executive authorities.

To the OSCE, its institutions and field operations

- Continue to provide a forum for participating States to exchange practices and lessons learned in the field of judicial administration, and in particular the composition and competencies of judicial councils.

Working Group II: Selection of Judges: Criteria and Procedure

Moderator: Mr. Frank Dalton, Head of Rule of Law and Human Rights Department, OSCE Presence in Albania

Introducer: Ms. Leny de Groot-van Leeuwen, Professor, University of Nijmegen

Rapporteur: Ms. Ana Petrič, Second Secretary, Permanent Mission of the Republic of Slovenia to the OSCE

In Working Group II the participants discussed criteria and procedures for the selection and promotion of judges. In general, they agreed that merit-based, transparent and fair selection procedures are essential for the independence of the judiciary. The moderator noted that appointed judges should be professionals with the highest legal expertise and persons with great communication skills, high moral character and integrity, which is of crucial importance for the independence and impartial performance of their work. The moderator provided a brief overview of the issues on the session's agenda, and invited participants to comment on selection criteria as well as procedures in their countries. Participants were invited to share positive and negative examples, and recommendations.

The introducer pointed out that judges are important public officials and their authority practically reaches every corner of society. Given their vast influence on determining human relations by legal means, she thought it was crucial to outline the process of their selection and appointment. She presented the two most frequent models of recruitment: the career model, in which young lawyers are selected as judges and are trained within the judiciary; and the professional model, where judges are selected from a pool of experienced lawyers. Although the models are quite different and occur in numerous variations, the procedure of judges' selection is usually controlled by the judicial branch. The introducer also described the typical involvement of the executive power in the selection and appointment, but noted that it should be limited to the formal act of appointing judges. According to her, strong independent institutions tasked with controlling judicial appointments are necessary, but do not guarantee the independence of the judiciary. The introducer stressed the importance of diversity in the composition of such bodies.

As a key recommendation, the introducer pointed out that in addition to professional and personality criteria (knowledge and skills including soft skills such as communication), the selection procedure should encompass so-called diversity criteria. This would ensure pluralism of the judiciary and diversification of its composition on the basis of gender, religious, ethnic, political, social and other backgrounds. In this way, the judiciary would enjoy legitimacy and public acceptance; the quality of justice would be increased by the plurality of knowledge, values and norms; and a culture of diversity would be promoted. The introducer explained that strictly meritocratic selection processes make it rather difficult to include diversity criteria.

During the session many participating States presented in detail their own rules and practice of judges' selection procedures, mainly pointing out the role of the independent selection commissions and judicial councils in this process. The participants described the criteria used in the recruitment and promotion procedures and how they are intended to guarantee a merit-based selection. In this regard they mentioned mainly written exams, personal interviews, age, education and training. Some suggested that medical criteria should be taken into account (medical and psychological tests). One speaker highlighted the need for selection decisions to be reasoned.

In addition, participants discussed the connection between the selection procedures of judges and the independence of the judiciary, how to determine the moral integrity of a candidate, and how to avoid corruption in the recruitment process. Furthermore, they debated whether life-time appointment of a judge guarantees a more independent judiciary. Two delegations reported about their plans to introduce life-time appointment for judges to strengthen their independence. They invited other countries to follow their example.

Some speakers pointed to systems of judicial traineeship during which the character and skills of candidates can be assessed before selecting them for the bench. Many participants mentioned the importance of gender balance in

the judiciary and explained the situation in their country. Some argued that although plurality and diversity criteria are important, they should not prevail over merit-based appointment, in which the best-qualified candidate is recruited as a judge.

Representatives of civil society mainly agreed that rules on judges' appointment procedures are in place, but argued that in reality they are not always applied. Some of them pointed to the vagueness of the criteria used in their respective countries. Speakers from non-governmental organizations also complained about closed and discretionary procedures that are subject to corruption. They called for more transparency, and concluded that a lack of transparency ultimately leads to the creation and maintenance of mistrust by the population in the judiciary. Furthermore, speakers from the non-governmental sector pointed out that decisions regarding the selection and appointment of judges were taken under the strong influence of the executive branch.

In this Working Group the following recommendations were presented:

To the participating States

- Adopt and apply in practice rules and laws pertaining to the selection of judges: the process should be fair, transparent and objective in order to guarantee the legitimacy and credibility of the judiciary;
- The selection procedure of judges should not allow undue interference from the executive or legislative branches of power;
- Fight corruption both in the judiciary and in judicial selection;
- Ensure that appointed judges are professionals with the highest legal expertise and persons with strong communication skills, high moral character and integrity;
- For merit-based recruitment and promotion, both objective and subjective criteria should apply. Subjective criteria (moral standards, attitudes, soft skills) should be carefully examined and assessed to prevent discrimination and abuse;
- For greater legitimacy and public acceptance, ensure that the selecting authority pays attention to creating a diverse judiciary; diversity should also be considered in the composition of selecting bodies;
- Gender balance should be achieved or maintained in the judiciary, at all levels;
- In participating States that have not already introduced life-time appointment of judges: consider adopting it, in order to reduce the vulnerability to external pressure due to the uncertainty of tenure;
- Consider increasing the role of judicial schools or colleges in the process of selecting judges. Look into needs to grant the schools more independence. Consider introducing traineeships in courts for better evaluation of candidates for the bench.

To the OSCE, its institutions and field operations

- OSCE/ODIHR should continue to perform its work in promoting the independence of the judiciary, to research and increase exposure to the variety of examples of selection criteria and procedures used across the OSCE region; to provide discussion forums on the topic and to facilitate transfer of know-how.

Working Group III: Accountability of Judges

Moderator: Mr. Evgeni Tanchev, President of Constitutional Court, Bulgaria

Introducer: Ms. Maria Giuliana Civinini, President of Assembly of EULEX judges

Rapporteur: Ms. Silvia Froats, Professional Associate, Political Section, United States Delegation to the OSCE

The moderator highlighted the importance of balancing judicial independence with judges' accountability. The significance of such careful balance for a legitimate and trustworthy judiciary cannot be underestimated. He invited participants to comment on judicial accountability, professionalism and integrity in the perspective of judicial independence. He expected discussions to touch upon disciplinary procedures, ethical codes, and public trust. The moderator also encouraged participants to comment on the degree of judges' immunity in their various legal systems. Furthermore, he suggested discussing criminal and disciplinary responsibility in the context of reversed judicial decisions, the impact of such decisions on professional performance evaluations, and effects on the financial situation of judges.

