Money Talks

Tilman Hoppe 2021-03-05T11:14:26

A parliament appoints a commission which looks into the wealth of judges, going back years and even decades in their personal financial history. If reasonable doubts remain that judges could have financed their cars or real estate from legitimate sources, they are being dismissed and banned from office for life. And this includes even the highest echelons of the judiciary, such as constitutional judges. Such radical judicial vetting measures might undermine judicial independence in normal conditions. However, the Venice Commission supported Albania in 2016 in introducing rather radical accountability tools, because of perceived high levels of corruption in the judiciary. Since the start of the vetting procedure in 2017, more than a hundred judges lost their job. Of the originally nine judges at the Constitutional Court of Albania, five "were dismissed, while three others resigned". One of the dismissed judges took her case to Strasbourg, claiming that her dismissal violated her rights to a fair trial and respect for private and family life.

At first glance, a constitutional lawyer might see the merits of her case: Reasonable doubts as grounds for firing – but what about the presumption of innocence? Going back years and decades – what about statutes of limitations and retroactivity? A commission appointed by parliament, and not one of its members is a sitting judge – what about the independence of the judiciary? A commission "sniffing around" in old tax documents and real estate contracts – what about the right to privacy?

On 2 February, the ECtHR published its 110-page long decision in Xhoxhaj v Albania and rejected the application. In its decision, the ECtHR acknowledged the Albanian context and gave clear priority to the need for cleaning up a corrupt judiciary. It denied protection under the ECHR to those who seek to abuse human rights for protecting a status quo of corruption. In this regard, the judgement is a treasure box for all stakeholders willing to identify inexplicable wealth of public officials, and to vet their integrity.

30 years of abusing the "human rights" argument

The ECtHR's strong stance can only be understood against the background of tiresome 30 years of anticorruption efforts. After the Iron Curtain came down in the 1990s, Eastern Europe and the Balkans were "an empty stage without even the scenery. They called it judiciary, but it wasn't one. The concept of human rights was unknown." International organisations came in, trying to establish the rule of law: drafting laws on fair trials; training judges and lawyers; discussing human rights and ethics. But, 30 years later, for several countries, reports by the EU reflect the sobering reality: "No progress was made during the reporting period. […] Corruption is widespread and the fight against it has not advanced."

Because judges and other public officials quickly understood how to play human rights in their favour: They would become experts on the presumption of innocence, retroactivity, or privacy, whenever someone questioned how an official with a monthly income of 400 Euro could afford a million-Euro villa.

When asked by journalists or prospective employers about the origin of their wealth, the excuses were absurd: Public officials would claim that their fortune came from producing honey from their own beehives; from picking "strawberries in Germany"; from winning in certain casinos (where, for strange reasons, mostly public officials had lucky streaks); or from "foreign exchange deals as a student". They would insist that a used, but shiny, Mercedes S320 had cost only 700 Euro (judges were also amazingly skilled mechanics). They would produce bizarre, freestyle certificates, stamped by the tax office, stating – without any explanation whatsoever – that all wealth of the judge was matched by legal income, while there would be no tax records on their mysterious revenue.

It was the same song over and over: Catch me if you can. And domestic courts across the Balkans and Eastern Europe would happily jump on concepts such as presumption of innocence or data protection the same way as applied in EU member states if that allowed them to protect their peers (and themselves): We have to respect EU-standards, what can you do?

The dilemma

This party went on for decades. Corrupt public officials would amass staggering amounts of cash, sometimes weighing hundreds of kilos. How the system provided for their impunity was bold. Corrupt networks plundered domestic budgets, while foreign donors poured hundreds of millions into anti-corruption projects with ambitious titles, but often modest, if any, impact, often leading nowhere with occupational therapy such as "admiring the problem [of corruption] at length" or with drafting laws which were never adopted.

The corrupt elites played along, mimicked reforms, and laughed about each additional year they could enjoy the fruits of their corruption. Meaningful reforms – such as introducing transparency of officials' wealth; checking it; cooperating internationally; and, if need be, confiscating it – would be stalled by decades of a boring dance: After years of pretend progress, the corrupt elite would let their puppets – such as constitutional courts or a data protection agencies – do the dirty work of discrediting legal amendments. Back to (almost) zero, and another reform cycle would start. Resisting and persisting was mostly all that civil society and donors could do. And in a way, that was already a lot.

