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Vienna, 21st August, 2017

To the attention of

The Honourable Members of CCJE

Concerning: report on the situation of the judiciary

Dear Sirs,

AEAJ, which enjoys observer status within CCJE, informed its members upon the invitation of CCJE and delivers the following report on the situation of administrative judiciary in its member states in alphabetical order:

Regarding Austria:

a) Judicial independence:

Facts: In some of the Austrian provinces ("Länder") no legislation exists, that the president of the administrative court is not subordinated to orders of the government of the province, in these provinces (e.g. Vienna) justice administration is done by the governments of the provinces to a great extent.

This fact is not in line with point 4 and 7 of the CM/Rec (2010)12.

b) External independence:

Facts: Since 2016 a certain Austrian daily newspaper showed unsubstantiated criticism without any reason in a general manner on qualifications and selection proceedings of new judges on the Federal Administrative Court on a personal level. This increased up to public personal verbal attacks and imputation of their position on three individual judges of this court in a certain court case, which was decided by these three judges (concerning application for permission of a third runway on the Vienna Airport, which was denied by these judges). [1]

The constantly rising verbal attacks following the negative decision of the Federal Administrative Court, culminated in a demand, publicly issued by the Conference of the Provincial Governors. As a directly mentioned consequence of this decision of the Federal Administrative Court they demanded to abolish certain procedural rights/duties of judges (namely to decide in the merits of the case). The 9 Provincial Governors of the "Länder" (Austrian Federal Provinces) are not only heads of those administrations, legally controlled by the administrative judges, but at the same time are also heads of the respective authority, selecting judges and budgeting for their respective administrative court.

It is a violation of point 13 of the CM/Rec (2010)12 and of point 18 of the CM/Rec (2010)12, because not only some parts of the Austrian media, but also members of the Austrian executive power showed public criticism of judiciary in that way, which undermined public confidence in the judiciary and have publicly acted which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal.

The demand of the Conference of the Provincial Governors also violates European standards to avoid unbalanced critical commentaries according to CCJE Opinion No. 18 (2015), part VIII, points 18 and 19.

[1] https://kurier.at/wirtschaft/das-bundesversorgungsgericht/226.082.359, https://kurier.at/politik/inland/neue-verwaltungsrichter-karenzierung-gleich-zum-dienstantritt/226.282.304, https://kurier.at/wirtschaft/posten-besetzungen-juristen-werfen-spoe-und-oevp-einflussnahme-vor/236.346.312, https://kurier.at/wirtschaft/richterliche-befangenheit/246.764.083, https://kurier.at/wirtschaft/das-schmalspur-gericht/247.256.901, https://kurier.at/meinung/kommentare/innenpolitik/richter-als-umwelt-moralisten/246.396.808, https://kurier.at/wirtschaft/zwei-umwelt-hardliner-und-ein-agrar-lobbyist/246.397.578, https://kurier.at/wirtschaft/verwaltungsrichter-staatsanwaltschaft-prueft-strafanzeige/249.697.568

https://kurier.at/politik/inland/wahl/plan-k/buerokratie-blockiert-milliarden-investitionen/281.137.214

c) Training of judges:

Facts: No independent authority exists, which ensures in-service training programmes for the approximately 750 administrative judges.

Recently an "Austrian Academy of Administrative Justice for Law, Management and Innovation" was founded by the 11 presidents of the administrative courts of first instance, the president of the Supreme Administrative Court and two Austrian universities.[2] Although this co-operation between the presidents of the administrative courts first instance, the Supreme Administrative Court and two Austrian Universities is welcomed as a co-operation, this construction lacks basic standards to fulfil the criteria of a proper training institution for judges. Among others, it is no "authority" and is not chaired by a judge.

