

**JUDICIAL INDEPENDENCE IN UKRAINE, POLAND AND ROMANIA -
COMPLIANCE WITH COPENHAGEN CRITERIA**

by Olha Hrubá

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COURSE: Constitutions and Constitution-making in Europe

PROFESSOR: Renata Uitz

Central European University

1051 Budapest, Nador utca 9.

Hungary

Abstract

Judicial reform can be implemented in different ways, in my work I speak about the way suggested by the European bodies, namely the European Commission and the Venice Commission. Copenhagen criteria, introduced by the Union to the accessing countries require having the independent judiciary in the state. Poland and Romania were the countries towards which the criteria were applied. In Ukraine because of the political situation and the change of the constitution judicial reform also took place and was monitored by the Venice Commission. Similarities of the problems the states had to struggle with in order to reform the judiciary brings to conclusion that the main reason of them is a common socialist past. The question is whether the way suggested by the Union and by the Venice Commission can be effective in such cases.

Table of Contents

Introduction	1
Chapter I. Judicial Reform in Ukraine. Opinion of the Venice Commission on the Draft Law on Judiciary and the Status of Judges.....	4
Chapter 2. Accession of Poland and Romania to EU. EU Conditionality.....	13
2.1 Copenhagen criteria.....	13
2.2 Judicial capacity	15
2.3 Judicial independence from the executive.....	17
2.4 Body Representing the Judiciary.....	19
2.5 Selection, appointment, promotion of judges.....	20
2.6 Rules of Incompatibility. Removal of the Judge from Office	22
2.7 Relationships between the courts	23
2.8 Corruption and Public Trust.....	26
2.9 Cooperation and Verification Mechanism.....	27
2.10 During the second flow of the reform	29
2.11 Criticism of the Judicial Reforms in Poland and Romania	29
Conclusion.....	33
Bibliography.....	37

Introduction

European Community has increased significantly during the time of its creation. Not only has the number of countries increased, but also the scope of competence of the organization. By being called a supranational organization, EU now deals with a wide range of matters which previously belonged to the jurisdiction of the Member States. In order to become a member of the EU, states should comply with a number of requirements. The criteria for accession, also-called Copenhagen criteria, were formulated in 1993. The latter, among other requirements, includes the requirement for judicial independence, which my thesis will be dedicated to.

There are no clear standards determined for the judiciary in the European Union legislation, however, it would be helpful to determine the latter more precisely in order to avoid such situation as, for instance, in Hungary now, when the problem with judiciary leads to incompliance with the EU law.

Of interest for me were the judicial reforms in Poland and Romania during the accession period. The experience of accession to the Union of Poland and Romania took place relatively recently, in 2003 in 2007 respectively. A part of my thesis will be dedicated to the judicial reform in Ukraine in 2010. As a potential member of EU, Ukraine pays much attention to comply with the EU standards. With Poland and Romania Ukraine has a close geographical position, similar size, communist past and what is the most important, a similar organization of judiciary. During the judicial reform Ukrainian legislators were guided by the recommendations of the Venice Commission. The latter gave its opinions on the draft amendments on the Law of Judiciary in 2010¹

¹ Venice Commission opinion on the Draft Law on the Judiciary and the Status of Judges of Ukraine, No. 550 / 2009

The accession procedure is highlighted in a number of documents among which are the treaty of accession and the monitoring reports of the European Commission; much information about the accession process is also contained in the reports of independent organizations such as Open Society institute. There are also numerous scholarly articles dedicated to the reforming of judiciary in Poland and Romania during the accession process. Some of them support the changes; some put into question the effectiveness of the Copenhagen criteria which in their point of view is too general to comply with the reality in particular states.

Changes in the judiciary which took place in Ukraine are mostly highlighted in the Law on the Judiciary and the Status of Judges in Ukraine; the changes were evaluated in the opinion of the Venice Commission at the stage of drafting the law, previously mentioned. The Venice Commission has also expressed its opinions in 2010 on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal.²

The aim of my thesis is to determine the EU requirements on the judicial independence and judicial capacity in the accessing countries and to determine how Ukrainian legislation is complying with the latter in the light of the recent reform. I want to evaluate the situation with the judiciary in Ukraine today and also to determine which changes should take place in order to comply with EU criteria. The evaluation of such changes will be made in the light of the accessing procedure of Poland and Romania.

In the first chapter of my thesis I will speak about the judicial reform in Ukraine, the reasons and outcome of it. I will pay much attention to the opinions of the Venice Commission which was given during drafting the law. In the second chapter I will dedicate to reforming of judiciary in Poland and Romania during the accession process s of it. I will speak about the issues concerning judicial independence and judicial capacity outlined in the

² Joint opinion of the Venice Commission on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal, Strasbourg, 18 October 2010 Opinion No. 588 / 2010, CDL-AD(2010)029.

monitoring reports of the European Commission and the Open Society Institute during the accession procedure.

The results of my research could also be used in order to determine to what extent the past regime has influenced the judiciary of the countries compared and to answer the question of whether such countries are able to overcome past and comply with EU standards. Answering the last questions is especially important now, in the time of crisis, when EU should be more selective in accepting new members-

Chapter I. Judicial Reform in Ukraine. Opinion of the Venice Commission on the Draft Law on Judiciary and the Status of Judges

Ukraine as the neighborhood state to the European Union and has expressed numerous its intentions to access the Union.. As one of the largest post-communist states with developing economy Ukraine has a chance of joining the union but, unfortunately, because of the political and economic instability in the country it has not reached its goal yet. Still it's trying to cooperate with the union in a number of areas and to change its legislation in accordance to EU standards. The general conclusion would be to decide that Ukraine in some years will access the Union. But some politicians are using the logo of 'movement towards EU' just to get access to power and to implement the legislation the latter wants. Recently, it happens often that the politicians who just came to power change the legislation and even the constitutional order. Judiciary plays not the last role in implementing the plans of politicians in their political race. I would like remind the events of 2004 when the changes were brought to the Constitution of Ukraine. The same year Constitutional Court declined in opening the case about the constitutionality of the changes to the constitution. In 2010 when a new President came to power the Constitutional court 'realized 'its role as a constitutional adjudicator a ruled that the changes of 2004 where unconstitutional. Probably not so known fact about the effectiveness of Ukrainian judiciary is the number of cases in the ECtHR from the prisoners who are waiting for years in prison just because of the delay in judicial proceedings. The recent example of the activity of judiciary in Ukraine was the number of proceedings against politicians. Not surprisingly international community calls Ukrainian judiciary highly politicized and society simply determines it as corrupted. Looking at the problem of "judicial insulation", some argue that "formal insulation of Ukrainian judiciary can and is routinely circumvented by enduring informal practices, which make it easy for any

motivated Ukrainian political incumbent to intervene in judicial affairs and impose his or her preferences on judicial case outcomes”³. Such idea suggests that even if judiciary institutionally will be separated from other branches of power it will only encourage informal communications. Thus, other guarantees, despite insulation, should exist in order to provide for judicial independence.

The reason for Ukraine to have its judiciary reformed was not the accession to EU(which actually never took place) but presidential elections in 2010 when a new group of politicians came to power and some changes had to be done in judiciary in order to provide the calm ruling in the next five years.

