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Committee on Legal Affairs and Human Rights

Judicial Corruption: urgent need to implement the Assembly's proposals

Extract of minutes of the hearing held in Helsinki on 27 May 2014

Rapporteur: Mr Kimmo Sasi, Finland, EPP/CD

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AS/Jur (2014) 19
AS/Jur (2014) 19 Addendum (English only)

Hearing with the participation of:

Sir Nicolas Bratza, Advisory Committee, European Human Rights Association, Strasbourg, former President of the European Court of Human Rights

Ms Monica Macovei, MEP, former Minister of Justice of Romania, Bucharest

The **Chairperson** welcomed the speakers.

The **rapporteur** thanked the European Human Rights Association (EHRA) for having prepared a background document on "Judicial corruption in Europe. Extent and impact", which would feed into his report. He stressed that judicial corruption undermined the very core of the rule of law, one of the Council of Europe's fundamental values, and recalled his previous work on this subject leading up to Resolution 1703 (2010). He deplored the fact that key recommendations made by the Assembly in this resolution had to date not been implemented and asked for the Committee's views on how much emphasis should be put on the perception of judicial corruption, as opposed to specific allegations of corrupt practices in member states.

Sir Nicolas focused on the impact of corruption on the protection of the fundamental human rights, and especially the lack of impartiality and independence of the courts required by Article 6 of the European Convention on Human Rights. He stressed that the lack of independence or impartiality often appeared to originate in some form of corruption in the broad sense, i.e. "the abuse of entrusted power for private gain". However, as it was difficult to obtain solid evidence to confirm that a decision of a tribunal was influenced by acts of corruption, the Strasbourg Court had been cautious about attributing a lack of independence to corrupt practices, preferring to confine itself to the conclusion that the necessary independence was lacking. Judicial corruption led not only to unfair trials, a distortion of the principle of equality of arms, the undermining of the presumption of innocence or deliberately protracted proceedings, but also puts at risk other fundamental rights. Sir Nicolas welcomed the Assembly's initiative and presented the document prepared by EHRA in brief, stressing the lack of accessible, consistent and comprehensive information on the implementation of national laws on judicial corruption (the full text of Mr Bratza's speech is available with the Secretariat).

Ms Macovei recalled how, as Minister of Justice of Romania, she helped set up a dedicated anti-corruption prosecutor's office. The first high-level "target" of its investigation was the Vice-Prime Minister of her own Government. The expectation had been that this office would "go after the opposition". But the office was kept going thanks to the influence of the EU Commission and other European partners. A corrupt political

* Extract of minutes declassified by the committee on 23 June 2014.

class does not want an independent, non-corrupt judiciary. Judicial corruption is the worst kind of corruption as it is the courts' responsibility to clean up other bodies. It turned out that the recommendation to give judges full independence, high salaries and life tenure was not sufficient. Care must be taken to whom such power shall be entrusted. Similarly, the creation of high judicial councils giving the judiciary the power to govern itself did not fulfil the expectation that this would lead to self-cleaning; instead it sometimes led to the corporatist defense of self-interests. Some judges even reject the unification of the case law as a violation of their independence, resulting in unpredictable outcomes. The Minister of Justice, when exercising disciplinary powers, is at least accountable to voters, contrary to judicial councils. In Romania, increased pressure on corrupt judges has led to increased "prices" and more sophisticated methods to avoid detection. She advised to vet every judge carefully before their appointment or promotion, to unify the case law to facilitate the detection of unusual decisions, to improve the publicity of judgments and the quality of the reasons given, and to eliminate corrupt judges from the system by dismissing them outright and not just reducing their salaries. A discussion ensued with the participation of **Mr. Fabritius** (who thanked Ms. Macovei for the rather grim picture she painted of the situation in Romania and asked if this should prevent Romania from joining the Schengen system, and asked her what she thought of the recent initiative to exempt MP's from criminal liability for bribery), **Mr. Diaz Tejera** (who noted that judges were also subject to undue pressures from other judges, and from the media; corruption could also be caused by the desire to become famous), **Mme Ameur** (who noted that the debate in Morocco focused on the independence on the judiciary from the political authorities), **Mr. Chope** (who asked whether such an alarming situation would allow the EU to proceed with the European arrest warrant, citing the case of a Croatian businessman, and asked whether transparency of the European Court of Justice could benefit from the possibility of dissents, as in the Strasbourg Court.), **Mr. Le Borgn'** (who agreed with the point made by Mr. Diaz Tejera on some judges' greed for media attention and asked to what extent judges and their families needed protection from physical threats), **Mr. Gross** (who asked Mr. Bratza what could be done to reduce pressures on younger judges and thanked Ms. Macovei for her openness), **Mr. Sasi** (who asked what would be an optimal salary level for judges, and what importance should be given to the perception of corruption), **Ms. Kapitanovich** (who stressed that the war in Bosnia and Herzegovina was not a civil war, but an aggression by Serbia).

