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# UNDERSTANDING AND COMBATING JUDICIAL CORRUPTION

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Abstract

*The research item of the paper is the term "judicial corruption". This particular term was ignored in the majority of countries of the Council of Europe. Judicial corruption as a term was first mentioned in the PACE documents- Resolution 1703 (2010) on judicial corruption. The author is trying to give answer to the question- Could there be a balance between establishing the responsibility of the judge and the independence guarantees? The term judicial corruption should not be manipulated with, i.e. the criminal cases of corruption where the judges and prosecutors are involved should be proved and led in line with all ECHR Article 6 fair trial requirements, and in compliance with the principle for presumption of innocence.*

*Keywords: judicial corruption, GRECO, Council of Europe, ECHR*

## INTRODUCTION

In the course of implementing the fourth evaluation round, GRECO (Council of Europe, Group of States against corruption), did not consider the term "judicial corruption", and this particular term was ignored in the majority of countries of the Council of Europe. Judicial corruption as a term was first mentioned in the PACE documents (Council of Europe Parliamentary Assembly) - Resolution 1703 (2010) on judicial corruption, however, it was not defined. Instead of considering this term, the

entire issue was reduced to the area of judicial ethics, promotion of judicial integrity and other. The newest PACE document Resolution 2098 (2016) states that:

> Judicial corruption severely impedes the protection of human rights, in particular judicial independence and impartiality. It also undermines public trust in the judicial process and infringes the principles of legality and legal certainty. Judicial corruption takes complex forms and comprises corruption related both to cases and to the career of a judge. Council of Europe member States must channel their efforts with regard to both of these aspects and provide effective mechanisms which allow for identification and investigation of cases of corrupt practices in the judiciary, and adequate sanctions for perpetrators (Council of Europe: Judicial corruption: urgent need to implement the Assembly's proposals).

Generally speaking, corruption is defined as the abuse of entrusted power for private gain. That formulation ensures that both private and public corrupt practices are covered. Corruption can be individual or institutional. The term is not precisely defined in the 2003 UN Convention against Corruption. The forms of corruption evolve continuously. It goes further than paying or taking a bribe and encompasses a large range of acts and omissions including bribery, abuse of functions, and misappropriation of State funds, illicit enrichment, or trading in influence (UN Convention against Corruption, 2003). Integrity (Latin: *Integritas*) means "whole and complete", synonyms are: honesty, decency, inseparability, sincerity, truthfulness, consistency of actions, values, methods, measures, other moral values of a person, who is not suspectable to corruption pressure and to whom the public interest is beyond her/his private interest.

Transparency International defines judicial corruption as "misuse of the position for personal purposes, gain of tangible or intangible advantage, influence peddling for the purpose of speeding up or slowing down the court cases, trading with information" (Transparency International Corruption Index). Political corruption in the judiciary means political influence on decision making process, manipulation with appointments, allocation of cases, unfounded reassignment, politically motivated dismissals, realization of career ambitions. Transparency International defines judicial corruption as misuse of the position for personal purposes, gain of tangible or intangible benefit, influence peddling for the purpose of speeding up or slowing down the cases, information trading, etc. Most common case of political corruption is the political influence on judicial decision making, judicial election manipulation, allocation of cases, unfounded reassignment, as well as politically motivated dismissals.Political corruption appears in the form of realization of career ambitions or professional aspirations. The term judicial corruption should not be manipulated with, i.e. the criminal cases of corruption where

the judges and prosecutors are involved should be proved and led in line with all ECHR Article 6 fair trial requirements, and in compliance with the principle for presumption of innocence. For example in Macedonia in the case JUSTITIA, twelve misdemeanour judges have been shown on breaking news in the media when entering the court building, apprehended by police officers, but recently, after seven years since the commencement of the procedute, the first instance judge has adopted a decision for their acquittal of accusation.

From the few analyses and researches in this area, there is insufficient information for effectively completed cases of judicial corruption. It can be a result of two things: first, that such case do not exist, and second, that there is no available information on judicial corruption related cases. However, if insufficiencies exist in the legal frame and/or the perception indicators show lack of confidence with regards to judiciary, then one can conclude that the judicial corruption benefits from impunity and the entire system becomes subjected to corruption. ECtHR is cautious and prefers the conclusion that the there is lack of independence in the concrete case, rather then that the decision is a result of corruptive practices (Bratza 2014). Conducted GRECO evaluations related to the Fourth Round Evaluation (Prevention of corruption among parliamentarians, judges and prosecutors)(Council of Europe 2018), so far, show two categories of countries and legal systems, which, considering the specifics of the legal tradition, culture and mentality, lead to different systems for determining the responsibility of the judges when it comes to violation of ethics. The first are the so-called "old democracies", where the judges are still elected by the legislative or executive authority; they have no strict regulations and criteria for election, promotion, evaluation, distribution of cases, and no system for conflict of interests, asset declarations or even lack of written ethical rules. Still, there is perception of long historical public trust and respect in the judiciary, strong social control, low number of dismissed judges, developed system of judicial transparency, self-control of the ethical violations, developed system for reporting violations of ethical principles, high level of integrity. On the other hand, there are the countries of "new democracies" aspirers for EU accession and the new EU member states, which adopted all international anti-corruption standards, but have weak implementation, existing low perception level of trust and high disrespect of judges among citizens., high number of dismissed judges, subjected to disciplinary procedures which are often criticised as a method for political rooting out of disobedient judges.