A new draft law on the judiciary was prepared and Venice Commission was asked to give an opinion on it. Afterwards, European Commission had to make a new opinion on the draft law because of the changes in the Constitution of Ukraine.⁴ After obtaining the opinion of the Venice Commission and after the proper legislative procedure a new law on the judiciary and the status of judges in Ukraine was adopted. There were also changes made in other legislative acts by the new law, on which Venice Commission also gave its opinion. Some of the changes which should take place were not discussed by the Commission simply because further changes to the constitutions were needed to implement such changes.

By the draft law the automatic system of assigning the cases was provided and that step was appreciated. It seems as merely a technical aspect of the work of the judge but in reality it influences strongly the independence of judiciary. Before the automatic system was provided, court chairs were able to assign a case to the judge which would be more favorable to taking a

³ Popova, Maria. 2012. *Politicized justice in emerging democracies : a study of courts in Russia and Ukraine* / Maria Popova: New York : Cambridge University Press, 2012., p 101.

⁴ Decision of the Constitutional Court of Ukraine determining the changes to the constitution as unconstitutional and brought back to power the Constitution of 1996. From 30 September 2010 N 20-rp/2010.

certain decision, or such a strategy can be used to neutralize “a trouble judge”⁵ by putting in the panel the judges with the different point of view.

The system of Courts in Ukraine was too complicated according to EU standards were there are usually two-three instances. Here we see a four level system.⁶ Procedure of creation and abolishing of the courts was criticized by the Commission. The President of Ukraine had a power to create and abolish the courts⁷. Such power belonged to the president before and the precedent of Viktor Yanukovych, Viktor Yushchenko, used the power actively in order to strike the decisions he didn't like⁸. However, with the draft law the Minister of Justice now gives the proposal to the President and not the State Judicial Administration as it was before. The recommendation of the Commission was not taken into account as the provision exists in the present law.⁹ There were improvements seen by the commission in the sphere of appointment and dismissal from administrative positions of the judges. The power to appoint and to dismiss from the administration position according to the draft law belonged to the High Council of Justice “upon submission of the respective council of judges”¹⁰. Criticized remained the factor that there was no basis determined by the draft law for the removal from the position.

The main changes which the new law brought and which were highly discussed in the society was the drastic limitation of the powers of the Supreme Court of Ukraine which according to the Constitution and the law on judiciary is still the “highest judicial body in the system of general courts”¹¹. The positive feature of the system of the courts was the abolishing of the military courts in Ukraine by the draft law. However, the powers of the

⁵ Popova, Maria. 2012. Politicized justice in emerging democracies : a study of courts in Russia and Ukraine / Maria Popova: New York : Cambridge University Press, 2012., p.136.

⁶ Law of Ukraine on the Judiciary and the Status of Judges, 07.07.2010 № 2453-VI.

⁷ The Constitution of Ukraine, Vidmosti of Verhovna Rada of Ukraine, 1996, Art. 106.23.

⁸ Ukraine: Respect Independent Judiciary. Available at: <http://www.hrw.org/news/2008/10/28/ukraine-respect-independent-judiciary> (the last access 10 March 2013).

⁹ Law on the Judiciary and the Status of Judges in Ukraine, Art 19.

¹⁰ *Id.*, Art 20.

¹¹ *Id.*, Art 17.3.

specialized courts were increased and the powers of the Supreme Court now belonged to the latter, particularly, “the competence to supervise the interpretation and application of the law by the lower courts”¹² was transferred to the high specialized courts. Besides, the number of judges in the Supreme Court was cut. Venice Commission did not find such dramatic changes reasonable. Further, the jurisdiction of the Supreme court as the court of cassation of Ukraine was limited only to substantive law¹³. As long as there was no clear definition of what is the substantive law the provision was controversial. Negative was the fact that the parties of the case did not have a direct access to the highest judicial body anymore. Only through the high specialized courts they could have applied to the latter. The draft law created the situation when there are courts with three types of jurisdiction: civil courts, administrative and commercial courts, and is not always clear to which court to go with the case. Reasonable would be to put the question of jurisdiction before the Supreme Court but the latter under the draft law can decide only the about the substantial matters and not procedural¹⁴. Thus, the question of jurisdiction remains unresolved. Inability of the highest judicial to review the cases would lead to the lack of uniformity in the law in Ukraine.

The strict system of the immunity of judges provided by the draft law seems to protect judge from liability in almost all the cases. Venice Commission is not satisfied with such a total blind protection as the judge can simply not carry any negative results for not fulfilling his direct obligations, i.e. an obligation to decide on the case.¹⁵ Judicial training in Ukraine according to the draft law should be provided by the National School of judges of Ukraine¹⁶. The School is not subjected to the Ministry of Education¹⁷

¹²Joint Opinion on the Law on the Judiciary and the Status of Judges of Ukraine, No. 588 / 2010, para24

¹³ Law on Judiciary and the Status of Judges of Ukraine, Art.38.1(2).

¹⁴ *Id.*

¹⁵ Joint Opinion on the Law on the Judiciary and the Status of Judges of Ukraine, No. 588 / 2010, para39.

¹⁶ *Id.*, Art.82

¹⁷ *Id.*

The main problem in appointing the judges in Ukraine is that the judge is appointed for the first time for five years and only afterwards the latter is elected by Verchovna Rada , the only legislative body in Ukraine, till retirement. The decision to appoint the judge for the first time is taken by the High Qualifications Commission of Judges, by the High Council of Justice and by the final appointment is made by the President¹⁸ - Problematic is the absence in the draft law of the criteria of rejection of the candidate. The Council of Justice can simply reject the candidate without the reasons provided by law. The Commission would like to see the role of the Council of Justice “short of being removed”¹⁹ It was pointed out by the Commission that the President in appointment process should only fulfill a “notary”²⁰ function. Thus, he or she should only check whether the Qualifications Commission and the High Council of Justice were following the procedural norms. In order to follow the European standards, the High Qualifications Commission during the appointment procedure should be subjected to concrete legislative norms which regulate how the Commission should collect information about the candidate. In the draft law such functions are described in very broad terms.²¹ Some scholars find that in order to take a position of the judge an internship should take place before taking the position²². As for instance in Poland, when before becoming a judge a candidate is working as a court assessor for three years. That would be more reasonable than working for five years and then become elected for the position again.

The judges in Ukraine are elected for a lifetime period by Verchovna Rada on the motion of the High Qualification Commission²³. The latter has too much discretion according to the opinion as there are no particular provisions in the legislation regulating the question under which circumstances can the HQC reject the candidate for the lifetime appointment.

¹⁸ Law on Judiciary and the Status of Judges of Ukraine, Art.66.

¹⁹ *Id.*, para. 50.

²⁰ *Id.*, para. 51.

²² L.M., Moskvych..To the *Question about the Problems of the Judicial Reform*. Visnyk of The Academy of Legal Studies of Ukraine 4 (59):171-179, 2009 p174.

²³ Law on Judiciary and the Status of Judges of Ukraine, Art 74.3 point 4, Art.77.1 and 78.