The introducer emphasized the need to ensure that accountability mechanism do not interfere with independence in judicial decision making. She recalled Council of Europe Recommendation No. 12 about judges' independence and freedom from interference and pressure during adjudication. She stressed that judges should not be held accountable for their opinions expressed in the course of adjudication nor their reasoned interpretation of the law, even if innovative, and that they should be subject only to the law and not to any executive or legislative authority, nor to any internal hierarchy or chain of command – in other words, judges should be free from internal or external pressure. She also opined that accountability of the individual judge should be strictly distinguished from that of the judiciary as a whole.

The introducer called on participants to examine which accountability mechanisms may interfere with judicial independence. She noted that certain mechanisms may be acceptable in developed and well-functioning democracies while the same should be avoided in less well-functioning systems. She suggested discussing various mechanisms, including: full transparency of budget operations; periodic reports to the public; transparent rules on case assignment and panel composition; public accessibility of judicial decisions and disciplinary decisions; codes of conduct and a well-functioning complaint system.

According to the introducer, nobody except for the appeal judge should be entitled to evaluate the quality of a judicial decision. However, if participating States decided upon evaluating the quality of decisions, it should only be done in the framework of systemic evaluation rather than performance evaluation of individual judges. Such evaluation is conducted with a view to improving the work of a particular court or group of judges, and hence all related decisions should be analyzed. The analysis can help develop training programmes, lead to dissemination of best practices, control the case flow, and help reducing backlogs. The introducer cautioned that the number of overturned or modified decisions should not be reflected in a judge's performance appraisal report. Otherwise judges could be tempted to avoid decisions that higher courts might overturn. This in turn risks producing a very conventional and homogenous judiciary, not open for innovation and continuous development and amelioration.

The introducer generally warned against involvement of higher level courts in performance evaluations and disciplinary matters regarding lower level judges of their jurisdiction. She advocated avoiding systems where a small group of judges – often politically appointed – may dictate how the judiciary interprets and applies the law. For the sake of judicial independence, she said that accountability for judicial decisions and interpretation of the law should be excluded completely from criminal and disciplinary proceedings. She also highlighted that disciplinary bodies should be independent themselves, and that their procedures should contain basic judicial safeguards for the benefit of judges facing proceedings, including the right to be assisted by a counsel, and the right to appeal.

Civil liability of judges should be strictly limited. Regarding judges' immunity from criminal charges, the introducer differentiated between immunity for opinions expressed in the course of adjudication and for common criminal offences. Regarding the latter, she pointed to special procedures to strip judges of their immunity and favoured special jurisdiction for such cases. With regard to criminal and disciplinary offences related to judges' "taking an unlawful decision," existing in some participating States, the introducer warned of the potential of abuse and called for restrictions in the text of respective provisions, such as particular intent to violate the law, or favouring one of the parties or himself/herself.

In a lively discussion, participants touched upon various issues related to judges' independence and accountability including a strong hierarchy among judges, special procedures and safeguards to protect judges from undue accusations, public trust in the legal system, the role of media, and accountability for unreasonable delays in trial procedures. Representatives of NGOs warned of the effect that non-democratic regimes can have on the independence of the judiciary. As a general recommendation, speakers suggested that monitoring of judges and courts could contribute to holding them accountable while preserving their independence.

Some speakers addressed the possibility in a few participating States to hold judges accountable for unlawful decisions, in criminal or disciplinary

proceedings. They also addressed judges' financial liability in some participating States for a State party's obligation to pay compensation, e.g. due to a European Court of Human Rights judgment. They discussed dangers of such accountability mechanisms for judicial independence, as well as the necessity to narrowly interpret and carefully apply related legal provisions. Both the moderator and the introducer warned against individual judges' liability for violations identified by international or regional courts.

Numerous participants mentioned the necessity of safeguards to be put in place to protect accused judges, including the right to legal counsel in disciplinary proceedings, and the right to appeal disciplinary decisions. Finally, the discussion turned to the necessity of sufficient remuneration to secure the financial independence of judges, and conversely, the potential negative impact on judicial independence of granting or denying additional benefits to judges, including housing, as practiced by a number of participating States.

It was concluded that while legal systems may vary widely, the practice has to evolve and develop in order to find the right balance between judges' accountability and independence. Any accountability mechanism including measures to fight corruption needs to be examined for its potential risk of encroaching on judges' independent decision making.

Specific recommendations included:

To the participating States

- Ensure that, in the adjudication of cases, judges are subject only to the law and not to executive or legislative authorities, nor to internal hierarchies or chain of command; ensure also that they are free from internal or external pressure;
- Consider abolishing or limiting judges' accountability (criminal, civil and disciplinary) for their opinions expressed in the course of adjudication and their reasoned interpretation of the law, even if innovative;
- Reconsider the practice of or avoid taking into account the number of decisions overturned or modified at the higher instance in individual judges' performance evaluations;
- Reconsider or avoid involvement of higher level courts in performance evaluation and disciplinary matters regarding the lower level judges of their jurisdiction;
- Grant certain minimum judicial safeguards to the judges accused of offences in disciplinary procedure, including the right to be assisted by counsel, and the right to appeal;
- Encourage civil society groups to monitor judicial proceedings and judicial authorities to co-operate with such initiatives by providing unhindered access to public trials and hearings.

To the OSCE, its institutions and field operations

- Continue OSCE monitoring programmes for trials and other aspects of legal systems; ensure continuing exchange of good practices with regard to such programmes and the discussion of their results;
- Continue to study lessons learned and best practices with regard to the selection of judges in the OSCE area and provide discussion forums on the topic.

Working Group IV: Public Access to Justice

Moderator: Prof. Laurence Tribe, Senior Counsellor for Access to Justice, United States Department of Justice

Introducer: Mr. Dmitrj Shabelnikov, Executive Director of Public Interest Law Institute, Russian Federation

Rapporteur: Ms. Sinead Harvey, Attache, Permanent Mission of Ireland to the OSCE

The introducer stated that the principle of access to justice contains two inseparable elements: access and the concept of justice itself. Access is worth nothing if there is no justice in courts. According to the introducer, access must be considered in the full sense: access to basic information; transparency of the judicial system; physical access to courts; absence of any hindrance; including economic ones such as court fees; and, finally, legal assistance for all.

The introducer then focused on legal aid and pointed out the differences between legal aid for civil matters on the one hand, and criminal matters on the other. Criminal legal aid is about basic human rights. In the civil context, legal aid is about enhancing social inclusion and social empowerment. He described the difference between primary legal assistance (practical information, legal information, an initial legal opinion or referral to a specialized body or organization) and secondary legal assistance (legal assistance to an individual in the form of a detailed legal opinion or legal assistance, whether or not in the context of formal proceedings, and assistance with a court action, including legal representation). He stated that in the region of the former Soviet Union, very few countries have implemented serious reforms of legal aid.

