

CONCLUDING CONFERENCE REMARKS

**by George Birmingham,
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When this conference opened this morning, we were immediately reminded of how important was our topic. In his first sentences, our President reminded us that judicial integrity is fundamental to the rule of law and a core value of the Council of Europe. That message was very quickly reinforced, if reinforcing was necessary, by the Secretary General who made clear that the fight against corruption, including judicial corruption, is a core issue for the Council of Europe. Achieving an independent judiciary free from corruption is right at the top of his personal agenda. He reminded us in sober terms of the cost of failure. If citizens lose confidence in the institutions of the State then the path leads to disorder, violence, revolution. We were quickly reminded of the scale of the task by Judge José Igreja Matos, who referred to a recent survey of member states which indicated that in the period covered by the survey 50% saw the situation as worse and only 10% saw the situation as better.

As we embark on our work we are conscious that we are following a path that is well trodden. There has been much work in this area by, amongst others, the ENCJ, the European Association of Judges, the International Commission of Jurists and the International Bar Association working with the Basel Institute on Governance. Particularly on point, though, is the work of GRECO. It is of course not coincidental that we are meeting today for this conference and that our opinion next year will be devoted to this issue of judicial integrity and corruption. The choice of topic for the opinion and therefore for the conference was designed to link in with GRECOS' schedule of work.

One key message that I took from the contributions this morning is that it is absolutely essential for GRECO and the CCJE to synchronise the approach so that what may emerge will be one coherent Council of Europe message.

Judge Marin Mrčela was very clear that GRECO in its work drew on our opinions and for our part it is important that we make full use of their report and build on their work over the last four years.

As we embark on our task, we take comfort from the fact that this is not a new issue for the CCJE, a number of our earlier opinions are highly relevant to this topic. Judge Alain Lacabarats grounded his talk on earlier opinions of the CCJE, placing particular reliance on Opinion 3.

A recurring theme throughout our discussions has been the link between independence/integrity. Two main threats have been identified. The first is corruption, in the sense of bribery. This is most relevant in countries where the rule of law is weak. Then, there is the issue of undue political influence. Yes, that arises in countries where the rule of law is weak, perhaps that might be expected, but it also arises as a significant issue in some countries where the rule of law would be perceived as strong. A third element was introduced by Judge Matos, who referred to the difficulties that can arise from inappropriate internal judicial management.

Different courts may attract different attention. So electoral courts, those dealing with election petitions and the like and constitutional/administrative courts may be subject to political pressure. In civil courts, in particular courts conducting commercial business, the spectre of bribery by wealthy individuals arises. The criminal courts raise the possibility of interventions by criminal gangs and organised crime.

Whatever form the threat takes, a response requires an assertion of independence and the creation of accountability structures. It must be acknowledged that there can sometimes be some tensions in this area. In the case of elections for appointment, for example, not widespread in the Council of Europe, an emphasis is placed on accountability but at a cost. On the other hand, appointments for life promote independence but can give rise to insularity on the part of some judges. It is the case though that strong accountability guards against bribery and robust independence resists undue political pressure. Undue political pressure may result in a political or economic elite achieving an effective immunity. Corruption marginalises the disadvantaged and vulnerable groups in society. Obtaining relief in court becomes not the right of all but a privilege for those who can afford it. One caution that was entered during the course of our discussions was that care must be taken so that an ostensible campaign or struggle against corruption must not be used to undermine judicial independence.

GRECO built its report around three themes:

1. Recruitment, careers and conditions of service
2. Ethical principles and rules of conduct
3. Supervision and enforcement

So far as the question of recruitment is concerned, it was recognised that different methods exist in different member states. For my part it was music to my ears to hear the reiteration from GRECO of their support for the principle that at least 50% of appointing bodies should be judges. This is an issue that is under discussion in Ireland at present.

In relation to conflicts of interest, Judge Paul Maffei mentioned kinship, holding employment in parallel and unacceptable commercial activities. When it comes to conflict of interest one perhaps thinks initially of financial involvement but Judge Lacabarats in his contribution referred to social groups, instancing by way of examples, Freemasonry. The question of social contact or fraternisation is potentially a particular issue in smaller countries. There, it may be the situation that judges went to the same schools, or are members of the same clubs or sporting bodies as some of those who appear before them. In such situations there may be a need for guidelines or for a code of conduct.

In relation to the question of political activity on the part of judges a starting point is that judges are citizens. There is a wide variation of approaches. In Canada, for example some judges do not vote in elections. Many would see that as going further than necessary. What is essential is that any activity should not serve to undermine public confidence in the independence and impartiality of the judiciary.

If one is to have a code of conduct one has to address the question of breaches of that code and that raises the question of sanctions. If serious transgressions occur then strong sanctions must be available. Such sanctions however will not go so far as the flaying alive of the offender as referred to by Judge Maffei, which he spoke about with reference to artist Gerard David's painting *The Judgement of Cambyses*. Care must be taken to ensure that the disciplinary regime must not be allowed become an instrument of oppression. Whilst all the organs of state must do their utmost to prevent and resist corruption, one does have to bear in mind that a campaign to undermine the judiciary, an attempt to bring judges to heel, can be packaged and presented as a campaign to root out corruption.

A number of interventions touched on the issue of asset declaration. There were some differences of approach. For my part I am somewhat sceptical about the value of such declarations as it seems to me naive to think that someone in receipt of a corrupt payment would be naive enough to include it in a declaration. Neither, would it be likely that those involved would be foolish enough to spend it on mega yachts as described by some contributors as to draw attention to their lifestyle.

The question of judicial remuneration also featured. It is the case that vulnerability and indeed desperation can lead to corruption. Singapore is a state that has made it a priority to resist corruption and part of their strategy involves high salaries for public officials. Judge Lacabarats from France broadened this issue and raised issues about the financing of the judiciary as an institution. He posed the question of whether there are implications for independence if courthouses are provided on a public private partnership basis.

Another issue raised was whether there should be post-retirement restrictions. Reference was made to the situation that prevails in relation to retiring EU commissioners. For my part I see the logic which led to the issue being raised but also see some difficulties. In particular, introducing new restrictions may present difficulties for individuals who have made preparations for retirement based on a particular regime.

Speakers made the point that it is in our hands, that the judiciary has the first and greatest responsibility to prevent judicial corruption. That provoked an intervention from our Vice-President, Judge Durro Sessa, who observed, "It falls on us to do all the work." Not all, I would say, but yes, the lion's share.