The commission mentions that it is very important to have judiciary independent from legislator. The election of judges by Verchovna Rada makes judiciary politicized. The election of judges was highly criticized by the Commission as the process is, firstly, politicized and, secondly, after being a judge for five years, it seems too complicated to require a qualified majority in order to elect the judge.²⁴

The legislator touches the topic of promotion only scarcely, without mentioning any criteria. Moreover, the procedure of promotion involves legislator again.²⁵ It seems strange that the High Qualifications Commission does not decide upon such issues. Thus, the procedure of promotion, as well as of transfer of the judges, is put under the political influence. The High Qualifications Commission is responsible for putting disciplinary sanctions on the judges of lower courts and the High Council of Justice-on the higher courts' judges.²⁶ The procedure of examining the case should be clarified.

The role of the Qualifications Commission in the judiciary is very important. The level of" structural insulation of the judiciary "²⁷depends on the role of the most influential bodies of judiciary, particularly the High Qualifications Commission. In countries where the Qualifications Commission consists mostly from the judges, the judiciary is more insulated. The extreme version of such insulation would be the judiciary of Italy and Russia where such bodies of judiciary are powerful and consists of judges.²⁸ In Ukraine only 2/3 of the members of the Qualifications Commission are the judges. Controversial seems the fact that the member of the Ministry of Justice also has the vote.²⁹ Thus, we see that judiciary in Ukraine in accordance with such principle is influenced by other branches and is not insulated.

²⁴ Law on Judiciary and the Status of Judges of Ukraine to 10, para. 58.

²⁵ *Id.*, Art 80.2.

²⁶ *Id.*, Art 86.

²⁷ *Id.* to 1, p 56.

²⁸ *Id.* to 25.

²⁹ *Id.* Art 92.

The removal from the office of the judge according to the Constitution is compiled by the same body that appointed or elected it³⁰. Thus, President of Ukraine and Verchovna Rada are in the scope. The Commission recommended amending this article of the constitution.

Self- government in Ukraine is represented by the Congress of Judges of Ukraine and other bodies-³¹The system of self- government is quite complicated in Ukraine Rather than having this controversial body, Commission strongly suggested to have a High Council of Justice as the main representative body, but with a fair representation of the judges there.

The body which is responsible for the administration in Ukraine is the State Judicial Administration³² the functions of which are very broad. The negative change according to the opinion was that the powers of the president to supervise the managerial stuff of the court were transferred to the State Judicial Administration. Basically judiciary by itself doesn't have a final influence on the administration of the judiciary. Such position is criticized. However, certain improvements were noticed by the Commission in this area. During the presidency of Leonid Kuchma, the State Judicial Administration was created and it was highly influenced by the executive, now, according to the draft law the HJA is subjected to the Congress of Judges of Ukraine. Unfortunately, even with a change of the body controlling the administration of the courts, because of the lack of financing, the situation with the working conditions of the judiciary is desperate. Lack of computerization, small offices, lack of personnel etc. influence negatively the work of judge.

In order to deal with the problem of delay in court proceedings the legislator of Ukraine introduced a number of time limitations for the proceedings. Despite the fact that now parties of the case should be more active in making their claims, the judges can now be liable for not complying with the time limits. The Commission supports the opinion of ECtHR were the latter says the liability of the judge in such cases cannot be the remedy for the injured person,

³⁰ Constitution of Ukraine, Art 126.

³¹ Law on the Judiciary and the Status of Judges, Art 126.

³² *Id.*, Art 145.

thus, such measures won't be affective³³ In its pilot decision the ECtHR said that the measures should be taken immediately by the State of Ukraine in order to deal with the low level of enforcement of judicial decisions as well as with the delays in judicial proceedings.³⁴ The way how Ukrainian legislative decided to resolve the problem is controversial. Now according to the changes in the administrative law and the criminal procedural law, officials and private persons will pay fine if they are responsible for non-enforcement of decision.³⁵ Making persons criminally responsible for non-enforcement or delays is reasonable only to some extent. The core of the problem is not in the functioning of the particular person but in the organization of the judiciary in general. Thus, legislator should deal with the problem in a more profound manner.³⁶

Thus, the main changes brought by the reform of judiciary in Ukraine were the limitation of the functions of the Supreme Court and increasing the powers of the High Council of Justice. The problem with the latter body is that of its 20 members only seven are judges.³⁷ The latter plays much role in appointing , dismissal, putting the disciplining sanctions on the judiciary³⁸ Some changes seem to work for the judicial independence as they diminish the role of the executive but in getting deep into the process of formation of the bodies, which seems to be independent, one starts to realize that the actors remain the same.

Opinions of the scholars and practitioners in Ukraine are pretty much the same: they don't call the reform as the one, which brought many positive changes to the judiciary in Ukraine. While resolving only partly the problems with financing, electing and appointment of judges, it led to deepening of other problems such as ineffectiveness of the judiciary in Ukraine. Because of such complicated system of courts some scholars claim that Ukrainian

³³ ECtHR, *Kormacheva v. Russia*, no. 53084/99, judgment of 29 January 2004, § 62; ECtHR, *Olshannikova v. Russia*, no. 77089/01, judgment of 29 June 2006, § 44.

³⁴ ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, judgment of 15 October 2009.

³⁵ Article 267 of the Code of Administrative Procedure of Ukraine, amended by Article 3.7, point 99, of Section XII of the Law.

³⁶ Law on the Judiciary and the Status of Judges, to 10, para 118.

³⁷ Law of Ukraine on the High Council of Justice, Art 5.

³⁸ *Id.*, Art 3.

judiciary is ineffective simply because the three mentioned branches of judiciary are working separately from each other and do not cooperate to provide the rule of law in the state. Independence of judiciary should not mean the isolation of the instances which should effectively cooperate. The reasonable way to resolve the problem would be to bring back the powers to the Supreme Court to provide for same application of law by other courts and to give recommendations to the lower courts. To provide for the effectiveness of the Ukrainian judiciary having judicial independence is not enough: “unification of judicial procedures, providence for the access to judiciary, making the system of the judiciary and its functioning transparent, elimination of collisions in the procedural laws would be helpful to improve the situation. “The main problem of the Ukrainian judiciary is in the absence of the concept of judiciary which would be created and elaborated by the group of people connected with the same systemic viewpoint”.³⁹ And on the field of a cruel political war any reform would be the reform of political compromises, resulted into the diversity of legal collisions.

³⁹ Kochenov, Dimitry. *EU enlargement and the failure of conditionality : pre-accession conditionality in the fields of democracy and the rule of law* / Dimitry Kochenov, European monographs: 59: Austin [etc.] ; Alphen aan den Rijn : Wolters Kluwer Law & Business, c2008, p179.

Chapter 2. Accession of Poland and Romania to EU. EU Conditionality

2.1 Copenhagen criteria

Before accessing the EU, Romania cooperated with the latter for almost twelve years and finally in 2005 the treaty of accession was signed. In order to access the Union, Romania had to comply with the Copenhagen criteria. During the pre-accession period the EU gave guidance to Romania and also monitored compliance with it. The reform in Romania during the accession period was concentrated on the following aspects: decentralization of the judiciary, changing the appointment and career system in the judiciary to provide independence of the latter; reforming the system of judges training; improvement of court management. "The European commission has based its democratic priorities on the legislative functioning in Romania and on decentralization, it has also stressed priorities linked to executive functioning." In its monitoring reports the European Commission points to a number of problems: lack of independence of judiciary from the executive in Romania; procedure of appointment of judges, which did not seem to provide for independence; lack of managerial personnel; low level of salaries of the judges; weak computerization of courts; high level of corruption within the judiciary and generally, and finally, the lack of popular trust in the judiciary.