Drawing attention to several examples of legal aid systems, some of which suffer from a lack of funding, the introducer detailed the effective legal aid system of one participating State. In this system a network of primary legal aid offices has been established to offer legal aid to all citizens. Everyone should be able to reach one of these offices by public transportation within one hour. This system was judged to be a model for many States where rural dwellers cannot access legal assistance for reasons of great distances, expensive transportation, and lack of infrastructure.

The introducer acknowledged that governments cannot fulfil all legal needs of every person and described some eligibility criteria, either income levels or property or belonging to a vulnerable group such as victims of domestic violence. Alternatively, where primary aid can be offered without any paperwork, the use of technologies can mean that people receive on time simple legal advice either over the phone or online and thus fewer people end up in court, cutting the eventual costs for the state. Another means to deliver legal aid is through using persons who are not necessarily qualified lawyers. Educated persons in the community should be trained and supervised and can serve as legal aid contact points.

He pointed out that a citizen's obligation to financially contribute to the legal aid provided could be beneficial in some cases, as it can help ensure that advice is sought only where there is a reasonable basis, and help save public funds. Moreover the introducer highlighted that in order to design an effective legal aid system one has to know the needs of the populations in the respective area and pointed out existing methodologies for legal needs assessments. Peoples' legal needs should be assessed and monitored on a regular basis because they change regularly.

The introduction was followed by a lively debate moderated by Professor Tribe. The moderator deplored the fact that people often have problems in meeting the monetary requirement for indigence, and they cannot get free legal services if they are only slightly above the income limit. Moreover, half of those eligible in the moderator's own country get turned away because the programmes lack financial and human resources.

The moderator supported the introducer in saying that one does not need to be trained for many years to help people identify what form they may need to file. A multi-layered system can help people to avoid costly proceedings later on. Sometimes very simple legal interventions can help reserve court resources for more challenging cases. The moderator called for civil society advocacy to persuade policy makers to devote more resources to legal aid programmes. He also touched upon the challenge of providing access to remote rural areas, or areas that are difficult to access, like after a natural disaster. For successful first aid provision in legal matters, the moderator pointed out that the existing good will, energy, and talent of volunteers should be coupled with the necessary training and support for them to go where their help is needed.

During the discussion, participating States offered their good practice examples on how they improved public access to justice. Mention was made of new technologies and model courts to foster easier public access. The training of "paralegal" personnel in legal aid was highlighted many times.

One delegation presented the so-called Brasilia Regulations regarding access to justice for vulnerable people, adopted at the Ibero-American Judicial Summit, held in Brasilia in 2008. The rules aim at guaranteeing access to justice for vulnerable people including those vulnerable due to their age, disability, belonging to indigenous communities, poverty, gender, immigration, displacement, and deprivation of liberty. The speaker made

reference to a recommendation aimed at the international community to keep these rules in mind in their justice reform projects.

Other participants criticized various practices hindering public access to justice, including closed trials, limited access to penitentiaries, and prohibitive rules against NGO/civil society involvement. Some speakers noted the low number and availability of legal experts as potentially hindering access to justice. Participants also discussed the lack of general accessibility of legal texts in some countries, and complained about non-transparent appointment procedures for legal counsel provided by the state. In this context, it was alleged that many state-appointed lawyers have close ties to the prosecutor, which may render legal assistance inefficient.

Participants also expressed concern with regard to accessing justice in rural areas. In this context, one participant mentioned as good practice certain incentives given by the Bar to lawyers who wish to practice in remote places. Several participants noted problems related to the payment of lawyers: in numerous countries the salary for lawyers appointed by the State is reportedly so low that they have no interest to work conscientiously on such cases; in other places lawyers' fees are so high that legal assistance is out of reach for many citizens. One participating State described the plan to issue an information booklet on courts and how to reach and address them as means to improve access to justice. Finally, alternative dispute resolution and in particular mediation in civil matters was mentioned as cost-effective means in delivering justice. One NGO representative praised mediation as a swift, flexible, and confidential alternative to judicial proceedings. He highlighted that mediation was an effective way to settle disputes, especially in rural areas where access to lawyers is not so simple. Finally, the speaker pointed out that mediation is non-prejudicial to future court proceedings.

In conclusion, the introducer applauded all countries that do provide for legal aid systems.

Specific recommendations included:

To the participating States

- Improve access to justice, particularly in under-developed, remote, and rural areas by addressing questions related to transport, infrastructure, technologies, as well as courts' public relations;
- Fix the tariffs for state-appointed lawyers based on the complexity of cases;
- Establish an efficient system for the publication of judicial decisions and ensure easy public access to them;
- Look into possible measures to increase the number of lawyers providing quality, free or reduced-charge legal services, for example by providing incentives; consider using non-lawyers for certain services;
- Exploit all means of primary legal aid services in order to assist clients effectively and avoid costly and unnecessary court proceedings;

- Establish mechanisms for the review and assessment of existing legal aid schemes and remedy shortcomings;
- Provide for or facilitate systematic monitoring of cases to assess citizens' evolving needs in the judicial system;
- Consider introducing elements of mediation.

To the OSCE, its institutions and field operations

- Bear in mind the 2008 Brasilia Regulations on Access to Justice for Vulnerable People in justice projects;
- Consider including mediation in its understanding and discussions of the overall concept of access to justice.

ANNEX I: ANNOTATED AGENDA

I. Introduction

Human Dimension Seminars are organized by the OSCE/ODIHR pursuant to the CSCE Summit decisions in Helsinki (1992) and Budapest (1994). The 2010 Human Dimension Seminar is devoted to *Strengthening Judicial Independence and Public Access to Justice* in accordance with PC Decision No. 931 of 26 March 2010 and No. 936 of 22 April 2010.

Judicial independence is central to a democratic system of government based on the separation of powers and the rule of law. Public confidence in government is undermined and the rule of law, upon which the protection of human rights depends, cannot be ensured if a judiciary cannot be relied upon to decide cases competently, independently and impartially. In that sense, judicial independence is important for precisely the reasons that the judiciary is important. Respect for the principle of judicial independence is a key OSCE human dimension commitment. In the Charter for European Security participating States agreed to promote the development of independent judicial systems (Istanbul 1999), a commitment reiterated in Helsinki Ministerial Council Decision no. 7/08 on *Further strengthening the rule of law in the OSCE area* (MC.DEC/7/08) and reflected in recent human dimension meetings such as the 2009 Human Dimension Seminar on Strengthening the Rule of Law in the OSCE Area.

