TAIEX Peer Review on Reforms in Judiciary, Penitentiary and Prevention of Torture and Ill-Treatment in Armenia

Yerevan, 6-10th March 2017

DRAFT REPORT

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AREA:

- Rules and practices on independence of the judiciary; recruitment and ethics
- Functioning and effectiveness of the Council of Justice, Prosecution Offices and Academy of Justice
- Separation of powers

I. EXECUTIVE SUMMARY

The aim of the JHA IND/EXP 64029 TAIEX Peer Review carried out by EU experts in Yerevan (Armenia) from 6 to 10th March 2017 is to analyse the current situation in the area of judiciary, penitentiary and prevention of torture and ill-treatment in relation to the Programme on Legal and Judicial Reforms 2012-2017.

The legal norms come into force during the reform process seem to be suitable for ensuring judicial independence. The recruitment of judges is quality-based and political influence is reduced widely.

The recruitment of prosecutors is similar to that of judges, but could be done in an even more objective way doing written tests (as applicants for posts of a judge have to do). The organisation of prosecution service and the line of supervision is in its basic principles quite similar to the German prosecutorial system.

For judges and prosecutors as well Codes of Ethics are established and even "in use", not just written on paper. Securing the legality of disciplinary proceeding the power to initiate the proceeding is clearly separated from the power to decide about the allegation and to impose sanctions.

The Academy of Justice is well established and obviously well-functioning. Its academic personnel as well as the staff are dedicated to their tasks. No undue political influence could be noticed and remarkably even representatives of NGOs agreed to that finding.

In the field of judiciary and prosecution service I didn't find hints to violations of the principle of separation of powers having in mind that this principle is realized in various countries differently.

For my recommendations/proposals for adjusting some elements of the ongoing reforms see IV.

II. DESCRIPTION OF THE CONTEXT

According to the scheduled agenda the following activities have been performed concerning independence, recruiting and ethics of judges and prosecutors and functioning and effectiveness of judiciary:

The scheduled agenda has been followed as established and updated at the beginning of the peer mission with the exception of the debriefing with the Minister of Justice (10 March, 12:40 – 13:30):

Introductory meeting with EU Delegation

Meeting with the Working Group coordinating the Justice Programme

Visit to the Court of first Instance of Malatia-Sebastia Communities of Yerevan

Meeting with the members of the Council of Justice

Meeting with representatives of NGOs and the Council of Europe

Visit to the Academy of Justice

Meeting with a senior prosecutor of the General Prosecutor's Office

Visit to the Prosecutor's Office of Ararat region at Artashat, Ararat Marz

III. ANALYSIS OF THE TOPICS AS GIVEN ABOVE

1. Procedure for the qualification test for inclusion in the list of candidates for judges

The procedure itself and the actual realization of tests is based on two written test of quite high level of requirements, a psychological test done by academic professionals and a structured interview done by the members of the Council of Justice . The written tests cover civil and criminal law and are evaluated by members of the Council of Justice. The results are graded, the grades are summed up and establish in that way a rank list. At the end of the procedure the top candidate is entitled to do the first choice among the vacancies, the second the second choice and so on. This excludes any unlawful influence on the decision, where a newly appointed judge takes up his/her first post. This is a remarkable step to full transparency at this sensitive final phase of appointing judges.

From my point of view the same could be done within the selection and appointment procedure of prosecutors without interfering the hierarchical structure of the prosecution service in its basics.

In the course of the selection-process of future prosecutors there is no written test, just an oral interview. From my point of view this is to be seen as a deficit concerning objectivity and comparability of the individual knowledge and performance of the applicants for a prosecutor's post.

2. Objective criteria and procedures for the performance evaluation and promotion of judges

By amendments and changes to the Judicial Code a well-balanced system of objective criteria for the evaluation of judges as the precondition for quality-based promotions has been established.