Poland accessed the EU in 2003. As well as Romania, during the accession Poland was subjected to the Copenhagen criteria and had to reform its judiciary. Both states had a communist past and this caused the existence of the same problems within the field of judicial independence. As in Romania, the most difficult problem Poland had to deal with was the high level of corruption in the judiciary. The European Commission, the OS institute in the reports mentioned the existence of high level corruption in Poland, and the problem was discussed in numerous articles. Besides corruption there were other aspects in the system of

judiciary of Poland infringing judicial independence. As in Romania, the judiciary in Poland was highly dependent on the executive; the process of appointing judges had to be improved; extremely long judicial proceedings took place, the problems of financing, court management and public trust were also mentioned in the reports.

Many authors have evaluated the “potential transformative role of the Union in promoting domestic change, during the pre-accession period and beyond.”⁴⁰ Some of them are in favor of the changes which took place in the member states and had been approved or initiated by the Union. The Union as a concentration of the most powerful European actors seems to be a reliable source of inspiration for third countries. However, not all scholars share the same viewpoint.

Mendelski in his work criticizes the EU conditionality approach, the “the main weapon of reform”, used by the EU towards the accessing countries. Simply the words of a scholar would not be convincing. However, Mendelski, with the example of Romania, shows that little was achieved by the judicial reform guarded by the Union. The author demonstrates that the reason was the strong politization of the judiciary which continued after the communist era. Instead of taking some new approach, the EU simply required from Romania to take as granted the model which existed in other member states.⁴¹ The reports of the European Commission and of the OS institute also show that the reform in the sphere of judicial capacity was much more successful than that in the field of judicial independence. The only reason why the judicial capacity was reached successfully is that it did not influence the “well established elites”.⁴²

⁴⁰ Mendelski Martin. 2011. *Rule of Law Reforms in the Shadow of Clientelism: The Limits of the EU's Transformative Power in Romania*. Polish Sociological Review (2(174)).

⁴¹ Mendelski, Martin. 2011. *Romanian Rule of Law Reform: A Two-Dimensional Approach*. Open Society Institute. *EU accession monitoring program (Budapest)*. 2001. Monitoring the EU accession. process : judicial independence : country reports. Budapest: Open Society Institute.

⁴² *Id.*, p 245.

Judicial reform in Romania can be classified in two ways: the period before accession and afterwards. Secondly, it can be divided into the reform in the sphere of judicial capacity and in the sphere of judicial independence. The classifications show that there were changes made during the accession period in Romania and also through the Cooperation and Verification Mechanism (CVM), which took place just after the accession, they also demonstrate the two main scopes of the judiciary in which the reform took place: judicial independence and judicial capacity. Romania together with Bulgaria were the only members to whom the CVM was applied after the accession. Such an attitude towards the member state is defined as discriminative by some scholars.⁴³

2.2 Judicial capacity

The first stage of reform in Romania took place before 2007 and during this period most success was reached on the level of judicial capacity. The most important effect of judicial capacity is that it strongly influences judicial independence. The lack of clarity in selecting, appointing, promoting and training the judges and court was noted in Romania. There was also a lack of clarity in the division of responsibilities between the court staff which led to slowness in their work. In the report it was also said that there was a high level of bribery inside the personnel⁴⁴ and that this diminishes the level of public trust in the judiciary. What is problematic regarding judicial capacity was the low level of computerization. In the courts, the poor working conditions in Romania was also highlighted. In light of improving judicial capacity, during the pre-accession period in Romania, new legislation was adopted and the

⁴³ C, Dallara, and Baracani E. 2005. *European Union Democracy and Rule of Law Promotion in South-Eastern Europe*. The Journal of European Affairs 3 (1):14-22.

⁴⁴In the OSI report on Judicial Independence in Romania it was said that bribery in the personnel was treated as a totally normal thing, even more normal than not giving a briber to the stuff..(OSI Report, p391).

agencies which were responsible for training the managerial personnel were created; the work of the judiciary became more computerized; the salaries of the judges were raised.

In Poland, as in Romania during the accession period, much attention was paid to support the judges with a professional court staff who would comply with all the non-judicial matters. The court manager was a “strongly advocated solution to improve the efficiency of judicial offices.”⁴⁵ The development of information communication technology was also supported. All these measures led to decreasing the number of tasks put on the judges. Compliance with the time limits of judicial proceedings was of great concern as there were many cases in ECtHR where the applicants claimed that their right to a fair trial was breached because the decision was not taken in time. With the new legislation the managerial tasks were transferred to the Court Directors, so that the judges could concentrate on their direct obligations.⁴⁶ In 2002, Romania did not have a developed managerial staff and presidents of the courts exercised managerial functions, being obliged to fulfill the orders of the Ministry of Justice and its departments.⁴⁷

The Commission in its 2002 monitoring report on Poland supported the training of judges which should have become more centralized and also aimed at increasing the level of knowledge in EU law. According to the OS Report in 2002, the training provided by the Ministry of Justice was not effective because of the excessive influence of the executive, which, for instance, had the power to cut the financing of the training. In Poland, the training was directed by the Ministry of Justice. As the Ministry did not have the resources to organize a fully centralized judicial education, the presidents of the court provided for it at the local

⁴⁵ Open Society Institute. EU accession monitoring program (Budapest). 2001. *Monitoring the EU accession process : judicial independence : country reports*. Budapest: Open Society Institute.

⁴⁶ *Id.*

⁴⁷ Open Society Institute. EU accession monitoring program (Budapest). 2002. *Monitoring the EU accession process: judicial capacity : country reports*. Budapest ; New York: Open Society Institute, EU Accession Monitoring Program. p 182.

level.”⁴⁸ There was no general program for the trainings, usually the judges did not have teaching skills, that is why it was recommended to transfer the training function to the “autonomous administrative institution in which judges were well represented”⁴⁹ instead of putting the responsibility on the executive branch which already had a strong influence on the judiciary.”⁵⁰ In Romania, like in Poland, the training process was controlled by the Ministry of Justice. Officially, the main organ for training was the National Institute for Magistrates but the latter was dependent on the Ministry financially, moreover its managerial business was directed by the Ministry.⁵¹

Other changes which took place were strongly connected to the independence sphere so I will discuss them within the scope of independence.

2.3 Judicial independence from the executive

In the countries compared, most of the powers within the judiciary belonged to the Ministry of Justice and partially to the body where the judiciary was represented fairly. In Poland the latter was the National Council of the Judiciary, and in Romania-the Superior Council of Magistracy. The main problem which the countries had to deal with was the procedure of decentralization of judiciary.

In the sphere of judicial independence, the position of the judiciary towards the executive in Romania was criticized.⁵² The Ministry of Justice was influencing the judiciary from all sides. The body representing the judiciary was the Superior Council of Magistracy. The Ministry of Justice had a strong influence on the Superior Council of Magistrates and,

⁴⁸ Piana, D. 2009. *The Power Knocks at the Courts' Back Door Two Waves of Post communist Judicial Reforms*. Comparative Political Studies, 42 (6):816-840.

