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Speech of Ambassador Janez Lenarčič

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at the

International Conference “Democracy in the Post-Soviet Territory 20 Years Later” Panel on “Depoliticizing the Courts and the Law Enforcement Agencies”



Prague, 12 September 2012

Excellencies,
Ladies and Gentlemen,

It is a pleasure and a privilege to address this distinguished gathering today. I very much appreciate the kind invitation by the President of the Comenius Society, Dr. Karel Muzikář, and this opportunity to speak on today's Panel on "Depoliticizing the Courts and the Law Enforcement Agencies."

More than 20 years into the process of transition in post-Soviet countries, it is now a good time to take stock of the progress achieved, and the remaining challenges. As all post-Soviet countries are members of the OSCE, it is also useful to recall some basic principles and standards that these countries have committed to, both as signatories to OSCE documents and as state parties to conventions and other international legal instruments developed by organizations such as the UN and the Council of Europe.

My speech therefore consists of four parts:

- **Politics and justice,**
- **Essence of democracy: rule of law, independent courts,**
- **OSCE commitments,** and
- **Kyiv Recommendations.**

Transition to democracy involves developing a system of governance that respects the separation of powers as one of its fundamental principles. This has been perhaps the greatest challenge for countries concerned: to make the journey from a system where state power was concentrated in a narrow circle, or even in the hands of one person, with executive, legislative and judicial institutions having little role beyond serving as transmission belts for that power. And to replace that with a system where state power is divided among separate and mutually independent institutions, including an independent judiciary.

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While talking about an independent judiciary, it is necessary to note that politics and justice cannot be fully and absolutely separated. Courts do not operate in a political vacuum. Especially courts of a higher instance (Supreme Courts, Cassation Courts, and Constitutional Courts) can have enormous impact, through their landmark decisions, on people's daily lives and thus contribute to shaping politics.

Worldwide, some of the most fundamental political dilemmas are brought before courts for judges to decide on. Political controversies, public policy questions and even fundamental moral predicaments, are often resolved by courts. Here are just some examples of the issues adjudicated by the courts: limits on political campaign financing, electoral dispute resolution, religious liberties, equality

rights, privacy issues, immigration, environmental protection, same-sex marriage and abortion, and – this very day – the measures to save the EU common currency. These are all matters of utmost political significance.

Accordingly, it is safe to say that, nowadays, judges play a significant role in policy making. Policy making is no longer the exclusive prerogative of legislatures and executives. It is therefore not by accident that in most constitutional systems, judges of the highest level are politically appointed. **Still, undue influence from executive or legislative branches over the courts is not acceptable.** The courts have to be able to exercise their powers independently. Such independence is essential for the rule of law.

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The UN Secretary General defined the rule of law as “a principle of governance in which **all persons, institutions and entities, public and private**, including the **State itself**, are **accountable to laws** that are publicly promulgated, **equally enforced** and **independently adjudicated**, and which are **consistent with international human rights** norms and standards.”* This means in particular that judges need to be able to independently, impartially and fairly adjudicate disputes between agents of state power,

* Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616).

including the government or administration, and citizens, as well as disputes among the agents of state power and other political forces.

Independent judges are key to providing effective protection of human rights and redress for human rights violations, and they are the ultimate arbiter in political disputes. To the extent that a court is able to make decisions free of influence from other political actors, and to pursue its work without having to worry about the consequences from other institutions, it is independent. The greater the level of input that these other actors have on the court's personnel, case selection, decision rules, jurisdiction, and enforcement of laws, the less independent it is. In other words, we are equating judicial independence with the judges' ability to act sincerely according to their interpretation of the law, and their own beliefs and convictions.

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In the body of OSCE human dimension commitments, the requirements of democracy and rule of law are inherently linked. In addition to commitments on democracy and rule of law in general, there are a number of commitments focusing on independence of the judiciary.

In **Copenhagen 1990 (para. 5.12)**, the participating States of the OSCE committed to ensure the independence of judges and the impartial operation of the public judicial service.

In **Moscow 1991 (para. 19)** the participating States committed more concretely 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 including, *inter alia*, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights” and to “ensure that the independence of the judiciary is guaranteed and enshrined in the constitution of the law of the country and is respected in practice, paying particular attention to the United Nations Basic Principles on the Independence of the Judiciary.”

