



## **Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights**

### **Corruption as a Threat to the Rule of Law**

#### **Submission of the International Commission of Jurists**

*March 2013*

#### **I. Introduction**

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

The International Commission of Jurists welcomes this opportunity to present written submissions to the Committee on Legal Affairs and Human Rights, in advance of the Committee's hearing on 19 March 2013, on the topic of corruption as a threat to the Rule of Law.

This paper addresses the links between protection against corruption and preservation of the Rule of Law. It does so with particular reference to the judicial system, which, if it operates as it should, acts as a crucial line of defence against the arbitrariness that corruption entails. It considers first, how corruption or allegations of corruption in the judicial system can corrode the Rule of Law, and analyses the causes of judicial corruption and the safeguards necessary to protect against it. It considers the need to protect against politically motivated allegations of corruption against judges, that can themselves damage judicial independence and the Rule of Law. Finally, the paper considers the significance of an independent judiciary in combating corruption in the wider society, through the criminal justice system. The paper addresses these issues with reference to country examples, with particular emphasis on two countries where the ICJ has recently conducted assessments of the judicial systems, the Russian Federation and the Republic

of Moldova, but also taking into account the experiences of countries in other parts of the Council of Europe region.

In many European states, corruption of the judiciary is a real and serious problem. For example, in Russia, in its 2010 report, the ICJ found that "the poor state of judicial independence is clearly facilitated by a legislative and administrative framework that fails to protect judges from undue influence by State or private interests..." and that "threats to judicial independence are reported to be particularly acute in cases where powerful political or economic elements have an interest in the outcome of a case."<sup>1</sup> In Moldova, a 2012 report of the ICJ found widespread distrust of the judiciary as prone to corruption, and open to undue influence from both public authorities and private persons and entities.<sup>2</sup>

Serious concerns regarding judicial corruption have been expressed by Council of Europe and European Union authorities in regard to several other Council of Europe Member States notably Romania, Bulgaria and Hungary. In other European states, for example in Italy, although the judiciary itself has remained relatively free of corruption, the judicial system has not succeeded in rooting out corruption in other sectors of the society.

The problem of judicial corruption needs to be addressed through reforms of the judicial system, as well as by measures to enhance the quality, education and status of the judicial profession. The difficulty is, that in seeking to combat judicial corruption, governments may weaken and undermine the independence of the judiciary, in turn making it more susceptible to corrupt influences, from government or elsewhere. In some systems, the judicial disciplinary process is also open to manipulation by outside interests, and becomes a means to remove or threaten those judges in the system who do act independently.

Effective prevention of corruption, in the judiciary or in other institutions of the State, requires much wider reform than specific anti-corruption measures. It requires both institutional structures and cultural conditions that foster a strong and independent judiciary. Such a judiciary can resist pressure from either the government or the private sector; has an interest in maintaining the prestige of the judiciary by ensuring the highest standards of integrity; can act to preserve these standards where necessary through self-governing mechanisms and the disciplinary system; and can decide impartially and impose sentences fearlessly in corruption trials.

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<sup>1</sup> ICJ, *The State of the Judiciary in Russia*, 2010, p.7.

<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Russia-indepjudiciary-report-2010.pdf>  
See further, regarding manipulation of the judicial disciplinary system to influence the judiciary, *Securing Justice: the Disciplinary System for Judges in the Russian Federation*, 2012. <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf>

<sup>2</sup> ICJ, *Reforming the Judiciary in Moldova: Prospects and Challenges*, 2012, p.9

[http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/ICJ\\_SFM\\_Report\\_Final.pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/ICJ_SFM_Report_Final.pdf)

Reform of the judiciary is only one aspect of the task however. Judicial reform will not in itself be effective if other institutions of the legal system, such as the police or the prosecution, remain corrupt. In combating corruption in the wider society, a strong and independent judiciary is therefore important, but it is only one part of the solution. The criminal justice system, even if it operates effectively, is not in itself enough to eliminate an entrenched culture of corruption. Preventive, as well as punitive, measures must be taken, to establish institutions, systems and social conditions that guard against arbitrariness and protect human rights.