The basic principles of assessment and evaluation are observed. Much impact is given to quantitative elements. These are the elements of assessment most simple to be found out from the judicial statistics. To see and decide on the quality of judicial work out of statistics is very questionable, if too much weight is given to figures and numbers. The reasons why a second instance judgement may differ from first instance decision are too manifold to be measured by statistics alone. It is very encouraging that the Minister of Justice mentioned in this context, that judges of higher instances are not necessarily the better and more qualified ones compared to first-instance-judges. This idea should be kept in mind by all who do assessments and evaluations to evade the seductive power of prima facie "undiscussable" figures and numbers. Even when some software and hardware support for the performance evaluation of judges is still outstanding at the moment that should not mislead to the fallacy that after establishing the IT-tools evaluation will go on automatically. The evaluation of the soft skill of judges is of utmost importance. This element of the evaluation has to be "hand-made" at any case and cannot be taken from the statistics how differentiated they may be.

3. Self-governance of judges

The established structure of self-governance with the Council of Justice and in near future the Supreme Judicial Council as the body which decides about human resources development and other issues essential for Armenian judiciary in regularly open sessions is fully acceptable. It is suitable to ensure the internal independence of judges and to enhance the guarantees for the self-government of the judicial power.

In one point the internal independence of judges and the "administrative independence" of the Council of Justice could be strengthened quite easily: Now the Chairman/-person of the Council of Justice is the President of the Court of Cassation, the highest Armenian Court. Given by tradition the President of Court of Cassation has a great influence on judiciary, even beyond the mere squashing or upholding decisions of lower instances. In the past he has been the one to determine the direction in which judiciary developed. Today therefore his power to summon the Council of Justice , to draft its agenda and to chair it even not having the right to vote is much more than just a technical issue.

I therefore recommend to give to the Council of Justice the competence to elect its president itself from among its judicial members, regardless of their individual rank in the court hierarchy. All members of the Council of Justice should be regarded as equal among themselves. To complete the self-governance of judiciary the president should be elected from among the judicial members, not from among the members (eminent lawyers) nominated by the General Assembly and/or the President of the Republic, because a clear emphasis should be given on SELF-Governance of JUDICIARY, i.e. the JUDGES.

4. Disciplinary liability and disciplinary proceedings

The Judicial Code now differentiates between subjects having the right to decide on initiating disciplinary proceedings and the Commission of Ethics and Disciplinary Matters acting as a court deciding in materia about sanctions, penalties and fines.

The most important issue about disciplinary proceedings is the fact, that the dismissal of a judge may be imposed exclusively by the Commission of Ethics and Disciplinary Matters. There is no other way, e.g. using an "administrative procedure" to dismiss a judge. In this way the most severe sanction

against a judge can only be done in a proceeding following the Criminal Procedure Code and by his/her peers, not by officials outside judiciary.

The General Assembly of Judges forms the Commission of Ethics and Disciplinary Matters securing the transparency. The Commission even acts as a consultative body preventing violation of rules of conduct by answering enquiries from judges with regard to the code of conduct of judges.

5. Balancing the number of judges and the workload of judges

Existing comparative statistics are not differentiated enough to give a realistic insight to the work which is done in detail by the Armenian judges. It does not establish a clear and meaningful overview which is the basis for all and everything concerning the workload-topic.

I see quite critical the idea of the planned "scientific justification" of the workload of judges. Something like this has been done in Germany two decades ago. It took millions of DM/Euro and burdened the judges a lot by using stopwatches, doing documentation and screening representative courts/courts which had be supposed to be representative even for others for statistical reasons.

The much easier and more convincing method is to establish a "system of typical cases" by a round-table of judges at various courts and estimating the average time needed to do such a case in e.g. first instance. A Croat lawyer havs developed such a method which brought very convincing results even in Montenegro. I recommend to contact Croatia for further info.

A remark to the methodology: The finding of an appropriate workload for judges shouldn't be mixed with deliberations how to reduce the workload itself. The latter is very worthwhile, but should be done as a second step after a clear finding of the status quo; otherwise nearly inevitably a big muddle of proposals, suggestions and allegations will arise among the stakeholders.