The 1991 Moscow Document then highlights a number of provisions from the aforementioned Basic Principles, including the prohibition of improper influence on judges, and ensuring that judges are properly qualified, trained and selected on a non-discriminatory basis.

Obviously, in more than two decades since the adoption of these documents, significant progress has been made. However, and equally obviously, much more still needs to be done in order for these commitments to become a reality in a number of countries in the post-Soviet space.

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As recalled in **Brussels 2006**, ODIHR is mandated to **assist participating States** in implementing the human dimension

commitments. ODIHR assists the participating States by facilitating consultations and the exchange of good practices.

The "**Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia**" were adopted in June 2010 at a regional expert meeting hosted by ODIHR together with the Max Planck Institute on Comparative Public Law and International Law. The purpose of the recommendations is to further strengthen judicial independence in Eastern Europe, South Caucasus and Central Asia and beyond. In this regard, the recommendations can be used as an **input to ongoing policy discussions on judicial reform** and technical assistance in participating States. Kyiv Recommendations consist of three different parts:

- ***Part I Judicial Administration,***
- ***Part II Judicial Selection and Training,*** and
- ***Part III Accountability of Judges and Judicial Independence in Adjudication.***

Part I is about balancing judges' independence and the political or democratic legitimacy of the judiciary and it focuses on judicial councils and the role of court chairs. The recommendations aim to **avoid undue executive *control* of the judiciary, while *involving* government and parliament officials in the judicial administration to allow for democratic legitimization of the judiciary.**

To avoid undue concentration of powers, the recommendations propose ways to divide competencies among various bodies with different composition commensurate with the degree of **desired or acceptable involvement of government** and other non-judicial members.

With regard to the court chairs, their role in managing the courts should not extend to controlling the content of their decisions. The recommendations therefore attempt to reduce court chairs' *de jure* and *de facto* competencies. This should enable individual judges to take decisions independently from expressed or implied expectations of court chairs that may amount to undue influence. Where court chairs are politically appointed, avoiding their influence on judges' decisions in individual cases will reduce the risk of undue politicization of the courts.

Part II deals with judges' fair and transparent selection according to merit, and their training. Both elements are crucial for recruiting and maintaining an independent and professional judicial corps. Judges are human beings with their own personal background and political and moral convictions, and it is natural that these do influence their decisions. Therefore it is necessary to pay attention to their diversity, to a **pluralistic and gender-balanced composition of the judiciary**, and also of the authorities that are selecting and training future judges.

Moreover, Part II includes recommendations on training, selection criteria and appointment procedures. The recommendations call on governments to ensure **diversity of access** to the judicial profession and to attract individuals from other legal professions as well as minorities.

Some of the recommendations address the **quality and independence of legal education and judges' training**. To facilitate **selection according to merit**, they also suggest clear selection criteria and transparent procedures. Finally the document recommends **limiting the discretion of Heads of States** in selection and appointment of judges.

Part III addresses questions related to discipline, professional evaluation, transparency, and independence within the judicial hierarchy. The recommendations suggest ways to find a proper **balance between judicial independence, which is particularly crucial in the process of adjudication, and the need to hold judges accountable** under law.

In particular, the recommendations in this part aim to **protect the core function of the judge – adjudication – from political and other undue influence and pressures**. Such influence and pressure is often applied through procedures for disciplining judges, evaluating their performance, and promoting them.

The recommendations also deal with transparency as a means to make judges accountable to society by other means than subjecting them to the control of the government.

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Ladies and Gentlemen,

Independence is not a right or entitlement of individual judges. It is not an end in itself. It is a means to secure the functioning of the rule of law in a democracy, and uphold human rights. That is why the separation of powers is often referred to as 'checks and balances' of competencies of the State powers, rather than a hermetic division between them.

Courts are political by nature and, as human beings, judges are 'political beings' too, but as any other agents of State power, judges need democratic legitimization. Therefore, the task of judicial administration is rarely entrusted to judges alone, and judges' independence needs careful balancing with their accountability, under the law and to the society they serve.

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Let me conclude by congratulating the Comenius Society and its President for organizing this Conference on such a timely and important topic. I look forward to the discussion.

Thank you for your attention.