## **II. The Rule of Law and Prevention of Corruption**

### ***The meaning of the Rule of Law***

One of the principal aims of the International Commission of Jurists since its inception has been to promote and protect the Rule of Law. ICJ Declarations adopted since the 1950s seek to elucidate the meaning of the Rule of Law and to spell out the practical measures needed to protect it. At the International Congress of Jurists meeting in Athens in 1955, the ICJ identified two crucial aspects of an effective Rule of Law. The first is that the Rule of Law is inextricably linked to the protection of human rights – without such protection, the rule of law does not reliably protect the individual. The second is judicial independence and impartiality. The “Act of Athens” agreed by the International Congress of Jurists, 1955, states as one of the four elements of the Rule of Law the principle that “[j]udges should be guided **by the Rule of Law, protect and enforce without fear or favour and resist and encroachments by governments or political parties on their independence as judges.**” The Rule of Law therefore, requires a judiciary that is uncorrupted; and an uncorrupted, impartial judiciary is necessary to protect the human rights of those that come before it.

This idea of the Rule of Law was further developed in 1959 in the Declaration of Delhi which recognises that “the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed ... to safeguard and advance [human] rights.” It “[r]eaffirms the principles expressed in the Act of Athens adopted by the International Commission of Jurists in June 1955, particularly that **an independent judiciary and legal profession are essential to the maintenance of the Rule of Law** and to the proper administration of justice.”

More recently, in the ICJ’s 2008 Geneva Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, it was stated that “the integrity of the judicial system is central to the maintenance of a democratic society. Impartiality of the judiciary requires that cases be decided only on the basis of lawfully and fairly obtained evidence and on the application in good faith of the law, free from any

extraneous influences, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.”<sup>3</sup>

The ICJ has therefore long seen corruption, in particular corruption in the legal and judicial system, as corrosive of the Rule of Law, but also as undermining human rights. In its most detailed declaration on the issue, in 1998, it concluded that “fighting corruption ought to be part of the fight for human rights and the rule of law which is central to the ICJ mandate. Legislative and other measures are required to combat corruption and impunity of its perpetrators.”<sup>4</sup> The ICJ Policy Framework for Preventing and Eliminating Corruption and ensuring the Impartiality of the Judicial System was developed specifically in recognition of the “negative effect of corruption on the maintenance of the rule of law and the legal protection of human rights”.

### **III. Judicial Independence and Corruption in the Judiciary**

#### ***International Standards***

In international standards on judicial independence, prevention of judicial corruption is an implicit condition of an independent and effective judiciary. The Basic Principles on the Independence of the Judiciary state in Principle 2 that: “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, **without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.**” The Bangalore Principles of Judicial Conduct similarly state that “a judge shall perform his or her judicial duties without favour, bias or prejudice”.<sup>5</sup>

At a European level, Recommendation R (94) of the Committee of Ministers on the Independence, Efficiency and Role of Judges, states in similar terms that “in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for

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<sup>3</sup> Principle 12 of the ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, see, Legal Commentary to the ICJ Geneva Declaration, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>

<sup>4</sup> ICJ Conference on the Rule of Law in a Changing World, 1998, Cape Town, South Africa, in *Congresses and Major Conferences of the ICJ*, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/CONGRESS-BOOKLET.pdf>

<sup>5</sup> See also, The Bangalore Principles of Judicial Conduct, Principles 2.1; The Universal Charter of the Judge, Article 5; Draft Universal Declaration on the Independence of Justice (Singhvi Declaration) Article 2, Collected in ICJ, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioner’s Guide No.1*. <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Procecutors-No.1-Practitioners-Guide-2009-Eng.pdf>

any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner.” (Principle I.2.d)<sup>6</sup>

As regards international standards on combating corruption, the European Corruption Conventions do not specifically address corruption within the judiciary, although they include judges within the general definition of “public officials”. However, the UN Convention against Corruption states, in Article 11, that:

“Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party **shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.** Such measures may include rules with respect to the conduct of members of the judiciary.”