In reply, **Ms. Macovei** stressed that whilst she stressed the example of Romania, which she knew best, similar problems existed in many countries in central and eastern Europe (e.g. in the Balkans, where she had worked as a consultant after the civil war) for example. Romania at least had a functioning mechanism to prosecute corrupt practices, though there were still attempts to abolish the special prosecutor's office, which continues to investigate representatives of the current authorities. Romania should definitely be allowed to join the Schengen system, as there had been no problems since 2007 with regard to the Schengen Information System. She acknowledged the existence of media pressure on judges, who should be able to withstand such difficulties, which come with the job. The surprise attempt to exempt MP's and certain senior officials from criminal liability for bribery, motivated precisely by the fact that the system works, was foiled by the Romanian constitutional court. She considered the European Arrest Warrant as a useful instrument to fight organised crime. Such international cooperation increased "peer pressure" on judges to work more correctly and to provide better arguments. Regarding the Court of Justice of the EU, she did not think that the lack of dissenting opinions made it any more prone to corrupt practices. She appealed to more countries to follow the Romanian example of robustly prosecuting corrupt practices on all sides of the political spectrum. The Romanian President continued to support the independence of the judiciary. Regarding the need for protection, no cases of physical threats against judges were known to her in Romania, but this could be different for example for judges dealing with mafia cases in Italy. There was a clear need for requiring judges to declare their assets, which would also do no harm in low-corruption countries. Finally, she apologized to Ms. Kapitanovich for referring to the post-conflict situation in the Balkans in unclear terms.

Mr. Bratza shared some of Mr. Chope's hesitation regarding the European Arrest Warrant, some cases showed that there are problems but he agreed with Ms. Macovei that there were considerable benefits too. As to dissenting opinions, these helped avoid unclear compromise formulas, in his experience. The drawback was the need to disclose every judges voting behaviour, which could lead to pressures. However the nine-year, non-renewable term of office helped to insulate judges from any such pressures. A problem could arise if judges did not yet reach retirement age after their 9 years in Strasbourg. The Committee of Ministers had called on States to take action. An example to follow could be the British practice of "secondment" with the possibility of return to a judges' previous post. Finally, he regretted that the Strasbourg Court, under his own presidency, did not discuss a violation of Article 6 in a case in which a newspaper had been found guilty of libel in a series of cases in which the same judge was involved repeatedly in cases brought by the same politician.

Ms. Telbis, the Secretary General of the EHRA, referring to research done in preparation of this hearing, stressed that enormous differences existed between countries, as regards disciplinary powers, judges'

salaries (which did not seem to have a decisive influence on corruption levels) and the perception of corruption by the general population (based on surveys by Transparency International).

The **Rapporteur** thanked the experts and the committee for the excellent discussion and noted that he would go ahead, in the report he was preparing, with “naming and shaming” countries where the independence of the judiciary needed to be upheld.

(i) The role of national parliaments in strengthening judicial capacity and accountability

Hearing *co-organised with the Committee on Rules of Procedure, Immunities and Institutional Affairs*

Statement by Ms Anna-Maja Henriksson, Minister of Justice of Finland

The **Minister** stressed that corruption, including in the judiciary, was a worldwide problem and many actors, including parliaments, could counteract it. Parliaments were empowered to enact legislation establishing specific rules. Anti-corruption legislation could impose sanctions, set up monitoring procedures, allowing for access to information on actions of all decision-makers, protect whistle-blowers, establish rules on party funding and electoral campaigns, and forcing political actors to declare their resources. Parliaments also had oversight mechanisms of their own, through their committees, auditors or ombudsmen. Thus the fight against corruption depended to a large extent on the commitment of parliaments, but the judiciary and public administration should also be involved in this process. In executing existing legislation, governments should investigate the need to amend it. In Finland, a working group had been appointed by the Minister of Justice on trading in influence, which was working on draft legislation on this form of corruption and was considering refining legislation on international bribery. The Minister also stressed the role of citizens and civil society in counteracting corruption by monitoring decision makers, which was a vital element in a state based on democracy, the rule of law and fundamental freedoms. The EU should also promote these values and the European Commission had recently published a report on how to strengthen the rule of law in EU member states. The Minister concluded by pointing out the tremendous responsibility of parliamentarians in setting standards on combating corruption.

Hearing with the participation of:

Mr David Kosař, Professor of Law, Masaryk University, Czech Republic

Mr Kaarlo Tuori, Professor of Jurisprudence, University of Helsinki, Finnish member of the Venice Commission