More specifically, participating States have acknowledged the significance of judicial independence for the full expression of the inherent dignity and of the equal and inalienable rights of all human beings (Copenhagen 1990). They have committed themselves to respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service, and in implementing the relevant standards and commitments to ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice.

They agreed to pay particular attention to the Basic Principles on the Independence of the Judiciary[4], which address such issues as the methods of appointing, remunerating and removing judges as well as the procedure for promotions, transfers, evaluation, discipline, training and continuing education that all potentially affect the courts and judges' independence (Moscow 1991). Participating States have thus made far-reaching commitments relating to practical issues, going well beyond written guarantees that alone do not ensure the actual independence of the judiciary as an institution or the independence of individual judges.

[4] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Over the past two decades many participating States have implemented reforms, both legislative and institutional, which were intended to foster separation of powers and judicial independence.
They have faced multifaceted challenges in their efforts as judicial independence requires a comprehensive approach and while certain measures may be obvious, others are open for discussion, requiring that different views and interests be considered. For instance, balancing the independence of the judiciary with the need for democratic legitimacy in a society governed by the rule of law is a challenge for every participating State. The time is now ripe for a fresh look at these efforts, to assess the progress made in establishing truly independent judiciaries, as well as to identify remaining challenges in strengthening them.

Discussions at the 2009 Human Dimension Seminar on Strengthening the Rule of Law in the OSCE Area confirmed that judicial councils and judicial administration more generally, selection and appointment of judges, as well as accountability, discipline and removal of judges are crucial issues affecting judicial independence that deserve more in-depth examination and further discussion. A recommendation made at this Seminar called on the OSCE, its institutions and field operations to continue facilitating exchanges of practices and contacts between the judiciaries of participating States.

As much as judicial independence is an essential element of democracy, unfettered access to a fair and efficient justice system, supported by an independent and impartial judiciary, is one of the fundamental pillars of a democratic government. Access to justice would remain a pious wish if special measures were not taken to translate it into reality. Among these measures, free or subsidized legal aid schemes have been advocated and implemented in a wide range of participating States. When assessing the effectiveness of such measures, it may prove important to examine the extent to which they reach out to remote and rural areas. Participating States have been encouraged by the Ministerial Council of the OSCE to continue and to enhance their efforts to strengthen the rule of law, including by facilitating access to courts and providing for the right to legal assistance (Helsinki 2008). Earlier commitments recalled that any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require (Copenhagen 1990). While developing policies to give effect to such a right, it is also important to pay attention to vulnerable groups. With this in mind, participating States have recognized how crucial it is that all female victims of violence be provided with full, equal and timely access to justice and effective remedies (Ljubljana 2005).

The 2010 Human Dimension Seminar will address some of the key issues related to judicial independence and access to justice, namely: 1) judicial administration with a special focus on judicial councils; 2) selection of judges: criteria and procedure; 3) accountability of judges; and 4) public access to justice. All these elements form part of the foundation for strengthening judicial independence and access to justice in the OSCE area.

II. Aims

In Helsinki in 2008, the Ministerial Council encouraged participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law, *inter alia* in the area of independence of the judiciary.

More specifically, in the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (Moscow 1991), participating States committed themselves, for the promotion of the independence of the judiciary, to

> (20.2) - promote and facilitate dialogue, exchanges and co-operation among national associations and other groups interested in ensuring respect for the independence of the judiciary and the protection of lawyers;
> (20.3) - co-operate among themselves through, inter alia, dialogue, contacts and exchanges in order to identify where problem areas exist concerning the protection of the independence of judges and legal practitioners and to develop ways and means to address and resolve such problems;
> (20.4) - co-operate on an ongoing basis in such areas as the education and training of judges and legal practitioners, as well as the preparation and enactment of legislation intended to strengthen respect for their independence and the impartial operation of the public judicial service.

In line with these goals, the Human Dimension Seminar aims to serve as a platform for exchanging good practices between the participating States on the issues related to judicial independence and access to justice. It will also provide an opportunity to discuss how reform processes could benefit from such exchanges of good practices. The discussions will be structured in four Working Groups as outlined in the Work Plan below.

III. Participation

Representatives of the OSCE participating States, OSCE institutions and field operations, intergovernmental and non-governmental organizations will take part in the Seminar.

Participation of experts on judicial independence, access to justice and the rule of law more generally will be particularly encouraged. In this regard, participating States are requested to publicise the Seminar within their rule of law and justice expert community and in academic circles and to include in their delegations, wherever possible, experts on related issues.

The Mediterranean Partners for Co-operation and the Partners for Co-operation are invited to attend and share their views and ideas on judicial independence and access to justice.

All participants are encouraged to submit in advance written interventions outlining proposals regarding the subject of the Seminar, which will be distributed to the delegates. Participants are also encouraged to make brief oral interventions during the Seminar. While prepared interventions are welcomed during the Plenary session, free-flowing discussion and exchanges are encouraged during the Working Group sessions.

IV. Organization

The Seminar venue is the "Novotel Warszawa Centrum" Hotel in Warsaw, ul. Marszałkowska 94/98.

The Seminar will open on Monday, 17 May 2010, at 10 a.m. It will close on Wednesday, 19 May 2010, at 6 p.m.

All plenary sessions and working group sessions will be open to all participants. The plenary and working group sessions will take place according to the Work Programme below.

Four working group sessions will be held consecutively. They will focus on the following topics:

1. Judicial Administration with a Special Focus on Judicial Councils

2. Selection of Judges: Criteria and Procedure

3. Accountability of Judges

4. Public Access to Justice

The closing plenary session, scheduled for the afternoon of 19 May 2010, will focus on practical suggestions and recommendations for addressing the issues discussed during the working group sessions.

A representative of the ODIHR will chair the plenary sessions.

The Rules of Procedure of the OSCE and the modalities for OSCE meetings on human dimension issues (Permanent Council Decision No. 476) will be followed, *mutatis mutandis*, at the Seminar.
Also, the guidelines for organizing OSCE meetings (Permanent Council Decision No. 762) will be taken into account.

Discussions during the Plenary and Working Group sessions will be interpreted from and into the six working languages of the OSCE.

Registration will be possible during the Seminar days from 8:00 until 16:30.

By prior arrangement with the OSCE/ODIHR, facilities may be made available for participants to hold side events at the Seminar venue. A table for

display/distribution of publications by participating organizations and institutions will also be available.

WORK PROGRAMME

Working hours: 10 a.m. – 1 p.m. and 3 – 6 p.m.