### ***The meaning of judicial corruption***

In its Policy Framework for Preventing and Eliminating Corruption and ensuring the Impartiality of the Judicial System, developed at a conference of the ICJ’s Centre for the Independence of Judges and Lawyers (CIJL) in 2000, the ICJ defined judicial corruption as follows:

“The judicial system is corrupted when any act or omission results of is intended to result in the loss of impartiality of the judiciary.

Specifically, corruption occurs whenever a judge or court officer seeks or receives a benefit of any kind or promise of a benefit of any kind in respect of an exercise of power or other action. Such acts usually constitute criminal offences under national law. Examples of corrupt criminal conduct are:

- bribery;
- fraud;
- utilisation of public resources for private gain;
- deliberate loss of court records; and
- deliberate alternation of court records.

Corruption also occurs when instead of procedures being determined on the basis of evidence and the law, they are decided on the basis of improper influences, inducements, pressures, threats, or interferences, directly or indirectly, from any quarter or for any reason.”

Judicial corruption therefore, may arise from improper influence on the judiciary by private persons, but also by public institutions or public officials acting outside the law. Where the powerful interests lie – in the public or

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<sup>6</sup> See also Recommendation CM/Rec(2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010, Articles 11; 14; 22.

private sectors – may vary in different societies. The safeguards needed to protect against such improper influence from the State are not entirely the same as those needed to protect against corruption from private interests. But both kinds of corruption require a strong and independent judiciary.

### ***The Impact of Judicial Corruption on the Rule of Law***

First and most directly, a corrupt judiciary denies individuals their right to a fair hearing by an independent and impartial tribunal, an internationally recognised human right<sup>7</sup> protected under Article 6 ECHR, that is central to the rule of law. A judge subject to undue influence cannot be relied on to be impartial or to protect equality of arms between the parties to a case. The principles of equality before the law, and of the certainty and predictability of the law, are nullified. Judicial corruption is also likely to undermine the right to an effective remedy for violations of human rights, protected *inter alia* under Article 13 ECHR and Article 2(3) ICCPR. More generally but equally importantly, a judge susceptible to undue influence cannot be relied on to protect other human rights, without which the Rule of Law is meaningless. A judge that can be bribed or influenced by one party or outside interest cannot be relied on to be vigilant against torture of a detainee, or to make the best interests of a child the primary consideration in a custody dispute, or to provide an appropriate remedy for an act of racial discrimination.<sup>8</sup>

The consequence of this unreliability is public distrust in the judicial system. International standards on judicial independence emphasise the importance of the public's perception of judicial integrity and impartiality – judges must not only be impartial, but must be seen to be so.<sup>9</sup> Where the public perceives the judicial system to be corrupt, partial and unreliable, the credibility of the law and the courts to resolve disputes and protect rights is undermined.<sup>10</sup> Judicial corruption is particularly damaging in this sense because, in destroying the integrity of those who should be the very guardians of the Rule of Law, it leads to a significant loss of faith by the public in the rule of law.

Furthermore, where the judiciary is prone to corruption, there is likely to be public mistrust of the idea of judicial independence - since that independence is misused, it becomes equated with freedom to engage in corruption with

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<sup>7</sup> Article 6 European Convention on Human Rights; Article 14 International Covenant on Civil and Political Rights, *inter alia*.

<sup>8</sup> For further analysis of the impact of corruption on the protection of human rights, see the International Council for Human Rights Policy, *Corruption and Human Rights: Making the Connection*, 2009; and Peter Langseth and Oliver Stolpe, *Strengthening the Judiciary against Corruption*, in *Strengthening Judicial Independence, Eliminating Judicial Corruption*, CIJL Yearbook 2000, p.55.

