Strasbourg, 22 February 2013

CDL(2013)007*
Engl. only

Opinion no. 698 / 2012

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT *AMICUS CURIAE* BRIEF ON THE IMMUNITY OF JUDGES FOR THE CONSTITUTIONAL COURT OF MOLDOVA

on the basis of comments by

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I. Introduction

1. By letter of 15 November 2012, the President of the Constitutional Court of Moldova requested the Venice Commission to give an *amicus curiae* brief relating to the amendments introduced by Law n. 153 of 5 July 2012 to Article 19.4 and 19.5 (inviolability of judges) of Law n. 544-XIII of 20 July 1995 on the Status of Judges (CDL-REF(2012)011).

2. Inter alia, the amendments remove the need for consent for the initiation of criminal proceedings and for criminal liability, i.e. submitting the case to court, against judges for the crimes of passive corruption and traffic of influence of the Criminal Code. The question before the Constitutional Court of Moldova is whether the amended Law violates Article 116.1 of the Constitution of Moldova on judicial independence.

3. The Constitutional Court seeks *amicus curiae* advice "based on international tools and practice, eminently, taking into account the principles that govern and ensure the independence, impartiality and inviolability of judges in a state of law."

4. The request points out that "this request is formulated also given the fact that the opinion of the Venice commission has not been sought at the drafting stage of the bill, contrary to the commitments assumed by the Republic of Moldova within the Council of Europe to undergo the Council of Europe's expertise for all bills on functioning of democratic institutions, independence and effectiveness of the judiciary and, that is, prior to adoption."

5. The Commission invited Messrs Hamilton, Mendes, Neppi Modona and Papuashvili to act as rapporteurs for this opinion.

6. This opinion has been adopted by the Venice Commission at its … plenary session (Venice, …).

II. International Standards

A. Intergovernmental organisations

7. The Committee of Ministers of the Council of Europe clarifies two fundamental principles in its Recommendation CM/Rec(2010)12: "The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in case of malice" (para. 68); "When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen" (para. 71).

8. In its Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption, the Committee of Ministers insisted on the objective "to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society" (Principle 6).

9. In its Opinion no. 3, the Council of Europe's Consultative Council of European Judges (CCJE) supports the rule that "Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process" (para. 52). As concerns vexatious claims against judges, the CCJE's Opinion no. 3 recommends that "in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceeding... when there is no proper case for suggesting that any criminal liability exists on the part of the judge" (para. 54).

10. The UN Basic Principles on the Independence of the Judiciary provide that "[w]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."[1]

B. Non-State actors

11. In respect of civil claims against judges, the Judges' Charter in Europe of the European Association of Judges provides that "[n]o Judge shall be directly liable to a civil suit in respect of the performance of his professional duties."[2]

12. The International Bar Association's Minimum Standards of Judicial Independence (1982) provide that "A judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions."[3]

13. The regional Beijing Statement of Principles of the Independence of the Judiciary considers that the judiciary, as an institution, bears the highest value in each society. In its provisions regarding judicial independence, the statement refers to the need for personal immunity of judges from civil suits for monetary damages for respective acts in the exercise of their function.[4]

14. The International Law Association's Burgh House Principles on the Independence of the International Judiciary go further: "Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial function."[5] However, this reference to 'diplomatic' immunities must be seen in the specific context of the international judiciary, where judges work in a foreign country and where their work directly affects the interests of foreign states.

C. State practice

15. There is no universal practice whereby judges are conferred with criminal inviolability. According to Hoppe[6] 20 out of 47 member states of the Council of Europe provide for criminal inviolability of High Court judges, and 16 out of 47 for judges of lower courts. In the European Union, the corresponding figures are 8 out of 27 and 4 out of 27. When one looks at the 15 pre-enlargement EU countries, only Italy provided for this type of criminal immunity in the judicial sector. Hoppe concludes that "a wide range of officials covered by immunity is, especially in the judicial sector, is a phenomenon of eastern member states of the Council of Europe and of the European Union."

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[1] Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, para. 16.

[2] Judge's Charter in Europe (European Association of Judges), as amended on April 20th, 1996, para. 10

[3] International Bar Association, Minimum Standards of Judicial Independence (1982), para. 43 (

[4] Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted at the 6th Conference of Chief Justices, held in Beijing in August 1997, as amended at Manila, 28 August 1997, para. 1 and 32.

[5] International Law Association, Study Group of the on the Practice and Procedure of International Courts and Tribunals, Burgh House Principles on the Independence of the International Judiciary, 2004, para. 5.1.