## FIST LEVEL DIRECTED TOWARDS IMPLEMENTATION OF THE CODE OF ETHICS

In the reports adopted so far, GRECO recommended the judiciary to detect the risks of conflict of interests and corruption by itself and show its capability for handling thereof. The judiciary can do that by implementing the given recommendations for establishing advisory bodies within the judiciary, which is in compliance with all documents of the Council of Europe and the Opinions of the Consultative Council of European Judges (CCJE), with regards to the implementation of the ethical rules (Council of Europe 2018). That is the first step towards self-discovery and self-detection of the responsibility for violation (or possibility for violation) of the ethical rules in form of self-reporting by the judge. The judges should be able to address their problem to the advisory body which will provide reliable advice in a confidential manner, whereby the good practices will be compiled and published in order to serve to other judges as a guide for application of the code. In addition, several problematic issues are addressed: how to elect a body constituting of judges with the best virtues in their personal and professional life, lacking any perceived or actual conflict of interests, highly respected in the so-called "judicial community" where the judges are fully trusted when it comes to sharing ethical dilemmas. It should perform its functions according to the highest discretion and confidentiality level with clear distinction of the competences between the said body and the disciplinary body. Another problems could be whether the case will be under the competence of the disciplinary body, whether the reported conduct presents less or more severe violation of the ethical rules, the danger of prejudice and personal feelings of sympathy, aversion, which impairs the impartiality of the entire process. This mechanism can transfer into a system, only in an atmosphere and culture of transparency, mutual trust, respect and discretion among the judges.

### *Example of Good Practice*

The Judicial Conference of the US Committee on Codes of Conduct deals with the confidential advising of judges in the daily implementation of the ethical principles. These opinions are advisory and published anonymously on its website. Some of the advices refer to the possible service on Governing Boards of NGO; disqualification where long-time friend or friend's law firm Is counsel; acceptance of hospitality and travel expense reimbursements from lawyers; membership in a political club; disqualification based on stockholdings by household family member , commenting on legal issues arising before the Governing Board of a Private College or University ; participation in fund raising for a religious organization; service on Governing Board of a Public College or University; acceptance of public testimonials or awards. Appearance

before a legislative or executive body or official, political involvement of a judge's spouse; extrajudicial writings and publications; use of title "Judge" by former judges, gifts to newly appointed judges; use of electronic social media by judges and judicial employees ("Published Advisory Opinions". United States Courts 2018).

### *Responsibility of the Judges and Functional Immunity*

When the responsibility of the judge is established, one must not invade the merit – content of the judicial persuasion and the inherent view, since the judges are not subjected to responsibility of the matters expressed in the decision, views i.e. what they decide on in judicial capacity. The interpretation of laws, measurement and weighing of evidence or assessment of facts must not be connected with criminal, civil or disciplinary responsibility, with the exception of cases of malice or rough negligence. Therefore, one must establish what is judicial reasoning and decision and their extent, which is quite difficult task. In the Concept of Law, the legal positivist H. L. A. Hart says that:

> The judges must make a choice which is neither arbitrary nor mechanical, whereas the judicial values leave their mark, such as independence, neutrality in the search of alternatives, taking account of all affected parties and giving explained reasons for the decision. The decision cannot be exceptionally well-judged; it can only be acceptable as explained, reasonable product of informed and impartial choice (Hart 2014).

The boundaries of judicial reasoning are limited and due to such reason the decisions are controlled via legal remedies which correct the intentional and unintentional errors of the judges. In general, the errors are considered as unwitting acts. The international documents do not determine the terms judicial error, fallacies, intentional violation of law, professional/ethical duties, intentional and rough oversights thoroughly, which will facilitate the definition of the limits marking the commencement of establishing the responsibility of the judge. On the other hand, that increases the risk of their arbitrary interpretation by the ones determining the level of guilt, qualification of violations, evidence and facts that will be gathered, and the questions raised as to their independence, expertise, personal and political affiliations, political background, prejudices, reasoning and logic, which may invade the merit of the decision and the persuasion of the judge. Clear definition of "performing judicial duties" is crucial, since it presents a basis for responsibility – for the conduct and acts conducted beyond the performance of the judicial function, the judges are subjected to responsibility as any other citizen). It should be distinguished when the judge is on duty and what the true meaning of professional performance of duties is. That is the time when the judge performs all activities related to official actions and process authorizations.