⁴⁹ Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process : judicial capacity : country reports.

⁵⁰ *Id.*, p 162.

⁵¹ *Id.*, p 178.

⁵² Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports, p 357.

thus, on the judiciary. As a result, the Courts' administration was basically controlled by the Ministry of Justice. The latter also controlled the career questions and the disciplining of judges.⁵³

Similarly, the Ministry of Justice in Poland had the most influential power - the power to influence the financing of the judiciary. The executive body, changing every three years, was not interested in a strong judiciary.⁵⁴ This made the judiciary highly dependent on the executive. The latter could have made cuts whenever it wanted i.e. the austerity measures imposed on the judiciary in 2001. The measures included numerous cuts for training of judges, examinations, conferences etc.⁵⁵ The positive aspect for the judicial independence was that the higher courts were financed separately in Poland.⁵⁶ In comparison to Poland, the situation in Romania was even worse: there was no body representing the judiciary in the Parliament, the budget requirements were sent by the regional courts to Parliament through the Ministry of Justice. Moreover, the executive and the Parliament were able to change the requirements formulated by regional courts.⁵⁷

As in Poland, Romanian executives were able to influence the financing of the courts and the salaries of the judges. The OS pointed out that the level of salaries for the judges in Romania depended considerably on additional payments (merit-based or contingent). This could have led to dependence by the court's hierarchy or from those who had control of such payments. Thus, it was pointed out that it would be reasonable to avoid the high dependence of salaries on such payments.⁵⁸

⁵³ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports p 357.

⁵⁴ Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process : judicial capacity : country reports., p 164.

⁵⁵ *Id.*, p170.

⁵⁶ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports. P330.

⁵⁷ *Id.*, p 374.

⁵⁸ Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process : judicial capacity : country reports., p375.

The judiciary in Romania was also influenced by the prosecutorial office. The position of the latter in the branches of power was undetermined. In the Romanian constitution the body which supervised the prosecutors was called the “judicial authority.”⁵⁹ Such determination was criticized in the OS report. In the report it was found as a positive step that in the Law on the Judiciary of Romania it was stated that the judicial power belonged only to the courts, however, the powers of the prosecutorial body which still remained under the “judicial authority” chapter in the Constitution, should have been diminished.⁶⁰ Judicial independence, according to the OS report was also threatened by the possibility of the prosecutor and the Minister of Justice to appeal the decisions of the Supreme Court. Thus, the executive had an influence even on the highest judicial body.

In Poland during the accession period, the Minister of Justice also fulfilled the functions of the General Prosecutor, thus, participating in public criminal proceedings. The European Commission in its regular report pointed out that “[t]here was no clear separation of functions of the Minister of Justice and the Attorney General. Draft legislation addressing this issue is being discussed within the government. It is aimed at separating the two functions, but the provisions as currently formulated will not result in the Attorney General becoming more independent.”⁶¹

2.4 Body Representing the Judiciary

In Poland the High Judicial Council was introduced after the earlier stage of the judicial reform (1989),.⁶² In the OS Report it was mentioned that the role of the National Council of

⁵⁹ Constitution of Romania, Chapter VI.

⁶⁰ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports, p361-362.

⁶¹ European Commission: ‘2000 Regular Report on Poland’s progress towards accession’ COM (2000) p. 15.

⁶² C, Dallara, and Baracani E, *European Union Democracy and Rule of Law Promotion in South-Eastern*

Judiciary should have been clarified.⁶³ The role of the body was unclear, it “didn’t seem to qualify as an organ of judicial self-government.”⁶⁴ Despite the fact that most of the members were judges,⁶⁵ which should have made the body able to represent the judges fairly, and the powers of the Council were mostly consultative. The fact that the Council had no financial powers, which belonged to the Ministry of Justice, made it totally ineffective. After the first year of the monitoring program there were two new laws on the judiciary adopted in Poland,⁶⁶ however the situation did not change for the Council. The latter got the right to comment on draft budgets, prepared by the courts, and to present them to the Ministry of Justice.⁶⁷

As mentioned earlier, the body representing the judiciary in Romania, namely the Superior Council of Magistrates, was weak and most powers belonged to the executive.

2.5 Selection, appointment, promotion of judges

The Ministry of Justice was highly involved in the appointment and promotion of judges in both countries. In Romania, contrary to Poland, selection and promotion were two different procedures. The Ministry of Justice was highly involved in both kinds of procedures and this was, of course, not a positive step towards independence. The Council of Magistracy could not have considered a candidate not recommended by the Minister. Afterwards the superior council of Magistracy would pass the candidate’s name to the President.⁶⁸ The way the judges were selected and appointed in Romania showed that there was much to be improved in the procedure in order to provide for the professionalism of the latter.

Europe. The Journal of European Affairs 3 (1):14-22.

⁶³ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports, p 311

⁶⁴ *Id.*, p. 322.

⁶⁵ Constitution of Poland, Art. 187.

⁶⁶ Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process : judicial capacity : country reports, p175-177.

⁶⁷ *Id.*

⁶⁸ *Id.*

Examination was organized by the Ministry of Justice and a very wide range of individuals were able to pass it. According to the Government Emergency Ordinance 20/2002, Members of Parliament, the Minister of Justice, State Secretaries and employees of the Ministry with the legal background could be appointed without examination. The independence of the Ministry employees seemed to be controversial, but still they could take part in the hearings and had a “consultative” vote there. The promotion of the Judges also depended on the executive. Despite the fact that the judge, who had to be promoted, could have complained to the Superior Council, it was not possible to initiate the promotion without the recommendation of the Minister of Justice. During the promotion procedure, unlike in Poland, where the apprenticeship test only mattered, the opinion of the superior judges was of great importance.⁶⁹

The selection process in Poland did not seem to infringe the independence of the judiciary as the functions were divided fairly between the judicial and executive body. In Poland in order to become a judge the candidate should have to first pass the apprenticeship period, then for three years work as a court assessor and only afterwards be appointed as a judge. In opinion of the OS Institute, Appointment was made by the President through the court college, general assembly of the regional court judges, The Ministry of Justice and the National Council of Judges. The positive factor was that the Ministry of Justice during the appointment process had only a right to a notbinding opinion about the candidate, sent to the latter by the general assembly of regional court judges. In its report as well as in the guidelines given to Ukraine, the EC asked to state in the legislation clearly the role of the President in the appointment procedure as being purely formal. The negative aspects in the selection procedure to which the OS in its report pointed was that the procedure of selecting the apprentices was not transparent enough as there were no representatives from civil society

⁶⁹ Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process: judicial capacity : country reports.

present during the selection process, only the appellate court Presidents could influence the outcome of the procedure. The fact that only the result of the exam mattered, without taking into account previous studies and work experience, was also criticized in the report.⁷⁰ Another negative aspect was that during the appointment procedure future judges could have been influenced by the executive and also by the superior judges. In OS Institute's opinion, the requirement of three years as assessor before becoming a judge was a too long term and should have been shortened.