The lack of an independent authority to ensure in-service training programmes violates points 56 and 57 of the CM/Rec (2010)12 and European standards (see CCJE Opinion No. 4 (2003).

d) Selection of judges:

Facts: the selection procedures for new judges vary within Austrian Federal Provinces ("Länder"). No uniform procedure or criteria exist, except of one provision on constitutional level[3]. Selection procedures, done by the administrative authorities of the governments of the provinces often lack transparency. There exists neither a right to challenge the decision of these administrative authorities, nor the selection procedure (nor are reasoned decisions made available to applicants).

Selection practise of some of the selecting administrative authorities in the Länder (e.g. recently in Vienna and Lower Austria) shows that they do not strictly follow the recommendations of the judges committee (see point 47 of the CM/Rec (2010)12), because not the first (out of three) proposed candidate is selected (but number two or three, although the first choice would have been available), the possibility to challenge their decision is specifically relevant to ensure sufficient external independence of judiciary.

[2] http://derstandard.at/2000059804791/Richterakademie-zur-Fortbildung-gegruendet

http://www.jku.at/verwaltungsgerichte/content

[3] Art. 134 para 2 of the Federal Constitutional Law foresees that administrative judges of the provinces are appointed by the government of the province. With exception of the President and Vice-President, the government has to call for proposals of three candidates (for appointment of new judges) of the plenary assembly of the administrative court (or of a committee to be elected by its members). It is not a formally binding proposal.

This practise and lack of legal provisions violate point 48 of the CM/Rec (2010)12.

e) court presidents:

e.1\. Facts: in case of the majority of first instance administrative courts, presidents do not have power to budget or to allocate budgetary means. In these cases court budgets lie in the competence of the administrations in the provinces (Länder).

This fact is not in line with European standards, contained in CCJE Opinion No. 19 (2016), part V, point 6, because the role of these presidents is not significant in the allocation of budgetary means.

CCJE Opinion No. 19 (2016), part V, point 8:

e.2\. Facts: concerning selection of judges: see above, lit.d).

Regarding selection of presidents: no provision exists, the provision in the Austrian Constitution (proposal of three candidates for appointment of judges) explicitly is not applicable in the case of selection and appointment of presidents of the courts. Therefore the selection and appointment remains in the full (discretionary) power of the executive power.

This fact is not in line with European standards, contained in CCJE Opinion No. 19 (2016), part V, point 8, because the procedures for the appointment of court presidents should follow the same path as that for the selection and appointment of judges.

Regarding Czech Republic:

a) Councils of Judiciary:

Facts: unlike in other Eastern European countries, judicial administration is executed by the Minister of Justice in the Czech Republic. By the members of judiciary, this circumstance is perceived as inadequate protection (inter alia this brings dependence on election cycles; actions to meet stressing needs of judiciary come only reluctantly, e.g. to draft a consistent legislation for court procedures).

No judiciary council exists yet, although this has been demanded by Czech members of judiciary over the last years. It is perceived that a judiciary council could also help to ensure independence of judiciary against the increasing pressure of the executive power on judiciary in the Czech Republic.

The perceived and repeatedly stressed need to have a specific body, which would increase the protection of independence of judiciary in the Czech Republic against the increasing pressure of executive power, should be taken seriously and should be implemented by the national legislative and executive power.

Thus the level at which judicial independence would be safeguarded in the Czech Republic, would be strengthened. This would be in line with European standards (see CCJE Opinion No. 10 (2007), Summary A.a)).

b) Selection of judges:

Facts: no objective selection procedure so far exists. Each regional court had its own selection criteria. The Minister of Justice tried to change the situation and issued a decree (which will enter into force on 1st January 2018) which should unite the selection criteria.

This fact violates points 44 of the CM/Rec (2010)12, because such procedural requirements should be transparent, objective and (regarding the decree) be determined by law (including consultations n with representatives of the judiciary in this law-making-process).

c) Remuneration of retired judges:

Facts: Czech judges are entitled to an average of 17% of their previous salary, the least in

This violates point 54 of the CM/Rec (2010)12 .