<sup>9</sup> See for example, Bangalore Principles of Judicial Conduct, Principle 3.2: “The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must be seen to be done.”

<sup>10</sup> See, ICJ, *Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System*, in *CIJL Yearbook 2000, Strengthening Judicial Independence, Eliminating Judicial Corruption*.

impunity. The principle of judicial independence is no longer seen as a worthwhile objective, since it serves to inhibit the rule of law, rather than protect it. This may facilitate government attempts to attack or control the judiciary.

#### **IV. Preventing Judicial Corruption**

Preventing and protecting against corruption of judges is part of the wider project of establishing and maintaining a strong and independent judiciary. In a system where judicial corruption has been tolerated, it requires both institutional and cultural change. Legislative reform in itself risks being artificial. For example, in Moldova, an ambitious package of judicial reform legislation has recently been enacted, with the express intention of ending judicial corruption. In its recent report on Moldova, the ICJ found that the legislation and the systems it puts in place have the potential to provide the basis for a strong and independent judiciary. However it warned that, in a country where there was no strong tradition of the Rule of Law and a deep rooted culture of corruption, the legislative reforms risked ineffectiveness in practice, without further measures of implementation including in relation to judicial appointments, training and continuing education, as well as judicial salaries and benefits.<sup>11</sup>

In the Russian Federation, a weak judiciary with a long-standing culture of dependence on the executive, a tradition of judges taking instructions channelled through the judicial hierarchy, in particular through court presidents, and reports of undue influence by powerful economic interests in several regions, is nevertheless governed by laws and by a sophisticated system of regulation which in many other jurisdictions could form the basis for an independent judiciary, free of corruption. Legislation can and should provide for better safeguards against undue influence of judges – and indeed the ICJ has made detailed recommendations in regard to aspects of such legislation – but this can only be the first step in changing practice.

Corruption of a state's judiciary tends to reflect wider cultures and practices in other institutions of State. Where judicial corruption is pervasive in other state institutions, it is difficult to isolate the judiciary from generalised corruption. Reform therefore needs to be focussed not only on the judiciary, but also on other institutions with which it interacts, such as the police and the prosecutor's office. In Moldova, the ICJ found that "some of the deeper problems in the judiciary are symptomatic of wider cultures of corruption and influence in the public sphere."<sup>12</sup>

It is also important that a holistic approach is taken to judicial reform. Raising judicial salaries is sometimes, for example, an important step towards relieving corruption. But following such a measure some years ago

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<sup>11</sup> ICJ, *Reforming the Judiciary in Moldova: Prospects and Challenges*, 2013

<sup>12</sup> ICJ, *Reforming the Judiciary in Moldova: Prospects and Challenges*, 2013, p.12

in Russia, without other steps being taken to reform the system, some experts consider that it only made the situation worse, by further empowering and creating a sense of impunity for those judges who were already misusing their position.<sup>13</sup>

The institutional, practical and educational measures needed to protect against corruption of the judiciary include the following.

### ***Independent Self-Governance of the Judiciary***

Independent self-governing structures for the judiciary are needed not only to protect against executive interference, but also to provide a strong guardian of judicial ethics and integrity, and to apply these values in judicial appointments, promotions, court management and disciplinary proceedings. In Bulgaria, for example, the weakness and lack of independence of the Supreme Judicial Council has been seen by experts as one of the main reasons for the politicisation of the judiciary. There have been allegations of politically influenced appointments to judicial positions, as well as to positions in the SJC, leading to undue influence in cases before the courts.<sup>14</sup> The SJC has failed to defend judicial independence in the context of government attacks, which have alleged corruption of judges critical of the government or to prevent the misuse of the disciplinary system, notably in the recent dismissal of the Chair of the Bulgarian Judges Association.<sup>15</sup>

