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Recommendations of the Regional Working Group on Judicial Capacity, in the framework of the European Union Rule of Law Initiative for Central Asia (Brussels, April 24, 2014)

The new Neighbourhood policy adopted by the Council of Europe provides a scope for cooperation in applying European standards and guidelines for further democratization of the judicial system of respective countries. The members of the Council of Europe present at the meeting suggested concrete solutions for promoting effective implementation of instruments of the Council of Europe relevant to the organisation of justice. The work of the European Commission for the Efficiency of Justice (CEPEJ) could serve as a useful reference to support the modernisation and reforms of justice systems in Central Asia.

Recommendations on collecting information and statistics for strategy planning

1. Collection of data should follow the principles of: Continuity (technically and type of data), transparency (results should not only be delivered to all stakeholders of justice administration but also to each judge), simplicity, acceptance and fairness.

2. Collection of data should be done in compliance with standards of CEPEJ.

3. Data collection should be part of supervision (correctness of entries), maintained and in case of conflicts a matter clear structure of discussion and responsibility.

4. Data collection always has to follow a purpose: Managing resources (budget and personnel), Caseflow (balancing workload - tackling backlog), the quality, performance and supervision; to enable access to justice and to prepare political decisions.

5. The application of indicators of CEPEJ is highly recommended.

6. Management reports should help stakeholders and court presidents to identify fields of action.

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Recommendations on providing adequate funding of the justice system

1. Adequate funding must correspond with the economic background of each state and the specific role and activities of national judiciary.

2. Its limits and thresholds should be as close as possible to international standards of European Judicial Systems or similar systems.

3. Population, GDP, Correlation between the GDP per capita and the total budget (courts, prosecution and legal aid), gross salaries, ITC, general expenses, court buildings, training, legal aid per inhabitant, relation of judges/non-judge-staff/prosecutors have to be highlighted.

4. Funding of judiciary has to be seen in correlation to the outcome (quantity and quality).

Recommendations for a more efficient administration of justice

1. Judiciary should be managed according of outcome orientation, based on contributions achieving objectives and in connection with solving societal problems.

2. Performance budgeting with obligatory objectives and performance indicators, performance measurement, reporting and performance management should be achieved.

3. This should follow a clear structure of strategic goals, outcomes, measures and benchmarks.

4. ICT should work as a tool to improve performance, change the relations between individuals and between individuals and organisations, both in the private and the public sector and should play a growing role within the justice administration and the justice service provision.

5. ICT should support case and file management, templates to support the formulation of judicial decisions by judges, provide on-line access to law and jurisprudence databases, the use of electronic filing and the exchange of electronic legal documents.

6. ICT should not only be used to enhance efficiency, but also “to facilitate the user’s access to the courts and to reinforce the safeguards laid down in Article 6 ECHR: access to justice, impartiality, independence of the judge, fairness and reasonable duration of proceedings”.

7. Case allocation must follow simple, fair and transparent procedures (and be determined either by fixed objective rules or randomly).

8. New measures aiming at reducing the workload of judges should be introduced when necessary. This could include introducing ADRs.

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9. Interfering must follow strictly predefined rules by law only.

10. Specialisation of judges must be provided due to raised complexity of cases and judicial background per major branches.

Recommendations for optimizing the role of public prosecutors

1. When not already provided for by the law, to ensure legislative guarantee of autonomy of the Prosecutor's Office; ensuring independence from undue interference by other bodies, representatives of political movements or influential persons in professional activities of the prosecutor.

2. Eliminating the need for approval of the decision of the prosecutor in court with higher prosecutor.

3. Improving requirements for training of persons performing functions of public prosecutor; when not already provided for by the law, to introduce mandatory long-term practical training before assigning a person to the position of prosecutor.

4. Elimination of disciplinary responsibility of the prosecutor in cases of verdict of "not guilty".

5. When not already provided for by the law, reorientation of the tasks of prosecutors and the main focus on protection of constitutional rights and interests of citizens and the rights enshrined in the constitution.

6. As part of the fight against corruption, identification of causes and conditions conducive to commission of crimes of corruption should be a priority for prosecutors. Proper implementation of prosecutorial oversight of all law enforcement agencies, public authorities in identifying causes and conditions conducive to corruption, making acts of prosecutorial response to eliminate them.

7. Strengthening prosecutorial oversight of law enforcement agencies to comply with the laws to protect the citizen and human rights and interests.

Recommendations for humanising the justice system

1. In order to reduce the prison population, judges should have the option to use alternative sanctions rather than imprisonment. They should also have the possibility to take preventive measures.

2. To establish probation service in the Central Asian States.

3. To encourage the Central Asian governments to introduce electronic monitoring tools on a trial basis.

4. To encourage prison services of the Central Asian States to offer tailored employment

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opportunities to their inmates.