However, it is a fact that the judges are subjected to the code of ethics with regard to the profession, not only during the performance of their official actions, but also beyond their working hours (some say that they play the role of a judge 24/7). Other fact is the establishing of malice or rough negligence, clear definition and pronouncing of the acts of disciplinary violation, existence of clearly defined procedure with all procedural guarantees in front of non-political body(this term is introduced in the 2016 Action Plan of the Committee of Ministers, which is disputable in case of existence of different systems for election of bodies competent for solving the status issues of judges).The sanctions must apply proportionally and not be pronounced out of arbitrary or political motives (Action plan, Council of Europe 2016).

## SUMMARY ANALYSIS FROM THE COMPARATIVE PRACTICE OF THE GRECO FOURTH EVALAUTION ROUND REPORTS WITH REGARDS TO THE RESPONSIBILITY OF JUDGES

The disciplinary responsibility applies to violation of ethical (e.g. incompatibilities) or professional duties. In some countries, the violations of ethical rules, such as less or more severe offence, are deemed as disciplinary violations. The violations are divided in two levels (less and more severe) or in three categories of offences, petty offence, less severe offence and more severe offence. The ethical violations may be included in all three categories, depending on the type of conduct. In some countries, there is an attempt for distinguishing the violations of ethical rules from the violations of professional duties, even though they are often confused; as well as the less and more severe ethical violations, due to their valuable importance and evaluation of the ethics according to the culturological, social and legal tradition – in many cases, it seems that they are just listed on a paper and therefore, glossaries, manuals and instructions are needed for everyday use; furthermore, the ethical and professional violations are not clearly distinguished from the appellate bases, thus creating additional danger from arbitration. Professional violations refer to violations related to timely schedule of hearing, timely decision making and writing, wrong decision, non-performance of other official duties, severe violation of provision of substantive or procedural law, lack of decision explanation, intentional non-reporting of conflict of interests and property are deemed as more severe violations of the discipline or due to severe negligence. Ethical violations refer to conduct harming the institution image, alcohol consumption, acts discrediting the personal reputation and the reputation and authority of the court, violation of ethical principles with regards to clients, colleagues, president of court and personnel, experts, prosecutors and lawyers, harm caused to the dignity and function, conduct endangering the trust in independent, impartial, professional and fair decision making by the courts.

Criminal responsibility - refers to criminal acts such as incriminations of bribe, authorization misuse and unauthorized disclosure of secret and confidential information. In some of the countries, the judges do not enjoy any immunity. In other countries, there is a criminal responsibility for involvement in conflict of interests and distortion of justice for the benefit or to the detriment of one of the clients (perverting the course of justice).

Civil responsibility – the judges cannot have civil responsibility for a damage caused to one of the clients, as a result of judicial error or civil responsibility for individual court decisions; however, there is a possibility for damage claim in case of intentional damage or severe negligence.

Immunity - GRECO has a sound view that the judges should enjoy protection from unfounded intrusions during the performance of their duties and therefore, they are granted with so-called functional immunity. However, at the same time for the purpose of implementing the 20 Guiding Principles on fight against corruption (Committee of Ministers, Council of Europe 1997), the immunity of judges should be limited to activities referring to their participation in the judiciary administration. The functional immunity must not be perceived as unlimited right of the judges and must not create the impression of judges as untouchable, and the deprivation of the immunity is necessary for the purpose of prosecution when the decision is a result of criminal act. With regards to the issue about the status and reputation of a judge deprived of immunity, we have a case where, upon the request of the Special Public Prosecutor's Office, a procedure was initiated for criminal act with reference to decisions adopted by administrative judges in the electoral process, the Judicial Council deprived the judges of their immunity, and the said judges have recently again decided on the occasion of the new local election. The term of reputation risk has been introduced by the "Deloitte" the brand dealing with creating management risk plans for large companies, states that the company's reputation is perhaps its most valuable asset and has the leading role among risks and is named as killer of the values. The massage for everyone who produces and sells values, must seriously take care of its reputation and the danger to which it is exposed. Extreme cases may even lead to bankruptcy (as in the case of Arthur Andersen). Recent examples of companies include: Toyota, Goldman Sachs, Oracle Corporation, NatWest. The measures for establishing the responsibility must not be taken for the purpose of repressions and vengeance towards the judges for particular political decision. Most of the ECHR judgments refer to violation of freedom of expression, referred to in Article 10 of ECHR, in cases where the judges publicly criticized particular conditions in the judiciary, for which disciplinary procedures were initiated against them and they were dismissed from their function (Baka v. Hungary, Kudeshkina v. Russia, Volkov v. Ukraine, Harabin v. Slovenia).