### ***An independent, fair and transparent system of judicial appointments***

The experience of Bulgaria also illustrates the importance of a transparent and independent appointments process in combating judicial corruption. Recent controversial appointments to the Constitutional Court, in 2012, show how a politicised appointments process can lead to the appointments of judges against whom there are unresolved accusations of corruption.<sup>16</sup>

Appointments of new, highly educated judges with a strong sense of judicial ethics can be one means of changing poor judicial cultures. Although systems of judicial appointment vary widely, European standards stipulate that decision-making authorities in such appointments should be independent, with at least half of its membership composed of judges elected by their peers.<sup>17</sup> In systems where corruption is widespread in the legal and political system, appointments of those with previous experience in the police, prosecution or court administration may lead to the perpetuation of a

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<sup>13</sup> ICJ, *The State of the Judiciary in Russia*, pp.24-25.

<sup>14</sup> NGO letter to PACE on the post-monitoring dialogue on Bulgaria, 21 January 2013

<sup>15</sup> ICJ statement, August 2012, *Bulgaria: ICJ raises concern at dismissal of Judge Todorova* <http://www.icj.org/bulgaria-icj-raises-concern-at-dismissal-of-judge-todorova/>; European Commission, *Report from the Commission to the European Parliament and the Council, on Progress in Bulgaria under the Cooperation and Verification Mechanism*, Brussels, 18/7/2012 COM (2012) 411 final, p.6.

<sup>16</sup> Euractiv.com, *Commission warns Bulgaria over Judicial Independence*, 31 October 2012; NGO letter to PACE on the post-monitoring dialogue on Bulgaria, 21 January 2013

<sup>17</sup> European Charter on the Statute for Judges, para.1.3



culture of corruption in the judiciary. This has been the concern, for example, in Moldova, where a large proportion of judges are drawn from those with five years or more experience in the legal system (for example as a prosecutor). Only a minority of new judges enter the profession through the other available route - a professional course at the National Institute of Justice. Although the system is now being unified to require all candidates to sit a common examination, there remains concern that those with experience in the judicial system may already have absorbed cultures or corruption.<sup>18</sup>

### ***The judicial career and management of the courts – the role of Court Presidents***

Where power lies in the day to day administration of the courts, in particular in the allocation of cases, as well as in judicial promotions and in decisions on pay and benefits, is also crucial to the susceptibility of a judicial system to undue influence. In the Russian Federation, for example, the highly dominant role of Court Presidents in all aspects of the management of the judiciary, including appointments, promotions, disciplinary action and allocation of cases, ensures that the Court President has numerous opportunities to control and influence the judges of his or her court. The ICJ has heard numerous consistent testimonies from judges and lawyers in Russia that Court Presidents act as a channel for inappropriate influence, either from state bodies or powerful non-state interests. Court Presidents in the Russian Federation are themselves political appointees, appointed by the Russian Federation President or on his nomination rather than by any judicial body.<sup>19</sup> There is strong evidence that, where a judge does not comply with the wishes of his or her Court President, the judge may be dismissed through manipulation of the disciplinary process. Disciplinary bodies (“Qualification Collegia”) are highly influenced by Court Presidents in their composition as well as in the mechanics of the disciplinary process and there are reports of undue influence by Court Presidents on their members.<sup>20</sup>

Systems for the random allocation of cases, as well as transparent structures of court management that are within the control of the judiciary, can provide important safeguards against such abuses.

### ***Judicial Education, Ethics and Culture***

Perhaps the key safeguard against judicial corruption, as well as the most ephemeral and the most difficult to establish, is a cadre of judges with a strong sense of judicial honour and the responsibility that comes with judicial power. Judges who have internalised an idea of the judiciary as the guardians of the rule of law, and as the repository of an independent power of the State, equal to that of the executive or legislature, are much more likely to resist undue influence. Judges who live in societies where the office of judge is highly respected and prestigious have a strong interest in

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<sup>18</sup> ICJ, *Reforming the Judiciary in Moldova: Prospects and Challenges*, 2013, Chapter III.