	Monday 17 May 2010	**Tuesday 18 May 2010**	**Wednesday 19 May 2010**
Morning	Opening plenary	Working group II	Working group IV
Afternoon	Working group I	Working group III	Closing plenary

V. WORK PLAN

17 May 2010, Monday

10:00-13:00 Opening Plenary Session

Welcome and introduction from the Seminar Chair
Ambassador Janez Lenarčič, Director of the OSCE/ODIHR

Welcoming Remarks
Representative of the host country, the Republic of Poland
Representative of the Chairperson-in-Office of the OSCE, the Republic of Kazakhstan

Keynote Speaker
Dr Guy Canivet
Member of the Constitutional Council of France and former President of the Court of Cassation, France

15:00-18:00 Working Group I:
Judicial Administration with a Special Focus on Judicial Councils

Moderator: **Dr Anja Seibert-Fohr**
Head of Minerva Research Group on Judicial Independence, Max-Planck Institute for
Comparative Public and International Law

Introducer: **Ms Elizaveta Danielyan**
Judge of the Criminal Chamber of the Court of Cassation of Armenia

Judicial Councils and bodies of judicial self-governance are in many participating States tasked to protect the independence of the judiciary, and play a vital role in judicial administration. The composition of these bodies, their appointment, status and competencies differ from country to country. However, these bodies and other actors responsible for justice administration, such as ministries of justice, face similar challenges: preventing and addressing undue influences on the judiciary while at the same time maintaining professional accountability.

Judicial councils often share the competencies for judicial administration with the executive. What should be the role of judicial councils, the executive and legislature in judicial administration?

What is the role of judicial self-governance bodies, especially where judicial councils are dominated by the executive and not considered part of the judiciary? In many participating States, judicial councils have the mandate to protect the independence of the judiciary. What are the powers and mechanisms necessary for this task? Are judicial councils willing and able to protect judges from improper influences in individual cases?

In some countries judicial councils consist primarily of judges, while in other countries the three branches of power are represented equally, or the executive plays the strongest role. Should the composition of the judicial council or other bodies ensure a balance of the need for independence with the requirements of democratic legitimacy? If so how? When does the composition of judicial councils become an obstacle to realizing the one or the other? How are the members of judicial councils appointed and dismissed?

The role of court presidents is crucial for the administration of their respective courts. In some countries, court presidents are selected by the executive and have an important role in selecting judges, evaluating them for promotion purposes or before permanent appointment, and disciplining them. Sometimes, the assignment of cases to judges is entirely in their hands, *de facto* or even *de jure*. When does their influence jeopardize the independence of judges? Which models of random cases assignment can serve as good practices to prevent undue influence in case assignment?

18 May 2010, Tuesday

10:00-13:00 Working Group II:
Selection of Judges: Criteria and Procedure

Moderator: **Mr Frank Dalton**
Head of Rule of Law and Human Rights Department, OSCE Presence in Albania

Introducer: **Dr Leny de Groot-van Leeuwen**
Professor, University of Nijmegen

A strong and independent judiciary requires merit-based selection and appointment procedures.
Objective criteria should enable the selection of the most qualified candidates for the judicial profession. Subjective criteria tend to give more room for arbitrary decisions, they bear the risk of undue executive influence to block politically unwanted candidates, and have the potential of undermining public trust in judicial independence. Which objective and subjective criteria guarantee a merit-based selection, while on the other hand ensuring the identification of candidates with the appropriate character and values to maintain independence? How can a representative and pluralistic composition of the judiciary be ensured?

Written examinations and personal interviews are widely used to assess candidates' knowledge, skills and character. How are these components weighted to ensure the most effective testing of future judges? Which elements should guarantee the fairness and transparency of evaluation systems for candidates and the public? The participants are invited to share their views in this regard.

Executive authorities in many participating States are involved in the appointment of judges, even when the selection and nomination is left entirely to the judiciary. In most countries, the discretion of the appointing authority is limited. During the Human Dimension Seminar 2009, it was suggested that the intervention of the executive and legislative branches of government should be limited to confirming the nominations made by an independent body. What is the role of the executive and the legislature in selecting and appointing judges? When does the involvement of executive authorities in the actual selection or their discretion in appointments become an obstacle to the actual or perceived independence of the judiciary?

15:00-18:00 Working Group III:
Accountability of Judges

Moderator: **Dr Evgeni Tanchev**
President of the Constitutional Court of Bulgaria/Venice Commission

Introducer: **Ms Maria Giuliana Civinini**
President of the Assembly of EULEX[5] judges

Accountability of judges is often seen as a threat to their independence; on the other hand, the need for judicial independence arguably reduces the scope for holding judges accountable. To maintain professionalism and integrity, judges should be held accountable in disciplinary proceedings. Only a professional and ethical judiciary can win public trust, be independent and be strong enough to withstand attempts to exert undue influence. Which disciplinary and removal procedures and sanctions pose a threat to judicial independence? How can the fight against unprofessional conduct and corruption make the judiciary stronger?

While judges enjoy a certain degree of immunity from criminal prosecution in most participating States, there are specific offences related to adjudication of cases. Criminal and disciplinary proceedings may be initiated in several participating States for alleged offences characterized as "wrong application of the law" or by similar terms; such proceedings may in some but not all instances be related to the reversal of relevant judgments on appeal. When does criminal prosecution and the threat of regress compromise judicial independence inadequately? Which practices effectively balance accountability with the need for independence in adjudication?

[5] European Union Rule of Law Mission in Kosovo.

In several participating States, the number of reversed judgments plays a role for evaluating judges' professional performance, and consequently for their career and financial status, sometimes even their tenure. When does judges' accountability for "correct application of the law" unduly influence their adjudication? How can the need for accountability and independence be balanced in this regard? This Working Group is invited to address contemporary challenges regarding accountability of judges *versus* their independence.

19 May 2010, Wednesday

10:00-13:00 Working Group IV:
Public Access to Justice

Moderator: **Prof. Laurence H. Tribe**
Senior Counsellor for Access to Justice, United States Department of Justice

Introducer: **Mr Dmitry Shabelnikov**
Country Director of Public Interest Law Institute, Russia

Access to justice is conditional on ensuring access to courts and availability of legal assistance to those who need it to exercise and protect their rights. Which good practices may be shared by the participating States in advancing access to justice? What programmes have been carried out to improve access to justice in general?
For residents of rural and remote areas in the OSCE region, access to justice is limited by great distances, expensive transportation, and lack of infrastructure. Can new technologies foster public access to justice in rural areas? Or conversely, can they rather deepen the existing gap between those who are familiar with the new technologies and those who are not? Which best practices in ensuring access to courts may be shared by the participants?