Regarding Greece:

a) Resources:

Facts: the budget of 2015 for the judiciary was budgeted with 561 million Euro, which corresponds to 0.36% of the overall state budget. Similarly, also the last years' restrictions in the budget produced conditions, which by far do not constitute sufficient resources to fulfil the duties and important role in ensuring the protection of human rights and fundamental freedoms. An efficient operation of the national judicial system is not possible.

Due to the fundamental lack of resources points 32 and 33 of the CM/Rec (2010)12 are violated.

Furthermore, the chronic underfunding of the judiciary interferes with the judiciary's constitutional role and violates European standards (see CCJE Opinion No. 18, part VIII, point 17).

b) Efficiency of decisions:

Under the topic of "acceleration" inter alia amendments of procedural provisions were made. These had the effect that especially in taxation cases the right to access to justice and to give effective judicial protection (especially for economically weaker citizens) is no longer guaranteed.

Equally, the court fees to access courts have been doubled. This mainly affects economically weaker parts of the population.

This is not in line with points 30 in combination with 31 (first sentence) of the CM/Rec (2010)12.

c) External independence:

c.1\.Facts: Final and irrevocable court decisions were abolished by national laws (enacted in the context of the Economic Adjustment Programmes and Memoranda of Understanding). These are e.g. decisions concerning issues mentioned above under b).

This is not in line with point 17 of the CM/Rec (2010)12.

c.2\. Facts: Not only the Greek media, but also members of the Greek executive power show public criticism of judiciary, which undermines the independence and public confidence in the judiciary. They also show criticism against judges' decisions which undermine independence of judiciary and public confidence in judiciary. For example, recently a judgement of the Greek Council of State on interim relief measures was commented by a minister with "this is justice? This will not come true".

It is a violation of point 13 of the CM/Rec (2010)12 and of point 18 of the CM/Rec (2010)12.

d) Remuneration of retired judges:

Facts: A relevant reduction of remuneration of retired judges had been declared to be unconstitutional by different courts, including the Greek Council of State. The legislator did not respect the decisions, but issued new laws, which foresee a reduction of pensions of judges of up to 60%.

This does not only violate point 17 of the CM/Rec (2010)12 (see above), but also violates point 54 of the CM/Rec (2010)12 .

Regarding Latvia:

Facts: by law (administrative) judges still enjoy administrative immunity, when they are not exercising judicial functions (for example: a judge, fishing without permit or speeding, will face disciplinary sanctions, but no administrative sanctions).

This is not in line with point 71 of the CM/Rec (2010)12.

Regarding Lithuania:

a) <u>remuneration of judges:</u>

Facts: Also Lithuania was forced to reduce remunerations of civil servants, including judges, due to the economic crises (in 2009).

However so far the remuneration of judges has still not re-gained the full amount of that remuneration, which they had received before (!) 2009. It must be noted that the general price level has increased relevantly. The level of remuneration of judges ranks on the one but last position (followed by Bulgaria) within the EU member states.

In addition, in practice, (other) civil servants, who had also been affected by the cuts, can receive additional remuneration (up to 50%) in case of good performance. This is – for sure - not applicable for judges. Thus for the time being, judges suffer more from the cuts of remuneration than other civil servants.

The remuneration of judges in Lithuania does not commensurate with the profession and responsibilities of Lithuanian judges, nor implies sufficient shields for their independence. This fact violates point 54 of the CM/Rec (2010)12.

b) <u>Assessment of judges:</u>

Assessment of judges has consequences for a judge's career (higher court or to become chairperson of a court or to be renewed in this timely limited position) in Lithuania.

Assessment is made by a Assesment Commission, which is established in line with point 44 of the CM/Rec (2010)12. The decision od the Assessment Commission can be challenged before the Lithuanian Council of Judiciary. However, in practise appeal decisions are only based on formal grounds so far.

The Lithuanian laws concerning assessment of judges are clear, but they define the needs of assessing the level of professional skills and activities only in general terms. The criteria and the procedure to assess the level of professional skills and activities are not regulated in detail by law and remain unclear.