<sup>19</sup> ICJ, *The State of the Judiciary in Russia*, pp.22-23.

<sup>20</sup> *Securing Justice: The Disciplinary System for Judges in the Russian Federation*

preserving judicial integrity. Across the Council of Europe region, the status and value attached to the office of a judge varies widely – in countries of the former Soviet Union, for example, there is still vestiges of the Soviet tradition in which judges were regarded as minor officials. Education, for new judges as well as continuing education for serving judges, is essential to create and sustain a culture of judicial independence and impartiality.

### **Judicial Salaries and Benefits**

Adequate judicial salaries are an essential protection against corruption in the judiciary, though this can be only one element of a more comprehensive reform.<sup>21</sup> Although there may be reluctance to raise salaries of a weak judiciary many of whom are not performing their function impartially or effectively, it is an unfortunate fact that judges who are very badly paid may feel that they have little choice but to accept bribes or dubious gifts. Indeed, this link between judicial salaries and judicial integrity is recognised by international and Council of Europe standards on judicial independence.<sup>22</sup> Low salaries may lead to systemic tolerance of corruption. In its recent report on Moldova, the ICJ was told that low judicial salaries “push judges to the brink” and its report noted that many national experts seemed to tacitly acknowledge that judges could hardly be expected to eschew corruption unless salaries were increased to an adequate level.<sup>23</sup>

In the Russian Federation, by contrast, where judicial salaries and benefits have risen significantly in recent times, this is generally thought to have had, if anything, a negative impact on judicial independence, in the absence of wider reforms of the system. There is a perception that certain wealthy local authorities can “buy” the local judiciary by providing valuable benefits such as housing.<sup>24</sup>

### **Accountability**

Both the judicial disciplinary system, and the criminal justice system, need to respond consistently, effectively and fairly to any acts of corruption in the judiciary.<sup>25</sup> Great care must be taken in this regard, however, as

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<sup>21</sup> Peter Langseth and Oliver Stolpe, *Strengthening the Judiciary against Corruption*, in *Strengthening Judicial Independence, Eliminating Judicial Corruption*, CIJL Yearbook 2000, p.64.

<sup>22</sup> Basic Principles on the Independence of the Judiciary, Principle 7; Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, procedure 5; Council of Europe Committee of Ministers, Recommendation R (94) 12, Principle III.1.b; European Charter on the Statute for Judges, Article 6.1.

<sup>23</sup> *Reforming the Judiciary in Moldova: Prospects and Challenges*, pp.16-17

<sup>24</sup> ICJ, *The State of the Judiciary in Russia*, pp.24-25.

<sup>25</sup> ICJ, *Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System*, in *CIJL Yearbook 2000, Strengthening Judicial Independence, Eliminating Judicial Corruption*. The Policy Framework recognised the need for national legislation to: criminalise conventional acts of corruption; require the disclosure of assets and liabilities of judges and other officers in the judicial system which is then independently monitored; provide for disciplinary or other proceedings against judges, in respect of a breach of a code of ethics, carried out by the judicial system; and provide for disciplinary or other proceedings against court officers consistent with any laws relating to their service.

mechanisms of judicial accountability are often abused to remove judges who act independently, contrary to powerful interests in the executive or the judicial hierarchy. If appropriate safeguards and guarantees of independence are not in place, the disciplinary and criminal justice systems can themselves become instruments of corruption.

This is illustrated for example by the experience in the Russian Federation, where the ICJ has found that judges feel constant pressure to conform to expectations inconsistent with independence, and face dismissal if they do not. Judges who hand down lenient sentences or have a lower rate of authorising pre-trial detention are often suspected of corruption and may face disciplinary action.<sup>26</sup> The disciplinary system is abused to serve the interests of court presidents or the local legal or law enforcement establishment or other powerful political or economic interests.<sup>27</sup>

An effective and fair system of judicial disciplinary action requires (a) independent disciplinary bodies that are not susceptible to undue influence (b) clear grounds and criteria for disciplinary action, consistently applied and subject to a clear limitation period (c) due process in disciplinary action, and the right of appeal to an independent court or tribunal.