It was determined as a negative aspect that there was no separate procedure of promotion in Poland. In order to become a judge of the higher court the same procedure through the nomination as an assessor was applied. Although there was a possibility to apply directly for the position, much more favor was given to those who passed apprenticeship. Thus, in reality, more preference is given to the apprentices rather than to experienced lawyers. The positive aspect for the judicial independence mentioned in the report was that the judges in Poland were appointed for life. The term in office of the judge could be continued by the NCJ after the age of retirement.⁷¹

2.6 Rules of Incompatibility. Removal of the Judge from Office

The rules of incompatibility of the position of the judge in Poland were criticized in the reports. The draft legislation in Poland provided the possibility for a judge to be the deputy Minister of Justice. At the very same time the legislation forbade any kind of activity which the judge could be paid for, except academic work. The judge could be a member of the

⁷⁰ Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process : judicial capacity : country reports p159. the OS suggests that performance during their studies and opinions from former superiors be taken into account.

⁷¹ *Id.*

executive body. Such a mix of responsibilities between the executive and judicial position could have infringed the principle of separation of powers and of judicial independence.⁷²

Another factor to which OS paid attention during evaluating the judicial capacity in the countries was the procedure of removal of judges. In Poland the judge could have been removed either through the disciplinary procedure or the Minister of Justice could have removed the judge after receiving the opinion from the general assembly of judges of the relevant court. The disciplinary procedure seemed to be quite fair. A judge could be sanctioned in a disciplinary procedure only “if the inspection reveals disciplinary violation.”⁷³ Afterwards proceedings in the disciplinary court took place. Thus, we see that there was a procedure which should have been fulfilled by the representatives of the judicial power and the decision was within their capacity.

In Romania, the situation was more criticized. The Minister of Justice had the power to order preliminary investigations, in the case of alleged misconduct, and also periodical verifications, conducted by the general inspectors. The law which regulated the question was not published, so the exercise of the power was controversial not only from the point of view of judicial independence.⁷⁴

2.7 Relationships between the courts

Both of the countries had problems with the unification of the courts' jurisprudence during the accession. In order to provide the rule of law in the judiciary the jurisprudence of the courts should be unified. Such unification depends on the relationships between the courts. The system of general courts in Romania consisted of four levels. It is common for the

⁷² Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports p 324.

⁷³ *Id.*

⁷⁴ Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process : judicial capacity : country reports, p178.

continental type of the system of judiciary but in the reports such structure has been criticized for being too complex.⁷⁵ Most of the Member States had the system of two levels, the existence of more than three levels was criticized. In Poland there was a three level system, satisfying the EU standards.⁷⁶

The negative factor according to the reports on Romania and Poland was the existence of the system of military courts in the states, because they were totally independent and thus could not have been effectively controlled. In Romania, the system of military courts existed, which was totally independent from the general courts. During the period of transformation in Poland, and in Romania recently, the Supreme Court got the power over the military courts. During the reform the Supreme Court became the last instance in military cases. Such change was determined as a positive one by the international society.⁷⁷ It was mentioned in the reports of 2002 that the restriction of the jurisdiction of the military courts in Poland over the police was a positive step.⁷⁸

According to the reports, the relationships between the lower and superior courts in Romania made the judges of the lower courts dependent on the superior judges. The relationships between the latter were based on the following rules: the higher court could give instructions to the lower courts only through the procedure of appeal, however higher courts had the power to conduct inspections in the lower courts and to put disciplinary sanctions on the judges. In the relationships between the courts, “informal relationships” were used in order to get some recommendations from the superior judges.⁷⁹

⁷⁵ Joint Opinion of the Venice Commission on the Draft Law of the Judiciary and the Status of Judges in Ukraine, 2010.

⁷⁶ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports

⁷⁷ *Id.*, pp 367-368.

⁷⁸ Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process : judicial capacity : country reports, p 174.

⁷⁹ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports, p389-391.

The relationships inside the court are also of a great concern as they influence the independence of each judge within the court system. As in Romania, in Poland there was a position of the Court President provided by legislation. The President of the court fulfilled managerial tasks. The latter was appointed for 4 years with the possibility to be reappointed for a second term by the Ministry of Justice after getting the opinion from the assembly of the judges of the regional or of the appellate court. There were concerns expressed by the OS Institute that the second term appointment could have been negatively influenced by the executive.⁸⁰ Such burden of responsibilities put on the President of the court was criticized by the OS Institute as no managerial skills were required in order to take the position.⁸¹

It was already pointed that the superior judges in Romania had an influence during the promotion of the judge.⁸² Inside Romanian courts the president of the court had the power to assign the cases to the judges. Such power is significant, as it infringes the independence of judiciary by creating the possibility to assign the case to a judge who will be sympathetic or just in favor of a particular outcome.⁸³ The automatic system of assigning cases would be the best option in order to provide for the rule of law in the system of courts. A wide range of “informal contacts between members of the judiciary”, which is common for the post-communist states, was also criticized in the reports. The reason could be the weakness of the Council of Magistrates which was not able to represent the judiciary fairly.⁸⁴

Another problem, probably connected with the post communist reality, was the “passive professional culture”⁸⁵ of the judges. Judges were not cooperating actively between each other. Most of the judges in Poland thought that “asking questions was a form of curtailing

⁸⁰ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports.

⁸¹ *Id.*

⁸² Open Society Institute. EU accession monitoring program (Budapest). 2002. Monitoring the EU accession process : judicial capacity : country reports.

⁸³ *Id.*

⁸⁴ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports p. 365.

⁸⁵ *Id.*, p 314.

judicial independence”⁸⁶ Such attitudes did not lead to the independence of the judiciary as a whole, it rather led to the non-correspondence between the case law of the higher and lower courts which further led to the need for unification.

2.8 Corruption and Public Trust

The problem of public trust in the judiciary in Romania and Poland was an outcome of strong politization and corruption within the judiciary. In Romania the level of public trust was diminished by the controversial rulings of the highest judicial bodies and by the public criticism of the judicial decisions by politicians. It is also of great importance that the situation with the judiciary was not highlighted in the media. As a “judiciary-related factor”⁸⁷ free media should fulfill the role of the guarantor of the accountability of the judiciary.⁸⁸ In Poland, the passiveness of the judges can also be caused by the controversial attitude towards the criticism of the judiciary by media. If not criticized, there was simply no need for the explanations. From another point of view, after the high level of criticism over, “allegations of corruption against judges”⁸⁹ it is no wonder public trust in the judiciary decreased significantly. However, there was a positive factor, mentioned in the reports, that the judges were obliged to disclose their incomes annually.⁹⁰ In Romania, in contrast, such provision existed; however, in practice disclosures were not made.⁹¹

The reasons for the corruption within the judiciary in the states compared could be different in terms of the system, not providing the independence of the judges, low level of salaries, and low level of judicial culture. General advices given by the Commission could be

⁸⁶ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports p. 314.

⁸⁷ *Id.*

⁸⁹ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports, p. 315.

