



***EAJ Working Group on the Situation of Member Associations***  
**Meeting of the EAJ in Chisinau, Rep. of Moldova**  
**18<sup>th</sup> to 21<sup>st</sup> May 2017**

**Progress Report (November to May 2017)**

**1 Introduction**

Since the November meeting of the EAJ in Mexico City no new enquires have been addressed to the Working Group (WG) by member associations of the EAJ. There were also no reactions so far from the Polish Association Iustitia concerning a request of last year (see minutes of Mexico). The WG did not receive any clarification.

Some members of the WG took part in other activities especially concerning Turkey and the implementation of the *EAJ-Provident Fund* (see report of the president of the EAJ). The WG dealt mainly and intensively with the elaboration of a draft ECHR- protocol on Judicial Independence.

**2 Draft ECHR-Protocol on Judicial Independence**

At the last meeting in Mexico the EAJ – assembly decided to postpone the examination of the draft protocol to the ECHR to the meeting in Moldova. The reason lied in the fact that the Universal Charter of the Judge was still under review and it seemed preferable to compare the two drafts. Therefore, a member of the WG on the Charter (General Secretary Giacomo Oberto) would join the WG *On the situation of member associations* to revise the draft protocol in view of its presentation in Chisinau.

The idea of a “European Convention on Judicial Independence” goes back to the « High-Level Conference of Ministers of Justice and representatives of the Judiciary, organized by the Council of Europe in Sofia/Bulgaria (21 - 22 April 2016)” . The Conference dealt with, developed and and decided on a “Council of Europe Action- Plan on strengthening the independence and impartiality of the judiciary”. In this document, all the relevant standards and rules which are decisive in fostering and developing independence/impartiality are mentioned. And it enumerates all the relevant actors and activities which can support the member states to achieve those objectives. Though the *Action Plan* is an important and useful document, it is not sufficient, because the key issue is not a want of appropriate standards but lies in the fact that those international standards consist of *soft law*. Therefore they cannot be enforced (like the articles of the European Convention on Human Rights which are international law).<sup>[1]</sup>There are no

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<sup>[1]</sup> The necessity of binding rules can be shown by many examples of the WG and the EAJ: Even though it was clear that commonly accepted international standards were infringed, national executive or legislative authorities often refused to correct decisions made on account of the judiciary, regardless that the EAJ stressed the facts and hinted at the problems. For example:

mechanisms to make sure that the member states are applying the international standards. Therefore, the Swiss delegation at the Conference (composed of representatives of government and the judiciary) invited the CoE to transform the commonly accepted international standards from non-binding soft law- norms to mandatory rules, e.g. in form of an European Convention on the Independence and Impartiality of the Judiciary.

In the wake of the above mentioned CoE - Conference the Swiss Association of Judges has applied to the EAJ-WG to draft a *Convention on Judicial independence and Impartiality*, which should be submitted to the EAJ and afterwards -provided it would be approved- to either hand it over to the competent CoE- Bodies who would start the process of working out a new CoE- Convention or a additional Protocol to the Convention.

The WG discussed this Swiss request and made a proposal to the EAJ-annual meeting in Jerusalem in May 2016. The Jerusalem assembly approved the proposition to give mandate to the WG on this project. In the debate on the project there was unanimous consent and full support was given to it (cf. minutes), though it was clear that there would be hard work ahead “because governments hesitate to adopt binding commitments for their countries regarding judiciary.” As to the form of international law the assembly preferred an “additional protocol to the Convention” because it could be considered a sort of by-law to article 6 and each State would put it into force step by step.

The WG did elaborate a draft of such a protocol during at an additional meeting in Geneva. It was then distributed among the EAJ member associations at its meeting in Mexico in October of last year. At the Mexico meeting, however the WG suggested to adjourn the debate on the draft until the next meeting in Moldova. The reason lied in the fact that the Universal Charter of the Judge was under review and it seemed to be preferable to compare the two drafts. Therefore, a member of the WG on the Charter (General Secretary Giacomo Oberto) would join the WG *On the situation of member associations* to revise the draft protocol in view of its presentation in Chisinau. The assembly did adjourn this item of the agenda and decided to treat it in Chisinau.