The assessment by the Assessment Commission is practiced only in an abstract and notional way. The level of skills and abilities is not clearly defined in the assessment. However, in practice the personal opinion of the chairperson of the court is resembled to be relevant in the assessment and selection procedure (in the selection procedure also the personal opinion of the colleagues).

The decision made by the Assessment Commission remains to the decisive basis and factor for the selection procedure for the higher level court position. The law provides that the candidate should be objectively compared to the other candidates. Because the level of skills and abilities is not claerly defined in the assessment it is not possible for the Selection Commission which is responsible for the selection procedure to compare candidates objectively.

Therefore the assessment concerning the career of judges is not based on objective criteria. This fact violates point 44 of the CM/Rec (2010)12 not guaranteeing individual independence properly (see also CCJE, opinion No. 17).

Regarding Poland:

First, AEAJ wants to specifically refer to the statement of the Executive Board of the European Network of Councils for the Judiciary of 26th April 2017[4], the European Association of Judges of 15th July 2017 [5] and of the Executive Board of the European Network of Councils for the Judiciary of 17th July 2017[6].

In general, for administrative judges, other organisational laws are applicable than for judges of ordinary courts. However, in certain cases (which are unregulated in the organisational laws)

[4] Inter alia you find it on: http://www.aeaj.org/media/files/2017-04-28-56-ENCJ%20Board%20statement%20on%20Poland%2026%20April%202017.pdf

[5] Inter alia you find it on: http://www.aeaj.org/media/files/2017-07-17-71-EAJ%20-%20Poland.pdf

[6] Inter alia you find it on: http://www.aeaj.org/media/files/2017-07-17-76-Statement_by_the_Executive_Board_ENCJ_17_July_2017_Final.pdf

concerning basic rights and obligations of the administrative judges (also) the new (recently adopted law proposal, which has become legal effect) Act on the Organization of Common Courts is applicable.

External independence:

Some background facts are presented to be read in line with the below mentioned examples:

Also in Poland judicial accountability is based on criminal and disciplinary sanctions as well as in legal control mechanisms of the individual judicial decisions. Judges of administrative courts as well as of common courts and of the Polish Supreme Court are subject to disciplinary responsibility and criminal responsibility (as well as have been subject of substantive assessment by inspecting judges once every 4 years, which was abolished by the new act on the organization of common courts). Disciplinary decisions are currently (in an anonymized way) published on the Supreme Court website regarding the common court judges. Between 2001 and 2016 5 judges were found guilty of corruption by criminal courts. In total there are 19 of such proceedings.[7] In this time period approximately 15.000 judges were on duty. Basically, no disciplinary sanction for legal errors of a judge(except for breaching procedural regulations) is foreseen.

Concerning history of the Supreme Court it is noteworthy to mention that by Act of 20th December 1989 the Supreme Court has been reformed. In 1990 tenures of all judges (convened in communist time) were finished. New composition of the court was convened by the President of the Republic on 4th June 1990. 57 new judges were convened including 22 from previous composition i.e. 38, 6%. The current Supreme Court Act entered into force on 1 January 2003. There are 93 positions in the court but in fact only 83 adjudicating judges (4 delegates).[8]

Concerning lustration after communistic regime: a form of verification of the judges was the so called Lustration Act of 11th April 1997 concerning the obligation to reveal any form of collaboration with Security Service in the years 1944-1990. It concerned judges as well (with exception) to the persons born after 1st August 1972. Statements of cooperation were officially published. Any admission to cooperation with Security Service did not automatically preclude from holding the function of a judge, although with no chance on promotion. However, where a false lustration statement had been submitted, this resulted with 10 years prohibition to serve as a judge. In 2006 Parliament adopted a second Lustration Act (lustration statements were needed to be submitted again), but because the majority of the act has been recognized as not meeting constitutional standards and as such not valid it has not major meaning in practice. In addition the Institute of National Remembrance (Instytut Pamięci Narodowej) publishes on its website information of the communist collaboration of higher public officials (including Supreme Court and SAC judges)[9].