⁹⁰ *Id.*

⁹¹ *Id.*

the reason of the deeply internal core of the problem, where external influence could have no result. As a measure against the corruption in Poland, the Commission only suggested the adoption of the anti-corruption legislation and underlined the importance of the “central integrated strategy at national level against corruption.”⁹²

A long period of infringement of the judicial independence principle in Poland and Romania caused the existence of other problems related to the judiciary which could not be included either in judicial capacity or in judicial independence directly. One such related problem was the low level of judicial culture in the states. The judicial culture in Poland and Romania during the accession period was poor, as in most post-communist countries, where the judiciary had more a role of a marionette. Judges in Poland got used to taking decisions in a formalistic manner, referring only to internal legislation (not including the Constitution), without giving a proper evaluation of the cases according to existing social values and international standards.⁹³ According to the statistics, only 20 percent of the court decisions in Poland referred to the constitution of Poland or to international law, or EU law particularly.⁹⁴ It was a deep problem because the new generation of lawyers was taught in the very same manner. The reason could also be the narrow scope of jurisdiction of the Constitutional Court of Poland. For instance, in the Czech Republic, where the latter had much broader powers, the culture of taking formal decisions was overcome much faster. A more progressive way of taking decisions by the Polish judges would change the perception of the whole judiciary.⁹⁵

2.9 Cooperation and Verification Mechanism

⁹² Regular Report from the Commission on Poland's Progress Towards Accession, 13/10/99, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/poland_en.pdf (last access 26 Marc 2013).

⁹³ Piana, D. 2009. The Power Knocks at the Courts' Back Door Two Waves of Postcommunist Judicial Reforms. *COMPARATIVE POLITICAL STUDIES* 42 (6):816-840.

⁹⁴ *Id.*

⁹⁵ *Id.*

Because of complying with the criteria not fully, Romania was the first country towards which the Cooperation and Verification Mechanism (CVM) was applied after accession to the Union. The mechanism pointed to some benchmarks which Romania should achieve, otherwise a safeguard clause could be applied.⁹⁶ The main benchmarks of the CVM were pointing to low level of accountability of the Supreme Council of Magistrates which influenced the transparency of the work of the judiciary generally, it also pointed to the high level of corruption.⁹⁷

In order to deal with the problem of transparency in the work of the judiciary, under CVM, Romania provided the unification of jurisprudence. An Action Plan was adopted by the Supreme Council of Magistracy. The legislation had to ensure that the jurisprudence of courts was consistent with each other and with the rulings of the High Court of Cassation and Justice. Previously the Supreme Court had issued the ruling in contradiction with the practice of the Constitutional Court,⁹⁸ judgments which were binding for all courts.⁹⁹ The legislator proposed in the law to provide an “appeal in the interest of law,”¹⁰⁰ which gave the possibility to appeal when the rulings of courts did not correspond to each other.¹⁰¹ In order to improve access to the courts’ jurisprudence, the High Court of Cassation and Justice started issuing

⁹⁶ “The Commission may apply safeguard measures based on Art 37 and 38 of the Act of Accession” if the latter won’t comply with the CVM benchmarks (European Commission 2006e: Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, C(2006) 6569, Brussels).

⁹⁷ Commission decision of 13 December 2006 Establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (notified under document number C(2006) 6570) (2006/929/EC), Official Journal of the European Union, L 354/58, 14 December 2006.

⁹⁸ Open Society Institute. EU accession monitoring program (Budapest). 2001. Monitoring the EU accession process : judicial independence : country reports, p 364.

⁹⁹ Constitution of Romania, Art. 145.

¹⁰⁰ Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession /* COM/2007/0378 final */, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0378:FIN:EN:HTML> (the last access 26 March 2013).

¹⁰¹ Such amendment also took place in the legislation of Ukraine. Recently the Supreme Court got the power to look through the case on the basis of the new findings if there was inconsistency in the rulings of the courts noticed by the applicant. (Constitution of Ukraine).

digests; leaflets with the case law of the Court of Appeal also became available to public.¹⁰² Among the positive steps was also the provision of training programs by the National Institute of Magistracy.

2.10 During the second flow of the reform

The main goal of fighting corruption was not reached. The Romanian Minister of Justice, Macovei, initiated the creation of the independent institutions that would fight corruption. The European Commission was happy to support such measures as the number of investigations increased considerably. However, such institutions only undermined the efficiency of the government, moreover those who were working for the institutions were politicized themselves on and off.¹⁰³

There are different views about the CVM or “post-accession conditionality”¹⁰⁴ mechanism. Despite the fact that the CVM measures got public support, “the national governments, for which the mechanism was specially designed, have not managed to meet the CVM benchmarks.”¹⁰⁵

2.11 Criticism of the Judicial Reforms in Poland and Romania

Some authors express their critical points of view about EU criteria for accession, also called the Copenhagen criteria. Mendelski in his critique recalls the works of Hammergen, Jensen and Heller and determines the EU approach as «non-complementary, apolitical,

¹⁰² While in Ukraine the Power of the Supreme Court to give recommendations on taking decisions in certain type of cases was restricted according to a new law.

¹⁰³ C, Dallara, and Baracani E. *op.cit.*

¹⁰⁴ Eli Gateva, Post-Accession Conditionality Support Instrument for Continuous Pressure? No. 18 | October 2010, Working Paper KFG: the Transformation Power of Europe.

¹⁰⁵ Piana, D. *op. cit.*, p 7.

technocratic, destined for failure in the countries applied». ¹⁰⁶ Pedro C. Magalhaes in his article shows doubts about the ability of the European Union to influence considerably the situation with the judiciary in the post-communist countries. In such countries politics are strongly connected with the judiciary, thus, influencing only the judiciary is not enough.

Martin Mendelski criticized the methods which the European Commission approved and supported. For instance, the Commission highly approved the increase in the salaries of the judges but as the World Bank Studies show “transparency in the level of salary levels and structures are apparently more important than the levels and structures themselves”. ¹⁰⁷ Changes brought to the Law on Judiciary in 2003, after which the High Court of Cassation and Justice got the power to rule on all appeals, caused an extraordinary backlog of cases. Such decisions were taken often by the Romanian politicians as in the end they are those who decide. In Romania, the way the state complied with the requirements of the Union was totally dependent on the political actors. For instance, Stanoiu, who was in power after the accession, did not invite civil society and judicial associations to participate in the reform. ¹⁰⁸ While the Minister of Justice. Macovei strongly encouraged the participation of civil society. ¹⁰⁹

Some authors also came to the conclusion that judicial independence does not exist and thus cannot be achieved. Larkins in his work points out that “impartiality, insularity, and scope of authority of courts not only are extremely difficult to measure in concrete political systems, but also come in different combinations and are by themselves insufficient to guarantee an independent judiciary.” ¹¹⁰

¹⁰⁶ Mendelski, and Martin. 2011. *Rule of Law Reforms in the Shadow of Clientelism: The Limits of the EU's Transformative Power in Romania*.

¹⁰⁷ *Id.*, p.9.

¹⁰⁸ *Id.*

¹⁰⁹ During the accession process she was responsible for the implementation of the judicial reform in Romania in order to comply with the membership criteria.

¹¹⁰ Magalhães, Pedro C. 1999. *The Politics of Judicial Reform in Eastern Europe*. Comparative Politics 32 (1):43-62.

The reason for the EU measures being ineffective could be a deep “clientelism problem”¹¹¹ in the post communist states. The EU does not have the power to change those who are ruling the state and this makes the problem of implication of the EU law even harder to resolve. Clientelism is not dangerous by itself. Its danger depends on the interests and aims of those who apply clientelism.¹¹² In most cases, clientelism in Romania is not aimed at strengthening the rule of law. Most likely, as long as the important decisions taken in order to provide the judicial independence can be blocked by the politicized Constitutional court, there will not be any real changes brought. New approaches should be applied towards the judiciary but the ones who are able to do that are the old powers, who are not really interested. There are many articles that pay attention to the post-communist reality that strongly influences the reform of judiciary at present.