In the appendix, you will find the definite draft of the protocol which shall be discussed at the meeting in Chisinau.

At the meeting in Chisinau the draft and the following questions will be discussed (see item 6.3 of the agenda of the EAJ-meeting):

- Is the intended beneficiary of the proposed document the citizen generally or the individual judge?
- If the former, how far would be the citizen be concerned with the internal workings of the judiciary?

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- Infringement of the principle of irrevocability of judges in Serbia (2010) and Turkey (2012 and 2015)
  - Undue reduction of salary of judges which could threaten Judicial Independence in Romania, Poland, Ukraine, Croatia, Iceland, Hungary Slovenia, Bulgaria (2009), Israel, Italy Lithuania, Portugal, Spain (2010), Greece (2012)
  - Infringement of the principle of functional immunity of the judge in Turkey (2015). Other well-known examples are disregard of judgments of constitutional courts by the executive branch in Turkey or in Poland, or infringements of Judicial Independence by the executive branch through so called *supervision measures* in Poland or the Slovak Republic

- If the latter, then is a further Protocol to the ECHR the best way of developing these principles, given the political realities in Council of Europe today, legitimate differences in practice in democratic states respecting the rule of law, and the approach of the Strasbourg Court that focuses on instances of bias and affords a wide margin of appreciation rather than minimum requirements to be reflected in the law of each contracting state?
- If the consensus is that the aim is to provide a formal document for states to agree such as a Protocol to the ECHR, then do we aim at the maximum content that we think the principle of judicial independence requires, or a number of minimum propositions that are broadly agreed on in existing state practice and thus have greater chance of adoption?
- If the consensus is that the aim is to provide a formal document for states to agree: is the text of the draft protocol a suitable one, should it be amended etc.?
- Does the WG get the mandate to work out – along the lines discussed - a final version for approval at the Chile meeting? (together with a plan of action concerning the initiation of such a protocol with the CoE)

### **3. Diversa**

No further remarks are to be made.

Basel (Switzerland), 05<sup>th</sup> Mayr 2017

Stephan Gass,  
*Chair, EAJ- Working Group On the Situation of member associations*

Appendix I

**Draft I**  
**(5<sup>th</sup> May 2017)**

**Protocol No. ...**  
**for the Protection of Human Rights and Fundamental Freedoms**  
**concerning Judicial Independence**

Draft	Remarks
<p>The Member States of The Council of Europe, signatory hereto,</p> <p>Having regard to the fundamental principle according to which everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law under the terms of Article 6 of the European Convention on Human Rights ;</p> <p>Having regard to the principle that the independence of judges from undue extraneous influence is a fundamental requirement of the notion of the Rule of Law reflected in the case law of the ECHR and the common constitutional traditions of the Contracting parties to the convention and further that judicial independence is indispensable to ensure that an individual judge always acts impartially;</p> <p>Having regard to the fundamental requirement of any legal system that seeks to ensure that a fair hearing is given to all parties and that human rights and fundamental freedoms are protected that judges are independent, impartial, open and transparent in all the decisions that they give;</p> <p>Noting that Judges must act and be seen to act without any improper external influence on them in the course of judicial proceedings assigned to them;</p> <p>Noting that Judges should only withdraw from a case or decline to act in a case assigned to them where there are valid reasons defined by law and relevant ethical principles of professional conduct and not otherwise;</p> <p>Noting that Judges are under an obligation do not put themselves into a position where their independence or impartiality may be questioned and refrain from any behaviour, action or expression which may affect public confidence in their impartiality and independence;</p> <p style="background-color: yellow;">Noting that everyone is not only entitled to a fair and public hearing but also to a well-functioning judicial system.</p> <p>Being resolved to take further steps to promote and better</p>	<p>The proposal P.Schneiderhahn concerning an “article A” is partly <b>integrated in the preamble</b>. The second paragraph remains to be discussed, if and where it should be inserted. The proposed Article reads:</p> <p style="text-align: center;"><b>“Article A</b></p> <p style="text-align: center;"><b>Right of Access to a functioning judicial system.</b></p> <p>Every natural or legal person is entitled to have access to a functioning judicial system. This entitlement goes further than the Right to a Fair Trial in a given case.</p> <p>In establishing if a natural or legal person has been deprived of this right, the Court takes into account the Rules and Standards of an independent judiciary, as taken down in the articles 1- 17 of this protocol and agreed by the State Parties.”</p>

protect the independence and impartiality of judges and the judiciary by means of a Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”);  
Have agreed as follows:

