SCREENING CHAPTER 23 - JUDICIARY AND BEST PRACTICES

2. Impartiality of the judiciary

- combating corruption in the judiciary
- bias
- code of ethics/code of conduct
- accountability of judges for quantity and quality of work (professional evaluation, complaints-mechanism)

As mentioned before, *Article 6(1) ECHR* as well as *Article 47 of the European Charter of Fundamental Rights* guarantee the right to "a fair and public hearing within a reasonable time by an **independent** and **impartial** tribunal established by law". The observance of this right requires candidate countries to have in place a fully **independent**, **impartial,** professional and efficient judiciary.

The *UN's International Covenant on Civil and Political Rights*[1] states in its article 14 (1) that "all persons shall be equal before the courts and tribunals" and further that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, **independent** and **impartial** tribunal established by law"

The judiciary, while being **independent**, must still be **accountable** and provide a service. Judges must not abuse their powers in any way. In particular, they must act with **impartiality** and treat all persons appearing before them equally.

The concepts of **independence** and **impartiality** sometimes are closely linked together. According to the *Manual on Human Rights for Judges, Prosecutors and Lawyers*[2], "**Only** an **independent** judiciary is able to render justice **impartially** on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual".

Yet, both independence and impartiality have their own specific meaning and requirements.

The notion of independence – as explained before - refers to relationship to others, in particular the executive branch. This status or relationship of independence of the judiciary involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

Impartiality, on the other hand**,** is a principle of justice holding that decisions should be based on objective criteria, rather than on the basis of bias, prejudice, or preferring the benefit to one person over another for improper reasons.

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[1] International Covenant on Civil and Political Rights (UN). E*ntry into force* 23 March 1976.

[2] *Human Rights in the Administration of Justice : A manual on Human Rights for Judges, Prosecutors and Lawyers, Chapter 4. Office of the United Nations High Commissioner for Human rights.*

The concept of judicial **impartiality** is also often considered to refer to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. This view has been confirmed at the international level, where, for instance, the Human Rights Committee has held that the notion of "impartiality" in Article 14(1) of the International Covenant on Civil and Political Rights, "implies that judges must not harbour preconceptions about the matters put before them, and that they must not act in ways that promote the interests of one of the parties".[3]
As for the European Court of Human Rights, it has consistently ruled that judicial **impartiality** has two requirements, namely, one *subjective* and one *objective* requirement. In the first place, "the tribunal must be *subjectively impartial*", in that "no member of the tribunal should hold any personal prejudice or bias". This personal "**impartiality** is presumed unless there is evidence to the contrary".[4]

Secondly, "the tribunal must also be impartial from an *objective viewpoint*", in that "it must offer guarantees to exclude any legitimate doubt in this respect".[5] With regard to the *objective test*, the Court has added that it must be determined whether there are ascertainable facts, which may raise doubts as to the impartiality of the judges, and that, in this respect, "even appearances may be of a certain importance", because "what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings".[6]

The full respect of the principle of **impartiality** is particularly relevant in the relations between judicial actors themselves. For example the relationship between judges and public prosecutors need to be based on a clear separation of tasks, responsibilities and powers in order to create, or secure the existence of, a system with the appearance and reality of two equal parties acting before an independent and impartial court. A distinction should be made between the two in terms of professional rights and responsibilities. According to recognised international standards, there should be both an institutional and functional separation of the tasks, responsibilities and powers of judges and public prosecutors. In this regard, Guideline 10 of the *Guidelines on the Role of Prosecutors regarding the role of the prosecutor in criminal proceedings provides*, "the office of prosecutors shall be strictly separated from judicial functions".[7] In addition, appropriate measures should be taken to ensure that a person can not at the same time performs duties as public prosecutor and court judge as provided for by Recommendation No 17 of the Recommendations Rec (2000) 19 on the Role of the Public Prosecution in the criminal judicial system. This being said, a legal system based on the rule of law also needs strong independent (from external influences) and impartial prosecutors willing resolutely to investigate and prosecute suspected crimes committed against human beings even if these crimes have been committed by persons acting in an official capacity[8].

