

CONSULTATIONS ON THE COUNCIL OF EUROPE STANDARDS IN  
SPHERE OF CRIMINAL LIABILITY OF A JUDGE FOR UNLAWFUL  
JUDGMENT

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# Introduction

(1)

- Question of judge's accountability is inseparably linked to:
- A) independence of judges
- B) immunity from prosecution for acts performed in the exercise of a judge's function with exception of intentional crimes ( **Venice Commission (VC)- Report on independence of judicial system Part I para 61.**)
- C) impartiality ( **ECtHR – Volkov vs Ukraine, Parlov-Tkalcic vs Croatia**)

# Introduction

(2)

- „ Judges should have unfettered freedom to decide cases impartially, in accordance with law and interpretation of facts” ( **Recommendation CMRec(2010)12, para 5.**
- „ The fundamental point is that a judge is in the performance of his or her functions no-one’s employees; he or she is holder of a State office. He or she is thus servantt of, and answerable only to law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside of judiciary” ( **CCJE Opinion 1 para 64 , 66)**

# Introduction

(3)

- „ The principle of judicial independence means that the independence of each individual judge is incompatible with the subordination of judges in their judicial decision-making activity” (VC- 2010 Report on the independence, para 72)

Council of Europe Recommendation CM/Rec(2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities

(4)

- „16. Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law.”
- „22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision-making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, .....

# Council of Europe Recommendation CM/Rec(2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities

(5)

- “66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.”
- „68. 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 cases of malice. „
- „70. Judges should not be personally accountable where their decision is overruled or modified on appeal”

# CCJE's Magna Carta for Judges

(6)

- “19. In each State, **the statute or the fundamental charter** applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure.
- 20. **Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions.**
- 21. The remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the state.
- 22. It is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.”

# CCJE Opinions

(7)

- **Opinion No.3**
- “a. Criminal liability
- 53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the **CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.**
- 5°) Conclusions on liability
- 75. As regards criminal liability, the CCJE considers that:
  - i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;
  - ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.”



# CCJE Opinions

( 8 )

- **Opinion No.18.**
- Thirdly, if a judge has engaged in improper actions of a sufficiently serious nature, he or she must be held accountable in a robust way, e.g. through the application of disciplinary procedures and, if appropriate, the criminal law. The CCJE has called this “punitive accountability”. Care must be taken, in all cases, to preserve judicial independence (paragraphs 33 and 37).”
- **Opinion No 20.**
- „39. Legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge’s work.”

# Venice Commission

(9)

- **Amicus Curiae Brief for the Constitutional Court of Moldova on the Criminal liability of judges – CDL-AD(2017)002**
- „- if a judge’s misconduct is capable of undermining public confidence in the judiciary, it is
- in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but criminal guilt;
- In conclusion: only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability. „

# Venice Commission

(10)

- Report on the Independence of the Judicial System Part I: The Independence of Judges –CDL-AD(2010)004,
- Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan – CDL-Ad(2008)039,
- Opinion on Draft amendments to Laws on the Judiciary of Serbia-CDL-AD(2013)005,
- Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia" CDL-AD(2015)042

# GRECO –Fourth Evaluation Report on Ukraine (11)

- „Consequently, GRECO recommends abolishing the criminal offence of “Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge” (article 375 of the Criminal Code) and/or, at the least, otherwise ensuring that this and any other criminal offences criminalize only deliberate miscarriages of justice and are not misused by law enforcement agencies to exert undue influence and pressure on judges.”

- **Sergey Zubarev v. Russia, app. no. 5682/06, 05/02/2015**
- „32..... Accordingly, the Court accepts that in the present case immunity from liability accorded to the judge in connection with her actions in a professional capacity as a presiding judge in a civil case may be regarded as having a legitimate aim namely pursuing the interests of the administration of justice.” ( Similar Gryaznov vs Russia)

- **Alparslan Altan v. Turkey, app. no. 12778/17, 16/04/2019**
- „113. The Court observes that judicial protection of this kind is granted to judges not for their own personal benefit but in order to safeguard the independent exercise of their functions (see paragraph 102 above). As the Government rightly pointed out, such protection does not mean impunity. Its purpose is to ensure that the judicial system in general and its members in particular are not subjected, while discharging their judicial functions, to unlawful restrictions by bodies outside the judiciary, or even by judges performing a supervisory or review function.

- **Parlov-Tkalcic v. Croatia, app. no. 24810/06, 22/03/2010**
- As regards the issue of “independence”, the Court further reiterates that in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, Findlay, *loc. cit.*). However, judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within.”

- Thank you for your attention