**ARTICLE 1**  
**Level of safeguard**

The principle of the independence of the judge and the impartiality of the individual judge should be enshrined in the constitution or at the highest possible legislative level in Contracting states, and all subordinate legislation shall be subject to this principle.

**ARTICLE 2**  
**Notification**

A judge has personal responsibility to ensure that he is she is impartial and their independence is not threatened by extraneous considerations, and accordingly in any case there is good reason to whether impartiality or independence may be questioned a judge should:

- i) inform the parties of any such reason and decide whether it requires the judge’s withdrawal from the proceedings;
- ii) have the possibility of notifying the council for the judiciary or another independent authority.

There shall be an effective remedy to investigate and address any case where there is good reason to believe that impartiality or independence has been threatened.

**ARTICLE 3**  
**External independence**

In order to ensure that judicial independence and impartiality is promoted and threats to it are eliminated, each Contracting state must ensure that there are laws that:

- (i) requires judges to give reasoned judgments publicly pronounced;
- (ii) ensures judges are not otherwise obliged to explain or justify their decisions;
- (iii) permits judicial decisions to be revised or reopened on review or appeal by a judge and in no other circumstance;
- (iv) prevents, without prejudice to the ability of the executive to issue an amnesty pardon or similar measure, a non-judicial body annulling a judicial

decision.

- (v) provides for sanctions against any person seeking to improperly influence a judge in respect of their judicial functions.

**ARTICLE 4**  
**Internal independence**

- i) The principle of judicial independence applies to each individual judge in the exercise of adjudicating functions.
- ii) In their decision making judges are independent and impartial and act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any other body or person not given the function of determining the case.
- iii) In particular judges may not be directed by a court president or other judges how to determine a case save by a decision of a competent court given on appeal or review.
- iv) The allocation of cases within a court has to follow objective pre-established and transparent criteria by law or law based regulations in order to safeguard the right to an independent and impartial judge.
- v) A case cannot be withdrawn from a particular judge without valid reasons on the basis of objective, pre-established criteria and following a transparent procedure by an authority within the judiciary.
- vi) Court inspection systems, where they exist, must not concern themselves with the merits or the correctness of decisions and should not influence judges to favour productivity over the proper performance of their role, on ground of efficiency.

**ARTICLE 5**  
**Independence, efficiency and resources, safety, budget**

Each Contracting state must:

- (i) allocate adequate resources, facilities and equipment to the courts to enable them in accordance with the standards laid down in Article 6 of the Convention

and to enable judges to work efficiently;

- (ii) afford the judiciary an effective opportunity to comment on budgetary proposals affecting the efficient running of the courts;
- (iii) take all reasonable measures to ensure the safety of judges

#### **ARTICLE 6**

##### **Appointment and career development**

- i) Decisions concerning the selection and career of judges shall be based on objective criteria pre-established by law or by the competent authorities.
- ii) Such decisions have to be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.
- iii) The authority taking decisions on the selection and career of judges is independent of the executive and legislative powers. It is mainly composed of judges elected by their peers.
- iv) Where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary has to be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.
- v) The selection and career procedures should be transparent with reasons for decisions being made to applicants on request.
- vi) An unsuccessful candidate has the right to challenge the decision.

#### **ARTICLE 7**

##### **Tenure and irremovability**

- i) The terms of office of judges must be established by law.
- ii) Ordinary judges should have permanent tenure until

retirement on appointment.