## THE SITUATION IN THE REPUBLIC OF MACEDONIA

For the period of 10 years (2006-2016), 15 applications were stopped, 1 rejected, 44 judges were dismissed, 1 application was rejected, only 1 fine was pronounced for disruption of interpersonal relations, 2 for lustration, and out of all dismissed judges only 4 are appellate judges, of whom two presidents, and the others are judges and presidents of basic courts who, in some of the cases, are dismissed for actions in many cases or actions in one case only. In the last two years, 5 procedures were initiated.

In 4 cases, ECHR decided that Article 6 was violated in the course of leading disciplinary procedure. We can come to the conclusion that there are obvious reasons and presumable (hidden) reasons. In the disciplinary decisions some characteristic reasons are specified which may indicate doubt of corruption and payment purposes, such as decision making by one individual instead of the council, awarding property to the detriment of the country, making two decisions in one case and disappearance of the case, non-submission of fines for collection, obsoleteness of great number of misdemeanour cases, decisions for revocation of detention without having legal conditions, provisioning of passport, procrastination of investigation procedures, judging the wrongly accused person, while the real perpetrator escaped, judging in cases where the spouse is forensic scientist, etc. If one monitors the further conduct of a dismissed judge (they became lawyers, professors, found a job in the politics), one can conclude that there are indications about their former connections; however, these are only indications and speculations. Among the judicial community there are doubts about the honour of particular judges related to sharing money with lawyer's offices, nepotism in the relations between the judge and lawyers – relatives, violation of the rules for public procurement, non-exemption in case of having legal or other basis, public – private partnership for procurement of computer and other equipment for the courts, corruption of foreign projects which are hard to prove, decisions for the benefit of the interests of the political parties, business, lobbying connections.

Only in two cases where severe violation of the code of ethics was established, the judges were effectively judged for crimes, one for taking bribe and the other for unconscientiously work while holding an official positioning all other cases of judge dismissal, many violations were combined for unconscientiously and unprofessional performance of the judicial duties and violation of the code of ethics, and in particular cases they were mixed, whereby in one case the prejudiced leading of the procedure for the benefit of one client was deemed as violation of the code of ethics, in combination with other acts of unconscientiously and unprofessional performance of the judicial duties. In other case, violation of the principles for impartial treatment of the clients was established, which action was not classified as violation of the code of ethics, meaning that there are differences in the classification of the actions.

In other case, severe violation of the court reputation and judicial function was established; however, the action was not classified as violation of the code of ethics. In one particular case, the non-pronouncing of judicial decisions and non-preparation of written decisions within the give deadline was deemed as violation of the code of ethics, while in other cases that was deemed as unconscientiously and improper performance of the judicial duties.

Not all of the judges against whom procedures were initiated are suspended, and this fact leaves the clients, whose cases are submitted to those particular judges, with the impression of selectivity and uncertainty. In particular cases, under one and the same basis, some of the judges are dismissed, while for other judges the procedures are stopped, which creates a confusion and doubt for possible selectivity of the disciplinary body. All of this should be subject to a thorough analysis; however, it is a fact that the specified decisions indicate that the Judicial Council does not fulfil the preventive function and allows the problem to escalate to the extent where the only solution is dismissal of the judge.

## CONCLUSION

Could there be a balance between establishing the responsibility of the judge and the independence guarantees? We deem that the hardest task in the process of establishing the responsibility is not to invade the merit of the case, since the clues for existence of doubt for some kind of messiness in the work of the judges appear once the decision is made and pronounced, when the clients can inspect the reasons and explanation (and rationality).

In most of the cases, disciplinary violations refer to unconscientious and unprofessional performance of duty, and the actual reasons are not always "obvious". In most of the cases, upon the initiation of disciplinary procedure against judges, they "ingenuously" resign their position in order to avoid the presentation of evidence for establishing the actual reason for their dismissal, so that they can appear innocent to the public, which on the other hand causes anger and demotivation of the majority of honourable judges. Hence, it is difficult to determine whether the judges are dismissed due to their corruptive conduct, since only in small number of cases referring to the dismissal of judges a criminal procedure was initiated, whereby, considering the presumption of innocence, the circumstances related to the corruptive conduct of several judges remain in the lobby, and that hypocrisy eventually creates perception of persistence and protection of the corruption of the judges and non-existence of the will for judicial resolution of the case.

On the other hand, when the actual reasons are not presented, some of the judges play the role of political victims of vengeance for adopting particular decision,

which once again creates a bad image of the judiciary.When the actual reasons are not transparent, some of the judges play the role of political victims of revenge for adopting particular decision, which once again creates a bad image of the judiciary (5 of them applied for the post of General Public Prosecutor - no rules for cooling period). 

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