[7] http://www.katowice.sa.gov.pl/,new,mg,5.html,328.

[8]) http://www.sn.pl/osadzienajwyzszym/Dzialalnosc_SN/Dzialalnosc_SN_2016.pdf

[9] http://katalog.bip.ipn.gov.pl/osoby-publiczne/?catalog=3

Relevant reforms of the judicial system have taken place in Poland from 1989 onwards: there was a number of procedural changes (criminal law, civil law, commercial law, family law), in 2012 periodical assessments of judges were introduced (currently revoked as from 12 August 2017), from 1990 onwards there was a three-stages common courts system in Poland and from 2004 onwards there is a two- stages system of administrative court system implemented in 2012 79 small local courts were liquidated but in years 2014 – 2015 75 of the were restored, furthermore there were reform concerning small value cases and voice recording in common courts (being introduced).

Facts: Not only the Polish media, but also members of the Polish executive power show public criticism of judiciary in a way, which undermines the independence and public confidence in the judiciary.

Examples:

a) Polish Prime Minister, Ms Beata Szydło, used stigmatizing slogans in public speeches, like „judicial guild" or saying „everyone knows someone who was hurt by the judiciary system"[10]. Equally she is cited in the media to have stressed that majority of judges are corrupt and are not subordinated to democratic control.[11] By this, the impression is made that judges act unrightfully and are unjust towards the society in the ongoing debate on judicial reforms.

b) Polish Minister of Justice, Mr Zbigniew Ziobro:

- Case of judge Justyna Koska-Janusz[12]: in an official communique posted on the Justice Ministry's website in October 2016, the judge was declared to be incapable of conducting a very simple though much publicized case, for the reasons of which the Minister of Justice did cease her external assignment of the higher instance court because of incompetence.

  However, it is noteworthy that the referred case concerned a criminal case where the indictment has been issued by prosecutor on 17th December 2013. Judge Justyna Koska-Janusz "received" that case on 18th December 2013 and the same day returned the case to the prosecutor to prepare psychiatrist opinion. Therefore it means that the case was

[10] https://www.youtube.com/watch?v=njzV1xa-zno

[11] http://www.mdr.de/nachrichten/politik/ausland/polen-justizreform-passiert-senat-100.html

[12] See http://www.hfhr.pl/en/what-are-limits-of-justice-ministers-freedom-to-express-his-opinions-on-judges/

finished after one day. Psychiatrist expert detected mental incompetence and case was finally finished by another judge.[13]

- Interview given by the Minister on 9th August 2017[14]: In this interview he has stressed that the jurisprudence of the Polish Supreme Court were directly linked with communistic times. There were no possibilities to punish communistic criminals. They could not accept moral bad behaviour or even pathologic behaviour. When the journalists indicated that only one judge in the Polish Supreme Court in 2017 has already been judge in communistic times, the Minister denied so. In Poland a pathological situation would exist, where judges would be out of any control. There were low ethical standards. With the reform, they would reckon with communism.

- On the official website of the Ministry of Justice a brochure (concerning the new judicial reform and the positive impacts) in the style tabloid with the information partly concerning only allegations but not finished by condemnation [15] is published.

c) Media reports:

The information that individual cases of misbehaviour of judges are subject to criminal and disciplinary liability, is not passed on to the public, but concealed in the reports.

- In the media there exists repeated information, which gives the impression that family law judges do take children away from their parents because of poverty reasons. However, the Ombudsman for Children has stated on a basis the cases review for 2015 that there was no such situation[16].