Mr Kosař focused on the role of parliaments in strengthening judicial accountability and referred to a research project on the Czech Republic and Slovakia. He indicated that judges could go astray in two ways: their selection of cases may not be in the interest of society or could have moral problems. For example, in Central Europe judges use various techniques to avoid delivering judgments, such as deciding only on procedural issues or splitting cases into different files. Mr Kosař further elaborated on the notion of “judicial accountability”, in the broad and narrow sense. In the broad sense, judicial accountability was a set of standards for evaluation of the behaviour of judges, and in the narrow sense – it was seen as an institutional relationship or arrangement, in which a judge could be held to account by a forum. National parliaments could use only very few mechanisms related to judicial accountability in the narrow sense, such as “sticks” like impeachment, retention, disciplinary motions, complaints, reassignment, relocation; “carrots” – like promotions, secondments, temporary assignment to the Ministry of Justice or appointment to the position of court president or dual mechanisms. These were normally employed by the judiciary’s self-governing bodies. However, a plethora of mechanisms to ensure judicial accountability in the broad sense could be used by national parliaments: *ex ante* mechanisms (appointment, codes of judicial conduct); transparency mechanisms (publication of all judgments, recording of trial proceedings, wide distribution of vacancies within the judiciary, publication of judicial statistics, etc.), institutional measures (creating or abolishing courts, introduction of lay judges, transfer of jurisdiction, etc.), statutory overrides and budgetary measures or elaborating rules on appointing court presidents, which had a major say in the career of younger judges. To conclude, Mr Kosař stressed that, while the judiciary had emancipated from the executive and the legislature, namely through the creation of high councils of judges in countries joining the EU and the Council of Europe, now parliaments were fighting to take back control, since the control by judicial councils delivering “internal justice” had not been effective.

Mr Tuori elaborated on three topical issues: legitimacy, independence and accountability of the judiciary. All three were interrelated. While the soft law of the Council of Europe rightly focused on judicial independence as a starting point, it underestimated the two other elements, and this approach had now been changing slowly, with the opinions of the Venice Commission putting more and more emphasis on accountability. As

regards legitimacy, the judiciary was not indeed rooted in direct democratic legitimacy, but it should be rooted in an indirect one, coming from the democratic legitimacy of the legislation; otherwise, it would have been an expert body specialised in an impartial enforcement of law. As regards independence, its primary function was to guarantee the impartiality of enforcement of law and to maintain indirectly the legitimacy of the judiciary. Functional independence meant that courts and judges should be free from any inappropriate external influence, also from that of the parliament, with the exceptions such as granting amnesty, if provided by the constitution. Institutional independence was difficult to define and had various sub-dimensions - in relation to judicial appointments, administration of judiciary, budgetary positions, etc. In European countries the focus was put on appointments and on the issue whether parliament and government should be involved in this process. According to the Venice Commission, parliament should not appoint judges, as this would politicize the whole process. In Western Europe and also in Finland, the executive played the main role in this respect. The Venice Commission had recommended establishing judicial councils, dealing with the administration of the judiciary, to Central, Eastern and Western European countries. As regards budgets, the judiciary itself should have a certain role in this area, although parliament was taking the final decision. There was a great variety of systems of institutional independence in Europe and the Committee of Ministers had showed its understanding of this variety. Concerning judicial accountability, it was a difficult concept. It could be legal – judicial or disciplinary - or public – i.e. before public opinion. Some countries granted full immunity to judges, some granted none, while others granted a functional one. According to the Venice Commission, limited functional immunity was justified. It should be limited to lawful acts performed in carrying out judicial functions and should not cover corruption, trafficking, bribery or other crimes not linked to judicial functions. According to the Venice Commission, parliament should not be allowed to lift judges' immunity; this should be the prerogative of the judicial council, which should also be competent to use disciplinary measures. Judicial accountability required transparency, open reasoning and media coverage. Parliaments could have a role here, by representing public opinion, by fighting corruption and bringing this issue to public attention through open debates or parliamentary committees' reports on the state of corruption. There should be no obstacles for anti-corruption authorities to report to parliament. However, only general issues on corruption should be debated in parliament and not individual cases, as this would endanger public confidence.

A discussion ensued with the participation of **Messrs Maruste** (who asked Mr Tuori about the legitimacy of constitutional courts' judges appointed by parliaments), **Cilevičs** (who stated that the independence of judges of constitutional courts was similar to that of ombudsmen and similar bodies and wondered who should be the supreme arbiter in controlling judges, in view of the judiciary's corporate solidarity), **Diaz Tejera** (who wondered about the borderline between law and politics in a democratic country), **Lord Tomlinson** (who stated that there had been too much discussion on negative aspects without noticing the bright sides of the situation) and **Ms Tatkakishvili** (who wondered about the accountability of politicians towards the judiciary, in the context of the situation in Georgia, where the high council of judges had recently been replaced, and whether the high council should be empowered to seize the constitutional court).

Mr Kosař replied to Mr Diaz Tejera that it was extremely difficult to define the borderline, although there were certain techniques in cases concerning corruption, such as dismissal of judges without a reason or demoting them. Concerning the question of Ms Taktakishvili, he agreed that the judicial council could refer to the Constitutional Court for the revision of laws. To Mr Cilevičs – he replied that corporate solidarity existed in all professional circles and - to Lord Tomlinson – that the present debate took place in an internal critical forum and that scholars always tended to focus on problems that need to be solved.

Mr Tuori stated that the appointment of Constitutional Court's judges was a special case, in which the borderline between law and politics was difficult to draw. Procedural arrangements were needed, such as qualified majority requirements for the appointment of judges, like in the case of other independent bodies. As regards appointments by the council of judges, the latter should not be composed merely of judges, but also of representatives of civil society and legal community, to avoid the risk corporatism, according to the Venice Commission.