Defendants in criminal cases in some participating States often have no access to legal counsel due to shortages of lawyers and the lack of legal aid schemes. Which measures are taken by the participating States to ensure access to legal counsel in criminal cases as one of key guarantees of the right to a fair trial? In non-criminal cases, which models of legal aid have been most effective to ensure access to justice, especially for residents of rural and remote areas? How should the needs for legal aid be assessed? Which partnerships may be forged between the legal profession and governments to address the existing gaps?

Justice must be equitable and accessible for all. Unfortunately, women victims of gender-based violence, or other forms of gender-based discrimination, are too often left without adequate protection and assistance in seeking justice. While many women may fear stigma and rejection by their communities for speaking out about the violence they have faced, judicial institutions also often lack sensitivity about the experiences of women during conflict or treat violations of women's rights as a low priority in comparison to other crimes. What can the judicial authorities and more broadly the participating States do to ensure that all female victims of violence or

gender-based discrimination are provided with full, equal and timely access to justice and effective remedies?

Court judgments are worth little if their timely enforcement is not ensured. Which special arrangements and mechanisms may be cited as good practices in this regard?

15:00-18:00 Closing Plenary Session

Rapporteurs' summaries from the Working Groups
Statements from Delegations

Closing Remarks
Amb. Janez Lenarčič
Director of the OSCE/ODIHR
Closing of the Seminar

ANNEX II: OPENING AND CLOSING REMARKS

Opening remarks

Ambassador Janez Lenarčič
Director of the Office for Democratic Institutions and Human Rights

Excellencies,
Ladies and Gentlemen,

Good morning and a very warm welcome to everyone at the 2010 Human Dimension Seminar on independence of judicial systems and public access to justice.

I would first like to express my appreciation to the Kazakh OSCE Chairmanship, and in particular Ambassador Madina Jarbussinova, for having proposed this topic which is familiar to those of you who participated in last year's Seminar here in Warsaw - on Strengthening the Rule of Law.

In fact, this year's Seminar is a seamless continuation of the discussions last year where our first Working Group was devoted to independence of the judiciary. This, frankly, also made our preparatory work easier: we did not, for instance, need to put together a new compilation of relevant OSCE commitments – you will find everything we prepared last year equally relevant to our discussions today.

A warm welcome also to the representative of ODIHR's host country, Secretary of State Jan Borkowski, as well as to our keynote speaker, a distinguished member of the Constitutional Council of the French Republic, Guy Canivet.

Before I ask Ambassador Jarbussinova to take the floor, let me just re-emphasize what I said on the same occasion last year: an independent judiciary is undoubtedly a cornerstone of the rule of law. In order to apply laws fairly and with integrity, judges must be independent and impartial. This message is hardly new, nor is it original. It may be regularly heard at our meetings, including our annual Human Dimension Implementation Meeting. And yet independence of the judiciary continues to remain an issue. Why does it pose such a challenge to many OSCE States?

At a first glance, ensuring independence of the judiciary should not be an overly difficult task for a government. As any public service, the judicial system should be provided with adequate resources that would enable it to function properly. It should be staffed with professionals who have the requisite knowledge and skills. But then comes an important difference with other public services: instead of managing this system, the government must relinquish control and refrain from interfering. In plain words, it must leave the judiciary alone.

That, in itself, would not pose any difficulty if only the judges simply minded their own business and did not interfere with the government's areas of responsibility. But of course part of the judges' job is to do precisely that. The judiciary resolves conflicts between the state and individuals, and it must defend individuals against abuses by the government. And the government must comply with and enforce judicial decisions. And so in the end it is not enough for the government to relinquish control of the judicial system, but the latter must also be given power. And this is the crux of the matter: sharing power does not come naturally to governments. It is just something governments are not very good at, worldwide.

A popular wisdom suggests that 'practice makes perfect'. This is true not only in crafts, education and sports, but also in governance. Those countries which have practiced separation of powers and independence of the judiciary for a long time are naturally better at it today. And, conversely, countries with the history of unity of state power and a centralised state find it difficult to allow the rule of law – not the rule by law – to take flourish. But they must continue to practice – or risk turning into oppressive regimes despised by their people.

Ladies and Gentlemen,

I would not do justice to our Office, the ODIHR, if I failed to mention at least some of our Rule of Law Programme activities. As in the past, ODIHR continues to supply policy-makers in the participating States with the information and tools they need to implement their OSCE commitments. We also work directly with the legal communities and other civil society actors to help them strengthen the rule of law in our region. I will mention here only three of the many activities we undertake.

- During the past year, and in partnership with the Max Planck Institute for Comparative Public Law and International Law, we carried out an in-depth assessment of the most pressing issues and gaps with judicial independence in the OSCE area. The results of this assessment will be discussed at an expert meeting in Kyiv next month, which will also help us prioritize our future activities. In this context, I invite you to tomorrow's side event on the topic hosted by the OSCE Spillover Mission to Skopje and ODIHR.

- To continue our good tradition, we will again convene an Expert Forum on Criminal Justice for Central Asia this year. This annual event, now in its third year, will be held in Dushanbe in June and will bring together some 100 participants from all Central Asian states to exchange experiences with experts from other participating States, and discuss the most topical issues for criminal justice reform in the region.

- And finally, in May, we started to implement a large project which aims to strengthen the capacity of South-East European justice systems to deal with war crimes cases. We count on the continuing co-operation from the OSCE field operations in this region, and we are especially fortunate to enjoy a good working relationship with the International

Criminal Tribunal for the former Yugoslavia – whose President, Judge Robinson, was the keynote speaker at last year's Seminar.

Ladies and Gentlemen,

This Seminar will assist the participating States and their civil societies to achieve better results with practicing judicial independence and access to justice. We have a full programme ahead of us and it is now my particular pleasure to hand the floor to Ambassador Madina Jarbussinova, followed by State Secretary Jan Borkowski.

Thank you, State Secretary.
I would now like to introduce our distinguished keynote speaker, and I must say that not everyday we can greet a famous member of the equally famous *Conseil Constitutionnel* of the Republic of France. I shall thank you, Judge Canivet, very much for accepting our invitation to deliver the keynote address for this year's Human Dimension Seminar. Let me mention some of the offices you have held and achievements you are responsible for. In 1999, you were appointed as President of the *Cour de cassation*, the highest Court in France. You also are the founding president of the Forum of European Judges in Matters of the Environment and the Network of European Judges for Mediation, and the founder and President of the Association of Heads of Supreme Courts of the European Union. In 2006, the then Minister of Justice entrusted you with the task of examining methods of training of judges to be appointed to posts as heads of courts, a topic directly relevant to this week's seminar.

I could go on and talk about you, but rather give you the floor so that you can talk to us.