International organisations were caught in a dilemma: They had to promote the rule of law and human rights (and for good reasons so), but somehow, this allowed the caste of corrupt judges (and other officials) to "wall themselves into a fortress" they called the EU-standard of rule of law.

Same standards, but different outcome

It was a painful for international organisations to concede: You cannot fight corruption in Ukraine as you do in Sweden. The gloves needed to come off. Or, in terms of constitutional law: A "pressing social need" can justify vetting measures in a country such as Albania, but which would be disproportionate in a country such as Sweden. Because: Without initial radical measures, there will be no judiciary left, nor human rights. In the words of the Venice Commission: Corruption, "if not addressed, could completely destroy […] [the] judicial system." In this regard, one must distinguish between countries with low and high levels of corruption. The Venice Commission had already used this two-class approach – "justifies and requires exceptional measures" – in its 2017 opinion on giving a council of international experts vetoing power in the selection of judges in Ukraine.

Balancing in favour of integrity

Now, with Xhoxhaj v Albania, this two-class approach will be part of the ECtHR case law: "It is for this reason that the vetting process of judges and prosecutors in Albania is sui generis and must be distinguished from any ordinary disciplinary proceedings against judges or prosecutors." As a result, the ECtHR shifted the constitutional balance in favour of integrity measures as follows:

1. The right to *privacy* (Art. 8) does not even apply to checking inexplicable wealth of a public official, as such checks only "ensure public trust in […] [the official's] integrity" (§ 362).
2. Based on "preliminary findings" of inexplicable wealth, the *burden of proof* may shift to the official "in order to prove the contrary" (§ 347). If the official fails to prove the contrary, this suffices to ban the official from public office for life. However, reversing the burden of proof is only possible for dismissing the official, not "in any criminal proceedings" (§ 243).
3. A financial check, as grounds for a dismissal, can go back *decades*: "[G]given that personal or family assets are normally accumulated over the course of working life, placing strict temporal limits for the evaluation of assets would greatly restrict and impinge on the authorities' ability to evaluate the lawfulness of the total assets acquired […]. This is all the more true in the Albanian context where prior verification of declarations of assets had not been particularly effective" (§§ 349, 351).

Calculation method

Access, by the applicant, to the "methodology used to calculate" her inexplicable wealth was one of the arguments by the ECtHR (§ 332) for the fairness of the procedure under Art. 6. It is thus not only a recommendation, but a necessity that asset declaration oversight bodies adopt a coherent calculation method. The Court followed the cash-flow method: The cash/savings by the end of a given calendar year, plus all expenses (outgoing cash-flows) during the year equals the lifestyle

of an official; this is compared with the cash/savings at the beginning of the given calendar year, plus all legal incoming cash-flows (=financial means). If the lifestyle exceeds the financial means, logically, the difference must come from obscure sources (footnote 1, page 8).

The net-worth method, as used mainly in the U.S., in principle comes to the same result. However, it often confuses legal practitioners about how to put gifts, floating market values, or unpaid loans into the equation. By contrast, the cash-flow method goes straight to the point: How much did you spend, and where did it come from? Journalists and NGOs (trained by U.S. experts) started to use the cash-flow method in Albania in 2015. The results of their analysis embarrassed the judiciary already in 2016. State institutions picked it up. Now the cash-flow method finally has the stamp of the ECtHR.

Outlook

The next battleground before the ECtHR will be criminal sanctions for inexplicable wealth ("illicit enrichment"). Several constitutional and supreme courts (inter alia France and Lithuania) already upheld the constitutionality of this offence. At least the confiscation of inexplicable wealth, even retroactively, has the support of the ECtHR already since 2015: "A careful examination of the applicants' financial situation confirmed the existence of a considerable discrepancy between their income and their wealth, and that discrepancy, which was a well-documented factual finding, then became the basis for confiscation."

Research abounds on how corruption is a violation of human rights. But: Did anybody ever even question this? Interestingly, no such research is found on the opposite, but in practice much more relevant point: How human rights arguments are systematically abused to protect corruption.