In the Russian Federation, for example, the vagueness of the grounds for disciplinary action has created room for wrongful and arbitrary interpretation and has led to inconsistent application of disciplinary sanctions.<sup>28</sup> The ICJ in its recent report on the disciplinary system in Russia found that such "arbitrariness in the interpretation and application of disciplinary action is widespread and of great concern".<sup>29</sup> It also found that lack of due process before disciplinary tribunals facilitated such arbitrariness<sup>30</sup> and that disciplinary bodies ("Qualification Collegia") were insufficiently independent of Court Presidents.

The application of the criminal justice system to the judiciary can be particularly controversial. It is unquestionable that there should be no judicial immunity for crimes of corruption. But in an environment where other institutions of government are also corrupt, there is a risk that criminal or disciplinary proceedings may be applied to victimise judges not favoured by the government, prosecutor's office or other powerful public or private interests.

In some jurisdictions, the law imposes particular safeguards in the prosecution of judges, which require, for example, the consent of a judicial body before an investigation or prosecution of a judge can be pursued.

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<sup>26</sup> ICJ, *Securing Justice: The Disciplinary System for Judges in the Russian Federation*, p.11.

<sup>27</sup> ICJ, *Securing Justice: The Disciplinary System for Judges in the Russian Federation*, op cit.

<sup>28</sup> ICJ, *Securing Justice: The Disciplinary System for Judges in the Russian Federation*, 2012, p.25-27

<sup>29</sup> *ibid*, p.27

<sup>30</sup> *ibid* p.11

These measures can be seen as inhibiting effective prosecution of crimes of corruption amongst the judiciary as they can delay or frustrate prosecutions, and allow time for the destruction of evidence of corrupt dealings. In Moldova, amending legislation has recently been passed lifting the check on prosecution of judges for two particular corruption offences. Previously, investigation and prosecution of a judge had to be pre-approved by the Superior Council of Magistracy. The removal of the requirement for the SCM's authorisation of prosecutions for these crimes of corruption is likely to assist in re-establishing the credibility of the judiciary and may facilitate effective prosecutions for corruption offences in appropriate cases. However there is real concern amongst the judiciary that the measure may lead to abusive prosecutions being pursued by the prosecutor's office, and the operation of the new law will require careful monitoring to ensure that this is not the case.<sup>31</sup>

## **V. The Judiciary as a check against corruption**

A strong and independent judiciary provides one of the most effective checks against corruption in other institutions of State, and is essential to effective enforcement of the criminal and administrative law against corruption. However, where corruption is endemic in the public and private life of a country, the solution needs to be preventative as well as judicial.

The importance of independent judiciaries and prosecution services in pursuing and securing convictions for crimes of corruption can be seen in regard to Italy, where a system of endemic corruption was tackled in the 1990s through high-level investigations and prosecutions which led to high level convictions and should have had a profound affect on the political system. There were an unprecedented number of convictions for crimes of corruption and ancillary offences during this period. In the case of Milan and of the operation "clean hands", the prosecutions were conducted by a specialist, independent and dedicated cadre of prosecutors.<sup>32</sup> Furthermore, all investigations and prosecutions in Italy are carried out in accordance with the principle of mandatory prosecution for all offences.<sup>33</sup> The independence of the Italian judiciary and prosecution service, was essential to the effectiveness of the prosecutions and the principle of mandatory prosecution ensured that trials could not be set aside at the preliminary investigations stage.