Thank you, Judge Canivet, for an inspiring opening keynote that has set the scene for an interesting three days of exchanges. Many issues which appear on the agenda are rather technical. But these technicalities and details create the machinery which sets in motion those very important values we came here to discuss.

Our first working group will be devoted to judicial administration, with a special focus on judicial councils. The participants will be invited to submit their views on whether judicial councils in many participating States have in fact strengthened judicial independence. And if not, what must be done to improve their role?

In our second working group, we will discuss the selection of judges. This is rightfully seen as a matter of paramount importance: it is no accident that fierce political battles are fought over judicial appointments in many participating States. But these battles also provide evidence that in these States judicial power is real. I would like to encourage the participants of this Working Group to find ways to ensure that individuals who become judges not only have the legal knowledge, but also the requisite courage and strong values.

Our third working group will tackle a thorny issue that we simply cannot ignore, the accountability of judges. I was reminded of an old joke this morning. At the beginning of the hearing the judge announced to the plaintiff and the defendant that the amount of the bribes they paid to the court was equal. “In this situation, said the judge, I have no choice but to resolve your dispute on the basis of the law.” We may safely conclude from this joke that unbiased decisions also come at a price.

On a serious note, independence should not be used to shield from responsibility those who don’t belong on the bench. Judges who engage in corruption and other unbecoming conduct must be held accountable. How should this be achieved without undermining the basis of judicial independence? More generally, this working group should address the question “how can judges be held accountable to constitution and laws, without compromising their independence”. We hope to hear some answers from you tomorrow afternoon.

Finally, our fourth working group will deal with public access to justice and should ensure that we don’t lose sight of the forest behind the trees. At the end of the day, judges must uphold justice. In this working group, the participants will have a chance to exchange views and good practices on improving access to justice in their countries.

In closing, allow me to give a special welcome to the moderators and introducers who accepted our invitation – thank you for taking up these important roles. As always, we look forward to the lively and enriching debate, to the productive exchange of ideas, good practices, and critical reflections.

Thank you.

Closing remarks

Ambassador Janez Lenarčič
Director of the Office for Democratic Institutions and Human Rights

Excellencies,

Ladies and Gentlemen,

The rapporteurs have so ably summarized the discussions in this room over the last three days and I am pleased with the outcome. Before I discharge my ceremonial functions as the Seminar Chair and close the meeting, allow me a few remarks.

The discussions we witnessed in the last few days demonstrate the complexities of the issues tackled at this seminar. Our moderators and introducers put forward questions of fundamental importance, such as:

- What can we realistically expect from judicial councils?
- What kind of judges do we want in our countries and how can we recruit them?
- Can we overcome corruption without compromising judicial independence?
- What steps must be taken by a government to ensure access to justice?

We heard many good answers and sound recommendations. We gathered them, make them available in the meeting report, analyze them and continue providing assistance to the participating States in the areas we have discussed throughout the last three days.

We know that one size doesn't fit all when it comes to legal reform: solutions that work for one country will not necessarily enjoy the same success in another. However, exchanges of this kind certainly increase the likelihood of successful reform efforts.

Many of you mentioned separation of powers and discussed how the judiciary provides important checks and balances for the other branches of power. We also had our own separation of powers in this room. While the practitioners and the scholars debated particular solutions to the challenges facing our justice systems, NGOs provided us all with a reality check and told their stories as users of these justice systems. I am grateful for the constructive input we received from NGO participants.

We were reminded over the last days that the rationale behind this seminar is to facilitate exchanges on particular human dimension issues between experts of the participating States. The more such experts are brought together by the participating States – the more successful human dimension seminars will be. Conversely, if participating States are not sending experts, the utility of such meetings will be limited.

As Seminar Chair I have noted with sadness that many participating States did not attend this HDS. Only 36 out of 56 States demonstrated their interest through participation. This is not how it should be and it calls into question the commitment by participating States to making events such as this one a success.

On a more encouraging note, let me thank each and every one participant for your contribution. Your intellectual curiosity and commitment make these events worthwhile. We had engaging and lively debates in all four working groups because the experts around this table were interested in the experience of others.

I declare this Human Dimension Seminar closed.

Have a safe travel back.

ANNEX III: INFORMATION ABOUT THE SPEAKERS

Dr. Guy Canivet is – since March 2007 – member of the Constitutional Council of the Republic of France. He commenced his judicial career in 1967 as trainee judge and was appointed in 1996 as President of the Paris Court of Appeal. In 1999, Dr. Canivet was appointed as President of the Court of Cassation. He served, amongst others, as Chairman of the French Section of the Committee for Judicial Cooperation France-Ireland-United Kingdom, President of the Louis Chatin Association for the Defence of Children's Rights, and Chairman of the Board of Directors of the National School for the Prison Service. Dr. Canivet is the founding president of the Forum of European Judges in Matters of the Environment and the Network of European Judges for Mediation. Moreover, he is the founder and President of the Association of Heads of Supreme Courts of the European Union. In 2006, he was entrusted by the Minister of Justice with the task of examining methods of training of judges to be appointed to posts as heads of courts. Dr. Canivet received several decorations and honours, and published around 50 articles or reports about comparative law, constitutional law and the application of European law at the national level.

Mrs. Yelizaveta Danielyan graduated from the Yerevan State University, and practiced law with the Armenian Collegium of Advocates before she was appointed a district court judge in Yerevan in 1991. In 1999 she became the chairwoman of a first instance court in Yerevan and in 2009 she was appointed to the Criminal Chamber of the Court of Cassation - the highest court in Armenia. In addition to her judicial duties, Judge Danielyan teaches procedural law at the Russian-Armenian Slavic University in Yerevan.

Dr. Anja Seibert-Fohr heads the Minerva Research Group at the Max-Planck Institute for Comparative Public Law and International Law in Heidelberg (Germany). She holds law degrees from Germany and the United States and received her Doctor of Juridical Science from the George Washington University in Washington D.C. As a visiting scholar of Georgetown University Law Center in 2009 Dr. Seibert-Fohr conducted research on comparative constitutional law. She has published widely in international law, i.e. as a co-editor of the Max Planck Commentaries on World Trade Law and author of "Prosecuting Serious Human Rights Violations" (OUP). She serves as a legal counsel to the German delegation to the OSCE with respect to its human dimension pillar, is a board member of the Journal "Security and Peace" and of the International Criminal Law Roundtable in German-speaking countries. Since 2003 she has been teaching International Criminal Law in the Joint Master of Comparative Law Programme of Mannheim and Adelaide University. Her current research projects are on judicial independence and comparative constitutionalism. In cooperation with the Organization for Security and Co-operation in Europe (OSCE) she conducts together with her research group a project on strengthening judicial independence in Post-Soviet states. In 2008 she received a grant for outstanding researchers from the Max Planck Society for the Advancement of Sciences.