[6] Tilman Hoppe, *Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe*, Journal of International Constitutional Law, vol. 5, 4/2011, p. 538 (https://www.agidata.org/pam/Documents/ICL_Journal_5_4_11.pdf).

D. The Venice Commission

16. The Venice Commission has consistently argued in favour of a limited functional immunity of judges:

> "Magistrates (judges, prosecutors and investigators) should not benefit from a general immunity as set out in the Bulgarian Constitution. According to general standards they certainly need protection from civil suits for actions done in good faith in the course of their functions. However, they should not benefit from a general immunity protecting them against prosecution for criminal acts for which they should be answerable before the courts."[7]

17. In its Report on the Independence of the Judicial System – Part I: The Independence of Judges, the Commission endorses the general rule that judges must not enjoy any form of criminal immunity for ordinary crimes committed out of the exercise of their functions:

> "It is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional (but only functional) immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crime, e. g. taking bribes)".[8]

18. In sum, judges should enjoy only functional immunity, that is to say immunity from prosecution only for lawful acts performed in carrying out their functions. In this regard, it seems obvious that passive corruption, traffic of influence, bribery, and similar offences cannot be considered as acts committed in the lawful exercise of judicial functions.

III. Purpose of judicial immunity

19. It must be stressed, from the outset, that the notion of judicial immunity is part of the wider concept of judicial independence. Judicial immunity is not an end in itself, but serves the independence of the judge who should be able to decide cases without fearing civil or criminal liability for judicial adjudication done in good faith.

20. The Council of Europe's Group of States against Corruption (GRECO) distinguishes two types of immunity: "non-liability immunity", which refers to non-liability for opinions expressed by parliamentarians or judgments handed down by judges and "inviolability-immunity" or "procedural immunity", which protects an official from prosecution.[9] In this line of thinking, procedural immunity is intended to provide the means of maintaining the substantive "non-liability immunity". Only following a special procedure during which the essence of the accusations against a Member of Parliament or a judge is examined, can procedural immunity be lifted and prosecution take place. As concerns judges, GRECO sees non-liability immunity for judges when they perform judicial activities as being a prerequisite of judicial independence, whereas procedural immunity "raises serious problems in respect of an effective fight against corruption."[10]

21. Clearly, judges – like any other person – should be punished for any crimes they commit, be they general crimes, for example causing a car accident in a state of drunkenness, or

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[7] Memorandum - Reform of the Judicial System in Bulgaria: Conclusions, CDL-AD(2003)012, para. 15, sub. a; see also Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine, CDL-AD(2011)033, para. 39; Opinion on the Draft Law on Judges and Prosecutors of Turkey, CDL-AD(2011)004, para. 88; Opinion on Act CLI of 2011 on the Constitutional Court of Hungary (CDL-AD(2012)009, para. 14.

[8] Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges*, CDL-AD(2010)004, para. 61.

[9] Group of States Against Corruption (GRECO), *Immunities of public officials as possible obstacles in the fight against corruption*, in *Lessons learned from the three Evaluation Rounds (2010-2012) - Thematic Articles,* p. 41.

[10] Ibid, p. 43.

specific crimes related to the judicial function, such as taking bribes for handing down favourable judgments. No criminal act should be covered by non-liability immunity and obviously judges should be prosecuted for all crimes. This general statement only needs to be qualified for judges, when penal (or disciplinary) norms are formulated too vaguely, such as "violating the law in adjudication".[11]

22. The justification for procedural immunity for judges - where it exists - cannot be to protect the judge from criminal prosecution, but only from false accusations that are levelled against a judge in order to exert pressure on him or her. In all other cases, procedural immunity has to be lifted by the competent organ within the judicial system.

23. Experience shows however, that judges tend to sometimes not lift the procedural immunity of their peers, even where there is no indication of pressure on the judge concerned. Such behaviour is in clear violation of the principle of equality of judges with ordinary citizens, but even worse, the non-lifting of immunity ruins the reputation of the judiciary as a whole.

24. Even if it is true that – as for any other person – a criminal accusation can destroy the reputation of a judge, the accusation is nonetheless not a sentence and the accusation brought by a prosecutor will be controlled by a judge during judicial proceedings, including the possibility of an appeal.

25. In order to justify or to maintain procedural immunity for judges, the central issue is whether there is a real danger that such false accusations could be brought against judges who represent the weakest state power[12]. The special status of the judiciary requires sufficient guarantees for judicial independence in a democratic state based on the rule of law, for example permanent tenure.[13] As seen above, some countries provide for procedural immunity for judges, probably because they fear that unjustified charges could be brought against them.