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<sup>31</sup> The constitutionality of the measure is currently under challenge before the Constitutional Court, on grounds that it interferes with constitutional protections of judicial independence. See, ICJ, *Reforming the Judiciary in Moldova: Prospects and Challenges*, pp.28-30. See also the recent opinion of the Venice Commission: Opinion no. 698/2012, Amicus Curiae Brief on the Immunity of Judges for the Constitutional Court of Moldova, Adopted by the Venice Commission at its 94<sup>th</sup> Plenary Session, 11 March 2013.

<sup>32</sup> See "Mani pulite: la vera storia 20 anni dopo" di Gianni Barbacetto, Peter Gomez e Marco Travaglio, and its preface freely available at the following website: <http://magistraturaindipendente.it/piercamillo-davigo-mani-pulite-venti.htm>

<sup>33</sup> Article 112, Italian Constitution.

However it is notable that the prosecutions and convictions of the 1990s did not eliminate corruption. Furthermore, the judiciary appears to have been subject to numbers of attacks following their fight against corruption. As highlighted in the last National Integrity System Assessment of 2012 of Transparency International, corruption is still endemic in Italy, although the judiciary represents the last bastion of the rule of law in this respect.<sup>34</sup>

Factors which hamper prosecution of crimes of corruption in Italy include the slowness and inefficiency of the judicial system, due in particular to its lack of resources,<sup>35</sup> coupled with a statute of limitations that continued to run until conviction by a court of last instance. This demonstrates that the political powers, executive and legislative, have also an essential role to play in terms of legislation and administrative practices to tackle corruption.

Similar problems have arisen in other Council of Europe countries, for example in Romania, where corruption trials are sometimes subject to significant delays, and several high-level corruption prosecutions have failed due to the expiry of the limitation period.<sup>36</sup>

## **VI. Conclusions**

A strong and independent judiciary is a necessary condition of preventing corruption in any society. Corruption in the judiciary itself strikes at the heart of the Rule of Law. Eliminating judicial corruption should be seen as an integral aspect of establishing and maintaining judicial independence and impartiality. Preventing such corruption requires much more than law enforcement measures; it requires a strong judiciary, that is institutionally independent of the executive, is subject to independent self-governing institutions and maintains high standards of judicial ethics and education. Corruption in the judiciary also needs to be addressed in conjunction with preventative measures aimed at addressing corruption in other institutions of State.

The Council of Europe has contributed significantly to standard-setting and monitoring on corruption and on relevant aspects of judicial independence and impartiality. It should continue and increase its efforts to provide support and advice to national judiciaries struggling to combat corruption; support judicial reforms that ensure that national legal frameworks governing judicial education, appointments, conditions of tenure, codes of conduct, and

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<sup>34</sup> [http://www.transparency.org/whatwedo/pub/corruzione\\_e\\_sistema\\_di\\_integrita\\_in\\_italia](http://www.transparency.org/whatwedo/pub/corruzione_e_sistema_di_integrita_in_italia) . See also the inaugural speech of the prosecutor before the Corte dei Conti, 2012: [http://www.corteconti.it/export/sites/portalecdc/documenti/documenti\\_procura/procura\\_generale/relazioni\\_anni\\_giudiziari/inaugurazione\\_anno\\_giudiziario\\_2012\\_scritta.pdf](http://www.corteconti.it/export/sites/portalecdc/documenti/documenti_procura/procura_generale/relazioni_anni_giudiziari/inaugurazione_anno_giudiziario_2012_scritta.pdf)

<sup>35</sup> [http://www.cortedicassazione.it/Documenti/Relazione\\_anno\\_giudiziario\\_2012.pdf](http://www.cortedicassazione.it/Documenti/Relazione_anno_giudiziario_2012.pdf)

<sup>36</sup> European Commission, *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism*, COM (2012) 410 final, pp.9, 12, 13. See also the experience of Bulgaria, where there have been concerns about delay in trials for offences of corruption.

disciplinary procedures conform to the highest standards; encourage development of standards of judicial ethics; and where necessary defends the independence of judiciaries against attack.