5. To improve the conditions of incarceration in the prison system to the extend permitted by the State budget.

6. To increase the skills of the penitentiary staff and to make better technical support and equipment available to them.

Recommendations for fighting corruption in the judiciary

1. Integrity measures need to apply to the various categories of judges/prosecutors and other court personnel

2. Adequate measures need to be in place against undue interference in the work of a judge or prosecutor

3. Adequate recruitment and career mechanisms need to be in place:
- to ensure objectivity, transparency, fairness, merit, integrity etc.
- to protect against undue external influence being exerted on an individual judge or prosecutor, his/her career, on the occasion of disciplinary mechanisms

4. To prevent risks of influence from the executive / political sphere, this is usually best done through the involvement of collegial bodies with a strong self-governing component (e.g. high judicial council composed of members of the judiciary and possibly external personalities)

5. Adequate mechanisms need to be in place
- to prevent arbitrary selective distribution of cases and undue removal of a judge or prosecutor,
- to ensure appropriate time and case management
- to ensure publicity and transparency of judicial proceedings

6. As regards prosecutors specifically, GRECO's case law from earlier rounds has insisted on the fact that - as a rule - only general (policy) instructions are permitted by the government, and that there should be safeguards for individual instructions (in writing only, added to the file, possibility to challenge the instruction etc.)

7. Adequate conditions of service including for remunerations need to be in place to limit risks for the integrity

8. General ethical principles and core values need to be in place for judges and prosecutors, including to ensure the highest level of integrity, objectivity, impartiality and preservation from undue influences (parties, media, but also supervisors, colleagues, friends and relatives….)

9. These should be clear and practical, and may thus need to be translated into a code of conduct describing more precisely how judges / prosecutors are meant to behave (at work and outside), and what others (Parties etc.) can expect from them

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10. Mechanisms need to be in place

- on how to deal with gifts / hospitality etc.: prohibition in principle, exception in certain limited cases (low value etc), declaration and/or transfer into collective ownership if it cannot be declined/given back
- on incompatibilities of functions of a judge / prosecutor with external activities (typically commercial, legal etc.), providing for exception in certain areas (e.g. academic work)
- on how to behave with third parties in certain circumstances
- to prevent the misuse of information
- for the management of conflicts of interest which would require to avoid the occurrence of such conflicts and provide for the conduct expected where such conflicts arise (declare it, abstain)

11. Depending on such factors as the level of corruption and of shadow/cash-based economy in a country, it may be useful to have a mechanism in place for the declaration of assets and interests (including income and liabilities, and the situation of spouses and dependent family members).

12. Where a mechanism is in place for the declaration of assets and interests, it should be effective thanks in particular to appropriate supervision and enforcement, including sanctions

13. More generally, the disciplinary mechanisms in place, and the bodies to decide on disciplinary aspects of judges and prosecutors need to be effective and ensure compliance with the various standards on integrity (general duties such as impartiality, codes of conduct, gifts, contacts with third persons etc.) > + adequate sanctions (effective, proportionate, dissuasive)

14. Training and adequate awareness raising measures need to be in place to inform judges and prosecutors about their duty of integrity and the mechanisms in place. They should have possibilities to seek advice and guidance when they have doubts about a concrete situation

15. Good practices: codes of conduct often address various matters, including gifts, contact with Parties and third persons, conflicts of interest. A Code should ideally be discussed / prepared with the profession, a copy handed over to all persons concerned including lay judges and new recruits, some kind of self-commitment taking place (e.g. by a signature or when taking the oath…)

Recommendations for developing professional legal training

1. Training on legal methodology is as important as specialized training.

2. Especially the improvement of writing skills for judgments is crucial and will additionally make the bailiffs work easier.

3. Seminars should include as well social and communication skills.

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4. Seminars which are conducted in an interactive mode are more effective

5. To improve sustainability in capacity development it is very important to generate modern teaching material / textbooks, especially in national languages.

6. To assist in providing the translations of all relevant international norms and standards.related to the “right to a fair trial” to the languages used by the Central Asian states.

7. The publication and the analysis of judicial decisions help students and practitioners to understand the law better and develop it further.

8. Seminars can function as centers for mutual discussion. Fruitful debates with the respective persons in charge might lead to necessary amendments in law.

9. It is necessary to develop and to implement training programs, manuals and training activities for the qualification status of advocates.

10. An essential precondition to increase the capacity of the judiciary is to modernize Higher Legal Education at universities.