26. The question whether the weak situation of the judiciary in some Eastern European countries warrants procedural immunity, cannot be answered on the basis of European standards alone. The Commission has pointed out in previous opinions and in its Report on the Independence of the Judiciary that the judiciary in a number of Eastern European countries is in a very weak position, especially in relation to the prosecution service.[14] Judges often do not dare to question criminal indictments brought by the prosecution leading to an extremely high percentage of convictions. Judges need to overcome this 'prosecutorial bias'. The answer to the question of whether judicial immunity is an appropriate means to overcome this problem will depend on the situation in each country.

IV. Amendments to Law No. 544-XIII

27. Prior to the amendment of Law No. 544-XIII, Article 19.4 provided that "Criminal proceedings may be instituted against a judge only by the Prosecutor General upon the consent of the Superior Council of Magistracy, the President of the Republic and Parliament".

[11] See the Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia (CDL-AD(2007)009).
[12] Alexander Hamilton, The Federalist no. 78, 1788.
[13] CDL-AD(2010)004, para. 38; see also German Federal Constitutional Court referring to the Judiciary as a separate entity, being of equal value to that attached to legislative and executive branches (BVerfGE 26, 141 – Richterbesoldung I).
[14] Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service (CDL-AD(2010)040), Section I: Dangers of excessive powers of the prosecutor's office for the independence of the Judiciary.

28. The new wording of Article 19.4 provides that criminal proceedings against a judge may be instituted "only by the Prosecutor General upon the consent of the Superior Council of Magistracy under conditions of the Criminal Procedure Code".

29. The draft Law thus removes the requirement for the President and Parliament's consent to proceedings and adds further exceptions which allow proceedings to be initiated without the Council's consent in respect of the offences of passive corruption and trafficking in influence. This extends to detaining, arresting and searching the suspect, if necessary by force, and the removal of the suspect judge's right to be released after identification is revoked.

30. The core of the amendment seems to be centred on the last sentence added to Article 19.4, which states that "the consent of the Superior Council of Magistracy for initiation of criminal procedure is not required" for the offences provided for in Articles 324 (passive corruption) and 326 (traffic of influence) of the Criminal Code of the Republic of Moldova.

31. Before the amendment, Article 19.5 provided that "A judge shall not be detained, brought by force, arrested or held criminally liable without the consent" of the aforementioned organs. An exception to the need for the Council's consent existed in the case of offences committed in *flagrante delicto*.

32. The new wording of Article 19.5 provides that "A judge shall not be detained, brought by force, arrested, searched without the consent of the Superior Council of Magistracy": the criminal liability of the judge has been removed from among the situations which require the consent of the SCM,. Also, for Article 19.5, the core of the amendment seems to be the added sentence, which provides that the consent of the SCM is not necessary in case of a flagrant crime and the offences of passive corruption and traffic of influence.

33. The issue before the Constitutional Court of Moldova is whether these amendments contradict Article 116.1 of the Constitution of Moldova, which reads: *"Judges sitting in the courts of law are independent, impartial and irremovable under the law."* (Article 116.1) and *"Judges may be punished as provided for under the rule of law"* (Article 116.5). It is worth noting that Article 116.5 of the Constitution of Moldova thus envisages that judges' conduct may attract criminal liability "under the rule of law".

34. Several issues arise in respect of these amendments. They concern the need for legislative action against corruption, the organs in charge of lifting immunity and the question of equality.

A. The need for action against corruption

35. The Third Evaluation Round Report from the Group of States Against Corruption (GRECO), encourages the amendment of the offences of bribery and traffic of influence, "given the seriousness of the problem of corruption in Moldova", in order to close loopholes in the legal framework and expand its applicability, aligning national legislation with the standards of the Criminal Law Convention on Corruption and its Additional Protocol.[15]

36. It would appear that Law no. 153 of 5 July 2012 is intended as part of a reply to this call for the closing of loopholes in the legal framework. While such a call provides serious grounds for action, this does not mean that any legislative action in response will be in conformity with the principle of judicial independence.

[15] Greco Eval III Rep (2010) 8E, Theme I, p. 25.

B. Lifting of immunity by the President of the Republic and Parliament

37. Before the amendment, criminal proceedings for ordinary crimes committed by judges were subject to the consent of the Superior Council of the Magistracy, the President of the Republic, and Parliament. Such a system contradicted the constitutional principle of judges' independence, since the fate of the judge was in the hands of political organs such as the President of the Republic and the governmental majority in Parliament.

38. Following the amendment, consent for the lifting of immunity is required only from the Superior Council of the Magistracy, which is in majority composed of judges. While the amendments remove the possibilities of political intervention, the risk of a corporatist management of criminal immunity - where immunity would not always be lifted as required - remains.