- iii) Where appointment is made for a probationary or fixed initial period, a decision on renewal or must be taken by an independent judicial authority on pre-existing published criteria.
- iv) The law of a Contracting state may provide for shorter periods of tenure for specific courts, such as service a constitutional court.
- v) In no case should judicial tenure depend on re-election.
- vi) A permanent appointment can only be terminated in cases of serious breaches of disciplinary provisions established by law, or where the judge can no longer perform judicial functions.
- vii) Early retirement is only possible at the request of the judge concerned or on medical grounds.
- viii) A judge may not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanction or reform of the organisation of the judicial system, and of a temporary assignment to reinforce other courts; the maximum duration of such assignments has to be defined by law.

### **ARTICLE 8 Remuneration**

- (i) The system of remuneration for judges must be established by law.
- (ii) The law must ensure that Judges' remuneration has to be commensurate with their professional standing and responsibilities as judges.
- (iii) Remuneration must be sufficient to attract appropriate candidates for judicial office, enable a judge to live in dignity without recourse to supplementary income. Remuneration shall include measures for parent leave, sickness and retirement.
- (iv) The law must provide for reviews to ensure that the value of judicial salaries is maintained.
- (v) The law shall prohibit the reduction of judicial salaries.
- (vi) The law must ensure that a judicial salary is not dependent on performance reviews, or



discretionary bonuses.

### **ARTICLE 9**

#### **Training**

- (1) Judges shall be sufficiently trained in their functions by a judicial training authority independent of the executive.
- (2) Such training shall be provided have to be entirely funded by the state.
- (3) Such training should ensure that judges regularly update and develop their understanding of the law and proficiency in their judicial duties.

### **ARTICLE 10**

#### **Assessment**

- (i) Where judicial authorities have established systems for the assessment of judges, such systems have to be based on objective criteria published in advance and made known to the judge.
- (ii) The assessment procedure must ensure that judges can express their view on their activities and the assessment of these activities.
- (iii) A judge aggrieved by an assessment shall be given reasons for it and be entitled to challenge it before an independent authority or a court.

### **ARTICLE 11**

#### **Liability**

- i) A judge who has the authority to determine a case, and acts in good faith in interpreting and applying the law, reviewing the evidence and deciding the facts is not liable to the parties for any errors made, nor subject to criminal proceedings at the instigation of the state.
- ii) Where a judge has been guilty of gross negligence in deciding a case, such a failure may be a matter for disciplinary sanction.
- iii) An action for damages for unlawful detention resulting from a judicial decision or compensation for breach of fair trial rights may only be brought against the state

Proposal: "... by an independent authority, **that include a majority of judges...**"

by a n aggrieved party and not against the judge.

- iv) When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.

**ARTICLE 12**  
**Disciplinary proceedings**

- i) Disciplinary proceedings may follow where a judge is guilty of a serious failure to carry out their duties in a fair, efficient and proper manner, having regard to the law and ethical guidance issued by the competent authority.
- ii) Such proceedings can only be brought following an investigation by an independent authority established by law or a judicial body.
- iii) Such an investigation must apply all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction.
- iv) Disciplinary measures and proceedings have to be pre-established by law and sanctions have to be proportionate.

**ARTICLE 13**  
**Judicial Associations**

Judges are free to form and join professional national and international associations which, both alone or with another body, have the task of safeguarding judicial independence, promoting the rule of law and protect their interests.

**ARTICLE 14**  
**Relationship to the Convention**

- i) As between the States Parties the provisions of Articles 1 to 13 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.
- ii) In addition to the remedies mentioned in the Convention the Court may receive applications from any person, nongovernmental organisation or group of individuals claiming any alleged breach of the provisions set forth in this protocol to the Convention by a member state.

**ARTICLE 15**  
**Signature and ratification**

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention.

It shall be subject to ratification, acceptance or approval.

A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention.

Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

**ARTICLE 16**  
**Entry into force**

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 17.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

**ARTICLE 17**  
**Depositary functions**

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles XX and XX;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned parties, being duly authorised thereto, have signed this Protocol.

Done at XXX, this XXth day of XX 120XX, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of

<p>Europe. The Secretary General of the Council of Europe shall transmit certified copies to each Member State of the Council of Europe.</p>	
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