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[3]Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 120, para. 7.2.
[4]Eur. Court HR, Case of *Daktaras v. Lithuania,* judgment of 10 October 2000, para. 30; emphasis added.
[5] *Ibid.*
[6] *Ibid*, para. 32.
[7] UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[8] Strengthening Judicial Integrety against corruption, Vienna, March 2001. Glogal Programme Against Corruption, Conferences. United Nations - UNODCCP

Another threat to the principle of impartiality is any form of widespread or common ***bias***, as well as any reports of other types of systematic discrimination in judgments themselves (however, it must be noted that bias or partiality in individual cases is extremely difficult to prove).

While this list of threats to the principle of impartiality is not presented here in an exhaustive manner, one more problem should be mentioned and that is the problem of **corruption** in the judiciary. According to studies from the United Nations, a *corrupt judiciary means that the legal and institutional mechanism designed to curb corruption, however well-targeted, efficient or honest, remains crippled. Unfortunately mounting evidence is steadily surfacing of widespread judicial corruption in many parts of the world. Insufficient attention has been given to the integrity of the judiciary and the broader criminal justice system. Corruption within the judicial sector ranks can create a malicious multiplier corruption effect on the rest of the public sector. One could consider judicial corruption as a "corruption of corruptions" in which those whose responsible to interpret and enforce the rules to counteract corrupt practices are themselves corrupt*[9]*."*

In other words, a corrupt judiciary is a serious impediment to the success of any anti-corruption strategy. An ethically compromised judiciary means that the legal and institutional mechanism designed to curb corruption, however well-targeted, efficient or honest, remains crippled.

Causes of judicial **corruption** seem to vary significantly from one country to another. Some of the possible causes include low remuneration and the administrative nature of the roles of judges, far reaching discretionary powers and weak monitoring of the execution of those powers. Factors which engender judicial abuse of power also create an environment where whistle blowing is unlikely, given the extensive power and authority of the individuals involved[10].

Indicators of **corruption**, as perceived by the public, include: delay in the execution of court orders; unjustifiable issuance of summons and granting of bails; prisoners not being brought to court; lack of public access to records of court proceedings; disappearance of files; unusual variations in sentencing; delays in delivery of judgements; high acquittal rates; conflict of interest; prejudices for or against a party witness, or lawyer (individually or as member of a particular group); prolonged service in a particular judicial station; high rates of decisions in favour of the executive; appointments perceived as resulting from political patronage; preferential or hostile treatment by the executive or legislature; frequent socialising with particular members of the legal profession, executive or legislature (with litigants or potential litigants); and post- retirement placements[11].

Therefore, **corruption** levels within the judiciary should be examined seriously by candidate countries and where needed, recognised as a problem and subject to firm and adequate measures. If efforts to fight corruption remain exclusively concentrated on law enforcement institutions, there is an additional danger that cases will be brought to trial, and expectations

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[9] http://www.unodc.org/unodc/en/corruption.html

[10] Buscaglia! Dakolias, Legal and Judicial Refonn Unit, Legal Department -The World Bank, *An Analysis of the Causes of Corruption in the Judiciary* (1999).

[11] Strengthening Judicial Integrety against corruption, Vienna, March 2001. Glogal Programme Against Corruption, Conferences. United Nations - UNODCCP

will be raised and ultimately destroyed, once the courts do not rule according to the law. Such a scenario easily leads to frustration within police and prosecution agencies and by the general public. It ultimately confirms, and upholds, the notion that corruption pays off[12].

Professional ethics and the objectivity of judges and other judicial actors can be strengthened through a number of measures but **quality education**, **awareness raising campaigns** and the adoption of **codes of ethics or a code of conduct for the judiciary** seem to be useful and result oriented tools. A transparent and preferably **random procedure for assignment of cases** also is an efficient tool to prevent corruption in the judiciary. Widespread delays cause multiple opportunities for corruption practices and the perception of corruption. Therefore, **practically tenable standards for timely delivery** must be developed and made public.[13]Other measures could consist of **computerisation of court files**, **decent remuneration** and a **merit based career path with transparent criteria for promotion and demotion** to avoid nepotism and corruption. Last but not least, judges and magistrates at large should not be seen to be above the law or enjoy any form of **immunity**. They should have no immunity from obedience to the law.
Accordingly, there must be a provision for judges and prosecutors –given the substantial powers they enjoy- to be made liable at disciplinary, administrative, civil and criminal level for their shortcomings. An **inspectorate and independent service** should be established within the judiciary to inspect and report regularly all judicial services.[14]Linked to this, parties in proceedings should be able to lodge **complaints** about judges to the appropriate authorities where there are signs of misconduct (bias, incompetence or serious delays). There should be mechanisms in place to discipline judges in this regard.