- Also in the media repeated information exists regarding excessively lengthy proceedings. These reports ignore statistical data according to which average lengths of the

[13] . Mass media supposed that was "revenge" for punishing by fine 2 000 Polish zloty Mr Zbigniew Ziobro by Judge Justyna Koska-Janusz during process in 2012. The Minister of Justice had been plaintiff and finally lost this case. Nowadays Judge Justyna Koska-Janusz had decided in a case against the Polish Minister of Justice, Mr Zbigniew Ziobro for defamation - case IC 1115/16 http://bip.warszawa.so.gov.pl/artykul/453/2943/komunikat-w-sprawie-i-c-1115-16

[14] https://www.zdf.de/nachrichten/heute-journal/wir-wollen-beidseitigen-respekt-100.html

[15] https://www.ms.gov.pl/pl/informacje/news,9422,sprawne-i-sprawiedliwe-sady--dobra-zmiana-w.html#prettyPhoto

[16] https://brpd.gov.pl/aktualnosci-wystapienia-generalne/rpd-nie-potwierdzil-odbierania-dzieci-z-biedy

proceedings in civil and commercial law cases are below EU average (based on data of 2014). [17]

- Recently, a Polish journalist has also stressed that there were no control of judiciary at all in Poland. No reform of judiciary had been made after the change of system in 1989. There were sufficient proofs that the judges did not fulfil their duties in a good way, because cases of corruption existed. All would assume that judges were corrupt. Judges were not being considered well in Polish society. Judges would deny to be controlled. A guild of judges had emerged in the last 26 years. She cited (anonymously) judges, who allegedly have said that they are an extraordinary guild; no one would be allowed to give orders to them.[18] Therefore, reform would be necessary.

Apart from the responsibility of the media and standards of qualitative journalism to be demanded, neither the Minister of Justice nor other representatives of the executive power (within their duties/competences) did take measures to protect judiciary from such unsubstantiated criticism.

This constitutes a violation of point 13 of the CM/Rec (2010).

Equally, the Polish Minister of Justice and the Polish Prime Minister did not observe the European standards that criticism should be undertaken in a climate of mutual respect. This unbalanced critical commentaries amount to an attack on the constitutional balance of a democratic state. Furthermore, no adequate protection against intimidation directed at members of the judiciary is granted. This constitutes a violation of European standards, contained in CCJE Opinion No. 18 (2015), part VIII, points 18 and 19.

Regarding Sweden:

See letter of AEAJ of January 2013 and of July 2015 on the problem of remuneration dependent on performance:

Facts: In Sweden the remuneration of judges is dependent on the performance which is in conflict with point 55 of the CM/Rec (2010)12.

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17 https://www.iws.org.pl/pliki/files/IWS_S%C4%85downictwo.%20Polska%20na%20tle%20pozosta%C5%82ych%20kraj%C3%B3w%20Unii%20Europejskiej.pdf

18 http://www.deutschlandfunk.de/polen-die-justizreform-ist-notwendig.694.de.html?dram:article_id=391533

The problems still exist: for the salary agreement the work of judges should be assessed when deciding the salary, however the employer must not let the result depend on what the judge has decided in a certain case. Therefore the yearly augmentation of remuneration can vary between 1-5 % (or more) within the same court. No salary raise at all, 0 percent, has been used as a disciplinary action towards a "disobedient" judge.

Regarding Turkey:

First, AEAJ wants to refer to many statements, reports, demands, issued by judicial society over the last year concerning the flagrant abolition of an independent judiciary in Turkey. Exemplified, it can be referred to many of such reports and activity documents of the Platform for an Independent Judiciary in in Turkey, which AEAJ is member of[19]. Sadly enough, many facts are notorious and have already come to the full attention of the honourable members of CCJE. Exemplified, AEAJ can refer to the last report, which updates and summarizes facts, which have happened since July 2016[20].

Secondly, only in an exemplified way, AEAJ wants to draw specific attention to the ongoing situation of judiciary in Turkey:

mass dismissals (more than 4000 judges and prosecutors) and mass arrests (approximately 2450 judges and prosecutors) have been made.

Dismissal decisions are neither based on a fair trial, nor issued in an individualized way and lacks basic requirements of a judicial decision: these circumstances violate inter alia points 3, 15, 28, 49, 50, 63, 69 of the CM/Rec (2010)12.