6. Justice Academy

The Justice Academy has given the most positive impressions to me. It is full capable to do the initial training for (future) judges, prosecutors and investigators. The Judicial Academy even deals with the education and training of court staff. This is essential for a functioning and effective judiciary, not less than educated and well-trained judges. The length of studies seems to be appropriate. The personnel involved is very dedicated to their job and I regard them as fully professional.

No-one of my interview-partners, remarkably even not the ones from NGOs complained about political influence on the curriculum or the lecturing. Representatives of NGOs are lecturers beside judges, prosecutors and university-professors and obviously well accepted by the students/the audience.

Even the intensifying of the cooperation between judges, prosecutors and advocates by organising joint training courses on topics like case law of ECHR, the Law of Eurasian Economic Union and soft skills is done in a successful way and gives a very positive perspective on the future development of Armenian legal professions.

Having in mind the distances within Armenia a well-functioning e-learning program is an effective tool to fulfil beside on-the-spot-lectures at the Academy the annual minimum of judicial and prosecutorial training-units for each judge and prosecutor.

7. Information technology and digitalisation related to independence of judges and their integrity

In this area I couldn't get enough insight without blaming anyone for this – inevitable – fact.

What I could realize: Very careful definitions of all data which judiciary expects to be collected automatically in future are to be done in advance, before starting to design and before establishing the IT-software, it's architecture and the respective programs. These preparatory steps are obviously underestimated nearly by everybody involved in the reform process.

8. Effectiveness of Prosecutor's Offices

The principle structure of prosecution services in Armenia appears to be quite similar to its German counterpart: The prosecutor is not an independent judge. The prosecutors are members or "elements" of a hierarchical system. This hierarchical system is in accordance with the Constitution. Under this perspective the prosecutor isn't the judges twin; he/she is his/her brother/sister-in-law. Therefor it is inappropriate and confusing to speak about prosecutors' independence and about ensuring prosecutors' independence. It is enough – and fully adequate – to protect the prosecutor against unlawful, extraneous and irregular influences from outside and from inside the prosecutorial service.

The procedure for appointing prosecutors, especially the establishing of the list of candidates for prosecutors doesn't prescribe a written test for the candidates. The very crucial decision is done just on the basis of the outcome, the impressions from the oral interview. I regard this as an unnecessary lack of objectivity and transparency. A procedure, parallel to the judges' candidates would strengthen the evidential quality and the reputation of the prosecutors' service.

Many results of the reform process will depend on whether the drafts on several laws, elaborated by the Prosecutor general's Office and submitted to the Ministry of Justice on 27 March 2013 will be transformed during the ongoing legislative process.

I could not understand in full the functions of the Prosecutor's Office in the sphere of protection of state interests outside the field of criminal law. I know, that this function is deeply entrenched in Armenian legal tradition. In most European countries this function is separated from the prosecutor's office and entrusted to other authorities. So the prosecutors are free to concentrate fully on impartial and objective prosecution of criminal offences. I regard this as a great advantage under the perspective of transparency and objectivity.

The prosecutor's office at Arashat, which I have visited covers around 1/10 of the Armenian population and deals with 10 prosecutors in three branch-offices and one main-office with around 500 cases a year; half of them lead to an indictment. Having in mind, that Ararat Marz is a rural area this gives the idea of a rather low level of criminality and a workload which allows careful and precise work.

This office has till now no IT-equipment at all. I don't see this circumstance as too negative: This gives the opportunity to avoid failures and to establish carefully a well-established system without outdated standards (see No. 7 break 2).

9. Some remarks concerning the efficiency of judiciary, even outside the scope of my own responsibility within this peer mission:

a.) Human resources:

Armenian judges undergo a very early specialisation. They apply for the post of a civil judge or a criminal judge and if selected, they are trained exclusively on these two separate topics. I see this as a quite outdated approach. Modern crimes are more and more done not by using knives and guns but the tools of civil and commercial "law". It is absolute necessary for a criminal judge to be very familiar with civil law and the judge dealing with civil cases is well advised to have a good knowledge of criminal law to realise "traces" of criminals during his/her civil proceedings.