[12] Idem
[13] Strengthening the Judicial Integrety against Corruption, Vienna, March 2001. Glogal Programme Against Corruption, Conferences. United Nations - UNODCCP
[14] Idem

3. Professionalism/competence

- pre-service training of judicial candidates
- continuous in-service training of all judicial staff
- specialisation, incl. EC law

The independence, efficiency and accountability of a justice system are part of a country's ability to take on the obligations of EU membership. These also require a high level of professionalism on the part of judges (and other court officials) and efficiency of the judicial system as a whole. **Training** is a widely accepted vehicle for judicial development and to improve judicial practices in general. The objective of judicial **training** is to help produce and support an impartial, competent, efficient and effective judiciary. Judicial **training** also is the foundation of judicial reform. Successful judicial reform is predicated upon the skills and attitudinal change that judicial **training** imparts[15].

The development of a **training** programme should always be based upon a thorough needs assessment. These are critical for the remedial and stable programmes which follow. Experience learns that these needs assessments are often inadequately co-ordinated with other aspects of the justice reform. This is a point which needs particular attention. **Training** needs need to be identified as clearly as possible, take account of planned and future developments in the legal framework (e.g. focus on **training** in EU acquis) and focus also on changes of attitude (e.g. special **training** on ethics) but in all cases need to be exactly and better co-ordinated with the overall reform agenda.[16]

Setting specific objectives and designing programmes and a curriculum is the logical next step. However, much also depends on the quality of university education, to which the **training** programmes need to be adapted, if not in the longer run the other way around. Apart from classical pre-service **training** and continuing judicial **training** building up certain specialisations, judicial **training** should also include self-study or mentoring. Overall, learning styles, practical advice to trainers and educational strategies can be acquired via various forms of technical assistance, including the twinning tool which the European Commission has successfully used in this area in various candidate countries. Finally, impact evaluations should be conducted on a regular basis, in parallel with the assessment of the overall quality of the justice reform.

The notion of judicial **training** includes a variety of subjects designed not only to improve knowledge, but also change attitudes. Regardless of course type, managing this **training** is critical. Some countries have adopted the view that the overall control and direction of judicial **training** must be in the judiciary's hands. In other countries, **training** is provided by separate entities such as law schools or judicial **training** institutes managed by the Ministry of Justice. However, as regards **training** for judges, it is generally acknowledged that either the judiciary itself or an independent association of judges should ultimately be responsible for the promotion of the professional education and/or **training** of judges. The same principle applies equally to the in-service **training** of judges. Support for this line is found in Principle

[15] Judge Sandra Oxner, paper on "Judicial education and the state of Philippine Judiciary" (June 1999)
[16] Judicial training and justice reform, Linn Hammergren, Centre for Democracy and Governance, Bureau for global programs, field support and research, US Agency for International Development, August 1998.

9 of the UN Basic Principles on the Independence of the Judiciary[17] and also the Chisinau Declaration, adopted in the framework of the Annual Conference of the Judicial **Training** Centres from Central and Eastern European countries which took place on 12 and 13 May 2000. The Declaration provides that, "*the **training** of the members of the judiciary should be arranged in an independent way by an independent body of the judiciary itself*." In accordance with these principles, the judiciary itself or an independent body should ultimately be responsible for the promotion of the pre-service and in-service education and **training** of judges.

Consequently, Candidate countries are invited to set up an integrated national system of professional **training**, delivered by an independent **training** institute, in particular as regard the education and **training** of judges. Such an institute or body should be adequately funded, staffed and equipped. Judges and other judicial actors should have the right if not the obligation to undergo both initial and continuous professional **training** (so called 'life-long learning'). In this respect, the Bangalore principles of Judicial Conduct [18] state that "*training and other facilities (...) should be made available, (...) to judges"*. A thorough needs assessment should be followed by the development of programmes and curricula having an adequate standard of teaching. The principle of 'train the trainers' should be considered. The quality and quantity of the **training** courses should be designed to ensure that legal and judicial reforms contribute to changing the attitudes and behaviours. As a result, **training** programs should be designed not only to enhance performance but also to strengthen the values of impartiality, professionalism, competency, efficiency and public service.