Recommendations for development of the legislation and legal practice in Central Asia aiming to strengthen the judicial capacity by ensuring independence of lawyers and their associations

1. The relations between the State and the legal profession shall be defined by direct acknowledgment and profound respect to the dual role played by the lawyers in administration of justice, namely representation of clients and serving the interests of the justice itself by upholding the authority of judicial system.

2. The State shall aim to strike proper balance between the two roles played by lawyers in order to enhance and safeguard their exercise. None of the roles shall take precedence or be hindered by virtue of any regulation since it irreparably undermines fairness of any proceedings and the crucial role of the judiciary. Ensuring the maximal possible independence of lawyers in all professional activities in the basic principle of balancing the abovementioned dual role.

3. As a matter of principle state regulation of the legal profession shall be restricted to adoption of “framework” legislative and regulatory instruments defining the structure and powers of lawyers’ professional associations, general criteria for acquisition and termination of professional status, grounds for disciplinary responsibility, and guarantees of individual and collective independence of lawyers.

4. Detailed regulation and administration of lawyers’ and their professional associations’ activities shall fall within the scope of powers of independent bodies within these associations. Creation of such independent bodies, their internal structure,

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appointment and dismissal of their officials shall be responsibility of the legal profession and shall attract no or minimal interferences of the State.

5. Lawyers' professional associations shall independently develop, adopt, enforce, and supervise enforcement of their charters, internal regulations, by-laws, codes of ethics, and disciplinary codes.

6. All decision and instruments adopted within the framework of self-regulation and self-administration of professional associations shall be open to effective procedural and substantive judicial review initiated by directly concerned parties.

7. All matters pertaining to conferring, suspension and termination of a status of lawyer shall fall within exclusive competence of self-regulating and self-administering community of lawyers. The State shall provide "framework" legislation and regulatory instruments guiding the legal profession in the relevant areas.

8. The State shall have the power to establish the minimal criteria of professional qualification and personal standing for all persons having the status of a lawyer, while the specific regulation shall be within the competence of self-administering lawyers' associations. The legislations, regulatory instruments, disciplinary codes and codes of professional ethics shall prescribe the restrictions on exercise of lawyer's functions; however the list of such restrictions shall be exhaustive and limited to most weighty grounds. Any discretion in interpretation of the applicable restrictions shall be limited.

9. The legislation shall directly stipulate exclusive power of the professional associations to adopt initial decisions on conferring, suspension and termination of the status of a lawyer.

10. Any decision on conferring, suspension and termination of the status of a lawyer shall be subject of judicial review. The scope of judicial review in such proceedings may not be limited to examination of only procedural issues, but must necessarily provide for the possibility and the duty of the courts to consider the reasons and grounds for the abovementioned decisions and well as to examine all and any relevant evidence.

11. All issues pertinent to disciplinary responsibility of lawyers have to be exhaustively regulated by general legislative norms and detailed internal legal instruments of the lawyers' community.

12. Disciplinary sanctions imposed on a lawyer must be strictly proportionate to the punishable act and shall not pursue any other goal, but ensuring compliance of a lawyer's actions with the requirements of the law and professional ethics, as well as maintenance of the positive image of the legal profession.

13. Imposition of disciplinary sanctions may not be justified by the outcome of judicial proceedings where a lawyer acted as a representative, a choice of defense strategy, procedural actions or statements of a lawyer, unless they in itself constituted direct violation of legal norms or ethical principles.

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14. Review and control of lawfulness of disciplinary sanction imposed by independent institutions of the legal profession shall be exercised only by the courts.

15. The existing legal norms, as well as internal regulatory instruments of professional lawyers' associations, codes of ethics, and disciplinary codes shall reflect and highlighted the dual role of a lawyer as a representative of a client and an officer of the court. Accordingly the lawyers shall have a right and an obligation to maintain the authority of the judiciary in the eyes of the public and to avoid and hinder any actions capable of undermining that authority.

16. The law and legal practice shall afford lawyers a possibility to freely express their critical opinions in respect of other participants of administration of justice, including the judges and the courts, when such criticism is justified by significant, sufficient, and valid reasons and complies with the principles of professional ethics.

17. Conclusion of legal representation agreements and terms of these agreements shall be independently defined by the lawyers and their clients within the general framework prescribed by law. Legal instruments regulating legal representation under an agreement shall always stipulate an absolute right of a client to terminate further representation. Under exceptional circumstances and relying on significant, sufficient, and valid reasons only the courts shall have the power to permanently or temporarily replace a legal representative.

18. A lawyer shall have a right to recuse himself from further representation of a client at any moment when 1) a conflict of interests arises between them, 2) their approaches to the strategy of defense or representation are fundamentally different and irreconcilable, or 3) further representation in line with the instructions of the client may reasonably lead to violation of the law or the principles of professional ethics.

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