C. Equality between judges and ordinary citizens

39. It could be argued that granting the power to initiate criminal proceedings against judges to the Prosecutor General only implies an improper interference with the judge's independence, since his or her fate is in the hands of an individual organ. Furthermore, such a power of the Prosecutor General, together with the consent of the Supreme Council of the Magistracy for initiating criminal proceeding for ordinary crimes, could violate the constitutional principle of equality between judges and other citizens who commit the same crimes and are normally prosecuted by all the public prosecutors having proper jurisdiction, without any consent of a collegial body.

40. However, it seems that this is a reasonable safeguard to reduce the risk of an abuse of power by the prosecution service in the form of a reasonable and proportionate compromise. This compromise avoids that the investigation is hampered because of the very burdensome need to seek approval for prosecution from the Supreme Council of the Magistracy. This compromise also avoids the other extreme, which would treat the judge identically to every other citizen of the state notwithstanding that there may be persons with motivations of their own for making a false complaint against the judge.

D. Arbitrary selection of crimes

41. It could be argued that treating corruption offences differently from others involves a selective approach which lacks a sound and legitimate foundation.

42. In the first place, corruption is a particular problem amongst the judiciary in a number of Eastern European countries and it is clear that the Moldovan legislator considers that it is a problem in Moldova. Where such a problem exists within the judiciary, it seems reasonable to treat it in a different way from other offences, which may not pose any particular problem.

43. Secondly, the nature of corruption as an essentially secret offence involving two persons means that the investigation of corruption often has to be carried out in a very different way from the investigation of other crimes. Giving advance warning to a suspect is likely to give an opportunity to destroy vital evidence. Having to notify a relatively large body such as the Superior Council of Magistracy of an intended investigation could even lead to the suspect judge becoming alerted in time to take steps to frustrate the investigation.

44. Thirdly, it has to be examined whether to single out these particular offences is rational. However, it appears that the two offences in question are those most likely to be committed by a corrupt judge.

V. Conclusion

45. This opinion does not intend to examine whether the Moldovan amendments contradict the Constitution of Moldova – this is the sole competence of the Constitutional Court of Moldova; nor does it purport to determine whether these amendments are needed in Moldova in the present situation - this is the competence of the Parliament of Moldova. This opinion only deals with the issue whether the removal of immunity for offences of passive corruption and trafficking in influence contradicts European standards.

46. The removal of the requirement of the consent by the President of the Republic and by Parliament for bringing criminal proceedings against judges improves judicial independence. The lifting of immunity by the Superior Council of Magistracy alone, which is in large part composed of judges elected by their peers, reduces the dependence of the judiciary on political organs.

47. The central issue is whether the complete removal of corruption offences from the scope of judicial immunity contradicts judicial independence, taking into account the weak position of the judiciary in Eastern Europe, including in Moldova.

48. There are two dangers against which judicial immunity could shield judges. One is that individuals bring false accusations against judges. A remedy against this danger is already contained in the law: only the Prosecutor General can initiate criminal proceedings against judges, including for the specific offences mentioned above. The Prosecutor General will abstain from pressing such charges unless there are sufficient grounds for them.

49. However, it could also be argued that the complete removal from the scope of judicial immunity of specific offences, such as the offences of passive corruption and trafficking in influence, entails another danger: a potential risk of false indictments for these crimes against judges who dare question the actions of the prosecution service. Given that in general the position of judges is weak as compared to that of prosecutors, (the threat of) false charges of passive corruption or trafficking of influence could be used by the Prosecutor General as a tool to make judges compliant with his or her wishes.

50. However, the following considerations appear to support the view that the Moldovan legislation does not contradict international standards:

(a) the fact that while many states, particularly in Eastern Europe, confer a criminal inviolability on judges, there is no internationally recognised norm requiring such inviolability. On the contrary, international standards support the principle that “when not exercising judicial functions judges are liable under civil, criminal and administrative law in the same way as any other citizen” (CM/Rec (2010)12, para 71). Indeed criminal judicial inviolability does not exist in the majority of democratic states, all of which nevertheless place a high value on judicial independence;
(b) the previously existing immunity for judges in Moldova is provided for in ordinary law. There is no express provision in the Constitution and it is argued that a right to immunity is implied in the guarantee of independence. However, the Constitution also provides for the punishability of judges according to the rule of law.

51. While functional safeguards are needed to guarantee judicial independence against undue external influence, broad immunity is not. Judicial independence does not depend on wide immunity and judges should answer for any alleged crimes on the presumption that normal procedures of defence, appeal and other elements of the rule of law are at their full disposal.

52. Whether the amendments contradict the Constitution of Moldova remains to be decided by the Constitutional Court.