Apart from judges, also prosecutors, judicial trainees, judicial advisors, court officials, bailiffs, lawyers etc…. should have access to relevant **training** within the context of a national **training** institute or have similar professional institutes of their own. In any case, judicial trainees should be given adequate academic *and practical* **training** in advance of their formal appointment to the bench and have the opportunity to specialise further in the course of their career. Regular assessments of the quality of **training** should be conducted to ensure that there are quantifiable indicators confirming that legal **training** strengthens professionalism, builds public confidence, and facilitates consensus and momentum for further reforms. Legal **training** should result in improving the performance of legal professionals, enhancing service quality and stimulating public respect. Language training should be an integrated part of judicial training, given the growing tendency of direct court to court dealings in the application of the EU acquis. **Training** therefore should play a key role in a merit based career system and be one of the elements deciding on promotion. , **Training** should always be embedded in and coherent with the main principles of the overall justice reform process.

Finally, training programs should be designed to provide a particular specialisation in European community law and on the mechanisms to render effective judicial cooperation between the Member States in civil and commercial matters and in penal matters. Therefore, in this field, the Candidate countries are invited to take into account in their integrated national system of professional training the tool of the European Judicial Network in civil and commercial matters created by the Council Decision 2001/470/EC of 28 May 2001, as well as

[17] Principle 9 of the UN Basic Principles on the Independence of the Judiciary provides: "Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence."

[18] Bangalore principles of Judicial Conduct adopted by the Judicial Group on Strengthening Judicial Integrity, as revised by the Round Table Meeting of Chiefs Justices held in The Hague, November 2002)

that of the European Judicial network in penal matters based on Joint Action of 29 June 1998 on the creation of a European Judicial Network (EJN).

4. Efficiency

- budget
- infrastructure, equipment, computerisation, case management tools
- recruitment of sufficient numbers of judges and support staff (vacant posts)
- backlogs, length of proceedings, importance of statistical data/analysis
- enforcement of judgments

Indicators of effort and progress made by a country to improve judicial efficiency include the level of the **annual budget** of the courts and **infrastructure and equipment** including the physical state and sufficiency of court houses, the level of computerisation, online access (to eg. constitutional court and supreme court jurisprudence) and effective **case flow (**the way cases flow through the entire court system, i.e. the way cases and court capacity are matched) and **records management** in courts.

The challenges courts are facing all over Europe are considerable : workload is on the rise, there are increasing concerns with security issues, technology is exploding while operating costs are under ever-closer scrutiny etc…. Modern courts need knowledgeable/specialised and cost-effective assistance in public administration, law, computer science, and architectural engineering. These tasks cannot be assumed by judges, leave aside court presidents. A functionally adequate and safe court building, equipped with the latest technology and equipment, is indispensable to the efficient operation of a court.

However, apart from the technology, equipment and infrastructure, there is also a need for a well-defined program of **human resource management**, including performance appraisal and work load assessment. Thorough assessments should be made to ensure that the courts are sufficiently staffed as regards **administrative and judicial support staff** (court officials, clerks, judicial advisors, execution officers) so that judges do not waste time carrying out non-judicial functions (e.g. typing their own summonses or calculating court fees, etc) and can focus on adjudicating functions.

For each country, reliable statistics should be kept on the ***total number of judges*** nationwide, and the number of judicial vacancies still open. The same statistics should be used as management tools in order to assess adequacy of judicial trainees, prosecutors, court advisors and, if relevant, support staff (court clerks). Competitions should be organised in a flexible manner allowing to respond to demands for recruiting additional staff where and when relevant.

The ***average duration*** for civil proceedings, criminal proceedings and, if relevant, commercial, juvenile or other specialised courts' proceedings should be monitored closely, as well as for the Supreme Court/ Constitutional Court/ Administrative Court. These should be in line with the provisions in **Article 6(1) ECHR** which guarantees the right to "a fair and public hearing **within a reasonable time.**

Several countries have considerable **backlogs** of cases in their court systems, which is of serious concern both from the individual human rights point of view (right to be heard within a reasonable time) and from the EU accession point of view (how can a country properly implement the acquis if it takes several years for Treaty rights to be enforced?).