Prof. Leny de Groot-van Leeuwen holds a MA from Leiden University and a PhD from the University of Utrecht (1991). She is Professor at the Law Faculty of the Radboud University in Nijmegen, the Netherlands. She teaches sociology of law at the university and ethics of law at the Training and Study Centre for the Judiciary. She has published widely in English and Dutch on the sociology of law, the ethics of law, the legal profession and the judiciary. Her latest publication - Separation of Powers in Theory and Practice, An International Perspective - was issued this year. Prof. de Groot-van Leeuwen chairs the Ethics sub-group of the Working Group for Comparative Study of Legal Professions of the International Sociological Association/Research Committee on Sociology of Law. She was overseas corespondent of *Amicus Curiae, Journal of the Society for Advanced Legal Studies and The Institute of Advanced Legal Studies,* University of London (1997-2004), editor of the Dutch and Belgian Law and Society journal *Recht der Werkelijkheid* and is now member of the editing board of the same journal, chief editor of the Dutch Journal *Klachtrecht* and member of the Advisory Board of *Legal Ethics*. Prof de Groot-van Leeuwen participated in several international events.

Dr. Frank Dalton has been Head of the Rule of Law and Human Rights Department for the OSCE Presence in Albania since 2008. Prior to this, he served for five years in other positions at the Presence. Before joining the OSCE, he was Programme Director for Southeast Europe with the Civic Education Project (CEP), an NGO supporting reform in university teaching of law, social sciences and economics. At the same time, he served as a visiting lecturer with CEP, teaching at the Aleksandër Xhuvani University in Elbasan and the University of Tirana. Prior to working in the region, he taught at Vytautas Magnus University in Lithuania. Courses included Sociology of Law, Public International Law, Human Rights and Criminal Law. During his years in Albania, he has served as a founder and/or board member of several non-profit organizations, including the Civil Society Development Centres supported by the OSCE, the Albanian School of Politics, Children are the Future, and CEP-Albania. He holds a bachelor's degree in government from Harvard University.

Ms. Maria Giuliana Civinini is member of the Italian judiciary since 1983. She served as a judge in the field of civil, criminal and labour law before she was appointed to serve at the Italian Supreme Court in 1999. In 2002 she was elected as member of the High Council for the Judiciary (*Consiglio Superiore della Magistratura - CSM*), where she held office until July 2006. Judge Civinini used to be a member of the Scientific Committee of the High Council for the Judiciary and as a member of CSM she supervised the activity of the Judicial Training Committee, which she also chaired.
Between 2002 and 2005, she was representative of the CSM in the European Judicial Training Network (2002-2005). Since 2008, judge Civinini is seconded by the Italian government to the EULEX Mission in Kosovo with the functions of President of the Assembly of EULEX Judges and Supreme Court Judge.
As civil procedural law scholar, she authored several publications and articles about summary proceedings, fair trial rights, juvenile proceedings, judicial

self-governance and court management. Since her graduation from law school, she contributes to national and international juridical journals.

Dr. Evgeni Tanchev is the current President of the Constitutional Court of the Republic of Bulgaria. He graduated from School of Law, Kliment Ohridski University of Sofia in1975. Since 1977 he was working in different capacities at the University of Sofia, where – in 2000 – he became the Chairman of the Department of Constitutional and Comparative Law (1990). Dr. Tanchev was a visiting professor at the University of Virginia and the Catholic University in Washington DC. He published over a hundred publications in Bulgarian, European and American journals; seven books including "Introduction to Constitutional Law" (2003) and *Ceci n'est pas une constitution* – Constitutionalization without a Constitution (2009). Dr. Tanchev is a member of several research associations in and outside Bulgaria, the International Commission of Jurists, and the editorial board of the European Public Law Journal. He is a legal expert for the OSCE, IFES and ABA/CEELI and advised the constitution drafting teams in Tajikistan, Latvia, Albania and other countries. In 2002, he was appointed as Chairman of the Council of Legal Advisors to the President of the Republic of Bulgaria. In 2003 he became justice at the Constitutional Court.

Mr. Dmitry Shabelnikov oversees the Public Interest Law Institute (PILI) Moscow office and is responsible for its Russia program. Over the last five years, he has been leading efforts to promote legal aid reforms in Russia and develop clinical legal education there, including the creation of the Clinical Legal Education Foundation (CLEF) of which Shabelnikov is a board member. Following the expansion of the PILI Moscow office in 2007, he manages a staff of three and continues to steer major PILI programs in Russia: Legal Aid Reform, Legal Education Reform, and Promoting Pro Bono. Mr. Shabelnikov graduated from the Moscow State University Faculty of Philology in 1993 and the Moscow Institute for Economics, Management and Law in 2003. Before joining the PILI team in 2003, he worked in various capacities for the Moscow offices of the American Bar Association's Central European and Eurasian Law Initiative (ABA CEELI) and the Ford Foundation. Shabelnikov has authored, edited and translated several books on public interest law, legal aid and other related subjects. He is fluent in Russian and English.

Prof. Laurence H. Tribe is a Harvard Law School Professor and was appointed in March 2010 by Attorney General Eric Holder Jr. to lead efforts to address the urgent issue of the crisis in access to justice in both the criminal and civil justice systems. As Senior Counselor for Access to Justice in the U.S. Department of Justice, Professor Tribe now directs a new initiative that seeks to improve delivery of legal services to the poor and middle class—and thus holds the potential to make a positive impact on the lives of thousands of Americans.

Until his recent appointment, Tribe served as the Carl M. Loeb University Professor at Harvard, where he taught constitutional law for more than 40 years. Tribe has argued 35 cases before the Supreme Court of the United States—including the historic *Bush v. Gore* case in 2000, on behalf of presidential candidate Albert Gore Jr. Tribe helped found the American

Constitution Society for Law and Policy in 2001 to promote the U.S. Constitution and the fundamental values of individual rights and liberties, equality, access to justice, democracy, and the rule of law. He has testified frequently before Congress on a broad range of constitutional issues and, while teaching at Harvard, helped write constitutions for South Africa, the Czech Republic, and the Marshall Islands.

Tribe has written 115 books and articles; his book *American Constitutional Law* has been cited more often than any other legal text since 1950. Tribe's most recent book is *The Invisible Constitution* (Oxford University Press, 2008); other works include *On Reading the Constitution* (with Michael Dorf) and *Abortion: The Clash of Absolutes*.