Arrest decisions against judges and prosecutors: lack fundamental rights granted under Art. 5 and 6 ECHR, the emergency legislation is excessive, no individualized charges so far have been brought forward properly against these judges.[21]

[19] To be found inter alia under: http://www.aeaj.org/blog

[20] To be found inter alia under: http://www.aeaj.org/media/files/2017-07-20-74-Situation%20of%20Turkish%20Judiciary%20-%20Platform%20Report.pdf

[21] See Venice Commission, Opinion on Emergency Decree Laws CDL-AD(2016)027, para. 119 et seq and para. 132 et seq. and see : Venice Commission, Opinion on Emergency Decree Laws CDL-AD(2016)027, para. 101 et seq. and see the Memorandum of the Commissioner for Human Rights of 7th October 2016, CommDH(2016)35

The practise of enforced transfers of judges to other (remote) courts and sudden removal from certain cases[22] are still practised (see the comments of CCJE to a request made by AEAJ on certain aspects of legislation on transfers, CCJE-BU(2016)3 of 5th July 2016).

Exemplified, AEAJ wants to refer to the case of Mustafa Karadag, chairman of the Union of Judges, who was transferred to a remote court. The transfer was not on a voluntary basis and done without giving any substantial reasons (i.e. same practise as noted in the CCJE comments of July 2016).

This practise violates points 5, 9, 22, 29, 49, 52 of the CM/Rec (2010)12.

The High Council of Judges and Prosecutors (HSYK) was no longer an independent organ, but under broad political influence. This has recently been confirmed by the European Network of the Councils for the Judiciary, when it suspended the observer status of HSYK in December 2016. This decision is founded on the conviction that the HSYK is currently not an institution that is independent of the executive and legislature ensuring the final responsibility for the support of the judiciary in the independent delivery of justice. There are no signs that the new Council of Judges and Prosecutors would have a different setting in order to regard it as independent. The new Council of Judges and Prosecutors shows even more relevant deficiencies[23].

This fact violates points 26, 27, 28, 29 of the CM/Rec (2010)12.

The mass dismissals and mass arrests without proper individualized accusations clearly have "chilling effect" within the judiciary[24]. This means that those judges and prosecutors, who are still in power, fear to be subject to such arbitrary measures themselves. These judges and prosecutors can no longer be seen to be independent, as the pressure is too high on them.

This violates points 4, 5, 8, 13, 22 of the CM/Rec (2010)12.

[22] E.g. [22] http://www.hurriyetdailynews.com/turkeys-board-of-judges-prosecutors-temporarily-suspends-four-for-ordering-release-of-gulen-suspects.aspx?pageID=238&nID=111576&NewsCatID=509

[23] See Venice Commission Opinion on the amendments to the Constitution, CDL-AD(2017)005, adopted by the Venice Commission on 10-11 March 2017, para. 114 et seq.

[24] in detail see Venice Commission, Opinion on Emergency Decree Laws CDL-AD(2016)027, para. 147 et seq.

YARSAV, the independent association of judges and prosecutors was dissolved by means of a decree-law.

This violates point 25 of the CM/Rec (2010)12.

Regarding Ukraine:

a) Tenure and irremovability:

a.1\. Facts: so far a probationary period of a fixed term of 5 years is provided by Ukrainian law for newly appointed judges. Only after renewal and final appointment (originally by the Ukrainian parliament, now by the Ukrainian Council of Judiciary) the mandate of a judge is permanent. Within this period of time to wait for a final appointment, there is a prohibition to work as judge.

In practise, after termination of the 5-years term, all in all up to 800 judges had to wait for much longer than one year in order to be finally appointed, because he Ukrainian parliament denied taking decisions. The situation has improved; the Ukrainian Council of Judiciary took up to decide. So far approximately 500 judges are still waiting for their renewal.