Judicial backlogs can result in lengthy pre-trial detentions, with detainees remaining in jail without charges for too long and the dropping of charges without a court judgment as a too frequent means for terminating criminal cases.

The **total number of court decisions** rendered in a year, the total number of new incoming cases and the total number of cases registered but still pending (**backlog**) should be carefully monitored and subject to identifying the main root causes for the backlog, appropriate measures should be taken to avoid and/or do away with backlogs in a speedy manner. Various forms of **alternative dispute resolution,** from mediation and conciliation, in which a third party presents a non-binding solution to a dispute, to arbitration, in which disputants are contractually bound to abide by a third party's decision, can shorten the time needed to resolve disputes, lower litigation costs, and alleviate slow or overburdened courts and ultimately avoid or reduce backlogs.

Finally, once a final decision rendered, the actual **enforcement of the court decision**[19] forms an integral part of the fundamental human right to a fair trial within a reasonable time in accordance with Article 6 of the European Convention on Human Rights and Article 13 of the Convention which prescribes the right to an effective legal remedy.

Most countries ensure enforcement of judgement in civil and commercial matters through enforcement agents, meaning all those persons responsible for carrying out the enforcement process (e.g. bailiffs, enforcement judges, sheriffs, court executors and court or judicial officers). Ideally, the role, organisation, status and training of enforcement agents should be **prescribed in individual laws and/or regulations** in order to bring as much certainty and transparency to the enforcement process as possible. As a complementary measure, enforcement agents should also be bound by **ethical and professional standards**. Enforcement agents should be **well educated and trained** in enforcement practices and procedures. Training of enforcement agents is vital to the overall **efficiency and effectiveness of the enforcement service**[20]**.**

Another issue that should also be mentioned in the context of judicial efficiency is the important work undertaken the **European Commission for the Efficiency of Justice (CEPEJ)**, set up by the Committee of Ministers on 18 September 2002, which is made of qualified experts coming from the 46 Member States of the Council of Europe. The CEPEJ aims to improve the quality of the judicial systems of the Council of Europe Member States. Its key task is to ensure the proper implementation at national level of the European principles and rules on the efficiency of justice. The CEPEJ deals with matters involving civil, administrative and criminal justice, when needed, in cooperation and liaison with the other international organisations, including the European Union (EU). In order to achieve its objectives, the CEPEJ: 1) examines the results achieved by the different judicial systems, by using common statistical criteria and means of evaluation; 2) identifies concrete ways of improving the measurement and functioning of the Member States' judicial systems and considers problems and fields for possible improvement.

[19] Council of Europe Rec (2003) 17 on enforcement of judgments in civil matters including commercial, consumer, labor, and family cases.
Council of Europe Rec (2003) 16 on execution of administrative and judicial decisions in the field of administrative law

[20] In the framework of its Co-operation Programmes to strengthen the Rule of Law, the Council of Europe organised a multilateral seminar on bailiffs (i.e. enforcement agents) in the enforcement of court decisions in civil and commercial cases. This seminar took place in Varna, Bulgaria, on 19 and 20 September 2002.

The milestone of the CEPEJ work is the 2006 Report for the evaluation of European judicial systems adopted by the CEPEJ at it Plenary Session on 6-7 July 2006). The Report contains a considerable amount of reliable and detailed data on the state of justice in Europe and contributes to better knowledge of the functioning of European judicial systems. The scope of data collected for this project is extensive, as it contains both quantitative and qualitative indicators for evaluating each judicial system's performance, e.g. access to justice and courts, functioning of courts and efficiency of justice, use of information technology in the court, fair trial, independence, impartiality, etc.

Given the importance and precedent character of the work undertaken by the CEPEJ, the European Union, and in particular the Commission, considers it essential to co-operates with the Council of Europe in order to ensure synergies and consistency in the field of evaluation of justice in Europe. Indeed, the ongoing co-operation between the Commission (in particular DG Justice, Freedom and Security) and the CEPEJ has already proved fruitful and resulted in a number of common initiatives aiming at improving the quality of justice and reinforcing mutual confidence. In this way, the Commission has showed its strong commitment to ensuring the smooth functioning of justice, which is the key priority for the EU.