Beside that the chance for judges to shift from criminal to civil law and vice versa gives a much better perspective of personal and professional development. A judge working all his/her professional life on one and single legal topic runs the risk to become bored and/or to get the tunnel vision. So his/her professionalism will fade away.

It is even easier to cover a varying inflow of civil and criminal cases if there is a flexibility to entrust the cases to judges according the needs without having a shortage of civil respectively criminal judges.

b.) Function of the second instance

In the now existing system the second instance is called "court of appeal", but according to the law and especially to the court practice it functions as a minor court of cassation, dealing mainly with violations of procedural law and sending cases back to first instance if there are omissions or missing fact-finding. The Court of Cassation does more or less the same and takes care of equal application of the law by the three courts of second instance. This is an unnecessary luxury and very ineffective.

Citizens taking legal proceedings are not interested in chiselled legal and dogmatic deliberations and semi-academic sophistications. They are interested in clear decisions in reasonable time. This aim can be reached by careful and prompt working first instances and second instances which do, if necessary "some repair" and patch up one or the other default or omission of first instance and than give their own judgment, amending the sentence of first instance if necessary, but <u>without</u> sending it back to first instance. The system of squashing and sending back consumes unnecessarily enormous capacities and wastes months and years. Second instances see quite often their task in "educating" the judges of first instance courts to work more carefully etc. This is outdated, if not wrong. Even the sentences/verdicts of second instance after continuing the procedure give clear hints to the judges of first instance – eventually – about their errors or omissions. That's enough to keep the system running and improving and it gives to citizens what they want: A judicial decision in reasonable time.

I have seen from the statistics, that the number of pending and unsolved cases increased remarkably during the last three years. It isn't up to me to find out the reasons for it. Probably Armenian judiciary is now overrun by micropayment-claims (telephone, water, electricity), which didn't exist in this form in the past.

Quite the same happened at Slovenia and Croatia. Their backlogs had been big and over-aged, not to say horrifying. Both countries succeeded in rising their resolving rate and reducing their backlogs after having done crucial and painful reforms in their Civil Procedure Codes: Limiting the squashing and referrals very, very strictly and binding second instance to the principle of continuing (if necessary) and finalizing the first-instance-proceeding. Doing so two instances would work "in materia" and one

limited “on the law”, to keep up equal application of the law. That will be enough and will work effective.

IV. Summary of recommendations:

a) The Council of Judiciary/High Judicial Council shouldn’t be chaired by the President/Chairman of the Court of Cassation. The Council should elect its President/Chairman from among its judicial members by itself.

b) Concerning establishing reliable figures about judicial workload I recommend to contact vice minister Maja Grubisin, Ministry of Justice of the Republic of Croatia. She has worked out a successful method of initialising the finding of reliable workload-figures by the judges/courts themselves.

c) Separate carefully deliberations about measuring/fixing judicial workload and deliberations about reducing the workload itself.

d) Before starting IT-programs and software-production establish a detailed and complete system of data you will collect in future, covering all areas of judiciary.

e) Even the candidates for prosecutors should do two written tests during the selection process.

f) Even the top candidate on the ranking list of prosecutors should have the first choice from the list of vacancies, the second the second etc., in the same way it is prescribed for the judges.

g) Abolish the early specialisation of judges respectively of the candidates for judges. Each single judge should be qualified to work on civil as well on criminal cases to keep up the flexibility of human resources management and to strengthen his/her professional standing.

h) Think about a deep-going change in the function of second instance. It should work even on the merit of the case and continue the first-instance-proceeding. Strictest limitation to squashing and referral to first instance will be a powerful tool against rising backlogs and will enhance efficiency of judiciary significantly.

München, 25th March 2017

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