This fact is not in line with Art.51 of the CM/Rec (2010)12.

a.2\. Facts: a judicial reform has been initiated in 2016, which is still ongoing. Reason were said to be a change of system and a generally perceived high percentage of corruption within judiciary in the Ukraine. On the one hand, lustrations of judges had taken place after February 2014, on the other hand, there are no reports, that exhaustive criminal or disciplinary proceedings against corrupt judges have taken place so far. Criminal and disciplinary proceedings against any form of corruption within judiciary are proven to be the most transparent solution, being part of basic standards of checks and balances of the three state powers.

As a first step of the judicial reform, the three High Cassation Courts (including also the High Administrative Court of the Ukraine, HACU) , located in Kiev and competent to decide as third instance, were abolished. Application to the newly created Supreme Court of the Ukraine (which is also designed as a Cassation Court and should start to operate soon) was opened, no automatic transfer took place. The relevant laws may be interpreted that those judges, who are not eligible (due to formal selection criteria) to apply to the new Supreme Court - as a minimum - have a right to be transferred (whereas also provisions exist concerning the right to be transferred to “an equal court” in case of liquidation of courts, which is argued by some to be the new Supreme Court). In any case, the legal fundament does not provide any details; there are no provisions concerning the procedures/criteria for those judges of the High Cassation Courts, who are not eligible to apply to the newly created Supreme Court or have not been selected.

Thus regulations, which lie down transparent and predictable standards for transfers of these judges in line with basic standards of rule of law are needed. Predictable standards are even more relevant, because judges have not only professional ties, but equally family and social ties in Kiev. Insufficient standards of transfer might result in enforced resignations of these judges by declaration, which could be equalized with de facto dismissals.

Keeping these circumstances in mind, including also the war situation within the Ukrainian territory, it is not in line with the points 49 and 52 of the CM/Rec (2010)12) not to guarantee certain standards of transfer of judges, even if irremovability is not unlimited. For these judges, the lack of standards and clearly transparent and predictable criteria and procedures it might also have effects on the principles laid down in Art. 22 of the CM/Rec (2010)12.

b) Independence of judiciary:

Facts: HACU will be abolished in the course of the ongoing judicial reform process. HACU judges are also in charge to decide on complaints against decisions of the Ukrainian Council of Judiciary.

On the one hand, several judges of HACU have applied for positions in the newly created Supreme Court. Finally, transfer decisions will be made also by the Ukrainian Council of Judiciary.

Therefore judges of HACU can no longer be perceived to be adequately individually independent in case they must decide in cases of (any) complaints against decisions of the Council of Judiciary. This is not in line with point 22 of the CM/Rec (2010)12. Necessary standards to protect their individual independence are not granted currently in the times of transition.

c) Selection procedure/career for the new Supreme Court:

Facts: a Public Integrity Council/Council of Fairness, consisting of members of NGOs (selected upon criteria set up by law), gives an evaluation opinion to the deciding selection body. The range of competences to check the “integrity” of a judge is not defined by law. No specific criteria are known. Furthermore, such a check is not done in each application case, but basically lies in the discretion of the members of the Public Integrity Council. In case the relevant selecting body (within the Council of Judiciary) wants to deviate from the recommendation of the Public Integrity Council, it must decide in a bigger chamber (all members) and must have a higher voting quorum to deviate from the opinion of the Public Integrity Council.

These circumstances, namely unclear criteria, unclear scope of competences, no standardized checks on every applicant, the threshold for the deciding competent body to vote against an opinion of the Public Integrity Council, constitute a violation of the points 44 and 46 of the CM/Rec (2010)12.

d) Disciplinary proceedings:

Facts: Due to different circumstances, the number of still deciding judges in the Cassation Courts strongly shrank. The still existing workload for those judges still sitting in bench is not able to be decided within reasonable time limits. However, in one case nevertheless (without other objectively founded reasons) disciplinary proceedings have been instigated because of not keeping reasonable time limits.

This fact is not in line with point 22 of the CM/Rec (2010)12, because the reasons do not lie in a failure of the judge to carry out duties in an efficient and proper manner.

Please do not hesitate to contact me for further information.

Yours faithfully,

Edith Zeller

President of AEAJ