The Romanian and Polish experience has shown that too much depends on the political situation in the state. The “[c]reation of the rule of law is a complex process in which models cannot simply be transplanted from abroad.”¹¹³ It is controversial whether the measures initiated from such a distance as the EU from the state can be effective when the internal actors can always find a way to hide the things which should not be shown to the Commission. Moreover, with the money which the Union gives for providing the rule of law in the state, many negative things can be done under the veil of the rule of law. One of the judges in an interview with Mendelski claimed that the “judicial system of Romania was destroyed from inside by the political reforms”.¹¹⁴ Even if there is a good for the providence

¹¹¹ Mendelski, and Martin. 2011. Rule of Law Reforms in the Shadow of Clientelism: The Limits of the EU’s Transformative Power in Romania.

¹¹² *Id.*

¹¹³ Mendelski, Martin. 2011. Romanian Rule of Law Reform: A Two-Dimensional Approach. p17

¹¹⁴ *Id.*

of the rule of law legislation, the Constitutional Court can almost always easily determine as unconstitutional anti-corruption legislation.¹¹⁵

Despite the criticism, some aims were put in order to achieve at least some judicial independence in Poland and Romania. Most results were reached in the sphere of judicial capacity and not judicial independence, as to provide for the latter was much more difficult and internal changes in the countries should have taken place before in the countries, particularly in the political situation. However, improvement in financing of courts, in the courts' management, computerization of the courts during the first years of the reform, was already not little. Moreover, after accessing the Union the states did not stop to reform their judiciary. In Romania they had to comply with the CVM and to move towards elimination of corruption and limiting the power of the executive towards the judiciary. Poland also had to continue the fight with corruption and to improve the speed of the judicial proceedings. Thus, access to the Union was not the end, it was rather the start of the continuous judicial reform which took place after the long communist past.

¹¹⁵ For instance, when the Constitutional Court of Romania declared unconstitutional the law on the National Integrity Agency.

Conclusion

Poland, Romania and Ukraine are the countries with the similar past. Two of them has already entered the Union and one of them, which is Ukraine, has an aim of becoming a Member State.

European Union because of complications of its enlargement process and also the enlargement of the scope it is dealing with also complicated the rules for the accessing members. In order to insure that the entering state will not only comply with the *acquis communautaire* but also correspond to other standards the Copenhagen criteria was created and from that time accessing states have also complied with the number of other requirements one of which was the requirement of the independent judiciary. Although there were no particular demands put in the criteria but according to the reports of the Commission the latter concentrated on: institutional independence, independence of the judges and the financial independence of the judiciary.¹¹⁶ During the accession period Poland and Romania in order to comply with the criteria had to reform their judiciaries. .

The Commission observed the compliance with the criteria by issuing the regular reports and guidelines. According to the latter judicial reform in Poland and Romania moved in similar ways. During the first period of the reform most results were reached in the sphere of judicial capacity. The first positive step was the system of automatic assignment of the cases. Computerization, trainings an increasing the number of managerial personnel also brought some improvements to the judiciary. The next step was meant to bring the independence of the judiciary from other branches and inside judiciary itself.

In both Romania and Poland judiciary was highly dependent from the executive, With the financial power centralized in the hands of executive the latter was really powerful. In the

¹¹⁶ Kochenov, Dimitry. *EU enlargement and the failure of conditionality : pre-accession conditionality in the fields of democracy and the rule of law* / Dimitry Kochenov, European monographs: 59: Austin [etc.] ; Alphen aan den Rijn : Wolters Kluwer Law & Business, c2008, p.257.

countries compared the body representing judiciary suffered from the lack of powers in comparison to the executive. The process of appointment and promotion was criticized more in Romania than in Poland. In Romania the executive was highly involved in the procedure of appointment and thus the principle of independence was infringed. Commission put under the question reasonableness of the three year long period of being as assessor in the Polish courts before becoming a judge-, Commission also criticized the absence of the separate procedure of promotion.

The Commission in the reports and thus the judicial reforms in general were aimed at implementing the system of training of the judges according to EU standards. The aim was partly reached in both of the countries.

In both of the countries the Minister of Justice had the power to remove the judge from the office however in Poland this could be done only after the motion of the collective judicial body. Thus the procedure of removal in Poland was more satisfying.

The existence of the four levels of judiciary in Romania was criticized as it does not correspond to EU standards where only two instances prevail. Existence of more levels complicates the procedure.

Creation of the position of the court manager was supported by the Commission and the latter generally pointed to the positives of involving the managerial personnel into the judiciary.

In the relationships between the courts it was common in the post-soviet countries to have informal contacts. At the very same time the judges at both countries were not eager to cooperate with each other officially.

During the accession the countries had also to harmonize the jurisprudence of the courts.

Both of the countries had to deal with the high level of corruption and the low level of public trust. Commission did not give any particular recommendations on how to fight the corruption; it rather supported a “central integrated strategy”¹¹⁷ provided by the governments of the states. Other problems related to independence of judiciary where the lack of judicial culture, clientelism.

The reform was highly criticized; many scholars claimed that the latter was totally ineffective. The reform of judiciary in order to comply with the accession criteria failed to reach the goals. The reason could be the lack of the deepness of research made by the Commission before picking up the strategy, or the deepness of the problems which could not be overcome even in decades. The questions that arose were: whether the accessing criterion in the sphere of judiciary was needed, whether the letter can be effective and to what extent?

In case of Ukraine the way of reform was under the supervision of the Venice Commission which is the body of the Union. I wanted to compare the ways towards the judicial independence suggested by different European bodies. There were some differences as the aims of the both institutions were slightly different and the Venice Commission could only give its opinion which is not obligatory at all while the European Union had the right to decline the access to the Union. EU by putting such requirements before the accessing states is aimed at making the legal system existing in the state correspondent to the EU standards. It is important to insure the capability of the state to cooperate permanently with the EU institutions and other States on the basis of EU law. Thus the Union while paying attention to the length of court proceedings did not put much attention to such problems as the enforcement of the judicial decisions because it was more related to the sphere of human rights. ¹¹⁸Problems with the judiciary to which the Venice Commission pointed in case of Ukraine were similar to those which Poland and Romania struggled with, i.e., high

¹¹⁷ Commission, European. 1999. Regular Report on Poland's Progress Towards Accession.

¹¹⁸ However, now with the implementation of the Charter of Human Rights the situation could be different.

involvement of executive, low level of computerization, complicated system of courts as well as in Romania, low level of financing the judiciary, weakness of training of the judges, high involvement of bodies members who were involved into politics. (High Council of Justice, Qualification Commissions of Judges, High Judicial Administration). The main feature of the judiciary in Ukraine was its high level of politization.

. In case of the Romania and Poland more success during the reform of judiciary was reached because of more financial support from behalf of the Union. The question remains whether the measures suggested by the European bodies can be effective in the states with such features as Poland, Romania and Ukraine? I came to conclusion that they can be effective only partially, but in order to reach some bigger results a more active and interested in EU integration process force is needed inside the country.

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